No. 90503-7

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

(Court of Appeals, Division I, Case No. 70327-7-I)

UNION BANK, N.A., a national banking association,

Plaintiff/Appellant,

v.

EAST CREEK VILLAGE, LLC, a Washington limited liability company; Shoreline Business and Professional Center, LLC, a Washington limited liability company; Kenneth Lyons, Melani A. Lyons, individually and the marital community thereof; Todd Arrambide, Kim M. Arrambide, individually and the marital community thereof,

Defendants, and

ELIZABETH Y. VANDERVEEN, A MARK VANDERVEEN, individually and the marital community thereof; HARLEY O'NEIL, JR., MICHELLE O'NEIL, individually and the marital community thereof; the TORI LYNN NORDSTROM TRUST, a Washington state trust; and HARLEY O'NEIL, JR., Trustee for the Tori Lynn Nordstrom Trust,

Defendants/Respondents.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. IDENTITY OF PETITIONERS

Petitioners are Elizabeth Y. Vanderveen, A. Mark Vanderveen, husband and wife (the "Vanderveens"), Harley O'Neil, Jr. and Michelle O'Neil, husband and wife (the "O'Neils"), and the Tori Lynn Nordstrom Trust and Harley O'Neil, Jr., its trustee (the "Trust"), collectively referenced herein as the Petitioners.

II. CITATION TO COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(2) and (4), this Court should review the unpublished decision by Division I of the Court of Appeals filed on June 9, 2014 in *Union Bank, N.A. v. East Creek Village, et al.*, 2014 WL 2574518, Case No. 70327-7-I ("*Vanderveen*"), which was based upon Division I's published decision on essentially identical issues in *Washington Federal v. Gentry*, 179 Wn.App. 470, 319 P.3d 823 (2014) ("*Gentry*"). *Gentry* and Division I's unpublished opinion in the companion case of *Washington Federal v. Harvey*, 2014 WL 646746, Case No. 69791-9-I ("*Harvey*") are the subject of pending Petitions for Review, under Case Nos. 90085-0 (*Gentry*) and 90078-7 (*Harvey*). A motion to transfer another substantially identical case from Division II to the Supreme Court for direct review is currently awaiting decision in *Union Bank v. Brinkman*, Case No. 89964-9 ("*Brinkman*").

A copy of the *Vanderveen* decision from which review is sought is

attached as Appendix A. A copy of the *Gentry* decision upon which is based is attached as Appendix B.

III. ISSUES PRESENTED FOR REVIEW

1. Review by the Supreme Court is required in order to resolve a direct conflict between decisions of Divisions I and II of the Court of Appeals on two issues:

(a) whether the Deed of Trust Act, RCW 61.24.100, prohibits a secured lender from seeking a deficiency judgment against a guarantor, after the lender elected to non-judicially foreclose a deed of trust securing the guarantor's obligations, and

(b) whether a deed of trust secures guarantor obligations (not just borrower/grantor obligations), where it is "given to secure" obligations under the "Related Documents" in addition to the obligations under the Note, and defines "Related Documents" to include obligations under "all guaranties ... executed in connection with the Indebtedness."

In *First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development LLC*, 178 Wn.App. 207, 314 P.3d 420 (2013) ("*First-Citizens*"), Court of Appeals Division II answered "yes" to both questions based upon a "plain language" analysis. A copy of the *First-Citizens* decision is attached as Appendix C. The same statute and deed of trust language is at issue in this case. However, in its *Gentry* decision, Division

I of the Court of Appeals declined to follow the *First-Citizens* opinion, instead reaching directly opposite determinations on those two issues. Division I applied the same determinations in reversing the trial court in the current *Vanderveen* case. Review by this Court is necessary to resolve the conflict between Divisions of the Court of Appeals and to correct Division I's misinterpretation and misapplication of the plain language of the deeds of trust and non-judicial foreclosure statute.

2. Review is also sought with respect to a related issue not argued to Division II in *First-Citizens*, and which was briefed and argued but not decided by Division I in *Vanderveen*, *Harvey* and *Gentry*: Can a secured lender contractually avoid the anti-deficiency protections of the Deed of Trust Act through boilerplate waiver provisions in its guaranty form, or is such action void as against public policy?

IV. STATEMENT OF THE CASE

A. Factual Background

This case arises out of a $5.1 million real estate loan (the "Loan") made in December 2008 by Frontier Bank jointly to West Creek Village, LLC, d/b/a East Creek Village, LLC ("East Creek," an entity owned by former defendants Lyons and Arrambide), and to Shoreline Business and Professional Center, LLC ("Shoreline," an entity owned by defendants Vanderveen, O'Neil and the Trust). The Loan was secured by a deed of

trust (the "Deed of Trust") against property jointly owned by East Creek and Shoreline, which they intended to develop with a project known as East Creek Village. The Loan was personally guaranteed by Lyons, Arrambide, Vanderveen, O'Neil and the Trust (the "Guarantors") pursuant to the terms of written Commercial Guaranties.[1]

The Deed of Trust provided that it was "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."[2] To eliminate any ambiguity, the Deed of Trust contained specific definitions of the terms "Indebtedness" and "Related Documents":

> The word "Indebtedness" means all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents, together with all renewals of, extensions of, modifications of, consolidations of and substitutions for the Note or Related Documents ...[3]
>
> The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, guaranties, security agreements, mortgagers, 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; provided that the environmental indemnity agreements are not "Related Documents" and are not secured by this Deed of Trust.[4]

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[1] Copies of the East Creek Loan documents are attached to the Declaration of Kenneth Lyons filed in support of defendants summary judgment motion below, as Exhibits A1 (Promissory Note), B1 (Deed of Trust), C1 (Lyons Commercial Guaranty), D (Notice of Final Agreement), E (LLC Company Resolution to Borrow) and F (Disbursement Request and Authorization). CP 89-123. The Deed of Trust is CP 97-107.

[2] The quoted Deed of Trust language was presented in block lettering and bold face. CP 98.

[3] CP 103 (emphasis added).

[4] *Id.* (emphasis added).

The Commercial Guaranties signed by the Guarantors[5] were not merely executed "in connection with" the Indebtedness; they obligated the Guarantors to satisfy the Note and pay the Indebtedness if their LLC borrower entities failed to do so.[6] Thus, when combined with the language declaring that the Deed of Trust was "given to secure ... performance of any and all obligations under ... the Related Documents," the plain language of the Deed of Trust definitions confirm that it was "given to secure ... performance of any and all obligations" under the Petitioners' Commercial Guaranties.

Frontier Bank was closed by state regulators at the end of April 2010, and the bank's assets (including the Loan) were sold by FDIC to Union Bank. East Creek and Shoreline subsequently defaulted. Rather than choosing to sue East Creek and Shoreline for a money judgment on the Note obligation, and/or suing the Guarantors for money judgments on their Commercial Guaranties, and rather than choosing to foreclose the Deed of Trust judicially, Union Bank elected the remedy of non-judicially foreclosing the Deed of Trust, acquiring the East Creek Village property via credit bid at the trustee's sale held on July 15, 2011.[7] This voluntary

[5] The Lyons Commercial Guaranty is CP 108-110. The terms of the other Commercial Guaranties were identical except for the names of the guarantors.
[6] CP 108 (Lyons Commercial Guaranty, page 1).
[7] CP 118-123 (Trustee's Deed).

election of remedies by Union Bank had legal consequences, which should be enforced by this Court.

B. Procedural Background

After the trustee's sale, Union Bank sued the Guarantors, seeking a deficiency judgment under their Commercial Guaranties.[8] The Guarantors moved for summary judgment of dismissal, arguing in their motion that the Deed of Trust secured their obligations under the Commercial Guaranties, and that as a result of its non-judicial foreclosure of the Deed of Trust, RCW 61.24.100(10) Union Bank was barred from seeking a deficiency judgment against them.[9] Union Bank disputed both arguments, and claimed that the Guarantors had waived the protection of RCW 61.24.100 via boilerplate language in the Commercial Guaranty forms.

The trial court granted summary judgment to the Petitioners, concluding that: (1) their Commercial Guaranty obligations were secured by the Deed of Trust which Union Bank had non-judicially foreclosed; (2) RCW 61.24.100(10) bars deficiency judgments against guarantors whose guaranty obligations were secured by the foreclosed deed trust; and (3) contractual waiver of the anti-deficiency protections provided by RCW

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[8] CP 1-52 at ¶¶ 5.1 (First Amended Complaint). Borrower East Creek had been named as a defendant in Union Bank's original Complaint. The claims against East Creek were deleted through the First Amended Complaint, removing it as a named defendant.

[9] CP 189-215 (Defendants' Motion for Summary Judgment). After the motion was filed, defendants Lyons and Arrambide settled with Union Bank and were dismissed.

61.24.100 is void as against public policy.[10]

The *Vanderveen*, *Harvey, Gentry* and *Brinkman* cases are among a large number of suits pending before the Washington courts, involving substantially identical deed of trust forms and attempts by banks to obtain deficiency judgments against guarantors after completing non-judicial foreclosure sales.[11] *First-Citizens* was the first of those cases to reach the appellate courts. In its December 3, 2013 published opinion, Division II of the Court of Appeals made the same determinations as the *Vanderveen* trial court on issues (1) and (2), above.[12] It held that the bank's deficiency claims were barred by RCW 61.24.100(10) because the guarantors' obligations were secured by the deed of trust which the bank had elected to non-judicially foreclose.

Two months later, however, Division I of the Court of Appeals reached diametrically opposite conclusions in its unpublished *Harvey* decision and published *Gentry* opinion, holding that the Harveys' and Gentrys' obligations under their Guaranties were <u>not</u> secured by the Deeds of Trust, and that even if their Guaranties were so secured, RCW

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[10] CP 506-08 (Original Order Granting Summary Judgment to Petitioners) and CP 509-10 (Order Denying Union Bank's Motion for Reconsideration).
[11] See amicus briefs filed in support of review by the Supreme Court in *Gentry* and *Harvey*.
[12] Although the guaranty form in *First-Citizens* contained the same boilerplate language as the Commercial Guaranties in *Harvey*, *Gentry* and *Vanderveen*, the bank chose not to argue waiver of the protections of RCW 61.24.100 in *First-Citizens*, making it unnecessary for Division II to decide issue (3).

61.24.100(10) did not bar the entry of deficiency judgments against them. Division I followed those determinations in its unpublished opinion in *Vanderveen*, as to which review is now sought by Petitioners.

In its *Harvey* and *Gentry* decisions, Division I rejected Division II's rulings in *First-Citizens*. Specifically in *Gentry,* Division I held that RCW 61.24.100(10) does not limit the bank's ability to obtain a deficiency judgment after a trustee's sale, construing the subsection to be purely permissive rather than prohibitive. *Gentry* 179 Wn.App. at 481-89; *Harvey* Slip Opinion at 3-7. In refusing to interpret the Deeds of Trust as securing the Guaranties, Division I effectively held that the inclusion of the word "guaranties" in the definition of "Related Documents" was superfluous, determining instead that the obligations secured by the Deeds of Trust were intended to be limited to those of the borrower/grantor LLC's only. *Gentry, supra* at 489-95; *Harvey,* Slip Opinion at 7-13. Both determinations were followed in the *Vanderveen,* Slip Opinion at 3-4.

Based upon those determinations in *Gentry* and *Harvey*, Division I declined to reach the third issue of whether the anti-deficiency protections of RCW 61.24.100 can be modified or eliminated by contract, or whether such contractual provisions are void as against public policy. *Gentry*, *supra* at 495-96; *Harvey* Slip Opinion at 13. Division I also found it unnecessary to reach the "waiver" issue in *Vanderveen*. Slip Opinion at 4.

V. ARGUMENT

Under RAP 13.4(b)(2) and (4), this Court will accept review when a Court of Appeals decision "is in conflict with another decision of the Court of Appeals," and when "the petition involves an issue of substantial public interest." The decision by Division I in *Vanderveen* satisfies both grounds for review. The *Vanderveen* opinion (and the *Gentry* opinion upon which it relies) and Division II's opinion *First-Citizens* are in direct conflict with each other on the central questions of construction of language defining the obligations secured by the Deeds of Trust and interpretation of the anti-deficiency provisions of RCW 61.24.100.

In light of the many similar cases pending below, an additional issue of substantial public interest is presented by the question not decided by Divisions I or II, i.e. whether the protections of RCW 61.24.100 can be eliminated through the banks' use of boilerplate waiver language.

A. Construction of the Deed of Trust in *First-Citizens*

It is axiomatic that the obligations which a deed of trust secures are defined by the language of the deed of trust itself, so that the recorded instrument can provide public notice of those obligations. In *Vanderveen*, *Harvey*, *Gentry*, *Brinkman*, *First-Citizens*, and in many other pending cases, the bank's deed of trust stated that it was given to secure "payment of the Indebtedness" and "performance of any and all obligations under the Note,

the Related Documents and this Deed of Trust." In their deed of trust forms, the banks specifically defined those capitalized terms, confirming that the words "Related Documents" included "all ... guaranties ... executed in connection with the Indebtedness."

In its decision, Division II had no difficulty confirming the meaning of that plain language:

> 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." A plain reading of this language includes the Allisons' earlier guaranty among the "now ... existing" "Related Documents" that these deeds of trust secured.

314 P.3d at 423, ¶10 (emphasis in original, footnotes omitted). It likewise found that the deeds of trust secured the Allisons' later guaranties:

> 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.
>
> Nor is there any ambiguity in Venture Bank's identical use of the term "the Indebtedness," 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. Thus, *we agree with the 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.*

Id., ¶¶ 11-12 (emphasis added, footnote omitted). The Deed of Trust at issue in this case contains the same "plain language."

B. Construction of the Deed of Trust by Division I in *Gentry, Harvey* and *Vanderveen*

In construing the substantially identical deed of trust form in *Gentry*, Division I began with the fundamental principle that a court is not to "interpret what was intended to be written but what was written," citing *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005). *Gentry, supra* at 490 ¶70. Yet it failed to follow that principle, and ignored others including the requirement to construe contracts as a whole, giving meaning to all of their terms. *McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971 (1983). Courts are to determine the parties' intent based on the "objective manifestations of the agreement, rather than on unexpressed subjective intent of the parties." *Hearst Communications, supra,* 154 Wn.2d at 503. The court "is not authorized to rewrite the contract; [its] task is to construe it." *Rodenbough v. Grange Ins. Assn.*, 33 Wn.App. 137, 140 (1982). Yet rewrite the deed of trust is exactly what Division I has done in *Vanderveen*, *Gentry* and *Harvey*.

In *Gentry*, Division I failed to even discuss, much less construe, the key definitions of "Indebtedness" and "Related Documents," which determine the nature and extent of the secured obligations. Instead, the Court blindly seized upon the final sentence of the "given to secure" paragraph ("This Deed of Trust is given and accepted on the following

terms:"), then combined it with a later paragraph addressing payment and performance by the borrower/grantor LLC's. Division I concluded at ¶72:

> Reading these two paragraphs together, the deeds of trust must be read as securing the payment and performance obligations of the **Borrowers and Grantors**. Here, **Borrower** and **Grantor** is the same entity for each loan secured by each deed of trust. There is simply no way to read these provisions so that any deed of trust secures the payment and performance obligations of anyone other than the **Borrower and Grantor**. The guarantors of the loans are neither. Thus, none of these deeds of trust secure the guaranties of the Gentrys.

Division I's "simply no way" conclusion in *Gentry*, followed in *Vanderveen*, is plainly wrong. The phrase "This Deed of Trust is given and accepted on the following terms," obviously refers to all of the remaining paragraphs of the Deed of Trust, including all of the bank-drafted definitions. Far from being limited to payment and performance by the borrower/grantor LLC's only, the bank-drafted deed of trust forms expressly stated that they were given to secure "payment of the Indebtedness" and performance of any and all obligations under the Note, the Related Documents and this Deed of Trust." (emphasis added).

Because the Related Document obligations secured by the Deed of Trust were expressly defined by the bank to include obligations under "all ... guaranties ... executed in connection with the Indebtedness," the only possible construction is that the Deed of Trust secured the Petitioners'

obligations under their Commercial Guaranties.[13]

This Court should accept review, reverse the erroneous decision by Division I in *Vanderveen* (and *Gentry* and *Harvey*), and confirm that the deed of trust form at issue in this and other cases secured the obligations of the Petitioners as Guarantors.

C. RCW 61.24.100(10)

In 1998, the Legislature amended the Deed of Trust Act to permit deficiency judgment in narrow circumstances. As a result of the amendments, the Act now provides: "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). In addition to other limitations in the statute, RCW 61.24.100(10) provides that "[a] trustee's sale under a deed of trust securing a commercial loan does not preclude an

[13] In its opinion in *Hearst Communications, Inc. v. Seattle Times Co.*, 120 Wn.App. 784, 798, 86 P.3d 1194 (2004), Division I held that it lacked authority to revise the contract in the guise of interpreting it, where the parties had specifically defined the terminology employed. The holding was affirmed by this Court, which noted that Hearst had failed to reduce its contended interpretation to writing: "Instead, they defined the specific elements of calculating gains and losses once, in great detail, and embedded those terms without qualification in the loss operations clause. Hearst essentially asks us to rewrite the JOA by revising the loss operations clause, something we are not at liberty to do." *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 510, 115 P.3d 262 (2005). Yet in *Vanderveen*, *Gentry* and *Harvey*, Division I ignored the lender's specific definitions and effectively rewrote the deeds of trust.

action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation was not secured by the deed of trust." (Emphasis added).

D. Interpretation of RCW 61.24.100(10) in *First-Citizens*

After noting that RCW 61.24.100(1) generally bars all deficiency judgments against guarantors, Division II addressed subsection (10) in *First-Citizens* as follows:

> 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.

314 P.3d at 424 (emphasis in original). Division II then applied the statutory language of subsection (10) to the facts actually presented in *First-Citizens*, *i.e.*, that the guaranty obligations were secured by the non-judicially foreclosed deed of trusts. The Court held that:

> Under the statutory construction principle *expressio unius est exclusio alterius*, [RCW 61.24.100(10)] 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.

Id. at 424-25 (bracketed reference added, emphasis again in original). As authority, the Court cited *State v. Kelley*, 168 Wn.2d 72, 83, 226 P.3d 773 (2010) (the "statute's exception of some weapons listed in firearm

enhancement statute shows legislative intent that crimes involving other weapons not on that list are not to be excepted"). Such construction is entirely consistent with other well-established Washington law.[14]

Looking to the statute's plain meaning in the context of the statutory scheme as a whole, Division II concluded that RCW 61.24.100(10) "creates an exception" to RCW 61.24.100(1)'s general prohibition against deficiency judgments following non-judicial foreclosure, by allowing the lender to sue a commercial loan guarantor if the guaranty was not secured by the foreclosed deed of trust. *Id.* at 424.

That exception does not apply where the guaranty was secured by the foreclosed deed of trust. Based on such analysis, Division II reversed the trial court's deficiency judgment against the guarantors. *Id.* at 426.

E. Interpretation of RCW 61.24.100(10) by Division I in *Gentry*, *Harvey* and *Vanderveen*

Division II disagreed with the statutory interpretation applied by

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[14] Legislative inclusion of certain items within a category necessarily implies that other items in that category were intended to be excluded. *Bour v. Johnson*, 122 Wn.2d 829, 836, 864 P.2d 380 (1993). "Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim expressio unius est exclusio alterius ...." *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999). *See also State v. Ortega*, 177 Wn.2d 116, 123-25, 297 P.3d 57 (2013) ("The doctrine of expressio unius est exclusio alterius ('to express or include one thing implies the exclusion of the other'), Black's Law Dictionary 661 (9th Ed. 2009) supports our finding that the express authority to rely on the request of another officer in making an arrest for a traffic infraction indicates that such authority does not extend to other non-felony offenses.); and *Adams v. King County*, 164 Wn.2d 640, 650 (2008) (expression of one thing in a statute excludes others and omissions are deemed to be exclusions).

Division I in *First-Citizens*. It explained its interpretation of RCW 61.24.100(10) in *Gentry* as follows:

> The problem with the Gentrys' interpretation is that it requires striking from the statute the word "not," as indicated by the following revision:
>
> > A trustee's sale under a deed of trust securing a commercial loan does ~~not~~ preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was ~~not~~ secured by the deed of trust.
>
> But the plain language of RCW 61.24.100(10) is permissive. That is, it states a permissive rule applicable to situations where the obligation of a borrower or guarantor is not secured by the deed of trust that was foreclosed by a trustee's sale. In that situation, the trustee's sale does not preclude the lender from bringing an action to collect on or enforce a guaranty. Only by striking the word "not" from the two places indicated above can the otherwise permissive statement of the statute be read as a prohibition.

Gentry, supra at 483 ¶¶43-44 (bold and strikethrough in original). Of course, this interpretation (followed in *Harvey* and *Vanderveen*) would require striking the entire last portion of subsection (10), as follows:

> A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor ~~if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust~~.

Indeed, under Division I's interpretation, the exception would swallow the rule. Rather than having to satisfy the "if" condition, lenders would be able to pursue deficiency judgments against guarantors in any scenario.

Division I's opinion in *Gentry* failed to discuss the well-established statutory construction principle of *expressio unius est exclusio alterius* to

RCW 61.24.100(10). Instead, it determined that the Gentrys' interpretation (and that of Division II in *First-Citizens*) was "grounded in a logical fallacy," *i.e.*,"The proposition that 'A implies B' is not the equivalent of 'non-A implies non-B,' and neither proposition follows logically from the other. *Gentry, supra* at 484-85 ¶50, quoting from *Course-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 703 (2nd Cir. 1980).

The only Washington authority cited by Division I in *Gentry* was a nearly century-old criminal case, *State v. Holland*, 99 Wash. 645, 170 P. 332 (1918). The rationale for that ancient decision has no plausible application to the present statutory interpretation question, i.e. whether the word "if" in RCW 61.24.100(10) should be read as "only if," as the principle of *expressio unius est exclusio alterius* clearly requires. Nevertheless, it was adopted by Division I as the basis for its decision:

> Putting aside terminology differences, like Holland, the Gentrys essentially argue that the inverse of what is stated in the statute is necessarily true. That is a logical fallacy. We cannot infer that the inverse of what the statute states is true. Based on these cases and our analysis of the statute before us, we reject the interpretation that the Gentrys assert.

Gentry, supra at 486 ¶54. This ruling was incorporated by reference in *Harvey* and followed in *Vanderveen.*

Division I's erroneous decision in *Vanderveen* (and *Gentry* and *Harvey*) should be reversed, and this Court should construe RCW 61.24.100(10) to bar post-trustee's sale deficiency judgment claims against

guarantors whose obligations were secured by non-judicially foreclosed deeds of trust.

F. Review Should Also be Accepted on the Issue of Whether the Anti-Deficiency Protections of RCW 61.24.100 Can Be Modified or Eliminated by Contract

Although raised in the trial courts, neither Division I nor Division II decided the issue of whether guarantors should be denied the benefit of RCW 61.24.100's protections through boilerplate waivers embedded in the lender-drafted guaranty forms. In *Vanderveen*, *Harvey* and *Gentry*, Division I didn't reach the issue of whether such provisions are void as against public policy, because it decided that no statutory protections were available to the guarantors in any event.

In *First-Citizens*, it was unnecessary for Division II to decide the issue because the lender elected not to argue that the waiver language in the guaranty was enforceable under RCW 61.24.100. However, Division II strongly indicated that it would find waivers of the protections of the statute unenforceable, if the issue were squarely presented to it. *First-Citizens Bank*, 314 P.3d at n.5. Similar views were expressed even more strongly by Division II in footnote 4 to its opinion in *First-Citizens Bank & Trust Co. v. Reikow*, 177 Wn.App. 787, 794, 313 P.3d 1208 (2013).

This Court has shown great reluctance to allow waiver of the statutory provisions governing non-judicial foreclosure. *See Bain v. Metro.*

Mtg. Group, Inc., 175 Wn.2d 417, 430, 486 P.2d 1080 (2012) (rejecting contractual modification of the Deed of Trust Act's definition of "beneficiary"); *see also Schroeder v. Excelsior Mgmt. Group, LLC*, 177 Wn.2d 94, 106-07, 297 P.3d 677 (2013) (stating that "We will not allow waiver of [Chapter 61.24 RCW's] protections lightly, " quoting *Bain*, 175 Wn.2d at 108). The protections for guarantors enumerated in RCW 61.24.100 are not "rights and privileges" that may be waived, rather they are limitations on the lender's power to obtain a deficiency from the guarantor. *Schroeder*, 177 Wn.2d at 106-07 (rejecting waiver argument because the Act's prohibition of non-judicial foreclosures of agricultural land was not a "right of the debtor," but a limit on a trustee's power).

Our courts have repeatedly held that a borrower cannot waive the protections of the Deed of Trust Act. This Court should accept review of this third issue and determine that the same rule applies to guarantors.[15]

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[15] *See, e.g., Schroeder*, 177 Wn.2d at 106-07; *Albice v. Premier Mtg. Services of Washington, Inc.*, 157 Wn.App. 912, 927-28 & n.10, 239 P.3d 1148 (2010) (holding foreclosure sale void because it occurred outside statutory time frame regardless of fact that extensions were agreed upon). *See also Stretch v. Murphy*, 112 P.2d 1018, 1021 (Or. 1941) (holding that waivers of protections in the foreclosure statute could not be waived because "[t]he statute involved is not one creating a merely personal privilege which may be waived."); *accord Dennis v. Moses*, 18 Wash. 537, 577-79, 52 P. 333 (1898) (holding that a borrower cannot prospectively waive his right of redemption under the foreclosure statute because of public policy considerations); *Conran v. White & Bollard*, 24 Wn.2d 619, 629, 167 P.2d 133 (1946) (finding that agreements that chill or suppress one's right to bid at a foreclosure sale "have long been held invalid against public policy.")

VI. CONCLUSION

Review should be accepted in this case pursuant to RAP 13.4(b)(2) and (4) in order to resolve the conflict between Divisions I and II and to provide guidance to Washington's trial and appellate courts on issues of substantial public interest.

Respectfully submitted this 9th day of July, 2014.

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APPENDIX A

Division I Opinion in

Union Bank v. Vanderveen

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

UNION BANK, N.A., a national banking association, Appellant, v. EAST CREEK VILLAGE, LLC, a Washington limited liability company; SHORELINE BUSINESS AND PROFESSIONAL CENTER, LLC, a Washington limited liability company; KENNETH LYONS, MELANI A. LYONS, individually and the marital community thereof; TODD ARRAMBIDE, KIM M. ARRAMBIDE, individually and the marital community thereof, Defendants, ELIZABETH Y. VANDERVEEN, A. MARK VANDERVEEN, individually and the marital community thereof; HARLEY O'NEIL, JR., MICHELE O'NEIL, individually and the marital community thereof; the TORI LYNN NORDSTROM TRUST, a Washington state trust; and HARLEY O'NEIL, JR., Trustee for the Tori Lynn Nordstrom Trust, Respondents.	NO. 70327-7-I DIVISION ONE UNPUBLISHED OPINION FILED: June 9, 2014

LEACH, J. — Union Bank appeals the trial court's summary dismissal of its action for a deficiency judgment against the guarantors of a loan following a trustee's sale

under a deed of trust securing that loan. Kenneth Lyons and Melani Lyons, A. Mark Vanderveen and Elizabeth Vanderveen, Todd Arrambide and Kim M. Arrambide, Harley O'Neil Jr. and Michele O'Neil, and Harley O'Neil Jr. as trustee for the Tori Lynn Nordstrom Trust (Guarantors), each signed a commercial guaranty of payment of loan to East Creek Village LLC and Shoreline Business and Professional Center LLC. Based on its reading of RCW 61.24.100(10), the trial court granted the Guarantors' motion for summary judgment, dismissing this action.[1] Because the trial court erred both in its interpretation of this statute and its application of the statute to relevant loan documents, we reverse and remand for further proceedings.

FACTS

In 2008 East Creek and Shoreline borrowed $5,100,000 from Frontier Bank and delivered their promissory note in that amount to the bank. A deed of trust executed by East Creek and Shoreline secured payment of the note. The Guarantors each executed a commercial guaranty of payment of the loan.

Union Bank acquired all of Frontier Bank's interest in the note, deed of trust, and commercial guaranties. East Creek and Shoreline defaulted on the bank loan. As a result, Union Bank elected to commence a nonjudicial foreclosure proceeding.

In July 2011, the trustee under the deed of trust then held by Union Bank conducted a sale based on the borrowers' default. Union Bank was the successful

[1] Lyons and Arrambide settled before the trial court granted summary judgment and are not parties to this appeal.

bidder at the sale, with a bid of $1,767,000. This left a substantial deficiency allegedly owed.

In 2012, Union Bank filed this lawsuit against the Guarantors to enforce their guaranties and to obtain a deficiency judgment based on the amount the bank claimed remained owing after the trustee's sale. The Guarantors moved for summary judgment, contending that the foreclosed deed of trust secured their guaranty obligations and RCW 61.24.100(10) barred the bank's request for a deficiency judgment. The trial court agreed, dismissed the bank's lawsuit, and awarded the Guarantors attorney fees.

Union Bank appeals.

ANALYSIS

Union Bank argues that RCW 61.24.100(10) does not bar its lawsuit for a deficiency judgment against the Guarantors. We agree.

This court reviews de novo summary judgment orders and engages in the same inquiry as the trial court.[2] Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.[3]

In Washington Federal v. Gentry,[4] we addressed the same issue as here: whether RCW 61.24.100(10) bars a lawsuit against the guarantors of a commercial loan following the nonjudicial foreclosure of the deed of trust securing payment of the loan. There, we held this provision does not bar such a lawsuit.[5] Here, the same principles

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[2] Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship, 158 Wn. App. 203, 215-16, 242 P.3d 1 (2010).

[3] CR 56(c).

[4] Wash. Fed. v. Gentry, ___ Wn. App. ___, 319 P.3d 823 (2014), petition for review filed, No. 90085-0 (Wash. Apr. 1, 2014).

[5] Gentry, 319 P.3d at 832.

that we applied in Gentry apply. RCW 61.24.100(10) does not bar Union Bank's lawsuit.

We also disagree with the trial court's determination that the foreclosed deed of trust secured the Guarantors' guaranty obligations. We have compared the deed of trust in Gentry with the deed of trust here. They have similar provisions defining whose obligations are secured. In both cases, the secured obligations are limited to those of the "Grantors" under the deeds of trust. Neither deed of trust states that the secured obligations include those of a guarantor of the loan. Following our analysis in Gentry again, we conclude that the foreclosed deed of trust did not secure the Guarantors' guaranty obligations. For this reason as well, RCW 61.24.100(10) does not bar Union Bank's claims against the Guarantors.

Because of our resolution of the application of RCW 61.24.100(10), we do not reach Union Bank's challenge to the trial court's determination that enforcement of any waiver of the protections of RCW 61.24.100 violates the statute and public policy.

The trial court awarded the Guarantors attorney fees as the prevailing party. In light of our disposition of the issues, we vacate this award. Because a prevailing party has not yet been determined, we decline to award fees to any party on appeal.

Finally, we address Union Bank's motion to strike appendix C to respondents' brief, which a commissioner of our court referred to the panel for decision. "Motions to strike sentences or sections out of briefs waste everyone's time."[6] Union Bank's motion unnecessarily required the commissioner and the panel to read four pleadings. It cited

[6] Redwood v. Dobson, 476 F.3d 462, 471 (7th Cir. 2007).

a court rule, GR 14.1, and a statute, RCW 2.06.040, which apply only to unpublished court of appeals decisions and not to trial court decisions. It generated unnecessary expense to all litigants. A simple statement in Union Bank's reply brief addressing appendix C's lack of precedential value would have better served the interests of the parties and furthered judicial economy. We deny the motion.

CONCLUSION

RCW 61.24.100(10) does not bar a lawsuit against the guarantors of a commercial loan following the nonjudicial foreclosure of the deed of trust securing payment of the loan. Therefore, we reverse the trial court and remand for further proceedings consistent with this opinion.

Leach, J.

WE CONCUR:

Spearman, C.J.

Becker, J.

APPENDIX B

Division I Opinion in

Washington Federal v. Gentry

179 Wash.App. 470

Editor's Note: Additions are indicated by Text and deletions by ~~Text~~.

Court of Appeals of Washington,
Division 1.

WASHINGTON FEDERAL, a federally chartered savings association, Appellant,
v.
Kendall GENTRY and Nancy Gentry, individually and the marital community comprised thereof, Respondents.

No. 70004–9–I. | Feb. 18, 2014.

Synopsis
Background: Bank commenced action against commercial guarantors to enforce their guaranties of loans and to obtain a deficiency judgment against them due to the shortfall arising from trustees' sales of property securing the loans. The Skagit Superior Court, David R. Needy, J., granted guarantors summary judgment. Bank appealed.

[Holding:] The Court of Appeals, Cox, J., held that the Deeds of Trust Act did not prohibit action for deficiency judgment against guarantors.

Reversed and remanded.

West Headnotes (16)

[1] **Guaranty**
⇐Defenses

Deeds of Trust Act generally prohibits an action for a deficiency judgment against a guarantor of a loan following a trustee's sale under a deed of trust securing that loan, although exceptions to this general rule apply to a guarantor of certain commercial loans. West's RCWA 61.24.100(1).

Cases that cite this headnote

[2] **Appeal and Error**
⇐Cases Triable in Appellate Court

The Court of Appeals reviews de novo summary judgment orders and engages in the same inquiry as the trial court.

Cases that cite this headnote

[3] **Statutes**
⇐Questions of law or fact

Statutory construction is a question of law.

Cases that cite this headnote

[4] **Statutes**
⇐Purpose and intent; unambiguously expressed intent

Where the language of a statute is clear, legislative intent is derived from the language of the statute alone.

Cases that cite this headnote

[5] **Statutes**
⇐Plain Language; Plain, Ordinary, or Common Meaning

The plain meaning of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, the related provisions, and the statutory scheme as a whole.

Cases that cite this headnote

[6] **Mortgages**
⇐Deficiency and personal liability

A "deficiency judgment" exists where a money judgment for a debt exceeds the value of the security for that debt at the foreclosure sale.

Cases that cite this headnote

[7] **Guaranty**
⇐Defenses

"Subject to this section" language in Deeds of Trust Act applicable to exceptions to rule, that the Deeds of Trust Act generally prohibits an action for a deficiency judgment against a guarantor of a loan following a trustee's sale under a deed of trust, requires consideration of the statute in its entirety, not just statute's limitations of scope of a deficiency judgment against a guarantor to waste and wrongful retention of rents. West's RCWA 61.24.100(1).

1 Cases that cite this headnote

[8] **Guaranty**
⇐Defenses

Provision in Deeds of Trust Act, stating that " a trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust," did not preclude deficiency judgment against guarantors of commercial loans, even though the guaranty was secured by deed of trust foreclosed by prior trustee's sale; plain language of statute was permissive, not prohibitive, stating permissive rule applicable to situations where obligation of a guarantor is not secured by deed of trust that was foreclosed by trustee's sale. West's RCWA 61.24.100(1).

1 Cases that cite this headnote

[9] **Guaranty**
⇐Defenses

Mortgages
⇐Debts secured in general

Deeds of trust on property securing loan did not secure guaranties of guarantors of the loan obligations, and thus, action for deficiency judgment against guarantors of loans following trustee's sale under deed of trust was not barred by provision in Deeds of Trust Act, stating that "a trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust"; guarantors were not parties to deeds of trust, and deeds of trust stated that payment and performance obligations were limited to the borrower and grantor of each instrument, not guarantors of the loan. West's RCWA 61.24.100(10).

3 Cases that cite this headnote

[10] **Appeal and Error**
⇐Cases Triable in Appellate Court

Court of Appeals reviews de novo a trial court's interpretation of the language of a contract.

Cases that cite this headnote

[11] **Contracts**
⇐Construction as a whole
Contracts
⇐Intention of Parties
Contracts
⇐Construing whole contract together

When interpreting a contract a court's primary goal is to discern the intent of the parties, and such intent must be discovered from viewing the contract as a whole.

Cases that cite this headnote

[12] **Contracts**

⇐Intention of Parties

Washington follows the "objective manifestation theory of contracts," under which the court attempts to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.

Cases that cite this headnote

[13] **Contracts**
⇐Language of contract

When interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used; court does not interpret what was intended to be written but what was written.

Cases that cite this headnote

[14] **Costs**
⇐Contracts

Court of appeals would decline to award attorney fees in connection with enforcement action against guarantors following a trustee's sale under deeds of trust securing commercial loans, because doing so would be premature, as prevailing party had not yet been determined and would not be determined until after a fair value hearing pursuant to Deeds of Trust Act. West's RCWA 61.24.100(5).

Cases that cite this headnote

[15] **Costs**
⇐Prevailing party

For purposes of attorney fee awards, "prevailing party" is one in whose favor a final judgment is rendered.

Cases that cite this headnote

[16] **Costs**
⇐Attorney fees on appeal or error

A trial court may include appellate attorney fees after remand.

1 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

PUBLISHED

COX, J.

[1] ***472** ¶ 1 The Deeds of Trust Act generally prohibits an action for a deficiency judgment against a guarantor of a loan following a trustee's sale under a deed of trust ***473** securing that loan.[1] But exceptions to this general rule apply to a guarantor of certain commercial loans.[2]

1 *See* RCW 61.24.100(1).

2 *Id.*

¶ 2 In this action, Washington Federal seeks a deficiency judgment against Kendall Gentry and Nancy Gentry. They executed guaranties of payment for commercial loans to three borrowers that they control. Based on its reading of

RCW 61.24.100, the trial court granted the Gentrys' motion for summary judgment of dismissal of this action. Because the trial court erred both in its interpretation of this statute and its application of the statute to relevant loan documents, we reverse and remand for further proceedings.

¶ 3 Kendall Gentry owned and/or managed three entities: Blackburn Southeast LLC, Landed Gentry Development Inc., and Gentry Family Investments LLC.[3]

3 Brief of Appellant at 4; Clerk's Papers at 525 (listing Kendall Gentry as chairman of Landed Gentry Development, Inc.); Clerk's Papers at 530 (listing Kendall Gentry as manager of Gentry Family Investments LLC); Clerk's Papers at 534 (listing Kendall Gentry as manager of Gentry Family Investments LLC, member of Blackburn Southeast LLC).

¶ 4 In 2005, Blackburn Southeast LLC obtained a commercial loan for $2,550,000 from Horizon Bank. This loan was evidenced by a promissory note that was secured by a May 1, 2006 deed of trust on property located on Little Mountain Road in Mount Vernon (the "Little Mountain Deed of Trust").

¶ 5 In April 2009, Landed Gentry Development Inc. obtained a commercial loan for $3,574,847.74 from Horizon Bank. This loan was evidenced by a promissory note that was also secured by the Little Mountain Deed of Trust and a May 1, 2006 deed of trust on property located on East Blackburn Road in Mount Vernon (the "Blackburn Road Deed of Trust").

¶ 6 In September 2009, Gentry Family Investments LLC obtained a commercial loan for $1,127,832.73 from Horizon *474 Bank. This loan was evidenced by a promissory note that was also secured by the Little Mountain Deed of Trust.

¶ 7 In sum, the Little Mountain Deed of Trust secured all three commercial loans. The Blackburn Road Deed of Trust secured only the Landed Gentry Development Inc. commercial loan.

**826 ¶ 8 Kendall and Nancy Gentry each executed commercial guaranties of payment for all three loans.

¶ 9 In January 2010, the three notes matured. The three borrowers failed to pay these notes at maturity. Likewise, the Gentrys did not honor their guaranties.

¶ 10 Horizon Bank failed. In April 2010, the Federal Deposit Insurance Corporation, as receiver for Horizon, assigned that bank's interests in the three notes, the deeds of trust, and the guaranties to Washington Federal.

¶ 11 In April 2011, the trustees, under the deeds of trust then held by Washington Federal, conducted sales based on the defaults by the three borrowers. The bank was the successful bidder for both properties at these sales. The bank did not credit bid the full amount of the debt at these sales. Thus, a substantial deficiency allegedly remains.

¶ 12 In March 2012, the bank commenced this action against the Gentrys to enforce their guaranties and to obtain a deficiency judgment against them due to the shortfall arising from the trustees' sales.

¶ 13 The Gentrys moved for summary judgment. They argued that the Deeds of Trust Act prohibited the bank from seeking a deficiency judgment against them. The bank opposed the motion and also moved for summary judgment, arguing that it was entitled to a deficiency judgment against the Gentrys.

¶ 14 The trial court granted the Gentrys' motion for summary judgment, denied the bank's motion, and dismissed this action with prejudice.

¶ 15 The bank appeals.

*475 THE DEEDS OF TRUST ACT

¶ 16 The threshold issue is whether and how a beneficiary under a deed of trust who elects not to foreclose the deed of trust as a mortgage may obtain a deficiency judgment against guarantors under the Deeds of Trust Act.

[2] ¶ 17 This court reviews de novo summary judgment orders and engages in the same inquiry as the trial court.[4] Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law.[5]

4 *Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship*, 158 Wash.App. 203, 215–16, 242 P.3d 1 (2010).

5 CR 56(c).

[3] [4] [5] ¶ 18 Statutory construction is a question of law.[6] This court's objective is to determine the Legislature's intent.[7] "Where the language of a statute is clear, legislative

intent is derived from the language of the statute alone."[8] "The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, the related provisions, and the statutory scheme as a whole."[9]

6 *City of Spokane v. Rothwell,* 166 Wash.2d 872, 876, 215 P.3d 162 (2009).

7 *Id.*

8 *Id.*

9 *Id.* at 876–77, 215 P.3d 162 (quoting *State v. Jacobs,* 154 Wash.2d 596, 600, 115 P.3d 281 (2005)).

[6] ¶ 19 RCW 61.24.100 addresses when actions for deficiency judgments may be brought when a deed of trust is not foreclosed as a mortgage.[10] A "deficiency judgment" *476 exists where a money judgment for a debt exceeds the value of the security for that debt at the foreclosure sale.[11]

10 RCW 61.24.100(8).

11 *Boeing Emps.' Credit Union v. Burns,* 167 Wash.App. 265, 282, 272 P.3d 908, *review denied,* 175 Wash.2d 1008, 285 P.3d 885 (2012).

History

¶ 20 In 1965, the Legislature enacted the Deeds of Trust Act, which permitted nonjudicial foreclosure of deeds of trust when certain requirements were met.[12] Citing an early law review article by a well-recognized **827 authority on the act, Division Three of this court observed that the Legislature designed this act "to avoid time-consuming judicial foreclosure proceedings and to save substantial time and money to both the buyer and the lender."[13] The act was designed to supplement the then existing foreclosure proceedings to better meet the needs of modern real estate financing.[14]

12 Laws of 1965, ch. 74.

13 *Peoples Nat. Bank of Wash. v. Ostrander,* 6 Wash.App. 28, 31, 491 P.2d 1058 (1971) (citing John A. Gose, *The Trust Deed Act in Washington,* 41 Wash. L.Rev. 94(1966)).

14 *Id.* (citing Gose, *supra,* at 96).

¶ 21 Our supreme court has explained that "[r]eading the entirety of [the act] in the context of the mortgage laws and the history of deed of trust legislation, it is apparent that there was contemplated a quid pro quo between lenders and borrowers."[15]

15 *Donovick v. Seattle–First Nat'l Bank,* 111 Wash.2d 413, 416, 757 P.2d 1378(1988).

¶ 22 Specifically, borrowers relinquished the statutory right to redeem the property up to one year after a foreclosure sale.[16] The relinquishment of this right allowed lenders to obtain title to the property sold at a trustee's sale *477 more quickly than in a judicial foreclosure.[17] Lenders were then able to sell the property and apply the sales proceeds to the debt.[18]

16 *Id.* (citing former RCW 61.24.050 (1965)); *see also* former RCW 6.24.140(1965).

17 *See* Gose, *supra,* at 95–96; former RCW 6.24.220 (1965).

18 *See* Gose, *supra,* at 95–96; former RCW 6.24.220 (1965).

¶ 23 In exchange for this advantage, lenders relinquished the right to seek deficiency judgments following trustees' sales.[19] Thus, the real property security was the sole means for the lender to satisfy the debt.

19 *Donovick,* 111 Wash.2d at 416, 757 P.2d 1378 (citing former RCW 61.24.100 (1965)); *see also* Gose, *supra,* at

96.

¶ 24 Notwithstanding these provisions, the act expressly provided that lenders retained the right to foreclose deeds of trust as mortgages.[20] If lenders elected that option, the provisions of the act did not apply.[21]

20 Gose, *supra*, at 96.

21 *Id.*

¶ 25 The provision of the act governing deficiency judgments has been codified at RCW 61.24.100 from the act's inception.[22] When first enacted in 1965, this provision banned any deficiency judgment on the obligation secured by the foreclosed deed of trust:

22 Former RCW 61.24.100 (1965).

> ***478** Foreclosure, as in this chapter provided, shall satisfy the obligation secured by the deed of trust foreclosed, regardless of the sale price or fair value, and no ***deficiency decree or other judgment shall thereafter be obtained on such obligation.***[23]

23 *Id.* (emphasis added).

¶ 26 In 1990, the Legislature amended this provision by creating an exception to the ban against any deficiency judgment on the obligation secured by the foreclosed deed of trust. It did so by adding the following emphasized language to the former version of the statute:

> Foreclosure, as in this chapter provided, shall satisfy the obligation secured by the deed of trust foreclosed, regardless of the sale price or fair value, and no deficiency decree or other judgment shall thereafter be obtained on such obligation, ***except that if such obligation was not incurred primarily for personal, family, or household purposes, such foreclosure shall not preclude any judicial or nonjudicial foreclosure of any other deeds of trust, mortgages, security agreements, or other security interests or liens covering any real or personal property granted to secure such obligation.***[24]

24 Laws of 1990, ch. 111, § 2 (emphasis added).

¶ 27 In 1998, the Legislature again amended this provision. This time, however, the revisions were more extensive. The Legislature rewrote the entire statute, which was then codified into twelve subsections.[25] Presumably, ****828** these amendments were made to better meet the evolving needs of commercial borrowers and lenders in real estate financing.[26] As of this writing, there have been no further amendments to this portion of the act.[27]

25 *See* Laws of 1998, ch. 295, § 12; RCW 61.24.100.

26 *See* Gose, *supra*, at 94, 96.

27 RCW 61.24.100.

¶ 28 In the current version of the act, the general bar against deficiency judgments remains.[28] But the Legislature created an exception for certain loans that it described as "commercial."[29] This term is a substitute for the former "obligation ... not incurred primarily for personal, family, or household purposes."[30] That provision no longer appears in the act. Such "commercial loans" are limited to those ***479** executed after June 11, 1998, the effective date of the 1998 amendments to this section.[31]

28 RCW 61.24.100(1).

29 *Id.*

30 *Compare* Laws of 1998. ch. 295, § 12, *with* Laws of 1990, ch. 111, § 2.

[31] Laws of 1998, ch. 295.

¶ 29 This legislative history illustrates the evolution of this part of the act over time. Deficiency judgments for deeds of trust that are not foreclosed as mortgages have generally and consistently been prohibited since enactment of the act in 1965. The Legislature enacted limited exceptions to this prohibition in 1990 and 1998. Among the limited exceptions enacted in 1998 are those applicable to guarantors of certain commercial loans.

Current Statute

¶ 30 RCW 61.24.100(1) states the current general rule regarding deficiency judgments following trustees' sales under deeds of trust. For these nonjudicial foreclosures, the rule states:

> ***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.[32]

[32] (Emphasis added.)

¶ 31 Further, RCW 61.24.100(3) states certain circumstances where deficiency judgments against borrowers, grantors, and guarantors are allowed:

> 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:
>
> (a) [provision addressing "waste to the property," "wrongful retention of any rents, insurance proceeds, or condemnation awards," etc.]
>
> (b) [provision regarding foreclosures of other deeds of trust, etc.]
>
> *480 (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.[33]

[33] (Emphasis added.)

¶ 32 Subsection (3)(c) addresses deficiency judgments against guarantors of certain commercial loans after trustees' sales under deeds of trust securing such loans. Significantly, the first clause of RCW 61.24.100(3)(c) states this provision is "[s]ubject to this section." The word "subject" means that this provision is dependent or conditioned on "this section." The 1998 session laws make clear that "this section" means RCW 61.24.100 in its entirety.[34]

[34] Laws of 1998, ch. 295, § 12.

¶ 33 Additionally, the text that follows this first clause makes clear that a further requirement of this provision is that "notices under RCW 61.24.042" must be given to the guarantor of the loan.[35]

[35] RCW 61.24.100(3)(c).

[7] ¶ 34 With this context in mind, we turn to the specific arguments before us. The bank argues that the trial court misinterpreted RCW 61.24.100(3)(c) when it "limit[ed] the scope of a deficiency judgment ****829** against a guarantor to waste and wrongful retention of rents."[36] We agree.

[36] Brief of Appellant at 15.

¶ 35 In the trial court's letter ruling, it stated in relevant part:

> RCW 61.24.100 clearly states deficiency judgments shall not be obtained against a guarantor when that guaranty is secured by a deed of trust which is nonjudicially foreclosed except for a few narrowly crafted exceptions.
>
> [The bank] argues that RCW 61.24.100(3)(c) creates an exception to seek unlimited deficiency judgments against any guarantor who is timely given notice under RCW 61.24.042 ([the Gentrys] received this notice). That interpretation requires the Court to ignore or give no meaning to the first four words of (3)(c) ***"Subject to this section."***
>
> ***481** "This section" RCW 61.24.100 allows deficiency judgments: prior to a trustee's sale, in judicial foreclosures for obligations not secured by the same

deed of trust, ***limited to a decrease in the fair value of property by waste or the wrongful retention of various funds.***

I interpret section (3)(c) as meaning that a deficiency judgment, against a guarantor whose guaranty was secured by the nonjudicially foreclosed deed of trust, ***can only be obtained for the decrease in fair value or wrongful retention, if the guarantor is given timely notice.***

The answer to the second issue is "no." ***[The bank] is only able to seek a deficiency judgment against [the Gentrys] for waste or wrongful retention.***[[37]]

37 Clerk's Papers at 775 (emphasis added).

¶ 36 The trial court properly concluded that RCW 61.24.100(1) generally bars deficiency judgments where deeds of trust are not foreclosed as mortgages, except for narrowly crafted exceptions. The court also properly rejected the bank's argument that RCW 61.24.100(3)(c) creates an unlimited exception that permits a lender to seek a deficiency judgment against a guarantor of certain commercial loans who is given timely statutory notices. As the trial court correctly stated, that would require rewriting the subsection to ignore its first clause: "Subject to this section."

¶ 37 But the trial court misread the scope of RCW 61.24.100(3)(c). Significantly, the words of the statute say "section," not "subsection." As we stated earlier in this opinion, the 1998 session laws make clear that "section" refers to RCW 61.24.100 in its entirety, not just subsections (3)(a) and (b). For this reason, the trial court misread the statute to limit an action against a guarantor for a deficiency judgment to "the decrease in fair value or wrongful retention [of rents, insurance proceeds, or condemnation awards], if the guarantor is given timely notice."[38] These limitations are based on subsections (3)(a) and (b) of the act. Thus, we ***482** conclude that the clause, "subject to this section," of RCW 61.24.100(3)(c) requires consideration of RCW 61.24.100 in its entirety, not just the limitations of subsections (3)(a) and (b).

38 *Id.*

¶ 38 Given this conclusion, we must then consider the Gentrys' argument that RCW 61.24.100(10) bars this action. Subsection (10) states:

> A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust.[39]

39 RCW 61.24.100(10).

[8] ¶ 39 Specifically, the Gentrys contend that the "clear language" of this subsection states that "obligations under a guaranty secured by a deed of trust are ***extinguished*** by the nonjudicial foreclosure of that deed of trust."[40] They assert that "subsection (10) ***prohibits*** a deficiency against a guarantor where a deed of trust secures it and has been foreclosed nonjudicially."[41] We disagree.

40 Brief of Respondents Kendall and Nancy Gentry at 15 (emphasis added).

41 *Id.* at 19.

****830** ¶ 40 We first note that the Gentrys use the word "extinguished." Notably, RCW 61.24.100(10) neither includes this word nor any synonym for it. We will not read this word into the statute.

¶ 41 Moreover, in our view, RCW 61.24.100(10) is not a prohibition. All it says is, "[a] trustee's sale under a deed of trust securing a commercial loan does not preclude [an action for a deficiency judgment on a guaranty] if that obligation ... was not secured by the deed of trust" that was foreclosed.

¶ 42 For example, we can envision a situation where the Gentrys executed another guaranty that had no relation to the commercial loans secured by any of the deeds of trust ***483** foreclosed by nonjudicial means here. In that case, the trustees' sales under these deeds of trust would have no effect on that other guaranty.

¶ 43 The problem with the Gentrys' interpretation is that it requires striking from the statute the word "not," as indicated by the following revision:

> A trustee's sale under a deed of trust securing a commercial loan does ~~not~~ preclude an action to collect or enforce any obligation of a borrower

> or guarantor if that obligation, or the substantial equivalent of that obligation, was ~~not~~ secured by the deed of trust.[42]

[42] (Emphasis and alterations added).

¶ 44 But the plain language of RCW 61.24.100(10) is permissive. That is, it states a permissive rule applicable to situations where the obligation of a borrower or guarantor is ***not*** secured by the deed of trust that was foreclosed by a trustee's sale. In that situation, the trustee's sale ***does not*** preclude the lender from bringing an action to collect on or enforce a guaranty. Only by striking the word "not" from the two places indicated above can the otherwise permissive statement of the statute be read as a prohibition.[43]

[43] *See, e.g., Glasebrook v. Mut. of Omaha Ins. Co.*, 100 Wash.App. 538, 545, 997 P.2d 981 (2000) ("Generally, we do not infer a prohibition absent specific language to that effect, unless the statute as a whole directs that conclusion.").

¶ 45 The Gentrys offer no explanation why we should rewrite the words of the statute under the guise of interpreting it to determine legislative intent. We decline either to omit language that is in the statute or add language that is not there.

¶ 46 Moreover, the Gentry's interpretation of RCW 61.24.100(10) is the inverse of what the plain language says. We also decline to add the inverse to the statute when the Legislature did not expressly do so.

***484** ¶ 47 *In re Detention of Lewis* contains an example of when the Legislature expressly codified the inverse.[44] There, the court stated:

[44] 163 Wash.2d 188, 177 P.3d 708 (2008).

> Pertinent here, the State need not plead a recent overt act in its petition where "it appears that ... [a] person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement." RCW 71.09.030(1). Conversely, the statute requires the State to allege a recent overt act where the offender is "a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement." RCW 71.09.030(5). Similarly, at trial, the State must prove beyond a reasonable doubt that the offender committed a recent overt act "[i]f, on the date that the petition is filed, the person was living in the community after release from custody." Former RCW 71.09.060(1) (2001).[45]

[45] *Id.* at 194, 177 P.3d 708 (alterations in original).

¶ 48 As the supreme court recognized in the above passage, the Legislature first described a situation in which a recent overt act did not need to be pleaded.[46] But rather than expecting the reader to imply the truth of the inverse, the Legislature went on to make an explicit rule for the inverse. The statute explicitly defined both the situation in which a recent overt act does not need to be ****831** pleaded, and the situation in which a recent overt act does need to be pleaded.[47]

[46] *Id.*

[47] *Id.*

¶ 49 Here, in contrast, the plain language of RCW 61.24.100 does not contain an expression of the inverse. The Gentrys do not provide any argument why we should imply the inverse. Moreover, we do not feel it appropriate to imply the inverse under these circumstances.

¶ 50 Additionally, the Gentrys' interpretation of subsection (10) is grounded in a logical fallacy. "The proposition ***485** that 'A implies B' is not the equivalent of 'non-A implies non-B,' and neither proposition follows logically from the other."[48] *State v. Holland* illustrates the problem of implying the inverse of a statute.[49]

[48] *Crouse–Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 703 n. 20 (2d Cir.1980) (citing J. COOLEY, A PRIMER OF FORMAL LOGIC 7 (1942)).

[49] 99 Wash. 645, 649–51, 170 P. 332 (1918).

¶ 51 In *Holland,* the law at the time made it illegal for a pharmacist to sell grain alcohol.[50] A pharmacist could sell it for mechanical or chemical purposes, but had to get the purchaser to sign his name in a record book and to keep a "true and exact" record of such transactions.[51] *Holland,* a

pharmacist, sold some grain alcohol to an informant.[52] The informant signed the record book, but he testified that he told Holland he might be using it for purposes other than mechanical or chemical.[53] On the strength of that testimony, Holland was convicted.[54]

50 *Id.* at 649, 170 P. 332.

51 *Id.* at 649–50, 170 P. 332.

52 *Id.* at 647, 170 P. 332.

53 *Id.*

54 *Id.* at 648, 170 P. 332.

¶ 52 Holland argued on appeal that his good faith was established as a matter of law by the fact that the informant signed the record book.[55] The court was not persuaded.[56] "Appellant's argument overlooks the fact that the permission accorded to druggists ... is to sell alcohol for mechanical or chemical purposes ***only.*** It is not a permission to sell to every person who signs a formal statement to that effect."[57]

55 *Id.* at 649–50, 170 P. 332.

56 *Id.* at 650, 170 P. 332.

57 *Id.*

¶ 53 The court then conducted a logical analysis of the statute and demonstrated that Holland's argument was ***486** based on a fallacy.[58] The first proposition, which is true, is that when the buyer does not sign the record book, the statute makes the seller guilty as a matter of law.[59] But Holland's second proposition is not true: when the buyer does sign the record book, he is not guilty as a matter of law.[60]

58 *See id.* at 651, 170 P. 332.

59 *Id.*

60 *Id.* at 649–51, 170 P. 332.

> Indeed it seems to us that the issue of good faith not only does arise, but can only arise when a formally sufficient record of the sale has been made. Without such a record there is no issuable fact; the sale is conclusively illegal without regard to the seller's good or bad faith. ***But the converse is not true.*** When the formal record has been made, the question of good faith is an issue. That question is then one of fact for the jury upon the evidence.[61]

61 *Id.* at 651, 170 P. 332 (emphasis added).

¶ 54 Putting aside terminology differences, like *Holland*, the Gentrys essentially argue that the inverse of what is stated in the statute is necessarily true. That is a logical fallacy. We cannot infer that the inverse of what the statute states is true. Based on these cases and our analysis of the statute before us, we reject the interpretation that the Gentrys assert.

¶ 55 In further support of their "clear language" argument, the Gentrys rely on *First–Citizens Bank & Trust Co. v. Cornerstone Homes & Development LLC*, a recent Division Two case.[62] We disagree with the reasoning and conclusion in that case.

62 178 Wash.App. 207, 314 P.3d 420 (2013).

****832** ¶ 56 There, a bank sued the guarantors of three commercial loans to Cornerstone Homes & Development, LLC for a deficiency judgment following nonjudicial foreclosures of ***487** the deeds of trust securing the loans.[63] THE SUPERIOR COURT entered judgment on the pleadings, ordering the guarantors to pay the deficiency.[64] Division Two reversed.[65]

63 *id.* at 421–22.

64 *id.* at 422.

65 *id.* at 421.

¶ 57 One of the issues before the court was whether RCW 61.24.100(10) created an exception to the general prohibition in RCW 61.24.100(1) against deficiency judgments following a trustee's sale under a deed of trust securing certain commercial loans.[66] The court held that subsection (10) created such an exception.[67] In doing so, the court quoted, in part, the subsection, emphasizing in its opinion the last words of the following quotation:

66 *Id.* at 424.

67 *Id.*

> 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.***[68]

68 *Id.*

¶ 58 The court then went on to apply the statutory construction principle *expressio unius est exclusio alterius.*[69] Doing so, the court concluded that the language of subsection (10):

69 *Id.* at 424–25.

> ***[I]mplies*** 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.[70]

70 *Id.* at 425 (some emphasis added).

488** ¶ 59 First, Division Two utilized a principle of construction that we believe does not control this case. The court concluded that subsection (10) is the "only*** exception under these circumstances."[71] But subsection (10) is not the ***only*** exception in RCW 61.24.100. This interpretation ignores other subsections within the statute, particularly subsection (3)(c), which is at issue in this case.

71 *Id.*

¶ 60 Second, we note that Division Two did not expressly address in its analysis what we pointed out earlier in this opinion. The argument that subsection (10) prohibits a deficiency judgment against guarantors requires the following reading of the statute:

> ¶ 61 A trustee's sale under a deed of trust securing a commercial loan does ~~not~~ preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was ~~not~~ secured by the deed of trust.[72]

72 RCW 61.24.100(10) (emphasis and alterations added).

¶ 62 We will not read out the word "not" from this provision. But we believe Division Two's reading implicitly does so. Moreover, as we explained earlier in this opinion, that court's reading of subsection (10) implies the inverse of the provision that is not true. We decline to do the same.

¶ 63 For these reasons, we are not persuaded that *First–Citizens* properly interprets the statute. Accordingly, we reject its reasoning and conclusion that RCW 61.24.100(10) bars an action where a guaranty is secured by the deed of trust foreclosed by a prior trustee's sale.

¶ 64 Finally, during oral argument and by additional authority, the Gentrys argue that the word "if" in this statute should be construed to mean "only if." Like Division Two, they cite the construction principle, *expression unius est exclusio alterius,* which means the " '[e]xpression of one ***489** thing in a statute ****833** implies exclusion of others, and this exclusion is presumed to be deliberate.' "[73]

73 *First–Citizens Bank,* 314 P.3d at 425 n. 15 (quoting *State v. Kelley,* 168 Wash.2d 72, 83, 226 P.3d 773 (2010)).

¶ 65 As we previously explained in this opinion, the

essence of the Gentrys' argument requires that we read RCW 61.24.100(10) to say more than it actually says. This argument is that the bank may bring this action to enforce the Gentrys' guaranties ***only if the*** guaranties were not secured by the nonjudicially foreclosed deeds of the trust securing the commercial loans. Notably, the statute says "if," not "only if." We decline to rewrite the statute by adding the word "only" into the analysis in order to conclude that the "if" clause is an indispensable condition precedent to bringing this action.

¶ 66 Also, it appears that the Gentrys argue that "only" should be written into the statute because subsection (10) is the " 'only exception under these circumstances.' "[74] They again cite *First–Citizens Bank* to support this assertion.[75] But, as we just discussed, subsection (10) is not the only exception in RCW 61.24.100.

74 Respondents' Citation of Additional Authority at 1 (quoting *First–Citizens Bank*, 314 P.3d at 425).

75 *Id.* (citing *First–Citizens Bank*, 314 P.3d at 425).

¶ 67 To summarize, we conclude that RCW 61.24.100(10) does not preclude this action for a deficiency judgment against the guarantors of these commercial loans. The trustees' sales under the deed of trust securing these loans do not bar this action. Moreover, this action is not barred by the limitations stated in RCW 61.24.100(3)(a) and (b). The trial court erred by deciding otherwise.

THE LOAN DOCUMENTS

[9] ¶ 68 Based on the incorrect premise that RCW 61.24.100(10) should be interpreted as they argue, the Gentrys ***490** further argue that their guaranties are secured by the various deeds of trust securing the loan. Accordingly, they claim that the trustees' sales under these deeds of trust bar this action for a deficiency judgment. Even if we agreed with their premise, we would still disagree with their conclusion. We hold that these deeds of trust do not secure the Gentrys' guaranties.

[10] [11] ¶ 69 This court reviews de novo a trial court's interpretation of the language of a contract.[76] "When interpreting a contract our primary goal is to discern the intent of the parties, and such intent must be discovered from viewing the contract as a whole."[77]

76 *Knipschield v. C–J Recreation, Inc.*, 74 Wash.App. 212, 215, 872 P.2d 1102(1994).

77 *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wash.2d 654, 669, 15 P.3d 115 (2000).

[12] [13] ¶ 70 Washington follows the "objective manifestation theory of contracts" to determine the parties' intent.[78] Courts focus on the "objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties."[79] "[W]hen interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used."[80] This court does not "interpret what was intended to be written but what was written."[81]

78 *Hearst Commc'ns. Inc. v. Seattle Times Co.*, 154 Wash.2d 493, 503, 115 P.3d 262 (2005).

79 *Id.*

80 *Id.* at 503–04, 115 P.3d 262.

81 *Id.* at 504, 115 P.3d 262.

¶ 71 Here, the deeds of trust at issue use identical language for the relevant provisions.[82] The first page of each deed of trust identifies the grantors under the instruments. For the Little Mountain Deed of Trust, the "Grantor" is ***491** Little Mountain East LLC.[83] For the Blackburn Road Deed of Trust, the "Grantors" are Blackburn Southeast LLC, Blackburn North LLC, and Little ****834** Mountain East LLC.[84] Horizon Bank, the predecessor in interest to Washington Federal, is identified as the "Grantee" or Beneficiary/Lender.[85] The Gentrys are not parties to these deeds of trust.

82 *Compare* Clerk's Papers at 9–17, with Clerk's Papers at 23–31.

83 *Id.* at 23.

[84] *Id.* at 9.

[85] *Id.* at 9, 23.

¶ 72 At page two of each of the deeds of trust, the Grantors state what is secured:

> 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: [86]

[86] *Id.* at 11, 25 (emphasis added).

Three paragraphs later, the Grantors state whose payment and performance obligations are secured by the deeds of trust:

> ***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.[87]

[87] *Id.* (second and third emphasis added).

Reading these two paragraphs together, the deeds of trust must be read as securing the payment and performance ***492** obligations of the ***Borrowers and Grantors.***[88] Here, ***Borrower*** and ***Grantor*** is the same entity for each loan secured by each deed of trust. There simply is no way to read these provisions so that any deed of trust secures the payment and performance obligations of anyone other than the ***Borrower and Grantor.*** The guarantors of the loans are neither. Thus, none of these deeds of trust secure the guaranties of the Gentrys.

[88] *See* Brief of Appellant at 25–26; Brief of Amici Curiae Washington Bankers Association and Union Bank, N.A. at 12–15.

¶ 73 Later in each deed of trust, another provision discusses full performance of the secured obligations:

> ***FULL PERFORMANCE.*** If ***Borrower and Grantor*** pay all the Indebtedness when due, and ***Grantor*** otherwise performs all the obligations imposed upon ***Grantor*** under this Deed of Trust, Lender shall execute and deliver to Trustee a request for full reconveyance and shall execute and deliver to Grantor suitable statements of termination of any financing statement on the evidencing Lender's security interest in the Rents and the Personal Property.[89]

[89] Clerk's Papers at 14, 28 (second and third emphasis added).

This language reinforces our conclusion. The exclusive focus is on the payment and performance obligations of the ***Borrower and Grantor*** of the deed of trust. There is simply no mention of such obligations of the guarantors.

¶ 74 In sum, we conclude when we read each of these deeds of trust as a whole, none secures the Gentrys' guaranties. Accordingly, the Gentrys' argument that RCW 61.24.100(10) bars this action against them is wholly unpersuasive for a second reason.

¶ 75 In support of their argument that the guaranties are secured by various deeds of trust, the Gentrys again rely on *First–Citizens Bank,* the recent Division Two case we previously discussed in this opinion.[90] They represent that the form of the deed of trust in that case is the same as those ***493** here. But the complete deeds of trust at issue in that case are not in this record on appeal. Consequently, we will not speculate on whether the representation is correct.

[90] 314 P.3d at 420.

¶ 76 Nevertheless, we take this opportunity to address arguments made here that were also clearly before that court.

¶ 77 In *First–Citizens Bank*, Division Two focused on different provisions in the deeds of trust before that court than those we just ****835** discussed. Specifically, the court quoted the following language:

> 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.[91]

91 *See First–Citizens Bank*, 314 P.3d at 423 (alteration in original).

Division Two concluded that this language included any guaranties of the loans secured by the deeds of trust in that case.[92] In so concluding, Division Two looked to the definition of the term "Related Documents" in the deeds of trust, which included any " '***guaranties*** ... whether ***now*** or hereafter ***existing,*** executed in connection with indebtedness.' "[93] As Division Two noted, this definition plainly includes "guaranties."[94]

92 *Id.*

93 *Id.*

94 *First–Citizens Bank*, 314 P.3d at 423.

¶ 78 The Gentrys make a similar argument here. They point to substantially similar language in these deeds of trust that contain the term "Related Documents" together with a similar definition.[95]

95 *See* Clerk's Papers at 17, 31 ("The words '***Related Documents' mean all*** promissory notes, credit agreements, loan 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,*** provided, that the environmental indemnity agreements are not 'Related Documents' and are not secured by this Deed of Trust.") (emphasis added).

¶ 79 ***494** But reading this definition to include ***all*** guaranties, regardless of who the guarantor is, ignores the specifications in the "Payment and Performance" provisions for the deeds of trust that are before us. As we discussed previously in this opinion, this latter provision makes clear whose obligations for payment and performance are secured by the deeds of trust. And there can be no doubt that such obligations are limited to the ***Borrower and Grantor*** of each instrument, not guarantors of the loan. Accordingly, the scope of the definition of "Related Document" does not include the guaranties of the Gentrys.

¶ 80 To the extent that *First–Citizens* holds otherwise, we disagree with its conclusion. That case does not control here.

¶ 81 We note that the trial court in this case reached a conclusion similar to that in *First–Citizens*. It concluded that "the guaranties executed by the Defendants were related documents."[96] It reached this conclusion by construing the deeds of trust instrument against the bank, the drafter:

96 Clerk's Papers at 774–75.

> Without repeating your respective positions, I find that the general principle of ambiguities being [construed] against the drafting party is the decisive factor.... The inconsistencies favor the Defendants and result in the conclusion that the guaranties were related documents and therefore secured by the foreclosed deeds of trust.[97]

97 *Id.*

Construing the deeds of trust instruments against the drafter was also a rationale that Division Two pointed to in a footnote.[98]

98 *First–Citizens Bank*, 314 P.3d at 423 n. 8.

¶ 82 ***495** The problem with this approach is that this principle applies only where an instrument is ambiguous.[99] As we discussed previously in this opinion, the deeds of trust in this case are not ambiguous when read as a whole. The Grantor under each instrument expressly stated that the deed of trust secured the obligations of the ***Borrower and***

Grantor. Each of these was the same entity for each loan. And none of these entities included the Gentrys, the guarantors of the loan obligations. Thus, this principle of interpretation does not apply in this case.

99 *See, e.g., Rouse v. Glascam Builders, Inc.*, 101 Wash.2d 127, 135, 677 P.2d 125 (1984).

¶ 83 Because of our resolution of the two issues in this opinion, we need not reach the third question: whether the waiver of anti-deficiency defenses language in the guaranties ****836** of payment is enforceable against the Gentrys. In order to make clear that the trial court's decision on this question is not binding on these parties, we vacate that portion of that court's decision.

¶ 84 There is an outstanding issue that is not presently before us. The Gentrys are entitled to a fair value hearing under RCW 61.24.100(5). That hearing has not yet occurred because the trial court decided this matter on summary judgment. Thus, remand for such a hearing is required.

ATTORNEY FEES

[14] ¶ 85 The Gentrys seek an award of attorney fees based on the contract provision in their guaranties. The bank reserves the right to seek fees under the same provision following remand and further proceedings. We deny an award of fees at this time to any party because doing so is premature.

[15] ¶ 86 Each of the guaranties in this case provides for payment of reasonable attorney fees to the bank in connection ***496** with enforcement of the guaranties.[100] RCW 4.84.330 makes this unilateral contractual provision bilateral, and further provides that the "prevailing party" is entitled to such an award. A prevailing party is one in whose favor a final judgment is rendered.[101]

100 *See* Clerk's Papers at 119, 122, 125, 128, 131, 134.

101 *Riss v. Angel*, 131 Wash.2d 612, 633, 934 P.2d 669 (1997).

[16] ¶ 87 Moreover, a trial court may include appellate attorney fees after remand.[102]

102 *See Stieneke v. Russi*, 145 Wash.App. 544, 572, 190 P.3d 60 (2008) ("Because we remand this case, neither party is entitled to attorney fees. If the trial court finds that the Stienekes met the required standard of proof, it should award attorney fees for this appeal as well.").

¶ 88 Because a prevailing party has not yet been determined and will not be determined until after a fair value hearing under RCW 61.24.100(5) on remand, we decline to award fees now. That determination may be made by the trial court at such time as it makes an award of reasonable attorney fees.

¶ 89 We reverse and remand for further proceedings. We also vacate that portion of the trial court's decision concerning the enforceability of waiver of anti-deficiency defenses. We also deny an award of attorney fees as premature.

WE CONCUR: LAU and BECKER, JJ.

Parallel Citations

319 P.3d 823

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APPENDIX C

Division II Opinion in

First-Citizens v. Cornerstone

178 Wash.App. 207
Court of Appeals of Washington,
Division 2.

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. | Dec. 3, 2013.

Synopsis
Background: Following nonjudicial trustee's sale, mortgagee brought action against guarantors seeking deficiency judgment. The Superior Court, Pierce County, John Russell Hickman, J., entered judgment in favor of mortgagee. Guarantors appealed.

Holdings: The Court of Appeals, Hunt, J., held that:

[1] deeds of trust also secured guaranty agreements;

[2] anti-deficiency provisions of Deed of Trust Act prohibited deficiency judgment; and

[3] guarantors were entitled to award of attorney fees.

Reversed.

West Headnotes (10)

[1] **Contracts**
⇐Intention of Parties

Washington follows the objective manifestation theory of contracts; a court's primary goal in interpreting a contract is to ascertain the parties' intent.

[2] **Contracts**
⇐Language of contract

Courts determine intent of the parties to a contract by focusing on the parties' objective manifestation of their intent in the written contract rather than on the unexpressed subjective intent of either party.

[3] **Contracts**
⇐Application to Contracts in General

When interpreting a contract, a court does not interpret what was intended to be written but what was written.

[4] **Guaranty**
⇐General rules of construction

The rules that apply to contracts also govern interpretation and construction of a guaranty.

[5] **Guaranty**
⇐Nature of Liability

By signing a guaranty, the guarantor promises a creditor to perform if the debtor fails to repay the loan.

[6] **Guaranty**

Scope and Extent of Liability

A guarantor is not to be held liable beyond the express terms of his or her engagement.

[7] **Guaranty**
Guaranties of mortgages and judgments

Deeds of trust that mortgagee non-judicially foreclosed to satisfy mortgagor's underlying debt also secured the guarantors' commercial guaranty under the express terms of the guaranty, promissory notes, and deeds of trust drafted by mortgagee's predecessor, where deeds of trust expressly stated that they were given to secure payment of indebtedness and performance of any and all obligations under the note, the related documents, and the deeds of trust, and guaranties expressly incorporated deeds of trust.

2 Cases that cite this headnote

[8] **Guaranty**
Defenses

Anti-deficiency provisions of Deed of Trust Act prohibited mortgagee from obtaining deficiency judgment against guarantors pursuant to guaranty agreements that were secured by deeds of trust that mortgagee non-judicially foreclosed to satisfy mortgagor's underlying debt, where provisions categorically prohibited a deficiency judgment against any borrower or guarantor following a nonjudicial foreclosure, subject to certain exceptions for deeds of trust securing commercial loans, and applicable exception only applied when guaranty agreement was not secured by deed of trust. West's RCWA 61.24.005 et seq.

1 Cases that cite this headnote

[9] **Statutes**
Express mention and implied exclusion; expressio unius est exclusio alterius

Expression of one thing in a statute implies exclusion of others, and this exclusion is presumed to be deliberate.

1 Cases that cite this headnote

[10] **Costs**
Contracts

Guarantors were entitled to award of attorney fees pursuant to guaranty agreements in action by mortgagee seeking deficiency judgment following nonjudicial foreclosure of deed of trust, where, although the commercial guaranty expressly purported to entitle only the lender to attorney fees, statute provided that such unilateral attorney fee provisions gave reciprocal rights to all parties to the contract. West's RCWA 4.84.330.

Attorneys and Law Firms

*421 Margaret Yvonne Archer, Attorney at Law, Tacoma, WA, for Appellants.

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Opinion

HUNT, J.

¶ 1 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 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.

1 Ch. 61.24 RCW.

FACTS

¶ 2 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.

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

¶ 3 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.

¶ 4 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.

*422 ¶ 5 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.

3 First–Citizens also sued Cornerstone, but it later withdrew this action.

ANALYSIS

I. GUARANTY & DEEDS OF TRUST

¶ 6 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

[1] [2] [3] ¶ 7 We review de novo a trial court's order granting judgment on the pleadings. *N. Coast Enters., Inc. v. Factoria P'ship,* 94 Wash.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 Wash.App. 758, 769, 275 P.3d 339, *review denied,* 175 Wash.2d 1008, 285 P.3d 885 (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 Wash.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 written but what *was* written." *Hearst*, 154 Wash.2d at 503, 504, 115 P.3d 262 (emphasis added) (citing *J.W. Seavey Hop Corp. v. Pollock*, 20 Wash.2d 337, 348–49, 147 P.2d 310 (1944)).

[4] [5] [6] ¶ 8 The rules that apply to contracts also govern interpretation and construction of a guaranty. *Bellevue Square Managers v. Granberg*, 2 Wash.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 Wash.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 Wash.App. 242, 246–47, 787 P.2d 963, *review denied* 114 Wash.2d 1029, 793 P.2d 975 (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

[7] ¶ 9 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 language.[5] This argument fails.

***423** ¶ 10 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.

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

> 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.

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

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, — Wash.App. ——, ——, n. 4, 313 P.3d 1208, 1215, 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 Wash.App. 345, 361, 177 P.3d 755 (2008))).

6 CP at 28.

7 CP at 28.

[...]

"*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.

[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 Wash.App. at 246–47, 787 P.2d 963.

¶ 12 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 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]

[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, 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, 818 N.W.2d 460.

*424 II. ANTI–DEFICIENCY STATUTE RCW 61.24.100

[8] ¶ 13 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 Wash.2d 572, 578, 210 P.3d 1007 (2009).

¶ 14 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]:

[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 Wash.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 Wash.App. at 365, 793 P.2d 449.

[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 Wash.App. at 365, 793 P.2d 449. 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.

[9] ¶ 15 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.*

RCW 61.24.100(10)[14] (emphasis added). Under the statutory construction principle expressio unius est exclusio alterius[15], the *425 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]

[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 Wash.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 Wash.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 Wash.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 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.

¶ 16 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).

17 CP at 33.

¶ 17 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 nonjudicially 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.

ATTORNEY FEES

[10] ¶ 18 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 *426 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.

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.

¶ 19 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.

We concur: WORSWICK, C.J., and JOHANSON, J.

Parallel Citations

314 P.3d 420

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