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NO. 51197-5-II

COURT OF APPEALS FOR DIVISION II

STATE OF WASHINGTON

PACIFIC COAST CONSTRUCTION, L.L.C., a Washington limited liability company; DAVID M. FERDERER; GARY M. CLINE and REBECCA J. CLINE, individually and the marital community comprised thereof

Petitioners

v.

WASHINGTON FEDERAL, NATIONAL ASSOCIATION
Respondents

PETITION FOR REVIEW
TO THE SUPREME COURT

PACIFIC COAST CONSTRUCTION, L.L.C., A WASHINGTON LIMITED LIABILITY COMPANY; DAVID M. FERDERER; GARY M. CLINE AND REBECCA J. CLINE

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I. IDENTITY PETITIONERS

Petitioners are the Defendants in Pierce County Superior Court Cause No. 16-2-12310-0 and Appellants in the Court of: *Pacific Coast Construction, L.L.C. et al. v. Washington Federal National Ass'n,* No. 51197-5-II. The Petitioners include individuals David Ferderer ("Ferderer") and Gary and Rebecca Cline ("the Clines"), and Pacific Coast Construction, L.L.C., an inactive Washington limited liability company ("PCC"). The Petitioners are collectively referred to as the ("Petitioners").

The Petitioners appealed an order granting Washington Federal National Association ("Washington Fedederal") summary judgment to foreclose a deed of trust. The trial court order included a decree of foreclosure on a deed of trust executed by Ferderer and The Clines to secure a promissory note executed by PCC. Petitioners claim the foreclosure is barred by the six year statute of limitations. Washington Federal claims the limitation period was extended by the Chapter 7 bankruptcies of Ferderer and the Clines.

II. CITATION TO COURT OF APPEALS DECISION

The Petitioners seek review of Division Two's unpublished Opinion, filed on July 31, 2018 ("Opinion" Appendix 1), affirming the trial court's summary judgment on the grounds that Ferderer's and the Cline's separate bankruptcies tolled the six year statute of limitation under

RCW 4.16.230 for the duration of the Ferderer bankruptcy, extending the statutory limitation period for almost four years from May 2015 to February 2018. The Opinion does not address the different bankruptcy periods for Clines – approximately 22 months – and Ferderer, approximately 33 months. Clines and Ferderer are tenants in common in the real property subject to the foreclosed deed of trust, and the Opinion imposes on the Clines, without discussion or authority, the longer Ferderer bankruptcy period.

III. ISSUES PRESENTED FOR REVIEW

A. Does the Opinion conflict with this Court's decisions rigorously enforcing the Statute of Limitations and refusing to allow parties to manipulate those statutes. *Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969), *superseded by statute, RCW 4.16.350, as recognized in Winbun v. Moore,* 143 Wn.2d 206, 214 n.3, 18 P.3d 576 (2001); and *Summerrise v. Stephens*, 75 Wn.2d 808, 454 P.2d 224 (1969). RAP 13.4(b)(1)

B. Does the Opinion involve issues of substantial public importance because the Opinion is antithetical to the legislative purposes of the Statutes of Limitations to compel actions be commenced within what the legislature deemed to be a reasonable time, and not postponed indefinitely by the variable periods of federal bankruptcy proceedings and can lead to absurd results? *Walcker v. Benson & McLaughlin,* 79 Wn. App. 739, 904 P.2d 1176 (1995); *Young v. Estate of Snell*, 134 Wn.2d 267, 279, 948 P.2d 1291 (1997); RAP 13.4(b)(4).

IV. STATEMENT OF THE CASE

Washington Federal's motion for summary judgment alleged that it is the holder of a Promissory Note in the original principal amount of

$850,000 signed by Pacific Coast on May 16, 2008 ("Note") with a maturity date of May 9, 2009. The Note was secured by a Deed of Trust of the same date signed individually by Federer and the Clines ("Deed of Trust") regarding properties they own in their individual capacities as tenants in common. PCC had no ownership interest in the real properties described in the Deed of Trust. The Note by its terms became due and payable in full on May 9, 2009. Washington Federal claims it is entitled to foreclose the Deed of Trust as a result of PCC's payment default on the Note.

Washington Federal commenced the present action by filing a complaint in Pierce County Superior Court to foreclose the Deed of Trust on October 26, 2016 - over seven (7) years and five (5) months after the Note became due and payable. Pacific Coast, Ferderer and the Clines answered the Complaint denying Washington Federal's claims and raising affirmative defenses including that the six-year statute of limitations barred judgment on the Note and foreclosure of the Deed of Trust and asserting the statutory limitation period expired on May 9, 2015.

Washington Federal brought a motion for an order on summary judgment foreclosing the Deed of Trust arguing, among other theories, that partial payments on the Note by the Chapter 7 Bankruptcy Trustee in Ferderer's and the Clines' 2011 bankruptcy cases and a payment from a

title insurance company in 2016, restarted the statute of limitations under RCW 4.16.270. Washington Fedederal also alleged the six year statutory limitation period was extended by the bankruptcy cases of Ferderer and the Clines'.

PCC, Ferderer and the Clines opposed the motion for summary judgment motion , citing in their response and arguing at the hearing that the partial payments were not made or authorized by the Defendants and therefore were involuntary under Washington case authorities, including the Supreme Court's ruling in *Easton v. Bigley*, 28 Wn.2d 674, 183 P.2d 780 (1947). These authorities limit application of the tolling provisions in RCW 4.16.270 to circumstances involving voluntary payments by the debtor. The Opinion did not address this issue because the Court of Appeals affirmed based on tolling of the statutory period as a result of the Ferderer and the Clines' bankruptcies.

The Petitioners also opposed Washington Federal's arguments that their separate individual Chapter 7 bankruptcies tolled the statutory limitation period under RCW 4.16.270, arguing that tolling the statutory limitation period in such circumstances contradicts both federal and state legal authorities.

The trial court granted Washington Federal's summary judgment on June 16, 2017, finding that partial payments were made on the Note

and ruling that such payments extended the statute of limitations under RCW 4.16.270. *CP* - The trial judge stated in her oral ruling that "…this Court believes [the partial payments] extended the statute of limitation time frame which would defeat the nonmoving party's argument that the statute of limitation ran in this case." *RP 36 lines 1-14.* PCC, Ferderer and Clines timely filed a request for reconsideration of the Order on Summary Judgment which was denied on July 27, 2017. *CP Order Denying Motion for Reconsideration.*

Pacific Coast, Ferderer and the Clines appealed the trial Court's orders granting summary judgment and denying reconsideration to Division Two of the Court of Appeals. The Court of Appeals affirmed the trial court order in the Opinion under the legal theory that federal bankruptcy stay tolls the statute of limitations under RCW 4.16.230 until a bankruptcy is closed.

Petitioners request review because the Court of Appeals' opinion allow parties to manipulate the statutes of limitation it is also antithetical to the legislative purposes of the statutes of limitations, which are to compel actions to be commenced within what the Legislature deemed to be a reasonable time. Under the Court of Appeals' decision, actions can be postponed indefinitely by the variable periods of federal bankruptcy proceedings, leads to absurd results.

V. REASON WHY REVIEW SHOULD BE ACCEPTED

A. The Court of Appeals' Decision Conflicts with this Court's Decisions Rigorously Enforcing the Statute of Limitations and Refusing to Allow Parties to Manipulate Those Statutes.

Review is justified in this case because the Court of Appeals' Opinion is in conflict with this Court's rigorous enforcement of statutes of limitations. *Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969), *superseded by statute, RCW 4.16.350, as recognized in Winbun v. Moore,* 143 Wn.2d 206, 214 n.3, 18 P.3d 576 (2001); and *Summerrise v. Stephens*, 75 Wn.2d 808, 454 P.2d 224 (1969). This Court has long rejected attempts to sidestep or manipulate statutes of limitations and has announced that "[a]gain, it has been many times held... that it is not the policy of the law to put it within the power of a party to toll the statute of limitations." *Bennett v. Thorne*, 36 Wash. 253, 269, 78 P. 936 (1904); *see also Mood v. Mood,* 171 Wash. 210, 221-222, 18 P.2d 21 (1933). Yet, the Court of Appeals did exactly that, by allowing creditors to invoke a bankruptcy stay as a basis to enlarge the limitations period, thus giving creditors indefinite, variable periods of time in which to foreclose on deeds of trust.

The purpose of the statutes of limitations is to protect potential defendants from long-dormant claims and protracted litigation; shield them and the judicial system from stale claims; and compel plaintiffs to

exercise their rights within a reasonable time. *Ruth v. Dight,* 75 Wn. 2d at 664-665. This Court has "so long adhered" to the policy that "the litigation of stale claims is unfair to the defending party and undesirable to society as a whole." *Young v. Estate of Snell,* 134 Wn.2d 267, 279, 948 P.2d 1291 (1997). As the U.S. Supreme Court pointed out, "[s]tatutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). Those statutes are designed to protect against a litany of ills:

> There is nothing inherently unjust about a statute of limitations. Limitations on the time in which one may sue also limit the time in which another may be sued. If one cannot bring an action, by the same token he cannot compel another to defend it. Statutes of limitation, although having their origins in legislative proceedings – aside from equitable principles of laches and estoppel – thus contemplate that a qualified freedom from unending harassment of judicial process is one of the hallmarks of justice. No civilized society could lay claim to an enlightened judicial system which puts no limits on the time in which a person can be compelled to defend against claims brought in good faith, much less whatever stale, illusory, false, fraudulent or malicious accusations of civil wrong might be leveled against him.

Ruth, 75 Wn.2d at 664 (footnote omitted). This Court recognizes that, as a practical matter, a person knows when he or she has a claim, stating that, "[a]fter all, when an adult person has a justiciable grievance, he usually knows it and the law affords him ample opportunity to assert it in the courts." *Id.* at 665.

Given these strong policies, Washington allows only limited, narrow exceptions to the statutes of limitations. *Bilanko v. Barclay Court Owners Ass'n*, 185 Wn.2d 443, 451, 375 P.3d 591, 595 (2016) (quoting *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 651, 310 P.3d 804 (2013) (statutory time bar is a "legislative declaration of public policy which the courts can do no less than respect," with rare equitable exceptions)). Washington law allows relief from statutes of limitations only when particular external forces beyond a claimant's power to control disable him or her from suing. *See* RCW 4.16.180 - .230.[1]

Consistent with this limitations schema, Washington law will not stop the statutes from running, if the plaintiff has the power to remove an obstacle to suit. For example, although RCW 4.16.180 tolls the statute during a defendant's absence from the state, it does not operate when the plaintiff can, indeed, serve the out-of-state defendant. *Summerrise v. Stephens*, 75 Wn.2d at 811 (plaintiff knew where the defendant was and had every right to proceed against him under the long-arm jurisdiction of the state, but failed to do so in a timely manner). In *Summerrise,* the Court

[1] For example, plaintiffs can do nothing to age a defendant into majority, revive the dead, restore sanity, or release a defendant from prison, and the statute is thus properly tolled. RCW 4.16.190 (limitations tolled by minority, incompetency, disability, or imprisonment); RCW 4.16.200 (death of plaintiff or defendant). Immunity is also a restriction which prohibited a plaintiff from commencing suit. *Seamans v. Walgren*, 82 Wn.2d 771, 514 P.2d 166 (1973) (a legislator's constitutional immunity from "any civil process during the session of the legislature" was a "statutory prohibition" pursuant to RCW 4.16.320).

pointed out that to rule otherwise jeopardizes the policies of the statute of limitations:

> The purpose of the statute of limitations is to compel actions to be commenced within what the legislature deemed to be a reasonable time, and not postponed indefinitely....To hold otherwise would allow suits against nonresidents of the state upon whom personal service can be obtained to be postponed indefinitely. The evil results of long delay are too obvious to require citation. We should not ascribe to the legislature an intent which would lead to such unfortunate consequences.

Summerrise, at 812.

Similarly, in *Spokane County v. Prescott*, 19 Wash. 418, 56 Pac. 661 (1898), the Court ruled that an action was time-barred, rejecting the plaintiff's excuse that the statute of limitations did not begin to run until it received leave of court to file the action:

> The weight of authority and reason seems to be that when the respondent had the option at any time to obtain leave of court to bring its action, and did not ask for such leave, it cannot enlarge the statute of limitations by its own delinquency.

Spokane County at 425. *See also Douglas County. v. Grant County,* 98 Wash. 355, 359-360, 167 P. 928 (1917) (laws preventing immediate resort to superior court are not disabilities that prevent accrual of the cause of action and running of the statute of limitations); *Edison Oyster Co. v. Pioneer Oyster Co.*, 22 Wn.2d 616, 157 P.2d 302 (1945) (same). Simply put, litigants are not permitted to manipulate the statute of limitations to their benefit, and defeat the policies underlying those statutes.

The Court of Appeals' Opinion, and the decision of Division One of Court of Appeals in *Merceri v. Deutsche Bank AG*, 2 Wn. App. 2d 143, 408 P.3d 1140 (2018), upon which the Opinion is based, overturn this Court's long-standing policy of supporting statutes of limitations, by adoption of a new policy creating indefinite periods of limitation dictated by the uncertain and variable durations of federal bankruptcy proceedings. This contravenes this Court's repeated admonitions that parties do not have the power to start or suspend the statutes of limitations, and that the policies underlying the statues are ill-served if plaintiffs are allowed indefinite time periods to sue.

The Court of Appeals acknowledged that Washington Federal, like Deutsche Bank in Merceri, could have – but chose not to – move the bankruptcy court for relief from stay, pursuant to 11 USC § 362(d). Opinion at page 7-8 citing: *Merceri at* 153-154. It is undisputed that Washington Federal could have – but chose not to – commence a foreclosure action after the Ferderer and the Clines bankruptcies were closed and the real property released from the bankruptcy estate in May 2014 when there remained over a year on the six-year statutory limitation period. Instead, Washington Federal waited almost one year and 5 months after the expiration of the six-year limitation period before it commenced a foreclosure action. Contrary to the policies emphasized in *Ruth,*

Summerrise, and *Spokane County*, the Division II's Opinion and the Court of Appeals opinion in Merceri ruled that this has no bearing on whether the stay is a statutory prohibition and further reasoned that, even if it did, due diligence is not required for statutory tolling. Opinion at pages 7-8 citing *Merceri* at 154-155.

The Court of Appeals is wrong. Whether Washington Federal or Deutsche Bank could have removed an obstacle to suit bears directly on whether one of the few narrow exceptions to the statute of limitations should apply. *See, e.g., Spokane County v Prescott.*[2] Diligence is a value at the heart of the policies underlying the statute of limitations. *See Summerrise; see also Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 772, 733 P.2d 530 (1987) ("A party must exercise reasonable diligence in pursuing a legal claim"). As demonstrated in *Summerrise,* if a party can act, but chooses not to, it cannot later be allowed to rely on a literal reading of a tolling statute. This Court should accept review, because the Court of Appeals' Opinion and the Merceri decision contravene this

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[2] The Court of Appeals attempted to distinguish the *Spokane County* line of cases by stating that those cases involved accrual of claims, not tolling, and the accrual of Deutsche Bank's action "was not in dispute." *Merceri* at 153 n.5. This is a distinction without a difference. It is black letter law that a cause of action accrues and the statute of limitations begins to run when a party has the right to apply to a court for relief. *Haslund v. Seattle*, 86 Wn.2d 607, 620, 547 P.2d 1221 (1976). Whether a statute of limitations is tolled at its start, or during its course, is irrelevant for purposes of the question here: Is the statute of limitations suspended if the plaintiff can remove the reason for tolling? For over a century, the answer has been "no."

Court's decisions protecting the sound policy for the statutes of limitations.

B. =

The Opinion creates indefinite periods of limitation dictated by the uncertain and variable duration of individual federal bankruptcy proceedings. In doing so, it contradicts Washington policy by exposing debtors to the litany of ills that the statute of limitations seeks to prevent.

Division Three has already addressed, and rejected, creditors' attempts to change state policy to allow them an indefinite time to foreclose deeds of trust. In *Walcker v. Benson & McLaughlin,* 79 Wn. App. 739, 904 P.2d 1176 (1995), *review denied* 129 Wn.2d 1008 (1996), Division Three rejected the creditor's argument that public policy supported an unlimited right to foreclose as inconsistent with the goals of the statutes of limitations:

> We are unpersuaded by Benson and McLaughlin's policy argument. It is unclear how an unlimited right to foreclose on a deed of trust would provide greater certainty of titles rather than the converse. Furthermore, the goal of statutes of limitations is to force claims to be litigated while pertinent evidence is still available and while witnesses retain clear impressions of the occurrence. Our policy is one of repose; the goals are to eliminate the fears and burdens of threatened litigation and to protect a defendant against stale claims.

Walcker, 79 Wn. App. at 745-746 (quoting *Stenberg v. Pacific Power & Light Co.,* 104 Wn.2d 710, 714, 709 P.2d 793 (1985) (citations omitted)).

Unlike Division Three, Division I in Merceri and Division II in this case did not analyze the issue by "…look[ing] to the purposes and policies of statutes of limitation..." as required by Washington legal authority. *Stenberg*, at 714. As a result, these decisions accorded creditors an indefinite, variable period of time in which to foreclose on deeds of trust. Debtors – unlike all other defendants – are now subject to the very ills the statutes of limitations are designed to avoid. The two recent Court of Appeals' decisions remove the shield against stale lawsuits and encourages creditors to sit on their rights. And, given that bankruptcy stays can last for years, it contravenes the Legislature's intent that the statute of limitations applies to both "the debt" and "the right" in foreclosure actions, by passing the Outlaw Mortgage statute, RCW 7.28.300, protecting debtors from clouds on their title from dormant claims. *Walcker*, at 74.

No good legal reason justifies suspending the statute of limitations, much less one that outweighs the harms it creates. There is no reason to toll the statue for sophisticated creditors like WaFed and Deutsche Bank, who can easily request leave of court to lift a stay. The Court's commonsense recognition in *Ruth v. Dight,* that a party knows when it has a justiciable grievance, is true here and in Merceri: the banks knew they had a claims against the debtors and had ample opportunity to file a claim

under the six year statutory limitation period, regardless of the debtors' bankruptcy cases. *See Aslanidis v. United States Lines,* 7 F.3d 1067, 1073 (2nd Cir. 1993) (in bankruptcy, "parties have more certain knowledge of when claims will expire, and the potential claims period is not unduly extended because of the length – which may be great in complex cases – of the bankruptcy proceedings.")

The Opinion and the decision of Division One Merceri, so inconsistent with Washington's policies and case law, will lead to inconsistent and absurd results. *See Young v. Estate of Snell,* 134 Wn.2d at 278. Depending on the length of the stay in any particular bankruptcy, the statute of limitations can be extended for years, casting a long shadow on title.[3]

And, in this case, the decision leads to disparate treatment between individual debtors subject to the same debt. Ferderer and Cline are co-owners of the property subject to the foreclosed deed of trust. Applying the new legal analysis of the Opinion and Merceri to their case, results in a different statute of limitation period for Ferderer - running for eight year and nine months – and the Clines – running for 7 years and 9 months.

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[3] See *Spirtos v. Neilson (In re Spirtos*), 2009 U.S. App. LEXIS 2032 (9th Cir. 2009) (personal bankruptcy proceeding, filed in 1993, "may be the longest running bankruptcy case in this Circuit"); Catherine Ho, *W.R. Grace Emerges From Chapter 11 Bankruptcy After More Than 12 Years*, THE WASHINGTON POST, Feb. 4, 2014, https://www.washingtonpost.com/business/capitalbusiness/wr-grace.

When applied to joint owners who seek bankruptcy protection, it can result in different statutes of limitations applying to owners with indivisible rights in the same property. In such a situation, the creditor may be able to foreclose under a tolled statute against one joint owner, but not the other, who then finds himself or herself owning property with a creditor seeking partition and sale. Or in the present case, finding that the statute of limitations regarding their individual debts, will be determined by actions is a legal proceeding in which they are not parties. This introduces uncertainty and irrationality into property rights and contravenes the purposes of statutes of limitations.

IV. CONCLUSION

For these reasons the Petitioners respectfully requests that this Court should grant Petitioners' request for review.

RESPECTFULLY SUBMITTED this 30th day of August, 2018.

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APPENDIX I

OPINION

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

WASHINGTON FEDERAL, NATIONAL ASSOCIATION, Respondent, v. PACIFIC COAST CONSTRUCTION, LLC, a Washington limited liability company; DAVID M. FERDERER; GARY M. CLINE and REBECCA J. CLINE, individually and the marital community comprised thereof, Appellants.	No. 51197-5-II UNPUBLISHED OPINION

MELNICK, J. — Pacific Coast Construction, LLC (PCC), David M. Ferderer, and Gary and Rebecca Cline (collectively Appellants) appeal from an order granting Washington Federal, National Association (Washington Federal) summary judgment. The order included a decree of foreclosure on a deed of trust executed by Ferderer and the Clines. The Appellants also appeal the trial court's denial of their motion to reconsider the grant of summary judgment. They claim the statute of limitations barred the action.

Because an automatic stay in bankruptcy prohibited actions against the subject property, the statute of limitations was tolled and the court properly granted summary judgment. We affirm.

FACTS

I. BACKGROUND

Ferderer and the Clines owned PCC, a real estate development company. On May 16, 2008, PCC took out an $850,000 line of credit from Horizon Bank. PCC executed a promissory note in the principal amount of $850,000. The note matured on May 9, 2009. Horizon Bank advanced a total of $848,236.07 on the line of credit.

Ferderer and the Clines executed a deed of trust securing the note. The deed of trust encumbered nine parcels of real estate located in Pierce County, including the parcels Washington Federal seeks to foreclose upon in this case.

PCC did not pay off the note on the maturity date. In an e-mail dated September 17, 2009, Horizon Bank notified Ferderer that PCC's account was "past due with a current principal balance of $848,236.07." Clerk's Papers (CP) at 175.

In early 2010, Washington Federal agreed to purchase Horizon Bank's assets. The Federal Deposit Insurance Corporation (FDIC), acting as receiver for Horizon Bank, assigned all beneficial interest under the deed of trust to Washington Federal. On February 10, 2011, Washington Federal recorded the assignment. The FDIC also endorsed PCC's note to the order of Washington Federal.

On July 28, Ferderer and the Clines each filed petitions for Chapter 7 bankruptcy. Washington Federal filed creditor claims in each case. From the bankruptcy proceedings, Washington Federal received the following payments due under the note. The bankruptcy trustee in the Clines' case distributed $963.61 to Washington Federal on April 2, 2013, and the Clines' case closed the next day. The bankruptcy trustee in Ferderer's case distributed $13,434.71 to

Washington Federal on May 1, 2014, and the case closed three weeks later.[1] In the bankruptcy proceedings, an automatic stay occurred and applied to "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3).

II. PROCEDURAL FACTS

On October 26, 2016, Washington Federal filed a complaint in Pierce County Superior Court seeking judicial foreclosure on the deed of trust. Washington Federal sought to foreclose on two of the eleven lots of real property encumbered by the deed of trust. Washington Federal alleged in part, that it held the note and had a superior interest in the deed of trust to any interest of the Appellants.

On December 5, the Appellants sought dismissal of the complaint. As relevant to this case, they argued that the statute of limitations for judicial foreclosure on a deed of trust barred the action.

Washington Federal moved for summary judgment, arguing that Ferderer's and the Clines' bankruptcy proceedings tolled the statute of limitations.[2] The trial court granted summary judgment in favor of Washington Federal, and entered a decree of foreclosure against the deed of trust.

The Appellants moved for reconsideration and the court denied it. The Appellants appeal.

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[1] The case closes when the trustee submits its final report to the court and asks to be discharged as trustee. At that point, the "case is fully administered." CP at 68.

[2] Washington Federal also argued that the statute of limitations did not bar the action because the bankruptcy trustee made payments on the note during the bankruptcy proceedings.

ANALYSIS

The Appellants argue that the court erred in granting summary judgment because Washington Federal did not file its action for foreclosure on the deed of trust within the six-year statute of limitations. They contend that the automatic stays prohibiting actions against property in Ferderer's and the Clines' bankruptcy estates were not absolute, and therefore did not toll the statute of limitations.[3] We disagree.

I. Standards of Review

We review summary judgment orders de novo, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005); *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). "Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *4518 S. 256th, LLC v. Karen L. Gibbon, P.S.*, 195 Wn. App. 423, 435, 382 P.3d 1 (2016); *Wash. Fed. v. Harvey*, 182 Wn.2d 335, 340, 340 P.3d 846 (2015); CR 56(c).

We also review de novo whether the applicable statute of limitations bars a claim. *4518 S. 256th, LLC*, 195 Wn. App. at 435.

We review the denial of a motion for reconsideration for abuse of discretion. *Martini v. Post*, 178 Wn. App. 153, 161, 313 P.3d 473 (2013). A trial court abuses its discretion if its

[3] The Appellants also argue that the bankruptcy trustees' payments did not affect the statute of limitations under RCW 4.16.270. They claim that the bankruptcy trustees were not their agents, and that the trustees' payments were therefore involuntary, and not a confirmation of debt by the Appellants. Because we resolve this case on other grounds, we do not address this issue.

"decision is manifestly unreasonable or based on untenable grounds." *Martini*, 178 Wn. App. at 161.

II. Statute of Limitations

"A statute of limitation bars a plaintiff from bringing an accrued claim after a specific period of time." *WA State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Constr. Co.*, 176 Wn.2d 502, 511, 296 P.3d 821 (2013); *Duke v. Boyd*, 133 Wn.2d 80, 92, 942 P.2d 351 (1997). The party asserting a statute of limitations as an affirmative defense bears the burden of proving that it bars a claim. *Rivas v. Overlake Hosp. Med. Ctr.*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008).

We agree with the parties that a six-year statute of limitations applies in this case. RCW 4.16.040(1) provides for a six-year limitation on the commencement of an "action upon a contract in writing, or liability express or implied arising out of a written agreement." However, a statute of limitations is tolled when "the commencement of an action is stayed by . . . a statutory prohibition." RCW 4.16.230. The tolling period ends when the relevant stay is lifted.

We also agree with the parties that the statute of limitations started to run on May 9, 2009, the maturity date of the note secured by the deed of trust. "Statutes of limitations do not begin to run until a cause of action accrues." *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 575, 146 P.3d 423 (2006); RCW 4.16.005. When the note secured by the deed of trust has a stated maturity date, the right to seek judicial foreclosure on the deed of trust accrues on that date. *Strong v. Sunset Copper Co.*, 9 Wn.2d 214, 221, 114 P.2d 526 (1941); *4518 S. 256th, LLC*, 195 Wn. App. at 433-34.

If the bankruptcy proceedings did not toll the six-year statute of limitations, it would have expired on May 11, 2015. CR 6(b); *Stikes Woods Neigh. Ass'n v. City of Lacey*, 124 Wn.2d 459, 466, 880 P.2d 25 (1994). Washington Federal filed its action on October 26, 2016.

A statutory tolling period "temporarily stops, but then resumes, the period of time within which the plaintiff must file suit." *Castro v. Stanwood Sch. Dist. No. 401*, 151 Wn.2d 221, 225, 86 P.3d 1166 (2004). Tolled means some condition is preventing the commencement of an action, and suspends the statutory limitation period. *Castro,* 151 Wn.2d at 225. When the condition ceases to exist, the limitation period usually resumes; in effect, the clock starts to tick again on the limitations period. *Castro,* 151 Wn.2d at 225-26.

A. Tolling of The Statute of Limitations Under The Federal Bankruptcy Code's Automatic Stay Statute

The Appellants argue that the automatic stay provisions of the bankruptcy code were not absolute, and were therefore not "prohibitions" on judicial foreclosure actions tolling the statute of limitations under RCW 4.16.230. They rely on *McDermott v. Tolt Land Co.*, 101 Wn. 114, 172 P. 207 (1918), to suggest that Washington Federal could have filed petitions in the bankruptcy proceedings to lift the stays and foreclose on the deed of trust. We disagree.

11 U.S.C. § 362(a)(3) provides that an automatic stay applies to "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." This statutory prohibition tolls the statute of limitations. RCW 4.16.230; *Merceri v. Deutsche Bank AG*, 2 Wn. App.2d 143, 149, 151, 408 P.3d 1140, *review denied*, No. 95654-5 (2018). Automatic stays imposed during bankruptcy prohibit a creditor from bringing a foreclosure action against the property of the bankruptcy estate, unless the plaintiff obtains relief from the stay. *Merceri*, 2 Wn. App.2d at 151. "The automatic stay remains in force until the

property at issue 'is no longer property of the estate.'" *Merceri*, 2 Wn. App.2d at 148 (quoting 11 U.S.C. § 362(c)(1)).

In *Merceri*, the bank seeking foreclosure argued that an automatic stay of actions during the debtor's bankruptcy proceedings tolled the statute of limitations on its action for judicial foreclosure of a defaulting debtor's home. 2 Wn. App.2d at 146. The trial court granted partial summary judgment in favor of the defaulting debtor, after ruling that the statute of limitations barred the action. *Merceri*, 2 Wn. App.2d at 145-46. The appellate court reversed, holding that, "[u]nder the plain language of RCW 4.16.230, the [six-year] statute of limitations [set out in RCW 4.16.040] is tolled during [a] bankruptcy stay." *Merceri*, 2 Wn. App.2d at 151. The court in *Merceri* rejected the debtor's argument that bankruptcy stays did not fall within the tolling provision of RCW 4.16.230. *Merceri*, 2 Wn. App.2d at 152-53.

The debtor relied on *McDermott*. *Merceri*, 2 Wn. App.2d at 152-53. *Merceri* noted that at the time of *McDermott*, in 1918, "a creditor could bring a foreclosure action during bankruptcy by suing the bankruptcy trustee." 2 Wn. App.2d at 152. Notably, 11 U.S.C. § 362(a)(3) was enacted in 1978, sixty years after *McDermott* was decided. Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2570. Therefore, at the time of *McDermott*, a bankruptcy did not constitute a statutory prohibition against foreclosure. *Merceri*, 2 Wn. App.2d at 152.

Additionally, *Merceri* rejected the debtor's argument that possible relief from automatic bankruptcy stays meant the stays were not statutory prohibitions under RCW 4.16.230. 2 Wn. App.2d at 153. The debtor argued that a stay in bankruptcy did not constitute a statutory tolling because a creditor could move for relief from the stay. *Merceri*, 2 Wn. App.2d at 154. The appellate court rejected the argument. *Merceri*, 2 Wn. App.2d at 154. "[T]he fact that [a party]

could have sought relief from the stay has no bearing on whether the stay is a statutory prohibition." *Merceri*, 2 Wn. App.2d at 153.

We conclude that the automatic stays in Ferderer's and the Clines' bankruptcy proceedings tolled the statute of limitations on Washington Federal's action for judicial foreclosure.

The Clines' bankruptcy lasted for 21 months and Federer's bankruptcy lasted for 34 months, until May 22, 2014. During that period, the bankruptcy statutes prevented Washington Federal from taking action against the property. The 34-month period excluded from the statute of limitations meant Washington Federal filed its lawsuit within the applicable statute of limitations. The six-year statute of limitations expired in February 2018. Washington Federal commenced its action for judicial foreclosure on October 26, 2016. CP at 1-37. Because the filing of the action did not violate the six-year statute of limitation, the trial court did not err.

III. GRANT OF SUMMARY JUDGMENT AND DENIAL OF MOTION TO RECONSIDER

We also conclude that trial court did not err in granting the motion for summary judgment, and therefore did not abuse its discretion in denying appellants' motion to reconsider.

The beneficiary of a deed of trust who holds the promissory note secured thereby, can judicially foreclose on the deed of trust in the event of default. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 92-94, 285 P.3d 34 (2012); *Umpqua Bank v. Shasta Apt., LLC*, 194 Wn. App. 685, 697, 378 P.3d 585, *review denied*, 186 Wn.2d 1026 (2016); RCW 61.12.040-.060, .24.100(8).

Here, the material facts are undisputed. The Appellants admitted the following facts in their response to the motion for summary judgment. PCC executed the note evincing a line of credit from Horizon Bank for $850,000. The maturity date of the note was May 9, 2009. Horizon Bank used "approximately $848,000" of the line of credit to pay down interest on PCC's other loans. CP at 339-40. Ferderer and the Clines executed a deed of trust securing the note and

encumbering the property at issue here. PCC defaulted on the note for failure to make a payment. The FDIC, acting as receiver for Horizon Bank, assigned the deed of trust to Washington Federal. The Appellants also do not dispute that Washington Federal holds the note secured by the deed of trust, and that the deed of trust provides that Ferderer and the Clines would default on the deed of trust if PCC failed "to make any payment when due" under the note. CP at 25.

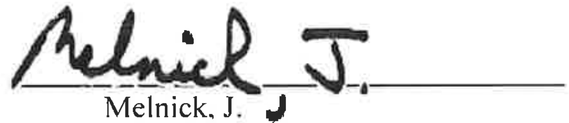
On these undisputed facts, Washington Federal was entitled to judgment as a matter of law on their claim for judicial foreclosure on the deed of trust.

IV. ATTORNEY FEES

The Appellants request costs and fees on appeal, costs and fees at trial, and costs and fees on remand in the event they prevail on appeal. Because the Appellants did not prevail on appeal, we deny their request.

We affirm.

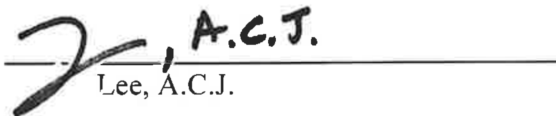
A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Melnick, J.

We concur:

Bjorgen, J.



Lee, A.C.J.

THE SUPREME COURT

STATE OF WASHINGTON

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March 28, 2018

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Re: Supreme Court No. 95654-5 - Michelle Merceri v. Deutsche Bank, et al.
Court of Appeals No. 75665-6-I

Clerk and Counsel:

The Court of Appeals forwarded to this Court the "PETITION FOR REVIEW TO THE SUPREME COURT" and the related Court of Appeals file in the referenced matter. The $200 filing fee (check #1060) has also been received. The matter has been assigned the Supreme Court cause number indicated above.

The parties are directed to review the provisions set forth in RAP 13.4(d) regarding the filing of any answer to a petition for review and any reply to an answer.

The petition for review will be set for consideration without oral argument by a Department of the Court; see RAP 13.4(i). If the members of the Department do not unanimously agree on the manner of the disposition, consideration of the petition will be continued for determination by the En Banc Court.

Usually there is approximately three to four months between receipt of the petition for review in this Court and consideration of the petition. This amount of time is built into the process to allow an answer to the petition and for the Court's normal screening process. At this time it is not known on what date the matter will be determined by the Court. The parties will be advised when the Court makes a decision on the petition.

Any amicus curiae memorandum in support of or in opposition to a pending petition for review should be served and received by this Court and counsel of record for the parties and other amicus curiae by not later than 60 days from the date the petition for review was filed; see RAP 13.4(h).

Counsel are referred to the provisions of General Rule 31(e) regarding the requirement to omit certain personal identifiers from all documents filed in this court. This rule provides that parties "shall not include, and if present shall redact" social security numbers, financial account numbers and driver's license numbers. As indicated in the rule, the responsibility for redacting the personal identifiers rests solely with counsel and the parties. The Clerk's Office does not review documents for compliance with the rule. Because briefs and other documents in cases that are not sealed may be made available to the public on the court's internet website, or viewed in our office, it is imperative that such personal identifiers not be included in filed documents.

Counsel are advised that future correspondence from this Court regarding this matter will most likely only be sent by an e-mail attachment, not by regular mail. This office uses the e-mail address that appears on the Washington State Bar Association lawyer directory. Counsel are responsible for maintaining a current business-related e-mail address in that directory.

Sincerely,

Erin L. Lennon
Supreme Court Deputy Clerk

ELL:jd

CAMPBELL, DILLE, BARNETT & SMITH, P.L.L.C.

August 30, 2018 - 4:13 PM

Filing Petition for Review

Transmittal Information

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