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Supreme Court No. 976317
Court of Appeals No. 77620-7-I

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

KREG KENDALL,

Petitioner,

v.

US BANK, N.A., and
QUALITY LOAN SERVICE CORP. OF WASHINGTON,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Pursuant to RAP 13.4(d), Respondent U.S. Bank answers the Petition for Review (the "Petition") filed by Kreg Kendall ("Mr. Kendall"). Review is not warranted. Mr. Kendall identifies but one basis for his Petition: that this case allegedly "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). But instead of identifying an issue of substantial public interest, the Petition makes the same arguments addressed in full by the Court of Appeals in an *unpublished* decision (the "Decision"). The Decision was well reasoned in holding that under Washington law (1) lenders receive tolling during the pendency of non-judicial foreclosure sales, (2) the statute of limitations for a lender's *in rem* foreclosure may restart based on a borrower's acknowledgment, even if the borrower is no longer personally liable for the debt, and (3) the simple act of recording a Declaration of Payment without paying off a loan is insufficient to invalidate a lien. In sum, the Decision is logical, consistent with precedent, and does not present issues of substantial public interest. There is no basis for this Court to accept review.

II. IDENTITY OF RESPONDENT

Respondent is U.S. Bank, in its capacity as Successor Trustee to Bank of America, NA, Successor in Interest to LaSalle Bank NA, as Trustee on Behalf of the Holders of the Washington Mutual Mortgage Pass-Through Certificates, WMALT Series 2007-OA3 ("U.S. Bank"). U.S. Bank is the holder of the subject mortgage and initiated this case by filing a complaint for judicial foreclosure in the trial court.

III. RESTATEMENT OF ISSUES PRESENTED

1. Whether the Court of Appeals correctly applied long-standing precedent to find that lenders, like U.S. Bank, receive tolling during the pendency of prior non-judicial foreclosure proceedings.

2. Whether the Court of Appeals correctly recognized that there is a distinction between personal liability and *in rem* liability for a debt, and therefore rightly held that the statute of limitations for *in rem* foreclosure may restart based on a borrower's acknowledgment, even if the borrower is no longer personally liable for the debt.

3. Whether the Court of Appeals correctly held that payment is a prerequisite to invalidating a loan under RCW 61.24.110(3)(a) and thus rightly rejected the argument that a borrower should receive a free house where a "Declaration of Payment" was recorded, even though the loan was never actually paid off.

IV. RESTATEMENT OF THE CASE

For purposes of answering the Petition, U.S. Bank largely relies on the Court of Appeals' statement of the background of this case,[1] but also offers the following short summary of facts and proceedings below.

On November 13, 2006, Mr. Kendall took out a mortgage loan (the "Note") in the original principal sum of $750,000.00 to buy a house. The Note was secured by a Deed of Trust encumbering the house, commonly known as 3805 110th Place NE, Bellevue, Washington 98004 (the "Property"). It is undisputed that Mr. Kendall has not made a monthly

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[1] The Court of Appeals' unpublished opinion is attached as Appendix A to the Petition for Review. It can also be found at U.*S. Bank NA v. Kendall*, No. 77620-7-I, 2019 WL 2750171 (Wash. Ct. App. July 1, 2019). The background section can be found at slip op. at 2-5.

mortgage payment under the Note for over 10 years, since March 2009. CP0665; CP1524 (¶ 11).

On September 24, 2009, Mr. Kendall filed a bankruptcy petition under Chapter 7 of the U.S. Bankruptcy Code, ultimately obtaining a discharge of his personal liability under the Note. *See In re Kreg Kendall*, U.S. Bankruptcy Court, W.D. Wash. Case No. 09-19868-KAO; CP0075-125; CP1526 (¶ 19); CP0127-28. Following Mr. Kendall's discharge in bankruptcy, U.S. Bank still maintained the right to enforce the Note *in rem*, and on January 22, 2010, the Bankruptcy Court entered an order terminating the automatic bankruptcy stay so that U.S. Bank could "pursue all remedies under state law in connection with the Property" including "commence[ment of] or continu[ance of] any action necessary to obtain complete possession of the Property free and clear of claims of the bankruptcy estate." CP0130-31. To that end, between 2010 and 2016, U.S. Bank caused three separate non-judicial foreclosure proceedings to be brought against the Property, with the noted duration of each as follows:

- May 5, 2010 – October 18, 2010 (166 days);
- October 23, 2014 – February 6, 2015 (106 days); and
- November 19, 2015 – June 2, 2016 (196 days).

CP0137-54. For a variety of reasons, including Mr. Kendall's attempts to obtain mortgage assistance, none of these non-judicial foreclosure proceedings resulted in a sale of the Property. *Id*.

In 2013, Mr. Kendall sought to sell the Property via a "short sale." CP0667. On April 11, 2013, U.S. Bank's agent sent Mr. Kendall a letter containing a short sale offer and agreeing to Mr. Kendall's "request to sell [his] home for less than [he] owe[d]." CP0830-31. Mr. Kendall initialed

the letter. *Id*. The letter explains that the Note was secured by the Property, and that the bank seeks to secure the payment on the Note through the sale of the Property. CP1516-17.

U.S. Bank's offer for a short sale was subject to and conditioned on compliance with specific terms, including Mr. Kendall's payment to U.S. Bank by certified funds no later than a date certain. *Id*. Accordingly, U.S. Bank specified two methods of accepting its offer: (1) mailing funds to an identified address or (2) wiring funds to an identified account. *Id*. Regardless of the payment method chosen by Mr. Kendall, for the offer to be accepted the funds had to be received by U.S. Bank by May 15, 2013. *Id*. Mr. Kendall did not submit payment by May 15, 2013 as specified under the offer. VRP 68:3-5.

Instead, Mr. Kendall placed the sale amount into escrow with Stewart Title and Escrow. CP0162-66. When he placed the funds into escrow, Mr. Kendall unilaterally conditioned U.S. Bank's ability to receive the funds on U.S. Bank's agreement to additional terms, including submission of additional documents to the escrow agent. *Id*. The funds in escrow were never transmitted to U.S. Bank in accordance with the short sale offer. VRP 68:3-5.

On December 22, 2015, Mr. Kendall recorded a Declaration of Payment pertaining to the funds that he had unilaterally conditioned and placed in escrow, but that U.S. Bank did not receive. CP0898-99. The Declaration of Payment inaccurately states that payment was tendered by Stewart Title and Escrow and that "the payment tendered was sufficient to meet the beneficiary's demand and no written objections have been received." *Id*. The Declaration of Payment was executed by Kevin Pedersen, an escrow agent at First American Title Insurance Company

("First American") and a close personal friend of Mr. Kendall. *Id*.; CP1306-09; CP1279. Mr. Pedersen executed the Declaration of Payment without approval or authorization from First American and claimed the Declaration of Payment was recorded without his knowledge. CP1307.

Subsequently, First American recorded an Affidavit of Wrongful Recording on October 31, 2016 stating that the Declaration of Payment was "**void, null and of no legal effect**." CP0159-60 (emphasis in original); CP1007-10. Mr. Pedersen admits he was not authorized by First American to sign the Declaration of Payment and had limited information, all supplied solely by Mr. Kendall, at the time that he did sign it. CP1306-09.

Because the short sale was never completed and the non-judicial foreclosure proceedings did not result in a sale of the Property, U.S. Bank brought an action against Mr. Kendall in the trial court seeking a judicial decree of foreclosure. CP1522-28. Mr. Kendall counterclaimed and sought a declaration that U.S. Bank did not have an enforceable lien on the Property, based on statute of limitations arguments and the Declaration of Payment. CP0001-22 (¶¶ 135-46, 147-50, 151-55, 156-58). The parties filed cross-motions for summary judgment on their respective claims. VRP 3:7-9.

Ruling on the cross-motions for summary judgment, the trial court dismissed Mr. Kendall's counterclaim for intentional infliction of emotional distress but reserved all other claims and counterclaims for trial. CP1440-43. On cross-motions for reconsideration, the trial court granted U.S. Bank's motion for summary judgment on its claim for a decree of judicial foreclosure, confirming that there are "no genuine issues of material fact regarding the plaintiff's right to foreclose on the property."

CP1515-17. In the same order, the trial court dismissed Mr. Kendall's counterclaim for a declaratory judgment that the lien ceased to exist and denied Mr. Kendall's motion for reconsideration in its entirety but failed to dismiss Mr. Kendall's Consumer Protection Act and breach of contract counterclaims against U.S. Bank. *Id*.

The Court of Appeals affirmed in part and reversed in part, all in U.S. Bank's favor. Specifically, the Court of Appeals affirmed the trial court's judgment granting a decree of judicial foreclosure and reversed the trial court's ruling on summary judgment that the Consumer Protection Act and breach of contract counterclaims against U.S. Bank should survive for trial. The Decision also granted U.S. Bank's request for attorneys' fees on appeal. Mr. Kendall filed a motion for reconsideration of the Decision, which was denied. Now Mr. Kendall seeks review of the Decision in this Court.

V. ARGUMENT

The Petition takes issue with three holdings in the Decision: (1) that the statute of limitations was tolled during past non-judicial foreclosures, (2) that the statute of limitations was restarted when Mr. Kendall acknowledged his debt post-discharge, and (3) that the Declaration of Payment recorded by Mr. Kendall was ineffective. The Court of Appeals soundly decided each of these issues, none of which present an issue of substantial public interest. Accordingly, the Petition should be denied.

A. Review Is Not Warranted Because the Decision Is Unpublished.

As an initial matter, it is worth noting that the Decision is unpublished and thus consistent with GR 14.1(a) it can only be cited as

non-binding authority. The future impact of the Decision, therefore, is minimal. This alone is a reason this case fails to present an issue of substantial public interest and is an independent basis on which to deny review.

B. The Court of Appeals Correctly Addressed Tolling and Issues of Non-Judicial Foreclosure Tolling Are Not Squarely Presented.

Mr. Kendall's argument that this Court should grant review to clarify whether non-judicial foreclosure proceedings toll the statute of limitations and, if so, when such tolling starts and stops, is baseless.

First, this case is not the appropriate vehicle to clarify questions of non-judicial foreclosure tolling raised by Mr. Kendall, such as "when does tolling begin … [and] when does tolling end?"[2] That is because any holding on non-judicial foreclosure tolling in this case would be *dicta* unless this Court also overrules the Court of Appeals' holding on acknowledgment of a debt. Given the Court of Appeals' alternative holdings on the statute of limitations issue, this Court would have to spend considerable time discussing acknowledgment before it could even reach the tolling issues raised by Mr. Kendall. And assuming this Court agrees that Mr. Kendall acknowledged his debt, the start and stop dates for tolling in this case are simply not relevant. Because non-judicial foreclosure tolling is not squarely presented on appeal, review should be denied.

Even if this issue were properly presented, the Court should still decline review because the Court of Appeals correctly followed precedent in pointing out that "[c]ase law clearly states that commencement of nonjudicial foreclosure proceedings tolls the six-year limitations period."

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[2] Petition at 15.

Slip op. at 10. While Mr. Kendall argues that non-judicial foreclosure tolling is a new judicial invention, he fails to recognize that the Court of Appeals was following 16 years' worth decisions recognizing non-judicial foreclosure tolling, dating back to *Bingham v. Lechner* in 2002. *See* 111 Wn. App. 118, 131, 45 P.3d 562 (2002). As the Decision recognized, non-judicial foreclosure tolling was recently reaffirmed by Division One in a published opinion, *Cedar West Owners Association v. Nationstar Mortgage, LLC*, 7 Wn. App. 2d 473, 482, 434 P.3d 554 (2019). Slip op. at 9-10. That non-judicial foreclosure tolling is well established in Washington jurisprudence is perhaps best shown by *Kerrigan v. Qualstar*. There, a plaintiff asked a federal district court to certify the question of whether non-judicial foreclosure proceedings toll the statute of limitations. *See Kerrigan v. Qualstar Credit Union*, No. C16-1528-JCC, 2016 WL 7103750, at *3 (W.D. Wash. Dec. 6, 2016), *aff'd*, 728 F. App'x 787 (9th Cir. 2018). The *Kerrigan* court refused to do so because the plaintiff could not establish that this issue was really an unsettled question warranting review by this Court. *Id.* That decision was affirmed by the Ninth Circuit. The *Kerrigan* court was right. No further clarification is needed.

The Court of Appeals was justified in refusing to overrule 16 years' worth of precedent without any showing that such precedent is incorrect or harmful. Lenders and borrowers in this state have relied on non-judicial foreclosure tolling for at least this amount of time and have done business based on this understanding. To eviscerate such tolling now, in *dicta*, would only cause confusion and uncertainty in the mortgage industry.

Although Mr. Kendall argues that non-judicial foreclosure tolling should be rejected because it is judge-made, he does nothing to show such tolling is inconsistent with the Deed of Trust Act ("DTA"), RCW 61.24, *et seq*. To the contrary, all of the judicial decisions upholding tolling for non-judicial foreclosure proceedings are consistent with the legislative scheme in the DTA. As a majority panel of Division III of the Washington Court of Appeals recently explained:

> Given the [DTA's] protections for borrowers, the nonjudicial foreclosure procedure is time consuming. A beneficiary who is pursuing nonjudicial foreclosure is taking action. Because the beneficiary is prohibited by RCW 61.24.030(4) from suing on its note while it is taking nonjudicial foreclosure action, RCW 4.16.230 applies [to toll the statute during such foreclosure actions].

U.S. Bank Nat'l Ass'n as Tr. of Holders of Adjustable Rate Mortg. Tr. 2007-2 v. Ukpoma, 8 Wn. App. 2d 254, 266, 438 P.3d 141 (2019) (Siddoway, J.). Non-judicial foreclosure proceedings were intended by the legislature to provide an efficient and cost-effective alternative to a judicial foreclosure action, which clearly would toll the statute of limitations. *See Glidden v. Mun. Auth. of Tacoma*, 111 Wn.2d 341, 346, 758 P.2d 487 (1988); RCW 4.16.230.

Non-judicial foreclosure proceedings are often stopped once started because built into these proceedings are opportunities for home buyers to avail themselves of procedures that would have the effect of delaying or cancelling the non-judicial foreclosure sale, including a right to mediation under RCW 61.24.163. Indeed, that was what Mr. Kendall himself sought during tolled periods. Surely the legislature did not intend to punish lenders for compliance with loss mitigation requirements by having the limitations period continue to run while the parties explore

legislatively mandated potential alternatives to foreclosure. If non-judicial foreclosure proceedings did not toll the statute of limitations, lenders' first choice would be to file a judicial foreclosure proceeding instead, frustrating the purpose of the DTA. Given these realities, there is simply no basis to reject the rule, long recognized by the Court of Appeals, that lenders are entitled to tolling during prior non-judicial foreclosure proceedings.

C. Review Is Not Warranted Because the Court of Appeals Correctly Applied Washington's Doctrine Governing Acknowledgment of Debt.

Mr. Kendall encourages review to clarify "[i]f an acknowledgment can be against a property where the [borrower] is not required to pay a debt." Petition at 13. The Court of Appeals correctly held that it can and that Mr. Kendall's acknowledgment of his debt in connection with a short sale application was enough to restart the limitation period on U.S. Bank's action for judicial foreclosure. Mr. Kendall primarily argues that this was error because a past bankruptcy discharge extinguished any potential *personal liability* that Mr. Kendall may have had for the underlying debt. But the debt did not simply disappear based on that discharge: the security interest for the debt—the lien on the Property—remained. As Mr. Kendall freely admitted below, "U.S. Bank is correct that after a bankruptcy discharge a creditor can still foreclose on a property." Kendall Reply Br. at 19; *see also In re Cortez*, 191 B.R. 174, 178 (B.A.P. 9th Cir. 1995) ("[A] bankruptcy discharge 'extinguishes only one mode of enforcing a claim—namely, an action against the debtor *in personam*—while leaving intact another—namely, an action against the debtor *in rem.*'" (citation omitted)). Thus, while it is true that Mr. Kendall no longer had personal liability for the debt after it was discharged in

bankruptcy, if he wanted clear title to the house, he still had to pay off the lien, which expressly survived his bankruptcy discharge.

Mr. Kendall admits that under established Washington law, acknowledgment of a debt revives a creditor's ability to pursue an action otherwise barred by the statute of limitations. CP0953-54; *see also Cannavina v. Poston*, 13 Wn.2d 182, 195, 124 P.2d 787 (1942) ("An acknowledgment or promise made before the statute has run vitalizes the old debt for another statutory period dating from the time of the acknowledgment or promise, while an acknowledgment made after the statute has run gives a new cause of action, for which the old debt is a consideration." (internal quotation marks and citation omitted)); *Jewell v. Long*, 74 Wn. App. 854, 857, 876 P.2d 473 (1994) ("[G]iving or substituting collateral security constitutes an acknowledgment that restarts the statute of limitations."). Washington's acknowledgment doctrine applies to attempts to enforce a debt *in rem*. To illustrate, another court recently applied the doctrine in a case where a borrower's *personal* liability under the subject note was discharged, but the possibility of *in rem* foreclosure remained. *See Thacker v. Bank of N.Y. Mellon*, No. 18-5562 RJB, 2019 WL 1163841 (W.D. Wash. Mar. 13, 2019). In *Thacker*, the borrower submitted four loan modifications *after* receiving a discharge of all his personal liability on the loan. The *Thacker* court, like the Court of Appeals here, found these loan modifications "acknowledged, in writing, the existence of the debt to the Defendants, and by seeking a modification, evinced an intent to pay the debt." 2019 WL 1163841, at *6. Based on this, the court held that "Plaintiff's acknowledgment of the debt restarted the statute of limitations" for *in rem* foreclosure of the debt. *Id.* at *7.

In doing so, the *Thacker* court clarified that acknowledgment applies in the case of a debt that is personally discharged in bankruptcy, if there is a chance that debt is still subject to *in rem* foreclosure. *See id.* *Thacker* specifically rejected the argument that federal Bankruptcy Code preempts Washington's acknowledgment-of-debt tolling doctrine and that such acknowledgment arguments are unavailable where the borrower's personal liability has been discharged. *Id.*[3] This is consistent with U.S. Bank's clear, undisputed right to pursue a judicial foreclosure action unimpeded by federal bankruptcy law. CP0130-31. After Mr. Kendall's bankruptcy discharge, U.S. Bank retained a valid lien on the Property based on Mr. Kendall's debt and his default under the Note. Mr. Kendall's discharge did not eliminate that debt vis-à-vis U.S. Bank's valid lien. A recent case from the Washington Court of Appeals, *Edmundson v. Bank of America, N.A.*, explained this point when reversing the trial court's conclusion that "the discharge of [the debtor's] personal liability on the note in bankruptcy also discharged the deed of trust lien." 194 Wn. App. 920, 924, 378 P.3d 272 (2016). Because the Deed of Trust lien survives discharge, the corresponding ability to foreclose *in rem* also survives discharge. *Id.* at 925. The Court concluded that this result was legally correct, because were it otherwise

[3] As the *Thacker* court explained: "[The] [p]arties raise arguments that, in some ways, conflate the requirements for acknowledgment of a debt for the purposes of the Washington statute of limitations with reaffirmation of a discharged debt under bankruptcy law. The finding that the Plaintiff acknowledged the debt for purposes of the statute of limitations is not intended, in anyway, to constitute a finding that the Plaintiff has reaffirmed a discharged debt under bankruptcy law. The finding is merely related to the operation of Washington's statute of limitations." 2019 WL 1163841, at *7.

> [the debtors would] retain ownership of property without repaying the loan used to purchase it. The loss shifts to the lender because the [debtors] no longer have any personal obligation on the promissory note due to the discharge in bankruptcy. Under the trial court's ruling, the lender also has no right to realize on the collateral for the loan. Neither the equity nor logic of this result is apparent to this court.

Id. at 927. Like the debtor in *Edmundson*, Mr. Kendall is conflating his discharge of personal liability under the Note with U.S. Bank's continuing ability to foreclose *in rem.* The Court of Appeals properly recognized the distinction between a personal discharge and foreclosure *in rem.*

In sum, the Decision, consistent with the holdings of *Edmundson* and *Thacker*, correctly recognized that an *in rem* debt acknowledgment can occur under Washington law even after *personal liability* is discharged for a debt. Here, Mr. Kendall acknowledged the debt by initialing the April 11, 2013 letter from U.S. Bank's agent containing a short sale offer for Mr. Kendall "to sell [his] home for less than [he] owe[d]." CP0830-31. By initialing the letter, Mr. Kendall acknowledged that the Note was secured by the Property, and because the letter is clear that it seeks to secure the payment on the Note through the sale of the Property rather than establish personal liability upon Mr. Kendall, Mr. Kendall's acknowledgment of his debt before the expiration of the six-year statute of limitations reset the clock on U.S. Bank's ability to commence judicial foreclosure proceedings. CP1516-17. Mr. Kendall, therefore, acknowledged the debt at issue before the six-year statute of limitations expired; the Court of Appeals was correct to hold that this acknowledgment operated to restart the statute of limitations for U.S. Bank's foreclosure. There is no reason for this Court to disturb that finding.

D. Review Is Not Warranted Because the Court of Appeals Correctly Interpreted the Declaration of Payment Statute and This Issue Is Rarely Presented.

While Mr. Kendall argues that interpreting the Declaration of Payment statute, RCW 61.24.110(3)(a), is a matter of public interest, the reality is that the statute is rarely employed. That is because generally lenders record lien releases without a need to resort to this statutory procedure, which is explicitly reserved for situations where there has been full payment and the trustee is "unable or unwilling to reconvey the deed of trust." RCW 61.24.110(3)(a). It is even rarer still that a borrower would deceptively record a document seeking a lien release under the statute where no payoff was actually made to the lender, as occurred in this case. While Mr. Kendall might claim that his Petition raises an issue of substantial public interest regarding the interpretation of RCW 61.24.110(3)(a), the fact is that his deceptive act and wrongful attempt to use this statute to get a free house is unique to him and does not raise a "substantial public" issue at all. It simply highlights Mr. Kendall's attempt to abuse the process.

The Court of Appeals correctly interpreted the statute. "To fulfill the Legislature's intent, statutes must be construed as a whole, and undue emphasis must not be placed on individual sections of a statute." *Davis v. State Through Dep't of Licensing*, 90 Wn. App. 370, 373, 952 P.2d 197 (1998). The Decision properly interpreted all sections of RCW 61.24.110(3) to mean that payment is a *prerequisite* to any recorded declaration triggering a 60-day mandatory objection period. *See* slip op. at 8 (holding that "the Declaration was prepared and filed without compliance with the *statutory* prerequisites" (emphasis added)). In its analysis, the Court pointed to the text of the statute, which makes clear

that a declaration can operate to extinguish a lien against real property only "***following payment to the beneficiary as prescribed in the beneficiary's demand***." *Id.* at 7 (emphasis added) (quoting RCW 61.24.110(3)(a)). It remains an undisputed fact on appeal that actual payment to the Trust, the beneficiary, was never made at all, let alone as prescribed in the beneficiary's demand. Yet, the Petition ignores this threshold statutory requirement.

Accepting Mr. Kendall's argument would read the statutory phrase "following payment to the beneficiary as prescribed in the beneficiary's demand" completely out of the statute, rendering it meaningless and not giving full effect to the legislature's intent. RCW 61.24.110(3)(a); *see State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014) ("[A] court must not interpret a statute in any way that renders any portion meaningless or superfluous." (internal quotation marks and citation omitted)). Mr. Kendall argues in the Petition, as he did below, that U.S. Bank should have been required to raise any objections, even an objection based on lack of payment, within 60 days. But the Decision clarified that payment is a prerequisite to an effective recording, and thus lack of payment does not need to be raised within 60 days of the initial document recording.

Mr. Kendall argues that the Decision leaves it unclear when "objections are required to be made and when . . . they can be termed as prerequisites." Petition at 18. That is not correct. The answer lies in the statute itself, which is consistent with the Decision. Satisfying the requirements of the first clause of RCW 61.24.110(3)(a) is a *prerequisite* to a valid recording, as it states that a declaration may be recorded only "*[i]f* the trustee of record is unable or unwilling to reconvey the deed of

trust within one hundred twenty days following payment to the beneficiary as prescribed in the beneficiary's demand statement . . . . " RCW 61.24.110(3)(a) (emphasis added). Once the prerequisites outlined in this dependent "if" clause are met, a Declaration of Payment may be recorded, and the 60-day objection period is triggered. Thus, any objection to the declaration that does not have to do with a failure to satisfy the first clause of the statute should be brought in the form of a formal, recorded objection within this 60-day period. Examples of such hypothetical objections include but are not limited to:

- An objection that the person who signed the Declaration of Payment is not authorized to do so within the meaning of the statute (*i.e.,* that the declarant is not a "a title insurance company or title insurance agent," "a licensed escrow agent," or "an attorney admitted to practice law in this state" (RCW 61.24.110(2)));
- an objection that the notarized declaration does not contain all categories of information required by the statute; and
- an objection that the Declaration of Payment was improperly served.

Under the Decision, deficiencies like those outlined above do not prevent an effective initial recording, but rather are valid objections to be raised in the 60-day objection period or forever waived. *See* RCW 61.24.110(3)(a)-(b). The Decision, therefore, does not eviscerate the statute. Rather, the Court of Appeals correctly rejected Mr. Kendall's argument that any payment-based objection must be raised within 60 days based on the plain language of the statute, which teaches that payment is a *prerequisite* to an effective recording.

It is ironic that Mr. Kendall characterizes this issue as one of "substantial public interest" when he is essentially asking this Court to interpret a statute intended to protect homeowners who *pay* their mortgages so as to allow him to obtain a house *without* paying off his mortgage, as it is undisputed that he never actually paid off the loan. Such a result is directly contrary to the policy goals of the statute.[4] It cannot be that a Declaration of Payment will be deemed valid whenever a debtor is able to find someone willing to record the words that the statute requires even when those words are indisputably false. That is not what the legislature intended when it included text in the statute clarifying that a Declaration of Payment may only be recorded "following payment to the beneficiary as prescribed in the beneficiary's demand statement." RCW 61.24.110(3)(a).

Mr. Kendall argues that because of the Decision, "no party can now rely on a declaration of payment to extinguish a lien,"[5] but as the Decision recognized, the text of the statute only requires lenders to record an objection if the statutory prerequisites to an effective declaration are met, *i.e.,* where the borrower has made a full payment in the manner prescribed. There is simply no statement in the statute that a third party may blindly rely on a Declaration of Payment as conclusive proof a lien has been paid off. Nor would such a rule make sense. Under Mr. Kendall's interpretation of RCW 61.24.110, defaulting homeowners would be incentivized to find a way to obtain and record a false

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[4] The legislative history clarifies that the statute was intended to be "about homeowners who pay off their mortgage and want the lien on their home removed." S.H.B. 1435, 63d Leg., Reg. Sess. (Wash. 2013).

[5] Petition at 17 n.9.

"Declaration of Payment" and then hope it goes unnoticed for 60 days so the debtor could take the house free and clear without paying his or her mortgage. This result is not only absurd, it flouts the legislature's intent of providing relief to homeowners that do in fact pay their mortgages and deserve to have the lien removed. *See State v. Larson*, 184 Wn.2d 843, 851, 365 P.3d 740 (2015) (statutes must be interpreted "to avoid absurd results").

In sum, the Court of Appeals correctly interpreted the text of the statutory scheme to mean that the 60-day objection period in RCW 61.24.110(3)(b) only commences after a valid "Declaration of Payment" is recorded in compliance with first clause of subsection (3)(a). Further, this issue is not one of "substantial public interest" but rather reflects proper application of the Declaration of Payment statute to the rare situation where a homeowner tries to utilize the statute without actually paying off his mortgage.

VI. CONCLUSION

For all of the reasons stated in this Answer, Mr. Kendall's Petition for Review should be denied.

DATED: October 7, 2019.

Stoel Rives LLP

s/ Vanessa Power
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CERTIFICATE OF SERVICE

I, Leslie Lomax, certify that at all times mentioned herein, I was and am a resident of the state of Washington, over the age of 18 years, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is that of Stoel Rives LLP, 600 University Street, Suite 3600, Seattle, WA 98101.

On October 7, 2019, I caused a copy of the foregoing to be served upon the following individual(s) in the manner indicated below:

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Executed on October 7, 2019.

*/s/ Leslie Lomax*________________
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October 07, 2019 - 11:40 AM

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