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No. 100918-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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COPPER CREEK (MARYSVILLE) HOMEOWNERS  
ASSOCIATION, *a Washington nonprofit corporation,*

*Petitioner,*

v.

SHAWN A. KURTZ and STEPHANIE A. KURTZ, *husband and  
wife and the marital or quasi-marital community composed thereof;*  
QUALITY LOAN SERVICE CORPORATION OF  
WASHINGTON, *a Washington corporation,*

*Respondent.*

WILMINGTON SAVINGS FUND SOCIETY, FSB, d/b/a  
CHRISTIANA TRUST, *not individually but as trustee from Pretium  
Mortgage Acquisition Trust, Selene Finance LP,*

*Respondent.*

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**AMICUS BRIEF OF  
NORTHWEST CONSUMER LAW CENTER**

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## **I. INTEREST OF AMICUS CURIAE**

Northwest Consumer Law Center (“NWCLC”) is a nonprofit organization serving low and moderate income consumers in the State of Washington. NWCLC is the only legal services organization in Washington State that focuses solely on consumer legal issues. While based in Seattle, NWCLC has represented and counseled consumers throughout all counties of the state. Since opening its doors in 2013, NWCLC has represented thousands of Washington homeowners facing the prospect of losing their homes as a result of defaulted mortgages and the foreclosure process. NWCLC represents clients in pursuing loan modifications, mediations, and bankruptcy protection in order to save their homes. When saving a home is not possible, NWCLC works to guide homeowners through a process that is fair and transparent and works with them to achieve the best possible outcome. NWCLC and its clients have an interest in the fair development of Washington’s foreclosure laws.

## **II. ARGUMENT**

During the Great Recession and the following years of financial aftershocks, many Washington homeowners fell behind on their mortgage and earned a financial fresh start through bankruptcy. However, their financial recovery is now being disrupted by lienholders coming back to foreclose on deed of trusts defaulted long ago during the recession. This

pattern has raised the issue on how the statute of limitations applies to deed of trusts where payments have not been made in over six years since a bankruptcy discharge. *Edmundson*, following the Washington Supreme Court's precedent set in *Herzog* and *Pratt*, provided instruction: that since personal liability on the underlying debt no longer exists after a bankruptcy, the six-year statute of limitations begins to accrue on a lienholder's deed of trust remedies. *See Edmundson v. Bank of Am., N.A.*, 194 Wn. App. 920, 378 P.3d 272 (2016), *Pratt v. Pratt*, 121 Wash. 298, 303, 209 P. 535 (1922); *see also Herzog v. Herzog*, 23 Wn.2d 382, 388, 161 P.2d 142 (1945). Then, Division I issued the decision at issue in this appeal in direct conflict with *Edmundson*, affecting the rights of Washington homeowners and creditors alike. As such, this Court should grant the petition for review to provide clear guidance for homeowners and creditors on how Washington's statute of limitations applies to a deed of trust after a bankruptcy discharge.

**A. The Great Recession & Defaulted Mortgages**

With the Great Recession beginning over a decade ago, many Washington homeowners lost their jobs and fell behind on their mortgage payments<sup>1</sup>. During this time, home values in Washington State decreased

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<sup>1</sup> The mortgage default rate soared to 4.5% in the second quarter of 2008, and 1.2 foreclosures were initiated in the first half of 2008. *See* Christopher J. Mayer, et. al., *The Rise in Mortgage Defaults*, FEDERAL

significantly<sup>2</sup>. As a result, many properties became underwater, with lienholders facing reduced recoveries during foreclosure.<sup>3</sup> Many second position lienholders would not have recovered anything from a foreclosure, and these lienholders wrote off the balance and oftentimes, transferred sold the lien at a discount to another party.

During this time, many Washington residents turned to bankruptcy as a solution for obtaining a financial fresh start, savings their homes, and moving forward from the Great Recession.<sup>4</sup> Over 200,000 Washington families turned to bankruptcy to find financial relief between 2008-2015.<sup>5</sup>

As the economy slowly recovered and home values dramatically increased across Washington State since the Great Recession<sup>6</sup>, many of

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RESERVE (Nov. 2008),

<https://www.federalreserve.gov/pubs/feds/2008/200859/200859pap.pdf>.

<sup>2</sup> The median home value in Washington State decreased by \$60,000 between 2007 and 2011. *See* Office of Financial Management, *Median Home Price*, <https://ofm.wa.gov/washington-data-research/statewide-data/washington-trends/economic-trends/median-home-price>.

<sup>3</sup> Studies estimated that one in every four homes across the nation was “underwater” in 2009. *See* Frank James, *Nearly One In Four U.S. Homes With Mortgages 'Underwater'*, NPR (Nov. 24, 2009)

[https://www.npr.org/sections/thetwo-way/2009/11/one\\_in\\_four\\_us\\_homes\\_underwater.html](https://www.npr.org/sections/thetwo-way/2009/11/one_in_four_us_homes_underwater.html).

<sup>4</sup> The Am. Bankr. Inst., *Bankr. Filing Trends in Washington* (Feb. 2022)

[https://abi-org.s3.amazonaws.com/Newsroom/State\\_Filing\\_Trends/2022\\_Filing\\_Trends\\_Washington.pdf](https://abi-org.s3.amazonaws.com/Newsroom/State_Filing_Trends/2022_Filing_Trends_Washington.pdf).

<sup>5</sup> *Id.*

<sup>6</sup> “Median [home] prices in 2020 exceeded 2009 values by 80.7%.” *See* Office of Financial Management, *Median Home Price*,

these lienholders have come back to life, seeking payment on deed of trusts that defaulted during the Great Recession and have not been paid in the years since, like the Kurtzes.

With this context, the *Copper Creek* decision affects thousands of Washington homeowners who fell on hard financial times during the Great Recession and the creditors who are now seeking collect on debt defaulted on over six years ago. As such, the Court should grant the petition for review to clarify the rights of these affected homeowners and creditors.

**B. The *Copper Creek* Decision Is In Conflict With Established Washington Law**

This Court should grant the petition for review when the *Copper Creek* decision conflicts with established Washington law addressing the statute of limitations on a deed of trust.

It is well established that an action based on promissory notes or deeds of trusts is governed by the statute of limitation on written contracts. *See Westar Funding, Inc. v. Sorrels*, 157 Wn. App. 777, 239 P.3d 1109, 1113 (2010). “An action upon a contract in writing” “shall be commenced within six years.” RCW 4.16.040(1). When there is an installment promissory note, the statute of limitations begins to run with each missed installment payment. *Herzog*, 23 Wn.2d at 388. (“[T]he statute of

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<https://ofm.wa.gov/washington-data-research/statewide-data/washington-trends/economic-trends/median-home-price>.

limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it.” “[F]or Washington creditors, any "action upon the mortgage is barred when the statute of limitations has run against the [entire] debt which the mortgage was given to secure.”” *Eng v. Specialized Loan Servicing*, 500 P.3d 171, 178 (2021) (quoting *Pratt*, 121 Wn. at 303). When the six-year statute of limitations runs on an installment payment, the installment is “time-barred and unenforceable.” *Id.* “In Washington State, “[a] mortgage creates nothing more than a lien in support of the debt which it is given to secure.” *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn. 2d 83, 92, 285 P.3d 34 (2012).

A bankruptcy discharge extinguishes the personal liability of a debtor. *Edmundson*, 194 Wn. App. At 925 (citations omitted). However, a secured creditor’s right to foreclose survives the discharge. *Id.* *Edmundson* applied this rule within Washington’s deed of trust context and found that since personal liability had been extinguished with a bankruptcy discharge, the six-year statute of limitations commenced on an installment note secured by a deed of trust. *Id.* at 930-931.

Both Washington and federal courts have followed *Edmundson*. *See, e.g. Jarvis v. Fed. Nat’l Mortg. Ass’n*, 726 F. Appx. 666, 677 (9th Cir. 2018); *Taylor v. PNC Bank, Nt’l Ass’n*, C19-01142-JCC, 2019 WL 4688804 (W.D. Wash. Sept. 26, 2019); *Hernandez v. Franklin Credit Mgmt. Corp.*,

*BR 18-01159-TWD*, 2019 WL 3804138 (W.D. Wash. Aug. 13, 2019), *aff'd sub nom. In re Hernandez*, 820 Fed. Appx. 593 (9th Cir. 2020); *Luv v. W. Coast Servicing*, No. 81991-7-I (Wash. Ct. App. Aug. 2, 2021) (unpublished); *U.S. Bank NA v. Kendall*, 77620-7-I (2019) (unpublished) (noting” the payments are no longer due as of the discharge, and the limitations period accrues and begins to run when the last payment was due.”).

Now, the *Copper Creek* came out in opposition of *Edmundson* and held that the statute of limitations did not begin to run after the bankruptcy discharge. As this is in direct conflict with *Edmundson*, *Herzog*, and *Pratt*, this Court should grant the petition for review to provide clear interpretation on the rights of homeowners and creditors in this situation.

**C. The *Copper Creek* Decision Is Contrary to the Purpose of Statute of Limitations**

Statutes of limitations "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Burnett v. N.Y. Cent. R. Co.*, 380 U.S. 424, 428 (1965).

One of the main purposes of Washington’s Deed of Trust Act is to “promote the stability of land titles.” *Cox v. Helenius*, 103 Wn. 2d 383, 387 (1985).

Here, the rules set forth in *Edmundson* and its progeny enforce both the purposes of statutes of limitations and the Deed of Trust Act. It both prohibits stale claims and promotes stability of land titles to enforce the statute of limitations on a deed of trust and prevent resting lienholders from attempting to foreclose more than six years after a debtor no longer has personal liability on a debt and no additional payments have been made.

### **III. CONCLUSION**

For the reasons set forth above, this Court should grant the petition for review.

Respectfully submitted this 11th day of July, 2022.

I certify that Northwest Consumer Law Center’s Amicus Brief contains 1790 words and is in compliance with the word limits imposed by RAP 18.17.

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