Court of Appeals No. 47395-0-II

Supreme Court No. 93206-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TODD BAKER and THERESA BAKER,

Petitioners

v.

PENNYMAC LOAN SERVICES, LLC;
NORTHWEST TRUSTEE SERVICES, INC,

Respondents

REVISED PETITION FOR REVIEW

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I. IDENTITY OF PETITION

Petitioners Todd and Theresa Baker ("the Bakers"), appellants in the Court of Appeals, ask this Court to accept review of the Court of Appeals decision terminating review designated in Part II of this petition.

II. CITATION TO COURT OF APPEALS DECISION

The Bakers seek review of the decision in *Baker v. PennyMac Loan Services,* Case No. 47395-0-II, filed May 10, 2016, by Division Two of the Court of Appeals. A copy of the decision is included in the Appendix attached hereto as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

Whether this Court should accept review of the Court of Appeals decision affirming the Clark County Superior Court's denial of the Bakers' motion for relief from judgment pursuant to CR 60(b) based on:

1. Pursuant to RAP 13.4(b)(3), a significant question of law of the United States is involved as the United States Supreme Court unanimously held in *Jesinoski* that a consumer does not need to file suit for a Truth in Lending Act (TILA) rescission to be effective and as such, the Court of Appeals' decision upholds a void rescission.

2. Pursuant to RAP 13.4(b)(4), this case involves an issue of substantial public interest that should be determined by the Washington

Supreme Court as homeowners who effectively rescind their mortgage should not be faced with foreclosure.

IV. STATEMENT OF THE CASE

A. Procedural History

Todd and Theresa Baker ("the Bakers") exercised their right to rescind their mortgage loan under the Truth in Lending Act (TILA) on May 28, 2009. CP 74. While the Bakers sent written notice of the rescission within the statutorily required three year period, they did not file suit to enforce the rescission (CP 130-143) within those three years from the date the loan was consummated.

PennyMac Loan Services, LLC ("PennyMac"), a purported servicer of the rescinded mortgage loan, acknowledged receipt of the rescission notice but refused to recognize its effect. CP 22. On or around September 2010, PennyMac initiated a nonjudicial foreclosure action against the Bakers' property. CP 47. Northwest Trustee Services, Inc. (NWTS) was appointed by PennyMac to be the trustee for the nonjudicial foreclosure. CP 47. On April 6, 2011, the Bakers filed a complaint against PennyMac and NWTS, requesting an injunction to stay the foreclosure and a declaratory judgment that the loan was properly rescinded, among other relief. CP 130-143.

The Clark County Superior Court enjoined the foreclosure and

required the Bakers to post a bond and make monthly payments into the registry of the court pending resolution of the claim.

On July 12, 2012, PennyMac and NWTS moved for summary judgment. CP 20. The Clark County Superior Court granted summary judgment in favor of PennyMac and NWTS. CP 6-10. In regards to the rescission claim, the trial court concluded in an advisory letter that the Bakers' "claim is time-barred for failure to file suit within three years of loan consummation." CP 7. The letter also stated that the Bakers "failed to establish they could tender proceeds of the loan." *Id.* The foreclosure was not resumed at that time.

On January 13, 2015, the Supreme Court of the United States reversed *McOmie-Gray v. Bank of America Home Loans*, 667 F.3d 1325 (9th Cir. 2012), and other similar cases, and unanimously held that a borrower need not file suit within three years of loan consummation to exercise his right to rescind under TILA, only submit written notice. *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 190 L. Ed. 2d 650 (2015).

Upon learning of the decision in *Jesinoski*, the Bakers promptly filed a Motion for Relief from Order & Judgment Pursuant to CR 60 ("Motion"). CP 98. The Clark County Superior Court denied the Motion on March 9, 2015. CP 161. The Bakers filed a Notice of Appeal on

March 26, 2015.

The Court of Appeals did not schedule oral argument, and on May 10, 2016, Division Two of the Court of Appeals filed an unpublished opinion terminating review.

B. Factual History

The Bakers obtained a mortgage loan from Paramount Equity Mortgage ("Paramount") on May 31, 2006. CP 38-48. After learning of multiple violations in their loan transaction, the Bakers exercised their rescission rights under TILA on May 28, 2009. CP 74. The Bakers sent a written notice of rescission to MorEquity, who claimed to be the owner of the loan at the time. CP 74. The Truth in Lending Act mandates that a notice of rescission negates the mortgage (or deed of trust) and requires the lender to return the loan proceeds and then requires the borrower to tender the balance of the loan. When the Bakers exercised their rescission rights, they were current on their mortgage. CP 38. The Bakers were able to tender the mortgage principal at the time of rescission, had made arrangements to do so prior to rescinding, and made this known in their rescission letter. CP 38-48.

After the Bakers exercised their right to rescind, PennyMac purportedly took over servicing of the subject loan. CP 83. PennyMac conceded it had been notified of the rescission, but refused to recognize its

validity as the rescission "was past the 3-day rescission period provided for by the Truth in Lending Act." CP 84; CP 136. While the Bakers were aware that PennyMac refused to recognize the rescission, the Bakers continued to make payments on the mortgage loan, relying on PennyMac's representations that it would not recognize the rescission as valid and that it would initiate foreclosure proceedings. CP 83; CP 136 (at Paragraph 3.25). The Bakers continued to make payments until they obtained representation and their attorney advised them to stop, as the loan had been properly rescinded under the TILA. CP 38-48. PennyMac then initiated a nonjudicial foreclosure action against the property on or around September 2010. CP 38-48.

In April 2011, the Bakers filed a complaint against PennyMac and NWTS, seeking enforcement of the rescission along with an injunction to stay the foreclosure, among other relief. CP 130. The Clark County Superior Court granted an injunction halting the foreclosure but later granted summary judgment in favor of PennyMac and NWTS, finding that the Bakers' rescission claim was time-barred because they failed to file suit within the three year period. CP 6-8. The superior court also found that the Bakers did not establish facts showing they could tender the proceeds of the loan. *Id.* The trial court awarded PennyMac $14,036.88 in attorneys' fees. *Id.*

On January 15, 2015, the Supreme Court of the United States decided *Jesinoski v. Countrywide Home Loans, Inc.*, 135 S. Ct. 790, 190 L. Ed. 2d 650 (2015). There, the borrowers, just like the Bakers, rescinded their mortgage loan by sending written notice, but not filing suit, within the required three year period. *Id.* at 791. The mortgage servicer refused to recognize the rescission as in the instant case. *Id.* In a unanimous decision, the Supreme Court held that "a borrower exercising his right to rescind under the Act need only provide written notice to his lender within the 3-year period, not file suit within that period." *Id.* at 790. In the opinion, Justice Scalia wrote that the statutory language of TILA "leaves no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind" and that the statute "nowhere suggests...that a lawsuit would be required" to effectively rescind under TILA. *Id.* at 792-793. In regards to the supposed tender requirement, *Jesinoski* states:

> It is also true that [TILA] disclaims the common-law condition precedent to rescission at law that the borrower tender the proceeds received under the transaction. 15 U. S. C. §1635(b)...**The clear import of §1635(a) is that a borrower need only provide written notice to a lender in order to exercise his right to rescind. To the extent §1635(b) alters the traditional process for unwinding such a unilaterally rescinded transaction, this is simply a case in which statutory law modifies common-law practice.**

Id. at 793 (emphasis added).

After learning of *Jesinoski*, the Bakers promptly filed a Motion for Relief from Judgment Pursuant to CR 60. CP 98. The Clark County Superior Court denied the Motion on March 9, 2015. CP 161. PennyMac and NWTS then scheduled a foreclosure sale. In the face of this appeal (and lis pendens), the nonjudicial foreclosure against the property was conducted on June 26, 2015.

On May 10, 2016, Division Two of the Court of Appeals filed an unpublished opinion terminating review and affirming the superior court's denial of the Bakers' motion for relief from judgment. The Court of Appeals found that the superior court did not abuse its discretion in denying the motion for relief from judgment under CR 60(b)(6) because the summary judgment dismissal did not have prospective application. The Court of Appeals also found that the superior court did not abuse its discretion in denying the Bakers' motion for relief from judgement under CR 60(b)(11) because it found that extraordinary circumstances did not exist here.

V. ARGUMENT

A. Summary of Argument

This Court should accept review pursuant to RAP 13.4(b)(3) because the Court of Appeals' decision affirms an order which allowed the

nonjudicial foreclosure of a void mortgage in conflict with the statutory language of the Truth in Lending Act and the United States Supreme Court's decision in *Jesinoski*. 135 S. Ct. 790 (2015). As the mortgage loan was void per the plain language of TILA and *Jesinoski*, relief from judgment should be granted under CR 60(b)(6) as prospective application is inequitable and under CR 60(b)(11) as extraordinary circumstances exist. This Court should also accept review pursuant to RAP 13.4(b)(4) because the Court of Appeals' decision substantially impacts public interest as it allowed foreclosure of a void mortgage loan.

B. This Court Should Accept Review Pursuant to RAP 13.4(b)(3) as the Decision of the Court of Appeals Conflicts with the Statutory Language of TILA and the United States Supreme Court's Holding in *Jesinoski*

This Court should accept review under RAP 13.4(b)(3) as there is a significant question of law of the United States involved.

When a borrower is entitled to rescind under TILA and sends a written, valid notice of rescission to the owner of their mortgage loan, the mortgage loan automatically becomes void. *See* National Consumer Law Center, Truth in Lending (8th ed. 2012), at 659 ("by operation of law, the security interest *automatically* becomes void..."). The Truth in Lending Act gives a borrower three years from consummation of the loan to send written notice of rescission when certain disclosure requirements are

violated. 15 U.S.C. § 1635(f). Prior to the issuance of *Jesinoski*, the Ninth Circuit imposed an additional requirement, not in the statutory language of TILA, that a borrower must file suit to enforce the rescission within three years from consumation of the loan. *McOmie-Gray v. Bank of America Home Loans,* 667 F.3d 1325 (9th Cir. 2012).

The Bakers sent their notice of rescission well within the three year time period and thus their mortgage loan was void under the clear language of TILA. 15 U.S.C. § 1635(f). The Bakers later filed suit to enforce their TILA rescission after PennyMac refused to honor it. As the Bakers filed suit in the pre-*Jesinoski* era, the superior court imposed the now-rejected *McOmie-Gray* three year requirement to file suit and thus dismissed the Bakers' claims.

In *Jesinoski*, the United States Supreme Court overturned *McOmie-Gray* when it unanimously held that the statutory language of TILA imposes no requirement to file suit within three years to enforce a rescission, and as such, a mortgage loan is void when a valid notice of rescission is sent. 135 S. Ct. 790 (2015).

After the issuance of *Jesinoski*, the Bakers immediately requested relief from judgment pursuant to CR 60(b)(6) as prospective application of the summary judgment dismissal after the issuance of *Jesinoski* is inequitable when their mortgage loan was void and pursuant to CR

60(b)(11) as extraordinary circumstances exist including the United States Supreme Court's clarification of the effect of a TILA rescission in *Jesinoski.* Moreover, it directly conflicted with federal law. The superior court refused to grant relief, and the Court of Appeals affirmed, finding that the summary judgment dismissal did not have prospective application and that extraordinary circumstances did not exist here.

i. The Court of Appeals is incorrect that the summary judgment dismissal lacks prospective application because the order allowed foreclosure of a void security instrument.

This Court should accept review because the judgment here has prospective application as it allowed foreclosure of a void mortgage in violation of the statutory language of TILA and the United States Supreme Court's decision in *Jesinoski.* The Bakers are entitled to relief under CR 60(b)(6) because it is inequitable for the judgment to have prospective application. The Court of Appeals found that the summary judgment dismissal in the underlying case lacked prospective application, failing to recognize the unique procedural context of nonjudicial foreclosures and that the mortgage loan was void when the notice of rescission was effectively sent.

The Bakers faced a nonjudicial foreclosure due to the summary judgment dismissal by the superior court. Nonjudicial foreclosure is a

process whose procedures are strictly prescribed by the Washington Deed of Trust Act. *Albice v. Premier Mortg. Servs. of Wash.*, Inc., 174 Wn.2d 560, 567, 276 P.3d 1277 (2012). The protections borrowers enjoy in judicial foreclosure, such as oversight from the judiciary and ability to bring affirmative defenses, are lacking. *Id.* In a nonjudicial foreclosure, there is no decree of foreclosure or order of sale from a court. *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 788, 295 P.3d 1179 (2012). Instead, a borrower must affirmatively seek an injunction and raise their own claims if there is a defense to the sale. *See generally Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 110-13, 297 P.3d 677 (2013). Washington courts have found that judgments ordering the sale of real property, a typical outcome in judicial foreclosures, have prospective application. *See, e.g. Pacific Sec. Companies v. Tanglewood, Inc.*, 57 Wn. App. 817, 790 P.2d 643 (1990). As such, their counterpart in nonjudicial foreclosures, dismissal of a borrower's claims enjoining a nonjudicial foreclosure, likewise have prospective application as both orders permit a foreclosure to continue and disposes of the borrower's defenses to foreclosure.

Here, in the underlying action, the Bakers obtained a preliminary injunction to enjoin the then-pending nonjudicial foreclosure on the property and made every payment into the court registry as required.

Then, summary judgment dissolved the injunction, allowing the foreclosure of a void mortgage loan to continue, even in the face of this appeal. The Court of Appeals' decision is in odds with the statutory language of TILA and the United States Supreme Court's decision in *Jesinoski* because the mortgage was void and yet the foreclosure occurred.

The Bakers acknowledge the Court of Appeals' concerns that every judgment could have some reverberations in the future. However, the Bakers are not arguing that every summary judgment dismissal has prospective application, but rather that the summary judgment dismissal in their case has prospective application as it allowed the nonjudicial foreclosure of a void note. As the Court of Appeals' decision is in contrast with TILA and *Jesinoski* in that it fails to recognize that the mortgage loan was void, this Court should grant review pursuant to RAP 13.4(b)(3).

ii. The Court of Appeals is incorrect that extraordinary circumstances do not exist here.

This Court should accept review because the Court of Appeals is incorrect that extraordinary circumstances do not exist here when the summary judgment dismissal allowed foreclosure of a void mortgage in contrast to *Jesinoski* and the statutory language of TILA. The Bakers are entitled to relief under CR 60(b)(11) because the issuance of *Jesinoski*

constitutes extraordinary circumstances. Both Washington and federal courts have found changes in law, when combined with other factors, constitute extraordinary circumstances warranting relief from judgment. *See, e.g., Flannagan v. Flannagan*, 42 Wn. App. 214, 709 P.2d 1247 (1985); *Phelps v. Alameida*, 569 F.3d 1120 (9th Cir. 2009). Moreover, there was not a mere change in law here, but rather confirmation of the plain language meaning of TILA by the Supreme Court in *Jesinoski,* which held the federal Truth in Lending statute never required a suit to enforce the rescission be filed within three years. The Bakers fall into this category due to the issuance of *Jesinoski* and the particular circumstances of this case.

Respondents have argued throughout the course of this appeal that the principles of finality warrant denial of the Bakers' motion for relief from judgment. By going forward with a sale in the face of this appeal, it is hard to credit Respondents' calls to the virtues of finality, since they created the "finality" by foreclosing. Respondents had notice of this appeal well before the foreclosure sale, and all three parties had constructive notice of lis pendens. Respondents would be unjustly enriched if allowed to reap the proceeds of an invalid foreclosure sale based on a void deed of trust. Indeed, Respondent NWTS conducted the foreclosure sale and submitted the Trustee's Deed in these proceedings

presumably so it could argue that the foreclosure was truly final and the third party purchaser would suffer hardship if relief from judgment was granted. This is a problem created by Respondent NWTS. As the principles of finality are not offended, and the issuance of *Jesinoski* confirming that a rescission is effective when sent with its relation to the nonjudicial foreclosure, the Court of Appeals' decision is in contrast to the law of the United States, and this Court should grant review pursuant to RAP 13.4(b)(3).

C. This Court Should Accept Review Pursuant to RAP 13.4(b)(4) as Public Interest is Affected When TILA is Not Enforced

This case involves an issue of substantial public interest which the Supreme Court should determine. The Court of Appeals' decision, with its implications for all persons who exercised their right to rescind their mortgage pre-*Jesinoski*, satisfies this standard. The Bakers properly exercised their TILA right to rescind their mortgage loan and satisfied all the statutory requirements. The Bakers then lost their home to foreclosure after the purported holder of a void mortgage foreclosed on their property.

TILA is a federal statute designed to protect consumers. It gives consumers the remedy of rescission when certain disclosure requirements are not met. The Bakers properly rescinded their mortgage loan under TILA—there is no dispute about that. There cannot be a valid foreclosure

if the mortgage loan was rescinded. All parties to the foreclosure proceeding had notice of the Bakers' interest due to the recording of lis pendens, and both PennyMac and NWTS had notice of this appeal during the foreclosure proceedings. As such, the foreclosure sale was conducted at Respondents' own risk. Moreover, under RCW 61.24, et seq., a void, rescinded deed of trust cannot support a nonjudical foreclosure. As the mortgage was validly rescinded and the foreclosure void, it would be inequitable for the judgment to stand. As such, this Court should grant review pursuant to RAP 13.4(b)(4).

VI. CONCLUSION

For the reasons set out above, the Bakers respectfully request that this Court accept review of the decision in *Baker v. PennyMac,* No. 47395-0-II, and apply federal law as set forth in *Jesinoski.*

Respectfully submitted this 17th day of June 2016.

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

May 10, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TODD and THERESA BAKER, husband and wife, Appellants, v. NORTHWEST TRUSTEE SERVICES, INC., PENNYMAC LOAN SERVICES, LLC, Respondents.	No. 47395-0-II UNPUBLISHED OPINION

WORSWICK, P.J. — In 2011, Todd and Theresa Baker filed suit to stay the foreclosure of their real property and to obtain a declaratory judgment that their loan was properly rescinded three years prior. The superior court granted summary judgment against the Bakers. The Bakers did not appeal then, but in 2015, filed a CR 60(b) motion, seeking relief from the summary judgment dismissal. The superior court denied their motion. The Bakers now appeal the denial of their CR 60(b) motion, arguing that it would be inequitable to apply the judgment prospectively given the Supreme Court's decision in *Jesinoski v. Countrywide Home Loans, Inc.*, ___ U.S. ___, 135 S. Ct. 790, 190 L. Ed. 2d 650 (2015), and that extraordinary circumstances exist. We disagree and affirm.

FACTS

I. BRIEF HISTORY OF TRUTH IN LENDING ACT

The Truth in Lending Act (TILA) is a consumer protection law intended to guarantee a meaningful disclosure of credit terms at the time a loan is executed. 15 U.S.C §§ 1601-1667f. A borrower generally has a three-day right to rescind after the closing of a loan transaction,

however if any of the material disclosures are omitted, the three-day rescission period is extended to three years. 15 U.S.C. § 1635. Until January 2015, federal circuit courts were split regarding what actions by borrowers were required to properly exercise their rights to rescission. The Ninth Circuit considered a suit time-barred if a borrower did not commence a lawsuit to enforce rescission within three years, even if they had submitted notice of rescission within the three year time period. *McOmie-Gray v. Bank of America*, 667 F.3d 1325, 1326 (9th Cir. 2012). In January 2015, the Supreme Court of the United States resolved the circuit split in *Jesinoski*, 135 S. Ct. at 793, holding that under TILA, rescission is effected when a borrower notifies the creditor in writing of his intention to rescind within three years after the transaction is consummated. The Court explained that such a notification constitutes a valid rescission as there is no requirement that a borrower sue within three years or that the rescission be accompanied by the borrower's tender.

II. PROCEDURAL HISTORY

On May 31, 2006, the Bakers refinanced their mortgage. On May 28, 2009, the Bakers signed and mailed Notice of Right to Cancel forms to MorEquity, the loan servicer at the time, indicating that they were rescinding the loans. MorEquity refused to recognize the rescission. In mid-2009, PennyMac took over servicing responsibilities on the Bakers' loans. In September 2009, the Bakers informed PennyMac that they had previously rescinded the loans.

On September 27, 2010, PennyMac sent the Bakers a notice of default informing the Bakers they were in default for failure to pay their monthly mortgage payments. PennyMac

recorded a Notice of Trustee's Sale, indicating the sale would take place on March 18, 2011. Northwest Trustee Services, Inc. (NWTS) is the trustee for the nonjudicial foreclosure.

On April 8, 2011, the Bakers filed suit against PennyMac and NWTS for an injunction to stay the foreclosure and a declaratory judgment that the loan was properly rescinded on May 28, 2009, among other relief not at issue here. On May 13, 2011, the superior court granted the Bakers' motion for a preliminary injunction to restrain the trustee's sale pending the outcome of the suit. On July 12, 2012, PennyMac and NWTS filed motions for summary judgment arguing in relevant part that the Bakers' rescission was invalid because the lawsuit was not commenced within three years of consummation of the loan transaction, as required by the Ninth Circuit Court of Appeals' interpretation of TILA's three year time period for rescission,[1] and the Bakers were unable to tender funds to repay the loans at issue.

The superior court granted the motions for summary judgment based on the following specific grounds: (1) the Bakers' failure to file the lawsuit to rescind their mortgage loan within three years of consummation of the loan, (2) the Bakers' failure to allege facts or disputed facts which would establish their claim, and (3) the Bakers' failure to establish they could tender the proceeds of the loan. The Bakers did not appeal the summary dismissal of their suit.

On January 13, 2015, the United States Supreme Court decided *Jesinoski*, resolving the circuit split. 135 S. Ct. at 793. On February 11, 2015, the Bakers filed a motion for relief pursuant to CR 60(b)(6) and (b)(11), asking the superior court to vacate its prior order and judgment and reopen the case. The superior court denied their motion, concluding that a

[1] *McOmie-Gray*, 667 F.3d at 1325.

subsequent change in law did not provide the basis for relief from a final judgment in the absence of extraordinary circumstances. The property was sold at a trustee's sale on June 26, 2015.[2]

ANALYSIS

"A trial court's denial of a motion to vacate under CR 60(b) will not be overturned on appeal unless the court manifestly abused its discretion." *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). "Errors of law are not correctable through CR 60(b); rather, direct appeal is the proper means of remedying legal errors." *State v. Keller*, 32 Wn. App. 135, 140, 647 P.2d 35 (1982). Our review of a CR 60(b) decision is limited to the trial court's decision, not the underlying order the party seeks to vacate. *See Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1986). A trial court abuses its discretion when its decision is based on untenable grounds or reasoning. *Tamosaitis v. Bechtel Nat'l, Inc.*, 182 Wn. App. 241, 254, 327 P.3d 1309 (2014).

I. CR 60(b)(6)

The Bakers first argue that the superior court abused its discretion by denying the Bakers' relief from judgment pursuant to CR 60(b)(6) because it is no longer equitable that the superior court's order granting summary judgment dismissal should have prospective application. We disagree.

[2] We granted PennyMac's motion to submit new evidence of this fact.

As an initial matter, the superior court did not specifically articulate its reasoning for denying the Bakers' motion for relief based CR 60(b)(6). Rather, the superior court issued its order denying the CR 60 motion generally, and enclosed a letter to the parties explaining "subsequent change in law does not provide the basis for relief from a final judgment in the absence of extraordinary circumstances. It is my conclusion [the Bakers] have not established extraordinary circumstances warranting relief from the judgment." Clerk's Papers at 160. Although the superior court did not state its grounds for denying CR 60 relief pursuant to CR 60(b)(6) specifically, "an appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court." *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986); *see also State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

CR 60(b) provides in part:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . . .
>
> (6) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or *it is no longer equitable that the judgment should have prospective application.*

This provision allows the trial court to address problems arising under a judgment that has continuing effect "'where a change in circumstances after the judgment is rendered makes it inequitable to enforce the judgment.'" *Pacific Sec. Cos. v. Tanglewood, Inc.*, 57 Wn. App. 817, 820, 790 P.2d 643 (1990) (quoting *Metropolitan Park Dist. v. Griffith*, 106 Wn.2d 425, 438, 723 P.2d 1093 (1986)).

In order to succeed on their motion for relief pursuant to CR 60(b)(6), the Bakers must first meet the threshold requirement that the judgment at issue has prospective application. *Maraziti v. Thorpe*, 52 F.3d 252, 254 (9th Cir. 1995).[3] The Bakers cannot meet this burden. The standard used in determining whether a judgment has prospective application is whether it is executory or involves the supervision of changing conduct or conditions. *Maraziti*, 52 F.3d at 254. The order granting summary judgment against the Bakers is not that type of order.

The Bakers contend that the order has prospective application because it allowed the nonjudicial foreclosure to continue. The Bakers are correct that the order lifted the temporary injunction enjoining the nonjudicial foreclosure sale, thus allowing PennyMac to move forward with foreclosure. But the mere fact that the order had some future consequence does not mean it has prospective application. "'Virtually every court order causes at least some reverberations into the future, and has, in that literal sense, some prospective effect. . . . That a court's action has continuing consequences, however, does not necessarily mean that it has 'prospective application' for the purposes of Rule 60(b)(5).'" *Maraziti*, 52 F.3d at 254 (quoting *Twelve John Does v. Dist. of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988)).

The Bakers cite *Tanglewood*, 57 Wn. App. 817 to support their claim. However, *Tanglewood* is distinguishable. There, the superior court entered a judgment issuing a foreclosure decree, ordering a sheriff's sale of the property, and entering a judgment against the

[3] Washington cases addressing application of CR60 (b)(6) are few, however, federal courts have considered at length the nearly identical language in Fed. R. Civ. P. 60(b)(5). When reviewing similar court rules, Washington courts often look to federal decisions as persuasive authority. *See Chelan Cty. Deputy Sheriff's Ass'n v. Chelan Cty.*, 109 Wn.2d 282, 291, 745 P.2d 1 (1987).

debtors for any deficiency remaining after applying the proceeds of the sale. 57 Wn. App. at 819. At the sheriff's sale, the creditor purchased legal title to the property. 57 Wn. App. at 819. The debtors moved for CR 60(b)(6) relief from the prior deficiency judgment because the creditor had already acquired equitable title to the property, thus eliminating the debtors' continuing debts under the doctrine of merger. 57 Wn. App. at 819-20. Division Three of this court held that a judgment ordering a sheriff's sale and authorizing a deficiency judgment following completion of the sale has prospective application and the court's inherent power to ensure an equitable result may be invoked by a CR 60(b)(6) motion. 57 Wn. App. at 821.

Unlike *Tanglewood*, the underlying order in this case has no prospective application. The summary judgment dismissal of the Bakers' claim did not impose any continuing obligation on the Bakers such as the deficiency judgment in *Tanglewood*. Nor did the dismissal order an execution sale required to be supervised or confirmed by the superior court. Rather, the underlying order from which the Bakers seek relief was nothing more than an unconditional dismissal of their claims. The Bakers could have appealed the order but chose not to. The fact that their decision not to appeal had some future consequence does not mean it had prospective application as required for CR 60(b)(6) relief. *See Twelve John Does*, 841 F.2d at 1139 (D.C. Cir.1988) ("it is difficult to see how an unconditional dismissal could ever have prospective application").

The Bakers also contend that the order granting summary judgment dismissal has prospective application because it may affect the Bakers' rights to challenge the legality of the foreclosure sale under the "Deeds of Trust Act." ch. 61 RCW. Any impact on potential future

litigation caused by the Bakers' decision not to appeal the order granting summary judgment does not constitute prospective application for purposes of CR 60(b)(6). As previously discussed, virtually every court order causes at least some reverberations into the future, but unless an order is executory or involves the supervision of changing conduct or conditions, it does not have prospective application. *Maraziti*, 52 F.3d at 254. The underlying order here was not executory nor did it involve any supervision of changing conduct. Any future impact would be caused by nothing more than the res judicata effect of an unappealed dismissal order and does not qualify the Bakers for CR 60(b)(6) relief.

Because the Bakers cannot show that the order granting summary judgment dismissal has prospective application, we reject the Bakers' claim for relief based on CR 60(b)6).

II. CR 60(b)(11)

The Bakers next argue that the trial court abused its discretion by denying their motion for relief pursuant to CR 60(b)(11). Specifically, the Bakers contend that extraordinary circumstances existed warranting relief from the order granting summary judgment dismissal including: (1) the United States Supreme Court's decision in *Jesinoski*, (2) PennyMac is not a proper party to the judgment, (3) finality is not affected because the nonjudicial foreclosure is still subject to challenge, and (4) relief from judgment will serve the ends of justice. Again, we disagree.

CR 60(b)(11) grants the court discretion to vacate an order for "any other reason justifying relief from the operation of the judgment." *Barr v. MacGugan*, 119 Wn. App. 43, 45-46, 78 P.3d 660 (2003). Despite its broad language, the use of CR 60(b)(11) should be reserved

for situations involving extraordinary circumstances not covered by any other section of CR 60(b). *In re Marriage of Furrow*, 115 Wn. App. 661, 673, 63 P.3d 821 (2003). Those extraordinary circumstances must relate to "'irregularities extraneous to the action of the court or questions concerning the regularity of the court's proceedings.'" 115 Wn. App. at 673-74 (quoting *In re Marriage of Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985)). Errors of law do not justify vacating an order under CR 60(b)(11). *Furrow*, 115 Wn. App. at 674.

In rare circumstances, a change in the law may create extraordinary circumstances, satisfying CR 60(b)(11). *In re Det. of Ward*, 125 Wn. App. 374, 380, 104 P.3d 751 (2005). For example, Washington courts have recognized the federal enactment of the Uniformed Services Former Spouses Protection Act[4] (USFSPA) as a change in law constituting an extraordinary circumstance warranting CR 60(b)(11) relief. *See Flannagan v. Flannagan*, 42 Wn. App. 214, 709 P.2d 1247 (1985).

The Bakers claim that the Supreme Court's decision in *Jesinoski* constitutes an extraordinary circumstance.[5] We disagree because *Flannagan* is distinguishable from the facts of this case and does not logically extend to the Bakers' claim.

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[4] 10 U.S.C. § 1408.

[5] The Bakers encourage us to analyze whether the change in law constitutes an extraordinary circumstance by applying the multifactor analysis set forth in *Phelps v. Alameida*, 569 F.3d 1120, 1135 (9th Cir. 2009). However, the Bakers provide no authority for why we should rely on a federal circuit court case to guide its analysis rather than established Washington case law. Furthermore, *Phelps* addressed a motion for relief in the habeas context, the facts of which are starkly different. We decline to apply the *Phelps* analysis.

By way of brief background, in 1981, the United States Supreme Court issued *McCarty v. McCarty*, 453 U.S. 210, 235 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), holding that federal law prohibited state courts from dividing military retirement pay pursuant to community property laws, as had been the practice in Washington. Immediately, and in direct response, Congress passed the USFSPA which permitted state courts to treat military retired pay payable for periods after June 25, 1981,[6] as community property. *Flannagan*, 42 Wn. App. at 215-16. Subsequently, the Washington Supreme Court held that Congress specifically intended the statute to be retroactively applied. *See In Re Marriage of Konzen*, 103 Wn.2d 470, 473-74, 693 P.2d 97, *cert. denied*, 473 U.S. 906, 105 S. Ct. 3530, 87 L. Ed. 2d 654 (1985).

We held that final dissolution decrees issued during the "McCarty period" could be reopened under CR 60(b)(11). *Flannagan*, 42 Wn. App. at 218. In *Flannagan*, we emphasized "the importance of finality and the limited nature of our deviation from the doctrine." 42 Wn. App. at 218. We then identified the four extraordinary circumstances warranting CR 60(b)(11) relief in that case:

> [F]irst, the clear congressional desire of removing all ill effects of *McCarty*; second, the alacrity with which the Congress moved in passing the USFSPA; third, the anomaly of allowing division of the military retirement pay before *McCarty* and after USFSPA, but not during the 20-month period in between; and fourth, the limited number of decrees that were final and not appealed during that period.
> . . . .
> We emphasize the limited nature of this exception. Allowing reopening in these cases will not provide a springboard for attacks on other final judgments.

42 Wn. App. at 222.

[6] The date of the *McCarty* opinion.

This case is unlike the cases allowing CR 60(b)(11) relief to decrees that were final during the *McCarty* period. Those cases responded to an act of Congress with the clear intent to retroactively apply USFSPA. Here, the change in law upon which the Bakers base their claim is nothing more than an opinion resolving a circuit split. The circuit split existed at the time the superior court ordered summary judgment. The Bakers could have appealed the superior court's interpretation of the time limit for rescission under TILA, arguing it used the incorrect interpretation, but they chose not to. Furthermore, allowing relief in a case because a later court decision alters or overrules precedent previously relied upon would have the exact effect warned about in *Flannagan*: allowing broad use of CR 60(b)(11) to provide a springboard for attacks on other final judgments. 42 Wn. App. at 222.

The Bakers also argue that "extraordinary circumstances exist because PennyMac did not obtain a judgment in its favor as the proper and correct party to the proceeding brought by the Bakers." Br. of Appellant 16. However, the Bakers named PennyMac in their complaint and alleged numerous wrongdoings by PennyMac. PennyMac defended itself against these claims and the superior court granted summary judgment in PennyMac's favor, awarding fees and funds held in the court registry to PennyMac. It appears that the Bakers now take issue with PennyMac's ability to enforce the Bakers' loan it was servicing.

The Bakers filed their lawsuit against PennyMac and made no additional attempt to amend the suit to include any additional party. If the Bakers believed that the trial court's entry of judgment in favor of PennyMac was an error of law, their remedy was to appeal the trial court's ruling. *Bjurstrom*, 27 Wn. App. at 451 ("The exclusive procedure to attack an allegedly

defective judgment is by appeal from the judgment, not by appeal from a denial of a CR 60(b) motion."). The Bakers offer no authority suggesting these vague allegations constitute an extraordinary circumstance warranting relief under CR 60(b)(11), and we hold that it does not.

The Bakers next argue that extraordinary circumstances exist because "relief from judgment under CR 60(b)(11) . . . would not offend the principles of finality" because the nonjudicial foreclosure has not been completed and the parties are in the same position as they were when the judgment was entered. Br. of Appellant 18. This argument is incorrect. The foreclosure sale has been completed.[7]

Washington courts emphasize the value of finality in judgments. "It must be remembered that one of the most important services the courts provide is to bring legal disputes to an end." *Genie Indus., Inc. v. Mkt. Transp., Ltd.*, 138 Wn. App. 694, 715, 158 P.3d 1217 (2007). The *Flannagan* court placed great weight on the importance of finality, cautioning that reopening a final judgment must only be done in truly extraordinary circumstances. "We believe the doctrine of finality of judgments is of great importance, and must be considered in any analysis of the retroactive application to final decrees. . . . [W]e emphasize the importance of finality and the limited nature of our deviation from the doctrine." *Flannagan*, 42 Wn. App. at 218 (1985) (footnote omitted). Here, the order granting summary judgment was clearly a final judgment subject to appeal. The Bakers chose not to appeal. PennyMac, NWTS, and the third party

[7] The Bakers also argue that because the proper owner of the loan is incapable of being identified, any foreclosure of the property is invalid. The Bakers offer no authority as to how this constitutes an extraordinary circumstance. Rather, they cite federal circuit court cases in which relief was granted before the underlying judgment became final.

purchasers of the property at the foreclosure sale have all proceeded in reliance on the finality of the order and we will not disturb that finality now.

Finally, the Bakers argue that CR 60(b)(11) relief would "serve[] the ends of justice." Br. of Appellant 19. However, the general equity of the superior court's denial of the Bakers' motion does not establish an extraordinary circumstance warranting relief. CR 60(b)(11) relief is reserved only for situations involving extraordinary circumstances. *Furrow*, 115 Wn. App. at 673. The superior court concluded that the Bakers have not established any extraordinary circumstances warranting relief. For the reasons discussed above, we hold that the trial court's conclusion was not an abuse of discretion.

ATTORNEY FEES

The Bakers argue that they are entitled to recover attorney fees and costs under the TILA, which allows for the recovery of fees in the case of a successful action. 15 U.S.C. § 1640(a)(3). The Bakers' claim for relief fails. Thus, no award of attorney fees is justified under the terms of 15 U.S.C. § 1640(a)(3).

NWTS also seeks costs under RAP 14.2 and RAP 18.1(b). As NWTS is a prevailing party, we grant its request.

In conclusion, we hold that the trial court did not abuse its discretion by denying the Bakers' CR 60(b) motion for relief because the Bakers cannot show that the order granting summary judgment dismissal against the Bakers has any prospective application or that any extraordinary circumstances exist warranting relief; we reject the Bakers' claims. Accordingly,

we affirm the superior court's denial of the Bakers' CR 60(b) motion for relief and award costs to NWTS pursuant to RAP 14.2 and RAP 18.1(b).

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.

Worswick, P.J.

We concur:

Lee, J.

Melnick, J.

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Todd Baker and Theresa Baker,

Petitioner,

vs.

PennyMac Loan Services, LLC and Northwest Trustee Services, Inc.,

Respondents.

No. 93206-9

Court of Appeals No. 47395-0-II

DECLARATION OF SERVICE

I, Amanda N. Martin, Staff Attorney for Northwest Consumer Law Center, 520 E. Denny Way, Seattle, WA 98122, hereby certify that on the date indicated below, I caused to be served true and correct copies of the following: 1) Revised Petition for Review, upon the following at the addresses stated below, via the method of service as indicated.

NW CONSUMER LAW CENTER
A Non-Profit Law Firm Advocating for Rights of the Consumer

520 East Denny Way
Seattle, WA 98122
Tele: (206) 805-0989
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Heidi Buck Morrison RCO Legal, P.S. 13555 SE 36th St, Ste 300 Bellevue, WA 98006-1489 Email:hbuckmorrison@northwesttrustee.com *Attorney for Respondent Northwest Trustee Services*	X Electronic Mail Facsimile First Class U.S. Mail X Legal Messenger

DATED this 17th day of June 2016.

Amanda N. Martin, WSBA #49581

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To whom it may concern,

Please see attached the Revised Petition for Review, Appendix A, and Declaration of Service in the following case:

Case Name: Baker v. PennyMac, et. al.
Case No: 93206-9
Filed by: Amanda Martin, WSBA No. 49581
Phone: 206-805-1716
Email: amanda@nwclc.org

If you have any questions, please contact me at the number above. Thank you!

NW CONSUMER LAW CENTER
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