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WASHINGTON STATE  
SUPREME COURT

NO. 93244-1

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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IOAN A. PAUNESCU and DANIELA PAUNESCU, husband and wife,

Petitioners,

v.

GERHARD H. ECKERT and MARGARETHE ECKERT AS TRUSTEES  
OF THE ECKERT FAMILY TRUST; and SCOTT RUSSON and JANE  
DOE RUSSON, husband and wife,

Respondents

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**SCOTT RUSSON'S ANSWER TO PETITION FOR REVIEW**

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## **I. IDENTITY OF THE ANSWERING PARTIES**

This Answer to Petition for Review is submitted on behalf of Scott Russon and Jane Doe Russon.

## **II. ISSUES PRESENTED FOR REVIEW**

Whether the Supreme Court should consider the issues presented in the Paunescus' Petition for Review.

## **III. INTRODUCTION**

This action arises from a foreclosure upon property owned by Petitioners Ioan and Daniela Paunescu in 2014 as a result of their failure to repay a private loan by Respondents Gerhard and Margarethe Eckert. Respondent Scott Russon was appointed as successor trustee for the nonjudicial foreclosure proceedings under chapter 61.24 RCW.

In their Petition for Review, Petitioners seek review such that this Court might reverse the decision of the trial court, which was affirmed by the Court of Appeals. Petitioners have not articulated any recognizable basis upon which their Petition should be granted. Petitioners list the Court's standards for accepting review (Pet. at 17); however, they fail to provide any support for their arguments that review should be granted.

This Court should deny the Petition. The decision of the Court of Appeals is not in conflict with a decision of the Supreme Court or any decision of the Court of Appeals. Further, Petitioners have not presented any significant questions of law under either the Washington or United

States Constitutions. Finally, Petitioners have not noted any substantial public interest that should be determined by the Supreme Court.

Petitioners' specific arguments for why review should be granted are difficult to decipher. Nonetheless, they seem to argue that they were not afforded a fair hearing based on their allegations that discovery was incomplete at the time of the Motion for Summary Judgment hearing. Further, Petitioners argue that they were denied the opportunity to confront the evidence against them.

These arguments are without merit. The record in this case is clear that Petitioners had a fair hearing and lost. Accordingly, this Court should deny review. RAP 13.4(b).

#### **IV. STATEMENT OF THE CASE**

The Court of Appeals opinion discusses the facts here, Op. at 2-3, but several facts bear emphasis.

##### **A. The Loan**

The property that is the subject of this case is located at 5619 NE 56<sup>th</sup> Street in Vancouver, Washington (hereinafter "the property"). CP 473-74. Ioan and Daniela Paunescu purchased the property in July of 2005. *Id.* The Paunescus took out several loans against the house in 2005 and 2006. CP 480.

Sometime in 2006, the Paunescus decided to start an adult home care business. CP 482. In order to open their business, they needed to build or buy a property. CP 509. They decided to operate the business on

their existing property. CP 482. In order to make extra room for the business and to bring the property into compliance with state regulations for an adult home care facility, an extensive remodel was required. CP 505.

The Paunescus commissioned designs for the addition to the property in February 2007. CP 489. The proposed addition provided for six (6) additional bedrooms with private bathrooms. CP 585. The new designs also provided for modifications to the property that would be compliant with the requirements of the Washington Association of Building Officials (“WABO”) and the Americans with Disabilities Act (“ADA”). CP 506.

In order to build the addition to the property, the Paunescus had to take out a loan. CP 514-15. The Paunescus had no equity in their property at the time and they had a poor credit history. *Id.* For these reasons, a traditional loan from a bank was not available to them. The Paunescus thus contacted an acquaintance, Ben Lucescu, to help them find a private lender. CP 504. Mr. Lucescu introduced the Paunescus to the Eckerts. CP 484. On or about May 15, 2007, the Paunescus obtained a \$290,000 loan from the Eckerts (hereinafter “the Eckert loan”). *Id.* The loan was secured by a Deed of Trust listing the Eckert Trust as the beneficiary. CP 587-90. The Eckert loan was a short term, interest only loan, due and payable in full on May 12, 2008. CP 592-95.

According to Mrs. Paunescu, they planned to use the Eckert loan to fund construction for the addition to their property for the adult home care business. CP 484. They intended to repay the Eckert loan through a refinance from another lender within one (1) year. *Id.*

The Paunescus failed to adequately manage their business such that they could repay the Eckert Loan. They did not have a formal business plan prior to taking the loan from the Eckerts and they significantly underestimated the time necessary to build the addition, obtain a permit, and open their business. CP 509-10.

According to Mrs. Paunescu, the process of opening an adult home care business first required her to build or buy a facility. *Id.* Next, they would have to apply for a license and sign a contract with the State to place residents in the facility. *Id.* Mrs. Paunescu admitted during her deposition that she and her husband underestimated the time required to build the addition, apply for a license, obtain a contract with the State, and have residents placed in the home from whom she could generate income to repay the loan. CP 510. According to Mrs. Paunescu, construction on the home began in May of 2007 and lasted until September of 2007. *Id.* The Paunescus did not have a budget for this process, nor did they organize a formal timeline for construction. *Id.*

The Paunescus did not hire a general contractor for the job. CP 506. Instead, they hired and managed contractors themselves. CP 491. Changes to the property were made according to the WABO requirements.

CP 505. In the end, the Paunescus did not get their license to operate the adult home care business until February 15, 2008—a little less than three (3) months before the loan came due. CP 511.

**B. Payments on the Loan**

The Paunescus made the required payments of \$2,900 per month to the Eckert Trust between June 2007 and November 2008 as contemplated by the Promissory Note they signed with the Eckerts. CP 592-595. In the fall of 2007, the Paunescus asked the Eckerts to loan them an additional \$50,000. CP 510. The Eckerts were unwilling to do so. *Id.* The Paunescus were unable to obtain refinancing of the Eckert loan by May 12, 2008. CP 490.

Mrs. Paunesucu admits that after they were unable to secure refinancing of the Eckert loan, they “paid the Eckerts out of their [loan] money” for approximately one and a half years. CP 512. The Paunescus wrote to the Eckerts in May 2009 and acknowledged their obligations:

**We are not disputing that we owe that amount. We do want to pay it back in full. . . We took out the private loan from the beginning with the thought that we will do the Adult Foster Care Home. This is what you knew the money was for. The loan was used all for the construction for the home.**

CP 648-649.

The Paunescus made payments of \$1,450 in December 2008 and January 2009. CP 597. Thereafter, the Paunescus stopped making payments on the loan until November 2012 when they paid \$500 per month until May of 2013. *Id.* The Paunescus made no further payments



on the Eckert loan. *Id.* In July of 2013, the Eckerts decided to seek the assistance of an attorney to secure full payment and/or foreclosure on the loan.

**C. Non-Judicial Foreclosure on the Property**

The Eckerts retained Scott Russon to proceed with a non-judicial foreclosure on the property. Because the Eckert loan was made for the expansion of the property to accommodate the adult home care business (a fact admitted by the Paunescus), Mr. Russon characterized the loan as commercial. CP 599-602.

Mr. Russon carefully adhered to the required procedures for a non-judicial foreclosure of a commercial loan. A Notice of Default was mailed to the Paunescus and posted on their property on September 11, 2013. CP 599-602. The Eckerts appointed Mr. Russon as the successor trustee on the Deed of Trust. CP 604-605. Upon Mr. Russon's appointment, the Eckerts executed a Request to Initiate Foreclosure Proceedings. CP 607-609. A Notice of Trustee's Sale and Notice of Foreclosure were served on October 31, 2013. CP 611-614.

Mr. Russon also provided copies of the Notice of Trustee's Sale to all of the parties that had an interest in the property, including the senior lienholder, MIT Lending. CP 688-697. The Notice of Trustee's Sale to MIT Lending was returned to Mr. Russon as "undeliverable." CP 668-686.

The Trustee's Sale was scheduled for February 7, 2014 at 2:00 p.m. at the gazebo in front of the Clark County Public Service Center. CP 611-614. The Eckerts, on behalf of the Eckert Family Trust, purchased the property at the Trustee's Sale for \$568,144.75 subject to the first MIT loan. CP 616.

**V. ARGUMENT WHY REVIEW SHOULD BE DENIED**

**A. Review is Not Warranted pursuant to RAP 13.4(b).**

RAP 13.4(b) does not authorize review in every case in which the Court of appeals may have erred. Instead, a decision must fall into one of the categories listed in the Rule.

Petitioners merely list the categories in RAP 13.4(b) in their Petition for Review. They seemingly assert that they are entitled to review based on one or all of these categories, though corresponding arguments are absent from their brief. Nevertheless, it appears that Petitioners argue that they were not afforded a fair hearing because discovery was incomplete prior to the Motion for Summary Judgment hearing.

As discussed below, Petitioners were given a fair hearing. They unequivocally stated to the Court on December 12, 2014 that they wished to move forward with the January 16, 2015 hearing on their Motion for Summary Judgment. CP 60. They did not request any additional depositions or discovery, though they were certainly entitled to do so. Nevertheless, they have not shown that the alleged denial of a fair hearing invokes any of the categories listed in RAP 13.4(b). Petitioners have not satisfied the requirements of RAP 13.4(b), and their Petition for Review should therefore be denied.

**B. Petitioners were Given a Fair Hearing on Their Motion for Summary Judgment.**

Petitioners argue that the trial court and the Court of Appeals deprived them of the right to a fair hearing by allowing the Motion for Summary Judgment hearing to proceed as scheduled on January 16, 2015. This argument must be rejected. Petitioners' arguments fail to address the fact that Daniela Paunescu stated in the hearing on December 12, 2014 that she wanted to hold the hearing on January 16, 2015. CP 60 & RP 12. Petitioners never asked for a continuance nor did they state that additional discovery was necessary. In fact, these arguments were not raised until *after* the Eckerts' and Russons' Motions for Summary Judgment were granted and the case was dismissed. Petitioners were given all the process to which they were due and had a full and fair opportunity to continue the summary judgment hearing. They cannot suddenly allege that the hearing was premature simply because they are unhappy with the result.

On appeal, the Court of Appeals considered, as it must, the issues presented including all arguments raised by Petitioners why the Motion for Summary Judgment hearing was premature. The Court of Appeals determined that Petitioners' claims did not present any basis to set aside or reverse the trial court's summary judgment orders.

Petitioners' arguments that they were not afforded a fair hearing must be rejected because Petitioners did, in fact, have an opportunity to be heard regarding all of the issues they now raise. Petitioners assign error to the Court of Appeals' ruling that 1) the loan was commercial; 2) the deed

of trust and promissory note were valid and enforceable; 3) the nonjudicial foreclosure was valid; and 4) Petitioners were not entitled to the Homestead exemption.

Petitioners ignore the fact that these issues were presented and argued to both the trial court and the Court of Appeals. These arguments were discussed at length in the Motion for Summary Judgment and the Appellate Brief, and have now been stated a third time in the Petition for Review. Petitioners have not raised any new facts or evidence in support of their claims nor have they pointed to any conflicting case law to suggest that the Court of Appeals' decision was incorrect. Thus, there is no basis for the Supreme Court to consider these issues again.

Finally, with respect to Petitioners' arguments relating to the award of attorneys' fees, counsel for the Russon Respondents were asked by the trial court to supplement their request for fees in order to provide the court with more information regarding the reasonableness of the fees. Counsel submitted the requested supplemental briefing and the court later awarded their requested fees and costs. Any delay in this process was nothing more than an effort by the court to ensure that the Russons' fees were reasonable and fair under the circumstances of the case. This was done as a protection to Petitioners and was in no way intended or designed to interfere with their right to appeal.

C. **Petitioners Have Not Demonstrated That This Case Merits Review by the Supreme Court.**

A party does not gain Supreme Court review by arguing that the Court of Appeals wrongly decided a case. The petitioner must show that the criteria set forth in RAP 13.4(b) apply. Petitioners have failed to show how any of their arguments fit the criteria set forth in RAP 13.4(b). Rather, they reiterate their summary judgment arguments a third time in an effort to convince the court of issues that the trial court dismissed and the Court of Appeals affirmed. Because Petitioners have not satisfied their obligations of RAP 13.4(b), their Petition for Review must be denied.

VI. **REQUEST FOR ATTORNEYS' FEES**

The Russon respondents request an award of attorney's fees on appeal pursuant to RAP 18.1(a). An award of attorney's fees based on a contractual provision is appropriate when the action arose out of the contract and the contract is central to the dispute. *Seattle First Nat'l Bank v. Wash. Ins. Ass'n.*, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991). Furthermore, RCW 4.84.330 provides:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

The Deed of Trust obviously was the foundation of the Petitioners' claims against the Eckert and Russon respondents. Petitioners' case rested

upon their theory that the Deed of Trust was invalid and, therefore, all actions by the Eckerts and Mr. Russon stemming from the Deed of Trust were similarly invalid. The Deed of Trust upon which Petitioners' claims are based include a provision by which Mr. Russon is entitled to recovery of "all costs, fees and expenses in connection with the Deed of Trust." Specifically, the Deed of Trust upon which the Petitioners' claims were based states as follows:

To pay all costs, fees and expenses in connection with the Deed of Trust, **including the expenses of the Trustee incurred in enforcing the obligation secured hereby** and Trustee's and attorney's fees actually incurred as provided by statute.

(emphasis added). Not only does the foregoing provision provide for payment of "all costs, fees and expenses in connection with the Deed of Trust," but it includes an illustrative example that establishes that such "costs, fees and expenses" specifically includes those incurred by the Trustee (Scott Russon). This entire case was about "enforcing the obligation secured [by the Deed of Trust]." Thus, Petitioners cannot reasonably contend that they are not responsible for the Russon respondents' costs, fees and expenses associated with this lawsuit. Accordingly, the Russon Respondents respectfully request an award of attorneys' fees and costs associated with responding to Petitioners' Petition for Review.

**VII. CONCLUSION**

For the reasons set forth above, the Russon Respondents respectfully request that the Petition for Review be denied.

DATED this 22nd day of July, 2016.

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

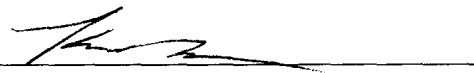
I am employed by the law firm of Scheer & Zehnder LLP.

At all times hereinafter mentioned, I was and am a legal resident of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below I served the document(s) to which this is attached, in the manner noted on the following person(s):

<b>PARTY/COUNSEL</b>	<b>DELIVERY INSTRUCTIONS</b>
<b><u>Plaintiffs</u></b> Ioan & Daniela Paunescu 13609 NE 28th Street Vancouver, WA 98682	( ) Via U.S. Mail (X) Via Legal Messenger ( ) Via Facsimile ( ) Via E-Mail
<b><u>CO/ Defendants Eckert</u></b> Ben Shafton Caron Colven Robison & Shafton, P.S. 900 Washington Street, Suite 1000 Vancouver, WA 98660	( ) Via U.S. Mail ( ) Via Legal Messenger ( ) Via Facsimile (X) Via E-Mail bshafton@ccrslaw.com

DATED this 22<sup>nd</sup> day of July, 2016, at Seattle, Washington.

  
Kandice Besaw, Legal Assistant