

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
6/25/2018 10:00 AM  
BY SUSAN L. CARLSON  
CLERK

Supreme Court No. 95654-5  
Court of Appeals No. 75665-6-I

SUPREME COURT  
OF THE STATE OF WASHINGTON

---

MICHELLE MERCERI, a single woman,

Petitioner,

vs.

DEUTSCHE BANK NATIONAL TRUST COMPANY, a national banking  
association, as trustee for holders of the BCAP LLC Trust 2007-AA2, et al,  
Respondent.

---

**DEUTSCHE BANK NATIONAL TRUST COMPANY, a national  
banking association, as trustee for holders of the BCAP LLC Trust  
2007-AA2'S ANSWER TO *AMICI CURIAE* MEMORANDUM OF  
PACIFIC COAST CONSTRUCTION, L.L.C., DAVID M.  
FEDERER, GARY M. CLINE AND REBECCA M. CLINE  
SUPPORTING THE PETITION  
FOR REVIEW**

---

Rebecca R. Shrader, WSBA No. 43918  
ANGLIN FLEWELLING RASMUSSEN  
CAMPBELL & TRYTTEN LLP  
701 Pike Street, Suite 1560  
Seattle, WA 98101  
Telephone 206-264-5913  
Attorneys for Appellant Deutsche Bank National Trust  
Company, as trustee for holders of the BCAP LLC  
Trust 2007-AA2

**TABLE OF CONTENTS**

	<u>Page</u>
I. IDENTITY OF ANSWERING PARTY.....	1
II. STATEMENT OF ANSWER.....	1
III. ARGUMENT .....	1
A. The Court of Appeals’ decision does not conflict with any Supreme Court decision.....	1
B. The Court of Appeals’ decision does not present an issue of Public Importance because whether or not the statute of limitations was tolled was in Merceri’s control.....	8
IV. CONCLUSION.....	10

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>FEDERAL CASES</b>	
<i>Aslanidis v. United States Lines</i> , 7 F.3d 1067 (2nd Cir., 1993).....	9
<i>Aurora Loan Servs. V. Amey (In re Amey)</i> , 314 B.R. 864 (Ga. N. Bnkry. Ct. Sept. 23, 2004) .....	10
<i>Koyle v. Sand Canyon Corp.</i> , 2016 U.S. Dist. LEXIS 29616 (D. Utah Mr. 8, 2016) .....	5
<i>In re Osborne</i> , 2001 Bankr. LEXIS 2314 .....	9
<i>Panzella v. Hills Stores Co.</i> , 171 B.R. 22 (E.D. Pa. 1994) .....	5
<b>STATE CASES</b>	
<i>Bennett v. Thorne</i> , 36 Wash. 253 (1904).....	6
<i>Bilanko v. Barclay Court Owners Ass’n</i> , 185 Wn.2d 443, 375 P.3d 591 (2016).....	5, 6
<i>Douglas County v. Grant County</i> , 98 Wash. 355, 167 Pac. 928 (1917) .....	6
<i>Edison Oyster Co. v. Pioneer Oyster Co.</i> , 22 Wn.2d 616, 157 P.2d 307 (1945).....	6, 7
<i>Finkelstein v. Sec. Props.</i> , 76 Wn.App. 733, 888 P.2d 161 (1995).....	6
<i>Lindquist v. Mullen</i> , 45 Wn.2d 675, 277 P.2d 724 (1954).....	2
<i>Merceri v. Deutsche Bank AG</i> , 2 Wn.App. 143, 408 P.3d 1140 (Jan. 22, 2018).....	1, 4, 5, 8

<i>National Bank of Commerce Trust &amp; Savings Ass'n v. Ham,</i> 592 N.W.2d 447, 256 Neb. 679 (Neb. 1999).....	5
<i>Osborne v. Buckman,</i> 993 P.2d 409 (Alaska 1999).....	5
<i>Reichelt v. Johns-Manville Corp.,</i> 107 Wn.2d 761, 733 P.2d 530 (1987).....	7
<i>Ruth v. Dight,</i> 75 Wn.2d 660, 453 P.2d 631 (1969).....	2, 3
<i>Sittner v. Schriever,</i> 22 P.3d 784 (Utah 2001).....	5
<i>Spokane County v. Prescott,</i> 19 Wash. 418, 53 Pac. 661 (1898).....	6
<i>Summerrise v. Stephens,</i> 75 Wn.2d 808, 454 P.2d 224 (1969).....	3, 4, 5
<i>Trustmark Nat. Bank v. Pike Co. Nat. Bank,</i> 716 So.2d 618 (Miss. 1998).....	5
<i>Turner &amp; Boisseau, Chtd. v. Lowrance,</i> 852 P.2d 517 (Kan. 1993).....	5
<i>Walcker v. Benson &amp; McLaughlin,</i> 79 Wn.App. 739, 904 P.2d 1176 (1995).....	8
<i>Young v. Estate of Snell,</i> 134 Wn.2d 267, 948 P.2d 1291 (1997).....	7
<i>Zuckerman v. 234-6 W. 22 St. Corp.,</i> 645 N.Y.S.2d 967 (1996).....	5
<b>FEDERAL STATUTES</b>	
11 U.S.C. § 362(d).....	9
<b>STATE STATUTES</b>	
RCW 4.16.080(2).....	7
RCW 4.16.180.....	3
RCW 4.16.230.....	<i>passim</i>

RCW 11.40.011 .....	7
RCW 64.34.264(2).....	5
<b>RULES</b>	
RAP 13.4(b) .....	1, 10

## **I. IDENTITY OF ANSWERING PARTY**

Deutsche Bank National Trust Company, a national banking association, as trustee for holders of the BCAP LLC Trust 2007-AA2, et al, (“Deutsche”) respectfully submits this Answer to the *Amici Curiae* Memorandum of Pacific Coast Construction, L.L.C., David M. Federer, Gary M. Cline and Rebecca M. Cline (“Pacific Coast”) Supporting the Petition for Review of the decision of the Court of Appeals, Division One, dated January 22, 2018, in *Merceri v. Deutsche Bank*, No. 75665-6-I.

## **II. STATEMENT OF ANSWER**

Pacific Coast’s *Amici Curiae* memorandum does not establish any of the criteria in RAP 13.4(b) for considering a Petition for Review.

## **III. ARGUMENT**

### ***A. The Court of Appeals’ decision does not conflict with any Supreme Court decision.***

The Court of Appeals held that a bankruptcy stay is a statutory prohibition that tolls the statute of limitations. *Merceri v. Deutsche Bank AG*, 2 Wn.App. 143, 154, 408 P.3d 1140 (Jan. 22, 2018). In doing so, it noted that the tolling provisions exist to assure all persons subject to a statute of limitations enjoy the full benefit of the limitation period. *Id.* at 147. The decision does not conflict with any Supreme Court decision.

Pacific Coast argues that the Court of Appeals erred. While Pacific Coast attempts to assert that the appellate decision conflicts with other decisions, it concedes that it is arguing that the decision is in conflict with “this Court’s rigorous enforcement of statutes of limitations.” *Memorandum*, p. 1. This is an argument based on policy as to why the decision should be reversed, and does not provide a basis for this Court to accept review.

None of the cases identified by Pacific Coast conflict with the Court of Appeals’ decision. In *Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969), the Court reviewed the “discovery rule” in the context of established precedent that for foreign items left inside surgical wounds, the statute of limitations began to run at the time the item was left inside the wound, as articulated by the Court in *Lindquist v. Mullen*, 45 Wn.2d 675, 277 P.2d 724 (1954). The Court in *Ruth* acknowledged the general policy of statute of limitations to protect defendants from long-dormant claims, but recognized that the rigid application of *Lindquist* failed to adhere to fundamental elements of fairness:

...[A] fair resolution of the dilemma involves both a preservation of limitations on the time in which the action may be brought, and a preservation of the remedy, too, where both parties are blameless as to delay in discovery of the asserted wrong.

*Ruth*, 75 Wn.2d at 666-67. The Court overruled *Lindquist*, and created an

exception to the statute of limitations as to a foreign body left in a surgical wound. *Id.* at 668.

The Court of Appeals' decision in this case is not in conflict with *Ruth*. The two decisions are consistent in that they both recognize that statutes of limitations can be extended. Also, the *Ruth* Court does not address tolling pursuant to a statutory prohibition or injunction.

The Court of Appeals' decision also does not conflict with *Summerrise v. Stephens*, 75 Wn.2d 808, 454 P.2d 224 (1969), which did not address RCW 4.16.230, but rather, dealt with tolling due to a party's absence from the state. In *Summerrise*, the plaintiff sued a doctor for malpractice. *Summerrise*, 75 Wn.2d at 810. The doctor had moved from Washington to California, and his residence in California was known to the plaintiff. *Id.* The plaintiff served the doctor nearly ten years after the statute of limitations expired, under the long-arm statute, which makes it possible to secure personal service outside the state in certain classes of cases. *Id.* The plaintiff argued that because RCW 4.16.180 tolled the statute when the defendant was absent from the state, the statute of limitations had not expired. *Id.* at 810-811.

The Washington Supreme Court noted that the rationale of RCW 4.16.180 is that every absence from the state that prevents service upon a defendant should be excluded in computing time within which a plaintiff



must commence his action. *Id.* at 811. The Court then considered the purpose of the long-arm statute, enacted in 1959, after the tolling statute, which provides a sure, inexpensive and expeditious means of bringing certain defendants into the courts of this state. *Id.* at 812. The Court determined that because the reason for tolling the statute had been removed by the long-arm statute, tolling in such cases was no longer necessary, and should not apply. *Id.* The Court also noted that most courts hold that under tolling provisions applied during the time the defendant is absent from the state, the statute continues to run if process could be served notwithstanding the absence. *Id.* at 813.

The Court of Appeals in *Merceri* also recognized that its goal when interpreting statutes is to effect the intent of the legislature, and that intent is discerned from the plain meaning of the text and the statutory scheme as a whole. *Merceri*, 2 Wn.App. at 147. In *Summerrise*, the Court found that the legislature enacted a new statute that eliminated the purpose for tolling when a defendant was out of state. *Summerrise* at 812. Here, there is no such new statute. RCW 4.16.230 provides for tolling when an action is stayed by injunction or statutory prohibition. From the statute's inception, there has always been an ability to take action to terminate an injunction or prohibition by litigation, yet the legislature did not require any such action for tolling to apply. The legislature also never enacted a

new statute that cured or resolved the underlying problem for which tolling was provided. Also, as the Court of Appeals in *Merceri* noted—and unlike in *Summerrise*—every jurisdiction with a tolling statute identical or similar to RCW 4.16.230 that has considered the issue, has uniformly held that a bankruptcy stay is a statutory prohibition that tolls the statute of limitations.<sup>1</sup> Nothing in the Court of Appeals’ decision conflicts with the Court’s decision in *Summerrise*, nor is *Summerrise* analogous.

The Court of Appeals’ decision also does not conflict with *Bilanko v. Barclay Court Owners Ass’n*, 185 Wn.2d 443, 375 P.3d 591 (2016). Pacific Coast asserts that *Bilanko* only allowed “limited, narrow exceptions to the statutes of limitations.” *Memorandum*, p. 3. *Bilanko* dealt with whether equitable tolling should apply to the one-year statute of limitations for challenging amendments to condominium declarations under RCW 64.34.264(2). *Bilanko*, 185 Wn.2d at 452. Finding no fraud on the part of the condominium association, the Court determined that there were no grounds to extend the statute of limitations. *Id.* The Court’s holding was specific to *equitable* exceptions. *Id.* (emphasis added).

---

<sup>1</sup>See *Osborne v. Buckman*, 993 P.2d 409, 412-413 (Alaska 1999); *Zuckerman v. 234-6 W. 22 St. Corp.*, 645 N.Y.S.2d 967, 969-971 (1996); *Koyle v. Sand Canyon Corp.*, 2016 U.S. Dist. LEXIS 29616 (D. Utah Mr. 8, 2016); *Sittner v. Schriever*, 22 P.3d 784 (Utah 2001); *Citicorp Mortgage v. Hardy*, 834 Pp.2d 554, 556 (Utah 1992); *National Bank of Commerce Trust & Savings Ass’n v. Ham*, 592 N.W.2d 447, 256 Neb. 679 (Neb. 1999); *Panzella v. Hills Stores Co.*, 171 B.R. 22 (E.D. Pa. 1994); *Turner & Boisseau, Chtd. v. Lowrance*, 852 P.2d 517, 519 (Kan. 1993); *Trustmark Nat. Bank v. Pike Co. Nat. Bank*, 716 So.2d 618, 620 (Miss. 1998).

Here, the bankruptcy stay prohibited foreclosure. RCW 4.16.230 tolled the statute of limitations. Fraud, bad faith, deception and/or false assurances are not required for tolling to apply, as was the analysis in *Bilanko*. See *Finkelstein v. Sec. Props.*, 76 Wn.App. 733, 739, 888 P.2d 161, 167 (1995) (“The predicates for an equitable tolling of the statute of limitations are either bad faith, deception, or false assurances...”). The Court of Appeals’ decision does not conflict with *Bilanko* in any respect.

Similarly, *Edison Oyster Co. v. Pioneer Oyster Co.*, 22 Wn.2d 616, 157 P.2d 307 (1945),<sup>2</sup> does not involve a statutory prohibition or injunction barring suit. In *Edison*, the reviewed whether a nine-year delay in making a replevin claim (under a three-year statute of limitations for personal property), was time-barred. *Id.* at 625-26. Pacific Coast analogizes *Edison*, arguing that “laws preventing immediate resort to superior court are not disabilities that prevent” the statute of limitations from running. *Memorandum*, p. 5. In *Edison*, the “law preventing immediate resort to superior court” was the prerequisite to replevin, requiring first a demand for the subject property. *Edison*, 22 Wn.2d at 626.

The demand requirement for replevin is not a statutory prohibition or injunction such as the automatic stay in bankruptcy. The demand is a

---

<sup>2</sup> Pacific Coast also cites to *Bennett v. Thorne*, 36 Wash. 253, 78Pac. 936 (1904), *Douglas County v. Grant County*, 98 Wash. 355, 167 Pac. 928 (1917), and *Spokane County v. Prescott*, 19 Wash. 418, 53 Pac. 661 (1898), in its memorandum. These cases were distinguished in Deutsche Bank’s Answer to Merceri’s Petition for Review.

prerequisite, and is not equivalent to litigating to obtain a court decision terminating a bankruptcy stay. *Edison* has no bearing on the case at bar, and the Court of Appeals' decision does not conflict with this decision.

*Young v. Estate of Snell*, 134 Wn.2d 267, 948 P.2d 1291 (1997), cited by Pacific Coast for the policy that litigating "stale claims" is undesirable, is also inapplicable because it does not involve a statutory prohibition or injunction, or RCW 4.16.230. Instead, *Young* concerned the interplay between RCW 4.16.080(2), the time limitation for personal injury claims, and RCW 11.40.011, limitations on claims against an estate. There was no issue of tolling, equitable or statutory. This case does not conflict with the Court of Appeals' decision.

*Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 733 P.2d 530 (1987), is cited by Pacific Coast for the premise that a party must exercise diligence in pursuing a legal claim. *Memorandum*, p. 6. *Reichelt*, like the cases *supra*, is irrelevant to the case at bar. *Reichelt* involved the application of the discovery rule in a statute of limitations analysis, and not a statutory prohibition/injunction. *Reichelt*, 107 Wn.2d at 769. The Court held that in order for the discovery rule to apply, there must be diligence on the party asserting it.

Here, RCW 4.16.230 is unconditional, and diligence was not required. As the Court of Appeals noted, "RCW 4.16.230 includes no such

requirement [of due diligence], and we are not at liberty to ‘add words where the legislature has chosen not to include them....’”. *Merceri*, 2 Wn.App.2d at 153-154 (citing *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010), and *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003)). Deutsche was prohibited from bringing its claims under federal law while *Merceri* enjoyed the protections of the bankruptcy stay, and RCW 4.16.230 tolled the statute of limitations.

***B. The Court of Appeals’ decision does not present an issue of Public Importance because whether or not the statute of limitations was tolled was in Merceri’s control.***

Pacific Coast contends that tolling under RCW 4.16.230 during the automatic stay would create “indefinite periods of limitation...” and contradict the policy of not exposing debtors to a “litany of ills” that the statute of limitations prevents. *Memorandum*, p. 7. Pacific Coast cites to *Walcker v. Benson & McLaughlin*, 79 Wn.App. 739, 904 P.2d 1176 (1995), wherein Division 3 rejected the contention that a grantee had an unlimited amount of time in which to foreclose a deed of trust. Like the other cases cited by Pacific Coast, *Walcker* has no bearing on this case. There was no statutory prohibition or injunction at issue in *Walcker* and the issue of tolling was not addressed or considered.

Pacific Coast also cites to *Aslanidis v. United States Lines*, 7 F.3d 1067 (2<sup>nd</sup> Cir., 1993), arguing that Deutsche knew it had a claim against Merceri and had ample time to enforce it, regardless of the time period of Merceri's bankruptcy. *Memorandum*, pp. 8-9. *Aslanidis*, however, concerned the statute of limitations for maritime claims under federal law. There was no relevant statute that tolled the statute of limitations during the stay, as RCW 4.16.230 did not apply. *Aslanidis* is irrelevant.

More importantly, any such "litany of ills" that Pacific Coast argues are the result of the Court of Appeals' decision are created and controlled by the debtor. Pacific Coast argues that applying RCW 4.16.230 to toll the statute of limitations will encourage creditors to "sit on their rights." *Memorandum*, p. 8. In bankruptcy, however, the debtor can request that the court lift the automatic stay. *See* 11 U.S.C. §362(d); generally, *In re Osborne*, 2001 Bankr. LEXIS 2314 at \*1-2 (Ga. S. Bnkry. Ct., Mar. 14, 2001 (Debtor requested that automatic stay be lifted to have dispute heard in state court). Merceri did just that in 2012, and thereby avoided any "litany of ills" that could result from further delay.<sup>3</sup> CP 125.

Finally, Pacific Coast's contention that the Court of Appeals' decision led to two different statutes of limitations for two different

---

<sup>3</sup> Contrary to Pacific Coast's assertion that Deutsche waited three years and six months after the stay terminated to foreclose, Deutsche commenced foreclosure again in January 2014, at least seven months before the statute could have run *without* tolling. CP 213-219.

owners of the property—one for the owner who filed bankruptcy and one for the owner who did not—is inaccurate, and the problem non-existent. Foreclosure is an *in rem* remedy. Because it is exacted against property, *any* owner of the property filing for bankruptcy will result in a statutory prohibition against foreclosure. The creditor could seek recovery against the debtor who did *not* file bankruptcy, but the creditor is prohibited from seeking recovery from the *property*, when one or more of its owners is in bankruptcy. See *Aurora Loan Servs. V. Amey (In re Amey)*, 314 B.R. 864, 867 (Ga. N. Bnkry. Ct. Sept. 23, 2004) (Bankruptcy filings by debtor, co-owner, or person acquiring property from debtor or co-owner will result in automatic stays.).

#### IV. CONCLUSION

For the foregoing reasons, Pacific Coast’s Memorandum fails to establish or support any criteria requiring review under RAP 13.4(b).

Respectfully submitted this 25<sup>th</sup> day of June, 2018.

ANGLIN FLEWELLING RASMUSSEN  
CAMPBELL & TRYTTEN LLP  
/s/ Rebecca R. Shrader  
Rebecca R. Shrader WSBA No. 43918  
701 Pike Street, Suite 1560  
Seattle, WA 98101  
206-264-5915  
rshrader@afrc.com  
*Attorneys for Respondent Deutsche Bank  
National Trust Company, as Trustee for holder of  
the BCAP LLC TRUST 2007-AA2*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 25<sup>th</sup> day of June, 2018, I caused to be delivered the foregoing DEUTSCHE BANK NATIONAL TRUST COMPANY, a national banking association, as trustee for holders of the BCAP LLC Trust 2007-AA2'S ANSWER TO AMICI CURIAE MEMORANDUM OF PACIFIC COAST CONSTRUCTION, L.L.C., DAVID M. FEDERER, GARY M. CLINE AND REBECCA M. CLINE SUPPORTING THE PETITION FOR REVIEW to the following parties in the manner indicated below:

Gordon A. Woodley  
10900 NE 4<sup>th</sup> St, Suite 2300  
Bellevue, WA 98004  
*Attorneys for Petitioner*

By United States Mail  
 By Legal Messenger  
 By CM/ECF e-Service  
 By Electronic Mail per  
agreement: Woodley@gmail.com

Susan L. Fullmer  
150 Nickerson St, Suite 311  
Seattle, WA 98109  
*Attorneys for Petitioner*

By United States Mail  
 By Legal Messenger  
 By CM/ECF e-Service  
 By Electronic Mail per  
agreement:susan@fullmerlaw.info

Joseph Jordan  
Lisa M. von Biela  
Northwest Justice Project  
401 2<sup>nd</sup> Ave. S., Suite 407  
Seattle, WA 98104  
*Attorneys for Amicus Curiae  
Northwest Justice Project*

By United States Mail  
 By Legal Messenger  
 By CM/ECF e-Service  
 By Electronic Mail



Stephen A. Burnham [ ] By United States Mail  
Barbara J. Kastama [ ] By Legal Messenger  
Campbell, Dille, Barnett & [X] By CM/ECF e-Service  
Smith, P.L.L.C. [ ] By Electronic Mail  
317 South Meridian  
Puyallup, WA 98371  
*Attorneys for Amici Curiae*  
*Pacific Coast Construction,*  
*David M. Federer, Gary M. and*  
*Rebecca M. Cline*

Tara Twomey, Esq. [ ] By United States Mail  
National Assoc. of Consumer [ ] By Legal Messenger  
Bankruptcy Attorneys and [X] By CM/ECF e-Service  
National Consumer Bankruptcy [ ] By Electronic Mail  
Rights Center  
150 The Alameda, Suite 200  
San Jose, CA 95126

Christina Latta Henry [ ] By United States Mail  
Henry & DeGraaf, PS [ ] By Legal Messenger  
150 Nickerson St., #311 [X] By CM/ECF e-Service  
Seattle, WA 98109 [ ] By Electronic Mail

Under the penalty of perjury of the laws of the State of  
Washington, the foregoing is true and correct.

Dated this 25<sup>th</sup> day of June, 2018, at Seattle, Washington.

/s/ Tamorah L. Burt  
Tamorah L. Burt, Legal Assistant

**AFRCT LLP**

**June 25, 2018 - 10:00 AM**

**Transmittal Information**

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 95654-5  
**Appellate Court Case Title:** Michelle Merceri v. Deutsche Bank, et al.  
**Superior Court Case Number:** 15-2-28838-5

**The following documents have been uploaded:**

- 956545\_Answer\_Reply\_20180625100008SC424252\_8256.pdf  
This File Contains:  
Answer/Reply - Other  
*The Original File Name was Answer to Pacific Coast Amicus .PDF*

**A copy of the uploaded files will be sent to:**

- amarshall@afrc.com
- bkastama@cdb-law.com
- chenry@HDM-legal.com
- josephj@nwjustice.org
- kblevins@afrc.com
- lisav@nwjustice.org
- lisavonbiela@live.com
- sfullmer7@gmail.com
- steveb@cdb-law.com
- susan@fullmerlaw.info
- ttwomey@me.com
- woodley@gmail.com

**Comments:**

---

Sender Name: Tammie Burt - Email: tburt@afrc.com

**Filing on Behalf of:** Rebecca R Shrader - Email: rshrader@afrc.com (Alternate Email: )

Address:  
701 Pike Street  
Suite 1560  
Seattle, WA, 98101  
Phone: (206) 492-2300

**Note: The Filing Id is 20180625100008SC424252**