No. 96257-0

SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON FEDERAL NATIONAL ASSOCIATION,

Respondent,

v.

PACIFIC COAST CONSTRUCTION, L.L.C., a Washington limited liability company; DAVID M. FERDERER; GARY M. CLINE and REBECCA J. CLINE, individually and the marital community comprised thereof,

Petitioners.

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Washington Federal National Association brought this action to judicially foreclose a deed of trust securing a commercial loan granted by Petitioners David Ferderer and Gary and Rebecca Cline. In an unpublished opinion, the Court of Appeals (Division II) held that Washington Federal's action was timely because RCW 4.16.230 operated to toll the six-year statute of limitations during the pendency of Ferderer's and the Clines's bankruptcy proceedings. In so holding, the Court followed the Court of Appeals (Division I)'s recently published opinion in *Merceri v. Deutsche Bank AG*, 2 Wn. App.2d 143 (2018), which decided the identical issue.

On July 11, 2018, this Court unanimously denied a petition for review in *Merceri*. 190 Wn.2d 1027, 421 P.3d 457 (2018). Nothing has changed, and Petitioners do not explain why this case satisfies the standard for review when *Merceri* did not—for good reason. Like *Merceri*, the opinion below does not involve an issue of public interest, nor does it conflict with any decision of this Court or the Court of Appeals. Indeed, the Court of Appeals' ***consistent*** opinions on this issue—which comport with the plain language of RCW 4.16.230, the Bankruptcy Code and case law from other jurisdictions—weigh strongly against review.

II. COUNTERSTATEMENT OF THE ISSUE

Does the Court of Appeals decision satisfy any consideration for review under RAP 13.4(b)? ***No.***

III. COUNTERSTATEMENT OF THE CASE

In 2008, Horizon Bank made a commercial loan to Pacific Coast Construction, LLC, a real estate development company. CP 97-98; CP 102-107. The loan was secured by a deed of trust that encumbered, among other parcels, the rental property subject to foreclosure in this case. CP 98-99; CP 109-112; CP 114-128. The deed of trust was granted by Federer and the Clines, who were Pacific Coast's managing principals. CP 111, 114. The deed of trust has priority over any other interest in the property. CP 99; CP 130-143. In 2010, Washington Federal acquired all rights to the loan, note and deed of trust from the FDIC. CP 99; CP 145-146.

Pacific Coast defaulted on the note, which matured on May 9, 2009. CP 98-99. On July 28, 2011, before Washington Federal commenced any foreclosure action on the deed of trust, Ferderer and the Clines each filed voluntary petitions for Chapter 7 bankruptcy. CP 60-63; CP 80-83. Washington Federal filed claims in both cases. CP 100. On April 2, 2013, Washington Federal received a distribution from the Cline bankruptcy, and on May 1, 2014, it received a distribution from the Ferderer bankruptcy—both of which were applied to the debt. *Id.*; CP 72,

92. The Clines's bankruptcy case was closed on April 3, 2013, and Ferderer's was closed on May 22, 2014. CP 58.

On October 26, 2016, Washington Federal filed this action to foreclose on the deed of trust. CP 1-37.[1] The statute of limitations to foreclose a deed of trust is six years. RCW 4.16.040; *4518 S. 256th, LLC v. Karen L. Gibbon, P.S.*, 195 Wn. App. 423, 434, 382 P.3d 1 (2016). Because this action accrued on May 9, 2009, ordinarily, the limitations period would have expired in May 2015—17 months before Washington Federal filed suit. But both Ferderer's and the Clines's bankruptcy cases lasted more than 17 months: 34 months for Ferderer; 21 months for the Clines. CP 58. Thus, Washington Federal's action was timely if the statute of limitations was tolled during the duration of the bankruptcy cases.

The trial court rejected Petitioners' statute of limitations defense, granted Washington Federal's motion for summary judgment, and entered a decree of foreclosure. CP 378-81. Petitioners appealed, and the Court of Appeals affirmed. Following the Court of Appeals' recent decision in

[1] Although the debt far exceeds the value of the property, Pacific Coast has been insolvent and defunct for many years and Washington Federal waived its right to collect a deficiency against it under RCW 6.23.020 and RCW 61.12.070. CP 4-5. And, because Ferderer and the Clines each obtained a discharge in bankruptcy, Washington Federal asserted no claims against them personally. *Id.* Washington Federal has sought to recover only from the property by judicial foreclosure.

Merceri, the Court below likewise held that RCW 4.16.230 tolled the six-year statute of limitations because Petitioners enjoyed an automatic stay against foreclosure during the pendency of their bankruptcies. The Court thereafter denied Petitioners' motion for reconsideration.

IV. ARGUMENT WHY THE PETITION SHOULD BE DENIED

The Petition gives lip service to RAP 13.4(b)'s criteria for review, hardly discusses the decision below, fails to quote the controlling statute, and, apparently, is premised on the theory that the Court of Appeals' straightforward application of RCW 4.16.230 (in this case and *Merceri*) undermines the statute of limitations. This Court already rejected that theory in denying review in *Merceri*, and Petitioners offer no reason to reconsider that decision now.[2] At bottom, like *Merceri*, the opinion below was entirely correct and thus does not adversely implicate any public interest, nor does it conflict with any Washington case law or policy.

A. There Is No Issue Involving A Substantial Public Interest. RCW 4.16.230 Tolled The Statute Of Limitations During The Pendency Of Petitioners' Bankruptcy Proceedings.

While Petitioners focus on the purpose of the statute of limitations, they ignore Washington's equally strong policy of tolling the statute to

[2] This Court didn't just reject the same or similar arguments, it rejected Petitioners' arguments. Petitioners filed an *amicus curiae* brief in *Merceri* supporting the petition for review, alleging (practically verbatim) the same supposed conflicts among Washington decisions.

achieve fairness. Our courts recognize the rule that if "a person is prevented from exercising his legal remedy by some positive rule of law, the time during which he is prevented from bringing suit is not to be counted against him in determining whether the statute of limitations has barred his right . . . ." *Seamans v. Walgren*, 82 Wn.2d 771, 775, 514 P.2d 166 (1973). So strong was the policy, that our legislature codified it:

> When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action.

RCW 4.16.230. Both here and in *Merceri*, the Court of Appeals correctly recognized that the automatic bankruptcy stay is a "statutory prohibition" that prevents commencement of a foreclosure action.

When Ferderer and the Clines filed for bankruptcy, it triggered the Bankruptcy Code's automatic stay provision. 11 U.S.C. § 362(a). This prevented Washington Federal from taking action against the property until both bankruptcies were closed, including any effort to foreclose on the deed of trust. *Id.*, § 362(a)(3) (stay applies to "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate"). Thus, Ferderer's and the Clines's bankruptcy cases plainly operated as an "injunction" and a federal "statutory prohibition" to stay accrual of the action within the meaning of

RCW 4.16.230. *See Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348, 354-55 (5th Cir. 2008) ("When a bankruptcy petition is filed, an automatic stay operates as a self-executing injunction.").

The Bankruptcy Code confirms that the automatic stay, coupled with RCW 4.16.230, tolls the statute of limitations for the entire duration of the stay. The Code provides in relevant part:

> … if applicable non-bankruptcy law … fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor … and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of –
>
> (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
>
> (2) 30 days after notice of the termination or expiration of the stay under section 362, 922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C. § 108(c). The reference to a "claim against the debtor" includes claims against the property of the debtor. *In re Hunters Run Ltd. P'ship*, 875 F.2d 1425, 1427 (9th Cir. 1989) (citing 11 U.S.C. § 102). "In some jurisdictions state law may dictate suspension of a statute of limitations when a bankruptcy … has stayed the initiation of such action. Such suspensions would presumably be included within the terms of 108(c), adding the entire duration of the automatic stay to the applicable time period." 1 Collier on Bankruptcy § 108.04, p. 108-14 (15th ed. 1993).

By its terms, RCW 4.16.230 is "applicable non-bankruptcy law" that suspends the statute of limitations. In states with statutes identical to RCW 4.16.230, courts uniformly hold that the statute of limitations is tolled by the Bankruptcy Code's automatic stay. *Timm v. Dewsnup*, 86 P.3d 699, 702 (Utah 2003) ("operation of these complementary statutes means that while the Dewsnups were in bankruptcy proceedings the lenders were barred from foreclosing on the trust deed property, and the statute of limitations on their foreclosure action was stayed."); *see also Osborne v. Buckman*, 993 P.2d 409, 412 (Alaska 1999); *Turner and Boisseau Chartered v. Lowrance*, 852 P.2d 517, 518-20 (Kan. App. 1993); *Norwest Bank Iowa, N.A. v. Corey*, 2000 WL 526681, *3 (Iowa App. Apr. 28, 2000); *Panzella v. Hills Stores Co.*, 171 B.R. 22, 24-25 (E.D. Pa. 1994). Indeed, in *Hunters Run*, the Ninth Circuit recognized that it was likely that RCW 4.16.230 tolled the limitations period "in spite of old Washington law based on the old bankruptcy law." 875 F.2d at 1429 n.5.

Petitioners argue that RCW 4.16.230 does not apply because Washington Federal could have sought relief from the automatic stay in the bankruptcy court. 11 U.S.C. § 362(d). But, contrary to Petitioners' suggestion, courts cannot ignore a "literal reading of a tolling statute." Petition at 11; *HomeStreet, Inc. v. Dep't of Rev.*, 166 Wn.2d 444, 451-52,

210 P.3d 297 (2009) (courts must give statutes their plain and ordinary meaning). As *Merceri* correctly recognized:

> If a creditor must move for relief in order to bring an action, the creditor is otherwise prohibited from bringing the action. And, contrary to Merceri's position that a statutory prohibition must be permanent and complete [to invoke RCW 4.16.230], the tolling statute expressly applies when an action is "stayed."

Merceri, 2 Wn. App.2d at 151. In short, "the fact that [a party] could have sought relief from the stay has no bearing on whether the stay is a statutory prohibition." Op. at 7-8 (quoting *Merceri*, 2 Wn. App.2d at 153).

Petitioners identify no substantial public interest weighing against application of RCW 4.16.230. On the contrary, tolling the limitations period lessens "the potential for abusive filings of bankruptcy proceedings to defeat legitimate deficiency actions on statute of limitations grounds." *Citicorp Mortg., Inc. v. Hardy*, 834 P.2d 554, 556 (Utah 1992). On the other hand, Petitioners' rule would force creditors to seek relief from the bankruptcy court, thereby denying honest debtors the benefit of the stay. *Merceri*, 2 Wn. App.2d at 148 (stay serves "first, to give the debtor a breathing spell from his creditors; and second, to prevent one creditor from rushing to enforce its lien" (internal quotes and citation omitted)). In short, RCW 4.16.230 and the automatic stay work perfectly together to protect the interests of both creditors and debtors.

Finally, there is no merit to Petitioners' suggestion that application of RCW 4.16.230 leads to unfair results where, as here, property is jointly owned by different debtors. Just as Washington Federal did in this case, to ensure that it does not forfeit any interest in the property, once the stay is lifted as to both debtors, the creditor will invariably bring its action to foreclose before the limitations period expires as to either debtor. In the event the stay is lifted only as to one debtor, and the creditor must bring its action to avoid the limitations period, the other debtor's interest in the property remains protected by the automatic stay; the creditor cannot simply force "partition and sale" without relief from the bankruptcy court. Under any scenario, the creditor's interest is protected by RCW 4.16.230 and the debtor's interest is protected by the automatic stay.

B. There Is No Conflict In The Decisions Of The Court of Appeals Or This Court; Every Court To Decide The Issue Agrees That The Bankruptcy Automatic Stay Tolls The Limitations Period.

Petitioners cannot find conflict between the Court of Appeals' decision in this case and any prior decision by a Washington court (or, as noted above, any decision from any jurisdiction with a statute similar to RCW 4.16.230). Indeed, other than *Merceri*, which the Court below followed, no prior Washington decision has addressed RCW 4.16.230 in

the context of a bankruptcy automatic stay.[3] By definition, then, not only is there no conflict, all Washington authority on this issue is consistent.[4] Petitioners argue that *Merceri* and the decision below conflict with principles articulated in various statute of limitations cases, but these cases are inapposite and the principles they address are irrelevant in this context.

None of the cases cited by Petitioners address whether the statute of limitations should be tolled due to a statutory prohibition or injunction, much less an automatic stay in bankruptcy. In *Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969), did not address tolling, but rather application of the "discovery rule" to the accrual of a malpractice claim based on foreign

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[3] Although not squarely addressing the issue, other Washington cases have suggested in dicta that the stay tolls the limitations period. *See Kiehn v. Nelsen's Tire Co.*, 45 Wn. App. 291, 297, 724 P.2d 434 (1986) ("if the action could have been commenced against Nelsen's Tire by effecting service of process within 90 days of filing, as provided by RCW 4.16.170, the stay resulting from a bankruptcy proceeding occurring within that period would indeed have tolled the running of the statute of limitations"). *See also Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 684-85, 10 P.3d 371 (2000) (approving *Kiehn*).

[4] In *McDermott v. Tolt Land Co.*, 101 Wash. 114, 172 Pac. 207 (1918), this Court held that bankruptcy did not toll the limitations period on a foreclosure action. Petitioners do not argue that the Court of Appeals' decision conflicts with *McDermott* for good reason. As *Merceri* correctly recognized, 2 Wn. App.2d at 152-53, when *McDermott* was decided in 1918, filing a petition in bankruptcy did not result in an automatic stay. *McDermott*, 101 Wash. at 119 ("these appellants might have brought their action to foreclose … notwithstanding the bankruptcy proceeding."). That changed in 1978, with the enactment of the Bankruptcy Code and its automatic stay provision. *See* Pub. L. No. 95-598, 92 Stat. 2549; *In re Calstar, Inc.*, 159 B.R. 247, 257 & n.28 (Bankr. D.Minn. 1993).

substances left in surgical wounds. Indeed, the Court recognized that sound policy requires "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" for an inability to bring the action earlier. 75 Wn.2d at 666-67. The same can be said here.

Similarly, *Spokane County v. Prescott*, 19 Wash. 418, 53 Pac. 661 (1898), did not involve tolling, but rather expiration, of the statute of limitations. There, the Court determined that a 3-year statute of limitations applied to an action to recover from a bond. A statute required the plaintiff to seek leave of court to bring the action. *Id.* at 424. The plaintiff did not seek leave until after the 3-year period expired. As with any plaintiff who waits until after the limitations period expires to commence an action, the Court held—unremarkably—that a plaintiff "cannot enlarge the statute of limitations by its own delinquency." *Id.* at 425. Here, there was no statute requiring Washington Federal to seek relief from the bankruptcy court, and no dispute that it brought this action within the limitations period.

Nor does the Court of Appeals' decision conflict with *Summerrise v. Stephens*, 75 Wn.2d 808, 454 P.2d 224 (1969). RCW 4.16.180 tolls the statute of limitations when the defendant is "out of the state." This Court found that the legislature intended the statute, which had been on the books since Territorial days, to toll the limitations period when the

defendant's absence prevented the plaintiff from effectuating service. *Id.* at 811. In 1959, Washington enacted a long-arm statute, RCW 4.28.185, that made it possible to serve out-of-state defendants and subject them to personal jurisdiction. Construing the statutes together, this Court held that a plaintiff could not avail itself of the tolling statute where the defendant was amenable to service via the long-arm statute. 75 Wn.2d at 809. In effect, the long-arm statute superseded the tolling statute in such instances. *Id.* at 815 ("the long-arm statute is a 'pro tanto repeal' of the tolling statute," quoting *Bolduc v. Richards*, 101 N.H. 303, 142 A.2d 156 (1958)).

Here, unlike *Summerrise*, new legislation did not conflict with the purpose of an antiquated tolling statute, but rather provided another instance where the legislature intended the statute to apply. The Bankruptcy Code's automatic stay provision was enacted decades after RCW 4.16.230 (*see* footnote 4), and, for the reasons discussed above, constituted a new "statutory prohibition" on the "commencement of an action." In other words, the automatic stay does not "pro tanto repeal" the purpose of RCW 4.16.230; it triggers it. Indeed, Petitioners do not and cannot explain how applying RCW 4.16.230 in the bankruptcy context frustrates—rather than furthers—the legislature's intent. It doesn't.

Finally, it is difficult to understand Petitioners' argument that the decision conflicts with *Walcker v. Benson*, 79 Wn. App. 739, 904 P.2d

1176 (1995). In *Walcker*, the court rejected the creditor's argument that the right to nonjudicially foreclose on a deed of trust should not be subject to any statute of limitation, and held that nonjudicial foreclosure must be initiated within the same six-year limitations period as an action to foreclose a mortgage. *Id.* at 743-46. *Walcker* did not address bankruptcy, statutory prohibitions, or tolling. Here, Washington Federal never sought an unlimited right to foreclose, nor did it fail to bring its foreclosure action within the six-year limitations period. Nor was that period tolled by virtue of Washington Federal's actions. It was Petitioners' decision to file bankruptcy, and the operation of the automatic stay, that forced the delay.

V. CONCLUSION

The petition for review should be denied.

RESPECTFULLY SUBMITTED this 17th day of October, 2018.

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CERTIFICATE OF SERVICE

I, Kathryn Savaria, hereby certify under penalty of perjury of the laws of the State of Washington that on October 17, 2018, I caused to be served a copy of the attached document to the following person(s) in the manner indicated below at the following address(es):

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