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Supreme Court No. 98932-0
Court of Appeals No. 80654-8-I

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

SANDRA M. MERCERI, a single woman,

Appellant,

v.

BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK,
as trustee, on behalf of the holders of the Alternative Loan Trust 2006-
OA19, Mortgage Pass Through Certificate Series 2006-OA19,

Respondent.

**RESPONDENT THE BANK OF NEW YORK MELLON'S
RESPONSE TO MOTION TO CONSOLIDATE**

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I. INTRODUCTION

Merceri's attempt to bolster an already improbable petition for review by adding new legal issues and then requesting consolidation *within her case only* lacks the necessary grounds for consolidation under RAP 3.3 and should be denied. As Merceri argues, the judgment at issue was already appealed through to conclusion. The court then entered the judgment with fees as a ministerial act. It cannot be appealed a second time. The current appeal does not deal with that judgment—it cannot, already have been appealed—but a motion to vacate it on allegedly new grounds. Merceri should not be permitted to jump over the necessary appellate procedural steps to have this court consider her "direct review" of a fees judgment that she already waived and now refuses to follow or even stay enforcement.

II. RELIEF REQUESTED

The Court should deny any relief to consolidate two wholly different legal issues on appeal because both have no potential possibility for this court to even entertain review. And if the Court permits consolidation of a direct appeal of a trial court's entry of a form judgment summary (a ministerial act permitted by its authority), it would wholly eviscerate the necessary appellate requirements needed for Merceri even to commence a petition for review (e.g. a review first by the Court of Appeals or some *actual circumstance in this case* which renders it necessary for expedited review to this court).

III. STATEMENT OF FACTS

In August 2018, the Court of Appeals unanimously reversed and remanded this case, ordering the trial court to grant judgment in favor of The Bank of New York Mellon (hereinafter "BONY") on its Motion for Summary Judgment. (*Merceri v. Bank of N.Y. Mellon*, 4 Wn. App. 2d 755, 763 (2018).) Merceri petitioned the Washington State Supreme Court for review, which was denied. *Merceri v. Bank of N.Y. Mellon*, 2018 Wash. LEXIS 879, 192 Wn.2d 1008, 430 P.3d 244, 2018 WL 6241557 (2018).

Despite the Court of Appeals' order and the Supreme Court's denial of review, Merceri proceeded to initiate another round of motions before the trial court, seeking leave to amend a complaint and stay the order from the Court of Appeals—*after* the Court of Appeals ordered the trial court to end this case. The trial court denied Merceri's post-judgment motions and entered judgment in favor of Defendants. (CP 194.) Pursuant to the order entering judgment in favor of BONY, Defendants sought and obtained reasonable fees and costs from the trial court in the amount of \$86,386.08, which necessarily includes interest accrued since entry on April 26, 2019. (CP 205.) Merceri did not appeal the fees awarded to BONY as "prevailing party" on summary judgment within 30 days of that decision in April 2019. However, the clerk never entered the fee award onto the docket, so did so just recently upon BONY's request. That act—

confirming that which was already ordered and decided, is not appealable nor on appeal.

A. Second Appellate Proceedings

Even after judgment was entered, Merceri continued her litigation battle to see if the trial court would reverse judgment based upon "new" theories. (CP 255.) Instead, the trial court denied post-judgment relief on her motion to set aside the judgment, and the Court of Appeals affirmed the trial court ruling therefrom. (*Id.*)

That was appealed, and the Court of Appeal affirmed in full in an unpublished decision. Merceri sought review by this court. And, in the meantime, Merceri fails to satisfy the fees judgment or reach any definitive resolution of the judgment order pending her appeal and the mandate from this court to fully conclude this action. Indeed, her counsel has repeatedly threatened to attempt to frustrate BONY's win with years of trial court proceedings and appeal.¹

B. Post-Judgment Supplemental Proceedings

In August 2020, BONY sought to enforce the attorneys' fees judgment. Merceri claimed that the attorneys' fees did not exist. So, BONY moved for supplemental proceedings. However, the Chief Civil Judge denied BONY's request for supplemental proceedings on the basis

¹ Although unnecessary to this court's review of the motion for consolidation, BONY submitted such email records at the hearing on entry of the form judgment summary.

of the absence of the form judgment summary pursuant to RCW 4.64.030. (The Court also further denied all of the relief, including CR 11 sanctions, requested by Merceri.)

Thereafter, BONY requested approval of the form judgment summary but Merceri's counsel objected to the trial court's entry of such. The trial court set a hearing date to decide the issue and BONY hereby submitted the form judgment summary (RCW 4.64.030) confirming the fees previously awarded and concluding the ministerial act necessary to enforce the fees judgment via supplemental proceeding.

IV. LEGAL ARGUMENT

Appellant Sandra Merceri will try every angle to continue to litigate this case in hopes that some court will eventually overturn the mandate/judgment in favor of BONY. *But that judgment was appealed to the highest level and Merceri lost.* This court should not permit her to sidestep appellate processes by consolidating for three basic reasons. First, the Court cannot consolidate on the basis of two legal issues being decided *in the same case*. Second, this court does not even have jurisdiction to decide either a petition for review, or even a motion for discretionary review, of a trial court's post-judgment fees award issued over a year ago and subsequently waived via failure to timely appeal. Finally, Merceri's attempt to bootstrap her untimely "appeal" of the fees

award along with her petition for review is a subterfuge to bolster the alleged inequity without any basis in facts or law.²

A. This Court Does Not Have To Consolidate Two Wholly Separate Legal and Procedural Issues Merely Because They Are In the Same Case.

Merceri misstates the procedural circumstances of this case to make this consolidation request through RAP 3.3. Instead of acknowledging that all of these circumstances have occurred *in the same case*, she contends that there are two separate cases. However, she cites to no case law or statutory authority for this proposition because it is procedurally ludicrous to have two separate cases with the same parties, same underlying claim (RCW 7.28.300) and same judgment entered in favor of BONY in 2019.

Because there are not actually *two cases* in existence or *two cases* "tried together" necessitating consolidation under RAP 3.3, the Court should deny the consolidation motion.

B. This Court Cannot Review Entry of Judgment or Fees Awarded Because Such Underlying Issues Were Never Timely Appealed.

With respect to the underlying attorneys' fees decision, Merceri *never* sought appellate review of the trial court's award of attorneys' fees as necessitated by RAP 2.2 within 30 days of that order in April 2019.

² This court will note Merceri's use of colorful language referring to herself as an "octogenarian" and "former homeowner," which have absolutely *zero* bearing on the procedural issues alleged and are just attempts to raise frivolous, improper motive type contentions.

Thus, as a matter of law, any appeal of the trial court's timely and appropriate decision to award attorneys' fees to BONY as the "prevailing party" has been waived and Merceri cannot use this procedure to resurrect the underlying judgment.

Here, any related notice of appeal or *direct petition for review* of the fees awarded must be summarily denied because BONY was properly adjudged prevailing party after the mandate issued. RAP 12.7. And any appeal of the underlying fees awarded is untimely and should be (or will be) summarily denied under RAP 2.2 and RAP 5.2(a). Thus, as a basic matter of procedural process, Merceri cannot consolidate a waived, tardy appeal, or continue any review of her pending petition with such legal issues.

Additionally, the notice of appeal of a post-judgment order under RAP 2.2(a)(13) ordinarily will *not* call up the underlying final judgment or the orders and the rulings preceding judgment or the orders and the rulings preceding the final judgment. *Carrara, LLC v. Ron & E Enters., Inc.*, 137 Wn. App. 822, 826 (2007); *Griffin v. Draper*, 32 Wn. App. 611, 613-14, *review denied*, 98 Wn.2d 1004 (1982); *In re Marriage of Osborne*, 24 Wn. App. 862, 865 (1979).

Finally, Merceri has not even alleged why or how the trial court's ministerial entry of the form judgment summary is connected to her current appeal pursuant to Civil Rule 60 denial. Pursuant to RAP 13.4(b), the Supreme Court will accept review of a Court of Appeals' decision

terminating review only if that decision fits within one of the four criteria set forth in RAP 13.4(b), none of which Merceri actually alleges in her motion or the accompanying notice of appeal on the fees awarded.

Based on the absence of this court's authority to adjudge a fees judgment entered well beyond the 30-day deadline to appeal, there is no basis to consolidate two issues within the same case.

C. Merceri's Arguments Herein Are a Maneuver to Bolster Her Meritless Procedural Petition for Review.

Merceri has not offered a single reason, factual or legal, that renders *direct review* of the form judgment summary. This attempt to circumvent appellate review with the Court of Appeals in the first instance before any petition to this court is a transparent attempt to bootstrap legal issue and strengthen a very weak petition for review on a procedural circumstance only bearing on this post-judgment scenario.³ The pending petition for review, which is based on a trial court post-judgment procedural vehicle (CR 60), was correctly determined and for which no review with the Supreme Court is required or necessitate under the given facts and law of this case.⁴

³ The amicus motion and related support for the petition for review highlights the fact that the circumstances of this case (entry of summary judgment on remand) are actually different than those by Merceri's original petition for review. In fact, the amicus seems to focus on the importance to circumstances under a "default judgment" process, which obviously is not the procedural stance of this case.

⁴ "CR 60(e)(1) serves a gate-keeping function by requiring the moving party to make a prima facie showing that the motion has merit. If the court determines that the moving party has made this showing, CR 60(e)(2) then

First, Merceri's arguments regarding an alleged "deficiency judgment" do not raise any necessary legal issues for direct review by the Washington Supreme Court. Tellingly, she offers no direct reason at all that any of the factors identified in RAP 13.4 could be met or are even present based upon the trial court's judgment summary. And this obvious attempt to bootstrap substantive arguments to procedural arguments is misguided because she knows that there is a statutory difference between a *nonjudicial* foreclosure and *judicial* foreclosure. RCW 61.24.100.⁵ In this case, BONY proceeded via a *nonjudicial* foreclosure and there was nothing stopping it from pursuing the fees judgment properly awarded before the trustee's sale occurred and without any admissible evidence in the trustee's sale notices that actually incorporates a judgment that Merceri claims does not even exist. And, separately, there was no court order restraining BONY from enforcing the default in the mortgage loan upon

requires it to enter an order fixing the time and place for a hearing and directing the non-moving party to appear and show cause why relief should be granted. If the court determines that the moving party has failed to make this showing, there is no reason to put the judgment holder through the needless expense of responding. Were this not the case, the moving party could simply move to vacate the judgment without first meeting CR 60(e)(1)'s requirements." (*Merceri II*, Unpublished Opinion dated June 15, 2020, p. 6.)

⁵ RCW 61.24.100: "(1) Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor *after a trustee's sale* under that deed of trust."

the mandate of the original appeal, especially when such efforts to restrain the sale were denied altogether by the trial court.

Once again, Merceri's claims about any "deficiency" judgment are not only factually incorrect but should never form the basis to consolidate two different appellate issues (legal versus procedural) within the same case.

V. CONCLUSION

Merceri's litigation strategy seems to be that if she somehow keeps the wheels of justice slowly spinning they will eventually spin the judgment in her favor. But the judgment itself is final, appealed, and not subject to further review. Her post-judgment attempts do not change that reality. Well, the wheels have fallen way off the track with this most recent petition for review and accompanying consolidation motion. Merceri cannot bypass the necessary procedural hoops merely because she already has a pending petition for review in this case. She cites no case or other legal authority necessitating such consolidation of two wholly different legal issues *in the same case*. And it would be unreasonable for this court to permit her to sidestep the proper appellate review because she appealed the fees awarded long ago.

BONY respectfully requests that the Court deny the motion to consolidate two legal issues in the same.

RESPECTFULLY SUBMITTED: December 4, 2020.

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