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74016-4

No. 74016-4-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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KEVIN E. EDMUNDSON and MECHE D. EDMUNDSON,  
husband and wife,

Respondents,

v.

CARRINGTON MORTGAGE SERVICING, LLC,

Appellant.

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**APPELLANTS' OPENING BRIEF**

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## Appendixes

**Appendix A:** Verbatim Report of Proceedings Transcript: Cross Motions  
for Summary Judgment before Hon. Laura Middaugh, August 7, 2015

**Appendix B:** . *Silvers v. U.S. Bank Nat. Ass'n*, 2015 WL 5024173, at \*4  
(W.D.Wash., 2015)

## I. INTRODUCTION

This case arises from Appellant Carrington Mortgage Servicing, LLC (hereinafter “Carrington”) efforts to foreclose on a deed of trust securing the repayment of a debt evidenced by a promissory note held by respondents Kevin and Meche Edmundson (collectively “the Edmundsons”), who defaulted on their loan. The Edmundsons filed a quiet title action based solely on their claim that Carrington’s ability to foreclose on its lien expired six years from when they defaulted on the loan.

Carrington submitted substantial evidence that the statute had not run based on (1) installment contract application; (2) applicable tolling; and (3) waiver. The trial court agreed that the statute of limitations had not run, yet nevertheless granted summary judgment in favor of the Edmundsons. (*See* Verbatim Report of Proceedings (“VROP”, pp. 17, ¶ 19-25; pp. 25, ¶ 24-25, pp.26, ¶ 1-5)(*See* App. A). The trial court seemingly based its decision on its belief that a Chapter 13 bankruptcy discharge voided the Deed of Trust. (VROP, pp. 24, ¶ 9-16 pp. 25, ¶ 2-9). Shortly thereafter, Carrington filed a Motion for Reconsideration, which the trial court also denied. CP 296; CP 354. Consequently, Carrington appeals the trial court’s decision to grant summary judgment in favor of Edmundsons’ Summary judgment.

The trial court impliedly denied summary judgment to Carrington based on its misinterpretation of the effect of a Chapter 13 discharge.

Specifically, the trial court seemed to believe that the right to enforce the Deed of Trust lapsed after the Note was discharged in the bankruptcy. (VROP, pp. 24, ¶ 9-16 pp. 25, ¶ 2-9, pp. 26, 6-11). . There is, however, ample and well-established legal authority to the contrary.

Moreover, the Edmundsons did not plead or make this argument at any point. Rather, they only argued that the statute of limitations ran because the statute of limitations began running in November 2008, when the Edmundsons defaulted on their loan, and the trustee recorded the Notice of Trustee's Sale on January 21, 2015, over three months too late. CP 5. It was improper for the trial court to grant summary judgment in favor of the Edmundsons when the trial court agreed that the statute of limitations had not run, yet ruled the debt was no longer enforceable because of the bankruptcy. This Court should reverse the grant of summary judgment to the Edmundsons and rule in favor of Carrington. The Court should also award Carrington its attorney fees and costs incurred on appeal.

## **II. ASSIGNMENT OF ERROR**

- (1) The trial court erred by denying Carrington's motion for summary judgment and granting the Edmundson's motion for summary judgment because as a matter of law the statute of limitations had not expired, and Carrington was entitled to foreclose on subject property.

(2) The trial court erred by denying Carrington's motion for reconsideration.

### **III. ISSUES RELATED TO THE ASSIGNMENT OF ERROR**

- i.** Did the trial court erroneously grant summary judgment on the Edmundsons' quiet title claim where it failed to show that the statute of limitations had expired for foreclosing non-judicially on subject property, and Carrington raised a genuine issue of material fact that the statute of limitations had not expired and the trial court ostensibly agreed with this position?
- ii.** Did the trial court erroneously deny Carrington's motion for reconsideration wherein it issued conflicting findings as to the enforceability of a Deed of Trust after a bankruptcy discharge?<sup>1</sup>

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

#### ***1. Plaintiffs' Loan and Default***

On July 12, 2007, Plaintiffs entered into a mortgage agreement ("Note") in the amount of \$313,381.00 with Countrywide Home Loans, Inc.<sup>2</sup> to purchase the property located at 13232 Military Rd S, Tukwila, WA 98168 (the "Subject Property"). CP 125-126. The Note provided for monthly payments in the

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<sup>1</sup> Trial court found in ¶ 2 that Deed of Trust is not extinguished when debtor is personally discharged yet in ¶ 5 found that Carrington lost its right to foreclose as of the date of the Edmundsons' discharge from bankruptcy on December 13, 2013.

<sup>2</sup> Bank of America, N.A. is successor by merger to BAC Home Loans Servicing LP formerly known as Countywide Home Loans; see also Compl. ¶ 2.3.

amount of \$1,980.78 due on the first day of every month beginning on September 1, 2007.<sup>3</sup> CP 123-125. The Note matures on August 1, 2037. CP 125. The Note was endorsed in blank from Countrywide. CP 123.

The Note is secured by a Deed of Trust, which was recorded on July 19, 2007 under King County recording number 20070719001034 and granted the note holder the power to foreclose in the event of Plaintiffs' default. CP 3.

Edmundsons made payments on their loan through October 2008. CP 3. The payments due for November 1, 2008 and all further payment remain owing. CP 3. Edmundsons do not dispute their default. CP 3.

## ***2. Edmundsons' Bankruptcy Filings***

On June 12, 2009, Edmundsons filed for Chapter 13 Voluntary Petition in United States Bankruptcy Court for the Western District of Washington Case Number 09-15795-MLB. CP 3. Edmundsons amended their plan on August 17, 2009. CP 3. Both in their original and amended plan, Edmundsons list Bank of America as a secured creditor and surrender the subject property under Paragraph 4 of the Local Bankruptcy Form 13-3. CP 3-4. Paragraph 4 provides as follows:

“The secured property described below will be surrendered to the following named creditors on confirmation. Upon conformation, all creditors to which the debtor is surrendering property pursuant to this paragraph are

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<sup>3</sup> Declaration of Carrington, Ex. A.

granted relief from the automatic stay to enforce their security interest against the property including taking possession and sale.”

Edmundsons obtained a discharge on December 31, 2013. CP 4.

### **3. 2014 Non-Judicial Foreclosure**

On May 9, 2014, Carrington, as servicer and attorney-in-fact, for Bank of America, N.A. appointed MTC Financial, Inc. dba Trustee Corps. (“Trustee Corps.”) as successor trustee. CP RJN, Ex. A. The Appointment of Successor Trustee was recorded on May 23, 2014 under King County recording number 2014052300338. CP 127-129. On January 21, 2015, Trustee Corps recorded a Notice of Trustee’s Sale under King County recording number 20150121000920. CP 128; CP 131-134. The trustee’s sale was set for May 22, 2015. CP 128; CP 131. By agreement of the parties, the foreclosure sale has been postponed to August 28, 2015. Trustee Corps is no longer the trustee. North Cascade Trustee Services Inc. was substituted in as trustee as of May 27, 2015. CP 128; CP135-136.

### **4. Procedural Posture**

Despite defaulting on their loan and subsequently surrendering the subject property in bankruptcy, Edmundsons filed a quiet title action to obtain the property free and clear based on a statute of limitations theory. The parties agreed to stay the sale of subject property pending outcome of the litigation.

Carrington moved for summary judgment on June 29, 2015. CP 109. In its motion for summary judgment, Carrington argued that no genuine issue of material fact existed in the quiet title claim, and because the statute of limitations had not expired, it was therefore entitled as a matter of law to foreclose on subject property. CP 115. The Edmundsons filed a motion for summary judgment on June 29, 2015. CP 191. The Edmundsons did not dispute the facts but argued in response that the statute of limitations begins to run from the first default. CP 195-197. The parties also briefed and argued the effect of the Chapter 13 bankruptcy, tolling of the statute of limitations, and the triggering event for the initiation of a when a non-judicial foreclosure. CP 197-200.

The trial court heard the cross summary judgment motions on August 7, 2015. (*See* VROP pp.1) The issue before the court on both motions was whether the statute of limitations had expired on Carrington's right to foreclose non-judicially on the subject property. The trial court denied Carrington's motion for summary judgment and granted summary judgment to the Edmundsons. CP 293-294. The trial court also subsequently denied the Edmundsons' motion for reconsideration. CP 367. Carrington timely appealed. CP 358-359.

## V. ARGUMENT

### A. Summary of the Argument

The trial court summarily determined Edmundsons' quiet title claim based on an erroneous interpretation of black letter bankruptcy law. The trial court declined to allow written findings, but the transcript from the proceeding clearly demonstrate that the court's reasoning and conclusion was in error. The evidence put forth by Carrington, however, demonstrated that the statute of limitations had not run and that a bankruptcy discharge only eliminated personal liability as opposed to the existence of the debt and ability to collect on the debt by foreclosing on the Deed of Trust. This Court should reverse the trial court's summary judgment order and grant judgment in favor of Carrington and allow it to proceed with foreclose. As the prevailing party on appeal, Carrington is entitled to their reasonable attorney fees and costs.

### B. Standard of Review

In reviewing a grant of summary judgment, this Court engages in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party bears the initial burden of showing the absence of an issue of material fact. See *Young v. Key Pharm., Inc.*, 11 Wn.2d 216, 225, 770 P. 2d 182 (1989). A material fact is one upon

which the outcome of the litigation depends. *Graham v. Concord Constr., Inc.*, 100 Wn. App. 851, 854 (2000).

Summary judgment is reviewed de novo. *Vallandigham v. Clover Park Sch. Dist. No.*, 400. 154 Wn.2d 16, 26, 109 P.3d 805 (2005). This Court will consider the same evidence that the trial court considered on summary judgment. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Yet, this Court may affirm the trial court ruling on any ground supported by the record, "even if the trial court did not consider the argument." *King Cnty. v. Seawest Inv. Assocs., LLC*, 141 Wn. App. 304, 310, 170 P. 3d 53 ( 2007) citing *LaMon v. Butler*, 112 Wn.2d 193, 200 -01, 770 P. 2d 1027 ( 1989).

Contract interpretation is a question of law when the interpretation does not depend upon the use of extrinsic evidence. *Washington State Major League Baseball Stadium Pub. Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.*, 176 Wn.2d 502, 517, 296 P.3d 821 (2013); see also *Keystone Masonry, Inc. v. Garco Constr., Inc.*, 135 Wn.App. 927, 932, 147 P.3d 610 (2006) ("[a]bsent disputed facts, the legal effect of a contract is a question of law that we review de novo").

A trial court abuses its discretion when its decision "is manifestly unreasonable or based upon untenable grounds or reasons." *State v. Stenson*, 132 Wash.2d 668, 701, 940 P.2d 1239 (1997). A court's decision is

manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard. *State v. Rundquist*, 79 Wash.App. 786, 793, 905 P.2d 922 (1995). “A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts.” *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684, 132 P.3d 115 (2006)

### **C. Statute of Limitations**

In Washington, RCW 7.28.300 provides that the record owner of real estate may maintain an action to quiet title against the lien of a deed of trust where an action to foreclose such deed of trust would be barred by the statute of limitations. RCW 7.28.300. The right to enforce a deed of trust in Washington is governed by a six-year statute of limitation. RCW 4.16.040. “The statute of limitations does not begin to run until a breach occurs.” *Safeco v. Ins. Co. v. Barcom*, 112 Wash. 2d 575, 583 (1989). Parties do not dispute the applicable statute of limitations or the date of default. VROP, pp. 19, ¶ 6-7. The argument centers around when the statute of limitations begins running on an installment contract.

### **D. Installment Contract**

The Edmundsons entire theory for their quiet title action is that the statute of limitations expired on Carrington’s right to foreclose their security interest because the clock started running on November 1, 2008, when they defaulted on

the loan, and the Notice of Trustee's Sale was recorded on January 21, 2015. CP 4-5. The Edmundsons claim that Carrington needed to commence its action (which in their view means record the Notice of Trustee' Sale) no later than November 1, 2014. CP 196. The Edmundsons' theory, however, misconstrues the governing law.

When a promissory note provides for installments, “[t]he general rule provides that “[a] separate cause of action arises on each installment, and the statute of limitations runs separately against each.” 31 Richard A. Lord, *Williston on Contracts* § 79:17 (4th ed. 2004); *see also* 25 Washington Practice §16 :20 at 196 (2013-13 Supp.) (“Where a contract calls for payment of an obligation by installments, the statute of limitations begins to run for each installment at the time such payment is due); *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 208–09, 118 S.Ct. 542, 139 L.Ed.2d 553 (1997); *see also Herzog v. Herzog*, 23 Wn.2d 382, 388, 161 P.2d 142 (1945). The Ninth Circuit as well as the Western Washington district court have held as much. *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1490 (9th Cir. 1993); *see also Arnett v. Mortgage Elec. Registration Sys., Inc.*, 14-CV-05298-BJR, 2014 WL 5111621, at \*8 (W.D. Wash. Oct. 10, 2014).

The loan in this case is an installment contract and payments are due monthly over the course of 30 years. CP 123. Specifically, the Deed of Trust provides that “this debt is evidenced by the Borrower’s note . . . which provides

for monthly payments, with the full debt, if not paid earlier, due and payable on August 1, 2037.” CP 9. An instrument does not mature until the date specified. *Mallroy v. J.B. Trucking, Inc.*, 100 Wn. App. 1042 (2000).

Because the obligations are payable in installments, a cause of action for breach of contract arises every time the Edmundsons missed a payment. Thus, the statute of limitations runs separately as to each installment payment. For this reason, the statute of limitations on the right to enforce the Deed of Trust did **not** begin running in November 2008, as the Edmundsons allege, because payments were still due. There is no evidence or record of acceleration. *See, e.g., Weinberg v. Naher*, 51 Wash 591, 595-96 (1909)(“[t]he debt does not become due on the mere default in the interest payment. Some affirmative action is required, some action by which the holder of the note makes known to the payors that he intends to declare the whole debt due.”). Unless the creditor expressly exercises the acceleration option, the statute of limitations applies to each installment separately, and does not begin to run on any installment until it is due. *United States*, 995 F.2d at 1490.

Edmundsons do not provide a single case or statute on point for their position that a missed payment under an installment contract starts the statute of limitations as to the entire debt owed. The Edmundsons rely on cases critically distinct from the present case. For example, the *Walcker* case involved a demand note. *Walcker v. Benson & McLaughlin, P.S.*, 79 Wn. App. 739, 741-42, 904

P.2d 1176, 1177 (1995)( six-year statute of limitations applies to demand notes and period begins to run from time of execution). A demand note is not at issue here but instead an installment contract. The Edmundsons ignore this key distinction. Contrary to the trial court's finding, the *Walcker* case does not broadly hold that the Deed of Trust is unenforceable once the note is unenforceable. CP 355. The *Walcker* court narrowly ruled that because the creditors did not initiate their foreclosure within the six-year limitation period from when the demand note came due, they lost the right to foreclose non-judicially on the deed of trust. *Walcker*, 79 Wn. App. at 746.

As for *Jordan v. Bergsma*, 63 Wn. App. 825, 822 P.2d 319 (1992), this case also did not discuss the running of the statute of limitations on an installment contract. Rather, the court reiterated the rule that “[a]lthough enforcement of an obligation may be barred by the statute of limitation, the obligation does not become void.” *Id.*

In sum, the Edmundsons did not set forth any legal authority on the running of the statute of limitations on installment contracts. Carrington's cause of action for installments not yet due at the time of default did not accrue because the entire debt was never accelerated. The note in its entirety did not mature in November 2008, rather an installment payment for that month came due. It was not until December 31, 2013 that the Edmundsons obtained their discharge. CP 4. The statute of limitations starts to run as of the date of discharge.

*See* App. B. *Silvers v. U.S. Bank Nat. Ass'n*, 2015 WL 5024173, at \*4 (W.D.Wash., 2015)(“The statute of limitations on the right to enforce the Deed of Trust began running the last time any payment on the Note was due. The Plaintiffs remained personally liable on the Note (and successive payments continued to be due) until January 1, 2010, when they missed that payment; they received their Chapter 7 discharge on January 25, 2010. Accordingly, the statute of limitations to enforce the Deed of Trust lien began to run on January 1, 2010.”). Therefore, Carrington is not barred by the statute of limitations from foreclosing.

#### **E. Bankruptcy Discharge**

“The majority view is clear: a valid pre-bankruptcy lien that is not avoided during the bankruptcy proceedings survives those proceedings unaffected.” *Stewart v. Underwood*, 146 Ariz. 145, 146, 704 P.2d 275, 276 (1985). “It is well-established that a lien on real property, including all amounts due thereunder, passes through a bankruptcy unaffected.” *Dewsnup v. Timm*, 502 U.S. 410, 418 (1992). Despite the widely and longstanding view that liens pass through bankruptcy unaffected, the trial court ignored the bankruptcy code and supporting authority and determined instead that because the note was unenforceable as of December 13, 2013, Carrington could not foreclose. *See* VROP, pp. 26, ¶¶6-11; CP 355. This is an obvious error.

As Carrington set forth in its briefing and at oral argument, while the

discharge obviated the personal obligation on the Note, Carrington’s right to enforce its lien survived post-discharge. The United States Supreme Court wrote: “A bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor *in personam*—while leaving intact another—namely, an action against the debtor *in rem*.” *Johnson v. Home State Bank*, 501 U.S. 78, 84, 111 S. Ct. 2150, 2154, 115 L. Ed. 2d 66 (1991). Only personal liability on a debt is removed after the discharge is granted. *In re Okosisi*, 451 B.R. 90, 96 (Bankr. D. Nev. 2011). The Edmundsons concede this point and cited similar case law in their trial court briefing. CP 207-208. The promissory note does not become entirely void and unenforceable as the Edmundsons suggest. Rather, the discharge itself has no effect on liens, and the creditor retains its right to payment in the form of its right to foreclose upon the case's conclusion without violating the discharge injunction. *Johnson*, 501 U.S. at 84. Case law is clear that the surviving mortgage interest corresponds to an “enforceable obligation” of the debtor. *Id.*

This rule of law does not change where it is alleged that the creditor failed to act. A failure to act, or an omission, or non-action is not expressly subject to the prohibition of 11 U.S.C. § 524(a)(2). *See* 4 Resnick and Sommer, *Collier on Bankruptcy*, ¶ 524.02[2] at 524-19 – 524-32.1 (16th ed. 2015). The discharge injunction prohibits only those acts that seek to collect, recover, or offset discharged debts as the “personal liability of the debtor.

11 U.S.C. § 524(a)(2); *In re Garske*, 287 B.R. 537 (9th Cir.2002); see also *In re Smiley*, 26 B.R. 680 (Bankr.Kan.1982)(holding that Section 524(a)(2) does preclude creditors holding unavowed liens from exercising their *in rem* rights subsequent to the granting of a discharge).

Therefore, in sum, the discharge in the bankruptcy case did not terminate Carrington's right to enforce its security instrument by way of a non-judicial foreclosure. It is undisputed that following the discharge, Carrington's remedy to foreclose remained in place. CP 4, ¶ 14-17, CP 207, ¶ 22-24, CP 208, ¶ 1-4. The trial court, however, disagreed with this well-established principle. VROP pp. 24, ¶ 8-16; CP 355-356.

#### **F. Tolling Further Delayed Statute of Limitations from Running.**

##### **a. Time Told During the Bankruptcy**

The Edmundsons filed for Chapter 13 bankruptcy on June 12, 2009 thereby halting creditor activities. The Edmundsons' first amended Chapter 13 plan provides that as follows:

“Upon confirmation, all creditors to which the debtor is surrendering property . . . are granted relief from the automatic stay to enforce their security interest against the property including taking possession and sale.”

Consequently, Carrington was precluded from taking any action against the property until they were granted relief from the automatic stay upon confirmation. The specific bankruptcy provision implicated here is 11 U.S.C.

§ 108(c) – the tolling provision, which extends state statutes of limitations for creditors who are barred by the automatic stay from taking timely action against the debtor. This statute provided in pertinent part:

[I]f applicable nonbankruptcy 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 ... of this title ... with respect to such claim.

In the present case, the Edmundsons' Chapter 13 bankruptcy occurred before the expiration of the limitations period and, at that time, Bank of America had the right to pursue foreclosure. Yet, its ability to exercise that right was frustrated by the automatic stay, and there is authority for the tolling of a statute of limitations during a bankruptcy. *In re Hunters Run Ltd. Partnership*, 875 F.2d 1425, 1429 (9th Cir.1989).

Moreover, pursuant to RCW 4.16.230, “[w]hen 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.” Washington courts have adopted the view that when a person is prevented from exercising a legal remedy, the

time during which the person is prevented from such action should not be included in calculating the statute of limitations. *Seamans v. Walgren*, 82 Wash.2d 771, 775, 514 P.2d 166 (1973); *see also Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn. 2d 670, 682, 10 P.3d 371, 377 (2000). The Court in *Seamans v. Walgren* held that:

“[w]hen 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 even though the statute makes no specific exception in his favor in such cases.”

Additionally, in *Young v. United States*, the United States Supreme Court held that “limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute.” *Young v. United States*, 535 U.S. 43, 49, 122 S.Ct. 1036, 152 L.Ed.2d 79 (2002). “Congress must be presumed to draft limitations periods in light of this background principle. That is doubly true when it is enacting limitations periods to be applied by bankruptcy courts, which are courts of equity and “appl[y] the principles and rules of equity jurisprudence.”” *Id.*

Because Bank of America lacked the ability to pursue collection efforts until the Court confirmed the plan on October 22, 2009 (which granted relief

from stay) the period of time during which Bank of American was unable to foreclose should be added to determine the length of time the statute has been tolled. Based on the foregoing, the statute of limitations, at a minimum, should be suspended from the initial filing of the bankruptcy (June 12, 2009) to the confirming of the Chapter 13 plan (October 22, 2009).

**b. Time Tolled at Commencement of the Non-Judicial Foreclosure**

The Washington Court of Appeals has already addressed this issue of tolling and affirmatively concluded that with respect to initiating a nonjudicial foreclosure, the “filing of foreclosure proceedings in July 1993 tolled the statute of limitations.” *Bingham v. Lechner*, 111 Wash.App. 118, 131 (2002). The Court in *Walcker* also implicitly found that a non-judicial foreclosure is not barred so long as foreclosure is initiated within the statute of limitations. Specifically, the Court concluded that “[b]ecause Benson and McLaughlin failed to initiate its foreclosure within the applicable six-year limitation period, the foreclosure should be barred.” *Walcker v. Benson & McLaughlin, P.S.*, 79 Wash.App. 739, 746 (1995) (emphasis added). Therefore, by logical extension, had the foreclosure been initiated within the statute of limitations, the foreclosure action would have been timely.<sup>4</sup>

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<sup>4</sup> 15A WASH. PRAC. HANDBOOK FOR CIVIL PROC. § 4.13 (2014-2015 ed.) (“Commencement of a nonjudicial foreclosure tolls the statute of limitations on

The commencement of the non-judicial foreclosure upon the issuing of the Notice of Default on October 23, 2014 triggered the second tolling event. The issuance of the Notice of Default initiates foreclosure proceedings. *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 109, 752 P.2d 385, 386 (1988) (lender commenced foreclosure proceedings by issuing the Notice of Default); *see also Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 316-17, 308 P.3d 716, 726 (2013), as modified (Aug. 26, 2013); RCW 61.24.030.

The Notice of Default precedes the Notice of Trustee's Sale. *Vawter v. Quality Loan Serv. Corp. of Washington*, 707 F. Supp. 2d 1115, 1121 (W.D. Wash. 2010). The *Vawter* case cited to by the Edmundsons provides as follows: “[o]nce a default on the secured obligation occurs, either the beneficiary or trustee may initiate the nonjudicial foreclosure process by giving written notice of default to the borrower and grantor.” *Id.* A Washington bankruptcy court concurred with his holding. “Nonjudicial foreclosure is initiated by the issuance of a notice of default to the debtor.” *In re Reinke*, ADV 09-01541, 2011 WL 5079561, at \*10 (Bankr. W.D. Wash. Oct. 26, 2011). “Under RCW 61.24.030, the notice

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enforcement of a promissory note.”); 27 WASH. PRAC., CREDITORS’ REMEDIES – DEBTORS’ RELIEF § 5.72 (2014) (“A statute of limitations may be tolled for non-statutory reasons. For example, commencement of a non-judicial foreclosure proceeding for collection of a promissory note secured by the foreclosure property tolls the statute of limitations on the promissory note.”)

of default must be transmitted “by the beneficiary or trustee” 30 days before the notice of sale is recorded, transmitted or served.”” *Id.*

Consequently, in the present case, the foreclosure was initiated on October 23, 2014 with the issuance of the Notice of Default. Therefore, had the statute of limitations been running as to the entire debt owed, which is not the case here, the non-judicial foreclosure was timely initiated. There is no genuine issue of material fact that the Edmundsons’ statute of limitations argument fails.

**G. The Edmundsons Waived Their Right to Challenge the Foreclosure.**

Equity also favors overturning the trial court’s ruling and finding for Carrington on summary judgment. The question of whether equitable relief is appropriate is a question of law. *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 483, 254 P.3d 835, 841 (2011). In their briefing, the Edmundsons agree that generally the doctrine of equitable tolling along with waiver and estoppel can be raised as a defense to statute of limitations claim. CP 198. Yet, they argue that Carrington is not entitled to such relief because of its failure to exercise due diligence. CP 198. This argument is undercut by fact that the Edmundsons surrendered the subject property in bankruptcy. Generally, Courts have consistently agreed that when a debtor surrenders property under § 1325(a)(5)(C), the debtor

relinquishes his or her rights to the collateral in favor of the creditor. *In re Cormier*, 434 B.R. 222, 230 (Bankr. D. Mass. 2010). Congress intended the term “surrender” to signify a return of property and a relinquishing of possession or control to the holder of the claim. *In re Carter*, 390 B.R. 648, 652 (Bankr. W.D. Mo. 2008).

The elements of equitable estoppel are: "(1) an admission, statement, or act inconsistent with a claim afterward asserted; (2) action by another in reasonable reliance on that act, statement, or admission; and (3) injury to the party who relied if the court allows the first party to, contradict or repudiate the prior act, statement, or admission." *See Peterson v. Groves*, 111 Wn. App. 306, 310, 44 P3.d 984 (2002). Equitable estoppel applies here based on the Edmundsons' express representations in their Chapter 13 bankruptcy. Specifically, in June 2009, the Edmundsons filed for a Chapter 13 bankruptcy in the United States Bankruptcy Court for the Western District of Washington Case Number 09-15795-MLB. In this Chapter 13 bankruptcy proceeding, the Edmundsons surrendered the subject property, located at 13232 Military Rd S, Tukwila, WA 98168. Surrender is viewed as the “relinquishing of any legal claim of the debtor and, once the plan is confirmed, of the debtor's bankruptcy estate to the collateral.” *In re White*, 282 B.R. 418, 422 (Bankr. N.D. Ohio 2002). It functions as both the debtor's consent to

relief from stay and with respect to real property and estoppel of the right to defend in any foreclosure. *Id.*

Because the Edmundsons surrendered the subject property in the bankruptcy proceeding, it is inequitable for the Edmundsons to now argue that they should be entitled to quiet title to property that their plan expressly surrendered years ago. The purpose of the doctrine of equitable estoppel is to prevent exactly this type of windfall.

Furthermore, the Edmundsons should be collaterally estopped from quieting title. The doctrine of collateral estoppel applies to bankruptcy proceedings. *Towe v. Martinson*, 195 B.R. 137, 141 (D. Mont. 1996) Collateral estoppel is a form of res judicata. *In re Associated Vintage Grp., Inc.*, 283 B.R. 549, 555 (B.A.P. 9th Cir. 2002).

Collateral estoppel bars the same parties, or their privies, from relitigating issues which have already been decided in a different cause of action. *Id.* Thus, the three elements that must exist to raise collateral estoppel are as follows: (1) the same issue adjudicated in the prior and present proceeding must have been decided in the prior adjudication; (2) a final judgment must have been issued on the merits; (3) the same parties or parties in privity must be involved. *Id.*

With respect to a property surrender, Section 1325(a)(5)(C) of the Bankruptcy Code permits a debtor to propose a plan which surrenders the

property securing an allowed secured claim to such claim holder. *In re Carter*, 390 B.R. 648, 650 (Bankr. W.D. Mo. 2008). § 1327 provides that “[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.” *Id.* “Section 1327(a) essentially codifies the doctrine of res judicata with respect to confirmed Chapter 13 plans.” *Id.* An order confirming a Chapter 13 plan is, therefore, res judicata “as to all issues decided or which could have been decided at the hearing on confirmation.” *Id.*

All of the elements necessary for collateral estoppel are present. In both this case and in the Chapter 13 bankruptcy, the surrender of the collateral and creditor’s secured claim are at issue. Further, the bankruptcy court confirmed the plan providing for the surrender of subject property. CP 4. The parties had a full and fair opportunity to adjudicate the issue in the Chapter 13 proceeding. If the Edmundsons wanted to reverse their surrender, the bankruptcy court would have been the proper forum for doing so. The Edmundsons should not be allowed to circumvent the bankruptcy proceeding by filing a lawsuit to basically undo their bankruptcy plan. The Edmundsons in essence are asking to make a

material change to their plan by removing the first secured asset. Lastly, the same parties or parties in privity are involved in both actions.

Therefore, the Edmundsons should not now after ceding their rights to possession of the property be able to challenge Carrington's right to foreclose on the subject property. The Edmundsons argue that equity supports their position so that a lender does not have 36 years to foreclose on the Deed of Trust in the absence of acceleration. CP 281. The trial court expressed agreement with this position. VROP pp. 25, ¶ 10-13. Yet, this argument fails to take into account that the obligation is a 30 year loan. There is nothing inequitable about a creditor being allowed to exercise a remedy expressly provided for in their contract. Moreover, the Edmundsons would receive a significant windfall if they were permitted to essentially obtain a free house that they previously abandoned and ceased making regular payments to the creditor in their Chapter 13.

#### **H. Carrington is Entitled to an Award of Attorneys' Fees and Costs**

Pursuant to RAP 18.1, Carrington request attorneys' fees and costs on appeal. Under the American Rule states that attorney fees may be awarded if authorized by contract, statute, or a recognized ground in equity. *City of Seattle v. McCready*. 131 Wn.2d 266, 931 P.2d 156 (1997). Attorney fees are awarded to the prevailing party in an action on a contract when the contract provides for

attorney fees and costs incurred to enforce its provisions. *QFC v. Mary Jewell T, L.L.C.*, 134 Wn. App. 814, 818, 142 P.3d 206 (2006).

Here, in this case the center of controversy is whether Carrington can foreclose on its Deed of Trust. The Deed of Trust securing Carrington's obligation addresses attorney fees in Paragraph 18, which provides as follows:

Foreclosure Procedures. If Lender requires immediate payment in full under Paragraph 9, lender may invoke the power of sale and any other remedies permitted by applicable law. Lender shall be entitled to collect all expense incurred in pursuing the remedies provided in this paragraph 18, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

Since the Edmundsons filed a quiet title action to bar Carrington from foreclosing, Carrington is entitled to attorney fees and costs incurred in defeating this claim pursuant to RCW 4.48.330. As the prevailing party on appeal, Carrington is entitled to their reasonable attorney fees and costs. *See Thompson v. Lennox*, 151 Wn.App. 479, 491, 212 P.3d 597 (2009) (holding that "[g]enerally, if such fees are allowable at trial, the prevailing party may recover fees on appeal as well); *see also Dan's Trucking, Inc. v. Kerr Contractors, Inc.*, 183 Wn.App. 133, 143, 332 P.3d 1154 (2014)

Because Carrington should have been the prevailing party at the trial court and its Deed of Trust authorizes an award of attorney's fees, Carrington

thus respectfully requests that the Court reverse the trial court's decision and grant its attorney's fees and costs.

## **VI. CONCLUSION**

The trial court's decision contravenes long-standing bankruptcy law as well as disregards Washington case law directly on point to this case, which holds that where a debt is payable in installments, a new statute of limitations period begins running anew on each installment. The only issue at this stage of the case is whether the trial court erred in granting summary judgment in favor of the Edmundsons despite finding the statute of limitations had not run on Carrington's right to foreclose. Carrington submits that the trial court erred by holding that as a matter of law that Carrington lost its right to foreclose as a result of the Chapter 13 discharge. The Edmundsons did not even take this position.

If the trial court's decision is not reversed, neither law nor equity will be served. Black letter bankruptcy law would be put into question, and a lender's rights to enforce its debt would be seriously compromised. And the Edmundsons will obtain a free house despite abandoning their claims in their Chapter 13 and not making payments on the loan since October 2008. The Court should reverse the trial court's summary judgment order and find in favor of Carrington. The Court should also award Carrington its reasonable attorney fees and costs on appeal.

Respectfully submitted this 21<sup>st</sup> day of January, 2016.

By:     /s/ Wesley Werich      
Nicolaus Daluiso, WSB  
Wesley Werich, WSB #38428  
Robinson Tait, P.S.  
Attorneys for Appellant

CERTIFICATE OF SERVICE

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

I am a paralegal at Robinson Tait, P.S., attorneys for Appellant, and am competent to be a witness herein.

On January 21, 2016, I caused to be served via first class, U.S. Mail a true and correct copy of the foregoing APPELLANT'S APPEAL BRIEF to the following:

Thomas H. Oldfield and  
Andrea Peterson  
Oldfield & Helsdon, PLLC  
PO Box 64189  
University Place, WA 98464

Rossi Maddalena  
Merrick, Hofstedt & Lindsey, P.S.  
3101 Western Ave., Ste. 200  
Seattle, WA 98121

DATED this 21<sup>st</sup> day of January 2016.

/s/ Natalie Quarnstrom  
Natalie Quarnstrom

# **APPENDIX A**

IN THE SUPERIOR COURT OF WASHINGTON  
FOR THE COUNTY OF KING

**N**  
**NAEGELI**  
DEPOSITION AND TRIAL EXPERTS

CORPORATE HEADQUARTERS  
111 SW FIFTH AVENUE  
SUITE 2020  
PORTLAND, OR 97204  
800.528.3335

KEVIN E. EDMUNDSON and  
MECHE D. EDMUNDSON, husband  
and wife,

Plaintiffs,

vs.

No. 1502059165

BANK OF AMERICA, N.A.,  
Successor by Merger to  
BAC Home Loans Servicer, LP  
FKA Countrywide Home Loans  
Servicing, LP; CARRINGTON  
MORTGAGE SERVICES, LLC as  
Servicer and Attorney in Fact  
for Bank of America, N.A.; MTC  
FINANCIAL INC., a Washington  
corporation dba TRUSTEE CORPS.,  
as trustee,

Defendants.

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CROSS-MOTIONS FOR SUMMARY JUDGMENT

HELD ON  
FRIDAY, AUGUST 7, 2015  
11:04 A.M.

BEFORE THE HONORABLE  
LAURA JEAN MIDDGAUGH  
SUPERIOR COURT JUDGE

THE NAEGELI ADVANTAGE

technology  
service price



NaegeliUSA.com

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**APPEARANCES**

**Appearing on behalf of the Plaintiff:**

ANDREA PETERSON, ESQUIRE

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**Appearing on behalf of the Defendant:**

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**CROSS-MOTIONS FOR SUMMARY JUDGMENT****HELD ON****FRIDAY, AUGUST 7, 2015****11:04 A.M.**

**THE COURT:** Good morning. Have a seat. All right. Let's have people please identify themselves for the record.

**MS. WERICH:** Wesley Werich appearing on behalf of Carrington, from Robinson Tate Law Firm.

**MS. PETERSON:** Good morning, Your Honor. Andrea Peterson on behalf of the plaintiffs.

**THE COURT:** All right. And there are cross-motions for summary judgment. I don't know who filed first, or were they filed the same day?

**MS. WERICH:** I wonder if they --

**MS. PETERSON:** Maybe by a few days.

**MS. WERICH:** Yeah. But I'm happy to start.

**MS. PETERSON:** But whatever the court wants to hear it in is fine by me.

**MS. WERICH:** Yeah.

**THE COURT:** Well, they're actually all the same issue, I think, so -- but since they filed first, we'll start with Carrington.

**MS. PETERSON:** I have a preliminary matter --

1           **THE COURT:** Yes.

2           **MS. PETERSON:** -- if I could?

3           In our reply briefing in response to a lack of  
4 response by Bank of America, the beneficiary of the note, we  
5 raised for the first time the fact that Carrington Mortgage  
6 does not have standing to bring -- or ask the court for the  
7 relief that it requests.

8           **THE COURT:** Right. I got distracted away from  
9 that by the issues.

10          **MS. PETERSON:** In our reply to our motion, which  
11 like I said was raised because we fully expected Bank of  
12 America to file responsive pleadings, Bank of America is the  
13 beneficiary with the right to foreclose on this deed of  
14 trust. Carrington is simply the servicer and the attorney  
15 in fact for Bank of America, but has not at any point in  
16 time in this motion process invoked their status as attorney  
17 in fact and is acting outside of Bank of America's  
18 authority.

19          **MS. WERICH:** I am happy to address that, Your  
20 Honor. The foreclosure documents, the notice of default and  
21 the notice of trustee's sale specifically say that  
22 Carrington Mortgage Services, as servicer and attorney in  
23 fact for Bank of America. So the foreclosure is in the name  
24 of Carrington as servicer and as an attorney in fact for  
25 Bank of America, and the declaration that we submitted on

1 behalf of Carrington also states that it is the servicer for  
2 Bank of America and Bank of America specifically had  
3 Carrington, as its servicer and attorney in fact, defend  
4 this action.

5 And just by way of Carrington being named in this  
6 lawsuit, they have standing to address the allegations  
7 therein and defend the action.

8 **MS. PETERSON:** Being a servicer of the note and  
9 being an attorney in fact is different than being the real  
10 party in interest. And to invoke an attorney in fact  
11 capacity, you must sign on behalf of that party as attorney  
12 in fact. Carrington Mortgage has not done that one time in  
13 these pleadings.

14 The assignment of deed of trust to Bank of America  
15 is in fact signed by Carrington as attorney in fact, so they  
16 know that they must invoke that privilege to act --

17 **THE COURT:** Well, but are you saying that I  
18 shouldn't consider their pleadings because, even though  
19 they're a named party, they are not allowed to argue these  
20 issues?

21 **MS. PETERSON:** Carrington was named simply because  
22 they are the servicer of the note and would be bound by any  
23 decision of this court. They do not have standing to  
24 foreclose the deed of trust unless they invoke their power  
25 of attorney privilege, and they have not done that.

1 Bank of America is the party in interest here.  
2 They are the beneficiary.

3 **THE COURT:** Wait. Didn't they say that they --  
4 the notice of default and the foreclosure was done by  
5 Carrington as attorney in fact for Bank of America?

6 **MS. PETERSON:** Correct. But the motions that are  
7 before the court today are not by Carrington as attorney in  
8 fact.

9 **THE COURT:** I understand that. So what you're  
10 saying is that Carrington as a named party, even though they  
11 have a legal argument that says you're wrong, doesn't have  
12 the right to respond.

13 **MS. PETERSON:** That is our argument, Your Honor,  
14 that they don't have standing to seek the relief that they  
15 are seeking today. Bank of America does. Carrington does  
16 not unless they invoke their attorney in fact privileges.

17 **THE COURT:** Okay. So they would have the right to  
18 respond to your motion, but not to file a motion on their  
19 own?

20 **MS. PETERSON:** I think they would have the right  
21 to respond had they signed as attorney in fact for Bank of  
22 America, but they haven't done that.

23 **THE COURT:** All right. An issue that was just  
24 raised and nobody's had a chance to respond to that, right,  
25 in writing?

1           **MS. PETERSON:** It was only raised because Bank of  
2 America didn't respond.

3           **THE COURT:** Didn't respond.

4           **MS. PETERSON:** It was the first opportunity we --

5           **THE COURT:** Right.

6           **MS. PETERSON:** We're quite surprised that Bank of  
7 America didn't file responsive pleadings in this matter.

8           **MS. WERICH:** Carrington is the servicer and  
9 attorney in fact for Bank of America, so the foreclosure  
10 documents all are dealing with Carrington as the servicer  
11 and attorney in fact for Bank of America. So Carrington has  
12 an inherent interest and is required to defend this action.

13           **THE COURT:** Right. Just from what I have before  
14 me, I think they're right. I think Carrington can respond.  
15 If you want to raise this issue later by filing supplemental  
16 proceedings, you can do so. Okay?

17           So let's go forward and you get to argue first  
18 since it's your motion.

19           **MS. WERICH:** Okay.

20           **THE COURT:** And you can stand or sit, I don't  
21 care.

22           **MS. WERICH:** I'd like to stand.

23           **THE COURT:** Whatever.

24           **MS. WERICH:** Thank you, Your Honor. Once again,  
25 Wesley Werich appearing on behalf of Carrington Mortgage

1 Services.

2 **THE COURT:** Counsel, are you going to stand during  
3 her argument?

4 **MS. PETERSON:** I -- I like to stand.

5 **THE COURT:** Well, okay.

6 **MS. PETERSON:** Feels more respectful, if you don't  
7 mind.

8 **THE COURT:** I don't mind.

9 **MS. PETERSON:** I don't want to make anyone  
10 nervous.

11 **MS. WERICH:** The facts are undisputed here, Your  
12 Honor. We've -- I can lay out a very brief timeline, but  
13 the note and deed of trust were entered into in July -- on  
14 July 12th, 2007. The default date is not disputed as well.  
15 The last payment was for the -- was the October 2008  
16 payment. Therefore, payment was due as of the November 1st,  
17 2008 payment. The last payment Carrington received was in  
18 December of 2008.

19 The plaintiffs filed for bankruptcy, a Chapter 13,  
20 in June of 2009. They amended their plan in August of 2009.  
21 That plan was -- in both their original plan and their  
22 amended plan, they surrendered their property, expressly  
23 surrendered their property. The plan was confirmed in  
24 October 22nd of 2009 and discharge was entered in December  
25 31, 2013.

1 In October of 2014, specifically on October 22nd,  
2 a notice of default was issued to -- commencing a  
3 nonjudicial foreclosure sale on the subject property. A  
4 notice of trustee's sale followed that notice of default,  
5 also issued on behalf of Carrington as servicer and attorney  
6 in fact for Bank of America. A sale date had been set,  
7 which the parties --

8 **THE COURT:** Okay. Here's my question for you.

9 **MS. WERICH:** Sure.

10 **THE COURT:** First, I don't -- and I don't think  
11 it's in the pleadings. If it is, I missed it and somebody  
12 needs to point it out to me.

13 When the Edmundsons filed their plan, I'm assuming  
14 that they said we have this note for X amount of dollars and  
15 a deed of trust on this property.

16 **MS. WERICH:** Correct, Your Honor.

17 **THE COURT:** And --

18 **MS. WERICH:** They're required to disclose in their  
19 bankruptcy plan.

20 **THE COURT:** Right. And the plan said and the  
21 bankruptcy court said on August 6th of 2009, they're going  
22 to surrender the property. You guys go and collect on it.  
23 Right?

24 **MS. WERICH:** Well, the bankruptcy court doesn't  
25 state that. It just says that --

1           **THE COURT:** It says you can. They're relieving --  
2 they're lifting the stay. So I guess part of my question  
3 is, what did they owe at that time? So it's your position  
4 that as of August 6th, 2009, they only owed the debts from  
5 November 1st, 2008 through August 6th, 2009?

6           **MS. WERICH:** I'm not quite sure --

7           **THE COURT:** Well, your position is that each  
8 payment -- that it's not accelerated just because they filed  
9 bankruptcy. It's not accelerated, the whole amount isn't  
10 due just because they missed a payment.

11          **MS. WERICH:** Correct.

12          **THE COURT:** So as of August 6th of 2009, all they  
13 had to do, then, was to make up the payments from November  
14 1st, 2008 through whatever -- through December --

15          **MS. WERICH:** Had they --

16          **THE COURT:** -- or October of 2009 because nothing  
17 was due past 2009. Is that right?

18          **MS. WERICH:** Had they elected to do that. But  
19 they elected to surrender their property. So that's --  
20 there's nothing in the record --

21          **THE COURT:** So they surrendered the property  
22 saying that the -- so that -- so the only amount that was  
23 due on the property, according to your analysis, was what --  
24 the debt was not accelerated to the full amount, so the only  
25 amount that was due was what was due as of 2009. So the

1 property would have been sold -- if you had elected to take  
2 the property, you could have only collected for October 6th  
3 of 2009 through October -- through the date of sale. And if  
4 there was another \$100,000 remaining, that would remain on  
5 the property?

6 **MS. WERICH:** Well, our client wasn't looking to  
7 collect the default owing. They were looking to just  
8 nonjudicially foreclose on the property and take the  
9 property back, relieving the debtors of all personal  
10 liability on the note.

11 When the debtors made the election in their  
12 bankruptcy to surrender and subsequently receive their  
13 discharge, Carrington -- the defendants were left with a not  
14 to foreclose on the property and take the property, just  
15 take the property back.

16 Had the debtors requested any sort of  
17 reinstatement -- none of that -- none of that's in the  
18 record, Your Honor, in terms of whether --

19 **THE COURT:** Right.

20 **MS. WERICH:** And I don't believe there was any  
21 dispute as to the fact that the note was not accelerated,  
22 that all payments were not at any point all called due. And  
23 there's no evidence in the record that the borrowers ever  
24 sought to reinstate their debt. They surrendered their  
25 property and --

1           **THE COURT:** Right. And you chose not to do  
2 anything with it, "you" meaning Carrington.

3           **MS. WERICH:** Yes, Your Honor, until -- I mean,  
4 we're talking about the -- the discharge was received in  
5 2013 and the foreclosure was initiated --

6           **THE COURT:** In 2014.

7           **MS. WERICH:** -- a year later. So we're not  
8 talking about this large span of time and the house has just  
9 -- this uncertainty about what's going to happen. It was  
10 roughly a year from discharge to the bank foreclosing on the  
11 house.

12           **THE COURT:** But it was five-plus years from the  
13 time when your client was authorized to enforce its security  
14 agreement and you chose not to do so.

15           **MS. WERICH:** Yes, Your Honor, which is also still  
16 within the statute of limitations of six years, even if we  
17 were going to use that date, which is not our position at  
18 all.

19           **THE COURT:** Well, but if they were -- the debtors  
20 were discharged in 2013, you couldn't enforce the note after  
21 2013, could you?

22           **MS. WERICH:** No, not the -- not the note for  
23 personal liability. But the note remained an enforceable  
24 obligation in terms of obtaining the property back.

25           **THE COURT:** Well, what if -- what if a note is

1 found to be unenforceable because of fraud? You can't  
2 enforce the note. Somebody says it was -- for some reason,  
3 you can't enforce the note. The person who signed it was  
4 incompetent, it was fraudulently obtained. And so there's  
5 an order that says you can't enforce the note. It's gone.  
6 The note's gone. You can't collect on the note.

7 Is it your position you can still collect on the  
8 security?

9 **MS. WERICH:** Yes, definitely. You have an  
10 equitable lien on the property.

11 **THE COURT:** No matter what?

12 **MS. WERICH:** Yes.

13 **THE COURT:** Okay. I don't -- I don't buy that.  
14 So you're going to have to convince me about that. If the  
15 note is gone, for whatever reason, and whether the statute  
16 of limitations has run, whether it has -- the court has  
17 found that the note was obtained by fraud or for some other  
18 reason and the note is gone -- and in this case, the note  
19 was gone as of December 31st, 2013 at the latest -- you  
20 could not enforce the note.

21 It does not seem to me that you should be able to  
22 get around that by saying, Okay. We can't enforce the note,  
23 but we can still get our payment under the note by enforcing  
24 -- by getting the amount of money from the property. Isn't  
25 that the same thing as enforcing the note?

1           **MS. WERICH:** No, because it's not the debtors'  
2 personal liability. You're not seeking actual payment under  
3 the note. You're just recovering your collateral that was -  
4 -

5           **THE COURT:** Fraudulently obtained.

6           **MS. WERICH:** Otherwise, the --

7           **THE COURT:** Let's say it was fraudulently  
8 obtained.

9           **MS. WERICH:** The result is the --

10          **THE COURT:** Could you still do it?

11          **MS. WERICH:** The bank still loaned that money to  
12 someone and so the alternative would be the fraudster would  
13 get a free house. I mean, so that's -- that's an even --

14          **THE COURT:** Well, no, the fraudster would be the  
15 person that's trying to enforce the note. You don't have a  
16 right to enforce this note. You just don't. And so what  
17 you're saying is: I know we don't have a right to enforce  
18 this note and so we can't get the money from him, but we can  
19 go around and get it from the property anyway. That's what  
20 you're saying.

21          **MS. WERICH:** Correct. And that's -- I mean, you  
22 can sue on notes or you can foreclose. Those are two  
23 separate avenues by which a lender can recover the money  
24 that they loaned the borrowers.

25          **THE COURT:** Isn't that -- that's not the law in

1 the state of Washington, is it? Isn't it if you don't try  
2 to enforce your note by the time the statute of limitations  
3 expired, you don't get to then still go and foreclose on the  
4 property?

5 **MS. WERICH:** No, I believe that's -- I don't  
6 believe that's the state of law at all in Washington. I  
7 don't think there's -- there's no statute of limitation  
8 provided for in the Deed of Trust Act. There's no --  
9 there's no Washington law saying that a lender must commence  
10 a nonjudicial foreclosure proceeding from the date of  
11 default. That is just -- it's nowhere to be found in the  
12 Deed of Trust Act or other statutory authority or case law.

13 There's contrary authority specifically holding  
14 that the lenders can foreclose, that each installment  
15 payment is due -- is just due for each installment payment.

16 **THE COURT:** But it's not due anymore. There are  
17 no installments due under this note.

18 **MS. WERICH:** The note's not just -- it just --  
19 it's not void. It's not that it's no longer in the picture.  
20 It's just not enforceable against the borrower himself or  
21 herself. It's still an instrument that is tied to the deed  
22 of trust. And the deed of trust specifically states also  
23 the maturity date of the note and that it's not due -- and  
24 that the debt -- since the debt was never accelerated, the  
25 payments aren't all due.

1           **THE COURT:** Why wasn't the debt accelerated when  
2 the bankruptcy court said -- and again, I'm making this  
3 assumption, and I think both parties apparently agree with  
4 me, that there's this note and it's secured by a deed of  
5 trust for, I think it was 331,000 or something like that,  
6 and take the property where -- you know, you take the  
7 property, the debtors turn over the property for the note.

8           So did the -- I don't have any evidence that the --  
9 -- what is it -- Carrington went in and said, "Oh, no, wait a  
10 minute. \$331,000 isn't due. They're only behind three  
11 payments. That's the only amount that's due." If you had --

12 --

13           **MS. WERICH:** I --

14           **THE COURT:** If you -- if, when the debtor said  
15 take it, Carrington said -- well, they said nothing, but  
16 they could have gone to the bankruptcy court and said, "Wait  
17 a minute. They don't owe us \$331,000. They only owe us  
18 five payments."

19           **MS. WERICH:** Acceleration under Washington law  
20 doesn't work that way. It has to be clear and unequivocal.  
21 It's just not a matter of they defaulted, they filed for  
22 bankruptcy, and so the debt's automatically accelerated.  
23 That's now what Washington law provides.

24           Acceleration has to be -- it's not just upon mere  
25 default. It has to be expressly and unequivocally

1 accelerated by the party who's collecting the debt. And  
2 acceleration has not occurred here and even -- and I mean --  
3 and I guess the arguments haven't even gotten to the tolling  
4 that occurred as a result of both the bankruptcy and the  
5 nonjudicial foreclosure.

6 So our briefly clearly lays out even if we were  
7 to, for the sake of argument, say that the clock started  
8 running on the November 2008 date based on the last payment  
9 being October of --

10 **THE COURT:** Well, I don't find that.

11 **MS. WERICH:** -- 2008.

12 **THE COURT:** I don't find it. I think that  
13 arguably the standard -- the statute of limitations began to  
14 run when the debtor says, "I owe \$331,000, it's secured by  
15 the deed of trust," and the bankruptcy court said, "Okay.  
16 You surrender your property for that note." And Carrington  
17 didn't come back and say, "Wait a minute. That's not the  
18 amount that's owed."

19 **MS. WERICH:** So then, Your Honor, based on -- if  
20 that's your reading -- if that's when you believe the debt  
21 was due, then the statute of limitations has definitely not  
22 run because it has not been six years from the date of the  
23 surrender.

24 **THE COURT:** I agree. It's five years and nine  
25 months or something like that.

1 MS. WERICH: Yes, Your Honor.

2 THE COURT: Okay. I know I put you off your  
3 schedule there. I'm sorry.

4 MS. WERICH: I'm not sure if I covered everything.  
5 I guess that leaves --

6 THE COURT: And the other --

7 MS. WERICH: I guess I'd like to leave argument  
8 for reply since --

9 THE COURT: Okay. I have one more question for  
10 you. The notice of default said it was for payments due  
11 November 1st, 2008 through October 22nd, 2014. Trust me,  
12 that's what it says.

13 MS. WERICH: Okay. I just wanted to see --

14 THE COURT: Yeah, that's what it said.

15 And so your position is this note continues  
16 running with the property whatever, forever, until -- for 30  
17 years, right?

18 MS. WERICH: Correct, based on the maturity date.

19 THE COURT: And so even though the debtor is not  
20 obligated to make the payments under the note, they're  
21 obligated to make the payments because the note was secured  
22 by the deed of trust?

23 MS. WERICH: They're only obligated -- if they  
24 wanted to now save their house, they could cure the default  
25 and obtain their house back. But they're not obligated --

1 Carrington could not pursue personal collection against the  
2 borrowers for that default. They could not file a suit on a  
3 note.

4 **THE COURT:** Okay. Thanks.

5 **MS. WERICH:** Thank you, Your Honor.

6 **MS. PETERSON:** The facts are not in dispute, as  
7 she states. The debtors' defaulted as of November 2008.  
8 The deed of trust has its own separate default provisions.  
9 Upon the trigger of that default provision, the obligation  
10 or the power to sell in the deed of trust became operative.  
11 The date of default is the November 8 payment. Six years  
12 from that date have expired.

13 When the plaintiffs filed for bankruptcy, there  
14 was no question that they surrendered their property. They  
15 had moved out long before they filed for bankruptcy and they  
16 have not lived in the house since. Carrington and Bank of  
17 America then had five-plus years since the date that they  
18 were relieved from the automatic stay to collect on the  
19 property. They haven't done it.

20 There's an old saying that old and stale claims  
21 have no remedy, and it's because statutes of limitation are  
22 mandatory. There is a law, Your Honor, RCW 7.28.300 -- I  
23 think it's the law you were referring to earlier -- that  
24 prohibits a lender or a creditor from foreclosing on a deed  
25 of trust where the underlying obligation is prohibited by

1 virtue of the expiration of the statute of limitations.

2 That is what we have here today.

3 The tolling argument is very well-settled law in  
4 Washington State. The Washington Supreme Court, 1998, was  
5 asked to determine whether a bankruptcy tolled the statute  
6 of limitations for the amount of time that the plaintiffs  
7 were in bankruptcy; they held that it does not. Only where  
8 the statute of limitations expires during the bankruptcy  
9 does a creditor then have an additional 30 days after the  
10 bankruptcy.

11 If the statute of limitations expires after the  
12 bankruptcy -- in this case, over five years later -- lenders  
13 and creditors can't be relieved from their own inaction.  
14 They were obligated and had the right, upon the surrender,  
15 to foreclose on the property. They failed to do so.

16 The policy that ruling in favor of Carrington will  
17 create is allowing banks to sit on their rights for 36 years  
18 while a plaintiff is still on title to the property. A  
19 bankruptcy discharge does not convey title to the property.  
20 The bank must foreclose. But if you take their argument to  
21 be true, for 36 years our clients will sit on title for that  
22 property. They will be liable if someone gets injured on  
23 the property. The bank will benefit from increased property  
24 values, from default interest rates. There is an advantage  
25 to the bank to waiting and no advantage to the plaintiffs

1 for remaining on title to the property.

2 And ruling in favor of the plaintiffs will not  
3 create an epidemic. This is a very, very rare case. It is  
4 very, very rare that a bank, with its own foreclosure  
5 department, streamlined processes, will let something like  
6 this slip through the cracks. It simply will not open the  
7 floodgates much like they say and create free houses for all  
8 sorts of debtors.

9 This is a very rare circumstance. The bank should  
10 not be benefitting on its rights and failing to foreclose  
11 within the statute of limitations.

12 **THE COURT:** All right. Any reply?

13 **MS. WERICH:** Just very briefly, Your Honor.

14 We also rely -- we relied on RCW 4.16.230, which  
15 specifically says when a party is not allowed to take action  
16 based on an injunction, that period is stayed. We were not  
17 relying solely on the Bankruptcy Code 108(c). And applying  
18 that stay provision would stay the bankruptcy and the  
19 nonjudicial -- once the nonjudicial was commenced upon  
20 issuance of the notice of default, the statute of  
21 limitations was tolled from that point on.

22 And in regards to equity, I think equity weighs  
23 largely in favor of the lender in this case. We're talking  
24 about borrowers who specifically surrendered their property,  
25 they relinquished all rights, and now they're coming back

1 years later and saying, "Just kidding. We want a free  
2 house."

3 **THE COURT:** What if there had been a lawsuit?  
4 Someone came onto the property, there was a -- an injured  
5 themselves, who pays for that?

6 **MS. WERICH:** I mean, that's a -- it would largely  
7 depend on the facts surrounding --

8 **THE COURT:** Well, let's assume that there was a  
9 defect in the property and it was -- the property -- it was  
10 the fault of something on the property, not the negligence  
11 of the plaintiff, the negligence of whoever is responsible  
12 for maintaining the property. Who pays for that?

13 **MS. WERICH:** I imagine both the borrowers would  
14 get sued and the lenders and the borrowers can seek an  
15 indemnification from the lender based on the fact that they  
16 surrendered the property and the property was vacated. And  
17 -- I mean, that's speculation. It's not -- I think the fact  
18 of the matter is the -- had the borrowers wanted to go back  
19 and strip the first lien, they need -- this is not the  
20 proper forum for doing so. They should have gone back into  
21 the bankruptcy court and filed an adversary action opposed  
22 to trying to circumvent their earlier bankruptcy proceeding  
23 where they surrendered the house.

24 And so I don't think there's -- equity's in favor  
25 of the borrowers getting a free house and I don't think the

1 Deed of Trust Act is in any way compromised with holding  
2 that the statute of limitations has not expired. Like I  
3 said, there hasn't been that much time that's even passed  
4 since the borrowers received their discharge and the  
5 foreclosure was initiated.

6 **THE COURT:** Okay. The advantage of ruling on  
7 these things on summary judgment for the trial court is that  
8 when you take this up on appeal, which I'm sure one side  
9 will or the other, they look at it de novo based on the  
10 pleadings that I have in front of me. So, quite frankly,  
11 the Court of Appeals doesn't give a darn what I say my  
12 reasons are for granting or denying the summary judgment  
13 because as long as you've made the arguments, you can raise  
14 them at the Court of Appeals.

15 So let me say that I am granting summary judgment  
16 in favor of the plaintiffs. I think that the law is -- I  
17 don't think that the statute of limitations is tolled in  
18 bankruptcy, but it's almost moot because of -- my rulings  
19 for this is that in this case, the creditor of the mortgage,  
20 whoever it is with, Bank of America or Carrington acting on  
21 behalf of them, had the right to enforce their -- to  
22 foreclose and enforce their security interest as of  
23 10/22/09. For whatever reason, they chose not to do so.

24 And I think they have the right to do that. It  
25 may be, under certain circumstances, that they don't want to

1 take property because it's going to be not cost effective  
2 for them to do it; that to foreclose on the property may be  
3 more than it's worth or, if they take the property, that  
4 there may be liability associated that they don't want. Or  
5 in this case, I suspect it fell through the cracks. But for  
6 whatever reason, I think they have the right not to  
7 foreclose on their property.

8 But they don't have the right to not foreclose on  
9 their property forever. And I believe that under Washington  
10 law, if you can't enforce the note, if the note is gone for  
11 whatever, the statute of limitations has run, you don't get  
12 to then foreclose on your mortgage, on the deed of trust.

13 This note you could not enforce as of December  
14 31st, '13 at the latest and, arguably, as of 10/29/09 when  
15 the bankruptcy court confirmed the plan that the property  
16 would be turned over to the creditor.

17 And I found the -- the most informative case for  
18 me was the Cormier case, the bankruptcy case, where it talks  
19 about just that issue. That the bankruptcy court can say to  
20 the creditor, "Here's what you get. You get your security."  
21 And the creditor can say, "No thanks." And then it ends.

22 I think that when the bank- -- when this was filed  
23 as the creditor could enforce on its security, that meant it  
24 could enforce on its entire security, not just those  
25 payments that were due as of December -- or October 22,

1 2009. That's -- that doesn't make any sense to me.

2 And it frustrates the purpose of bankruptcy to  
3 allow a creditor to decide not to accept the bankruptcy  
4 court's order that what they can get for their debt is the  
5 security, by then having them come after the creditor has  
6 been discharged and say, "We know you're discharged from  
7 this, but you still owe us for -- you still owe the money as  
8 of October 22nd, 2014 and so we're going to foreclose on  
9 this."

10 It frustrates the Deed of Trust Act to allow that  
11 -- to allow the creditors to sit on this for over 30 years  
12 when they have been expressly told that what you get is your  
13 security.

14 And so as far as the equities, I don't think the  
15 equities go necessarily in either side, but there is a  
16 slight equitable, I think, strength to the plaintiffs'  
17 position that they did what they were supposed to do. They  
18 declared it in bankruptcy. The bankruptcy court said turn  
19 it over and they said whenever you ask for it basically. We  
20 know that's what -- that's what surrender means. And they  
21 did what they were supposed to do and it was the creditor  
22 who didn't do what they should have done, which was to get  
23 rid of that.

24 If we're looking at the statute of limitations, I  
25 don't think the statute of limitations runs until October

1 22nd, 2009, if you look at the statute of limitations on the  
2 note, because I don't -- based on what I have before me,  
3 there was no express declaration of the entire amount being  
4 due until the bankruptcy court said take your security  
5 interest in lieu of this note.

6 But it's a moot issue, I think, because the note  
7 was unenforceable as of 12/31/13. So whether it was  
8 unenforceable because of a statute of limitations or because  
9 of the discharge or for any other reason, it was  
10 unenforceable as of that date and I don't think you get to  
11 get around that.

12 So I'm granting the plaintiffs' motion for summary  
13 judgment. The order, like I said, you don't have to write  
14 down my reasons for it because the Court of Appeals doesn't  
15 care. And you can go make all these arguments again anew at  
16 the Court of Appeals.

17 The order must list everything that I considered,  
18 all the pleadings that I considered on both sides because  
19 even though they were cross-motions, I considered everything  
20 because they were all the same issue.

21 So you have to list everything that I considered  
22 and then when you take it up to the Court of Appeals, they  
23 will hear it de novo and you can go from there.

24 And it's an interesting concept of should this  
25 have gone back to the bankruptcy court, but nobody raised

1 that issue until argument. And so I don't know whether the  
2 bankruptcy court would have then said -- what would have  
3 happened if it had gone back to the bankruptcy court. Would  
4 the bankruptcy court have said, oh, geez, this property is  
5 now worth a heck of a lot more because they haven't  
6 foreclosed on their interest and so we want the money to  
7 give to the creditors? I don't know. Interesting thought.  
8 But it was not briefed, so I'm not considering that.

9 **MS. WERICH:** Sorry, Your Honor. Just to briefly  
10 clarify, your ruling was that the -- I understand you  
11 granted plaintiff's motion for summary judgment. I'm not  
12 arguing --

13 **THE COURT:** My ruling is I'm granting plaintiffs'  
14 motion for summary judgment. You do not need to put into  
15 this order my reasons for it.

16 **MS. WERICH:** If I would like to put some reasons  
17 in the order, I just want to make sure I'm understanding the  
18 --

19 **THE COURT:** I don't want you to put reasons in the  
20 order.

21 **MS. WERICH:** Okay.

22 **THE COURT:** It doesn't matter, guys. It doesn't  
23 matter. This is a motion for summary judgment. I am not  
24 making any factual determinations that need to go into the  
25 order because the facts are not disputed.

1 My reasons for this are not binding on the Court  
2 of Appeals. They can agree with my reasons when they review  
3 this -- and your briefing may be different when you get up  
4 to the Court of Appeals because of what you've heard me say.  
5 You're not bound by the same briefs, though you're bound by  
6 the same issues that you've raised down here and you can't  
7 raise any more factual issues. But they're not bound by my  
8 reasons for what I have done since there is -- you know,  
9 since we're not in dispute and I'm not -- my issue does not  
10 -- my ruling, it doesn't make any difference, quite frankly,  
11 what I am or am not finding.

12 And so, I don't see the point in spending several  
13 hours going over how to draft an order that says what my  
14 findings are and, quite frankly, if I was going to do that,  
15 it would be very extensive and would be a lot more detailed  
16 than -- and a lot more intelligent in the way that I said it  
17 than I'm just saying it off the top of my head. But I don't  
18 need to do that. I don't need to write an opinion and to  
19 cite all of my reasons for it and to cite the cases that I  
20 read, which were in addition to the cases that you cited,  
21 and all the cases that you cited. I don't need to do that  
22 and, quite frankly, I don't want to waste my time doing it  
23 because the Court of Appeals doesn't care.

24 I'm just saying that -- I've been doing this for  
25 15 years and, you know, I'd much rather have them just go at

1 it again up there because you may decide when you get up  
2 there that the reasons that I gave are not the ones that you  
3 want to pursue, even though you won at this level. And  
4 you're not bound to say, "Well, Judge Middaugh said that  
5 this and this and this and therefore we win." You may want  
6 to go up to the Court of Appeals and say, "I agree we won,  
7 but I think what Judge Middaugh -- the basis for it was  
8 wrong." It may very well be and so it's, you know -- there  
9 you go.

10 So all I'm saying is give me an order that lists  
11 everything I considered, deny the defendant's motion, grant  
12 the plaintiffs' motion for summary judgment. If you want to  
13 address the issue of whether they had the authority to bring  
14 that, that's going to require separate briefing, whether  
15 Carrington did or not.

16 And obviously the motion is granted against -- the  
17 plaintiffs' motion is granted against all defendants, not  
18 just Carrington, even though Carrington is the only one that  
19 responded.

20 **MS. PETERSON:** Your Honor, there's a successor  
21 trustee that was appointed in June of 2015. They are not  
22 named as a defendant, but they are of record as successor  
23 trustee. So the language in the proposed order says  
24 "defendants and their successors and assigns." Is that  
25 sufficient for your purposes or would you --

1           **THE COURT:** I think it would be.

2           **MS. PETERSON:** Okay. Now, there's a question of  
3 attorneys' fees in the deed of trust. Is that --

4           **THE COURT:** That needs to be -- you'll need to  
5 file those motions if you're asking for attorneys' fees.  
6 And I understand there's going -- you're going to be  
7 requesting -- there's going to have to be a specific order  
8 getting rid of the deed of trust, at least for this. I  
9 think the taxes are not addressed here. Are they?

10          **MS. WERICH:** No.

11          **THE COURT:** No, because you don't get rid of those  
12 unpaid taxes.

13          **MS. WERICH:** So this just means all of my -- it  
14 only includes your briefing, so we filed a motion as well  
15 for summary judgment.

16          **MS. PETERSON:** No, this -- this is just the order  
17 granting plaintiffs'. I have a separate order denying --

18          **THE COURT:** But I did consider --

19          **MS. WERICH:** But I believe you wanted all the  
20 documents you considered; correct?

21          **THE COURT:** Yeah. It should all be on one order  
22 that I'm --

23          **MS. WERICH:** Okay.

24          **THE COURT:** I'm granting the plaintiffs', denying  
25 the defendants', and I'm basing it on all of the pleadings

1 that I got from both sides. And this is everything that I  
2 got. If you want to take a look and make sure that you've  
3 listed everything, I'm assuming that everything I have in my  
4 hand is what I got. If you want to do that and make sure,  
5 because when you go up to the Court of Appeals --

6 **MS. WERICH:** Well, mine's this thick, so that's  
7 slightly concerning.

8 **THE COURT:** Well, I take out things like --

9 **MS. PETERSON:** May I approach?

10 **THE COURT:** Yeah.

11 **MS. PETERSON:** Thank you.

12 **THE COURT:** I take out things like service  
13 documents and --

14 **MS. PETERSON:** Oh, right. Okay.

15 **THE COURT:** -- stuff like that because I don't  
16 care. But I did get motions, responses and replies from  
17 both sides.

18 **MS. WERICH:** For both? Okay.

19 **THE COURT:** I did.

20 **MS. WERICH:** So I guess this is (inaudible) your  
21 office (inaudible) --

22 **THE COURT:** So if there is something that is not  
23 there that I should have considered, then --

24 **MS. WERICH:** No, because like I said, I have them  
25 separate completely. So everything really in your motion

1 wouldn't be added to that in part of yours. And our  
2 opposition to your motion --

3 **THE COURT:** So you guys do that order, would you,  
4 and then get back to me. Just give it to the clerk and  
5 she'll send it back.

6 **MS. WERICH:** Okay.

7 **THE COURT:** And I look forward to the decision  
8 from the Court of Appeals on this if you -- and I think it  
9 raises a lot of interesting issues that have been sideswiped  
10 and just gone around on the outskirts of, and maybe this  
11 will actually be the case that addresses on point the issues  
12 that you guys have been addressing, having to rely on cases  
13 that have dealt with it sidewise.

14 So make new law. Have fun with that. If you want  
15 your attorneys' fees, you have to file the motion within 10  
16 days from the date of the order here. And if there are any  
17 --

18 **MS. PETERSON:** So can this order reserve the right  
19 to bring a motion for fees --

20 **THE COURT:** Yea.

21 **MS. PETERSON:** -- for the plaintiff?

22 **THE COURT:** Yes. And also, since I'm granting  
23 summary judgment, there -- if I'm understanding the relief  
24 requested, there's going to have to be some other orders  
25 that flow from the summary judgment.

1           **MS. PETERSON:** The trustee's sale will have to be  
2 permanently enjoined. I don't -- do we need an order?

3           **MS. WERICH:** I mean, I think if it says enjoined -

4 -

5           **THE COURT:** Well, you guys deal with if there's  
6 anything else. I'm just saying you make sure it's in there  
7 or you file it within 10 days and then you've got,  
8 obviously, your 30 days to file your notices of appeal.

9           **MS. WERICH:** Mm-hmm. Thank you, Your Honor.

10          **THE COURT:** All right. So get that done, send it  
11 back to me.

12           **(Whereupon, the proceedings were concluded at**

13 **11:44 a.m.)**

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CERTIFICATE

I, Sheri L. Schneider, do hereby certify that the proceeding named herein was professionally transcribed on the date set forth in the certificate herein; that I transcribed all testimony adduced and other oral proceedings had in the foregoing matter; and that the foregoing transcript pages constitute a full, true and correct record of such testimony adduced and oral proceeding had and of the whole thereof.

IN WITNESS HEREOF, I have hereunto set my hand this 14th day of August, 2015 .



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Sheri L. Schneider



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## **APPENDIX B**

2015 WL 5024173

Only the Westlaw citation is currently available.  
United States District Court, W.D. Washington,  
at Tacoma.

Ronald M. SILVERS and Alisa M. Silvers, Plaintiffs,

v.

U.S. BANK NATIONAL ASSOCIATION As  
Trustee for the Certificate Holders of Citigroup  
Mortgage Loan Trust Inc., Asset Backed  
Passthrough Certificates Series 2007-AMCI;  
Fidelity National Title Insurance Company  
of Washington, Inc., as trustee, Defendant.

No. 15-5480 RJB.

Signed Aug. 25, 2015.

#### Attorneys and Law Firms

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WA, Thomas Henry Oldfield, Oldfield & Helsdon, PLLC,  
University PL, WA, for Plaintiffs.

Abraham K. Lorber, John S. Devlin, III, Lane Powell PC,  
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### ORDER ON U.S. BANK'S MOTION TO DISMISS AND PLAINTIFFS' MOTION TO CERTIFY QUESTION

ROBERT J. BRYAN, District Judge.

\*1 This matter comes before the Court on U.S. Bank National Association as trustee for the certificate holders of Citigroup Mortgage Loan Trust Inc., Asset Backed Pass-Through Certificates Series 2007-AMCI's ("U.S. Bank") Motion to Dismiss (Dkt.8) and Plaintiffs' Motion to Certify Question of State Law to the Washington Supreme Court (Dkt.12). The Court has considered the pleadings filed in support of and in opposition to the motions and the file herein.

This case concerns real property located at 10912 185th Avenue East, Bonney Lake, Washington. Dkt. 1-2. The sole question in the case is when the six year statute of limitation began to run on enforcing a deed of trust. Plaintiffs contend that the statute of limitation began to run on September 1, 2008, and so U.S. Bank's right to enforce a deed of trust lien

against the property has expired. Dkt. 11. U.S. Bank argues that it began to run on January 1, 2010. Dkt. 8. Plaintiffs also argue that when the statute of limitations began to run is a question that this Court should certify to the Washington State Supreme Court. Dkt. 12. For the reasons set forth below, U.S. Bank's Motion to Dismiss (Dkt.8) should be granted, and Plaintiffs' Motion to Certify Question of State Law to Washington Supreme Court (Dkt.12) should be denied.

### I. BACKGROUND FACTS AND PROCEDURAL HISTORY

The following background facts are uncontested.

#### A. BACKGROUND FACTS

On September 6, 2006, Plaintiffs borrowed \$319,200 from Argent Mortgage Company, LLC ("Argent") evidenced by a Promissory Note ("Note"). Dkt. 1-2. The Note was secured against the property by a Deed of Trust. Dkt. 11-1, at 5-29. Argent assigned its interest in the Deed of Trust to U.S. Bank on September 9, 2006. Dkt. 11-1, at 31-32.

Plaintiffs made loan payments through August 29, 2008, but since then, no further payments have been made. Dkt. 11-1, at 2.

On September 30, 2009, Plaintiffs petitioned for bankruptcy relief under Chapter 7 of the U.S. Bankruptcy Code. *In re Silvers*, United States Bankruptcy Court for the Western District of Washington case number 09-47299 PHB; Petition found in this case at Dkt. 11-1, at 34-75. (Further citations to pleadings from the bankruptcy case will be citations to the record in this case). In the Petition's "Debtor's Statement of Intention," Plaintiffs indicated that the real property at issue here would be surrendered to the lender, although they may also have intended that the property be exempt. Dkt. 11-1, at 68. On November 4, 2009, the Chapter 7 Trustee filed a Report of No Distribution which indicated that there was no property available for distribution from the estate over and above that exempted by law. Dkt. 11-2, at 6. On January 25, 2010, the Plaintiffs received an order granting them discharge under 11 U.S.C. § 727 ("Discharge Order"). Dkt. 11-1, at 77-78.

Parties agree that the effect of the Discharge Order was to render the Note unenforceable pursuant to 11 U.S.C. § 524(a). Dkts. 8, at 4 and 11 at 3. Parties also agree that the Deed of

Trust was enforceable post bankruptcy discharge. Dkts. 1–2, at 6; 8, at 4.

\*2 On March 26, 2015, the Plaintiffs received a “Default Notice and Notice of Intent to Foreclose.” Dkt. 11–1, at 80–82. U.S. Bank acknowledges that it has made no further attempt to foreclose on the property. Dkt. 8, at 2.

## B. PROCEDURAL HISTORY

Plaintiffs filed this case on July 10, 2015, and contend that the statute of limitations has expired on U.S. Bank's right to enforce the Deed of Trust lien against the property. Dkt. 1–2. They seek declaratory relief that the applicable six year statute of limitations in which U.S. Bank could have enforced the Deed of Trust has expired, and request an order quieting title, and attorneys' fees. *Id.*

## C. PENDING MOTIONS

U.S. Bank moves to dismiss the case arguing that the six year statute of limitations did not begin to run until January 1, 2010, and so, it still may bring a non-judicial foreclosure action. Dkts. 8 and 13. U.S. Bank argues that where, as here, the debt is payable in installments, a separate cause of action arises on each installment, so the statute of limitations runs separately as to each. *Id.* It argues that the statute of limitations began to run on the last time any payment was due, which was January 1, 2010, the due date before Plaintiffs' obligations under the Note were discharged under the bankruptcy court's Discharge Order. *Id.*

Plaintiffs oppose the motion to dismiss. Dkt. 11. They argue that a trust deed securing an obligation is voidable upon the expiration of the statute of limitation. *Id.* Plaintiffs assert that the deed of trust is a separate contract with its own default provisions and statute of limitations. *Id.* Plaintiffs maintain that the U.S. Bank's ability to foreclose or enforce the lien expired six years after they first defaulted under the Deed of Trust, that is, when they failed to make the September 2008 payment. *Id.* Plaintiffs argue that U.S. Bank confuses the requirements of the Note with the separate legal obligations of the Deed of Trust. *Id.* They maintain that if U.S. Bank's theory is accepted, a “lender, who chooses not to accelerate a debt would have no less than 36 years to foreclose a Deed of Trust securing a 30 year loan, even if the default was failure to make the first or second payment.” *Id.* Plaintiffs argue that this would frustrate the purposes of the statute of limitation. *Id.*

Plaintiffs also file a motion to certify the following question to the Washington State Supreme Court: “Whether the six year statute of limitations applicable to all written contracts applies to a deed of trust separately than the underlying promissory note that requires periodic payments.” Dkts. 12 and 20. Plaintiffs argue that there is no governing Washington authority on the question. *Id.* They maintain that if the statute of limitations does apply separately, “the remedy of foreclosure against the collateral on the instrument is unavailable to the creditor more than six years after the breach thereunder; although the remedy under the promissory note itself, in a given case, may not be.” *Id.*, at 3. Plaintiffs argue that certification would serve judicial economy. *Id.*

\*3 The Court notes that the parties do not address the impact, if any, of the automatic bankruptcy stay under 11 U.S.C. § 362(a), which was in place before Plaintiffs were discharged in bankruptcy.

## II. DISCUSSION

As a federal court sitting in diversity, this court is bound to apply state law. *State Farm Fire and Casualty Co. v. Smith*, 907 F.2d 900, 901 (9th Cir.1990). In applying Washington law, the Court must apply the law as it believes the Washington Supreme Court would apply it. *Gravquick A/S v. Trimble Navigation Intern. Ltd.*, 323 F.3d 1219, 1222 (9th Cir.2003). “[W]here there is no convincing evidence that the state supreme court would decide differently, a federal court is obligated to follow the decisions of the state's intermediate appellate courts.” *Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir.2001) (quoting *Lewis v. Tel. Employees Credit Union*, 87 F.3d 1537, 1545 (9th Cir.1996) (internal quotation marks omitted)).

### A. STANDARD FOR MOTION TO DISMISS

Fed.R.Civ.P. 12(b) motions to dismiss may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir.1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir.1983). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the

elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1964–65, 167 L.Ed.2d 929 (2007) (internal citations omitted). “Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Id.* at 1965. Plaintiffs must allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 1974.

## B. STATUTE OF LIMITATIONS

In Washington, under **RCW 7.28.300**,

The record owner of real estate may maintain an action to quiet title against the lien of a mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed of trust would be barred by the statute of limitations, and, upon proof sufficient to satisfy the court, may have judgment quieting title against such a lien.

The Washington statute of limitation governing actions on written contracts, like the Deed of Trust here, is six years. RCW 4.16.040. “The statute of limitation does not begin to run until a breach of the contract occurs.” *Safeco Ins. Co. v. Barcom*, 112 Wash.2d 575, 583, 773 P.2d 56 (1989).

U.S. Bank argues that the Deed of Trust is an installment contract. Indeed, the Deed of Trust provides that Plaintiffs agreed to “pay **when due** the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note.” Dkt. 11–1, at 8 (*emphasis added*). Plaintiffs also agreed to pay, on the day “Periodic Payments” are due, escrow items including: taxes, leasehold payments or ground rents, premiums for hazard insurance and premiums for mortgage insurance, if any. *Id.* The Deed of Trust defines “periodic payment” as “the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under [Funds for Escrow Items] of this Security Instrument.” Dkt. 11–1, at 6. Accordingly, the Deed of Trust’s obligations are payable in installments, and Plaintiffs’ breach of the contract occurred every time they missed an installment. (Plaintiffs argue that U.S. Bank conflates the obligations required under the Deed of Trust with the obligations of the Note. Plaintiffs fail to acknowledge, though, that the Deed of Trust specifically

adopts the Note’s obligations and timing of when payments are due.) The Deed of Trust is an installment contract.

\*4 In Washington, “when recovery is sought on an obligation payable by installments[,] the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it.” *Herzog v. Herzog*, 23 Wash.2d 382, 388, 161 P.2d 142, 144–45 (1945); *In re Parentage of Fairbanks*, 142 Wash.App. 950, 960, 176 P.3d 611 (2008). “A separate cause of action arises on each installment, and the statute of limitations runs separately against each....” 31 Richard A. Lord, *Williston on Contracts* § 79:17, at 338 (4th ed.2004); see also 25 David K. Dewolf, Keller W. Allen & Darlene Barrier Caruso, *Washington Practice: Contract Law and Practice* § 16:20, at 196 (2012–13 Supp.) (“Where a contract calls for payment of an obligation by installments, the statute of limitations begins to run for each installment at the time such payment is due”).

The statute of limitations on the right to enforce the Deed of Trust began running the last time any payment on the Note was due. The Plaintiffs remained personally liable on the Note (and successive payments continued to be due) until January 1, 2010, when they missed that payment; they received their Chapter 7 discharge on January 25, 2010. Accordingly, the statute of limitations to enforce the Deed of Trust lien began to run on January 1, 2010. Plaintiffs’ case should be dismissed.

## C. CERTIFICATION TO STATE SUPREME COURT

Pursuant to RCW 2.60.020,

When in the opinion of any federal court before whom a proceeding is pending, it is necessary to ascertain the local law of this state in order to dispose of such proceeding and the local law has not been clearly determined, such federal court may certify to the supreme court for answer the question of local law involved and the supreme court shall render its opinion in answer thereto.

Further, under Washington’s Rules of Appellate Procedure 16.16,

The Supreme Court may entertain a petition to determine a question of law certified to it under the Federal Court Local Law Certificate Procedures Act if the question of state law is one which has not been clearly determined and does not involve a question determined by reference to the United States Constitution.

Plaintiffs' motion to certify the above question to the Washington State Supreme Court (Dkt.12) should be denied. Plaintiff failed to show that such a certification should be made. Washington law regarding the statute of limitations and installment contracts has been determined. Plaintiffs' motion should be denied.

### **III. ORDER**

Therefore, it is hereby **ORDERED** that:

- U.S. Bank National Association as trustee for the certificate holders of Citigroup Mortgage Loan Trust Inc., Asset Backed Pass-Through Certificates Series 2007-AMC1's ("U.S.Bank") Motion to Dismiss (Dkt.8) **IS GRANTED**;
- This case **IS DISMISSED**; and
- Plaintiffs' Motion to Certify Question of State Law to the Washington Supreme Court (Dkt.12) **IS DENIED**.

\*5 The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

#### **All Citations**

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