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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GARY McGREAL and JESSICA McGREAL, Appellants,

v.

PEAK FORECLOSURE SERVICES OF WASHINGTON, INC.,
LILIAN SOLANO (Trustee Sales Officer), JONNY DAHINTON
(Trustee Sales Officer), SHELLPOINT MORTGAGE
SERVICING, and THE BANK OF NEW YORK MELLON FKA
THE BANK OF NEW YORK, AS TRUSTEE FOR THE
CERTIFICATE HOLDERS OF THE CWALT, INC.,
ALTERNATIVE LOAN TRUST 2006-40T1, MORTGAGE
PASS-THROUGH CERTIFICATES, SERIES 2006-40T1,
Respondents.

BRIEF OF RESPONDENTS

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The Bank of New York Mellon FKA The Bank of New York, as
Trustee for the Certificateholders of the CWALT, Inc., Alternative
Loan Trust 2006-40T1, Mortgage Pass-Through Certificates,
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I. INTRODUCTION

Nearly one year after Respondents¹ prevailed on their Motion for Summary Judgment in this action and well after the thirty-day appeal deadline for that order had expired, Appellants Gary McGreal and Jessica McGreal (“Appellants” or the “McGreals”) instead elected to file a CR 60(b)(1) Motion to Vacate Judgment based on a single ground—that the McGreals made a typographical error in their response to Respondents’ summary judgment motion and that typographical error warranted vacating the judgment.

After the trial court rejected the McGreals’ specious arguments and denied their motion to vacate judgment, the McGreals appealed. However, despite only appealing the order denying their motion to vacate, the Opening Brief in substance demonstrates that this appeal is nothing but a backdoor attempt to

¹ The Respondents are (1) Peak Foreclosure Services of Washington, Inc. (“Peak”), (2) NewRez LLC fka New Penn Financial, LLC dba Shellpoint Mortgage Servicing (“Shellpoint”), and The Bank of New York Mellon FKA The Bank of New York, as Trustee for the Certificateholders of the CWALT, Inc., Alternative Loan Trust 2006-40T1, Mortgage Pass-Through Certificates, Series 2006-40T1 (“BNYM”) (collectively, “Respondents”)

revive their failed summary judgment arguments. Indeed, the Opening Brief does not once mention any arguments the McGreals raised before the trial court in connection with their CR 60(b)(1) motion to vacate, much less mention the trial court's rationale in denying the motion. Instead, the Opening Brief regurgitates the McGreals' deficient summary judgment arguments claiming that Respondents supposedly failed to comply with requirements under the Deed of Trust Act ("DTA")—RCW 61.24.031(1)(c)—to provide them with a Notice of Pre-Foreclosure Options. These arguments are improper on numerous grounds.

First, the McGreals misunderstand the scope of this appeal. They did not appeal the order granting summary judgment, and any attempt to do that indirectly now is impermissible. The McGreals are well-beyond the thirty (30) day deadline to appeal the trial court's summary judgment order, and their CR 60(b)(1) motion to vacate did not extend that appeal deadline. Therefore, the Court lacks jurisdiction to hear this appeal because, in substance, it is just an untimely appeal of the order granting summary judgment in favor of Respondents.

Second, the Opening Brief contains numerous procedural deficiencies. It is replete with arguments and citations to authority

that lack any understandable connection to the McGreals' motion to vacate. In addition, the McGreals' sole assignment of error concerning the motion to vacate is unsupported by argument, authority, or applicable record citations. The Opening Brief also improperly raises arguments for the first time on appeal that were not raised in the McGreals' motion to vacate papers. Thus, the McGreals have waived review of their assignment of error and all arguments in their Opening Brief.

Finally, despite the fact that the Opening Brief completely ignores the order denying the McGreals' motion to vacate—the only order at issue on appeal—the record unambiguously shows that the trial court did not commit any error. Because the sole issue on appeal is whether the motion to vacate was properly granted, the standard of review on appeal is abuse of discretion. Not only did the trial court refute that the alleged typographical error played any role in its order granting summary judgment, but legal errors are not reviewable in connection with motions to vacate under CR 60(b)(1) in any event. Therefore, the McGreals do not and cannot show that the trial court abused its discretion.

Accordingly, for these reasons and the reasons detailed below, Respondents respectfully request that this Court affirm the trial court's denial of the McGreals' motion to vacate judgment.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the Court lack jurisdiction to hear this untimely appeal?
2. Have the McGreals waived their Assignment of Error and arguments raised in the Opening Brief?
3. Did the trial court abuse its discretion in denying the McGreals' motion to vacate judgment?

III. FACTUAL AND PROCEDURAL HISTORY

A. The McGreals Obtain A Loan Secured By A Deed of Trust And Default On Their Loan Obligations

In October 2006, the McGreals obtained a loan from Countrywide Home Loans, Inc. ("Countrywide") to refinance the property located at 23044 Jefferson Point Road, NE Kingston, Washington 98346 (the "Property"). (CP 464, 488-502, Exs. B-C) The loan was secured by a Deed of Trust recorded against the Property. (CP 491-502, Ex. C).

In or around May 2011, the McGreals stopped making payments on the loan. (CP 39) In July 2011, the McGreals were

advised that they were in default and received multiple letters regarding their delinquent status. (CP 507-514, Exs. E-F) In October 2011, Countrywide assigned its interest in the Deed of Trust to BNYM. (CP 529, Ex. H). When the McGreals failed to cure their default, BNYM initiated non-judicial foreclosure proceedings. (CP 626-639, Exs. F-G)

**B. Pre-Foreclosure Notices Are Sent To The McGreals
And A Notice of Default Is Eventually Issued**

In compliance with the DTA, on or about July 9, 2012, a Notice of Pre-Foreclosure Options was sent to the McGreals. (CP 532-535, Ex. I) Thereafter, the McGreals were sent a second notice on or about July 26, 2013. (CP 465, 541-544, Ex. J) Likewise, additional notices were posted on the Property in or around August 2013 and November 2013. (CP 465 ¶¶ 13-14). Shellpoint, as servicer of the loan, also repeatedly attempted to contact the McGreals to discuss foreclosure avoidance by telephone without success. (CP 465-466 ¶¶ 15-16)

On January 28, 2014, Peak was appointed as successor trustee. (CP 619, Ex. C) Peak issued a notice of default on or about September 12, 2014 and subsequently recorded a notice of trustee's sale on October 14, 2014. (CP 627-639, Exs. F-G)

C. The McGreals File The Instant Lawsuit And The Trial Court Grants Summary Judgment for Respondents

On April 16, 2015, the McGreals filed this lawsuit seeking damages and injunctive relief based in large part on allegations that Respondents supposedly failed to comply with certain statutory requirements for non-judicial foreclosure under the DTA. (CP 3-5, 44-45)

On December 1, 2017, Respondents filed a motion for summary judgment showing that there was no triable issue of material fact and that they were entitled to judgment as a matter of law (“2017 Motion for Summary Judgment”). (CP 426-443) In the motion, *inter alia*, Respondents presented incontrovertible evidence that they complied with the DTA’s statutory requirements, including sending the Notice of Pre-Foreclosure Options required by RCW 61.24.031. (CP 532-535, 541-544)

Although the trial court afforded the McGreals multiple opportunities to properly respond to Respondents’ summary judgment motion, the McGreals failed to submit any evidence with either of their responses filed on January 4, 2018 and May 16, 2018. (CP 90-212, 213-241) In the McGreals’ responses, they continued to argue—without admissible evidence and in direct

contrast to the evidence proffered by Respondents—that Respondents allegedly failed to send the Notices of Pre-Foreclosure Options mandated by the DTA and that foreclosure was therefore improper. (CP 95-97, 226-227)

On May 25, 2018, the trial court granted summary judgment in favor of Respondents and entered judgment in favor of Respondents (“Judgment”). (CP 251) The McGreals did not appeal the Judgment.

D. Nearly One Year Later, The McGreals File A Motion To Vacate Judgment, And The Trial Court Denies The Motion

Rather than appealing the Judgment, on May 16, 2019, the McGreals filed a “Motion to Vacate Summary Judgment” pursuant to CR 60(b)(1) (“2019 Motion to Vacate”) almost one year after Respondents had prevailed on their summary judgment motion. (CP 252-254)² The sole ground for the McGreals’ motion was

² At the same time, on March 19, 2019, the McGreals commenced an separate lawsuit against Peak and Shellpoint asserting nearly identical claims as in this case. That companion lawsuit—which was dismissed in the trial court based on res judicata grounds—is the subject of a second appeal filed by Appellants before this Court. *See McGreal v. Peak Foreclosure Services, et al.*, Court of Appeals Division II, Case No. 53533-5-II.

exceedingly narrow—their sole argument was that they had inadvertently misquoted a provision of the DTA:

In my Response to Defendants’ Motion for Summary Judgment I had quoted the NOPFO as RCW 61.24.031(c). This was a typo and should have read RCW 61.24.031(1)(c). . . . This case should not have been awarded against the Plaintiffs based on an irrelevant clerical error. The key reference was cited correctly.

(CP 253-254)

After a hearing on the 2019 Motion to Vacate, the trial court denied the McGreals’ motion on August 5, 2019. (CP 729-730) In the order, the trial court stated: “Contrary to Plaintiffs’ assertion, Plaintiffs’ own typographical error played no role in the Court’s granting of Defendants’ Motion for Summary Judgment, and further, Plaintiffs fail to offer any facts, law, or argument that would be appropriate grounds to vacate the May 25th Order.” (*Id.*)

E. The McGreals Appeal The Denial Of Their Motion To Vacate, But With Arguments Solely Pertaining To Their Summary Judgment Opposition

On August 19, 2019, the McGreals filed a Notice of Appeal stating their intention to seek appellate court review “of the Motion to Vacate Summary Judgment of June 7, 2019.” (CP 732-733)

Despite the limited scope of the notice of appeal and in spite of the fact that the McGreals did not and could not appeal Judgment, the McGreals filed their Opening Brief replete with arguments that reiterate the same failed arguments they made in connection with Respondents’ motion for summary judgment. (AB 3-11) Notably, the McGreals do not mention the arguments they raised in their motion to vacate papers or the trial court’s order denying the 2019 Motion to Vacate. (*Id.*)

IV. STANDARD OF REVIEW

Motion to Vacate. A motion to vacate judgment under CR 60(b) is reviewed for an abuse of discretion. *Barr v. MacGugan*, 119 Wash. App. 43, 46, 78 P.3d 660, 662 (2003).

V. ARGUMENT

A. This Court Lacks Jurisdiction To Hear This Appeal Because It Is, In Reality, An Untimely Appeal Of The Judgment

“A necessary prerequisite to appellate jurisdiction is the timely filing of the notice of appeal.” *Buckner, Inc. v. Berkey Irr. Supply*, 89 Wash. App. 906, 911, 951 P.2d 338, 341 (1998); *Malott v. Randall*, 83 Wash. 2d 259, 266, 517 P.2d 605, 609 (1974) (“The timely filing of a notice of appeal is jurisdictional.”). As the Washington Supreme Court has explained:

Where rule of court prescribes the time of filing of the notice of appeal such is a jurisdictional step and neither stipulation nor other act of the parties can confer the right of appeal once lost by expiration of the time prescribed by the rule for filing of the notice. In other words, an appeal must be perfected in the manner and time required by the rule in the court where judgment or order from which appeal is taken is entered to give appellate court jurisdiction of the appeal for purpose other than dismissal of the appeal.

In re Yand's Estate, 23 Wash. 2d 831, 838, 162 P.2d 434, 437 (1945).

“A notice of appeal must be filed within 30 days of the decision which the party filing the notice wants reviewed, or within 30 days of the entry of an order deciding a *timely* motion for reconsideration.” *King Cty. v. Williamson*, 66 Wash. App. 10, 11, 830 P.2d 392, 393 (1992) (citing RAP 5.2(a) and (e)). However, a motion under CR 60(b)(1) to vacate judgment does not qualify as a motion for reconsideration for purposes of extending the notice of appeal deadline—“A CR 60 motion to vacate a judgment is not one of the posttrial motions that extends the time for filing an appeal under RAP 5.2(e).” *Matter of Parental Rights to E. R. D.*, 197 Wash. App. 1042, *4 (2017)³; *see also* RAP 5.2(a)(e) (CR 60(b) motions not identified as the type of motion that would operate to extend the appeal deadline).

Further, any issues raised on appeal in connection with the appeal of a CR 60(b) motion are limited to the trial court’s exercise of discretion in deciding the issues raised in that motion—not the underlying judgment or any prior order by the trial court. *In re*

³ Although this is an unpublished opinion, it is citable as non-binding, persuasive authority pursuant to GR 14.1(a). *See* GR 14.1(a) (“unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party...”).

Dependency of J.M.R., 160 Wash. App. 929, 939 n.4, 249 P.3d 193, 199 (2011); *see, e.g., Bjurstrom v. Campbell*, 27 Wash. App. 449, 452, 618 P.2d 533, 535 (1980) (explaining that where appellants failed to “seek timely review of th[e] [underlying] judgment . . . CR 60(b) is not a substitute for appeal[ing]” the judgment). “Said another way, an unappealed final judgment cannot be restored to an appellate track by means of moving to vacate and appealing the denial of the motion.” *State v. Gaut*, 111 Wash. App. 875, 881, 46 P.3d 832, 835 (2002).

To illustrate, in *U.S. Bank N.A. v. Harkey*, 189 Wash. App. 1005 (2015)⁴ (“*Harkey*”), the Court of Appeals dismissed an appeal as untimely based on the plaintiff’s failure to timely appeal the underlying judgment. There, the trial court entered a default judgment against the plaintiff in 2011. *Id.* at *1. Rather than appeal the default judgment, the plaintiff filed numerous motions to reconsider and/or motions to vacate the judgment under Rule 60(b) instead of challenging the default judgment itself. *Id.* at *1-*2. After the trial court denied these various motions to vacate the default judgment, in March 2014, the plaintiff filed a notice of

⁴ *Id.*

appeal challenging not only the default judgment from 2011, but also purporting to challenge the various motions to vacate judgment/reconsideration on appeal as well.

In ultimately dismissing the appeal as untimely, the Court of Appeals explained that the plaintiff's "serial motions to set aside or vacate the default judgment, whether styled as a motion to set aside the judgment or motion to reconsider, repeatedly asked for the same remedy-to vacate the default judgment" and commented that the "motions to vacate the default judgment [we]re in substance untimely motions to reconsider the default judgment order." *Id.* at *2 n.8. In connection with the plaintiff's CR 60(b) motion, the court stated:

It is well settled that an appeal from the denial of a CR 60(b) motion is not a substitute for an appeal and is limited to the propriety of the denial, not the impropriety of the underlying order. . . . In other words, an unappealed final judgment cannot be restored to an appellate track by moving to vacate the judgment and then appealing the denial of that motion. . . . **This is so because the 'exclusive procedure to attack an allegedly defective judgment is by appeal from the judgment, not by appeal from a denial of a CR 60(b) motion.'**

Id. at *3 (emphasis added) (citations omitted). Consequently, because the plaintiff “filed his notice of appeal on March 4, 2014 nearly three years after the trial court entered a default judgment against him” and “[b]ecause none of his subsequent motions challenging the default judgment tolled, extended, or revived the time period for filing a notice of appeal, his appeal [wa]s time barred.” *Id.* at *3, *5 (dismissing appeal as untimely).

In this case, although the McGreals purport to appeal the trial court’s order denying their 2019 Motion to Vacate, the Opening Brief does not raise any arguments made in connection with that motion, but instead raises the same arguments they made in connection with the 2017 summary judgment proceedings. As in *Harkey*, however, these summary judgment arguments are not properly before this Court.

Indeed, the trial court granted Respondents’ 2017 Summary Judgment Motion on May 25, 2018. (CP 251) The McGreals did not appeal the Judgment, but instead filed the two-page 2019 Motion to Vacate claiming that the trial court erred in granting summary judgment based on a typographical error contained in the McGreals’ response to the 2017 Summary Judgment Motion. (CP 253-254) Yet, the Opening Brief does not mention their argument

concerning the alleged typographical error raised in their 2019 Motion to Vacate papers, but rather re-hashes the same arguments they made in connection with the summary judgment motion.

For example, the McGreals argue on appeal that Respondents' representatives "did not meet the requirements for due diligence per under [sic] RCW 61.24.032(5) . . . to send borrowers the pre-foreclosure due diligence letter" and that foreclosure was not "started legally". (AB 6-7) These are the same merits arguments already raised by Appellants and rejected by the trial court in connection with 2017 Motion for Summary Judgment and which were not raised in their 2019 Motion to Vacate papers. (CP 95, 97) ("The Plaintiffs had not received a Notice of Pre-Foreclosure Options (NOPFO) . . . as required. . ." and "Peak Foreclosure Services, Inc. is [] proceeding with what is now obvious to all parties, an illegal foreclosure.")

As demonstrated, however, Appellants' arguments are improper because the appeal is solely limited to the *propriety of the denial of the 2019 Motion to Vacate*, not the impropriety of the order granting summary judgment in favor of Respondents. *See*

Bjurstrom, 27 Wash.App. at 451 n.4, 618 P.2d 533.⁵ Although the McGreals' appeal is disguised in form as an appeal from the order denying their 2019 Motion to Vacate, it is in substance nothing other than an appeal challenging the order granting summary judgment. The McGreals cannot circumvent their failure to timely file a notice of appeal from the 2018 summary judgment under the guise of an appeal from the trial court's order denying their Motion to Vacate.

Thus, the instant appeal is untimely and this Court lacks jurisdiction to hear the instant untimely appeal. *See, e.g.*, *Washington v. Boeing Co.*, 105 Wash. App. 1, 18, 19 P.3d 1041, 1051 (2000) (declining to consider untimely appeal); *Harkey*, 189 Wash. App. 1005 at *5 (dismissing appeal as untimely).

B. The Opening Brief Contains Numerous Procedural Defects Dooming The Appeal

The McGreals' Opening Brief is replete with various arguments that lack any understandable connection to the narrow issue on appeal—whether the trial court abused its discretion in

⁵ Likewise, Appellants' 2019 Motion to Vacate under CR 60(b) did not extend the notice of appeal deadline for the 2017 Motion for Summary Judgment either. *See, infra*, § V(a) at p. 12.

denying the 2019 Motion to Vacate. Further, because the Opening Brief fails to address the substance of their motion to vacate, the McGreals also have waived review of their Assignment of Error and all arguments on appeal.

1. Appellants’ Arguments Are Unsupported By Meaningful Analysis or Authority And Should Be Disregarded

As an initial matter, the Court of Appeals “presumes that the court below proceeded according to law and reached a correct decision, and that the burden is upon the appellant to show error.” *Housing Auth. of King Cty. v. Saylor*, 87 Wash. 2d 732, 742, 557 P.2d 321, 327 (1976).

Appellate courts are not obligated to consider arguments proffered by an appellant which are unsupported by relevant authority or meaningful analysis. *See State v. Elliott*, 114 Wash. 2d 6, 15, 785 P.2d 440, 445 (1990) (courts need “not consider claims insufficiently argued by the parties”); *Cowiche Canyon Conservancy v. Bosley*, 118 Wash. 2d 801, 809, 828 P.2d 549, 553 (1992) (declining to consider grounds argued which were “not supported by any reference to the record nor by any citation of authority”). Indeed, appellate courts “do not consider conclusory

arguments” and “[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit appellate review.”

Christian v. Tohmeh, 191 Wash. App. 709, 728, 366 P.3d 16, 26 (2015) (citations omitted).

Importantly, pro se appellants are held to the same standards as attorneys. “[I]n undertaking the role of a lawyer, [an appellant] . . . assumes the duties and responsibilities and is accountable to the same standards of ethics and legal knowledge.” *Batten v. Abrams*, 28 Wash. App. 737, 739 n.1, 626 P.2d 984, 986 (1981). “[T]he law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel—both are subject to the same procedural and substantive laws.” *In re Marriage of Olson*, 69 Wash. App. 621, 626, 850 P.2d 527, 530 (1993); *see, e.g., State v. Marintorres*, 93 Wash. App. 442, 452, 969 P.2d 501, 506 (1999) (refusing to consider pro per’s conclusory and unsupported claims).

In this case, despite only appealing the order denying the 2019 Motion to Vacate, the McGreals fail to offer any meaningful argument or analysis showing how the trial court abused its discretion in denying that motion. Indeed, the Opening Brief makes no mention of the narrow arguments at issue in their 2019

Motion to Vacate concerning the “irrelevant clerical error”. (CP 254) Nor does the Opening Brief address the trial court’s rationale in denying their 2019 Motion to Vacate. (CP 729-730)

To illustrate, the Opening Brief’s “Issues Pertaining to Assignments of Error” and “Argument” sections have nothing to do with the 2019 Motion to Vacate. Instead, the McGreals identify nine alleged “issues” on appeal, which address matters pertaining to the requirements under RCW 61.24.031, among other things. Such matters include whether “a trustee, beneficiary or unauthorized agent [can] issue a notice of default without satisfying the due diligence requirements of RCW 61.24.031(5)” or whether a Notice of Default’s “address field” is required to contain a “current address”. (AB 5-6)

Similarly, the “Argument” section of the Opening Brief merely contains disjointed citations to authority concerning a lender’s obligations under the DTA when pursuing non-judicial foreclosure and a defendant’s burden on summary judgment. (AB 9-10) However, none of these points explains or otherwise addresses the limited “clerical error” argument they raised in the 2019 Motion to Vacate, which is the only subject of this appeal. (CP 254)

Accordingly, because the Opening Brief is replete with irrelevant issues, arguments, and authority that lack any coherent relationship to Appellants' 2019 Motion to Vacate, the Court should decline to consider the Opening Brief for this reason alone.

2. Appellants Have Waived Their Assignment of Error and Arguments on Appeal

In addition to the McGreals' failure to meet their heavy burden to demonstrate error by the trial court with proper arguments and authority, they have also waived consideration of both the Assignment of Error and arguments contained in their Opening Brief.

It is well-settled that if “the assignment of error is not argued in the brief . . . [it] is waived.” *Erdmann v. Henderson*, 50 Wash. 2d 296, 298, 311 P.2d 423, 424 (1957); *see, e.g., Jensen v. Jensen*, 190 Wash. App. 1011, *3 (2015) (assignment of error waived where the “notice of appeal designated the court’s final decree”, but the appellant “fails to assign error to, or present argument about, the court’s final decree or its findings of fact and

conclusions of law.”)⁶; *Smith v. King*, 106 Wash. 2d 443, 451-52, 722 P.2d 796, 801 (1986) (finding an assignment of error pertaining to trial court’s award of attorney fees to be waived where the “assignment of error is neither stated nor argued, nor is any legal authority bearing on that issue cited.”).

Relatedly, arguments made on appeal that were not properly raised in the trial court below are waived on appeal. *See Christensen v. Hoskins*, 65 Wash. 2d 417, 421, 397 P.2d 830, 832 (1964) (argument could not “be considered because it was [not] . . . properly presented to the trial court.”); Wash. R. App. P. 2.5(a) (court of appeals “may refuse to review any claim of error which was not raised in the trial court.”).

Here, the McGreals only appealed the 2019 Motion to Vacate. (CP 733) (“Gary L. McGreal and Jessica McGreal, plaintiffs, seek[] review by the designated appellate court of the Motion to Vacate Summary Judgment of June 7, 2019.”) In their sole assignment of error, they seek this Court’s review of whether “[t]he trial court erred and committed an abuse of discretion in

⁶ This case is cited as non-binding persuasive authority only pursuant to GR 14.1(a).

entering the order denying appellants’ motion to vacate the final judgment when the Defendants’ have failed their burden of truth requirements to supply uncontroverted facts demonstrating that they had met the due diligence requirements of RCW 61.24.031(5).” (AB 3) In other words, the Assignment of Error—just like the Notice of Appeal—specifically seeks review of the 2019 Motion to Vacate, despite discussing the underlying summary judgment order.

However, as demonstrated, the Opening Brief fails in its entirety to address the narrow scope of the 2019 Motion to Vacate and, instead, improperly re-argues the same issues previously raised and rejected in connection with the summary judgment motion. (AB 6-8) Thus, because the McGreals have failed to support their only Assignment of Error with relevant argument and authority, and because the McGreals are raising arguments on appeal that were not at issue in their Motion to Vacate, both the Assignment of Error and arguments on appeal are waived.⁷

⁷ Although the McGreals raised various arguments concerning Respondents’ alleged failure to provide pre-foreclosure options during the hearing on their 2019 Motion to Vacate, such arguments were not properly before the trial court. “[E]very motion must specify the grounds and relief sought “with particularity” . . . and *courts may not consider grounds not stated in the*

C. Nonetheless, The Trial Court Did Not Abuse Its Discretion In Denying Appellants’ Motion to Vacate

The only issue appropriate for appellate review is the singular issue presented in the 2019 Motion to Vacate— whether the judgment should have been vacated “based on an irrelevant clerical error” because they incorrectly cited to RCW 61.24.031(c) in their Response to Respondents’ Summary Judgment Motion, instead of citing to the correct subsection **RCW 61.24.031(1)(c)**. (CP 254)

Despite the McGreals’ failure to properly raise this issue on appeal, the record demonstrates that the trial court did not abuse its discretion by denying the 2019 Motion to Vacate. The trial court’s ruling was not based on untenable grounds or made for untenable reasons. Not only did Respondents produce irrefutable evidence

motion.” *Orsi v. Aetna Ins. Co.*, 41 Wash. App. 233, 247, 703 P.2d 1053, 1061 (1985) (citing CR 7(b)(1)) (emphasis added); *see also* CR 7(b)(1) (it is incumbent on a moving party to make such motion “in writing . . . with particularity the grounds therefor, and shall set forth the relief or order sought.” CR 7(b)(1) (emphasis added). Relatedly, it is improper for courts to “consider an issue raised for the first time during oral argument” because “[i]t is particularly unfair to consider an argument when opposing counsel has had no opportunity to prepare a response.” *Cf. State v. Kirwin*, 137 Wash. App. 387, 394, 153 P.3d 883, 887 (2007) (citation omitted).

demonstrating compliance with the DTA's pre-notice of default requirements during the summary judgment proceedings, but the trial court adequately explained that McGreals' failure correctly to cite the applicable subsection of the RCW played no role in its decision to grant summary judgment for Respondents. None of this amounts to an abuse of discretion warranting reversal of the Judgment.

**1. Respondents' Uncontroverted Evidence
Established Compliance With The DTA's Pre-
Foreclosure Notice Provision**

Preliminarily, Respondents' undisputed evidence submitted in connection with the 2017 Motion for Summary Judgment established that the McGreals were sent the Notices of Pre-Foreclosure Options as required under the DTA, RCW 61.24.031(1)(b)-(1)(c), (5).

"RCW 61.24.031 [of the DTA] authorizes a trustee, a beneficiary, or an authorized agent to issue a notice of default" after completing certain due diligence requirements specified by statute. *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wash. 2d 820, 828 n.3, 355 P.3d 1100, 1104 (2015); RCW 61.24.031(5). Under this statutory provision, a trustee is not authorized to issue a notice of

default until either “(i) Thirty days after satisfying the due diligence requirements as described in subsection (5) of this section and the borrower has not responded; or (ii) if the borrower responds to the initial contact, ninety days after the initial contact with the borrower was initiated.” RCW 61.24.031(1).

Subsection (5) authorizes issuance of a notice of default where the “beneficiary or authorized agent has initiated contact with the borrower as required under subsection (1)(b)”, which includes providing the borrower with the statutorily mandated Notice of Pre-Foreclosure Options. RCW 61.24.031(1)(b)-(1)(c), (5). Among other things, the Notice of Pre-Foreclosure Options is required to inform the borrowers that if they fail to respond “within thirty days, a notice of default may be issued and [they] may lose [their] home in foreclosure.” RCW 61.24.031(5).

Here, Respondents introduced uncontroverted evidence on summary judgment that statutory Notices of Pre-Foreclosure Options were sent to the McGreals in July 2012 and July 2013, and that the McGreals failed to respond to those notices. (CP 532-548, Exs. I-J) In addition, Respondents’ uncontroverted evidence demonstrated that Shellpoint went beyond its obligations under the DTA and attempted to contact the McGreals by phone, follow-up

letters through the mail, and even posted notices to the front door of the Property concerning the impending foreclosure. (CP 465-66 ¶¶ 13-16) None of these efforts elicited any response from the McGreals. (*Id.*)

Thus, the Notice of Pre-Foreclosure Option letters, coupled with the extensive follow-up phone calls, letters, and notices physically posted to the Property, established that Respondents satisfied the DTA's due diligence requirements as a matter of law. *See, e.g., Knecht v. Fid. Nat. Title Ins. Co.*, No. C12-1575RAJ, 2015 WL 3618358, at *9 (W.D. Wash. June 9, 2015) (“Although no one produced a letter that complied with RCW 61.24.031, the [defendant's] declaration establishes, on a more-probable-than-not basis, that [defendant] complied with RCW 61.24.031 . . . by making the required contact with [the borrowers] by letter and telephone.”).

In opposition to Respondents' 2017 Summary Judgment Motion, however, the McGreals offered no admissible evidence. (CP 90-212, 213-241) Notably, the McGreals failed to meet their evidentiary burden in opposition despite receiving multiple continuances of the summary judgment hearing date and multiple opportunities to correct their deficient opposition papers. (RP 25).

**2. The Trial Court Did Not Abuse Its Discretion
Based On The McGreals' Alleged Typographical
Error**

Furthermore, although the McGreals chose to file the motion to vacate under CR 60(b)(1)—nearly one year after the trial court granted the 2017 Motion for Summary Judgment—the Opening Brief fails to raise a single argument showing that the trial court abused its discretion in refusing to vacate the Judgment.

“CR 60(b) provides, in part . . . On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order[.]” *Luckett*, 98 Wash. App. at 310 (citing CR 60(b)(1)).

It is well-established in Washington, however, “that a mistake of law will not support vacation of a judgment” under CR 60(b). *Bjurstrom*, 27 Wash. App. 449 at 451; *Union Bank, N.A. v. Vanderhoek Assocs., LLC*, 191 Wash. App. 836, 843, 365 P.3d 223, 227 (2015) (“Errors of law may not be corrected by a CR 60 motion; rather, they must be raised on appeal.”).

On appeal, a trial court’s decision on a CR 60(b) motion is narrowly reviewed under an abuse of discretion standard. *In re Marriage of Tang*, 57 Wash. App. 648, 653, 789 P.2d 118 (1990). This means that an appellate court “will not overturn the [trial court’s] decision unless the trial court exercised its discretion on untenable grounds or for untenable reasons.” *In re Dependency of J.M.R.*, 160 Wash. App. at 939 n.4, 249 P.3d at 199 (citation omitted).

In their 2019 Motion to Vacate, the McGreals premised the entire motion on the argument that “th[e] case should not have been awarded against the Plaintiffs based on an irrelevant clerical error [because the McGreals cited to RCW 61.24.031(c) instead of RCW 61.24.031(1)(c) in one of their responses]. The key reference was cited correctly.” (CP 252-253) But, as reflected by the record, the trial court appropriately denied the 2019 Motion to Vacate by rejecting this hollow argument.

First, the trial court’s order clearly explains that “[c]ontrary to Plaintiffs’ assertion, Plaintiffs’ own typographical error played no role in the Court’s granting of Defendants’ Motion for Summary Judgment[.]” (CP 730) Stated differently, the trial court explicitly acknowledged that the McGreals’ claimed citation

error—the sole basis for their motion—had no impact on the trial court’s ultimate decision to grant Respondents’ summary judgment motion.

Second, despite premising their motion to vacate on the typographical error, they in fact did correctly cite to RCW 61.24.031(1)(c) in one of their summary judgment responses. (CP 215) (citing to “RCW 61.24.31(1)(c)”). Moreover, during the summary judgment hearing, the trial court was provided with a copy of RCW 61.24.031, which naturally would include subdivision (1)(c). (CP 251, RP 8) Thus, the record belies the McGreals’ motion to vacate arguments and shows that the trial court did not rely on incorrect authority in granting summary judgment.

Moreover, to the extent the McGreals were suggesting in their motion to vacate that the trial court committed a legal error on summary judgment, this would not have been an appropriate basis to warrant vacating the summary judgment order in any event because mistakes of law are not reviewable in connection with CR 60(b)(1) motions. *See Bjurstrom*, 27 Wash. App. 449 at 451. The trial court otherwise correctly determined that there were no other bases raised in the 2019 Motion to Vacate that would have justified

vacating the judgment and Appellants have offered no other arguments on appeal showing otherwise. (CP 252-254)

Thus, the trial court did not abuse its discretion in denying the 2019 Motion to Vacate, and this Court should affirm the trial court's order for this additional reason.

VI. CONCLUSION

This Court should affirm the trial court because the McGreals failed to timely appeal the order that is the true subject of the appeal—the 2017 Motion for Summary Judgment. Nonetheless, despite the Opening Brief's numerous procedural deficiencies, the record ultimately supports the trial court's decision to deny the 2019 Motion to Vacate and demonstrates that the trial court did not abuse its discretion. Accordingly, Respondents respectfully request that this Court affirm.

DATED: May 11, 2020.

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