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Division III
State of Washington
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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

UMPQUA BANK,

Respondent,

v.

CHARLES A. GUNZEL, III, et al,

Appellant

No. 374009

APPELLANT'S BRIEF

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I. INTRODUCTION

From 2004 to 2009, Umpqua Bank was in a lending relationship with non-party Cornerstone Building Company. The promissory note was guaranteed by Charles A. Gunzel through a separate agreement. Charles A. Gunzel was not a borrower on the promissory note. After several modifications, the promissory note came due in full on May 28, 2009. Cornerstone continued to make payments on the note after it became due in full, but no payments were made by the personal guarantor on the personal guaranty. On March 28, 2019, almost ten years after the note became due in full, Umpqua Bank commenced this action to collect on the personal guaranty.

Under Oregon law, the statute of limitations on a written contract is six years. Oregon case law further makes it clear that a personal guaranty is a separate contract distinct from the underlying contract with its own statute of limitations. *Eustis v. Park-O-Lator Corp.*, 435 P.2d 802, 804 (Or. 1967). “[T]he cause of action against the guarantor accrues upon the maturity of the note...” *Id.* The trial court erred in concluding that payments on the promissory note constituted payments on the personal guaranty, extending the date of accrual for the statute of limitations under ORS 12.240. *Accord* RCW 4.16.280. Further, Oregon case law acknowledges the near-universal understanding that prospective waivers of

statutes of limitation are void for public policy. *Mitchell v. Campbell*, 13 P. 190, 192 (Or. 1886) (*quoting Crane v. French*, 38 Miss. 503, 509 (1860)). As a result, the Court should reverse the trial court's order granting Umpqua Bank's motion for summary judgment with instructions to dismiss the action with prejudice.

II. ASSIGNMENT OF ERROR

1. Whether the trial court erred in granting summary judgment to Umpqua Bank and denying summary judgment to Charles Gunzel.

The issues pertaining to this error are:

- a. When did the cause of action accrue on the personal guaranty agreement, triggering the commencement of the statute of limitations?
- b. Whether under Oregon law, payments on a promissory note constitute payments on a personal guaranty under ORS 12.240.
- c. Whether a party to contract can prospectively waive or extend the statute of limitations as a defense to payment.

III. STATEMENT OF THE CASE

The facts in this case are not in dispute. On May 28, 2004, Cornerstone Building Company (Cornerstone) as borrower executed a promissory note in the amount of \$100,000.00 in favor of Umpqua Bank (Umpqua) as lender. *CP 169*. On the same date, appellant Charles A. Gunzel III (Gunzel) executed a "commercial guaranty" in which Gunzel

personally guaranteed the Cornerstone loan. *CP 66-68*. Over the next several years, the loan between Cornerstone and Umpqua was modified on multiple occasions. *See CP 169-80*. As part of these modifications, Gunzel executed further, substantially similar guarantees. *See CP 41-73*. The last modification occurred on June 27, 2007. *CP 175*.

Under the June 27, 2007 “Change in Terms Agreement,” Cornerstone agreed to pay Umpqua the principal amount of \$200,000.00. *Id.* The maturity date of the note set forth therein was May 28, 2009. *Id.* On the same date, Gunzel executed a new commercial guaranty (Guaranty Agreement) which contained integration provisions overriding any previous terms and conditions. *CP 70-73; see also CP 72*. The governing law set forth in the Guaranty Agreement is the laws of the State of Oregon. *CP 72*.

Under the terms of the Guaranty Agreement, Gunzel guaranteed “full and punctual payment and satisfaction of the indebtedness of Borrower to Lender...” *CP 70*. Gunzel’s obligations under the guarantee were immediate upon receipt by the lender and were ongoing:

This Guaranty will take effect when received by the Lender without necessity of any acceptance by the Lender, or any notice to Guarantor or to Borrower, and will continue in full force until all the Indebtedness incurred or contracted for [...] have been fully and finally paid and satisfied and all of Guarantor’s other obligations under the Guaranty shall have been performed in full.

CP 70. The Guaranty Agreement purported to waive effectively all defenses to collection under the agreement, including statutes of limitation-related defenses. *CP 71.* The Guaranty Agreement further contained a savings clause, providing that “if such waiver is determined to be contrary to any applicable law or public policy, such waiver shall be effective only to the extent permitted by law or public policy.” *CP 72.*

On May 28, 2009, Cornerstone defaulted on its obligations under the promissory note by failing to pay the note as due in full. *CP 75; CP 175.* In turn, Gunzel defaulted on his obligation in the Guaranty Agreement to make full and punctual payment. *CP 70.* While Cornerstone continued to make payments on the note until 2013, no payments were made by Gunzel in regard to the Guaranty Agreement. *CP 75-81; CP 220.*

Procedural History

On March 28, 2019, Umpqua commenced this action against Charles Gunzel and Ginelle Gunzel. *CP 1.* On July 16, 2019, Gunzel moved for summary judgment based on the expired statute of limitation and the lack of liability to the marital community. *CP 4-17.* In doing so, Gunzel raised the arguments set forth in this appeal that under Oregon law, the statute of limitations on a personal guaranty is independent from the underlying obligation, and that waiver of the statute of limitations violates Oregon public policy. *CP 9-12; CP 9-16.*

On October 2, 2019, the trial court dismissed the claims against the marital community. *CP 157*. However, the court concluded that while the cause of action under the Guaranty Agreement accrued on May 28, 2009, the payments on the promissory note by Cornerstone extended the statute of limitations on the separate Guaranty Agreement. *CP 156-57*. On January 22, 2020, the court entered judgment in favor of Umpqua against Gunzel. *CP 234*.

IV. LEGAL ARGUMENT

The Court should reverse the trial court's order in this matter denying Gunzel's motion for summary judgment. Under the laws of the State of Oregon, a cause of action on a personal guarantee, like any other contract, accrues upon breach. Oregon law is clear that a personal guaranty is a separate contract distinct from the underlying debt with an independent statute of limitations. Here, it is undisputed that the underlying indebtedness became due in full no later than May 28, 2009. There was no new breach which did or could have occurred under the Guaranty Agreement past this date. No payments were made under the Guaranty Agreement which could extend the statute of limitations. As Oregon has a six-year statute of limitations on collection of debts, the statute of limitations expired on May 28, 2015, almost four years before Umpqua Bank commenced this action. Further, the terms of the Guaranty Agreement

purporting to prospectively waive the statute of limitations are void under Oregon public policy. As a result, the Court should reverse the trial court's order denying Gunzel summary judgment and the order granting Umpqua summary judgment.

A. Standard of Review.

Summary judgment shall be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). An appellate court reviews a grant or denial of summary judgment de novo. *Green v. American Pharmaceutical Co.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998). In this matter, the case below was decided on summary judgment in which Gunzel's motion for summary judgment was denied and Umpqua's motion for summary judgment was granted. The facts material to this matter are not in dispute. As a result, the standard of review is de novo.

B. The Court Should Conclude That The Cause Of Action Against Gunzel For Breach Of Guaranty Agreement Accrued No Later Than May 28, 2009 When The Loan To Cornerstone Became Due In Full.

The Court should conclude that the cause of action on the Guaranty Agreement accrued no later than May 28, 2009, commencing the time for

bringing the action within the statute of limitations. Under Oregon law, the statute of limitations on a breach of contract is six years. ORS 12.080(1). A claim for breach of contract accrues when the contract is breached. *Alderson v. State of Oregon*, 806 P.2d 142 (Or. App. 1991).

As applied to the case at hand, under the “Change in Terms Agreement,” the maturity date of the Cornerstone promissory note was May 28, 2009. *CP 175*. Gunzel guaranteed “full and punctual payment and satisfaction of the indebtedness of Borrower to Lender...” *CP 70*. When Cornerstone failed to pay the note in full, Gunzel breached the terms of the Guaranty Agreement to personally ensure full and punctual payment of the promissory note. As a result, Umpqua’s cause of action accrued against Gunzel for breach of the Guaranty Agreement no later than May 28, 2009.

C. The Trial Court Erred When It Concluded That Payments On The Promissory Note Constituted Payments On The Personal Guaranty. Under Oregon Law, A Personal Guaranty Is A Separate And Distinct Obligation.

The Court should reverse the order granting summary judgment to Umpqua because under Oregon law, a personal guaranty is separate from the underlying note and payments on the note do not constitute payments on the guaranty. Oregon law is substantively identical to Washington law in that payments of principal and interest will extend the statute of

limitations on payment of a promissory note. ORS 12.240 accord RCW 4.16.280. However, this extension is specific to the “existing contract, whether it is a bill of exchange, promissory note, bond, or other evidence of indebtedness” upon which payment is made. See ORS 12.240. Under Oregon law, a personal guaranty is a contract separate from the underlying note with its own statute of limitations. *Eustis*, 435 P.2d at 804.

In *Eustis v. Park-O-Lator Corp.*, plaintiffs O.B. Eustis and Michael Slavich purchased shares of and loaned money to Park-O-Lator Corporation. *Id.* at 803. As consideration for these loans, defendant Abe Zaha agreed he would be personally liable for payment of the promissory note, but only in the event Park-O-Lator were to file “a petition in bankruptcy or shall be adjudicated a bankrupt, or make a general assignment, or take the benefit of any insolvent act, or debtor’s relief act, or if a receiver or trustee shall be appointed for the corporation’s property; or if the corporation shall become insolvent.” *Id.* The commercial promissory notes were dated September 1, 1956 and payable on September 1, 1957, resulting in expiration of the statute of limitations for the promissory notes on September 1, 1963. *Id.* The parties agreed that Park-O-Lator became insolvent in 1965 with the notes remaining unpaid, and Eustis brought an action thereafter against Zaha on the personal guaranty. Zaha argued that the statute of limitations on the guarantee expired with the underlying note

while Eustis argued that under the terms of the guaranty, the cause of action did not accrue until 1965 when Park-O-Lator became insolvent. *Id.* at 803-04.

On appeal, the Oregon Supreme Court began by recognizing the general proposition that “[i]n the usual contract in which the guarantor guarantees the payment of a note, the cause of action against the guarantor accrues upon the maturity of the note and the statute of limitations runs on the guaranty at the same time it runs on the note.” *Id.* at 804. However, the court noted that in this specific case, Zaha’s guaranty was not co-extensive with underlying debt. *Id.* Instead, the guaranty was conditioned upon a specific event, the insolvency of the corporation, and therefore did not accrue until the occurrence of this event. *Id.* The court then went on to determine whether it was permissible for a personal guaranty to extend beyond the expiration of the underlying debt itself. *Id.* Recognizing that the contracts were separate agreements, the court concluded that the expiration of the statute of limitations for the underlying debt did not shorten the statute of limitations on the guaranty. *Id.* As a result, while acknowledging the general rule that the statute of limitations on a personal guaranty accrues upon maturity of the underlying debt, the judgment against Zaha was appropriate because the language of the specific guaranty changed the accrual of the obligation to the date of Park-O-Lator’s insolvency. *Id.*

Recently, the Court of Appeals for Oregon reaffirmed the distinction between the statute of limitations for a personal guaranty and the underlying promissory note. *State by & through Bus. Dev. Dep't v. Huttenbauer*, 456 P.3d 340, 344 (Or. App. 2019). In *Huttenbauer*, the court rejected the invitation to “adopt either the ‘ancillary’ test or the ‘known participant’ test for determining whether a guaranty can be considered to be part of a larger, negotiable instrument.” *Id.* at 345 (in *Huttenbauer*, the loan was from the State of Oregon which was not subject to the statutes of limitation set forth in Chapter 12 of the Oregon Revised Code, *see* ORS 12.250).

Under the law as articulated in *Eustis*, the statute of limitations on the personal guaranty executed by Gunzel accrued no later than May 28, 2009 when the final extension of the loans made to Cornerstone became mature and payable in full. As set forth in the Guaranty Agreement executed by Gunzel, the guaranty was a “continuing guarantee of payment and performance” obligating Gunzel to “absolutely and unconditionally guarantee full and punctual payment and satisfaction of the indebtedness of the Borrower to Lender.” *CP 70*. In the section addressing the duration of the guaranty, the agreement states that “[t]his Guaranty will take effect when received by the Lender without necessity of any acceptance by the Lender, or any notice to Guarantor or to Borrower, and will continue in full force until all the Indebtedness incurred or contracted for [...] have been

fully and finally paid and satisfied and all of Guarantor's other obligations under the Guaranty shall have been performed in full." *Id.*

In other words, as set forth in *Eustis*, the Guaranty Agreement between Umpqua and Gunzel is the "usual" situation where "the cause of action against the guarantor accrues upon the maturity of the note..." *Id.* at 804. While the payments extended the statute of limitations on the underlying note, ORS 12.240, the Guaranty Agreement is a separate contract and it is undisputed that no payments were made under the Guaranty Agreement. *CP 75-81; CP 220*. Notably, this is the default rule in jurisdictions which have addressed the issue. "In most of the jurisdictions in which the point has arisen, it has been held that a payment by a principal debtor will not operate to toll the Statute of Limitations as to a guarantor of the debt..." See E.W.H., *Annotation, Acknowledgment, New Promise, or Payment by Principal as Tolling Statute of Limitations as Against Guarantor*, 84 A.L.R. 729 (1933) (emphasis added); see also *Corona v. Corona*, 329 P.3d 701, 708 (N.M. Ct. App. 2014); *Marinelli v. Lombardi*, 196 A. 701, 703 (N.J. 1938); *Fed. Deposit Ins. Corp. v. Petersen*, 770 F.2d 141, 143 (10th Cir. 1985). Because the Guaranty Agreement is a separate contract, the trial court erred when it concluded that payments on the underlying note extended the statute of limitations for claims under the

Guaranty Agreement. As a result, the Court should reverse the trial court's decision with instructions to enter dismissal in favor of Gunzel.

D. The Purported Waiver Of The Statute Of Limitations Defense Contained In The Guaranty Agreement Violates Oregon Public Policy.

In concluding that the statute of limitations has run on the Guaranty Agreement, the Court should further conclude that the purported waivers of the statute of limitations contained therein violate Oregon public policy. Under Oregon law, statutes of limitations are matters of legislative policy and should not be altered or extended except by the legislature. *See Waxman v. Waxman & Assocs., Inc.*, 198 P.3d 445, 453 (Or. App. 2008). Where a term of a contract violates public policy, the provision is unenforceable. *See W. J. Seufert Land Company v. Greenfield*, 496 P.2d 197 (Or. 1972). The Supreme Court for the State of Oregon has repeatedly noted that prospective waivers of the statute of limitations violate public policy. In *Mitchell v. Campbell*, the court favorably quoted language from other jurisdictions holding that a contractual waiver of a statute of limitations violates public policy:

Suppose, then, an agreement made by the maker of a note that he would not set up the defense of usury. Would an action lie for a breach of that agreement? It appears not; and the reason is that the right to make the defense is not only a private right to the individual, but it is founded on public policy, which is promoted by his making the defense, and contravened by his refusal to make it. The same principle is

applicable to the policy of the statute of limitations; and, with regard to all such matters of public policy, it would seem that no man can bind himself by estoppel not to assert a right which the law gives him on reasons of public policy.

13 P. at 192 (Or. 1886) (*quoting Crane*, 38 Miss. at 509) (emphasis added).

In *Evans v. Finley*, a series of promissory notes were made which pledged certain horses as collateral under a chattel mortgage. 111 P.2d 833, 834 (Or. 1941). The first mortgage was executed in 1933 for the benefit of Mary King. *Id.* In 1935, the State of Oregon amended the statute of limitations for chattel mortgages to a period of three years. *Id.* at 834-35. However, the mortgage could be extended if the mortgagee recorded an affidavit setting forth the terms of the mortgage and the amount still owed on the underlying note. *Id.* at 834-35. In 1939, one of the mortgage holders brought an action against the debtor and the successor to Mary King seeking to foreclose on the mortgage. *Id.* at 834. The plaintiff successfully challenged the King mortgage as barred by the statute of limitations and King appealed. *Id.*

On appeal, King argued that the 1935 statute was unconstitutional as applied to her mortgage because it impaired her contract in violation of the Oregon and United States Constitutions. *Id.* at 835. The court on appeal acknowledged that a statute of limitations could unconstitutionally impair a present contract, but that the extension procedure left the substantial rights

under the mortgage unimpaired. *Id.* at 836. In doing so, the court cited favorably to the discussion of the public import of statutes of limitation:

It is in its nature a statute of limitations. The right of the state of prescribe the time within which existing rights shall be prosecuted, and the means by and conditions on which they may be continued in force, is, we think, undoubted. Otherwise, where no term of prescription exists at the inception of a contract, it would continue in perpetuity, and all laws fixing a limitation upon it would be abortive. Now, it is elementary that the state may establish, alter, lengthen, or shorten the period of prescription of existing rights, provided that a reasonable time be given in future for complying with the statute.

Id. at 836-37 (*quoting Vance v. Vance*, 108 U.S. 514, 517 (1883)) (emphasis added). In affirming the decision below, the court explicitly noted that statutes of limitation are matters of public policy: “[s]tatutes of limitation are no doubt passed to promote the general welfare[; t]he mischief which they are intended to remedy ‘is the general inconvenience resulting from delays in the assertion of a legal right which it is practicable to assert.’” *Evans*, 111 P.2d at 838 (1941) (*quoting* 17 R.C.L., Limitation of Actions, 666 § 3).

Oregon is not alone in recognizing that prospective waivers of the statute of limitations are void for public policy. The conclusion is near-universal. *See e.g. Haggerty v. Williams*, 855 A.2d 264, 268 (Conn. App. 2004); *accord Ahmad v. Eastpines Terrace Apartments, Inc.*, 28 A.3d 1, 8 (Md. App. 2011); *Hirtler v. Hirtler*, 566 P.2d 1231, 1231 (Utah 1977); *Munter v. Lankford*, 127 F.Supp. 630, 633 (D.D.C.1955), *aff’d*, 232 F.2d

373 (D.C.Cir.1956); *First National Bank of Eastern Arkansas v. Arkansas Development Finance Authority*, 870 S.W.2d 400 (Ark. App. 1994); *First National Bank v. Mock*, 203 P. 272 (Colo. 1921); *National Bond & Investment Co. v. Flaiger*, 77 N.E.2d 772 (Mass. 1948); cf. *Fireman's Fund Ins. Co. v. Sand Lake Lounge, Inc.*, 514 P.2d 223 (Alaska 1973) (noting general rule that waivers of statute of limitations made at time of contract are contrary to public policy); *Ross v. Ross*, 393 P.2d 933, 934-35 (Ariz. 1964) (public policy cannot be wiped out by private attempt to repeal statutes of limitation in advance); *Commercial National Bank v. Tucker*, 254 P. 1034, 1035 (Kan. 1927) (statute of limitations cannot be modified or extended by agreement); *Citizens Bank of Shelbyville v. Hutchison*, 113 S.W.2d 1148 (Ky. 1938) (contract undertaking to fix longer period of limitation than that established by statute is void); *Cobble v. Royal Neighbors of America*, 236 S.W. 306 (Mo. 1921) (postponement of right to sue, carrying years beyond statute of limitations, are null and void); *John J. Kassner & Co. v. New York*, 389 N.E.2d 99, 103 (N.Y. 1979) (if agreement to waive or extend statute of limitations made at inception of liability it is unenforceable because party cannot make valid promise in advance that statute founded in public policy shall be inoperative); *Alliance First National Bank v. Spies*, 110 N.E.2d 483, 484 (1953) (noting that generally such agreement is void against public policy and unenforceable); *Squyres*

v. Christian, 253 S.W.2d 470 (Tex. Civ. App. 1952) (any agreement in advance to waive statute of limitation on note is void as against public policy).

Although the Statute of Limitations is generally viewed as a personal defense to afford protection to defendants against defending stale claims, it also expresses a societal interest or public policy of giving repose to human affairs. Because of the combined private and public interests involved, individual parties are not entirely free to waive ... the statutory defense.

John J. Kassner & Co, 389 N.E.2d at 103 (citations and internal quotation marks omitted).

As applied to the case at hand, the Court should reject the argument Umpqua made to the trial court that the waiver of the statute of limitations defense in the Guaranty Agreement is enforceable. Here, the Guaranty Agreement includes a broad array of waivers, including a specific waiver of defenses under the applicable statute of limitations. *CP 71*. The statute of limitations of six years has expired as discussed *supra*. Because the waiver of the statute of limitations defense is void for public policy, the Court should reverse the trial court's decision and remand for entry of dismissal in favor of Gunzel.

E. Attorney's Fees.

Pursuant to RAP 18.1, Gunzel requests an award of attorney's fees because this action arose out of contract with an attorney's fees provision.

RAP 18.1 is a procedural rule and does not provide a substantive basis for an award of attorney's fees.

Under the Guaranty Agreement, Gunzel agreed to pay "all of Lender's costs and expenses, including Lender's attorney fees and legal expenses, incurred in connection with enforcement of the Agreement." *CP 70*. This provision includes attorney's fees incurred on appeal. *Id.* Under RCW 4.84.330, attorney's fees clauses in contract are deemed to be bilateral, regardless of the contract's provisions. *Accord* ORS 20.096. As discussed *supra*, the Court should conclude that statute of limitations on the Guaranty Agreement has expired and thus Gunzel is entitled to an award of attorney's fees for successfully defending against enforcement of the Guaranty Agreement. The Court should further instruct the trial court to award Gunzel his costs and attorney's fees incurred before the trial court. *See Landis & Landis Const., LLC v. Nation*, 171 Wn. App. 157, 168, 286 P.3d 979, 984 (2012).

V. CONCLUSION

The Court should conclude that the statute of limitations on the Guaranty Agreement expired no later than May 28, 2015. As this action was commenced on March 28, 2019, the statute of limitations expired several years prior. The Court should further conclude that under Oregon

law, payments on an underlying promissory note do not extend the statute of limitations on a personal guaranty, and that prospective waivers of the statute of limitations are void under Oregon public policy. Therefore, the Court should reverse the ruling of the trial court, and remand for entry of dismissal of the claims against Gunzel with prejudice.

DATED this 20th day of July, 2020.

A handwritten signature in blue ink, appearing to read "Bret Uhrich", is centered on the page.

BRET UHRICH, WSBA #45595

CERTIFICATE OF SERVICE

I, Natalie A. DeLaRosa, certify that at all times mentioned herein, I was and am a resident of the state of Washington, over the age of eighteen years, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is that of Walker Heye Meehan & Eisinger, PLLC, 1333 Columbia Park Trail, Ste 220, Richland, WA 99352.

On July 20, 2020, I caused a copy of the foregoing document to be served upon the following counsel of record in the manner indicated below:

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DATED at Richland, Washington this 20th day of July, 2020.



NATALIE A. DELAROSA, Paralegal

WALKER HEYE MEEHAN & EISINGER PLLC

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