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NO. 374009

SUPREME COURT
OF THE STATE OF WASHINGTON

UMPQUA BANK,

Petitioner,

v.

CHARLES A. GUNZEL III, et al.,

Respondent.

RESPONDENT UMPQUA BANK'S PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner is Umpqua Bank ("Umpqua"), Respondent in the Court of Appeals and Plaintiff below in Benton County.

II. CITATION TO COURT OF APPEALS

Umpqua seeks review of two published opinions, both styled *Umpqua Bank v. Gunzel*, No. 37400-9-III. *Gunzel I*, was filed March 25, 2021 (Appendix A, hereto). After Umpqua moved for reconsideration and to supplement the record, Division III filed a second published opinion, *Gunzel II*, on August 24, 2021 (Appendix B, hereto).

III. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court incorrectly concluded that Gunzel's continued payments on the Note after its maturity date did not extend the statute of limitations on his follow-on guaranty under either Washington or Oregon law?

2. Whether the Court of Appeals should raise un-litigated issues—and then remand for entry of judgment rather than further fact-finding—after resolving them on an undeveloped record while ignoring Gunzel's obvious perjurious statements.

IV. STATEMENT OF THE CASE

A. Factual Background

1. The Parties

Umpqua is an Oregon bank with locations across the west coast. Charles A. Gunzel III ("Gunzel") is the founder and president of his now-defunct closely-held construction company, Cornerstone Building Co. ("Cornerstone"). Gunzel is the listed registered agent and sole governor of Cornerstone, which has been inactive since 2009 with a business license that expired the same year. *See* Appendix C.

2. Gunzel Personally Guarantees Cornerstone's Debt with Umpqua

To fund its business operations, Cornerstone obtained a line of credit from Umpqua evidenced by a commercial promissory note ("the Note"). CP 169. The funding of such

credit required a personal guaranty from Gunzel. Virtually all loans to small and mid-sized businesses are structured this way.[1]

Between May 28, 2005 and May 21, 2007, Gunzel, on behalf of his company, entered into a series of Modification Agreements in which the maturity date and interest rate were changed. *See* CP 169 – 180. Each time, Gunzel executed a companion personal guaranty. *See* CP 41 – 73.

By June 27, 2007, the maximum credit line was $200,000—still personally guaranteed by Gunzel—and the maturity date was extended to May 28, 2009. CP 70-73; 175.

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[1] *See e.g.*, *The Role of Secured Credit in Small Business Lending*, Ronald Mann, Georgetown Law Review, 86 GEOLJ 1 (1997), *citing* Lawrence Gardner, Protecting the Small Business Owner's Personal Assets-Borrower's Viewpoint, J. LENDING & CREDIT RISK MGMT., Dec. 1996, at 48, 48 ("Up to 99.5% of loans to closely held companies require ... the personal guaranty of the owner."). *See also*, *Insider Guaranties in Bankruptcy: A Framework for Analysis*, Marshall Tracht, University of Miami Law Review, 54 UMIALR 497 ("First, a very large number of small business loans are made with personal guaranties.").

3. The Personal Guaranty Specifically Links the Enforceability of the Guaranty to the Enforceability of the Note

The personal guaranties signed by Gunzel were "continuing guarantees" that were effective for the duration and enforceability of the underlying indebtedness itself (the Note):

> This Guaranty will take effect when received by the Lender ... **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 127, 130, 133, 137 (emphasis added). Gunzel's guaranty of payment to Umpqua would not expire simply because the maturity date of the Note arrived; instead, Gunzel promised (and the bank relied on that promise in extending the requested credit) that he would remain liable "until all the Indebtedness" incurred had been repaid. The purpose of this provision was to give effect to the general statutory rule that continued payments on a debt extend the statute of limitations on that debt. ORS 12.240, *see also* RCW 4.16.280 (Washington's equivalent).

Gunzel expressly agreed to waive the statute of limitations as a defense to his personal obligations—so the Note and guaranty ran at the same rate so to speak:

> Guarantor also waives any and all rights or defenses based on surety or impairment of collateral including, but not limited to, any rights or defenses arising by reason of ...(E) **any statute of limitations,** if at any time any action or suit brought by Lender against Guarantor is commenced, **there is outstanding indebtedness which is not barred by any applicable statute of limitations.**

CP 127, 130, 134, 138 (emphasis added).

So long as there was an outstanding debt that, itself, was not yet barred by any applicable statute of limitations, Gunzel agreed that the statute of limitations would not impact his guaranty(ies) to Umpqua. This was a necessary part of Umpqua's risk calculation that allowed it to lend to Cornerstone. Gunzel, a sophisticated businessperson and beneficiary of the term, agreed that it was consistent with public policy:

> Guarantor warrants and agrees that each of the waivers set forth above is made with Guarantor's full knowledge of its significance and consequences

> and that, under the circumstances, the waivers are reasonable and not contrary to public policy or law.

CP 128.

4. Gunzel and Cornerstone Default on the Debt

When the Note became due on May 28, 2009, Cornerstone (and Gunzel) failed to pay. CP 220. Nonetheless, Gunzel continued to personally make payments on the Note until late 2013. After Cornerstone became defunct in 2009, Umpqua accepted nearly 100 further payments, which, to its reasonable understanding under the agreements, forestalled the statute of limitations—and the necessity of formal legal action at that time. CP 75–81. The final payments to Umpqua relative to the debt were sent from Gunzel's personal bank account:[2]

THE BACK OF THIS CHECK CONTAINS A SECURITY MARK. DO NOT ACCEPT WITHOUT HOLDING AT AN ANGLE TO VERIFY SECURITY MARK.

Post to Account: 3468648478 $200.00 12/09/2013

CHARLES A. GUNZEL III
2000 MADRONA POINT DR
BREMERTON, WA 98312-2335

WELLS FARGO

Please post this payment for Our Mutual Customer
Please Direct Any Questions To 800-956-4442 or
Please Return Check To
WELLS FARGO BANK, NA
Dept #34033, PO BOX 39000, San Francisco, CA 94139
9600055846 1204866949

56-382/412 1204866949

December 9, 2013

PAY Two Hundred and 00/100 Dollars $ **********200.00

VOID 90 DAYS AFTER ISSUE

TO THE ORDER OF UMPQUA BANK
ATTN: RICK REED
1377 MOHAWK BLVD
SPRINGFIELD OR 97477-3358

Wells Fargo as agent for its customer

Wells Fargo Bank, NA
115 Hospital Drive
Van Wert, OH 45891

Memo

⑈1204866949⑈ ⑆041203824⑆ 9600055846⑈

2 Appendix D.

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B. Procedural Background

1. Gunzel Acknowledges the Amount and Existence of the Debt

As Gunzel was fulfilling his obligations from 2009 to 2013, Umpqua was slow to file suit. It waited until there was genuinely no other choice and after no further voluntary payments were forthcoming—almost six years after the last payment from Gunzel—filed on March 25, 2019. CP 1.

Gunzel's answer admitted Umpqua was owed "approximately $280,000." CP 187 – 88. He also admitted that "as par[t] (sic) of the Loan relationship, Gunzel agreed to and did execute certain Commercial Guarantees." CP 188.

2. The Trial Court Denies Gunzel's Motion for Summary Judgment

On July 16, 2019, Gunzel filed his motion for summary judgment seeking an order dismissing Umpqua's claim arguing that, because the personal debt became due in 2009, the statute of limitations had run. CP 4. Gunzel acknowledged that Umpqua continued to receive payments until 2013 (CP 7), but

never argued then that only Cornerstone made payments (rather than himself, personally). He also did not provide a declaration in support of his motion.

On October 2, 2019, the Court denied Gunzel's motion, agreeing with Umpqua that its claims were not barred as a matter of law. Its Order reflected that:

> 8. The cause of action against Charles A. Gunzel III by Umpqua Bank, based on Mr. Gunzel's personal guaranties, accrued upon maturity of the promissory note, *i.e.* May 28, 2009, which was extended by payments made through December 16, 2013.
>
> 9. The cause of action against Charles A. Gunzel III by Umpqua Bank was filed within the statute of limitations, *i.e.* prior to December 16, 2019 which is six years after the last payment was made on the promissory note, *i.e.* December 16, 2013.

CP 156 – 57. All of this was consistent with the pleadings, framing the parties' respective positions, as well as the arguments advanced at that time to the trial court.

3. The Trial Court Grant's Umpqua's Motion for Summary Judgment

Umpqua filed its own motion for summary judgment roughly two weeks later, in October 2019. CP 158. It noted that

the amount and existence of the debt was not in dispute, and that the Court had already found Gunzel's personal guaranty of the Note was not barred by the statute of limitations on account of Gunzel's payments over time. CP 158.

Instead of timely responding, Gunzel brought a motion to continue on shortened time a week after his response was due — which the trial court, arguably in error, granted. Gunzel filed a response on December 30, 2019.

Since the amount and existence of the debt were undisputed Gunzel asserted only that Umpqua "materially increased the risk to [Gunzel]" by continuing to accept payments after the 2009 maturity date (CP 214), and that Umpqua's representative did not have personal knowledge of the loan documents (CP 215).

Gunzel also submitted a declaration which was almost completely untethered from the legal arguments advanced in his

brief. He—falsely[3]—stated that he "did not consent to the extension of the debt evidenced by loan number 346868478" and that "Cornerstone Building Company continued to make payments on loan number 346868478 until December of 2013." CP 220. Gunzel never cited this declaration in his opposition nor did he utilize it to factually resist summary judgment in briefing or in argument to the trial court.[4]

After hearing oral argument in January 2020, the trial court took the matter under advisement and subsequently granted Umpqua's motion. CP 234. The Court awarded judgment to Umpqua on the outstanding debt, along with attorneys' fees and costs. CP 234. Gunzel appealed to Division III.

4. *Gunzel I*

On March 25, 2021, Division III of the Court of Appeals handed down its published decision. Appendix A. The Court

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[3] CP 127–138.

[4] Had he done so, Umpqua could have offered additional declarations with its rebuttal materials, or even strike the motion in favor of additional discovery—and renew it on a more developed record.

reversed, finding periodic payments did *not* extend the statute of limitations as to Gunzel (only as to Cornerstone).

The Court of Appeals plainly entered its opinion under an erroneous assumption that *only* Cornerstone, not Gunzel, made payments to Umpqua. "[T]he parties ask us to determine when a cause of action accrued, for purposes of the statute of limitations, against a guarantor of a commercial loan **when the commercial borrower defaulted but made periodic payments thereafter**." Op. at p. 1. The Court then stated the first question is "when does the statute of limitations begin to accrue on the obligation of the guarantor of a loan when the underlying debtor defaults but later tenders payments, **but in the meantime the guarantor tenders no payments**?" *Gunzel I* at 6 (emphasis added).[5] Accordingly, since the Court held that the statute of limitations as to the

[5] The Court acknowledged the strangeness of a distinction between a personal guarantor who is the president and owner of a debtor and the debtor itself. *See Gunzel I* at p. 12 ("Admittedly this fear [that a debtor could string along a creditor until the guarantor is released under the statute of limitations] could come to fruition.").

guaranty began to run upon the 2009 maturity date of the Note, and the statute of limitations was extended (or tolled) only as to the Note and Cornerstone, and not the personal guaranty and Gunzel, Umpqua's lawsuit was untimely. *Id*.

Notably, this was all premised upon an un-litigated, factually undeveloped question, *i.e.*, who was the actual payor of the after-maturity periodic payments to Umpqua over the ensuing years. Umpqua had neither reason, incentive, nor legal obligation to deliver evidence addressing who physically wrote the checks or whose account the funds came from since that issue was not before the court in either of Gunzel's or Umpqua's motion for summary judgment.

Based on a record that was necessarily deficient, the Court of Appeals found in Gunzel's favor—including finding contractual waivers of the statute of limitations as being void as against public policy under Oregon law (and ostensibly Washington law -both issues of first impression). Op. at p. 5.

5. *Gunzel II*

In *Gunzel I*, the Court of Appeals posited that if Gunzel had made, ratified, or approved the payments given to Umpqua between the 2009 maturity date and the last payment in 2013 (which he did), then he would have still been liable for the debt as that would have tolled the statute of limitations against a guarantor as well. *See* Op. at 12 ("We acknowledge that, when the guarantor approves or ratifies the late part payment by the primary debtor, the statute of limitations will be revived as to the guarantor as well.").

But therein lies the problem. Gunzel *had* made the payments to Umpqua pursuant to his guaranty—and it was provable. Umpqua immediately moved for reconsideration and to supplement the record, noting (1) Gunzel's representation to the Court that he had not approved payments between 2009 and 2013 was demonstrably false and (2) that the issue had never been litigated below, thus the lack of a sufficient record.

The Court of Appeals sharply denied Umpqua's request, stating Umpqua did not seek to enhance the factual record until after the issuance of the Court's opinion in *Gunzel I*,[6] and because somehow that the equities did not favor the bank. *Gunzel II* at 2. Division III chastised both counsel and (by name) a bank employee for *perceived* discovery abuse—notwithstanding the lack of evidence of any meet-and-confer, no discovery motion on the issue, no trial court order on this point, and without any other meaningful evidence in the record to support such castigations. Effectively, the most extreme sanctions available under *Burnet*[7] were entered on a closed record, without a semblance of process.

Despite facially acknowledging the seriousness of perjury in the courts ("[t]his court abhors perjury"), the Court of Appeals all but ignored the undeniable proof of Gunzel's false

[6] That is, before Umpqua knew the Court of Appeals would raise and rule upon an issue never litigated below.
[7] Exclusion of evidence and entry of judgment, not to mention attorneys' fees and costs for the entire action to be awarded to a perjurer who admittedly breached his guaranty obligations.

statements,[8] noting simply that it "recognize[d] the possibility that Charles Gunzel committed perjury" and relegated Umpqua to nebulous post-judgment, CR 60 practice with a cursory instruction to the trial court to not take instruction on how to rule on such a future motion based on its published opinions. *Id.* at 23.[9]

Because the two published opinions are of sweeping consequence, each for various reasons, and are the product of an undeveloped record, Umpqua now seeks review and, ultimately, justice from this Court.[10]

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[8] On reconsideration, Gunzel was given an opportunity by the Court of Appeals to respond, wherein he chose to completely ignore the claims and evidence of perjury and did not otherwise contest the proof put forward at all.

[9] It cannot be stated strongly enough: the entire legal system revolves around the honor system of witnesses swearing to tell the truth. If that is not zealously protected and honored by every court, the system cannot work and everything is lost.

[10] As it stands, Gunzel, who benefitted from a loan made to his closely held company, after promising he would repay the loan, promising he would not raise a statute of limitations defense, who then made approximately 100 small payments after maturity, the last of which definitively came from his own personal account, all while admitting the debt was unpaid and

V. ARGUMENT

Two primary issues are presented. The first is substantive. Was the Court of Appeals correct when it decided, as a matter of first impression, that statute of limitations waivers in the context of personal guaranties are void as against public policy. And second—procedurally—does an appellate court err when it bases its opinion (particularly one in which it directs that final judgment be entered) on a factual predicate that was neither raised nor developed at the trial court level rather than supplementing the record, or at least remanding the matter for further proceedings before the trial court.

RAP 13.4(b) provides that a petition for review will be granted by the Washington Supreme Court:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

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due, stands to obviate all his promises relied upon by Umpqua, because he provably perjured himself to the trial court and then perpetuated that lie to the Court of Appeals about such payments and where they came from.

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution or the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Multiple grounds exist in this case (1, 3 and 4). As explained below, the Court of Appeals opinions in both *Gunzel I* and *Gunzel II* are deeply problematic. Contrary to *Gunzel I*, the 'waiver' language in the personal guaranty was not a prospective waiver, but rather a device to ensure the guaranty and underlying debt would run together for purposes of the applicable statute of limitations. Moreover, Oregon courts have not analyzed statute of limitation waivers, though they have enforced contractual waivers of defenses generally. For a Washington court to establish new principles in a published decision, through the lens of Oregon law as a means of setting new Washington law, is simply inappropriate. It is one thing for a Washington court to

adopt a new rule under Washington, it is quite another to use an Oregon contract under Oregon law to springboard a novel published opinion, particularly under the factual background of this case.

Accepting review provides a much-needed opportunity to clarify the analysis for waivers of statute of limitations under the law and to right an injustice by Gunzel's sanctionable conduct.

Additionally, accepting review promotes the substantial public interest in reinforcing certainty for businesses and individuals engaged in commercial transactions with banks by ensuring personal guaranties can be relied upon, thus strengthening banks' abilities to continue to lend to undercapitalized companies. The documents at issue in this case are standard forms[11]—and likely a part of tens of thousands

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[11] The guaranties and loan documents in this case were "LaserPro" forms. LaserPro is a document-assembly system launched in the 1985 for generating loan documentation now used "more than 3,000 lenders nationwide" including Umpqua as distributed by Harland Financial Solutions. *See*

transactions across Washington and the country.[12] The necessity of review is particularly pronounced in light of increasing economic uncertainty and cost of lending. Concrete risk management around personal guaranties make it *more* likely that banks will offer loans to new and smaller businesses.

Lastly, "the primary social purpose of the judicial process is deciding disputes in a manner that will, upon reflection, permit the loser as well as the winner to feel that he has been fairly treated." George C. Christie, *Objectivity in the Law*, 78 Yale L.J. 1311, 1329 (1969). Stated plainly, that did not occur in this case. The case went to the appellate court on one issue; and was resolved, in part, on the basis of a separate one, in which evidence was neither sought nor developed and the conclusion therefrom was frankly, wrong. Absent review, final judgment will be entered on the basis of an untested—and indeed, false—

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https://www.cuinsight.com/press-release/harland-financial-solutions-laserpro-celebrates-25th-anniversary (last visited on September 22, 2021).

[12] *See Footnote 1, supra.*

declaration. This Court should accept this case and confirm that judgment *on the merits* means exactly that.

A. This Court Should Decide Whether an Express and Unambiguous Waiver of the Statute of Limitations in a Commercial Lending Document is Enforceable

Under Oregon law, as in Washington, the statute of limitations for breach of a written contract is six years. ORS 12.080(1). The underlying indebtedness became due on May 28, 2009, and Gunzel's failure to have all debts repaid at that time breached the Note and his personal guaranty. Oregon's six year statute of limitations began running at that time. However, payments of principal and interest extend the statute of limitations on post-breach payments. ORS 12.240; *accord* RCW 4.16.280. Because Umpqua accepted Gunzel's payments on the Note though December 16, 2013, the statute of limitations was extended to December 16, 2019, *i.e.*, the last payment, plus six years.

Under Oregon law (like Washington), courts give full effect to all provisions of a contract. "Interpretations giving

lawful effect to all the provisions in a contract are favored over those that render some of the language meaningless or ineffective." *Pelly v. Panasyuk*, 2 Wn. App. 2d 848, 865-66 (2018). Giving all provisions contained in the personal guaranty effect leads to only one conclusion: the personal guaranty is enforceable for the duration of the debt (i.e. so long as the underlying Cornerstone debt itself remains enforceable under the law).

Gunzel I incorrectly held that the waiver in the guaranty was a "prospective" waiver against public policy. Under such a theory, Gunzel's waiver would entail a waiver of his right to assert the statute of limitations "for all time." But that is not what the guaranty says:

> GUARANTOR'S WAIVERS
>
> Guarantor also waives any and all rights or defenses based on surety or impairment of collateral including, but not limited to, any rights or defenses arising by reason of ...(E) any statute of limitations, **if at any time any action or suit brought by Lender against Guarantor is commenced, there**

is outstanding indebtedness which is not barred by any applicable statute of limitations.

CP 127 (emphasis added).

This language is unambiguous: so long as there was an outstanding debt that, itself, was not barred by any applicable statute of limitations, Gunzel agreed that he could not assert any statute of limitations defense with regard to his guaranty of that same debt.

Furthermore, even if Gunzel is right—and the contract language is a "prospective waiver"—such waivers are nevertheless legal and Division III erred. It is a truism that a contract validly made between competent parties is not to be set aside lightly. *Bliss v. Southern Pacific Co. et al.*, 321 P.2d 324, 329 (Or. 1958). "The right to contract privately is part of the liberty of citizenship, and an important office of the courts is to enforce contractual rights and obligations." *Bagley v. Mt. Bachelor, Inc.*, 340 P.3d 27, 33 (Or. 2014).

Under Oregon law, like Washington, parties are free to contract and waive various rights and responsibilities unless there is *clear and concise* evidence that the contract violates public policy. This right is so extensive that parties may contract to eliminate recovery entirely against each other, *Fujitsu Microelectronics, Inc. v. Lam Research Corp.*, 27 P.3d 493, 495 (Or. App. 2001); waive all defenses, *W.J. Seufert Land v. Greenfield*, 496 P.2d 197, 200 (Or. 1972); and alter the statute of limitations, *Biomass One v. S-P Construction*, 799 P.2d 152, 154-55 (Or. App. 1990).

In fact, courts will only interfere with the parties' freedom to contract when there is a violation of a public policy that is "clear and 'overpowering'." *Young v. Mobil Oil Corp.*, 735 P2d 654, 657 (Or. App. 1987). In determining whether an agreement is illegal because it is contrary to public policy, "[t]he test is the evil tendency of the contract and not its actual injury to the public in a particular instance." *Pyle v. Kernan*, 36 P.2d 580, 583 (Or. 1934). The fact that the effect of a contract provision may be

harsh as applied to one of the contracting parties does not mean that the agreement is, for that reason alone, contrary to public policy. *Bagley,* 340 P.3d at 34.

Indeed, waivers of <u>all</u> defenses are valid and enforceable under Oregon law. *W.J. Seufert*, 496 P.2d at 201 (1972) ("[T]he agreement between plaintiff and defendants under which defendants, **as guarantors**, agreed to **waive <u>all defenses</u>** to payment of the principal obligation other than actual payment was a valid agreement.") (emphasis added). It is a fundamental and categorical error to nevertheless hold that waiver of ***one defense*** would be unenforceable.

After Gunzel convinced Umpqua to make four separate loans based on the strength of his personal promise and guarantee to repay the debt (*i.e.*, accepting the benefits of those loans), Gunzel has no basis to deny its applicability here. *See, e.g., Hartman v. Anderson,* 49 Wn.2d 154, 159 (1956) (after party had accepted the benefits of the contract, it was estopped to deny

liability therefrom); *State v. Northwest Magnesite Co.,* 28 Wn.2d 1, 76 (1947); *Swint v. Swint,* 395 P.2d 114, 116 (Or. 1965).

It simply makes sense that a personal guaranty on a loan should be effective so long as the underlying debt is enforceable and collectable. To hold otherwise would defeat a lender's very basis for rendering such a loan in the first place.

Equally important, the waiver does not offend the public policy of Washington either. Agreements waiving the statute of limitations are also enforceable under Washington law:

> Unless inhibited by some statutory provision, **an agreement to waive the statute of limitations**, made after the statute has commenced to run but before it has fully run, **is valid and binding upon the parties** if it is supported by a sufficient consideration and is for a definite period of time.

J.A. Campbell Co. v. Holsum Baking Co., 15 Wn.2d 239, 255 (1942) (emphasis added), *see also Taplett v. Khela*, 60 Wn. App. 751, 759 (1991). There is no statutory provision in Washington or Oregon prohibiting this personal guaranty and the waivers contained therein. Here, the guaranty specifically states that

limitations do not begin to run and cannot be pled as a defense so long as any amount unpaid under the underlying debt is not barred by such limitations. It is thus supported by consideration and specifies a time during which the limitations defense is tolled.

And perhaps most critically, such waivers are commonly used by lender throughout the country.[13] Permitting banks to negotiate terms in this respect not only facilitate loans to businesses that may not otherwise receive one, but further, allows for latitude and payment plans if they get in trouble. Yet Gunzel asks the Court of Appeals to upend commercial law—in two states—by finding that a commonly used clause, in tens of thousands of transactions (or more), through a form guaranty used by thousands of financial institutions, is now deemed illegal.

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[13] *Footnote 1*, *supra*.

This Court should take the opportunity to address this significant problem created by *Gunzel I and II*.

B. Review is Warranted Because Division III's Opinion Applied the Appellate Rules in a Way that Denied Umpqua Due Process

1. <u>The "Approval and Ratification" Rule</u>

Courts have routinely held that when the guarantor him or herself makes those payments, the statute of limitations is also extended. *See, e.g.*, *PNL Asset Management Co. v. Brendgen & Taylor Partnership*, 193 Ariz. 126, 970 P.2d 958, 964 (1998) ("The ... guarantors necessarily knew and consented to the partial payments and written acknowledgments made by [the debtor]."); *Corona v. Corona*, 2014-NMCA-071, 329 P.3d 701, 709 (2014) ("[i]f the guarantor consents to or ratifies the payment… the guarantor is deemed to have joined in the payment, which is sufficient to revive the debt as to the guarantor."); 4 Williston on Contracts (4th ed.), § 8:42, at 680 (2020) (similar); 51 Am.Jur.2d Limitation of Actions § 311 (2011) (similar). Gunzel has always recognized "the guaranty executed by Gunzel was parallel to the obligations of the loans to Cornerstone Building Co." CP 12.

Critically, this issue was never developed or litigated in either summary judgment proceeding—but then, surprisingly, Division III held the absence of evidence against Umpqua and entered judgment accordingly. This is both unfair and unsustainable.

2. When an Appellate Court Raises and Resolves Factual Issues on Appeal, It Does a Disservice to Both the Parties and Superior Court Judges

All parties to an appeal benefit from appellate restraint related to undeveloped issues. The main features of the civil justice system are: (1) neutral and passive decision makers, and (2) party presentation of evidence and arguments. Stephan Landsman, *Readings On Adversarial Justice: The American Approach To Adjudication*, 2-4 (1988). Party identification of the issues is at the very core of this system.[14] This is no less true in Washington. As this Court has repeatedly observed:

[14] *See* Neal Devins, *Asking the Right Questions: How the Courts Honored the Separation of Powers by Reconsidering* Miranda, 149 U. PA. L. REV. 251, 252 (2000) ("[A] central tenet of our adversarial system is that (save for jurisdictional issues) the

> … insofar as possible, there shall be one trial on the merits with all issues fully and fairly presented to the trial court at that time so the court may accurately rule on all issues involved and correct errors in time to avoid unnecessary retrials…
>
> Objections must be accompanied by a reasonably definite statement of the grounds therefore so that… the adversary may be afforded an opportunity to remedy the claimed defect.

State v. Boast, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976); *see also Haslund v. City of Seattle*, 86 Wn.2d 607, 614, 547 P.2d 1221 (1976) ("The trial court, in our view, should have had the benefit of vigorous and detailed objections… giving it an opportunity to correct the error, if any.").

RAP 12.1 does allow the appellate courts to reach new issues, to be sure. But those issues must be raised in a way that affords due process. *See* RAP 12.1(b) ("…the court may notify the parties and give them an opportunity to present written argument on the issue raised by the court."); *Obert v. Envtl. Research & Dev. Corp.*, 112 Wn.2d 323, 333, 771 P.2d 340

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parties to a case—not the judges deciding the case—raise the legal arguments.").

(1989). These steps—notice and an opportunity to be heard—reflect due process.[15]

Factual investigation, preparation of declarations, and the marshaling of evidence cannot be done on appeal normally. So if a factual argument is to be made, there is nothing unfair about requiring *a party* to make it—and prove it—at the trial court level. Not only is this what attorneys are paid to do, but this is the premise on which our system rests. *Cf. United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one.").

[15] The Court raising and resolving a discrete legal issue, flowing from an otherwise developed record, is a different thing. *See City of Seattle v. McCready,* 123 Wn.2d 260, 268, 868 P.2d 134 (1994) (constitutional authority of superior court considered for the first time on appeal); *Hall v. Am. Nat'l Plastics, Inc.*, 73 Wn.2d 203, 205, 437 P.2d 693 (1968) (legal issue).

Conversely, there is very little benefit to *sua sponte* review of factual issues, and decisions made on an undeveloped record invite, as here, unreviewable error.

3. Division III Created New Law—and Issued a Harsh Ruling—Based Upon an Undeveloped Factual Issue

The burden to prove the affirmative defense of statute of limitations rested with Gunzel. *Young Soo Kim v. Choong-Hyun Lee*, 174 Wn. App. 319, 323, 300 P.3d 431 (2013). And had he resisted summary judgment on the basis of having no role in the payments, a factual record could have been marshalled around that question which would have confirmed his lack of candor to the tribunal below. He never raised that argument.

The issue did not arise until appeal.[16] It was neither asserted by Umpqua in its motion for summary judgment, nor

[16] RAP 9.12 limits review of summary judgment to "evidence and issues [conjunctive] called to the attention of the trial court." *See also Silverhawk, LLC v. KeyBank Nat'l Ass'n*, 165 Wn. App. 258, 265–66, 268 P.3d 958 (2011) (declining to consider arguments raised on appeal not raised at summary judgment); *cf. United States v. Dunkel*, 927 F.2d 955, 956 (7th

argued as "material" in opposition. Instead, Division III raised a new issue on its own accord and then ruled upon it, on a closed record. Had the ruling been to remand for further fact-finding around the "approval and ratification" issue, it would be at least fair to the parties and trial court. But it was far worse than that. Division III ordered that Umpqua should simply lose—because it did not *disprove* an un-raised issue, as the *moving party*, at summary judgment. And when Umpqua protested in reconsideration, Division III—with no small amount of sarcasm[17]—resolved an undeveloped alleged "discovery dispute" against Umpqua (effectively entering the harshest sanctions available under CR 37, with nothing resembling a

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Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").

[17] *See* Op. at 21 ("We assume the bank does not suggest that it literally encountered difficulty by shoveling underground and into a mountain in order to locate records deeply buried years ago" in reference to Umpqua's assertions that the many of the underlying loan payment supporting documents were stored for year at an Iron Mountain facility). Every commercial litigator knows about document storage at Iron Mountain. *See* https://www.ironmountain.com/.

Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997) analysis).[18] It also made "equitable findings" and shamed a good person and employee of the bank, by name in a published opinion.

This is simply unworkable. The rules of procedure "are designed to further the due process of law that the Constitution guarantees," *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000), and "[t]he opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).

Umpqua, deserves the opportunity to meet and challenge the arguments against it. It should not have to preemptively

[18] Because this was a completely un-ripened discovery allegation, in a case tightly bound by the pleadings and Gunzel's judicial admissions, *cf. Mukilteo Ret. Apartments, L.L.C. v. Mukilteo Inv'rs L.P.*, 176 Wn. App. 244, 254-55, 310 P.3d 814 (2013) ("a defendant's pleading should apprise the plaintiff of the allegations in the complaint that stand admitted and will not be in issue at trial and those that are contested and will require proof to be established to enable plaintiff to prevail.").

disprove every conceivable issue the record on appeal might support, when such facts were not relied upon by anyone below at the trial court. That is unwieldy for both litigants and trial judges. This Court should accept review and confirm the proper scope of appellate review.

VI. CONCLUSION

The trial court's decision should stand, and the Court of Appeals Opinions should be vacated. Umpqua should further be awarded its reasonable attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 23rd day of September, 2021.

This document contains 4,988 words pursuant to RAP 18.17.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the date below, I caused a true and correct copy to be served on the following parties in the manner listed below:

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/s/Paula Polet
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Division III
State of Washington
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Court of Appeals NO. 374009

SUPREME COURT
OF THE STATE OF WASHINGTON

UMPQUA BANK,
Petitioner,

v.

CHARLES A. GUNZEL III, et al.,
Respondent.

APPENDIX TO RESPONDENT UMPQUA BANK'S PETITION FOR REVIEW

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Designation	Document Description	App. No.
A.	Umpqua Bank v. Gunzel, No. 37400-9-III. Gunzel I, filed March 25, 2021	001 - 026
B.	Umpqua Bank v. Gunzel, No. 37400-9-III. Gunzel II, filed August 24, 2021	027 - 050
C.	WASHINGTON STATE SECRETARY OF STATE CORPORATIONS REGISTRY: Cornerstone Building Co.	051
D.	DECLARATION IN SUPPORT OF RESPONDENT UMPQUA BANK'S MOTION FOR RECONSIDERATION AND TO SUPPLEMENT THE RECORD	052 - 055

RESPECTFULLY SUBMITTED this 23rd day of September, 2021.

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APPENDIX A

FILED
MARCH 25, 2021
In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

UMPQUA BANK, Respondent, v. CHARLES A. GUNZEL, III, and GINELLE F. GUNZEL, husband and wife, Appellant.	)))))))))))	No. 37400-9-III PUBLISHED OPINION

FEARING, J. — In an appeal wherein we apply Oregon law, the parties ask us to determine when a cause of action accrued, for purposes of the statute of limitations, against a guarantor of a commercial loan when the commercial borrower defaulted but made periodic payments thereafter. Did the limitation period commence to run on the first default by the borrower or did later payments by the borrower extend the

commencement of the period? We base our decision on the language of the commercial guaranty, Oregon statutes, Oregon case law regarding application of the statute of limitations, Oregon law regarding waiver of protections under the statute of limitations, and Oregon public policy prohibitions against waiver. We hold that Oregon law invalidated the partial waiver of the protection of the statute of limitations found in the parties' commercial guaranty. In turn, we conclude that the statute of limitations commenced on the first default by the borrower, and we direct judgment in favor of guarantor, Charles Gunzel.

FACTS

This appeal concerns a loan issued by Umpqua Bank to a corporation, Cornerstone Building Co., with Charles Gunzel personally guaranteeing the loan's payment. On June 27, 2007, Cornerstone borrowed $200,000 from Umpqua Bank. The maturity date for the entire debt, under the promissory note signed by Cornerstone, was May 28, 2009.

Also on June 27, 2007, Charles Gunzel, the president and owner of Cornerstone, executed a commercial guaranty, under which Gunzel guaranteed Cornerstone's payment and performance of the $200,000 indebtedness to Umpqua Bank. Gunzel had guaranteed earlier extensions of credit by Umpqua Bank to Cornerstone. The June 2007 commercial guaranty was on a pre-printed form supplied by Umpqua Bank and prepared and copyrighted by an entity that supplies forms for financial institutions.

The commercial guaranty signed by Charles Gunzel expressed that Oregon law governed the agreement. The guaranty required that Gunzel, in the event of Cornerstone's default, fully and timely repay any remaining indebtedness and required that Gunzel remain liable indefinitely:

> THIS IS A "CONTINUING GUARANTY" UNDER WHICH GUARANTOR AGREES TO GUARANTEE THE FULL AND *PUNCTUAL* PAYMENT, PERFORMANCE AND SATISFACTION OF THE INDEBTEDNESS OF BORROWER TO LENDER, NOW EXISTING OR HEREAFTER ARISING OR ACQUIRED, ON AN OPEN AND CONTINUING BASIS.
>
> . . . .
>
> This Guaranty will take effect when received by Lender without the necessity of any acceptance by Lender, or any notice to Guarantor or to Borrower, and *will continue in full force until all the Indebtedness incurred or contracted* before receipt by Lender of any notice of revocation *shall have been fully and finally paid and satisfied and all of Guarantor's other obligations under this Guaranty shall have been performed in full*.

Clerk's Papers (CP) at 70 (emphasis added).

Under the June 2007 commercial guaranty, the statute of limitations to be applied on any suit brought by Umpqua Bank against Charles Gunzel would in essence be the same as the statute of limitations imposed on any suit brought by Umpqua Bank against Cornerstone for the principal debt owed:

> Guarantor also waives any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of . . . any statute of limitations, *if at any time* any action or suit brought by Lender against Guarantor is commenced, *there is outstanding indebtedness which is not barred by any applicable statute of limitations*.

CP at 71 (emphasis added). The guaranty further read:

> Guarantor warrants and agrees that each of the waivers set forth above is made with Guarantor's full knowledge of its significance and consequences and that, under the circumstances, the waivers are *reasonable and not contrary to public policy or law*. If any 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 at 71 (emphasis added). Finally, both the June 2007 loan agreement and commercial guaranty afforded Umpqua Bank reasonable attorney fees and costs incurred when enforcing the respective agreements.

On May 28, 2009, the maturity date of the promissory note, Cornerstone defaulted on its obligations by failing to pay the note in full. On June 30, 2009, Cornerstone's shareholders voted to dissolve the corporation. Nevertheless, the defunct corporation periodically made payments on the loan until December 16, 2013. As of Cornerstone's final payment, the balance of the loan's principal was $185,214.

In its brief, Umpqua Bank repeatedly claims that Charles Gunzel personally made the payments after May 28, 2009. Nevertheless, it cites to no portion of the record to support this factual allegation. The records provided by Umpqua Bank indicate that payment was applied to Cornerstone's debt and does not specify any payment from Gunzel. We recognize that a defunct corporation could still maintain a bank account and make payments from that account. Although a bank will likely require a corporation, at the time it opens an account, to prove the existence of the corporation, the bank will likely not require periodic proof of the ongoing existence of the corporation. In a

declaration, Charles Gunzel avers that Cornerstone, not he, tendered the late payments to Umpqua Bank. Umpqua Bank does not controvert this testimony.

PROCEDURE

On March 28, 2019, more than nine years after Cornerstone's default, Umpqua Bank brought suit against Charles Gunzel to enforce the personal guaranty for Cornerstone's debt. Umpqua Bank sought to recover the principal amount of $185,214.00, interest totaling $72,177.84, interest thereafter at $28.30 per day beginning March 25, 2019, and late charges in the amount of $194.21.

Charles Gunzel moved for summary judgment on the basis of the statute of limitations. He argued that, under Oregon law: (1) the statute of limitations on a personal guaranty is independent from any underlying obligation, (2) the six-year statute of limitations accrued on May 28, 2009, when Cornerstone's loan matured without payment and he thereby became obligated to pay the debt, (3) Cornerstone's period payments thereafter did not recommence the statute of limitations since Gunzel remained in default under his guaranty, (4) the waiver of the statute of limitations defense under his guaranty agreement with Umpqua Bank violated public policy, and (5) the statute of limitations bars Umpqua's suit because the bank sued after May 28, 2015. The trial court denied Charles Gunzel's motion.

Umpqua Bank moved for summary judgment. The trial court granted Umpqua's motion and entered judgment in Umpqua Bank's favor in the amount of $265,045.99.

The trial court also granted Umpqua Bank's request for reasonable attorney fees and costs.

LAW AND ANALYSIS

On appeal, we must answer four discrete questions. First, under Oregon law, when does the statute of limitations begin to accrue on the obligation of the guarantor of a loan when the underlying debtor defaults but later tenders payments, but in the meantime the guarantor tenders no payments? Second, did the commercial guaranty between Umpqua Bank and Charles Gunzel alter the date of the accrual of the Oregon statute of limitations? Third, if the answer to question two is yes, was that alteration in the form of a waiver? Fourth, did Oregon public policy prohibit the commercial guaranty from modifying the accrual date of the statute of limitations? We address these questions in such order.

Statute of Limitations on a Guaranty

The parties agree that Oregon law controls application of the statute of limitations and that six years is the limitation period to apply to Umpqua Bank's claim against Charles Gunzel on the guaranty. The parties disagree as to the date of accrual of the cause of action. Gunzel contends the action accrued when Cornerstone first defaulted on the loan on May 28, 2009. Umpqua Bank wishes to start the commencement of the running of the limitation period when Cornerstone tendered its last payment on December 16, 2013.

Under an Oregon statute, the statute of limitations for a breach of contract is six years. OR. REV. STAT. (ORS) § 12.080(1). In turn, under another Oregon statute, the limitation period on a debt owed does not commence until the last payment made by the borrower.

> Whenever any payment of principal or interest is made after it has become due, upon an existing contract, whether it is a bill of exchange, promissory note, bond, or other evidence of indebtedness, the limitation shall commence from the time the last payment was made.

ORS § 12.240.

Charles Gunzel argues that the delay of the accrual date resulting from a late payment only applies to the underlying note on the loan, under the language of ORS § 12.240, and not to any guaranty of the debt. The statute does not mention that the limitation period on any guaranty is extended by reason of a late payment, although the Oregon statute mentions "other evidence of indebtedness." Gunzel contends that Oregon case law stands for the proposition that the underlying loan agreement and the guaranty of the debt are distinct contracts and, therefore, the accrual date on the statute of limitations for each discrete contract are different. We agree.

Charles Gunzel emphasizes *Eustis v. Park-O-Lator Corp.*, 249 Or. 194, 435 P.2d 802, 437 P.2d 734 (1967). Defendants Abe and Sara Zaha personally guaranteed the debt of Park-O-Lator Corporation owed to O.B. Eustis. Under the guaranty agreement, the Zahas became responsible for the corporate debt, not on the maturity date of Park-O-

Lator's notes, but only after the corporation became insolvent. The Supreme Court of Oregon recognized that, although the statute of limitations had lapsed as to Eustis' claims against Park-O-Lator when it earlier defaulted on the loan, the statute of limitations against the Zahas did not begin to run until the corporation's insolvency at a later date.

The Oregon Supreme Court, in *Eustis v. Park-O-Lator Corp.*, observed that personal guarantees and agreements for underlying debt are separate contracts with independent statutes of limitation. Although both limitation periods typically run concurrently, they need not run parallel. The Oregon Supreme Court held the Zahas to be liable under the guaranty even though the limitation period had expired against the corporation. The plaintiffs had filed within six years of the corporation becoming insolvent.

In *Eustis v. Park-O-Lator Corp.*, the statute of limitations against the guarantor did not accrue at a date earlier than the statute of limitations against the borrower as is proposed by Charles Gunzel to his guaranty. Instead, the converse occurred. We see no reason, however, to distinguish the two distinct circumstances for purposes of accrual of the claim. *Eustis* stands for the propositions that the loan agreement and the guaranty agreement are discrete contracts and the accrual date for the debt owed by the borrower can be separate from the date of accrual on the obligation of the guarantor.

No Oregon case directly addresses the question of whether a late payment by the debtor extends the accrual date for the statute of limitations on the claim against the

guarantor. Nevertheless, in addition to *Eustis v. Park-O-Lator Corp.* indirectly supporting this conclusion, the majority, if not universal, rule in the United States stands for the proposition. One annotation reads:

> 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, even though it might do so as to a surety.

Acknowledgement, New Promise, or Payment by Principal as Tolling Statute of Limitations as Against Guarantor, 84 A.L.R. 729, 729 (1933).

This majority rule follows from the distinction between the underlying debt agreement and the guaranty agreement as made by the Oregon court in *Eustis v. Park-O-Lator Corp.* The obligations of the guarantor are not predicated on the note, but on the contract expressed in the guaranty. *Cadle Co. v. Webb*, 66 Mass. App. Ct. 269, 273, 846 N.E.2d 1179 (2006). A guaranty of a promissory note is essentially a new contract independent of any contract obligations of the maker promisor. *Maddox v. Duncan*, 143 Mo. 613, 45 S.W. 688, 689 (1898).

In turn, based on the independent contract between the lender and the guarantor, the guaranty is not necessarily subject to the same statute of limitations as the underlying obligation. *Hudson v. Game World, Inc.*, 126 N.C. App. 139, 484 S.E.2d 435, 440 (1997). A guarantor's liability generally arises at the time of the default of the principal debtor on the obligations which the guaranty covers. *In re Estate of Bitker*, 251 Wis. 538,

30 N.W.2d 449, 452 (1947); *Hudson v. Game World, Inc.*, 484 S.E.2d 435, 440 (1997). Stated differently, the right to sue on the guaranty arises immediately on the failure of the principal debtor to pay the debt at maturity. *Wachovia Bank & Trust Co. v. Clifton*, 203 N.C. 483, 166 S.E. 334, 335 (1932); *Beebe v. Kirkpatrick*, 321 Ill. 612, 152 N.E. 539, 541 (1926).

Because the guarantor generally becomes obligated to pay the borrower's entire debt on any default, payment of interest by the makers of a note, after maturity but before suit is barred on the note, does not toll the statute of limitations against those who have guaranteed the payment of the note. *Wachovia Bank & Trust Co. v. Clifton*, 166 S.E. 334, 335 (1932). Although part payment by the maker of the note might suffice to restart the limitations period as to the maker, such payment does restart the period for the guarantor. *Marinelli v. Lombardi*, 16 N.J. Misc. 71, 196 A. 701, 703 (1938); 51 AM. JUR. 2D *Limitation of Actions* § 312 (2011). An acknowledgment by a principal debtor will not affect the running of the statute of limitations as to a guarantor. *Federal Deposit Insurance Corp. v. Petersen*, 770 F.2d 141, 143 (10th Cir. 1985). Even when the guaranty covers several loans to the debtor but only one agreement between the lender and the guarantor establishes the guaranty, the statute of limitations begins to run against all debt on the default of the principal on just one of the loans. *Spellbrink v. Bramberg*, 245 Wis. 103, 13 N.W.2d 600, 601-02 (1944).

In *Hudson v. Game World, Inc.*, 484 S.E.2d 435, 440 (1997), the court ruled that the creditor's cause of action arose against guarantor Richard Tarkington when the principal debtor, Aqua-Life, stopped making payments on the Hudson Pools' account. In *Maddox v. Duncan*, 45 S.W. 688, 689 (1898), the Supreme Court of Missouri addressed the same question. The *Maddox* court held that a guaranty of a promissory note is essentially a new contract independent of any contract obligations of the maker promisor. The court ruled that late payments on a note by the maker did not arrest the running of the statute of limitations as to the guarantor.

Pursuant to the loan agreement between Cornerstone and Umpqua Bank, the maturity date for the promissory note was May 28, 2009. By failing to satisfy Cornerstone's debt in full by that date, Charles Gunzel breached his commercial guaranty agreement with Umpqua. Gunzel took no steps to cure the default thereafter. Thus, according to Oregon case law, Umpqua's cause of action arose against Gunzel on May 28, 2009. This conclusion follows the general Oregon rule that a claim for breach of contract accrues when the contract is breached. *Alderson v. State*, 105 Or. App. 574, 806 P.2d 142, 146 (1991).

We acknowledge that, when the guarantor approves or ratifies the late part payment by the primary debtor, the statute of limitations will be revived as to the guarantor as well. *Corona v. Corona*, 2014-NMCA-071, 329 P.3d 701, 709 (2014); *PNL Asset Management Co. v. Brendgen & Taylor Partnership*, 193 Ariz. 126, 970 P.2d 958,

964 (Ct. App. 1998). We recognize that Charles Gunzel was the president and owner of Cornerstone. Nevertheless, in response to Gunzel's summary judgment motion, Umpqua Bank provided no facts as to the role that Gunzel played in the part payments, let alone any authorization or ratification of the payments by Gunzel. Umpqua Bank does not argue ratification.

Contract Statute of Limitations

To repeat, the commercial guaranty signed by Charles Gunzel declared:

> Guarantor also waives any and all rights or defenses based on suretyship . . . but not limited to, any rights or defenses arising by reason of . . . any statute of limitations, *if at any time* any action or suit brought by Lender against Guarantor is commenced, *there is outstanding Indebtedness which is not barred by any applicable statute of limitations*.

CP at 71 (emphasis added). The parties agree that, on March 28, 2019, the date Umpqua Bank filed suit, the statute of limitations did not bar any debt owed by Cornerstone since Cornerstone made a payment on December 16, 2013, which date was within six years of March 28, 2019. As already indicated, under an Oregon statute, the limitation period, at least as to Cornerstone, did not commence until the last payment made by the borrower. ORS § 12.240.

Umpqua Bank wishes, under the terms of the commercial guaranty, to apply the same accrual date to any suit on the guaranty against Charles Gunzel. In response, Gunzel argues, in part, that state statutes, not the parties' agreement, govern accrual of

cause of action and the running of the statute of limitations. Gunzel emphasizes ORS § 12.010, which declares:

> Actions shall only be commenced *within the periods prescribed in this chapter*, after the cause of action shall have accrued, except where a different limitation is prescribed by statute.

(Emphasis added.)

We agree with Umpqua Bank that, despite the guaranty being a contract distinct from the loan agreement signed by Cornerstone, the commercial guaranty language in effect imposed the same limitation period on any suit brought against guarantor, Charles Gunzel. By the language of the commercial guaranty, the accrual date to start the limitation period's running would also be the same as the length of the limitation period. Gunzel agreed to waive the bar of any statute of limitations if "there is outstanding indebtedness which is not barred by any applicable statute of limitations."

As a general proposition, contracting parties may insert in the agreement a statute of limitations different from the statute of limitations otherwise imposed by statute. *Biomass One, LP v. S-P Construction*, 103 Or. App. 521, 799 P.2d 152, 154 (1990). Parties are free to contractually limit the timeframe in which to bring a claim, and that limit will be enforced unless unreasonable. *Hatkoff v. Portland Adventist Medical Center*, 252 Or. App. 210, 287 P.3d 1113, 1121 (2012); *Wood Park Terrace Apartments Ltd. Partnership v. Tri-Vest, LLC*, 254 Or. App. 690, 297 P.3d 494, 497 (2013). This freedom to contract extends to the accrual date for the limitation period. *Wood Park*

Terrace Apartments Ltd. Partnership v. Tri-Vest, LLC, 297 P.3d 494, 497 (2013). Whether the contractual period violates Oregon public policy under these circumstances is a distinct question. Nevertheless, we disagree with Charles Gunzel's implied argument that parties to contracts in Oregon can never alter either the limitation period or the date for the accrual of the running of the period.

Waiver

The commercial guaranty signed by Charles Gunzel did not read: "The statute of limitations for suit on the guaranty shall commence to run at the last time of payment on the debt by either the borrower or the guarantor." Stated differently, the language in the commercial guaranty signed by Charles Gunzel did not directly impose the same accrual date for a claim on the guaranty as with any suit on the debt. Instead, the guaranty language indirectly created the same accrual date through a waiver, but only assuming that the limitation period otherwise imposed by statute would then bar suit. We consider this distinction important as discussed below. We also consider this language a "partial waiver" of the statute of limitations.

Public Policy

We must now determine whether to enforce the statute of limitations partial waiver in the commercial guaranty signed by Charles Gunzel. Gunzel argues that the guaranty's waiver of his statute of limitations defense violates Oregon public policy. Umpqua Bank seeks enforcement of the waiver since Gunzel did not waive his right to

assert a statute of limitations defense for all time, but only for as long as the statute of limitations for the promissory note had not expired. Because the waiver did not impose a definitive accrual date within a reasonable time of Gunzel's breach, we agree with Charles Gunzel. In so ruling, we note that the commercial guaranty is on a form prepared for Umpqua Bank. Umpqua Bank does not contend that Charles Gunzel could have negotiated to remove the waiver.

Oregon, like any other state, sometimes invalidates contracts or contractual clauses based on public policy. Early in its history, the Oregon Supreme Court followed the principle that no man or woman can bind himself or herself by estoppel not to assert a right which the law gives on reasons of public policy. *Mitchell v. Campbell*, 14 Or. 454, 13 P. 190, 192 (1886). The Oregon Supreme Court refuses any hard and fast rule for determining the invalidity of a contract as against public policy. *W.J. Seufert Land Co. v. Greenfield*, 262 Or. 83, 496 P.2d 197, 200 (1972). The test is the evil tendency posed by the type of contract in general and not its actual injury to the public in a particular instance. *W.J. Seufert Land Co. v. Greenfield*, 496 P.2d 197, 200 (1972).

When assessing the validity of a contract or contractual provision, all courts naturally identify the policy forwarded by the party challenging the contract and then ascertain the reasons behind the policy. The policy often arises from a statute, such as a statute of limitations.

Statutes of limitation are passed to promote the general welfare. *Evans v. Finley*, 166 Or. 227, 111 P.2d 833, 837 (1941). The policy behind the limitation is to require suits to be brought in due season and to discourage stale demands to the prejudice of the defending party. *Evans v. Finley*, 111 P.2d 833, 837 (1941); *Mitchell v. Campbell*, 13 P. 190, 192 (1886). Statutes of limitation create a procedural device for establishing a point of repose for past actions and for ensuring that the search for truth is not impaired by the loss of evidence whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise. *Godoy v. Wells Fargo Bank, NA*, 575 S.W.3d 531, 538 (Tex. 2019); *Childs v. Haussecker*, 974 S.W.2d 31, 38-39 (Tex. 1998). In addition to affording comfort and rest to the defendant, statutes of limitation protect the courts and the public from the perils of adjudicating stale claims. *Godoy v. Wells Fargo Bank, NA*, 575 S.W.3d 531, 538 (Tex. 2019). Statutes of limitations express a societal interest or public policy of giving repose to human affairs. *Bank of New York Mellon v. WMC Mortgage, LLC*, 151 A.D.3d 72, 56 N.Y.S.3d 1, 4 (2017); *Haggerty v. Williams*, 84 Conn. App. 675, 855 A.2d 264, 268 (2004).

Oregon entered the Union thirty years before Washington's statehood. The ancient decision, *Mitchell v. Campbell*, 14 Or. 454, 13 P. 190 (1886) directly addresses the validity of contract waivers of the defense of the statute of limitations. The Oregon Supreme Court wrote that a contract not to plead the statute of limitations clearly appears to be an agreement in violation of public policy. *Mitchell v. Campbell*, 13 P. 190, 192

(1886). The Oregon Supreme Court, in *Mitchell*, analogized a waiver of the statute of limitations to an agreement forgoing the defense of usury. The right to make each of the defenses is not only a private right to the individual, but it is founded on public policy, which is promoted by asserting the defense and contravened by one's refusal to make it. The Oregon Supreme Court has never overruled *Mitchell v. Campbell*.

Oregon follows the majority rule that a waiver of the defense of the statute of limitations violates public policy. In an appendix, we list the many states, wherein courts have refused to enforce statutes of limitations waivers.

According to jurisdictions, other than Oregon, an anticipatory waiver of the statute of limitations will not be enforced as contravening public policy against stale suits. While parties may waive many statutory and even constitutional rights, a statute of limitations is not solely a right belonging to the party asserting it. *Godoy v. Wells Fargo Bank, NA*, 575 S.W.3d 531, 538 (Tex. 2019). Therefore, an agreement in advance to waive or not plead the statutes of limitation is void as against public policy. *Godoy v. Wells Fargo Bank, NA*, 575 S.W.3d 531, 537 (Tex. 2019); *Simpson v. McDonald*, 142 Tex. 444, 179 S.W.2d 239, 243 (1944). Parties may agree to shorten the time period but may not agree at the inception of the contract to extend the statute of limitations because a party cannot in advance, make a valid promise that a statute founded in public policy shall be inoperative. *Bank of New York Mellon v. WMC Mortgage, LLC*, 56 N.Y.S.3d 1, 5 (2017); *Kentucky River Coal & Feed Co. v. McConkey*, 271 Ky. 261, 111 S.W.2d 418,

419 (1937). A waiver at the inception of the contract is generally the result of ignorance, improvidence, unequal bargaining positions, or simply unintended. *John J. Kassner & Co. v. City of New York*, 46 N.Y.2d 544, 551, 389 N.E.2d 99, 415 N.Y.S.2d 785 (1979).

One foreign court expressed fear that to uphold the validity of such waivers in the original contract would result in the waivers being inserted in every promissory note and similar instrument as a matter of routine. *Haggerty v. Williams*, 855 A.2d 264, 269 (Conn. App. 2004). Any statute imposing a limitation of time for suing on a contract would be annihilated. *Haggerty v. Williams*, 855 A.2d 264, 269 (2004); *Hirtler v. Hirtler*, 566 P.2d 1231, 1231-32 (Utah 1977).

In addition to public policy precluding the lengthening of the statute of limitations, public policy precludes contract provisions that delay the accrual of the running of the limitation period since this delay would also lengthen the time. Thus, the parties cannot agree at the inception of the contract to delay the running of a limitations period. *Bank of New York Mellon v. WMC Mortgage, LLC*, 56 N.Y.S.3d 1, 5 (2017); *John J. Kassner & Co. v. City of New York*, 46 N.Y.2d 544, 551, (1979); *Haggerty v. Williams*, 855 A.2d 264, 269 (Conn. App. 2004).

The Texas courts have created one exception to the prevailing view of voiding a waiver of the statute of limitations. The Texas courts will enforce a waiver when the contact substitutes a specific and reasonable time for the accrual or running of the limitation period. *Godoy v. Wells Fargo Bank, NA*, 575 S.W.3d 531, 533 (Tex. 2019);

American Alloy Steel, Inc. v. Armco, Inc., 777 S.W.2d 173, 177 (Tex. App. 1989). The agreement must be for a pre-determined length of time. *Duncan v. Lisenby*, 912 S.W.2d 857, 859 (Tex. App. 1995).

In *Godoy v. Wells Fargo Bank NA*, the Texas Supreme Court held enforceable one portion of a contractual waiver that resulted only in the substitution of a four-year limitations period for a two-year period rather than the abandonment of all limitations. The court ruled that the substitution was sufficiently specific. The waiver in Charles Gunzel's commercial guaranty lacked any firm ending date, however. The Texas Supreme Court, in *Godoy v. Wells Fargo Bank NA*, nullified another portion of the contractual waiver that read similarly to Gunzel's waiver.

In *Godoy v. Wells Fargo Bank NA*, 575 S.W.3d 531, 533-34, guarantor Gerald Godoy agreed to:

> waives any and all rights or defenses arising by reason of . . . any statute of limitations, if at any time any action or suit brought by Lender against Guarantor is commenced, there is outstanding indebtedness of Borrower to Lender which is not barred by any applicable statute of limitations.

The Texas court held the provision to be unenforceable because the provision lacked specificity or a limit to a reasonable time. If the debtor periodically paid a small amount on the debt, no limitation period might ever apply to the guaranty.

Because of the language of the commercial guaranty signed by Charles Gunzel, Umpqua Bank argues that the document did not create a prospective waiver of the statute

of limitations. Rather the language functioned as a retrospective delay in the accrual date for the limitation period. Nevertheless, the language functioned as a prospective partial waiver. *Godoy v. Wells Fargo Bank* teaches that regardless of how a lender wishes to characterize such language, a court should void the partial waiver.

Umpqua Bank relies on *W.J. Seufert Land Co. v. Greenfield*, 262 Or. 83, 496 P.2d 197 (1972). In *Seufert*, the guarantor argued that a clause, under which he agreed not to assert any defenses to an action to enforce the guaranty, voided the entire guaranty. The court ruled that, assuming the waiver invalid, the guaranty still was enforceable. Instead, such a contract provision is only invalid when urged as a bar against a defense which may not be legally contracted away. The court upheld the validity of an agreement between a creditor and a guarantor which could limit or destroy a right of subrogation in the guarantor against the debtor. The decision does not address a statute of limitations provision in a contract.

Umpqua Bank also contends that *State v. Huttenbauer*, 301 Or. App. 332, 456 P.3d 340 (2019) supports the proposition that a party can waive the protections of a statute of limitations. We disagree. In *Huttenbauer*, the court ruled that no statute of limitations runs against a debt owed to a state agency.

Despite its commercial guaranty reading to the contrary, Umpqua Bank asks us to apply Washington law to the defense of the statute of limitations. Umpqua Bank cites

J.A. Campbell Co. v. Holsum Baking Co., 15 Wn.2d 239, 255, 130 P.2d 333 (1942), wherein the Washington Supreme Court wrote:

> Unless inhibited by some statutory provision, an agreement to waive the statute of limitations, *made after the statute has commenced to run but before it has fully run*, is valid and binding upon the parties if it is *supported by a sufficient consideration and is for a definite period of time*.

(Emphasis added.) This rule helps the bank none. Umpqua Bank gave no additional consideration for the waiver. The waiver was not for a definitive time limit.

We recognize the oddity of our holding the modification of the statute of limitations found in Charles Gunzel's commercial guaranty void because of its nature as a waiver when, if Umpqua Bank had reworded the governing sentence, we might uphold the modification. We might uphold the contractual modification if it read that the limitation period for any suit to enforce the obligation on the guaranty shall not commence to run until the last payment on the debt or guaranty made by the lender or the guarantor. As already analyzed, this latter language is not in the form of a waiver. Oregon law generally upholds a contract change to the statute of limitations. Thus, our ruling may promote form over substance, because the same result follows from our hypothetical language as from the actual language in the guaranty.

Umpqua Bank could argue our distinction between a contract modification and a waiver is not fair because we foster form over substance. Nevertheless, Charles Gunzel could argue the opposite. If the commercial guaranty employed our hypothetical

language and we upheld the validity of the contractual modification, Gunzel could argue unfairness since the hypothetical language in essence operated as a waiver that is void against public policy. Umpqua Bank controlled the language placed in the commercial guaranty and could have reworded the language if it so chose.

We recognize that the commercial guaranty also read that Charles Gunzel warranted that the statute of limitations waiver was reasonable and did not violate public policy. Nevertheless, Umpqua Bank cites no law that supports a conclusion that a party may not rely on public policy invalidating a contract waiver if that party declared the reasonableness of the waiver in the contract or declared the waiver to conform to public policy. In the following sentence in the commercial guaranty, Umpqua Bank recognized the possibility of public policy voiding the waiver. Financial institutions could annihilate the legislature's statute of limitations by always placing such warranty clauses in loan and guaranty documents. *Haggerty v. Williams*, 855 A.2d 264, 269 (Conn. App. 2004); *Hirtler v. Hirtler*, 566 P.2d 1231, 1231-32 (Utah 1977).

Umpqua Bank complains that, under our ruling, the sole shareholder of a corporation that guarantees the corporate debt could string a bank along with periodic payments from the corporate debtor long enough to release himself or herself form the guaranty by the passing of the statute of limitations. Admittedly, this fear could come to fruition although we do not know if Charles Gunzel operated under this sophisticated motivation. Regardless a sophisticated financial institution such as Umpqua Bank could

protect itself from such conduct. Umpqua Bank remained free to file suit against Charles Gunzel at any time after the first default by Cornerstone. Also, the law does not preclude a waiver of the statute of limitations once the limitation period commences to run. Umpqua Bank could have insisted that Gunzel sign a waiver, after the default by Cornerstone, in exchange for withholding suit.

Equitable Estoppel

Umpqua asks that, if we refuse to enforce the partial waiver of the statute of limitations, we estop Charles Gunzel from denying the commercial guaranty's validity, because he accepted the benefits of the loans and extensions of credit to Cornerstone, for which he was the founder and president. In Oregon, a party may be equitably estopped from invoking a statute of limitations defense in certain circumstances. *Donohoe v. Mid-Valley Glass Co.*, 84 Or. App. 584, 735 P.2d 11, 12 (1987). To constitute an equitable estoppel, or estoppel by conduct, (1) there must be a false representation, (2) the representation must be made with knowledge of the facts, (3) the other party must have been ignorant of the truth, (4) the representation must have been made with the intention that it should be acted on by the other party, and (5) the other party must have been induced to act upon it. *Donohoe v. Mid-Valley Glass Co.*, 735 P.2d 11, 12 (1987).

Umpqua Bank does not present evidence, let alone contend, that Charles Gunzel uttered any false representation. Thus, the bank satisfies none of the five elements of equitable estoppel.

We recognize that, under the commercial guaranty, Charles Gunzel warranted that the statute of limitations waiver was reasonable and in conformance with public policy. Nevertheless, Umpqua Bank does not rely on this purported representation when arguing estoppel. Umpqua Bank also does not cite authority that supports a conclusion that a party may not rely on public policy invalidating a contract waiver if that party declared the reasonableness of the waiver or its conformance with public policy in the contract.

Attorney Fees

Both parties request an award of reasonable attorney fees and costs on appeal. In addition, Charles Gunzel requests that this court instruct the trial court to award him attorney fees and costs incurred before the trial court. Despite language in the commercial guaranty to the contrary, both parties ask that we apply Washington law to the question of attorney fees and costs.

RAP 18.1 governs the award of attorney fees and expenses on appeal, and states:

> (a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(Boldface omitted.) The parties' commercial guaranty contained an attorney fee provision, allowing Umpqua to recover attorney fees and costs incurred by enforcement of the agreement. Nevertheless, a Washington statute transforms such a one-sided attorney fees clause into a bilateral provision. RCW 4.84.330 declares:

> In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorneys' fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, *whether he or she is the party specified in the contract or lease or not*, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.

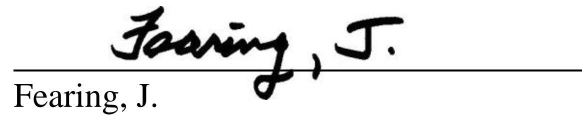
(Emphasis added.)

Since we declare void the delay in the accrual of the limitation period found in the commercial guaranty and since the statute of limitations bars Umpqua Bank's suit against Charles Gunzel, Gunzel has successfully defended against Umpqua's suit for collection of the debt. Since Gunzel prevails, we award him reasonable attorney fees and costs incurred on appeal and before the trial court. Since the trial court is better suited to determine the reasonableness of the fees before it, we remand to the superior court to award a reasonable sum of fees and costs to Gunzel for both the appeal and the superior court litigation. Judgment should then be entered for Gunzel in that amount.

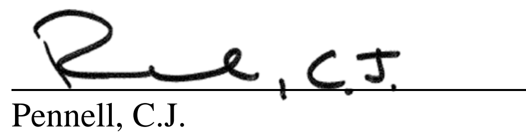
CONCLUSION

We reverse the superior court. We hold invalid the partial waiver of the statute of limitations in Charles Gunzel's commercial guaranty agreement. We rule that the statute of limitations bars Umpqua Bank's suit against Gunzel on the guaranty. We remand to

the superior court to enter judgment in favor of Gunzel for a reasonable sum of attorney fees and costs incurred by Gunzel both before the trial court and on appeal.


Fearing, J.

WE CONCUR:


Pennell, C.J.

Staab, J.

APPENDIX B

FILED
AUGUST 24, 2021
In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

UMPQUA BANK, Respondent, v. CHARLES A. GUNZEL, III, and GINELLE F. GUNZEL, husband and wife, Appellants.	)	No. 37400-9-III PUBLISHED OPINION

FEARING, J. — This is our second published opinion in this appeal. In our first opinion, we ruled that the Oregon statute of limitations barred Umpqua Bank's suit against Charles Gunzel on his guaranty of a hefty debt owed by the borrower Cornerstone Building Company. *Umpqua Bank v. Gunzel*, 16 Wn. App. 2d 795, 483 P.3d 796 (2021).

Umpqua Bank seeks reconsideration of our opinion based on new evidence and fraud. Along with its motion for reconsideration, the bank moves this court to

supplement the evidentiary record. We elect, pursuant to RAP 17.6(b), to resolve the two related motions with an opinion.

Based on a newly produced record that shows one or more payments to the bank by guarantor Charles Gunzel personally, rather than the debtor corporation, Cornerstone Building Company, Umpqua Bank now asserts that Gunzel prevaricated in a declaration opposing the bank's summary judgment motion. Umpqua Bank also contends that Gunzel's personal payments extended the accrual of the statute of limitations. In turn, Umpqua Bank requests that we reverse our ruling in favor of Charles Gunzel because Gunzel perjured himself in his declaration and because this court decided the appeal on the basis that Gunzel tendered no personal payments when the parties did not litigate this factual question. Umpqua Bank asks that we grant it judgment against Gunzel.

We exercise our discretion to deny Umpqua Bank's motion to supplement the record because the bank did not seek to enhance the factual record until after the issuance of the court's opinion, because the bank should have produced the relevant document in response to a discovery request, and because the equities do not favor the bank. We deny the motion for reconsideration because we decline to review new evidence and because this court based its earlier decision on an issue litigated by the parties.

FACTS

We refer the reader to our first opinion for most of the underlying facts behind the suit by Umpqua Bank against Charles Gunzel. *Umpqua Bank v. Gunzel*, 16 Wn. App. 2d

795 (2021). We briefly recap those facts.

On June 27, 2007, Cornerstone Building, Co., a corporation, borrowed $200,000 from Umpqua Bank. The maturity date for the entire debt, under the promissory note signed by Cornerstone, was May 28, 2009. Charles Gunzel, the president of Cornerstone, executed a commercial guaranty, under which Gunzel guaranteed Cornerstone's payment of the $200,000 indebtedness to Umpqua Bank. The guaranty addressed the statute of limitations for any claim on the guaranty and read in part:

> Guarantor also waives any and all rights or defenses based on suretyship . . . but not limited to, any rights or defenses arising by reason of . . . any statute of limitations, *if at any time* any action or suit brought by Lender against Guarantor is commenced, *there is outstanding Indebtedness which is not barred by any applicable statute of limitations*.

Clerk's Papers (CP) at 71 (emphasis added). The guaranty read that Oregon law controlled the parties' relationship.

On May 28, 2009, the maturity date of the promissory note, Cornerstone defaulted on its obligations by failing to pay the note in full. Nevertheless, according to the record on summary judgment, the corporation periodically made late payments on the loan until December 16, 2013.

PROCEDURE

The relevant facts behind this second ruling are the procedures in the superior court during the summary judgment motion process and the procedures in this appellate court since we issued our ruling. On March 28, 2019, Umpqua Bank filed suit against

Charles Gunzel on his personal guaranty. Gunzel raised the defense of the statute of limitations and contended that the statute commenced to run on the default by debtor Cornerstone Building on May 28, 2009. Umpqua argued that the statute of limitations did not begin to run until the last late payment on December 16, 2013.

On May 21, 2019, Gunzel propounded interrogatories and requests for production to Umpqua Bank. Among other documents requested, Gunzel sought the following:

> REQUEST FOR PRODUCTION NO. 2: Please provide copies of all records showing payments on the obligation and the balance owing after each such payment.

CP at 22. Umpqua Bank produced only one document in response, an "Umpqua Bank Loan Accounting System Note Transcript Statement." CP at 77. Umpqua Bank employee, Lisa Redcay, signed and verified the bank's document response.

Charles Gunzel's counsel thereafter identified for Umpqua Bank its deficiencies in the production of documents. Counsel emphasized that the bank had failed to provide the Cornerstone promissory note in response to one of the other requests for records. Counsel for Umpqua did not respond. Gunzel sent a second set of requests for production that requested, in part, a copy of all loan documents. On July 11, 2019, Umpqua merely repeated its response to the earlier request for documents. The bank once again failed to produce the promissory note. Umpqua Bank failed to verify its second response to the request for production of documents.

Charles Gunzel scheduled, pursuant to CR 30(b)(6), a corporate deposition of Umpqua Bank. The notice of deposition designated the answers to Gunzel's discovery requests as one of the topics for questioning during the deposition scheduled for December 20, 2019. Umpqua failed to produce a witness for the deposition. The superior court imposed discovery sanctions on Umpqua and its counsel for the nonappearance.

Charles Gunzel moved for summary judgment dismissal of the suit on the basis of the statute of limitations. He argued that, under Oregon law: (1) the statute of limitations on a personal guaranty is independent from any underlying obligation, (2) the six-year statute of limitations accrued on May 28, 2009, when Cornerstone's loan matured without full payment and he thereby became obligated to pay the debt, (3) Cornerstone's periodic payments thereafter did not recommence the running of the statute of limitations against him since he remained in default under his guaranty, (4) the waiver of the statute of limitations defense under his guaranty agreement with Umpqua Bank violated public policy, and (5) the statute of limitations barred Umpqua's suit because the bank sued after May 28, 2015. Note that Gunzel framed the issues as if Cornerstone, not he personally, tendered the late payments.

In his brief in support of his motion for summary judgment, Charles Gunzel wrote: "[t]hereafter, Cornerstone Building Co. continued to make payments through December 16, 2013." CP at 7. Gunzel based this factual assertion on Umpqua's responses to

discovery that showed the bank applied payments only to the promissory note and Cornerstone Building's matching loan account number 124790 as opposed to Gunzel's personal guaranty account number 525164.

In response to Charles Gunzel's summary judgment motion, Umpqua Bank contended that both parties agreed no material factual disputes existed. The bank wrote four times, in its opposing memorandum of authorities, that, after Cornerstone Building's default, Gunzel, as president of the corporation, continued to direct Cornerstone to make payments to Umpqua Bank until December 2013. The bank did not cite the record for its factual allegation that Gunzel directed Cornerstone to issue payments. The bank, in its summary judgment motion response, did not suggest that Gunzel personally made a payment.

In opposition to Charles Gunzel's summary judgment motion, Lisa Redcay, assistant vice president and special assets officer in the Special Assets Department of Umpqua Bank, submitted a declaration. She did not claim in the declaration that Charles Gunzel personally tendered a payment to the bank.

As part of its response to Charles Gunzel's summary judgment motion, Umpqua Bank asked the court to "sua sponte" grant it summary judgment against Gunzel. Gunzel asked the court for a postponement of the bank's motion so he could have more time to respond. The trial court denied Charles Gunzel's motion and the bank's sua sponte motion.

Umpqua Bank thereafter moved again for summary judgment. In opposition to the bank's motion, Charles Gunzel submitted a declaration that read, in part:

> I did not consent to the extension of the debt evidenced by loan number 3468648478 owed by Cornerstone Building Company to Umpqua Bank beyond the maturity date of May 28, 2009. *Cornerstone Building Company continued to make payments* on loan number 3468648478 until December of 2013.

CP at 220 (emphasis added).

In response to Charles Gunzel's declaration and brief opposing the bank's motion, Umpqua Bank filed a reply brief. In the reply brief, the bank, in support of its attempt to impose personal liability on Gunzel and without any citation to the record, wrote that: "Mr. Gunzel . . . was the actual person responsible for continuing to make payments to Umpqua after the debt became due and owing." CP at 226. The bank later wrote, in its reply brief: "Umpqua merely notes that *Gunzel's payments* after the debt became due and owing extended the statute of limitations of the debt [under the guaranty] as this court has already found as a matter of law." CP at 226-27 (emphasis added). The statement lacked any citation to the record to show that Gunzel personally made a payment or that the trial court earlier issued a finding as a matter of law.

The trial court granted Umpqua Bank's summary judgment motion and entered judgment in the bank's favor in the amount of $265,045.99.

Charles Gunzel appealed to this court. In Gunzel's opening brief on appeal, he wrote, with regard to payments after Cornerstone Building's default: "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." Appellant's Br. at 4. CP at 75-81 is the Umpqua Bank Loan Accounting System Note Transcript Statement, the only document produced by the bank in discovery. The note transcript statement lists Cornerstone Building as the borrower and Charles Gunzel as a guarantor. The statement records payments on the loan, but does not identify the payor. CP 220 is the first page of Charles Gunzel's declaration that declares, in part: "Cornerstone Building Company continued to make payments on loan number 3468648478 [after the maturity date] until December of 2013."

In its respondent's appellate brief, Umpqua Bank identified issue 1 on appeal as:

> Whether the trial court correctly concluded that *Gunzel's continued payments* on the Note after its maturity date extended the statute of limitations on its corresponding personal guaranty in accordance with Oregon law?

Resp't's Br. at i, 3 (emphasis added). In its brief's introduction, Umpqua Bank wrote:

> While the Note became fully due and payable in 2009, it remained unpaid, *Gunzel continued to make payments* in partial satisfaction of the company's obligations on the Note (and his own personal obligations on the guaranty) until 2013. Doing so forestalled Umpqua's collection actions on both the Note and the personal guaranty.

Resp't's Br. at 1 (emphasis added).

> To be sure, *Gunzel* made a calculated and conscience choice to continue making payments on the Note even after its maturity.

Resp't's Br. at 2 (emphasis added). The statements in the Umpqua Bank's brief's introduction contained no citations to the superior court record. In the brief's argument, Umpqua Bank contended: "Instead, Umpqua merely notes that *Gunzel's payments* after the debt became due and owing extended the statute of limitations of the debt not the date of maturity." Resp't's Br. at 15.

In his reply brief, Charles Gunzel emphasized that Umpqua Bank asserted facts in its brief, which facts lacked support in the record. Gunzel highlighted the two quotes above from pages 1 and 2 of the bank's brief.

On appeal, this court posed four discrete questions and answered the questions as follows. Question one: under Oregon law, when does the statute of limitations begin to accrue on the obligation of the guarantor of a loan when the underlying debtor defaults but later tenders payments, but in the meantime the guarantor tenders no payments? Answer: at the time the underlying debtor first defaults on the loan. Question two: did the commercial guaranty between Umpqua Bank and Charles Gunzel alter the date of the accrual of the Oregon statute of limitations? Answer: yes, the commercial guaranty read that the statute of limitations would not run on the claim against Charles Gunzel unless the statute had run on the claim against Cornerstone Building. Question three: if the answer to question two is yes, was that alteration in the form of a waiver? Answer three: yes, the alteration was in the form of an advance waiver. Question four: did Oregon

public policy prohibit the commercial guaranty from an advance waiver of the accrual date of the statute of limitations? Answer: yes.

In our opinion's recital of facts, we wrote:

> In its brief, Umpqua Bank repeatedly claims that Charles Gunzel personally made the payments after May 28, 2009. Nevertheless, it cites to no portion of the record to support this factual allegation. The records provided by Umpqua Bank indicate that payment was applied to Cornerstone's debt and does not specify any payment from Gunzel. . . . In a declaration, Charles Gunzel avers that Cornerstone, not he, tendered the late payments to Umpqua Bank. Umpqua Bank does not controvert this testimony.

Umpqua Bank v. Gunzel, 16 Wn. App. 2d 795, 799-800 (2021). As part of this court's ruling, we wrote:

> We acknowledge that, when the guarantor approves or ratifies the late part payment by the primary debtor, the statute of limitations will be revived as to the guarantor as well. *Corona v. Corona*, 2014-NMCA-071, 329 P.3d 701, 709 (2014); *PNL Asset Management Co. v. Brendgen & Taylor Partnership*, 193 Ariz. 126, 970 P.2d 958, 964 (Ct. App. 1998). We recognize that Charles Gunzel was the president and owner of Cornerstone. Nevertheless, in response to Gunzel's summary judgment motion, Umpqua Bank provided no facts as to the role that Gunzel played in the part payments, let alone any authorization or ratification of the payments by Gunzel. Umpqua Bank does not argue ratification.

Umpqua Bank v. Gunzel, 16 Wn. App. 2d 795, 805 (2021).

After release of our decision, Umpqua Bank moved the court for reconsideration and to supplement the record to consider evidence contained in a new declaration of Lisa Redcay. Redcay's declaration reads, in part:

> 3. In reviewing the recent published opinion on this Court relative to this dispute, the Court incorrectly presumed that Mr. Gunzel was either unaware and/or uninvolved in the last several payments made on the Cornerstone notes, namely payments in July, September, November and December of 2013. Not only is this an incorrect assumption, but each of these payments was actually made by Mr. Gunzel, personally, and directed to the bank to apply to the Cornerstone loan number (3468648478).
>
> 4. As this is an older debt, all hardcopies and original loan documentation are stored at Iron Mountain for the bank. After reading this Court's opinion and mistaken belief that Mr. Gunzel was claiming he did not make the 2013 payments, I searched the bank's files and found copies of these four checks below:
>
> [The declaration then shows four checks written on a Wells Fargo bank account of Charles Gunzel III each in the amount of $200. The checks are dated July 31, 2013, September 10, 2013, November 6, 2013, and December 9, 2013].
>
> 5. Not only was Mr. Gunzel aware of these payments, he was the one that made them from his own personal account. Thus the statement this Court was relying on from him that somehow it was Cornerstone making these payments is simply a lie. During the bank's motion for summary judgment before the trial, who was making these 2013 payments was never pertinent to the arguments being made by either party thus the bank had no reason to search these older files for such information.

Resp't Umpqua Bank's Mot. for Recons. And to Suppl. the R., App. A at 2-3.

In her declaration, Lisa Redcay did not identify the location of Iron Mountain. Iron Mountain, Inc. is an American enterprise information management services company founded in 1951 and headquartered in Boston. Redcay skirted any explanation as to why Umpqua Bank failed to produce the checks during trial court discovery.

LAW AND ANALYSIS

In its motion for reconsideration, Umpqua Bank asks that we reverse and grant it judgment against Charles Gunzel based on new evidence that Gunzel tendered late

payments and that Gunzel committed perjury. The bank also complains that we addressed an issue not litigated. As alluded to in our first opinion, we would have affirmed the superior court's judgment in favor of the bank if the bank had presented facts supporting its assertions about Gunzel's conduct and Gunzel had failed to sufficiently controvert those facts on summary judgment.

In support of its motion for reconsideration, Umpqua Bank also files a motion, pursuant to RAP 9.11, to submit additional evidence. We first address whether to grant the bank's motion to supplement the record before analyzing whether the court mistakenly decided the case on a spurious issue.

Perjury and Motion to Supplement the Record

Umpqua Bank requests that this court, pursuant to RAP 9.11(a), consider the declaration of Lisa Redcay, including the affixed checks showing payments by Charles Gunzel. RAP 9.11 declares:

> **(a) Remedy Limited.** The appellate court may direct that additional evidence on the merits of the case *be taken before the decision of a case on review* if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) *it is equitable to excuse a party's failure to present the evidence to the trial court*, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

(Emphasis added.)

We emphasize that RAP 9.11(a) authorizes additional evidence on appeal only before the appeals court renders its decision. We deny the motion to supplement on this basis alone. No Washington decision presents circumstances whereby a party sought to furnish the appellate court new evidence after the court's decision.

RAP 9.11 presents a limited remedy. *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 593, 849 P.2d 669 (1993). RAP 9.11(a) contains six conditions under which new evidence will be received on appeal. Normally, new evidence will be accepted only if the movant fulfills all six of these conditions. *State v. Ziegler*, 114 Wn.2d 533, 541, 789 P.2d 79 (1990); *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 593 (1993).

Even if we were to permit the late, late filing of the request to supplement the record, we would deny the motion because Umpqua Bank fails to satisfy condition three of the six conditions under RAP 9.11. The bank lacks any excuse for its failure to present the additional evidence before the trial court, let alone present the records timely before this reviewing court. In a declaration in support of his summary judgment motion and in his brief in support of summary judgment, Gunzel wrote that Cornerstone Building tendered all the late payments. In its summary judgment briefs, the bank wrote that Gunzel tendered the late payments. Because Gunzel presented evidence contrary to the facts asserted by Umpqua Bank and because the bank relied on this purported fact for its

summary judgment motion, it should have produced the evidence by the time of the summary judgment hearings.

In his reply brief before this court, Charles Gunzel criticized Umpqua Bank for asserting in its appellate brief that Gunzel tendered payment to the bank when the bank failed to present any evidence to support this assertion. The bank should have earlier known of the factual dispute of who tendered payments, so, by the time of the reply brief, the bank lacked any semblance of an excuse not to seek to add evidence before this court's ruling. The bank instead buried its head in the sand, which apparently it also did when responding to discovery requests.

Umpqua Bank lacks clean hands in seeking to supplement the record. The bank should have disclosed the checks written by Charles Gunzel during discovery. By failing to produce the records, the bank flouted important court rules, on which fair and orderly litigation is based. Lisa Redcay verified under oath that the bank had produced all requested documents. In her recently submitted declaration, Redcay fails to explain the violation of the discovery rules and does not even recognize the document having been sought during discovery.

Umpqua Bank asks us to waive the conditions to RAP 9.11(a). We recognize that we may waive the requirements of RAP 9.11 to serve the ends of justice. *Sears v. Grange Insurance Association*, 111 Wn.2d 636, 640, 762 P.2d 1141 (1988), *overruled in part on other grounds by Butzburger v. Foster*, 151 Wn.2d 396, 89 P.3d 689 (2004)

(plurality opinion); *Washington Federation of State Employees, Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 885, 665 P.2d 1337(1983); *In re Detention of Brooks*, 94 Wn. App. 716, 723, 973 P.2d 486 (1999), *aff'd in part, rev'd in part*, 145 Wn.2d 275, 36 P.3d 1034 (2001), *overruled in part on other grounds by In re Detention of Thorell*, 149 Wn.2d 724, 72 P.3d 708 (2003).

In *Washington Federation of State Employees Council 28, AFL-CIO v. State*, 99 Wn.2d 878 (1983), the Supreme Court granted a motion for submittal of additional evidence because the State officer created the new document after the initiation of litigation, because the document solved the problem raised by the plaintiff in litigation, and because of a question from the court in anticipation of oral argument.

In *Detention of Brooks*, 94 Wn. App. 716 (1999), this court granted the State's motion to supplement the record, before its decision. In a sexually violent offender prosecution's appeal, in which the appellant contended the relevant statute violated the equal protection clause, the State asked to file a declaration of the superintendent of the Special Commitment Center in Monroe with facts and opinions about treating a sexually violent person. This court noted that the facts were "well within the arena of this court's ability to conceive" when addressing the important constitutional issue. 94 Wn. App. 716, 724 (1999).

We decline to waive the requirement that the movant seek to introduce additional evidence before the court's decision. None of the Washington decisions addressing

waiver involve a request to supplement the record after the appellate court's decision. We also decline waiver of all six of the conditions under RAP 9.11(a) because of the unclean hands of Umpqua Bank and because of fair warning to the bank before the trial court and before this court of the need to support its factual assertion, of payments by Charles Gunzel, with payment records.

Because we deny Umpqua Bank's motion to supplement the record, we do not consider the declaration of Lisa Redcay in support of the bank's motion for reconsideration. Therefore, this court lacks evidence of any perjury by Charles Gunzel.

Un-Litigated, Un-Developed Issue

Umpqua Bank remonstrates that this court based its decision on an issue not litigated before the superior court. The bank suggests that this court violated the bank's due process rights by resting its decision in part on the assumption that Cornerstone Building, not Charles Gunzel, tendered all late payments. In so arguing, Umpqua Bank cites fundamental principles of law with little relevance to the steps taken by this court to reach its ruling. In so arguing, Umpqua Bank fails to note that the parties' superior court pleadings and the parties' appeal briefs repeatedly disagreed as to whether Gunzel personally tendered payments to the bank.

In support of its objection to this court's ruling, Umpqua Bank asserts arguments that misrepresent or misconstrue the record before the trial court and before this court. First, the bank laments the lack of a complete record before the trial court. Yet, the bank

fails to identify what additional record should have been placed before the trial court and who should have presented that record to the court. Presumably, the bank wishes that the trial court had received the four checks it implanted into Lisa Redcay's recent declaration. Of course, photocopies of those checks always remained in the custody of Umpqua Bank, and the bank should have produced the four checks in discovery.

In a related argument, Umpqua Bank promotes the fairness of requiring a party to assert factual arguments at the proper time so that the trial court can equitably resolve issues before it. Presumably Umpqua Bank complains that Charles Gunzel did not assert before the trial court that Cornerstone Building, not him, tendered late payments to the bank. The record reads otherwise.

Charles Gunzel moved for summary judgment before Umpqua Bank filed a motion for judgment. Gunzel then framed the issue, as to whether the statute of limitations bars the bank's suit, as if Cornerstone Building, not he personally, tendered the late payments. In his brief in support of his motion for summary judgment, Gunzel wrote: "[t]hereafter, Cornerstone Building Co. continued to make payments through December 16, 2013." CP at 7. Gunzel based this factual assertion on Umpqua's responses to discovery that showed that Umpqua Bank applied the payments to Cornerstone Building's loan account number as opposed to his personal guaranty account number. We may presume that Umpqua Bank read Gunzel's pleadings and knew that

Gunzel sought summary judgment based on the factual proposition that Cornerstone Building paid the late payments.

In opposition to Charles Gunzel's summary judgment motion, Umpqua Bank Assistant Vice President Lisa Redcay submitted a declaration. She did not claim in the declaration that Charles Gunzel personally tendered any payment to the bank. Instead, the bank wrote four times, in its memorandum of authorities, that, after Cornerstone Building's default, Gunzel, as president of the corporation, continued to direct Cornerstone to make payments to Umpqua Bank until December 2013. If the bank wished to foster the factual contention that Gunzel directed payments, Umpqua Bank should have cited to the record, but it failed to corroborate this assertion with any evidence. More importantly, if the bank believed that Gunzel personally issued payments, the bank should have presented the trial court copies of the four checks it then held in its possession. To rebut a properly supported summary judgment motion, the adverse party may not rest on allegations. CR 56(e); *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975).

Umpqua Bank thereafter moved for summary judgment. In opposition to the bank's motion, Charles Gunzel submitted a declaration that read, in part:

> I did not consent to the extension of the debt evidenced by loan number 3468648478 owed by Cornerstone Building Company to Umpqua Bank beyond the maturity date of May 28, 2009. Cornerstone Building Company continued to make payments on loan number 3468648478 until December of 2013.

CP at 220. Thus, in order to defeat the bank's motion, Gunzel presented testimony that Cornerstone Building made late payments. We may assume that the bank then understood that Gunzel placed the identity of the payor of the late payments at issue.

In its brief supporting its motion for reconsideration, Umpqua Bank writes that Charles Gunzel "*buried* in a declaration," his avowal that Cornerstone Building tendered the payments. Resp't Umpqua Bank's Mot. for Recons. and to Suppl. the R. at 2. We are unsure as to why the bank characterizes this testimony as "buried," when the testimony was in the same font and English language as found the bank's own pleadings and was filed in the same manner as Lisa Redcay's declaration in support of the bank's motion. No facts suggest and Umpqua Bank does not argue that Gunzel entombed his avowal in Iron Mountain.

Umpqua Bank filed a reply brief in support of its summary judgment motion. In support of its attempt to impose personal liability on Charles Gunzel, the bank wrote that: "Mr. Gunzel . . . was the actual person responsible for continuing to make payments to Umpqua after the debt became due and owing." CP at 226. The bank later wrote, in the reply brief: "Umpqua merely notes that Gunzel's payments after the debt became due and owing extended the statute of limitations of the debt [under the guaranty] as this Court has already found as a matter of law." CP at 226-27. Thus, the bank sought judgment based on the factual assumption and assertion that Gunzel personally issued payments.

Unfortunately for Umpqua Bank, it failed to cite to the factual record to show that Gunzel personally made a payment, and thus it did not contradict Gunzel's declaration of payment by the company. Uncontroverted, relevant facts offered in support of summary judgment are deemed established. *Central Washington Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989); *Parrott Mechanical, Inc. v. Rude*, 118 Wn. App. 859, 864, 78 P.3d 1026 (2003). Although courts generally apply this rule in the context of the nonmovant failing to file contravening affidavits, the rule should apply with added force to the movant failing to file countering declarations since the moving party carries the burden to show by uncontroverted facts the lack of a genuine issue of material fact. *Hope v. Larry's Markets*, 108 Wn. App. 185, 191, 29 P.3d 1268 (2001).

In its brief in support of its motion for reconsideration before this court, Umpqua Bank writes that the trial court based its ruling on a finding that Charles Gunzel made the payments that extended the statute of limitations. The bank, however, fails to cite to the trial court record in support of its assertion that the superior court entered a finding. Anyway findings of fact on summary judgment are not proper, are superfluous, and are not considered by the appellate court. *Chelan County Deputy Sheriffs' Association v. County of Chelan*, 109 Wn.2d 282, 294 n.6, 745 P.2d 1 (1987); *Kries v. WA-SPOK Primary Care, LLC*, 190 Wn. App. 98, 117, 362 P.3d 974 (2015). If the court had entered such a finding, we would have needed to review whether any facts supported the

finding for purposes of affirming the ruling or whether facts contravened the finding so as to require denial of the summary judgment motion.

Umpqua Bank contends that the circumstantial evidence established that Charles Gunzel must have tendered the late payments because of Cornerstone Building being a defunct closely held corporation. In Charles Gunzel's declaration, he testified that Cornerstone Building had dissolved as a corporation. Nevertheless, in opposition to Charles Gunzel's summary judgment motion and in support of its summary judgment motion, the bank never submitted evidence about stockholders and officers of the corporation. Although Gunzel may have provided money to Cornerstone Building to pay and may have directed the corporation to pay, others also could have done so. The case's factual record shows nothing about the inner operations of Cornerstone Building.
Mere speculation cannot support or defeat a motion for summary judgment. *Kyreacos v. Smith*, 89 Wn.2d 425, 429, 572 P.2d 723 (1977); *Heringlake v. State Farm Fire & Casualty Co.*, 74 Wn. App. 179, 192, 872 P.2d 539 (1994). Just as important, Umpqua Bank never argued before the trial court or earlier argued before this court that circumstantial evidence compelled such a conclusion.

Umpqua Bank emphasizes the newly discovered evidence of four checks, "dug out of Iron Mountain," which the bank claims shows perjury. We assume the bank does not suggest that it literally encountered difficulty by shoveling underground and into a mountain in order to locate records deeply buried years ago. Declarant Lisa Redcay

provided no explanation for the late submittal of the four checks. If the evidence was available but not offered until after that opportunity passes, the parties are not entitled to another opportunity to submit that evidence. *Davies v. Holy Family Hospital*, 144 Wn. App. 483, 500, 183 P.3d 283 (2008), *abrogated on other grounds by Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 393 P.3d 776 (2017).

Finally, Umpqua Bank complains that this court's initial opinion was based almost entirely on Charles Gunzel's declaratory statement that Cornerstone Building tendered the late payments. To the contrary, this court engaged in an extensive analysis as to the language in Charles Gunzel's commercial guaranty, the Oregon statute of limitations on promissory notes, the difference between when the limitation period accrues for purposes of the debt of the borrower and when the period accrues for purposes of the guarantor's obligation, waiver of the protection of the statute of limitations, and public policy against waivers. This court wrote only one paragraph in its legal analysis about the implications of whether Charles Gunzel or Cornerstone Building issued the late payments. We accurately noted that, despite occasionally asserting that Gunzel tendered the payments, the bank submitted no evidence in support of its assertion.

In its respondent's brief, Umpqua Bank identified issue 1 on appeal as:

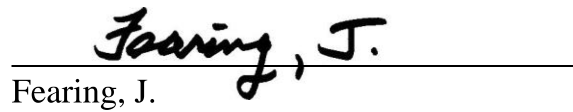
> Whether the trial court correctly concluded that *Gunzel's continued payments* on the Note after its maturity date extended the statute of limitations on its corresponding personal guaranty in accordance with Oregon law?

Resp't Umpqua Bank's Response Br. at 3. This framing of the issue required the court to determine whether the facts submitted during the summary judgment process supported the factual assumption inserted into the issue and, if so, whether personal payments extended the running of the statute of limitations. The bank's own framing of an issue required that this court resolve whether late payments by Charles Gunzel extended the statute of limitations. Facts inserted into a party's statement of issues are fair game for this court to challenge and to issue a decision based on a lack of support for the purported facts.

This court abhors perjury. We recognize the possibility that Charles Gunzel committed perjury. With the denial of Umpqua Bank's motion for reconsideration, we remand the case to the superior court to enter judgment in favor of Gunzel. Our ruling, however, does not preclude Umpqua Bank from later filing in the superior court a motion for relief of judgment pursuant to CR 60(b). The superior court sits in a better position than this court to determine if Gunzel perjured himself, to assess whether the bank engaged in due diligence when responding to discovery and when searching its records, and to weigh the equities between the parties. We proffer no opinion as to the validity of any motion for relief from judgment.

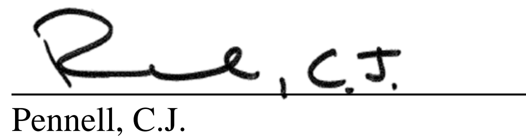
CONCLUSIONS

We deny Umpqua Bank's motion to submit additional information and its motion for reconsideration. We confirm our first opinion.



Fearing, J.

WE CONCUR:



Pennell, C.J.

Staab, J.

APPENDIX C

https://ccfs.sos.wa.gov/#/BusinessSearch/BusinessInformation

Corporations and Charities ...

File Edit View Favorites Tools Help

Intapp Suggested Sites Web Slice Gallery

Page Safety Tools

Corporations and Charities Filing System

Business Information

BUSINESS INFORMATION

Business Name: **CORNERSTONE BUILDING CO.**

Business Type: **FOREIGN PROFIT CORPORATION**

Principal Office Street Address: **358 SUPERIOR ST SE #100, SALEM, OR, 97301**

Expiration Date: **03/31/2009**

Formation/ Registration Date: **03/03/2006**

Inactive Date: **07/01/2009**

Nature of Business:

UBI Number: **602 583 505**

Business Status: **TERMINATED**

Principal Office Mailing Address:

Jurisdiction: **UNITED STATES, OREGON**

Period of Duration: **PERPETUAL**

REGISTERED AGENT INFORMATION

Registered Agent Name: **CHUCK GUNZEL**

Street Address: **23361 W LUDVICK LAKE DRIVE, SEABECK, WA, 98380, UNITED STATES**

Mailing Address:

GOVERNORS

Title	Governors Type	Entity Name	First Name	Last Name
GOVERNOR	INDIVIDUAL		CHUCK	GUNZEL III

APPENDIX D

NO. 374009

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

UMPQUA BANK,

Respondent,

v.

CHARLES A. GUNZEL III, et al.,

Appellant.

DECLARATION IN SUPPORT OF RESPONDENT UMPQUA BANK'S MOTION FOR RECONSIDERATION AND TO SUPPLEMENT THE RECORD

Daniel A. Brown, WSBA #22028
Sean D. Leake, WSBA #52658
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
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Email: dbrown@williamskastner.com
sleake@williamskastner.com

Attorneys for Respondent Umpqua Bank

7369505.1

I, Lisa Redcay declare as follows:

1. I am over the age of 18, competent to testify, and state the following based upon my personal knowledge and the review of the pertinent files and documents in Umpqua Bank's possession relative to this dispute and the underlying loan transaction with the Defendant.

2. I am an Assistant Vice President and Special Assets Officer in the Special Assets Department of Umpqua Bank ("Umpqua"). I was given charge of collecting on the unpaid notes at issue in the underlying superior court action against Mr. Gunzel as guarantor of the debtor, Cornerstone. Cornerstone was not pursued as it was determined through our investigations that the company/debtor was defunct with no continuing business nor assets, having closed its business and ceasing operations back in 2009.

3. In reviewing the recent published opinion on this Court relative to this dispute, the Court incorrectly presumed that Mr. Gunzel was either unaware and/or uninvolved in the last several payments made on the Cornerstone notes, namely payments in July, September, November and December of 2013. Not only is this an incorrect assumption, but each of these payments was actually made by Mr. Gunzel, personally, and directed to the bank to apply to the Cornerstone loan number (3468648478).

4. As this is an older debt, all hardcopies and original loan documentation are stored at Iron Mountain for the bank. After reading this Court's opinion and mistaken belief that Mr. Gunzel was claiming he

did not make the 2013 payments, I searched the bank's files and found copies of these four checks below:

THE BACK OF THIS CHECK CONTAINS A SECURITY MARK - DO NOT ACCEPT WITHOUT HOLDING AT AN ANGLE TO VERIFY SECURITY MARK

Post to Account: 3468648478 $200.00 07/31/2013

CHARLES A. GUNZEL-III
1121 S OAKCREST RD
ARLINGTON, VA 22202-2227

WELLS FARGO

Please post this payment for Our Mutual Customer
Please Direct Any Questions To 800-956-4442 or
Please Return Check To:
WELLS FARGO BANK, NA
Dept #34033, PO BOX 39000, San Francisco, CA 94139
9600055846 1191374632

56-382/412 1191374632

July 31, 2013

PAY Two Hundred and 00/100 Dollars $ **********200.00

VOID 90 DAYS AFTER ISSUE

TO THE ORDER OF
UMPQUA BANK
ATTN: RICK REED
1377 MOHAWK BLVD
SPRINGFIELD OR 97477-3358

Wells Fargo as agent for its customer

Wells Fargo Bank, NA
115 Hospital Drive
Van Wert, OH 45891

Memo

⑈1191374632⑈ ⑆041203824⑆ 9600055846⑈

THE BACK OF THIS CHECK CONTAINS A SECURITY MARK - DO NOT ACCEPT WITHOUT HOLDING AT AN ANGLE TO VERIFY SECURITY MARK

Post to Account: 3468648478 $200.00 09/10/2013

CHARLES A. GUNZEL-III
2000 MADRONA POINT DR
BREMERTON, WA 98312-2335

WELLS FARGO

Please post this payment for Our Mutual Customer
Please Direct Any Questions To 800-956-4442 or
Please Return Check To:
WELLS FARGO BANK, NA
Dept #34033, PO BOX 39000, San Francisco, CA 94139
9600055846 1195666390

56-382/412 1195666390

September 10, 2013

PAY Two Hundred and 00/100 Dollars $ **********200.00

VOID 90 DAYS AFTER ISSUE

TO THE ORDER OF
UMPQUA BANK
ATTN: RICK REED
1377 MOHAWK BLVD
SPRINGFIELD OR 97477-3358

Wells Fargo as agent for its customer

Wells Fargo Bank, NA
115 Hospital Drive
Van Wert, OH 45891

Memo

⑈1195666390⑈ ⑆041203824⑆ 9600055846⑈

THE BACK OF THIS CHECK CONTAINS A SECURITY MARK - DO NOT ACCEPT WITHOUT HOLDING AT AN ANGLE TO VERIFY SECURITY MARK

Post to Account: 3468648478 $200.00 11/06/2013

CHARLES A. GUNZEL-III
2000 MADRONA POINT DR
BREMERTON, WA 98312-2335

WELLS FARGO

Please post this payment for Our Mutual Customer
Please Direct Any Questions To 800-956-4442 or
Please Return Check To:
WELLS FARGO BANK, NA
Dept #34033, PO BOX 39000, San Francisco, CA 94139
9600055846 1201688621

56-382/412 1201688621

November 6, 2013

PAY Two Hundred and 00/100 Dollars $ **********200.00

VOID 90 DAYS AFTER ISSUE

TO THE ORDER OF
UMPQUA BANK
ATTN: RICK REED
1377 MOHAWK BLVD
SPRINGFIELD OR 97477-3358

Wells Fargo as agent for its customer

Wells Fargo Bank, NA
115 Hospital Drive
Van Wert, OH 45891

Memo

⑈1201688621⑈ ⑆041203824⑆ 9600055846⑈

THE BACK OF THIS CHECK CONTAINS A SECURITY MARK. DO NOT ACCEPT WITHOUT HOLDING AT AN ANGLE TO VERIFY SECURITY MARK.

Post to Account: 3468648478 $200.00 12/09/2013

CHARLES A. GUNZEL III
2000 MADRONA POINT DR
BREMERTON, WA 98312-2335

WELLS FARGO

Please post this payment for Our Mutual Customer
Please Direct Any Questions To 800-956-4442 or
Please Return Check To
WELLS FARGO BANK, NA
Dept #34033, PO BOX 39000, San Francisco, CA 94139
9600055846 1204866949

56-382/412 1204866949

December 9, 2013

PAY Two Hundred and 00/100 Dollars $ **********200.00

VOID 90 DAYS AFTER ISSUE

TO THE ORDER OF UMPQUA BANK
ATTN: RICK REED
1377 MOHAWK BLVD
SPRINGFIELD OR 97477-3358

Wells Fargo as agent for its customer

Wells Fargo Bank, NA

Memo

⑈1204866949⑈ ⑆041203824⑆ 9600055846⑈

5. Not only was Mr. Gunzel aware of these payments, he was the one that made them from his own personal account. Thus the statement this Court was relying on from him that somehow it was Cornerstone making these payments is simply a lie. During the bank's motion for summary judgment before the trial, who was making these 2013 payments was never pertinent to the arguments being made by either party thus the bank had no reason to search these older files for such information.

The foregoing statement is made under penalty of perjury under the laws of the State of Washington and Oregon.

Signed at Roseburg, Oregon this 7th day of April, 2021.

Lisa Redcay

Lisa Redcay

WILLIAMS KASTNER

September 23, 2021 - 1:14 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	37400-9
Appellate Court Case Title:	Umpqua Bank v. Charles A. Gunzel, III, et al
Superior Court Case Number:	19-2-00789-1

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  This File Contains:
  Petition for Review
  The Original File Name was Umpqua_-_Petition_for_Review.pdf

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Comments:

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SEATTLE, WA, 98101-1368
Phone: 206-628-6655

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Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	37400-9
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Superior Court Case Number:	19-2-00789-1

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