No. 90078-7

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

(Court of Appeals, Division I, Case No. 69791-9-I)

WASHINGTON FEDERAL, a federally chartered savings association,

Plaintiff/Appellant,

v.

LANCE HARVEY, individually, and the martial community comprised of LANCE HARVEY and "JANE DOE" HARVEY, husband and wife

Defendants/Respondents.

PETITION FOR REVIEW

Dean A. Messmer, WSBA #5738
Lasher Holzapfel Sperry & Ebberson, PLLC
601 Union St., Suite 2600
Seattle, WA 98101
Telephone: (206) 654-2440
messmer@lasher.com

Attorneys for Defendants/Respondents
Lance and "Jane Doe" Harvey

TABLE OF CONTENTS

I. IDENTITY OF PETITIONERS 1

II. CITATION TO COURT OF APPEALS DECISION 1

III. ISSUES PRESENTED FOR REVIEW 1

IV. STATEMENT OF THE CASE 3
A. Factual Background 3
B. Procedural Background 5

V. ARGUMENT 8
A. Construction of the Deed of Trust by Division II in *First-Citizens* 8
B. Construction of the Deed of Trust by Division I in *Gentry* and *Harvey* 10
C. RCW 61.24.100(10) 12
D. Interpretation of RCW 61.24.100(10) by Division II in *First-Citizens* 13
E. Interpretation of RCW 61.24.100(10) by Division I in *Harvey* and *Gentry* 15
F. Review Should Also be Accepted on the Issue of Whether the Anti-Deficiency Protections of RCW 61.24.100 Can Be Modified or Eliminated by Contract 17

VI. CONCLUSION 19

APPENDICES

A. *Washington Federal v. Gentry* Decision ..... A-1 - A-29
B. *Washington Federal v. Harvey* Decision ..... B-1 - B-15
C. *First Citizens v. Cornerstone* Decision ..... C-1 - C-8

TABLE OF AUTHORITIES

CASES

Adams v. King County, 164 Wn.2d 640 (2008) 14
Albice v. Premier Mtg. Services of Washington, Inc., 157 Wn. App. 912, 239 P.3d 1148 (2010) 18
Bain v. Metro. Mtg. Group, Inc., 175 Wn.2d 417, 486 P.2d 1080 (2012) 18
Bour v. Johnson, 122 Wn.2d 829, 864 P.2d 380 (1993) 14
Conran v. White & Bollard, 24 Wn.2d 619, 167 P.2d 133 (1946) 18
Course-Hinds Co. v. InterNorth, Inc., 634 F.2d 690 (2nd Cir. 1980) 16
Dennis v. Moses, 18 Wash. 537, 52 P. 333 (1898) 18
First-Citizens Bank & Trust Co. v. Cornerstone Homes & Devel., LLC, 178 Wn. App. 207, 314 P.3d 420 2013) ..... passim
First-Citizens Bank & Trust Co. v. Reikow, 177 Wn. App. 787, 313 P.3d 1208 (2013) 17
Hearst Communications, Inc. v. Seattle Times Co., 120 Wn. App. 784, 86 P.3d 1194 (2004) 12
Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 115 P.3d 262 (2005) 10, 12
Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 980 P.2d 1234 (1999) 14
McGary v. Westlake Investors, 99 Wn.2d 280, 661 P.2d 971 (1983) 11
Schroeder v. Excelsior Mgmt. Group, LLC, 177 Wn.2d 94, 297 P.3d 677 (2013) 18
State v. Holland, 99 Wash. 645, 170 P. 332 (1918) 16
State v. Kelley, 168 Wn.2d 72, 83, 226 P.3d 773 (2010) 14
State v. Ortega, 177 Wn.2d 116, 297 P.3d 57 (2013) 14
Stretch v. Murphy, 112 P.2d 1018 (Or. 1941) 18
Washington Federal v. Gentry, ___ Wn.App. ___, ___P.3d ___, Case No. 70004-9-I (Div. I, February 18, 2014) ..... passim
Washington Federal v. Harvey, 2014 WL 646746, Case No. 69791-9-I (Div. I, February 18, 2014) ..... passim

STATUTES

RCW 61.24.100(1) 13-14
RCW 61.24.100(10) ..... passim

OTHER AUTHORITIES

Black's Law Dictionary 661 (9th Ed. 2009) 14

RULES

RAP 13.4(b)(2) 1, 8, 19
RAP 13.4(b)(4) 1, 19

I. IDENTITY OF PETITIONERS

Petitioners are Lance Harvey and his wife (the "Harveys").

II. CITATION TO COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(2) and (4), this Court should review the unpublished decision by Division I of the Court of Appeals filed on February 18, 2014 in *Washington Federal v. Harvey*, 2014 WL 646746, Case No. 69791-9-I (the "*Harvey*" decision), which was based upon Division I's published decision in *Washington Federal v. Gentry*, __ Wn. App. __, __ P.3d __, Case No. 70004-9-I, filed on the same date (the "*Gentry* decision"). Copies of the *Gentry* and *Harvey* decisions are attached hereto as Appendices A and B, respectively.

III. ISSUES PRESENTED FOR REVIEW

1. Review by the Supreme Court is required in order to resolve a direct conflict between decisions of Divisions I and II of the Court of Appeals on two issues:

(a) whether the Deed of Trust Act, RCW 61.24.100, prohibits a secured lender from seeking a deficiency judgment against a guarantor, where the lender elected to non-judicially foreclose a deed of trust securing the guarantor's obligations, and

(b) whether a deed of trust secures guarantor obligations (not just borrower/grantor obligations), where it is "given to secure"

obligations under the "Related Documents" in addition to the obligations under the Note, and defines "Related Documents" to include obligations under "all guaranties ... executed in connection with the Indebtedness."

In *First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development LLC*, 178 Wn. App. 207, 314 P.3d 420 (2013) ("*First-Citizens*"), Court of Appeals Division II answered "yes" to both questions based upon a "plain language" analysis. A copy of the decision is attached as Appendix C. The same statute and deed of trust language is at issue in this case. However, in its *Harvey* and *Gentry* decisions, Division I of the Court of Appeals declined to follow the *First-Citizens* opinion, and instead reached directly opposite determinations on those two issues. Review by this Court is necessary to resolve the conflict and correct Division I's misinterpretation and misapplication of the plain language of the deeds of trust and non-judicial foreclosure statute.

2. Review is also sought with respect to a related issue which was not argued to Division II in *First-Citizens*, and which was briefed and argued but not decided by Division I in its *Harvey* and *Gentry* decisions: Can a secured lender contractually avoid the anti-deficiency protections of the Deed of Trust Act through boilerplate waiver provisions in its guaranty form, or is such action void as against public policy?

IV. STATEMENT OF THE CASE

A. Factual Background

This action arises out of a $2.56 million real estate loan made in July 2007 by Horizon Bank to Kaydee Gardens 9, LLC ("Kaydee Gardens"), an entity then owned by Lance Harvey and Mark Tapert. The loan was secured by a deed of trust (the "Deed of Trust") against property owned by Kaydee Gardens, and was guaranteed by Harvey and Tapert.[1]

After Mr. Tapert withdrew as co-owner of the LLC, Horizon Bank re-documented the loan in November 2008, with only Mr. Harvey as Guarantor. The $2.56 million loan continued to be secured by the July 2007 Deed of Trust, but Horizon Bank prepared a new Note, Guaranty and other loan documents[2] for execution by Kaydee Gardens and Mr. Harvey.

The Kaydee Gardens Deed of Trust provided that it was "given to secure (a) payment of the Indebtedness and (b) performance of any and all obligations under the Note, the Related Documents, and this Deed of Trust."[3] To eliminate any ambiguity, the Deeds of Trust contained specific definitions of the terms "Indebtedness" and "Related Documents":

> The word "Indebtedness" means all principal, interest, and

---

[1] A copy of the Deed of Trust is attached to the Declaration of Lance Harvey, CP 553-566. For ease of reference, a copy was also included in Appendix C attached to the Brief of Respondents Harvey filed with the Court of Appeals below.

[2] Copies of those documents appear at CP 535-36 and 553-99. They were also included in Appendix C to Brief of Respondents Harvey filed with the Court of Appeals

[3] That language was presented in block lettering and bold face. CP 556.

> other amounts, costs and expenses payable under the Note or Related Documents, together with all renewals of, extensions of, modifications of, consolidations of and substitutions for the Note or Related Documents ...[4]
>
> The words "Related Documents" mean all promissory notes, credit agreements, loan agreements, guaranties, security agreements, mortgagers, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness; provided that the environmental indemnity agreements are not "Related Documents" and are not secured by this Deed of Trust.[5]

The Guaranty signed by Mr. Harvey was not merely executed "in connection" with the Indebtedness; it obligated him to satisfy the Note and pay the Indebtedness if his LLC borrower entity failed to do so.[6] Thus, when combined with the language declaring that the Deed of Trust was "given to secure ... performance of any and all obligations under ... the Related Documents," the plain language of the definitions confirm that the Deed of Trust was "given to secure ... performance of any and all obligations" under the Harvey Guaranty.

Horizon Bank was closed by state regulators in January 2010, and the bank's assets (including the Kaydee Gardens loan documents) were sold by FDIC to Washington Federal ("WaFed"). In May 2011, Kaydee Gardens stopped making payments following a dispute over the balance due. Rather than choosing to sue Kaydee Gardens for a money judgment

---

[4] CP 562 (emphasis added).
[5] *Id.* (emphasis added).
[6] CP 585 (Harvey Commercial Guaranty, page 1.

on the Note obligation following the default, and/or suing the Harveys on their Guaranty, and rather than choosing to foreclose the Deed of Trust judicially, WaFed elected to foreclose the Kaydee Gardens Deed of Trust non-judicially, acquiring the Kaydee Gardens property via Trustee's Deed through its credit bid at the trustee's sale held on November 14, 2011.[7]

B. Procedural Background

Following the trustee's sale, WaFed sued the Harveys, claiming that they were liable for a deficiency judgment under the Guaranty.[8] The parties subsequently filed cross motions for summary judgment. In their motion, the Harveys argued that the Kaydee Gardens Deed of Trust secured the Guaranty, and that as a result of non-judicial foreclosure through the trustee's sale, RCW 61.24.100(10) prohibited WaFed from seeking a deficiency judgment against them.[9] WaFed disputed both arguments, and also contended that the Harveys had waived the protection of RCW 61.24.100 through boilerplate language in the Guaranty. The trial court granted the Harveys' motion, concluding that: (1) the Harvey Guaranty was secured by the Deed of Trust which WaFed had non-judicially foreclosed; (2) RCW 61.24.100(10) bars a deficiency judgment against a guarantor where the guaranty obligations were secured by the

[7] CP 602-07 (Trustee's Deed).
[8] CP 943-955 at ¶¶ 5.1 (Complaint).
[9] CP 608-619 (Harvey Cross Motion for Summary Judgment).

foreclosed deed trust; and (3) waiver of the anti-deficiency protections afforded by RCW 61.24.100 is void as against public policy.[10]

The *Harvey* and *Gentry* cases are among a large number of cases pending before the Washington courts, involving substantially identical deed of trust forms and attempts by banks to obtain deficiency judgments against guarantors after completing non-judicial foreclosure sales.[11] *First-Citizens* was the first of those cases to reach the appellate courts. In its December 3, 2013 published opinion, Division II of the Court of Appeals made the same determinations as the Harvey trial court on issues (1) and (2), above.[12] It held that the bank's deficiency claims were barred by RCW 61.24.100(10) because the guarantors' obligations were secured by the deed of trust which the bank had elected to non-judicially foreclose.

---

[10] CP 273-277 (Original Order Granting Summary Judgment to Harveys) and CP 12-13 (Order Denying WaFed Motion for Reconsideration).

[11] In addition to *First-Citizens, Gentry* and *Harvey*, there are at least four such cases currently pending before Division I: *Union Bank vs. Lyons*, Appeal No. 70327-7-I; *Union Bank vs. McAbee*, Appeal No. 70497-4-I; *Union Bank vs. Pelzel*, Appeal No. 70869-4-I; and *Union Bank vs. Deyo*, Appeal No. 71168-7-I. Motions for Stay pending Supreme Court determination of these issues were filed with Division I on March 14, 2014 in the *Lyons* and *McAbee* appeals.

At least five more cases are currently pending before Division II: *Union Bank vs. Brinkman*, Appeal No. 44839-4-II; *Union Bank vs. Riley*, Appeal No. 44970-6-II; *Union Bank vs. Brunaugh*, Appeal No. 45010-1-II; *Union Bank vs. Brunaugh*, Appeal No. 45014-3-II; and *Union Bank vs. Moore*, Appeal No. 45311-8-II. A motion to transfer the *Union Bank v. Brinkman* appeal to this Court for direct review is set on the Supreme Court Commissioner's Motion Calendar for March 27, 2014, under Case No. 89964-9.

Many similar cases are also still pending in the Washington Superior Courts, awaiting a final appellate determination of these issues.

[12] Although the guaranty form in *First-Citizens* contained the same boilerplate language as the Harvey Guaranty, the bank chose not to argue waiver of the protections of RCW 61.24.100, making it unnecessary for Division II to decide issue (3).

Two months later, however, Division I of the Court of Appeals reached diametrically opposite conclusions in its unpublished *Harvey* opinion and published *Gentry* decision, holding that the Harveys' and Gentrys' obligations under their Guaranties were not secured by the Deeds of Trust, and that even if the Guaranties were so secured, RCW 61.24.100(10) did not bar the entry of deficiency judgments against them. In its *Harvey* and *Gentry* decisions, Division I considered and rejected Division II's determinations in the *First-Citizens* opinion.

Specifically, in the *Gentry* decision, Division I held that RCW 61.24.100(10) does not limit the bank's ability to obtain a deficiency judgment, construing the subsection to be purely permissive rather than prohibitive. *Harvey* at 3-7, *Gentry* at 11-20. In refusing to interpret the Deeds of Trust as securing the Guaranties, Division I effectively held that the inclusion of the word "guaranties" in the definition of "Related Documents" was superfluous, determining instead that the obligations secured by the Deeds of Trust were intended to be limited to those of the borrower/grantor LLC's only. *Harvey* at 7-13; *Gentry* at 21-27.

Having resolved those two issues, Division I declined to reach the third issue of whether the anti-deficiency protections of RCW 61.24.100 can be modified or eliminated by contract, or whether such contractual provisions are void as against public policy. *Harvey* at 13; *Gentry* at 27.

V. ARGUMENT

Under RAP 13.4(b)(2) and (4), this Court will accept review when a Court of Appeals decision "is in conflict with another decision of the Court of Appeals," and when "the petition involves an issue of substantial public interest." The decision by Division I in this case satisfies both grounds for review. The *Harvey*, *Gentry* and *First-Citizens* opinions are in direct conflict with each other on the central questions of construction of language defining the obligations secured by the Deeds of Trust and interpretation of the anti-deficiency provisions of RCW 61.24.100.

In light of the many similar cases pending below, an additional issue of substantial public interest is presented by the question not decided by Divisions I or II, i.e. whether the protections of RCW 61.24.100 can be eliminated through the banks' use of boilerplate waiver language.

A. Construction of the Deed of Trust by Division II in *First-Citizens*

It is axiomatic that the obligations which a deed of trust secures are defined by the language of the deed of trust itself, so that the recorded instrument can provide public notice of those obligations. In *Harvey*, *Gentry*, *First-Citizens*, and in many other pending cases, the bank-drafted Deeds of Trust stated that they were given to secure "payment of the Indebtedness" and "performance of any and all obligations under the Note,

the Related Documents and this Deed of Trust." In their deed of trust forms, the banks specifically defined those capitalized terms, confirming that the words "Related Documents" included "all ... guaranties ... executed in connection with the Indebtedness."

In its decision, Division II had no difficulty confirming the meaning of such language:

> These deeds of trust defined (1) "Indebtedness" as "all principal, interest, and other amounts, costs and expenses payable under the Note *or Related Documents*"; and (2) "Related Documents" to include any "*guaranties* ... whether *now* or hereafter *existing*, executed in connection with the indebtedness." A plain reading of this language includes the Allisons' earlier guaranty among the "now ... existing" "Related Documents" that these deeds of trust secured.

314 P.3d at 423, ¶10 (emphasis in original, footnotes omitted). It likewise found that the deeds of trust secured the Allisons' later guaranties:

> This plain language expressly incorporates future "Related Documents," which unambiguously includes future "deeds of trust" as well as "promissory notes" "executed in connection with the Indebtedness," "now or hereafter existing," namely Cornerstone's promissory notes and deeds of trust later executed to obtain this contemplated loan.
>
> Nor is there any ambiguity in Venture Bank's identical use of the term "the Indebtedness," in both the deeds of trust and the Allisons' guaranty, to refer to Cornerstone's construction loans from Venture bank, secured by the deeds of trust. Thus, *we agree with the Allisons that these reciprocal plain terms operate together such that the deeds of trust expressly secure the Allisons' guaranty in addition to Cornerstone's construction loan.*

Id., ¶¶ 11-12 (emphasis added, footnote omitted). The Deed of Trust at

issue in this case contains the same "plain language."

B. Construction of the Deed of Trust by Division I in *Gentry* and *Harvey*

In construing the Deeds of Trust in this case and in *Gentry*, Division I began by restating the fundamental principle that the Court is not to "interpret what was intended to be written but what was written," citing *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005). *Harvey* at 8; *Gentry* at 21. However, Division I then failed to even discuss, much less interpret, the key definitions of Indebtedness and Related Documents in the Deeds of Trust, which determine the nature and extent of the secured obligations. Instead, the Court seized upon the final sentence of the "given to secure" paragraph, which stated that "This Deed of Trust is given and accepted on the following terms," and combined it with a later paragraph addressing payment and performance by the Gentrys' borrower/grantor LLC's.

In its *Gentry* opinion, Division I concluded at page 23:

> Reading these two paragraphs together, the deeds of trust must be read as securing the payment and performance obligations of the **Borrowers and Grantors**. Here, **Borrower** and **Grantor** is the same entity for each loan secured by each deed of trust. There is simply no way to read these provisions so that any deed of trust secures the payment and performance obligations of anyone other than the **Borrower and Grantor**. The guarantors of the loans are neither. Thus, none of these deeds of trust secure the guaranties of the Gentrys.

Division I reached the same conclusion in *Harvey*, even though the

Kaydee Gardens Deed of Trust contained additional language which should have made its intent even clearer. It did not simply state that it was given to secure "(a) payment of the Indebtedness and (b) performance of any and all obligations under the Note, the Related Documents, and this Deed of Trust," without limiting those to obligations of the borrower/grantor. It went on to provide that it was also given to secure "any and all of the Grantor's obligations under that certain Construction Loan Agreement between Grantor and Lender of even date herewith."[13]

Division I's "simply no way" conclusion in *Gentry* and *Harvey* is plainly wrong. A contract is to be construed as a whole, giving meaning to all of its terms. *McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971 (1983). The phrase "This Deed of Trust is given and accepted on the following terms," relied upon by Division I in *Gentry*, obviously refers to all of the remaining paragraphs of the Deed of Trust, including all of the definitions. Far from being limited to payment and performance by the borrower/grantor LLC's, the Deeds of Trust expressly stated that they were given to secure "payment of the Indebtedness" and performance of any and all obligations under the Note, the Related Documents and this Deed of Trust." (emphasis added). Those Related Document obligations included obligations under "all ... guaranties ... executed in connection

[13] CP 556, quoted by Division I in *Harvey* at 9.

with the Indebtedness," a phrase clearly including the Harvey Guaranty.[14]

In *Harvey*, where the bank wanted to limit the obligations the Deed of Trust was "given to secure" to those of the grantor only, it knew how to do so, e.g., in its reference to "the Grantor's obligations under that certain Construction Loan Agreement." In contrast, the language as to securing the Related Documents included "any and all obligations."

This Court should accept review, reverse the erroneous decision by Division I in *Harvey* (and *Gentry*), and confirm that the Deed of Trust at issue in this and other cases secured the obligations of the guarantors.

C. RCW 61.24.100(10)

In 1998, the Legislature amended the Deed of Trust Act to permit deficiency judgment in narrow circumstances. As a result of the amendments, the Act now provides: "Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale

[14] In its opinion in *Hearst Communications, Inc. v. Seattle Times Co.*, 120 Wn. App. 784, 798, 86 P.3d 1194 (2004), Division I held that it lacked authority to revise the contract in the guise of interpreting it, where the parties had specifically defined the terminology employed. The holding was affirmed by this Court, which noted that Hearst had failed to reduce its contended interpretation to writing: "Instead, they defined the specific elements of calculating gains and losses once, in great detail, and embedded those terms without qualification in the loss operations clause. Hearst essentially asks us to rewrite the JOA by revising the loss operations clause, something we are not at liberty to do." *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 510, 115 P.3d 262 (2005). Yet in *Gentry* and *Harvey*, Division I ignored the lender's specific definitions and effectively rewrote the deeds of trust.

under that deed of trust." RCW 61.24.100(1) (emphasis added). In addition to other limitations in the statute, RCW 61.24.100(10) provides that "[a] trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation was not secured by the deed of trust." (Emphasis added).

D. Interpretation of RCW 61.24.100(10) by Division II in *First-Citizens*

After noting that RCW 61.24.100(1) generally bars all deficiency judgments against guarantors, Division II addressed subsection (10):

> Subsection (10) creates an exception to subsection (1)'s general prohibition against deficiency judgments following nonjudicial foreclosure, by allowing the lender to sue a commercial loan guarantor *if* the guaranty was *not* secured by the foreclosed deed of trust.

314 P.3d at 424 (emphasis in original). Division II then applied the statutory language of subsection (10) to the facts actually presented in *First-Citizens*, *i.e.*, that the guaranty obligations were secured by the non-judicially foreclosed deed of trusts. The Court held that:

> Under the statutory construction principle *expressio unius est exclusio alterius*, [RCW 61.24.100(10)] implies that (1) this express exception to the anti-deficiency judgment statute is the only exception under these circumstances; and (2) therefore, further implies that where a guaranty *was* secured by the foreclosed deed of trust (which also secured a commercial loan), the lending bank *cannot* sue the guarantor for any deficiency remaining after the trustee's sale of the secured property.

Id. at 424-25 (bracketed reference added, emphasis again in original). As authority, the Court cited *State v. Kelley*, 168 Wn.2d 72, 83, 226 P.3d 773 (2010) (the "statute's exception of some weapons listed in firearm enhancement statute shows legislative intent that crimes involving other weapons not on that list are not to be excepted"). Such constructions are entirely consistent with other well-established Washington law.[15]

Looking to the statute's plain meaning in the context of the statutory scheme as a whole, Division II concluded that RCW 61.24.100(10) "creates an exception" to RCW 61.24.100(1)'s general prohibition against deficiency judgments following non-judicial foreclosure, by allowing the lender to sue a commercial loan guarantor if the guaranty was not secured by the foreclosed deed of trust. *Id.* at 424.

That exception does not apply where the guaranty was secured by the foreclosed deed of trust. Based on such analysis, Division II reversed the trial court's deficiency judgment against the guarantors. *Id.* at 426.

---

[15] Legislative inclusion of certain items within a category necessarily implies that other items in that category were intended to be excluded. *Bour v. Johnson*, 122 Wn.2d 829, 836, 864 P.2d 380 (1993). "Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim expressio unius est exclusio alterius ...." *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999). *See also State v. Ortega*, 177 Wn.2d 116, 123-25, 297 P.3d 57 (2013) ("The doctrine of expressio unius est exclusio alterius ('to express or include one thing implies the exclusion of the other'), Black's Law Dictionary 661 (9th Ed. 2009) supports our finding that the express authority to rely on the request of another officer in making an arrest for a traffic infraction indicates that such authority does not extend to other non-felony offenses.); and *Adams v. King County*, 164 Wn.2d 640, 650 (2008) (expression of one thing in a statute excludes others and omissions are deemed to be exclusions).

E. Interpretation of RCW 61.24.100(10) by Division I in *Harvey* and *Gentry*

Division II disagreed with the statutory interpretation applied by Division I in *First-Citizens*. *Harvey* at 4; *Gentry* at 17. It explained its interpretation of RCW 61.24.100(10) in *Gentry* as follows:

> The problem with the Gentrys' interpretation is that it requires striking from the statute the word "not," as indicated by the following revision:
>
> > A trustee's sale under a deed of trust securing a commercial loan does ~~not~~ preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was ~~not~~ secured by the deed of trust.
>
> But the plain language of RCW 61.24.100(10) is permissive. That is, it states a permissive rule applicable to situations where the obligation of a borrower or guarantor is not secured by the deed of trust that was foreclosed by a trustee's sale. In that situation, the trustee's sale does not preclude the lender from bringing an action to collect on or enforce a guaranty. Only by striking the word "not" from the two places indicated above can the otherwise permissive statement of the statute be read as a prohibition.

Id. at 13 (bold and strikethrough in original). Of course, this interpretation would require striking the entire last portion of subsection (10), as follows:

> A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor ~~if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust~~.

Indeed, under Division I's interpretation, the exception would swallow the rule. Rather than having to satisfy the "if" condition, lenders would be able to pursue deficiency judgments against guarantors in any scenario.

Division I's opinion in *Gentry* declined to discuss the application of the well-established statutory construction principle of *expressio unius est exclusio alterius* to RCW 61.24.100(10). Instead, it determined that the Gentrys' interpretation (and that of Division II in *First-Citizens*) was "grounded in a logical fallacy," *i.e.,* that "The proposition that 'A implies B' is not the equivalent of 'non-A implies non-B,' and neither proposition follows logically from the other. *Gentry* at 15, quoting from *Course-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 703 (2nd Cir. 1980).

The only Washington authority cited by Division I in *Gentry* was a nearly century-old criminal case, *State v. Holland*, 99 Wash. 645, 170 P. 332 (1918). The rationale for the decision in *State v. Holland* has no plausible application to the present statutory interpretation question, i.e. whether the word "if" in RCW 61.24.100(10) should be read as "only if," as the principle of *expressio unius est exclusio alterius* clearly requires. Nevertheless, it was adopted by Division I as the basis for its decision:

> Putting aside terminology differences, like Holland, the Gentrys essentially argue that the inverse of what is stated in the statute is necessarily true. That is a logical fallacy. We cannot infer that the inverse of what the statute states is true. Based on these cases and our analysis of the statute before us, we reject the interpretation that the Gentrys assert.

Gentry at 17. This ruling was incorporated by reference in *Harvey*.

Division I's erroneous decision in *Harvey* (and *Gentry*) should be

reversed, and this Court should construe RCW 61.24.100(10) to bar post-trustee's sale deficiency judgment claims against guarantors whose obligations were secured by non-judicially foreclosed deeds of trust.

F. Review Should Also be Accepted on the Issue of Whether the Anti-Deficiency Protections of RCW 61.24.100 Can Be Modified or Eliminated by Contract

Although raised in the trial courts, neither Division I nor Division II decided the issue of whether guarantors should be denied the benefit of RCW 61.24.100's protections through boilerplate waivers of the embedded in the lender-drafted guaranty forms.

In *Harvey* and *Gentry*, Division I didn't reach the issue of whether such provisions are void as against public policy, because it decided that no statutory protections were available to the guarantors in any event.

In *First-Citizens*, it was unnecessary for Division II to decide the issue because the lender elected not to argue that the waiver provisions of the guaranty were enforceable under RCW 61.24.100. However, Division II strongly indicated that it would find waivers of the protections of the statute unenforceable, if the issue were squarely presented to it. *First-Citizens Bank*, 314 P.3d at n.5. Similar views were even more strongly expressed by Division II in footnote 4 to its opinion in *First-Citizens Bank & Trust Co. v. Reikow*, 177 Wn. App. 787, 794, 313 P.3d 1208 (2013).

This Court has shown great reluctance to allow waiver of the

statutory provisions governing non-judicial foreclosure. *See Bain v. Metro. Mtg. Group, Inc.*, 175 Wn.2d 417, 430, 486 P.2d 1080 (2012) (rejecting contractual modification of the Deed of Trust Act's definition of "beneficiary"); *see also Schroeder v. Excelsior Mgmt. Group, LLC*, 177 Wn.2d 94, 106-07, 297 P.3d 677 (2013) (stating that "We will not allow waiver of [Chapter 61.24 RCW's] protections lightly, " quoting *Bain*, 175 Wn.2d at 108). The protections for guarantors enumerated in RCW 61.24.100 are not "rights and privileges" that may be waived, rather they are limitations on the lender's power to obtain a deficiency from the guarantor. *Schroeder*, 177 Wn.2d at 106-07 (rejecting waiver argument because the Act's prohibition of non-judicial foreclosures of agricultural land was not a "right of the debtor," but a limit on a trustee's power).

Courts have repeatedly held that a borrower cannot waive the protections of the Deed of Trust Act. This Court should accept review of this third issue and determine that the same rule applies to guarantors.[16]

---

[16] *See, e.g., Schroeder*, 177 Wn.2d at 106-07; *Albice v. Premier Mtg. Services of Washington, Inc.*, 157 Wn. App. 912, 927-28 & n.10, 239 P.3d 1148 (2010) (holding foreclosure sale void because it occurred outside statutory time frame regardless of fact that extensions were agreed upon). *See also Stretch v. Murphy*, 112 P.2d 1018, 1021 (Or. 1941) (holding that waivers of protections in the foreclosure statute could not be waived because "[t]he statute involved is not one creating a merely personal privilege which may be waived."); *accord Dennis v. Moses*, 18 Wash. 537, 577-79, 52 P. 333 (1898) (holding that a borrower cannot prospectively waive his right of redemption under the foreclosure statute because of public policy considerations); *Conran v. White & Bollard*, 24 Wn.2d 619, 629, 167 P.2d 133 (1946) (finding that agreements that chill or suppress one's right to bid at a foreclosure sale "have long been held invalid against public policy.")

VI. CONCLUSION

Review should be accepted in this case pursuant to RAP 13.4(b)(2) and (4) in order to resolve the conflict between Divisions I and II and to provide guidance to Washington's trial and appellate courts on issues of substantial public interest.

Respectfully submitted this 20th day of March, 2014.

LASHER HOLZAPFEL SPERRY & EBBERSON, PLLC

By Dean A Messmer
Dean A. Messmer, WSBA #5738
Attorneys for Defendants/Respondents
Lance and "Jane Doe" Harvey

601 Union St., Suite 2600
Seattle, WA 98101
Telephone: (206) 654-2440
Email: messmer@lasher.com

CERTIFICATE OF SERVICE

I certify that on March 20, 2014, I caused a copy of the foregoing document to be served via messenger to the following counsel of record:

Gregory R. Fox, WSBA #30559
Ryan P. McBride, WSBA #33280
Lane Powell PC
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101-2338

Joy Lawrence

APPENDIX A

Washington Federal v. Gentry

Div. I Case No. 70004-9-I (February 18, 2014)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WASHINGTON FEDERAL, a federally chartered savings association, Appellant, v. KENDALL GENTRY and NANCY GENTRY, individually and the marital community comprised thereof, Respondents.	No. 70004-9-I DIVISION ONE PUBLISHED FILED: February 18, 2014

Cox, J. — The Deeds of Trust Act generally prohibits an action for a deficiency judgment against a guarantor of a loan following a trustee's sale under a deed of trust securing that loan.[1] But exceptions to this general rule apply to a guarantor of certain commercial loans.[2]

In this action, Washington Federal seeks a deficiency judgment against Kendall Gentry and Nancy Gentry. They executed guaranties of payment for commercial loans to three borrowers that they control. Based on its reading of RCW 61.24.100, the trial court granted the Gentrys' motion for summary

---

[1] See RCW 61.24.100(1).

[2] Id.

judgment of dismissal of this action. Because the trial court erred both in its interpretation of this statute and its application of the statute to relevant loan documents, we reverse and remand for further proceedings.

Kendall Gentry owned and/or managed three entities: Blackburn Southeast LLC, Landed Gentry Development Inc., and Gentry Family Investments LLC.[3]

In 2005, Blackburn Southeast LLC obtained a commercial loan for $2,550,000 from Horizon Bank. This loan was evidenced by a promissory note that was secured by a May 1, 2006 deed of trust on property located on Little Mountain Road in Mount Vernon (the "Little Mountain Deed of Trust").

In April 2009, Landed Gentry Development Inc. obtained a commercial loan for $3,574,847.74 from Horizon Bank. This loan was evidenced by a promissory note that was also secured by the Little Mountain Deed of Trust and a May 1, 2006 deed of trust on property located on East Blackburn Road in Mount Vernon (the "Blackburn Road Deed of Trust").

In September 2009, Gentry Family Investments LLC obtained a commercial loan for $1,127,832.73 from Horizon Bank. This loan was evidenced by a promissory note that was also secured by the Little Mountain Deed of Trust.

---

[3] Brief of Appellant at 4; Clerk's Papers at 525 (listing Kendall Gentry as chairman of Landed Gentry Development, Inc.); Clerk's Papers at 530 (listing Kendall Gentry as manager of Gentry Family Investments LLC); Clerk's Papers at 534 (listing Kendall Gentry as manager of Gentry Family Investments LLC, member of Blackburn Southeast LLC).

In sum, the Little Mountain Deed of Trust secured all three commercial loans. The Blackburn Road Deed of Trust secured only the Landed Gentry Development Inc. commercial loan.

Kendall and Nancy Gentry each executed commercial guaranties of payment for all three loans.

In January 2010, the three notes matured. The three borrowers failed to pay these notes at maturity. Likewise, the Gentrys did not honor their guaranties.

Horizon Bank failed. In April 2010, the Federal Deposit Insurance Corporation, as receiver for Horizon, assigned that bank's interests in the three notes, the deeds of trust, and the guaranties to Washington Federal.

In April 2011, the trustees, under the deeds of trust then held by Washington Federal, conducted sales based on the defaults by the three borrowers. The bank was the successful bidder for both properties at these sales. The bank did not credit bid the full amount of the debt at these sales. Thus, a substantial deficiency allegedly remains.

In March 2012, the bank commenced this action against the Gentrys to enforce their guaranties and to obtain a deficiency judgment against them due to the shortfall arising from the trustees' sales.

The Gentrys moved for summary judgment. They argued that the Deeds of Trust Act prohibited the bank from seeking a deficiency judgment against them. The bank opposed the motion and also moved for summary judgment, arguing that it was entitled to a deficiency judgment against the Gentrys.

The trial court granted the Gentrys' motion for summary judgment, denied the bank's motion, and dismissed this action with prejudice.

The bank appeals.

THE DEEDS OF TRUST ACT

The threshold issue is whether and how a beneficiary under a deed of trust who elects not to foreclose the deed of trust as a mortgage may obtain a deficiency judgment against guarantors under the Deeds of Trust Act.

This court reviews de novo summary judgment orders and engages in the same inquiry as the trial court.[4] Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law.[5]

Statutory construction is a question of law.[6] This court's objective is to determine the Legislature's intent.[7] "Where the language of a statute is clear, legislative intent is derived from the language of the statute alone."[8] "The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of

---

[4] Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship, 158 Wn. App. 203, 215-16, 242 P.3d 1 (2010).

[5] CR 56(c).

[6] City of Spokane v. Rothwell, 166 Wn.2d 872, 876, 215 P.3d 162 (2009).

[7] Id.

[8] Id.

the language at issue, as well as from the context of the statute in which that provision is found, the related provisions, and the statutory scheme as a whole."[9]

RCW 61.24.100 addresses when actions for deficiency judgments may be brought when a deed of trust is not foreclosed as a mortgage.[10] A "deficiency judgment" exists where a money judgment for a debt exceeds the value of the security for that debt at the foreclosure sale.[11]

History

In 1965, the Legislature enacted the Deeds of Trust Act, which permitted nonjudicial foreclosure of deeds of trust when certain requirements were met.[12] Citing an early law review article by a well-recognized authority on the act, Division Three of this court observed that the Legislature designed this act "to avoid time-consuming judicial foreclosure proceedings and to save substantial time and money to both the buyer and the lender."[13] The act was designed to supplement the then existing foreclosure proceedings to better meet the needs of modern real estate financing.[14]

---

[9] Id. at 876-77 (quoting State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)).

[10] RCW 61.24.100(8).

[11] Boeing Emps.' Credit Union v. Burns, 167 Wn. App. 265, 282, 272 P.3d 908, review denied, 175 Wn.2d 1008 (2012).

[12] Laws of 1965, ch. 74.

[13] Peoples Nat. Bank of Wash. v. Ostrander, 6 Wn. App. 28, 31, 491 P.2d 1058 (1971) (citing John A. Gose, The Trust Deed Act in Washington, 41 WASH. L. REV. 94 (1966)).

[14] Id. (citing Gose, supra, at 96).

Our supreme court has explained that "[r]eading the entirety of [the act] in the context of the mortgage laws and the history of deed of trust legislation, it is apparent that there was contemplated a quid pro quo between lenders and borrowers."[15]

Specifically, borrowers relinquished the statutory right to redeem the property up to one year after a foreclosure sale.[16] The relinquishment of this right allowed lenders to obtain title to the property sold at a trustee's sale more quickly than in a judicial foreclosure.[17] Lenders were then able to sell the property and apply the sales proceeds to the debt.[18]

In exchange for this advantage, lenders relinquished the right to seek deficiency judgments following trustees' sales.[19] Thus, the real property security was the sole means for the lender to satisfy the debt.

Notwithstanding these provisions, the act expressly provided that lenders retained the right to foreclose deeds of trust as mortgages.[20] If lenders elected

---

[15] Donovick v. Seattle-First Nat'l Bank, 111 Wn.2d 413, 416, 757 P.2d 1378 (1988).

[16] Id. (citing former RCW 61.24.050 (1965)); see also former RCW 6.24.140 (1965).

[17] See Gose, supra, at 95-96; former RCW 6.24.220 (1965).

[18] See Gose, supra, at 95-96; former RCW 6.24.220 (1965).

[19] Donovick, 111 Wn.2d at 416 (citing former RCW 61.24.100 (1965)); see also Gose, supra, at 96.

[20] Gose, supra, at 96.

that option, the provisions of the act did not apply.[21]

The provision of the act governing deficiency judgments has been codified at RCW 61.24.100 from the act's inception.[22] When first enacted in 1965, this provision banned any deficiency judgment on the obligation secured by the foreclosed deed of trust:

> Foreclosure, as in this chapter provided, shall satisfy the obligation secured by the deed of trust foreclosed, regardless of the sale price or fair value, and ***no deficiency decree or other judgment shall thereafter be obtained on such obligation.***[23]

In 1990, the Legislature amended this provision by creating an exception to the ban against any deficiency judgment on the obligation secured by the foreclosed deed of trust. It did so by adding the following emphasized language to the former version of the statute:

> Foreclosure, as in this chapter provided, shall satisfy the obligation secured by the deed of trust foreclosed, regardless of the sale price or fair value, and no deficiency decree or other judgment shall thereafter be obtained on such obligation, ***except that if such obligation was not incurred primarily for personal, family, or household purposes, such foreclosure shall not preclude any judicial or nonjudicial foreclosure of any other deeds of trust, mortgages, security agreements, or other security interests or liens covering any real or personal property granted to secure such obligation.***[24]

In 1998, the Legislature again amended this provision. This time, however, the revisions were more extensive. The Legislature rewrote the entire

---

[21] Id.

[22] Former RCW 61.24.100 (1965).

[23] Id. (emphasis added).

[24] Laws of 1990, ch. 111, § 2 (emphasis added).

statute, which was then codified into twelve subsections.[25] Presumably, these amendments were made to better meet the evolving needs of commercial borrowers and lenders in real estate financing.[26] As of this writing, there have been no further amendments to this portion of the act.[27]

In the current version of the act, the general bar against deficiency judgments remains.[28] But the Legislature created an exception for certain loans that it described as "commercial."[29] This term is a substitute for the former "obligation . . . not incurred primarily for personal, family, or household purposes."[30] That provision no longer appears in the act. Such "commercial loans" are limited to those executed after June 11, 1998, the effective date of the 1998 amendments to this section.[31]

This legislative history illustrates the evolution of this part of the act over time. Deficiency judgments for deeds of trust that are not foreclosed as mortgages have generally and consistently been prohibited since enactment of the act in 1965. The Legislature enacted limited exceptions to this prohibition in

---

[25] See Laws of 1998, ch. 295, § 12; RCW 61.24.100.

[26] See Gose, supra, at 94, 96.

[27] RCW 61.24.100.

[28] RCW 61.24.100(1).

[29] Id.

[30] Compare Laws of 1998, ch. 295, § 12, with Laws of 1990, ch. 111, § 2.

[31] Laws of 1998, ch. 295.

1990 and 1998. Among the limited exceptions enacted in 1998 are those applicable to guarantors of certain commercial loans.

Current Statute

RCW 61.24.100(1) states the current general rule regarding deficiency judgments following trustees' sales under deeds of trust. For these nonjudicial foreclosures, the rule states:

> ***Except to the extent permitted in this section for deeds of trust securing commercial loans***, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or ***guarantor*** after a trustee's sale under that deed of trust.[32]

Further, RCW 61.24.100(3) states certain circumstances where deficiency judgments against borrowers, grantors, and guarantors are allowed:

> This chapter does not preclude any one or more of the following after a trustee's sale under a deed of trust securing a commercial loan executed after June 11, 1998:
>
> (a) [provision addressing "waste to the property," "wrongful retention of any rents, insurance proceeds, or condemnation awards," etc.]
>
> (b) [provision regarding foreclosures of other deeds of trust, etc.]
>
> (c) ***Subject to this section***, an action for a deficiency judgment against a guarantor if the guarantor is timely given the notices under RCW 61.24.042.[33]

Subsection (3)(c) addresses deficiency judgments against guarantors of certain commercial loans after trustees' sales under deeds of trust securing such loans. Significantly, the first clause of RCW 61.24.100(3)(c) states this provision

---

[32] (Emphasis added.)

[33] (Emphasis added.)

is "[s]ubject to this section." The word "subject" means that this provision is dependent or conditioned on "this section." The 1998 session laws make clear that "this section" means RCW 61.24.100 in its entirety.[34]

Additionally, the text that follows this first clause makes clear that a further requirement of this provision is that "notices under RCW 61.24.042" must be given to the guarantor of the loan.[35]

With this context in mind, we turn to the specific arguments before us. The bank argues that the trial court misinterpreted RCW 61.24.100(3)(c) when it "limit[ed] the scope of a deficiency judgment against a guarantor to waste and wrongful retention of rents."[36] We agree.

In the trial court's letter ruling, it stated in relevant part:

> RCW 61.24.100 clearly states deficiency judgments shall not be obtained against a guarantor when that guaranty is secured by a deed of trust which is nonjudicially foreclosed except for a few narrowly crafted exceptions.
>
> [The bank] argues that RCW 61.24.100(3)(c) creates an exception to seek unlimited deficiency judgments against any guarantor who is timely given notice under RCW 61.24.042 ([the Gentrys] received this notice). That interpretation requires the Court to ignore or give no meaning to the first four words of (3)(c) ***"Subject to this section."***
>
> "This section" RCW 61.24.100 allows deficiency judgments: prior to a trustee's sale, in judicial foreclosures for obligations not secured by the same deed of trust, ***limited to a decrease in the fair value of property by waste or the wrongful retention of various funds.***

---

[34] Laws of 1998, ch. 295, § 12.

[35] RCW 61.24.100(3)(c).

[36] Brief of Appellant at 15.

> I interpret section (3)(c) as meaning that a deficiency judgment, against a guarantor whose guaranty was secured by the nonjudicially foreclosed deed of trust, ***can only be obtained for the decrease in fair value or wrongful retention, if the guarantor is given timely notice.***
>
> The answer to the second issue is "no." ***[The bank] is only able to seek a deficiency judgment against [the Gentrys] for waste or wrongful retention.***[37]

The trial court properly concluded that RCW 61.24.100(1) generally bars deficiency judgments where deeds of trust are not foreclosed as mortgages, except for narrowly crafted exceptions. The court also properly rejected the bank's argument that RCW 61.24.100(3)(c) creates an unlimited exception that permits a lender to seek a deficiency judgment against a guarantor of certain commercial loans who is given timely statutory notices. As the trial court correctly stated, that would require rewriting the subsection to ignore its first clause: "Subject to this section."

But the trial court misread the scope of RCW 61.24.100(3)(c). Significantly, the words of the statute say "section," not "subsection." As we stated earlier in this opinion, the 1998 session laws make clear that "section" refers to RCW 61.24.100 in its entirety, not just subsections (3)(a) and (b). For this reason, the trial court misread the statute to limit an action against a guarantor for a deficiency judgment to "the decrease in fair value or wrongful retention [of rents, insurance proceeds, or condemnation awards], if the

---

[37] Clerk's Papers at 775 (emphasis added).

guarantor is given timely notice."[38] These limitations are based on subsections (3)(a) and (b) of the act. Thus, we conclude that the clause, "subject to this section," of RCW 61.24.100(3)(c) requires consideration of RCW 61.24.100 in its entirety, not just the limitations of subsections (3)(a) and (b).

Given this conclusion, we must then consider the Gentrys' argument that RCW 61.24.100(10) bars this action. Subsection (10) states:

> A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was not secured by the deed of trust.[39]

Specifically, the Gentrys contend that the "clear language" of this subsection states that "obligations under a guaranty secured by a deed of trust are ***extinguished*** by the nonjudicial foreclosure of that deed of trust."[40] They assert that "subsection (10) ***prohibits*** a deficiency against a guarantor where a deed of trust secures it and has been foreclosed nonjudicially."[41] We disagree.

We first note that the Gentrys use the word "extinguished." Notably, RCW 61.24.100(10) neither includes this word nor any synonym for it. We will not read this word into the statute.

Moreover, in our view, RCW 61.24.100(10) is not a prohibition. All it says is, "[a] trustee's sale under a deed of trust securing a commercial loan does not

---

[38] Id.

[39] RCW 61.24.100(10).

[40] Brief of Respondents Kendall and Nancy Gentry at 15 (emphasis added).

[41] Id. at 19.

preclude [an action for a deficiency judgment on a guaranty] if that obligation . . . was not secured by the deed of trust" that was foreclosed.

For example, we can envision a situation where the Gentrys executed another guaranty that had no relation to the commercial loans secured by any of the deeds of trust foreclosed by nonjudicial means here. In that case, the trustees' sales under these deeds of trust would have no effect on that other guaranty.

The problem with the Gentrys' interpretation is that it requires striking from the statute the word "not," as indicated by the following revision:

> A trustee's sale under a deed of trust securing a commercial loan does ~~not~~ preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was ~~not~~ secured by the deed of trust.[42]

But the plain language of RCW 61.24.100(10) is permissive. That is, it states a permissive rule applicable to situations where the obligation of a borrower or guarantor is ***not*** secured by the deed of trust that was foreclosed by a trustee's sale. In that situation, the trustee's sale ***does not*** preclude the lender from bringing an action to collect on or enforce a guaranty. Only by striking the word "not" from the two places indicated above can the otherwise permissive statement of the statute be read as a prohibition.[43]

---

[42] (Emphasis and alterations added).

[43] See, e.g., Glasebrook v. Mut. of Omaha Ins. Co., 100 Wn. App. 538, 545, 997 P.2d 981 (2000) ("Generally, we do not infer a prohibition absent specific language to that effect, unless the statute as a whole directs that conclusion.").

The Gentrys offer no explanation why we should rewrite the words of the statute under the guise of interpreting it to determine legislative intent. We decline either to omit language that is in the statute or add language that is not there.

Moreover, the Gentry's interpretation of RCW 61.24.100(10) is the inverse of what the plain language says. We also decline to add the inverse to the statute when the Legislature did not expressly do so.

In re Detention of Lewis contains an example of when the Legislature expressly codified the inverse.[44] There, the court stated:

> Pertinent here, the State need not plead a recent overt act in its petition where "it appears that ... [a] person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement." RCW 71.09.030(1). Conversely, the statute requires the State to allege a recent overt act where the offender is "a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement." RCW 71.09.030(5). Similarly, at trial, the State must prove beyond a reasonable doubt that the offender committed a recent overt act "[i]f, on the date that the petition is filed, the person was living in the community after release from custody." Former RCW 71.09.060(1) (2001).[45]

As the supreme court recognized in the above passage, the Legislature first described a situation in which a recent overt act did not need to be pleaded.[46] But rather than expecting the reader to imply the truth of the inverse, the Legislature went on to make an explicit rule for the inverse. The statute

---

[44] 163 Wn.2d 188, 177 P.3d 708 (2008).

[45] Id. at 194 (alterations in original).

[46] Id.

explicitly defined both the situation in which a recent overt act does not need to be pleaded, and the situation in which a recent overt act does need to be pleaded.[47]

Here, in contrast, the plain language of RCW 61.24.100 does not contain an expression of the inverse. The Gentrys do not provide any argument why we should imply the inverse. Moreover, we do not feel it appropriate to imply the inverse under these circumstances.

Additionally, the Gentrys' interpretation of subsection (10) is grounded in a logical fallacy. "The proposition that 'A implies B' is not the equivalent of 'non-A implies non-B,' and neither proposition follows logically from the other."[48] State v. Holland illustrates the problem of implying the inverse of a statute.[49]

In Holland, the law at the time made it illegal for a pharmacist to sell grain alcohol.[50] A pharmacist could sell it for mechanical or chemical purposes, but had to get the purchaser to sign his name in a record book and to keep a "true and exact" record of such transactions.[51] Holland, a pharmacist, sold some grain alcohol to an informant.[52] The informant signed the record book, but he testified

---

[47] Id.

[48] Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690, 703 n.20 (2d Cir. 1980) (citing J. COOLEY, A PRIMER OF FORMAL LOGIC 7 (1942)).

[49] 99 Wash. 645, 649-51, 170 P. 332 (1918).

[50] Id. at 649.

[51] Id. at 649-50.

[52] Id. at 647.

that he told Holland he might be using it for purposes other than mechanical or chemical.[53] On the strength of that testimony, Holland was convicted.[54]

Holland argued on appeal that his good faith was established as a matter of law by the fact that the informant signed the record book.[55] The court was not persuaded.[56] "Appellant's argument overlooks the fact that the permission accorded to druggists . . . is to sell alcohol for mechanical or chemical purposes ***only.*** It is not a permission to sell to every person who signs a formal statement to that effect."[57]

The court then conducted a logical analysis of the statute and demonstrated that Holland's argument was based on a fallacy.[58] The first proposition, which is true, is that when the buyer does not sign the record book, the statute makes the seller guilty as a matter of law.[59] But Holland's second proposition is not true: when the buyer does sign the record book, he is not guilty as a matter of law.[60]

---

[53] Id.

[54] Id. at 648.

[55] Id. at 649-50.

[56] Id. at 650.

[57] Id.

[58] See Id. at 651.

[59] Id.

[60] Id. at 649-51.

> Indeed it seems to us that the issue of good faith not only does arise, but can only arise when a formally sufficient record of the sale has been made. Without such a record there is no issuable fact; the sale is conclusively illegal without regard to the seller's good or bad faith. ***But the converse is not true.*** When the formal record has been made, the question of good faith is an issue. That question is then one of fact for the jury upon the evidence.[61]

Putting aside terminology differences, like Holland, the Gentrys essentially argue that the inverse of what is stated in the statute is necessarily true. That is a logical fallacy. We cannot infer that the inverse of what the statute states is true. Based on these cases and our analysis of the statute before us, we reject the interpretation that the Gentrys assert.

In further support of their "clear language" argument, the Gentrys rely on First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development LLC, a recent Division Two case.[62] We disagree with the reasoning and conclusion in that case.

There, a bank sued the guarantors of three commercial loans to Cornerstone Homes & Development, LLC for a deficiency judgment following nonjudicial foreclosures of the deeds of trust securing the loans.[63] The superior court entered judgment on the pleadings, ordering the guarantors to pay the deficiency.[64] Division Two reversed.[65]

---

[61] Id. at 651 (emphasis added).

[62] __ Wn. App. __, 314 P.3d 420 (2013).

[63] Id. at 421-22.

[64] Id. at 422.

[65] Id. at 421.

One of the issues before the court was whether RCW 61.24.100(10) created an exception to the general prohibition in RCW 61.24.100(1) against deficiency judgments following a trustee's sale under a deed of trust securing certain commercial loans.[66] The court held that subsection (10) created such an exception.[67] In doing so, the court quoted, in part, the subsection, emphasizing in its opinion the last words of the following quotation:

> A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to . . . enforce any obligation of a . . . guarantor if that obligation . . . ***was not secured by the deed of trust.***[68]

The court then went on to apply the statutory construction principle *expressio unius est exclusio alterius*.[69] Doing so, the court concluded that the language of subsection (10):

> ***[I]mplies*** that (1) this express exception to the anti-deficiency judgment statute is the ***only*** exception under these circumstances; and (2) therefore, further ***implies*** that where a guaranty ***was*** secured by the foreclosed deed of trust (which also secured a commercial loan), the lending bank ***cannot*** sue the guarantor for any deficiency remaining after the trustee's sale of the secured property.[70]

First, Division Two utilized a principle of construction that we believe does not control this case. The court concluded that subsection (10) is the "***only***

---

[66] Id. at 424.

[67] Id.

[68] Id.

[69] Id. at 424-25.

[70] Id. at 425 (some emphasis added).

exception under these circumstances."[71] But subsection (10) is not the ***only*** exception in RCW 61.24.100. This interpretation ignores other subsections within the statute, particularly subsection (3)(c), which is at issue in this case.

Second, we note that Division Two did not expressly address in its analysis what we pointed out earlier in this opinion. The argument that subsection (10) prohibits a deficiency judgment against guarantors requires the following reading of the statute:

> A trustee's sale under a deed of trust securing a commercial loan does ~~not~~ preclude an action to collect or enforce any obligation of a borrower or guarantor if that obligation, or the substantial equivalent of that obligation, was ~~not~~ secured by the deed of trust.[72]

We will not read out the word "not" from this provision. But we believe Division Two's reading implicitly does so. Moreover, as we explained earlier in this opinion, that court's reading of subsection (10) implies the inverse of the provision that is not true. We decline to do the same.

For these reasons, we are not persuaded that First-Citizens properly interprets the statute. Accordingly, we reject its reasoning and conclusion that RCW 61.24.100(10) bars an action where a guaranty is secured by the deed of trust foreclosed by a prior trustee's sale.

Finally, during oral argument and by additional authority, the Gentrys argue that the word "if" in this statute should be construed to mean "only if." Like Division Two, they cite the construction principle, *expressio unius est exclusio*

---

[71] Id.

[72] RCW 61.24.100(10) (emphasis and alterations added).

alterius, which means the "'[e]xpression of one thing in a statute implies exclusion of others, and this exclusion is presumed to be deliberate.'"[73]

As we previously explained in this opinion, the essence of the Gentrys' argument requires that we read RCW 61.24.100(10) to say more than it actually says. This argument is that the bank may bring this action to enforce the Gentrys' guaranties ***only if*** the guaranties were not secured by the nonjudicially foreclosed deeds of the trust securing the commercial loans. Notably, the statute says "if," not "only if." We decline to rewrite the statute by adding the word "only" into the analysis in order to conclude that the "if" clause is an indispensable condition precedent to bringing this action.

Also, it appears that the Gentrys argue that "only" should be written into the statute because subsection (10) is the "'only exception under these circumstances.'"[74] They again cite First-Citizens Bank to support this assertion.[75] But, as we just discussed, subsection (10) is not the only exception in RCW 61.24.100.

To summarize, we conclude that RCW 61.24.100(10) does not preclude this action for a deficiency judgment against the guarantors of these commercial loans. The trustees' sales under the deed of trust securing these loans do not

---

[73] First-Citizens Bank, 314 P.3d at 425 n.15 (quoting State v. Kelley, 168 Wn.2d 72, 83, 226 P.3d 773 (2010)).

[74] Respondents' Citation of Additional Authority at 1 (quoting First-Citizens Bank, 314 P.3d at 425).

[75] Id. (citing First-Citizens Bank, 314 P.3d at 425).

bar this action. Moreover, this action is not barred by the limitations stated in RCW 61.24.100(3)(a) and (b). The trial court erred by deciding otherwise.

THE LOAN DOCUMENTS

Based on the incorrect premise that RCW 61.24.100(10) should be interpreted as they argue, the Gentrys further argue that their guaranties are secured by the various deeds of trust securing the loan. Accordingly, they claim that the trustees' sales under these deeds of trust bar this action for a deficiency judgment. Even if we agreed with their premise, we would still disagree with their conclusion. We hold that these deeds of trust do not secure the Gentrys' guaranties.

This court reviews de novo a trial court's interpretation of the language of a contract.[76] "When interpreting a contract our primary goal is to discern the intent of the parties, and such intent must be discovered from viewing the contract as a whole."[77]

Washington follows the "objective manifestation theory of contracts" to determine the parties' intent.[78] Courts focus on the "objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties."[79]

---

[76] Knipschield v. C-J Recreation, Inc., 74 Wn. App. 212, 215, 872 P.2d 1102 (1994).

[77] Weyerhaeuser Co v. Commercial Union Ins. Co., 142 Wn.2d 654, 669, 15 P.3d 115 (2000).

[78] Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

[79] Id.

"[W]hen interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used."[80] This court does not "interpret what was intended to be written but what was written."[81]

Here, the deeds of trust at issue use identical language for the relevant provisions.[82] The first page of each deed of trust identifies the grantors under the instruments. For the Little Mountain Deed of Trust, the "Grantor" is Little Mountain East LLC.[83] For the Blackburn Road Deed of Trust, the "Grantors" are Blackburn Southeast LLC, Blackburn North LLC, and Little Mountain East LLC.[84] Horizon Bank, the predecessor in interest to Washington Federal, is identified as the "Grantee" or Beneficiary/Lender.[85] The Gentrys are not parties to these deeds of trust.

At page two of each of the deeds of trust, the Grantors state what is secured:

> THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) ***PAYMENT*** OF THE INDEBTEDNESS AND (B) ***PERFORMANCE*** OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS DEED OF TRUST. THIS DEED OF

---

[80] Id. at 503-04.

[81] Id. at 504.

[82] Compare Clerk's Papers at 9-17, with Clerk's Papers at 23-31.

[83] Id. at 23.

[84] Id. at 9.

[85] Id. at 9, 23.

> TRUST IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS:[86]

Three paragraphs later, the Grantors state whose payment and performance obligations are secured by the deeds of trust:

> ***PAYMENT AND PERFORMANCE.*** Except as otherwise provided in this Deed of trust, ***Borrower and Grantor*** shall pay to Lender all indebtedness secured by this Deed of Trust as it becomes due, and ***Borrower and Grantor*** shall strictly perform all their respective obligations under the Note, this Deed of Trust, and the Related Documents.[87]

Reading these two paragraphs together, the deeds of trust must be read as securing the payment and performance obligations of the ***Borrowers and Grantors***.[88] Here, ***Borrower*** and ***Grantor*** is the same entity for each loan secured by each deed of trust. There simply is no way to read these provisions so that any deed of trust secures the payment and performance obligations of anyone other than the ***Borrower and Grantor***. The guarantors of the loans are neither. Thus, none of these deeds of trust secure the guaranties of the Gentrys.

Later in each deed of trust, another provision discusses full performance of the secured obligations:

> ***FULL PERFORMANCE.*** If ***Borrower and Grantor*** pay all the Indebtedness when due, and ***Grantor*** otherwise performs all the obligations imposed upon ***Grantor*** under this Deed of Trust, Lender shall execute and deliver to Trustee a request for full reconveyance and shall execute and deliver to Grantor suitable statements of

---

[86] Id. at 11, 25 (emphasis added).

[87] Id. (second and third emphasis added).

[88] See Brief of Appellant at 25-26; Brief of Amici Curiae Washington Bankers Association and Union Bank, N.A. at 12-15.

> termination of any financing statement on the evidencing Lender's security interest in the Rents and the Personal Property.[89]

This language reinforces our conclusion. The exclusive focus is on the payment and performance obligations of the ***Borrower and Grantor*** of the deed of trust. There is simply no mention of such obligations of the guarantors.

In sum, we conclude when we read each of these deeds of trust as a whole, none secures the Gentrys' guaranties. Accordingly, the Gentrys' argument that RCW 61.24.100(10) bars this action against them is wholly unpersuasive for a second reason.

In support of their argument that the guaranties are secured by various deeds of trust, the Gentrys again rely on First-Citizens Bank, the recent Division Two case we previously discussed in this opinion.[90] They represent that the form of the deed of trust in that case is the same as those here. But the complete deeds of trust at issue in that case are not in this record on appeal. Consequently, we will not speculate on whether the representation is correct.

Nevertheless, we take this opportunity to address arguments made here that were also clearly before that court.

In First-Citizens Bank, Division Two focused on different provisions in the deeds of trust before that court than those we just discussed. Specifically, the court quoted the following language:

> GIVEN TO SECURE (A) PAYMENT OF THE ***INDEBTEDNESS*** AND (B) PERFORMANCE OF ***ANY AND ALL OBLIGATIONS***

---

[89] Clerk's Papers at 14, 28 (second and third emphasis added).

[90] 314 P.3d at 420.

> ***UNDER*** THE NOTE, ***THE RELATED DOCUMENTS***, AND [THE] DEED[S] OF TRUST.[91]

Division Two concluded that this language included any guaranties of the loans secured by the deeds of trust in that case.[92] In so concluding, Division Two looked to the definition of the term "Related Documents" in the deeds of trust, which included any "'***guaranties*** . . . whether ***now*** or hereafter ***existing***, executed in connection with indebtedness.'"[93] As Division Two noted, this definition plainly includes "guaranties."[94]

The Gentrys make a similar argument here. They point to substantially similar language in these deeds of trust that contain the term "Related Documents" together with a similar definition.[95]

But reading this definition to include ***all*** guaranties, regardless of who the guarantor is, ignores the specifications in the "Payment and Performance" provisions for the deeds of trust that are before us. As we discussed previously in this opinion, this latter provision makes clear whose obligations for payment

---

[91] See First-Citizens Bank, 314 P.3d at 423 (alteration in original).

[92] Id.

[93] Id.

[94] First-Citizens Bank, 314 P.3d at 423.

[95] See Clerk's Papers at 17, 31 ("The words '***Related Documents***' ***mean all*** promissory notes, credit agreements, loan agreements, ***guaranties***, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, ***whether now or hereafter existing, executed in connection with the indebtedness***; provided, that the environmental indemnity agreements are not 'Related Documents' and are not secured by this Deed of Trust.") (emphasis added).

and performance are secured by the deeds of trust. And there can be no doubt that such obligations are limited to the ***Borrower and Grantor*** of each instrument, not guarantors of the loan. Accordingly, the scope of the definition of "Related Document" does not include the guaranties of the Gentrys.

To the extent that First-Citizens holds otherwise, we disagree with its conclusion. That case does not control here.

We note that the trial court in this case reached a conclusion similar to that in First-Citizens. It concluded that "the guaranties executed by the Defendants were related documents."[96] It reached this conclusion by construing the deeds of trust instrument against the bank, the drafter:

> Without repeating your respective positions, I find that the general principle of ambiguities being [construed] against the drafting party is the decisive factor. . . . The inconsistencies favor the Defendants and result in the conclusion that the guaranties were related documents and therefore secured by the foreclosed deeds of trust.[97]

Construing the deeds of trust instruments against the drafter was also a rationale that Division Two pointed to in a footnote.[98]

The problem with this approach is that this principle applies only where an instrument is ambiguous.[99] As we discussed previously in this opinion, the deeds of trust in this case are not ambiguous when read as a whole. The Grantor under

---

[96] Clerk's Papers at 774-75.

[97] Id.

[98] First-Citizens Bank, 314 P.3d at 423 n.8.

[99] See, e.g., Rouse v. Glascam Builders, Inc., 101 Wn.2d 127, 135, 677 P.2d 125 (1984).

each instrument expressly stated that the deed of trust secured the obligations of the ***Borrower and Grantor***. Each of these was the same entity for each loan. And none of these entities included the Gentrys, the guarantors of the loan obligations. Thus, this principle of interpretation does not apply in this case.

Because of our resolution of the two issues in this opinion, we need not reach the third question: whether the waiver of anti-deficiency defenses language in the guaranties of payment is enforceable against the Gentrys. In order to make clear that the trial court's decision on this question is not binding on these parties, we vacate that portion of that court's decision.

There is an outstanding issue that is not presently before us. The Gentrys are entitled to a fair value hearing under RCW 61.24.100(5). That hearing has not yet occurred because the trial court decided this matter on summary judgment. Thus, remand for such a hearing is required.

ATTORNEY FEES

The Gentrys seek an award of attorney fees based on the contract provision in their guaranties. The bank reserves the right to seek fees under the same provision following remand and further proceedings. We deny an award of fees at this time to any party because doing so is premature.

Each of the guaranties in this case provides for payment of reasonable attorney fees to the bank in connection with enforcement of the guaranties.[100] RCW 4.84.330 makes this unilateral contractual provision bilateral, and further

[100] See Clerk's Papers at 119, 122, 125, 128, 131, 134.

provides that the "prevailing party" is entitled to such an award. A prevailing party is one in whose favor a final judgment is rendered.[101]

Moreover, a trial court may include appellate attorney fees after remand.[102]

Because a prevailing party has not yet been determined and will not be determined until after a fair value hearing under RCW 61.24.100(5) on remand, we decline to award fees now. That determination may be made by the trial court at such time as it makes an award of reasonable attorney fees.

We reverse and remand for further proceedings. We also vacate that portion of the trial court's decision concerning the enforceability of waiver of anti-deficiency defenses. We also deny an award of attorney fees as premature.

Cox, J.

WE CONCUR:

Ley, J.

Becker, J.

[101] Riss v. Angel, 131 Wn.2d 612, 633, 934 P.2d 669 (1997).

[102] See Stieneke v. Russi, 145 Wn. App. 544, 572, 190 P.3d 60 (2008) ("Because we remand this case, neither party is entitled to attorney fees. If the trial court finds that the Stienekes met the required standard of proof, it should award attorney fees for this appeal as well.").

APPENDIX B

Washington Federal v. Harvey

Div. I Case No. 69691-9-I (February 18, 2014)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WASHINGTON FEDERAL, a federally chartered savings association, Appellant, v. LANCE HARVEY, individually and the marital community comprised of LANCE HARVEY and JANE DOE HARVEY, husband and wife, Respondents.	No. 69791-9-I DIVISION ONE UNPUBLISHED FILED: February 18, 2014

Cox, J. — The Deeds of Trust Act generally prohibits an action for a deficiency judgment against a guarantor of a loan following a trustee's sale under a deed of trust securing that loan.[1] In Washington Federal v. Gentry, we held that RCW 61.24.100(10) does not bar an action for a deficiency judgment after a trustee's sale against a guarantor for a certain type of commercial loan if the deed of trust secures the guaranty.[2]

---

[1] RCW 61.24.100(1).

[2] Washington Federal v. Gentry, No. 70004-9, slip op. at 12-13 (Wash. Ct. App. Feb. 18, 2014).

Washington Federal commenced this action for a deficiency judgment against Lance Harvey and his wife. Lance Harvey executed a guaranty of payment for a commercial loan to Kaydee Gardens 9 LLC. Based on its reading of RCW 61.24.100, the trial court granted the Harveys' motion for summary judgment, dismissing this action. Because the trial court erred both in its interpretation of this statute and its application of the statute to relevant loan documents, we reverse and remand for further proceedings.

In 2007, Kaydee Gardens 9 LLC obtained a loan from Horizon Bank. This loan was evidenced by a promissory note that was secured by a July 11, 2007 deed of trust. Harvey executed a commercial guaranty of payment of the loan.

In 2008, Harvey became the sole member of Kaydee Gardens. Consequently, the parties modified the documentation for the loan that then had an outstanding balance of $2,559,482.25. The loan was evidenced by a new promissory note but continued to be secured by the July 11, 2007 deed of trust.

Horizon Bank failed. In June 2011, the Federal Deposit Insurance Corporation, as receiver, assigned that bank's interest in the note, the deed of trust, and the guaranty to Washington Federal.

Based on the borrower's failure to make the periodic monthly payments due on the promissory note, the bank elected to commence a nonjudicial foreclosure proceeding. Moreover, Harvey failed to honor the guaranty.

In November 2011, the trustee under the deed of trust then held by Washington Federal conducted a sale based on the borrower's default. The

bank was the successful bidder at the sale. But it did not credit bid the full amount of the debt. Thus, a substantial deficiency allegedly remains.

In January 2012, the bank commenced this action against the Harveys to enforce the guaranty and to obtain a deficiency judgment based on the shortfall that remained after the trustee's sale.

The bank moved for summary judgment. The Harveys made a cross-motion for summary judgment. They argued that the Deeds of Trust Act prohibited the bank from seeking a deficiency judgment against them.

The trial court granted the Harveys' motion, denied the bank's motion, and dismissed this action with prejudice. The trial court also denied the bank's motion for reconsideration.

This appeal followed.

THE DEEDS OF TRUST ACT

The bank argues that RCW 61.24.100(10) does not bar this action for a deficiency judgment against these guarantors. We agree.

This court reviews de novo summary judgment orders and engages in the same inquiry as the trial court.[3] Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law.[4]

---

[3] Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship, 158 Wn. App. 203, 215-16, 242 P.3d 1 (2010).

[4] CR 56(c).

Statutory construction is a question of law.[5] This court's objective is to determine the Legislature's intent.[6] "Where the language of a statute is clear, legislative intent is derived from the language of the statute alone."[7] "The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, the related provisions, and the statutory scheme as a whole."[8]

In Washington Federal v. Gentry, we addressed the same issue as here: whether RCW 61.24.100(10) bars this action against the guarantors of this commercial loan.[9] There, we held this provision does not bar such an action.[10]

Here, the same principles that we applied in that case apply in this case. RCW 61.24.100(10) does not bar this action, even if this guaranty is secured by the deed of trust that was the subject of the prior trustee's sale for this commercial loan.

---

[5] City of Spokane v. Rothwell, 166 Wn.2d 872, 876, 215 P.3d 162 (2009).

[6] Id.

[7] Id.

[8] Id. at 876-77 (quoting State v. Jacobs, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005)).

[9] Gentry, No. 70004-9, slip op. at 12-13.

[10] Id.

The Harveys cite a 1998 WSBA newsletter to support their reading of RCW 61.24.100(10).[11] They argue that the newsletter supports their assertion that "RCW 61.24.100 reflects the legislative intent to preclude deficiency judgments against ***secured*** commercial loan guaranty obligations through subsection (10)."[12]

Assuming without deciding that the newsletter supports the Harveys' assertion, we disagree with the conclusion. We do so for the reasons fully explained in Gentry.

The Harveys also cite Beal Bank, SSB v. Sarich and Glenham v. Palzer.[13] They argue these cases show that "Washington courts have created a clear line of demarcation prohibiting deficiency actions on obligations secured by a non-judicially foreclosed deed of trust."[14] We again disagree.

While deficiency judgments against guarantors of loans are generally prohibited for deeds of trust that are not foreclosed as mortgages, there are specified exceptions for guarantors of certain commercial loans. The Harveys fall within an exception, specifically RCW 61.24.100(3)(c).

---

[11] Brief of Respondents at 27-29 (citing Craig A. Fielden, An Overview of Washington's 1998 Deed of Trust Act Amendments, WSBA REAL PROP., PROBATE & TRUST SECTION NEWSLETTER, Summer 1998 at 4).

[12] Id. at 28.

[13] Id. at 28-29 (citing Beal Bank, SSB v. Sarich, 161 Wn.2d 544, 167 P.3d 555 (2007); Glenham v. Palzer, 58 Wn. App. 294, 792 P.2d 551 (1990)).

[14] Id. at 28.

We next consider the other apparent bases for the trial court's ruling. In its letter ruling, the court stated:

> RCW 61.24.100 entitled: Deficiency Judgments, Foreclosure, Trustees Sale, Application of Chapter presents a fairly clear structure. The general rule is that: "Except to the extent permitted in this section for deeds of trust securing commercial loans, a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against any borrower, grantor, or guarantor after a trustee's sale under that deed of trust." RCW 61.24.100(1). What this means to this court is that to sue for a deficiency judgment one must then qualify under one of the exceptions in this section. In this section there are three exceptions: (3), (6) and (10).
>
> ***The Exceptions***: Under RCW 61.24.100(3), an action for a deficiency judgment may be pursued under ***two narrow circumstances: (a) any decrease in fair market value caused by waste and (b) wrongful retention of any rents, insurance proceeds or condemnation awards.*** Under RCW 61.24.100(6), an action for a deficiency judgment may be pursued against a ***guarantor granting a deed of trust to secure its guaranty*** but only to the extent stated in subsection (3)(a)(i) – which refers to waste and wrongful retention. Under RCW 61.24.100(10), an action for a deficiency judgment may be pursued against borrowers or guarantors if the obligation was not secured by a deed of trust. This one is more wide open. ***But what it means is that if you do not qualify under (10) then you are limited to waste and wrongful retention as grounds for pursuing a deficiency judgment.***[15]

The trial court correctly stated the general rule. Deficiency judgments following a trustee's sale are generally prohibited. But, as the court recognized, there are exceptions. The court identified these "exceptions" as subsections (3), (6), and (10) of RCW 61.24.100. We consider each provision, in turn.

As we previously stated in this opinion and in Gentry, subsection (10) does not bar this action for a deficiency judgment against the guarantors of this

---

[15] Clerk's Papers at 10-11 (emphasis added).

commercial loan. The trial court's interpretation of this statute to the contrary was erroneous.

Additionally, a plain reading of subsection (6) shows that it is inapplicable to this case. There is no evidence in this record that Harvey "grant[ed] a deed of trust to secure [this] guaranty of a commercial loan."[16] Rather, they contend the Borrower/Grantor did so.

We also held in Gentry that subsection 3(c) is not limited by the provisions of subsection 3(a) and (b). Thus, waste and wrongful retention of funds does not restrict a lender's ability to seek a deficiency judgment against guarantors under subsection 3(c). To the extent the trial court held otherwise in this case, that was erroneous.

In sum, we conclude that RCW 61.24.100(10) does not preclude this action for a deficiency judgment against the guarantors of these commercial loans. The trustee's sale under the deed of trust securing this commercial loan does not bar this action. Moreover, this action is not barred by the limitations stated in RCW 61.24.100(3)(a) and (b).

THE LOAN DOCUMENTS

Based on the incorrect premise that RCW 61.24.100(10) should be interpreted as they argue, the Harveys further argue that the guaranty was secured by the deed of trust securing this loan. Accordingly, they claim that the trustee's sale under the deed of trust bars this action for a deficiency judgment.

---

[16] RCW 61.24.100(6).

Even if we agreed with their premise, we would still disagree with their conclusion. We hold that the deed of trust does not secure Harvey's guaranty.

This court reviews de novo a trial court's interpretation of the language of a contract.[17] "When interpreting a contract our primary goal is to discern the intent of the parties, and such intent must be discovered from viewing the contract as a whole."[18]

Washington follows the "objective manifestation theory of contracts" to determine the parties' intent.[19] Courts focus on the "objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties."[20] "[W]hen interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used."[21] This court does not "interpret what was intended to be written but what was written."[22]

Here, the first page of the deed of trust identifies the "Grantor" as Kaydee Gardens 9 LLC. Horizon Bank, the predecessor in interest to Washington

---

[17] Knipschield v. C-J Recreation, Inc., 74 Wn. App. 212, 215, 872 P.2d 1102 (1994).

[18] Weyerhaeuser Co v. Commercial Union Ins. Co., 142 Wn.2d 654, 669, 15 P.3d 115 (2000).

[19] Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

[20] Id.

[21] Id. at 503-04.

[22] Id. at 504.

Federal, is identified as the "Grantee" or Beneficiary/Lender. Harvey is not a party to this deed of trust.

At page three of the deed of trust, the Grantor states what is secured:

> THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS GIVEN TO SECURE (A) ***PAYMENT*** OF THE INDEBTEDNESS AND (B) ***PERFORMANCE*** OF ANY AND ALL OBLIGATIONS UNDER THE NOTE, THE RELATED DOCUMENTS, AND THIS DEED OF TRUST. THIS DEED OF TRUST, INCLUDING THE ASSIGNMENT OF RENTS AND THE SECURITY INTEREST IN THE RENTS AND PERSONAL PROPERTY, IS ALSO GIVEN TO SECURE ANY AND ALL OF ***GRANTOR'S*** OBLIGATIONS UNDER THAT CERTAIN CONSTRUCTION LOAN AGREEMENT BETWEEN ***GRANTOR*** AND LENDER OF EVEN DATE HEREWITH. ANY EVENT OF DEFAULT UNDER THE CONSTRUCTION LOAN AGREEMENT, OR ANY OF THE RELATED DOCUMETNS REFERRED TO THEREIN, SHALL ALSO BE AN EVENT OF DEFAULT UNDER THIS DEED OF TRUST. THIS DEED OF TRUST IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS:[23]

This provision discusses the ***Grantor's*** obligations. It does not mention the ***guarantor's*** obligations. The next paragraph further clarifies whose payment and performance obligations are secured by the deed of trust:

> ***PAYMENT AND PERFORMANCE.*** Except as otherwise provided in this Deed of Trust, ***Grantor*** shall pay to Lender all amounts secured by this Deed of Trust as they become due, and shall strictly and in a timely manner perform all of ***Grantor's*** obligations under the Note, this Deed of Trust, and the Related Documents.[24]

Reading these two paragraphs together, the deed of trust must be read as securing the payment and performance obligations of the ***Grantor.*** There simply is no way to read these provisions so that this deed of trust secures the payment

---

[23] Clerk's Papers at 556 (emphasis added).

[24] Id. (some emphasis added).

and performance obligations of anyone other than the ***Grantor***. Harvey, the guarantor of the loan, is not the ***Grantor***. Thus, the deed of trust does not secure Harvey's guaranty.

Later in the deed of trust, another provision discusses full performance of the secured obligations:

> ***FULL PERFORMANCE.*** If ***Grantor*** pays all the Indebtedness when due, and otherwise performs all the obligations imposed upon ***Grantor*** under this Deed of Trust, Lender shall execute and deliver to Trustee a request for full reconveyance and shall execute and deliver to Grantor suitable statements of termination of any financing statement on file evidencing Lender's security interest in the Rents and the Personal Property.[25]

This language reinforces our conclusion. The exclusive focus is on the payment and performance obligations of the ***Grantor*** of the deed of trust. There is simply no mention of such obligations of Harvey, the guarantor.

In sum, we conclude when we read this deed of trust as a whole, it does not secure Harvey's guaranty. Accordingly, the argument that RCW 61.24.100(10) bars this action is wholly unpersuasive for a second reason.

The Harveys also rely on First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development, LLC, a recent Division Two case provided to this court as supplemental authority in this case.[26] We note that in this case, Washington Federal submitted to the trial court in its motion for reconsideration copies of the loan documents, including the deeds of trust at issue in First-Citizens.[27] Thus,

---

[25] Id. at 559 (some emphasis added).

[26] __ Wn. App. __, 314 P.3d 420 (2013).

[27] Clerk's Papers at 94-181.

copies of the loan documents in First-Citizens are in this record. Comparing the respective loan documents, there are slight variations between the deeds of trust in that case and the deed of trust in this case.[28]

Nevertheless, in Gentry, we addressed why we disagree with the rationale and conclusion in First-Citizens.[29] Here, having compared the deeds of trust in that case with the deed of trust here, we note that they have similar provisions defining whose obligations are secured. In both cases, the secured obligations are limited to those of the "Grantors" under the deeds of trust. None state the secured obligations include those of the guarantor of the loan. Having confirmed in this case that the loan documents in First-Citizens contain similar language in material respects to that in the deed of trust here, we must disagree with the rationale of that case for this additional reason.

We note that the trial court in this case reached a conclusion similar to that in First-Citizens. It concluded that "the guaranty in this matter was a Related Document under the subject Deed of Trust clause." It reached this conclusion by construing the deed of trust instrument against the bank, the drafter:

> Even if ambiguous, at minimum, the ambiguity must be construed against the drafter, which means it is still subject to the Related Documents clause. As such, the guaranty was secured by the Deed of Trust. Given that security; to sue for deficiency requires that the plaintiff bank must meet either the conditions of either RCW 61.24.100(3) or (6). Since the deficiency sought by the bank is not based in either waste or wrongful retention its law suit must fail.[30]

---

[28] Compare id. at 119-27, 146-54, 169-77, with id. at 554-64.

[29] Gentry, No. 70004-9, slip op. at 17.

[30] Clerk's Papers at 11.

Construing the deeds of trust instruments against the drafter was also a rationale that Division Two pointed to in a footnote.[31]

As we stated in Gentry, the problem with this approach is that this rationale applies only where an instrument is ambiguous.[32] As we discussed previously in this opinion, the deed of trust in this case is not ambiguous when read as a whole. The Grantor expressly stated that the deed of trust secured the obligations of the ***Grantor***. The ***Grantor*** did not include Harvey. Thus, this principle of interpretation does not apply in this case.

The Harveys also cite a Michigan case to supports it reading of the deed of trust.[33] In Greenville Lafayette LLC v. Elgin State Bank, the Michigan Court of Appeals examined a Michigan statute regarding foreclosure by advertisement.[34] As part of its analysis, the court concluded that "the plain language of the mortgage contract specifically includes guaranties in the indebtedness secured by the mortgage."[35] The court quoted some of the definitions from the mortgage that appear to be similar to the definitions in this case.[36] But we have no means

---

[31] First-Citizens Bank, 314 P.3d at 423 n.8.

[32] See Gentry, No. 70004-9, slip op. at 26 (citing Rouse v. Glascam Builders, Inc., 101 Wn.2d 127, 135, 677 P.2d 125 (1984)).

[33] Brief of Respondents at 17-18 (citing Greenville Lafayette, LLC v. Elgin State Bank, 296 Mich. App. 284, 818 N.W.2d 460 (2012)).

[34] 296 Mich. App. 284, 285, 818 N.W.2d 460 (2012).

[35] Id. at 291.

[36] Id. at 290.

of knowing if other relevant portions of the mortgage are the same or similar to the provisions of these loan documents that we have discussed previously in this opinion. Thus, we decline to rely on that case here.

In sum, the unambiguous language in the deed of trust shows that the Grantor under this instrument did not intend to secure Harvey's guaranty. RCW 61.24.100(10) simply does not apply to this case, even if we accepted the Harveys' erroneous interpretation of this statute. The bank may seek a deficiency judgment against the Harveys. The trial court erred when it granted the Harveys' motion for summary judgment, denied the bank's similar motion, and dismissed the complaint with prejudice.

Because of our resolution of the two issues in this opinion, we need not reach the third question: whether the waiver of anti-deficiency defenses language in the guaranty of payment is enforceable against the Harveys. In order to make clear that the trial court's decision on this question is not binding on these parties, we vacate that portion of that court's decision.

There is an outstanding issue that is not presently before us. The Harveys are entitled to a fair value hearing under RCW 61.24.100(5). That hearing has not yet occurred because the trial court decided this matter on summary judgment. Thus, remand for such a hearing is required.

ATTORNEY FEES

The Harveys seek an award of attorney fees based on the contract provision in the guaranty. The bank reserves the right to seek fees under the same provision following remand and further proceedings.

Because a prevailing party has not yet been determined and will not be determined until after a fair value hearing under RCW 61.24.100(5) on remand, we decline to award fees now. That determination may be made by the trial court at such time as it makes an award of reasonable attorney fees.

We reverse and remand for further proceedings. We also vacate that portion of the trial court's decision concerning the enforceability of waiver of anti-deficiency defenses. We also deny an award of attorney fees as premature.

Cox, J.

WE CONCUR:

Becker, J.

APPENDIX C

First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development, LLC

-- Wn.App --, 314 P.3d 420 (Div. II 2013)

178 Wash.App. 207
Court of Appeals of Washington,
Division 2.

FIRST–CITIZENS BANK & TRUST COMPANY, Respondents,
v.
CORNERSTONE HOMES & DEVELOPMENT, LLC, a Washington Corporation; and its Guarantor Daniel L. Allison and Jeanne Allison, individually and the marital community composed thereof, Appellants.

No. 43619–1–II. | Dec. 3, 2013.

Synopsis
Background: Following nonjudicial trustee's sale, mortgagee brought action against guarantors seeking deficiency judgment. The Superior Court, Pierce County, John Russell Hickman, J., entered judgment in favor of mortgagee. Guarantors appealed.

Holdings: The Court of Appeals, Hunt, J., held that:

[1] deeds of trust also secured guaranty agreements;

[2] anti-deficiency provisions of Deed of Trust Act prohibited deficiency judgment; and

[3] guarantors were entitled to award of attorney fees.

Reversed.

West Headnotes (10)

[1] **Contracts**
⇦Intention of Parties

Washington follows the objective manifestation theory of contracts; a court's primary goal in interpreting a contract is to ascertain the parties' intent.

[2] **Contracts**
⇦Language of contract

Courts determine intent of the parties to a contract by focusing on the parties' objective manifestation of their intent in the written contract rather than on the unexpressed subjective intent of either party.

[3] **Contracts**
⇦Application to Contracts in General

When interpreting a contract, a court does not interpret what was intended to be written but what was written.

[4] **Guaranty**
⇦General rules of construction

The rules that apply to contracts also govern interpretation and construction of a guaranty.

[5] **Guaranty**
⇦Nature of Liability

By signing a guaranty, the guarantor promises a creditor to perform if the debtor fails to repay the loan.

[6] **Guaranty**

⚭Scope and Extent of Liability

A guarantor is not to be held liable beyond the express terms of his or her engagement.

[7] **Guaranty**
⚭Guaranties of mortgages and judgments

Deeds of trust that mortgagee non-judicially foreclosed to satisfy mortgagor's underlying debt also secured the guarantors' commercial guaranty under the express terms of the guaranty, promissory notes, and deeds of trust drafted by mortgagee's predecessor, where deeds of trust expressly stated that they were given to secure payment of indebtedness and performance of any and all obligations under the note, the related documents, and the deeds of trust, and guaranties expressly incorporated deeds of trust.

2 Cases that cite this headnote

[8] **Guaranty**
⚭Defenses

Anti-deficiency provisions of Deed of Trust Act prohibited mortgagee from obtaining deficiency judgment against guarantors pursuant to guaranty agreements that were secured by deeds of trust that mortgagee non-judicially foreclosed to satisfy mortgagor's underlying debt, where provisions categorically prohibited a deficiency judgment against any borrower or guarantor following a nonjudicial foreclosure, subject to certain exceptions for deeds of trust securing commercial loans, and applicable exception only applied when guaranty agreement was not secured by deed of trust. West's RCWA 61.24.005 et seq.

1 Cases that cite this headnote

[9] **Statutes**
⚭Express mention and implied exclusion; expressio unius est exclusio alterius

Expression of one thing in a statute implies exclusion of others, and this exclusion is presumed to be deliberate.

1 Cases that cite this headnote

[10] **Costs**
⚭Contracts

Guarantors were entitled to award of attorney fees pursuant to guaranty agreements in action by mortgagee seeking deficiency judgment following nonjudicial foreclosure of deed of trust, where, although the commercial guaranty expressly purported to entitle only the lender to attorney fees, statute provided that such unilateral attorney fee provisions gave reciprocal rights to all parties to the contract. West's RCWA 4.84.330.

Attorneys and Law Firms

***421** Margaret Yvonne Archer, Attorney at Law, Tacoma, WA, for Appellants.

Douglas N. Kiger, Blado Kiger Bolan, PS, Tacoma, WA, for Respondents.

Peter J. Mucklestone, Davis Wright Tremaine LLP, Gregory R. Fox, Ryan P. Mcbride, Lane Powell PC, Averil Budge Rothrock, Matthew Turetsky, Schwabe Williamson & Wyatt PC, Seattle, WA, Amicus Curiae on behalf of Wa Federal and Union Bank Na WA Bankers Assoc.

Opinion

HUNT, J.

¶ 1 Daniel L. and Jeanne Allison, guarantors of three commercial promissory notes issued by Cornerstone

Homes & Development, LLC, appeal the superior court's judgment on the pleadings, ordering them to pay a deficiency following a nonjudicial trustee's sale of Cornerstone's properties that secured the notes with construction deeds of trust. The Allisons argue that (1) these construction deeds of trust also secured their commercial guaranty obligations; and (2) the anti-deficiency provisions of the "Washington Deed of Trust Act"[1] prohibit a deficiency judgment against a guarantor when, as here, the underlying deeds of trust secured the guaranty. We agree. We hold that RCW 61.24.100(10) prohibited First–Citizens Bank & Trust Company from obtaining a deficiency judgment against the Allisons because the deeds of trust that First–Citizens non-judicially foreclosed to satisfy Cornerstone's underlying debt also secured the Allisons' commercial guaranty under the express terms of the guaranty, promissory notes, and deeds of trust drafted by First–Citizens' predecessor. Accordingly, we reverse the superior court's deficiency judgment against the Allisons and its award of attorney fees to First–Citizens. We also grant attorney fees to the Allisons on appeal.

1 Ch. 61.24 RCW.

FACTS

¶ 2 In 2003, commercial developer Daniel L. Allison,[2] managing member of Cornerstone Homes & Development, LLC, signed a commercial guaranty, prepared and presented by Venture Bank, for all subsequent loans from Venture Bank to Cornerstone. The language of this guaranty stated that it encompassed all other "related" documents "executed in connection with the indebtedness" then or in the future. Clerk's Papers (CP) at 33.

2 This guaranty also obligated Daniel Allison's wife, Jeanne Allison.

¶ 3 Three years later, from 2006 to 2007, Venture Bank made several commercial loans to Cornerstone, for which Cornerstone signed three promissory notes, prepared and presented by Venture Bank. As security for these promissory notes, Venture Bank took three separate construction deeds of trust, also prepared and presented by Venture Bank, for three Cornerstone properties. In 2009, Cornerstone defaulted on all three loans and ceased its business operations.

¶ 4 The Washington State Department of Financial Institutions closed Venture Bank and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. The FDIC sold to First–Citizens most of Venture Bank's assets, including its loans to Cornerstone. On October 2 and November 20, 2009, First–Citizens nonjudicially foreclosed on the Cornerstone properties secured by the deeds of trust. Following these sales, there remained a $4,240,424.11 deficiency.

*422 ¶ 5 First–Citizens sued guarantors the Allisons for this deficiency[3] and moved for judgment on the pleadings. The superior court granted the motion and awarded judgment in favor of First–Citizens for the full deficiency amount and $31,370.00 in attorney fees. The Allisons appeal.

3 First–Citizens also sued Cornerstone, but it later withdrew this action.

ANALYSIS

I. GUARANTY & DEEDS OF TRUST

¶ 6 The Allisons argue that (1) their obligations under their guaranty were discharged when First–Citizens nonjudicially foreclosed on Cornerstone's deeds of trust, which also expressly secured their guaranty; and (2) thus, RCW 61.24.100 did not allow First–Citizens to obtain a judgment against them for the loan deficiency that remained after the trustee's sale of Cornerstone's property. We agree.

A. Standard of Review

[1] [2] [3] ¶ 7 We review de novo a trial court's order granting judgment on the pleadings. *N. Coast Enters., Inc. v. Factoria P'ship,* 94 Wash.App. 855, 858, 974 P.2d 1257 (1999). Interpretation of a contract is a question of law, which we also review de novo. *Wright v. Dave Johnson Ins., Inc.,* 167 Wash.App. 758, 769, 275 P.3d 339, *review denied,* 175 Wash.2d 1008, 285 P.3d 885 (2012). Washington follows the "objective manifestation theory of contracts"; our primary goal in interpreting a contract is to ascertain the parties' intent. *Hearst*

Commc'ns, Inc. v. Seattle Times Co., 154 Wash.2d 493, 503, 115 P.3d 262 (2005). Thus, we determine intent by focusing on the parties' objective manifestation of their intent in the written contract rather than on the unexpressed subjective intent of either party; in other words, "We do not interpret what was *intended* to be written but what *was* written." *Hearst*, 154 Wash.2d at 503, 504, 115 P.3d 262 (emphasis added) (citing *J.W. Seavey Hop Corp. v. Pollock*, 20 Wash.2d 337, 348–49, 147 P.2d 310 (1944)).

[4] [5] [6] ¶ 8 The rules that apply to contracts also govern interpretation and construction of a guaranty. *Bellevue Square Managers v. Granberg*, 2 Wash.App. 760, 766, 469 P.2d 969 (1970).[4] By signing a guaranty, the guarantor promises a creditor to perform if the debtor fails to repay the loan. *B & D Leasing Co. v. Ager*, 50 Wash.App. 299, 306, 748 P.2d 652 (1988). Nevertheless,

> [a] guarantor is *not* to be held *liable beyond the express terms* of his or her engagement. If there is a question of meaning, the guaranty is *construed against the party who drew it up* or against the party benefited.
> *Matsushita Elec. Corp. of Am. v. Salopek*, 57 Wash.App. 242, 246–47, 787 P.2d 963, *review denied* 114 Wash.2d 1029, 793 P.2d 975 (1990) (emphasis added). Here, it is undisputed that Venture Bank drafted the Allisons' commercial guaranty and Cornerstone's deeds of trust.

B. Cornerstone's Deeds of Trust Secured the Allisons' Guaranty

[7] ¶ 9 First–Citizens argues that the deeds of trust securing Cornerstone's promissory notes to Venture Bank did not secure the Allisons' guaranty because they contained no such operative language.[5] This argument fails.

***423** ¶ 10 Contrary to First–Citizens' argument, these deeds of trust, drafted by its predecessor, Venture Bank, expressly stated that they were

> ... GIVEN TO SECURE (A) PAYMENT OF THE INDEBTEDNESS AND (B) PERFORMANCE OF *ANY AND ALL OBLIGATIONS* UNDER THE NOTE, *THE RELATED DOCUMENTS*, AND [THE] DEED [S] OF TRUST.

CP at 22 (emphasis added). These deeds of trust defined (1) "Indebtedness" as "all principal, interest, and other amounts, costs and expenses payable under the Note or *Related Documents* "; and (2) "Related Documents" to include any "*guaranties* ... whether *now* or hereafter *existing*, executed in connection with the indebtedness." CP at 28 (emphasis added). A plain reading of this language includes the Allisons' earlier guaranty among the "now ... existing"[6] "Related Documents"[7] that these deeds of trust secured.

¶ 11 Similarly, the Allisons' guaranty, also drafted by Venture Bank, used the same "Related Documents" language as follows:

> This Guaranty, *together with any Related Documents*, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Guaranty.

4 *See also Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wash.2d 692, 699, 952 P.2d 590 (1998).

5 The Allisons' guaranty also contained a provision purporting to waive "any and all rights or defenses" under any law "which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor." CP at 32. But in this appeal, First–Citizens expressly does not claim that the Allisons waived protection under the deed of trust statute; instead, it argues that "the anti-deficiency exception to guarantor liability simply does not apply in the first place." Br. of Resp't at 10. *See*, in contrast, *First–Citizens Bank & Trust Co. v. Reikow*, No. 43181–5–II, —— Wash.App. ——, ——, n. 4, 313 P.3d 1208, 1215, 2013 WL 6008624, at *7, n. 4 (Wash.Ct.App. June 27, 2013) (noting, in response to First–Citizens' argument that the guarantor waived protection in that case: (1) the Washington Supreme Court's reluctance to enforce a contractual provision waiving statutory requirements governing nonjudicial foreclosure, and (2) that " 'intent to waive must be shown by unequivocal acts or conduct which are inconsistent with any intention other than to waive.' " (quoting *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 143 Wash.App. 345, 361, 177 P.3d 755 (2008))).

6 CP at 28.

7 CP at 28.

[...]

"*Related Documents* " mean all *promissory notes,* credit agreements, loan agreements, environmental agreements, guaranties, security agreements, mortgages, *deeds of trust,* security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or *hereafter existing, executed in connection with the Indebtedness.*

CP at 32–33 (emphasis added). This plain language expressly incorporates future "Related Documents," which unambiguously includes future "deeds of trust" as well as "promissory notes" "executed in connection with the indebtedness," "now or hereafter existing," namely Cornerstone's promissory notes and deeds of trust later executed to obtain this contemplated loan.[8] CP at 33.

8 First–Citizens does not dispute that Daniel Allison executed his guaranty in contemplation of Venture Bank's future construction loans to Cornerstone, for which Cornerstone later signed promissory notes secured by the deeds of trust on Cornerstone's properties. Instead, First–Citizens and amici curiae, Washington Bankers Association and Washington Federal and Union Bank (WBA), argue that the deeds of trust could not have also secured the Allisons guaranty because they did not own the land that Cornerstone provided as security for the deeds of trust.
That the Allisons did not own Cornerstone's property used to secure its deeds of trust does not undermine the plain language of the deeds of trust, which also secure the Allisons' guaranty. Moreover, even if the language of the deeds of trust describing what they secured were arguably ambiguous, we would have to construe it against First–Citizens, which stands in the shoes of the guaranty's drafter, Venture Bank. *See Matsushita,* 57 Wash.App. at 246–47, 787 P.2d 963.

¶ 12 Nor is there any ambiguity in Venture Bank's identical use of the term "the Indebtedness,"[9] in both the deeds of trust and the Allisons' guaranty, to refer to Cornerstone's construction loans from Venture bank, secured by the deeds of trust.[10] Thus, we agree with the Allisons that these reciprocal plain terms operate together such that the deeds of trust expressly secure the Allisons' guaranty in addition to Cornerstone's construction loan.[11]

9 CP at 33.

10 Amici banks make a compelling argument that accepting the Allisons' argument here would (1) call into question many similar documents securing and guaranteeing commercial loans; and (2) run contrary to the general purpose that personal guaranties serve in the banking industry, namely to assure an additional source of payment to lenders when borrowers default and their securities are insufficient to satisfy the debt. Here, however, we confront specific language that Venture Bank selected for inclusion in these documents and which we must construe against the drafting bank, even if the bank's specific language choice subverts this general guaranty purpose.

11 Even if these documents were ambiguous, their interpretation presents an issue of first impression in Washington. A Michigan appellate court, however, addressed identical contract language in *Greenville Lafayette, LLC v. Elgin State Bank,* 296 Mich.App. 284, 818 N.W.2d 460 (2012), concluding that the "plain language" of the deed of trust "specifically include[d] guaranties in the indebtedness secured by the mortgage." *Greenville,* 296 Mich.App. at 291, 818 N.W.2d 460.

*424 II. ANTI–DEFICIENCY STATUTE RCW 61.24.100

[8] ¶ 13 Having determined that the deeds of trust secured the Allisons' guaranty, we next determine whether First–Citizens can obtain a deficiency judgment against the Allisons for the remaining amount due on Cornerstone's loan following the trustee's sale of Cornerstone's property by nonjudicial foreclosure. To make this determination, we address whether RCW 61.24.100 offers the same anti-deficiency judgment protections to commercial guarantors that it provides to borrowers. Again, we discern the statute's plain meaning from the ordinary meaning of the language at issue, the context in which that statutory provision is found, related provisions, and the statutory scheme as a "whole." *State v. Engel,* 166 Wash.2d 572, 578, 210 P.3d 1007 (2009).

¶ 14 Washington's anti-deficiency statute, RCW 61.24.100, categorically prohibits a deficiency judgment against any *borrower* or *guarantor* following a nonjudicial foreclosure, subject to certain exceptions for deeds of trust securing commercial loans[12]:

12 *See, e.g.,* RCW 61.24.100(10), *infra.*

> Except to the extent permitted in this section for deeds of trust securing commercial loans, *a deficiency judgment shall not be obtained on the obligations secured by a deed of trust against* any borrower, grantor, or *guarantor* after a trustee's sale under that deed of trust.
>
> RCW 61.24.100(1) (emphasis added). *See also Thompson v. Smith,* 58 Wash.App. 361, 365, 793 P.2d 449 (1990). Under this statute a creditor sacrifices its usual right to a deficiency judgment when the creditor elects the "inexpensive and efficient" nonjudicial foreclosure procedure to satisfy a defaulted loan.[13] *Thompson,* 58 Wash.App. at 365, 793 P.2d 449.

13 Amici WBA argue that it would "accomplish nothing" to have a deed of trust securing a guaranty. Br. of Amici Curiae WBA at 9. We note that First–Citizens triggered the ultimate protections afforded by the anti-deficiency statute when it voluntarily elected to avail itself of the relatively "inexpensive and efficient" nonjudicial foreclosure option. *Thompson,* 58 Wash.App. at 365, 793 P.2d 449. Moreover, RCW 61.24.100(9) specifically contemplates a party's ability to forego its contractual right to recover any portion or all of a deficiency, which First–Citizens did when its predecessor, Venture Bank, drafted the deeds of trust in such a manner as to secure the Allisons' guaranty. As the Allisons correctly note,

> > First–Citizens had a variety of remedies available to it to collect on the Cornerstone debt. It could have foreclosed judicially and simultaneously pursued a deficiency against both Cornerstone and the guarantor. It could have sued on the Guaranty first, leaving the foreclosure option available as a later remedy. Or it could (and did) choose the efficient remedy of a Trustee's sale pursuant to the Deed of Trust Act without judicial oversight.
>
> Br. of Appellant at 24.

[9] ¶ 15 Subsection (10) creates an exception to subsection (1)'s general prohibition against deficiency judgments following nonjudicial foreclosure by allowing the lender to sue a commercial loan guarantor if the guaranty was *not* secured by the foreclosed deed of trust:

> A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to ... enforce any obligation of a ... guarantor if that obligation ... *was not secured by the deed of trust.*

RCW 61.24.100(10)[14] (emphasis added). Under the statutory construction principle expressio unius est exclusio alterius[15], the *425 above language implies that (1) this express exception to the anti-deficiency judgment statute is the only exception under these circumstances; and (2) therefore, further implies that where a guaranty *was* secured by the foreclosed deed of trust (which also secured a commercial loan), the lending bank *cannot* sue the guarantor for any deficiency remaining after the trustee's sale of the secured property.[16]

14 *See also* RCW 61.24.100(6), which addresses a lender's ability to obtain a deficiency judgment against a guarantor who granted a deed of trust to secure its guaranty of a commercial loan (which is not the case here):

> A *guarantor granting a deed of trust* to secure its guaranty of a commercial loan shall be subject to a deficiency judgment following a trustee's sale under that deed of trust only to the extent stated in subsection (3)(a)(i).

(Emphasis added). Under its plain language, this statutory provision does not apply here, however, because guarantor Allisons did *not* grant the foreclosed deeds of trust on Cornerstone's property. Instead, it was Cornerstone that granted these deeds of trust, to secure its commercial loan.

15 "Expression of one thing in a statute implies exclusion of others, and this exclusion is presumed to be deliberate." *State v. Kelley,* 168 Wash.2d 72, 83, 226 P.3d 773 (2010) (statute's exception of some weapons listed in firearm enhancement statute shows legislative intent that crimes involving *other* weapons not on the list are *not* to be excepted) (citing *State v. Delgado,* 148 Wash.2d 723, 729, 63 P.3d 792 (2003), which similarly explained: " 'Under expressio unius est exclusio alterius, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other.' " (quoting *In re Det. of Williams,* 147 Wash.2d 476, 491, 55 P.3d 597 (2002))).

16 Amici contend that this statutory interpretation conflicts with RCW 61.24.100(6), *see* n. 14 and with RCW 61.24.100(3)(c), which provides:

> This chapter does not preclude any one or more of the following after a trustee's sale under a deed of trust securing a commercial loan executed after June 11, 1998:
>
> [....]
>
> (c) *Subject to this section,* an action for a deficiency judgment against a guarantor if the guarantor is timely given the notices under RCW 61.24.042.

(Emphasis added). We disagree.

By its express language, RCW 61.24.100(3)(c) is "Subject to" other subsections of RCW 61.24.100, such as RCW 61.24.100(10), which limits RCW 61.24.100(3)(c) by allowing a deficiency judgment

action against a guarantor where the nonjudicially foreclosed deeds of trust did *not* also secure the guaranty, along with securing the commercial loan; because the Allisons' guaranty was secured by the deeds of trust, this subsection does not apply here. *See also* RCW 61.24.100(3)(a)(i), which allows a deficiency judgment action against a guarantor who caused a decrease in the judicially foreclosed property's fair value by waste or who wrongfully retained proceeds from the property; because there were no allegations of waste or wrongful retention of proceeds here, this subsection also does not apply.

¶ 16 As we have already held, the nonjudicially foreclosed deeds of trust secured the Allisons' guaranty, in addition to securing Cornerstone's promissory notes to Venture Bank. This security triggered the statutory limitation in RCW 61.24.100(10), which prohibits a deficiency judgment action against a guarantor in the Allisons' situation: The Allisons' guaranty was secured by Cornerstone's deeds of trust under the plain language of these deeds of trust and other "Related documents,"[17] all drafted by Venture Bank in contemplation of Cornerstone's construction loan. In short, the general statutory prohibition against deficiency judgments applies to prohibit deficiency judgments against deed-of-trust-secured guarantors like the Allisons, despite their role as guarantors of a commercial loan, when the lender elects nonjudicial foreclosure to obtain repayment of a defaulted commercial loan secured by deeds of trust that secure not only the loan but also the guaranty. RCW 61.24.100(10).

17 CP at 33.

¶ 17 We hold that RCW 61.24.100's anti-deficiency protections prohibit a lender from obtaining a deficiency judgment against a guarantor whose guaranty was secured by a nonjudicially foreclosed deed of trust that also secured the guaranty. Based on this statute and the plain language of the guaranty and the deeds of trust, both drafted by the lender, we further hold that the superior court erred in awarding First–Citizens a deficiency judgment against the Allisons after the nonjudicial foreclosure sales of the properties secured by the deeds of trust.

ATTORNEY FEES

[10] ¶ 18 Both parties request attorney fees under RAP 18.1 and the terms of the Allisons' guaranty. Although this commercial guaranty expressly purports to entitle only the lender to attorney fees,[18] RCW 4.84.330[19] provides that such unilateral attorney *426 fee provisions give reciprocal rights to all parties to the contract. Because the Allisons are parties to the guaranty that First–Citizens sought to enforce and they are also the prevailing party, we award them attorney fees on appeal.

18 The Allisons' guaranty stated: "Guarantor agrees to pay upon demand all of Lender's ... attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Guaranty." CP at 32.

19 RCW 4.84.330 provides:

> 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.

¶ 19 We reverse the superior court's deficiency judgment and attorney fee award to First–Citizens and remand to the superior court. We also award the Allisons attorney fees on appeal.

We concur: WORSWICK, C.J., and JOHANSON, J.

Parallel Citations

314 P.3d 420

End of Document