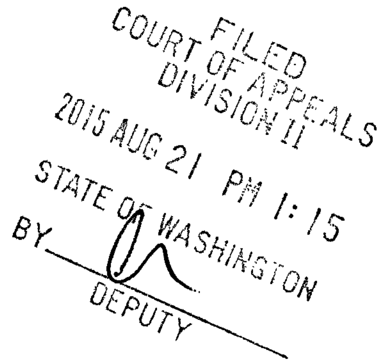

NO. 47395-0-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

TODD BAKER AND THERESA BAKER,

Appellants,

vs.

PENNYMAC LOAN SERVICES, LLC, NORTHWEST TRUSTEE SERVICES, INC.,

Respondents.

RESPONDENT'S BRIEF

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I. INTRODUCTION

The Bakers failed to establish their right to relief from judgment under WASH. R. CIV. P. 60(b). It is well established that a subsequent change in law, such as the Supreme Court decision in *Jesinoski v. Countrywide Home Loans, Inc.*, is not enough to allow relief from a final judgment. The Final Order and Judgment in this case did not have prospective application and thus did not implicate relief under WASH. R. CIV. P. 60(b)(6).

The Bakers further failed to establish extraordinary circumstances warranting relief from judgment under WASH. R. CIV. P. 60(b)(11), beyond the mere fact of the Supreme Court's decision in *Jesinoski.* The resolution of a circuit split is an ordinary occurrence that will not suffice to reopen the floodgates of concluded and final litigation. The Bakers failed to act with diligence in pursuing their claims, as they did not seek appeal or reconsideration of the adverse ruling. That PennyMac is the servicer of the loan does not warrant relief from judgment when those facts were known to the Bakers at the pleading and summary judgment stage of the concluded litigation. No abuse of discretion is shown. To the contrary, interests of finality and equity weigh in favor of affirming the denial of the Bakers' motion, even more so now that the foreclosure sale has been completed and the Bakers are no longer in possession of their

home. Washington and federal precedent supports affirmance in these circumstances.

II. STATEMENT OF THE ISSUES

1. The standard for relief under WASH. R. CIV. P. 60(b)(6) does not apply to judgments that do not have "prospective application." Was denial of the Bakers' request for WASH. R. CIV. P. 60(b)(6) relief within the sound exercise of the trial court's discretion where the Final Order and Judgment against the Bakers has no prospective application? **Yes.**

2. A subsequent change in law does not warrant WASH. R. CIV. P. 60(b)(11) relief where there are no additional extraordinary circumstances present. Was denial of the Bakers' request for WASH. R. CIV. P. 60(b)(11) relief within the sound exercise of the trial court's discretion where the only reason supporting relief was the Supreme Court's *Jesinoski* decision? **Yes.**

3. Is PennyMac's position as loan servicer insufficient to qualify as an extraordinary circumstance warranting WASH. R. CIV. P. 60(b) relief where this information was known to the Bakers at the time of pleading their Complaint and on summary judgment, and the Bakers neither advanced their argument nor appealed the adverse ruling? **Yes.**

4. Do interests of finality and equity support the denial of the

Bakers' motion for relief where the property has been sold to a third-party purchaser and the Bakers are no longer in possession? **Yes.**

III. COUNTER STATEMENT OF THE CASE

Todd and Theresa Baker (the "Bakers") filed suit April 8, 2011 against PennyMac Loan Services, LLC ("PennyMac") and Northwest Trustee Services, Inc. ("Northwest Trustee") seeking an injunction to prevent foreclosure of their property. (CP 130-43). They also alleged causes of action for rescission of their loan, breach of the duty of good faith and fair dealing, and violations of Washington's Consumer Protection Act. *Id.* Although the Bakers had sent their rescission notice to MorEquity, the previous loan servicer, their Complaint focused on PennyMac's purported wrongdoing and alleged that PennyMac "refused to acknowledge the rescission or the voided status of the note." (CP 136, ¶ 3.21). The Bakers' Complaint also alleged that PennyMac was not the beneficiary of their loan, and "as a servicer, it cannot prosecute a foreclosure, nor appoint a trustee." (CP 140, ¶ 3.46).

PennyMac and Northwest Trustee both moved for Summary Judgment. The trial court issued a ruling by letter on November 27, 2012 in which it rejected the Bakers' claims on multiple grounds including a time-bar, holding:

> With respect to the rescission claim, the court concludes Plaintiffs' claim is time-barred for failure to file suit within three years of

> loan consummation. Additionally, Plaintiffs have failed to identify facts or disputed facts which would establish their claim, and failed to establish they could tender the proceeds of the loan. As to the second and third causes of action, as Plaintiffs did not seek judicial enforcement of the rescission of their loan transaction within three years, PennyMac had a legal right to compel performance and could not be held to have breached [sic] the duty of good faith and fair dealing by asserting a right it legally held.

(CP 6-7). The court also awarded PennyMac its fees and costs incurred in defending against the Bakers' lawsuit, and released funds being held in the court registry to PennyMac. (CP 8-9). A Final Order and Judgment was entered on December 21, 2012. *Id.*

The Bakers did not move for reconsideration, nor for relief under WASH. R. CIV. P. 60. The Bakers did not appeal the adverse ruling.

Years later in February 2015, the Bakers filed a Motion for Relief from Judgment under CR 60(b) against PennyMac and Northwest Trustee. (CP 98-114). In their motion, the Bakers alleged that the more than two-year-old final judgment should be reopened due to a subsequent change in law under *Jesinoski v. Countrywide Home Loans, Inc.*, __ U.S. __, 135 S. Ct. 790, 190 L. Ed. 2d 650 (2015). In *Jesinoski*, the U.S. Supreme Court held that a borrower need only send a notice of rescission within the three-year statute of limitations, not commence a lawsuit.

The trial court promptly heard oral argument on the Bakers' motion and considered their supplemental authority. (CP 156, 157). On March 10, 2015, the trial court issued a letter ruling and order denying the

Bakers' CR 60 motion ("Order Denying the Motion for Relief") (CP 160). The trial court held that "subsequent change in law does not provide the basis for relief from a final judgment in the absence of extraordinary circumstances. It is my conclusion Plaintiffs have not established extraordinary circumstances warranting relief from the judgment." *Id.*

The Bakers did not seek a stay to preserve the status quo pending appeal of denial of the CR 60 motion. The nonjudicial foreclosure sale on the Bakers' property took place on June 26, 2015. Appellant's Brief ("Appellant's Brief") at 9.[1] The property was sold to a third party. See Declaration of Claire Rootjes, Exh. A.[2]

The Bakers appeal the denial, arguing that the trial court abused its discretion. Because the trial court's determination was supported by the law and the evidence, this Court should affirm.

IV. STANDARDS OF REVIEW

PennyMac agrees with the Bakers that the standard of review on appeal is abuse of discretion. Appellant's Brief, at 4 (citing *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794 P.2d 526 (1990)); *see also*

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[1] In some parts of their brief, the Bakers assert that the nonjudicial foreclosure is still pending, but they directly acknowledge at page 9 that the nonjudicial foreclosure sale occurred June 26, 2015.

[2] PennyMac has filed a Motion to Submit New Evidence in order to introduce the document attached to Exhibit A, and includes the citation to this evidence contingent upon that motion being granted.

Gustafson v. Gustafson, 54 Wn. App. 66, 69, 772 P.2d 1031 (1989) (explaining review of decision under CR 60(b)(6) and 60(b)(11) is for abuse of discretion). "If the discretionary judgment of the trial court is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld." *Lindgren*, 58 Wn. App. at 595 (citing generally *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990)).

Applying these standards, this Court should affirm.

V. ARGUMENT

The Bakers moved for relief from the judgment under WASH. R. CIV. P. 60(b)(6) and 60(b)(11). The trial court properly denied relief under both provisions.

A. The Bakers are not entitled to relief under WASH. R. CIV. P. 60(b)(6) because the judgment does not have prospective application.

This Court should affirm the trial court's denial of relief under WASH. R. CIV. P. 60(b)(6), which provides that a court may grant relief from a judgment if the "judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." WASH. R. CIV. P. 60(b)(6) (emphasis added). The Bakers rely on this last section and argue that changed circumstances warrant relief in this case. This provision does not apply

because the judgment does not have "prospective application."

No Washington court has explicitly considered the meaning of the language "prospective application," but federal courts have considered at length analogous language in FED. R. CIV. P. 60(b)(5). When construing similar court rules, Washington courts often look to federal decisions as persuasive authority. *See Chelan Cy. Deputy Sheriff's Ass'n v. Chelan Cy.*, 109 Wn.2d 282, 291, 745 P.2d 1 (1987); *Weeks v. Chief of Wash. State Patrol*, 96 Wn.2d 893, 897, 639 P.2d 732 (1982).[3] The Ninth Circuit Court of Appeals has persuasively explained that to have "prospective application," the judgment must be "executory" or involve "supervision of changing conduct," as follows:

> Virtually every court order causes at least some reverberations into the future, and has, in that literal sense, some prospective effect . . . . That a court's action has continuing consequences, however, does not necessarily mean that it has "prospective application" for the purposes of Rule 60(b)(5). The standard used in determining whether a judgment has prospective application is "whether it is 'executory' or involves 'the supervision of changing conduct or conditions[.]'"

Maraziti v. Thorpe, 52 F.3d 252, 254 (9th Cir. 1995); s*ee also Gibbs v. Maxwell House*, 738 F.2d 1153, 1155-56 (11th Cir. 1984) ("That plaintiff remains bound by the dismissal is not a 'prospective effect' within the meaning of rule 60(b)(5) any more than if plaintiff were continuing to feel

[3] The Bakers agree that review of case law under the analogous federal rule is appropriate. Appellant's Brief, at 12.

the effects of a money judgment against him.").

The Bakers argue that the trial court's judgment dismissing their claims has "prospective application" because it "affects the Bakers' rights relating to the ongoing foreclosure proceedings, such as a suit to challenge an illegal foreclosure." Appellant's Brief, at 11. The construction sought by the Bakers has been rejected because the construction "apparently is to the effect that a judgment has prospective effect so long as the parties are bound by it, would read the word 'prospective' out of the rule." *Maraziti*, 52 F.3d at 254 (quoting *Schwartz v. United States*, 976 F.2d 213, 218 (4th Cir. 1992)). The judgment is no more prospective than any other judgment dismissing a claim or awarding a money judgment.

While the Bakers are correct that the Supreme Court has held that "changed circumstances" may warrant relief under the provision, the party seeking relief must first establish the threshold requirement that the judgment is prospective, i.e., that the "prospective application" portion of the statute even applies.[4] The Bakers cannot do so here. WASH. R. CIV. P. 60(b)(6) does not apply because the judgment in this case does not have

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[4] Each of the Supreme Court cases cited by the Bakers dealt with prospective relief. *Horne v. Flores*, 557 U.S. 433, 129 S. Ct. 2579, 174 L. Ed. 2d 406 (2009); *Rugo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384, 112 S. Ct. 748, 116 L. Ed. 2d 867 (1992); *Agostini v. Felton*, 521 U.S. 203, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997) (permanent injunction).

prospective application.

B. The Bakers are not entitled to relief under WASH. R. CIV. P. 60(b)(11) because issuance of the *Jesinoski* decision does not constitute extraordinary circumstances.

Denial also was proper under WASH. R. CIV. P. 60(b)(11), a catch-all provision that authorizes a judgment to be vacated "for any other reason justifying relief." This subsection is limited in application. WASH. R. CIV. P. 60(b)(11) operates in "unusual situations which typically involve reliance on mistaken information." *In re Marriage of Tang*, 57 Wn. App. 656, 789 P.2d 118 (1990) (citing *In re Adoption of Henderson*, 97 Wn.2d 356, 359-60, 644 P.2d 1178 (1982)). Irregularities that are extraneous to the court's action or that involve substantial deviations from a proscribed rule or mode of proceeding justify vacation under WASH. R. CIV. P. 60(b)(11), whereas errors of law do not. *In re Marriage of Furrow*, 115 Wn. App. 661, 674, 63 P.3d 821 (2003). Errors of law must be raised directly on appeal. *Ghebrehriorghis v. Dep't of Labor*, 92 Wn. App. 567, 962 P.2d 829 (1998). A subsequent change in the law, with no additional extraordinary circumstances, does not support relief. *Columbia Rentals, Inc. v. Washington*, 89 Wn.2d 819, 576 P.2d 62 (1978).

The Bakers failed to appeal the alleged error of law regarding the trial court's application of the time-bar. WASH. R. CIV. P. 60(b)(11) does not support collateral attack years later based on an error of law

established through a change in the law. The Bakers cannot show that the trial court abused its discretion when it denied CR 60(b)(11) relief.

1. Washington courts do not allow relief from judgment after a change in law absent extraordinary circumstances.

Washington courts have rejected parties' attempts to utilize WASH. R. CIV. P. 60(b)(11) as a means to reverse a judgment due to a subsequent change in the law where additional extraordinary circumstances were not present. *Pac. Tel. & Tel. Co. v. Henneford*, 199 Wash. 462, 92 P.2d 214 (1939); *In re Marriage of Brown*, 98 Wn.2d 46, 653 P.2d 602 (1982); *Lynn v. Labor & Indust.*, 130 Wn. App. 829, 837, 125 P.3d 202 (2005).

In *Columbia Rentals, Inc. v. Washington*, the Supreme Court considered whether to reopen a number of quiet title actions based on a Washington Supreme Court case that had been reversed by the United States Supreme Court. 89 Wn.2d 819. The varying rules of law between the overruled Washington decision and the Supreme Court decision created a "checkerboard pattern of [property] ownership." *Id.* at 820. Despite this disparate result, the Washington Supreme Court refused to alter the judgments based in the change in the law. "If prior judgments could be modified to conform with subsequent changes in judicial interpretations, we might never see the end of litigation." *Id.* at 823.

2. Cases under the USFSPA present extraordinary circumstances not present here.

Washington courts have found extraordinary circumstances under WASH. R. CIV. P. 60(b)(11) arising from a change of one unique law—the Uniformed Services Former Spouses Protection Act ("USFSPA"). The cases cited by the Bakers for the proposition that a change in law warrants relief from judgment are cases under this statutory scheme. Appellant's Brief, at 12-13. These USFSPA cases demonstrate extraordinary circumstances that are not present in this case.

Prior to 1981, it was established in Washington that military pensions were community property that could be divided upon dissolution of the marriage. *In re Marriage of Giroux*, 41 Wn. App. 315, 318, 704 P.2d 160 (1985). In 1981, the United States Supreme Court issued a decision in *McCarty v. McCarty*, holding that federal law prohibited state courts from dividing military retirement pay pursuant to community property laws. *Id.* at 317. Soon after, in direct response to *McCarty*, the President signed the USFSPA, which "permits state courts to treat military retired pay payable for periods after June 25, 1981, as community property." *Id.* Congress specifically intended the statute to be retroactively applied. *Id.* at 318-19.

In light of the clear direction from Congress to apply the

provisions of the USFSPA retroactively to benefit those individuals whose cases were decided in the interim period between *McCarty* and the enactment of the USFSPA, this Court utilized WASH. R. CIV. P. 60(b)(11) to provide those spouses relief from judgment. *In re the Marriage of Flannagan*, 42 Wn. App. 214, 709 P.2d 1247 (1985). Even with Congress's clear direction, this Court stepped carefully before holding that WASH. R. CIV. P. 60(b)(11) applied. Division II found that the cases after the adoption of the USFSPA presented no less than four unusual circumstances that combined to show extraordinary circumstances, as follows:

> First, the clear congressional desire of removing all ill effects of *McCarty*; second, the alacrity with which the Congress moved in passing the USFSPA; third, the anomaly of allowing division of the military retirement pay before *McCarty* and after USFSPA, but not during the 20-month period in between; and fourth, the limited number of decrees that were final and not appealed during that period.

Id. at 222. Due to these extraordinary circumstances, relief was appropriate, but the decision "emphasize[d] the limited nature of this exception. Allowing reopening in these cases will not provide a springboard for attacks on all other final judgments." *Id.*

The extraordinary circumstances presented in the cases under the USFSPA are not present here. In fact, this case can be categorized as a run-of-the-mill request for relief from judgment. While the USFSPA

cases presented clear Congressional direction dictating a retroactive application of the law, there are no similar directions under the *Jesinoski* case. That case is a resolution of a circuit split, which does not present extraordinary circumstances. *See U.S. ex rel. Garibaldi v. Orleans Parish School Bd.*, 397 F.3d 334 (5th Cir. 2005). In *Garibaldi* the Fifth Circuit noted that "[a]fter almost every resolution of a circuit conflict there is a losing litigant somewhere who could argue similarly for reopening his case because it was decided erroneously in light of the subsequent Supreme Court decision. . . ." *Id.* at 338. The Fifth Circuit concluded that the common situation of a resolution of a circuit conflict, without anything more exceptional, does warrant relief. *Id.*

Marriage of Flannagan and *Garibaldi* support the trial court's conclusion that "Plaintiffs have not established extraordinary circumstances warranting relief from the judgment." (CP 160). The trial court did not abuse its discretion and the Order Denying the Motion for Relief should be affirmed.

3. Federal courts have similarly required extraordinary circumstances before finding that a change in law warrants relief.

Numerous federal courts have similarly refused to apply FED. R. CIV. P. 60(b)(6), the analogous catch-all provision under the Federal Rules, when there is a subsequent change in law. "It is well established

that a change in decisional law is not, by itself, an 'extraordinary circumstance' meriting Rule 60(b)(6) relief." *Blue Diamond Coal Co. v. Trustees of the UMWA Combined Benefit Fund*, 249 F.3d 519, 524 (6th Cir. 2001); *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir. 1990) ("[a] change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone grounds for relief from a final judgment.").

For instance, in the case *Title v. United States*, the citizenship of the appellant was revoked, despite the fact that the United States had failed to file an affidavit of good cause with its Complaint in the denaturalization proceeding. 263 F.2d 28 (9th Cir. 1959). When a subsequent United States Supreme Court decision came down, indicating that the affidavit was a procedural prerequisite to a denaturalization suit, the appellant sought relief from the judgment under FED. R. CIV. P. 60. The Ninth Circuit Court of Appeals affirmed the district court's denial of his motion. "Rule 60(b) was not intended to provide relief for error on the part of the court or to afford a substitute for appeal. Nor is a change in the judicial view of applicable law after a final judgment sufficient basis for vacating such a judgment entered before announcement of the change." *Id.* at 31. The Court made this determination despite the seriousness of the issue at stake in that case: an individual's right to citizenship. Many other

federal courts have reached similar determinations and have rejected attempts to reopen judgments due to a subsequent change in law,[5] even where a law was invalidated on constitutional grounds. *See Blue Diamond*, 249 F.3d at 524 (citing *Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 748-49 (5th Cir. 1995) ("Changes in decisional law based on constitutional principles are not of themselves extraordinary circumstances sufficient to justify Rule 60(b)(6) relief."); *Collins v. City of Wichita*, 254 F.2d 837, 838-39 (2d Cir. 1958) (holding invalidation by the United States Supreme Court of Kansas statute that was basis of previous final judgment insufficient to establish "extraordinary circumstances" to merit Rule 60(b)(6) relief)).

The Bakers admit that in order to be entitled to relief, the proper inquiry is whether or not they have presented "extraordinary circumstances" in addition to a change in decisional law. Appellant's Brief, at 14. They argue that the following facts constitute "extraordinary circumstances" warranting relief under the Ninth Circuit case *Phelps v. Alameda*, 569 F.3d 1120 (9th Cir. 2009): (1) the facts of *Jesinoski* and the

[5] *See Blue Diamond*, 249 F.3d at 524 (citing *Agostini v. Felton*, 521 U.S. 203, 239, 138 L. Ed. 2d 391, 117 S. Ct. 1997 (1997) ("Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6) . . . ."); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628-29 (7th Cir. 1997); *Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754, 757 (2d Cir. 1986); *Berryhill v. United States*, 199 F.2d 217, 219 (6th Cir. 1952)).

Bakers' case are similar; (2) the Bakers did not delay in bringing their suit after *Jesinoski* was decided; (3) the parties are in the same position as when the judgment was entered; and (4) the law was not "changed," but clarified. Appellant's Brief, at 14-15. This is wrong. The comparison to the facts of *Phelps* does not hold up.

In *Phelps v. Alameda*, the Ninth Circuit examined six factors to determine if extraordinary circumstances warranting Rule 60(b)(6) relief were present. *Phelps*, 569 F.3d at 1137-40.[6] The factors were as follows: (1) nature of the intervening change in law; (2) petitioner's exercise of diligence in pursuing the issue during the underlying proceedings; (3) whether interests of finality are implicated; (4) delay between the finality of the judgment and the motion for Rule 60(b)(6) relief; (5) the degree of connection between the cases; and (6) interests of comity.[7] *Id.*

Applying these factors to the instant case reveals that relief from judgment is not warranted. Taking the factors out of order, the Bakers first argue regarding the fifth factor that relief is warranted because the facts of their case and *Jesinoski* are similar. But the *Phelps* court did not consider similarity of fact patterns, looking instead at the connection between the

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[6] The court cautioned that these rules should not be taken as an exhaustive or mechanical list of considerations. 569 F.3d at 1141.

[7] This last primarily concerns habeas corpus actions, like in *Phelps*. *Phelps*, 569 F.3d at 1139-40.

case relied upon for the original decision, and the case overturning, or clarifying, it. In this case, the Court would look at the connection between *Mc'Omie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325 (9th Cir. 2003), the case relied upon for the original decision, and *Jesinoski*. In *Phelps*, the court noted that the "the intervening change in the law directly overruled the decision for which reconsideration [had been] sought." *Lopez v. Ryan*, 678 F.3d 1131 (9th Cir. 2012) (citing *Phelps*). No similar connection is present here because neither the Bakers' case nor *Mc'Omie-Gray* were reviewed or referenced in any way by *Jesinoski*. *See Ritter v. Smith*, 811 F.2d 1398, 1402 (11th Cir. 1987) (cases closely related because the Supreme Court granted certiorari in the *Ex Parte Baldwin* case, 456 So.2d 129 (Ala. 1984), for the express purpose of resolving the dispute between *Ritter* and *Baldwin*).

Next, addressing the second *Phelps* factor, the Bakers point out that they quickly filed their motion after *Jesinoski* was decided. Appellant's Brief, at 15. This is not the type of diligence considered by the *Phelps* court. The *Phelps* court looked at the degree of diligence the petitioner used in pursuing the issue in the underlying proceeding. *Id.* at 1136. In this case, the Bakers were not diligent. After the trial court granted PennyMac's motion for summary judgment, the Bakers did not file a motion for reconsideration and did not file an appeal. (CP 117). *See*

Gonzelez v. Crosby, 545 U.S. 524, 535, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005) (explaining that the petitioner's failure to appeal or seek rehearing and point out the circuit split demonstrated a lack of diligence confirming no extraordinary circumstances justifying relief). The *Phelps* court also considered the length of time between the final decision and the CR 60 motion. In the case at bar, the two year length of time is significant, weighing against relief.[8]

Addressing the third *Phelps* factor, the Bakers claim that the interests of finality will not be implicated if the court grants relief under WASH. R. CIV. P. 60, because they are still in possession of their property. Appellant's Brief, at 15. This is untrue, and perhaps the result of a failure to update their brief after the foreclosure sale occurred. The Bakers admit that the property was sold in a trustee's sale on June 25, 2015. Appellant's Brief, at 9. The property is now in the possession of a third-party purchaser. Rootjes Decl., Exh. A. Interests of finality instead are critical here and warrant protection of the interests of PennyMac, Northwest Trustee, and the third-party purchaser of the property.

Finally, the Bakers address the first *Phelps* factor by arguing that the nature of the change in law warrants relief. *Phelps* differentiated

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[8] The final decision was handed down November 27, 2012 (CP 6-7), while the CR 60 motion was not brought until February 11, 2015. (CP 98-114).

between a "change in law . . . upset[ting] or overturn[ing] a settled legal principle" and a decision that resolved a question of law that was previously unsettled. Appellant's Brief, at 14 (citing *Phelps*, at 569 F.3d 1136). Under *Phelps*, while the second of these scenarios might warrant relief from judgment, the first would not. At places in their briefing, the Bakers try to analogize the change in law here to the second scenario, contending that "the Supreme Court did not make a change in the [law] [sic] but held that the existing Truth-In-Lending Act rescission statute permitted rescission by merely sending the notice." Appellant's Brief, at 14. Their contention fails. Resolution of the circuit split overturned a settled legal principle in the Ninth Circuit, demonstrating that this case falls within the first scenario that does not warrant relief.

In *Gonzales v. Crosby*, relied upon heavily by the Ninth Circuit Court of Appeals in *Phelps*, the Supreme Court stated that its resolution of a circuit split works a change in the law and does not constitute a clarification of an unsettled area, as follows:

> Petitioner contends that *Artuz*'s change in the interpretation of the AEDPA statute of limitations [is an extraordinary circumstance.] We do not agree. The District Court's interpretation was by all appearances correct under the Eleventh Circuit's then prevailing interpretation . . . . It is hardly extraordinary that subsequently, after petitioner's case was no longer pending, this Court arrived at a different interpretation.

Gonzelez, 545 U.S. at 536.

Like in the *Gonzalez* case, the Supreme Court's ruling in *Jesinoski* resolved a clear split between the federal circuits. The Bakers admit that the trial court's decision in this case was by all appearances correct under the Ninth Circuit's then controlling opinion, *Mc'Omie-Gray v. Bank of Am. Home Loans*, 667 F.3d 1325 (9th Cir. 2003). Appellant's Brief, at 22. Jesinoski's resolution of the circuit split worked a "change in law" of the type that *Phelps* explained would not warrant Rule 60(b) relief.

The Bakers have not established extraordinary circumstances warranting relief under the factors set forth in *Phelps* or under any other standard. The fact that a money judgment was awarded to PennyMac does not warrant relief from the judgment under WASH. R. CIV. P. 60. *In re Fine Paper Antitrust Litigation*, 840 F.2d 188, 194 (3d Cir. 1988). Even if the Ninth Circuit *Mc'Omie-Gray* case relied upon by the trial court had been declared unconstitutional, that would not qualify as an extraordinary circumstance. *See Batts v. Tow-Motor Forklift Co.*, 66 F.3d 743, 748-49 (5th Cir. 1995). The fact that a property right is at issue does not qualify as an extraordinary circumstance. *Columbia Rentals Inc. v. Washington*, 89 Wn.2d 819, 576 P.2d 62 (1978). The fact that individuals in a similar circumstance to the Bakers would now be entitled to a different result does not qualify as an extraordinary circumstance. *Id.* No exceptional

circumstances warranting relief exist. The trial court's decision should be affirmed.

C. The Bakers' assertion that PennyMac is not the proper party in interest does not qualify as an extraordinary circumstance warranting relief from the judgment.

1. PennyMac's status as loan servicer was known to the Bakers when they filed their Complaint.

The Bakers are not entitled to relief from the judgment due to circumstances known to them at the time they filed their Complaint. In their CR 60 motion, the Bakers claimed that PennyMac's status as servicer of the loan constituted "extraordinary circumstances" sufficient to warrant relief from judgment. But PennyMac's status as loan servicer was not new information. In their Complaint, the Bakers alleged that PennyMac was not the beneficiary of their loan, and "as a servicer, it cannot prosecute a foreclosure, nor appoint a trustee." (CP 140 at ¶ 3.46).

The Bakers failed then and now to articulate why information known to them at the pleading and summary judgment stage would warrant relief from judgment years later. *See Vance v. Thurston County Comm'rs*, 117 Wn. App. 660, 671, 71 P.3d 680 (2003) (documents the county had previously provided were not newly discovered evidence supporting relief from judgment). If the Bakers believed that the entry of judgment in favor of PennyMac, as servicer, was an error of law, their

remedy was to appeal the trial court's original ruling. *Ghebrehriorghis*, 92 Wn. App. at 567; *see also Bjurstrom v. Campbell*, 27 Wn. App. 449, 618 P.2d 533 (1980). They did not. Relief from judgment was not warranted on this ground.

2. PennyMac is a real party in interest because the Bakers' claims related to PennyMac's purported wrongdoing.

The Bakers further claimed that granting them relief from the judgment in PennyMac's favor was warranted because PennyMac, as loan servicer, was not the proper party-in-interest to the litigation. The Bakers' arguments are unfounded. In their Complaint, the Bakers alleged wrongdoing directly by PennyMac through numerous actions PennyMac allegedly took.[9] These allegations, which the Bakers utterly failed to prove in the underlying litigation, were all against and pertained to PennyMac's alleged conduct. The Bakers' current assertion that PennyMac was not the proper party to the lawsuit is simply revisionist history. The Court properly ruled on summary judgment that the Bakers "failed to identify facts or disputed facts which would establish their claim" against PennyMac (CP 6-7).

[9] CP 135 at ¶ 3.20 and 5.5; CP 136 at ¶ 3.21; CP 140 at ¶ 4.1; CP 141 at ¶ 5.2.

D. Interests of finality support affirmance of the trial court's denial of relief from the judgment.

The Bakers next argue that extraordinary circumstances exist because "relief from the judgment" does not affect interests of finality. The Bakers allege that the underlying judgment in this case was not final because they still remain in possession of the property and the nonjudicial foreclosure of their property has not yet been completed. Appellant's Brief, at 18.

As already discussed, this is no longer true, which the Bakers admit elsewhere in their brief. *See* Appellant's Brief, at 9. This portion of the Bakers' argument is therefore moot and should be disregarded.

"It must be remembered that one of the most important services the courts provide is to bring legal disputes to an end." *Genie Indus., Inc. v. Mkt. Transp., Ltd.*, 138 Wn. App. 694, 715, 158 P.3d 1217 (2007). "The finality of the determination serves the interests of society as well as those of the parties by bringing an end to litigation on the claim." *Columbia Rentals, Inc.*, 89 Wn.2d at 821. "[I]n the conflict between the principles of finality in judgments and the validity of judgments, modern judicial development has been to favor finality rather than validity." *In re Marriage of Brown*, 98 Wn.2d at 49.

A judgment on the merits issued by a trial court that resolves all claims and defenses asserted by the parties to the litigation is considered a

final judgment. *Nelson v. Spanaway Gen. Med. Clinic*, 135 Wn.2d 255, 264, 956 P.2d 312 (1998). There is no dispute that the "Final Judgment and Order" in this case was a final judgment subject to appeal under RAP 2.2. (CP 8). This situation is therefore unlike those cases cited by the Bakers where claims or appeals were pending when post-judgment relief was sought. *See* Appellant's Brief, at 19. Both PennyMac and the third-party purchaser of the property at the foreclosure sale are entitled to benefit from the finality of the judgment entered by the Court. Contrary to the Bakers' argument, interests of finality are present and significant and support the trial court's decision.

E. Equitable concerns support affirmance of the trial court's denial of relief from the judgment.

Finally, the Bakers attempt to utilize a general call to "equity" to circumvent the established boundaries of relief under CR 60(b)(11). But federal and state case law clearly provide that a change in law does not warrant relief from a judgment absent extraordinary circumstances, which the Bakers have not proven. This alone supports affirmance. On appellate review, moreover, the Bakers cannot establish an abuse of discretion by asserting that equitable relief was obligatory. Even assuming a court could have gone against the weight of authority to grant equitable relief in these circumstances, it was not required to do so. Denial of the motion was within the bounds of the trial court's discretion. This Court does not

weigh the equities anew.

The Bakers' tale is not compelling on its face in any event. The equities weigh in favor of the denial of their motion. A final order and judgment were entered in PennyMac's favor. The Bakers failed to appeal that adverse ruling, which is a factor cutting against relief in the very *Phelps* test on which the Bakers have attempted to rely. No facts show that the Bakers were prevented by "circumstances beyond their control" from taking "timely action to protect their interest," as they assert without factual support. Appellant's Brief, at 20. The Bakers could have appealed, citing the circuit split that was then evident, or the other grounds for relief that they now assert. They chose not to. Equity does not protect those who sleep on their rights. *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835 (9th Cir. 2002) (discussing laches).

The Bakers' arguments regarding the status of the property no longer apply in light of the completed nonjudicial foreclosure sale. Assertions of "equity" did not require that the trial court grant the Bakers' motion then, and do not require reversal now. The finality of the judgment and the status quo relied upon by PennyMac, Northwest Trustee, and the third-party purchaser should be preserved.

VI. CONCLUSION

The Bakers have failed to present extraordinary circumstances

warranting relief from the judgment. A change in decisional law, without additional extraordinary circumstances, is not enough to warrant relief under WASH. R. CIV. P. 60(b). Those Washington cases that have permitted such relief have only done so under the USFSPA and the special circumstances presented by that statute, which are not present here. None of the *Phelps* factors cited by the Bakers—diligence, finality, connection between the cases, and the nature of the change in law—actually warrant relief in this case. The fact that PennyMac is the servicer of the loan does not warrant relief from judgment when these facts were known to the Bakers at the pleading and summary judgment stage.

No abuse of discretion is shown. Numerous precedents support the trial court action. The Bakers failed to appeal the final judgment against them, and the property has now been sold to a third party. The judgment should not be disturbed two years later. This Court should affirm.

Respectfully submitted on this 20th day of August, 2015.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct: That on the 20th day of August, 2015, I arranged for service *via* U.S. Mail of the foregoing RESPONDENT'S BRIEF to the parties to this action as follows:

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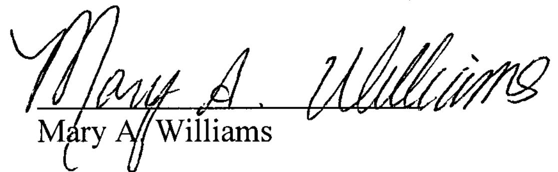

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