No. 95654-5

SUPREME COURT
OF THE STATE OF WASHINGTON

MICHELLE MERCERI, Petitioner,

v.

DEUTSCHE BANK AG a/k/a DEUTSCHE BANK doing business in the United States as DEUTSCHE BANK USA, and as DEUTSCHE BANK NATIONAL TRUST COMPANY, a national banking association, as trustee for holders of the BCAP LLC Trust 2007-AA2, Respondent

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PETITIONER MICHELLE MERCERI'S CONSOLIDATED ANSWER TO AMICI BRIEFS IN SUPPORT OF PETITION FOR REVIEW TO THE SUPREME COURT

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I. Introduction

In response to and in support of the amicus curiae briefs of Northwest Justice Project ("NJP"), Pacific Coast Construction, L.L.C. et al ("Pacific Coast"), and the National Association of Consumer Bankruptcy Attorneys/National Consumer Bankruptcy Rights Center ("NACBA"), Petitioner Michelle Merceri answers that the three amici curiae motions and briefing further establish substantial public interest for accepting review under RAP 13.4(b)(4). The amici briefs further demonstrate that review should also be accepted under RAP 13.4(b)(1) and RAP 13.4(b)(2), particularly as to (1) whether the trial court correctly determined that Deutsche Bank was not entitled to tolling for the liftable automatic bankruptcy stay, and (2) whether the trial court correctly determined that Deutsche Bank was not entitled to tolling for its nonjudicial foreclosure attempts.

II. Argument

A. The three amici motions and briefing further establish the substantial public interest in this case, warranting Supreme Court review under RAP 13.4(b)(4).

The amici curiae submissions by NJP, NACBA, and Pacific Coast further establish that there is substantial public interest to warrant Supreme Court review under RAP 13.4(b)(4). NJP and NACBA serve and represent homeowners and bankruptcy debtors in Washington and across the country.

See amici curiae motions. Pacific Coast is similarly situated, representing bankruptcy debtors with a case working its way up through Division Two.[1] *Id. See,* e.g., *Grant County Fire Prat. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 803, 83 P.3d 419 (2004) (RAP 13.4(b)(4) is met when a decision "immediately affects significant segments of the population, and has a direct bearing on commerce, finance, labor, industry, or agriculture.") The amici amplify the substantial public interest reason to grant review under RAP 13.4(b)(4).

B. Division One's opinion conflicts with Supreme Court precedent on the statutes of limitation and tolling, warranting Supreme Court review under RAP 13.4(b)(1).

The interplay of the state statutes and the bankruptcy statutes (i.e. statutory interpretation) was the basis of the trial court's certified question:

> Even though 11 U.S.C. 108 does not, itself, toll a state statute of limitations, is RCW 4.16.230 a state statute incorporated into section 108(c)(1) to toll the statute of limitations during a bankruptcy stay? Cf. Hazel v. Van Beek, 135 Wn.2d 45, 64-66, 954 P.2d 1301 (1998).

CP 732. Division One did not properly analyze this certified question. Division One failed to apply the plain language of the tolling statute (RCW 4.16.230), the state limitations recognition statute (11 USC § 108(c)(1)),

[1] Merceri's counsel have been contacted by other similarly situated plaintiffs. *See*, e.g., *CitiMortgage Inc. v. Moseley*, Case No., 50895-8-II, currently in the appellate briefing phase.

and the automatic stay statute (11 USC § 362). It failed to apply Supreme Court precedent analyzing RCW 4.16.230, with its "prohibition" and "commencement of an action" language, as well as the history of the opinions applying the statute of limitations and tolling in Washington. *See*, e.g., *Inland Empire Dry Wall Supply Co. v. Western Surety Co*., 189 Wn.2d 840, 408 P.3d 691 (2018); *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 311, 268 P.3d 892 (2011) (internal citations omitted.) *See also Durant v. State Farm Mut. Auto. Ins. Co.*, __ Wn.2d __, __ P.3d __ (June 7, 2018), in which this Court, on a question certified by the federal district court, again reiterated that a "court's fundamental objective in determining what a statute means is to ascertain and carry out the legislature's intent" and to "construe[ ] the act as a whole, giving effect to all of the language used." *Durant*, slip op. at 5.

Deutsche Bank never explains why it never proceeded with judicial enforcement of its deed of trust within six years and why it never proceeded against the codebtor, Jones, who did not file bankruptcy. *See* Deutsche Bank COA opening brief at 3-5. *United States v. Dos Cabezas Corp*., 995 F.2d 1486 (9th Cir. 1993) (automatic stay did not toll the limitations as to non-bankruptcy codebtors; action for deficiency judgment against codebtors was time-barred because the "Bankruptcy Code gives creditors a means of obtaining relief when the automatic stay leaves their interests inadequately

protected.") *Dos Cabezas* at 1492. It is undisputed that Deutsche Bank failed to proceed, failed to lift the removable bankruptcy stay, and failed to judicially foreclose until years after the six-year statute of limitations had already run.

And, unfortunately, Division One never analyzed the plain language of § 362 (d)(2)'s "walk" provision. Deutsche Bank never "pushed the button" to continue its nonjudicial foreclosure. Division One focused only on the temporary "don't walk" provision of § 362(a), inexplicably rewarding Deutsche Bank for standing idle on the sidewalk in bankruptcy court for over two years, and then standing idle for years after the bankruptcy stay had concluded.

The Pacific Coast amicus brief provides additional Supreme Court authority demonstrating Division One's conflict with Supreme Court decisions rigorously enforcing the statute of limitations and refusing to allow parties to manipulate those statutes. *See*, e.g., *Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969), superseded by statute RCW 4.16.350, as recognized in *Winbun v. Moore*, 143 Wn.2d 206, 214 n.3, 18 P.3d 576 (2001); *Summerrise v. Stephens*, 75 Wn.2d 808, 454 P.2d 224 (1969) (refusing to grant tolling under RCW 4.16 because plaintiff could have served the out-of-state defendant, but chose not to); *Bilanko v. Barclay Court Owners Ass'n*, 185 Wn.2d 443, 451, 375 P.3d 591, 595 (2016)

(*quoting Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 651, 310 P.3d 804 (2013) (statutory time bar is a "legislative declaration of public policy which the courts can do no less than respect," with rare equitable exceptions). *See also Board of Regents v. Tomanio, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980)*); *Aslanidis v. United States Lines*, 7 F.3d 1067, 1073 (2nd Cir. 1993) (in bankruptcy, "parties have more certain knowledge of when claims will expire, and the potential claims period is not unduly extended because of the length - which may be great in complex cases - of the bankruptcy proceedings.").

The Supreme Court authority applies equally to deny Deutsche Bank's claimed *additional* 840 days of tolling for its nonjudicial foreclosure attempts. Division One failed to consider this issue, and in its recent unpublished opinions on the subject did not conduct the required statutory analysis of the tolling statute, RCW 4.16.230, or apply Supreme Court precedent regarding the statute of limitations and tolling. *See Heintz v. U.S. Bank*, No. 76297-4-I, slip op. at 5-6 (Div. 1, Jan. 16, 2018) (unpublished, *review denied* on other grounds May 1, 2018, No. 95484-4); *Erickson v. America's Wholesale Lender*, No. 77742-4-I, 2018 Wn.App. LEXIS 811, at *10 (Div. 1 Apr. 16, 2018) (unpublished) Review of this nonjudicial foreclosure tolling issue is appropriate under RAP 13.7(b), RAP 2.5(a), RAP 13.4(b)(1) and RAP 13.4(b)(2). *See* Merceri's reply in support of

petition for review, section IV(B).

This Division One conflict with Supreme Court authority and the need for proper statutory analysis are important grounds to accept review under RAP 13.4(b)(1)

C. Division One's opinion conflicts with other published Court of Appeals opinions, warranting Supreme Court review under RAP 13.4(b)(2).

The Pacific Coast amicus brief also correctly addresses the conflict between Division One's opinion and Division Three's long-standing decision in *Walcker v. Benson & McLaughlin*, 79 Wn. App. 739, 904 P.2d 1176 (1995) *review denied* 129 Wn.2d 1008 (1996), applying the Outlawed Mortgage Statute, RCW 7.28.300, (rejecting creditors' attempts to change state policy to allow them an indefinite time to foreclose deeds of trust.) Division One did not look to "the purposes and policies of statutes of limitation," as the *Walcker* court did, applying *Stenberg v. Pacific Power & Light Co*., 104 Wn.2d 710, 714, 709 P.2d 793 (1985). Review is appropriate under RAP 13.4(b)(2) (conflicting Court of Appeals decisions).

The plain language "commencement of an action" issue is at the center of the trial court's certified question, which focuses on the interplay between RCW 4.16.230[2] and two federal bankruptcy statutes. Petition for

[2] **RCW 4.16.230 Statute tolled by judicial proceedings.** When the *commencement of an action* is stayed by injunction or a statutory prohibition, the time of the continuance of

review at 4, 8-9.

In its opposition to NJP's and NACBA's amicus motions and in its motion to extend time, Deutsche Bank claimed that NJP's "commencement of an action" definition under RCW 4.16.230 is the first time that the issue has been raised in this case, ignoring the certified question and the required plain language analysis of RCW 4.16.230, and ignoring its own statements to the trial court and the Court of Appeals where Deutsche Bank repeatedly claimed it had "commenced" an action before bankruptcy or "recommenced" an "action" after bankruptcy. Deutsche Bank wrote:

> On January 20, 2014, the successor trustee issued a new notice of default, *re-commencing* Deutsche's non-judicial foreclosure of the defaulted loan."

Deutsche Bank COA Opening Br. at 7 (emphasis added).

> Here, Deutsche was prohibited from *continuing* with, or *re-commencing* its foreclosure for over two years because Merceri sought and received the protection of the automatic stay in bankruptcy."

Id. at 23 (emphasis added); *see also id.* at 40-41. Contrary to its claim that this is a new issue, Deutsche Bank carried its "commencement" argument through to its answer to the petition for review, stating: "In January 2014, a new foreclosure was *commenced*." Deutsche Bank answer to petition for review at 5, ln. 1 (emphasis added). Deutsche Bank's claim that

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the injunction or prohibition shall not be a part of the time limited for the *commencement of the action.* (Italics emphasis added.)

"commencement" is a new issue is patently false.

NJP and NACBA cite additional authority construing "commencement" of an "action" in another context to aid this Court's application of RCW 4.16.230 to the facts in this case, specifically whether and when Deutsche Bank "commenced" an "action" prior to bankruptcy, and thus whether RCW 4.16.230 has any application. (Merceri has argued that RCW 4.16.230 does not apply to the *continuation* of an action. *See*, e.g., petition for review at 4, 8 9).

Deutsche Bank's claim that this court may not consider appellate authority discussing "commencement" of a nonjudicial foreclosure, while considering the plain "commencement" language of RCW 4.16.230, is ludicrous. It is appropriate for NJP and NACBA to cite published Washington authority where Division One analogized the "commencement" of a nonjudicial foreclosure regarding affirmative defenses, e.g., *Olsen v. Pesarik*, 118 Wn.App. 688, 77 P.3d 385 (2003).

NJP's and NACBA's concern about different statutes of limitations for different foreclosure remedies is well-founded. Not only did Division One's opinion undermine statutes of limitations and tolling statutes and conflict with long-standing Court of Appeals authority in *Walcker*, *supra*, but the Court of Appeals, in *Edmundson v. Bank of America, NA*, 194 Wn.App. 920, 378 P.3d 273 (2016), suggested that a nonjudicial foreclosure

remedy has its own statute of limitations: "As an agreement in writing, the deed of trust foreclosure *remedy* is subject to a six-year statute of limitations." *Edmundson* at 927 (emphasis added). It is not the *remedy* in the deed of trust that is addressed in RCW 4.16.040. It is the *cause of action* to enforce the written agreement that is addressed.[3] It is the accrual date of the *cause of action* which starts the statute of limitations; and an "action" must be "commenced" before the six-year statute of limitations expires.[4] *Walcker* held that:

> The plain language of RCW 61.24.020 states that, "[e]xcept as provided" in the deed of trust act, mortgage law applies to foreclosure of deeds of trust. The act does not address the applicability of statutes of limitations. Therefore, RCW 7.28.300, which expressly makes the statute of limitations a defense in mortgage foreclosure proceedings, applies to foreclosure of trust deeds as well. Because Benson and McLaughlin failed to initiate its foreclosure within the applicable six-year limitation period, the foreclosure should be barred.

Walcker at 746, *citing Chatos v. Levas*, 14 Wn.2d 317, 321, 128 P.2d 284 (1942). So perhaps it is more precise to say that the six-year statute of limitations applies to attempts to enforce the promissory note, regardless of

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[3] **RCW 4.16.040 Actions limited to six years**. The following *actions* shall be *commenced* within six years: (1) An *action* upon a contract in writing, or liability express or implied arising out of a written agreement, except as provided for in RCW 64.04.007(2). . . . (Italics emphasis supplied.)

[4] **RCW 4.16.005 Commencement of actions.** Except as otherwise provided in this chapter, and except when in special cases a different limitation is prescribed by a statute not contained in this chapter, *actions* can only be *commenced* within the periods provided in this chapter after the *cause of action* has accrued. (Italics emphasis supplied.)

whether an attempted foreclosure (utilizing the power of sale in the deed of trust to enforce the promissory note) is judicial or nonjudicial.

Review is appropriate under RAP 13.4(b)(2) (conflicting Court of Appeals decisions).

III. Conclusion

Division One's Deutsche Bank decision upsets the statute of limitations and tolling world in Washington. Review should be accepted to correct Division One's fundamental misunderstanding, which conflicts with well-settled Washington law. The Pacific Coast, NJP, and NACBA amici establish that there is a substantial public interest in this case, and they correctly argue that Division One's opinion conflicts with Supreme Court and Court of Appeals authority, for which review should be granted under RAP 13.4(b)(1), RAP 13.4(b)(2), and RAP 13.4(b)(4).

Respectfully submitted this June 25, 2018.

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CERTIFICATE OF SERVICE

I certify that on June 25, 2018, a copy of the foregoing Petition for Review was served at the indicated address by:

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