

No. 71634-4-I
DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

U.S. BANK, NA, and its successors-in-interest and assigns
Plaintiff-Respondent

vs.

MICHAEL HARKEY;
Defendant-Appellant;

Unknown Spouse or Domestic Partner of Michael E. Harkey; Occupants
of the premises; and any persons or parties claiming to have any right,
title, estate, lien or interest in the real property described in the complaint,

Defendants.

ON APPEAL FROM ISLAND COUNTY SUPERIOR COURT
CASE NO. 10-2-00558-1

RESPONDENT'S BRIEF

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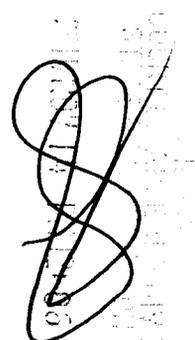
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I. INTRODUCTION

Defendant-Appellant Michael Harkey's property was nonjudicially foreclosed in December 2008. Harkey never sought to enjoin the trustee's sale before it was conducted. Harkey never challenged the sale until May 2011, when he appeared in this quiet-title action and moved to vacate a default judgment that had been entered against him earlier that month. After that motion was denied, Harkey renewed his motion to vacate on at least four more occasions. At no time did he demonstrate the four elements necessary to vacate a default judgment.

Harkey finally filed a notice of appeal in March 2014. The notice was untimely as to all but two orders of reconsideration listed in his notice. His brief to this Court fails to address the four prerequisites for vacating a default judgment; his proffered defenses are time-barred; and the relief he seeks is prohibited by statute. Harkey's appeal should be dismissed or, alternatively, denied.

II. STATEMENT OF ISSUES

1. Should Harkey's appeal be dismissed when it was filed more than three years after entry of final judgment and he never submitted a timely motion under CR 59?

2. Did the Superior Court act within its scope of discretion in denying Harkey's repeated motions to vacate a default judgment when he never presented evidence of excusable neglect and due diligence?

3. Did the Superior Court act within its scope of discretion in denying Harkey's repeated motions to vacate a default judgment when his proffered defenses were all barred by RCW 61.24.127?

4. Is the Deed of Trust Act (RCW Chapter 61.24) a constitutional exercise of the Legislature's powers?

III. STATEMENT OF THE CASE

In September 2007, Harkey borrowed \$417,000 from Plaintiff-Respondent US Bank, NA. He granted a deed of trust on property he owned on Camano Island as security for the loan.¹

After just three months, Harkey defaulted on the loan. He admits he did not make the payment due on January 1, 2008, or any payments thereafter.²

US Bank initiated a nonjudicial foreclosure. A Notice of Default was issued on April 30, 2008. The trustee's sale was eventually held on December 8, 2008, after a delay while Harkey filed for bankruptcy and

¹ CP 462-63; *see also* CP 298.

² CP 298.

then had his petition dismissed for failure to file a credit counseling certificate.³ US Bank was the successful bidder and took title to the property by trustee's deed recorded on December 12, 2008, in the Island County Auditor's Office.⁴

In July 2010, US Bank commenced the present action for declaratory relief and to quiet title in Island County Superior Court.⁵ Harkey could not be found for personal service of the summons and complaint; on January 10, 2011, the Superior Court granted US Bank's motion for leave to serve Harkey by publication.⁶ Following completion of publication, the Superior Court entered an order on April 7, 2011, granting US Bank's motion for default against Harkey.⁷ Finally, the Superior Court entered a default judgment on May 3, 2011.⁸ At that point, it had been 2 years, 4 months, and 25 days since the trustee's sale.

On May 31, 2011, Harkey finally appeared in the action by filing a "Motion to Set Aside Default Judgment and to Suspend Its Operation." Harkey's motion was made pursuant to CR 55 and CR 60; it did not seek

³ CP 463-64. Just as he did in the Superior Court here, Harkey filed multiple motions in the U.S. Bankruptcy Court seeking to have the dismissal vacated. *See* CP 414, 415 (Docket Nos. 34, 43).

⁴ CP 464.

⁵ CP 461.

⁶ CP 437-38, 443-58.

⁷ CP 430-31.

⁸ CP 428-29.

relief under CR 59.⁹ The Superior Court denied that motion on June 21, 2011.¹⁰

Harkey filed more papers and motions in the action after June 21, 2011, including three more motions to vacate the default judgment. Harkey has not appealed from the orders denying the motions to vacate, so US Bank will not describe them further.

On October 24, 2013, Harkey filed an “Amended Motion to Vacate Judgment and for Revision of Court Order(s) [sic].”¹¹ This was Harkey’s *fifth* motion to vacate the default judgment. The Superior Court again refused to vacate the 31-month-old judgment by order entered on December 26, 2011.¹²

Harkey filed a motion for reconsideration — his sixth attempt to have the default judgment vacated — on Thursday, January 6, 2014.¹³ This was 11 days after the order denying his motion was entered. The Superior Court denied reconsideration by orders entered on February 4, 2014, and February 19, 2014.¹⁴

⁹ CP 421-26.

¹⁰ CP 382-87.

¹¹ CP 179-235.

¹² CP 101-05.

¹³ CP 61-100.

¹⁴ CP 23-24. Harkey’s Notice of Appeal lists the February 4, 2014, order and attaches a copy that is not from the official court file. See CP 1 (Item No. 6) and CP 18-19. The Clerk’s Papers provided to this Court, however, do not include a copy of the February 4, *(cont’d on following page)*

Harkey finally filed a notice of appeal from the default judgment and other orders on March 4, 2014.¹⁵

IV. ARGUMENT

Harkey's appeal never confronts the substantial procedural flaws to his repeated attempts to vacate the default judgment entered against him. Although the Superior Court expressly noted these as grounds for denying Harkey's motions, Harkey simply ignores them here or dismisses them with conclusory statements and no citations to authority.

Harkey also spends pages describing his proposed defenses to US Bank's quiet-title action. But, he fails to provide any reasoned analysis to explain why those defenses — regardless of whether they are legally cognizable — are not time-barred under RCW 61.24.127. Similarly, he never explains to this Court why he should be allowed to attack the validity of the trustee's sale years after its completion when such relief is expressly prohibited by RCW 61.24.127.

As the following discussion demonstrates, Harkey's appeal is untimely, has conceded key points by his failure to address them, ignores

(footnote cont'd from previous page)
2014, order. In effect, the February 19, 2014, order denying reconsideration superseded the earlier order, as explained in a letter from Hon. Alan R. Hancock. CP 25-26.

¹⁵ CP 1-22.

applicable statutes and rules, and simply ignores controlling legal principles. The Superior Court's judgment and orders should stand.

A. STANDARD OF REVIEW

On an appeal from an order denying a motion to vacate a default judgment under CR 55(c), the Court of Appeals reviews the order for abuse of discretion.¹⁶ The same standard — abuse of discretion — also applies to an appeal from an order made pursuant to CR 60.¹⁷

To the extent that pure questions of law are properly before this Court, its standard of review is *de novo*.¹⁸

B. HARKEY'S APPEAL MUST BE DISMISSED AS UNTIMELY

Harkey failed to file a notice of appeal until 34 months after final judgment was entered against him. His appeal is untimely and must be dismissed.

Generally, a notice of appeal must be filed within the longer of 30 days after: (i) entry of final judgment; or (ii) as relevant here, motions

¹⁶ See *Matia Invest. Fund v. City of Tacoma*, 129 Wn.App. 541, 119 P.3d 391 (2005), *rev'd on other grounds*, *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007).

¹⁷ See *Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380 (2014).

¹⁸ See *West Consultants, Inc. v. Davis*, 177 Wn.App. 33, 38, 310 P.3d 824 (2013).

made pursuant to CR 50(b), CR 52(b), or CR 59.¹⁹ An extension of the deadline will be granted “only in extraordinary circumstances and to prevent a gross miscarriage of justice.”²⁰

Default judgment was entered against Harkey on May 3, 2011.²¹ This constituted a final judgment in the lawsuit, which started the running of Harkey’s time to file a notice of appeal. The time expired on June 2, 2011.

Harkey filed his “Motion to Set Aside Default Judgment and to Suspend Its Operation” on May 31, 2011, 28 days after entry of the final judgment. Harkey’s motion sought relief pursuant to “CR 55(c), 60(b)(7) and (11), and RCW 4.28.200.”²² On its face, then, Harkey’s motion was not one of the motions delineated in RAP 5.2 that will extend the time for a notice of appeal.²³ Neither CR 55 nor CR 60 are designated as motions that will extend the time for filing a notice of appeal. To the contrary, CR

¹⁹ See RAP 5.2(a), (e).

²⁰ RAP 18.8(b). See also RAP 1.2(c) (appellate courts’ power to waive or alter provisions in Rules of Appellate Procedure is “subject to restrictions in rule 18.8(b) and (c)”).

²¹ CP 428-29.

²² CP 421.

²³ Nor could Harkey’s motion be re-characterized as a motion for reconsideration, because it was filed more than 10 days after entry of the judgment. See CR 59(b).

60(b) expressly states, “A motion under this section (b) does not affect the finality of the judgment or suspend its operation.”²⁴

Harkey’s Motion to Set Aside Default Judgment was denied on June 22, 2011.²⁵ Even assuming for the sake of argument that that motion did toll the time to appeal, the deadline for serving a notice of appeal would have expired on July 22, 2011.

Harkey’s appeal is also untimely as to the December 26, 2013, order listed in his notice of appeal. Harkey filed a motion for reconsideration on January 6, 2014.²⁶ This was 11 days after the order was filed and, therefore, was untimely.²⁷ Because Harkey’s motion for reconsideration under CR 59 was late, it did not serve to extend his time to file an appeal.²⁸

²⁴ The “supplemental” nature of proceedings under CR 60 is underscored by the rule’s procedural requirements: the party seeking relief is required to file a motion and obtain an order to show cause, all of which “shall be served upon the parties affected in the same manner as in the case of summons in a civil action,” *i.e.*, by personal service. *See* CR 60(e)(3). Thus, the rule treats a CR 60 motion as the functional equivalent of an entirely new action, rather than a motion in the context of an existing lawsuit.

²⁵ CP 382-83.

²⁶ CP 61.

²⁷ *See* RAP 18.6(a) (Saturdays, Sundays, and legal holidays included if period of time greater than six days); *accord*, CR 6(a).

²⁸ *See Schaefco, Inc. v. Columbia River Gorge Comm’n*, 121 Wn.2d 366, 367-68, 849 P.2d 1225 (1993) (untimely motion for reconsideration did not extend time to appeal, even when Superior Court ruled on merits of motion).

Harkey filed his notice of appeal on March 5, 2014. Except for the final two orders entered denying Harkey's January 6, 2014, motion for reconsideration, Harkey's notice was untimely.

US Bank expects Harkey will respond that his time to appeal was extended by his various motions and other pleadings filed at various times from December 2011 through January 2014. All of those motions were filed far more than 10, or even 30, days after entry of judgment. In addition, they sought relief under CR 60, which does not extend the time to appeal. Moreover, repeated filings of motions seeking the same relief — here, vacatur of a default judgment — should not serve to continue extending the time to appeal. Indeed, RAP 5.2 refers to “*a* motion for reconsideration” (emphasis added), not to “motions for reconsideration,” indicating that a party must present all grounds for reconsideration in a single motion. Under Harkey's analysis, anyone could continue, or resurrect, a right to appeal by repeatedly filing motions to vacate (or for reconsideration) years after the final judgment was entered.

Harkey failed to file his notice of appeal within the 30-day period prescribed by RAP 5.2. His appeal is untimely and must be dismissed.

C. HARKEY HAS WAIVED ANY APPEAL AS TO CERTAIN ORDERS LISTED IN HIS NOTICE OF APPEAL

Harkey's Notice of Appeal lists seven items for which he sought review:²⁹

1. Order Authorizing Service by Publication, entered January 10, 2011;
2. Order Granting Plaintiff's Motion for Default as to Defendant Michael Harkey, entered April 7, 2011;
3. Judgment, entered May 3, 2011;
4. Order Denying Defendant's Motion to Set Aside Default Judgment and to Suspend Its Operation, entered June 21, 2011;
5. Order Denying Motion to Vacate Default and Default Judgment, entered December 26, 2013;
6. Order Denying Defendant's Motion to Reconsider, entered February 4, 2014;
7. Order Denying Defendant's Motion to Reconsider, entered February 19, 2014.

Harkey's Assignments of Error merely reiterate his brief's table of contents³⁰ and do not provide "separate concise statements of each error ... together with the issues pertaining to the assignments of error."³¹ None of his Assignments of Error address the orders granting service by publication or granting the motion for default. Nor does Harkey's brief contain any

²⁹ See CP 1-2.

³⁰ Compare Appellant's Brief, 9-10, with Appellant's Brief, 10-11.

³¹ RAP 10.3(a)(4).

discussion as to what error, if any, was committed by the Superior Court when it authorized service by publication or granted US Bank's motion for default, Item Nos. 1 and 2 in his Notice of Appeal.

Harkey argues that Superior Court should have *vacated* the default judgment, Item No. 3 in his Notice, but that is based on the arguments he presented in his subsequent motions. His Assignments of Error do not describe any specific error committed by the Court when it originally entered the judgment. Critically, he does not proffer any explanation why, based on the record existing at the time of presentation, the Superior Court erred in entering the judgment.

A CR 60 motion does not create a vehicle for reviewing the default judgment itself.

A motion to vacate [under CR 60] is not, itself, a substitute for an appeal, and claimed errors of law during trial will not be considered on such a motion. ... Similarly, appellate review of a ruling on a motion to vacate is very limited.

An appeal is allowed from a ruling on a motion to vacate (RAP 2.2(a)(10)), *but an appeal from the ruling does not bring the final judgment up for review.*³²

³² Tegland, 4 WASHINGTON PRACTICE: RULES PRACTICE, CR 60, at 565 (5th ed. 2006) (emphasis added). "Unlike a motion for reconsideration or a new trial (CR 59), a motion to vacate a judgment pursuant to CR 60 is not a substitute for an appeal. The courts have consistently rejected efforts to use a motion to vacate as a vehicle for asserting errors of law." *Id.*, at 548.

Accordingly, any discussion in Harkey's brief as to the merits of his repeated CR 60 motions cannot be considered as a basis for reviewing the default judgment itself.

Harkey has presented this Court with no basis on which to review the proceedings prior to his filing a motion to set aside the default judgment in May 2011.

The technical failure to assign error on appeal does not waive an issue that is clearly argued in the briefs, but when *neither* the assignments of error *nor* the substance of the briefs raise an issue, the other party might be prejudiced if the court addressed it.³³

Harkey, therefore, has waived any appeal as to Item Nos. 1, 2, and 3 in his Notice of Appeal.

**D. THE SUPERIOR COURT PROPERLY DENIED HARKEY'S
MAY 2011 MOTION TO SET ASIDE THE DEFAULT
JUDGMENT**

Harkey's original motion to set aside the default judgment was based on CR 55(c), CR 60(b)(7) and (11), and RCW 4.28.200.³⁴ Harkey presented no compelling reason to set aside the default judgment, so the Superior Court did not abuse its discretion in denying the motion.

³³ *Sentinel C3, Inc. v. Hunt*, 181 Wn.2d 128, 138 n.4, 331 P.3d 40 (2014) (emphasis in original).

³⁴ CP 421.

“For good cause shown and upon such terms as the court deems just, the court *may* set aside an entry of default and, if a judgment by default has been entered, *may* likewise set it aside in accordance with rule 60(b).”³⁵ A default order may be set aside upon a showing of both excusable neglect *and* due diligence.³⁶ On the other hand, to set aside a default judgment, the defendant is required to show “(1) excusable neglect, (2) due diligence, plus (3) a meritorious defense, and (4) no substantial hardship to [the] opposing party.”³⁷ A ruling under CR 55(c)(1) is reviewed for abuse of discretion.³⁸

Harkey’s motion in May 2011 noted that he had been served by publication. Harkey, however, did not dispute the propriety of such service, nor did he present any argument that his failure to appear was due to excusable neglect or that he had acted with due diligence.³⁹ He continues these omissions in the present appeal.

Harkey argues to this Court that he demonstrated “good cause” by presenting meritorious defenses as well as a general request to defend on

³⁵ CR 55(c)(1) (emphasis added).

³⁶ See *In re Estate of Stevens*, 94 Wn.App. 20, 30, 971 P.2d 58 (1999).

³⁷ *Id.*

³⁸ See *id.*, at 29.

³⁹ See CP 421-26.

the merits.⁴⁰ Harkey fails to recognize that “good cause” under CR 55(c)(1) required him to demonstrate “excusable neglect and due diligence” and is *in addition to* demonstrating meritorious defenses.⁴¹ Harkey did not present any evidence or argument to support a finding of excusable neglect or to explain why he had waited 30 months after the trustee’s sale to challenge its validity.⁴² He thereby failed to satisfy the first two requirements for obtaining relief under CR 55(c)(1). The Superior Court, therefore, did not abuse its discretion in denying his motion.

Harkey’s second avenue for requesting relief was pursuant to CR 60(b)(7): “If the defendant was served by publication, relief may be granted as prescribed in RCW 4.28.200.”

If the summons is not served personally on the defendant in the cases provided in RCW 4.28.110 and 4.28.180, he or she or his or her representatives, on application and sufficient cause shown, ... *may* in like manner *be allowed* to defend after judgment, and within one year after the rendition of such judgment, on such terms as may be just; ...⁴³

⁴⁰ See Appellant’s Brief, 28-29. Harkey apparently is arguing that a defendant who is served by publication has the *right* under CR 55(c)(1) to appear and defend on the merits after entry of a default judgment simply by filing a motion to vacate. This is directly contradicted by the rule itself — “the court ... *may* likewise set [a default judgment] aside” (emphasis added) — and is unsupported by any citations to authority.

⁴¹ As discussed below (*see* pp. 16-18, *infra*), Harkey’s proposed defenses are not meritorious.

⁴² See CP 421-26. Harkey has never claimed he was unaware the lawsuit had been commenced, although service was by publication.

⁴³ RCW 4.28.200 (emphasis added).

A motion to vacate pursuant to CR 60(b) is also reviewed for abuse of discretion.⁴⁴ As with a motion under CR 55(c), “the trial court must first decide whether substantial evidence exists to support a defense to the claim.”⁴⁵

The primary duty of the courts in considering motions to set aside default judgments is to inquire whether or not the moving party against the default has a defense on the merits.⁴⁶

Harkey asserted only two defenses in his May 2011 motion: (1) the date for the trustee’s sale date was set too soon after Harkey was discharged from bankruptcy; and (2) Harkey was not given adequate notice of the continued sale date.⁴⁷ Neither constitutes a valid defense in the circumstances here.

Harkey’s brief refers to these two grounds as the basis for his May 2011 motion.⁴⁸ The Superior Court rejected these defenses.⁴⁹ Harkey presents no argument why the Superior Court erred. The failure to present

⁴⁴ See *Jones v. City of Seattle*, 179 Wn.2d at 360, *supra*.

⁴⁵ *Suburban Janitorial Svces. v. Clarke American*, 72 Wn.App. 302, 305, 863 P.2d 1377 (1993).

⁴⁶ *Id.*

⁴⁷ See CP 425-26.

⁴⁸ See Appellant’s Brief, 14.

⁴⁹ CP 384-87.

argument in an opening brief constitutes a waiver of that error as a grounds for reversal.⁵⁰

In any event, Harkey's time to challenge the trustee's sale had expired. He failed to bring any action before the sale to enjoin it and thereby waived any objections to the sale's going forward.⁵¹ As of December 2008, when Harkey's property was foreclosed, Washington law generally held that a borrower waived all claims, including for money damages, if she failed to restrain a trustee's sale before it was conducted.⁵²

In 2009, the Legislature amended the Deed of Trust Act by adding RCW 61.24.127.⁵³ The new statute overruled case law to preserve a claim for damages brought after a trustee's sale even if the borrower had not sought to restrain the foreclosure:

(1) The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages asserting:

(a) Common law fraud or misrepresentation;

⁵⁰ See *Brown v. Vail*, 169 Wn.2d 318, 336 n.11, 237 P.3d 263 (2010); see also *Anfinson v. Fedex Ground Package System, Inc.*, 174 Wn.2d 851, 861, 281 P.3d 289 (2012); *Sentinel C3, Inc. v. Hunt*, 181 Wn.2d at 138 n.4, *supra*.

⁵¹ See RCW 61.24.130(1); see also *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003).

⁵² See *Brown v. Household Realty Corp.*, 146 Wn.App. 157, 189 P.3d 233 (2008), *rev. denied*, 165 Wn.2d 1023, 202 P.3d 308 (2009).

⁵³ Laws of 2009, Ch. 292, § 6. Research has not revealed any decisions applying RCW 61.24.127 retroactively where the trustee's sale occurred before the statute became effective. That issue need not be decided here because, as the following discussion demonstrates, Harkey cannot obtain any relief under the statute, anyway.

- (b) A violation of Title 19 RCW;
 - (c) Failure of the trustee to materially comply with the provisions of this chapter; or
 - (d) A violation of RCW 61.24.026.
- (2) The nonwaived claims listed under subsection (1) of this section are subject to the following limitations:

(a) The claim must be asserted or brought within two years from the date of the foreclosure sale or within the applicable statute of limitations for such claim, *whichever expires earlier*;

(b) The claim may not seek any remedy at law or in equity other than monetary damages;

(c) The claim may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property;⁵⁴

Harkey did not raise any claims against the trustee's sale until he filed his motion to set aside the default judgment on May 31, 2011, nearly 30 months after the sale.⁵⁵ Both of his proposed defenses assert a failure by the trustee to comply with the Deed of Trust Act. That is subject to the two-year limitation in RCW 61.24.127(2).⁵⁶ Consequently, his defenses were time-barred.

⁵⁴ RCW 61.24.127(1), (2) (emphasis added).

⁵⁵ The failure to assert claims until after expiration of the statutory two-year limit arguably establishes a lack of due diligence as a matter of law.

⁵⁶ Harkey argues that his fraud claim was subject to a three-year statute of limitations that did not begin to run until his discovery of the fraud. *See* Appellant's Brief, 34. This completely ignores the Legislature's directive that the maximum time for bringing suit is two years after the trustee's sale. *See* RCW 61.24.127(2)(a). Harkey's argument would
(cont'd on following page)

Furthermore, none of the claims preserved in RCW 61.24.127 can be used to challenge “the validity or finality of the foreclosure sale.”⁵⁷ Yet, this is precisely what Harkey is attempting to achieve with his arguments. His brief repeatedly states, “The Foreclosure was *void ab initio*.”⁵⁸ Harkey seeks to “Argu[e] the Defects of the Foreclosure” as a defense to a quiet-title action, that is, an action that would establish title to property based on the trustee’s sale.⁵⁹ And, he argues that US Bank does not have a right to take possession through an unlawful-detainer action “Because The Foreclosure Was Unlawful.”⁶⁰

When the Legislature enacted RCW 61.24.127 in 2009, it was manifestly aware that allowing a borrower to sue for damages after completion of a trustee’s sale was far different from allowing a borrower to attack the sale itself. Therefore, the Legislature expressly prohibited “any remedy at law or in equity other than monetary damages.”⁶¹ The relief sought by Harkey is anything but damages: he seeks to have the entire

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be valid only if subsection 2(a) ended with the phrase, “whichever expires *later*.” It does not, and his argument for a longer period is frivolous.

⁵⁷ RCW 61.24.127(2)(c). See *Frizzell v. Murray*, 179 Wn.2d 301, 312, 313 P.3d 1171 (2013) (“Accordingly, we remand for the trial court to determine the impact of RCW 61.24.127 on Frizzell’s claims. Of course, in so far as any of her claims attempt to unsettle the deed of trust and invalidate the foreclosure sale, they are subject to the waiver provision.”).

⁵⁸ Appellant’s Brief, 21, 23, 24, 25.

⁵⁹ *Id.*, 27.

⁶⁰ *Id.*, 36.

⁶¹ RCW 61.24.127(2)(b).

foreclosure declared “void *ab initio*.” This is forbidden by RCW 61.24.127, and Harkey has presented no authority that permits such relief.

Accordingly, the Superior Court did not abuse its discretion in entering its June 21, 2011, order denying his motion to set aside the default judgment.

**E. THE SUPERIOR COURT PROPERLY DENIED HARKEY’S
OCTOBER 2013 MOTION FOR RELIEF**

Harkey’s Notice of Appeal also designates for review the Superior Court’s order dated December 26, 2013, denying his October 2013 motion to vacate the default and default judgment, as well as orders denying reconsideration entered on February 4, 2014, and February 19, 2014.⁶² The motion to vacate merely renewed Harkey’s previous motion from May 2011, long after the time for seeking reconsideration of the order denying it had expired. The Superior Court did not abuse its discretion in refusing to grant the relief requested by Harkey.

Harkey’s motion to vacate the default judgment filed in October 2013 suffers from all the same timeliness defects as his May 2011 motion, compounded by the fact that it was now 4 years and 10 months since the

⁶² *But see* discussion at 4 n.14, above.

trustee's sale had been conducted.⁶³ Similarly, as the Superior Court expressly found, Harkey failed to present any evidence of mistake, inadvertence, or surprise, or of due diligence in asking for relief. Accordingly, for those reasons alone, the Superior Court properly exercised its discretion to deny the motion.

Harkey's motion in October 2013 was also an impermissible attempt to take a second bite at the apple to have the default judgment vacated. Harkey argues that CR 60 does not expressly require a movant to present all potential defenses in a single motion.⁶⁴

In denying Harkey's CR 60 motion in December 2013, Judge Hancock stated,

Michael Harkey was required to assert any arguments in favor of vacating the default judgment when he first moved to set it aside in May 2011. Arguments not made at that time have been waived. The law does not permit piecemeal motions, such as Michael Harkey's *five separate motions to vacate* filed in Case No. 10-2-0558-1.⁶⁵

Harkey's serial renewals of his motion to vacate essentially were motions for reconsideration of the denial of his original motion in May 2011. Harkey's choice of names for his repeated motions should not serve to disguise their true character: it would elevate form over substance to allow a

⁶³ See discussion at pp. 6-9, *supra*.

⁶⁴ See Appellant's Brief, 30-31.

⁶⁵ CP 104 (emphasis added).

party who repeatedly asks a court to change its ruling in a previous order to evade CR 59 by simply naming the subsequent filings something other than “Motion for Reconsideration.”

On a motion for reconsideration, a party may not propose new theories of the case that could have been raised before entry of the adverse decision.⁶⁶ Certainly, it was within the Superior Court’s discretion here to refuse to re-visit its earlier ruling based on arguments that had either been rejected previously or could have, but were not, presented on the original motion, regardless of what title Harkey put on his motion.⁶⁷

The Superior Court’s December 26, 2013, order denying Harkey’s fifth attempt to vacate the same default judgment was not an abuse of discretion.

F. THE DEED OF TRUST ACT IS CONSTITUTIONAL

When Harkey moved for reconsideration in January 2014 — his sixth attempt to have the default judgment vacated — he raised a

⁶⁶ See *Wilcox v. Lexington Eye Institute.*, 130 Wn.App. 234, 241, 122 P.3d 729 (2005).

⁶⁷ Harkey asserts that reconsideration was appropriate because the Superior Court did not have the benefit of *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012), when it denied his first motion to set aside the default judgment in May 2011. The later publication of *Bain* does not affect whether the *argument* was available to Harkey in 2011. In fact, the issues concerning whether MERS was a proper beneficiary had been percolating for several years before Harkey’s motion. See, e.g., *In re Jacobson*, 402 B.R. 359, 367 & n.2 (W.D.Wa. Bankr. 2009); *Moon v. GMAC Mortg. Corp.*, 2008 WL 4741492, at *3 (W.D.Wa. 2008).

constitutional argument for the first time.⁶⁸ Harkey asserts that the Deed of Trust Act⁶⁹ is unconstitutional because it usurps the Superior Court's "exclusive" jurisdiction over all cases at law involving the title or possession of real property.⁷⁰ Harkey errs just in stating his thesis: the Washington Constitution confers "original" jurisdiction upon the Superior Court, not "exclusive" jurisdiction. Harkey's proposition fails, however, even if it were correctly framed.

Harkey's thesis is that the constitutional grant of original jurisdiction to the Superior Court prohibits the Legislature from restricting that jurisdiction "by statutorily creating a trustee to decide title to land through a nonjudicial foreclosure procedure; and legislation that has the purpose or effect of divesting those courts of that jurisdiction are void."⁷¹ In fact, the Deed of Trust Act recognizes, and preserves, the Superior Court's constitutional grant of original jurisdiction.

At the outset, the full consequences of Harkey's argument must be clearly understood. The Washington Constitution provides:

The superior court shall have original jurisdiction in all cases at law which involve the title or possession of real

⁶⁸ CP 61-100.

⁶⁹ RCW Chapter 61.24.

⁷⁰ See Appellant's Brief, 18-19. The record does not show the Washington State Attorney General was served with Harkey's constitutional challenge. See RCW 7.24.110.

⁷¹ Appellant's Brief, 19.

property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand or the value of the property in controversy amounts to three thousand dollars or as otherwise determined by law, or a lesser sum in excess of the jurisdiction granted to justices of the peace and other inferior courts⁷²

Accordingly, a ruling that the Deed of Trust Act violates the Constitution by infringing on the Superior Court's jurisdiction will also serve as precedent for an attack on any other statutes that affect the Superior Court's power to adjudicate a case where the demand or property in controversy exceeds \$300.⁷³ Harkey's analysis would invalidate Washington's Uniform Arbitration Act⁷⁴ and Uniform Mediation Act⁷⁵ as unconstitutional, as well as any agreement for alternative dispute resolution among private parties, because those would move disputes to a forum outside the Superior Court.

The Washington Supreme Court ruled more than 25 years ago in *Kennebec, Inc. v. Bank of the West* that the Deed of Trust Act does not violate the Washington Constitution.⁷⁶ Most notably, the Supreme Court reached this conclusion in reviewing an earlier version of the Act that did not include all of the protections now present in RCW Chapter 61.24.

⁷² Washington Constitution, Art. IV, § 6.

⁷³ RCW 2.08.010 sets \$300 as the monetary threshold for the Superior Court's original jurisdiction. As an example of the potential mischief raised by Harkey's argument, District Courts are granted jurisdiction over matters up to \$75,000 (RCW 3.66.020), which obviously conflicts with, and arguably usurps, the grant of original jurisdiction to the Superior Court.

⁷⁴ RCW Chapter 7.04A.

⁷⁵ RCW Chapter 7.07.

⁷⁶ 88 Wn.2d 718, 565 P.2d 812 (1977).

In *Kennebec*, the borrower “challenge[d] the statutory procedure as representing significant state involvement” and violating due process “because in the act there is no notice and no hearing provided for at a meaningful time prior to a taking of a significant property interest.”⁷⁷ The borrower argued that,

[T]he state, having enacted legislation and “creating” the remedy of nonjudicial foreclosure, is involved significantly so that the foreclosure, though accomplished in fact between private parties, was state action. Therefore, the due process clause of the United States Constitution and the Constitution of the State of Washington are called into play.⁷⁸

Kennebec first considered whether there was significant state involvement so as to trigger due-process concerns. Relying on two out-of-state cases — *Greene v. First Nat’l Exch. Bank of Virginia*⁷⁹ and *Brown v. U.S. Nat’l Bank of Oregon*⁸⁰ — the Supreme Court concluded that the Deed of Trust Act is “permissive legislation” and that merely enacting a statute that permits private conduct with no further significant state participation is “passive involvement” that does not rise to “state action.”⁸¹ Consequently, a nonjudicial foreclosure under the Deed of Trust Act does not involve state action that deprives the borrower of property without due process of law.

⁷⁷ *Id.*, at 720.

⁷⁸ *Id.*

⁷⁹ 348 F.Supp. 672 (W.D.Va. 1972)

⁸⁰ 265 Or. 234, 509 P.2d 442 (1973)

⁸¹ See *Kennebec*, 88 Wn.2d at 722-24, *supra*.

Kennebec then examined whether the Deed of Trust Act is a state-created remedy. The Court found that deeds of trust were enforceable at common law and, although they may not have been used, that remedy was “available as early as Washington’s territorial days.”⁸² Public policy, as expressed in statute, authorized only mortgages beginning in 1869, but that policy was changed when the Legislature authorized deeds of trust in 1965. Consequently, Chapter 61.24 is simply a codification of common law, not a state-created remedy.⁸³

Kennebec concluded:

In light of the above, we consider RCW 61.24 and the case at bench. No state official, using that term in its broadest sense, has been involved in this matter other than in the most ministerial manner prior to the challenge of the act’s constitutionality. The act did not compel any of the parties to contract in the manner in which they did. Other financial and security arrangements might have been selected.

RCW 61.24 is entirely noncoercive. The state takes only a neutral position. It neither commands nor forbids nonjudicial foreclosure. *If the parties elect to contract and use the deed of trust device, the statute regulates its manner of operation almost solely for the protection of the debtor.* But the state does not involve itself in the transaction in any significant manner; its involvement at most is passive. The creditor may, if he chooses, elect to involve the state by utilizing judicial foreclosure and thereby preserving any deficiency that may exist. However, if he opts to foreclose nonjudicially, he does not involve the state, but by so doing he is restricted to the value of his security.

⁸² *Id.*, at 724.

⁸³ *See id.*, at 724-25.

It is our view that absent racial discrimination overtones, significant “state action” cannot be predicated upon such passive involvement as the enactment of permissive state laws which merely authorize, and to that extent, encourage private conduct. And this is so regardless of the fact that a permissive statute may have changed previous public policy. Private action is not to be attributed to the state for due process purposes of the Fourteenth Amendment simply because the conduct is permitted by state law, whether statutory or judicial.

We hold that RCW 61.24, as it existed prior to the 1975 amendments, is passive state involvement and does not constitute significant “state action” and, therefore, it is neither violative of the due process clause of the Fourteenth Amendment nor of article 1, section 3 of the Washington State Constitution.⁸⁴

As noted in *Kennebec*, RCW Chapter 61.24 was amended in 1975.⁸⁵

The legislation enhanced the law’s protection for the debtor by requiring service of a detailed notice of default before commencing a foreclosure, prescribing the form for a notice of trustee’s sale, and limiting the amount that can be charged to a debtor seeking to cure a default. The 1975 amendments did not alter the State’s passive involvement in nonjudicial foreclosures.

Kennebec roundly rejected a constitutional challenge to the Deed of Trust Act. Harkey does not even mention *Kennebec* in his brief, much less

⁸⁴ *Id.*, at 725-26 (emphasis added).

⁸⁵ See Laws of 1975, Ch. 129. A copy of the legislation is included in Appendix A to this brief.

explain what has changed in RCW Chapter 61.24 since *Kennebec* to justify overturning that precedent.

Harkey's central, albeit brief, constitutional challenge is that the Deed of Trust Act impermissibly usurps the Superior Court of its original jurisdiction to decide matters involving title to real property by delegating such powers to a trustee. His argument, however, fails to recognize key provisions of the statutory scheme as well as fundamental concepts underlying the deed of trust. In the end, Harkey's challenge cannot withstand analysis.

To begin, one must recognize that a borrower generally has no need to seek relief with respect to a deed of trust unless a reconveyance is required or there is a foreclosure. In other words, a borrower whose payments are current and still has a balance owing on her loan does not need judicial assistance *because nothing is happening to affect her rights in her property*.

In the event of a foreclosure, the Deed of Trust Act imposes a number of prerequisites to a trustee's sale including: qualifications for a person or entity to act as a trustee; the timing and content of notices of default and trustee's sale; mediation; how, and for how long, a trustee's

sale can be continued; and how a default can be cured before the sale.⁸⁶ Crucially, if the Act's requirements are not complied with or if there is any other reason why the foreclosure is faulty, "the borrower, grantor, any guarantor, or any person who has an interest in, lien, or claim of lien against the property or some part thereof" may file an action in Superior Court "to restrain, on any proper legal or equitable ground, a trustee's sale."⁸⁷

This is precisely the access to Superior Court to which Harkey asserts he is entitled by the Washington Constitution. Thus, far from usurping the Superior Court's jurisdiction to adjudicate disputes concerning real property, the Deed of Trust Act *preserves* that power by expressly authorizing judicial intervention when there is "any proper legal or equitable ground" to challenge the trustee's sale.

The Act preserves a right to judicial intervention in other situations, as well. For example, if a deed of trust is not reconveyed within 60 days after the obligation is satisfied, a grantor can commence an action "in any court having competent jurisdiction" for damages, attorney fees, and an order declaring the deed of trust reconveyed.⁸⁸

⁸⁶ *See, generally*, RCW 61.24.010 to 61.24.090.

⁸⁷ RCW 61.24.130(1).

⁸⁸ *See* RCW 61.16.030. That statute is applicable to deeds of trust pursuant to RCW 61.24.020.

RCW 61.24.110 also regulates reconveyances by a trustee. That statute requires a beneficiary to request reconveyance within 60 days; it allows others to make that request if the beneficiary fails to do so; and it authorizes others to record a “declaration of payment” “[i]f the trustee of record is unable or unwilling to reconvey the deed of trust” within 120 days of payment to the beneficiary. If no objection is made to the declaration of payment within 60 days of recording, the lien of the deed of trust “must cease to exist.”⁸⁹ Most interesting, all of these curative remedies are self-help provisions which do not require any judicial intervention. But, under Harkey’s analysis, these efficient, inexpensive remedies are unconstitutional and must be abandoned in preference for litigation because they do not require the Superior Court to adjudicate these issues affecting title to real property.⁹⁰

Harkey’s challenge also fails because he ignores the consensual nature of a deed of trust. In executing a deed of trust, the grantor consents

⁸⁹ RCW 61.24.110(3)(b) .

⁹⁰ Attention should also be paid to the fact that a reconveyance usually is required when the grantor sells the property and the loan is repaid at closing, or the grantor refinances with a new loan. In the first instance, the grantor no longer has an interest in the property and, therefore, does not really care if the reconveyance is recorded. Rather, it is the new owner’s lender who especially benefits from the reconveyance in order to remove the senior lien. The lender will have the power and resources to clear title. Similarly, in a refinance, the refinancing lender will want the reconveyance recorded in order to eliminate the senior lien. U.S. Bank’s point is that the original grantor will not be left alone at the mercy of the original beneficiary except in the rare instance where the original loan is repaid without a sale of the property or a refinance.

to allowing a nonjudicial foreclosure instead of a judicial foreclosure; in return, the grantor is protected from any deficiency judgment. This is no different than any private contract that provides for some form of alternative dispute resolution.

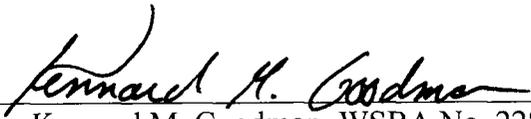
The Deed of Trust Act is constitutional. Harkey's attack on that ground must be rejected.

V. CONCLUSION

For the foregoing reasons, Respondent US Bank respectfully requests that this Court dismiss Harkey's appeal or, alternatively, affirm the judgment and orders entered below.

RESPECTFULLY SUBMITTED this 12th day of November, 2014.

BISHOP, MARSHALL & WEIBEL, P.S.

By: 
Kennard M. Goodman, WSBA No. 22823
David A. Weibel, WSBA No. 24031

APPENDIX A

which he resides, from the time he leaves his place of residence until he returns thereto, said expense to be paid by the county to which he travels. If one trip includes two or more counties, the expense may be apportioned between the counties visited in proportion to the amount of time spent in each county on the trip. If an official reporter uses his own automobile for the purpose of such transportation, he shall be paid therefor at the same rate per mile as county officials are paid for use of their private automobiles. The sworn statement of the official reporter, when certified to as correct by the judge presiding, shall be a sufficient voucher upon which the county auditor shall draw his warrant upon the treasurer of the county in favor of the official reporter.

The salaries of official court reporters shall be paid upon sworn statements, when certified as correct by the judge presiding, as state and county officers are paid.

Passed the Senate May 22, 1975.

Passed the House May 19, 1975.

Approved by the Governor May 31, 1975.

Filed in Office of Secretary of State May 31, 1975.

CHAPTER 129

[Engrossed Senate Bill No. 2416]

DEEDS OF TRUST

AN ACT Relating to deeds of trust; amending section 1, chapter 74, Laws of 1965 and RCW 61.24.010; amending section 2, chapter 74, Laws of 1965 and RCW 61.24.020; amending section 3, chapter 74, Laws of 1965 and RCW 61.24.030; amending section 4, chapter 74, Laws of 1965 as amended by section 1, chapter 30, Laws of 1967 and RCW 61.24.040; amending section 9, chapter 74, Laws of 1965 as amended by section 4, chapter 30, Laws of 1967 and RCW 61.24.090; and amending section 13, chapter 74, Laws of 1965 and RCW 61.24.130.

Be it enacted by the Legislature of the State of Washington:

Section 1. Section 1, chapter 74, Laws of 1965 and RCW 61.24.010 are each amended to read as follows:

(1) The terms "record" and "recorded" as used in this chapter, shall include the appropriate registration proceedings, in the instance of registered land.

(2) The trustee of a deed of trust under this chapter shall be:

(a) Any corporation or association authorized to engage in a trust business in this state; or

(b) Any title insurance company authorized to insure title to real property under the laws of this state, or its agents; or

(c) Any attorney who is an active member of the Washington state bar association at the time he is named trustee.

(d) Any agency of the United States government.

(3) In the event of the death, incapacity or disability, or resignation of the trustee, the beneficiary may nominate in writing a successor trustee. Upon recording in the mortgage records of the county or counties in which the trust deed is recorded, of the appointment of a successor trustee, the successor trustee shall be vested with all powers of the original trustee.

Sec. 2. Section 2, chapter 74, Laws of 1965 and RCW 61.24.020 are each amended to read as follows:

A deed conveying real property to a trustee in trust to secure the performance of an obligation of the grantor or another to the beneficiary may be foreclosed as in this chapter provided. The county auditor shall record such deed as a mortgage and shall index the name of the grantor as mortgagor and the names of the trustee and beneficiary as mortgagee. No person, corporation or association may be both trustee and beneficiary under the same deed of trust (~~nor may the trustee be an employee, agent or subsidiary of a beneficiary of the same deed of trust~~): PROVIDED, That any agency of the United States government may be both trustee and beneficiary under the same deed of trust.

Sec. 3. Section 3, chapter 74, Laws of 1965 and RCW 61.24.030 are each amended to read as follows:

It shall be requisite, to foreclosure under this chapter:

- (1) That the deed of trust contains a power of sale;
 - (2) That the deed of trust provides in its terms that the real property conveyed is not used principally for agricultural or farming purposes;
 - (3) That a default has occurred in the obligation secured or a covenant of the grantor, which by the terms of the deed of trust makes operative the power to sell;
 - (4) That no action is pending on an obligation secured by the deed of trust;
- ((and))

(5) That the deed of trust has been recorded in each county in which the land or some part thereof is situated; and

(6) That at least thirty days before notice of sale shall be recorded, transmitted or served, written notice of default shall be transmitted by the beneficiary or trustee to the grantor or any successor in interest at his last known address by both first class and certified mail, return receipt requested, and the beneficiary or trustee shall cause to be posted in a conspicuous place on said premises, a copy of said notice, or personally served on the grantor or his successor in interest. This notice shall contain the following information:

- (a) A description of the property which is then subject to the deed of trust;
- (b) The book and the page of the book of records wherein the deed of trust is recorded;
- (c) That the beneficiary has declared the grantor or any successor in interest to be in default, and a concise statement of the default alleged;
- (d) An itemized account of the amount or amounts in arrears if the default alleged is failure to make payments;
- (e) An itemized account of all other specific charges, costs or fees that the grantor is or may be obliged to pay to reinstate the deed of trust before the recording of the notice of sale;
- (f) The total of subparagraphs (d) and (e) of this subsection, designated clearly and conspicuously as the amount necessary to reinstate the note and deed of trust before the recording of the notice of sale;
- (g) That failure to cure said alleged default within thirty days of the date of mailing of the notice, or if personally served, within thirty days of the date of personal service thereof, may lead to recordation, transmittal and publication of a

notice of sale, and that the property described in subparagraph (a) of this subsection may be sold at public auction at a date no less than one hundred twenty days in the future;

(h) That the effect of the recordation, transmittal and publication of a notice of sale will be to (i) increase the costs and fees and (ii) publicize the default and advertise the grantor's property for sale;

(i) That the effect of the sale of the grantor's property by the trustee will be to deprive the grantor or his successor in interest and all those who hold by, through or under him of all their interest in the property described in subsection (a);

(j) That the grantor or any successor in interest has recourse to the courts to contest the alleged default on any proper ground.

Sec. 4. Section 4, chapter 74, Laws of 1965 as amended by section 1, chapter 30, Laws of 1967 and RCW 61.24.040 are each amended to read as follows:

A deed of trust may be foreclosed in the following manner:

~~(1) ((At least one hundred and twenty days before sale, notice thereof shall be recorded by the trustee in the office of the auditor in each county in which the deed of trust is recorded. At least one hundred twenty days prior to sale copies of the notice shall be transmitted by first class and by certified mail, return receipt requested, to each person who has an interest in or lien or claim of lien against the property or some part thereof, provided such interest, lien or claim is of record at the time the notice is recorded, and provided the address of such person is stated in the recorded instrument evidencing his interest, lien or claim or is otherwise known to the trustee. If a court action to foreclose a lien or other encumbrance on all or any part of the property is pending and a lis pendens in connection therewith is on file on the date the notice is recorded in the office of the auditor pursuant to subdivision (1) of this section, a copy of the notice shall also be transmitted by first class and by certified mail, return receipt requested, to the plaintiff or his attorney of record. The copy of the notice shall be transmitted to the address to which such person shall have in writing requested the trustee to transmit the notice and if there has been no such request, to the address appearing in the recorded instrument evidencing his interest, lien or claim, and if there be neither such request nor record address, to the address otherwise known to the trustee. In addition, at least one hundred twenty days prior to sale, a copy of the notice shall be posted in a conspicuous place on said premises, or in lieu of posting, a copy of the notice may be served upon any occupant of said real property in the manner in which a summons is served, said service to be at least one hundred twenty days prior to sale.)) At least ninety days before the sale, the trustee shall:~~

(a) Record a notice in the form hereinafter specified in section 4(1)(f) of this 1975 amendatory act in the office of the auditor in each county in which the deed of trust is recorded;

(b) Cause a copy of the notice as hereinafter provided in section 4(1)(f) of this 1975 amendatory act, to be transmitted by both first class and certified mail, return receipt requested, to each person who has an interest in or lien or claim of lien against the property or some part thereof, provided such interest, lien or claim is of record at the time the notice is recorded and further provided the address of

such person is stated in the recorded instrument recording his interest, lien or claim, or is otherwise known to the trustee;

(c) Cause a copy of the notice as hereinafter provided in section 4(1)(f) of this 1975 amendatory act to be transmitted by both first class and certified mail, return receipt requested, to the plaintiff or his attorney of record, in any court action to foreclose a lien or other encumbrance on all or any part of the property, provided a court action is pending and a lis pendens in connection therewith is on file on the date the notice is recorded in the office of the auditor;

(d) Cause a copy of the notice as hereinafter provided in section 4(1)(f) of this 1975 amendatory act to be transmitted by both first class and certified mail, return receipt requested, to any person who shall have requested such notice in writing to the trustee at the address specified by the requesting person;

(e) Cause a copy of the notice as hereinafter provided in section 4(1)(f) of this 1975 amendatory act to be posted in a conspicuous place on said premises, or in lieu of posting, cause a copy of said notice to be served upon any occupant of said real property;

(f) The notice shall be in the following form:

NOTICE OF TRUSTEE'S SALE

I.

NOTICE IS HEREBY GIVEN that the undersigned trustee will on the day of, 19. ., at the hour of o'clock . . M. at
[street address and location if inside a building] in the City of, State of Washington, sell at public auction to the highest and best bidder, payable at the time of sale, the following described real property, situated in the County of, State of Washington, to-wit:

which is subject to that certain deed of trust dated, 19. ., recorded, 19. ., in volume of Mortgages, at Page, under Auditor's File No., mortgage records of County, Washington, from, as Grantor, to, as Trustee, to secure an obligation in favor of, as Beneficiary, the beneficial interest in which was assigned by, under an Assignment dated, 19. ., and recorded under Auditor's File No.

II.

No action is now pending to seek satisfaction of the obligation in any Court by reason of the Grantor's default on the obligation secured by said deed of trust.

III.

The default for which this foreclosure is made is as follows:

[If default is for other than payment of money, set forth the particulars]

Failure to pay when due the following amounts which are now in arrears:

IV.

The sum owing on the obligation secured by the deed of trust is: Principal \$, together with interest as in the note provided from the day of, 19.., and such other costs and fees as are provided by statute.

V.

The above-described real property will be sold to satisfy the expense of sale and the obligation secured by said Deed of Trust as provided by statute. Said sale will be made without warranty, express or implied, regarding title, possession, or encumbrances on the day of, 19... The defaults referred to in paragraph III must be cured by the day of, 19.., (10 days before the sale) to cause a discontinuance of the sale. The sale will be discontinued and terminated if at any time before the day of, 19.., (10 days before the sale) the default as set forth in paragraph III is cured and the Trustee's fees and costs are paid. The sale may be terminated by the grantor anytime after the day of, 19.., (10 days before the sale) and before the sale by the grantor or his successor in interest paying the principal and interest plus costs and fees.

VI.

A written notice of default was transmitted by the Beneficiary or trustee to the grantor or his successor in interest at the following address:

.....
.....
.....

by both first class and certified mail on the day of, 19.., proof of which is in the possession of the trustee; or the grantor or his successor in interest was personally served on the day of, 19.., with said written notice of default by the beneficiary or his trustee, and the trustee has in his possession proof of such service.

VII.

The Trustee whose name and address is set forth below will provide in writing to anyone requesting it, a statement of all costs and fees due at any time prior to the sale.

VIII.

The effect of the sale will be to deprive the grantor and all those who hold by, through or under him of all their interest in the above-described property.

IX.

Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the trustee's sale.

.....
 } Trustee
 }
 } Address
 }
 } Phone
 STATE OF WASHINGTON }
 COUNTY OF } ss.

On this day personally appeared before me, to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this day of, 19...

.....
NOTARY PUBLIC in and for the State of Washington, residing at

[SEAL]

(2) In addition to providing the grantor or his successor in interest the notice as provided in section 4(1)(f) of this 1975 amendatory act, the trustee shall include with the notice provided in section 4(1)(f) of this 1975 amendatory act a statement to the grantor or his successor in interest in substantially the following form:

NOTICE OF FORECLOSURE

Pursuant to the Revised Code of Washington,
Chapter 61.24, et seq.

The attached Notice of Sale is a consequence of your default in your obligation to, the beneficiary of your Deed of Trust and holder of your Note. Unless you cure the default, your property will be sold at auction on the day of, 19...

To cure your default, you must bring your payments current and pay accrued late charges and other costs and attorneys fees as set forth below by the day of, 19... (10 days before sale date). To date, these arrears and costs are as follows:

	<u>Currently due to reinstate</u>	<u>Amount that will be due to reinstate in</u>	
		<u>40 days</u>	<u>80 days</u>
	<u>.....</u> <u>[date]</u>	<u>.....</u> <u>[date]</u>	<u>.....</u> <u>[date]</u>
<u>Delinquent payments from the 1st day of, 19.., in the amount of:</u>	<u>\$.....</u>	<u>\$.....</u>	<u>\$.....</u>
<u>Late charge for every delinquent dollar owed in the amount of:</u>	<u>\$.....</u>	<u>\$.....</u>	<u>\$.....</u>
<u>Attorneys fees in the amount of:</u>	<u>\$.....</u>	<u>\$.....</u>	<u>\$.....</u>
<u>Trustee's expenses in the amount of:</u> <u>[Itemization]</u>		<u>Estimated Costs</u>	<u>Estimated Costs</u>
<u>.....</u>	<u>.....</u>	<u>.....</u>	<u>.....</u>
<u>.....</u>	<u>.....</u>	<u>.....</u>	<u>.....</u>
<u>.....</u>	<u>.....</u>	<u>.....</u>	<u>.....</u>
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<u>TOTALS</u>	<u>.....</u>	<u>.....</u>	<u>.....</u>

You may reinstate your Note and Deed of Trust at any time up to the day of, 19.., (10 days before the sale date) by paying the amount as set forth above. Of course, each month that passes brings another monthly payment due, and such monthly payment and any late charge must be added to your reinstating payment. AFTER THE DAY OF, 19.., (THE 80TH DAY), YOU MAY NOT REINSTATE YOUR DEED OF TRUST BY PAYING THE BACK PAYMENTS AND COSTS AND FEES AS OUTLINED ABOVE. In such a case, you will only be able to stop the sale by paying the total principal balance (\$.....) plus accrued interest, costs and advances, if any, made pursuant to the terms of the documents.

You may contest this default by initiating court action in the Superior Court of County. In such action, you may raise any legitimate defenses you

have to this default. You may also contest this sale in court by initiating court action. A copy of your Note and Deed of Trust are enclosed. You may wish to consult a lawyer. Legal action on your part may prevent or restrain the sale, but only if you persuade the court of the merits of your defense.

If you do not reinstate your Note and Deed of Trust by paying the amount demanded here, or if you do not succeed in restraining the sale by court action, your property will be sold to satisfy your obligations. The effect of such sale will be to deprive you and all those who hold by, through or under you of all interest in the property;

(3) In addition the trustee shall cause a copy of the notice as provided in section 4(1)(f) of this 1975 amendatory act to be published in a legal newspaper in each county in which the property or any part thereof is situated, once weekly during the four weeks preceding the time of sale;

~~((2)) (4) ((The notice aforesaid shall indicate the names of the grantor, trustee and beneficiary of the deed of trust, the description of the property which is then subject to the deed of trust, the book and page of the book of record wherein the deed of trust is recorded, the default for which the foreclosure is made and the date by which the default must be cured in order to cause a discontinuance of the sale, the amount or amounts in arrears if a default is for failure to make payment, the sum owing on the obligation secured by the deed of trust, and the time and place of sale.))~~ On the date and at the time designated in the notice of sale, the trustee shall sell the property at public auction to the highest bidder. The trustee may sell the property in gross or in parcels as the trustee shall deem most advantageous;

~~((3)) (5) ((A copy of the notice aforesaid shall be published in a legal newspaper in each county in which the property or any part thereof is situated, once weekly during the four weeks preceding the time of sale.))~~ The place of sale shall be at any designated public place within the county where the property is located and if the property is in more than one county, the sale may be in either of the counties where the property is located. The sale shall be on the day and during the hours set by statute for the conduct of sales of real estate at execution;

~~((4)) (6) ((The trustee shall sell the property in gross or in parcels as it shall determine, at the place and during the hours directed by statute for the conduct of sales of real estate at execution, at auction to the highest bidder.))~~ The trustee may for any cause he deems advantageous continue the sale for a period or periods not exceeding a total of thirty days by a public proclamation at the time and place fixed in the notice of sale. No other notice of the postponed sale need be given;

~~((5)) (7) The purchaser shall forthwith pay the price bid and on payment the trustee shall execute to the purchaser its deed; the deed shall recite the facts showing that the sale was conducted in compliance with all of the requirements of this chapter and of the deed of trust, which recital shall be prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value ((:));~~

~~((6)) (8) The sale as authorized under this chapter shall not take place less than ((six months))~~ one hundred ninety days from the date of default in the obligation secured.

Sec. 5. Section 9, chapter 74, Laws of 1965 as amended by section 4, chapter 30, Laws of 1967 and RCW 61.24.090 are each amended to read as follows:

(1) At any time prior to the ~~((time))~~ tenth day before the date set by the trustee for the sale in the recorded notice of sale, or in the event the trustee continues the sale pursuant to section 4(6) of this 1975 amendatory act, at any time prior to the tenth day before the actual sale, the grantor or his successor in interest, any beneficiary under a subordinate deed of trust or any person having a subordinate lien or encumbrance of record on the trust property or any part thereof, shall be entitled to cause a discontinuance of the sale proceedings by curing the default or defaults set forth in the notice, which in the case of a default by failure to pay, shall be by paying to the trustee ~~((a sum sufficient to cure all defaults other than such portion of principal as would not then be due had no default occurred, plus the costs of the trustee incurred and the trustee's fee accrued, which accrued fee shall not exceed fifty dollars.))~~:

(a) The entire amount then due under the terms of the deed of trust and the obligation secured thereby, other than such portion of the principal as would not then be due had no default occurred, and

(b) The expenses actually incurred by the trustee enforcing the terms of the note and deed of trust, including a reasonable trustee's fee, which is not to exceed twenty-five dollars at the time the notice of trustee's sale is given and is not to exceed fifty dollars forty days after the date of notice of trustee's sale is given and is not to exceed seventy-five dollars eighty days after the date of notice of trustee's sale is given, together with the trustee's reasonable attorney's fees, together with costs of recording the notice of discontinuance of notice of trustee's sale. In the event the property secured by the deed of trust is a single-family dwelling the total of the trustee's fees and the attorney's fees shall not exceed two hundred fifty dollars without court approval.

(2) Upon receipt of such payment the proceedings shall be discontinued, the deed of trust shall be reinstated and the obligation shall remain as though no acceleration had taken place.

(3) In the case of a default which is occasioned by other than failure to make payments, the person or persons causing the said default shall pay the expenses incurred by the trustee and the trustee's fees as set forth in subsection (1)(b) of this section.

(4) Any person having a subordinate lien of record on the trust property and who has cured the default or defaults pursuant to this section shall thereafter have included in his lien all payments made to cure any defaults, including interest thereon at ~~((six))~~ eight percent per annum, payments made for trustees' costs and fees incurred as authorized herein, and his reasonable attorney's fees and costs incurred resulting from any judicial action commenced to enforce his rights to advances under this section.

(5) If the default is cured and the obligation and the deed of trust reinstated in the manner hereinabove provided, the trustee shall properly execute, acknowledge and cause to be recorded a notice of discontinuance of trustee's sale under such deed of trust. A notice of discontinuance of trustee's sale when so executed and acknowledged is entitled to be recorded and shall be sufficient if it sets forth a record of the deed of trust and the book and page upon which the deed of trust is

recorded and a reference to the notice of sale and the book and page on which the name is recorded, and a notice that such sale is discontinued.

Sec. 6. Section 13, chapter 74, Laws of 1965 and RCW 61.24.130 are each amended to read as follows:

Nothing contained in this chapter shall prejudice the right of the grantor or his successor in interest to restrain, on any proper ground, a threatened sale by the trustee under a deed of trust. In the event that the property secured by the deed of trust is a single-family dwelling occupied by the grantor or his successor in interest, and the court finds that there is proper ground to restrain a threatened sale by the trustee under a deed of trust, the court shall require the grantor or his successor in interest to enter into a bond in the amount of two hundred fifty dollars with surety to the satisfaction of the clerk of the superior court to the adverse party affected thereby, conditioned to pay all damages and costs which may accrue by reason of the injunction or restraining order. In addition, the court shall require as a condition of continuing the restraining order that the grantor or his successors in interest shall pay to the clerk of the court every thirty days the monthly payment of principal and interest that would be due on the obligation secured by the deed of trust if the deed of trust was not being foreclosed.

Passed the Senate May 22, 1975.

Passed the House May 19, 1975.

Approved by the Governor May 31, 1975.

Filed in Office of Secretary of State May 31, 1975.

CHAPTER 130

{Substitute Senate Bill No. 2966}

FIRE PROTECTION DISTRICTS—LOCAL IMPROVEMENT DISTRICTS

AN ACT Relating to fire protection districts; amending section 39, chapter 34, Laws of 1939 as last amended by section 1, chapter 16, Laws of 1972 ex. sess. and RCW 52.16.070; amending section 40, chapter 34, Laws of 1939 as amended by section 1, chapter 161, Laws of 1961 and RCW 52.20.010; amending section 41, chapter 34, Laws of 1939 as amended by section 2, chapter 161, Laws of 1961 and RCW 52.20.020; amending section 3, chapter 161, Laws of 1961 and RCW 52.20.025; creating new sections; repealing section 17, chapter 34, Laws of 1939, section 60, chapter 70, Laws of 1941 and RCW 52.08.070; repealing section 44, chapter 34, Laws of 1939 and RCW 52.20.050; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Section 1. Section 39, chapter 34, Laws of 1939 as last amended by section 1, chapter 16, Laws of 1972 ex. sess. and RCW 52.16.070 are each amended to read as follows:

Except as authorized by virtue of the issuance and sale of district coupon warrants and general obligation bonds, and the creation of local improvements districts and the issuance of local improvement bonds and warrants of the fire protection district, the board of fire commissioners shall have no authority to incur expenses or other financial obligations payable in any year in excess of the aggregate amount of taxes levied for that year, revenues derived from contracts, leases and fire protection services rendered to any other municipal corporation, person, firm or corporation, or state agency, grants, bequests, gifts or donations

No. 71634-4-I
DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

U.S. BANK, NA, and its successors-in-interest and assigns
Plaintiff-Respondent

vs.

MICHAEL HARKEY;
Defendant-Appellant;

Unknown Spouse or Domestic Partner of Michael E. Harkey; Occupant
of the premises; and any persons or parties claiming to have any right,
title, estate, lien or interest in the real property described in the complaint.
Defendants.

ON APPEAL FROM ISLAND COUNTY SUPERIOR COURT
CASE NO. 10-2-00558-1

CERTIFICATE OF SERVICE

Kennard M. Goodman, WSBA No. 22823
David A. Weibel, WSBA No. 24031

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vs.

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