

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

Case No. 45311-8-II

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UNION BANK NA,

Respondent,

v.

DANIEL J. MOORE and JEANNINE K. MOORE,

Appellants,

and

MARK D. NOWELS and the marital community of  
MARK D. NOWELS and KRISTY NOWELS,

Defendants.

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**APPELLANTS' OPENING BRIEF**

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**TABLE OF CONTENTS**

**INTRODUCTION ..... 1**

**ASSIGNMENTS OF ERROR ..... 4**

**ISSUES PERTAINING TO ASSIGNMENT OF ERROR ..... 4**

**STATEMENT OF THE CASE..... 5**

    A. Frontier Bank Grants the Loan..... 5

    B. Union Bank Elects to Non-Judicially Foreclose and *Then* Bring  
        a Deficiency Action..... 6

    C. The Express Terms of the Loan Documents Drafted by the  
        Bank. .... 7

        1. The Obligations Secured by the Deed of Trust ..... 8

        2. The Interrelationship of the Promissory Note, the Guaranty,  
            and the Deed of Trust. .... 9

        3. The Guaranty’s “Waiver” Provision ..... 10

    D. Union Bank Moves for Summary Judgment..... 10

**ARGUMENT..... 11**

    A. The Standard of Review..... 11

    B. The Summary Judgment Standard. .... 12

    C. The *Cornerstone* Decision is Dispositive Here..... 13

    D. Core's Deed of Trust Secured the Moores' Guaranty ..... 16

    E. Washington’s Anti–Deficiency Statute RCW 61.24.100  
        Prohibits a Deficiency Judgment on the Moores’ Guaranty .... 19

    F. Frontier Bank and Union Bank Forfeited Their Right to Pursue  
        the Guarantors ..... 22

G.	The Moores Could Not and Did Not Waive the Statutory Protections of RCW 61.24.100 - the Guaranty “Waiver” Provision is Void, Unenforceable, and Contrary to Public Policy. ....	24
1.	The “Waiver” Provision is not Effective to Modify the Requirements and Protections of the Deed of Trust Act.....	26
2.	The “Waiver” Provision is Insufficiently Specific to be Enforceable.....	32
3.	Enforcement of the “Waiver” Provision Would Violate Public Policy. ....	34
	<b>REQUEST FOR ATTORNEYS' FEES.....</b>	<b>36</b>
	<b>CONCLUSION .....</b>	<b>38</b>
	<b>CERTIFICATE OF SERVICE .....</b>	<b>40</b>

## TABLE OF AUTHORITIES

### Cases

<u>Adams v. King County</u> , 164 Wn.2d 640, 192 P.3d 891 (2008).....	27
<u>Amresco Independence Funding, Inc. v. SPS Props., LLC</u> , 129 Wn. App. 532, 119 P.3d 884 (2005) .....	20
<u>B &amp; D Leasing Co. v. Ager</u> , 50 Wn.App. 299, 748 P.2d 652 (1988) .....	12
<u>Bain v. Metropolitan Mortgage Group, Inc.</u> , 175 Wn.2d 83, 285 P.3d 34 (2012).....	passim
<u>Bellevue Square Managers v. Granberg</u> , 2 Wn.App. 760, 469 P.2d 969 (1970) .....	12
<u>Birkeland v. Corbett</u> , 51 Wn.2d 554, 320 P.3d 635 (1958) .....	32
<u>Cathay Bank v. Lee</u> , 14 Cal. App. 1533 (1993) .....	32
<u>Diamond B Constructors, Inc. v. Granite Falls School Dist.</u> , 117 Wn. App. 157, 70 P.3d 966 (2003) .....	17
<u>First Citizens Bank &amp; Trust Co. v. Cornerstone Homes &amp; Dev., LLC</u> , __ Wn. App. __, 314 P.3d 420 (2013) .....	passim
<u>First Citizens Bank &amp; Trust Co. v. Reikow</u> , __ Wn. App. __, 313 P.3d 1208 (2013) .....	3, 33
<u>Fluke Capital Mgmt. Services, Co. v. Richmond</u> , 106 Wn.2d 614, 724 P.2d 356 (1986) .....	35
<u>Godfrey v. Hartford Ins. Co.</u> , 142 Wn.2d 885, 16 P.3d 617 (2001) .....	29
<u>Grandview Inland Fruit Co. v. Hartford Fire Ins. Co.</u> , 189 Wash. 590, 66 Pac. 827 (1937) .....	34
<u>Hartley v. State</u> , 103 Wn.2d 768, 698 P.2d 77 (1985) .....	12
<u>Hearst Comm., Inc. v. Seattle Times Co.</u> , 154 Wn.2d 493, 115 P.3d 262 (2005) .....	11

<u>Herskovits v. Group Health Coop. of Puget Sound</u> , 99 Wn.2d 609, 664 P.2d 474 (1983).....	12
<u>J.W. Seavey Hop Corp. v. Pollock</u> , 20 Wn.2d 337, 147 P.2d 310 (1944) .....	11
<u>Jacobsen v. State</u> , 89 Wn.2d 104, 569 P.2d 1152 (1977) .....	12
<u>Kennebec, Inc. v. Bank of the West</u> , 88 Wn.2d 718, 565 P.2d 812 (1977) .....	35
<u>Landmark Dev., Inc. v. City of Roy</u> , 138 Wn.2d 561, 980 P.2d 1234 (1999).....	27
<u>Matsushita Elec. Corp. of Am. v. Salopek</u> , 57 Wn.App. 242, 787 P.2d 963, review denied 114 Wn.2d 1029, 793 P.2d 975 (1990) .....	12
<u>Metropolitan Mortgage &amp; Sec. Co, Inc. v. Becker</u> , 64 Wn. App. 626, 825 P.2d 360 (1992) .....	37
<u>Mostrom v. Pettibon</u> , 25 Wn. App. 158, 607 P.2d 864 (1980) .....	13
<u>Murphy v. Campbell Investment Co.</u> , 79 Wn.2d 417, 486 P.2d 417 (1971) .....	34
<u>National Electric Contractor's Ass'n v. Riverland</u> , 138 Wn.2d 9, 978 P.2d 481 (1999).....	27
<u>Nationwide Mutual Fire Ins. Co. v. Watson</u> , 120 Wn.2d 178, 840 P.2d 851 (1992).....	12
<u>Old Nat'l Bank of Wash. v. Seattle Smashers Corp.</u> , 36 Wn. App. 688, 691, 676 P.2d 1034 (1984) .....	3
<u>Peoples Nat'l Bank of Wash. v. Ostrander</u> , 6 Wn. App. 28, 491 P.2d 1058 (1971).....	19
<u>Preston v. Duncan</u> , 55 Wn.2d 678, 349 P.2d 605 (1960) .....	13
<u>Realm, Inc. v. City of Olympia</u> , 168 Wn. App. 1, 277 P.3d 679 (2012) .....	16

<u>Resolution Trust Corp. v. Titan Financial Corp.</u> , 22 F.3d 923 (9th Cir. 1994) .....	32
<u>Schroeder v. Excelsior</u> , 177 Wn.2d 94, 297 P.3d 677 (2013).....	passim
<u>Security State Bank v. Burk</u> , 100 Wn. App. 94, 995 P.2d 1272 (2000) .....	34
<u>Shoreline Community College Dist. v. Employment Security Dept.</u> , 120 Wn.2d 394, 842 P.2d 938 (1992) .....	34
<u>Tanner Elec. Coop. v. Puget Sound Power &amp; Light</u> , 128 Wn.2d 656, 911 P.2d 1301(1996) .....	16
<u>Thompson v. Smith</u> , 58 Wn. App. 361, 793 P.2d 449 (1990) .....	21, 23, 35
<u>Udall v. T.D. Escrow Services, Inc.</u> , 159 Wn.2d 903, 154 P.3d 882 (2007) .....	20
<u>Union Bank v. Gradsky</u> , 265 Cal. App. 2d 40 (1968) .....	32
<u>Walker v. Quality Loan Service Corp.</u> , 176 Wn.App. 294, 308 P.3d 716 (2013) .....	29
<u>Weyerhaeuser Co. v. Tri</u> , 117 Wn.2d 128, 814 P.2d 629 (1991).....	27
<u>White v. Kent Medical Center, Inc.</u> , 61 Wn. App. 163, 810 P.2d 4 (1991) .....	13
<u>Wilson v. Steinbach</u> , 98 Wn.2d 434, 656 P.2d 1030 (1982) .....	13
<u>Wright v. Dave Johnson Ins., Inc.</u> , 167 Wn.App. 758, 275 P.3d 339, review denied, 175 Wn.2d 1008, 285 P.3d 885 (2012) .....	11

**Statutes**

California Civil Code § 2856.....32

Ch. 61.24 RCW.....2

Ch. 7.04 RCW.....29

RCW 4.84.330 .....36, 37

RCW 6.21.080 .....20

RCW 6.23.010 .....20

RCW 6.23.020 .....20

RCW 61.12.060 .....20

RCW 61.12.070 .....20

RCW 61.12.080 .....20

RCW 61.24.100 .....passim

RCW 61.24.100(1).....21, 22

RCW 61.24.100(10).....passim

RCW 61.24.100(5).....33

RCW 61.24.100(9).....23, 26

**Rules**

RAP 18.1(b).....36

**Treatises**

67 Wash. L. Rev. 235, RIGHTS OF WASHINGTON JUNIOR LIENORS  
IN NONJUDICIAL FORECLOSURE, Washington Mutual Savings  
Bank v. United States (1992)..... 19

## **INTRODUCTION**

Daniel Moore and Jeannine Moore, guarantors of a commercial promissory note issued by Core Development, LLC, appeal the Superior Court's summary judgment in favor of Union Bank, in which the trial court ordered the Moores to pay a deficiency following a nonjudicial trustee's sale of Core Development property that secured the promissory note and guaranties with a construction deed of trust.

Frontier Bank, Respondent Union Bank's predecessor-in-interest, made a commercial loan to Core Development, LLC ("Core"). The loan was secured by a Deed of Trust against certain real property owned by Core. Appellants Daniel Moore and Jeannine Moore also each signed a loan Guaranty to secure fulfillment of the obligations under the loan. All of the loan documents, including the Deed of the Trust and the Guaranties, were drafted by Frontier Bank without any input from Core or the Moores. Important to this appeal is that the express terms in Frontier Bank's Deed of Trust form provide that the Deed of Trust secures not only the Promissory Note signed by borrower Core, but also the Moore Guaranties upon which Union Bank now sues. After Frontier Bank failed and the FDIC sold the Bank's assets to Union Bank, Union Bank elected to non-judicially foreclose upon the Deed of Trust that secured both the Core Note and the Moore Guaranties. Union Bank acquired the property at the trustee sale by way of a credit bid, after which there remained a deficiency claimed to be over \$580,000.

Following the nonjudicial foreclosure, Union Bank sued the Moores, as guarantors, for this deficiency and moved for summary

judgment. The superior court granted Union Bank's motion as to liability, but set the matter over for an evidentiary hearing as to the amount of the deficiency. Prior to that hearing, the parties stipulated to a judgment in favor of Union Bank and against the Moores in the amount of \$275,000, reserving to the Moores the right to appeal both the judgment and the amount. The Moores now appeal.

On appeal, the Moores assert that (1) the Core Deed of Trust also secured the Moores' performance under the commercial Guaranty; (2) the anti-deficiency provisions of the "Washington Deed of Trust Act"<sup>1</sup> prohibit a deficiency judgment against a guarantor when, as here, the underlying Deed of Trust secured the Guaranty; and 3) the "waiver" provision set forth in the Moores' Guaranty are void and may not be enforced against the Moores because they are not permitted under the Act, would violate public policy, and would impermissibly defeat the rights and obligations of the parties under the Act.

The Moores' position on the first two of these points is directly supported in the law by this Court's recent holdings in *First Citizens Bank & Trust Co. v. Cornerstone Homes & Dev., LLC*, \_\_ Wn. App. \_\_, 314 P.3d 420 (2013). In that case, and based upon virtually identical facts, this Court held that RCW 61.24.100(10) prohibited First Citizens from obtaining a deficiency judgment against the Allisons, who were guarantors of borrower Cornerstone's debt, because the deeds of trust that First Citizens non-judicially foreclosed upon to satisfy Cornerstone's

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<sup>1</sup>Ch. 61.24 RCW.

underlying debt also secured the Allison's commercial guaranty under the express terms of the guaranty, promissory notes, and deeds of trust drafted by First-Citizen's predecessor. The same is true in this case.

The Moores' position on the issue of waiver is equally well-founded. Although it did not decide the specific issue of whether statutory protections governing nonjudicial foreclosure can be waived by contract, Division II of the Court of Appeals addressed this issue with favor in *First Citizens Bank & Trust Co. vs. Reikow*, \_\_ Wn. App. \_\_, 313 P.3d 1208, 1212-13 (2013), fn. 3, 4. The *Cornerstone* Court later acknowledged the significance of the *Reikow* discussion on this issue in footnote 5 of its opinion. *Cornerstone*, 314 P.3d at 422 fn. 5. The *Reikow* Court noted that,

under Washington law, "a guaranty agreement should receive a fair and reasonable interpretation reflecting the purpose of the agreement and *the right of the guarantor not to have his obligation enlarged.*" *Old Nat'l Bank of Wash. v. Seattle Smashers Corp.*, 36 Wn. App. 688, 691, 676 P.2d 1034 (1984) (emphasis added in original).

*Reikow*, 313 P.3d at fn. 4. The *Reikow* Court went on to reiterate and embrace the Washington Supreme Court's reluctance to enforce a contractual provision waiving the statutory requirements governing nonjudicial foreclosure. *Reikow*, 313 P.3d at fn. 4, citing to *Schroeder v. Excelsior*, 177 Wn.2d 94, 106-07, 297 P.3d 677 (2013) and *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83, 108, 285 P.3d 34 (2012).

The Moores respectfully request that this Court hold that Union Bank's election to non-judicially foreclose on the Deed of Trust

discharged all obligations secured by the Deed of Trust, including the Moores' obligations under the Guaranties. The Moores request that this Court reverse the order of the trial court, remand this matter with instruction to vacate the judgment, to reverse its award of attorney fees to Union Bank, to grant attorney fees to the Moores on appeal, and to dismiss Union Bank's deficiency action with prejudice.

### **ASSIGNMENTS OF ERROR**

The Moores assign error to the trial court's order on summary judgment entered on May 14, 2013, Clerk's Papers (CP) at 457-59, which order provides that Union Bank is entitled to a deficiency judgment against the Moores pursuant to the Guaranty, even though the Moores' obligations under the Guaranty were discharged when Union Bank foreclosed on the Deed of Trust that secured the Guaranty.

### **ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. By its terms, did the non-judicially foreclosed Deed of Trust prepared by Union Bank's predecessor secure the Guaranty obligations of the Moores in addition to the obligations of the borrower/grantor?

2. Does the Deed of Trust Act, chapter 61.24 RCW, prohibit a secured lender from seeking a deficiency judgment against a guarantor, where that lender voluntarily elected to non-judicially foreclose under the Act and where the guarantor's obligations are also secured by the same deed of trust foreclosed upon?

3. May a secured lender who invoked and benefitted from the streamlined and unsupervised non-judicial foreclosure remedy created by

the Deed of Trust Act contractually eliminate and avoid the very statutory limitations and conditions under which the Legislature permitted the lender to conduct a non-judicial foreclosure in the first place?

5. Is a purported contractual waiver of the statutory protections and due process requirements of RCW 61.24.100 valid and enforceable, when the waiver is 1) not expressly permitted under RCW 61.24.100, 2) insufficiently specific, and 3) violative of public policy?

### **STATEMENT OF THE CASE**

#### **A. Frontier Bank Grants the Loan.**

In 2006, Frontier Bank made a commercial loan of \$712,500 to Core Development LLC (“Core”)<sup>2</sup>, to finance the construction of an office building in Auburn, Washington. CP at 9, 270. For this loan, Core signed a Promissory Note, prepared and presented by Frontier Bank. CP at 352, 273-74. As security for this Promissory Note, Frontier Bank took a Construction Deed of Trust (the “Deed of Trust”), also prepared and presented by Frontier Bank, on the building site and improvements (the “Property”). CP at 275-83.

As additional security for the loan to Core, Daniel Moore, a member of Core, and his wife Jeannine each signed a Commercial Guaranty, prepared and presented by Frontier Bank, for the loan from

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<sup>2</sup>The Members of Core Development LLC were Appellant Daniel Moore and Co-Defendants Mark Nowels and Jason Cole. Appellant Jeannine Moore is Daniel Moore’s wife.

Frontier Bank to Core.<sup>3</sup> CP at 284-89. The language of this Guaranty represented that it was interrelated with and encompassed all other “related” documents “executed in connection with the indebtedness” then or in the future. *Id.*

The Washington State Department of Financial Institutions subsequently closed Frontier Bank and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. The FDIC sold many of Frontier Bank's assets to Union Bank, including Frontier Bank's loan to Core. CP at 293-94.

**B. Union Bank Elects to Non-Judicially Foreclose and *Then* Bring a Deficiency Action.**

Union Bank claims that, in November 2008, Core defaulted on the loan; after this, Union Bank initiated a non-judicial foreclosure of the Deed of Trust. CP at 144-45. On March 4, 2011, a foreclosure trustee sale was held at the instance of Union Bank, and Union Bank acquired the property at the trustee sale by way of a credit bid. CP at 145. Union Bank claims that, following this sale, there remained a deficiency of over \$580,000. CP at 6.

Once Core defaulted on the loan, Union Bank had a variety of remedies available to it to collect on the Core debt. Union Bank could have foreclosed judicially and simultaneously (or at a later time) pursued a deficiency against both Core and the Moores as Guarantors. Union

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<sup>3</sup>The form of the Commercial Guaranty and the terms contained therein are the same for Daniel Moore and Jeannine Moore. As used herein, “Guaranty” shall mean each of these two Guaranties.

Bank could have sued on the Promissory Note or the Guaranty first, leaving the foreclosure option available as a later remedy. But Union Bank voluntarily elected to avail itself of the inexpensive and efficient non-judicial foreclosure procedures under Chapter 61.24 RCW.

Union Bank commenced this lawsuit seeking a deficiency judgment under the Moore Guaranty after it successfully completed its non-judicial foreclosure on the Deed of Trust. CP at 1-42.<sup>4</sup> Union Bank attached and incorporated into its Complaint all of Frontier Bank's loan documents, *Id.*, including the Promissory Note, CP at 9-19, the Deed of Trust, CP at 11-19, and the Guaranties, CP at 20-31. Union Bank also attached and incorporated into its Complaint documents pertinent to its completed non-judicial foreclosure. CP at 32-42. The Guaranty executed by the Moores was the sole basis for Union Bank's claim against the Moores. CP at 1-42.

**C. The Express Terms of the Loan Documents Drafted by the Bank.**

The Promissory Note, the Deed of Trust, the Guaranty, and all of the other loan documents were produced by Frontier Bank on Frontier Bank's pre-printed forms, without input from Core or the Moores. CP at 9-31. Thus, the form and express terms of the loan documents, including the Deed of Trust and Guaranty, were exclusively dictated by the Bank. By their own terms, the Promissory Note, the Deed of Trust,

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<sup>4</sup> In addition to the Moores, Union Bank also sued the other Members of Core as co-guarantors. Union Bank voluntarily dismissed Jason Cole from the action. Union Bank obtained a default judgment against Mark Nowels and his marital community.

and the Guaranty are related and intertwined. *Id.* Indeed, the loan documents themselves infer that they must be construed together.

### **1. The Obligations Secured by the Deed of Trust**

Frontier Bank's pre-printed Deed of Trust sets forth the obligations it secures. These obligations are more than just the borrower's obligations in the Promissory Note. The Deed of Trust provides:

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

CP at 12. The scope of the obligations secured is further clarified by the Deed of Trust's stated definitions of "Indebtedness" and "Related Documents." The Deed of Trust defines "Indebtedness" to include obligations arising from "Related Documents":

The words "Indebtedness" means all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents, together with all renewals of, extensions of, modifications of, consolidations of and substitutions for the Notes or Related Documents and any amounts expended or advanced by Lender to discharge Grantor's obligations or expenses incurred by Trustee or Lender to enforce Grantor's obligations under this Deed of Trust, together with interest on such amounts as provided in this Deed of Trust. (Emphasis added.)

CP at 17. The Deed of Trust explicitly defines "Related Documents" to include all guaranties:

The words "Related Documents" mean *all promissory notes*, credit agreements, loan agreements, *guaranties*, security agreements, mortgages, *deeds of trust*, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, *executed in connection with the Indebtedness*; provided that the environmental indemnity agreements are not "Related Documents" as are not secured by this Deed of Trust. (Emphasis added).

CP at 18.<sup>5</sup> Thus, the Deed of Trust expressly secured the Guaranty upon which Union Bank now sues.

## **2. The Interrelationship of the Promissory Note, the Guaranty, and the Deed of Trust.**

The Deed of Trust expressly incorporates the terms of the Promissory Note and the Guaranty, as well as all other loan documents, into the Deed of Trust itself. The Deed of Trust, under the section entitled "**MISCELLANEOUS PROVISIONS**," provides:

**Amendments.** This Deed of Trust, *together with any Related Documents*, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Deed of Trust. No alteration of, or amendment to this Deed of Trust shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment. (Emphasis added.)

CP at 16. As with the Deed of Trust, the Guaranty also expressly incorporates the terms of the Deed of Trust and the Promissory Note, as well as all other loan documents, into the Guaranty itself. The Guaranty, under the section entitled "**MISCELLANEOUS PROVISIONS**," provides:

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<sup>5</sup> The Guaranty also contains a definition of "Related Documents" that is virtually identical to the definition found in the Deed of Trust. CP at 22, 25.

**Amendments.** This Guaranty, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Guaranty. No alteration of, or amendment to this Guaranty shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment. (Emphasis added.)

CP at 21, 24. The terms of the Deed of Trust that Union Bank foreclosed upon are thus expressly incorporated into the Guaranty and are also considered terms of the Guaranty.

### **3. The Guaranty's "Waiver" Provision**

The language chosen by the bank for the Guaranty purports to waive any defense a guarantor might contemplate. *See*, CP at 21, 24. The Guaranty goes on to provide, however, that

If any such waiver is determined to be contrary to any applicable law or public policy, such waiver shall be effective only to the extent permitted by law or public policy." *Id.* (Emphasis added).

### **D. Union Bank Moves for Summary Judgment.**

Union Bank moved for summary judgment based on the loan documents attached to its Complaint. CP at 179-89. After hearing oral argument on all issues, the trial court ruled in favor of Union Bank on the issue of liability, stating that the parties enjoyed "freedom of contract" and that the Moores had waived the statutory protections of RCW 61.24.100. Report of Proceedings (RP) at 18-19; CP at 456, 457-59. The trial court scheduled an evidentiary hearing to determine the proper amount of the deficiency judgment. CP at 456.

The parties subsequently stipulated to a judgment amount, but fully reserved Appellants' right to appeal both the trial court's summary judgment ruling and the amount of the judgment. CP at 461-65. The Moores timely appealed. CP at 466.

## ARGUMENT

### A. The Standard of Review.

A court reviews the trial court's summary judgment determination *de novo*, engaging in the same inquiry as the trial court. Hearst Comm., Inc. v. Seattle Times Co., 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Interpretation of a contract is a question of law, which a court reviews *de novo*. Wright v. Dave Johnson Ins., Inc., 167 Wn.App. 758, 769, 275 P.3d 339, review denied, 175 Wn.2d 1008, 285 P.3d 885 (2012).

A court's primary goal in interpreting a contract is to ascertain the parties' intent. To this end, Washington follows the "objective manifestation theory of contracts," under which the court attempts to determine the parties' intent by focusing on the parties' objective manifestations of that intent *in the written contract* rather than on the unexpressed subjective intent of either party. Hearst, 154 Wn.2d at 503. In other words, a court does "not interpret what was *intended* to be written but what *was* written." Hearst, 154 Wn.2d at 503, 504, 115 P.3d 262 (emphasis added) (citing J.W. Seavey Hop Corp. v. Pollock, 20 Wn.2d 337, 348–49, 147 P.2d 310 (1944)).

The rules that apply to contracts also govern interpretation and construction of a guaranty. Bellevue Square Managers v. Granberg,

2 Wn. App. 760, 766, 469 P.2d 969 (1970).<sup>6</sup> By signing a guaranty, the guarantor promises a creditor to perform if the debtor fails to repay the loan. B & D Leasing Co. v. Ager, 50 Wn.App. 299, 306, 748 P.2d 652 (1988). Nevertheless,

[a] guarantor is *not* to be held liable beyond the express terms of his or her engagement. If there is a question of meaning, the guaranty is construed against the party who drew it up or against the party benefited.

Matsushita Elec. Corp. of Am. v. Salopek, 57 Wn.App. 242, 246–47, 787 P.2d 963, *review denied* 114 Wn.2d 1029, 793 P.2d 975 (1990) (Emphasis added). Here, it is undisputed that Frontier Bank drafted the Moores' Guaranty and Core's Deed of Trust.

#### **B. The Summary Judgment Standard.**

Summary judgment is only appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Hartley v. State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985) (emphasis added) (citing Herskovits v. Group Health Coop. of Puget Sound, 99 Wn.2d 609, 613, 664 P.2d 474 (1983)). A material fact is one upon which the outcome of the litigation depends. Nationwide Mutual Fire Ins. Co. v. Watson, 120 Wn.2d 178, 186, 840 P.2d 851 (1992) (citing Jacobsen v. State, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977)).

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<sup>6</sup> See also, Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 699, 952 P.2d 590 (1998).

In determining whether the Court should have granted Union Bank's Motion for Summary Judgment, the court was required to assume the facts in a light most favorable to the Moores, who were the non-moving parties. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Summary judgment is not warranted in situations where, through evidentiary facts are not in dispute, different inferences may be drawn from them as to ultimate facts. (Citations omitted). Even though evidentiary facts are not in dispute, if different inferences may be drawn therefrom as to ultimate facts such as intent, knowledge, good faith, negligence, *et cetera*, summary judgment is not warranted. Preston v. Duncan, 55 Wn.2d 678, 681 82, 349 P.2d 605 (1960); Sanders v. Day, 2 Wn. App. 393, 398, 468 P.2d 452 (1970). Summary judgment must be denied if the record shows any reasonable hypothesis that entitles the non-moving party to relief. White v. Kent Medical Center, Inc., 61 Wn. App. 163, 175, 810 P.2d 4 (1991) (citing Mostrom v. Pettibon, 25 Wn. App. 158, 162, 607 P.2d 864 (1980)).

In this case, the trial court misapplied the law and, in light of the foregoing principles, and Union Bank's Motion for Summary Judgment should have been denied. Moreover, this action should have been dismissed with prejudice, with an award of attorney fees to the Moores.

**C. The Cornerstone Decision is Dispositive Here.**

This Court recently addressed the very same issues presented here in First Citizens Bank & Trust Co. v. Cornerstone Homes & Dev., LLC, \_\_ Wn. App. \_\_, 314 P.3d 420 (2013). In that case, Cornerstone had

obtained a commercial loan from First Citizens, as evidenced by a promissory note, and secured that loan with a deed of trust on Cornerstone's property. As further security for that loan, First Citizens had the Allisons sign a commercial guaranty. The forms and language used in that promissory note, deed of trust, and guaranty were the very same forms used by Frontier Bank in the present case.<sup>7</sup>

In this case, as well as in *Cornerstone*, the "Indebtedness" consisted of a loan made by the bank to a property owner LLC, an entity owned by the individual guarantors who were its members. The LLC was the "Borrower" of the loan and the "Grantor" of the Deed of Trust. The only "guaranties ... executed in connection with the Indebtedness" were those executed by the individual LLC Members.

Per the terms of the Commercial Guaranty forms signed by the Moores in the current case, as with the Allisons in *Cornerstone*, those individuals guaranteed "full and punctual payment and satisfaction of the Indebtedness of Borrower to Lender, and the performance and discharge of all Borrower's obligations to Lender under the Note and Related Documents." CP at 20-25. It cannot be disputed that "all Borrower's obligations to Lender under the Note and Related Documents" have indeed been satisfied and/or extinguished by the nonjudicial foreclosure. There are no "Borrower's obligations" left to satisfy.

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<sup>7</sup> Both Frontier Bank and First Citizens had obtained these standard forms from Laser Pro, a commercial vendor of loan processing documents and software. See the annotations at the bottom of CP at 10 (promissory note), CP at 19 (deed of trust), and CP at 22, 25 (guaranty).

In this case, as in Cornerstone, the loan documents were prepared entirely by the lending bank, and there is no evidence of any participation by the borrowers or guarantors in either the negotiation or drafting of the words employed. The Cornerstone Court had no difficulty concluding that the obligations secured by the Deed of Trust, as set forth its "granted to secure" paragraph, included those arising under the original loan guaranties signed by the individual Members of the LLC borrower:

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

Cornerstone, 314 P.3d at 422 (Emphasis in original, footnotes omitted). The Cornerstone Court also pointed to the "Amendments" (*i.e.*, "entire agreement") clause and "Related Documents" definition in the Allison's Commercial Guaranty as further confirmation of its interpretation as to later guaranties:

This plain language expressly incorporates future "Related Documents," which unambiguously includes future "deeds of trust" as well as "promissory notes" "executed in connection with the indebtedness," "now or hereafter existing," namely Cornerstone's promissory notes and deeds of trust later executed to obtain this contemplated loan.

Nor is there any ambiguity in Venture Bank's identical use of the term "the Indebtedness," in both the deeds of trust and the Allison's guaranty, to refer to Cornerstone's construction loans from Venture bank, secured by the

deeds of trust. Thus, we agree with the Allisons that these reciprocal plain terms operate together such that the deeds of trust expressly secure the Allisons' guaranty in addition to Cornerstone's construction loan. (Emphasis added)

Cornerstone, 314 P.3d at 423. These interpretations give full effect to the plain meaning and stated intent of the documents drafted by the lending banks, and the same determination should be reached by this Court.

Based upon facts virtually identical to facts in this case, this Court held that RCW 61.24.100(10) prohibited First Citizens from obtaining a deficiency judgment against the Allisons, because the deeds of trust that First Citizens non-judicially foreclosed upon to satisfy Cornerstone's underlying debt also secured the Allisons' commercial guaranty under the express terms of the guaranty, promissory notes, and deeds of trust drafted by First-Citizen's predecessor.

This case demands the same outcome – that Union Bank is prohibited from obtaining a deficiency judgment against the Moores. Notwithstanding, the Moores offer additional argument in support of their position on these issues.

#### **D. Core's Deed of Trust Secured the Moores' Guaranty**

The "touchstone of contract interpretation is the parties' intent," which starts with review of the plain language used in the contract documents. Tanner Elec. Coop. v. Puget Sound Power & Light, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996). Courts will look at the contract language as a whole and will give greater weight to specific terms over general terms to harmonize apparently contradictory terms. Realm, Inc. v. City of Olympia, 168 Wn. App. 1, 277 P.3d 679 (2012);

Diamond B Constructors, Inc. v. Granite Falls School Dist.,  
117 Wn. App. 157, 165, 70 P.3d 966 (2003).

As with the deed of trust at issue in Cornerstone, the express language of the Deed of Trust in this case similarly provides that the Moores' Guaranty was secured by the Deed of Trust. The Deed of Trust, drafted by Union Bank's predecessor, Frontier Bank, expressly stated that it was

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

CP at 12 (emphasis added). The Deed of Trust defined "Indebtedness" as "all principal, interest, and other amounts, costs and expenses payable under the Note or Related Documents." CP at 17 (Emphasis added). The Deed of Trust further defined "Related Documents" to include any and all "guaranties ... whether now or hereafter existing, executed in connection with the Indebtedness." CP at 18 (Emphases added). A plain reading of this language includes the Moores' Guaranty among the "Related Documents" that this Deed of Trust secured.

Similarly, the Moores' Guaranty, also drafted by Frontier Bank, used the same "Related Documents" language as follows:

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

[...]

"Related Documents" mean all promissory notes, credit agreements, loan agreements, environmental agreements,

guaranties, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness.

CP at 21-22, 24-25 (Emphases added). This plain language expressly incorporates all “Related Documents,” which unambiguously includes all “deeds of trust” as well as “promissory notes” “executed in connection with the Indebtedness,” “now or hereafter existing,” namely Core's Promissory Note and Deed of Trust executed to obtain this contemplated loan. *Id.*

There is likewise no ambiguity in Frontier Bank's identical use of the term “the Indebtedness” in both the Deed of Trust and the Moores' Guaranty, to refer to Core's Construction Loan from Frontier Bank, secured by the Deed of Trust. *See*, CP at 17.

Frontier Bank drafted the Guaranty using language that complemented and was wholly consistent with the terms used in the Deed of Trust. The Guaranty not only acknowledges these and all other terms in the Deed of Trust, it expressly incorporates the Deed of Trust terms into the Guaranty. (“This Guaranty, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Guaranty.” CP at 21, 24.) The words Frontier Bank chose to use in its Deed of Trust and acknowledged and accepted in its Guaranty provide that the Deed of Trust secures the Guaranty.

Moreover, in its Deed of Trust, Frontier Bank actually took care to expressly exclude obligations that were not to be secured by the Deed of Trust. In particular, Frontier Bank deliberately and intentionally defined

“Related Documents” to exclude environmental indemnities from obligations secured by the Deed of Trust (...”the environmental indemnity agreements are not ‘Related Documents’ and are not secured by this Deed of Trust.” CP at 18. Just as Frontier Bank did with environmental indemnities, Frontier Bank could have expressly excluded guaranties from the obligations secured by its Deed of Trust, but it chose not to do so. By defining “Related Documents” in the manner it chose, Frontier Bank deliberately and intentionally included guaranties with the obligations that were to be secured by the Deed of Trust, including the Moores’ Guaranty.

In sum, the plain reciprocal terms of the Deed of Trust and the Guaranty operate together such that the Deed of Trust expressly secures the Moores' Guaranty in addition to Core's Construction Loan.

**E. Washington’s Anti-Deficiency Statute RCW 61.24.100 Prohibits a Deficiency Judgment on the Moores’ Guaranty**

The Washington Deed of Trust Act created a nonjudicial foreclosure option for deeds of trust as an alternative to the traditional judicial foreclosure system. *See*, 67 Wash. L. Rev. 235, RIGHTS OF WASHINGTON JUNIOR LIENORS IN NONJUDICIAL FORECLOSURE, Washington Mutual Savings Bank v. United States (1992). It was designed by the Legislature to "save substantial time and money" by allowing secured lenders to avoid time-consuming judicial foreclosure proceedings." Peoples Nat'l Bank of Wash. v. Ostrander, 6 Wn. App. 28, 31, 491 P.2d 1058 (1971). Courts have acknowledged this statutorily authorized power of sale is a "significant power" conferred to lenders, since it allows for the swift forfeiture of debtors' interests with relative

ease and without judicial supervision. Bain v. Metropolitan Mortgage Group, Inc., 175 Wn.2d 83, 95, 285 P.3d 34 (2012). As a result, courts consistently have strictly construed the Act in favor of borrowers, rather than the secured creditors who foreclose under the Act. *Id.*; Udall v. T.D. Escrow Services, Inc., 159 Wn.2d 903, 915, 154 P.3d 882 (2007).

The deed of trust statutes codified in chapter 61.24 RCW allow a trustee to sell a property without a judicial process. ... Because these statutes remove many protections borrowers have under a mortgage, lenders must strictly comply with the statutes, and courts must strictly construe the statutes in the borrower's favor.

Amresco Independence Funding, Inc. v. SPS Props., LLC, 129 Wn. App. 532, 536-37, 119 P.3d 884 (2005).

A lender that elects to invoke this power of sale without judicial oversight, however, must also accept certain statutorily imposed limitations on otherwise available remedies – the power does not come without a price. Under a judicial foreclosure, a creditor may sue for a deficiency when the sale of property secured under a deed of trust falls short of the debt. RCW 61.12.070, .080. On the other hand, debtors subject to a judicial foreclosure can potentially obtain an upset price to reduce or eliminate the deficiency or even redeem their property following the judicial foreclosure. RCW 61.12.060; RCW 6.21.080; RCW 6.23.010, .020.

In contrast, the Deed of Trust Act contemplates a "*quid pro quo*" between lenders and borrowers. Debtors "relinquished a right to redemption and to a judicially imposed upset price. Creditors, in exchange for inexpensive and efficient non-judicial foreclosure

procedures, sacrificed a substantial benefit that remains available in a judicial foreclosure.” *Thompson v. Smith*, 58 Wn. App. 361, 365, 793 P.2d 449 (1990). Specifically, creditors who elect the inexpensive remedy of nonjudicial foreclosure subject themselves to the anti-deficiency provision of the Act and forfeit their right to seek a deficiency judgment in many circumstances. *Id.*; RCW 61.24.100.

Two recent appellate decisions are dispositive of Union Bank's claims against the Moores: *Cornerstone*, 314 P.3d 420, and *First Citizens Bank & Trust Co. v. Reikow*, \_\_ Wn. App. \_\_, 313 P.3d 1208 (Slip Op. Np. 43181-5-11, November 13, 2013).

As noted by this Court in *Cornerstone*, the anti-deficiency provision of the Act, RCW 61.24.100, "categorically prohibits a deficiency against a *borrower* or *guarantor* following a nonjudicial foreclosure, subject to certain exceptions for deeds of trust securing commercial loans. [RCW 61.24.100(1) provides]:

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

*Cornerstone*, 314 P.3d at 424. Subsection (10) to RCW 61.24.100 is one such “extent permitted,” creating an exception to subsection (1)'s general prohibition against deficiency judgments following nonjudicial foreclosure, allowing a lender to sue a commercial loan guarantor so long as the guaranty was not secured by the foreclosed deed of trust. RCW 61.24.100(10) provides:

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

Thus, provided that certain notice and other conditions are met (see, e.g., RCW 61.24.100(3)(c)), the creditor may sue post nonjudicial foreclosure for a deficiency against a commercial guarantor, but only if that guaranty was not secured by the foreclosed deed of trust. If secured, the action is statutorily barred.

RCW 61.24.100's anti-deficiency protections prohibit a lender from obtaining a deficiency judgment against a guarantor whose guaranty was secured by a nonjudicially foreclosed deed of trust that also secured the guaranty.

*Cornerstone*, 314 P.3d at 425. As construed by *Cornerstone*, Union Bank's deficiency claim against the Moores is now barred by Washington's Deed of Trust Act, because the Guaranty upon which Union Bank sues was secured by the same Deed of Trust on which it nonjudicially foreclosed.

#### **F. Frontier Bank and Union Bank Forfeited Their Right to Pursue the Guarantors**

The disposition of this case turns on the fact that the Guaranty is secured by the Deed of Trust, and that Union Bank elected to non-judicially foreclose on that Deed of Trust. RCW 61.24.100(1) and (10) direct that all obligations secured by the Deed of Trust, including the Moores' Guaranty, were discharged at the conclusion of the trustee's sale. Union Bank's election to invoke the statutorily created remedy of non-judicial foreclosure on the Deed of Trust was also an election to forfeit

further collection on all obligations secured by that same Deed of Trust, to include the Moores' Guaranty.

To be sure, Union Bank had a variety of remedies available to it to collect on the Core debt. It could have foreclosed judicially and simultaneously pursued a deficiency against both Core and the Guarantors. It could have sued on the Promissory Note or the Guaranty first, leaving the foreclosure option available as a later remedy. But Union Bank voluntarily chose to nonjudicially foreclose on the Deed of Trust under RCW 61.24.100.

By proceeding under RCW 61.24.100, an efficient process without judicial oversight, Union Bank sacrificed its usual right to a deficiency judgment when it elected the “inexpensive and efficient” nonjudicial foreclosure procedure to satisfy a defaulted loan. *Thompson*, 58 Wn.App. at 365, 793 P.2d 449. In this case, as with the bank in *Cornerstone*, Union Bank triggered the ultimate due process protections afforded to the parties by RCW 61.24.100, when it chose the relatively “inexpensive and efficient” nonjudicial foreclosure option. *Thompson*, 58 Wn.App. at 365. Indeed, by drafting the Deed of Trust in such a way that it expressly secured the Moores' Guaranty, Frontier Bank waived its right to recover a deficiency, which itself operates as a waiver of the bank's rights, as contemplated by RCW 61.24.100(9).<sup>8</sup>

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<sup>8</sup> RCW 61.24.100(9) provides that:

(9) Any contract, note, deed of trust, or guaranty may, by its express language, prohibit the recovery of any portion or all of a deficiency after the property encumbered by the deed of trust securing a commercial loan is sold at a trustee's sale.

Union Banks' own actions and those of its predecessor foreclosed any deficiency judgment remedies under the Guaranty. Frontier Bank chose to secure the Guaranty by the Deed of Trust, even though it could have drafted the Deed of Trust differently to exclude guaranties from the obligations it secured (as it did with environmental indemnity agreement obligations). Union Bank chose to foreclose nonjudicially, even though it could have foreclosed judicially or simply sued on the Promissory Note or Guaranty.

Those choices now have ramifications. The Moores' obligations under the Guaranty were discharged, as a matter of law, following the non-judicial foreclosure on the Deed of Trust securing the Guaranty. *Cornerstone*, 314 P.3d at 425; RCW 61.24.100. Union Bank is now statutorily barred from obtaining a deficiency judgment against the Moores. *Id.*

**G. The Moores Could Not and Did Not Waive the Statutory Protections of RCW 61.24.100 - the Guaranty "Waiver" Provision is Void, Unenforceable, and Contrary to Public Policy.**

Union Bank argued below that, through the use of a boilerplate "waiver" provision in the Moore Guaranty, it is entitled to wholly disregard the legislatively-imposed limitations on remedies that accompany an election to foreclose nonjudicially. However, Union Bank may not contractually expand the remedy legislatively created or eliminate conditions imposed by the Deed of Trust Act through a purported "waiver." Union Bank may not use a "waiver" provision in the

Guaranty to sidestep the statutory prohibitions of the Deed of Trust Act and contractually compromise the due process protections it contains.

At the hearing on Union Bank's motion for summary judgment, the trial court opined that the parties enjoyed "freedom of contract," which permitted Union Bank to require that Mr. & Mrs. Moore to waive the statutory protections of RCW 61.24.100 mandated by the Legislature. "I don't think that the legislature, nor the court in the *Bain* decision meant to interfere with fundamental principles of freedom of contract, particularly, in a commercial setting." RP at 19. However, the trial court offered no cogent explanation of why "fundamental principles of freedom of contract" should necessarily trump statutory requirements based on public policy and due process.

The Moores' challenge does not involve application or waiver of a guarantor's defense, as Union Bank may urge. Rather, this appeal involves the propriety of contractually disregarding the statutory scope of a lender's available remedies that remain following a remedy election. Specifically, the Moores ask this Court to determine the legal ramifications that follow a creditor's voluntary election to foreclose non-judicially, when the Guaranty on which the creditor bases its deficiency claim is secured by the Deed of Trust.

In short, the "waiver" provision in the Guaranty is not valid and may not be enforced to permit a deficiency judgment, because to do so would be contrary to the Deed of Trust Act and its public policy, the recent Supreme Court decisions in *Bain and Schroeder*, and the Division II decision in *Reikow*.

**1. The “Waiver” Provision is not Effective to Modify the Requirements and Protections of the Deed of Trust Act.**

Union Bank has no legal authority to expand the remedies it has been statutorily granted by the Legislature or to otherwise compromise the due process protections afforded by the Act. What the Guaranty entitles a "waiver" is better described as an impermissible attempt to contractually modify and expand a legislatively-created remedy that the Legislature expressly limited and conditioned. Indeed, the Washington Supreme Court held just last year that contractual alteration or expansion of remedies under the Deed of Trust Act is not authorized. *Bain v. Metropolitan Mortgage Group, Inc., supra.*

The opening sentence of RCW 61.24.100 presents mandatory language - except as otherwise provided in RCW 61.24.100, a deficiency judgment "*shall not* be obtained" against a borrower or guarantor. Nothing in RCW 61.24.100 provides or even suggests that any protections of the Act may be waived. Absent express legislative authorization, a creditor may not contractually modify those statutory rights. *Bain, supra.*

It should be noted that the Legislature has expressly authorized some specific deviations from the Act. In subsection (9), for example, the Legislature affirmatively authorized parties to contractually prohibit a lender from seeking a deficiency. However, there is no equivalent legislative authorization that would allow the parties to contractually *expand* the circumstances in which a lender may take a deficiency or to contractually waive a borrower or guarantor's protections under the Act.

The Legislature has also expressly and narrowly permitted contractual limitation of other particular protections of the Act. At subsection (4), the Legislature provided that parties may, in certain express and limited circumstances, contract for a deadline to file a deficiency suit later than the Act's statute of limitations. At subsection (7), the Legislature authorized parties to contractually preserve a deficiency against the guarantor in instances where a deed in lieu of foreclosure is accepted. Finally, at subsection (11), the Legislature authorized parties to waive a guarantor's objection to impairment of collateral by the trustee's sale. The narrow and limited authorizations set forth in subsections (4), (7), (9), and (11) are the only circumstances in which the Legislature authorized contractual limitation of Deed of Trust Act protections.

When the Legislature specially authorizes certain specified acts, acts not so specified will be presumed to be deliberately excluded. *National Electric Contractor's Ass'n v. Riverland*, 138 Wn.2d 9, 17-18, 978 P.2d 481 (1999); citing *Weverhaeuser Co. v. Tri*, 117 Wn.2d 128, 133-34, 814 P.2d 629 (1991) (“[W]hen a statute specifies the class of things upon which it operates, it can be inferred that the Legislature intended to exclude any omitted class.”); *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999). Put another way, “omissions are deemed exclusions.” *Adams v. King County*, 164 Wn.2d 640, 650, 192 P.3d 891 (2008), quoting, *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

While the Cornerstone Court did not squarely address the issue of a waiver in this context, it did apply the statutory construction principle *expressio unius est exclusio alterius*,<sup>9</sup> to its analysis of the Deed of Trust Act. Under this canon of statutory construction, to express one thing in a statute implies the exclusion of the other. Cornerstone, 314 P.3d at 424-25 (citations omitted). The statute was clear to express the particular areas in which the parties to a nonjudicial foreclosure may deviate from the Act. See, RCW 61.24.100 subsections (4), (7), (9), and (11). These express provisions are the only such deviations permitted to the limitations imposed by the Deed of Trust Act. Deviation from RCW 61.24.100(10) is not permitted.

This is particularly true here in light of the recent Washington Supreme Court decisions in Bain and Schroeder, in which the Supreme Court refused to allow contractual modification of the protections in the Deed of Trust Act. Schroeder v. Excelsior, 177 Wn.2d 94, 106-07, 297 P.3d 677 (2013); Bain, *supra*, 175 Wn.2d at 107-08.

In Bain, the Supreme Court was asked to determine if a deed of trust beneficiary may non-judicially foreclose under the Deed of Trust Act when the designated beneficiary is not also the holder of the promissory note that the deed of trust secures. In Bain, the subject deed of trust contractually authorized the designated beneficiary to non-judicially foreclose pursuant to the Act. The Deed of Trust Act, however,

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<sup>9</sup> “Expression of one thing in a statute implies exclusion of others, and this exclusion is presumed to be deliberate.” State v. Kelley, 168 Wn.2d 72, 83, 226 P.3d 773 (2010).

defines a beneficiary as one who is not only designated in the deed of trust, but who is also the holder of the secured note. The Act only conferred the power of non-judicial foreclosure to a beneficiary as defined in the Act.

The *Bain* Court held that the Deed of Trust Act remedy could not be contractually altered and, since the beneficiary did not meet the statutory requirements, it had not been conferred the power of non-judicial foreclosure. As the *Bain* Court explained:

This is not the first time that a party has argued that we should give effect to its contractual modification of the statute. In *Godfrey*,<sup>10</sup> Hartford Casualty Insurance Company had attempted to pick and choose what portions of Washington's Uniform Arbitration Act, chapter 7.04 RCW, it and its insured would use to settle disputes. The court noted that parties were free to decide whether to arbitrate, and what issues to submit to arbitration, but “once an issue is submitted to arbitration, Washington's [arbitration] act applies.” By submitting to arbitration, “they have activated the entire chapter and the policy embodied therein, not just the parts useful to them.” The legislature has set forth in great detail how nonjudicial foreclosures may proceed. We find no indication the legislature intended to allow the parties to vary these procedures by contract. We will not allow waiver of statutory protections lightly. MERS did not become a beneficiary by contract or under agency principals.

*Id.*, 175 Wn.2d at 107-08. (Emphasis added). See also, *Walker v. Quality Loan Service Corp.*, 176 Wn.App. 294, 309, 308 P.3d 716 (2013).

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<sup>10</sup> *Godfrey v. Hartford Ins. Co.*, 142 Wn.2d 885, 16 P.3d 617 (2001).

The Supreme Court again confirmed its position this past year in *Schroeder v. Excelsior Mgmt. Group, LLC, supra*. The *Schroeder* court also addressed a deed of trust in the context of the Deed of Trust Act. There, the parties attempted to contract around the statutory prohibition against non-judicial foreclosure against agricultural lands. *Schroeder*, 177 Wn.2d at 98, 106-107. Based on the contractual authorization in the deed of trust it drafted, the bank argued that, despite the statutory limitation, the borrower had waived the protections of the Deed of Trust Act. Citing its recent decision in *Bain*, the Court stated: "This is not the first time we have confronted the argument that statutory requirements of the Deed of Trust Act may be waived contractually." *Id.* at 107. The Court then confirmed that it will not allow contractual waiver under the Deed of Trust Act:<sup>11</sup> "These are not, properly speaking, rights held by the debtor; instead, they are limits on the trustee's power to foreclose without judicial supervision." *Id.* at 107.

This case is analogous to *Schroeder*. RCW 61.24.100(10) limits the power of parties who elect to foreclose non-judicially when a guaranty is secured by the deed of trust foreclosed upon. Banks cannot contract around the statutory bar to deficiency actions against parties whose obligations were secured by a non-judicially foreclosed deed of trust.

Belying its reliance on the "waiver" provision, Union Bank has implicitly acknowledged that, to pursue a deficiency under the Deed of

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<sup>11</sup> In a footnote, the Supreme Court allowed that "[t]here may be technical procedural details that the parties may, by agreement, modify or waive, but strict compliance with mandated requisites is required." *Id.* at 107, fn. 7.

Trust Act, the bank was required to provide certain proscribed notices and commence its action within one year of the trustee's sale. *See*, CP at 53, 185. Even though the Guaranty purports to waive the Guarantor's notice rights and the statute of limitations defense, Union Bank apparently recognized that it had no right to contractually override those statutory notice prerequisites and time limits for a deficiency suit.

In sum, Washington's Supreme Court has twice ruled in the last two years that the Act should not be construed to provide more expansive rights to lenders than those expressly conferred. *See*, *Bain*, 175 Wn.2d at 107-08; *Schroeder*, 177 Wn.2d at 106-07. The statute is clear regarding the scope of the exception to the general bar on deficiency judgments following non-judicial foreclosures and its protections to guarantors that their obligations not be enlarged.

Union Bank chose to invoke the power of sale authorized by the Deed of Trust Act so as to complete a relatively quick and inexpensive sale of Core's property without judicial oversight or review. In electing that statutorily-created remedy, Union Bank forfeited the right to seek a deficiency judgment based upon any contractual obligation secured by the same deed of trust foreclosed upon. Union Bank cannot expand its rights by contracting away the limitations that the Deed of Trust imposes.<sup>12</sup>

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<sup>12</sup> Statutory law in effect at the time of contract, "enter in and form a part of it, as fully as if they had been expressly referred to and incorporated in the terms. This principle embraces alike those laws which affect its construction and those which affect its enforcement or discharge." *Dopps v. Alderman*, 12 Wn.2d 268, 273-74, 121 P.2d 388 (1942) (emphasis added). *See also*, *Fischler v. Nicklin*, 51 Wn.2d 518, 522, 319 P.2d 1098 (1958); *Cunningham v. Weyerhaeuser Timber Co.*, 52 F. Supp. 654 (W.D. Wash. 1943).

## **2. The “Waiver” Provision is Insufficiently Specific to be Enforceable.**

Even if the contract provisions in the Guaranties could truly be deemed "waivers," as opposed to an effort to contractually expand a legislatively-created remedy, those “waiver” provisions are unenforceable. Waiver can only result from an "intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. The person against whom a waiver is claimed must have intended to relinquish the right, advantage, or benefit, and his action must be inconsistent with any other intention than to waive them.” *Birkeland v. Corbett*, 51 Wn.2d 554, 565, 320 P.3d 635 (1958).

In this case, the "waiver" provision in the Guaranty is insufficiently specific and fails to expressly state that the guarantor waives statutory rights it may hold as the guarantor on a secured guaranty. CP at 20-21, 24-25. To be enforceable, the waiver must cite the specific statute that provides the right being waived and explain the legal significance of the waiver. See, e.g., *Union Bank v. Gradsky*, 265 Cal. App. 2d 40 (1968); *Cathay Bank v. Lee*, 14 Cal. App. 1533 (1993); *Resolution Trust Corp. v. Titan Financial Corp.*, 22 F.3d 923 (9th Cir. 1994).<sup>13</sup> The "waiver" provision in the subject Guaranty makes no

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<sup>13</sup> The waiver in the Guaranty has its foundation on California statutory law, specifically California Civil Code § 2856, which expressly authorizes such waivers. There is no such authorization in Washington. To the contrary, Washington's Deed of Trust Act strictly limits deviation from its terms.

mention of the Washington Deed of Trust Act and is wholly silent of the right of a secured guarantor.

In November of last year, this Court addressed the enforceability of such general waivers of Deed of Trust Act protections in First Citizens Bank & Trust Co. v. Reikow, \_\_\_ Wn. App. \_\_\_, 313 P.3d 1208 (Slip. Op. No. 43181-5-11, November 13, 2103). In Reikow, the bank sought to enforce a purported waiver of the guarantor's Deed of Trust Act right to have the fair value of foreclosed property determined by the court. The Court was not required to decide the case based on the waiver argument presented here.

However, in response to the bank's argument that the guarantor waived protection in that case, the Reikow Court noted (1) the Washington Supreme Court's reluctance to enforce a contractual provision waiving statutory requirements governing nonjudicial foreclosure, and (2) that "intent to waive must be shown by unequivocal acts or conduct which are inconsistent with any intention other than to waive." Reikow, 313 P.3d at fn. 4 (citations omitted). Notwithstanding, the Reikow Court went on to say: "[w]ere we to find the issue relevant to this dispute, the broad boilerplate waiver in the guaranties' fine print could hardly defeat the explicit and specific provisions of RCW 61.24.100(5), which plainly aim to protect guarantors from have their obligations enlarged." Reikow, 313 P.3d at 1213, n. 4.<sup>14</sup>

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<sup>14</sup> This Court did not address the boilerplate waivers in its Cornerstone decision because First Citizens Bank abandoned the waiver argument on appeal. *See*, 314 P.3d at 422, n. 5. The Cornerstone opinion nevertheless favorably referenced the Reikow decision. *Id.*

The "boilerplate waiver" in the Moore Guaranty does not qualify as an intentional relinquishment of a known right. Its only apparent purpose is to enlarge the obligations of the guarantors beyond the limits permitted by the Deed of Trust Act. As such, the "waiver" provision in the Guaranty is thus unenforceable by Union Bank as against the Moores.

### **3. Enforcement of the "Waiver" Provision Would Violate Public Policy.**

Finally, the "waiver" provision may not be enforced because to do so would contravene public policy. "[A]n individual may not waive a right where such a waiver violates public policy. ... Where a statutorily created private right serves a public policy purpose, the persons protected by the statute cannot waive the right..." *Shoreline Community College Dist. v. Employment Security Dept.*, 120 Wn.2d 394, 410, 842 P.2d 938 (1992). This has long been the law:

To deny a recovery to the appellant would in effect be a holding that one could bind himself by contract not to avail himself of a right which the law has allowed to him on grounds of public policy. While one may decline to take advantage of a privilege given to him by such a statute, he may not bind himself by or be held to a contract which denies to him a right which the law has allowed to him on grounds of public policy.

*Grandview Inland Fruit Co. v. Hartford Fire Ins. Co.*, 189 Wash. 590, 605, 66 Pac. 827 (1937) (Emphasis added). See also, *Murphy v. Campbell Investment Co.*, 79 Wn.2d 417, 422-23, 486 P.2d 417 (1971); *Security State Bank v. Burk*, 100 Wn. App. 94, 98-99, 995 P.2d 1272 (2000).

The Deed of Trust Act has been acknowledged by our Supreme Court as representing the "public policy of our state." *Kennebec, Inc. v. Bank of the West*, 88 Wn.2d 718, 725, 565 P.2d 812 (1977). Therefore, an attempted waiver of the Deed of Trust Act is prohibited.<sup>15</sup>

“Under Washington law, a creditor that holds a deed of trust as security for a loan can use either judicial or non-judicial procedures to enforce that security.”<sup>16</sup> *Fluke Capital Mgmt. Services, Co. v. Richmond*, 106 Wn.2d 614, 624, 724 P.2d 356 (1986). A creditor's decision to non-judicially foreclose is a decision to limit its own remedies - to sacrifice the substantial remedies that remain available in a judicial foreclosure - so that it may receive the benefit of the efficient and inexpensive non-judicial foreclosure process to realize on its security. *Id.*; *Thompson v. Smith*, 58 Wn. App. at 361. Once the creditor elects the statutory remedy of non-judicial foreclosure, its rights are determined by the Deed of Trust Act.

Through the Deed of Trust Act, the Legislature afforded lenders the power of judicially unsupervised sales, which allows them to inexpensively and efficiently realize the value of real property securing their loans without the burdens of redemption periods and upset price

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<sup>15</sup> Indeed, the Guaranty itself provides that provisions it contains may not be enforced if against public policy. CP at 21, 24.

<sup>16</sup> As the court explained in *Thompson*, 58 Wn. App. at 366:

[T]he beneficiary of a trust deed is faced with an election of remedies upon default. The beneficiary may (1) where the trust deed secures a note, sue on the note; (2) foreclose under the existing mortgage foreclosure proceedings; or (3) foreclose pursuant to RCW 61.24.

hearings. That power was accompanied by limitations and consequences to the lender. In exchange for losing these rights, the Legislature provided that those with obligations secured by a foreclosed deed of trust would not be subject to deficiency judgments, that is, the lender would forfeit the right to further pursue any obligations that were secured by a nonjudicially foreclosed deed of trust. Enforcement of the “waiver” provision in the Guaranty would upset the delicate balance that the Legislature created under the Deed of Trust Act and, therefore, would contravene public policy.

As such, the “waiver” provision in the Guaranty should not be enforced because doing so would violate public policy. *See also, Bain, supra; Schroeder, supra.*

#### **REQUEST FOR ATTORNEYS' FEES**

Pursuant to RAP 18.1(b), the terms of the Guaranty, and RCW 4.84.330, the Moores request that they be awarded their attorneys' fees incurred defending this lawsuit and prosecuting this appeal.

The Commercial Guaranty upon which Union Bank sued provides for payment of attorneys' fees as follows:

**Attorneys' Fees, Expenses.** Guarantor agrees to pay upon demand all of the Lender's costs and expenses, including Lender's attorneys' fees and Lender's legal expenses, incurred in connection with the enforcement of this Guaranty. Lender may hire or pay someone else to help enforce this Guaranty, and Guarantor shall pay the costs and expenses of such enforcement. Costs and expenses include Lender's attorneys' fees and expenses whether or not there is a legal lawsuit, including attorneys' fees and legal expenses for bankruptcy proceedings (including efforts to modify or vacate any automatic stay

or injunction ), appeals, and any anticipated post-judgment collection services. Guarantor shall also pay all court costs, and such additional fees as directed by the court.

CP at 21, 24. Although this Commercial Guaranty expressly purports to entitle only the lender to attorney fees, RCW 4.84.330<sup>17</sup> provides that such unilateral attorney fee provisions give reciprocal rights to all parties to the contract. The contractual and statutory right of the prevailing party to an attorney fee award is absolute. The court only has discretion with regard to the amount to be awarded. Metropolitan Mortgage & Sec. Co., Inc. v. Becker, 64 Wn. App. 626, 632, 825 P.2d 360 (1992).

If this Court holds that Union Bank's election to non-judicially foreclose on the Deed of Trust discharged the Moores' obligations under the Guaranty, the Moores, as the prevailing party, are entitled to an award for attorneys' fees, costs and expenses incurred defending this lawsuit and prosecuting this appeal. This Court should rule that the Moores are entitled to recover all reasonable attorneys' fees in this action and, upon submission of a proper fee petition and costs bill, award the Moores the fees incurred in this appeal. The matter should be remanded to the trial court for a determination of the amount and an award of reasonable fees incurred.

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<sup>17</sup> RCW 4.84.330 provides:

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

## **CONCLUSION**

Union Bank must be bound by its affirmative commercial choices and those of Frontier Bank, its predecessor. Frontier Bank had the choice of how it drafted all of the loan documents, including the Promissory Note, the Deed of Trust, and the Guaranty. Frontier Bank chose the particular language under which the Deed of Trust secured the obligations of not only the borrower, but of the guarantors as well.

Following default, Union Bank had choices as well, including a variety of remedies available to it to collect on the Core debt. It could have foreclosed judicially and simultaneously pursued a deficiency against both Core and the guarantors. It could have sued on the Promissory Note and/or Guaranty first, leaving the foreclosure option available as a later remedy. Or, it could (and did) choose the efficient remedy of a trustee's sale pursuant to the Deed of Trust Act without judicial oversight. In choosing this last remedy, however, Union Bank also accepted the statutory limitations imposed on the remedy, to include the limitation that the bank must forego a deficiency judgment for any debts secured by the deed of trust foreclosed upon.

Union Bank is barred from seeking a deficiency judgment because of the banks' unilateral decisions to 1) secure the Guaranty by the Deed of Trust, and 2) foreclose non-judicially pursuant to the Deed of Trust Act. This Court should reverse the order of the trial court, remand this matter with instruction to vacate the judgment, to reverse its award of attorney fees to Union Bank, to grant attorney fees to the Moores on appeal, and to dismiss Union Bank's deficiency action with prejudice.

Respectfully submitted this 7th day of February 2014.

ANDERSON LAW FIRM PLLC



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Attorneys for Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

***Counsel for Respondent:***

Matthew A. Goldberg, Esq.	<input type="checkbox"/>	Hand Delivery
Allison C. Bizzano, Esq.	<input type="checkbox"/>	U.S. Mail (first-class, postage prepaid)
Assayag Mauss, PLC	<input type="checkbox"/>	Facsimile
2018 - 156th Ave. NE, Suite 100	<input checked="" type="checkbox"/>	Email mattg@amlegalgroup.com
Bellevue, WA 98007	<input type="checkbox"/>	allisonb@amlegalgroup.com

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 7th day of February, 2014, at Tacoma, Washington.

  
\_\_\_\_\_  
Mark B. Anderson

# ANDERSON LAW OFFICE PLLC

## February 07, 2014 - 4:40 PM

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