

No. 46565-5-II

---

IN THE COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

DONALD C. LINKEM and ELIZABETH A. LINKEM, husband and wife,  
and the marital community composed thereof; PAUL E. WILSON  
and KELLY I. WILSON, husband and wife, and the marital community  
composed thereof; PACIFIC RESOURCE DEVELOPMENT, INC., a  
Washington corporation; DAVID A. PARKER and VELMA L. PARKER,  
husband and wife, and the marital community composed thereof; and  
PACIFIC BAY, INC., a Washington corporation,

Appellants,

v.

UNION BANK, N.A., as successor in interest to the FDIC as  
Receiver of Frontier Bank,

Respondent.

---

**BRIEF OF RESPONDENT**

---

Stellman Keehnel, WSBA No. 9309  
Andrew R. Escobar, WSBA No. 42793  
**DLA PIPER LLP (US)**  
701 Fifth Avenue, Suite 7000  
Seattle, WA 98104-7044  
Tel: (206) 839-4800  
Fax: (206) 839-4801  
E-mail: stellman.keehnel@dlapiper.com  
E-mail: andrew.escobar@dlapiper.com

Attorneys for Respondent Union Bank, N.A.

FILED  
COURT OF APPEALS  
DIVISION II  
2015 FEB 02 AM 8:55  
STATE OF WASHINGTON  
BY   
DEPUTY

**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION .....	1
II. ISSUES PRESENTED ON APPEAL.....	4
III. STATEMENT OF THE CASE.....	4
IV. ARGUMENT .....	9
A. The Correct Standard of Review is Abuse of Discretion.....	9
B. The January 31 Order Was Properly Vacated Under CR 60(b)(1) and (5) Because Procedural Irregularities Resulted in Dismissal of Claims Against Vanderhoek Associates, LLC.....	9
C. The Superior Court Exercised Proper Discretion When it Vacated the Judgment Under CR 60(b)(11).....	13
V. CONCLUSION.....	22

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>Alpine Indus. Inc. v Gohl</i> , 101 Wn.2d 252, 676 P.2d 488 (1984).....	23
<i>In re Center Wholesale, Inc.</i> , 759 F.2d 1440 (9th Cir. 1985) .....	10
<i>Clapp v. Olympic View Pub. Co., LLC</i> , 137 Wn. App. 470, 154 P.3d 230 (2007).....	15
<i>Columbia Rentals, Inc. v. State</i> , 89 Wn.2d 819, 576 P.2d 62 (1978).....	18
<i>Estate of Treadwell ex rel. Neil v. Wright</i> , 115 Wn. App. 238, 61 P.3d 1214 (2003).....	passim
<i>First-Citizens Bank &amp; Trust Co. v.</i> <i>Cornerstone Homes &amp; Development, LLC</i> , 178 Wn. App. 207, 314 P.3d 420 (2013).....	passim
<i>In re Guardianship of Karan</i> , 110 Wn. App. 76, 38 P.3d 396 (2002).....	15, 16, 2
<i>Haley v. Highland</i> , 142 Wn.2d 135, 156, 12 P.3d 119 (2000).....	9
<i>Hernandez v. DOL</i> , 107 Wn. App. 190, 26 P.3d 977 (2001).....	15
<i>Lejeune v. Clallam County</i> , 64 Wn. App. 257, 823 P.2d 1144 (1992).....	17
<i>Lunsford v. Saberhagen Holdings, Inc.</i> , 166 Wn.2d 264, 208 P.3d 1092 (2009).....	21
<i>Lynn v. Washington State Department of Labor and Industries</i> , 130 Wn. App. 829, 125 P.3d 202 (2005).....	19

<i>In re Marriage of Irwin</i> , 64 Wn. App. 38, 822 P.2d 797 (1992).....	14
<i>In re Marriage of Maxfield</i> , 47 Wn. App. 699, 737 P.2d 671 (1987).....	10
<i>Martin v. Martin</i> , 20 Wn. App. 686, 581 P.2d 1085 (1978).....	19
<i>McDevitt v. Harborview Med. Center</i> , 179 Wn.2d 59, 316 P.3d 469 (2013).....	21
<i>Shum v. DOL</i> , 63 Wn. App. 405, 819 P.2d 399 (1991).....	10, 22
<i>State v. Atsbeha</i> , 142 Wn.2d 904, 16 P.3d 626 (2001).....	20
<i>State v. Ward</i> , 125 Wn. App. 374, 104 P.3d 751, <i>review denied</i> , 155 Wn.2d 1025 (2005).....	14
<i>Suburban Janitorial Services v. Clarke American</i> , 72 Wn. App. 302, 863 P.2d 1377 (1993).....	17
<i>Washington Federal v. Gentry</i> , 179 Wn. App. 470, 319 P.3d 823 (2014).....	passim
<i>Washington Federal v. Harvey</i> , Nos. 90078–7, 90085–0, 2015 WL 114165, ___ P.3d ___ (Jan. 8, 2015).....	3, 8
<b>STATUTES</b>	
RCW 24.61.100 .....	3
RCW 51.28.040 .....	19
<b>OTHER AUTHORITIES</b>	
B. Barker & I. Scharf, Wash.Prac. § 10.5 (3d ed. 1989) .....	14
CR 59 .....	7

CR 60 .....	passim
<i>In the Groove or In a Rut? Resolving Conflicts Between Divisions of the Washington State Court of Appeals at the Trial Court Level, 48 Gonz. L. Rev. 455 (2012–13) .....</i>	14
RAP 2.5(a) .....	15
RAP 7.2(e) .....	3, 7

## I. INTRODUCTION

On July 3, 2014, the Superior Court heard Union Bank's Motion to Vacate January 31, 2014 Summary Judgment Order (the "Motion to Vacate"). At the hearing's conclusion, the Superior Court indicated its desire to grant Union Bank its requested relief and vacate the January 31, 2014 summary judgment order (the "January 31 Order"):

I am going to vacate my January 31 order, and I'm going to do it both on procedural and substantive grounds. I think the judgment is void as in terms of Vanderhoek Associates. I think there was an irregularity in obtaining a judgment or order. I don't believe that the parties, despite the wording "remaining defendants", intended for Vanderhoek Associates, LLC, to be dismissed; therefore, it was not a final judgment. And I also think there is a reason justifying relief from operation of the judgment and that is the law changed 18 days later in the *Gentry* case out of Division I.

RP July 3, 2014 at 28:14–24. The Superior Court focused in particular on the fact that its January 31 Order's interlineated language was contrary to the Superior Court's intent, and thus the January 31 Order was deemed a final judgment erroneously because it should not have included a grant of summary judgment in favor of borrower defendant Vanderhoek Associates, LLC, which had not filed a motion for summary judgment or otherwise joined in any such motion:

And so my intent on January 31st was to dismiss, based on *First Citizens*, the individual guarantors. It was not to dismiss a borrower.

RP July 3, 2014 at 11:25–12:2.

This procedural irregularity resulted in a due process violation. Union Bank had been denied its due process right to notice and opportunity to be heard regarding (1) the dismissal of its claims against Vanderhoek Associates, LLC—which had never requested such relief, and (2) the dismissal of its claims against the borrower defendants—Vanderhoek Associates, LLC and Pacific Bay, Inc.—even though there was no argument presented, written or orally, on whether Union Bank continues to have valid claims against a *borrower* defendant in light of *First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development, LLC*, 178 Wn. App. 207, 314 P.3d 420 (2013), which does not address the issue.

In addition to this procedural irregularity, the Superior Court also sought to vacate its January 31 Order on the grounds that a substantive change in law arose 18 days after the January 31 Order. This substantive change in the law occurred when Division I of the Washington Court of Appeals issued its decision in *Washington Federal v. Gentry*, 179 Wn. App. 470, P.3d 823 (2014), which fundamentally disagreed with *First-*

*Citizens*. The *Washington Federal v. Gentry* decision constituted a substantial change in the law because the Superior Court was no longer bound by *stare decisis* to follow *First-Citizens*. To adhere to the Court of Appeals' application of RCW 24.61.100 in *Washington Federal*, which the Superior Court believed was the correct interpretation, the Superior Court sought to vacate its January 31 Order. That this was a proper exercise of discretion is confirmed by the fact that the Washington Supreme Court unanimously affirmed *Washington Federal* on January 8, 2015,<sup>1</sup> thereby resolving with finality this much-litigated issue throughout the State. *Washington Federal v. Harvey*, Nos. 90078–7, 90085–0, 2015 WL 114165, at \*3, \_\_\_ P.3d \_\_\_ (Jan. 8, 2015).<sup>2</sup>

For both of these two independent reasons, the Superior Court entered an order on July 3, 2014, which set forth its intention to vacate the January 31 Order, subject to this Court's authorization under RAP 7.2(e). On October 7, 2014, this Court granted the trial court permission to

---

<sup>1</sup> The *Washington Federal v. Gentry* and *Washington Federal v. Harvey* decisions by the Court of Appeals, both of which present the same issues, were accepted for review by the Washington Supreme Court on July 9, 2014. The Washington Supreme Court consolidated the two cases and on January 8, 2015, issued a unanimous opinion affirming both *Washington Federal* Court of Appeals decisions. The Washington Supreme Court ruled the bank could seek deficiency judgments against the guarantors because guarantors are not protected from deficiency judgments under Washington's Deeds of Trust Act (DTA). Nos. 90078–7, 90085–0, 2015 WL 114165, at \*3, \_\_\_ P.3d \_\_\_ (Jan. 8, 2015).

<sup>2</sup> Although the appellants filed their corrected Opening Brief after the Washington Supreme Court's *Washington Federal* decision, they make no mention of it in their Opening Brief. Nor do their original or corrected briefs even indicate that the Washington Supreme Court had previously accepted review of the case.

formally enter its July 3, 2014 order vacating the January 31 Order. Thereafter, on October 17, 2014, the Superior Court formally vacated its January 31 Order. The Linkem Defendants<sup>3</sup> then brought this appeal. As set forth more fully herein, the Superior Court did not abuse its discretion in vacating its January 31 Order. Accordingly, Union Bank respectfully requests that this Court affirm the Superior Court's vacatur of the January 31 Order.

## II. ISSUES PRESENTED ON APPEAL

- A. Did the Superior Court act within its discretion when it vacated its January 31 Order, pursuant to Civil Rule 60(b)(1) and (5), after the court inadvertently denied Union Bank procedural due process by dismissing Union Bank's claims against Vanderhoek Associates, LLC and Pacific Bay, Inc.?
- B. Did the Superior Court act within its discretion when it vacated its January 31 Order, pursuant to Civil Rule 60(b)(11), after the Court of Appeals issued *Washington Federal*, which fundamentally disagreed with *First-Citizens* and was rendered just 18 days after the January 31 Order?

---

<sup>3</sup>As used herein, the "Linkem Defendants" collectively refers to the appellants, which are Donald C. Linkem, Elizabeth A. Linkem, Richard T. Brunaugh, Amanda B. Brunaugh, Paul E. Wilson, Kelly I. Wilson, Pacific Resource Development, Inc., David A. Parker, Velma I. Parker, and Pacific Bay, Inc.

### III. STATEMENT OF THE CASE

Union Bank filed the underlying lawsuit to collect on defaulted promissory notes through (1) a receiver's sale of the real property securing the notes and (2) the establishment of the notes' makers' and guarantors' liability for the remaining deficiency. On August 9, 2013, the Superior Court partially granted Union Bank's Summary Judgment Motion, holding that the Guarantor Defendants<sup>4</sup> were liable for the deficiency and that they were entitled to a fair-market-valuation hearing. CP 319–321.

On December 3, 2013, the Court of Appeals issued its decision in *First-Citizens*. Shortly after this decision, guarantor defendants Minne and Trudy Vanderhoek, but not borrower defendant Vanderhoek Associates, LLC, filed a motion to revise the August 9, 2013 order granting partial summary judgment to Union Bank on the issue of the guarantor defendants' liability for the deficiency, and to dismiss Union Bank's remaining claims against Minnie and Trudy Vanderhoek only ("Vanderhoeks' Motion for Revision"). CP 322–43. The Linkem Defendants joined in that motion on January 21, 2014. CP 387–90. On

---

<sup>4</sup> The "Guarantor Defendants" are the following defendants, all of whom executed personal guaranties to secure the obligations of borrower Vanderhoek Associates, LLC on the November 30, 2008 promissory note and to secure the obligations of borrower Pacific Bay, Inc. on the August 10, 2005 promissory note: Minne Vanderhoek, Trudy Vanderhoek, Donald C. Linkem, Elizabeth A. Linkem, Richard T. Brunaugh, Amanda Brunaugh, Paul E. Wilson, Kelly I. Wilson, Pacific Resource Development, Inc., David A. Parker, Velma L. Parker.

January 31, 2014, the Superior Court granted the Vanderhoeks' Motion for Revision, holding that under *First-Citizens*, the Guarantor Defendants were not liable for the deficiency. CP 429–31.

Rather than granting only the relief sought by the movants Minne and Trudy Vanderhoek, and rather than granting only the relief sought by the Linkem Defendants, the January 31 Order's interlineation, which was written by the Linkem Defendants' counsel, inadvertently dismissed Union Bank's remaining claims against **all** defendants, thereby sweeping up **borrower** defendants Vanderhoek Associates, LLC and Pacific Bay, Inc. CP 429–31. While the Linkem Defendants had joined in the Vanderhoeks' Motion for Revision, one of the borrower defendants—Vanderhoek Associates, LLC—never joined in the Vanderhoeks' Motion for Revision.<sup>5</sup> The Vanderhoeks' Motion for Revision did not include any briefing whatsoever as to Union Bank's claims against the borrower defendants, nor was the issue raised during the motion's hearing on January 31, 2014.

On February 18, 2014—a mere 18 days after the January 31 Order but past the deadline to seek reconsideration of the order—the Court of Appeals issued its decision in *Washington Federal*. This decision

---

<sup>5</sup> Vanderhoek Associates, LLC's lawyer had withdrawn two years prior, and thus it could not possibly have requested dismissal of Union Bank's claims in January 2014. See RP July 3, 2014 8:8–19.

disagrees with *First-Citizens* and holds (1) that the Deeds of Trust Act does not prohibit a post-foreclosure action for deficiency against guarantors and (2) that the deed of trust securing a grantor's obligation does not also secure a guarantor's obligation.

During a hearing on February 28, 2014, the Superior Court announced *sua sponte* its intention to reverse its January 31 Order based on the *Washington Federal* decision, and requested briefing from the parties on whether it was still bound by the *First Citizens* decision. CP 528:15–16. Based on the Superior Court's invitation, Union Bank filed a Motion to Address Change in Controlling Law Governing Guarantors' Liability for a Deficiency (CP 432–446) under CR 59, which was heard on April 4, 2014. The Guarantor Defendants convinced the Superior Court during the April 4 hearing that the January 31 Order was a final order (because non-movant Vanderhoek Associates, LLC was inadvertently swept into the January 31 Order), so only a CR 60 motion to vacate, not a CR 59 reconsideration motion, could be entertained by the Superior Court. CP 491–93. The Superior Court denied Union Bank's CR 59 motion solely on that basis. CP 491–93.

Union Bank subsequently moved the Superior Court to vacate its January 31 Order pursuant to CR 60(b)(1), (5) and (11). CP 638–40. The Superior Court heard the motion on July 3, 2014. At the hearing's

conclusion, the Superior Court signed an order declaring its intention to grant Union Bank's motion and vacate the January 31 Order, subject to receiving this Court's authorization under RAP 7.2(e). CP 638–40.

On July 14, 2014, the Linkem Defendants filed a motion to reconsider the Superior Court's July 3, 2014 Order. CP 641–46. The Superior Court denied the reconsideration motion on July 28, 2014. CP 679. On August 1, 2014, the Linkem Defendants filed a premature and erroneous notice of appeal, and later that day filed an amended notice of appeal, which was also premature.<sup>6</sup> CP 680–88, 689–97.

On October 7, 2014, this Court granted the Superior Court permission to formally enter its July 3, 2014 order vacating its January 31 Order. On October 17, 2014, the Superior Court formally vacated the January 31 Order. The Linkem Defendants now bring this appeal challenging the Superior Court's decision to vacate its January 31 Order.

#### IV. ARGUMENT

##### A. The Correct Standard of Review is Abuse of Discretion

The standard of review for this appeal is an abuse-of-discretion

---

<sup>6</sup>The Linkem Defendants' original notice of appeal was erroneous because it listed among the appellants Minne Vanderhoek and Trudy Vanderhoek, both of whom previously resolved Union Bank's claims against them and were no longer in the case. The original and amended notices of appeal were both premature because the July 3, 2014 order they attempted to appeal states only the Superior Court's intention to vacate its January 31 Order subject to receiving authorization from this Court under RAP 7.2(e). When the notices of appeal were filed, an order had not yet been entered to vacate the January 31 Order.

standard. *Estate of Treadwell ex rel. Neil v. Wright*, 115 Wn. App. 238, 249, 61 P.3d 1214, 1219 (2003) (“A trial court’s decision to grant or deny a motion to vacate under CR 60(b) will not be overturned on appeal absent abuse of discretion.”). The Linkem Defendants erroneously argue that *de novo* review applies and cite to *Haley v. Highland*. Opening Brief at 6. *Haley* does not support that argument but instead confirms that the abuse-of-discretion standard governs this appeal: “[a] trial court’s denial of a motion to vacate under CR 60(b) will not be overturned on appeal unless the court manifestly abused its discretion.” 142 Wn.2d 135, 156, 12 P.3d 119, 129 (2000).

**B. The January 31 Order Was Properly Vacated Under CR 60(b)(1) and (5) Because Procedural Irregularities Resulted in Improper Dismissal of Claims Against Vanderhoek Associates, LLC**

Union Bank asks this Court to affirm the Superior Court’s order vacating its January 31 Order under CR 60(b)(1) and (5). The January 31 Order was the product of a procedural irregularity that denied Union Bank its due process right to notice and opportunity to be heard. This procedural irregularity has two facets: (a) the January 31 Order dismissed Union Bank’s claims against Vanderhoek Associates, LLC even though Vanderhoek Associates, LLC never requested such relief; and (b) the January 31 Order dismissed Union Bank’s claims against the borrower

defendants—Vanderhoek Associates, LLC and Pacific Bay, Inc.—even though there was no argument presented—written or orally—on whether Union Bank continues to have valid claims against a **borrower** defendant in light of *First-Citizens*, which does not address the issue. Thus, the issue of whether Union Bank’s remaining claims against the two borrower defendants, Vanderhoek Associates, LLC and Pacific Bay, Inc., should be dismissed was not before the Superior Court.

The due process violation resulting from this procedural irregularity required the January 31 Order to be set aside on voidness grounds. See *In re Marriage of Maxfield*, 47 Wn. App. 699, 704, 737 P.2d 671 (1987) (“It is fundamental that a person must receive adequate notice and opportunity to be heard before a judgment can be entered against him.”); *In re Center Wholesale, Inc.*, 759 F.2d 1440, 1448–51 (9th Cir. 1985) (“a judgment may be set aside on voidness grounds under Rule 60(b)(4) [federal analog of CR 60(b)(5)] for a violation of the due process clause of the Fifth Amendment”; reversing denial of Rule 60 motion because the moving party did not receive adequate notice and opportunity to be heard prior to entry of judgment).<sup>7</sup>

---

<sup>7</sup> The Linkem Defendants misstate the court’s ruling in *Shum v. DOL* as holding “only extraordinary circumstances which relate to irregularities which are extraneous to action of court or go to the question of regularity of its proceedings are a basis for vacating an order under Rule 60(b).” Opening Brief at 9. *Shum*, however, only states that such extraordinary circumstances are necessary for a CR 60(b)(11) motion, not all CR 60(b)

The January 31 Order's procedural irregularity stems from its interlineation, which confusingly dismisses Union Bank's claims as to the "remaining defendants." CP 429–31. The Superior Court repeatedly stated during hearings on April 4, 2014 and July 3, 2014 that its intent regarding its January 31 Order was to **not** dismiss parties such as Vanderhoek Associates, LLC which had not sought dismissal of Union Bank's claims against them and were not guarantors:

- In response to a statement by Union Bank's counsel that the January 31 Order's interlineation granted dismissal to parties that had not moved for dismissal, the Superior Court stated, "That was something that was done by counsel. I didn't make that ruling, I don't believe." RP April 4, 2014 at 24:1.
- "And so my intent on January 31st was to dismiss, based on *First Citizens*, the individual guarantors. It was not to dismiss a borrower." RP July 3, 2014 at 11:25–12:2.
- "I think the judgment is void as in terms of Vanderhoek Associates. I think there was an irregularity in obtaining a judgment or order. I don't believe that the parties, despite the wording "remaining defendants", intended for Vanderhoek Associates, LLC, to be dismissed; therefore, it was not a final judgment." RP July 3, 2014 at 28:16–21.

The Superior Court's subsequent clarification of its intent regarding its January 31 Order is not surprising because, as discussed above, Vanderhoek Associates, LLC never sought to be dismissed from this action, and the issue of borrower liability had never been briefed or

---

motions. 63 Wn. App. 405, 408, 819 P.2d 399, 401 (1991). Nevertheless, as set forth herein, there are such extraordinary circumstances here that allowed the Superior Court to exercise its discretion and vacate the January 31 Order. *See infra* at 14–15.

argued. Nor was dismissal of Vanderhoek Associates, LLC discussed among counsel when the “remaining defendants” interlineation was made; indeed, Union Bank’s counsel believed at the time that the interlineation referred only to the Linkem Defendants because their counsel, Mr. Riley, had introduced himself when the hearing began as representing the “remaining defendants”—the identical words Mr. Riley used in making the interlineation. RP July 3, 2014 at 9:6–7. Mr. Riley did not represent Vanderhoek Associates, LLC. RP July 3, 2014 at 3:17–4:1 (the Superior Court stating at the July 3 hearing, following Mr. Riley’s introduction, that “I can understand why you might be very clear on who you represent.”). With Mr. Riley not representing Vanderhoek Associates, LLC, and with Mr. Riley having defined his clients at the hearing as the “remaining defendants,” everyone—including Union Bank’s counsel and especially the Superior Court—understood “remaining defendants” in the interlineation as not including Vanderhoek Associates, LLC. *See* RP July 3, 2014 at 9:6–7 (Union Bank’s counsel); RP April 4, 2014 at 24:1 and RP July 3, 2014 at 11:25–12:2, 28:16–21 (Superior Court).

During the April 4 hearing, the Superior Court felt constrained that based on the “remaining defendants” interlineation on the face of the January 31 Order, it had no choice but to recognize the January 31 Order as a final judgment that dismissed Union Bank’s claims against all

defendants, notwithstanding the Superior Court's true intentions with respect to that order. At the July 3 hearing, having been presented with Union Bank's vacatur motion, the proper tool to remedy the irregularities of the January 31 Order not explaining the Superior Court's intent, the Superior Court decided vacatur was required, after readily acknowledging the procedural mess created by the January 31 Order's interlineation:

The reason I'm smiling is because this morning I had to reverse a decision that I made because there was an error in the order. And I fully expect that at some point Division II is going to say, Judge Serko, would you mind reading your orders before you—and not create all this morass of procedural nightmare? So that's the reason I smile.

RP July 3, 2014 at 10:17–23. The Superior Court therefore corrected its procedural irregularity by deciding to vacate the January 31 Order. CP 638–40. Union Bank respectfully submits that this correction was not an abuse of discretion and requests that this Court affirm that decision.

**C. The Superior Court Exercised Proper Discretion When it Vacated the Judgment Under CR 60(b)(11)**

As an additional, independent basis for vacating the January 31 Order, the Superior Court determined that a subsequent, substantial change in the law warranted relief under CR 60(b)(11). Specifically, the Court of Appeals' decision in *Washington Federal v. Gentry*, 179 Wn. App. 470, 319 P.3d 823 (2014), effected a substantial change in the

controlling law because the Superior Court was no longer bound by *stare decisis* to follow the holding in *First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development, LLC*, 178 Wn. App. 207, 314 P.3d 420 (2013), as it was required to do when it issued the January 31 Order. See *In the Groove or In a Rut? Resolving Conflicts Between Divisions of the Washington State Court of Appeals at the Trial Court Level*, 48 Gonz. L. Rev. 455, at 459–62, 506–07 (2012–13) (explaining that the Court of Appeals is a unitary court and providing guidance on how a Superior Court should handle a situation when there is a divisional split).

Civil Rule 60(b)(11) allows the Superior Court to vacate a prior order when there has been a change in the law coupled with extraordinary circumstances. See *Estate of Treadwell v. Wright*, 115 Wn. App. 238, 250–51, 61 P.3d 1214, *review denied*, 149 Wn.2d 1035 (2003) (trial court abused discretion in not granting Rule 60(b)(11) motion based on change in law); *In re Marriage of Irwin*, 64 Wn. App. 38, 64, 822 P.2d 797 (1992) (“a change in the law justifies granting the [CR 60(b)(11)] motion, whereas a change in the circumstances of the party does not.”) (quoting 1 B. Barker & I. Scharf, *Wash.Prac.* § 10.5, at 141 (3d ed. 1989)); *State v. Ward*, 125 Wn. App. 374, 379, 104 P.3d 751, *review denied*, 155 Wn.2d 1025 (2005) (“a change in the law may create extraordinary circumstances, satisfying CR 60(b)(11)”).

Here, the extraordinary circumstances included: (1) the fact that the January 31, 2014 Order is itself the reversal of a prior order; (2) the temporal proximity of *Washington Federal* being decided just 18 days after the January 31 Order, but outside the window to seek reconsideration of the order; (3) the opposite conclusions reached by the Court of Appeals in *Washington Federal* and *First-Citizens*; and (4) the procedural difficulties occasioned by Union Bank's efforts to respond to the Superior Court's February 28, 2014 invitation to seek reconsideration of the January 31 Order.<sup>8</sup> The extraordinary circumstances are magnified by the Washington Supreme Court's January 8, 2015 decision to affirm unanimously the Court of Appeals' *Washington Federal* decision.

*Treadwell* is on point. In *Treadwell*, the Superior Court entered summary judgment on November 30, 2001, dismissing plaintiff's claims against defendant, on grounds that defendant owed no duty to plaintiff. 115 Wn. App. at 242–43. Just 55 days later, the Court of Appeals decided *In re Guardianship of Karan*, 110 Wn. App. 76, 38 P.3d 396 (2002),

---

<sup>8</sup> When Union Bank's Motion to Vacate was before the Superior Court, the Linkem Defendants did not dispute Union Bank's explanation that extraordinary circumstances are present that justify application of CR 60(b)(11) if a change in the controlling law has occurred. CP 535–38, 581. Rather, they argued only that there had not been a change in the controlling law. Because the Linkem Defendant's did not challenge this explanation below, pursuant to RAP 2.5(a), this Court need not entertain any such argument by them now. See *Clapp v. Olympic View Pub. Co., LLC*, 137 Wn. App. 470, 476, 154 P.3d 230, 234 (2007) ("Generally, we do not consider arguments a party makes for the first time on appeal"); *Hernandez v. DOL*, 107 Wn. App. 190, 199, 26 P.3d 977, 981 (2001) (declining to entertain arguments that were not presented at trial).

which imposed a duty on persons in the position of the *Treadwell* defendant. Like Union Bank here, the *Treadwell* plaintiff filed a CR 60(b)(11) motion, based on the change of law effected by *Karan*, to vacate the November 30, 2001 summary judgment. 115 Wn. App. at 243. The Superior Court denied plaintiff's CR 60(b)(11) motion. *Id.* Plaintiff appealed the Superior Court's denial of the CR 60(b)(11) motion. The Court of Appeals reversed, holding that the Superior Court had abused its discretion in denying the change-in-law-based CR 60(b)(11) motion. *Treadwell* is procedurally equivalent in terms of timing to the case at bar, and the extraordinary circumstances that justified reversing the trial court's denial of a CR 60(b)(11) motion in *Treadwell* similarly warrant this Court affirming the Superior Court's vacation of the January 31 Order.

When the Superior Court subsequently explained it believed its original decision on August 9, 2013 was the correct decision, it reached this conclusion by using its own reasoning to choose between a split of authority in the Court of Appeals. This split of authority no longer exists because the Washington Supreme Court affirmed on January 8, 2015 the *Washington Federal* Court of Appeals decisions. In reaching its unanimous decision, the Supreme Court agreed that guarantors of loans are not protected from deficiency judgments following the lenders'

exercising its rights under a deed of trust. This was precisely the issue before Superior Court when it used its judgment to rely on *Washington Federal v. Gentry* instead of *First-Citizens*. The fact that the Supreme Court embraced the same reasoning the Superior Court used to reach its decision further validates the Superior Court's decision to vacate the January 31 Order pursuant to CR 60(b)(11).

In arguing principles of *res judicata*, the Linkem Defendants entirely ignore the very purpose of CR 60, which authorizes Superior Courts to reopen and reconsider *res judicata* decisions under specific circumstances. See e.g., *Lejeune v. Clallam County*, 64 Wn. App. 257, 269, 832 P.2d 1144, 1150 (1992) (“A trial level tribunal is not always required to honor a valid claim of *res judicata*”; citing to CR 60 as an example of an exception to *res judicata*). The fact that Union Bank proceeded under CR 60, rather than collaterally attacking a prior judgment through a later-filed lawsuit, distinguishes the various authorities cited in the Opening Brief because **none** of those cases dealt with a CR 60 motion. This is significant, because the finality concern that underpins the Opening Brief's *res judicata* authorities falls away in the CR 60 context. As the Court of Appeals explained in *Suburban Janitorial Services v. Clarke American*:

The finality of judgments is an important value of the legal

system. However, in both civil and criminal cases, circumstances arise where finality must give way to the even more important value that justice be done between the parties. CR 60 is the mechanism to guide the balancing between finality and fairness.

72 Wn. App. 302, 313, 863 P.2d 1377, 1383 (1993).

This balancing of finality with justice under CR 60 is what occurred in the on-point *Treadwell* decision discussed above. 115 Wn. App. at 242–43. Moreover, as confirmed in *Treadwell*, and contrary to what the Linkem Defendants argue in their Opening Brief, an appellate court decision that postdates a final judgment can serve as a basis for granting a CR 60(b)(11) motion to vacate.

The primary authority relied on by the Opening Brief, *Columbia Rentals, Inc. v. State*, 89 Wn.2d 819, 576 P.2d 62 (1978), is inapposite. There, the plaintiff filed a collateral attack lawsuit **over 14 years after** its claims had been resolved in a prior proceeding, and over 8 years after a United States Supreme Court decision created a change in the law. Significantly, the plaintiff in *Columbia Rentals* did not seek to amend the 14-year-old judgment under CR 60, but instead tried to evade the 14-year-old judgment by filing a new lawsuit. Under these circumstances, the Washington Supreme Court appropriately barred the subsequently-filed suit under *res judicata* principles and held that under the circumstances a departure from the normal operation of *res judicata* was not warranted.

*Id.* at 821–22 (“The finality of the determination serves the interests of society as well as those of the parties by bringing an end to litigation on the claim.”). This is not the situation presented here, where Union Bank proceeded via a timely CR 60 motion, and principles of justice and equity strongly militated in favor of vacating the January 31 Order in light of the *Washington Federal v. Gentry* decision, which was decided a mere 18 days after the Superior Court entered its January 31, 2014 Order. And these principles of justice are of even greater import now that the Washington Supreme Court has unanimously affirmed the *Washington Federal* decisions.

The other opinions cited by the Opening Brief on this issue are equally inapposite. *Lynn v. Washington State Department of Labor and Industries*, 130 Wn. App. 829, 125 P.3d 202 (2005), was an appeal from a denial by the Department of Labor and Industries, and its Board of Industrial Insurance Appeals, of a claimant’s petition. The *Lynn* court did not address CR 60, but instead interpreted the change-of-circumstances language in RCW 51.28.040—a labor statute that is not relevant here. The court in *Lynn* invoked *res judicata* to bar the claim, notwithstanding a subsequent Court of Appeals decision, because RCW 51.28.040 only applies where a claimant’s circumstances are altered by events unique to the claimant—a standard that does not encompass a subsequent appellate

decision that created a change in the law as to all claimants. *Id.* at 834, 836 (“We have no reason to believe the legislature intended the change of circumstances statute to be a means to avoid long-standing rules of finality.”). The Opening Brief’s reliance on the divorce case *Martin v. Martin*, 20 Wn. App. 686 (1978), is also misplaced because *Martin*, as with the other cases relied on by the Linkem Defendants, does not address a CR 60 motion to vacate. There, the Court of Appeals refused to apply retroactively a new principle of law announced by the Washington Supreme Court because such an application “would produce substantial inequitable results[,]” especially in light of the 14 years that had passed since the divorce decree had been issued. Finally, *State v. Atsbeha*, 142 Wn.2d 904 (2001), cannot assist the Linkem Defendants because it was a criminal case that determined the correct lens to assess expert testimony regarding a diminished capacity defense. Because CR 60 only applies in civil cases, it was not addressed in that decision.

Further, the Opening Brief mischaracterizes Washington law in arguing that the *Washington Federal v. Gentry* decision cannot apply retroactively because “[t]he only instance where a subsequent change in law was allowed retroactive effect on previous decisions of the Court occurs when the legislature or congress changed the law to retroactively have an effect on previous decisions of the Court.” Opening Brief at 9.

Despite the Linkem Defendants' contention to the contrary, Washington precedents support the proposition that a decision of the Court of Appeals (and of the Supreme Court) applies retroactively. For example, the Court of Appeals' opinion in *Lunsford v. Saberhagen Holdings, Inc.* explained, "When a Washington appellate decision applies a rule announced in that decision retroactively to the parties in *Lunsford*, the rule will also be applied to all litigants not barred by a procedural rule." 139 Wn. App. 334, 160 P.3d 1089 (2007). That rule of retroactive application renders *Washington Federal v. Gentry* a retroactive decision, since it applies to the litigants in that case. Moreover, the Washington Supreme Court's decision in *Lunsford*, underscores this retroactive-application rule even further: "[r]etroactive application, by which a decision is applied both to the litigants before the court and all cases arising prior to and subsequent to the announcing of the new rule, is 'overwhelmingly the norm.'" *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270, 208 P.3d 1092 (2009); see also *McDevitt v. Harborview Med. Center*, 179 Wn.2d 59, 75, 316 P.3d 469, 477 (2013) (stating that it is only in "rare instances" where a Washington court will give a decision prospective-only application).

Retroactive application of an appellate decision is therefore the default rule in Washington, and there is no need for an appellate court to explicitly identify its ruling's retroactive application. Accordingly,

because the *Washington Federal v. Gentry* decision by its terms applied retroactively to the parties in that case, it applies retroactively here—just like the *Karan* decision applied retroactively to the proceeding in *Treadwell*. See *Washington Federal v. Gentry*, 179 Wn. App. 495–96 (vacating summary judgment ruling and remanding for fair value hearing); *Treadwell*, 115 Wn. App. at 251 (reversing denial of motion to vacate under CR 60(b)(11) and remanding for trial). This, of course, also holds true with the Supreme Court’s *Washington Federal* decision.

Finally, the Linkem Defendants’ reliance on *Shum v. DOL* is also misplaced. The Opening Brief cites to *Shum* for the proposition that issues involving questions of law are a matter for appeal and should be left to the appellate court to deal with. Opening Brief at 9. Union Bank has not claimed an error of law, but rather a substantial change in the law coupled with extraordinary circumstances that justified the Superior Court vacating the January 31 Order. *Shum* is therefore inapposite. None of the cases relied on by the Opening Brief creates a retroactivity bar to the Superior Court employing CR 60(b)(11) to effect its earlier-stated goal of vacating and reversing its January 31, 2014 decision.

## V. CONCLUSION

As the Washington Supreme Court recognized 30 years ago, the trial court is “best equipped to evaluate the grounds for a post-trial

motion,” which includes a CR 60(b) motion to vacate. *Alpine Indus. Inc. v Gohl*, 101 Wn.2d 252, 256, 676 P.2d 488 (1984). Here, the Superior Court recognized the procedural irregularity created by its January 31 Order and properly exercised its discretion to rectify the “morass of procedural nightmare” by vacating that order. RP July 3, 2014 at 10:22–24. Union Bank respectfully requests that this Court affirm the Superior Court’s decision.

Respectfully submitted this 29th day of January, 2015.



Stellman Keehnel, WSBA No. 9309  
Andrew R. Escobar, WSBA No. 42793  
DLA PIPER US LLP  
701 Fifth Avenue, Suite 7000  
Seattle, WA 98104-7044  
Tel: 206.839.4800  
Fax: 206.839.4801  
E-mail: stellman.keehnel@dlapiper.com  
E-mail: andrew.escobar@dlapiper.com

Attorneys for Respondent Union Bank,  
N.A.

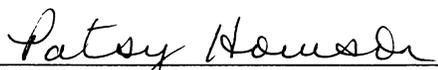
**CERTIFICATE OF SERVICE**

I declare that on January 29, 2015, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated:

Brian L. Budsberg, WSBA No. 11225 Budsberg Law Group, PLLC P.O. Box 1489 1115 West Bay Drive, Suite 302 Olympia, WA 98507 Tel: 360.584.9093 Fax: 360.252.8333 Email: paralegal@budsberg.com  <i>Attorneys for appellants Donald C. and Elizabeth A. Linkem, Richard T. and Amanda B. Brunaugh, Paul E. and Kelly I. Wilson, Pacific Resource Development, Inc., David A. and Velma L. Parker, and Pacific Bay, Inc.</i>	<input type="checkbox"/> Via Hand Delivery <input checked="" type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Email
--	--

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

Dated this 29th day of January, 2015 at Seattle, Washington.

  
\_\_\_\_\_  
Patsy Howson