77974-1

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STATE OF WASHINGTON

No. 77974-1

THE SUPREME COURT
STATE OF WASHINGTON

AMERICAN DISCOUNT CORP. and
UNITED COLLECTION SERVICE, INC.

Petitioner

v.

AUSTIN SHEPHERD, Jr., et. ux.

Respondent.

RESPONSE TO PETITION FOR REVIEW

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RESPONSE TO PETITION FOR REVIEW

This case does not present a pressing issue of public policy that requires a decision by the Supreme Court. The court below decided that in order for a Judgment Creditor (or assignee of that creditor) to levy execution on a judgment there must be a valid enforceable judgment.

The case does not present a significant issue of law under the Constitution of the State of Washington or of the United States. The Court of Appeals ruled that the judgment expired and could not be revived. This ruling was based upon *J.D. Tan, L.L.C. v. Summers* 107 Wn. App. 266, 26 P. 3d 1006 (2001) and did not need to reach any constitutional issues. Any discussion of the constitutionality of the statute in question is merely dicta.

Many of the arguments raised in the Opening and Reply Briefs of Joy Shepherd attached as Appendices 1 and 2, respectively, and incorporated by this reference, adequately respond to the issues raised in the Petition for Review. In addition, Joy Shepherd relies on the well-reasoned, articulate opinion of the Court of Appeals, which is based upon well-established Washington law.

ARGUMENT

United has not shown any reason as provided by RAP 13.4(b) that this Court should grant review.

This case addresses the question of what happens if no authorized person renews a judgment within the time provided for by statute. Petitioner United Collection seeks review of the decision of the Court of Appeals declaring that when no authorized person renewed the judgment in 1996 it expired and could not be resurrected by a subsequent action of the legislature.

RAP 13.4(b) sets forth the "Considerations governing Acceptance of Review."

> A case will be accepted only (1) If the decision of the Court of Appeals in conflict with a decision of the Supreme Court; (2) If the decision of the Court of Appeals is in conflict with another decision fo the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

It is clear that the first two considerations are not met. There are no other decisions dealing with the issues in this case that conflict with this decision. Consequently, the first two considerations are not a basis for granting review.

There are no significant constitutional issues that require resolution by this court.

The first reason that United argues for Review is that it asserts that there are significant constitutional issues that require review by the Supreme Court. United's argument must fail. The Court of Appeals ruled:

> We hold that the judgment expired and cannot be revived under the nonclaim statute, and therefore **do not need to address the constitutionality of the 2002 amendments.** [emphasis supplied]

The entire constitutional issue analysis is dicta because the court did not need to reach the issue in order to decide the case. Even though the constitutional issues were discussed, they are clearly not necessary to the ruling. The case does not present a case significant question of law under the Constitution of the State of Washington or the United States. This is a case of statutory construction, not constitutional policy. United is merely upset with the decision below and seeks review. (Petition for Review at 16.)

This case does not present any serious questions of public policy that require a decision by this Court.

United argues at Page 6 of the Petition that foreclosure of this judgment lien is governed by RCW 6.13.010 *et. seq* and not by RCW 4.56.210. United then cites several examples of situations where there is a judgment without a lien. While United is correct that a judgment lien does not attach to homesteaded property until the provisions of RCW 6.13.010 *et. seq.* are complied with, what United does not show is that there are any cases where there is a lien arising out of a judgment without a valid judgment. It is possible to have a judgment without a lien. It is impossible, however, to have a lien arising from a judgment without a judgment

Nothing in the any of the statutes provides for the enforcement of a judgment lien on the homestead without the existence of a valid judgment at the time of the execution. Contrary to United's statement at page 5 – 6 that Judgments are rights that are subject to a limitation period that can be extended, the statute says something different. RCW 4.56.210 provides in pertinent part as follows:

Cessation of lien -- Extension prohibited -- Exception.

(1) Except as provided in subsections (2) and (3) of this section, after the expiration of ten years from the date of the entry of **any judgment heretofore or hereafter rendered in this state, it shall cease to be a lien or charge against the estate or person of the judgment debtor. No suit, action or other proceeding shall ever be had on any judgment rendered in this state by which the lien shall be extended or continued in force for any greater or longer period than ten years.**[emphasis supplied]

There is long standing authority dating back to *Roche v. McDonald*, 136 Wn. 322, 239 P. 1015, 44 A.L.R. 444 (1925) that Judgments are non claim statutes. *See*, *Bellevue School District No. 405 v. Brazier Construction Co.*, 103 Wn. 2d 111, 117-118, 691 P.2d 178 (1984)(liens of judgments (RCW 4.56) as an example of a non claim statute). They are statutes of duration, not limitation and when the judgment expires, all rights that flow from the judgment die with it. *See, inter alia*, *Grub v. Fogle's Garage, Inc.*, 5 Wash. App. 840, 843, 491 P.2d 258 (1971). In *Grub*, the judgment creditor obtained a writ of execution prior to the expiration of the judgment lien but did not confirm the sale within the period. The court held that the failure to confirm within the period rendered the sale void. *See also, Mueller v. Miller*, 82 Wn. App. 236, 247, 917 P.2d 604 (1996). (execution sale held after the 10 year life

of the judgment lien was void) In this case, all of United's discussion of the differences between judgment liens, homestead liens, and the like are not relevant. In order to force collection of a judgment on homesteaded property, or any other property, for that matter, there must be a valid judgment in effect at the time of the execution sale and at the time that it is confirmed. *Grub, supra.*

The court below determined that the judgment and lien terminated when the judgment expired because it was not properly renewed. "A judgment is a born by statute and dies by statute." *Ferry County Title & Escrow Co. v. Fogle's Garage, Inc.*, 4 Wn. App. 874, 880, 484 P.2d 458 (1971). It has long been the law in this state that when a judgment dies, all proceedings ancillary to the judgment die with it. *See, inter alia, Long v. Smith*, 125 Wn. 183, 215 P. 342 (1923), *Kandoll v. Penttila*, 18 Wn.2d 434, 139 P.2d 616 (1943), *Roche v. McDonald*, *supra.*

The Court of Appeals decided this issue on the basis of prior precedent and a careful reading of the statute. The Judgment expired when it was not properly renewed. This is neither new law nor is it momentous decision affecting public policy that requires a decision by the Supreme Court. A clear reading of the statute is that it applied only to validly extended judgments.

Since it is uncontroverted that this judgment was not properly extended, it was not in existence on the date that the legislature amended the statute, Consequently, the statute could not apply to it. This is hardly an issue of pressing public policy requiring decision by this court.

CONCLUSION

This case does not meet the criteria for acceptance of review by the Supreme Court. It does not resolve conflicting court rulings. It does not resolve a significant question of law under the Constitution of the State of Washington or of the United States. It does not address any substantial issue of public policy that requires a decision by this court. The Petition for Review should be denied

The court should deny the Petition for Review.

Respectfully submitted this December 8, 2005

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Appendix 1 - Opening Brief of Joy Shepherd
Appendix 2 - Reply Brief of Joy Shepherd
Appendix 3 - Court of Appeals Opinion

No. 54017-3-1

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

JOY SHEPHERD,

Appellant,

v.

UNITED COLLECTION SERVICE, INC.,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

This is an appeal by Joy Shepherd ("Appellant") of the trial court's denial of a motion to vacate an extension of Judgment. This judgment arose as a business debt of the marital community of W. Austin Shepherd and Joy Shepherd. The judgment was in favor of American Discount Corporation, Inc. and was originally filed on August 21, 1986. This judgment was assigned to United Collection Service, Inc. ("Respondent") on October 15, 1987. The judgment remained unpaid and an Order Extending the Judgment in favor of Respondent was entered on July 8, 1996.

The extension of the Judgment in 1996 was void as RCW 6.17.020(3), as codified at that time, did not permit assignees of the judgment to extend the judgment. This statute was unambiguous and did not permit assignees to extend judgments for an additional ten years. The Assignment of the Judgment in 1996 was void as a result of the Court of Appeals decision in *J.D. Tan, L.L.C. v. Summers* 107 Wn. App. 266, 26 P. 3d 1006 (2001) and RCW 6.17.020(3).

The 2002 Amendments to RCW 6.17.020(3) which permit an assignee to extend the judgment cannot be retroactively applied to revive an expired judgment. This appeal invites a determination by the Court of Appeals as to the retroactive effect of the 2002 amendments to RCW

6.17.020(3) on judgments that were extended by assignees of the original judgment creditor.

Appellant appeals from the On July 8, 2004 Order entered by the King County Superior Court denying Appellant's Motion to Vacate the Order of Extension. CP 72.

II. ASSIGNMENTS OF ERROR

Appellant makes the following assignments of error:

1. The trial court erred in denying Appellant's Motion to vacate the Order Extending the Judgment as the underlying judgment was expired as a matter of law under RCW 6.17.020(3) when it was improperly extended by an assignee.

2. The trial court erred in denying Appellant's Motion to vacate the Order Extending the Judgment by applying the 2002 Amendments to RCW 4.17.020(3) to retroactively extend the Judgment in favor of the assignee.

3. The trial court erred in failing to clarify that the judgment only applied to Joy Shepherd's community interests.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Superior Court in 1996 have authority to extend a judgment when that extension was sought not by the original judgment creditor but by its assignee? (Assignment of Error Nos. 1, and 2)

2. Does the text of the RCW 6.17.020 as amended by Chapter 261, Laws of 2002 apply to revive a expired judgment which was improperly extended by an assignee in 1996? (Assignment of Error Nos. 1, and 2)

3. Was the 2002 amendment to RCW 6.17.020 which retroactively enabled assignees to extend judgments constitutional, as applied to this case, when the Court of Appeals had previously determined in *J.D. Tan, LLC v. Summers* that assignees could not extend the judgment? (Assignment of Error Nos. 1, and 2)

4. Can Joy Shepherd, individually, be the intended judgment debtor when she never signed any of the underlying documents? (Assignment of Error No. 3)

IV. STATEMENT OF THE CASE.

The Judgment in this case was originally entered on August 21, 1986 in favor of American Discount, Inc. CP 1-3. On October 15, 1987, it was assigned of record to Respondent, United Collection Services, Inc. CP 4. The judgment was not collected within ten years. On July 8, 1996, Respondent sought an extension and an order was entered on July 8, 1996 extending the judgment. CP 5-6. The primary issue in this appeal involves the question of whether this extension of the judgment was valid.

In July of 2001, Division One of the Washington Court of Appeals decided *J. D. Tan, LLC v. Summers*, (*supra*). An undivided panel of the

Court of Appeals held that an assignee of a judgment could not renew the judgment for another ten year period under RCW 6.17.020(3) as it existed in 2001. *J.D. Tan* 107 Wn. App at 269. The question presented in *J. D. Tan* was whether an assignee had the right of extension provided in subsection (3) of the statute. The Court ruled that the statute was unambiguous and that assignees could not renew the judgment. Id. Subsection (3) of RCW 6.17.020 as codified in 2001 did not include assignees as a party who could extend the judgment.

RCW 6.17.020(3) was amended by Chapter 261, Laws of 2002 to allow an assignee or the current holder of the judgment to renew judgments. The statutory amendment to subsection (3) permitted assignees to extend the judgment. The effective date of this enactment was June 13, 2002.

On February 12, 2004 Appellant obtained an Order to Show Cause why the 1996 Order should not be vacated as being void *ab initio*. CP 9-10. On July 8, 2004 an order was entered by Judge Doerty of the King County Superior Court denying the Motion to Vacate the Order Extending the Judgment. CP 43-44. This is the order appealed from. A Notice of Appeal was filed on March 25, 2004. CP 73.

V. SUMMARY OF ARGUMENT

In 1996 when the King County Superior Court entered its Order Extending the Judgment, it did not have authority to extend the judgment.

The order was *void ab initio*. The subsequent amendment of the statute did not revive the expired judgment. It is a violation of the separation of powers for the Legislature to retroactively amend a statute to overrule a decision of the judiciary.

The court also erred in not clarifying that the judgment was entered against Joy Shepherd only in her community capacity and not in her individual capacity.

VI. AUTHORITY AND ARGUMENT

A. Standard of Review.

The present appeal presents a pure question of law regarding the interpretation of a statute. Accordingly, the trial court's decision is reviewed "de novo". *State v. Ammons*, 136 Wn. 2d 453, 456, 693 P.2d 812 (1998). To the extent that this appeal presents subsidiary issues involving determinations of fact, those issues are reviewed under the "substantial evidence" standard. *Fred Hutchinson Cancer Research Center v. Holman,* 107 Wn.2d 693, 712, 732 P.2d 974 (1987).

B. The Court Did Not Have Authority To Extend The Judgment in Favor of an Assignee in 1996.

In 1994, the Washington Legislature revised RCW 6.17.020 to permit the extension of time during which execution may be issued on a judgment. Prior to 1994, execution on a judgment could be issued for only ten years from the date of entry of the judgment. The statute as amended in 1994

permitted the extension for an additional ten years by the original holder of the judgment. An assignee was not listed in Subsection 3 of the statute.

The pertinent text of RCW 6.17.020(3) prior to the 2002 Amendments is set forth below:

> (3) After June 9, 1994, *a party in whose favor a judgment has been rendered* pursuant to subsection (1) or (4) of this section may, within ninety days before the expiration of the original ten year period, apply to the court that rendered the judgment for an order granting an additional ten years during which an execution may be issued. (Emphasis supplied).

The language in this subsection does not include the word "assignee". Only a "party in whose favor a judgment has been rendered" can extend the judgment. Subsection 1 of the statute does specifically include assignees.

This specific issue of whether an assignee could extend the judgment for an additional ten years under RCW 6.17.020(3) was addressed in *J.D. Tan, LLC v. Summers (supra)*. The Court in *J.D. Tan* set out verbatim the reasoning of the trial court's order that found that RCW 6.17.020 (3) does not authorize an assignee of the original judgment creditor request an extension of the judgment:

> This Court agrees that if the drafters of the revisions to RCW 6.17.020 which were ultimately codified in RCW 6.17.020(3) had been thinking clearly, both they and the entities testifying in favor of the amendments would have agreed to add the words "or the assignee" to the phrase "a party in whose favor a judgment has been rendered" in order to permit assignees to extend the ten-year period. Nonetheless, such an omission is not a mere clerical error which the Court can unilaterally "correct." A court must

> enforce unambiguous statutes as written, not as they could have been written if the drafters had been thinking clearly. 107 Wn. App. at 268.

The Court determined that subsection 3 of the statute was unambiguous and should be enforced as written:

> When a statute is clear and unambiguous, its meaning is to be derived from the language of the statute alone and it is not subject to judicial construction.
>
> Appellants argue that the trial court erred in finding that the statute is unambiguous and so not subject to interpretation. A statute is "ambiguous" and thus requires judicial interpretation whenever it is susceptible to more than one reasonable interpretation. This statute is not ambiguous. The statute clearly refers to "a party in whose favor a judgment has been rendered" as the only person that may extend a judgment. The statute cannot reasonably be understood to apply to assignees of judgments as well as to original judgment creditors.
>
> Since the statute is not amenable to more than one interpretation, it is not ambiguous, and the trial court did not err in enforcing it as written. 107 Wn. App. at 269.

"It is an elementary rule that where certain language is used in one instance, and different language in another, there is a difference in legislative intent. *Seeber v. Public Disclosure Comm'n,* 96 Wn.2d 135, 139, 634 P.2d 303 (1981). The fact that the Legislature omitted "or an assignee" from RCW 6.17.020(3), after including that phrase in RCW 6.17.020(1), unambiguously reflects the Legislature's intent to exclude assignees from RCW 6.17.020(3). The policy that the Legislature was trying to enforce is

not subject to debate or judicial review because the language of the statute is unambiguous.

Further support for the conclusion that RCW 6.17.020 is not ambiguous is found in *Johns v. Erhart*, 85 Wn. App. 607, 611, 934 P.2d 701 (1997) where the court strictly construed the statute against a creditor finding that the statute must be applied as written, noting that "We will not speculate on why the Legislature granted authority to extend a judgment in one case, but refused it in another."

In *Johns, supra* the court considered the statutory construction of RCW 6.17.020(3) with respect to whether a bankruptcy court judgment filed as foreign judgment in state court, but not rendered by the state court, could be extended. The appellate court unanimously ruled that, based on strict interpretation of the statute, the foreign judgment could not be extended because it was not "rendered by" the state court. A strict interpretation of RCW 6.17.020(3) with regard to assignees is appropriate.

In July 1996, when the court entered its Order Extending the Judgment there was no authority to do so. As a result the Order was void *ab initio*. The trial court should have vacated the order. The court has no jurisdiction to enforce to the judgment. In *Hazel v. Beek*, 135 Wn.2d 45, 53, 954 P.2d 1301 (1998) the court reiterated the rule that a trial court has no discretion when faced with a void judgment:

> McLiesh follows the common law principle which states a void judgment can be attacked at any time. *See* CR 60(b)(5); *In re Marriage of Leslie*, 112 Wn.2d 612, 620, 772 P.2d 1013 (1989). This principle has been applied in the context of confirmation of an execution sale. *See Mueller v. Miller*, 82 Wn. App. 236, 251, 917 P.2d 604 (1996) ("A trial court has no discretion when faced with a void judgment, and must vacate the judgment 'whenever the lack of jurisdiction comes to light.'") (emphasis added) (quoting *Mitchell v. Kitsap County*, 59 Wn. App. 177, 180-81, 797 P.2d 516 (1990)).

Both RCW 6.17.020 and *J.D. Tan* provide express authority for declaring the 1996 extension of the judgment void. A void judgment must be vacated. *See In Re Marriage of Leslie,* 112 Wn.2d 612, 618-619, 772 P.2d 1013 (1989). The trial court erred by not finding Respondent's extension of the judgment void and vacating the judgment under CR 60(b)(5).

C. <u>The Amendments To RCW 4.17.020(3) Cannot Retroactively Extend The Expired Judgment In Favor Of The Assignee.</u>

The fact that the judgment was expired is of particular importance when considering the operative effect of the 2002 Amendments to RCW 4.17.020(3). The legislative amendments cannot revive an expired judgment. The arguments in support of this are twofold: (1) The judgment expired and no judgment existed for RCW 4.17.020(3) as amended in 2002 to operate on; and (2) the retroactive application of the 2002 Amendments is unconstitutional as applied to this case.

A brief review of the amendments to RCW 4.17.020 is helpful. The amendments in 1994 did not apply retroactively. The 1994 amendments

avoided the problems raised by the retroactive effect of the 2002 amendments. *See Hazel v. Beek,* 135 Wn. 2d 45, 954 P.2d 1301 (1998) where the court noted that the 1994 amendments to RCW 4.16.020 were prospective only:

> It would be improper for us to write new exceptions into RCW 4.56.210. If the Legislature intended for tolling, it could have provided for it; and, in fact, in 1994 the Legislature amended RCW 6.17.020(3), RCW 4.16.020, and RCW 4.56.190 to provide for a 10-year extension of the life of a judgment upon request of the creditor. Laws of 1994, ch. 189, §§. 1-3. *The Legislature explicitly made the new exception prospective only.* RCW 6.17.020(3). With the Legislature having specifically addressed the manner by which a creditor can extend the life of a judgment, we will not interfere with the issue. (Emphasis Added) 135 Wn. 2d at 64.

The 2002 Amendments provide for the retroactive effect of the statute by adding a new subsection set forth as RCW 6.17.020(8):

> (8) The chapter 261, Laws of 2002 amendments to this section apply to all judgments currently in effect on June 13, 2002, to all judgments extended after June 9, 1994, unless the judgment has been satisfied, vacated, and/or quashed, and to all judgments filed or rendered, or both, after June 13, 2002.

The portion of the statute that is in question is "to all judgments extended after June 9, 1994, unless the judgment has been satisfied, vacated, and/or quashed". Since the judgment held by Respondent was expired and the order extending it was void there was no "judgment" in effect to which the amended version of the statute could apply. A valid judgment was not in existence on June 13, 2002, the effective date of 2002 amendments.

A constitutional reading of the amended statute would be that it applies to all judgments which were extended by the original judgment creditor after 1994 and prior to June 13, 2002 or that had been rendered after 1994 but not yet renewed because the 10 year period had not run at the time of enactment of the statute. The statute can be read in this manner to avoid a constitutional challenge. Wherever possible, it is the duty of this court to construe a statute so as to uphold its constitutionality. *Anderson v. Morris*, 87 Wn.2d 706, 558 P.2d 155 (1976).

D. The Application Of The 2002 Amendments Is Unconstitutional As Applied To This Case.

Appellant has a substantive right to the 1986 Judgment being treated as expired. The enlargement of the period of time that a judgment can be enforced is a substantive right. It is not a procedural remedy. The 2002 amendments to RCW 6.17.020 had the legal consequence of expressly overruling *J.D. Tan*.

If the court adopts the Respondent's position, the 2002 Amendments revived all judgments that were extended by assignees after June 9, 1994. This directly overrules *J.D. Tan*. This result is not constitutionally permitted. In *State v. T.K.*, 139 Wn.2nd 320, 987 P.2d 63 (1999) the court stated that the retroactive effect of the statute could not be constitutionally applied where vested rights or contractual obligations are affected. The Court in *State v. T.K.* stated:

> Contrary to the State's argument, amending a statute does not necessarily mean that the prior statute ceases to exist. An amendment generally means that the new statute will apply as of the effective date of the amendment. There are many cases, however, in which a preamendment version of a statute will continue to govern in cases arising prior to the amendment, **particularly where vested rights or contractual obligations are affected**. *See, e.g., In re F.D. Processing, Inc.*, 119 Wn.2d 452, 461-62, 832 P.2d 1303 [1992] (in action relating to statute extending lien protection to agricultural processors, preamendment version of statute governs because amendment to definition of agricultural products affected bank's vested right in a security interest and, therefore, not retroactively applied); *Ashenbrenner v. Department of Labor & Indus.*, 62 Wn.2d 22, 25, 380 P.2d 730 [1963] (rights of workmen's compensation claimants are controlled by law in force at time of injury rather than by law which becomes effective subsequently) [emphasis supplied] 139 Wn. 2nd at 327-328

In *Barstad v. Stewart Title Guaranty Co., Inc.*, 145 Wash.2d 528, 536–537, 39 P.3d 984 (2002) the Court described when a statutory amendment can be applied retroactively if it is constitutionally permitted:

> A statutory amendment will be applied retroactively, if constitutionally permissible under the circumstances, when it is (1) intended by the Legislature to apply retroactively, (2) curative in that it clarifies or technically corrects ambiguous statutory language, or (3) remedial in nature. *McGee Guest Home, Inc. v. Dep't of Soc. & Health Servs.*, 142 Wn.2d 316, 324-35, 12 P.3d 144 (2000) (citing *State v. Cruz*, 139 Wn.2d 186, 191, 985 P.2d 384 (1999)).

The 2002 amendments are not technical in nature. The statute was not ambiguous prior to the amendments and they do not clarify an ambiguous term. A statute is "remedial" when it relates to a practice, procedure or remedy and does not affect a substantive or vested right. *Miebach v.*

Colasurdo, 102 Wn. 2d 170, 181, 685 P.2d 1074 (1984). The amendments are intended to apply retroactively. *See* RCW 6.17.020(8). The 2002 amendments this subsection state that they apply to all judgments currently in effect on June 13, 2002, to all judgments extended after June 9, 1994, unless the judgment has been satisfied, vacated, and/or quashed, and to all judgments filed or rendered, or both, after June 13, 2002. The key question is whether the amendments can be constitutionally applied retroactively.

The retroactive application of the 2002 amendments is not constitutionally permitted as applied to the case. Washington Courts disfavor retroactivity. *In Re Estate of Burns*, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997) The amendments fail in two ways in this case. First, it does not clarify or technically correct ambiguous language. The court in *J.D. Tan* ruled that the prior statute was clear on its face. 107 Wn. App. at 269. It is not remedial in nature. It creates a substantive right where none existed before. The *J.D. Tan* decision clearly held that there was no right to renew. *Id.* If the legislation is given effect, it will have retroactively taken away that right. All debtors whose judgments were expired by virtue of the former RCW 6.17.020 now face revival by assignees of the judgments. The court must consider the effect on mortgages and other transactions completed during that period.

The Legislature overstepped its bounds in enacting Subsection 8 of the Statute in 2002. To retroactively legislatively validate prior unauthorized

conduct and reverse a judicial decision is an unconstitutional usurpation of the judiciary's authority and a violation of the doctrine of Separation of Powers. The Legislature is presumed to be aware of judicial constructions of existing statues. *Hazel v. Van Beek*, 135 Wn. 2d at 58.

In *Johnson v. Morris*, 87 Wn.[2d] 922, 926, 557 P.2d 1299 (1976), the court addressed the constitutional authority of the legislature to over rule decisions made by the courts:

> Petitioner cites no authority for the proposition that the legislature is empowered to retroactively "clarify" an existing statute, when that clarification contravenes the construction placed upon that statute by this court. Such a proposition is disturbing in that it would effectively be giving license to the legislature to overrule this court, raising separation of powers problems.

The court went on to find that the legislature could not retroactively modify a statute upon which the court had spoken.

The issue was addressed again in *State v. Dunaway*, 109 Wn.2d 207, 743 P.2d 1237 (1987) where the Court emphasized that the Legislature cannot be used as the "court of last resort" to retroactively overturn decisions:

> Generally, subsequent enactments that only clarify an earlier statute can be applied retrospectively. *Johnson v. Morris*, 87 Wn.2d 922, 925, 557 P.2d 1299 (1976); *Marine Power & Equip. Co. v. Human Rights Comm'n Hearing Tribunal*, 39 Wn. App. 609, 614, 694 P.2d 697 (1985). An enactment supplying a definition for an ambiguous term contained in an earlier statute is merely a clarification. Nevertheless, even a clarifying enactment cannot be applied retrospectively when it contravenes a construction placed on the original statute by the judiciary. *Overton v. Economic Assistance Auth.*, 96

> Wn.2d 552, 558, 637 P.2d 652 (1981); Johnson, at 925 26; *State v. Taylor,* 47 Wn. App. 118, 123, 734 P.2d 505 (1987). "Any other result would make the legislature a court of last resort." 1 A C. Sands, Statutory Construction § 27.04 (4th ed. 1985). The Court of Appeals has already construed the SRA's "same criminal conduct" language in a manner that is inconsistent in certain respects with the 1987 statutory definition. *See State v. Edwards,* 45 Wn. App. 378, 725 P.2d 442 (1986). For example, the new definition in RCW 9.94A.400(1)(a) provides that crimes involving separate victims cannot constitute the same criminal conduct, while Edwards held that they can. See discussion above. Therefore, we will not apply the 1987 definition to the present cases.

In *State v. Dean*, 113 Wn. App. 691, 698, 54 P.3d 243 (2002) the court put the matter succinctly:

> Curative amendments cannot be applied retroactively if they contravene a judicial construction of the original statute. *State v. Jones*, 110 Wn.2d 74, 82, 750 P.2d 620 (1988); *State v. Dunaway*, 109 Wn.2d 207, 216 n. 6, 743 P.2d 1237, 749 P.2d 160 (1987) (to do so would make the Legislature a court of last resort; *Johnson v. Morris*, 87 Wn.2d 922, 926, 557 P.2d 1299 (1976) ("Such a proposition is disturbing in that it would effectively be giving license to the legislature to overrule the state Supreme Court, raising separation of powers problems.")

Other courts which have addressed the issue have reached the same result. *Carpenter v. Butler*, 32 Wn.2d 371, 201 P.2d 704 (1949); *State v. Taylor*, 47 Wn. App. 118, 123, 734 P.2d 505 (1987); *Magula v. Benton Franklin Title Co.*, 131 Wn.2d 171, 181– 182, 930 P.2d 307 (1997).

The law is clear that the legislature cannot overrule the courts on issues which they have resolved. That is exactly what the Respondent wishes the court to do in this case. This results in a violation of the doctrine of

"Separation of Powers." It is an unconstitutional undertaking and is not allowed.

Retroactive application of statutes is not favored in American Jurisprudence. In *Landgraf v. USI Film Products*, 511 U.S. 244, 265-266, 114 S.Ct. 1483, 1497, 128 L.Ed. [2d] 229 (1994) Justice Stevens writing for the court explained this principle in detail:

> As JUSTICE SCALIA has demonstrated, the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted, For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." Kaiser, 494 U.S., at 855 (SCALIA, J., concurring). In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.
>
> It is therefore not surprising that the anti-retroactivity principle finds expression in several provisions of our Constitution. The Ex Post Facto Clause flatly prohibits retroactive application of penal legislation. Article I, § 10, cl. 1, prohibits States from passing another type of retroactive legislation, laws "impairing the Obligation of Contracts." The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a "public use" and upon payment of "just compensation." The prohibitions on "Bills of Attainder" in Art. I, §§ 9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. *See, e.g., United States v. Brown*, 381 U.S. 437, 456-462 (1965). The Due Process Clause also protects the interests in fair notice and repose that may be

> compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause "may not suffice" to warrant its retroactive application. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976).
>
> These provisions demonstrate that retroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.

In summary, what the courts have ruled upon may not be changed retroactively by the legislature. This is an unconstitutional usurpation of the court's powers. The *J.D. Tan* court found that the statute was not ambiguous. It clearly ruled on the issue of extension of judgments and held that there was no authority for an assignee to extend a judgment for an additional ten years. The Order Extending the Judgment was void *ab initio*. The judgment of the trial court denying the Motion to Vacate the Extension should be reversed.

E. Joy Shepherd Is Not Liable For The Judgment In Her Individual Capacity.

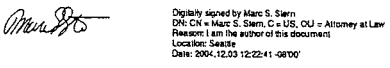
In the Reply Memorandum filed in support of the motion to vacate the extension the judgment was a copy of the original contract entered into by W. Austin Shepherd. *See* Joy Shepherd's Reply Memorandum, Exhibit A. CP 40-42. Joy Shepherd's name does not appear on this document. The Security Agreement is executed in the name of W. Austin Shepherd, and is signed by Austin Shepherd. A person not signing the document can not be held liable

thereon. *Mutual Security v. Unite*, 68 Wn. App. 636, 640, 847 P.2d 4 (1993). Since she was not a signor, her inclusion on the caption and body was descriptive only. The Court should clarify the judgment and determine that it named the marital community and not Joy Shepherd individually as to her separate estate. The Order Extending the Judgment should be vacated to correct this defect.

VII. CONCLUSION

On the basis of the foregoing, Appellant respectfully requests that the Court reverse the trial court's decision and vacate the Order Extending Judgment. Alternatively, the court can determine that the naming of Joy Shepherd is descriptive only and does not constitute a separate judgment against her.

Dated this December 3, 2004



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APPENDIX

1. RCW 6.17.020 as amended by Chapter 261, Laws of 2002.

RCW 6.17.020
Execution authorized within ten years -- Exceptions -- Fee -- Recoverable cost.

(1) Except as provided in subsections (2), (3), and (4) of this section, the party in whose favor a judgment of a court has been or may be filed or rendered, or the assignee or the current holder thereof, may have an execution, garnishment, or other legal process issued for the collection or enforcement of the judgment at any time within ten years from entry of the judgment or the filing of the judgment in this state.

(2) After July 23, 1989, a party who obtains a judgment or order of a court or an administrative order entered as defined in RCW 74.20A.020(6) for accrued child support, or the assignee or the current holder thereof, may have an execution, garnishment, or other legal process issued upon that judgment or order at any time within ten years of the eighteenth birthday of the youngest child named in the order for whom support is ordered.

(3) After June 9, 1994, a party in whose favor a judgment has been filed as a foreign judgment or rendered pursuant to subsection (1) or (4) of this section, or the assignee or the current holder thereof, may, within ninety days before the expiration of the original ten-year period, apply to the court that rendered the judgment or to the court where the judgment was filed as a foreign judgment for an order granting an additional ten years during which an execution, garnishment, or other legal process may be issued. If a district court judgment of this state is transcribed to a superior court of this state, the original district court judgment shall not be extended and any petition under this section to extend the judgment that has been transcribed to superior court shall be filed in the superior court within ninety days before the expiration of the ten-year period of the date the transcript of the district court judgment was filed in the superior court of this state. The petitioner shall pay to the court a filing fee equal to the filing fee for filing the first or initial paper in a civil action in the court, except in the case of district court judgments transcribed to superior court, where the filing fee shall be the fee for filing the first or initial paper in a civil action in the superior court where the judgment was transcribed. The order granting the application shall contain an updated judgment summary as provided in RCW 4.64.030. The filing fee required under this subsection shall be included in the judgment summary and shall be

a recoverable cost. The application shall be granted as a matter of right, subject to review only for timeliness, factual issues of full or partial satisfaction, or errors in calculating the judgment summary amounts.

(4) A party who obtains a judgment or order for restitution, crime victims' assessment, or other court-ordered legal financial obligations pursuant to a criminal judgment and sentence, or the assignee or the current holder thereof, may execute, garnish, and/or have legal process issued upon the judgment or order any time within ten years subsequent to the entry of the judgment and sentence or ten years following the offender's release from total confinement as provided in chapter 9.94A RCW. The clerk of superior court, or a party designated by the clerk, may seek extension under subsection (3) of this section for purposes of collection as allowed under RCW 36.18.190, provided that no filing fee shall be required.

(5) "Court" as used in this section includes but is not limited to the United States supreme court, the United States courts of appeals, the United States district courts, the United States bankruptcy courts, the Washington state supreme court, the court of appeals of the state of Washington, superior courts and district courts of the counties of the state of Washington, and courts of other states and jurisdictions from which judgment has been filed in this state under chapter 6.36 or 6.40 RCW.

(6) The perfection of any judgment lien and the priority of that judgment lien on property as established by RCW 6.13.090 and chapter 4.56 RCW is not altered by the extension of the judgment pursuant to the provisions of this section and the lien remains in full force and effect and does not have to be rerecorded after it is extended. Continued perfection of a judgment that has been transcribed to other counties and perfected in those counties may be accomplished after extension of the judgment by filing with the clerk of the other counties where the judgment has been filed either a certified copy of the order extending the judgment or a certified copy of the docket of the matter where the judgment was extended.

(7) Except as ordered in RCW 4.16.020 (2) or (3), chapter 9.94A RCW, or chapter 13.40 RCW, no judgment is enforceable for a period exceeding twenty years from the date of entry in the originating court. Nothing in this section may be interpreted to extend the expiration date of a foreign judgment beyond the expiration date under the laws of the jurisdiction where the judgment originated.

(8) The chapter 261, Laws of 2002 amendments to this section apply to all

judgments currently in effect on June 13, 2002, to all judgments extended after June 9, 1994, unless the judgment has been satisfied, vacated, and/or quashed, and to all judgments filed or rendered, or both, after June 13, 2002.

[2002 c 261 § 1; 1997 c 121 § 1; 1995 c 231 § 4; 1994 c 189 § 1; 1989 c 360 § 3; 1987 c 442 § 402; 1980 c 105 § 4; 1971 c 81 § 26; 1929 c 25 § 2; RRS § 510. Prior: 1888 p 94 § 1; Code 1881 § 325; 1877 p 67 § 328; 1869 p 79 § 320; 1854 p 175 § 242. Formerly RCW 6.04.010.]