

90078-7

Court of Appeals, Case No. 70004-9-I

No. 90085-0

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IN THE SUPREME COURT  
STATE OF WASHINGTON

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WASHINGTON FEDERAL, a federally chartered savings association,

Plaintiff/Appellant,

v.

KENDALL D. GENTRY and NANCY GENTRY, individually,  
and the martial community comprised thereof

Defendants/Respondents.

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**PETITION FOR REVIEW**

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## **I. IDENTITY OF PETITIONERS**

Petitioners are Kendall and Nancy Gentry, the Defendants/ Respondents below (the “Gentrys”).

## **II. CITATION TO COURT OF APPEALS DECISION**

Pursuant to RAP 13.4(b)(2) and (4), this Court should review the published decision in Washington Federal v. Gentry, \_\_ Wn. App. \_\_, \_\_ P.3d (February 18, 2014), Case No. 70004-9-I, filed on February 18, 2014, by Division I of the Court of Appeals (“Gentry”). A copy of the Gentry decision is attached hereto as Appendix A.

## **III. ISSUES PRESENTED FOR REVIEW**

1. Review by the Supreme Court is required in order to resolve a direct conflict between decisions of Divisions I and II of the Court of Appeals on two issues:

(a) whether the Deed of Trust Act, RCW 61.24.100, prohibits a secured lender from seeking a deficiency judgment against a guarantor, where the lender elected to non-judicially foreclose a deed of trust securing the guarantor’s obligations, and

(b) whether a deed of trust secures guarantor obligations (in addition to borrower/grantor obligations), where it is “given to secure” obligations under the “Related Documents” in addition to the obligations

under the Note, and defines “Related Documents” to include obligations under “all guaranties ... executed in connection with the Indebtedness.”

In First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development LLC, 178 Wn. App. 207, 314 P.3d 420 (2013) (“First-Citizens”), Division II of the Court of Appeals answered “yes” to both questions based upon a “plain language” analysis. The same statute and essentially identical deed of trust language is at issue in this case. However, in its Gentry decision, Division I of the Court of Appeals declined to follow the First-Citizens opinion, and instead reached directly opposite determinations on the controlling issues of statutory and contract interpretation. Review by this Court is necessary to resolve this conflict and correct Division I’s misinterpretation and misapplication of the plain language of the deeds of trust and non-judicial foreclosure statute.

2. Review is also sought with respect to a related issue which was not argued to Division II in First-Citizens, and which was briefed and argued but not decided by Division I in its Gentry decision: Can a secured lender contractually avoid the anti-deficiency protections of the Deed of Trust Act through boilerplate waiver provisions in its guaranty form, or is such action void as against public policy?

## IV. STATEMENT OF THE CASE

### A. Factual Background

This action arises out of loans obtained from Horizon Bank by three entities owned by the Gentrys—Blackburn Southeast LLC, Landed Gentry Development Inc., and Gentry Family Investments LLC. On December 14, 2005, Blackburn Southeast borrowed \$2,550,000.00 (the “Blackburn SE Note”).<sup>1</sup> On April 27, 2009, Landed Gentry borrowed \$3,574,847.74 (the “Landed Gentry Note”).<sup>2</sup> On September 1, 2009, Gentry Family borrowed \$1,127,832.73 (the “Gentry Family Note”).<sup>3</sup>

Payment of the Blackburn SE Note was secured with a deed of trust<sup>4</sup> on property located on Little Mountain Road, Mount Vernon (the “Little Mountain DOT”). The Little Mountain DOT also provided security for the Gentry Family Note and the Landed Gentry Note.<sup>5</sup> Payment of the Landed Gentry Note was further secured by a deed of trust<sup>6</sup> on property located on East Blackburn Road, Mount Vernon, Washington (the “Blackburn Road DOT”). In addition to signing the two

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<sup>1</sup> CP 53-59 (Blackburn SE Note).

<sup>2</sup> CP 4-7 (Landed Gentry Note).

<sup>3</sup> CP 41-44 (Gentry Family Note).

<sup>4</sup> CP 23-32 (Little Mountain DOT); CR 517 at ¶ 2.10 (Complaint).

<sup>5</sup> CP 517 at ¶ 2.7 (Complaint).

<sup>6</sup> CP 9-21 (Blackburn Road DOT).

deeds of trust on behalf of their LLC entities, the Gentrys personally guaranteed each of the three notes (collectively, the “Guaranties”).<sup>7</sup>

Both the Blackburn Road DOT and the Little Mountain DOT (collectively, the “Deeds of Trust”) provide that they are “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.”<sup>8</sup> To eliminate any ambiguity, the Deeds of Trust contained specific definitions of the terms “Indebtedness” and “Related Documents”:

The word “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 Note or Related Documents ...<sup>9</sup>

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” and are not secured by this Deed of Trust.<sup>10</sup>

The Guaranties signed by the Gentrys were not merely executed “in connection” with the Indebtedness; they obligated the Gentrys to

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<sup>7</sup> CP 61-66 (Blackburn SE Guaranties); CR 34-39 (Landed Gentry Guaranties); CR 46-51 (Gentry Family Guaranties).

<sup>8</sup> That language was presented in block lettering and bold face. CP 11, 25.

<sup>9</sup> CP 16-17, 30 (emphasis added).

<sup>10</sup> CP 17, 31 (emphasis added).

satisfy the Note and pay the Indebtedness if their LLC borrower entities failed to do so.<sup>11</sup> Thus, when combined with the language declaring that the Deeds of Trust were “given to secure ... performance of any and all obligations under ... the Related Documents,” the plain language of the definitions confirm that the Deeds of Trust were “given to secure ... performance of any and all obligations” under the Gentry Guaranties.

Each of the three Notes matured on January 5, 2010. The borrower LLC’s failed to pay the Notes when they became due.<sup>12</sup> As a result, Washington Federal (“WaFed”), the successor-in-interest to Horizon under an assignment from the FDIC, non-judicially foreclosed upon both the Blackburn Road Property and the Little Mountain Road Property. WaFed purchased both properties by credit bids at the trustee’s sale held on April 1, 2011.<sup>13</sup>

## **B. Procedural Background**

Following the trustee’s sale, WaFed sued the Gentrys, claiming that they were liable for a deficiency judgment under their Guaranties.<sup>14</sup> The Gentrys then moved for summary judgment of dismissal, arguing that the Deeds of Trust secured the Guaranties, and that as a result of non-judicial foreclosure through the trustee’s sale, the Deed of Trust Act and

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<sup>11</sup> CR 34-39; CR 46-51 and CP 61-66.

<sup>12</sup> CP 518 at ¶ 3.1 (Complaint).

<sup>13</sup> CP 518-19 at ¶¶ 4.1-4.6 (Complaint).

<sup>14</sup> CP 515-558.

specifically, RCW 61.24.100 (10) prohibited WaFed from seeking a deficiency judgment against them.<sup>15</sup> WaFed disputed both arguments, and also contended that the Gentrys had waived the protection of RCW 61.24.100 through boilerplate language in the Guaranties. The trial court granted the Gentrys' motion, concluding that: (1) the Gentrys' Guaranties were secured by the Deeds of Trust which WaFed had non-judicially foreclosed; (2) RCW 61.24.100 (10) bars a deficiency judgment against a guarantor where the guaranty obligations were secured by the foreclosed deed trust; and (3) waiver of the anti-deficiency protections afforded by RCW 61.24.100 is void as against public policy.<sup>16</sup>

The Gentry case is one of a large number of cases pending before the Washington courts, involving substantially identical deed of trust forms and attempts by banks to obtain deficiency judgments against guarantors after completing non-judicial foreclosure sales.<sup>17</sup> First-Citizens

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<sup>15</sup> CP 792-798.

<sup>16</sup> CP 765-767.

<sup>17</sup> In addition to First-Citizens, Gentry and Washington Federal v. Harvey (argued to and decided by Division I at the same time as Gentry), there are at least four such cases currently pending before Division I: Union Bank vs. Lyons, Appeal No. 70327-7-I; Union Bank vs. McAbee, Appeal No. 70497-4-I; Union Bank vs. Pelzel, Appeal No. 70869-4-I; and Union Bank vs. Deyo, Appeal No. 71168-7-I. Motions for Stay pending Supreme Court determination of these issues were filed with Division I on March 14, 2014 in the Lyons and McAbee appeals.

At least five more cases are currently pending before Division II: Union Bank vs. Brinkman, Appeal No. 44839-4-II; Union Bank vs. Riley, Appeal No. 44970-6-II; Union Bank vs. Brunaugh, Appeal No. 45010-1-II; Union Bank vs. Brunaugh, Appeal No. 45014-3-II; and Union Bank vs. Moore, Appeal No. 45311-8-II. A motion to transfer the Union Bank v. Brinkman appeal to this Court for direct review is set on the Supreme Court Commissioner's Motion Calendar for March 27, 2014, under Case No. 89964-9.

was the first of those cases to reach the appellate courts. In its December 3, 2013 published opinion, Division II of the Court of Appeals made the same determinations as the Gentry trial court on issues (1) and (2), above.<sup>18</sup> It held that the bank's deficiency claims were barred by RCW 61.24.100 (10) because the guarantors' obligations were secured by the deed of trust which the bank had elected to non-judicially foreclose.

Two months later, however, Division I of the Court of Appeals reached diametrically opposite conclusions in this case, holding that the Gentrys' obligations under the Guaranties were not secured by the Deeds of Trust, and that even if the Guaranties were so secured, RCW 61.24.100(10) does not preclude the entry of a deficiency judgment against the Gentrys. In its Gentry decision, Division I considered and rejected Division II's determinations in the First-Citizens opinion.

Specifically, in the Gentry decision, Division I held that RCW 61.24.100 (10) does not limit the bank's ability to obtain a deficiency judgment, construing the statute to be purely permissive rather than prohibitive. Gentry at 11-20. Further, in refusing to interpret the Deeds of Trust as securing the Guaranties, Division I effectively held that the inclusion of the word "guaranties" in the definition of "Related

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Many similar cases are also still pending in the Washington Superior Courts, awaiting a final appellate determination of these issues.

<sup>18</sup> Although the guaranty form in First-Citizens contained the same boilerplate language as the Gentry Guaranties, the bank chose not to argue waiver of the protections of RCW 61.24.100, making it unnecessary for Division II to decide issue (3).

Documents” was superfluous, determining instead that the obligations secured by the Deeds of Trust were intended to be limited to those of the borrower/grantor LLC’s only. Id. at 21-27.

Having resolved the first two issues, Division I declined to reach the third issue of whether the anti-deficiency protections of RCW 61.24.100 can be modified or eliminated by contract, or whether such contractual provisions are void as against public policy. Id. at 27.

## V. ARGUMENT

Under RAP 13.4(b)(2) and (4), this Court will accept review when a Court of Appeals decision “is in conflict with another decision of the Court of Appeals,” and when “the petition involves an issue of substantial public interest.” The decision by Division I in this case satisfies both grounds for review. The Gentry and First-Citizens opinions are in direct conflict with each other on the central questions of construction of language defining the obligations secured by the Deeds of Trust and interpretation of the anti-deficiency provisions of RCW 61.24.100. Although not decided by the Court of Appeals in either First-Citizens or the Gentry decision, the question of whether the protections of RCW 61.24.100 can be modified or eliminated through the banks’ use of boilerplate waiver language are also issues of substantial public interest, given the many similar cases pending below.

**A. Construction of the Deed of Trust by Division II in First-Citizens**

It is axiomatic that the obligations which a deed of trust secures are defined by the language of the deed of trust itself, so that the recorded instrument can provide public notice of those obligations. In Gentry, in First-Citizens, and in the many similar pending cases, the bank-drafted Deeds of Trust state that they were given to secure “payment of the Indebtedness” and “performance of any and all obligations under the Note, the Related Documents and this Deed of Trust.” In their deed of trust forms, the banks specifically defined those capitalized terms, confirming that the words “Related Documents” include “all ... guaranties ... executed in connection with the Indebtedness.”

In its decision, Division II had no difficulty confirming the meaning of such language:

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.

First-Citizens, 314 P.3d at 423 (emphasis in original, footnotes omitted).

It applied similar reasoning in determining that the Deed of Trust secured the Allison’s 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 Allison’s that these reciprocal plain terms operate together such that the deeds of trust expressly secure the Allison’s guaranty in addition to Cornerstone’s construction loan.*

Id. (emphasis added, footnote omitted). The Deeds of Trust at issue in this case contain the same “plain language.”

**B. Construction of the Deed of Trust by Division I in Gentry**

In construing the Deeds of Trust in this case to determine what obligations they secured, Division I began by restating the fundamental principle that the Court is not to “interpret what was intended to be written but what was written,” citing Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005). Gentry at 21. However, it then failed to even discuss, much less interpret, the key definitions included in the Deeds of Trust to confirm the nature and extent of the secured obligations. Instead, the Court seized upon the final sentence of their “given to secure” paragraphs, stating that “This Deed of Trust is given and accepted on the following terms:” together with a subsequent paragraph addressing payment and performance by the Gentry’s borrower/grantor LLC’s. Division I concluded at page 23:

Reading these two paragraphs together, the deeds of trust must be read as securing the payment and performance obligations of the **Borrowers and Grantors**. Here, **Borrower** and **Grantor** is the same entity for each loan secured by each deed of trust. There is simply no way to read these provisions so that any deed of trust secures the payment and performance obligations of anyone other than the **Borrower and Grantor**. The guarantors of the loans are neither. Thus, none of these deeds of trust secure the guaranties of the Gentrys.

Division I's "no other way" conclusion is simply wrong. A contract is to be construed as a whole, giving meaning to all of its terms. McGary v. Westlake Investors, 99 Wn.2d 280, 285, 661 P.2d 971 (1983). The phrase "This Deed of Trust is given and accepted on the following terms" clearly refers to all of the remaining terms of the Deed of Trust, including all of the definitions, not simply to one paragraph addressing the grantor/borrower's obligations. Rather than being limited to payment and performance by the borrower/grantor LLC's, the Deeds of Trust expressly stated that they were given to secure "payment of the Indebtedness" and performance of any and all obligations under the Note, the Related Documents and this Deed of Trust." (emphasis added).<sup>19</sup> The "Related Documents" were expressly defined to include the Gentry Guaranties.<sup>20</sup>

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<sup>19</sup> CP 23-32; CP 9-21.

<sup>20</sup> In its opinion in Hearst Communications, Inc. v. Seattle Times Co., 120 Wn. App. at 79, Division I held that it lacked authority to revise the contract in the guise of interpreting it, where the parties had specifically defined the terminology employed. The holding was affirmed by this Court, which noted that Hearst had failed to reduce its contended interpretation to writing: "Instead, they defined the specific elements of calculating gains and losses once, in great detail, and embedded those terms without qualification in the loss operations clause. Hearst essentially asks us to rewrite the JOA

This Court should accept review, reverse the erroneous decision by Division I, and confirm that the Deeds of Trust at issue in this and other related cases secured the obligations of the guarantors.

**C. RCW 61.24.100 (10)**

In 1998, the Legislature amended the Deed of Trust Act to permit deficiency judgment in narrow circumstances. As a result of the amendments, the Act now 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.” RCW 61.24.100 (1) (emphasis added). In addition to other limitations in the statute, RCW 61.24.100 (10) provides that “[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).

**D. Interpretation of RCW 61.24.100 (10) by Division II in First-Citizens**

After noting that RCW 61.24.100 (1) generally bars all deficiency judgments against guarantors, Division II commented upon subsection (10) as follows:

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by revising the loss operations clause, something we are not at liberty to do.” Hearst Communications, Inc. v. Seattle Times Co., 154 Wn.2d at 510.

Subsection (10) creates an exception to subsection (1)'s general prohibition against deficiency judgments following nonjudicial foreclosure, by allowing the lender to sue a commercial loan guarantor *if* the guaranty was *not* secured by the foreclosed deed of trust.

First-Citizens, 314 P.3d at 424 (emphasis in original). Division II then applied the statutory language of subsection (10) to the facts actually presented in First-Citizens, i.e. that the guaranty obligations were secured by the non-judicially foreclosed deed of trusts. The Court held that:

Under the statutory construction principle *expressio unius est exclusio alterius*, [RCW 61.24.100 (10)] implies that (1) this express exception to the anti-deficiency judgment statute is the only exception under these circumstances; and (2) therefore, further implies that where a guaranty *was* secured by the foreclosed deed of trust (which also secured a commercial loan), the lending bank *cannot* sue the guarantor for any deficiency remaining after the trustee's sale of the secured property.

Id. at 424-25 (bracketed reference added, emphasis in original). As authority, the Court cited State v. Kelley, 168 Wn.2d 72, 83, 226 P.3d 773 (2010) (the "statute's exception of some weapons listed in firearm enhancement statute shows legislative intent that crimes involving other weapons not on that list are not to be excepted"). Such constructions are entirely consistent with other well-established Washington law.<sup>21</sup>

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<sup>21</sup> Legislative inclusion of certain items within a category necessarily implies that other items in that category were intended to be excluded. Bour v. Johnson, 122 Wn.2d 829, 836, 864 P.2d 380 (1993). "Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius* ...." Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999). See also State v. Ortega, 177 Wn.2d 116, 123-25, 297 P.3d 57 (2013) ("The doctrine of *expressio unius est exclusio alterius* ('to express or

In other words, looking to the statute’s plain meaning in the context of the statutory scheme as a whole, Division II concluded that RCW 61.24.100 (10) “creates an exception” to RCW 61.24.100 (1)’s general prohibition against deficiency judgments following non-judicial foreclosure, by allowing the lender to sue a commercial loan guarantor if the guaranty was not secured by the foreclosed deed of trust. Id. at 424.

Based on this analysis, Division II reversed the trial court’s deficiency judgment against the guarantors. Id. at 426.

**E. Interpretation of RCW 61.24.100 (10) by Division I in Gentry**

In the present case, Division I “disagree[d] with the reasoning and conclusion in that case [First-Citizens].” Gentry at 17. It explained its interpretation of RCW 61.24.100 (10) as follows:

The problem with the Gentrys’ interpretation is that it requires striking from the statute the word “not,” as indicated by the following revision:

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.

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include one thing implies the exclusion of the other’), Black’s Law Dictionary 661 (9th Ed. 2009) supports our finding that the express authority to rely on the request of another officer in making an arrest for a traffic infraction indicates that such authority does not extend to other non-felony offenses.); and Adams v. King County, 164 Wn.2d 640, 650, 192 P.3d 891 (2008) (expression of one thing in a statute excludes others and omissions are deemed to be exclusions).

But the plain language of RCW 61.24.100(10) is permissive. That is, it states a permissive rule applicable to situations where the obligation of a borrower or guarantor is not secured by the deed of trust that was foreclosed by a trustee's sale. In that situation, the trustee's sale does not preclude the lender from bringing an action to collect on or enforce a guaranty. Only by striking the word "not" from the two places indicated above can the otherwise permissive statement of the statute be read as a prohibition.

Id. at 13 (bold and strikethrough in original). Of course, this interpretation would require striking the entire last portion of subsection (10), as follows:

~~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.~~

Indeed, under Division I's interpretation, the exception would swallow the rule. Rather than having to satisfy the "if" condition, lenders would be able to pursue deficiency judgments in any scenario.

Division I's opinion in Gentry declined to discuss the application of the statutory construction principle of *expressio unius est exclusio alterius* to RCW 61.24.100 (10). Instead, it determined that the Gentry's interpretation (and that of Division II in First-Citizens) was "grounded in a logical fallacy," i.e. that "The proposition that 'A implies B' is not the equivalent of 'non-A implies non-B,' and neither proposition follows logically from the other. Gentry at 15, quoting from Course-Hinds Co. v. InterNorth, Inc., 634 F.2d 690, 703 (2nd Cir. 1980).

The only Washington authority cited by Division I in *Gentry* was a nearly century-old criminal case, *State v. Holland*, 99 Wash. 645, 170 P. 332 (1918). The rationale for the decision in *State v. Holland* has no plausible application to the present statutory interpretation question, i.e. whether the word “if” in RCW 61.24.100 (10) should be read as “only if,” as the principle of *expressio unius est exclusio alterius* clearly requires. Nevertheless, it was adopted by Division I as the basis for its decision:

Putting aside terminology differences, like *Holland*, the *Gentry*s essentially argue that the inverse of what is stated in the statute is necessarily true. That is a logical fallacy. We cannot infer that the inverse of what the statute states is true. Based on these cases and our analysis of the statute before us, we reject the interpretation that the *Gentry*s assert.

*Gentry* at 17.

Division I’s erroneous decision should be reversed, and proper rules of statutory construction should be applied by this Court to determine that RCW 61.24.100 (10) bars post-trustee’s sale deficiency judgment claims against guarantors whose obligations were secured by non-judicially foreclosed deeds of trust.

**F. Review Should Also be Accepted on the Issue of Whether the Anti-Deficiency Protections of RCW 61.24.100 Can Be Modified or Eliminated by Contract**

Although raised in the trial courts, neither Division I nor Division II decided the issue of whether guarantors should be denied the benefit of RCW 61.24.100’s protections through boilerplate waivers of the

embedded in the lender-drafted guaranty forms. Division I found it unnecessary to reach the issue of whether the waiver of anti-deficiency defenses is void as against public policy, because it decided that no statutory protections were available to the guarantors in any event.

In First-Citizens, Division II did not reach the issue because the lender elected not to argue that the waiver provisions of the guaranty were enforceable under RCW 61.24.100. However, Division II strongly indicated that it would find waivers of the protections of the statute to be unenforceable, if the issue were squarely presented to it. First-Citizens, 314 P.3d at n. 5. Similar views were even more strongly set forth by Division II in footnote 4 to its opinion in First-Citizens Bank & Trust Co. v. Reikow, 177 Wn. App. 787, 794, 313 P.3d 1208 (2013).

This Court should accept review of this question so that can resolve all three of the key issues presented in Gentry and the numerous similar cases pending before the Courts of Appeal and Superior Courts, and because this Court has shown great reluctance to allow waiver of the statutory provisions governing non-judicial foreclosure. See Bain v. Metro. Mortg. Grp., Inc., 175 Wn.2d 417,430, 486 P.2d 1080 (2012) (rejecting contractual modification of the Deed of Trust Act's definition of "beneficiary"); see also Schroeder v. Excelsior Mgmt. Group, LLC, 177 Wn.2d 94, 106–07, 297 P.3d 677 (2013) (stating that "We will not allow waiver of [Chapter 61.24 RCW's] protections lightly," quoting Bain, 175

Wn.2d at 108). The protections for guarantors enumerated in RCW 61.24.100 are not “rights and privileges” that may be waived, rather they are limitations on the lender’s power to obtain a deficiency from the guarantor. Schroeder, 177 Wn.2d at 106-07 (rejecting waiver argument because the Act’s prohibition of non-judicial foreclosures of agricultural land was not a “right of the debtor,” but a limit on a trustee’s power).

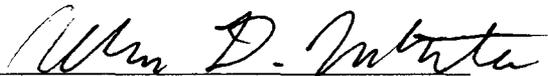
Courts have repeatedly held that a borrower cannot waive the protections of the Deed of Trust Act. This Court should accept review and determine that the same rule applies to guarantors. See, e.g., Schroeder, 177 Wn.2d at 106-07; Albice v. Premier Mortg. Services of Washington, Inc., 157 Wn. App. 912, 927-28 & n.10, 239 P.3d 1148 (2010) (holding foreclosure sale void because it occurred outside statutory time frame regardless of fact that extensions were agreed upon); Stretch v. Murphy, 112 P.2d 1018, 1021 (Or. 1941) (holding that waivers of protections in the foreclosure statute could not be waived because “[t]he statute involved is not one creating a merely personal privilege which may be waived.”); accord Dennis v. Moses, 18 Wash. 537, 577-79, 52 P. 333 (1898) (holding that a borrower cannot prospectively waive his right of redemption under the foreclosure statute because of public policy considerations); Conran v. White & Bollard, 24 Wn.2d 619, 629, 167 P.2d 133 (1946) (finding that agreements that chill or suppress one’s right to bid at a foreclosure sale “have long been held invalid against public policy.”).

## VI. CONCLUSION

The Court should accept review pursuant to RAP 13.4(b)(2) in order to resolve the conflict between Divisions I and II and to provide guidance to Washington's trial and appellate courts. This Court should also accept review pursuant to RAP 13.4(b)(4) because whether a lender can contractually limit a guarantor's anti-deficiency defense involves an issue of substantial public interest.

DATED this 20 day of March, 2014.

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## CERTIFICATE OF SERVICE

I, Jane A. Mrozek, hereby certify that on the 20th day of March, 2014, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

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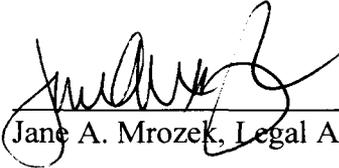
- U.S. Mail, postage prepaid
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- Electronic Mail

I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 20th day of March, 2014, at Seattle, Washington.

  
\_\_\_\_\_  
Jane A. Mrozek, Legal Assistant

# APPENDIX A

2014 FEB 18 AM 9:41

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

WASHINGTON FEDERAL, a federally chartered savings association,	)	No. 70004-9-1
	)	
Appellant,	)	DIVISION ONE
	)	
v.	)	
	)	
KENDALL GENTRY and NANCY GENTRY, individually and the marital community comprised thereof,	)	PUBLISHED
	)	
Respondents.	)	FILED: <u>February 18, 2014</u>
	)	

Cox, J. — The Deeds of Trust Act generally prohibits an action for a deficiency judgment against a guarantor of a loan following a trustee's sale under a deed of trust securing that loan.<sup>1</sup> But exceptions to this general rule apply to a guarantor of certain commercial loans.<sup>2</sup>

In this action, Washington Federal seeks a deficiency judgment against Kendall Gentry and Nancy Gentry. They executed guaranties of payment for commercial loans to three borrowers that they control. Based on its reading of RCW 61.24.100, the trial court granted the Gentrys' motion for summary

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<sup>1</sup> See RCW 61.24.100(1).

<sup>2</sup> Id.

judgment of dismissal of this action. Because the trial court erred both in its interpretation of this statute and its application of the statute to relevant loan documents, we reverse and remand for further proceedings.

Kendall Gentry owned and/or managed three entities: Blackburn Southeast LLC, Landed Gentry Development Inc., and Gentry Family Investments LLC.<sup>3</sup>

In 2005, Blackburn Southeast LLC obtained a commercial loan for \$2,550,000 from Horizon Bank. This loan was evidenced by a promissory note that was secured by a May 1, 2006 deed of trust on property located on Little Mountain Road in Mount Vernon (the "Little Mountain Deed of Trust").

In April 2009, Landed Gentry Development Inc. obtained a commercial loan for \$3,574,847.74 from Horizon Bank. This loan was evidenced by a promissory note that was also secured by the Little Mountain Deed of Trust and a May 1, 2006 deed of trust on property located on East Blackburn Road in Mount Vernon (the "Blackburn Road Deed of Trust").

In September 2009, Gentry Family Investments LLC obtained a commercial loan for \$1,127,832.73 from Horizon Bank. This loan was evidenced by a promissory note that was also secured by the Little Mountain Deed of Trust.

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<sup>3</sup> Brief of Appellant at 4; Clerk's Papers at 525 (listing Kendall Gentry as chairman of Landed Gentry Development, Inc.); Clerk's Papers at 530 (listing Kendall Gentry as manager of Gentry Family Investments LLC); Clerk's Papers at 534 (listing Kendall Gentry as manager of Gentry Family Investments LLC, member of Blackburn Southeast LLC).

In sum, the Little Mountain Deed of Trust secured all three commercial loans. The Blackburn Road Deed of Trust secured only the Landed Gentry Development Inc. commercial loan.

Kendall and Nancy Gentry each executed commercial guaranties of payment for all three loans.

In January 2010, the three notes matured. The three borrowers failed to pay these notes at maturity. Likewise, the Gentrys did not honor their guaranties.

Horizon Bank failed. In April 2010, the Federal Deposit Insurance Corporation, as receiver for Horizon, assigned that bank's interests in the three notes, the deeds of trust, and the guaranties to Washington Federal.

In April 2011, the trustees, under the deeds of trust then held by Washington Federal, conducted sales based on the defaults by the three borrowers. The bank was the successful bidder for both properties at these sales. The bank did not credit bid the full amount of the debt at these sales. Thus, a substantial deficiency allegedly remains.

In March 2012, the bank commenced this action against the Gentrys to enforce their guaranties and to obtain a deficiency judgment against them due to the shortfall arising from the trustees' sales.

The Gentrys moved for summary judgment. They argued that the Deeds of Trust Act prohibited the bank from seeking a deficiency judgment against them. The bank opposed the motion and also moved for summary judgment, arguing that it was entitled to a deficiency judgment against the Gentrys.

The trial court granted the Gentrys' motion for summary judgment, denied the bank's motion, and dismissed this action with prejudice.

The bank appeals.

### THE DEEDS OF TRUST ACT

The threshold issue is whether and how a beneficiary under a deed of trust who elects not to foreclose the deed of trust as a mortgage may obtain a deficiency judgment against guarantors under the Deeds of Trust Act.

This court reviews de novo summary judgment orders and engages in the same inquiry as the trial court.<sup>4</sup> Summary judgment is appropriate when there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law.<sup>5</sup>

Statutory construction is a question of law.<sup>6</sup> This court's objective is to determine the Legislature's intent.<sup>7</sup> "Where the language of a statute is clear, legislative intent is derived from the language of the statute alone."<sup>8</sup> "The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of

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<sup>4</sup> Cornish Coll. of the Arts v. 1000 Va. Ltd. P'ship, 158 Wn. App. 203, 215-16, 242 P.3d 1 (2010).

<sup>5</sup> CR 56(c).

<sup>6</sup> City of Spokane v. Rothwell, 166 Wn.2d 872, 876, 215 P.3d 162 (2009).

<sup>7</sup> Id.

<sup>8</sup> Id.

the language at issue, as well as from the context of the statute in which that provision is found, the related provisions, and the statutory scheme as a whole.”<sup>9</sup>

RCW 61.24.100 addresses when actions for deficiency judgments may be brought when a deed of trust is not foreclosed as a mortgage.<sup>10</sup> A “deficiency judgment” exists where a money judgment for a debt exceeds the value of the security for that debt at the foreclosure sale.<sup>11</sup>

#### *History*

In 1965, the Legislature enacted the Deeds of Trust Act, which permitted nonjudicial foreclosure of deeds of trust when certain requirements were met.<sup>12</sup> Citing an early law review article by a well-recognized authority on the act, Division Three of this court observed that the Legislature designed this act “to avoid time-consuming judicial foreclosure proceedings and to save substantial time and money to both the buyer and the lender.”<sup>13</sup> The act was designed to supplement the then existing foreclosure proceedings to better meet the needs of modern real estate financing.<sup>14</sup>

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<sup>9</sup> *Id.* at 876-77 (quoting State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)).

<sup>10</sup> RCW 61.24.100(8).

<sup>11</sup> Boeing Emps.’ Credit Union v. Burns, 167 Wn. App. 265, 282, 272 P.3d 908, review denied, 175 Wn.2d 1008 (2012).

<sup>12</sup> Laws of 1965, ch. 74.

<sup>13</sup> Peoples Nat. Bank of Wash. v. Ostrander, 6 Wn. App. 28, 31, 491 P.2d 1058 (1971) (citing John A. Gose, The Trust Deed Act in Washington, 41 WASH. L. REV. 94 (1966)).

<sup>14</sup> *Id.* (citing Gose, supra, at 96).

Our supreme court has explained that “[r]eading the entirety of [the act] in the context of the mortgage laws and the history of deed of trust legislation, it is apparent that there was contemplated a quid pro quo between lenders and borrowers.”<sup>15</sup>

Specifically, borrowers relinquished the statutory right to redeem the property up to one year after a foreclosure sale.<sup>16</sup> The relinquishment of this right allowed lenders to obtain title to the property sold at a trustee’s sale more quickly than in a judicial foreclosure.<sup>17</sup> Lenders were then able to sell the property and apply the sales proceeds to the debt.<sup>18</sup>

In exchange for this advantage, lenders relinquished the right to seek deficiency judgments following trustees’ sales.<sup>19</sup> Thus, the real property security was the sole means for the lender to satisfy the debt.

Notwithstanding these provisions, the act expressly provided that lenders retained the right to foreclose deeds of trust as mortgages.<sup>20</sup> If lenders elected

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<sup>15</sup> Donovick v. Seattle-First Nat’l Bank, 111 Wn.2d 413, 416, 757 P.2d 1378 (1988).

<sup>16</sup> Id. (citing former RCW 61.24.050 (1965)); see also former RCW 6.24.140 (1965).

<sup>17</sup> See Gose, supra, at 95-96; former RCW 6.24.220 (1965).

<sup>18</sup> See Gose, supra, at 95-96; former RCW 6.24.220 (1965).

<sup>19</sup> Donovick, 111 Wn.2d at 416 (citing former RCW 61.24.100 (1965)); see also Gose, supra, at 96.

<sup>20</sup> Gose, supra, at 96.

that option, the provisions of the act did not apply.<sup>21</sup>

The provision of the act governing deficiency judgments has been codified at RCW 61.24.100 from the act's inception.<sup>22</sup> When first enacted in 1965, this provision banned any deficiency judgment on the obligation secured by the foreclosed deed of trust:

Foreclosure, as in this chapter provided, shall satisfy the obligation secured by the deed of trust foreclosed, regardless of the sale price or fair value, and ***no deficiency decree or other judgment shall thereafter be obtained on such obligation.***<sup>[23]</sup>

In 1990, the Legislature amended this provision by creating an exception to the ban against any deficiency judgment on the obligation secured by the foreclosed deed of trust. It did so by adding the following emphasized language to the former version of the statute:

Foreclosure, as in this chapter provided, shall satisfy the obligation secured by the deed of trust foreclosed, regardless of the sale price or fair value, and no deficiency decree or other judgment shall thereafter be obtained on such obligation, ***except that if such obligation was not incurred primarily for personal, family, or household purposes, such foreclosure shall not preclude any judicial or nonjudicial foreclosure of any other deeds of trust, mortgages, security agreements, or other security interests or liens covering any real or personal property granted to secure such obligation.***<sup>[24]</sup>

In 1998, the Legislature again amended this provision. This time, however, the revisions were more extensive. The Legislature rewrote the entire

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<sup>21</sup> Id.

<sup>22</sup> Former RCW 61.24.100 (1965).

<sup>23</sup> Id. (emphasis added).

<sup>24</sup> Laws of 1990, ch. 111, § 2 (emphasis added).

statute, which was then codified into twelve subsections.<sup>25</sup> Presumably, these amendments were made to better meet the evolving needs of commercial borrowers and lenders in real estate financing.<sup>26</sup> As of this writing, there have been no further amendments to this portion of the act.<sup>27</sup>

In the current version of the act, the general bar against deficiency judgments remains.<sup>28</sup> But the Legislature created an exception for certain loans that it described as "commercial."<sup>29</sup> This term is a substitute for the former "obligation . . . not incurred primarily for personal, family, or household purposes."<sup>30</sup> That provision no longer appears in the act. Such "commercial loans" are limited to those executed after June 11, 1998, the effective date of the 1998 amendments to this section.<sup>31</sup>

This legislative history illustrates the evolution of this part of the act over time. Deficiency judgments for deeds of trust that are not foreclosed as mortgages have generally and consistently been prohibited since enactment of the act in 1965. The Legislature enacted limited exceptions to this prohibition in

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<sup>25</sup> See Laws of 1998, ch. 295, § 12; RCW 61.24.100.

<sup>26</sup> See Gose, supra, at 94, 96.

<sup>27</sup> RCW 61.24.100.

<sup>28</sup> RCW 61.24.100(1).

<sup>29</sup> Id.

<sup>30</sup> Compare Laws of 1998, ch. 295, § 12, with Laws of 1990, ch. 111, § 2.

<sup>31</sup> Laws of 1998, ch. 295.

1990 and 1998. Among the limited exceptions enacted in 1998 are those applicable to guarantors of certain commercial loans.

*Current Statute*

RCW 61.24.100(1) states the current general rule regarding deficiency judgments following trustees' sales under deeds of trust. For these nonjudicial foreclosures, the rule states:

***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.<sup>[32]</sup>

Further, RCW 61.24.100(3) states certain circumstances where deficiency judgments against borrowers, grantors, and guarantors are allowed:

This chapter does not preclude any one or more of the following after a trustee's sale under a deed of trust securing a commercial loan executed after June 11, 1998:

(a) [provision addressing "waste to the property," "wrongful retention of any rents, insurance proceeds, or condemnation awards," etc.]

(b) [provision regarding foreclosures of other deeds of trust, etc.]

(c) ***Subject to this section***, an action for a deficiency judgment against a guarantor if the guarantor is timely given the notices under RCW 61.24.042.<sup>[33]</sup>

Subsection (3)(c) addresses deficiency judgments against guarantors of certain commercial loans after trustees' sales under deeds of trust securing such loans. Significantly, the first clause of RCW 61.24.100(3)(c) states this provision

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<sup>32</sup> (Emphasis added.)

<sup>33</sup> (Emphasis added.)

is “[s]ubject to this section.” The word “subject” means that this provision is dependent or conditioned on “this section.” The 1998 session laws make clear that “this section” means RCW 61.24.100 in its entirety.<sup>34</sup>

Additionally, the text that follows this first clause makes clear that a further requirement of this provision is that “notices under RCW 61.24.042” must be given to the guarantor of the loan.<sup>35</sup>

With this context in mind, we turn to the specific arguments before us. The bank argues that the trial court misinterpreted RCW 61.24.100(3)(c) when it “limit[ed] the scope of a deficiency judgment against a guarantor to waste and wrongful retention of rents.”<sup>36</sup> We agree.

In the trial court’s letter ruling, it stated in relevant part:

RCW 61.24.100 clearly states deficiency judgments shall not be obtained against a guarantor when that guaranty is secured by a deed of trust which is nonjudicially foreclosed except for a few narrowly crafted exceptions.

[The bank] argues that RCW 61.24.100(3)(c) creates an exception to seek unlimited deficiency judgments against any guarantor who is timely given notice under RCW 61.24.042 ([the Gentrys] received this notice). That interpretation requires the Court to ignore or give no meaning to the first four words of (3)(c) **“Subject to this section.”**

“This section” RCW 61.24.100 allows deficiency judgments: prior to a trustee’s sale, in judicial foreclosures for obligations not secured by the same deed of trust, **limited to a decrease in the fair value of property by waste or the wrongful retention of various funds.**

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<sup>34</sup> Laws of 1998, ch. 295, § 12.

<sup>35</sup> RCW 61.24.100(3)(c).

<sup>36</sup> Brief of Appellant at 15.

I interpret section (3)(c) as meaning that a deficiency judgment, against a guarantor whose guaranty was secured by the nonjudicially foreclosed deed of trust, ***can only be obtained for the decrease in fair value or wrongful retention, if the guarantor is given timely notice.***

The answer to the second issue is “no.” ***[The bank] is only able to seek a deficiency judgment against [the Gentrys] for waste or wrongful retention.***<sup>37</sup>

The trial court properly concluded that RCW 61.24.100(1) generally bars deficiency judgments where deeds of trust are not foreclosed as mortgages, except for narrowly crafted exceptions. The court also properly rejected the bank’s argument that RCW 61.24.100(3)(c) creates an unlimited exception that permits a lender to seek a deficiency judgment against a guarantor of certain commercial loans who is given timely statutory notices. As the trial court correctly stated, that would require rewriting the subsection to ignore its first clause: “Subject to this section.”

But the trial court misread the scope of RCW 61.24.100(3)(c). Significantly, the words of the statute say “section,” not “subsection.” As we stated earlier in this opinion, the 1998 session laws make clear that “section” refers to RCW 61.24.100 in its entirety, not just subsections (3)(a) and (b). For this reason, the trial court misread the statute to limit an action against a guarantor for a deficiency judgment to “the decrease in fair value or wrongful retention [of rents, insurance proceeds, or condemnation awards], if the

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<sup>37</sup> Clerk’s Papers at 775 (emphasis added).

guarantor is given timely notice."<sup>38</sup> These limitations are based on subsections (3)(a) and (b) of the act. Thus, we conclude that the clause, "subject to this section," of RCW 61.24.100(3)(c) requires consideration of RCW 61.24.100 in its entirety, not just the limitations of subsections (3)(a) and (b).

Given this conclusion, we must then consider the Gentrys' argument that RCW 61.24.100(10) bars this action. Subsection (10) states:

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.<sup>[39]</sup>

Specifically, the Gentrys contend that the "clear language" of this subsection states that "obligations under a guaranty secured by a deed of trust are *extinguished* by the nonjudicial foreclosure of that deed of trust."<sup>40</sup> They assert that "subsection (10) *prohibits* a deficiency against a guarantor where a deed of trust secures it and has been foreclosed nonjudicially."<sup>41</sup> We disagree.

We first note that the Gentrys use the word "extinguished." Notably, RCW 61.24.100(10) neither includes this word nor any synonym for it. We will not read this word into the statute.

Moreover, in our view, RCW 61.24.100(10) is not a prohibition. All it says is, "[a] trustee's sale under a deed of trust securing a commercial loan does not

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<sup>38</sup> Id.

<sup>39</sup> RCW 61.24.100(10).

<sup>40</sup> Brief of Respondents Kendall and Nancy Gentry at 15 (emphasis added).

<sup>41</sup> Id. at 19.

preclude [an action for a deficiency judgment on a guaranty] if that obligation . . . was not secured by the deed of trust” that was foreclosed.

For example, we can envision a situation where the Gentrys executed another guaranty that had no relation to the commercial loans secured by any of the deeds of trust foreclosed by nonjudicial means here. In that case, the trustees’ sales under these deeds of trust would have no effect on that other guaranty.

The problem with the Gentrys’ interpretation is that it requires striking from the statute the word “not,” as indicated by the following revision:

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.<sup>[42]</sup>

But the plain language of RCW 61.24.100(10) is permissive. That is, it states a permissive rule applicable to situations where the obligation of a borrower or guarantor is *not* secured by the deed of trust that was foreclosed by a trustee’s sale. In that situation, the trustee’s sale *does not* preclude the lender from bringing an action to collect on or enforce a guaranty. Only by striking the word “not” from the two places indicated above can the otherwise permissive statement of the statute be read as a prohibition.<sup>43</sup>

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<sup>42</sup> (Emphasis and alterations added).

<sup>43</sup> See, e.g., Glasebrook v. Mut. of Omaha Ins. Co., 100 Wn. App. 538, 545, 997 P.2d 981 (2000) (“Generally, we do not infer a prohibition absent specific language to that effect, unless the statute as a whole directs that conclusion.”).

The Gentrys offer no explanation why we should rewrite the words of the statute under the guise of interpreting it to determine legislative intent. We decline either to omit language that is in the statute or add language that is not there.

Moreover, the Gentry's interpretation of RCW 61.24.100(10) is the inverse of what the plain language says. We also decline to add the inverse to the statute when the Legislature did not expressly do so.

In re Detention of Lewis contains an example of when the Legislature expressly codified the inverse.<sup>44</sup> There, the court stated:

Pertinent here, the State need not plead a recent overt act in its petition where "it appears that ... [a] person who at any time previously has been convicted of a sexually violent offense is about to be released from total confinement." RCW 71.09.030(1). Conversely, the statute requires the State to allege a recent overt act where the offender is "a person who at any time previously has been convicted of a sexually violent offense and has since been released from total confinement." RCW 71.09.030(5). Similarly, at trial, the State must prove beyond a reasonable doubt that the offender committed a recent overt act "[i]f, on the date that the petition is filed, the person was living in the community after release from custody." Former RCW 71.09.060(1) (2001).<sup>[45]</sup>

As the supreme court recognized in the above passage, the Legislature first described a situation in which a recent overt act did not need to be pleaded.<sup>46</sup> But rather than expecting the reader to imply the truth of the inverse, the Legislature went on to make an explicit rule for the inverse. The statute

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<sup>44</sup> 163 Wn.2d 188, 177 P.3d 708 (2008).

<sup>45</sup> Id. at 194 (alterations in original).

<sup>46</sup> Id.

explicitly defined both the situation in which a recent overt act does not need to be pleaded, and the situation in which a recent overt act does need to be pleaded.<sup>47</sup>

Here, in contrast, the plain language of RCW 61.24.100 does not contain an expression of the inverse. The Gentrys do not provide any argument why we should imply the inverse. Moreover, we do not feel it appropriate to imply the inverse under these circumstances.

Additionally, the Gentrys' interpretation of subsection (10) is grounded in a logical fallacy. "The proposition that 'A implies B' is not the equivalent of 'non-A implies non-B,' and neither proposition follows logically from the other."<sup>48</sup> State v. Holland illustrates the problem of implying the inverse of a statute.<sup>49</sup>

In Holland, the law at the time made it illegal for a pharmacist to sell grain alcohol.<sup>50</sup> A pharmacist could sell it for mechanical or chemical purposes, but had to get the purchaser to sign his name in a record book and to keep a "true and exact" record of such transactions.<sup>51</sup> Holland, a pharmacist, sold some grain alcohol to an informant.<sup>52</sup> The informant signed the record book, but he testified

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<sup>47</sup> Id.

<sup>48</sup> Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690, 703 n.20 (2d Cir. 1980) (citing J. COOLEY, A PRIMER OF FORMAL LOGIC 7 (1942)).

<sup>49</sup> 99 Wash. 645, 649-51, 170 P. 332 (1918).

<sup>50</sup> Id. at 649.

<sup>51</sup> Id. at 649-50.

<sup>52</sup> Id. at 647.

that he told Holland he might be using it for purposes other than mechanical or chemical.<sup>53</sup> On the strength of that testimony, Holland was convicted.<sup>54</sup>

Holland argued on appeal that his good faith was established as a matter of law by the fact that the informant signed the record book.<sup>55</sup> The court was not persuaded.<sup>56</sup> "Appellant's argument overlooks the fact that the permission accorded to druggists . . . is to sell alcohol for mechanical or chemical purposes *only*. It is not a permission to sell to every person who signs a formal statement to that effect."<sup>57</sup>

The court then conducted a logical analysis of the statute and demonstrated that Holland's argument was based on a fallacy.<sup>58</sup> The first proposition, which is true, is that when the buyer does not sign the record book, the statute makes the seller guilty as a matter of law.<sup>59</sup> But Holland's second proposition is not true: when the buyer does sign the record book, he is not guilty as a matter of law.<sup>60</sup>

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<sup>53</sup> Id.

<sup>54</sup> Id. at 648.

<sup>55</sup> Id. at 649-50.

<sup>56</sup> Id. at 650.

<sup>57</sup> Id.

<sup>58</sup> See id. at 651.

<sup>59</sup> Id.

<sup>60</sup> Id. at 649-51.

Indeed it seems to us that the issue of good faith not only does arise, but can only arise when a formally sufficient record of the sale has been made. Without such a record there is no issuable fact; the sale is conclusively illegal without regard to the seller's good or bad faith. ***But the converse is not true.*** When the formal record has been made, the question of good faith is an issue. That question is then one of fact for the jury upon the evidence.<sup>61]</sup>

Putting aside terminology differences, like Holland, the Gentrys essentially argue that the inverse of what is stated in the statute is necessarily true. That is a logical fallacy. We cannot infer that the inverse of what the statute states is true. Based on these cases and our analysis of the statute before us, we reject the interpretation that the Gentrys assert.

In further support of their "clear language" argument, the Gentrys rely on First-Citizens Bank & Trust Co. v. Cornerstone Homes & Development LLC, a recent Division Two case.<sup>62</sup> We disagree with the reasoning and conclusion in that case.

There, a bank sued the guarantors of three commercial loans to Cornerstone Homes & Development, LLC for a deficiency judgment following nonjudicial foreclosures of the deeds of trust securing the loans.<sup>63</sup> The superior court entered judgment on the pleadings, ordering the guarantors to pay the deficiency.<sup>64</sup> Division Two reversed.<sup>65</sup>

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<sup>61</sup> Id. at 651 (emphasis added).

<sup>62</sup> \_\_\_ Wn. App. \_\_\_, 314 P.3d 420 (2013).

<sup>63</sup> Id. at 421-22.

<sup>64</sup> Id. at 422.

<sup>65</sup> Id. at 421.

One of the issues before the court was whether RCW 61.24.100(10) created an exception to the general prohibition in RCW 61.24.100(1) against deficiency judgments following a trustee's sale under a deed of trust securing certain commercial loans.<sup>66</sup> The court held that subsection (10) created such an exception.<sup>67</sup> In doing so, the court quoted, in part, the subsection, emphasizing in its opinion the last words of the following quotation:

A trustee's sale under a deed of trust securing a commercial loan does not preclude an action to . . . enforce any obligation of a . . . guarantor if that obligation . . . **was not secured by the deed of trust.**<sup>[68]</sup>

The court then went on to apply the statutory construction principle *expressio unius est exclusio alterius*.<sup>69</sup> Doing so, the court concluded that the language of subsection (10):

**[I]mplies** that (1) this express exception to the anti-deficiency judgment statute is the **only** exception under these circumstances; and (2) therefore, further **implies** that where a guaranty **was** secured by the foreclosed deed of trust (which also secured a commercial loan), the lending bank **cannot** sue the guarantor for any deficiency remaining after the trustee's sale of the secured property.<sup>[70]</sup>

First, Division Two utilized a principle of construction that we believe does not control this case. The court concluded that subsection (10) is the "**only**

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<sup>66</sup> Id. at 424.

<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> Id. at 424-25.

<sup>70</sup> Id. at 425 (some emphasis added).

exception under these circumstances.”<sup>71</sup> But subsection (10) is not the *only* exception in RCW 61.24.100. This interpretation ignores other subsections within the statute, particularly subsection (3)(c), which is at issue in this case.

Second, we note that Division Two did not expressly address in its analysis what we pointed out earlier in this opinion. The argument that subsection (10) prohibits a deficiency judgment against guarantors requires the following reading of the statute:

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.<sup>[72]</sup>

We will not read out the word “not” from this provision. But we believe Division Two’s reading implicitly does so. Moreover, as we explained earlier in this opinion, that court’s reading of subsection (10) implies the inverse of the provision that is not true. We decline to do the same.

For these reasons, we are not persuaded that First-Citizens properly interprets the statute. Accordingly, we reject its reasoning and conclusion that RCW 61.24.100(10) bars an action where a guaranty is secured by the deed of trust foreclosed by a prior trustee’s sale.

Finally, during oral argument and by additional authority, the Gentrys argue that the word “if” in this statute should be construed to mean “only if.” Like Division Two, they cite the construction principle, *expressio unius est exclusio*

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<sup>71</sup> Id.

<sup>72</sup> RCW 61.24.100(10) (emphasis and alterations added).

*alterius*, which means the “[e]xpression of one thing in a statute implies exclusion of others, and this exclusion is presumed to be deliberate.”<sup>73</sup>

As we previously explained in this opinion, the essence of the Gentrys’ argument requires that we read RCW 61.24.100(10) to say more than it actually says. This argument is that the bank may bring this action to enforce the Gentrys’ guaranties **only if** the guaranties were not secured by the nonjudicially foreclosed deeds of the trust securing the commercial loans. Notably, the statute says “if,” not “only if.” We decline to rewrite the statute by adding the word “only” into the analysis in order to conclude that the “if” clause is an indispensable condition precedent to bringing this action.

Also, it appears that the Gentrys argue that “only” should be written into the statute because subsection (10) is the “only exception under these circumstances.”<sup>74</sup> They again cite First-Citizens Bank to support this assertion.<sup>75</sup> But, as we just discussed, subsection (10) is not the only exception in RCW 61.24.100.

To summarize, we conclude that RCW 61.24.100(10) does not preclude this action for a deficiency judgment against the guarantors of these commercial loans. The trustees’ sales under the deed of trust securing these loans do not

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<sup>73</sup> First-Citizens Bank, 314 P.3d at 425 n.15 (quoting State v. Kelley, 168 Wn.2d 72, 83, 226 P.3d 773 (2010)).

<sup>74</sup> Respondents’ Citation of Additional Authority at 1 (quoting First-Citizens Bank, 314 P.3d at 425).

<sup>75</sup> Id. (citing First-Citizens Bank, 314 P.3d at 425).

bar this action. Moreover, this action is not barred by the limitations stated in RCW 61.24.100(3)(a) and (b). The trial court erred by deciding otherwise.

### THE LOAN DOCUMENTS

Based on the incorrect premise that RCW 61.24.100(10) should be interpreted as they argue, the Gentrys further argue that their guaranties are secured by the various deeds of trust securing the loan. Accordingly, they claim that the trustees' sales under these deeds of trust bar this action for a deficiency judgment. Even if we agreed with their premise, we would still disagree with their conclusion. We hold that these deeds of trust do not secure the Gentrys' guaranties.

This court reviews de novo a trial court's interpretation of the language of a contract.<sup>76</sup> "When interpreting a contract our primary goal is to discern the intent of the parties, and such intent must be discovered from viewing the contract as a whole."<sup>77</sup>

Washington follows the "objective manifestation theory of contracts" to determine the parties' intent.<sup>78</sup> Courts focus on the "objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties."<sup>79</sup>

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<sup>76</sup> Knipschild v. C-J Recreation, Inc., 74 Wn. App. 212, 215, 872 P.2d 1102 (1994).

<sup>77</sup> Weyerhaeuser Co v. Commercial Union Ins. Co., 142 Wn.2d 654, 669, 15 P.3d 115 (2000).

<sup>78</sup> Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

<sup>79</sup> Id.

"[W]hen interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used."<sup>80</sup> This court does not "interpret what was intended to be written but what was written."<sup>81</sup>

Here, the deeds of trust at issue use identical language for the relevant provisions.<sup>82</sup> The first page of each deed of trust identifies the grantors under the instruments. For the Little Mountain Deed of Trust, the "Grantor" is Little Mountain East LLC.<sup>83</sup> For the Blackburn Road Deed of Trust, the "Grantors" are Blackburn Southeast LLC, Blackburn North LLC, and Little Mountain East LLC.<sup>84</sup> Horizon Bank, the predecessor in interest to Washington Federal, is identified as the "Grantee" or Beneficiary/Lender.<sup>85</sup> The Gentrys are not parties to these deeds of trust.

At page two of each of the deeds of trust, the Grantors state what is secured:

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. THIS DEED OF

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<sup>80</sup> Id. at 503-04.

<sup>81</sup> Id. at 504.

<sup>82</sup> Compare Clerk's Papers at 9-17, with Clerk's Papers at 23-31.

<sup>83</sup> Id. at 23.

<sup>84</sup> Id. at 9.

<sup>85</sup> Id. at 9, 23.

TRUST IS GIVEN AND ACCEPTED ON THE FOLLOWING  
TERMS.<sup>[86]</sup>

Three paragraphs later, the Grantors state whose payment and performance obligations are secured by the deeds of trust:

**PAYMENT AND PERFORMANCE.** Except as otherwise provided in this Deed of trust, **Borrower and Grantor** shall pay to Lender all indebtedness secured by this Deed of Trust as it becomes due, and **Borrower and Grantor** shall strictly perform all their respective obligations under the Note, this Deed of Trust, and the Related Documents.<sup>[87]</sup>

Reading these two paragraphs together, the deeds of trust must be read as securing the payment and performance obligations of the **Borrowers and Grantors**.<sup>88</sup> Here, **Borrower** and **Grantor** is the same entity for each loan secured by each deed of trust. There simply is no way to read these provisions so that any deed of trust secures the payment and performance obligations of anyone other than the **Borrower and Grantor**. The guarantors of the loans are neither. Thus, none of these deeds of trust secure the guaranties of the Gentrys.

Later in each deed of trust, another provision discusses full performance of the secured obligations:

**FULL PERFORMANCE.** If **Borrower and Grantor** pay all the Indebtedness when due, and **Grantor** otherwise performs all the obligations imposed upon **Grantor** under this Deed of Trust, Lender shall execute and deliver to Trustee a request for full reconveyance and shall execute and deliver to Grantor suitable statements of

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<sup>86</sup> Id. at 11, 25 (emphasis added).

<sup>87</sup> Id. (second and third emphasis added).

<sup>88</sup> See Brief of Appellant at 25-26; Brief of Amici Curiae Washington Bankers Association and Union Bank, N.A. at 12-15.

termination of any financing statement on the evidencing Lender's security interest in the Rents and the Personal Property.<sup>189]</sup>

This language reinforces our conclusion. The exclusive focus is on the payment and performance obligations of the *Borrower and Grantor* of the deed of trust. There is simply no mention of such obligations of the guarantors.

In sum, we conclude when we read each of these deeds of trust as a whole, none secures the Gentrys' guaranties. Accordingly, the Gentrys' argument that RCW 61.24.100(10) bars this action against them is wholly unpersuasive for a second reason.

In support of their argument that the guaranties are secured by various deeds of trust, the Gentrys again rely on First-Citizens Bank, the recent Division Two case we previously discussed in this opinion.<sup>90</sup> They represent that the form of the deed of trust in that case is the same as those here. But the complete deeds of trust at issue in that case are not in this record on appeal. Consequently, we will not speculate on whether the representation is correct.

Nevertheless, we take this opportunity to address arguments made here that were also clearly before that court.

In First-Citizens Bank, Division Two focused on different provisions in the deeds of trust before that court than those we just discussed. Specifically, the court quoted the following language:

GIVEN TO SECURE (A) PAYMENT OF THE *INDEBTEDNESS*  
AND (B) PERFORMANCE OF *ANY AND ALL OBLIGATIONS*

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<sup>89</sup> Clerk's Papers at 14, 28 (second and third emphasis added).

<sup>90</sup> 314 P.3d at 420.

**UNDER THE NOTE, THE RELATED DOCUMENTS, AND [THE] DEED[S] OF TRUST.**<sup>[91]</sup>

Division Two concluded that this language included any guaranties of the loans secured by the deeds of trust in that case.<sup>92</sup> In so concluding, Division Two looked to the definition of the term "Related Documents" in the deeds of trust, which included any "**guaranties . . . whether *now* or hereafter *existing*, executed in connection with indebtedness.**"<sup>93</sup> As Division Two noted, this definition plainly includes "guaranties."<sup>94</sup>

The Gentrys make a similar argument here. They point to substantially similar language in these deeds of trust that contain the term "Related Documents" together with a similar definition.<sup>95</sup>

But reading this definition to include **all** guaranties, regardless of who the guarantor is, ignores the specifications in the "Payment and Performance" provisions for the deeds of trust that are before us. As we discussed previously in this opinion, this latter provision makes clear whose obligations for payment

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<sup>91</sup> See First-Citizens Bank, 314 P.3d at 423 (alteration in original).

<sup>92</sup> Id.

<sup>93</sup> Id.

<sup>94</sup> First-Citizens Bank, 314 P.3d at 423.

<sup>95</sup> See Clerk's Papers at 17, 31 ("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' and are not secured by this Deed of Trust.") (emphasis added).

and performance are secured by the deeds of trust. And there can be no doubt that such obligations are limited to the ***Borrower and Grantor*** of each instrument, not guarantors of the loan. Accordingly, the scope of the definition of "Related Document" does not include the guaranties of the Gentrys.

To the extent that First-Citizens holds otherwise, we disagree with its conclusion. That case does not control here.

We note that the trial court in this case reached a conclusion similar to that in First-Citizens. It concluded that "the guaranties executed by the Defendants were related documents."<sup>96</sup> It reached this conclusion by construing the deeds of trust instrument against the bank, the drafter:

Without repeating your respective positions, I find that the general principle of ambiguities being [construed] against the drafting party is the decisive factor. . . . The inconsistencies favor the Defendants and result in the conclusion that the guaranties were related documents and therefore secured by the foreclosed deeds of trust.<sup>[97]</sup>

Construing the deeds of trust instruments against the drafter was also a rationale that Division Two pointed to in a footnote.<sup>98</sup>

The problem with this approach is that this principle applies only where an instrument is ambiguous.<sup>99</sup> As we discussed previously in this opinion, the deeds of trust in this case are not ambiguous when read as a whole. The Grantor under

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<sup>96</sup> Clerk's Papers at 774-75.

<sup>97</sup> Id.

<sup>98</sup> First-Citizens Bank, 314 P.3d at 423 n.8.

<sup>99</sup> See, e.g., Rouse v. Glascam Builders, Inc., 101 Wn.2d 127, 135, 677 P.2d 125 (1984).

each instrument expressly stated that the deed of trust secured the obligations of the ***Borrower and Grantor***. Each of these was the same entity for each loan. And none of these entities included the Gentrys, the guarantors of the loan obligations. Thus, this principle of interpretation does not apply in this case.

Because of our resolution of the two issues in this opinion, we need not reach the third question: whether the waiver of anti-deficiency defenses language in the guaranties of payment is enforceable against the Gentrys. In order to make clear that the trial court's decision on this question is not binding on these parties, we vacate that portion of that court's decision.

There is an outstanding issue that is not presently before us. The Gentrys are entitled to a fair value hearing under RCW 61.24.100(5). That hearing has not yet occurred because the trial court decided this matter on summary judgment. Thus, remand for such a hearing is required.

#### **ATTORNEY FEES**

The Gentrys seek an award of attorney fees based on the contract provision in their guaranties. The bank reserves the right to seek fees under the same provision following remand and further proceedings. We deny an award of fees at this time to any party because doing so is premature.

Each of the guaranties in this case provides for payment of reasonable attorney fees to the bank in connection with enforcement of the guaranties.<sup>100</sup> RCW 4.84.330 makes this unilateral contractual provision bilateral, and further

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<sup>100</sup> See Clerk's Papers at 119, 122, 125, 128, 131, 134.

provides that the “prevailing party” is entitled to such an award. A prevailing party is one in whose favor a final judgment is rendered.<sup>101</sup>

Moreover, a trial court may include appellate attorney fees after remand.<sup>102</sup>

Because a prevailing party has not yet been determined and will not be determined until after a fair value hearing under RCW 61.24.100(5) on remand, we decline to award fees now. That determination may be made by the trial court at such time as it makes an award of reasonable attorney fees.

We reverse and remand for further proceedings. We also vacate that portion of the trial court's decision concerning the enforceability of waiver of anti-deficiency defenses. We also deny an award of attorney fees as premature.

Cox, J.

WE CONCUR:

Jay, J.

Becker, J.

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<sup>101</sup> Riss v. Angel, 131 Wn.2d 612, 633, 934 P.2d 669 (1997).

<sup>102</sup> See Stieneke v. Russi, 145 Wn. App. 544, 572, 190 P.3d 60 (2008) (“Because we remand this case, neither party is entitled to attorney fees. If the trial court finds that the Stienekes met the required standard of proof, it should award attorney fees for this appeal as well.”).