

69791-9

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No. 69791-9-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

WASHINGTON FEDERAL, a federally chartered savings association,

Plaintiff-Appellant

v.

LANCE HARVEY, individually and the marital community comprised of
LANCE HARVEY and "JANE DOE" HARVEY, husband and wife,

Defendants-Respondents

ON APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
(Hon. Eric Z. Lucas)

BRIEF OF APPELLANT

Gregory R. Fox
WSBA No. 30559
Ryan P. McBride
WSBA No. 33280
*Attorneys for Appellant
Washington Federal*

LANE POWELL PC
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101-2338
Telephone: 206.223.7000
Facsimile: 206.223.7107

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I. INTRODUCTION

Respondent Lance Harvey (“Harvey”) agreed to “absolutely and unconditionally” guarantee a multi-million dollar commercial loan made to his company, Kaydee Gardens 9, LLC (“Kaydee Gardens”), to finance a real estate development project. Kaydee Gardens granted a deed of trust on the real estate to secure the loan. After Kaydee Gardens defaulted, and Harvey refused to make good on his guaranty, Appellant Washington Federal—who acquired the original lender’s rights to the loan from the FDIC—non-judicially foreclosed on the deed of trust. The value of the real estate collateral was inadequate, however, to satisfy Kaydee Gardens’ debt, so Washington Federal filed an action on the guaranty seeking a judgment against Harvey in the amount of the deficiency.

On cross-motions for summary judgment, the trial court dismissed Washington Federal’s claim. It concluded that Kaydee Gardens’ deed of trust did not just secure Kaydee Gardens’ indebtedness on the loan, but also Harvey’s separate guaranty. The trial court further concluded that the Deed of Trust Act precludes a lender from bringing an action for a deficiency judgment against a guarantor of a commercial loan after a deed of trust securing the guaranty is non-judicially foreclosed. Finally, the court refused to enforce a clause in the guaranty in which Harvey agreed

to waive “defenses arising by reason of ... ‘anti-deficiency’ law ... which may prevent Lender from bringing ... a claim for deficiency[.]”

The trial court erred on all three fronts, any one of which requires reversal. *First*, the plain language and legislative history of the Deed of Trust Act—and, specifically, RCW 61.24.100(3)(c)—permit lenders to bring actions for a deficiency judgment against guarantors of commercial loans regardless of whether the guaranty is secured by the foreclosed deed of trust. *Second*, even if the Act precluded such an action, it would not bar Washington Federal’s claim here because it is equally clear that the parties did not intend Kaydee Gardens’ deed of trust to secure Harvey’s guaranty. *Third*, Harvey expressly waived any anti-deficiency defense he may have had, and that waiver is enforceable as a matter of public policy.

II. ASSIGNMENTS OF ERROR AND STATEMENT OF ISSUES

Washington Federal assigns error to (1) the November 29, 2012 letter ruling and order granting Harvey’s motion for summary judgment, denying Washington Federal’s motion for summary judgment, and dismissing Washington Federal’s claims (CP 185-87; CP 273-77); and (2) the January 2, 2013 order denying Washington Federal’s motion for reconsideration (CP 12-13). The issues presented are:

1. After a lender non-judicially forecloses on property under a borrower’s deed of trust securing a commercial loan, does the Deed of

Trust Act, Chapter 61.24 RCW, permit the lender to bring an action for a deficiency judgment against a guarantor of that loan even if the guaranty is secured by the same deed of trust? **Yes.**

2. If the Deed of Trust Act does not permit a lender to bring an action for a deficiency judgment against a guarantor when the guaranty is secured by the borrower's foreclosed deed of trust, then:

a. Did the trial court err when it concluded that Harvey's guaranty was secured by the borrower's deed of trust? **Yes.**

b. Did the trial court err when it concluded that the express waiver of anti-deficiency defenses in Harvey's guaranty was void and unenforceable as a matter of public policy? **Yes.**

III. STATEMENT OF THE CASE

A. Statement Of Facts

The facts are simple and undisputed. In November 2008, Kaydee Gardens borrowed over \$2.5 million from Horizon Bank to develop real property (the "Loan"). CP 836-42 (agreement); CP 844-46 (note). In connection with the Loan, Kaydee Gardens executed a "Resolution" authorizing it, as the "Company," "to mortgage, pledge ... or otherwise encumber" its own property "as security for the payment of any loans ... or any other or further indebtedness of the Company to Lender[.]" CP 362-63. Notably, the Resolution did not authorize Kaydee Gardens to

encumber its property to secure the obligations of any other entity, including a guarantor. *Id.* Pursuant to the Resolution, Kaydee Gardens granted Horizon Bank a lien on real property located in Everett, Washington pursuant an already existing Construction Deed of Trust (the “Deed of Trust”). CP 853-63. Consistent with the Resolution, the Deed of Trust states that it was granted to secure “Payment and Performance” by the “Grantor,” which it defined as Kaydee Gardens. CP 855.

Also in connection with the Loan, and as an additional form of security, Lance Harvey (“Harvey”), the sole member of Kaydee Gardens, executed a Commercial Guaranty in favor of Horizon Bank (“Guaranty”). CP 848-51. In the Guaranty, Harvey “absolutely and unconditionally guarantee[d] full and punctual payment and satisfaction” of Kaydee Garden’s indebtedness on the Loan. *Id.* at 848. The Guaranty also contained an express waiver clause, by which Harvey agreed to:

... waive[] any and all rights or defenses based on suretyship or impairment of collateral including, but not limited, any rights or defenses arising by reason of ... ‘anti-deficiency’ law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender’s commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale ...

Id. at 849. Harvey did not grant Horizon Bank any security in connection with the Guaranty, and there is no language in the Guaranty that states or

suggests that the parties intended Harvey's independent obligation as a guarantor to be secured by the Deed of Trust. CP 848-51. There is no extrinsic evidence to that effect, either; the parties did not negotiate or discuss the terms of the Deed of Trust or Guaranty, which were created using so-called "Laser Pro" forms. CP 535 (Harvey Decl., ¶¶ 6, 9).

In June 2011, Horizon Bank's interest in the Loan, Deed of Trust and Guaranty were assigned to Washington Federal by the FDIC. CP 846; CP 865-66. By then, Kaydee Gardens had already defaulted on the Loan. CP 815 (Ford Decl., ¶ 5); CP 326 (Ford Decl., ¶¶ 4, 5). On June 28, 2011, Washington Federal sent Kaydee Gardens and Harvey a notice of default, demanding that Kaydee Gardens and Harvey cure the default, or else the property would be sold at a trustee's sale pursuant to the Deed of Trust. CP 868-75. The notice specifically warned Harvey, as guarantor, that he "may be liable for a deficiency judgment to the extent the sale price obtained at the Trustee's Sale is less than the debt secured by the Deed of Trust." CP 870. Neither Kaydee Gardens nor Harvey cured the default. CP 816 (Ford Decl., ¶ 11); CP 326 (Ford Decl., ¶ 5).

Accordingly, on August 10, 2011, the trustee sent a notice of sale to Kaydee Gardens and Harvey informing them that a trustee's sale was scheduled for November 14, 2011. CP 877-90. Harvey received the notice. CP 536-37 (Harvey Decl., ¶ 12). This notice also informed

Harvey that, as a guarantor, he could be liable for a deficiency judgment. CP 880, 887. The sale went forward and Washington Federal purchased the property with a credit bid of \$1,450,000, which was consistent with its appraised value. CP 892-97 (trustee's deed); CP 718-813 (appraisal). After the sale proceeds were applied to the Loan principal, interest, foreclosure expenses, fees and costs incurred through the date of the trustee's sale, a deficiency remained in the amount of \$1,238,358. CP 816 (Ford Decl., ¶ 12); CP 327 (Ford Decl., ¶ 9).

B. Procedural History

On January 11, 2012, Washington Federal sued Harvey to enforce the Guaranty. CP 943-955. Washington Federal moved for summary judgment, asking the trial court for a judgment against Harvey in the deficiency amount, plus interest, attorneys' fees and costs. CP 898-913. Harvey cross-moved for summary judgment, asking the court to dismiss Washington Federal's claim. CP 608-27. Harvey argued that, as a matter of contract interpretation, his performance under the Guaranty was secured by the Deed of Trust and that, as a matter of statutory construction, Washington Federal lost its right to seek a deficiency judgment against

him when it foreclosed on the Deed of Trust. *Id.* He also argued that the Guaranty's waiver of anti-deficiency defenses was unenforceable. *Id.*¹

On November 29, 2012, the trial court issued a letter ruling and order denying Washington Federal's motion for summary judgment and granting Harvey's cross-motion. CP 186-87; CP 273-76. The court concluded that (1) where a lender non-judicially forecloses on a deed of trust, RCW 61.24.100(10) bars the lender from seeking a deficiency judgment against a guarantor if the guarantee was secured by the deed of trust; (2) the Guaranty was secured by the Deed of Trust pursuant to its "Related Documents" term and, thus, Washington Federal, could not seek a deficiency judgment against Harvey; and (3) the Guaranty's express waiver of anti-deficiency rights and defenses was "void as contrary to the provisions of that statute and its underlying public policy." CP 275. The trial court denied Washington Federal's motion for reconsideration. CP 12-13. Washington Federal filed this timely appeal. CP 1-11.

IV. ARGUMENT

This Court reviews summary judgment *de novo*, engaging in the same inquiry as the trial court and viewing the facts and all reasonable

¹ In opposition to Washington Federal's motion, Harvey also argued that the trial court could not enter judgment for Washington Federal because there were issues of fact regarding the "fair value" of the property and the deficiency amount. CP 512-32. Because it granted Harvey's cross-motion, the court did not reach these damages questions.

inferences in the light most favorable to the nonmoving party. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 501, 115 P.3d 262 (2005). Summary judgment is proper if the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. CR 56(c); *Hearst*, 154 Wn.2d at 501.

A. The Deed Of Trust Act Allows Washington Federal To Bring An Action For A Deficiency Judgment Against Harvey.

This Court reviews issues of statutory interpretation *de novo*. *City of Spokane v. Rothwell*, 166 Wn.2d 872, 876, 215 P.3d 162 (2009). The objective is to determine legislative intent. *Id.* Where the plain meaning of a statute is clear, legislative intent is derived from that plain meaning. *Id.* The “plain meaning” of a statute is to be discerned from the ordinary meaning of the language used, as well as from the context of the statute, related provisions, and the statutory scheme as a whole. *Id.* at 876-77. A statute must be construed so that all language is given effect and no portion is rendered meaningless or superfluous. *Id.* The Court must also avoid constructions that yield unlikely, absurd, or strained consequences. *Id.* If the statute is susceptible to more than one reasonable interpretation after this inquiry, then the Court may consider legislative history. *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

The trial court ignored the plain meaning, context and legislative history of the Deed of Trust Act when it dismissed Washington Federal's deficiency action against Harvey. In RCW 61.24.100(3)(c), the legislature recognized that lenders have a broad right to bring an action for a deficiency judgment against a guarantor of a commercial loan. While the legislature placed certain limits on such actions, none of those limits relate to whether the guaranty is secured by the borrower's deed of trust. The trial court's conclusion that RCW 61.24.100(10) imposes such a limit was erroneous; that statute has nothing to do with an action for a deficiency judgment. If the trial court's construction were adopted, it would create conflict between several portions of the Deed of Trust Act and, worse yet, lead to an absurd result that would frustrate the very purpose of the Act.

1. RCW 61.24.100(3)(c) Permits A Lender To Bring An Action For A Deficiency Judgment Against A Guarantor Of A Commercial Loan Even If The Guaranty Is Secured By The Borrower's Deed Of Trust.

The plain meaning of the Deed of Trust Act unambiguously allows Washington Federal to obtain a deficiency judgment against Harvey. In 1965, the legislature enacted the Deed of Trust Act to supplement the traditional judicial foreclosure process with an "efficient and inexpensive" alternative of non-judicial foreclosure. *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985). It was intended "to avoid time-consuming

judicial foreclosure proceedings and to save substantial time and money to both the buyer and the lender. This feature of the act has been applauded as meeting the need of modern real estate financing.” *Peoples Nat’l Bank of Wash. v. Ostrander*, 6 Wn. App. 28, 31, 491 P.2d 1058 (1971). The Act contemplated a “quid pro quo between lenders and borrowers” in which the lender gave up a right to a deficiency judgment against the borrower, while the borrower gave up the right of redemption. *Donovick v. Seattle–First Nat’l Bank*, 111 Wn.2d 413, 416, 757 P.2d 1378 (1988).

Historically, creditors could seek a deficiency judgment against a guarantor after a judicial foreclosure. *See Nat’l Bank of Wash. v. Equity Investors*, 86 Wn.2d 545, 546 P.2d 440 (1976); *George v. Jenks*, 197 Wn. 551, 85 P.2d 1083 (1938). The original Deed of Trust Act, and a 1990 amendment, did not, however, address whether a lender could still seek a deficiency judgment from a guarantor after non-judicial foreclosure. *See* Laws of 1965, ch. 74, § 10; Laws of 1990, ch. 111 § 2. Although it was generally assumed that the Act did not provide anti-deficiency protection to guarantors, Washington courts refused to clarify the issue. *Glenham v. Palzer*, 58 Wn. App. 294, 298 n. 4, 792 P.2d 551 (1990); *Thompson v. Smith*, 58 Wn. App. 361, 367 n. 4, 793 P.2d 449 (1990). This silence threatened to disrupt a key benefit of the Act; that is, with the right to

pursue a guarantor after non-judicial foreclosure uncertain, creditors might opt for the longer, more expensive process of judicial foreclosure.

In 1998, the legislature significantly amended the Deed of Trust Act to clarify the availability and scope of a deficiency judgment against borrowers, grantors and guarantors. Laws of 1998, ch. 295, § 12. The Act generally precludes a lender from bringing an action for a deficiency judgment against a borrower, grantor or guarantor “[e]xcept to the extent permitted in this section for deeds of trust securing commercial loans[.]” RCW 61.24.100(1). One of those exceptions applies to actions against a “borrower” or “grantor,” and it gives the lender only a limited right to a deficiency judgment. Under section (3)(a), a lender may bring an action for a deficiency judgment against a borrower or grantor only for a “decrease in the fair value of the property caused by waste,” or “wrongful retention of rents, insurance proceeds, or condemnation awards[.]” RCW 61.24.100(3)(a)(i). Because neither of these two conditions existed here, Washington Federal could not, and did not, seek a deficiency judgment against Kaydee Gardens, the only “grantor” of the Deed of Trust.

But the Deed of Trust Act contains a separate exception that applies exclusively to deficiency actions against a “guarantor” of a commercial loan but, unlike section (3)(a), such an action is not limited to waste or wrongful retention of rents. Section (3)(c) provides:

(3) 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:

* * *

(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.

RCW 61.24.100(3)(c). This section, which the trial court inexplicably failed to cite in its ruling, controls here. CP 186-87. Harvey does not dispute that Washington Federal gave him the requisite notice under RCW 61.24.042. CP 536-37 (Harvey Decl., ¶ 12); CP 880, 887. The only issue, then, is whether Washington Federal's broad right to pursue a deficiency judgment against Harvey under section (3)(c) was somehow limited by another section of RCW 61.24.100. It was not.

There are only three sections in RCW 61.24.100 that limit a lender's right under section (3)(c) to obtain a deficiency judgment against a guarantor. None of them apply. First, section (4) requires the action to be brought within one year of the trustee's sale. RCW 61.24.100(4). Washington Federal did so. CP 892-97 (trustee's deed); CP 943-55 (complaint). Second, section (5) allows a guarantor to request the court to determine the "fair value" of the property when fixing the deficiency amount. RCW 61.24.100(5). Harvey made such a request. CP 512-32. And third, section (6) provides that, where a *guarantor* grants a deed of

trust on his own property, following a trustee's sale of such property, a deficiency judgment is limited to waste and wrongful retention of rents. RCW 61.24.100(6). This section does not apply because Harvey did not grant a deed of trust on his own property; the Deed of Trust encumbered Kaydee Gardens' property, not Harvey's. CP 853-63 (Deed of Trust).

In sum, RCW 61.24.100(3)(c) gave Washington Federal a right to seek a deficiency judgment against Harvey; none of the narrow limits set forth in sections (4) through (6) curtailed that right. Importantly, and as discussed below, both the plain meaning and legislative history of the statute confirm that Washington Federal's right to a deficiency judgment against Harvey exists regardless of whether the Deed of Trust also secured his Guaranty. The trial court's conclusion to the contrary was error.

2. RCW 61.24.100(10) Does Not Apply To Or Preclude An Action For A Deficiency Judgment Against A Guarantor.

The trial court ignored RCW 61.24.100(3)(c), and dismissed Washington Federal's action based exclusively on its conclusion that RCW 61.24.100(10) sets forth yet another limit to a lender's right to obtain a deficiency judgment against a guarantor. Section (10) provides:

(10) 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.

RCW 61.24.100(10). Even though section (10) is phrased permissively to *allow* lenders to bring certain actions against borrowers and guarantors, the trial court read it negatively to *preclude* lenders from bringing an action for a deficiency judgment against a guarantor if the guaranty was secured by the borrower's deed of trust. CP 187; CP 275. The trial court's interpretation of section (10) must be rejected because it is contrary to the language of the section itself, conflicts with other parts of the statute and would undermine a key purpose of the Deed of Trust Act.

On its face, section (10) has nothing to do with a lender's right to obtain a "deficiency judgment" against a guarantor. "When the legislature uses two different terms in the same statute, courts presume the legislature intends the terms to have different meanings." *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007). When the legislature intended the Deed of Trust Act to mean "an action for a deficiency judgment," it used that precise term. *See* RCW 61.24.100(3)(a) ("action for a *deficiency judgment* against a borrower or grantor"); RCW 61.24.100(3)(c) ("action for a *deficiency judgment* against a guarantor"); *also* RCW 61.24.100(5) ("the *deficiency judgment* against the guarantor"); RCW 61.24.100(6) ("guarantor ... shall be subject to a *deficiency judgment*"). In section (10), however, the legislature used an entirely

different term—“an action to collect or enforce any obligation”—which appears nowhere else in RCW 61.24.100. This difference was intentional.

The legislature’s reference in section (10) to “an action to collect or enforce any obligation ... not secured by the deed of trust” is directed to the situation where a borrower or guarantor has an obligation to a lender that is *separate* from the commercial loan that is subject to the foreclosed deed of trust. A borrower or guarantor can owe multiple debts to a single lender or multiple obligations in a single transaction. As respected commentators have recognized, section (10) makes it clear that foreclosure on property securing a commercial loan will not extinguish a lender’s rights to enforce debts and obligations separate from that loan. *See* 27 Marjorie Dick Rombauer, *Wash. Practice: Creditors’ Remedies—Debtors’ Relief* § 3.37 (2d ed. Supp. 2012) (section (10) allows parties to “carve out” obligations, such as liability for environmental contamination, from a transaction where a commercial loan is secured by the deed of trust). In short, section (10) addresses a lender’s right to pursue a separate debt; it does not address a lender’s right to pursue a deficiency judgment on the same debt. As discussed above, that right is addressed in section (3) only.

Not only does this interpretation comport with section (10)’s plain meaning, it avoids hopeless conflict between other parts of the statute. *See Am. Legion Post # 149 v. Dep’t of Health*, 164 Wn.2d 570, 585, 192 P.3d

306 (2008) (courts must construe statutes to avoid conflicts between different provisions). If the term “an action to collect or enforce any obligation” is construed to mean the same thing as “an action for a deficiency judgment,” as the trial court concluded, then section (10) would **absolutely preclude** a lender from bringing **any** action for a deficiency judgment against a borrower or guarantor if the commercial loan or guaranty were secured by a foreclosed deed of trust. But, as explained, sections (3)(a) and (6) already expressly **permit** a lender to bring an action for a deficiency judgment against a borrower or guarantor (for waste and/or wrongful retention of rents) in precisely that situation. RCW 61.24.100(3)(a)(i) & (6). The trial court’s interpretation, therefore, places sections (3)(a) and (6) in direct conflict with section (10).

It also creates absurd distinctions the legislature would not have intended. *Bellevue Fire Fighters Local 1604, Int’l Ass’n of Fire Fighters, AFL-CIO, CLC*, 100 Wn.2d 748, 754, 675 P.2d 592 (1984) (statutes must be given a reasonable construction to avoid meaningless distinctions). The legislature carefully drafted RCW 61.24.100 to afford guarantors far less anti-deficiency protection than borrowers and grantors, except in the one situation where they should be treated the same. Under section (3)(c), a lender may obtain a full deficiency judgment against a guarantor (subject to “fair value” set off), unless the guarantor grants a deed of trust on his

own property; in that case, the guarantor is a “grantor” and, as such, section (6) gives him the same anti-deficiency protection section (3)(a) gives any grantor, *i.e.*, the lender can only seek a judgment for waste or wrongful retention of rents. RCW 61.24.100(3)(a) & (6). In this way, RCW 61.24.100 provides symmetrical anti-deficiency protection to borrowers and grantors, on the one hand, and guarantors, on the other hand, who agree to encumber their own property to secure the debt.

That protection is part of the basic “quid pro quo,” *Donovick*, 111 Wn.2d at 416, inherent to non-judicial foreclosure. But if section (10) is construed as an exception to section (3)(c), that careful symmetry falls apart, and some guarantors will receive absolute anti-deficiency protection despite having given up nothing toward the “quid pro quo.” That is, if the trial court’s view is adopted, a guarantor who puts up no property of his own, but whose guaranty is deemed secured by the borrower’s deed of trust, will be immune from a deficiency judgment—even though the borrower himself will remain liable for a limited deficiency judgment under section (3)(a) as will a guarantor who encumbers his own property under section (6). There simply is no rational reason why the legislature would give guarantors who do not risk their own property greater anti-deficiency protection than borrowers or, grantors and guarantors who do.

Last, but not least, the trial court’s interpretation frustrates one of the central underpinnings of the Deed of Trust Act—which is to facilitate real estate financing through an “efficient and inexpensive” alternative to judicial foreclosure. *Cox*, 103 Wn.2d at 387; *Ostrander*, 6 Wn. App. at 31. As it stands, lenders are willing to non-judicially foreclose on deeds of trust securing commercial loans confident that, if there is a deficiency, they can obtain a deficiency judgment against most guarantors. If this Court adopts the trial court’s construction of RCW 61.24.100(10), in cases like this one, lenders will be forced to file pre-foreclosure lawsuits on the guaranty, or to initiate judicial foreclosure actions in lieu of a non-judicial foreclosure, if there is even a chance that the value of the foreclosed property will be insufficient to cover the debt; otherwise, their ostensibly “absolute” guaranties will be absolutely worthless. By the same token, such a result would unnecessarily subject guarantors to judgments before lenders have an opportunity to apply the value of the borrower’s real estate collateral to reduce the guarantors’ liability. This Court should give RCW 61.24.100(3)(c) its intended effect, and avoid that absurd result.

3. The Legislative History Of The Deed Of Trust Act’s 1998 Amendments Confirms Washington Federal’s Right To A Deficiency Judgment Against Harvey.

The trial court must be reversed based on the plain meaning of the Deed of Trust Act alone. Consideration of the Act’s legislative history

only confirms that meaning in any event. Useful legislative history may include bill reports. *Zervas Group Architects, P.S. v. Bay View Tower LLC*, 161 Wn. App. 322, 237 n. 18, 254 P.3d 895 (2011). The 1998 amendments to RCW 61.24.100 were enacted by the legislature through Engrossed Substitute Senate Bill (“ESSB”) 6191. The House Bill Report for ESSB 6191 summarized three conditions a lender had to meet in order to seek a deficiency judgment against a guarantor of a commercial loan:

The beneficiary may seek a deficiency judgment against a guarantor of the commercial loan if certain conditions are met, including the following: (1) the action must be commenced within one year; (2) the guarantor must have been given notice of the trustee’s sale that contains the guarantor’s rights and defenses, and an opportunity to cure the default; and (3) the guarantor may ask the court to determine the fair value of the property, and the amount of the deficiency is the amount owed by the guarantor to the beneficiary less the greater of either the fair value of the property or the price paid at the sale.

H.B. Rep. on ESSB 6191, 55th Leg., Reg. Sess. (Wash. 1998).² These three conditions are now reflected in RCW 61.24.100(4) (action must be commenced in one year), RCW 61.24.100(3)(c) (guarantor must be given statutory notice), and RCW 61.24.100(5) (“fair value” defense).

Noticeably absent from this legislative analysis is any suggestion that RCW 61.24.100(10) was intended to provide a further condition on a

² The bill reports are available through the legislature’s website at <http://dlr.leg.wa.gov/billsummary/default.aspx?year=1997&bill=6191>.

lender's right to bring a deficiency action against a guarantor. Indeed, like the text of the statute itself, nothing in the legislative history of the 1998 amendments supports the trial court's construction of subsection (10). On the contrary, the Final Bill Report noted the drafters' intent "to avoid time consuming and expensive judicial foreclosure proceedings and to save time and money for both the borrower and the lender." F.B. Rep. on ESSB 6191, 55th Leg., Reg. Sess. (Wash. 1998). As explained above, the trial court's construction would have the opposite effect in cases like this one; lenders will be forced to file a lawsuit on the guaranty and/or initiate judicial foreclosure because, otherwise, their guaranties will be worthless. For this reason too, this Court should conclude that Washington Federal may seek a deficiency judgment against Harvey, regardless of whether his Guaranty was secured by the Deed of Trust.

B. Harvey's Guaranty Was Not Secured By The Deed Of Trust.

Because the Deed of Trust Act permits deficiency actions against guarantors even when a guaranty is secured by a foreclosed deed of trust, this Court does not need to determine the contract interpretation issue of whether, in this case, the Deed of Trust secured the Guaranty. But if this Court does reach that issue, then it must conclude that the parties intended the Deed of Trust to secure only Kaydee Gardens' obligations on the Loan—not Harvey's obligations under the Guaranty. The trial court's

conclusion that the Deed of Trust secured the Guaranty is contrary to both the plain language of the agreements and commercial reality. The judgment in Harvey's favor must be reversed for this reason as well.

The goal of contract interpretation is to determine the parties' intent. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). That intent may be discovered from the language of the contract, as well as by "viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of the respective interpretations advocated by the parties." *Id.* at 667. This Court should avoid interpreting contracts in ways that lead to absurd results. *Forest Mktg. Enter.'s, Inc. v. Dep't of Natural Resources*, 125 Wn. App. 126, 132, 104 P.3d 40 (2005). "Where two commercial entities sign a commercial agreement, [courts] will give such an agreement a commercially reasonable construction." *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 705, 952 P.2d 590 (1998).

In concluding that Harvey's Guaranty was secured by the Deed of Trust, the trial court relied entirely on language in the Deed of Trust itself, even though it was executed by Horizon Bank and Kaydee Gardens more than a year before Harvey signed the Guaranty. The Deed of Trust states that it was granted to secure "Payment" and "Performance" as follows:

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 THE DEED OF TRUST. THIS DEED OF TRUST IS GIVEN AND ACCEPTED ON THE FOLLOWING TERMS:

CP 855 (emphasis added). The term “Related Documents” is defined in the Deed of Trust to include, among other things, “guaranties.” CP 861. The trial court concluded that because the Deed of Trust secured the “Performance of ... the Related Documents,” and Related Documents uses the word “guaranties,” then the Deed of Trust should be interpreted to secure Harvey’s performance on the Guaranty. CP 275. This superficial connect-the-dots interpretation fails on multiple levels.

To begin with, the trial court ignored other terms in the Deed of Trust, which show that the parties intended the deed to secure only the obligations of Kaydee Gardens, not Harvey. The above section states that the Deed of Trust is “given and accepted” only “on the following terms.” Those “terms” appear in the very next section, and they identify whose “Payment” and “Performance” is secured. That section states:

PAYMENT AND PERFORMANCE. Except as otherwise provided in this Deed of Trust, Grantor shall pay to Lender all amounts secured by this Deed of Trust as they become due, and shall strictly and in a timely

manner perform all of Grantor's obligations under the Note, this Deed of Trust and the Related Documents.

CP 855 (emphasis added). The Deed of Trust defines "Grantor" exclusively as "Kaydee Gardens 9, LLC." CP 861. As discussed below, the terms "Guarantor," *i.e.*, Harvey, and "Guaranty" are separately defined. Read together and in their entirety, as they must, the "Payment" and "Performance" provisions show that the Deed of Trust secures only Kaydee Gardens' "obligations under the ... Related Documents," not the "Guarantor's" separate obligations under the "Guaranty."

That the Deed of Trust secures only Kaydee Gardens' obligations on the Loan, and not Harvey's under the Guaranty, is further shown by its "FULL PERFORMANCE" section, which states that reconveyance shall occur when "Grantor" pays or otherwise performs, as follows:

FULL PERFORMANCE. If Grantor pays all the Indebtedness, including without limitation all future advances, when due, and 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 termination of any financing statement on file evidence Lender's security interest in the Rents and Personal Property.

CP 858 (emphasis added). Thus, the Deed of Trust is discharged only if the "Grantor," *i.e.*, Kaydee Gardens—not a "Guarantor," *i.e.*, Harvey—"pays" and "performs." Similarly, the Deed of Trust's warranty provision applies only until "the Grantor's Indebtedness shall be paid in full." CP

857 (emphasis added). Here too, the plain language of the Deed of Trust contradicts the trial court's conclusion that the parties intended Kaydee Gardens' property to secure the obligations of a "Guarantor" like Harvey.

A close reading of the "Related Documents" provision confirms this intent. "Related Documents" are defined as "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 ... executed in connection with the indebtedness." CP 861. While this list includes the generic term "guaranties," it does not include the specific term "Guaranty," which the Deed of Trust separately defines and encompasses Harvey's Guaranty. *Id.* The parties' use of the general term "guaranties" and not the specifically defined term "Guaranty" should be construed as an intended exclusion of the latter. *See Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354, 103 P.3d 773 (2004) (courts give greater weight to specific and exact terms over general language); *Diamond "B" Constructors, Inc. v. Granite Falls Sch. Dist.*, 117 Wn. App. 157, 165, 70 P.3d 966 (2003) (where a contract provides general and specific terms, the specific controls over the general).

That the parties did not intend the specific term "Guaranty" to fall within the scope of the generic term "guaranties" is further shown by the Deed of Trust's reference to the analogous terms "Note" and "promissory

notes.” “Note” is specifically defined; “promissory notes” appears in the definition of “Related Documents.” CP 861. Notably, the Deed of Trust’s “Payment” and “Performance” provisions state that the deed secures obligations under the “Note” *and* “Related Documents,” meaning that the generic term “promissory notes” does not include the specifically defined term “Note”; otherwise, the term Note would be superfluous—contrary to another well-accepted rule of contract interpretation. *Wilson Court*, 134 Wn.2d at 706-07. So it is with “Guaranty” and “guaranties.”³ This Court should reject the trial court’s myopic focus on a generic word used in the boilerplate “Related Documents” section. Read as a whole and in its entirety, it is clear the Deed of Trust does not secure Harvey’s Guaranty.

This conclusion is confirmed by the terms of the Guaranty and other extrinsic evidence. The Resolution Kaydee Gardens executed in connection with the Loan authorized it to encumber its property “as security for the payment of any loans ... of the Company to Lender[.]” CP 362-63. The Resolution did not authorize it to encumber property to secure the obligations of a guarantor. *Id.* Consistent with that authority,

³ The Guaranty defines the terms “Guaranty” and “Related Documents” the same as the Deed of Trust. CP 850-51. And, like the Deed of Trust, its use of those terms shows that the generic term “guaranties” in the “Related Documents” provision cannot include the specifically defined term Guaranty, *i.e.*, “This Guaranty, *along with any Related Documents ...*” CP 850 (Amendments).

the Promissory Note between Kaydee Gardens and Horizon Bank states expressly that “this Note is secured by ... a Construction Deed of Trust dated July 11, 2007 ... in favor of Lender[.]” CP 845. Conspicuously, the Guaranty, executed by Harvey the same day as the Note, contains no reference to the Deed of Trust. CP 848-51. The inclusion of this language in the Resolution and Note, but not the Guaranty, is entirely consistent with the Deed of Trust, which, as explained, likewise shows the parties’ intent to secure only Kaydee Gardens’ obligations, not Harvey’s.

Indeed, there is no other “commercially reasonable construction” possible given the parties’ objectives. *Wilson Court*, 134 Wn.2d at 705. Securing the Guaranty with the same Deed of Trust that secured Kaydee Gardens’ debt would serve no purpose. From the bank’s perspective, the whole point of a guaranty is to obtain an *additional* source of payment in the event the borrower’s collateral lacks sufficient value to satisfy the debt. From the guarantor’s perspective, his or her liability will be reduced by the value of the borrower’s collateral whether or not the guaranty is secured. In sum, there simply was no benefit to Horizon Bank or Harvey in having the Deed of Trust secure both Kaydee Garden’s primary obligation and Harvey’s secondary obligation, and the parties’ agreements reflected that commercial reality. So should this Court. The trial court’s conclusion that the Deed of Trust secured the Guaranty was erroneous.

C. The Guaranty's Waiver Of Anti-Deficiency Defenses Does Not Violate Public Policy And Is Enforceable As A Matter Of Law.

Even if this Court concludes that Harvey was entitled to a limited anti-deficiency defense based on RCW 61.24.100(10) and the boilerplate language in the Deed of Trust, it must still reverse the trial court because Harvey expressly waived that defense. In the Guaranty, Harvey agreed to:

... waive[] ... any rights or defenses arising by reason of ... 'anti-deficiency' law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor ...

CP 849. Although Harvey later claimed that he did not read the waiver and would not have understood it even if he had (CP 396 (Harvey Decl., ¶ 8)), he cannot rely on ignorance to avoid its effect.⁴ “It is a general rule that a party to a contract which he has voluntarily signed will not be heard to declare that he did not read it, or was ignorant of its contents.” *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 381, 745 P.2d 37 (1987) (quoting *Nat. Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 912, 506 P.2d 20 (1973)). Indeed, Harvey did not argue unconscionability below, nor did he dispute that the plain language of the Guaranty's waiver clause covered his anti-deficiency defense based on RCW 61.24.100(10).

⁴ The Guaranty also contains a separate warranty in which Harvey represented that he agreed to the waiver with “full knowledge” of its consequences, as well as bold acknowledgement language, which appears immediately above the signature line, confirming that Harvey read and agreed to all the provisions of the Guaranty. CP 851.

Rather, Harvey argued, and the trial court agreed, that the waiver was unenforceable as a matter of law. Not so. It is black letter law that a guarantor's suretyship and statutory defenses "may be explicitly waived in a guaranty agreement and such waiver provisions are enforceable." 38A C.J.S., *Guaranty* § 125 (2008); also 38 Am.Jur.2d, *Guaranty*, § 67 ("the guaranty may provide, by its terms, that the guarantor remains liable despite the release of the principal debtor"). Washington courts have long recognized and applied this common law rule. *Fruehauf Trailer Co. of Canada Ltd. v. Chandler*, 67 Wn.2d 704, 709, 409 P.2d 651 (1966) (upholding guarantor's waiver of defense of discharge); *Seattle First Nat'l Bank v. West Coast Rubber Inc.*, 41 Wn. App. 604, 609, 705 P.2d 800 (1985) (upholding guarantor's waiver of surety defenses); *United States v. Everett Monte Cristo Hotel, Inc.*, 524 F.2d 127, 136 (9th Cir. 1975) (under Washington law, guarantor defenses may be "lost by consent or waiver").

The Deed of Trust Act did not change this familiar rule. To be sure, nothing in the text of the Act suggests a legislative intent to disrupt the common law rule. When the legislature intends to deny contracting parties the freedom to bargain away statutory rights, it knows how to say so. See, e.g., RCW 19.118.130 (waiver of rights under lemon law void); RCW 19.100.220(2) (same under franchise act); RCW 21.20.430(5) (securities act); RCW 50.40.010 (unemployment compensation); RCW

51.04.060 (workers compensation). Indeed, in the analogous context of UCC Article 9, the legislature prohibited a waiver of a debtor's rights upon default, but preserved the common law rule permitting a waiver of guarantor defenses. RCW 62A.9A-602 & cmt. ("Washington variations of this section ... preserve the ability of a guarantor to waive suretyship defenses"). RCW 61.24.100 contains no express anti-waiver provision and, as noted above, its text and history show that the legislature intended to confirm lender's traditional right to seek a deficiency judgment against a commercial guarantor following foreclosure; and there is no reason to believe it wanted to change the common law rule with respect to waivers.

Nor is the Guaranty's waiver clause void as against public policy. "An agreement that has a tendency to be against the public good, or to be injurious to the public violates public policy." *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007) (citation and internal quotation marks omitted). There is no injury to the public here, much less to the policies underlying the Deed of Trust Act. The Act's three goals are: (1) the non-judicial foreclosure process should be efficient and inexpensive; (2) the process should result in interested parties having an adequate opportunity to prevent wrongful foreclosure; and (3) the process should promote stability of land titles. *Cox*, 103 Wn.2d at 387. Neither the trial court nor Harvey made any effort to identify how a sophisticated

guarantor's waiver of anti-deficiency defenses in a commercial transaction would frustrate the Act's goals. It wouldn't.

As discussed above, the legislature recognized that guarantors do not have the same anti-deficiency rights as borrowers and, thus, the default rule is that lenders *can* bring "an action for a deficiency judgment against a guarantor" so long as they give notice. RCW 61.24.100(3)(c). In giving lenders this right, the legislature necessarily determined that deficiency actions against guarantors do not undermine the policies of the Deed of Trust Act. Even if RCW 61.24.100(10) were improbably construed to give commercial guarantors a limited defense to that default rule where a borrower's deed of trust secures the guaranty, no public policy is offended where, as here, a sophisticated guarantor of a commercial loan knowingly agrees to restore the lender to the same right to a deficiency judgment it has against all other guarantors under RCW 61.24.100(3)(c). In short, a commercial guarantor's waiver of an anti-deficiency defense does not offend public policy because the Act already reflects a public policy in favor of allowing deficiency judgments against commercial guarantors.

Indeed, the same concerns that might preclude a borrower's waiver of an anti-deficiency defense simply do not apply to guarantors. Because there is no possibility of a deficiency judgment against the borrower, the lender has every incentive to seek the highest value for the property at the

trustee's sale. See *Beal Bank, SSB v. Sarich*, 161 Wn.2d 544, 53, 167 P.3d 555 (2007) (Sanders, J., concurring) (RCW 61.24.100 “helps ensure the foreclosing lienor will set the highest value for the property, or at least cover its liability”). A lender's incentive is exactly the same even if a guarantor waives any anti-deficiency protection he or she may have under RCW 61.24.100(10). This is so because when a lender brings a deficiency action against a guarantor, the Act allows the guarantor to ask the trial court to decrease the deficiency amount if the property's “fair value” is shown to be greater than its sale price. RCW 61.24.100(5).⁵

Finally, the Supreme Court's recent decisions in *Bain v. Mortg. Elec. Registration Sys.*, 175 Wn.2d 83, 285 P.3d 34 (2012), and *Schroeder v. Excelsior Mgmt. Group LLC*, No. 86433-1 (Wash. Feb. 28, 2013), do not affect this analysis. Neither case addressed RCW 61.24.100(10), deficiency judgments, commercial loans, guaranties or the enforceability of express waivers by sophisticated parties like Harvey. Rather, in both cases the Court held, without significant analysis, that parties cannot contractually waive “statutory requirements” that the *trustee* must follow *prior to* a non-judicial foreclosure sale. *Bain*, 175 Wn.2d at 107-08;

⁵ As noted, Harvey raised such a challenge below. In moving for summary judgment, Washington Federal did not argue that the Guaranty waived Harvey's right to a “fair value” determination under RCW 61.24.100(5). See CP 898-909; CP 335-51 (“Washington Federal does not argue that Guarantors waived their fair value affirmative defense.”).

Schroeder, slip. op. at 11-12. As the Court noted in *Schroeder*, the rule that a person can ordinarily waive “rights or privileges” does not apply to these procedural requisites because they “are not, properly speaking, rights held by the debtor; instead, they are limits on the trustee’s power to foreclose without judicial supervision.” *Id.*

That makes sense. As a matter of due process and public policy, these requirements antecedent to foreclosure must be followed because they protect other interested parties (like junior lienholders) and prevent future title disputes—two key purposes of the Deed of Trust Act. *Cox*, 103 Wn.2d at 387. These concerns are simply not implicated where, as here, the statutory prerequisites are followed, a valid trustee’s sale is held, and the only interests that remain are those of the original contracting parties. Indeed, if RCW 61.24.100(10) did confer Harvey with an anti-deficiency defense, contrary to the common law, then it is precisely the kind of “rights-or-privileges-creating statute” that the Court recognized was subject to waiver doctrine. *Schroeder*, slip. op. at 12. To be sure, the Court’s valid concern for protecting homeowners and other unsophisticated borrowers from overreaching lenders and/or trustees has no applicability in a commercial transaction between sophisticated parties.

If anything, enforcing Harvey’s waiver would promote—rather than frustrate—the purpose of the Deed of Trust Act in cases like this one.

As noted, a key goal of the Act is to encourage real estate financing by keeping the non-judicial foreclosure process efficient and inexpensive for everyone involved. *Cox*, 103 Wn.2d at 387. The 1998 amendments, which confirmed a lender's right to seek a deficiency judgment against a guarantor of a commercial loan, advanced that goal. If courts refuse to enforce a guarantor's express waiver of whatever anti-deficiency defenses he or she may have under RCW 61.24.100(10), then lenders will have no choice but to file lawsuits on the guaranty prior to non-judicial foreclosure or to bypass non-judicial foreclosure altogether and initiate the kind of inefficient and expensive judicial foreclosure action the Act was intended to curtail. This Court should refuse to construe the Deed of Trust Act or the Deed of Trust to compel that result. At the very minimum, it should follow the common law rule, and enforce an express and unambiguous waiver executed by a sophisticated guarantor of a commercial loan.

V. CONCLUSION

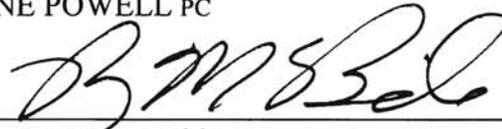
Harvey agreed to guaranty Kaydee Gardens' commercial loan unconditionally and absolutely. Kaydee Gardens defaulted on the loan and Harvey defaulted on the guaranty. The plain meaning of RCW 61.24.100(3)(c) permits Washington Federal to obtain a deficiency judgment against Harvey on his guaranty and, even if Harvey had an anti-deficiency defense based on RCW 61.24.100(10) and the boilerplate terms

of the Deed of Trust, Harvey waived that defense. The trial court's judgment in Harvey's favor must be reversed, and the case remanded for a determination of Washington Federal's damages.

RESPECTFULLY SUBMITTED this 5th day of March, 2013.

LANE POWELL PC

By



Ryan P. McBride

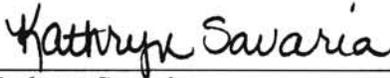
Attorneys for Appellant Washington Federal

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2013, I caused to be served a copy of the foregoing **BRIEF OF APPELLANT** on the following person(s) in the manner indicated below at the following address(es):

Mr. Dean A. Messmer
Lasher Holzapfel Sperry & Ebberson, PLLC
Two Union Square
601 Union Street, Suite 2600
Seattle, WA 98101-4000
E-Mail: messmer@lasher.com

- by CM/ECF
- by Electronic Mail
- by Facsimile Transmission
- by First Class Mail
- by Legal Messenger
- by Overnight Delivery



Kathryn Savaria

~~X~~
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