No. 1032668

SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 858246-Division I

FREDERICK REYNOLDS, an individual
Respondent/Cross-Appellant

vs.

JOSANNE B. LOVICK, an individual
Appellant/Cross-Respondent

RESPONDENT/CROSS-APPELLANT FREDERICK REYNOLDS' RESPONSE TO PETITION FOR REVIEW AND CROSS-PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Respondent/Cross-Appellant Frederick Reynolds ("Reynolds") responds to Appellant/Cross-Respondent Josanne B. Lovick's ("Lovick") Petition for Review ("Petition").

B. COURT OF APPEALS' DECISION

The Petition seeks review of the Unpublished Opinion of the Court of Appeals, Division I, attached as Appendix A to the Petition ("Opinion").

C. ISSUES PRESENTED FOR REVIEW

Reynolds maintains that review of the Petition should not be accepted. However, this Court should accept review of Reynolds' cross-petition for review of the Court of Appeals' denial of his request for attorneys' fees.

D. STATEMENT OF THE CASE

Reynolds supplements the facts with the following:

Reynolds commenced legal action against Lovick to collect on a promissory note ("Note"). On September 12, 2018, Lovick

was personally served in Washington with the Summons and Complaint. Believing that Lovick had not timely answered or appeared in the action, Reynolds filed on October 3, 2018, an Ex Parte Motion for an Order and Judgment of Default, CP 55, which was entered by the Trial Court on the ex parte calendar the same day that it was filed (the "Order and Judgment"). CP 64-66. However, unbeknownst to Reynolds and the Trial Court, Lovick had filed, but not served, an answer to the Complaint at 4:20 p.m. on October 2, 2018.[1] CP 46-54.

Lovick became aware of the Order and Judgment as of at least March 2, 2019, CP 93, ¶ 17, and explained that at the time, she believed that the Order and Judgment were improperly obtained:

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[1] Lovick conceded in her First Motion to Vacate that she had only filed her Answer with the Trial Court. See CP 93, ¶ 14 ("In fact, a Letter of Acknowledgement and a Summons Response Letter with attachments was filed by me in this Court...on October 2, 2018[.]") (emphasis added). Lovick's account changed by the time she filed her Reply, wherein she asserted that another individual had filed and served her Answer. CP 153-154.

> I was frustrated with the process because I believed that the [Order and Judgment] had been unfairly and perhaps illegally obtained but I did not know what recourse was available to me to correct the error and reverse the Court's [Order and Judgment].

CP 94, ¶ 20.

Nonetheless, Lovick did not take any action to learn what options were available to her and instead merely hoped that Reynolds would cease collection efforts. CP 94, ¶¶ 20-21. However, Reynolds continued to pursue collection efforts and contacted Lovick again in August 2020 to demand payment. Lovick then consulted with a California attorney regarding her options. CP 94-95, ¶¶ 22-23. Based upon the legal advice of counsel, Lovick made a strategic decision to "threaten" Reynolds with a new action in hopes of avoiding the Order and Judgment. CP 95, ¶¶ 24-25. Accordingly, Lovick responded to Reynolds by letter dated September 24, 2020, as follows:

> Regarding your August 17, 2020 correspondence to me, please be on notice that I have consulted with an attorney who has checked the record and, in discussions with the court clerk, has come to the

> conclusion that the judgement taken in this matter appears to have been done incorrectly. He is presently looking into filing a lawsuit against you regarding the reopening of this case and getting your judgement overturned.

CP 107 (emphasis added).

Yet, despite informing Reynolds that she was looking into reopening the lawsuit, Lovick did not take any action to challenge the Order and Judgment. Instead, in July 2021, Lovick partially satisfied the Order and Judgment by payment of $10,000.00 to Reynolds. CP 67-69.

On July 27, 2023, almost five years after the Order and Judgment were entered, Lovick moved for the first time to vacate pursuant to CR 60(b)(4), (5) and (11) ("First Motion to Vacate"). CP 70-112. Lovick raised several issues in her First Motion to Vacate relating to, inter alia, jurisdiction and notice. In particular, Lovick maintained that the Order and Judgment were void because she was entitled to but did not receive notice and because the Trial Court did not have jurisdiction. CP 71-72; 75-78; 81-82.

The Trial Court denied Lovick's First Motion to Vacate by order dated August 11, 2023. CP 159-160 ("Order Denying First Motion to Vacate"). In its oral findings, the Trial Court explained that the Order and Judgment were not void because service of process was properly achieved. RP 28. As to Lovick filing her Answer prior to entry of the Order of Default, the Trial Court observed that the record reflected that Lovick had not served her Answer:

> I assume based on Mr. Lee's declaration that he was unaware when he presented that order. The court certainly was. It would not have been scanned in time the court [sic] the day before receiving it to have it available at an ex parte hearing. It would just not have been scanned in time, so, I am aware of that.

RP 29.

The Trial Court found that even if Lovick had served her Answer, she was required, but had not timely moved, to vacate the Order and Judgment, which warranted denial of her First Motion to Vacate. RP 19, 30-32. The Trial Court entered a written order that

same day denying Lovik's First Motion to Vacate on grounds that Lovick did not (1) establish good cause pursuant to CR55(c)(1) to set aside the Order of Default; (2) move to vacate within a reasonable time; (3) establish a basis to vacate the Judgment; or (4) set forth a prima facie defense under CR 60. CP 159. However, the Trial Court declined to award Reynolds the attorneys' fees he incurred in responding Lovick's First Motion to Vacate. CP 160.

On September 28, 2023, over six weeks after the Trial Court denied Lovick's First Motion to Vacate, Lovick filed a Motion for Order to Set Aside Default Order and Vacate Default Judgment ("Second Motion to Vacate"). CP 6-22. In her Second Motion to Vacate, Lovick disputed several of the Trial Court's findings in the Order Denying First Motion to Vacate, including that the Order and Judgment were not void and that Lovick did not establish good cause to vacate the Order of Default under CR 55(c)(1). CP 11. Lovick also argued that the Order and Judgment violated her due process rights because she did not receive notice after her

appearance. CP 13-20.

The Trial Court denied Lovick's Second Motion to Vacate, finding that it was an untimely motion for reconsideration and that Lovick had otherwise not established a basis to vacate the Order and Judgment. CP 219-220. The Trial Court also awarded Reynolds his attorneys' fees pursuant to the Note and CR 11. Lovick appealed, and the Court of Appeals, Division I, affirmed the Trial Court's denial of Lovick's First and Second Motions to Vacate, but held that attorneys' fees were not awardable pursuant to the Note. The Court of Appeals remanded on the award of Reynolds' attorneys' fees pursuant to CR 11 in responding to Lovick's Second Motion to Vacate.

E. ARGUMENT

1. The Opinion Does Not Conflict With Any Decision of the Supreme Court.

It is true that a party who has appeared in an action is entitled to notice prior to entry of default. CR 55(a)(3). However, a default judgment entered without requisite notice or where a defendant is

not in default is not automatically void under CR 60(b)(5); instead, it is voidable. Chehalis Coal Co. v. Laisure, 97 Wash. 422, 433, 166 P. 1158 (1917) ("Chehalis"); Rabbage v. Lorella, 5 Wash.App.2d 289, 299-300, 426 P.3d 768 (2018) ("Rabbage"); Matter of Marriage of Orate, 11 Wash.App.2d 807, 813, 455 P.3d 1158 (2020) ("Orate"). Indeed, a default judgment is "void" only where jurisdiction over the defendant was never acquired by initial service of process or where the court does not have subject matter jurisdiction over the claim. Rabbage, 5 Wash.App.2d at 297. Thus, "[w]here the court has personal and subject matter jurisdiction, a procedural irregularity renders a judgment voidable, not void." Id. at 298 (internal citations and quotations omitted).

Several decisions from this Court confirm that an order and judgment of default entered after a defendant's appearance and without notice are voidable but are not automatically void. For example, in Chehalis, this Court held that a default judgment entered without notice and after the defendant appeared and filed a

motion for a more definite statement was voidable, not void. Chehalis, 97 Wash. at 430. The court explained:

> Moreover, respondent actually appeared in response to that service by serving upon appellant's then attorneys in that action a motion to require the complaint to be made more definite and certain and a demand for a bill of particulars, thus effectually waiving any defect in the service and submitting to the jurisdiction of the court. The court thereafter had jurisdiction. If through fraud or concealment practiced upon it, or through inadvertence or mistake, it thereafter entered a judgment prematurely or while a motion was pending undisposed of and without notice, the judgment was irregularly entered. It was voidable, not void.

Id. (emphasis added). Later, in Merchants' Collection Co. v. Sherburne, ("Merchants"), this Court confirmed as follows:

> A judgment prematurely entered is voidable, but it is not void. Being voidable, it may be successfully attacked under certain conditions by a motion made within the statutory limit of time fixed for attacking judgments by motion[.]

158 Wash. 426, 427, 290 P. 991 (1930) (internal citations omitted). Three years after Merchants, this Court explained in Person v. Plough, 174 Wash. 160, 24 P.2d 591 (1933) ("Person") that, as to

jurisdiction, the summons was served in an action properly brought in the county where the subject property was located and, therefore, "the court had jurisdiction of the parties and subject-matter." Id. at 163. Accordingly, this Court held that a subsequently obtained default judgment obtained after appearance was not automatically void. Id. In this, the Person court explained that "[e]ven though the default judgment had been entered without notice after appearance by appellants, it would not have been void, but merely voidable." Id.

Later, in Dike v. Dike, 75 Wash.2d 1, 8, 448 P.2d 490 (1968) ("Dike"), this Court again distinguished between a voidable judgment as being erroneously entered and a void judgment as being entered without jurisdiction. The Court there quoted with approval the following:

> Indeed, it is a general principle that where a court has jurisdiction over the person and the subject matter, no error in the exercise of such jurisdiction can make the judgment void, and that a judgment rendered by a court of competent jurisdiction is not void merely because there are irregularities or errors

> of law in connection therewith. This is true even if there is a fundamental error of law appearing upon the face of the record. Such a judgment is, under proper circumstances, voidable, but until avoided is regarded as valid.

Id. (quoting 31 Am.Jur., Judgments, s 401, p. 66).

In her Petition, Lovick fails to mention Chehalis, Merchants, or Person, and cites to Dike in passing for the limited proposition that an order may be void if entered by a court without inherent authority. Petition, p. 13. In addition to overlooking significant precedent, Lovick misconstrues the holding of Tiffin v. Hendricks, 44 Wash.2d 837, 271 P.2d 683 (1954) ("Tiffin") as a basis for seeking review.

In Tiffin, this Court reversed a trial court's denial of a motion to vacate a default judgment that was entered without requisite notice. Id. This Court explained that where a default judgment was obtained without the defendant being in default "the defendant may have such a default judgment set aside as a matter of right and no showing of a meritorious defense is necessary." Id.

at 847 (emphasis added). However, Tiffin did not address the issue of jurisdiction or distinguish between or evaluate the discrete concepts of a "void" versus a "voidable" judgment. Rather, the Court in Tiffin was merely making a correct observation that a party "may" be entitled to vacate a judgment by establishing that they were not in default. Indeed, the Court in Tiffin was not tasked with determining whether the default judgment was "void" for lack of jurisdiction or if the motion to vacate was timely brought, as those issues were not before the Court.

Tiffin also did not overrule Chehalis, Merchants, or Person, which are directly on point here. In addition, to apply Tiffin to automatically void a judgment where notice was not provided would be inconsistent with Dike, which establishes that judgment is not void unless obtained without personal or subject matter jurisdiction. Dike, 75 Wash.2d at 8. Accordingly, Tiffin does not stand for the proposition that a judgment entered without notice is

automatically void or that jurisdiction otherwise acquired can thereafter be lost.

As part of her argument that the Opinion is not consistent with this Court's precedent, Lovick maintains that the Judgment is void because the Trial Court lacked the inherent power to enter it. However, a lack of inherent power is a question of subject matter jurisdiction, which is "composed of two necessary components: (1) the authority to adjudicate the particular claim and (2) the authority to issue a particular form of relief." Ronald Wastewater Dist. v. Olympic View Water and Sewer Dist., 196 Wash.2d 353, 372, 474 P.3d 547 (2020) ("Ronald Wastewater").

As to adjudicative authority, a court lacks inherent authority where the authority to act was not delegated to it. Id. at 373 (holding that the court did not have authority to annex an area because power to do was conferred on the State and not delegated to the court). In contrast, the authority to issue a particular form of relief arises from the complaint. Id. at 372. Thus, for example, "in

a quiet title property claim, the court's exercise of jurisdiction is confined to issuing the appropriate relief, that is, to quiet title. The court would exceed its relief authority if it were to issue tax relief." Id.

Yet, procedural errors and errors in the application of law do not constitute a lack of authority:

> But legal errors occur within a court's proper exercise of authority, where the court has the authority to adjudicate the claim and errs in its application of law or fact. Whereas, jurisdictional deficiencies result from a court acting outside of its adjudicative authority where it lacks any power to issue relief.

Id. at 373; see also Matter of Marriage of Kaufman, 17 Wash.App.2d 497, 515, 485 P.3d 991 (2021) (observing that there is no support for the argument "that a court loses its inherent power to enter an order if the order contains a legal error[.]").

Here, the Court of Appeals correctly concluded that the lack of notice and any irregularity in obtaining a default judgment after Lovick appeared and answered did not deprive the Trial Court of

jurisdiction already acquired.[2] Opinion, p. 7. Lovick was personally served, and the Trial Court had the inherent power to enter the Order and Judgment pursuant to RCW 2.08.010 and the Complaint.[3] Therefore, pursuant to Ronald Wastewater, the Order and Judgment are not void as a matter of law. Ronald Wastewater, 196 Wash.2d at 372-73. Instead, the Order and Judgment were "voidable," which means that Lovick must establish that she is entitled to vacate the Judgment, including by demonstrating that her motion was timely, she acted with due diligence, and has a

[2] The failure to provide notice is attributable to Lovick's initial failure to serve Reynolds with her Answer. As Lovick did not serve Reynolds as required by CR 5, Reynolds could not have been required to provide notice to Lovick.

[3] Lovick argued in her First Motion to Vacate that the Trial Court did not have subject matter jurisdiction and that she did not answer the Complaint, but instead filed an appearance. However, Lovick abandoned this argument on appeal and now seems to argue that her "appearance" was indeed an Answer. Opening Brief of Appellant, p. 24 ("Lovick properly entered an appearance and answer[]."). Moreover, in her appeal, Lovick does not dispute that the Trial Court had jurisdiction in personam and subject matter jurisdiction.

prima facie defense. Rabbage, 5 Wash.App.2d at 298; Chehalis, 97 Wash. at 433; Topliff, 130 Wash.App. at 308.

As to the requirement that a party seek relief within a reasonable time, CR 60(b), the Court of Appeals and Trial Court correctly concluded that Lovick did not establish that she acted within a reasonable time because she waited almost five years and partially satisfied the Judgment before moving to vacate. In addition, as set out in the Opinion, this significant delay occurred after Lovick became aware of a procedural irregularity as of at least March 2019. Opinion, p. 10. As the Court of Appeals recognized, "while there is a preference for resolving cases on their merits, the timely pursuit of available remedies is generally a prerequisite to application of that preference." Id. Accordingly, the Court of Appeals did not err, and Lovick did not establish a basis for discretionary review.

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2. The Opinion Does Not Conflict With Other *Current* Appellate Decisions.

Lovick maintains that the Opinion conflicts with the Division III decision, Servatron, Inc. v. Intelligent Wireless Prods., Inc., 186 Wash.App. 666, 679, 346 P.3d 831 (2015) ("Servatron"), which she argues establishes that courts have a mandatory obligation to vacate a default judgment where the requisite notice was not provided or where the party is not in default.[4] Lovick's reliance is misplaced because as now recognized by Division III (and Division I), appellate decisions like Servatron misconstrue earlier case law. Orate, 11 Wash.App.2d at 813 (Division III); Rabbage, 5 Wash.App.2d at 300 (Division I).

Importantly, Division III recognized in Orate as follows:

> A string of Court of Appeals cases...have wrongly concluded that default judgments entered by courts, even courts with jurisdiction, are void….This error

[4] Lovick also relies upon Dep't of Lab. & Indus. v. Fowler, 23 Wash.App.2d 509, 532, n. 12, 516 P.3d 831 (2022), review denied, 200 Wash.2d 1027, 523 P.3d 1184 (2023), which is not applicable because the decision is limited to temporary restraining orders.

> appears to have started with *Shreve v. Chamberlin*, 66 Wash.App. 728, 731, 832 P.2d 1355 (1992), which misconstrued our Supreme Court precedent.

Orate, 11 Wash.App.2d at 813 (internal citations omitted). Therefore, the Opinion does not conflict with Division III decisions, as Lovick suggests.

It is true that Division II has not had occasion to revisit Shreve v. Chamberlin, 66 Wash.App. 728, 733, 832 P.2d 1355 (1992) ("Shreve"), which held that a default judgment must be vacated as a matter of right if entered without the requisite notice. However, Shreve does not justify review for several reasons. First, as Divisions I and III correctly recognize, cases like Shreve misapply this Court's precedent. Moreover, Shreve is outdated and merely reflects that, unlike Divisions I and III, Division II has not had occasion to revisit aging decisions like Shreve. Accordingly, the Opinion does not conflict with current appellate decisions to justify review.

3. The Court of Appeals Correctly Determined That Judgment Was Not Void Based Upon Alleged Due Process Violations.

In her Second Motion to Vacate, which was for all purposes an untimely motion for reconsideration, Lovick argued for the first time that the Order and Judgment violated her due process rights. The Trial Court and Court of Appeals disagreed, and the Court of Appeals correctly observed that Lovick could not merely characterize the error as a due process violation to avoid the Order and Judgment because doing so "does not change the analysis as to whether the judgment is void." Opinion, p. 7. Nonetheless, Lovick advances various arguments in Sections 4 and 5 of her Petition relating to purported due process violations.

However, a judgment or order are not void unless entered by a court without personal or subject matter jurisdiction. Ronald Wastewater 196 Wash.2d at 372-73; Rabbage, 5 Wash.App.2d at 298. Alleged due process violations are not jurisdictional issues and do not void a judgment. Rather, in the context of a motion to

vacate, and even where due process was allegedly denied, a party must still establish their right to relief under CR 60, including that they acted with due diligence. Topliff, 130 Wash.App. at 308. This requirement is consistent with the well-established rule that "[a] judgment that is void due to lack of jurisdiction can be vacated at any time, but a motion to vacate any other type of judgment must be brought within the time constraints of CR 60." Rabbage, 5 Wash.App.2d at 300 (emphasis added).

For example, in Topliff, the defendant, an insurer, did not receive notice of the lawsuit because the insurance commissioner failed to forward process. Topliff, 130 Wash.App. at 305. Despite the significant oversight, which was not attributable to any fault of the defendant, the court still required the defendant to satisfy the requirements for seeking relief pursuant to CR 60(b), including by moving for relief within a reasonable time, acting with due diligence, and establishing a prima facie defense. Id. at 306-8.

Initially, Lovick did not establish a due process violation because she was served with the Summons and Complaint, and lack of notice prior to entry of the Order and Judgment was attributable to her own failure to serve Reynolds. Moreover, even assuming that Lovick was deprived of her due process rights, the Court of Appeals correctly concluded that she must still establish her right to set aside and vacate the Order and Judgment. Topliff, 130 Wash.App. at 308.

Of course, Lovick did not satisfy her burden because, as set forth above, she did not move to vacate within a reasonable time as required by CR 60(b), act with due diligence as required for a motion brought pursuant to CR 60(b) and CR 55, or establish a prima facie defense as required for a motion brought pursuant to CR 60(b)(11). Lovick could not establish these elements to vacate the Order and Judgment in her First Motion to Vacate, which she filed on July 27, 2023. CP 70. Yet, Lovick's Second Motion to Vacate, in which she raised due process arguments for the first

time,[5] was filed two months later, on September 28, 2023. CP 221. The additional delay in Lovick filing her Second Motion to Vacate compounds the already unreasonable time for moving to vacate and further reflects that Lovick did not exercise due diligence. Therefore, the Court of Appeals correctly concluded that Lovick's alleged due process violations do not void the Order and Judgment, and Lovick has not established a basis for review by this Court.

4. The Court of Appeals Correctly Concluded That the Trial Court Did Not Abuse Its Discretion.

Without reference to any of the criteria required for review established by RAP 13.4, Lovick argues that the Trial Court abused its discretion by not vacating the Order and Judgment. However, Lovick does not offer any substantive explanation as to why the Trial Court abused its discretion. Moreover, the Trial Court cannot reasonably be said to have abused its discretion where Lovick

[5] Lovick's due process arguments are akin to the arguments raised in her First Motion to Vacate that the Order and Judgment were void and, alternatively, were subject to vacation pursuant to CR 60(b)(11). Therefore, the arguments still constitute an untimely motion for reconsideration and should be denied on this basis.

waited almost five years before moving to vacate, despite believing that the Order and Judgment were incorrectly obtained, threatening to reopen the lawsuit, and then partially satisfying the Judgment. The Trial Court and Court of Appeals correctly found that Lovick did not satisfy her burden to establish a basis to vacate the Order and Judgment. Accordingly, Lovick's vague catchall argument does not justify granting review.

Lovick also seems to suggest that the Order of Default should have been set aside even if the Judgment of Default was not. This result would be illogical and leave the Judgment fully enforceable. Therefore, the Court of Appeals also correctly concluded that Lovick would have to establish a right to vacate the Judgment to be entitled to relief.

F. CROSS-PETITION

The Note contains an attorney fee provision, which provides in relevant part that if the Note is in default "and is placed for collection," then Lovick "shall pay all reasonable costs of

collection and attorneys' fees." CP 43. In Washington, unilateral attorneys' fee provisions contained within a contract, such as the Note, are bilaterally enforceable in favor of the prevailing party. RCW 4.84.330. "For RCW 4.84.330 to apply: (1) the action must be 'on a contract or lease,' (2) the contract must contain a unilateral attorney fee or cost provision, and (3) there must be a 'prevailing party.'" Wachovia SBA Lending v. Kraft, 138 Wash.App. 854, 859, 158 P.3d 1271 (2007), aff'd sub nom. Wachovia SBA Lending, Inc. v. Kraft, 165 Wash.2d 481, 200 P.3d 683 (2009) (quoting RCW 4.84.330). For these purposes, the prevailing party is "the party in whose favor final judgment is rendered." RCW 4.84.330.

An award of attorneys' fees in favor of the prevailing party pursuant to RCW 4.84.330 is mandatory, although courts may exercise discretion as to the amount. Wachovia SBA Lending v. Kraft, supra, 138 Wash.App. at 859; see also Crest Inc. v. Costco Wholesale Corp., 128 Wash.App. 760, 772, 115 P.3d 349 (2005)

(providing that "RCW 4.84.330 mandates the award of fees to the prevailing party, with no discretion except as to the amount.").

Here, the Note contains a unilateral attorneys' fee provision, which allows Reynolds to recover all costs of collections and attorneys' fees. Thus, pursuant to RCW 4.84.330, the attorneys' fee provision establishes a nondiscretionary duty for the Trial Court to award Reynolds his attorneys' fees as the prevailing party. RCW 4.84.330.

Notwithstanding that Lovick never disputed the enforceability of the attorney fee provision at the Trial Court,[6] the Court of Appeals held that the Note merged with the Judgment and ceased to exist. Opinion, p. 16. Under this reasoning, the Court of Appeals held that Reynolds was not entitled to recover his attorneys' fees incurred in responding to Lovick's First and Second

[6] The "[f]ailure to raise an issue before the trial court generally precludes a party from raising it on appeal." New Meadows Holding Co. by Raugust v. Washington Water Power Co., 102 Wash.2d 495, 498, 687 P.2d 212 (1984) (internal citations omitted).

Motions to Vacate under the Note. Respectfully, the conclusion reached by the Court of Appeals incorrectly applies two appellate decisions, which justifies review pursuant to RAP 13.4(b)(2).

In particular, the Opinion relies upon Caine & Weiner v. Barker, 42 Wash.App. 835, 713 P.2d 1133 (1986) ("Caine") and Woodcraft Const., Inc. v. Hamilton, 56 Wash.App. 885, 786 P.2d 307 (1990) ("Woodcraft") for the authority that an attorney fee provision merges with the Judgment. However, Caine does not establish this strict of a rule and instead confirms a well-recognized exception to its general application:

> despite the general rule that underlying rights and obligations are extinguished by the judgment, the doctrine is designed to promote justice and should not be carried further than that end requires. 11 Am.Jur.2d *Bills & Notes* § 922 (1963); 50 C.J.S. *Judgments* § 599 (1947). Therefore, where the original obligation provides for special rights or exemptions, in some circumstances these may be preserved and recognized despite merger.

Caine, 42 Wash.App. at 837. Thus, Caine confirms that attorney fee provisions may survive merger where the provision was

intended to be preserved, and the Court of Appeals overextended Caine in concluding that the attorney fee provision within the Note automatically merged with the Judgment.

Unlike the attorney fee provision at issue in Caine, the Note here does not limit an award of attorneys' fees to the "suit." Instead, the Note authorizes an award for all fees incurred in connection with all "collection" efforts. Post-judgment activities, such as executing and defending a judgment, are inherently a component of collections because a party cannot collect where there is no judgment. Therefore, pursuant to Caine, the attorney fee provision contained within the Note was preserved and survives the judgment. Caine, 42 Wash.App. at 837.

Accordingly, the Opinion is inconsistent with Caine to the extent that the Court of Appeals concluded that Reynolds was not entitled to his attorneys' fees in responding to Lovick's First and Second Motions to Vacate. The misapplication and overextension

of Caine by the Court of Appeals warrants correction by the grant of discretionary review pursuant to RAP 13.4(b)(2).

G. CONCLUSION

For the foregoing reasons, Lovik does not present any basis to trigger Supreme Court review of her Petition. However, review of Reynolds' cross-petition should be accepted, and the Court should reverse the denial of Reynolds' attorneys' fees pursuant to the Note.

Pursuant to RAP 18.17(b), I certify that the foregoing Respondent/Cross-Appellant's Response to Petition for Review and Cross-Petition for Review consists of 4,429 words, exclusive of the title page, Table of Contents, Table of Authorities, Declaration of Service, signature block, and this Certificate of Compliance. RAP 18.17(c)(2).

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DATED this 14th day of August, 2024.

s/ Elizabeth Slattery

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DECLARATION OF SERVICE

SUZANNE M. COLLINS DECLARES AS FOLLOWS:

1. I am a paralegal with Wolf Lee Hurst & Slattery, PLLP, am over the age of 18, and make this declaration based upon personal knowledge and belief.

2. On August 14, 2024, I filed the foregoing Respondent/Cross-Appellant's Response to Petition for Review and Cross-Petition for Review via the Court's ECF system. A copy of this brief will also be e-mailed to the Pro Se Appellant/Cross-Respondent named below at the following e-mail addresses via the Court's ECF system:

Josanne B. Lovick
jblovick@hotmail.com

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my knowledge and belief.

August 14, 2024
Athol, Idaho

s/ Suzanne M. Collins
Suzanne M. Collins

WOLF LEE HURST & SLATTERY, PLLP

August 14, 2024 - 3:10 PM

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