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APPENDIX A

JRT
DMMIII
JSC

Judgment rendered June 29, 2022. Application for rehearing may be filed within the delay allowed by Art. 2166.

NO. 54,545-CA

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

******

GEORGE MATTHEW CULBERTSON AND SARAH ELIZABETH CULBERTSON
Plaintiffs-Appellants
vs.
WELLS FARGO USA HOLDINGS, INC., WELLS FARGO, N.A., WELLS FARGO HOME MORTGAGE, INC., STEVE RANNEY AND MATTHEW KRUEGER
Defendants-Appellees

******

Appealed from the
First Judicial District Court for the
Parish of Caddo, Louisiana
Trial Court No. 614,421

Honorable Michael A. Pitman, Judge

******

ALAN PESNELL LAWYER, LLC
By: W. Alan Pesnell
Counsel for Appellants

BURR & FORMAN, LLP
By: Christopher D. Meyer
Counsel for Appellees,
Wells Fargo, USA Holdings, Inc.,
Wells Fargo Bank, N.A.,
Wells Fargo Home Mortgage, Inc.

******

Before MOORE, COX, and THOMPSON, JJ

THOMPSON, J.

An active duty servicemember in the United States Air Force and his wife, who are entitled to certain protections afforded by the Servicemembers Civil Relief Act, signed a mortgage with Wells Fargo on a property they owned in Shreveport. Soon after signing the mortgage, the couple filed for bankruptcy. Whether any payments were made toward the mortgage is uncertain. Wells Fargo appeared in the bankruptcy proceedings and moved to have the property abandoned for purposes of eventual foreclosure. The couple moved to Florida and were granted a discharge under Chapter 7 bankruptcy laws. To date, Wells

Fargo has not foreclosed on the property, steadfastly asserting that the mortgage account remains subject to the protections of the federal Servicemembers Civil Relief Act. Despite no evidence of repayment of any of the debt, the servicemember and his wife filed suit, claiming ownership of the property due to Wells Fargo's failure to foreclose against them within five years of the abandonment of the property in the bankruptcy. They assert that their obligations under the mortgage are prescribed. We find that the mortgage account is subject to the protections of the Servicemembers Civil Relief Act, which tolls any state prescriptive period for the duration of one's active duty military service, and we affirm the trial court's ruling.

FACTS

To afford certain safeguards in civil litigation, including foreclosure proceedings for active duty members of the armed services, Congress enacted the Servicemembers Civil Relief Act ("SCRA"), which is a federal law designed to ease financial burdens on servicemembers during periods of active duty military service. 50 U.S.C. §§ 3901-4043.

50 U.S.C. § 3936 provides as follows:

§ 3936. Statute of limitations

> **(a) Toiling of statutes of limitation during military service** The period of a servicemember's military service may not be included in computing any period limited by

law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.

(b) Redemption of real property
A period of military service may not be included in computing any period provided by law for the redemption of real property sold or forfeited to enforce an obligation, tax. or assessment.

(c) Inapplicability to internal revenue laws
This section does not apply to any period of limitation prescribed by or under the internal revenue laws of the United States.

On September 19,2000, George Matthew Culbertson[1] began active duty military service in the United States Air Force. On May 17,2008, he and his wife, Sarah Culbertson, (hereinafter collectively referred to as "appellants") signed a mortgage with Wells Fargo on a home located at 202 Leland Drive, Shreveport, LA 71105. Wells Fargo funded the loan. Benefits under the SCRA were applied to appellants' account at the outset, due to Mr. Culbertson's status

[1]In the original lawsuit's caption, George Culbertson's last name is incorrectly spelled "Culberson." The correct spelling "Culbertson" will be used herein.

as active duty military when the mortgage was signed.

On February 17,2009, approximately 9 months after signing the mortgage on their house, appellants filed for bankruptcy in the United States Bankruptcy Court for the Western District of Louisiana. The record is not clear on whether the appellants ever made any effort to repay Wells Fargo. On October 27,2009, Wells Fargo moved the bankruptcy court to lift the automatic stay and to abandon the property, an important and mandatory first step required for Wells Fargo to begin the process of foreclosing on the property in an attempt to recover the money owed to it by appellants. On November 16,2009, by order of the bankruptcy court, the property was abandoned in the bankruptcy, which enabled Wells Fargo to take the next step in a foreclosure proceeding. To date. Wells Fargo has not taken any further action to foreclose on the property against the active duty servicemember, Mr. Culbertson.

On March 5, 2012, appellants were granted a discharge under Chapter 7. Their bankruptcy case was closed on April 30,2012.

On March 11, 2015, Wells Fargo sent Mr. Culbertson a letter with notice that his loan "was approved for SCRA benefits." Wells Fargo sent appellants similar letters over the course of the next few years. Wells Fargo continued its pattern of behavior and did not proceed further with any action to foreclose against the appellants.

On October 22,2018, appellants contacted Wells mortgage account beginning in 2008. The letter also stated that the mortgage account was currently receiving benefits under the SCRA. Wells Fargo did not appear eager to initiate foreclosure proceedings against an active duty member of the armed services. The letter provided: "If you would like us to initiate foreclosure proceedings our customer must execute the Servicemembers Civil Relief Act Waiver of Rights Form (Waiver of Rights)." The letter included the contact information for appellants to request a waiver of rights form. The letter concluded:

> We want to let you know a bankruptcy filing does not stop SCRA protections from continuing or being placed on the account. Even though you are not liable for the debt the lien is still valid and a foreclosure sale would need to be held. We apologize for any confusion this situation may have caused you.

The appellants do not claim to have executed a waiver of rights form, and the record does not indicate that Wells Fargo received a completed waiver of rights form from appellants.

On February 11,2019, appellants filed a petition for declaratory judgment in the Caddo Parish district court, alleging that the debt owed to Wells Fargo is prescribed pursuant to La C. C. art. 3498, and all rights under the mortgage are extinguished. La. C. C. art. 3498, and all rights under the mortgage are

extinguished. La. C.,C. art. 3498 is the Louisiana state law containing the prescriptive period for actions on negotiable and nonnegotiable instruments. La. C.C. art 3498 provides that actions on instruments, whether negotiable or not, and on promissory notes, whether negotiable or not, are subject to a liberative prescription of five years. This prescription commences to run from the day payment is exigible.

On January 27, 2021, appellants filed a motion for partial summary judgment, seeking summary judgment on the ownership of the house at issue, and an order declaring the Wells Fargo mortgage cancelled. On March 15, 2021, Wells Fargo filed a motion for summary judgment seeking dismissal of the appellants' claims with prejudice, arguing that the SCRA tolling provision applied to the mortgage. Wells Fargo asserted that the mortgage was not prescribed, even though foreclosure had not occurred.

On April 26, 2021, a hearing was held on the cross motions for summary judgment. Following arguments, the trial judge specifically noted the plain language of 50 U.S.C. § 3936, emphasizing that the period of a servicemember's military service may not be included in computing any statute of limitations. The trial judge stated: "[i]t's undisputed that Mr. Culbertson was a member of the United States Air Force when this property was purchased. [...] 50 U.S.C. § 3936 applies in this matter." At the conclusion of the hearing, the trial judge denied appellants' motion for partial summary judgment and granted Wells Fargo's motion for summary judgment, dismissing appellants'

action with prejudice. This appeal followed.

LAW AND DISCUSSION

Appellants assert two assignments of error:

Assignment of Error No. 1: **The trial court committed legal error in granting the summary judgment motion of Wells Fargo, by applying the provisions of 50 U.S.C. 3936.**

Assignment of Error No. 2: **The trial court committed legal error by failing to grant summary judgment in favor of Appellants.**

Appellate courts review motions for summary judgment *de novo*, using the same criteria that govern the district court's consideration of whether summary judgment is appropriate. *Peironnet v. Matador Res., Co.,* 12-2292 (La. 6/28/13), 144 So. 3d 791; *Bess v. Graphic Packaging Int'l Inc.*, 54, 111 (La. App. 2 Cir. 11/17/21). 331 So. 3d 490. A motion for summary judgment is a procedural device used when there is no genuine issue of material fact for all or part of the relief prayed for by a litigant. *Schultz v. Guoth,* 10-0343 (La. 1/19/11), 57 So. 3d 1002. The procedure is favored and shall be construed to secure the just, speedy, and inexpensive determination of actions. La. C.C.P. art. 966(A)(2).

A motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to

material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3). A fact is material if it potentially ensures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue of material fact is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. *Maggio* v. *Parker,* 17-1112 (La. 6/27/18), 250 So. 3d 874; *Jackson* v. *City of New Orleans,* 12-2742 (La. 1/28/14), 144 So. 3d 876, *cert, denied,* 574 U.S. 869,135 S. Ct. 197, 190 L.Ed. 2d 130 (2014); *Bess, supra.* In determining whether an issue is genuine, a court should not consider the merits, make credibility determinations, evaluate testimony, or weigh evidence. *Bess, supra: Chanler* v. *Jamestown Ins. Co.*, 51,320 (La. App. 2 Cir. 5/17/17), 223 So. 3d 614, *writ denied,* 17-01251 (La. 10/27/17), 228 So. 3d 1230.

Appellants argue the SCRA's provision regarding statutes of limitations, 50 U.S.C. § 3936, does not apply to appellants' mortgage. Therefore, Wells Fargo's failure to foreclose on the property within the five-year prescriptive period contained in La. C. C. art. 3498 extinguishes appellants' obligation under the mortgage, and they are the owners of the subject property. Appellants filed for relief in the bankruptcy court and surrendered the property at issue to the bankruptcy trustee. Appellants note that Wells Fargo appeared in the bankruptcy proceeding and requested that the property be abandoned for the express purpose of foreclosure, but never foreclosed on

the property. Appellants seem to argue that Mr. Culbertson's initiation of the bankruptcy proceedings constituted a "waiver" of his SCRA rights on the mortgage account. Further, appellants assert that once the abandonment of the property in the bankruptcy took place, the five-year prescriptive period contained in La. C. C. art. 3498 began to run. We disagree.

Appellants claim that at the point of abandonment of the asset by the bankruptcy court, there was no further impediment for Wells Fargo to foreclose. Appellants argue that a suit against the appellants personally was enjoined by bankruptcy law. Therefore, the foreclosure suit that Wells Fargo failed to initiated would be *in rem,* on the property itself, and not subject to any protection from the SCRA. Therefore, appellants claim that Wells Fargo could have proceeded with the foreclosure on the property *in rem,* and the protections of 50 U.S.C. § 3936 no longer applied to appellants. Appellants discount the property right they have in ownership of the subject property as well as their right to receive, as owners, any excess proceeds above the mortgage that would be generated from the foreclosure sale. The *in rem* limitation of Wells Fargo's rights benefit appellants, as it would stop Wells Fargo from collecting against them any deficiency between the mortgage balance and the foreclosure sale proceeds. The mortgage balance and the foreclosure sale proceeds. The opposite situation still exists in favor the appellants, as any foreclosure sale proceeds above the remaining balance of the mortgage would be payable to the appellants. What the appellants assert as a shield they also wield as a

sword.

Wells Fargo argues that the SCRA does apply to appellants' loan because Mr. Culbertson was, and still is, an active duty servicemember; he had been in active duty service for eight years prior to signing the mortgage with Wells Fargo. Wells Fargo contends that 50 U.S.C. § 3936 of the SCRA requires any applicable prescriptive period be tolled during a servicemember's active duty military service for any claim brought by or against a servicemember.

As Wells Fargo correctly notes, the SCRA's tolling command is "unambiguous, unequivocal, and unlimited." *Conroy* v. *Aniskoff,* 507 U.S. 511, 514, 113 S. Ct. 1562,1564,123 L. Ed. 2d 229 (1993). Further, the tolling provision is mandatory, and there are no exceptions to the straightforward reading of § 3936. The only critical factor is military service; once that circumstance is shown, the period of limitations is automatically tolled for the duration of the service. *See In Re Puckett*, 49,046 (La. App. 2 Cir. 4/17/14), 137 So. 3d 1264.

As noted above, a servicemember may waive the protections of the SCRA. 50 U.S.C. § 3918 provides, in pertinent part:

> **(a) In general**
>
> A servicemember may waive any of the rights and protections provided by this chapter. Any such waiver that applies to

an action listed in subsection (b) of this section is effective only if it is in writing and is executed as an instrument separate from the obligation or liability to which it applies. In the case of a waiver that permits an action described in subsection (b), the waiver is effective only if made pursuant to a written agreement of the parties that is executed during or after the servicemember's period of military service. The written agreement shall specify the legal instrument to which the waiver applies and, if the servicemember is not a party to that instrument, the servicemember concerned.

(b) Actions requiring waivers in writing

The requirement in subsection (a) for a written waiver applies to the following:

(1) The modification, termination, or cancellation of –

> (A) a contract, lease, or bailment; or
>
> (B) an obligation secured by a mortgage, trust, deed, lien, or other security in the nature of a mortgage.

The record contains no evidence that appellants executed a written waiver of the SCRA's protections. Appellants could have done so at any point over the past ten years. Wells Fargo sent appellants written correspondence on more than one occasion informing them of the protections on their account under the SCRA. Wells Fargo also made appellants aware of the requirement to waive their SCRA rights on the mortgage account *in writing,* even though they had filed bankruptcy and their personal obligation had been discharged. The trial court correctly found that until Mr. Culbertson waives his SCRA protections, the SCRA tolls the five-year prescriptive period for foreclosure contained in La. C. C. 3498.

We find that the appellants have failed to provide support for their contention that the SCRA does not apply to the mortgage at issue. Appellants cannot point to any law or jurisprudence that would provide an exception to the mandatory tolling provision of the SCRA in these circumstances. Further, it is clear from the record that appellants never executed a waiver of rights form, as required by 50 U.S.C. § 3918.

Appellants also fail to provide any support or applicable jurisprudence for their contention that the initiation of the bankruptcy proceedings constitutes a sufficient waiver of their SCRA rights on the mortgage account, or that a foreclosure proceeding would be *in rem* and not subject to the protections of the SCRA. Accordingly, the five-year prescriptive period contained in La. C. C. art. 3498 has been tolled on the

mortgage for the entirety of Mr. Culbertson's active duty military service. Wells Fargo's time to foreclose on the property has not prescribed, as the prescriptive period has not started to run. As such, the appellants' obligations on the mortgage have not been extinguished, and they are not the owners of the subject property. We find both of the appellants' assignments of error to lack merit. The trial court did not err in denying appellants' motion for partial summary judgment, granting Wells Fargo's motion for summary judgment, and dismissing appellants' action with prejudice.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of appeal are assessed to the Culbertsons.

AFFIRMED.

STATE OF LOUISIANA
COURT OF APPEALS, SECOND CIRCUIT
430 Fannin Street
Shreveport, LA 71101
(318) 227-3700

Michael A. Pitman
Judge, 1st JDC
501 Texas Street
Shreveport, LA 71101

William Alan Pesnell
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720 Murray Street
Alexandria, LA 71301

Christopher Daniel Meyer
BURR & FORMAN, LLP
190 E. Capitol St., Ste. M-100
Jackson, MS 32901

Mike Spence
Clerk of Court, Caddo Parish
501 Texas Street, Room 103
Shreveport, LA 71101

NOTICE OF JUDGMENT AND
CERTIFICATE OF MAILING

June 29, 2022

DOCKET Number: CA 21-54545

GEORGE MATTHEW CULBERTSON
AND SARAH ELIZABETH CULBERTSON

VERSUS

WELLS FARGO USA HOLDINGS, INC.
WELLS FARGO, N.A., WELLS FARGO
HOME MORTGAGE, INC., STEVE RANNEY,
AND MATTHE KRUEGER

NOTICE IS HEREBY GIVEN that the attached judgment and written opinion was rendered this date and a copy was mailed to the trial judge, the trial court clerk, all counsel of record and all parties not represented by counsel as listed above.

FOR THE COURT

Clerk of Court

APPENDIX B

IN THE FIRST JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF CADDO
STATE OF LOUISIANA

GEORGE MATTHEW CULBERTSON
AND SARA ELIZABETH CULBERTSON

VS. DOCKET NO. 614,421

WELLS FARGO USA HOLDINGS, INC.
WELLS FARGO, N.A., WELLS FARGO
HOME MORTGAGE, INC., STEVE
RANNEY AND MATTHEW KRUEGER

APPEARANCES:

FOR THE PLAINTIFFS:

W. ALAN PESNELL

FOR THE DEFENDANT:

CHRISTOPHER D. MEYER

PROCEEDINGS HAD in the above entitled matter before His Honor, MICHAEL A. PITMAN, Judge of the First Judicial District Court, in and for the Parish of Caddo, State of Louisiana, held on APRIL 26, 2021.

Reported by:

Kassi M. Cuff, CCR, CSR
Official Court Reporter

[DATE STAMP]
FILED
OCT 04 2021
/s/
Maggie Peterson
Deputy Clerk of Court
Caddo Parish

***

... because they didn't even know it was – they thought Wells Fargo had done what they were supposed to do, what they told the bankruptcy court they were going to do. So they hadn't been able to convert it to a rental property, they haven't been able to insure it, they've been on the hook for personal liability, and, you know, we're still there. We tried to insure it, but because of this court fight, we couldn't get an insurance company to take it. And right now there is a squatter sitting out there that I've got to go evict. They're paying legal fees that. So to say that they didn't have any reliance or any damages done by that reliance is - - which they didn't say, but I mean, you know, laches applies, Judge. They've waited 12 years. Prescription applies to that asset. As we cited to you in the Bankruptcy Code, when they close that bankruptcy case, all equitable rights revert to the debtor, including inchoate rights. So we think it applies, as we don't think that the action at issue that should have been filed in 2009 or 2010 has anything to do with Section 3936, it's an in rem action.

THE COURT: Thank you.

MR. PESNELL: Thank you.

THE COURT: All right. This is a very interesting argument on a very specific federal statute. It is 50USCA3936, and it reads as follows: The period of a service members military service may not be included, I want to emphasize the words, may not be included, in computing any period limited by law,

regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a state (or political subdivision of a state), or the United States, by or against the service member, or the service member's heirs, executors, administrators, or assigns, period, and quote.

It's undisputed that Mr. Culbertson was a member of the United States Air Force when this property was purchased. I certainly appreciate Mr. Pesnell's argument, but the Court finds in my - - in this Court's opinion that 50USCA3936 applies in this matter, and the Court will accordingly deny the plaintiff's partial motion for summary judgment, and grant the defendant's motion for summary judgment.

MR. PESNELL: Thank you, Judge. Note our objection to your ruling.

THE COURT: So noted.

MR. PESNELL: Judge, we also had a request to have this, whatever the order is, certified for an appeal, but you denied my partial and granted his so we're out of here, so I take it that's moot.

THE COURT: All right.

MR. MEYER: Judge, I'll prepare the judgment.

THE COURT: Okay Thank you.
(Proceedings concluded.)

APPENDIX C

FIRST JUDICIAL DISTRICT COURT
FOR THE PARISH OF CADDO,
STATE OF LOUISIANA

NO. 614-421-C DIVISION "C"

GEORGE MATTEW CULBERTSON and
SARA ELIZABETH CULBERTSON

WELLS FARGO USA HOLDINGS, INC.,
WELLS FARGO, N.A., WELLS FARGO
HOME MORTGAGE, INC., STEVE
RANNEY, and MATTHEW KRUEGER

FILED: _____ BY: _____
Deputy Clerk

JUDGMENT

The Motion for Partial Summary Judgment filed by Plaintiffs George Matthew Culbertson and Sara Elizabeth Culbertson, and Motion for Summary Judgment filed by Defendants Wells Fargo USA Holdings, Inc. and Wells Fargo Bank, N.A. (Wells Fargo Home Mortgage, Inc. is a division of Wells Fargo Bank, N.A. and is not a separate legal entity apart from Wells Fargo Bank, N.A.), came before this Court on April 26, 2021. Present were:

Alan Pesnell, attorney for George Culbertson and Sara Elizabeth Culbertson; and

Christopher D. Meyer, attorney for Wells Fargo USA Holdings, Inc. and Wells Fargo Bank, N.A.

After considering the law, the record, the evidence and the argument.

IT IS ORDERED, ADJUDGED, AND DECREED that the Motion for Partial Summary Judgment filed by Plaintiffs George Matthew Culbertson and Sara Elizabeth Culbertson is DENIED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment filed by Defendants Wells Fargo USA Holdings, Inc. and Wells Fargo Bank, N.A. is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all claims against the above represented Defendants are dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that each party shall bear its own costs.

Judgment rendered in open court at Shreveport, Louisiana on the 26th day of April, 2021.

Judgment signed in chambers at Shreveport, Louisiana on 21st day of May, 2021.

/s/
Judge Michael Pitman
1st Judicial District Court

PLEASE MAIL NOTICE OF THE SIGNING OF THIS JUDGMENT IN ACCORDANCE WITH LSA-C.C.P. ART. 1913 TO:

GEORGE MATTHEW CULBERTSON AND SARA ELIZABETH CULBERTSON, THROUGH THEIR ATTORNEY OF RECORD
MR. W. ALAN PESNELL
120 EAST MARK STREET
MARKSVILLE, LA 71351

WELLS FARGO USA HOLDINGS, INC. AND WELLS FARGO BANK, N.A. THROUGH THEIR ATTORNEY OF RECORD
CHRISTOPHER D. MEYER
BURR & FORMAN, LLP
190 EAST CAPITOL STREET, SUITE M-100
JACKSON, MISSISSIPPI 39201

RULE 9.5 CERTIFICATE

I certify that I circulated this proposed judgment to counsel for all parties by electronic mail on May 6, 2021 and that

_X_ no opposition was received or ✓
____ the following opposition was received.

I have allowed at lease five (5) working days before presentation to the court.

Certified this 14th day of May, 2021.

/s/ Christopher D. Meyer
Christopher d. Meyer

CERTIFICATE OF NOTICE OF JUDGMENT

GEORGE MATTHEW CULBERTSON, ET AL
VS.
WELLS FARGO USA, HOLDINGS INC., ET AL

NO. 614421-C
STATE OF LOUISIANA
PARISH OF CADDO
FIRST JUDICIAL DISTRICT COURT

I HEREBY CERTIFY THAT ON THIS DAY A NOTICE OF THE ATTACHED JUDGMENT WAS MAILED BY ME, WITH SUFFICIENT POSTAGE TO:

BURR & FORMAN LLP
190 E. CAPITOL STREET, SUITE M-100
JACKSON, MS 39201

DONE AND SIGNED ON MAY 26, 2021.

/s/
DEPUTY CLERK

CERTIFICATE OF NOTICE OF JUDGMENT

GEORGE MATTHEW CULBERTSON, ET AL
VS.
WELLS FARGO USA, HOLDINGS INC., ET AL

NO. 614421-C
STATE OF LOUISIANA
PARISH OF CADDO
FIRST JUDICIAL DISTRICT COURT

I HEREBY CERTIFY THAT ON THIS DAY A NOTICE OF THE ATTACHED JUDGMENT WAS MAILED BY ME, WITH SUFFICIENT POSTAGE TO:

PESNELL LAW FIRM
400 TRAVIS ST., STE. 100
SHREVEPORT, LA 71101

DONE AND SIGNED ON MAY 26, 2021.

/s/
DEPUTY CLERK

APPENDIX D

B18J (Official Form 18J) (08/07)

United States Bankruptcy Court
Western District of Louisiana
Case No. 09-10462
Chapter 7

In re: Debtors*

George Matthew Culbertson
(known aliases: George M. Culbertson)
4913 Del Rio Trial
Wichita Falls, TX 76310
Social Security No: xxx-xx-0008

Sara Elizabeth Culbertson
(known aliases: Sara E. Culbertson)
4913 Del Rio Trial
Wichita Falls, TX 76310
Social Security No: xxx-xx-6374

Employer's Tax I.D. No.(s). *[if any]*:

DISCHARGE OF DEBTORS

It appearing that the debtors are entitled to a

*Set forth all names, including trade names, used by the debtor within the last 8 years. (Federal Rule of Bankruptcy Procedure 1005). For joint debtors, set forth the last four digits of both Social Security numbers.

discharge,

IT IS ORDERED

The debtors are granted a discharge under section 727 of title 11, United States Code, (the Bankruptcy Code).

BY THE COURT

Dated: 3/5/12 /s/ Stephen v. Callaway
United States Bankruptcy Judge

SEE THE BACK OF THIS ORDER FOR IMPORTANT INFORMATION.

Official Form 18J continued (08/07)

EXPLANATION OF BANKRUPTCY DISCHARGE IN A JOINT CHAPTER 7 CASE

This court order grants a discharge to the persons named as the debtors. It is not a dismissal of the case and it does not determine how much money, if any, the trustee will pay to creditors.

Collection of Discharged Debts Prohibited

The discharge prohibits any attempt to collect from the named debtors a debt that has been discharged. For example, a creditor is not permitted to contact a debtor by mail, phone, or otherwise, to file or continue a lawsuit, to attach wages or other property, or to take any other action to collect a discharged debt from the debtors. A creditor who violates this order can be required to pay damages and attorney's fees to the debtors.

However, a creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the debtors' property after the bankruptcy, if that lien was not avoided or eliminated in the bankruptcy case. Also, a debtor may voluntarily pay any debt that has been discharged.

Debts That are Discharged

The chapter 7 discharge order eliminates a debtors' legal obligation to pay a debt that is

discharged. Most, but not all, types of debts are discharged if the debt existed on the date the bankruptcy case was filed. (If this case was begun under a different chapter of the Bankruptcy Code and converted to chapter 7, the discharge applies to debts owed when the bankruptcy case was converted.)

Debts that are Not Discharged,

Some of the common types of debts which are not discharged in a chapter 7 bankruptcy case are:

a. Debts for most taxes;
b. Debts incurred to pay nondischargeable taxes (in a case filed on or after October 17, 2005);
c. Debts that are domestic support obligations;
d. Debts for most student loans;
e. Debts for most fines, penalties, forfeitures, or criminal restitution obligations;
f. Debts for personal injuries or death caused by the debtor's operation of a motor vehicle, vessel, or aircraft while intoxicated;
g. Some debts which were not properly listed by the debtor;
h. Debts that the bankruptcy court specifically has decided or will decide in this bankruptcy case are not discharged;

i. Debts for which the debtor has given up the discharge protections by signing a reaffirmation agreement in compliance with the Bankruptcy Code requirements for reaffirmation of debts; and

j. Debts owed to certain pension, profit sharing, stock bonus, other retirement plans, or to the Thrift Savings Plan for federal employees for certain types of loans from these plans (in a case filed on or after October 17,2005).

This information is only a general summary of the bankruptcy discharge. There are exceptions to these general rules. Because the law is complicated, you may want to consult an attorney to determine the exact effect of the discharge in this case.

APPENDIX E

SEAL

SO ORDERED.

SIGNED November 16, 2009

/s/
Stephen v. Callaway
United States Bankruptcy Judge

UNITED STATE BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

IN THE MATTER OF: CASE NO. 09-BK-10462

GEORGE MATTHEW CULBERTSON AKA
GEORGE M. CULBERTSON AND
SARA ELIZABETH CULBERTSON AKA
SARA E. CULBERTSON, Debtors

CHAPTER 13

WELLS FARGO FINANCIAL
AMERICA, INC., Mover

ORDER GRANTING RELIEF OF AUTOMATIC STAY

____CONSIDERING, the Motion to Life Stay and for Abandonment filed on behalf of WELLS FARGO FINANCIAL AMERICA, INC.

IT IS ORDERED that the automatic stay order proceeding under any other Chapter of the Bankruptcy Code to which this matter be converted, be lifted and the below described property be abandoned from the estate in order to permit Mover to foreclose on its security interest or to obtain ownership and/or possession through any other legal means as to the property located at 202 Leland Drive, Shreveport, Louisiana, 71105, all as more particularly described on the note and mortgage attached to the originally filed Motion.

IT IS FURTHER ORDERED that Mover is allowed to assert an unsecured deficiency claim after the sale of the property.

UPON GOOD CAUSE SHOWN, this Order is executory upon signing.

###

PREPARED AND SUBMITTED BY:

ROGERS & CARTER
4415 Thornhill Avenue
Shreveport, Louisiana 71137
(318) 861-1111

By: /s/ Kevin J. Payne
KEVIN J. PAYNE BAR #28717
ATTORNEY FOR MOVER

APPENDIX F

11/01/2022 "See News Release 047 for any Concurrences and/or Dissents."

THE SUPREME COURT OF THE
STATE OF LOUISIANA

GEORGE MATTHEW CULBERTSON AND SARAH ELIZABETH CULBERTSON

VS. NO. 2022-C-01159

WELLS FARGO USA HOLDINGS, INC., WELLS FARGO, N.A., WELLS FARGO HOME MORTGAGE, INC., STEVE RANNEY, AND MATTHEW KRUEGER

IN RE: George Matthew Culbertson - Applicant Plaintiff; Sarah Elizabeth Culbertson - Applicant Plaintiff; Applying For Writ Of Certiorari, Parish of Caddo, 1st Judicial District Court Number(s) 614,421, Court of Appeal, Second Circuit, Number(s) 54,545-CA;

November 01, 2022

Writ application denied.

SJC
JLW
JDH
JTG

WJC
JBM
PDG

Supreme Court of Louisiana
November 01, 2022
/s/
Chief Deputy Clerk of Court
For the Court

APPENDIX G

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

IN THE MATTER OF CASE NO. 09-BK-10462

GEORGE MATTHEW CULBERTSON A/K/A GEORGE M. CULBERTSON AND SARA ELIZABETH CULBERTSON AKA SARA E. CULBERTSON, Debtors

Chapter 13

WELLS FARGO FINANCIAL AMERICA, INC.
Mover

MOTION TO LIFT STAY
AND FOR ABANDONMENT

The motion of Wells Fargo Financial America, Inc. ("Mover") represents that:

1.

The above captioned Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code on or aboaut February 17, 2009.

2.

The Bankruptcy Court has jurisdiction over the proceeding pursuant to 28 U.S.C. § 1334, and 111 S.C. §362.

3.

In order to secure the payment, together with interest and attorney's fees, Debtor granted a security interest in favor of the holder of the contract on the property described on the Security Agreement. UCC-1 and/or Mortgage attached herein, said mortgage attaching to the debtor's principal residence located at 202 Leland Drive, Shreveport, Louisiana 71105, all as more particularly described on the attached note and mortgage.

4.

The Debtor's Chapter 13 Plan filed on February 17, 2009 and the two amended plans filed subsequently provide that the Debtors will surrender the real property to Mover.

5.

Mover has also been unable to verify current insurance on the collateral.

6.

Creditor should be allowed to pursue a deficiency claim for any balance remaining.

7.

The balanced on the account is $132,888.52, plus costs and fees.

8.

The Debtors value the real property at $120,000.00, according to Schedule A, which Mover only accepts for the purpose of the filing of this motion. Therefore, there is no equity in the property.

9.

The collateral is depreciating in value each month, and for that reason, Mover does not have adequate protection of its interest in the property.

10.

Mover shows that Debtor has no equity in the property.

11.

If Mover is not permitted to pursue the Debtor in State Court, it will suffer irreparable injury, loss and damage, and, accordingly, Mover seeks an order lifting the stay due to the Debtor's lack of any equity interest in the mortgaged property.

12.

Good Cause is shown for the motion to Life Stay Order to be executory upon signing.

WHEREFORE, Mover prays that after notice and hearing, the automatic stay presently in effect

pursuant to 11 U.S.C. §362 be lifted in order that it may proceed against Debtor in state court and be allowed to file a deficiency claim and the collateral be abandoned from the estate in order to permit Mover to foreclose on its security interest or to obtain ownership through any legal means and good cause is shown for the Motion to Life Stay Order to executory upon signing. As further relief, Mover prays that should this case be converted to a case under another Chapter, that any order obtained lifting the stay will be considered a matter of res judicata alleviating the need of Mover having to appear before this Court again to litigate this same issue.

ROGERS & CARTER
(A Professional Law Corporation)

/s/ Kevin J. Payne
By:_____

Fred A. Rogers, III	Bar #2080
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Stacy M. Young	Bar #19547
Kevin M. Payne	Bar #28717
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APPENDIX H

Copper Creek (Marysville) Homeowners Ass'n v. Kurtz

Court of Appeals of Washington, Division One
September 29, 2021, Oral Argument;
April 11, 2022, Filed
No. 82083-4-I

Reporter

21 Wn. App. 2d 605 * | 508 P.3d 179 ** | 2022 Wash. App. LEXIS 781 *** | 2022 WL 1074984

Copper Creek (Marysville) Homeowners Association, Respondent, v. Shawn A. Kurtz et al., Defendants, Wilmington Savings Fund Society, FSB, as Trustee, Appellant.

Subsequent History: Review granted by Copper Creek Homeowners Ass'n v. Wilmington Sav. Fund Soc'y, 2022 Wash. LEXIS 459 (Wash., Sept. 7, 2022)

Prior History: [***1] Appeal from Snohomish Superior Court. Docket No: 19-2-00052-8. Judge signing: Honorable Eric A Lucas. Judgment or order under review. Date filed: 10/16/2020.

Copper Creek (Marysville) Homeowners Ass'n v. Kurtz, 2022 Wash. App. LEXIS 58 (Wash. Ct. App., Jan. 18, 2022)

Core Terms

statute of limitations, installment, accelerate, trial court, personal liability, attorney's fees, lender, trust deed, default, bankruptcy discharge, foreclosure, maturity, installment note, limitations, six years, motion to dismiss, summary judgment, discharged, triggered, accrued, tolling statute, borrower,

nonjudicial foreclosure, promissory note, maturity date, trustee sale, discovery, notice, award of attorney's fees, prevailing party

Case Summary

Overview

HOLDINGS: [1]-A summary judgment quieting title in favor of the homeowners' association was improper because the trial court erred in determining that the statute of limitations rendered the deed of trust (DOT) unenforceable. The Servicemembers Credit Relief Act, 50 U.S.C.S. § 3936(a), tolled the period for any action to enforce the debt until the debtor, an active duty servicemember, was relieved of personal liability on the debt by the discharge in bankruptcy and, at that time, the statute of limitations began to run on any unpaid installments; the successor beneficiary could enforce the deed of trust, except to the extent the statute of limitations rendered any unpaid installments uncollectable; [2]-The court awarded the successor beneficiary attorney fees because it was the prevailing party. The contractual provision for attorney fees in the DOT supported an award on appeal.

Outcome

Judgment reversed and remanded.

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Governments > Legislation > Statute of Limitations > Time Limitations

View more legal topics

Entitlement as Matter of Law, Appropriateness

An appellate court reviews orders on summary

judgment de novo. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. When the underlying facts are undisputed, appellate courts review de novo whether the statute of limitations bars an action. The six year statute of limitations for an agreement in writing applies to enforcement of a deed of trust. More like this Headnote
Shepardize® - Narrow by this Headnote(1)
Business & Corporate Compliance > ... > Negotiable Instruments > Types of Negotiable Instruments > Promissory Notes
Real Property Law > Financing > Mortgages & Other Security Instruments > Definitions & Interpretation
Commercial Law (UCC) >
Negotiable Instruments (Article 3) > Enforcement > Persons Entitled to Enforcement
View more legal topics

Negotiable Instruments, Promissory Notes

A deed of trust creates a security interest in real property. A note is a separate obligation from the deed of trust. The note represents the debt, whereas the deed of trust is the security for payment of the debt. The security instrument follows the note that it secures. The holder of the promissory note has the authority to enforce the deed of trust because the deed of trust follows the note by operation of law. More like this Headnote
Recommended Source: 4 Powell on Real Property § 37.12 ; Mortgage Creation—Type...
Shepardize® - Narrow by this Headnote

Bankruptcy Law > ... > Automatic Stay > Scope of Stay

> Claims Against Estate Property
View more legal topics
Scope of Stay, Claims Against Estate Property
A bankruptcy petition triggers an automatic stay on proceedings to obtain possession or exercise control of property in the bankruptcy estate. This stays all creditor actions to enforce liens against the debtor's property, including commencement of a foreclosure action. Actions against the debtor are stayed until the earliest of case closure, dismissal, or discharge. 11 U.S.C.S. § 362(c)(2). The stay remains in effect against actions on the property of the estate until the property leaves the estate. § 362(c)(1). If the statute of limitations to enforce a claim expires during the bankruptcy stay, 11 U.S.C.S. § 108(c)(2) provides a 30 day window after lifting of the bankruptcy stay in which to file the claim.
More like this Headnote
Recommended Source: 5 Collier on Bankruptcy P 554.02 ; Abandonment of Property...
Shepardize® - Narrow by this Headnote
Bankruptcy Law > ... > Types of Claims > Secured Claims & Liens > Avoidance & Survival
Real Property Law > Bankruptcy > Discharge & Dischargeability
View more legal topics
Secured Claims & Liens, Avoidance & Survival

A defaulting debtor can protect himself from personal liability by obtaining a discharge in a Chapter 7 liquidation. Discharge of debts in bankruptcy extinguishes the personal liability of the debtor. But, the discharge extinguishes only the right of action

against the debtor in personam, leaving intact the option to enforce a claim against a debtor in rem. The Bankruptcy Code provides that a creditor's right to foreclose on secured property survives the bankruptcy. 11 U.S.C.S. § 522(c)(2). A lien on real property passes through bankruptcy unaffected. However, a stay remains in effect against actions on the property of the estate until the property leaves the estate. 11 U.S.C.S. § 362(c)(1).

More like this Headnote

Shepardize® - Narrow by this Headnote

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Installment Contracts

Commercial Law (UCC) > General Provisions (Article 1) > General Provisions > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

View more legal topics

Types of Contracts, Installment Contracts

The ability to enforce a breach of a promissory note depends on whether it is a demand or installment note. A demand promissory note is mature at its inception and is enforceable at any time. Therefore, the statute of limitations on a demand note runs from date of execution. By contrast, an installment note is payable in installments and matures on a future date. The statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it. A separate statute of limitation accrues and runs for each individual installment. The note holder has six years from default on an installment to enforce payment of that installment. The final six year period

to take action related to the debt begins to run at the date of full maturity. More like this Headnote
Shepardize® - Narrow by this Headnote
Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Installment Contracts
Real Property Law > Financing > Mortgages & Other Security Instruments > Definitions & Interpretation
View more legal topics

Types of Contracts, Installment Contracts

An installment note or the deed of trust securing it may include an option to accelerate the maturation date in case of breach of the contract. Upon acceleration, the entire balance becomes due and triggers the statute of limitations for all remaining installments. Acceleration of the maturity date of a promissory note requires an affirmative action that is clear, unequivocal, and effectively notifies the borrower of the acceleration. Default alone does not accelerate the note. Even if the provision in an installment note provides for the automatic acceleration of the due date upon default, mere default alone will not accelerate the note. More like this Headnote
Shepardize® - Narrow by this Headnote
Governments > Legislation > Statute of Limitations > Time Limitations
Real Property Law > Financing > Mortgages & Other Security Instruments > Definitions & Interpretation

Statute of Limitations, Time Limitations

Deed of trust remedies are subject to Wash. Rev. Code § 4.16.040, the six year statute of limitations. A debtor facing foreclosure can raise the statute of limitations

as a defense to the sale. Wash. Rev. Code § 7.28.300. To the extent that the statute of limitations runs on an underlying note, it also runs to the same extent on the enforcement of a deed of trust.
More like this Headnote
Shepardize® - Narrow by this Headnote
Governments > Legislation > Statute of Limitations > Time Limitations
Real Property Law > Financing > Mortgages & Other Security Instruments > Definitions & Interpretation
Statute of Limitations, Time Limitations
The proposition that the statute of limitations runs against enforcement of a deed of trust from the date of the last payment due prior to the debtor's discharge in bankruptcy is in error. Caselaw did not establish such a rule, nor has the Supreme Court of Washington; it is not the law in Washington. Federal cases, which are the source of that interpretation of Edmundson v. Bank of America, 194 Wn. App. 920, 378 P.3d 272 (2016), are in error. To the extent that unpublished state appellate cases have repeated the federal interpretation, they are also in error.
More like this Headnote
Shepardize® - Narrow by this Headnote(1)
Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Installment Contracts
Governments > Legislation > Statute of Limitations > Time Limitations
Types of Contracts, Installment Contracts
When recovery is sought on an obligation payable by installments, the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to

recover it. Missing a payment in an installment note does not trigger the running of the statute of limitations on the portions of the debt that are not yet due or mature.
More like this Headnote
Shepardize® - Narrow by this Headnote
Business & Corporate Compliance > ... > Negotiable Instruments > Discharge & Payment > Time for Payments
Discharge & Payment, Time for Payments
Default in payment alone does not work an acceleration to a note.
More like this Headnote
Shepardize® - Narrow by this Headnote
Bankruptcy Law > ... > Bankruptcy > Discharge & Dischargeability > Effect of Discharge
Governments > Legislation > Statute of Limitations > Time Limitations
Discharge & Dischargeability, Effect of Discharge
Edmundson v. Bank of America, 194 Wn. App. 920, 378 P.3d 272 (2016) does not stand for the proposition that bankruptcy discharge of personal liability of the debtor accelerates the obligation on an installment note or commences the statute of limitations on both the outstanding balance of the note and on enforcement of the deed of trust.
More like this Headnote
Shepardize® - Narrow by this Headnote(1)
Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Basis of Recovery
View more legal topics
Attorney Fees & Expenses, Basis of Recovery

Under Washington law, a trial court may grant attorney fees only if the request is based on a statute, a contract, or a recognized ground in equity. The question of whether there is a legal basis for award of attorney fees is an issue of law reviewed de novo.
More like this Headnote
Shepardize® - Narrow by this Headnote
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
View more legal topics
Standards of Review, Abuse of Discretion
An appellate court reviews the amount of attorney fees awarded for abuse of discretion. A trial judge is given broad discretion in determining the reasonableness of an award, and in order to reverse that award, it must be shown that the trial court manifestly abused its discretion.
More like this Headnote
Shepardize® - Narrow by this Headnote
Civil Procedure > Appeals > Costs & Attorney Fees
Appeals, Costs & Attorney Fees
A contractual provision for an award of attorney fees at trial also supports an award of attorney fees on appeal.
More like this Headnote
Shepardize® - Narrow by this Headnote
Headnotes/Summary
Summary
WASHINGTON OFFICIAL REPORTS SUMMARY
Nature of Action: A homeowners' association that held a lien for unpaid assessments on property subject to nonjudicial foreclosure filed suit against, inter alia, the trustee and successor beneficiary of the deed of

trust securing the owners' installment loan for lien foreclosure, restraint of the trustee's sale, wrongful foreclosure, and quiet title. After defaulting on the loan, the married owners had separated and discharged their personal liability for the loan in separate Chapter 7 bankruptcy proceedings.

Superior Court: The Superior Court for Snohomish County, No. 19-2-00052-8, Eric Z. Lucas, J., on October 16, 2020, entered a summary judgment quieting title in favor of the homeowners' association.

Court of Appeals: Holding that the trustee and successor beneficiary could enforce the deed of trust, except to the extent the six-year limitation period of RCW 4.16.040(1) rendered any unpaid installments uncollectable, because the bankruptcy discharges did not extinguish the debt, modify the schedule of payments, or accelerate the maturity date of the loan, the court reverses the judgment and remands the case for further proceedings.

Headnotes

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] Limitation of Actions > Statutory Provisions > Applicability > Review > Standard of Review.

Whether an action or proceeding is statutorily time barred is reviewed de novo if the underlying facts are undisputed.

[2] Limitation of Actions > Deeds of Trust > Nonjudicial Foreclosure > Limitation Period > Applicability.

The nonjudicial foreclosure remedy for enforcing a deed of trust is subject to the six-year limitation period of RCW 4.16.040(1) for actions on written contracts.

[3] Deeds of Trust > Nature > Relationship of Note and

Deed of Trust > Separate Enforcement.
A deed of trust creates a security interest in real property. In a transaction involving both a promissory note and a deed of trust securing the note, the note is a separate obligation from the deed of trust. The note represents the debt, and the deed of trust represents security for payment of the debt.
[4] Deeds of Trust > Enforcement > Party Entitled To Enforce > Holder of Note.
A holder of a promissory note evidencing an obligation secured by a deed of trust has the authority to enforce the deed of trust under ch. 61.24 RCW, as the deed of trust follows the note by operation of law.
[5] Limitation of Actions > Tolling Statute > Servicemembers Civil Relief Act.
Under 50 U.S.C. § 3936, the Servicemembers Civil Relief Act tolls statutory limitation periods in lawsuits involving the personal liability of active duty servicemembers.
[6] Deeds of Trust > Discharge in Bankruptcy of Underlying Personal Liability > Effect on Deed of Trust.
Under 11 U.S.C. § 522(c)(2), a creditor's right to foreclose on a debt secured by a deed of trust survives the debtor's discharge of the debt in a Chapter 7 bankruptcy proceeding. Under 11 U.S.C. § 524(a)(1), the discharge extinguishes only the right of action against the debtor in personam, leaving intact the option to enforce a claim against the debt in rem. However, under 11 U.S.C. § 362(c)(1), a stay remains in effect against actions on the property of the estate until the property leaves the estate.
[7] Limitation of Actions > Bills and Notes > Collection

> Limitation Period > Promissory Note > Installment Debt > Distinguished From Demand Obligation.

The ability to enforce a breach of a promissory note depends on whether it is a demand or installment note. A demand note is mature at its inception and is enforceable at any time. Therefore, the six-year limitation period of RCW 4.16.040(1) on enforcing repayment runs from the date of execution. By contrast, an installment note is payable in installments and matures on a future date. The six-year limitation period runs against each installment from the time it becomes due, i.e., from the time when an action might be brought to recover it. The final six-year period to take action related to the debt begins to run at the date of full maturity.

[8] Limitation of Actions > Bills and Notes > Collection > Limitation Period > Promissory Note > Installment Debt > Acceleration of Maturity > Effect.

When the maturity of a debt that is repayable in installments is accelerated, the entire remaining balance becomes due and the statutory limitation period on enforcing repayment is triggered for all remaining installments.

[9] Limitation of Actions > Bills and Notes > Collection > Limitation Period > Promissory Note > Installment Debt > Acceleration of Maturity > How Made > In General.

To accelerate the maturity of a debt that is repayable in installments, the creditor or holder of the note must take an affirmative action that is clear, is unequivocal, and effectively notifies the borrower of the acceleration. Mere default alone does not accelerate an installment note, even if a provision in the installment

note provides for automatic acceleration of the due date upon default.

[10] Limitation of Actions > Deeds of Trust > Nonjudicial Foreclosure > Defenses > Limitation Period.

A debtor facing nonjudicial foreclosure of a debt secured by a deed of trust can raise the six-year limitation period of RCW 4.16.040(1) as a defense to the trustee's sale. To the extent that the six-year limitation period runs on the underlying debt, it also runs to the same extent on enforcement of the deed of trust.

[11] Statutes > Construction > Authority > Judiciary > Federal Courts.

Federal courts have no authority to decide Washington law.

[12] Limitation of Actions > Deeds of Trust > Nonjudicial Foreclosure > Limitation Period > Promissory Note > Installment Debt > Discharge in Bankruptcy of Personal Liability > Effect.

A debtor's discharge in a bankruptcy proceeding of an installment debt secured by a deed of trust does not accelerate the maturity of the debt or commence the six-year limitation period of RCW 4.16.040(1) on both the outstanding balance of the note and enforcement of the deed of trust in a nonjudicial foreclosure proceeding.

[13] Costs > Attorney Fees > Basis for Award > In General.

Attorney fees may be awarded to a litigant only when authorized by a contract, statute, or recognized ground in equity.

[14] Costs > Attorney Fees > Grounds > Question of

Law or Fact > Review > Standard of Review.
Whether there is a legal basis for an award of attorney fees is a question of law that is reviewed de novo.
[15] Costs > Attorney Fees > Equitable Grounds > Reversal of Prevailing Party Status > Effect.
A trial court's award of attorney fees on equitable grounds need not be vacated when there is a change of the prevailing party on appeal.
[16] Costs > Attorney Fees > Amount > Review > Standard of Review.
An appellate court reviews the amount of attorney fees awarded for abuse of discretion.
[17] Costs > Attorney Fees > Amount > Reasonableness > Discretion of Court.
A trial court has broad discretion in determining the reasonableness of an attorney fee award. The trial court's decision will not be disturbed by a reviewing court absent a showing that the trial court manifestly abused its discretion.
[18] Costs > Attorney Fees > Contractual Right > On Appeal > In General.
A contractual provision for an award of attorney fees at trial also supports an award of attorney fees on appeal.
Appelwick, J. Pro Tem., delivered the opinion for a unanimous court.
Deeds of Trust > Nonjudicial Foreclosure > Limitation Period > Applicability.
Bills and Notes > Collection > Limitation Period > Promissory Note > Installment Debt > Distinguished From Demand Obligation.
Bills and Notes > Collection > Limitation Period > Promissory Note > Installment Debt > Acceleration of

Maturity > Effect.
Bills and Notes > Collection > Limitation Period > Promissory Note > Installment Debt > Acceleration of Maturity > How Made > In General.
Deeds of Trust > Nonjudicial Foreclosure > Defenses > Limitation Period.
Deeds of Trust > Nonjudicial Foreclosure > Limitation Period > Promissory Note > Installment Debt > Discharge in Bankruptcy of Personal Liability > Effect.
Counsel: Anne M. Dorshimer and Amy Edwards (of Stoel Rives LLP), for appellant.
Marlyn K. Hawkins and Samantha J. Brown (of Barker Martin PS), for respondent.
Judges: Authored by Marlin Appelwick. Concurring: Cecily Hazelrigg, Lori Smith.
Opinion by: Marlin Appelwick
Opinion
[*608] [**183]
¶1 Appelwick, J.* — Selene/Wilmington seeks reversal of summary judgment quieting title in favor of Copper Creek. Relying on Edmundson v. Bank of America, NA, 194 Wn. App. 920, 378 P.3d 272 (2016), the trial court determined the statute of limitations rendered the Selene/Wilmington deed of trust unenforceable. This was error.
¶2 The statute of limitations ran against the deed of trust only to the extent it ran against the underlying debt. The underlying debt was an installment debt. The statute of limitations accrued on each individual installment as it came due. Bankruptcy discharge of

*Judge Marlin J. Appelwick is serving as a judge pro tempore of the Court of Appeals pursuant to RCW 2.06.150.

the debtor did not extinguish the debt, modify the schedule of payments, or accelerate the maturity date. And, the lender did not accelerate the maturity date of the loan. **[***2]** The statute of limitations on each of the missed installments began running from the date they came due. Bankruptcy did not toll the statute of limitations. The discharge left intact the lender's option to enforce the debt against the property in rem. [*609]

¶3 However, the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. § 3936(a), tolled the period for any action to enforce the debt until the debtor, an active duty service member, was relieved of personal liability on the debt by the discharge in bankruptcy. At that time, the statute of limitations began to run on any unpaid installments. Selene/Wilmington may enforce the deed of trust, except to the extent the statute of limitations has rendered any unpaid installments uncollectable.

¶4 We reverse and remand for further proceedings.

FACTS

¶5 In 2007, Shawn and Stephanie Kurtz purchased real property with a note for $303,472 secured by a deed of trust (DOT).[1] Shawn was active duty in the

[1]CTX Mortgage Company LLC was the original beneficiary of the DOT. CTX assigned the DOT to J.P. Morgan Mortgage Acquisition Corporation in December 2013. In December 2018, J.P. Morgan Mortgage Acquisition assigned the DOT to JPMorgan Chase Bank, which immediately assigned it to Citibank NA as trustee for CMLTI Asset Trust. Citibank assigned the DOT to Wilmington Savings Fund Society as trustee for Pretium Mortgage Acquisition Trust in April 2019.

United States military at the time and continued to be an active duty serviceman until at least September 2020. The property was within the Copper Creek (Marysville) Homeowners Association, and the Kurtzes were obligated to pay annual assessments of $400.

¶6 In January 2008, Shawn and Stephanie **[***3]** separated and Stephanie moved out of the property. The Kurtzes stopped paying on the note in 2008 or 2009. Stephanie filed for Chapter 7 bankruptcy protection in February 2010. Stephanie included the property secured by the DOT on the bankruptcy schedule of creditors holding secured claims. On the debtor's statement of intention, Stephanie noted the mortgage and her intention to surrender the property. Stephanie did not claim the property as exempt. Stephanie received a bankruptcy discharge in June 2010. The note was among the claims discharged **[**184]** without payment. Stephanie's bankruptcy case was closed on June 18, 2010.

[*610]

¶7 The Kurtzes ceased payment of their annual assessment to Copper Creek in July 2010.

¶8 Shawn filed a separate Chapter 7 bankruptcy in March 2011. He identified the property secured by the DOT and his intention to surrender it. Shawn did not claim the property as exempt. Shawn also included Copper Creek as a creditor holding a secured claim for homeowners' dues in the amount of $1,826.50. His bankruptcy was discharged on July 13, 2011, and his

case closed on July 18, 2011.[2] The note was among the claims discharged without payment.

¶9 The property sat vacant and fell into disrepair. **[***4]** In November 2018, Copper Creek recorded a notice of claim of lien against the property for the $15,278.68 in assessments, fees, interest, and attorney fees and costs that had accrued on the property. Copper Creek filed for judicial foreclosure to recoup the delinquent assessments.[3] Copper Creek acknowledges that it named only the Kurtzes as defendants in the judicial foreclosure, omitting the lenders because its assessment lien was junior to the lender and it was not seeking to foreclose the lender's interest. Copper Creek requested appointment of a receiver to "obtain possession of the Lot, refurbish it to a reasonable standard for rental units, and rent the Lot or permit its rental to others." In April 2019, Copper Creek and the Kurtzes entered an agreed order with the court for appointment of a custodial receiver. Copper Creek recorded the order appointing the receiver with Snohomish County Superior Court. The receiver spent $22,470.24 rehabilitating the property and began renting it at fair market value.

¶10 Shortly after completion of the repairs to the

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[2]Because the record does not include whether the secured property was abandoned by the bankruptcy court prior to closure, we assume the protective injunction ended upon closure of the bankruptcy case. See 11 U.S.C. § 362(c)(1).

[3]Shawn was still an active service member when Copper Creek filed for judicial foreclosure. He does not appear to have challenged the suit; instead he agreed to receivership. The validity of Copper Creek's judicial foreclosure action is not before us.

property, Quality Loan Service Corporation of Washington (QLS) **[*611]** as trustee commenced nonjudicial foreclosure on the property on behalf **[***5]** of successor beneficiary Wilmington Savings Fund Society FAB and loan servicer Selene Finance LP (together "Selene/Wilmington"). On October 30, 2019, QLS provided a notice of trustee sale of the property to Copper Creek. In February 2020, Copper Creek notified QLS that enforcement of the DOT was barred by the statute of limitations and demanded discontinuation of the sale. QLS refused and Copper Creek filed a motion to restrain the sale.

¶11 Copper Creek also filed a complaint against the Kurtzes, Selene/Wilmington, and QLS for lien foreclosure, restraint of the trustee sale, wrongful foreclosure, and quiet title.[4] In April 2020, Selene/Wilmington filed a CR 12(b)(6) motion to dismiss the action to quiet title for lack of standing. Prior to a ruling on that motion, Copper Creek received a deed in lieu of foreclosure from the Kurtzes that was recorded with the county on June 10, 2020.

¶12 In May 2020, Selene/Wilmington contacted Shawn and Stephanie and asked if they would execute a waiver of the statute of limitations on the underlying loan: "Given that you both seem to have moved on from the Property now, executing such a document likely

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[4]Shawn was still an active duty service member at the time of this lawsuit. Arguably, the SCRA barred this action as against him. The issue of the SCRA's application to these claims is not before us. Moreover, the issue became moot when Copper Creek received the deed in lieu of foreclosure and the Kurtzes were no longer party to the suit.

wouldn't impact you much, if at all, but i[t] could help my client **[***6]** in the underlying litigation, and we'd be willing to give you something in exchange for your trouble." Shawn refused and notified Copper Creek of the request.

¶13 In June 2020, Copper Creek moved to continue the sale and the motion to dismiss. The trial court granted Copper Creek's motion, **[**185]** continuing both the trustee sale and the motion to dismiss to allow the parties time to conduct discovery. The court entered an order compelling discovery with a deadline of July 7, 2020 and awarded attorney fees to Copper Creek. QLS then canceled the sale.

[*612]

¶14 Copper Creek requested and received leave to amend its complaint to reflect its standing through the deed in lieu of foreclosure. Selene/Wilmington did not comply with discovery requests by the deadline. On July 10, 2020, QLS provided notice of trustee sale on the property to be conducted in October 2020. Copper Creek moved to enjoin the sale, and the trial court granted the motion.

¶15 Copper Creek requested an additional continuance on the motion to dismiss and moved for default judgment due to Selene/Wilmington's failure to provide discovery or file an answer to the amended complaint. In support of its motion to dismiss, Selene/Wilmington argued that **[***7]** because the property formerly belonged to a member of the United States military, the SCRA applied to toll the statute of limitations on the DOT. After oral argument on several competing motions, the trial court denied Selene/Wilmington's motion to dismiss and awarded Copper Creek attorney

fees. The court expressed concern about Selene/Wilmington's "bad faith compliance with the rules in terms of discovery." In an attempt to force Selene/Wilmington to complete discovery, the court entered an order of default against Selene/Wilmington that would "enter on August 14, 2020 unless an order striking this default is entered by this court before said date." Selene/Wilmington answered the complaint, and the parties stipulated to strike the order of default.

¶16 Copper Creek then filed a motion for summary judgment. Selene/Wilmington opposed the summary judgment and filed a *CR 12(c)* motion for judgment on the pleadings. After oral arguments, the trial court granted the summary judgment and quieted title in Copper Creek. The court struck Selene/Wilmington's motion for judgment on the pleadings as a *CR 11* sanction. The trial court also awarded reasonable attorney fees to Copper Creek under *RCW 4.84.185*, the contractual attorney **[***8]** fee provision in the DOT, and also "as a matter of equity because [of Selene/Wilmington's] bad faith and misconduct shown repeatedly throughout this **[*613]** case." The court subsequently entered a judgment against Selene/Wilmington for $96,779.09 in attorney fees.

¶17 Selene/Wilmington appeals the court's orders on summary judgment, motion to dismiss, and motion for judgment on the pleadings, and the judgment for attorney fees.

DISCUSSION

[1, 2] ¶18 The trial court granted summary judgment quieting title as to Copper Creek, because the statute of limitations had run on enforcement of the DOT. We review orders on summary judgment de novo. *Kim v.*

Lakeside Adult Fam. Home, 185 Wn.2d 532, 547, 374 P.3d 121 (2016). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (citing CR 56(c))*. When the underlying facts are undisputed, we review de novo whether the statute of limitations bars an action. *Edmundson, 194 Wn. App. at 927-28*. The six year statute of limitations for an agreement in writing applies to enforcement of a DOT. *Id. at 927*; *RCW 4.16.040(1)*.

I. *Enforcement of the Deed of Trust*

[3, 4] ¶19 A DOT creates a security interest in real property. *Brown v. Dep't of Com., 184 Wn.2d 509, 515, 359 P.3d 771 (2015)*. A note is a separate obligation from the DOT. *In re Tr.'s Sale of Real Prop. of Burns, 167 Wn. App. 265, 272, 272 P.3d 908 (2012)*. The note represents the debt, whereas the DOT is the security **[***9]** for payment of the debt. *See id*. The security instrument follows the note that it secures. *Deutsche Bank Nat'l Tr. Co. v. Slotke, 192 Wn. App. 166, 177, 367 P.3d 600 (2016)*. "The holder of the promissory note has the authority to enforce the deed of trust because the deed of trust follows the note by operation of law." *Winters v. Quality Loan* ***[**186]*** *Serv. Corp. of Wash., 11 Wn. App. 2d 628, 643-44, 454 P.3d 896 (2019)*.

[*614] A. The SCRA Tolled the Statute of Limitations on Enforcement of the Debt

[5] ¶20 Selene/Wilmington tried to enforce the terms of the note as secured by the DOT through nonjudicial foreclosure, which prompted Copper Creek to bring the action to quiet title. The trial court concluded that the

SCRA tolling provision did not apply to the foreclosure action, which allowed the statute of limitations to run on the DOT. The SCRA tolls statutes of limitations in lawsuits involving service members.[5]

> The period of a servicemember's military service may not be included in computing any period limited by law, regulation, or order for the bringing of any action or proceeding in a court, or in any board, bureau, commission, department, or other agency of a State (or political subdivision of a State) or the United States by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns.

50 U.S.C. § 3936(a).

¶21 Shawn appears to have defaulted on the note in 2008 or **[***10]** 2009. The parties do not dispute that Shawn was an active duty service member until at least September 2020. As a result, the SCRA tolled any court action involving Shawn during his service. *50 U.S.C. § 3936(a)*. Bankruptcy discharge extinguished Shawn's personal liability on July 13, 2011. See *Johnson v. Home State Bank, 501 U.S. 78, 82-83, 111*

[5]Washington has an equivalent statute that provides, "The period of a service member's military service may not be included in computing any period limited by law, rule, or order, for the bringing of any action or proceeding in a court … by or against the service member or the service member's dependents, heirs, executors, administrators, or assigns." RCW 38.42.090(1).

S. Ct. 2150, 115 L. Ed. 2d 66 (1991). Without Shawn's personal liability, the debt, as evidenced by the note, was no longer enforceable against a service member. Without a service member's involvement, the SCRA ceased to toll the statute of limitations. As of July 14, 2011, the six year statute **[*615]** of limitations began running on enforcement of the unpaid installment.[6] See *id. at 84*.

B. Bankruptcy Did Not Extinguish the Secured Debt

[6] ¶22 The Kurtzes both filed for Chapter 7 bankruptcy. "A defaulting debtor can protect himself from personal liability by obtaining a discharge in a Chapter 7 liquidation." *Id. at 82-83*. Discharge of debts in bankruptcy extinguishes the "'personal liability of the debtor.'" *Id. at 83* (quoting *11 U.S.C. § 524(a)(1)*). So, the Kurtzes no longer had liability for the monthly installment payments on the note, past due or future,

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[6]The statute of limitations was tolled only because of the SCRA. Bankruptcy does not toll the statute of limitations. Hazel v. Van Beek, 135 Wn.2d 45, 64-66, 954 P.2d 1301 (1998); Merceri v. Deutsche Bank AG, 2 Wn. App. 2d 143, 148, 408 P.3d 1140 (2018). A bankruptcy petition triggers an automatic stay on "proceedings to obtain possession or exercise control of property in the bankruptcy estate." Merceri, 2 Wn. App. 2d at 148 (citing 11 U.S.C. § 362(a)(3)). This stays all creditor actions to enforce liens against the debtor's property, including commencement of a foreclosure action. Id. at 148-51. Actions against the debtor are stayed until the earliest of case closure, dismissal, or discharge. 11 U.S.C. § 362(c)(2). The stay remains in effect against actions on the property of the estate until the property leaves the estate. 11 U.S.C. § 362(c)(1). If the statute of limitations to enforce a claim expires during the bankruptcy stay, 11 U.S.C. § 108(c)(2) provides a 30 day window after lifting of the bankruptcy stay in which to file the claim. Merceri, 2 Wn. App. 2d at 148-49.

as of their respective discharge dates. But, the discharge extinguishes only the right of action against the debtor in personam, leaving intact the option to enforce **[***11]** a claim against a debtor in rem. *Id. at 84*. The Bankruptcy Code provides that a creditor's right to foreclose on secured property survives the bankruptcy. *Id. at 83*; *11 U.S.C. § 522(c)(2)*. A lien on real property passes through bankruptcy unaffected. *Dewsnup v. Timm, 502 U.S. 410, 418, 112 S. Ct. 773, 116 L. Ed. 2d 903 (1992)*. However, a stay remains in effect against actions on the property of the estate until the **[**187]** property leaves the estate. *11 U.S.C. § 362(c)(1)*.

[*616] C. *The Statute of Limitations Application to Promissory Notes*

[7] ¶23 The ability to enforce a breach of a promissory note depends on whether it is a demand or installment note. A demand promissory note is mature at its inception and is enforceable at any time. *Cedar W. Owners Ass'n v. Nationstar Mortg. LLC, 7 Wn. App. 2d 473, 483, 434 P.3d 554 (2019)*. Therefore, the statute of limitations on a demand note runs from date of execution. *4518 S. 256th, LLC v. Karen L. Gibbon, PS, 195 Wn. App. 423, 434, 382 P.3d 1 (2016)*. By contrast, an installment note is payable in installments and matures on a future date. *Merceri v. Bank of N.Y. Mellon, 4 Wn. App. 2d 755, 759, 434 P.3d 84 (2018)*. "[T]he statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to recover it." *Herzog v. Herzog, 23 Wn.2d 382, 388, 161 P.2d 142 (1945)*. A separate statute of limitations accrues and runs for each individual installment. *Edmundson, 194*

Wn. App. at 931. The note holder has six years from default on an installment to enforce payment of that installment. See *Merceri, 4 Wn. App. 2d at 759-60*. The final six year period to take action related to the debt begins to run at the **[***12]** date of full maturity. *Id. at 760*.

[8, 9] ¶24 An installment note or the DOT securing it may include an option to accelerate the maturation date in case of breach of the contract. *See 4518 S. 256th, 195 Wn. App. at 441*. Upon acceleration, the entire balance becomes due and triggers the statute of limitations for all remaining installments. *Id. at 434-35*. Acceleration of the maturity date of a promissory note requires an affirmative action that is clear, is unequivocal, and effectively notifies the borrower of the acceleration. *Id. at 435*. Default alone does not accelerate the note. *Id*. "[E]ven if the provision in an installment note provides for the automatic acceleration of the due date upon default, mere default alone will not accelerate the note." *A.A.C. Corp. v. Reed, 73 Wn.2d 612, 615, 440 P.2d 465 (1968)*. **[*617]**

[10] ¶25 DOT remedies are subject to RCW 4.16.040, the six year statute of limitations. *Merceri, 4 Wn. App. 2d at 759*. A debtor facing foreclosure can raise the statute of limitations as a defense to the sale. *Walcker v. Benson & McLaughlin, PS, 79 Wn. App. 739, 746, 904 P.2d 1176 (1995); RCW 7.28.300*. Applying the statute of limitations defense to nonjudicial foreclosure of a DOT based on past due installments, we held that recovery was allowed for the actionable installments but not for those made unenforceable by the six year statute of limitations. *Cedar W., 7 Wn. App. 2d at*

489-90. To the extent that the statute of limitations runs on the underlying note, it **[***13]** also runs to the same extent on the enforcement of a DOT. See *Walcker, 79 Wn. App. at 740-41*.

D. *Bankruptcy Discharge of Personal Liability on an Installment Note Does Not Modify the Payment Schedule or Accelerate the Maturity Date of the Note*

¶26 The trial court concluded that Selene/Wilmington was precluded from enforcing its DOT by the statute of limitations. It reached this conclusion by relying on *Edmundson* for the proposition that the statute of limitations runs against enforcement of a DOT from the date of the last payment due prior to the debtor's discharge in bankruptcy.[7] This was error. *Edmundson* did not establish such a rule. No Washington Supreme Court case has established such a rule. It is not the law in Washington. The federal cases, which are the source of that interpretation of Edmundson, are in error.[8] To the extent that unpublished **[*618] [**188]**

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[7]The trial court referenced Hernandez v. Franklin Credit Management Corp., which relied on Edmundson as discussed below. No. BR 18-01159-TWD, 2019 WL 3804138, 2019 U.S. Dist. LEXIS 136543 (W.D. Wash. Aug. 13, 2019) (court order), aff'd sub nom. In re Hernandez, 820 F. App'x 593 (9th Cir. 2020).

[8]These cases were also questioned in an article published by the Creditor Debtor Rights Section of the Washington State Bar Association. Jason Wilson-Aguilar, Does a Bankruptcy Discharge Trigger the Running of the Statute of Limitations on Actions to Enforce a Deed of Trust?, 37 Creditor Debtor Rts. Newsl., no. 1, Summer 2019, at 3-6, https://wsba.org/docs/default-source/legal-community/sections/cd/resources/creditor-debtor-rights-section-summer-2019-newslet

state appellate cases have repeated the federal interpretation, they are also in error.

¶27 The Edmundsons signed an installment note secured by a DOT in July 2007. *Edmundson, 194 Wn. App. at 923*. They failed to pay **[***14]** the November 1, 2008 installment and never made another payment. Id. The Edmundsons filed for Chapter 13 bankruptcy in June 2009. *Id*. Their bankruptcy plan was confirmed, and they were discharged on December 31, 2013. *Id*. The lender filed a notice of default on October 23, 2014, and a trustee sale was scheduled to satisfy the unpaid monthly obligations under the note and DOT. *Id*.

¶28 The Edmundsons sought to restrain the trustee's sale and quiet title to the property. *Id. at 924*. They argued the bankruptcy discharge of their personal liability on the note rendered the DOT unenforceable. Id. This court rejected the premise that the lien was discharged, stating, "In sum, nothing in this record and nothing under either federal or state law supports the conclusion that the discharge of personal liability on the note also discharges the lien of the deed of trust securing the note. The deed of trust is enforceable." *Id. at 927*.

¶29 The Edmundsons also argued under the *Walcker* case that the statute of limitations had begun to run on the DOT as of their first missed payment on the note on November 1, 2008. *Id. at 929*. And, since the

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ter.pdf?sfvrsn=af5e0cf1_4#:~:text=In%20contrast%20to%20Edmundson%20and,limitations%20under%20an%20installment%20note [https://perma.cc/7MPA-GE24].

statute of limitations had run before the lender attempted to enforce the note, the DOT **[***15]** was no longer enforceable. *Id*. However, we rejected the Edmundsons' and the trial court's reliance on *Walcker* for the proposition that the statute of limitations had run. *Id. at 928*. The *Walcker* case concerned failure to pay on a demand note. *79 Wn. App. at 741*. We noted that *Walcker* applied the six year statute of limitations, running **[*619]** from the date of execution of the note, and found the lender's efforts to foreclose on the DOT were barred as untimely. *Edmundson, 194 Wn. App. at 928-29*. But, because the Edmundsons' debt was an installment note, *Walcker* was inapplicable. *Id. at 929*.

¶30 We also rejected the Edmundsons' argument that no resort to remedies under the deeds of trust act, *ch. 61.24 RCW*, had occurred before the statute of limitations had run. *Id. at 930*. We concluded that the October 23, 2014 written notice of default was evidence of resort to remedies under the act. *Id*. Under the Edmundsons' theory, the statute of limitations began running November 1, 2008 and would have expired on October 31, 2014. *Id*. Thus, even under their timeline, the action on the DOT was not untimely. *Id. at 931*.

¶31 And, we rejected the Edmundsons' premise that the statute of limitations began to run on the full amount of the note from the first missed payment. *Id. at 931-32*. That argument contradicted settled law from the Washington **[***16]** Supreme Court: "'[W]hen recovery is sought on an obligation payable by installments, the statute of limitations runs against each installment from the time it becomes due; that is, from the time when an action might be brought to

recover it.'" *Id. at 930* (quoting *Herzog, 23 Wn.2d at 388*). Missing a payment in an installment note does not trigger the running of the statute of limitations on the portions of the debt that are not yet due or mature. ¶32 We then applied this rule to the individual payments the Edmundsons missed beginning with the November 1, 2008 payment and every successive payment due prior to the bankruptcy discharge that ended their personal liability on the note. *Id. at 931*. Because the nonjudicial foreclosure commenced October 23, 2013, "each of these missed payments accrued within six years of the resort to the remedies under the Deeds of **[**189]** Trust Act. The statute of limitations did not bar enforcement of the deed of trust for these missed payments." *Id*. (footnote omitted). Therefore, **[*620]** in the pending in rem nonjudicial foreclosure action, no portion of the debt was rendered unenforceable by the statute of limitations.

¶33 The trial court apparently believed that either the lender or the Edmundsons' bankruptcy had accelerated the note and triggered **[***17]** the statute of limitations on the entire debt. *Id*. But, "'[d]efault in payment alone does not work an acceleration.'" *Id. at 932 (quoting A.A.C. Corp., 73 Wn.2d at 616)*. While acceleration of the maturity of the note was an option for the creditor under the Edmundsons' DOT, we determined "there [was] no evidence that the lender accelerated the maturity date of the note," and "to the extent the trial court ruled that some event during the bankruptcy proceeding triggered [the acceleration] provision, the court is wrong." *Id. at 931-32*. "Accordingly … the statute of limitations for each monthly payment accrued as the payment became

due." *Id. at 932*.

[11] ¶34 The *Edmundson* opinion addressed the various issues through application of settled law. But, subsequent courts have interpreted *Edmundson* as announcing a new rule. The first manifestation of a new rule of law attributed to *Edmundson* came in *Jarvis v. Federal National Mortgage Ass'n, No. C16-5194-RBL, 2017 WL 1438040, 2017 U.S. Dist. LEXIS 62102 (W.D. Wash. Apr. 24, 2017*) (court order), **aff'd**, *726 F. App'x 666 (9th Cir. 2018)*. It observed,

> The last payment owed commences the final six-year period to enforce a deed of trust securing a loan. This situation occurs when the final payment becomes due, such as when the note matures or a lender unequivocally accelerates the note's maturation.

*Jarvis, 2017 WL 1438040, at *2, 2017 U.S. Dist. LEXIS 62102, at *6*. This much is settled Washington law. The decision goes on to say,

> It also occurs at the payment owed immediately **[***18]** prior to the discharge of a borrower's personal liability in bankruptcy, because after discharge, a borrower no longer has forthcoming installments **[*621]** that he must pay.[9] *See Edmundson, 194 Wn.*

[9]The mistaken idea that bankruptcy starts the clock on enforcement of the DOT appears to have originated with a lender's argument to the court in Silvers v. U.S. Bank National Ass'n, No. 15-5480 RJB, 2015 WL 5024173, at *4, 2015 U.S. Dist. LEXIS 112650, at *10 (W.D. Wash. Aug. 25, 2015) (court order). In its

*App. at 931; see also Silvers v. U.S. Bank Nat['l] Ass'n, [No. 15-5480 RJB,] 2015 WL 5024173, at *4[, 2015 U.S. Dist. LEXIS 112650, at *10 (W.D. Wash. Aug. 25, 2015) (court order)]*.

… .

… Because the Edmundsons owed no future payments after the discharge of their liability, the date of their last-owed payment kickstarted the deed of trust's final limitations period. …

… .

The Court agrees with Silvers'[s] and Edmundson's

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motion to dismiss, U.S. Bank acknowledged "there can be no doubt that the Deed of Trust lien survived the Chapter 7 bankruptcy." Without citation to supporting law, U.S. Bank made the assertion that the statute of limitations "began running the last time any payment on the Note was due," which was the payment immediately prior to discharge in bankruptcy. The court accepted U.S. Bank's argument and concluded, the statute of limitations on the right to enforce the Deed of Trust began running the last time any payment on the Note was due. The Plaintiffs remained personally liable on the Note (and successive payments continued to be due) until January 1, 2010, when they missed that [***19] payment; they received their Chapter 7 discharge on January 25, 2010. Accordingly, the statute of limitations to enforce the Deed of Trust lien began to run on January 1, 2010.

Silvers, 2015 WL 5024173, at *4, 2015 U.S. Dist. LEXIS 112650, at *10. Silvers was cited in briefing in the Edmundson case, but not mentioned, let alone adopted in Edmundson. And, Silvers could not have established new law as federal courts have no authority to decide Washington law. In re Est. of Stoddard, 60 Wn.2d 263, 270, 373 P.2d 116 (1962).

holdings. The discharge of a borrower's personal liability on his loan—the cessation of his installment obligations—is the analog to a note's maturation. In both cases, no more payments could become due that could trigger RCW 4.16.040's limitations period. …
Jarvis, 2017 WL 1438040, at *2-3, 2017 U.S. Dist. LEXIS 62102, at *6-10.
The court's conclusion was not dicta [because] it was necessary to deciding whether the creditor could foreclose on the Edmundsons' home, or whether they could sustain an action for quiet title.
[*622] Jarvis, 2017 WL 1438040, at *3, 2017 U.S. Dist. LEXIS 62102, at *9.
¶35 However, we did not purport to announce such a rule in Edmundson. We merely **[**190]** applied Herzog to the facts of the case. The Edmundsons missed monthly payments from November 1, 2008 through December 31, 2013 when their personal liability to make the payments ceased. *Edmundson, 194 Wn. App. at 931*. Our decision focused on whether any of those payments was no longer enforceable in the foreclosure action. The Edmundsons had not asserted that the bankruptcy discharge triggered the running of the statute of limitations on the entire debt. It would have done them no good. The foreclosure was commenced less than a year after the discharge in bankruptcy. It simply was not an issue before the court. And, we did not decide the issue expressly or in dicta.[10] Such a rule exists only in the inferences drawn

[10]Nor did we discuss the policy implications of such a rule in Edmundson. Such a rule implicates a number of policies that do

and stated in the federal decisions.

¶36 Such a rule would attribute to a bankruptcy discharge of the debtor more than relief from personal liability. It would mean the option of the lender to accelerate or not to accelerate the maturity date of the note was eliminated. **[***20]** It would mean that the payment schedule no longer applied and the maturity was accelerated. Affecting the lender's rights in a negative manner is not necessary to effect the **[*623]** purposes of the bankruptcy discharge. The federal district court decisions do not rely on any provision in the Bankruptcy Code as requiring such a result. We can find no bankruptcy provision that would do so.

¶37 Moreover, *Jarvis*'s explanation of the rule is

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not arise from nonpayment in a nonbankruptcy setting. The debtor may benefit by a shorter window in which the lien may be extinguished, or by living in the property for free while the lender forgoes foreclosure. As title holder, the debtor may be able to take advantage of market changes to sell the property for more than the lien amount if the lender is not forced for foreclose rapidly. The stability of land title records may be a concern. The debtor remains on the title pending foreclosure. The debtor can execute a deed in lieu of foreclosure to remove themselves from title. The sanctity of contract is raised by determining that discharge of personal liability on the installment note eliminates the lender's contraction option; it is a choice to accelerate or not to accelerate the maturity of the debt. The lender may find changing economic conditions make it more favorable to ultimate recovery to delay enforcement, though some portion of the debt may become uncollectable. This is not exhaustive of potential policy concerns. The important point is that we undertook no such policy analysis in Edmundson as would have been expected when announcing a new rule.

totally at odds with our rejection of the notion that the maturity of the loan was accelerated by the lender or by bankruptcy discharge. Id. at 932. Our opinion did not announce an "analog" rule. Rather, the federal district court arrived at this result through its misinterpretation of *Edmundson*.[11]

¶38 In 2019 another federal district court case added to the error. *Hernandez v. Franklin Credit Mgmt. Corp., No. BR 18-01159-TWD, 2019 WL 3804138, 2019 U.S. Dist. LEXIS 136543 (W.D. Wash. Aug. 13, 2019) (court order), aff'd sub nom. In re Hernandez, 820 F. App'x 593 (9th Cir. 2020)*. It observed,

In Edmundson, the Washington State Court of Appeals ruled that the six-year statute of limitations for enforcing a deed of trust payable in installments begins to accrue on each month that a borrower defaulted on a payment, until the borrowers' personal liability is discharged in a bankruptcy proceeding. The court of appeals reasoned that the statute of limitations does not continue to accrue after **[***21]** discharge because, at that point, installment payments are no longer due and owing under either the note or deed of trust. Several courts have adopted this legal

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[11]The next case, chronologically, cites to Jarvis and Edmundson for the rule but does not comment on it. Taylor v. PNC Bank, Nat'l Ass'n, No. C19-1142-JCC, 2019 WL 4688804, at *2, 2019 U.S. Dist. LEXIS 165678, at *4 (W.D. Wash. Sept. 26, 2019) (court order) ("the six-year statute of limitations period for enforcing a deed of trust payable in installments begins to accrue on each date that a borrower defaults on a payment until the borrowers' personal liability is discharged in a bankruptcy proceeding, as after that point no future installment payments will be due").

rule from *Edmundson. See U.S. Bank NA v. Kendall, [No. 77620-7-I,] slip. op. at 4 (Wash. Ct. App. [July 1,] 2019*) [(unpublished)] (noting that although a deed of trust's lien is not discharged in bankruptcy, the limitations period for an enforcement action "accrues **[**191]** and begins to run when the last payment **[*624]** was due" prior to discharge)[, *http://www.courts.wa.gov/opinions/pdf/776207.pdf, review denied, 194* Wn.2d 1024, 456 P.3d 394 (2020)]; *Jarvis v. Fed. Nat'l Mortg. Ass'n, No. C16-5194-RBL, Dkt. No. 47 at 6 (W.D. Wash. 2017), aff'd mem., 726 Fed. App'x. 666 (9th Cir. 2018*) ("The final six-year period to foreclose runs from the time the final installment becomes due … [which] may occur upon the last installment due before discharge of the borrower's personal liability on the associated note"). *Hernandez, 2019 WL 3804138, at *2-3, 2019 U.S. Dist. LEXIS 136543*, at *5-6 (emphasis added) (some alterations in original) (footnote and some citations omitted). Hernandez's source for the rule is clearly Jarvis, but the emphasized language is its own addition to the error.[12] No such statement is found in

[12]Notably, two unpublished Court of Appeals cases have picked up on the interpretation given to Edmundson by the federal district court. The first in time cited to Jarvis for the rule. Kendall, No. 77620-7-I, slip op. at 9 (noting that a DOT lien is not discharged in bankruptcy but the limitations period for an enforcement action "accrues and begins to run when the last payment was due" prior to discharge). The parties accepted that Edmundson stated the appropriate statute of limitations rule. Ultimately, the decision in the case did not turn on the issue.The second cited to Jarvis and Hernandez and incorporated language from those cases purporting to explain the rule. Luv v. W. Coast

the Edmundson opinion.
[12] ¶39 In Edmundson, this court did not say that bankruptcy discharge of liability on an installment note accelerates the maturity of the note. We did not say that the discharge kick-starts the running of the DOT **[***22]** final statute of limitations period. We did not say that discharge is an analog to acceleration and triggers the statute of limitations on the entire obligation. We did not say we were announcing any new rule. Rather, we simply applied settled law from *Herzog*, that the statute of limitations runs on each installment of a promissory note from the date it is due. *Edmundson, 194 Wn. App. at 931*.
[*625]
¶40 The federal district court cases rely solely on the *Edmundson* decision as the basis for the state law they apply. Their interpretation of *Edmundson* is erroneous.
¶41 *Edmundson* does not stand for the proposition that bankruptcy discharge of personal liability of the debtor accelerates the obligation on an installment note or commences the statute of limitations on both the outstanding balance of the note and on enforcement of the DOT. The trial court erred in relying on Edmundson for such a proposition.
E. The Statute of Limitation in This Case

Servicing, Inc., No. 81991-7-I, slip. op at 4-5 (Wash. Ct. App. Aug. 2, 2021) (unpublished) ("the six-year statute of limitations on the note was triggered on March 1, 2009, the date that Luv's last payment was due prior to his bankruptcy discharge"), https://www.courts.wa.gov/opinions/pdf/819917.pdf. The outcome of that opinion is contrary to the outcome here.

¶42 Under *Herzog* and *Edmundson*, the statute of limitations on *Kurtz*'s installment debt would have begun to run on each payment individually from its due date. Bankruptcy would not toll the statute of limitations. *Hazel v. Van Beek, 135 Wn.2d 45, 64-66, 954 P.2d 1301 (1998)*; *Merceri v. Deutsche Bank AG, 2 Wn. App. 2d 143, 148, 408 P.3d 1140 (2018)*. Here, the SCRA applied and tolled the statute of limitations until Shawn no longer had personal liability on the note. That occurred **[***23]** on July 13, 2011, the date of the discharge of his personal liability on the debt. The statute of limitations began to run on all of the past due installments from that date.

¶43 There is no evidence the lender exercised an option and accelerated the installment note. The trial court erroneously relied on *Edmundson* to conclude that Shawn's bankruptcy accelerated the note or triggered the statute of limitations on enforcing the DOT. The bankruptcy eliminated only Shawn's personal liability on the note. The debt, the note, and the payment schedule remain unchanged. The notice of nonjudicial foreclosure was given on October 20, 2019, prior to the November payment coming due. Any outstanding installments prior to November 2013 are not enforceable in the foreclosure action due to the six year statute of limitations. But, enforcement of the DOT was **[**192]** not barred as to the remainder due under the note.

[*626]

¶44 The trial court erred by quieting title in Copper Creek.

II. Attorney Fees

¶45 The trial court awarded Copper Creek attorney

fees and costs for the summary judgment and quieting title under multiple rules: *RCW 4.84.185* for frivolous defenses advanced without reasonable cause, the contractual attorney fee provision in the DOT (**[***24]** *RCW 4.84.330* and *RCW 4.28.328* for prevailing in a defense of a lis pendens), and equity based on *Selene / Wilmington*'s "bad faith and misconduct shown repeatedly and throughout this case." Selene/Wilmington argues the trial court erred by awarding attorney fees and costs to Copper Creek for its defense of the case and for responding to the motions to dismiss.

[13, 14] ¶46 "Under Washington law, a trial court may grant attorney fees only if the request is based on a statute, a contract, or a recognized ground in equity." *Gander v. Yeager, 167 Wn. App. 638, 645, 282 P.3d 1100 (2012)*. The question of whether there is a legal basis for award of attorney fees is an issue of law we review de novo. *Id. at 646*.

¶47 The DOT contains a mandatory attorney fee provision: "Lender shall be entitled to recover its reasonable attorneys' fees and costs in any action or proceeding to construe or enforce any term of this Security instrument." *RCW 4.84.330* makes this provision reciprocal: "[T]he prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements."

¶48 As a result of our decision, Copper Creek is no longer the prevailing party and cannot recoup attorney fees under the terms of the DOT. The court's **[***25]** additional reasons for the attorney fee award—*RCW 4.84.185 and 4.28.328*—also fail based on our decision

in favor of Selene/Wilmington. Copper Creek acquired its interest from Kurtz through the deed in lieu of foreclosure and is subject to the terms of the DOT. **[*627]** Selene/Wilmington is entitled to attorney fees at trial as the prevailing party under the DOT.

[15] ¶49 However, we do not set aside the award of attorney fees made by the trial court. The record is clear that the trial court strongly believed that an independent basis in equity justified the award of attorney fees. We agree. The change of prevailing party does not require vacating that equitable award.

[16, 17] ¶50 An appellate court reviews the amount of attorney fees awarded for abuse of discretion. *Ethridge v. Hwang, 105 Wn. App. 447, 460, 20 P.3d 958 (2001)*. "A trial judge is given broad discretion in determining the reasonableness of an award, and in order to reverse that award, it must be shown that the trial court manifestly abused its discretion." *Id*. Selene/Wilmington strongly opposed Copper Creek's motion for attorney fee, and specifically called attention to several billing entries it considered to be related only to the Kurtzes or QLS. The trial court reduced the amount of fees recoverable from the requested $113,430.80 **[***26]** to $96,779.09. It reviewed the billing and awarded attorney fees broken down by month. This was a proper exercise of the court's discretion.

[18] ¶51 Selene/Wilmington is the prevailing party on appeal. The contractual provision for an award of attorney fees in the DOT supports an award of attorney fees on appeal. *Edmundson, 194 Wn. App. at 920*. Therefore, we award attorney fees on appeal to Selene/Wilmington.

¶52 We reverse and remand for further proceedings.
Smith and Hazelrigg, JJ., concur.
Review granted at 200 Wn.2d 1001 (2022).
References
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