NO. 101047-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

John Earl Erickson and Shelley Ann Erickson,

Appellants

v.

Vanessa Power, et al.,

Respondents

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

Court of Appeals, Div. I, No. 82755-3-I

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I. INTRODUCTION

Appellants John and Shelley Ericksons' petition for review should be denied. The Court of Appeals properly affirmed the trial court's order granting summary judgment in favor of Respondents[1] (collectively "Stoel Rives") and denying the Ericksons' CR 56(f) motion. Likewise, the Court of Appeals properly denied the Ericksons' motion for reconsideration. The rulings are legally and factually sound and do not present issues warranting review by the Supreme Court.

Since 2010, the Ericksons have pursued legal actions in state and federal trial and appellate courts against the Trust[2] that holds their mortgage loan. In this case, the Ericksons assign blame to the Trust's loan servicer and outside counsel. All of the

[1] Respondents are Select Portfolio Servicing, Inc.; Stoel Rives LLP; and Vanessa Power, John Glowney, and Will Eidson. The Ericksons voluntarily dismissed their claims against Thomas Reardon and Lance Olsen.

[2] Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-4.

cases are based on the same facts and assert the same fundamental legal theories. All have failed.[3]

The Ericksons have not made a mortgage payment since July 2009. As a result, the Trust secured a judgment and decree of judicial foreclosure in 2015. The foreclosure judgment was affirmed on appeal, and this Court declined review in 2017. In an effort to circumvent the foreclosure judgment, in 2019 the Ericksons filed an action under CR 60 against the Trust, alleging fraud based on the theory that the Trust does not hold the original, endorsed-in-blank Note. That case was dismissed, affirmed on appeal, and review was denied by this Court.

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[3] *See Erickson v. Long Beach Mortg. Co.*, No. 10-cv-1423 MJP, 2011 WL 830727 (W.D. Wash. Mar. 2, 2011), *aff'd*, 473 F. App'x 746 (9th Cir. 2012); *Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-4 v. Erickson,* King County Superior Court Case No. 14-2-00426-5; 197 Wn. App. 1068 (2017) (unpublished), *rev. denied* 188 Wn.2d 1021 (2017); *Erickson v. Deutsche Bank as Trustee,* King County Superior Court Case No. 19-2-12664-7; 2021 WL 5564415, Case No. 81648-9-I (Wash. Ct. Appeals Nov. 29, 2021) (unpublished); *rev. denied,* 2022 WL 1415006, __ Wn.2d __ (May 4, 2022).

The Ericksons then filed suit against the Trust's service providers: its loan servicer and counsel. The Ericksons made the same factual and legal assertions rejected by multiple courts in prior proceedings. The only difference was an additional declaration, the Almanza Declaration, filed by the Ericksons after the close of briefing on summary judgment, which they claim is evidence of fraud on the court. The trial court specifically considered the Almanza Declaration, found no genuine issue of disputed fact supporting the fraud claim, and granted Stoel Rives' motion for summary judgment. The Court of Appeals affirmed on collateral estoppel grounds. The Court of Appeals' opinion is sound and does not warrant review. The petition should be denied.

II. STATEMENT OF THE CASE

On March 3, 2006, the Ericksons entered into a mortgage loan with Long Beach Mortgage Company (the "Note"). CP 2277-80. The Note was secured by a Deed of Trust. CP 2282-93. The Ericksons have made no payments on the Note since

July 2009.

A. ***Erickson I*: 2010 Federal Court Action.**

In 2010, the Ericksons sued the Trust and others in King County Superior Court, which was removed to federal court as *Erickson v. Long Beach Mortg. Co.*, No. 10-1423 MJP, 2011 WL 830727 (W.D. Wash. Mar. 2, 2011). The Ericksons claimed that the Trust could not produce the Ericksons' original Note. That claim was rejected by the District Court, which held that "[the Trust] provide[d] evidence demonstrating their ownership of the note, which the Ericksons do not credibly challenge." *Id.* The ruling was upheld by the Ninth Circuit. *See Erickson v. Long Beach Mortg. Co.*, 473 F. App'x 746 (9th Cir. 2012).

B. ***Erickson II*: 2014 Foreclosure Action.**

In 2014, the Trust filed a foreclosure action against the Ericksons in King County Superior Court to foreclose on the Note and Deed of Trust. *See* CP 2027-61 (*Deutsche Bank National Trust Co. as Trustee v. Erickson, et al.,* King County Superior Court Case No. 14-2-00426-5 KNT. The copy of the

Note that was attached to the complaint inadvertently did not include the back side of the third page of the Note, which reflects the Note was endorsed "in blank." The Trust corrected this by filing a complete copy of the Note in support of summary judgment. CP 2272-93.

At the summary judgment hearing, the Trust brought the original Note to court. To address the Ericksons' contentions of fraud and forgery, the hearing was continued to allow the Ericksons' forensic expert to inspect the Note. CP 2243:11 - 18 ("So here's what we're going to do: Mr. Kah has represented that his clients' document forensic examining expert is here, the note is here. I'm going to give you the opportunity to have him look at the note, as long as he doesn't alter it or destroy it in any way. I'm going to set this over. I don't normally do this in motions for summary judgment, but I'd really like to kind of resolve these issues.").

After the Ericksons' forensic expert inspected the Note, the hearing resumed a week later. CP 2246. On August 27, 2015,

summary judgment was granted in the Trust's favor and judgment and a decree of foreclosure was entered (the "Foreclosure Judgment"). CP 2193 - 2201.

The Court of Appeals affirmed the Foreclosure Judgment, and this Court denied review. *Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-4 v. Erickson*, 197 Wn. App. 1068 at *7-8 (2017) (unpublished) (holding collateral estoppel barred the Ericksons from arguing the Trust did not hold the original Note and finding "[e]ven if the Ericksons were not collaterally estopped from their substantive arguments, a holder of a note endorsed in blank is entitled to enforce that note" and because the Trust "presented an original, signed, endorsed in blank note at the summary judgment hearing, it was entitled to summary judgment and to enforce the note against the Ericksons."); *rev. denied,* 188 Wn.2d 1021 (2017).

C. ***Erickson III*: 2019 CR 60 Action.**

On May 13, 2019, the Ericksons filed a complaint seeking to set aside the Foreclosure Judgment under CR 60 and restrain a foreclosure sale. CP 2027-61. The case was stayed twice during the pendency and dismissal of separate bankruptcy filings by Shelley and John Erickson. *See In re Ch. 13 Bankruptcy Petition of Shelley Erickson,* U.S. Bankruptcy Court, W.D. Wash. Case No. 19-12026-TWD; *In re Ch. 13 Bankruptcy Petition of John Erickson*, U.S. Bankruptcy Court, W.D. Wash. Case No. 19-14143-CMA. The case was dismissed on summary judgment. CP 2063–66. The Court of Appeals affirmed, and this Court denied review. *See* 2021 WL 5564415, Case No. 81648-9-I (Wash. Ct. Appeals Nov. 29, 2021) (unpublished); *rev. denied*, 2022 WL 1415006, __ Wn.2d. __ (May 4, 2022).

D. ***Erickson IV*: 2020 Service Provider Action.**

The Ericksons filed this case on May 7, 2020, against the Trust's agents, including its loan servicer and counsel. CP 1–141. The Ericksons sought $10 million for "compensation and

recoupment" and asserted the very same claims against Stoel Rives that they asserted against the Trust in the 2019 action under CR 60.

After Stoel Rives moved for summary judgment, on the eve of the hearing, the Ericksons moved to disqualify the assigned judge and filed a CR 56(f) motion to continue the hearing. *See* CP 2394-2405. To avoid creating an issue for appeal, the assigned judge recused herself because she had entered the Foreclosure Judgment in 2015. *See* CP 2477-78.

Upon reassignment, the summary judgment hearing was rescheduled. Although briefing on summary judgment was closed, the Ericksons then made numerous additional filings including motions to strike evidence, supplemental declarations, various deposition notices of both parties and non-parties, exhibit lists, and supplemental opposition briefing. *See* CP 2445–59; 2460-063; 2465–66; 2467-73; 2480-81; 2486-87; 2492-94; 2495-2525; 2426-27; 2605-70; 2882-89; 2890-2900; 2901-3219; 3251-3415; 3428-32. The supplemental filings included the

Declaration of Jess Almanza, at issue on appeal here. *See* CP 2495-2525.

At the hearing, the trial court considered all pending motions and all evidence and filings submitted, including the Almanza Declaration. *See* CP 3508-15. The trial court denied the Ericksons' request under CR 56(f) as unsupported and granted summary judgment in favor of Stoel Rives. *Id.* The Court of Appeals affirmed and denied the Ericksons' motion for reconsideration.

III. ARGUMENT

A. The Ericksons' Petition Does Not Raise an Issue of Substantial Public Interest.

The Ericksons' attempt to articulate an issue of substantial public interest fails. The Ericksons contend Stoel Rives perpetrated fraud on the court by representing entities without the authority to foreclose. But the issue of the authenticity of the Note, and the authority of the Trust to foreclose on the Note, has been litigated and resolved multiple times over. In light of that, the Court of Appeals correctly affirmed the trial court's order

granting summary judgment for Stoel Rives on the basis of collateral estoppel. *See* Appendix 1 (Opinion) at pp. 10-14.

The Court of Appeals correctly found that collateral estoppel bars the Ericksons' claims because the claims rely on the same, previously-litigated allegation that the Trust does not hold the original Note and does not have standing to foreclose. Collateral estoppel prevents re-litigation of an issue after the party estopped has had a full and fair opportunity to present its case. *Hanson v. City of Snohomish,* 121 Wn.2d 552, 561, 852 P.2d 295 (1993). Collateral estoppel requires four elements: (1) identical issues; (2) a final judgment on the merits; (3) same parties or parties in privity; and (4) application of the doctrine must not work an injustice on the party against whom it is to be applied. *Hadley v. Maxwell,* 144 Wn.2d 306, 311-12, 27 P.3d 600 (2001).

In their petition for review, the Ericksons focus only on the fourth element. *See* Petition at 22-23. They contend that application of collateral estoppel would work an injustice

because: (a) the identity of Stoel Rives' client was previously "concealed;" and (b) they "newly-discovered" Mr. Almanza, whose signature endorsed the Note in-blank. *Id.* at 25-26. Neither assertion has merit.

Stoel Rives publicly represented the Trust (Deutsche Bank as Trustee) as counsel of record in both *Erickson II* and *Erickson III*. When the Ericksons named the Trust's loan servicer (Select Portfolio Servicing) as a party in this case, *Erickson IV*, Stoel Rives appeared as counsel of record. There has been no concealment, as the Ericksons contend. Regardless, as the Court of Appeals properly found, the "basis of this argument is that Deutsche Bank and its agents committed fraud by foreclosing without holding the note." Opinion at 12. "Final judgments entered in the previous cases already resolved this issue." *Id.* Not only is the assertion unsupported by the factual record, it is of no legal import.

The Ericksons also contend that the Court of Appeals erred by declining to reach the question of whether the Ericksons failed

to establish fraud, and in that context, declining to consider the Almanza Declaration. *See* Opinion at 14 n. 74 ("Because we can affirm on this ground [collateral estoppel] alone, we decline to reach the question of whether the Ericksons failed to establish fraud."); Opinion at 9 n. 50 ("Because we affirm on this basis [denial of CR 56(f)], we do not reach the trial court's conclusion that Almanza's declaration did not present a genuine issue of material fact."). There was no error, and there is no substantial issue of public interest.

Because collateral estoppel bars the Ericksons' claim against the Trust's agents, the Court of Appeals did not err in affirming dismissal on that ground alone. And the Court of Appeals properly affirmed the trial court's denial of the Ericksons' CR 56(f) motion. *See* Opinion at 5-9 (citing at n. 44 trial court's finding that the Ericksons did not "identify a single thing that you haven't been able to obtain in discovery [or] explain why you haven't been able to obtain it in discovery."). In doing so, the Court of Appeals did not need to consider the

Almanza Declaration or reach the trial court's conclusion that the declaration did not present a genuine issue of material fact." Opinion at 9 n. 50.

The ruling is wholly supported by the record. That is because the Ericksons have had ample time and opportunity to pursue this claim, over multiple cases and many years, but have opted not to do so until after-the-fact. Although the Ericksons have challenged authenticity of the Note since 2010, and have called into question the endorser since 2015, the Ericksons never pursued discovery until *after* summary judgment briefing in this case closed in 2021. *See* Opinion at 7-9; CP 3237-38 (Ericksons admit that they knew of the potential significance of Almanza during foreclosure action in **2015**); CP 2297 (Ericksons assert facts related to Almanza in opposition to summary judgment in CR 60 action in **2018**); CP 1929-30 (Ericksons identified Almanza as a potential witness in November **2020**). The trial court's denial of the Ericksons' CR 56(f) motion, and the Court of Appeals' ruling affirming that order, are sound. *See Bavand*

v. OneWest Bank, 196 Wn. App. 813, 821-22, 385 P.3d 233 (2016) (affirming trial court's denial of CR 56(f) motion); Opinion at 7-9 (detailing facts supporting denial of Ericksons' CR 56(f) motion).

Collateral estoppel does not work an injustice where, as here, the Ericksons have raised the identical claim four times. As the Court of Appeals correctly found, the Almanza Declaration is "merely an extension of the same argument and evidence presented in *Erickson III*." Opinion at 13. The Ericksons have had more than a full and fair opportunity to litigate their claim regarding authenticity of the note. The Ericksons identify no substantial public interest that warrants this Court's review.

B. The Ericksons' Petition Does Not Raise Significant Constitutional Issues.

The Ericksons' petition does not raise significant issues under the Washington Constitution. The Ericksons claim that their due process rights were violated by the Court of Appeals' resolution of the appeal on collateral estoppel grounds, without consideration of the Almanza Declaration. There was no error.

The Ericksons contend that the Court of Appeals erred because it "misapprehended the record of the proceedings for summary judgment in the Superior Court because the Superior Court did not grant summary judgment based on its denial of the Ericksons' CR 56(f) Motion to Continue Summary Judgment Proceedings" and that the Court of Appeals "overlooked the procedural fact that the Superior Court considered the [Almanza declaration] and concluded that the Declaration did not present a material issue of fact." *See* Petition at 29. The Ericksons are wrong.

The Opinion plainly addresses the trial court's disposition of the Almanza Declaration. At note 50, the Opinion states that "[b]ecause we affirm on this basis [collateral estoppel], we do not reach the trial court's conclusion that Almanza's declaration did not present a genuine issue of material fact." *See* Opinion at 9, n. 50. As such, the Court of Appeals did not, as the Ericksons argue, "misapprehend" the trial court's disposition of the Almanza Declaration. To the contrary, the Court of Appeals

addressed the Almanza Declaration in detail in the context of the CR 56(f) motion. *See* Opinion 8-9. The Opinion's disposition of the Almanza Declaration was proper and does not present a due process issue.

IV. CONCLUSION

The Court of Appeals properly affirmed the trial court's order granting summary judgment in favor of Stoel Rives, and denying the Ericksons' CR 56(f) motion. Likewise, the Court of Appeals properly denied the Ericksons' motion for reconsideration. The Ericksons provide no valid basis for this Court to grant review. Respondents respectfully request that the Court deny the Ericksons' petition.

This certifies that this Answering Brief contains 2621 words pursuant to RAP 18.17.

DATED: August 4, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2022, I caused the foregoing document to be e-filed with the Supreme Court of Washington, which will send electronic notice to:

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