NO. 90117-1



SUPREME COURT OF THE STATE OF WASHINGTON

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Respondent,

v,

RONALD & KATHLEEN STEINMANN,

Petitioners.

# RESPONDENT FEDERAL NATIONAL MORTGAGE ASSOCIATION'S ANSWER TO PETITION FOR REVIEW

Joshua B. Lane, WSBA #42192
Robert W. Norman, WSBA #37094
HOUSER & ALLISON, APC
1601 Fifth Avenue, Suite 850
Seattle, WA 98101
(206) 596-7838
Attorneys for Respondent Federal National Mortgage Association

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## I. INTRODUCTION

This case involves a disputed post-foreclosure eviction. Respondent Federal National Mortgage Association ("Fannie Mae") purchased the property of Petitioners Ronald and Kathleen Steinmann (the "Steinmanns") at a trustee's sale after the Steinmanns defaulted on their residential loan. Fannie Mae initiated this unlawful detainer action after the Steinmanns refused to vacate the property. The trial court granted Fannie Mae's motion for summary judgment and issued an order for writ of restitution.

The Steinmanns appealed, raising many issues not raised before the trial court and not preserved for appeal. The Court of Appeals affirmed, granted Fannie Mae's request for attorney's fees and costs, and denied the Steinmanns' subsequent requests to submit additional evidence and for reconsideration. The Steinmanns now seek discretionary review in this Court.

This Court's discretionary review is not warranted. The Court of Appeals' unpublished decision is fact-specific, entirely consistent with settled Washington law, and establishes no precedent. The Steinmanns

provide no reasonable argument to support their contention that the issues in this case present a conflict with a decision by the Supreme Court, a conflict with a decision of the Court of Appeals, or qualify as issues of substantial public interest requiring further guidance by this Court. Accordingly, this Court should deny review.

## II. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals properly award Fannie Mae its attorney's fees on appeal?

2. Did the Court of Appeals properly deny the Steinmanns' Motion to Add Additional Evidence?

3. Whether Fannie Mae is entitled to an award of attorney's fees and costs incurred in responding to the Steinmanns' Petition?

## III. RESTATEMENT OF THE CASE

### A. Foreclosure Proceedings.

In 2008, the Steinmanns refinanced their property and secured the loan with a deed of trust in favor of IndyMac Bank, F.S.B. Clerk's Papers ("CP") at 65. Two years later, the Steinmanns defaulted on their loan obligations. CP at 128. Regional Trustee Services Corporation (the

"Trustee") sent them default letters and a Notice of Trustee's Sale. CP at 114, 135. The February 2011 Notice of Trustee's Sale specifically provided the requisite notice:

> Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections *if they bring a lawsuit to restrain the same pursuant to RCW 61.24.130.* Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's Sale.

CP at 135 (emphasis added). This Notice was recorded with the Clark County Auditor, served, and published. CP at 127-29. The Trustee further notified the Steinmanns that their right to occupy the property would terminate 20 days after the sale. *Id.* Despite the notices, the Steinmanns neither sued to restrain the foreclosure nor made payments to reinstate their loan. CP at 116-17.

In June 2011, the Trustee held the Trustee's sale and conveyed the property by Trustee's deed to the highest bidder, Fannie Mae. CP at 86. Later that month, Fannie Mae sent the Steinmanns a 20-Day Notice to Quit, explaining that it had purchased the property at a Trustee's sale and was entitled to possession. CP at 8-12. The Steinmanns did not vacate the property. CP at 1.

**B. Fannie Mae's Unlawful Detainer Action.**

In September 2011, Fannie Mae filed a complaint for unlawful detainer against the Steinmanns. *Id.* The Steinmanns sought to defend against the action by claiming that the unlawful detainer was improper because the Trustee's sale was defective and Fannie Mae had no right to the property. CP at 104.

In January 2012, Fannie Mae moved for summary judgment, arguing that there were no genuine issues of material fact and that it was entitled to possession as a matter of law because (1) the only issue in an unlawful detainer action is possession and (2) the Steinmanns waived their opportunity to challenge the foreclosure sale by failing to enjoin it before it occurred. CP at 95. The Steinmanns responded that they did not realize the significance of the pending Trustee's sale and that they did not restrain it, partially because the California law firm that they hired took their retainer but did not help them. Also, the Steinmanns argued that there were genuine issues of material fact regarding the validity of the foreclosure sale and other issues. CP at 102.

In Kathleen Steinmann's summary judgment declaration, the Steinmanns admitted having received a Notice of Default in January 2011 and a Notice of Trustee's Sale in February 2011 but they claimed that no one ever told them that they needed to obtain a restraining order to prevent the Trustee's sale from occurring. The superior court granted Fannie Mae's motion for summary judgment and ordered that a writ of restitution issue granting Fannie Mae possession of the property. CP at 174. The Steinmanns appealed.

### C. The Court of Appeals Affirmed, Awarded Fees, and Denied Additional Evidence.

The Court of Appeals concluded that because the Steinmanns failed to restrain the foreclosure sale, they waived any objection to the foreclosure proceedings and their unlawful detainer action did not provide a forum for litigating claims to title. *Fannie Mae v. Steinmann*, No. 43133-5-II, slip op. at 8 (September 10, 2013). Finding that the Steinmanns offered no viable defense to the unlawful detainer action, the Court of Appeals affirmed the trial court's grant of summary judgment to Fannie Mae. *Id.*

The Court of Appeals granted Fannie Mae's request for attorney fees on appeal. *Id.* at 9. The Court of Appeals concluded that under RAP 18.1, Fannie Mae was entitled to its fees and costs on appeal pursuant to both the deed of trust executed by the Steinmanns and RCW 59.18.290(2). *Id.*

The Steinmanns filed a Motion for Reconsideration and a Motion to Add Additional Evidence. The Court of Appeals summarily denied both motions. *Fannie Mae v. Steinmann*, No. 43133-5-II, slip op. at 1 (March 4, 2014). The Steinmanns then filed their Petition for Review.

## IV. REASONS WHY REVIEW SHOULD BE DENIED

### A. The Court of Appeals' Unpublished Decision Applied Settled Law to Undisputed Facts.

This case involves straightforward application of settled principles of law to the undisputed relevant facts. The Court of Appeals was correct that Fannie Mae was (and is) entitled to fees on appeal under RAP 18.1, RCW 59.18.290(2), and the deed of trust. Courts have repeatedly held that under RAP 18.1(a), appellate courts may grant a party reasonable attorney fees or expenses if applicable law permits it. The Court of Appeals correctly held that RCW 59.18.290(2) allows an attorney's fees

award to a landlord who prevails in an unlawful detainer action, and that the deed of trust signed by the Steinmanns included a provision for attorney's fees, including appellate fees.

The Court of Appeals also correctly applied settled law when it denied the Steinmanns Motion to Add Additional Evidence. The Steinmanns concede that they "did not bring forward the document contained in its [sic] Motion to Add Additional Evidence until after the unpublished opinion was rendered by the Court of Appeals." Pet. at 6. Courts have repeatedly held that permitting a party to supplement the record under these circumstances undermines principles of finality and invades the province of the trial court. *Hollis v. Garwall, Inc.*, 88 Wn. App. 10, 17, 945 P.2d 717 (1997) *aff'd*, 137 Wn.2d 683, 974 P.2d 836 (1999) (*citing Washington Fed'n of State Employees, Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 884-885, 665 P.2d 1337 (1983)).

Finally, the Court of Appeals' unpublished decision properly rejected the Steinmanns' contention that they can seek relief from a Trustee's sale in a subsequent unlawful detainer action. *Fannie Mae v. Steinmann*, No. 43133-5-II, slip op. at 8 (September 10, 2013). The Court

of Appeals correctly determined that the Steinmanns waived any objection to the foreclosure proceedings.

### B. The Petition Does Not Identify Any Conflict Between the Court of Appeals' Decision and Any Supreme Court Decision.

This Court will accept a petition for review if the decision of the Court of Appeals is in conflict with a decision of this Court. RAP 13.4(b)(1). An award of fees pursuant to RAP 18.1 by the Court of Appeals is reviewed by the Supreme Court for an abuse of discretion. *See, e.g., In re Marriage of Pollard*, 99 Wn. App. 48, 56-57, 991 P.2d 1201 (2000); *MacKenzie v. Barthol*, 142 Wn. App. 235, 242, 173 P.3d 980 (2007).

Based on this standard, the Steinmanns contend that this Court should grant review of the Court of Appeals' award of attorney fees to Fannie Mae because the decision purportedly conflicts with decisions of this Court. In support of this argument, the Steinmanns cite to three Washington Supreme Court cases: *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 79 P.3d 1154 (2004); *In Re Forfeiture of One 1970 Chevrolet Chevelle*, 166 Wn.2d 834, 215 P.3d 166 (2009); and *Touchet Valley Grain*

*Growers, Inc. v. Opp and Seibold Gen. Const., Inc.*, 119 Wn.2d 334, 831 P.2d 724 (1992). Pet. at 4-6. These cases, however, do not conflict with the Court of Appeals' decision.

*Malted Mousse* is one of many Washington cases holding that attorney's fees on appeal are recoverable "only if allowed by statute, rule, contract and the request is made pursuant to RAP 18.1(a)." *See, e.g., Malted Mousse*, 150 Wn.2d at 535. In *Malted Mousse*, the respondent moved for fees on appeal under RAP 18.9(a), alleging that the appeal was frivolous. Finding that the respondent did not meet the standard for establishing a frivolous appeal and failed to cite any other basis for reasonable attorney fees on appeal other than frivolity, this Court denied the respondent's request for fees. *Id.*

Here, however, Fannie Mae's request for fees to the Court of Appeals was made pursuant to RAP 18.1, not RAP 18.9, and the Court of Appeals' decision awarding fees and costs to Fannie Mae was made pursuant to RAP 18.1, not RAP 18.9. *Fannie Mae v. Steinmann*, No. 43133-5-II, slip op. at 9 (September 10, 2013). Specifically, the Court of Appeals concluded that an award of fees to Fannie Mae was proper

pursuant to both statute and contract. *Id. Malted Mousse* is inapposite to the basis for the Court of Appeals' decision in this case and, thus, there is no conflict.

*Chevelle* involves a challenge to an order for forfeiture of two automobiles under RCW 69.50.505, drug trafficking laws. 166 Wn.2d at 836. *Chevelle* neither awards fees nor discusses requests for fees; the Steinmanns cite to *Chevelle* solely for the general rule that, "[w]here the legislature uses certain statutory language in one statue [sic] and different language in another, a difference in legislative intent is evidenced." Pet. at 5 (*citing Chevelle*, 166 Wn.2d at 842). *Chevelle* has no application to this case as the Court of Appeals' decision does not, in any way, involve the interpretation of statutory language. Instead, the Court of Appeals' decision cites to RCW 59.18.290(2) as one basis for awarding fees to Fannie Mae, correctly stating that "RCW 59.18.290(2) allows an attorney fees award to a landlord who prevails in an unlawful detainer action." *Fannie Mae v. Steinmann*, No. 43133-5-II, slip op. at 9 (September 10, 2013). Although the Steinmanns appear to dispute the Court of Appeals' application of RCW 59.18.290(2), *Chevelle* does not address RCW

59.18.290(2) or any of the other statutes cited by the Steinmanns, nor does *Chevelle* address the basis for the Court of Appeals' award of fees here, *i.e.*, a prevailing party's request for fees pursuant to RAP 18.1. Thus, again, there is no conflict.

*Touchet Valley* involves questions of liability following the structural failure of a grain-storage building owned by the appellant, a farmers' cooperative. 119 Wn.2d at 337. Defendant/Respondent, Opp & Seibold, sought attorney's fees on appeal under CR 11. *Id.* at 355. This Court denied Opp & Seibold's request for fees concluding that Touchet Valley's prosecution of the appeal was not frivolous. *Id.* As noted above, Fannie Mae's request for fees to the Court of Appeals was not premised on a claim of a frivolous appeal under CR 11, but rather on statutory and contract provisions as allowed under RAP 18.1. *Fannie Mae v. Steinmann*, No. 43133-5-II, slip op. at 9 (September 10, 2013). *Id.* Although the Steinmanns appear to dispute whether Fannie Mae was a party to the deed of trust executed by the Steinmanns, *Touchet Valley* does not address deeds of trust, nor does *Touchet Valley* address the basis for the Court of

Appeals' award of fees in this case, namely, a prevailing party's request for fees pursuant to RAP 18.1. Thus, there is no conflict.

### C. The Petition Does Not Identify Any Conflict With Any Other Court of Appeals Decision.

The Steinmanns contend that this Court should grant review of the Court of Appeals' decision because the Court of Appeals' subsequent "[r]efusal to allow Petitioners to add additional evidence on review results in a decision in this matter to be in conflict with the decision of Division I Court of Appeals," citing *Bavand v. OneWest Bank, F.S.B.*, 176 Wn. App. 475, 309 P.3d 636 (2013). Pet. at 6. This Court will accept a petition for review if the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals. RAP 13.4(b)(2).

The Court of Appeals has complete discretion in determining whether to review additional evidence subject to RAP 9.11; such decisions are not subject to review by this Court. *See Washington Fed'n*, 99 Wn.2d at 884 (*citing* RAP 9.11). The Steinmanns, however, argue they meet the requirements of RAP 9.11 to allow the Court of Appeals to consider additional evidence. RAP 9.11 provides:

> *The appellate court may only on its own initiative direct that additional evidence be taken before the decision of a case on review if*: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through post-judgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

(Emphasis added). This is not the proper standard, however, for determining if an appellate court should allow additional evidence *after* rendering the decision of a case on review. The Steinmanns concede that they did not submit their Motion to Add Additional Evidence until after the Court of Appeals rendered their unpublished decision. Pet. at 6. It is not equitable for an appellate court to permit a party to wait until after the court's opinion is filed and then come forward with evidence that might have supported a different result. *Hollis*, 88 Wn. App. at 17-18. Accordingly, the Court of Appeals properly denied the Steinmanns' Motion because the Motion was made after the Court of Appeals rendered their unpublished decision in this matter.

The Steinmanns further argue that the Court of Appeals' decision conflicts with *Bavand* because it purportedly "would authorize the sale by Regional Trustees Services Corporation to Fannie Mae even though it had no authority to make that sale." Pet. at 7. The primary issue here was whether the Steinmanns waived their objections to the sale pursuant to RCW 61.24.040. RCW 61.24.040(1)(f)(IX) provides that failure to enjoin a foreclosure, waives setting the sale aside:

> Anyone having any objection to the sale on any grounds whatsoever will be afforded an opportunity to be heard as to those objections *if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130.* Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.

(Emphasis added). Unlike the Steinmanns, the borrowers in *Bavand* brought a lawsuit to restrain the sale pursuant to RCW 61.24.130, *prior* to the sale. 176 Wn. App. at 492. The Steinmanns waited to challenge the sale until after Fannie Mae purchased the property at the sale and filed an unlawful detainer action against the Steinmanns.[1] *Fannie Mae v. Steinmann*, No. 43133-5-II, slip op. at 2-4 (September 10, 2013). Because

[1] "Sometimes it is said that, if a man neglects to enforce his rights, he cannot complain if, after a while, the law follows his example." Oliver Wendell Holmes, *The Path of the Law*, 10 Harvard L. Rev. 457, 476 (1897).

*Bavand* is distinguishable it does not conflict with the Court of Appeals' decision.

### D. The Petition Does Not Involve an Issue of Substantial Public Interest Requiring a Determination by This Court.

The Steinmanns' final contention is that their lawsuit involves an issue of substantial public interest. Pet. at 9. This Court will accept a petition for review if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4).

The Steinmanns first appear to claim there is a substantial public interest in the issue of providing "clear title" to any future purchaser of the property from Fannie Mae. This issue is not properly before the Court; the Steinmanns presume that which they seek to prove, i.e., that the title to their property is unclear because the Trustee's sale was void. The Steinmanns failed, however, to convince the trial court and the Court of Appeals that the sale was void, and are now seeking another bite at the apple to make that argument. While the Steinmanns may have a substantial interest in voiding the sale of the property, they have failed to show any substantial *public* interest in this issue. Likewise, the Steinmanns have failed to show whether an authoritative determination by

this Court would provide future guidance to public officers, or whether the issue is likely to recur, in light of the waiver circumstances present here. *See, e.g., Washington Off Highway Vehicle Alliance v. State*, 176 Wn.2d 225, 233, 290 P.3d 954 (2012) (outlining factors for a continuing and substantial public interest in reviewing a moot case). The Steinmanns therefore fail to demonstrate that their petition involves any issue of substantial public interest justifying discretionary review.

## V. ATTORNEY'S FEES AND COSTS

If attorney's fees and costs are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney's fees and costs may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. RAP 18.1(j). If this Court denies the Steinmanns' Petition, Fannie Mae respectfully requests an award of its reasonable attorney's fees and costs pursuant to RAP 18.1(j). If this Court grants the Steinmanns' Petition, Fannie Mae respectfully requests an award of its reasonable attorney's fees and costs pursuant to RAP 18.1(a) for the reasons discussed above, i.e., RCW 59.18.290(2) – allowing an

award of attorney's fees to a landlord who prevails in an unlawful detainer action – and the deed of trust executed by the Steinmanns – which includes a provision awarding attorney's fees, including appellate fees.

## VI. CONCLUSION

For the reasons stated above, Fannie Mae asks the Court to deny the Steinmanns' Petition.

RESPECTFULLY SUBMITTED this 2nd day of May, 2014.

HOUSER & ALLISON, APC

*/s/ Joshua B. Lane*
JOSHUA B. LANE, WSBA #42192
Robert W. Norman, WSBA #37094
Attorneys for Respondent Federal National Mortgage Association

## PROOF OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that on May 2, 2014, I caused the attached **Respondent Federal National Mortgage Association's Answer to Petition for Review** to be served electronically by email to the Petitioners' counsel of record, Brian H. Wolfe, by previous agreement with Mr. Wolfe, to the following email address:

bwolfe@bhw-law.com.

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

DATED this 2nd day of May, 2014, at Seattle, WA.

*/s/ Shawn K. Williams*
SHAWN K. WILLIAMS
Legal Assistant

## OFFICE RECEPTIONIST, CLERK

**To:** Shawn K. Williams
**Cc:** bwolfe@bhw-law.com; Joshua B. Lane
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**Cc:** bwolfe@bhw-law.com; Joshua B. Lane
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Good Morning,

On behalf of Houser & Allison, APC, and Joshua B. Lane, WSBA #42192, (206) 596-7838, attorneys for the Respondent Federal National Mortgage Association, please find attached for filing the Respondent Federal National Mortgage Association's (1) Notice of Withdrawal and Substitution of Counsel; and (2) Answer to Petition for Review.

Regards,
Shawn

Shawn K. Williams
Legal Assistant
**HOUSER**
& ALLISON, APC
1601 Fifth Ave., Ste 850
Seattle, WA 98101
P: (206) 596-7838 F: (206) 596-7839
www.houser-law.com
Offices in Orange, Los Angeles, & San Diego Counties,
Boston, Las Vegas, Newark, New York, Phoenix, Portland, Seattle & Twin Cities.