Supreme Court Case No. 96790-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DARYL & JULIE FERGUSON,

Petitioners,

v.

RTS PACIFIC, INC.; GREEN TREE SERVICING, LLC; EVERHOME MORTGAGE COMPANY; EVERBANK; AND Doe Defendants 1 through 20, inclusive.

Respondents.

GREEN TREE SERVICING LLC'S ANSWER TO PETITION FOR REVIEW

William G. Fig
Elizabeth A. Semler
Sussman Shank LLP
1000 SW Broadway, Suite 1400
Portland, Oregon 97205
(503) 227-1111
wfig@sussmanshank.com
esemler@sussmanshank.com

Attorneys for Ditech Financial LLC fka Green Tree Servicing LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

I. INTRODUCTION

Appellants Daryl and Julie Ferguson ("Appellants") stopped paying their mortgage back in 2009 and, in 2014, when faced with foreclosure, filed a lawsuit in Pierce County Superior Court asserting various claims against the mortgagee (Respondent EverBank), loan servicer (Respondent Green Tree Servicing LLC, now known as Ditech Financial LLC) and RTS Pacific, Inc. (identified as a "foreclosure trustee" in Appellants' lawsuit)[1] ("Pierce County Lawsuit").

With respect to Green Tree Servicing LLC ("Green Tree"), Appellants asserted a claim for violation of the Washington Consumer Protection Act ("WCPA") and a claim for intentional and/or negligent misrepresentation. In making these claims, Appellants generally alleged that all defendants "… made numerous misrepresentations about the ownership of the Promissory Note and the 'beneficiary' as defined by the Deed of Trust Act, as well as the identity of the owner of the beneficial interest in his Deed of Trust [and that] all of the Defendants have demanded amounts from [Plaintiffs] that are not due and owing." CP __ (Dkt No. 2, ¶ 3.7, 3.8). Appellants also alleged, upon

[1] RTS Pacific, Inc. did not appear in the Pierce County Lawsuit Superior Court or participate in the appeal from the Pierce County Lawsuit.

information and belief, that Green Tree (and the other defendants) "have repeatedly engaged in making such misrepresentations to other Washington homeowners and/or there is a substantial likelihood that they will do so in the future." CP __ (Dkt No. 2, ¶ 3.7).

Green Tree filed a motion for summary judgment in the Pierce County Lawsuit seeking dismissal of the two claims asserted against Green Tree. The Pierce County Superior Court granted Green Tree's motion, dismissing Appellants' claims with prejudice ("Superior Court Judgment"). Appellants, after considerable delay, appealed the Superior Court Judgment. On appeal, the Court of Appeals issued an unpublished opinion in which the Court affirmed the Superior Court Judgment because Appellants failed to identify any disputed issue of material fact to avoid summary judgment on their WCPA and fraud claims against Green Tree ("COA Opinion"). The COA Opinion stated that Appellants failed to present any evidence to show that Green Tree made any misrepresentations, demanded amounts that were not due, or lacked authority to act, and that Appellants' claims were correctly dismissed by the Superior Court.

This Court's discretionary review of the COA Opinion is not warranted. The COA Opinion is fact-specific, entirely consistent with settled Washington law, and establishes no precedent because it is unpublished. Appellants do not present any arguments to the contrary or cite to any authority pursuant to RAP 13.4 to warrant review by this Court. Instead, Appellants' "Statement of Grounds for Direct Review" erroneously argues that RAP 4.2 provides a basis for direct review of the Superior Court Judgment by this Court.

RAP 4.2 is inapplicable here. Appellants previously appealed the Superior Court Judgment to the Court of Appeals and, after the COA Opinion was issued, Appellants sought reconsideration of the COA Opinion. Any rights to review pursuant to RAP 4.2 have long since expired. Moreover, Appellants' *pro se* status does not excuse their reliance on RAP 4.2. When the Court of Appeals denied Appellants' Motion for Reconsideration, the Court of Appeals expressly notified Appellants that review of the COA Opinion should be based on RAP 13.4. See 12/14/18 Letter from Richard D. Johnson, Court Administrator/Clerk of Court of Appeals. Mr. Johnson's letter is attached hereto as Exhibit 1. Yet, Appellants do not cite to or apply RAP 13.4. Therefore, because Appellants

provide no reasonable argument to support review pursuant to RAP 13.4, Appellants' Petition for Review should be denied.

II. ISSUE PRESENTED FOR REVIEW

Is there any basis, as required under the Washington Rules of Appellate Procedure ("RAP") Rule 13.4(b), for this Court to accept discretionary review of this matter?

III. COUNTER-STATEMENT OF THE CASE

A. The Original Loan

On October 8, 2003, Appellant Daryl M. Ferguson borrowed $204,000 from First Horizon Corporation d/b/a First Horizon Home Loans ("Loan"). The Loan was evidenced by an Interest First Adjustable Rate Note ("Note"), a Deed of Trust, and Line of Credit Deed of Trust in connection with the Loan. CP __ (Dkt No. 31, ¶¶ 3 and 4, Exhibits 1 and 2); CP __ (Dkt No. 38, ¶ 3, Ex. 1, p. 15). The Deed of Trust was secured by real property owned by Appellants and located at 6009 99th Avenue Southeast, Snohomish, WA 98290 ("Property"). *Id*.

On May 20, 2008, the servicing of the Loan was transferred to Respondent EverHome Mortgage Company ("EverHome"), effective June 2, 2008. CP__ (Dkt No. 31, ¶ 5). In July 2011, EverHome merged into Respondent EverBank; thereafter,

EverHome was renamed EverHome Mortgage, a division of EverBank. CP __ (Dkt No. 31, ¶ 12); CP __ (Dkt No. 32). In the merger, EverBank acquired all of the assets previously held by EverHome, and as a result, the beneficial interest in Appellants' Deed of Trust transferred to EverBank. *Id*.

B. Appellants' 2009 Default

In or about October 2009, Appellants stopped making payments on the Loan. CP __ (Dkt No. 38, ¶ 3, Ex. 1, p. 21). In April 2010, EverBank, began non-judicial foreclosure proceedings against the Property. CP __ (Dkt No. 31, ¶ 11). That sale did not take place because Appellants filed a Petition for Bankruptcy under Chapter 13 of the Bankruptcy Code. CP __ (Dkt No. 2, ¶ 2.8). Appellants' Chapter 13 case was converted to a Chapter 7 case and then dismissed. EverBank re-started the process of non-judicial foreclosure of the Property. However, on two subsequent occasions (in response to EverBank's December 2011 Notice of Trustee's Sale and August 7, 2013 Notice of Trustee's Sale), Appellants again filed for bankruptcy. CP __ (Dkt No. 2, ¶ 2.9). On April 10, 2014, Appellants' third Chapter 13 bankruptcy case was dismissed. CP __ (Dkt No. 2, ¶ 2.11).

C. Green Tree Becomes Servicer

On May 1, 2014, Green Tree became the servicer of the Loan. CP __ (Dkt No. 37, ¶ 7). On May 15, 2014, Green Tree sent Appellants a letter stating that it was the new servicer of their loan and that Federal National Mortgage Association ("Fannie Mae") owned the Loan. CP __ (Dkt No. 2. ¶ 2.11); CP __ (Dkt No. 38, ¶ 3, Ex. 1, p. 27).

On June 18, 2014, Appellant Daryl Ferguson sent Green Tree a letter which listed various objections to Green Tree's notice. CP __ (Dkt No. 38, ¶ 3, Ex. 1, p. 30). Appellant Daryl Ferguson disputed that Fannie Mae owned the Loan. *Id*. He also alleged that the Loan was "paid off by a secret and unknown insurance policy, the proceeds of which policy were received by an entity in the chain of alleged creditors…," as well as various other disputed issues. *Id*.

On June 23, 2014, Green Tree responded to Mr. Ferguson's letter and stated that Fannie Mae owned the Loan. CP __ (Dkt No. 38, ¶ 3, Ex. 1, p. 39). On September 15, 2014, Green Tree again notified Mr. Ferguson that the Loan was owned by Fannie Mae and provided a website address for Appellants to verify this statement. CP __ (Dkt No. 38, ¶ 3, Ex. 1, pp. 39-40). Fannie Mae has owned

the Loan since at least May 1, 2014, or the entire time Green Tree has serviced the Loan. CP __ (Dkt No. 37, ¶ 7).

IV. PETITION FOR REVIEW SHOULD BE DENIED

A. Standard of Review

Under RAP 13.4(b), a petition for review will be granted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Appellants do not make any arguments to support review under RAP 13.4(b). Accordingly, their Petition should be denied. However, even if Appellants raised arguments under RAP 13.4(b) there is still no basis to grant their Petition for Review.

B. The Court of Appeals' Unpublished Decision is Not in Conflict with a Decision of the Supreme Court or the Court of Appeals

The COA Opinion does not conflict with any prior decision of any court of this State. The Court of Appeals found: “The [Appellants] do not address the evidence in the record or required elements of a CPA claim. They fail to identify any disputed issue of material fact precluding summary judgment.” The Court of Appeals

Unpublished Decision, No. 76273-7-I/1 is attached hereto as Exhibit 2. The Court of Appeals also found that although Appellants appeared to question the validity of a power of attorney from EverBank to Green Tree, "they did not raise the issue below, and on appeal, they do not explain the basis for such an objection." *Id*. The Court of Appeals also held that Appellants' assertion that "all of the Defendants have demanded amounts from Mr. Ferguson that are not due and owing" was too vague and conclusory to identify and issue warranting appellate review. *Id*.

Appellants do not identify any decision of this Court or the Court of Appeals in conflict with the COA Opinion. Nor could they. It is well settled that: (i) summary judgment is appropriate if the party opposing the motion fails to demonstrate the existence of a genuine issue of material that fact; and (ii) failure to raise an issue before the trial court generally precludes a party from raising it on appeal. RAP 9.12; *Young v. Key Pharm., Inc*., 112 Wash. 2d 216, 225, 770 P.2d 182, 187 (1989); S*mith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). Therefore, because the COA Opinion does not conflict with any decision of this Court or the Court of Appeals, the Petition for Review should be denied.

C. No Conflict Among Court of Appeals

Appellants assert that there is a conflict among decisions of the Court of Appeals which justifies review. Appellants' Petition argues that: "Requiring as *Krienke* does that a trustee's sale take place before a plaintiff may bring a damages claim contradicts the logic of more recent cases like *Klem* and *Panag*, both of which call for liberal construction of plaintiffs' remedies, not additional hurdles absent from Washington's statutes or case law." Petition p. 15.

The problem with this argument is that the COA Opinion did not hold or in any way conclude anything with respect to the damages available to a plaintiff in a foreclosure case. To the contrary, with regard to Appellants' claim for damages under the WCPA, the COA Opinion held that Appellants did not "address the evidence in the record or required elements of a CPA claim. They fail to identify any disputed issue of material fact precluding summary judgment." Accordingly, because the COA Opinion did not reach any ruling with respect to available damages (or the law authorizing such damages), the COA Opinion does not conflict with

another Court of Appeals decision so as to warrant Supreme Court review of the COA Opinion.[2]

D. Case Does Not Present a Significant Question of Law Under the Constitution of the State of Washington or of the United States

Appellants do not argue how the Court of Appeals decision presents a significant question of law under the Washington or United States Constitutions. Therefore, review should not be granted on this basis.

E. Petition Does Not Involve an Issue of Substantial Public Interest

1. Court of Appeals Unpublished Decision has No Effect Outside of this Case

Review is not warranted because the COA Opinion is unpublished and will not affect other litigants as the opinion cannot be cited for precedent.

2. No Issues of Substantial Public Interest

Appellants argue, citing RAP 4.2, that direct review of the Superior Court Judgment is warranted because the case "involves a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." Assuming, without

[2] Any conflict or uncertainty about remedies available absent a completed foreclosure sale was resolved by *Frias v. Asset Foreclosure Servs., Inc*., 181 Wash. 2d 412, 432-33, 334 P. 3d 529, 539 (2014).

agreeing, that this argument is analogous to an argument under RAP 13.4(b)(4) that the COA Opinion "involves an issue of substantial public interest," there is still no basis for this Court to grant review.

Appellants assert that they "need the Supreme Court's guidance with respect to trustees' duties under the Deed of Trust Act." Petition, p. 9. Appellants further argue that "The instant case presents a fact pattern that would allow the Court to clarify a trustee's statutory and common law duties as those duties exist under Deed of Trust Act and to make clear what claims a property owner has available when a foreclosure has not yet occurred." *Id*.

Appellants did not ask the Superior Court or the Court of Appeals to rule "on trustee's statutory and common law duties as those duties exist under Deed of Trust Act and to make clear what claims a property owner has available when a foreclosure has not yet occurred." Further, neither the Superior Court Judgment nor the COA Opinion addresses these issues. Accordingly, granting review would not result in clarification of any issue of broad public import which requires prompt and ultimate determination.

The Superior Court Judgment included no findings of fact or conclusions of law with regard to the issues Appellants now claim

are of broad public import. Further the unpublished COA Opinion did not reach any conclusions on these issues. Accordingly, because a review of the COA Opinion would not result in clarifying a trustee's duties or the damages available to plaintiffs in foreclosure lawsuits, RAP 13.4(b)(4) does not support review in this case, and Appellants' Petition should be denied.

V. CONCLUSION

For all of the reasons set forth above, Appellants' Petition for Review of the Court of Appeals unpublished decision in this case should be denied.

Dated this 13th day of March, 2019.

SUSSMAN SHANK LLP

By *s/ Elizabeth A. Semler*

William G. Fig, WSBA 33943
wfig@sussmanshank.com
Elizabeth A. Semler, WSBA 40365
esemler@sussmanshank.com
Attorneys for Ditech Financial LLC
fka Green Tree Servicing LLC

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I filed the attached Answer to Petition for Review on March 13, 2019, using the electronic filing function of the court's eFiling system.

I further certify that, on the same date, I served a copy of this Answer upon the following, via first class mail, postage prepaid:

Julie and Daryl Ferguson
2525 Lake Avenue
Snohomish, WA 98290
Pro Se

s/ Elizabeth A. Semler
Elizabeth A. Semler, WSBA 40365

***(03072012);1**

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

December 14, 2018

Barbara L Bollero
AFRCT, LLP
701 Pike St Ste 1560
Seattle, WA 98101-3915
bbollero@afrct.com

William G Fig
Sussman Shank LLP
1000 SW Broadway Ste 1400
Portland, OR 97205-3089
wfig@sussmanshank.com

Daryl Ferguson
Julie Ferguson
2525 Lake Avenue
Snohomish, WA 98290

CASE #: 76273-7-I
Daryl Ferguson and Julie Ferguson, Appellants v. Green Tree Servicing, LLC et al, Respondents

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

LAW

Enclosure

c: Reporter of Decisions

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DARYL M. FERGUSON and JULIE FERGUSON, Appellants, v. RTS PACIFIC, INC.; GREEN TREE SERVICING, LLC; EVERHOME MORTGAGE COMPANY; EVERBANK; and Doe Defendants 1 through 20, inclusive, Respondents.	No. 76273-7-I ORDER DENYING MOTION FOR RECONSIDERATION

The Appellants, Daryl and Julie Ferguson, have filed a motion for reconsideration. A panel of the court has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Chun, J.

Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DARYL M. FERGUSON and JULIE FERGUSON, Appellants, v. RTS PACIFIC, INC.; GREEN TREE SERVICING, LLC; EVERHOME MORTGAGE COMPANY; EVERBANK; and Doe Defendants 1 through 20, inclusive, Defendants.	No. 76273-7 DIVISION ONE UNPUBLISHED OPINION FILED: October 1, 2018

CHUN, J. — Facing imminent foreclosure, homeowners filed a lawsuit against several entities, seeking to enjoin the pending sale of their property and raising several claims, including a claim under the Consumer Protection Act (CPA). Approximately two years later, the trial court granted the defendants' motions for summary judgment and dismissed the homeowners' claims. The homeowners have demonstrated no basis to reverse the trial court's orders. We affirm.

FACTS

In 2003, Daryl and Julie Ferguson borrowed $204,000 from First Horizon Corporation d/b/a First Horizon Home Loans. A deed of trust on real property owned by the Fergusons in Snohomish, Washington, secured the loan.

In 2008, First Horizon assigned its beneficiary interest under the deed of trust to EverBank. A separate but related entity, EverHome Mortgage Company, began servicing the loan. In 2010, EverBank transferred its beneficiary interest and physical possession of the note to EverHome Mortgage. However, a 2011 merger of EverBank and EverHome Mortgage negated the effect of this transfer. EverHome Mortgage merged into EverBank, and EverBank acquired all of EverHome's assets.

In 2009, the Fergusons stopped making payments on the loan. They requested a loan modification in 2009, 2010, and 2012, but ultimately did not qualify.

At several points following the Fergusons' default, the holder of their note initiated nonjudicial foreclosure proceedings. A July 2010 foreclosure sale did not take place because the Fergusons filed a petition for bankruptcy. Subsequent trustee's sales scheduled to occur in March 2012, September 2013, and December 2013, likewise did not take place.

In 2014, EverBank initiated nonjudicial foreclosure proceedings for a fourth time and in December 2014, a few days before the scheduled trustee's sale, the Fergusons filed a complaint against EverBank and EverHome Mortgage.[1] The complaint also named Green Tree Servicing LLC, an entity that began servicing the Fergusons' loan in May 2014.[2] The Fergusons sought a preliminary injunction to prevent the pending sale and alleged violations of the CPA, chapter 19.86 RCW, among other causes of action.[3]

---

[1] The sole surviving successor of the 2011 merger, EverBank, and not EverHome Mortgage, is a party to this appeal.

[2] The complaint also named RTS Pacific, Inc. and 20 "Doe Defendants." RTS, which entered receivership, did not participate in the summary judgment proceedings nor in this appeal.

[3] The Fergusons also asserted claims of intentional and negligent misrepresentation but expressly abandoned both causes of action at the summary judgment hearing. The Fergusons also alleged a violation of the deed of trust act, but only as to RTS Pacific.

The parties stipulated to a preliminary injunction of the trustee's sale. With respect to the CPA claim, the Fergusons alleged that between 2010 and 2014, the defendants made statements misrepresenting the identity of the beneficiary of the deed of trust and owner of the note.

EverBank and Green Tree filed motions for summary judgment. To the extent the Fergusons based their CPA claim on documents filed in April 2010 and earlier, EverBank argued that the statute of limitations barred it. See RCW 19.86.120 (the CPA has a four-year statute of limitations). EverBank also denied the allegation of misrepresentation and submitted evidence to show its statements to the Fergusons accorded with documents created between 2008 and 2014 that identified the beneficiary of the deed of trust and the entity entitled to foreclose.

Green Tree likewise denied any inaccuracies in its communications with the Fergusons. Green Tree submitted evidence showing the accuracy of its statements that the Federal National Mortgage Association, otherwise known as Fannie Mae, was an owner or investor in the loan. Green Tree also pointed out that, while the Fergusons disputed Green Tree's calculation of the amounts due under the loan, they provided no evidence to demonstrate error in the accounting.

Upon considering the motions, the Fergusons' responses, and after hearing arguments from all parties, the trial court granted both motions and dismissed the Fergusons' claims against EverBank and Green Tree. The Fergusons appeal.

ANALYSIS

As an initial matter, we note the Fergusons represent themselves on appeal. While mindful of the inherent difficulty of self-representation, we generally hold self-

represented litigants to the same standard as attorneys, requiring compliance with all procedural rules on appeal. In re Marriage of Olson, 69 Wn. App. 621, 626, 850 P.2d 527 (1993). An appellant must provide "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(6). Arguments unsupported by references to the record, meaningful analysis, or citation to pertinent authority need not be considered. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

The Fergusons' briefing on appeal does not comply with the Rules of Appellate Procedure in several respects. Despite the clear requirements of RAP 10.3(a)(2), (5), and (6), the Fergusons' opening brief contains no citations to the more than 700 pages of clerk's papers or verbatim report of proceedings, does not outline the essential facts and procedural events, clearly delineate the arguments, nor identify and apply the correct standard of review for dismissal under CR 56. These significant defects impact our ability to provide meaningful appellate review.

Insofar as we are able to discern the Fergusons' arguments, we conclude that the trial court properly granted summary judgment. The Fergusons claim dismissal was improper because hypothetical facts raised by the complaint sufficed to state a claim for relief. But the court granted motions for summary judgment under CR 56, not motions to dismiss the complaint under CR 12(b)(6). The Fergusons rely only on cases, such as Brown v. MacPherson's, Inc., 86 Wn.2d 293, 297, 545 P.2d 13 (1975), that involve motions under CR 12(b)(6). While CR 12(b)(6) permits courts to consider hypothetical facts, Cutler v. Phillips Petrol. Co., 124 Wn.2d 749, 755, 881 P.2d 216 (1994), CR 56 does not.

In resolving motions for summary judgment, the court may consider material outside the pleadings submitted by the parties, including affidavits, declarations, and other documentary evidence. CR 56(e). A court properly grants summary judgment when there exist no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). The Fergusons do not address the evidence in the record or required elements of a CPA claim. They fail to identify any disputed issue of material fact precluding summary judgment.

The Fergusons contend the trial court unfairly granted summary judgment based on new evidence presented by opposing counsel. This argument appears to refer to a document attached to Green Tree's reply brief submitted below, showing that EverBank granted limited power of attorney to Green Tree. Green Tree submitted the document to rebut the claim, raised in the Fergusons' response brief, that Green Tree had not established its authority to initiate foreclosure by appointing a new trustee. At the summary judgment hearing, the Fergusons' counsel initially stated she had not received the document in discovery, but after Green Tree's counsel confirmed that he had, in fact, provided the document about a month before the hearing, the Fergusons' counsel acknowledged she may have "missed it." Although the Fergusons now appear to question the validity of the document, they did not raise the issue below, and on appeal, they do not explain the basis for such an objection.

The Fergusons also claim the defendants misrepresented the relationship between EverBank and EverHome Mortgage. They refer to EverBank's attorney's statement at the summary judgment hearing that before the 2011 merger, the two entities were "sister" companies "under the same parent EverBank Financial." But

again, the Fergusons' complaint solely alleged misleading statements regarding the identity of the beneficiary and note holder. And more importantly, although the Fergusons insist that counsel's statement is untrue, no evidence in the record appears to contradict counsel's description. Nor do the Fergusons cite any authority to support their position that "the servicer and beneficiary cannot be affiliated with one another unless the loan originated with them."[4] We do not consider arguments unsupported by authority or analysis. See Cowiche Canyon, 118 Wn.2d at 809.

In their complaint, the Fergusons asserted that "all of the Defendants have demanded amounts from Mr. Ferguson that are not due and owning." On appeal, they reiterate their claim of "inaccuracies as to what is owed including fees and penalties." However, this vague and conclusory claim of error is insufficient to identify an issue warranting appellate review.

The Fergusons appear to challenge the validity of the original promissory note and the 2008 assignment of beneficiary interest based on missing or allegedly fraudulent signatures. They also claim that EverHome Mortgage was not properly licensed to service their loan. These allegations appear to involve events that took place on or before April 2010 and would be barred by the governing statute of limitations. See RCW 19.86.120. In any event, the Fergusons neither raised these claims in their complaint nor opposed the motions for summary judgment on these grounds. "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the

[4] To the extent the Fergusons seek sanctions against EverBank's counsel, we deny the request. The record does not support the Fergusons' claim that EverBank's counsel denied the entities are "one and the same." At the summary judgment hearing, counsel informed the trial court that, following the merger, EverBank and EverHome Mortgage were "no longer separate entities."

trial court." RAP 9.12. An argument neither pleaded nor argued to the superior court on summary judgment cannot be raised for the first time on appeal. Sourakli v. Kyriakos, Inc., 144 Wn. App. 501, 509, 182 P.3d 985 (2008). This rule ensures we engage in the same inquiry as the trial court. Vernon v. Aacres Allvest, LLC, 183 Wn. App. 422, 436, 333 P.3d 534 (2014). Accordingly, we decline to address the Fergusons' arguments raised for the first time on appeal.

In addition, the Fergusons claim evidence "discovered since the court of appeals filing" warrants reversal. They rely on CR 59(a)(4), which provides a mechanism to move for reconsideration in superior court based on "[n]ewly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial." CR 59(a)(4). Civil rules, such as CR 59, govern procedure in civil actions in superior court and provide no basis for this court to "reconsider" a superior court's decision. Nothing in the record indicates the Fergusons filed a CR 59 motion for reconsideration below within ten days of entry of the court's orders. See CR 59(b). Nor do they identify any new evidence in support of this claim.

Finally, the Fergusons claim the trial court improperly granted summary judgment without affording them the opportunity to initiate discovery or depose the "Doe defendants 1-20." To the contrary, the record indicates both parties participated in discovery with ample time to depose witnesses. The court heard the defendants' motions for summary judgment approximately two years after the plaintiffs filed their complaint and the Fergusons did not seek a continuance, under CR 56(f) or otherwise,

to conduct further discovery. The record does not support a claim that the Fergusons lacked an adequate opportunity to pursue discovery.

We affirm the trial court's summary judgment orders.

Chun, J.

WE CONCUR:

Mann, A.C.J.

SUSSMAN SHANK LLP

March 13, 2019 - 3:45 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96790-3
Appellate Court Case Title:	Daryl Ferguson and Julie Ferguson v. Green Tree Servicing, LLC et al.
Superior Court Case Number:	14-2-07802-0

The following documents have been uploaded:

- 967903_Answer_Reply_20190313154422SC758145_2410.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Answer to Petition for Review.PDF

A copy of the uploaded files will be sent to:

- bbollero@afrct.com
- kmuir@sussmanshank.com
- tburt@afrct.com
- wfig@sussmanshank.com

Comments:

Sender Name: Jennifer Langlois - Email: jlanglois@sussmanshank.com
Filing on Behalf of: Elizabeth A Semler - Email: esemler@sussmanshank.com (Alternate Email: jlanglois@sussmanshank.com)

Address:
1000 SW Broadway
Suite 1400
Portland, OR, 97205
Phone: (503) 227-1111

Note: The Filing Id is 20190313154422SC758145