No. 97879-4

SUPREME COURT
OF THE STATE OF WASHINGTON

ROBERT C. TERHUNE, et al.,

Petitioners,

v.

U.S. BANK TRUST, N.A. as Trustee for LSF9 Master Participation Trust and CALIBER HOME LOANS, INC.,

Respondents.

ANSWER TO PETITION FOR REVIEW

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CALIBER HOME LOANS, INC.

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I. COURT OF APPEALS' DECISION

Robert C. Terhune, Tara Terhune, and Equity Group NWest LLC (collectively, the "Terhunes"), have asked the Court to grant discretionary review of the unanimous, published decision of Division II of the Court of Appeals in *Terhune v. N. Cascade Tr. Servs., Inc.*, 446 P.3d 683 (2019).

II. ISSUE PRESENTED FOR REVIEW

The Terhunes present three issues to this Court. U.S. Bank and Caliber answer the issues as follows, in order to present the petition to this Court in a manner which more accurately reflects the standard under RAP 13.4(b) and the issues raised and argued before the Court of Appeals.

Answer to Issue No. 1.

It is not an issue of substantial public interest that the Court of Appeals declined to rule on the Terhunes' argument that the statute of limitations may prevent collection of all or part of a loan in a nonjudicial foreclosure proceeding.

Answer to Issue No. 2.

It is not an issue of substantial public interest that the Court of Appeals found two pieces of evidence by U.S. Bank and Caliber satisfied their initial burden of proving that there was no genuine issue of material fact on whether U.S. Bank was the holder of the note and the Terhunes

failed to present specific facts that demonstrated a genuine issue of material fact.

Answer to Issue No. 3.

The Court of Appeal's decision does not conflict with this Court's holding in *SentinelC3, Inc. v. Hunt*, 181 Wash. 2d 127, 142 (2014).

III. STATEMENT OF THE CASE

A. The Loan

In January 2008, the Terhunes refinanced their property with a $1,499,999.00 loan ("Loan") from Countrywide. (CP 7, 86, 477.) In exchange for the Loan, the Terhunes executed and delivered a promissory note ("Note"), secured by deed of trust ("Deed of Trust") encumbering certain real property known as 18306 Driftwood Drive E, Lake Tapps, Washington 98391. (CP 7, 86, 477.) The Note is an installment note, requiring payments on the "first day of each month, beginning on March 01, 2008." (CP 7, 86-87, 488.) The maturity date on the Note is February 1, 2038. (CP 95, 489.)

B. The Default

The Terhunes paid only 10 installments on the Loan. (CP 7-8, 87, 477.) When the Terhunes defaulted in 2009, Countrywide was the loan servicer and sent out a series of three letters advising the Terhunes that certain remedies may be pursued if their default was not cured. (CP 8, 87-

88, 478.) These letters were sent on or about December 17, 2008 ("First NIA"), January 16, 2009 ("Second NIA"), and February 17, 2009 ("Third NIA"). (CP 8, 87-88, 478.) No letter advised the Terhunes that the remedy of acceleration had been elected.

C. Written Communications Showing No Acceleration

The following written communications to the Terhunes after the Third NIA shows the lender never elected to accelerate:

Document	Amount	Citation
Account Statement (October 29, 2009)	$86,382.00	CP 431
Account Statement (November 27, 2009)	$8,290.00	CP 432
Notice of Default ("2010 NOD")	$169,476.25	CP 359
Notice of Foreclosure ("2010 NOF")	$256,210.39	CP 371-372
Notice of Trustee's Sale ("2010 NOTS")	$219,736.39	CP 361-362
Caliber's October 12, 2015 letter	$538,874.11	CP 273
Notice of Default ("2015 NOD")	$732,627.78	CP 280
Notice of Trustee's sale ("2016 NOTS")	$669,729.11	CP 287

In addition to the foregoing, at least two other written communications show no acceleration. First, in the lender's response to the Terhunes' request for information the lender states: "**As of December 23, 2010, the account is due for the January 2009 installment**…" (CP 88-89 [emphasis in original].) Second, in Caliber's notice to the Terhunes that it had acquired the servicing of the Loan, the June 5, 2015 letter

states: "We **are not** requesting that you pay the entire loan balance…" (CP 89 [emphasis added].)

D. Transfers of the Loan

The original lender on the Terhunes' Loan was Countrywide. (CP 7, 86, 477.) Thereafter, the Loan transferred as follows:

Document	Date	Citation
Recorded Assignment of Deed of Trust to BAC Home Loans Servicing, LP, fka Countrywide Home Loans Servicing, LP	March 25, 2010	CP 9, 88 ¶ 9, 167
Recorded Assignment of Deed of Trust to U.S. Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust	Sept. 15, 2015	CP 89 ¶ 16, 201-202

Caliber began servicing the Loan on May 26, 2015. (CP 12, 89.)

E. First Nonjudicial Foreclosure and *Terhune I*

On or about March 19, 2010, Recontrust issued the 2010 NOD. (CP 9.) On or about August 24, 2010, Recontrust issued the 2010 NOF. (CP 371-374.) The next day Recontrust recorded the 2010 NOTS, setting a trustee's sale for December 3, 2010. (CP 9, 361-362.) On November 19, 2010, the Terhunes sought to avoid foreclosure when they filed a complaint in the superior court ("*Terhune I*"). (CP 9-10, 311, 315-375.) In *Terhune I* they challenged the lender's authority to enforce the Loan. (CP 315-324.)

One day before the scheduled trustee's sale, the Terhunes obtained

a temporary restraining order ("TRO") enjoining "the December 3, 2010 trustee's sale" of the property. (CP 10, 375-379.) On February 18, 2011, the *Terhune I* court denied the preliminary injunction and dissolved the TRO on the merits. (CP 389-391.) The order was based on:

> Defendants having submitted their opposition and supporting Declarations, a Show Cause hearing having been held and arguments heard on January 21, 2011. (CP 389-390.)

F. Loss Mitigation

Since May 2015, Caliber has offered the Terhunes four separate Trial Period Plans—in October 2015, January 2016, March 2016, and July 2016. (CP 91-92.) The Trial Period Plans would have reduced the monthly payments to $8,184.94, $7,464.79, $7,525.88, and $7,612.80, respectively. (CP 91-92.) The Terhunes never responded. (CP 92.)

G. The Second Nonjudicial Foreclosure

On October 13, 2015, U.S. Bank appointed North Cascade Trustee Services, Inc. ("NCTS") as the successor trustee. (CP 13, 90.) NCTS then issued another FDCPA 30-day debt validation letter on December 21, 2015. (CP 13.) On the same day, NCTS issued the 2015 NOD. (CP 13, 90.) The NOD specified the total amount due as $732,627.78. (CP 90-91.) Because the Terhunes' default continued unabated, NCTS recorded the

2016 NOTS. (CP 90-91.) The trustee's sale was set for February 17, 2017. (CP 90-91.)

H. Procedural History

The Terhunes commenced this action against U.S. Bank and Caliber on February 7, 2017, asserting claims for injunctive relief, quiet title, and violation of Washington's Consumer Protection Act ("CPA"). (CP 1-20.) The Terhunes asserted that Countrywide accelerated the Loan and by December 31, 2014, March 19, 2015, or alternatively, October 25, 2015, the six-year limitations period under RCW 4.16.040 had expired. (CP 8, 11.) On this basis, the Terhunes asserted a claim for injunctive relief (CP 15) and quiet title (CP 16). The Terhunes also asserted that U.S. Bank and Caliber violated the CPA by proceeding with nonjudicial foreclosure while failing to contact them and exercising due diligence as required by the Deed of Trust Act. (CP 16.) U.S. Bank and Caliber filed their motion for summary judgment on October 4, 2017. (CP 57.)

IV. ARGUMENT

The Rules of Appellate Procedure state that a petition for review will be accepted by the 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." RAP 13.4(b).

The Terhunes' petition is based on RAP 13.4(b)(1) and (4). Pet. at 10-11. However, the Terhunes simply argue that the Court of Appeals erred in affirming the trial court's grant of summary judgment. The Supreme Court of Washington is not simply an "error-checking" court; rather, it reviews limited categories of cases in the exercise of its discretion within the Rules of Appellate Procedure.

Even if the Terhunes' asserted basis for seeking discretionary review were one of the bases on which the Court grants review, there is still no reason to grant review of the Terhunes' case because the Terhunes' arguments are incorrect. The unanimous Court of Appeals did not "negate[] the parties' contracts and the Deeds of Trust Act…" Petition at 12. Neither did it render a decision conflicting with this Court's holding in *SentinelC3, Inc. v. Hunt.* Pet. at 11, 17. Rather, the Court of Appeals merely made the routine decision of applying well-established case law to the facts of the case and concluded that the evidence was insufficient to create a triable issue of fact. If the Terhunes were correct that this constitutes error worthy of Supreme Court review, the Court would need to grant review of every Court of Appeals' decision affirming a trial court

grant of summary judgment, which, of course, this Court does not do. *French v. Uribe, Inc.*, 132 Wash. App. 1 (2006), *review denied*, 158 Wash. 2d 1022 (2006); *Zipp v. Seattle Sch. Dist. No. 1*, 36 Wash. App. 598 (1984), *review denied*, 101 Wash. 2d 1023 (1984).

In sum, there is no reason to review this case because the decision of the Court of Appeals does not conflict with any decision of this Court, nor does it present any other issue of substantial public importance warranting review.

A. There Are No Grounds For Review Under RAP 13.4(b)(1) Because the Decision of the Court of Appeals Does Not Conflict With a Decision of the Supreme Court

This case presents no issue of a conflict between the decision of the Court of Appeals and a decision of the Supreme Court as required by RAP 13.4(b)(1). The Terhunes argue that the Court of Appeals' decision conflicts with the holding in *SentinelC3, Inc. v. Hunt*, 181 Wash. 2d 127 (2014). Pet. 11, 17. However, *SentinelC3* does not support the Terhunes' cause.

SentinelC3 concerned a judicial proceeding to determine the fair value of shares in a closely held corporation. *SentinelC3, Inc.*, 181 Wash. 2d at 132. The issue on appeal was whether the respondent shareholders "presented sufficient evidence *to defeat* the [petitioner] corporation's motion for summary judgment." *Id.* Respondents filed an opposition to

summary judgment that relied on a party affidavit indicating respondents had retained an expert who *would* testify as to the value of the shares and that their expert was still analyzing the financial records obtained in discovery. *Id.* Critically, the respondents did not submit an affidavit from their expert. Rather, they attempted to summarize what the expert would say once he completed his analysis of the financial records. *Id.* at 136. As such, the respondents submitted lay testimony in place of an expert because their expert was not ready to sign his own affidavit.

The trial court granted summary judgment in favor of Sentinel and denied the respondents' motion for reconsideration. *SentinelC3* at 138. The Court of Appeals reversed, holding that the lay submission by the respondents predicting what their expert would say was sufficient to create a triable issue of fact. *Id.* ("The Court of Appeals concluded that the Respondents created a genuine issue of material fact just by asserting that they had consulted an expert who disagreed with Sentinel's valuation.") This Court reversed, finding that the trial court properly granted summary judgment in favor of Sentinel, explaining:

> The Court of Appeals erred in ruling that the Respondents' assertions were sufficient to defeat summary judgment. First, to defeat a motion for summary judgment, a party must present more than "[u]ltimate facts" or conclusory statements. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wash.2d 355,

> 359–60, 753 P.2d 517 (1988) (mere "supposition or opinion" insufficient to defeat summary judgment). The Respondents' beliefs about secret deals and pending sales do not meet this standard, because they were not based on any actual evidence.

Id. at 140.

Here, neither U.S. Bank nor Caliber summarize what an expert witness ***might*** testify to later on. Rather, as noted by the Court of Appeals, the "record contains two pieces of evidence showing that U.S. Bank is the holder of the Terhunes' note." *Terhune*, 446 P.3d at 691. Specifically, U.S. Bank and Caliber relied on a declaration from an employee at Caliber regarding his review of the loan file and U.S. Bank's possession of the note. In addition, the record showed a beneficiary declaration signed by Caliber as attorney in fact for U.S. Bank stating that U.S. Bank was the actual holder of the Terhunes' note. *Id.* The Court of Appeals found that "[t]his evidence satisfied U.S. Bank's ***initial burden*** of proving that there was no genuine issue of material fact." *Id.* (emphasis added). And, that the "burden then shifted to the Terhunes to present specific facts that demonstrated a genuine issue of material fact." *Id.* The Terhunes simply failed to introduce evidence to demonstrate a genuine issue of material fact. Instead, they attacked U.S. Bank and Caliber's evidence and offered only "supposition or opinion" of their own.

Indeed, the Court of Appeals referred to this Court's opinion in *Bain v. Metropolitan Mortgage Group, Inc.* for guidance on whether an agent—such as the loan servicer, Caliber—can represent the holder of the note. *Terhune*, 446 P.3d at 691 (quoting *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wash. 2d 83, 106 (2012)). Citing well established principals, the Court of Appeals explained that Caliber could act as an agent for U.S. Bank as the holder of the Terhunes' note and the record lacked any evidence from the Terhunes to create a trial issue of fact on this point.

The Court of Appeals did not run afoul of *SentinelC3*. Rather, it measured U.S. Bank and Caliber's evidence as sufficient to initially shift the burden and the Terhunes simply did not provide anything to shift it back. There is no basis on which to conclude that the Court of Appeals' decision is in conflict with *SentinelC3* or any other decision of this Court.

Accordingly, there are no grounds for review under RAP 13.4(b)(1).

B. There Are No Grounds For Review Under RAP 13.4(b)(4) Because the Decision of the Court of Appeals Has Very Limited Impact

This case presents no issue of substantial public importance required by RAP 13.4(b)(4) for the Court to grant review either. The Terhunes argue that "whether the statute of limitations had run on earlier missed payments" is of substantial public importance. Pet. at 11-12. They

also argue that it is "unfairly prejudicial for a borrower to be burdened with proving who has possession of their promissory note…" Pet. at 11, 18. They are wrong on each point.

1. The Statute of Limitations on Earlier Missed Payments

The Terhunes argue that the beneficiary or trustee should not determine whether the statute of limitations has run on earlier missed payments absent court oversight. Pet. at 12. This argument is based on the unsound premise that a hypothetical fact is permitted when considering a motion under CR 56. It is well established that CR 56 motions do not permit hypothetical facts. Therefore, this argument does not provide a basis for review because hypothetical facts in the context of a CR 56 motion is not of substantial public importance.

The Terhunes base their argument on a hypothetical foreclosure sale. *See* Pet. at 12-13 ("The Terhunes also have an interest in the sale proceeds that exceed the amount owed to the beneficiary.") However, because there has been no foreclosure sale, there are no sale proceeds. *See id*. at 687; *see also* CP. Indeed, the Terhunes cite to nothing in the CP that would suggest a sale has occurred.

Unlike a CR 12 motion that permits consideration of hypothetical facts, a motion under CR 56 does not. *Smith v. Reich*, 191 Wash. App. 1038 (2015) (unpublished). The Court of Appeals did not address whether

the statute of limitations would apply to earlier missed payments because the issue can be addressed in the foreclosure proceeding. *Terhune*, 446 P.3d at 693 n.5.

In short, the Court of Appeals correctly found that the issue was not material to the trial court's ruling on reconsideration of its order granting summary judgment. Accordingly, the issue is not one of substantial public interest either and does not support review here.

2. Proof of Ownership of the Loan

The Terhunes also argue that whether a Deed of Trust Act beneficiary declaration can be signed by an agent to establish the beneficiary as the holder of the note raises an issue of substantial public interest. Pet. at 18. This argument is also not a basis for review because the issue was not material to the trial court's granting of summary judgment.

As noted above, the Court of Appeals found that U.S. Bank and Caliber ***shifted the initial burden*** on summary judgment with two pieces of evidence in the record: a declaration by an employee at Caliber who reviewed the records and attested to the fact that U.S. Bank possesses the note; and the fact that a beneficiary declaration identifying U.S. Bank as the holder was issued to the trustee. *Terhune*, 446 P.3d at 691. The court explained that this merely shifted the initial burden and the Terhunes then

had the burden to present specific facts that demonstrated a genuine issue of material fact. *Id.* The Terhunes failed to do so, instead only challenging the adequacy of U.S. Bank and Caliber's evidence. *Id.* Toward that end, the Court of Appeal noted this Court's prior teaching that an agent may represent the holder of a note and the RCW specifically approves the use of agents. *Id.* (citing *Bain*).

Because the Terhunes merely dispute the Court of Appeals finding on the sufficiency of the evidence, this matter is inappropriate for review and is not an issue of substantial public interest either.

V. CONCLUSION

Based on the foregoing, U.S. Bank and Caliber request the Court deny the Terhunes' petition for review.

DATED: December 30, 2019

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CERTIFICATE OF SERVICE

On January 6, 2020, I caused to be served upon the below named counsel of record, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

Michele K. McNeill SKYLINE LAW GROUP PLLC 2155 112th Ave NE Bellevue, WA 98004 Phone: (425) 455-4307 Fax: (800) 458-1184 Email: michele@skylinelaw.com Counsel for Plaintiffs/Appellants	**X** Via the Appellate Court Web Portal ___ Via hand delivery **X** Via U.S. Mail, 1st Class, Postage Prepaid ___ Via Overnight Delivery ___ Via Facsimile ___ Via Email

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

EXECUTED at San Francisco, California, on January 6, 2020.

Matthew Walkup

PERKINS COIE LLP

January 06, 2020 - 11:29 AM

Transmittal Information

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