NO. 96790-3

THE SUPREME COURT OF THE STATE OF WASHINGTON

DARYL M. FERGUSON and JULIE FERGUSON,

Appellants/Plaintiffs

v.

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

Respondents/Defendants

ON APPEAL FROM THE SUPERIOR COURT OF
SNOHOMISH COUNTY, STATE OF WASHINGTON
Superior Court No. 14-2-07802-0

and

COURT OF APPEALS, DIVISION I
No. 76273-7-I

RESPONDENT TIAA, FSB d/b/a EVERBANK f/k/a EVERHOME MORTGAGE COMPANY'S ANSWER TO APPELLANTS' PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. IDENTITY OF RESPONDENT

This Answer is by Respondent TIAA, FSB d/b/a EverBank f/k/a EverHome Mortgage Company ("EverBank").

II. CITATION TO COURT OF APPEALS DECISION

Petitioners Daryl Ferguson and Julie Ferguson (the "Fergusons"), filed a Petition for Review ("Petition") of Division One's unpublished decision in *Ferguson v. RTS Pacific, Inc., et al*, No. 76273-7, 2018 Wash. App. LEXIS 2262, 5 Wn. App. 2d 1027 (Ct. App. Oct. 1, 2018).

III. COUNTERSTATEMENT OF ISSUES PRESENTED

First Issue: Whether Petitioners have shown under RAP 13.4(b)(2)[1] that Division One's unpublished decision is in conflict with any published appellate decision, when Petitioners cite to only a single federal court ruling which is in accord with the unpublished decision?

Second Issue: Whether Petitioners have shown under RAP 13.4(b)(4)[2] that a matter of substantial public interest is presented by Division One's unpublished decision affirming that Petitioners' failed to prove any triable fact issues in response to Respondents' well-supported Motion for Summary Judgment of dismissal of Petitioners' Consumer Protection Act (the "CPA")[3] and misrepresentation claims.

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[1] Despite their references to RAP 14.2(a)(1) and (2) [Petition, p. 2], Petitioners recite only the grounds set forth in RAP 14.2(a)(3) and (4) to accept review [Petition, pp. 2, 8, 15]. Regardless, because their Petition concerns an unpublished opinion of the Court of Appeals rather than direct appeal of a Superior Court Order, the grounds for accepting review are set forth in RAP 13.4(b)(2) and (4).

[2] *See*, n. 1, *supra.*

[3] RCW 19.86, *et seq.*

IV. SUMMARY OF ARGUMENTS

Because Petitioners do not identify any countervailing published opinions of the Court of Appeals, and rely exclusively on a single federal court ruling which is in accord with Division One's decision, they have not established grounds supporting this Court's acceptance of review under RAP 13.4(b)(2).

Because Petitioners failed to show any triable fact issues in response to summary judgment motions and Division One's affirmation of the summary judgment dismissal was required by well-settled precedent, no issue of substantial public interest is presented by Division One's decision and Petitioners therefore have not established grounds supporting this Court's acceptance of review under RAP 13.4(b)(4).

V. COUNTERSTATEMENT OF THE CASE

A. Procedural History.

The Fergusons appeal the trial court's award of summary judgment dismissing their action against Respondents EverBank and GreenTree Servicing LLC, n/k/a Ditech Financial LLC ("GreenTree"). [CP 1-8.] The Fergusons filed their action in Snohomish County Superior Court in December 2014 against EverBank, GreenTree, RTS Pacific, Inc. ("RTS"), and Doe Defendants, arising from the pending nonjudicial foreclosure of their home.[4] [CP 617-35.] In support of their CPA, negligent, and

[4] RTS appeared and answered [CP 575-80], but then made an Assignment for Benefit of Creditors [CP 569-72] and did not participate further in the trial court or on appeal.

intentional misrepresentation claims, they contended misrepresentations concerning the identity of the Note holder and Deed of Trust Beneficiary were made by EverBank during the foreclosure proceedings.[5]

On December 1, 2016, the trial court heard EverBank and GreenTree's summary judgment motions. During oral argument, the Fergusons dismissed and waived both misrepresentation claims. [RP 11, 25-26.] The trial court awarded EverBank and GreenTree dismissal with prejudice of the remaining CPA claim. [CP 1-8.]

Appellants timely filed their notice of appeal on December 30, 2016. [CP 411.] Division One issued its unpublished opinion affirming the summary judgment dismissal on October 1, 2018. The Fergusons' Petition for Discretionary Review followed.

B. Statement of Facts.

1. Fergusons Enter Loan with First Horizon Secured by Deed of Trust.

On October 8, 2003, Daryl M. Ferguson entered an Interest First Adjustable Rate Note with First Horizon Corporation d/b/a First Horizon Home Loans ("First Horizon") in the principal amount of $204,000.00 (the "Note"). [CP 472, 482-84.] The Fergusons secured the Note by granting a deed of trust ("Deed of Trust") on their property commonly known as 6009 99th Avenue Southeast, Snohomish, WA 98290 ("the Property"), which was recorded on October 15, 2003. [CP 472, 487-504.] First Horizon was the beneficiary identified in the Deed of Trust. [CP 487.]

[5] A fourth cause of action for Deed of Trust Act violations was pleaded solely against RTS. [CP 631.]

2. EverBank Owns and EverHome Services the Loan, and Fergusons Default.

By correspondence dated May 20, 2008, the Fergusons were informed their loan's servicing was being transferred to EverHome Mortgage Company ("EverHome"), effective June 2, 2008. [CP 472, 505-07.] Shortly thereafter, on June 9, 2008, an Assignment of the Deed of Trust by First Horizon to EverBank was recorded. [CP 472, 509.] The Fergusons defaulted on their mortgage the following year, in 2009. [CP 474-75.]

No later than March 9, 2010, EverHome held the original Note. [CP 472-73, 511.] On April 2, 2010, an Assignment of the Deed of Trust was recorded with EverBank transferring beneficial interest to EverHome. [CP 473, 513-14.] That same day, EverHome recorded an Appointment of RTS as Successor Trustee [CP 473, 516-17], followed by a Notice of Trustee's Sale identifying EverHome as beneficiary of Deed of Trust [CP 473, 519-22].

In July 2011, EverHome merged into EverBank with its assets vesting immediately into EverBank, including its beneficial interest in the Deed of Trust. [CP 473-74.] On December 5, 2011, another Notice of Trustee's Sale was recorded, identifying the beneficiary of the Deed of Trust as EverBank, successor by merger to EverHome. [CP 475, 524-27.] The third Notice of Trustee's Sale was recorded on May 15, 2013 [CP 475, 529-33], and the fourth on August 7, 2013, both identifying the same beneficiary [CP 475, 535-39].

3. Loan Servicing Transfers to Green Tree, and the Fergusons Sue.

In May 2014, servicing of the Fergusons' loan was transferred to GreenTree. [CP 414, 424, 432-33.] Thereafter, TIAA-CREF Trust Company, FSB merged with and into EverBank. As a result, EverBank's name changed to TIAA, FSB d/b/a EverBank f/k/a EverHome Mortgage Company.[6]

After servicing transferred to GreenTree, the Fergusons filed their Complaint against EverBank and GreenTree for violations of the CPA, negligent misrepresentation, and intentional misrepresentation.[7] [CP 618-35.] They contended that EverBank repeatedly misrepresented the identity of the Deed of Trust beneficiary during foreclosure proceedings, and in the publicly recorded documents. [CP 630-34.] They also claimed EverBank demanded payments that were not due on the loan. [CP 631.]

4. EverBank and Green Tree are Awarded Summary Judgment of Dismissal with Prejudice.

EverBank moved for summary judgment [CP 386-409], supported by three Declarations, numerous exhibits [CP 346-84, 471-548, 558-68], a Request for Judicial Notice, and exhibits thereto [CP 464-70]. It argued that the Fergusons' claims were time-barred because the documents were prepared or recorded more than four years before they filed suit. [CP 395.]

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[6] The merger occurred after the case was adjudicated in the trial court and appealed, and is not of record below. A copy of the Certificate of Merger of TIAA and EverBank was submitted with EverBank's Answering Brief as Appendix Exhibit 1.

[7] A Deed of Trust Act violation claim was also plead solely against RTS. [CP 631.]

EverBank's evidence showed it made only consistent and accurate representations about the Note holder and Deed of Trust beneficiary. [CP 471-548.] The identity of the loan's owner, Fannie Mae—which was also correctly disclosed to the Fergusons—was nevertheless irrelevant to entitlement to foreclose. [CP 397-98; RP 20-22.] The Fergusons provided no controverting evidence about the Note's holder, nor did they show they were caused any injuries by EverBank's communications with them. [CP 47-274, 279-332, 648-745

In response to the trial judge's questioning during oral argument, the Fergusons conceded they could not prove their causes of action for negligent and intentional misrepresentation, and the court dismissed those claims. [RP 11, 25-26.] EverBank was awarded summary judgment, dismissing the sole remaining CPA claim against it with prejudice [CP 6-8], as was GreenTree [CP 1-5] on its motion [CP 333-45] and evidence [CP 10-17, 25-33, 412-63].

5. Summary Judgment of Dismissal is Affirmed on Appeal.

On appeal, the Fergusons alleged new facts and theories of liability. They contended EverHome was never licensed in Florida to service the Note and Deed of Trust, the loan documents were invalid for lack of signatures and/or forgery, and the stated arrearages and mortgage loan statements were inaccurate. [Opening Brief, pp. 3-6.] They also asserted they had discovered new evidence during the summary judgment proceedings, and should be permitted to conduct discovery. [*Id.*, p. 8.]

EverBank responded that the Fergusons' new facts and theories raised for the first time on appeal could not be considered. [Answering Brief, pp. 27-30.] Their claims for forgery and other contentions concerning their loan origination documents were also time-barred. [*Id.*] Their assertion that the case should be remanded for further discovery was not preserved for appeal—indeed, they raised no objections in the trial court and had participated in discovery. [*Id.*, pp. 30-32.]

Division One affirmed both EverBank and GreenTree's summary judgment awards on the grounds they argued. It noted the Fergusons did not address any of the evidence in the record or the CPA claim elements. [Opinion, p. 5.] They offered no evidence that misrepresentations were made about the relationship between EverHome and EverBank, nor any authority to support that the loan servicer and beneficiary cannot be affiliated entities under the DTA. [*Id.*, at 6.]

Division One reiterated that any claim based on events that occurred four or more years before the Complaint was filed were barred by the CPA's Statute of Limitations under RCW19.86.120. Further, pursuant to RAP 9.2, Division One could not consider claims and arguments neither raised in the Complaint nor addressed on summary judgment. [*Id.*, at 6-7.] The Fergusons did not identify new evidence or any lack of opportunity to perform discovery, nor did they cite anything—other than the inapplicable CR 59—allowing remand to perform discovery or to present such evidence on appeal. [*Id.*, at 7.]

Consequently, Division One affirmed both summary judgment awards, and the Fergusons filed their Petition.

VI. ARGUMENTS

A. Considerations Governing Acceptance of Review.

The considerations governing this Court's acceptance of review are set forth in RAP 13.4(b):

> A petition for review will be accepted 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 a published 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 Fergusons' Petition neither cites to, applies, nor argues RAP 13.4, nor any specific considerations thereunder. Because they mention neither Supreme Court precedent nor constitutional issues, the most generous reading of their Petition suggests the second and fourth considerations as the bases on which they rely.

B. <u>The Opinion Conflicts with No Published Appellate Decisions</u>.

The Fergusons assert: "The trial court made these decisions [awarding summary judgment] by relying solely upon a decision of the U.S. District Court, which is based upon an unpublished decision from the Court of Appeals. The trial court in this case relied upon the Order entered in the U.S. District Court case of *Vawter v. Quality Loan Service Corp*., 707 F. Supp. 2d 1115 (W.D. Wash. 2010) and that decision relied upon the unpublished decision of the Court of Appeals in *Krienke v. Chase*, 140 Wash. App. 1032 (2007)." [Petition, p. 2, n. 1 (some correct citation format supplied).]

But EverBank never relied on, discussed, or even cited to *Vawter* or *Krienke* in any of its summary judgment briefing [CP 34-46, 386-409] or arguments [RP 1-26]. Neither did GreenTree [CP 18-24, 333-45; RP 26-56], nor the Fergusons themselves [CP 253-74, 309-32; RP 1-56]. More importantly, there is no indication whatsoever that either the trial court or Division One so relied on—or even reviewed—either *Vawter* or *Krienke*. [RP 1-56; Opinion.]

More to the point, *Vawter* and *Krienke* do not come within the parameters of RAP 13.4(b)(2). *Vawter* is a U.S. District Court opinion, while *Krienke* is an unpublished—not published—decision. Consequently, neither is "a published decision of the Court of Appeals" as required by RAP 13.4(b)(2). Even if they were, however, Division One's opinion does not conflict with either one.

The primary holding in *Vawter* and *Krienke* (on which *Vawter* relied) was that no claim for wrongful foreclosure under the Deed of Trust Act ("DTA") may be plead absent a completed Trustee's sale. *Vawter, supra*, 707 F. Supp. 2d at 1123; *Krienke v. Chase Home Fin., LLC*, No. 35098-0-II, 2007 Wash. App. LEXIS 2668, at *12 (Ct. App. Sep. 18, 2007). That rule of law has since been established by the Washington Supreme Court: "[W]e hold there is no actionable, independent cause of action for monetary damages under the DTA based on DTA violations absent a completed foreclosure sale." *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 429, 334 P.3d 529, 537 (2014).

Here, no DTA claim was even plead against EverBank. Division One's opinion mentions the DTA only in passing as a claim plead—and unresolved—solely against the non-participating party, RTS. [Opinion, p. 2, n. 3.] The opinion does not address the requirements for prevailing on a wrongful foreclosure cause of action, as do *Vawter, Krienke,* and *Frias.*

Thus, there is no conflict between *Vawter, Krienke,* and Division One's opinion here, nor does either cited case come within RAP 13.4(b)(2)'s strictures. Consequently, the Fergusons have shown no grounds for acceptance of review under that Rule.

C. <u>The Opinion Involves No Issues of Substantial Public Interest</u>.

The Fergusons base their plea that this Court accept review under RAP 13.4(b)(4) due to issues of substantial public interest on two claims. First they assert:

> Decisions are being rendered by Washington superior courts, as well as some unpublished decisions of the Courts of Appeal, which rely upon orders issued by U.S. District Court judges when those orders use for support unpublished decisions of the Court of Appeal. In other words, reliance upon the orders of the U.S. District Courts is not only improper because those orders ignore the clear meaning of this Court's recent decisions interpreting the requirements of the Deed of Trust Act, but because the orders rely almost exclusively upon unpublished decisions of the Courts of Appeal.

[Petition, p. 9.]

Second, they rail at the absence of judicial oversight of nonjudicial foreclosures and the Trustee's role in the process. They assert "an opinion by this Court that helps clarify the duties of a trustee is extremely important at this time," and request "clarif[ication of] a trustee's statutory and common law duties as those duties exist under [the DTA.]" [*Id.*, p. 10.]

The Fergusons conclude their substantial public interest arguments with the assertion:

> If orders such as those issued by the U.S. District Courts upon which the trial court in this case relied are permitted to remain unchallenged and uninterpreted by this Court, countless other Washington property owners will be deprived of their rights.

[*Id.*, p. 11.]

Petitioner's arguments are untethered to any specifics involving their litigation and appeal—indeed, they appear to be "cut and pasted"

from entirely different litigation.[8] As noted above, neither the trial court nor Division One relied on either unpublished or U.S. District Court opinions.

Division One's opinion cited only to three decisions of this Court and three published opinions of the Courts of Appeal. [*See,* Opinion.] The trial court, too, referred to no unpublished or U.S. District Court opinions. [RP 1-55.]

In oral argument, both EverBank and GreenTree referenced an unpublished opinion, *Conner v. Everhome Mortg. Co.*, No. 74050-4-I, 2016 Wash. App. LEXIS 2799 (Ct. App. Nov. 21, 2016). [RP 5, 35.] To the extent the trial court may have relied on that decision—which is not indicated—this Court apparently found *Conner* did not address an issue of substantial public interest, as it denied review. *Conner v. Everhome Mortg. Co.*, 188 Wn.2d 1004, 393 P.3d 359 (2017).

Further, GreenTree cited only a single [CP 343-44]—and EverBank a handful of—U.S. District Court opinions in the summary judgment briefing [CP 396, 400, 402-03, 405, 407-08]. But neither of

[8] Notably, the Ferguson rely on this Court's statement that "there is considerable ongoing foreclosure litigation on the point [whether MERS can be a deed of trust beneficiary under Washington law] in both state and federal courts, with no authority from this court [or] the Court of Appeals to guide those decisions." *Vinluan v. Fidelity Nat'l. Title & Escrow Co.*, No. 85637-1, at *4 (Wash. Apr. 25, 2011) (ruling denying review) (quoted in *Bain v. Metro. Mortg. Grp. Inc.*, No. C09-0149-JCC, 2011 U.S. Dist. LEXIS 155099, at *4 (W.D. Wash. June 24, 2011)). However, they ignore that this Court subsequently issued just such authority on that nonjudicial foreclosure issue, and others, and no MERS issues were raised in their litigation. *See, Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012); *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012); *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013); *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013).

them cited any unpublished opinions, and the cited District Court opinions all relied on established, published Washington law.

In short, the Fergusons did not and cannot show that either the trial court or Division One relied on unpublished appellate and/or trial court opinions in ruling on Petitioners' claims, as they assert. Consequently, their argument that the manner in which decisions in nonjudicial foreclosure litigation are rendered constitutes an issue of substantial public concern is unfounded and inapplicable to the facts of this litigation. It does not support a basis for granting review under RAP 13.4(b)(4).

The Fergusons' second argument for review—the need to establish a foreclosing trustee's duties—is equally unsupported. After RTS filed its Answer and Notice of Assignment for Benefit of Creditors, the trustee had no further involvement in the litigation. Remarkably, the Fergusons took no further discernable action against it. Nevertheless, they devote several pages of their Petition to arguing that the duties of a Trustee—essentially a non-party—must be established by this Court.

But the legislature has already established that a foreclosing trustee "has a duty of good faith to the borrower, beneficiary, and grantor." RCW 61.24.010. This Court has examined and explained that duty in several decisions, notably *Cox v. Helenius*, 103 Wn.2d 383, 693 P.2d 683 (1985); *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 154 P.3d 882 (2007); *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012); *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013); *Lyons v. U.S.*

Bank Nat'l. Ass'n., 181 Wn.2d 775, 336 P.3d 1142 (2014); *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014); and *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 355 P.3d 1100 (2015).

Completely absent from the Fergusons' Petition is an explanation how acceptance of review of a case not involving a trustee, and in which no rulings about a trustee's duty were made—nor was that duty even discussed or considered by the parties (other than in the Complaint), trial court, and Court of Appeals—will resolve a substantial public interest.

Although there is the hypothetical possibility that establishment of a foreclosing trustee's duty to various parties may require further analysis by this Court, this litigation does not present those facts. The Fergusons' RAP 13.4(b)(4) arguments do not withstand analysis. Accordingly, this Court should refuse to accept review on the basis that an issue of substantial public interest exists.

VII. REQUEST FOR ATTORNEY'S FEES

EverBank requests this Court award its attorney's fees incurred in responding to the Fergusons' Petition for Review. Each contract entered by Petitioners includes an attorney's fee clause permitting EverBank's recovery of enforcement costs and fees, including costs on appeal. [CP 472, § 7(E); 499, § 26.] EverBank's appellate fees and costs should be awarded to it. *See, Marine Enters. v. Sec. Pac. Trading Corp.*, 50 Wn. App. 768, 750 P.2d 1290, *rev. den'd.*, 111 Wn.2d 1013 (1988).

VIII. CONCLUSION

For the foregoing reasons, the Court of Appeals Division One's decision was correct. Therefore, Respondent EverBank respectfully requests this Court deny the Fergusons' Petition for Review.

Respectfully submitted this 29th day of March, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of March, 2019, I caused to be delivered the foregoing RESPONDENT EVERBANK'S ANSWER TO PETITION FOR REVIEW to the following parties in the manner indicated below:

Julie and Daryl Ferguson 2525 Lake Avenue Snohomish, WA 98290 *Petitioners, pro se*	[X] By United States Mail [ ] By Legal Messenger [ ] By Email [ ] By Facsimile
William G. Fig SUSSMAN SHANK LLP 1000 SW Broadway, Suite 1400 Portland, OR 97205-3089 *Attorneys for Defendant Green Tree Servicing, LLC*	[X] By United States Mail [ ] By Legal Messenger [ ] By Email [X] By CM/ECF e-Service

Under the penalty of perjury of the laws of the State of Washington, the foregoing is true and correct.

Dated this 29th day of March, 2019, at Seattle, Washington.

ANGLIN FLEWELLING RASMUSSEN
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