96790-3

FORM 18. MOTION
(Rule 17.3 (a))

No. 76273-7-1

SUPREME COURT or COURT OF APPEALS , DIVISION I OF THE STATE OF WASHINGTON

Daryl and Julie Ferguson
Plaintiff
v.
RTS Pacific Inc. Green Tree Servicing LLC)
Everhome Mortgage Co.Everbank and Doe)
Defendant 1-20)
)
)
)

Petition for Review
Court of Appeals Division 1
One Union Square
600 University Street
Seattle, WA 98101-4170

Petition for Review

[Date] 1/13/2019

Respectfully submitted,
Daryl and Julie Ferguson
Signature

Attorney for [Appellant, Respondent, or Petitioner]
[Name, address, telephone number, and Washington State Bar Association membership number of attorney]

COURT OF APPEALS DIVISION 1
No. 76273-7-1

IN THE COURT OF APPEALS DIVISION 1
OF THE STATE OF WASHINGTON

Daryl & Julie Ferguson

Appellant,

v.

RTS PACIFIC,INC ; INC.; GREEN TREE SEVICING, LLC,
EVERHOME MORTGAGE COMPANY; EVERBANK;
and Doe Defendants 1-20, inclusive

Respondents.

APPELLANT'S DARYL & JULIE FERGUSON'S STATEMENT OF GROUNDS FOR DIRECT REVIEW BY THE SUPREME COURT

Pro Se

Daryl and Julie Ferguson

Daryl and Julie Ferguson brought (3) Three causes of action against Defendant Regional Trustee Services, Inc. ("Trustee"): (1) Consumer Protection claim (2) Violation of Deed of Trust Act and (3) Intentional Emotional Distress Disorder, Plaintiff respectfully requests that the Court grant direct review of Defendant's summary judgment and denial of Plaintiff's motion for reconsideration. As set forth below, the Supreme Court's review of the judgment and order denying motion for reconsideration are warranted under RAP 4.2(a) because the appeal involves: (1) "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination;"and (2) "an issue in which there is a conflict among decisions of the Courts of Appeal."

I. NATURE OF THE CASE AND DECISIONS

A. Nature of Decision.

Two decisions of the trial court are at issue: granting summary judgment against Plaintiff with prejudice, dismissing Daryl and Julie Ferguson's claims against the foreclosing trustee that attempted to wrongfully foreclose on plaintiff's home and then denying Plaintiff s Motion for Reconsideration. The trial court made these decisions by relying solely upon a decision of the U.S. District Court, which is based upon an unpublished decision from the Court of Appeals.[1] The trial court dismissed plaintiff s claims without consideration of this Court's decisions and in spite of the fact that there were genuine issues of material fact which remain to be resolved. The judgment and order denying motion for reconsideration disposed of all issues before the trial court.

[1] 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 2nd 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).*

The Order granting summary judgment was entered on December 1, 2016 and the motion for reconsideration was denied on December 14, 2018.

B. Nature of Case.

Plaintiff's Daryl and Julie Ferguson ("the Property"), from which they live and were to lease the south west portion of the property for extra income. On or about October 9, 2003, Daryl and Julie Ferguson executed a Promissory Note for $204,000 ("Note") and Deed of Trust ("DOT") in favor of First Horizon , identified as the Lender and Beneficiary ("First Horizon") on the DOT.[2] The DOT, which names Defendant Everhome mortgage and Everbank's Trustee's predecessor entity, Regional Trustee Services, LLC as the Trustee, was recorded on March 1, 2010 in the records of Snohomish County, Washington.[3] On or about March 1, 2010, Everhome purported to appoint Defendant Trustee RTS as successor Trustee on behalf of Everhome Mortgage .[4] Defendant executed the Appointment of Successor Trustee as "attorney-in-fact on behalf of the Beneficiary Everbank", and Everhome mortgage were acting as one in the same the Deed was transferred from to on another in spite of the fact that the Washington Deed of Trust Act ("DTA") requires that any appointment document be signed by the Beneficiary. *Id.* RCW 61.24, *et seq.* and in particular, RCW 61.24.005(2).

Because Daryl and Julie Ferguson in March of 2009 were instructed skip two months on their payments by a represented from Everhome mortgage in order to qualify for the new "Making Home Affordable Program" by applying for a home loan modification and enter in to a forbearance and reduced payments for 6 months thereafter. In September 2009, an employee of Everhome confirmed on the phone the (Fergusons) were granted a loan modification and fixed rate of 2.5% not to forget our last forbearance payment period will end October 2009 with new modification payment to begin in December 2009

[4] On or about March 1 2010, defendant Trustee caused a Notice of Trustee's Sale ("NOTS") to be posted at Daryl and Julie Ferguson ' residence and to be recoreded in the records of Snohomish County, Washington. The scheduled sale date was July 2, 2010 On or about September 10, 2009 , plaintiff's Daryl and Julie Ferguson received a Notice Everhome Mortgage that they were our new mortgage servicer, this was the first notification that there was a new servicer on our mortgage and our payment to First Horizon were on automatic draft from Bank of America we were instructed to make a double payment in September 2008 the Ferguson's were unsuccessful at recovering the September 2008 payment from First Horizon who serviced our loan since 1996. After we received notice from Everhome mortgage we began making monthly payments modification. [5] RTS, still refused to discontinue the sale, RTS indicated that they will continue with the sale because Lynette Asberry executed RTS to move forward.

Claiming the Ferguson loan modification was denied due to the fact of not residing on the property and not having adequate income when in fact the Ferguson prove that in Exhibit 1 pages 1 and 2 and Exhibit 6 docket # 9000517693/DDM pages 1-6 of Exhibit 6, Lynette Asberry an employee of Everbank , directed RTS to move forward with the scheduled foreclosure sale. Daryl and Julie Ferguson were forced to hire Melissa Huelsman and file an automatic stay through her counsel, continued to try to get Defendant Trustee to discontinue the foreclosure sale, to no avail Since , presumably the new noteholder and "beneficiary" as defined under the DTA, had not provided Defendant Trustee with any instructions to commence or proceed with the foreclosure sale, it is clear that Defendant Trustee was operating on its own and in contravention of the requirements of the DTA. RCW 61.24, *et seq.;* RCW 61.24.005(2).

Exhibit 1 Huelsman Declaration.
Exhibit 2 Huelsman Declaration.

[6] Nevertheless, the Trustee's refusal to act impartially and investigate further about The prior loan modification acceptance and forbearance payments that were never applied to Daryl and Julie Ferguson arrearages causing great accounting errors on the amount due , on or about June 30 2010, caused Daryl and Julie Ferguson retain attorney Melissa Huelsman in the amount of $ 3500.00 and file a Cease and Desist letter to defendant Trustee via facsimile.[7] On or about July 2, 2010, defendant Trustee acknowledged receipt of the cease and desist .

Trustee proceeded with the foreclosure without any legal authority, without instruction from the correct entity and ignored very specific contradictory information provided by Daryl and Julie Ferguson. Defendant Trustee did not comply with the requirements of the Deed of Trust Act at any point in this process, and as a result, it has violated its duties under the DTA,which support a claim for a violation of the Consumer Protection Act . RCW 19.86, *et seq.*; RCW 61.24.010(4). Daryl and Julie Ferguson suffered significant financial damage and emotional distress as a result of the refusal of Defendant Trustee to comply with the requirements of the DTA.Plaintiff Daryl and Julie Ferguson experienced emotional and economic injury as the result of defendant Trustee's conduct. [8]On March 1st 2010, Grady Ferguson was handed a Notice of Trustee Sale by Lita Host servicer for Gary's Process Service. Daryl Ferguson immediately went to confront the person serving notice with great embarrassment found it to be his elementary sons classmates mother whom have attended birthday parties and school events with this goes beyond humiliating, as the individual that handed the Notice of Trustee Sale was to the very person Grady Ferguson who had vested thousands of dollars moving his mobile home and setting it up on Daryl and Julie Fergusons property were to lease the space for $1000.00 per month

[7] see Exhibit Huelsman Declaration

[9]After receiving the NOTICE OF TRUSTEE SALE , Daryl and Julie Ferguson turned to their close friends Shaun & Tonja Burke for advice, Shaun Burke had the utmost respect for Daryl and Julie Ferguson and was there with them during the mediation meeting for the loan modification and had helped to try and prove to the servicer, along with Daryl, that he still did reside in his same home even though the City of Snohomish had changed the address.

[10]However, since the foreclosure was initiated, and the modification was wrongfully denied, Daryl and Julie's demeanor changed and the Fergusons have displayed fear and stress Due Due to the fear of Daryl and Julie Ferguson losing their home Grady and Sandy Ferguson decided not to lease the space where there mobile home resides and instead they have rented a small apartment in town and three storage units until this matter has been resolved. Grady and Sandy Ferguson have too suffered great financial loss and Daryl and Julie Ferguson are out over $120,000 of rental income As a result, Daryl and Julie Ferguson lost Grady and Sandy Ferguson from moving into their Mobile Home that was set up on Daryl and Julie Ferguson's 2525 Lake Ave Property in October 2009 and not leasing the space for $1000 per month , which directly impacted Daryl and Julie Ferguson income.

.[11] The foreclosure sale of continued to loom, resulting in Daryl and Julie Ferguson being unable to sleep due to the fear and distress of them losing the home that they and 5 children reside .[12]Defendant's Trustee initiated and continued with a foreclosure upon its own initiative, and they did so even with specific knowledge that they did not have the legal authority to proceed, and that Daryl and Julie Ferguson had obtained and paid for a loan modification. It is therefore liable to Daryl and Julie Ferguson.

II. ISSUES FOR DIRECT REVIEW

1. Whether the trial court erred when it granted summary judgment in favor of Defendant Trustee when that decision was based upon an order issued by a U.S. District Court judge which is in direct contravention of the decisions of this Court and the laws of Washington state.
2. Whether it is appropriate for the courts of Washington state to rely upon orders issued by U.S. District Court judges when those orders rely upon unpublished decisions of the Washington Courts of Appeal, which cannot be relied upon by the Washington courts.

III. GROUNDS FOR DIRECT REVIEW

See Ferguson's Declaration
See Ferguson's Declaration

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[13]The instant case should be granted direct review because, pursuant to RAP 4.2(a)(4) and 4.2 (a)(3) respectively, it involves "a fundamental and urgent issue of broad public import which requires prompt and ultimate determination "and it involves "an issue in which there is a conflict among decisions of State courts and Court of Appeals.

A. There is a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.

There is a foreclosure crisis. A final resolution of the issues presented by this case is vital because of the large number of people currently impacted by the foreclosure crisis. 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. This means that the Washington trial courts which rely upon the U.S. District Court orders are relying upon nothing more than the orders of a trial court, but those courts are using as a basis for their decisions, opinions upon which they are prohibited from relying. RCW 2.06.040; GR 14.1. As a result of this backdoor method of reliance upon the unpublished decisions, Daryl & Julie Ferguson and other Washington homeowners have had their claims dismissed.[14] While the crisis was initially sparked by sub-prime lending, a greater number of prime loans are now going into default. According to numbers from Realtytrac® on average residents of Washington shows "every 1 of 892 homes that receive a notice of default results in a foreclosure of their home

[15] *Grant v. First Horizon Home Loans* 2012 WL 1920931, *5-6 (Wash Ct App 2012). *Vinluan v. Fidelity Nat'l Title & Escrow Co.*, No 85637-1, at *4 (Wash Apr 25, 2011) (ruling denying review) (noting with reference to MERS's status as a DTA beneficiary that "there is considerable ongoing foreclosure litigation ... in both state and federal courts, with no authority from this court [or] the Court of Appeals to guide those decisions")

Washington shows "every 1 of 892 homes that receive a notice of default results in a foreclosure of their home."

Moreover, virtually all (if not all) banks doing business in Washington use deeds of trust to secure their home loans. Additionally, when Lenders begin to foreclose on a property in a non-judicial way there is no court oversight and the consumers are left to entrust the Lenders to strictly follow the Deed of Trust Act AND trust the foreclosing Trustee, who has been appointment by the Lender and *collects their fees from the Lender,* to act as an impartial judge between the grantors and grantees. Thus, the duties of a trustee are at issue in the vast majority of all home foreclosures in Washington. As a result, an opinion by this Court that helps clarify the duties of a trustee is extremely important at this time.

We need the Supreme Court's guidance with respect to trustees' duties under the Deed of Trust Act. The foreclosure crisis has focused the legislature's attention on the Deed of Trust Act. [16]However, as shown by the arguments raised below in this case, there is still controversy about how various sections of the Deed of Trust Act (including those sections that relate to the duties of a trustee) should be interpreted. 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.

Daryl and Julie Ferguson and other Washington state homeowners cannot wait for individual cases to make their way through the appellate process. That could take a few more years, and in the meantime, people facing foreclosure are losing their homes

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because of the

[11]Foreclosure Activity http://www.realtytrac.com/statsandtrends/foreclosuretrends/wa

because of the reliance upon the U.S. District Court orders.[17] Thus, this issue is of public importance and will continue to threaten the property rights of residents of Washington State, unless, our Supreme Court gives us guidance as to the viability of claims against foreclosing trustees and other participants in the non-judicial foreclosure process under the DTA. 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.

B. There is a conflict among the decisions of the Court of Appeals

The concerns about federal courts interpreting Washington state foreclosure statutes first began when the King County Superior Court tried to certify questions to this Court in connection with one of its cases. Although the questions from the Washington trial court were deemed inappropriate, this Court expressed concern about the dearth of clear legal standards guiding application of state law in the home foreclosure context.[18] Following the *Vinluan* decision, Judge Coughenour of the U.S. District Court, Western District of Washington certified three questions in two cases that were consolidated during review and resulted in this Court's decision in Bain. While it would appear that this Court made clear in the *Bain* decision, a case involving claims regarding actions undertaken before the foreclosure sale was completed, that plaintiffs may pursue claims for violations of the Consumer Protection Act for those actions, numerous federal courts and some Washington state courts have ignored the holding in *Bain* to reach the conclusion that the only relief to which a plaintiff is entitled before completion of a

[17] See *Vinluan v. Fidelity Nat'l Title & Escrow Co.*, No. 85637-1, (Wash Apr. 25, 2011)

[18] See Vinluan v. Fidelity Nat. Title & Escrow Co., No. 85637-1, at *4 (Wash Apr. 25, 2011) (ruling denying review) (noting with reference to MERS's status as a OTA beneficiary that "there is considerable ongoing foreclosure litigation . . . in both state and federal courts, with no authority from this court [or] the Court of Appeals 'to guide those decisions").

foreclosure sale is injunctive relief.[19] *See, Vawter v. Quality Loan Service Corp. of Washington*, 707 F.Supp.2d 1115 (W.D. Wash. 2010) and its progeny. *Vawter* and the orders and opinions that have relied upon it for support in dismissing plaintiff's claims, rely entirely upon an unpublished Court of Appeals decision, *Krienke v. Chase Home Fin., LLC*, 140 Wash.App. 1032, 2007 WL 2713737 (Wash. Ct. App. 2007). The Court in *Krienke* considered a claim for "wrongful foreclosure" under the Deed of Trust Act ("DTA"), briefed by *pro se* litigants. RCW 61.24, *et seq.* The *Krienke* Court concluded that "there is no case law supporting a claim for damages for the *initiation* of an allegedly wrongful foreclosure sale." 2007 WL 2713737, *5. *Krienke* has never been cited in subsequent published Washington cases, because as an unpublished Court of Appeals opinion, it is devoid of precedential weight in the state courts and therefore may not be cited. Wash. Rev. Code § 2.06.040 ("Decisions determined not to have precedential value shall not be published."); *see also* GR 14.1 (unpublished Court of Appeals opinions may not be cited in Washington). However, the federal courts have repeatedly cited to it in support of their dismissal of plaintiffs' claims and those federal court opinions have been utilized for support in other unpublished opinions of the Courts of Appeal. The present conflict between recent state court opinions, including those of this Court and state legislation on the one hand, and *Krienke* and *Vawter*, and their progeny on the other, presents an important matter of state law appropriate for direct review.

Several federal court orders have relied on *Krienke* and *Vawter* in reasoning that a homeowner facing foreclosure cannot state a claim for damages in the absence of a

[20] *Bain v. Metropolitan Mortg. Group Inc.*, 175 Wash.2d 83, 285 P.3d 34 (Wash. 2012).

[21] The need for a definitive ruling from the Washington Supreme Court is particularly great because *Vawter* has recently been cited as authority for the claim that Washington does not recognize a cause of action in the absence of a trustee's sale in the unpublished Court of Appeals case *Grant v. First Horizon Home loans*, 2012 WL 1920931, *5-6 (Wash. Ct. App. 2012). Although *Grant* declined to rest its holding on the non-precedential *Krienke*, it viewed *Vawter* as independent support for the analysis in *Krienke*

process," and 3) a cause of action for damages would undermine the goal that nonjudicial foreclosure be efficient and inexpensive. *Id.* at 1122-24.

Although *Krienke* has lacked precedential significance as a matter of state law since it was decided, and its reasoning has since been undermined by Washington precedent,[22] *Krienke's* reasoning has been repeatedly cited through reliance on *Vawter*. Yet recent rulings by this Court and recent legislative changes, contradict *Vawter* and *Krienke's* absolute bar against damages actions in the absence of a trustee's sale. Further, the final word on the meaning of Washington state statutes rests with this Court and not with federal trial courts.

Federal judges themselves are split as to whether Washington law permits a plaintiff to sue for damages in the absence of a trustee's sale. *Vawter* and its related cases may be contrasted with a number of recent federal opinions. [23]Interestingly, the U.S. District Courts have entirely ignored an unpublished Ninth Circuit opinion, which is consistent with this Court's DTA decisions, *in Jared v. Keahey (In re Keahey),* 414 Fed.Appx. 919 (9th Cir. 2011) (upholding bankruptcy court's award of damages violations of the duties under the Deed of Trust Act, an award of attorneys fees and costs under the Deed of Trust Act and for intentional infliction of emotional distress where trustee wrongfully sought to foreclose but no foreclosure sale was ever completed) and a

[24] *Compare Krienke*, 2007 WL 2713737, *5 (holding damages claim contrary to DTA where Act's purpose is to promote stable land titles and "courts promote the [DTA's] objectives [by] declining to invalidate completed sales even where trustees have not complied with the statute's technical requirements") *with Albice v Premier Mortg. Services of Washington, Inc.*, 174 Wash.2d 560, 575, 276 P.3d 1277 (Wash. 2012) (voiding completed foreclosure sale because the trustee did not have the requisite authority under the DTA to conduct the sale and quieting title in the homeowner)

[25] See Barrus v. Recon Trust Co., No. 11-01578-KAO, Dkt. No. 114, *11-21 (Bkrtcy. W.D. Wash., May 6, 2013) (Order on Cross Motions for Summary Judgment) (denying defendant's motion for summary judgment on CPA claim where no trustee's sale of property had occurred); Beaton v. JP Morgan Chase Bank N.A., 2013 WL 1282225, *5 (W.D. Wash. 2013) (concluding that plaintiff's DTA cause of action survived a motion to dismiss since if the foreclosing entity "did not have authority to initiate foreclosure proceedings without knowledge of the beneficiary as required by RCW 61.24.030(7)(this would result in a material violation of the DTA") (emphasis added), accord Mickelson v. Chase Home Finance, LLC, 2012 WL 3240241, *3-5 (W.D. Wash. 2012) (also sustaining claim for violation of DTA duty of good faith for "bringing nonjudicial foreclosures without being the proper trustee") (emphasis added); McDonald v. OneWest Bank, 2013 WL 858173, *15 n.11 (W.D. Wash. 2013) (in the absence of a trustee's sale, "[d]amages may ... be available under . . the Washington Consumer Protection Act or fraud") (citing Bain, 175 Wash.2d at 115-20, Myers v. Mortgage Electronic Registration Systems, Inc., 2012 WL 678148, *2 n.3 (W.D. Wash. 2012))

U.S. Bankruptcy Court decision, which is also consistent, in *Reinke v. Nw. Trustee Svcs., Inc. (In re Reinke)*, 2011 WL 5079561, *14-16 (Bkrtcy. W.D. Wash. 2011) (analyzing elements of foreclosure-related CPA claim where no trustee's sale occurred).

This Court recently recognized claims for damages without acknowledging any need that a trustee's sale occur in the foreclosure related cases *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wash.2d 83, 285 P.3d 34 (Wash. 2012), and *Klem v. Washington Mutual Bank*, 176 Wash.2d 771, 295 P.3d 1179 (Wash. 2013). This Court in *Bain* held that MERS's failure to comply with the OTA by seeking to foreclose without being a holder of the applicable note was actionable in a claim for damages under the CPA. 175 Wash.2d at 115-20. Similarly, this Court held in *Klem* that a trustee's failure to act impartially between noteholders and mortgagors, in violation of the OTA, could support a claim for damages under the CPA-without referencing any requirement that a trustee's sale actually occur. 176 Wash.2d at 1192 ("[T]he failure to enjoin a sale does not operate to waive claims based on the foreclosure process where it would be inequitable to do so. Where applicable, waiver only applies to actions to vacate the sale and *not to damages actions.")* (emphasis added). Earlier this year, in *Schroeder v. Excelsior Management Group, LLC*, 297 P.3d 677, 683 (Wash. 2013), the Court emphasized that the Deed of Trust Act "is not a rights-or-privileges-creating statute" but rather presents non-waiveable requirements for foreclosing entities, and reiterated that "strict compliance [with the OTA] is required" *Id* (citing *Albice v. Premier Mortg. Servs. of Wash, Inc.*, 174 Wash.2d 560, 568, 276 P.3d 1277 (2012)).

Recent statutory amendments also suggest that Washington recognizes a claim for damages in the absence of a trustee's sale. In particular, Washington Revised Code

section 61.24.127, adopted after *Krienke* was decided, provides that "[t]he failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter *may not be deemed a waiver of a claim for damages*" for specific claims. RCW 61.24.127(1) (emphasis added). That statutory language would make little sense if plaintiffs *lacked* claims for damages before, or in the absence of, efforts to enjoin a trustee's sale. If such claims did not exist in the first place, why would the legislature specify circumstances in which they were not waived?

The current DTA further specifies that, even where the borrower does not seek an injunction to restrain the trustee's sale, he or she may bring a claim for damages for violations of RCW 19.86, *et seq.*, which contains the Consumer Protection Act. Wash. Rev. Code § 61.24.127(1)(b). Elsewhere, the DTA specifies that it is an unlawful or deceptive act or practice under the CPA for the trustee to fail to either mediate in good faith, remit payments for the foreclosure fairness account at the time a notice of trustee's sale is issued, or follow statutory requirements in initiating the notice of default and subsequent contacts. RCW 61.24.135(2). Thus, the DTA directly contemplates that plaintiffs may state a claim for damages related to a foreclosing entity's conduct violating the DTA, even where a foreclosure sale has yet to-or never does-occur.

As an equitable matter, it does not make any sense to conclude that the Washington Legislature intended a requirement that a trustee's sale take place before a plaintiff can bring a claim for damages related to the foreclosure of his or her property. Both the DTA and the CPA are protective statutes construed in favor of vulnerable

consumers. [26]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.

IV. CONCLUSION

Pursuant to RAP 4.2(a)(3) and (4), this Court should accept direct review of the trial court's SMJ ruling and the trial court's denying the motion for reconsideration.

Respectfully submitted this 13th day of January 2019.

By: _____

Daryl and Julie Ferguson
Appellant's

[27] See Klem, 176 Wash.2d at 789 (the OTA' must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight .n conducting nonjudicial foreclosure sales") (citing Udall v. T.D. Escrow Servs., Inc., 159 Wash 2d 903, 915-16, 154 P.3d 882 (Wash. 2007)); Panag v. Farmers Ins Co of Washington, 166 Wash.2d 27, 40-41, 204 P.3d 885 (Wash. 2009) (declining to "narrowly construe the [CPA] by importing a requirement that the plaintiff be a consumer or be in a consensual business relationship"); Wash. Rev. Code § 19 86.920 (calling for liberal construction of CPA)

FAX TRANSMISSION

SENT ON: 1-13-2019

VIA FAX FOR FILING IN:

COURT OF APPEALS DIVISION 1 **COURT**

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FAX: 206-389-2613

ATT LAUREL CASE MANAGER DIVISION 1

FILE # 76273-9-I

FAX TRANSMISSION

SENT ON: 1-13 2019

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COURT OF APPEALS DIVISION 1 **COURT**

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FAX: 206-389-2613

ATT LAUREL CASE MANAGER DIVISION 1

FILE # 76273-7-I

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COURT OF APPEALS DIVISION 1 COURT

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FAX: 503-248-0130

WILLIAM G. FIG

FILE # 76273-7-1

FORM 18. MOTION
(Rule 17.3 (a))

No. 76273-7-1

SUPREME COURT or COURT OF APPEALS , DIVISION I OF THE STATE OF WASHINGTON

Daryl and Julie Ferguson
Plaintiff
v.
RTS Pacific Inc. Green Tree Servicing LLC)
Everhome Mortgage Co.Everbank and Doe)
Defendant 1-20)
)
)
)

Petition for Review
William G Fig Sussman Shank
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Petition for Review

[Date] 1/13/2019

Respectfully submitted,
Daryl and Julie Ferguson
Signature

Attorney for [Appellant, Respondent, or Petitioner]
[Name, address, telephone number, and Washington State Bar Association membership number of attorney]

FAX TRANSMISSION

SENT ON: 1-15-2019

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COURT OF APPEALS DIVISION 1 **COURT**

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FAX: 206-492-2319

Barbara L Bollero

FILE #: 77273-7-I

FORM 18. MOTION
(Rule 17.3 (a))

No. 76273-7-1

SUPREME COURT or COURT OF APPEALS , DIVISION I OF THE STATE OF WASHINGTON

Daryl and Julie Ferguson
Plaintiff
v.
RTS Pacific Inc. Green Tree Servicing LLC
Everhome Mortgage Co.Everbank and Doe
Defendant 1-20

Petition for Review
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Petition for Review

[Date] 1/13/2019

Respectfully submitted,
Daryl and Julie Ferguson
Signature

Attorney for [Appellant, Respondent, or Petitioner]
[Name, address, telephone number, and Washington State Bar Association membership number of attorney]

			5123717143	N/A		
Jan 4	9:39AM	Received		0:42	0	No fax
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Jan 5	10:34AM	Received		0:43	0	No fax
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				N/A		

PROOF OF SERVICE

HP Officejet Pro 8600 N911g Series

Fax Log for
Shaun & Tonja Burke
425-3743141
Jan 14 2019 1:21AM

Last Transaction

Date	Time	Type	Station ID	Duration	Pages	Result
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HP Officejet Pro 8600 N911g Series

Fax Log for
Shaun & Tonja Burke
425-3743141
Jan 14 2019 1:27AM

Last Transaction

Date	Time	Type	Station ID	Duration	Pages	Result
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SENT ON: 1-13 2019

VIA FAX FOR FILING IN:

COURT OF APPEALS DIVISION 1 **COURT**

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FAX: 206-389-2613

ATT LAUREL CASE MANAGER DIVISION 1

FILE # 76273-7-I

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

No. 76273-7-I/1

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]

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[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.