No. 93422-3

SUPREME COURT
OF THE STATE OF WASHINGTON

JACK GRANT,

Plaintiff-Appellant

v.

FIRST HORIZON HOME LOANS, et al.,

Defendant-Respondent

ON APPEAL FROM DIVISION I OF THE COURT OF APPEALS
(NO. 72905-5-I)
ON APPEAL FROM WHATCOM COUNTY SUPERIOR COURT
(NO. 10-2-02676-9)

RESPONDENT FIRST HORIZON HOME LOANS' ANSWER TO APPELLANT'S PETITION FOR REVIEW

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I. INTRODUCTION

Pursuant to RAP 13.4(d), Respondent First Horizon Home Loans, a division of First Tennessee Bank National Association ("First Horizon") respectfully submits this answer to Appellant Jack Grant's Petition for Discretionary Review.

This is a case where Grant's complaint was dismissed pursuant to defendants' CR 12 motions, Grant appealed, the dismissal was affirmed save for Grant's narrow request for injunctive relief ("*Grant I*"), and the limited remaining claim was remanded back to state court. First Horizon moved for summary judgment before the trial court, won, and Grant appealed again ("*Grant II*"). During *Grant II*, Grant contended that, in light of intervening case law[1], the original dismissal of his Consumer Protection Act ("CPA") claim had been improperly affirmed by *Grant I*.

In its ruling on *Grant II*, Division 1 held that while it had authority to revisit the correctness of its prior ruling in *Grant I*, intervening precedents did not require that *Grant I* be overturned because it would have reached the same result in the first appeal regardless of the new

[1] Cases decided after *Grant I* that Grant contends constitute a change in intervening law are: *Trujillo v. Nw. Tr. Servs., Inc.*, 183 Wn.2d 820, 355 P.3d 1100 (2015), *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013), *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn.2d 775, 336 P.3d 1142 (2014), and *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wash. 2d 412, 334 P.3d 529 (2014), and *Bain v. Metro. Mortgage Grp., Inc.*, 175 Wash. 2d 83, 285 P.3d 34 (2012). Petition p. 10. Of these cases, only *Frias*, *Lyons*, and *Trujillo* were decided after this Court denied Grant's petition for review following Grant I.

cases. Simply put, the Court considered the very cases that Grant wanted it to consider and found the prior dismissals should still be affirmed under these new cases.

Grant's case offers no new insight into Washington's wrongful foreclosure jurisprudence and does not fall into any of the categories set out by RAP 13.4(b). Accordingly, Grant's Petition for Review should be denied.

II. STATEMENT OF THE CASE

A. Factual Recitation from *Grant I*.

Many of the relevant facts of this suit were laid out by the Court of Appeals in *Grant I*:

> In December 2003, Grant obtained an $800,000 construction loan from Horizon Bank to make improvements to his beach cottage in Blaine, Washington. The following year, Grant submitted an application to First Horizon Home Loans for a new loan of $838,000 (Loan) to refinance the construction loan. As a condition for the new loan, Stewart Title informed Grant that his wife must be added to the title and must sign the note (Note). Additionally, the loan amount approved was only $800,000. Grant objected to the changes, but he ultimately executed a quitclaim deed adding his wife to the title. Grant and his wife then signed the note and executed a deed of trust (Deed of Trust). According to Grant, he received an oral commitment that the quitclaim deed would be held in a file and not recorded except in the event of default. In fact, the quitclaim deed was recorded immediately. Grant and his wife divorced in 2009. Grant was awarded the beach property as his separate property.

....

In April 2010, Grant stopped making payments on the loan. Quality Loan Service Corporation of Washington (Quality) issued a notice of default on July 15, 2010. Quality identified itself as the agent for the "current owner/beneficiary of the Note secured by the Deed of Trust"[.]

...

On July 20, 2010, MERS recorded an assignment to BNYM of the deed of trust "together with the Promissory Note secured by said Deed of Trust". 9 On September 10, 2010, BNYM appointed Quality as successor trustee of the deed of trust. In this capacity, Quality issued a notice of trustee's sale on September 28, 2010. The notice set a sale date of January 7, 2011. Grant filed a complaint in Whatcom County Superior Court seeking to enjoin the trustee's sale. He also asked the court to declare the note and deed of trust void, quiet title in his favor, and award damages and attorney fees.

....

Grant asserted causes of action for (1) breach of contract; (2) bad faith/"breach of duties"; (3) intentional infliction of emotional distress; (4) interference with contractual relations; (5) negligence; and (6) violation of various statutory requirements. Grant also asserted several affirmative defenses, presumably to the enforcement of the note and deed of trust, including "wrongful conduct, undue influence and duress." 11 On November 5, 2010, the trial court granted Grant's request for a temporary restraining order enjoining the trustee's sale.

....

First Horizon, Stewart Title, and Quality each filed motions to dismiss under CR 12(b)(6) or CR 12(c), arguing that most of Grant's claims were based on conduct occurring in

> 2004 and therefore barred by the statutes of limitation. Quality and First Horizon also argued that Grant's claims for intentional infliction of emotional distress, bad faith/breach of duty, Consumer Protection Act (CPA) violations, "wrongful foreclosure," and negligence failed on their merits.
>
> After argument on the motions, the court concluded the statute of limitations had run on the claims of intentional infliction of emotional distress, on the interference with contractual relationship, negligence, and CPA claims.[2]

B. In *Grant I*, the Court of Appeals Affirmed Dismissal of All Claims Except One.

Grant appealed the trial court's Rule 12 dismissal of his claims.[3] In *Grant I*, this Court analyzed each of Grant's causes of action and found that each claim was properly dismissed.[4] This included Grant's CPA claim, whose dismissal the Court explicitly affirmed.[5] Thus, following dismissal, Grant had no live claim for damages remaining in the lawsuit. However, the Court then reversed the case on the limited issue of "the authority of First Horizon and/or Quality Loans to commence foreclosure proceedings under the DTA," which implicated only Grant's claims for injunctive and declaratory relief.[6]

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[2] *Grant v. First Horizon Home Loans*, 168 Wn. App. 1021, *1-4 (2012) ("Grant I").
[3] *See Grant I*, 168 Wn. App. 1021.
[4] *See id.*
[5] *Grant I*, 168 Wn. App. 1021 at *7.
[6] *Id.* at *10.

Following the decision in *Grant I*, Grant petitioned this Court for review.[7] The Supreme Court denied the petition for review on March 6, 2013.[8] Subsequently, the Court of Appeals issued its mandate on April 5, 2013, remanding the case to the trial court.[9]

As discussed below, on remand Grant argued that his CPA claim was still live and the claim should be evaluated under the law of the *Frias*, *Klem*, and *Lyons* cases.[10] While *Frias*[11] and *Lyons*[12] were decided after this case was remanded, *Klem*[13] was handed down by the Supreme Court even before it denied Grant's petition for review in *Grant I*.

C. On Remand, First Horizon Demonstrated that it was the Note Holder.

After the Court's limited remand, First Horizon moved for summary judgment dismissal of Grant's remaining claims.[14] In support of its motion, First Horizon presented sworn testimony that Grant's original Note and Deed of Trust were in the possession of Bank of New York Mellon ("BNYM") from early 2005 until January 16, 2014.[15] BNYM had purchased the loan from First Horizon after it was originated but First

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[7] *See* CP 111.
[8] *Id.*
[9] CP 114-15.
[10] *See* Op. Br. pp. 3-4 (assignment or error 1).
[11] *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 416, 334 P.3d 529 (2014)
[12] *Lyons v. U.S. Bank Nat. Ass'n*, 181 Wn.2d 775, 779, 336 P.3d 1142 (2014)
[13] *Klem v. Wn. Mut. Bank*, 176 Wn.2d 771, 774, 295 P.3d 1179 (Feb. 28 2013)
[14] *See* CP 5.
[15] CP 27 at ¶ 5.

Horizon had remained the servicer.[16] After that time, the original Note was transferred to Nationstar Mortgage LLC (Nationstar), BNYM's new servicing agent on the Loan.[17] Grant did not submit any sworn testimony rebutting these facts.

First Horizon also authenticated a copy of the Note through a declaration, reflecting that the Note is indorsed in blank.[18]

On December 2, 2014, the trial Court granted motions for summary judgment filed by both First Horizon and by Quality Loan Service Corporation of Washington (deed of trust trustee).[19] This second appeal followed.

D. Grant Appealed Again, Arguing an Intervening Change in Law.

Following the trial court's summary judgment ruling, Grant appealed again.[20] In *Grant II*, Grant hoped to revitalize his CPA claim based on a supposed change in the law.[21] The CPA claim had previously been dismissed by the trial court on a Rule 12 motion and that dismissal was affirmed by the Court of Appeals in *Grant I*.[22] The *Grant II* Court

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[16] CP 27-28.
[17] *Id.* at ¶ 8.
[18] CP 34.
[19] CP 307-309.
[20] *See Grant v. First Horizon Home Loans*, 194 Wash. App. 1015 (2016) ("*Grant II*").
[21] *Id.*
[22] *Id.*

affirmed the summary judgment dismissal of Grant's suit, holding that "Because we are unpersuaded that our previous decision would have come out differently under current law, we decline to exercise our discretion to reinstate the claim."[23]

III. ARGUMENT AGAINST DISCRETIONARY REVIEW

A. Legal Standard

The Washington Rules of Appellate Procedure provide that the following considerations govern whether the Supreme Court will accept a petition for review:

> (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). Here, Grant contends that review should be granted under RAP 13.4(b)(1) and (4).[24]

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[23] *Id.*

[24] *See* Petition p. 7-8.

B. Grant Misconstrues the Court of Appeals' Holding – Grant Got His Second Bite at the Apple and the Court Found his Claims to be Without Merit.

Grant's first basis for seeking review is his contention that the Court of Appeals' decision conflicts with the prior decisions of this Court.[25] Grant concedes that the decision in *Grant I* was law of the case, but that an exception exists to the general rule that the law of the case is binding.[26] Grant cites this Court's holding in *Roberson v. Perez*, 156 Wn.2d 33, 123 P.3d 844 (2005) for the proposition that the law of the case doctrine may be avoided where (1) the Court's decision was clearly erroneous; or (2) there has been an intervening change in law.[27]

Grant contends the Court of Appeals conflated these exceptions by determining that there had been a change in precedent but its prior decision was not erroneous.[28]

Grant simply misunderstands the well-reasoned alternative analyses in which the Court of Appeals engaged. First, the Court acknowledged that, had its previous decision been in error by virtue of subsequent case law, it would not be required to perpetuate that error.[29] Then, the Court reviewed Grant's argument and considered the alleged legal changes and

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[25] Petition pp. 8-13.
[26] *Id.* at pp. 8-9.
[27] *Id.* at p. 9
[28] *Id.*
[29] *Grant v. First Horizon Home Loans*, 194 Wn. App. 1015, *5 (2016)

how they might impact his claims.[30] Having reviewed the effect of *Klem* and *Frias* on Grant's claims, the Court of Appeals then determined that the intervening precedents did not "materially affect[] his case. That is, he [did] not establish that his consumer protection claim would have survived the first appeal if *Klem* had been available as a precedent."[31]

In this way, the *Grant II* Court re-reviewed the CPA claim from *Grant I* and determined that, given the benefit of subsequent legal developments, it still would have affirmed the dismissal of the CPA claim.

There is nothing improper about how the Court of Appeals disposed of *Grant II.* Indeed, *Roberson* requires that there be a ***change*** in intervening law – the development of any intervening law will not do. Under the formulation Grant proposes, the mere fact that additional case law has developed on a topic is sufficient to completely reopen a previously dismissed claim, whether or not the change in law would have made any difference. This cannot be correct as it is contrary to goals of finality and judicial economy in the legal process. *See Roberson*, 156 Wn.2d at 41, 44.

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[30] *Id.* (Reviewing Grant's allegation that *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013) and *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 334 P.3d 529 (2014) changed CPA law in his favor).
[31] *Id.*

Nonetheless, the Court of Appeals gave Grant the benefit of the doubt and found that his claims still failed. The Court found that Grant's CPA claim was "at best inchoate in the first round" and was not a "serious consumer protection act claim to be litigated." *Grant II*, 194 Wn. App. 1015, *7. That decision is not in opposition to any order of this Court and so the Petition for Review should be denied.

C. Public Policy Does Not Favor Further Review.

At its core this was a wrongful foreclosure case.[32] In the course of the litigation on remand, it was undisputed that:

1. Grant signed the note and deed of trust[33];

2. Grant was seriously in default on the Loan[34]; and

3. BNYM – the beneficiary pursuing foreclosure - held the indorsed-in-blank note. [35]

Under these facts, First Horizon had authority to foreclose the loan and in fact this authority was not disputed during the *Grant II* appeal. *See Bain v. Metro. Mortgage Grp., Inc.*, 175 Wn.2d 83, 111, 285 P.3d 34, 48 (2012) (successor lender shows it has authority to foreclose by holding note).

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[32] *Grant II* at * 1.
[33] *Id.*
[34] *Id.*
[35] CP 27 at ¶ 5.

Despite this, Grant contends that public policy requires this Court to review the Court of Appeals decision.[36] He contends that the "sheer volume of cases" handed down in recent years on the topic of "wrongful foreclosure" require that borrowers have the opportunity to have the correct law applied.[37] This argument, however, ignores the incredibly unique procedural posture of Grant's case as well as the fact that the Court of Appeals did re-review its prior ruling and found that it got the answer right.

Given the rarity of cases in this procedural posture and the fact that Grant cannot legitimately contest BNYM's authority to foreclose, public policy does not require prolonging this litigation yet again. *See Bain*, 175 Wn.2d at 94 (first goal of the Deed of Trust Act is that "the nonjudicial foreclosure process should remain efficient and inexpensive").

IV. CONCLUSION

Grant got his first bite of the apple, lost, and was given another shot. In *Grant II*, the Court of Appeals carefully reviewed the intervening legal developments and found that Grant still could not "develop and articulate a theory that was at best inchoate in the first round." Under

[36] Petition pp. 13-19.
[37] *Id.* at p. 19.

these circumstances Grant cannot satisfy the elements of RAP 13.4 and his Petition for Review should be denied.

RESPECTFULLY SUBMITTED this 23rd day of August, 2016.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury of the laws of the State of Washington that on the 23rd day of August, 2016, I caused to be served a copy of the attached document to the following person(s) in the manner indicated below at the following address(es):

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