

FILED

OCT 18 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 307263  
COURT OF APPEALS STATE OF WASHINGTON  
DIVISION III

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Wells Fargo Bank NA, as Trustee for Wamu Mortgage Pass-Through  
Certificates Series 2005 PRI Trust and their loan  
servicing agent JP Morgan Chase Bank NA, Respondent

v.

Christopher L. Short et al., Appellant

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Appellant's Opening Brief

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Christopher L. Short, Pro se  
P.O. Box 1080  
Republic, Washington 99166  
(509) 775-2521

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**IDENTIFICATION OF PARTIES**

Plaintiff and now Respondent: Wells Fargo NA, as Trustee for Wamu Mortgage Pass-Through Certificates Series 2005 PRI Trust<sup>1</sup>through their loan servicing agent JP Morgan Chase Bank NA, hereinafter referred to as “Trust”

Defendant and now Appellant: Christopher L. Short hereinafter referred to as “Mr. Short”

**ASSIGNMENT OF ERROR**

The trial court erred in granting summary judgment in a judicial foreclosure action without evidence requisite to support a finding that Trust is the holder of a promissory note secured by a deed of trust executed by Mr. Short.

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<sup>1</sup> The declarations of Mr. Lin {398 line 10} and Ms. Urquidi {CP 109 line 10} use the conjunction “and” instead of “through” in the caption header, which in effect adds a plaintiff. Mr. Short informed both parties of this corruption of the caption which information declarants ignored. Mr. Short made objections to the trial court in his response to motion for summary judgment {CP 340 line 15– CP 341 line 8} that their declarations are inadmissible for filing in their current form. Of note is only the captions headers on the declarations are corrupted, all other documents us the correct captioning.

## ISSUES PERTAINING TO ASSIGNMENT OF ERROR

### 1. Summary Judgment

- 1.1 Did the trial court err when it allowed into evidence and consideration by the court photocopies of a promissory note executed by Mr. Short which were attached to Trust's complaint {CP 415} motion for summary judgment and declaration of Ms. Urquidi {CP 117-123} that were partial, incomplete, not sworn, not certified and not original in contradiction to RCW 56(e) and ER 1002?
- 1.2 Did the trial court err when it allowed into evidence and consideration by the court the declaration of Ms. Urquidi {CP 109-113} who did not have personal knowledge of the matters testified to in contradiction to CR 56(e)?
- 1.3 Did the trial court err when it allowed into evidence and consideration by the court the declaration of Ms. Urquidi {CP 109-113} who did not show affirmatively that they were competent to testify to the matters in contradiction to CR 56(e)?
- 1.4 Did the trial court err when it allowed into evidence and consideration by the court the declaration of Ms. Urquidi {CP 109-113} in support of summary judgment which referred to papers but did not have attached to it

or serve therewith sworn or certified copies of referred to papers in contradiction to CR 56(e)?

- 1.5 Did the trial court err when it allowed into evidence and consideration by the court two mutually exclusive sets of alleged material facts regarding the chain of title of a promissory note secured by a deed of trust executed by Mr. Short {CP 111 lines 4-8} {CP 111 lines 20-23}. Material facts upon which all Trust's claim to being holder of a promissory note secured by a deed of trust by of chain of title hinge?
- 1.6 Did the trial court err when it allowed into evidence and consideration by the court declaration(s) of Ms. Urquidi {CP 109-113 & CP 353-397} that were corrupt as to format and form?
- 1.7 Did the trial court err when it made a finding at the hearing on Mr. Short's motion for reconsideration {RP 07/02/2012 page 6} that Trust was not required to comply with the rules of evidence regarding a promissory note as described in CR 56(e) and ER 1002?
- 1.8 Did the trial court err when it made a finding that an assignment of a deed of trust {CP 454} securing a promissory note executed by Mr. Short was validly assigned to Trust?

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## INTRODUCTION

This is an appeal from a summary judgment entered in the Okanogan County Superior Court {CP 92-93}. The cause of action, default on the payment of a promissory note that is secured by a deed of trust, a foreclosure action.

The statutory remedy of a non-judicial trustee's sale under RCW 61.24 was not available in this case because the real property was designated agricultural land. An injured party is specifically barred from using a non-judicial trustee sale as a remedy if the real property is designated agricultural land and fails to meet the requisites to a trustee's sale per RCW 61.24.030(2).

The essential elements of judicial and non-judicial foreclosure do not differ. The essential elements are:

1. A <sup>1</sup>holder of a promissory note.
2. A default in payment(s) by the maker of the promissory note to the holder;
3. A deed of trust that secures the promissory note that has been made or validly assigned to the holder of the promissory note.

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<sup>1</sup> The holder is defined by RCW 61.24.005(2) as "Beneficiary" and is the exclusive party entitled to foreclose on the obligation secured by the deed of trust. The holder further is the injured party, the party with "standing to sue", the "real party of interest, and the party with the right to enforce on a note per RCW 62A.3.301. The holder is the only party that has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.



In a non-judicial trustee's sale proceeding the owner of the promissory note must certify to the trustee that they are the owner of the note i.e. that they have possession of the promissory note per RCW 61.24.030 (7)(a).

In a judicial foreclosure proceeding the holder of the promissory note must prove to the court that they are the holder of the promissory note i.e. that they have possession of the promissory note.

The holder of a promissory note as designated by RCW 62A.1-201(21) is the person in possession of the promissory note.

To prove one is the holder/person in possession of a promissory note in a judicial proceeding one simply needs to file the original promissory note with the court. A promissory note is a negotiable instrument as defined by RCW 62A.3-104 and a local superior court rule in <sup>2</sup>Whatcom County has succinctly addressed this filing requirement.

**WCCR 54(c)**

**No judgment shall be taken upon a negotiable instrument until the original instrument has been filed.**

No original promissory note has been filed with the court in this case.

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<sup>2</sup> Although Whatcom County Superior Court is not the trial court in this case, no court may adopt a rule with regard to substantive law that is in contradiction to well-established case law or statutory law, but in fact the function of the local rule is to distill the case and statutory law to eliminate revisiting established issues.

The trial court Judge made statements in a dialogue with Mr. Short at the hearing on entry of a judgment of foreclosure per the previously entered order of summary judgment that may be useful to this court in identifying and understanding the origin of the trial court's primary error of not requiring Trust to provide evidence that they are the holder of a promissory note executed by Mr. Short.

The honorable Judge Culp was presiding at the hearing.

The following is the verbatim exchange that took place per the {RP 07/12/2012 page 6, line 4-16}:

THE COURT:           And of course you're talking about as you did originally, the original of the note and deed of trust.

MR. SHORT:           That's correct your honor. It's-- it's a negotiable bearer document.

THE COURT:           And the record reflects Ms. Stearns you weren't a part of the argument. I'm sure you've reviewed Mr. Lin's argument at the time and the Court ruled that it was virtually impossible to have the original of the note and deed of trust. I think they're in some warehouse in Louisiana or somewhere as I recall.

MS. STEARNS:        Your Honor, yes. I believe that is correct and additionally I would just state we are not collecting on the note. (...)

Judge Culp's statement "that it was virtually impossible to have the original of the note and deed of trust" indicates that he had confusion about the essential elements requisite to properly adjudicate the action before him.

First of all Banks are in the business of making, storing, sending and receiving promissory notes. The reason promissory notes are stored in secure records facilities is because they are negotiable instruments almost as liquid as cash money. Banks negotiate a note by transferring possession of the note in accordance with the procedure outlined in RCW 62A.3-201. It is of equivalence to think that the purchaser of promissory note, another bank for example, would accept anything but the original note (with an endorsement) than to think a bank would accept photocopies of dollar bills for deposit.

The secondary issue is that all original deeds of trust and any assignment of a deed of trust submitted for filing with a county auditor must be an original document. Copies obtained from the county for any purpose thereafter are public records and admissible as such.

Mr. Short does in fact challenge the validity of the assignment of the deed of trust, but not whether a publicly recorded document submitted to the court can or should be an original.

The third issue, which Ms. Stearns raises is the notion that they may not need the original promissory note because as she states: “...and additionally I would just state we are not collecting on the note.”

This of course is factually not accurate. Trust’s complaint at their prayer for relief {CP 411, line 16 – 413, line 6} clearly contradicts that statement.

The ancillary issues addressed in the remainder of this brief, although valid and consequential, are moot if this court agrees with the assessment that the trial court’s sense of knowledge was not sufficient to comprehend the nature of the issues presented.

Appellant moves the court to take this opportunity and make a determination on this primary issue and immediately remand this case back to the trial court with instructions.

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## STATEMENT OF CASE

Trust filed suit in the Superior Court of the State of Washington in and for Okanogan County on 11/16/2010 against Mr. Short {CP 408-454} claiming they were the current holder of a promissory note secured by a deed of trust executed by Mr. Short in favor of Washington Mutual Bank FA {CP 409}. Trust further alleged that payment on the promissory note was delinquent and that they were the assignee of a deed of trust securing said promissory note {CP 410 line 5-8}. Trust asserted that as current holder of the promissory note that they had a right to foreclose under the deed of trust. {CP 410, lines 1-9}

Mr. Short answered Trust's complaint and initiated discovery {CP 402-407} to determine the truth and authenticity of Trust's claim. Trust ignored Mr. Short's discovery request and instead filed a motion for summary judgment {CP 348-397}. Mr. Short moved the trial court to compel Trust to comply with the rules of discovery. Trust was compelled by order of the court to comply with discovery and Trust's initial motion for summary judgment was stricken from calendar.

Trust responded to Mr. Short's first set of discovery requests and filed a second motion for summary judgment with a <sup>1</sup>new witness, Ms. Urquidi who made a supporting declaration. {CP 109-113}

Mr. Short requested that Trust make available the new witness, Ms. Urquiti for examination. Trust ignored Mr. Short's request.

Mr. Short instead of again compelling discovery decided to respond to Trust's motion for summary judgment, {CP 333-347} Mr. Short argued:

- That there were several issues of material fact in dispute in particular the chain of title alleged in the Trust's complaint is contradicted by Trust's responses to discovery, two mutually exclusive scenarios are presented {CP 334-339};
- Trust was not the holder of the promissory note {CP 334-339};
- Trust's witnesses were not competent or credible {CP 339-345};
- Trust's witness' declarations were not in compliance with RCW 9A.72.85 or the court rules and should be stricken as inadmissible {CP 343 –345};

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<sup>1</sup> As has been noted elsewhere herein Trust's then attorney Mr. Albert Lin was Trust's original declarant in support of motion for summary judgment {CP 398-401}. Mr. Lin tacitly withdrew his declaration after being challenged by Mr. Short regarding its truthfulness.

- That documentary evidence, papers referenced in a declaration {CP 109-113} were not submitted as required by court rule CR 56(e) and/or the rules of evidence i.e. being sworn or certified papers, except where exempted by rule e.g. public records.
- That the deed of trust was improperly assigned and it's execution highly irregular {CP 342-344}.

The court ruled that there were no issues of material fact in dispute.

Mr. Short made a Motion for Reconsideration {CP 67-91}. The court denied said motion {CP 06}.

Mr. Short filed this appeal {CP 01-02}.

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## PROMISSORY NOTE

In the State of Washington RCW 62A, the state's adaptation of the UCC, defines, instructs and governs the use and function of instruments used in commerce, such as promissory notes.

RCW 62A.3.104 classifies a promissory note as a negotiable instrument.

### **RCW 62A.3-104 Negotiable Instrument**

**(a) Except as provided in subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:**

- (1) Is payable to bearer or to order at the time it is issued or first comes into possession of a holder;**
- (2) Is payable on demand or at a definite time; and**
- (3) Does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.**

**(b) "Instrument" means a negotiable instrument.**

The court was tasked with determining if the claimant, Trust is the holder of a promissory note, which is defined by the foregoing statute as a negotiable instrument. A holder of a negotiable instrument, in this case a promissory note, is defined at RCW 62A.1-201(21).



**RCW62A.1-201(21)**

**(21) "Holder" with respect to a negotiable instrument, means:**

**(A) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;**

**(B) The person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or**

**(C) The person in control of a negotiable electronic document of title.**

Negotiable instruments are negotiated in accordance RCW 62A.3-201.

(a) Negotiation means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer who thereby becomes the holder.

When a holder of a negotiable instrument, in this case a promissory note, files a <sup>1</sup>claim in the Washington State Superior court requesting the court grant them a judgment they are in essence negotiating the promissory note in exchange for a judgment of the court. A judgment has commercial value, judgments are bought and sold in the marketplace, and therefore a promissory note and a judgment are fungible.

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<sup>1</sup> RCW 62A.3-301

The person entitled to enforce an instrument

Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

It leads to an absurdity when one contemplates the idea that the holder of a promissory note should be granted both a judgment of the Superior Court and the right to retain possession of the promissory note on which that judgment is based.

WCCR 54(c) a local court rule of the Whatcom county Superior Court distills the essence of well-established case and statutory law into a legal maxim;

**No judgment shall be taken upon a negotiable instrument until the original instrument has been filed.**

No original promissory note has been filed with the trial court, therefore no judgment can be granted. Trust counters that they have a witness {CP 112, lines 15-17} who has testified that she has personal knowledge that an original promissory note executed by Mr. Short is in secure warehouse in Monroe, LA., that this secure warehouse is under the control or ownership of Chase.

If this were true, a question every reasonable person would have to ask is, why would Trust not order <sup>2</sup>Chase to put the promissory note in a secure envelope and send it via a secure courier to the Okanogan County Superior Court.

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<sup>2</sup> Chase Bank is one on the major banks in the World and is fully familiar with receiving, storing, and sending negotiable instruments. Whenever a promissory note secured by a deed of trust is "paid off" whether by completing all the payments, refinance or other means the holder of the promissory note must return the promissory note to the maker.

If Trust is actually the holder of a promissory note executed by Mr. Short, Trust has no legitimate reason or purpose to maintain possession.

The trial court erred when it allowed Trust to ignore the requirements of RCW 56(e) and ER 1002 and allowed into evidence and consideration by the court un-sworn and/or uncertified facsimiles and speculative testimony not carrying the quality of proof or having the fitness to induce a finding of no material facts in dispute.

The trial court erred at the hearing on Mr. Short's motion for reconsideration {RP 03/15/2012} when the court stated it was satisfied with a certified copy of the promissory note, when no certified copy of the promissory note, even if acceptable as evidence, has been filed with the court. Ms. Urquidi attached to her declaration {CP 117-122} a mere<sup>3</sup> partial photocopy with no certification as to being a copy of the original.

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<sup>3</sup> The back of a promissory note is integral part of the note. Similar to a check that is where any endorsement(s) would appear.

## COMPETENT WITNESS

Trust has submitted declarations by two witnesses in support of two motions for summary judgment. The first declaration submitted by then attorney for Trust, Mr. Albert Lin {CP 398-401 no exhibits attached} has apparently been tacitly withdrawn. This occurred after it was pointed out to Mr. Lin that many of the statements contained in his declaration appeared flagrantly false. Therefore, only the competency of the new witness Araceli Urquidi, who provided <sup>1</sup>declarations {CP 353-397 and CP 109-113 with Exhibits <sup>2</sup>CP 116-272} for Trust's second motion for summary judgment, will be addressed.

Affidavits/Declarations submitted in support of a motion for summary judgment must conform to CR 56(e) and by reference ER 602.  
CR 56

- (e) Form of Affidavits; Further Testimony; Defense Required.  
Supporting and opposing affidavits **shall be made on personal knowledge**, shall set forth such facts as would be admissible in

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<sup>1</sup> Ms. Urquidi {CP 353-397} and Mr. Lin's {CP 398-401} first declarations in support of Plaintiff's motion for summary judgment did not conform to the requirements of RCW 9A.72.85. Both were sworn under penalty of perjury under the laws of the United States of America {CP 355} & {CP 401} as well as other objectionable non-conformities. After Mr. Short objected, Ms. Urquidi submitted a second declaration {CP 109-113}, which addressed conformity to RCW 9A.72.85 by being sworn under penalty of perjury under the laws of the State of Washington but neglected other objectionable issues raised by Mr. Short. Mr. Short maintains his objections to Ms. Urquidi's declaration on multiple grounds {CP 329-332} {CP 339-345}.

<sup>2</sup> Plaintiff has apparently inadvertently inserted the Order Granting Plaintiff's Motion for Summary Judgment between Ms. Urquidi's statement of fact and the Exhibits to her declaration at CP 114-115.

evidence, and shall show affirmatively that the affiant is **competent** to testify to the matters stated therein. **Sworn or certified copies of all papers** or parts thereof referred to in an affidavit shall be attached thereto or served therewith...

Washington Rules of evidence Rule 602 states:

#### LACK OF PERSONAL KNOWLEDGE

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has **personal knowledge of the matter**. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

The witness/declarant states at item 1 of her declaration:

“....As to the following facts, I know them to be true of my own personal knowledge...” {CP 109 line 16-17}

If this statement were true her declaration would comply with the requirement of CR 56(e) and ER 602, but CR 56(e) and ER 602 require more than the mere statement, they require some proof:

- (affiant) shall show **affirmatively** that the affiant is **competent** to testify to the matters stated therein; (CR 56(e))
- **A witness may not testify** to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. (ER 602).

**No evidence has been submitted to the trial court, nor is there any testimony from the witness herself describing how she came to have personal knowledge of the facts for and about which she has provided testimony.**

Examples of documentary evidence the witness may have provided that may have been sufficient to support a finding the witness has personal knowledge of the facts of the matter:

- Pay stubs
- w-2 forms
- letters of employment
- letter of agency
- Washington State licensing data base search
- ledgers or other business records

Examples of testimony the witness may have provided that may have been sufficient to support a finding the witness has personal knowledge of the facts of the matter:

- I have been employed by ABC since \_\_\_\_\_
- On or about \_\_\_\_\_ I was in Monroe, LA at Chase's secure warehouse.....

- On or about \_\_\_\_\_ I examined Mr. Short's original promissory note

An examination of Ms. Urquidi's declarations {CP 109-113} or the attached Exhibits {CP 116-272} will reveal no such testimony or any such document attached.

Declarant, Ms. Urquidi introduces herself as a duly authorized agent and signor for Wells Fargo Bank, NA, as Trustee for WaMu Mortgage Pass-Through Certificates Series 2005 PRI Trust, and its servicing agent JP Morgan Chase Bank, NA {CP 109 line 19-21}.

No letter of agency has been submitted nor any proof she has authority to sign for any of the parties mentioned.

Declarant, Ms. Urquidi signs her declaration in Chatworth, California and inserts above the title line "HL Sr. Research Specialist".

No definition for that title is offered, nor who conferred such designation.

The trial court erred when it allowed into evidence and consideration by the court the declaration of a witness who did not have personal knowledge of the matters testified to in contradiction to CR 56(e).

The trial court erred when it allowed into evidence and consideration by the court the declaration of a witness who did not show affirmatively

that they were competent to testify to the matters in contradiction to CR 56(e).

A further examination of Ms. Urquidi's declarations will reveal corruption of the caption header where a party, JP Morgan Chase Bank NA, is apparently added as an additional plaintiff by the conjunction "and" {CP 109 line 10} instead of "through" used in Trust's complaint {CP 408 line 10} this without leave of the court and over the objections of Mr. Short. Of note is the only documents that this corruption of the caption header occurs in are the declarations of Ms Urquidi {CP 109 line 10 & CP 353 line 10} and Mr. Lin {CP 398 line 10}.

The trial court erred when it allowed into evidence and consideration by the court the declaration of a witness who flagrantly violated the rules of format and form for a document submitted to the court for filing.

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**CHAIN OF TITLE**  
**Trust's two accounts of the material facts**

**Fact set one.**

Trust's complaint {CP 409 lines 17-23}, states on 10/02/2008 Trust's motion for summary judgment and the supporting declaration's of Ms. Urquidi {CP 111 line 4} state as fact that on 09/25/2008 a promissory note secured by a deed of trust executed by Mr. Short were assigned to JP Morgan Chase Bank NA by Washington Mutual Bank FA pursuant to an agreement with the FDIC which had seized the assets of Washington Mutual Bank.

**Fact set two**

At Trust's responses to Mr. Short's discovery requests {CP 337, Interrog. 1.4}, Trust states that Washington Mutual Bank FA at the time of the FDIC seizure of its assets did not own Mr. Short's loan i.e. a promissory note secured by a deed of trust. This was confirmed in the second declaration submitted by Ms. Urquidi {CP 111 line 20} in support of plaintiff's motion for summary judgment.

Therefore a promissory note secured by a deed of trust executed by Mr. Short were not part of the Washington Mutual Bank FA asset pool seized by the FDIC on September 25, 2008 as alleged, and therefore could

not have been assigned to JP Morgan Chase Bank NA as stated, and therefore all the alleged subsequent assignments of a promissory note and the deed of trust securing the promissory note executed by Mr. Short, including the alleged assignment to Trust would be of necessity a nullity?

The trial court erred when it allowed into evidence and consideration by the court two mutually exclusive accounts of the material facts regarding the chain of title of a promissory note secured by a deed of trust executed by Mr. Short. The court granting a motion for summary judgment ruling there was a not a genuine dispute as to the material facts, when Trust's two mutually exclusive accounts of the material facts in and of themselves create a genuine dispute as to material facts.

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## SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate under the following circumstances:

1. The Court can only consider admissible evidence, CR 56 (e);
2. “The moving party bears the initial burden of showing the absence of material fact. (Citation omitted).” *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 381, 46 P.3d 789, 795;
3. If the moving party meets its initial burden, then the burden shifts to the other party. *Right-Price Recreation, LLC, supra*, 381, 382, 795;
4. The court must consider the facts and all reasonable inferences from those facts in the light most favorable to the nonmoving party. *Right-Price Recreation, LLC, supra*, 381, 795.

Only after consideration of the criteria above is summary judgment appropriate. *Right-Price Recreation, LLC, supra*, 381, 795. Trust has met none of the four criteria.

COURT OF APPEALS DIVISION III OF THE STATE OF WASHINGTON

Wells Fargo Bank, N.A. as Trustee	)	
for Wamu Mortgage Pass-Through	)	
Certificates Series 2005-PRI Trust	)	Case No: 307263
through their loan servicing agent	)	Case No: 102006232 Okanogan
JP Morgan Chase Bank, N.A.	)	DECLARATION OF
	)	SERVICE
Respondents,	)	
	)	
vs	)	
	)	
Christopher L. Short; et al	)	
	)	
Appellants.	)	
_____	)	

I certify that on October 17, 2012, I sent by United States Mail copies of the of the attached Amended Appellant's Opening Brief:

Barbara L. Bollero and Ann T. Marshall (individually)  
Bishop White Marshall & Weibel PS  
720 Olive Way, Suite 1201  
Seattle, WA. 98101-1878

I declare under penalty of perjury and the laws of the State of Washington that the foregoing is true and correct and that this Declaration was executed in Republic, WA. on October 17, 2012.



Christopher L. Short  
PO Box 1080  
Republic, WA 99166  
509 775 2521