

FILED
Court of Appeals
Division II
IN THE COURT OF APPEALS OF THE
State of Washington
7/1/2019 8:00 AM

NO. 51232-7-3

FLOYD and MARGARET SCOTT, husband and wife,
Plaintiffs/Appellants,

vs.

**NORTHWEST TRUSTEE SERVICES, INC; and WELLS FARGO
BANK, NA,**

Defendants/Respondents.

**ON APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON IN AND FOR THE COUNTY OF CLARK**

**APPELLANTS SCOTTS'
RESPONSE TO RESPONDENTS' REPLY**

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I INTRODUCTION

A. Mortgage Note Arrearages No Longer Exist.

While making it clear that we reserved our right to continue to contest the unlawful foreclosure, Plaintiffs reinstated the Note and deed of trust (“DOT”) by paying the arrearages several months ago and then sold the property located at 2907 Drummond Ave., Vancouver, WA 98642 (“Property”).

II ARGUMENT

B. Rebuttal to Defendants’ Rebuttal to Plaintiffs’ Opening Brief.

Respondents have offered several arguments to rebut the arguments contained in Appellants’ Opening Brief. This Response to Defendants’ Reply (“Response”) responds to the portions of the Reply that contain enough legal reasoning, if only barely so, to justify some sort of response.

Defendants’ main argument, repeated over and over again, is that the Washington Supreme Court has already decided that the Security Follows the Note Doctrine means whoever physically possesses a mortgage note that identifies him or her as the payee or that is endorsed in blank is entitled to enforce the deed of trust (“DOT”) that secures the note; even if he or she does not own the note.

Nobody understands better than Plaintiffs that the Supreme Court has concluded that, under the terms of the Washington Deeds of Trust Act (“DTA”), the holder of the note is entitled to foreclose. But the Supreme Court has never come to that conclusion after interpreting relevant provisions of a DOT. This appeal is based on the relevant provisions of Plaintiffs’ DOT. The appellate courts of this state have never addressed the issues raised in Plaintiffs’ Opening Brief. For that reason, as Plaintiffs indicate in the Opening Brief, this is a case of first impression in Washington. And if the case is decided correctly, the decision will reverberate not just across the State of Washington, but across the entire country.

1. Washington Courts Have Ignored RCW 61.24.030(3).

RCW 61.24.030(3) *requires* the court to determine whether a default has occurred “in the obligation secured . . . , *which by the terms of the deed of trust makes operative the power to sell [the property].*” (bracketed material and italics added). Despite the subsection’s status as a *requirement* of a lawful trustee’s sale, only a hand full of Washington cases even mention the subsection. And of the few cases that mention RCW 61.24.030(3), all of them either mis-state what it requires,¹ or quote

¹ Several of the cases state that RCW 61.24.030(3) requires only that a default has occurred. This kind of intellectual sloppiness would be appalling if observed in the work of a first-year law student; it is horrifyingly eye-opening when observed in the work of a judge. In many cases, and it truly pains me to say this, judges in this state are not giving taxpayers their money’s worth. By refusing to apply the amount of intellectual energy required to arrive at the correct answers to these important questions, they are piggy backing on the intellectual work of other and are effectively stealing their pay.

the subsection's language and then refuse to consult the relevant provisions of the DOT.

Brown and every other significant Washington foreclosure decision has been decided based on the provisions of the DTA. Not one Washington foreclosure case—Ever! —has been decided based on the default requirements contained in the DOT. Since RCW 61.24.030(3) requires that there be a default which by the terms of the deed of trust makes operative the power to sell the property, every Washington case, including *Brown*, that has judged the legality of a non-judicial foreclosure proceeding without consulting the relevant provisions of the DOT has been fatally flawed.

Plaintiffs' appeal asks this Court to decide whether a default occurred in the obligation secured, which under the terms of the deed of trust—not under the terms of the DTA—made operative the power to sell the property. The *Brown* decision should not control the outcome of this case. So, if you are going to deny our claims, please have enough intellectual integrity to apply your own intellectual energy to overcome our claims. Please don't simply and inappropriately piggyback on the holding in *Brown* to deny our claims. Because *Brown* specifically states that it does not apply to the issues raised in this appeal.² *Brown v. Department of Commerce*, 184 Wn.2d 509, 529 fn. 9, (2015).

² "The parties agree that the note is secured by a publicly recorded deed of trust, but the deed is not in this court's record. . . . The parties present no arguments relating to the

We address the issue of whether *Brown* controls this case prolifically in the opening brief. *Appellants' Opening Brief* (“*Opening Brief*”) at 20-33. So, Plaintiffs will not invest many additional pages arguing the issue in this brief. However, we will make two more points about the issue.

2. Freddie Mac Remained the Mortgagee after It transferred the Note to Wells.

In a mortgage loan transaction that results in a borrower issuing a mortgage note and mortgage (or deed of trust) to a lender, the lender is often referred to as the *mortgagee* and the borrower as the *mortgagor*. *Webster's Encyclopedic Unabridged Dictionary of the English Language* (New Revised Edition 1997) (“*Webster's*”) defines the term *mortgagee* as “a person to whom property is mortgaged.” *Webster's* at 932. The same source defines the mortgagor as “a person who mortgages property.” *Id.* And the term *mortgage* is defined as “a conveyance of property to a creditor as security, as for the repayment of money.” *Id.*

Combining the definitions of *mortgagee* and *mortgage* yields the following meaning for the term *mortgagee*: A person to whom property is conveyed as security for the *repayment* of money. This definition tracks perfectly with the definition of the person the DOT secures contained in

deed of trust as distinct from the note.” Brown, 184 Wn.2d at fn. 9. As *Brown* relates to this appeal, the immediately preceding quote is the most important language in the case for two reasons. First, this appeal is primarily based on the language contained in the deed of trust, and the quoted language proves the decision in *Brown* is not based on the language contained in the deed of trust. How could it be, when the Court admits it never had the opportunity to review the DOT. Second, *Brown* cannot control an appeal that is based on arguments the *Brown* Court did not consider.

every standard DOT: “This Security Instrument secures *to Lender* [the person to whom the borrower’s property is conveyed as security for repayment of the lent]: (1) the *repayment* of the debt. . . .” (emphasis added and bracketed material not in original).

By the way, one cannot receive *repayment of a debt* if one has not loaned any money. In this case Wells has loaned nothing. The Scotts do not owe Wells a debt. How then can Wells possibly be the *secured party* (aka the mortgagee, the lender, and the beneficiary of the DOT) when the security language in the DOT states that it secures “*to Lender*: (i) *repayment* of the loan evidenced by the note. . . .” If there is even an ounce of intellectual honesty within you, you know that that language cannot be squared with the notion that Wells is the beneficiary of the DOT and therefore is entitled to foreclose under the DOT.

Following a trustee’s sale, RCW 61.24.080(2) requires the trustee to apply the proceeds of the sale to the obligation secured by the DOT. This requirement makes the job of determining who holds the interest secured by the DOT—and therefore who is the party secured by the DOT—very simple: Simply observe to whom the trustee transfers the proceeds of the trustee’s sale.³

³ Under RCW 62A.9A-315(a)(1), “A security interest . . . continues in collateral notwithstanding sale, . . . unless the secured party authorized the disposition free of the security interest . . .;” and under (a)(2), “A security interest attaches to any identifiable proceeds of collateral.” And under RCW 62A.9A-102(a)(12), collateral means “the property subject to a security interest. . . .” This makes the borrower’s home “collateral” because it is subject to the security interest created by the deed of trust for the benefit of the mortgagee.

By law, RCW 61.24.080(2), the trustee must pay the proceeds of the trustee's sale to the obligation secured by the deed of trust. Therefore, by law, the person to whom the trustee pays the proceeds must be the person who owns the obligation secured by the deed of trust. Since, pursuant to RCW 62A.9A-315, an interest in collateral continues in the proceeds of the sale of the collateral, the person who is entitled to the proceeds of the sale of the security is, by definition, the secured party.

In *Brown*, Ms. Brown's property was never sold. But the Supreme Court indicated who would have been entitled to the proceeds of the sale of the property (i.e., the sale of the security) had the property been sold at public auction: Freddie Mac! *Brown*, 184 Wn.2d at 523. This means the *Brown* Court acknowledged, as a matter of law (RCW 61.24.080(2)), and maybe without realizing it was doing so, that Freddie Mac—not Wells—held the obligation secured by the deed of trust. Freddie Mac, based on the interest it held, by definition and by law, was the secured party, the mortgagee, the lender, and the beneficiary of the deed of trust.⁴

In *Brown*, Freddie Mac did not hold the blank-endorsed note, or, consequently, the right to enforce the note. M & T Bank held the right to enforce the note. Hence, by the requirement of RCW 61.24.080(2), the *right to enforce the note* could not have been the right that Ms. Brown's

⁴ For more than a thousand years the beneficiary of a trust has always been the person who is entitled to the benefit(s) that the trust distributes. The benefit that a mortgage trust distributes is always either the borrower's home or the proceeds from the sale of the borrower's home. Accordingly, whoever is entitled to the proceeds from the sale of the home is--backed by one thousand years of western history--the beneficiary of the DOT.

deed of trust secured. This conclusion is inescapable, unless you are so determined to arrive at a result favorable to the bank that that you are willing to compromise your integrity to get there.

The above analysis is irrefutable proof that the deed of trust does not follow the physical transfer of the secured note unless the note is transferred for value. *RCW 62A.9A-203(a), (b), (g)*. This is the true meaning of *RCW 62A.9A-203(a), (b), and (g)*—the codification of the common law *Security Follows the Note Doctrine*. And, therefore, this is the true meaning of the common law *Security Follows the Note Doctrine*.

The widely held belief that the Security Follows the Note Doctrine means the security follows any transfer of a blank-endorsed, secured promissory note is about as ignorant and overly-simplified an understanding of the meaning of that sophisticated doctrine as it is possible to have. A true understanding of the meaning of the doctrine is achieved at a much higher level than the level at which such ignorant and overly-simplified explanations dominate the intellectual landscape.

3. Wells Ceased to be the Lender When It Sold the Loan.

At page 4 of the Reply, Respondents make the following assertions:

The Scotts' deed of trust defined Wells Fargo as the "Lender," and the deed of trust further defined the "Lender" as the beneficiary of the deed of trust. (cite omitted). The Scotts further agreed in the deed of trust that it was subject to any requirements of Washington law. (cite

omitted). Under RCW 61.24.005(2), the holder of the promissory note is also the beneficiary of the deed of trust.

These statements are so unintelligent that Plaintiffs feel our intelligence has been diminished by having had to read them. Plaintiffs are not even sure what point Defendants are attempting to make by making these statements. Frankly, we are not sure that Defendants are sure what points they are attempting to make by making these statements.

It is true that Plaintiffs' deed of trust names Wells Fargo the *lender* and the *lender* the beneficiary of the deed of trust. Of course, Wells Fargo was identified as the *lender* in the deed of trust; it originated the loan. And the lender is always the beneficiary of the deed of trust.⁵ But what do either of those two facts have to do with any principle or law that is relevant to any issue Plaintiffs have asked this Court to decide? The short answer to that question is "Nothing!"

Wells continued to be the lender and the beneficiary of the DOT only so long as it continued to own Plaintiffs' debt. The moment it sold the loan to Freddie Mac, it ceased to be the lender and the beneficiary of the DOT. Sections of the DOT explain the process for transferring lender and beneficiary-of-the-deed-of-trust status from one person to another.

⁵ By the way, this fact is additional proof that the *Brown* decision is fatally flawed. In *Brown*, Freddie Mac remained the "lender" after transferring the note to M & T Bank. This fact was undisputed in the *Brown* case. Because Freddie Mac continued to be the lender after transferring the note to M & T Bank, Freddie Mac continued to be the secured party, the beneficiary of the DOT, and the mortgagee after transferring the note to M & T Bank. After all, the DOT does clearly and unambiguously state, "This Security Instrument secures *to Lender*. . . ." Freddie Mac's and M & T Banks' respective armies of commercial lawyers certainly knew how to state, "This Security Instrument secures *to Noteholder*," if the noteholder is who they intended the DOT to secure.

Plaintiffs identify those sections and thoroughly explain the process at pages 22-25 of the Opening Brief.

4. Plaintiffs' Do Not Allege the DOT Defines the Lender as the Owner of the Loan.

Respondents state, "The Scotts' repeated allegation that the deed of trust defines the Lender as the owner of the loan is wrong." Horsefeathers! The borrower becomes indebted by accepting the loan with the understanding that it must be repaid with interest. It is self-evident that the lender owns the indebtedness. The DOT does not need to define the lender as the owner of the loan. Nevertheless, the DOT does define the lender as the owner of the loan. But you must know how to interpret the language of a DOT to know that it defines the lender as the owner of the loan. Apparently, Defendants don't know how to interpret the DOT's language.

Here is the simple explanation of how the DOT defines the lender as the owner of the loan. The DOT defines the loan as "The debt evidenced by the note. . . ." *Deed of Trust* at 2(H). The lender owns the borrower's debt; nobody can deny that fact. Ergo, the DOT defines the lender as the owner the loan.

This assertion does not deserve any more discussion.

5. Freddie Mac Did Not Have to Possess the Note to Own It.

The allegation: "The Scotts never alleged in the trial court that Freddie Mac possessed the note at any time, much less 'transferred' the

note to Wells Fargo, as they assert repeatedly throughout their opening brief, for the first time on appeal.” *Reply* at 4. And later in the Reply Defendants assert, “Wells Fargo never assigned the deed of trust, it was always the Lender and beneficiary of the instrument.” *Reply* at 17.

Are Defendants kidding? Do they really believe this flummery? Do Defendants really believe that because Wells allegedly never delivered the note to Freddie Mac, Wells somehow remains the owner of the note? This is lunacy.

For the Court’s information, Freddie Mac requires every lender who sells it a loan to deliver the blank-endorsed promissory note and DOT to Freddie Mac, or to hold the note as a custodian for Freddie Mac. *CP* at 15. Undoubtedly, despite the foolishness on page 17 of the Reply, Wells delivered the note to Freddie Mac, or, under the Purchase Agreement, held the note as a custodian for Freddie Mac, which is the legal equivalent of delivering the note to Freddie Mac.

But none of this is important. What is important is that the promissory note and the DOT are two different documents that serve two different functions. The promissory note represents the obligation to repay the debt. The DOT secures that obligation. *In re Trustee’s Sale of Real Property of Burns*, 167 Wn.App. 265, 272, 272 P.3d 908 (2012).

If the holder of the note is also the secured party under the deed of trust, he or she, in the event of a default on the promissory note, can sue

on the note or, alternatively, foreclose on the security for the note. In other words, the two remedies are separate from one another, and they must be enforced separately. *Id.* at 276-278; *RCW 62A.3-310(b)(3)* (“if the check or note is dishonored, and the obligee of the obligation for which the instrument was taken is the person entitled to enforce the instrument, the obligee may enforce either the instrument or the obligation.”). Therefore, unless you are the holder of the note and the owner of the obligation the DOT secures, having the right to enforce the note does not imply that you have the right to enforce the security for the note.

Defendants claim that a noteholder automatically has the right to enforce the security for the note because that noteholder has the right to enforce the note. But Defendants do not explain why that claim is true. There is a reason why Defendants don’t explain why that claim is true; because the claim is not true.

The clear implication of *RCW 62A.3-310(b)(3)* is if the person entitled to enforce the note is not the obligee, then the right to enforce the underlying obligation (in this case, the right to enforce the DOT) is lost. Official Comment 3 to UCC §3-310 makes the point explicitly.

6. There were Two Versions of the Promissory Note.

Defendants claim, “There was no Wells Fargo ‘version’ of the promissory note, as asserted by the Scotts. *Reply* at 9. Further, they claim:

In support of its motion to dismiss, Wells Fargo filed, and identified as such, the promissory note *the Scotts* attached as an exhibit to their Complaint, which they [the Scotts] alleged was a true and correct copy of the promissory note they executed. The promissory note they signed would not have been indorsed yet. In any event, this was not Wells Fargo's 'version' of the note—it was the Scotts.

The above quote contains several revelations. First, Defendants acknowledge the note would not have been endorsed yet on the day Plaintiff Margaret Scott signed it. By doing so, Defendants implicitly admit the note was a true and correct copy of the note Mrs. Scott signed, as Plaintiffs alleged in the Complaint. When Plaintiffs filed the Complaint, they did not have the trustee's version of the note. Second, Defendants appear to be oblivious to the fact that by including the note as an exhibit in their Motion to Dismiss Defendants adopted the note as their version of the note. Consequently, as Plaintiffs indicate in their brief, there was a Wells Fargo version of the note and a trustee's version of the note.

7. The Court should not Disregard Plaintiffs' Waiver Argument.

Defendants demand that the Court, “. . . disregard the Scott's waiver argument because they raise it for the first time on appeal.” *Reply* at 13.

If it is possible for a demand to show a complete lack of ability to reason legally, this demand shows it. The waiver argument could not have been made in the trial court. The waiver did not occur until Defendants failed to appeal—in *this Court*—the trial court's lack of jurisdiction ruling in their favor. Nothing more need be said about this argument.

8. The Court Should Not Reject Plaintiffs' Constitutional Claim.

Defendants proclaim, "The Court can reject the Scotts' constitutionality claim because the Scotts never raised it in the trial court, . . . failed to give notice of the claim to the Washington State Attorney General, the Scotts did not address the highly differential standard, and because the Deeds of Trust Act is consistent with the deed of trust." *Id.* Balderdash!

9. Constitutional Argument Could Not Be Raised in Trial Court.

The constitutional argument could not have been made in the trial court. Ours is a "facial challenge," as opposed to an "as applied challenge," to RCW 61.24.030(7)(a). The difference between the two types of challenges is that a statute is rendered *completely inoperative* if it is declared facially unconstitutional. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 258, 241 P.3d 320 (20110).

The trial court granted NWTS's Motion to Dismiss in December 2017, and Plaintiffs appealed in December 2017. Until June 7, 2018, RCW 61.24.030(7)(a) required the trustee to obtain proof the beneficiary was the *owner* of the note to acquire the authority to conduct a non-judicial foreclosure. Notwithstanding the Supreme Court's holding in *Brown*, RCW 61.24.030(7)(a) contained the correct standard until June 7, 2018. Accordingly, Plaintiffs could not challenge the statutory provision facially

until June 7, 2018. We did so as soon as we could, nearly seven months after the trial proceeding ended.

10. Plaintiffs were not required to Notify the Attorney General.

Plaintiffs were not required to notify the Attorney General of their constitutional claim. RCW 7.24.110 requires a party to notify the Attorney General when seeking a declaratory judgment that the provisions of a statute are unconstitutional. Plaintiffs have not requested a declaratory judgment. We did not bring this action under RCW 7.24.110.

Even if we had brought our action under that statutory provision, that provision can be waived. *Leonard v. Seattle*, 81 Wn.2d 479, 481, 503 P.2d 741 (1972). If it applies in this case, and it doesn't, it was been waived. Defendants are making the argument for the first time here in the Court of Appeals.

C. Defendants Have Waived Lack of Proper Service Claim.

Defendants have waived the lack-of-proper-service claim. Based on the holding in *Brown*, Defendants moved the trial court to grant dismissal. They submitted documents outside the pleadings—files and records in the case—in support of the motion. Citing Defendants' use of documents outside the pleadings, the trial court converted the motion to dismiss to a motion for summary judgment and granted the motion.

Summary judgment is a final judgment *on the merits* of a case. *Chau v. Attorney General*, 2009 Wash. App. LEXIS *9-10 (“Second, that action resulted in a final judgment on the merits because the trial court it

on summary judgment and we affirmed the summary judgment on the merits.”); *In re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004) (“[a] grant of summary judgment is a final judgment *on the merits* with the same preclusive effect as a full trial”); *Emeson v. Dept. of Corr.*, 194 Wn. App 617, 627, 376 P.3rd 430 (2016); *Munoz Munoz v. Bean*, 2016 Wash. App. LEXIS *37.

A court has authority to grant judgment on the merits of a case only if it has personal jurisdiction over the parties to the dispute. *Eagle Sys., Inc. v. Employment Security Dept.*, 181 Wn. App. 455, 459, 326 P.3d 764 (2014) (“When the trial court lacks personal jurisdiction, any judgment entered is void.”). Thus, by failing to appeal the trial court’s summary judgment and res judicata and collateral estoppel rulings, Defendants have waived the lack of personal jurisdiction ruling.

Given the level of discourse in the Reply, Plaintiffs don’t expect Defendants to understand what we are talking about. But we do expect the Court to understand. The principle is well explained in *EF Operating Corp. v. American Bldgs.*, 993 F.2d 1046 (1993).

In *EF Operating Systems, Inc.*, EF Operating Systems sued a consignee over an unpaid delivery bill. Eventually, both EF Operating and the consignee moved for summary judgment. In addition, the consignee moved for dismissal based on the trial court’s lack of personal jurisdiction. The trial court ruled against the consignee’s lack of jurisdiction motion by

implication when it decided the summary judgment motion in the consignee's favor.

EF Operating Systems appealed the summary judgment. The consignee did not cross appeal and defended the appeal in part by alleging the trial court's lack of personal jurisdiction. The Third Circuit Court of Appeals made the following ruling:

A grant of summary judgment and a dismissal for lack of personal jurisdiction are . . . wholly different forms of relief. (cite omitted). The latter is a dismissal without prejudice, whereas the former is a ruling on the merits which if affirmed would have preclusive effect. (cite omitted). By seeking dismissal of the complaint for lack of personal jurisdiction, Flaherty is not seeking to support the summary judgment on different grounds. (cite omitted). *Rather it seeks to vacate the summary judgment.* Thus, where an appellant files an appeal seeking review of a summary judgment for the appellee, the appellee must cross-appeal to contest the district court's adverse ruling on his motion to dismiss for lack of personal jurisdiction. (cite omitted). *See Benson v. Armontrout*, 767 F.2d 454, 455 (8th Cir. 1985) (appellee must cross-appeal to argue that the district court should have ruled on the merits and dismissed a habeas claim with prejudice where the court denied relief without prejudice). Since Flaherty did not cross-appeal, we have jurisdiction to review the district court's summary judgment ruling only.

EF Operating Corp., 993 F.2d at 1048-49.

The Third Circuit's reasoning applies in Washington. Respondents are arguing that the Court should uphold the trial court's dismissal for lack of jurisdiction, its summary judgment ruling, and its ruling that summary judgment and collateral estoppel apply. But as in *EF Operating Systems, Inc.*, the dismissal for lack of personal jurisdiction seeks to vacate the summary judgment and res judicata and collateral estoppel rulings. As was

true for the Third Circuit, this Court has jurisdiction to review the trial court's summary judgment and res judicata and collateral estoppel rulings only. *Modumetal, Inc. v. Xtallic Corp.*, 4 Wn. App 2d 810, 836-837, 425 P.3d 871 (2018); *State v. Strutton*, 1998 Wash. App. LEXIS 733;

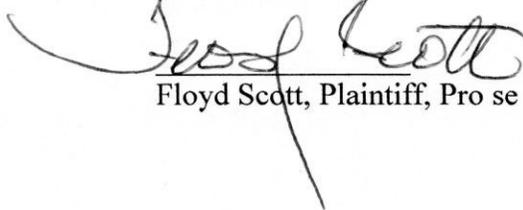
V CONCLUSION

For all the foregoing reasons, Plaintiffs request that the Court reverse the trial court's summary judgment ruling and remand the case to the trial court with instructions to reinstate Plaintiffs' CPA claim and to grant summary judgment that Wells is not the Secured party or Beneficiary under the terms of the DOT.

Dated this 28th day of June 2019 at Ridgefield, Washington.

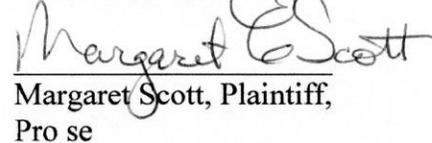
Respectfully Submitted

FLOYD SCOTT



Floyd Scott, Plaintiff, Pro se

MARGARET SCOTT



Margaret Scott, Plaintiff,
Pro se

CERTIFICATE OF DELIVERY

I hereby certify that I, Margaret E Scott, have this 28th day of June 2019,
delivered copies of the following:

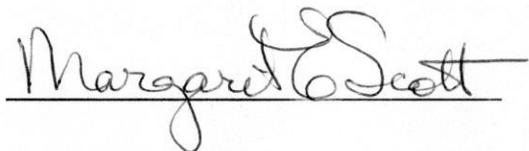
APPELLANTS SCOTTS' RESPONSE TO RESPONDENTS' REPLY

upon the parties of record below in this proceeding in the manner indicated:

Justin T. Jastrzebski	<input type="checkbox"/> By United States Mail
AFRCT LLP	<input type="checkbox"/> By Legal Messenger
701 Pike St. Ste 1560	<input checked="" type="checkbox"/> By CM/ECF eService
Seattle, WA 98101-3915	<input type="checkbox"/> By Electronic Mail

Carol Catherine McCauley	<input type="checkbox"/> By United States Mail
Columbia Credit Union	<input type="checkbox"/> By Legal Messenger
PO Box 324	<input checked="" type="checkbox"/> By CM/ECF eService
Vancouver, WA 98666	<input type="checkbox"/> By Electronic Mail

DATED this 28th day of June 2019.



Margaret E Scott, Plaintiff, Pro se

MARGARET SCOTT - FILING PRO SE

June 29, 2019 - 12:00 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51232-7
Appellate Court Case Title: Floyd and Margaret Scott, Appellants v Northwest Trustee Svc, et al, Respondents
Superior Court Case Number: 17-2-01951-1

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