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**COURT OF APPEALS
OF THE
STATE OF WASHINGTON
DIVISION TWO**

FLOYD AND MARGARET SCOTT,

Plaintiffs and Appellants,

vs.

NORTHWEST TRUSTEE SERVICES, INC.; WELLS FARGO BANK,
NA; FEDERAL HOME LOAN MORTGAGE CORPORATION; AND
DOE DEFENDANTS 1-20,

Defendants and Respondents.

**AMENDED BRIEF OF RESPONDENTS
WELLS FARGO BANK, NA AND FEDERAL
HOME LOAN MORTGAGE CORPORATION**

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I. INTRODUCTION

Plaintiff-Appellant Margaret Scott obtained a loan from Wells Fargo, and she and her husband, Floyd Scott, granted a deed of trust on a rental property they owned to secure the loan. The Scotts failed to make the monthly payments, and Defendant-Respondent Wells Fargo Bank, N.A. commenced a non-judicial foreclosure.

In response to the foreclosure, the Scotts filed three Complaints. The first two, filed in their first action, were dismissed. The Scotts filed their third Complaint in a new action, asserted the same claims that were previously dismissed, and never served the Complaint.

In all of their complaints, the Scotts alleged that Wells Fargo could not foreclose because it did not own the loan. The Washington Supreme Court decisions *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 359 P.3d 771 (2015), and *Bain v. Metro Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012), control this case—in both cases the Court held that the promissory note holder, not the owner, is the beneficiary of the deed of trust. The Scotts simply invite this Court to disregard Washington Supreme Court precedent.

The Court should affirm the trial court's decision dismissing the Scotts' Complaint against Wells Fargo and Freddie Mac.¹

II. RESTATEMENT OF ISSUES ON APPEAL

A. The Scotts never served their Complaint. In the trial court, they argued in response to Wells Fargo and Freddie Mac's motion to dismiss that they completed valid service. On appeal, they abandoned this argument, and asserted only that the defense was waived. Should the Court disregard the Scotts' new waiver argument?

B. The trial court dismissed the Scotts' Complaint under res judicata and collateral estoppel due to two previous dismissals. On appeal, the Scotts abandoned their trial court argument that the previous dismissals were due to deception by counsel, argued for the first time that the dismissals were not "final judgments," and continued to argue they materially amended their third Complaint. Should the Court disregard the Scotts' new argument regarding finality, and was the dismissal appropriate because all complaints alleged the same substantive allegation that Wells Fargo was not the beneficiary of the deed of trust because it did not own the loan?

C. The trial court dismissed the Scotts' claim for violation of the Consumer Protection Act because Wells Fargo was not required to own

¹ The Scotts request on appeal that the Court reverse the trial court's decision which dismissed the Scotts' third complaint, *and* grant the Scotts summary judgment. The Scotts never filed a motion for summary judgment in the trial court.

the loan to appoint a successor trustee on the deed of trust. Were the Scotts' claims that Wells Fargo could not commence foreclosure because it did not own the loan correctly rejected?

D. The Scotts argue that the Washington Deeds of Trust Act is unconstitutional. Can the Court reject this argument because it was not raised in the trial court, the record does not support review, the Scotts failed to give notice of the claim to the Washington State Attorney General, the Scotts did not address the highly deferential standard, and because the Deeds of Trust Act is consistent with the Scotts' deed of trust?

III. RESTATEMENT OF THE CASE

A. Factual Background

In September 2010, Margaret Scott borrowed \$151,158.00 from Wells Fargo. CP 13–15, 56–58, 247–50. She and her husband Floyd Scott granted a deed of trust to Wells Fargo, which encumbered the Scotts' Vancouver, Washington rental property. CP 17–35, 60–78. The promissory note was payable to Wells Fargo Bank, N.A. CP 13–15, 247–50.

The promissory note, as of August 2015, prior to foreclosure, was indorsed in blank by Wells Fargo, Wells Fargo held the note, and Freddie Mac owned the loan. CP 6 ¶ 3.9, 247-50, 272.²

² The indorsed promissory note (CP 247–50) was never referenced in the Scotts' Complaint (CP 3–46), nor filed by Wells Fargo or Freddie Mac in their motion to dismiss, and

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. CP 17–18, ¶C. The Scotts further agreed in the deed of trust that it was subject to any requirements of Washington law. CP 27, ¶16. Under RCW 61.24.005(2), the holder of the promissory note is also the beneficiary of the deed of trust.

The Scotts' repeated allegation that the deed of trust defines the Lender as the owner of the loan is wrong.

Wells Fargo never assigned the deed of trust to Freddie Mac, or any other party.

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. *See e.g.* AOB p. 18, 19, 21, 22, and 23.

Ms. Scott stopped making monthly loan payments in January 2015. AOB 7, CP 170.

the Scotts also never filed or addressed the indorsed note in their opposition to the motion to dismiss (CP 338–54). A copy of the indorsed note was only filed in the trial court by Northwest Trustee in connection with its own motion to dismiss, which was filed and heard separately. CP 205–337. Likewise, the Scotts never alleged a deficiency in a beneficiary declaration (CP 272) executed by Wells Fargo in their Complaint (CP 3–46), nor did they address or raise any issue with the declaration in response to Wells Fargo and Freddie Mac's motion to dismiss (CP 338–54). The beneficiary declaration (CP 272) was also only filed by Northwest Trustee in support of its own separately filed and heard motion to dismiss (CP 205–337).

On August 14, 2015, Wells Fargo appointed Northwest Trustee Services, Inc. as the successor trustee on the deed of trust, and recorded the appointment on August 19, 2015. CP 37–39, 274–76.

On August 21, 2015, NWTS issued a Notice of Default. CP 41–46, 169–74. The Scotts did not reinstate the loan. On November 13, 2015, Ms. Scott filed for bankruptcy protection. CP 97.

The following year, on August 4, 2016, NWTS issued and recorded a Notice of Trustee’s Sale, along with a Notice of Foreclosure. CP 91–95. The trustee’s sale was scheduled for September 30, 2016. CP 93. The Scotts listed the property for sale, and accepted an offer to sell the property. CP 464. No foreclosure sale has ever been held because the Scotts sold the property and paid off the loan.

B. Procedural History

Two weeks before the scheduled foreclosure sale date, on September 16, 2016, the Scotts filed their first lawsuit against Wells Fargo and NWTS. CP 131–147, 221–29.

1. The Scotts’ First Lawsuit

In their first Complaint, the Scotts alleged that Wells Fargo acted as the beneficiary of the deed of trust, and appointed the successor trustee, even though Freddie Mac purchased the loan, and that Wells Fargo was not the beneficiary. CP 134 ¶3.5, 135 ¶3.14. Wells Fargo moved to dis-

miss the claims against it for failure to state a claim. CP 186. On March 31, 2017, the trial court determined that “as pleaded, the court is unable to sustain the viability of the complaint by the plaintiffs,”³ and the Scotts’ first Complaint was dismissed without prejudice and without leave to amend. CP 439.

Despite the court’s order that prohibited amendment, the Scotts filed a “Revised Complaint” on June 5, 2017, in the same action. CP 176–84. The Scotts’ substantive claims remained the same, and they added Freddie Mac as an additional defendant. *Id.*

Wells Fargo and Freddie Mac moved to dismiss the Revised Complaint. CP 333, AOB 8–9, RP, Vol. 2, 4:5–25. At the hearing on this motion to dismiss, the Scotts advised the court that they were withdrawing their Revised Complaint, and further advised that they had filed a new lawsuit. *Id.* The court dismissed the Scotts’ Revised Complaint, without prejudice and without leave to amend. CP 189.

2. *The Scotts’ Second Lawsuit*

On August 25, 2017, the Scotts re-filed their Complaint, this time as a new case. CP 3–46, AOB 8–9. The Scotts handed Wells Fargo and Freddie Mac’s attorney a copy of the Complaint, sent a copy to the attorney’s office, and sent another copy by certified mail to the attorney’s of-

³ CP 356.

fice. CP 47–48. The Scotts were advised, in person and in writing, that the parties’ attorney was not authorized to accept service of process of the Complaint. CP 47–50.

All of the Scotts’ three Complaints were substantively the same. In all of their Complaints, the Scotts alleged that Wells Fargo was not the beneficiary of the deed of trust because Freddie Mac owned the loan, and therefore Wells Fargo could not appoint Northwest Trustee as the successor trustee of the deed of trust. CP 3–46, 131–74, 176–84.

3. Wells Fargo and Freddie Mac’s Motion to Dismiss

On September 29, 2017, Wells Fargo and Freddie Mac moved to dismiss the Scotts’ third Complaint, for three reasons: (1) the Scotts failed to serve their Complaint, (2) the Scotts’ claims were barred by res judicata and collateral estoppel, and (3) the Complaint failed to state a claim for relief because it claimed only a loan “owner” could foreclose. CP 190–204.

In response to Wells Fargo and Freddie Mac’s motion to dismiss, the Scotts argued:

- (1) Failure to Serve the Complaint: Mailing and hand delivering copies to counsel of record was valid service (CP 340–41);⁴

⁴ The Scotts abandoned this on appeal..

(2) Res judicata or collateral estoppel: Their claims were not barred because:⁵

- the previous two orders of dismissal was obtained through deception of counsel (CP 341–43);
- Their claims were not barred by res judicata or collateral estoppel because their second complaint was dismissed, rather than “withdrawn,” because counsel misled them (CP 343–46); and
- Their claims in the third Complaint were different because it additionally alleged that the defendants were not entitled to foreclose because the power of the sale clause violates Washington law (CP 346–47).

(3) Failure to state a claim: The Scotts argued:

- A party must both own the loan and hold the note to enforce the note and deed of trust. CP 348–53.
- The loss mitigation declaration (CP 88 – 89) did not comply with the requirement under RCW 61.24.030(7),⁶ and Wells Fargo did not establish that it held the promissory note.⁷

⁵ The Scotts abandoned on appeal the first two arguments they made in the trial court regarding res judicata and collateral estoppel, and raised a new argument on appeal, that the prior dismissals were not final judgments.

⁶ The Scotts never alleged a violation of RCW 61.24.030(7) in their Complaint, and Wells Fargo and Freddie Mac never argued the loss mitigation declaration complied with or otherwise satisfied RCW 61.24.030(7), or even addressed that statute because it was never at issue.

⁷ The Scotts alleged in their Complaint that Wells Fargo could not foreclose because the holder is prohibited from foreclosing. CP 7 ¶3.12, CP 10 ¶4.10. The Scotts only alleged that Wells Fargo was not the beneficiary because it did not *own* the loan. *Id.* In their opposition to the motion to dismiss in the trial court, the Scotts argued that Wells Fargo and Freddie Mac split ownership from the right to enforce the promissory note, because Freddie Mac owned the promissory note, but did not hold it. CP 352. They argued Wells Fargo was the holder. CP 353. The Scotts further assert repeatedly on appeal that Wells Fargo held the promissory note. AOB 3, 47.

Additionally, at the hearing on Wells Fargo and Freddie Mac's motion to dismiss, the Scotts asserted that there were two "versions" of the promissory note—a copy of the original note, payable to Wells Fargo, before it was indorsed, and a copy of the note after it was indorsed in blank by Wells Fargo. RP, Vol. 2, 13:4-6.

There was no Wells Fargo "version" of the promissory note, as asserted by the Scotts. *See* AOB 15. 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 alleged was a true and correct copy of the promissory note they executed. CP 5, 15. 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.

Northwest Trustee Services filed a separate motion to dismiss on October 2, 2017. CP 205. NWTS attached a copy of the promissory note to its motion, which was indorsed in blank. CP 206, 246–50.

At the hearing on Wells Fargo and Freddie Mac's motion to dismiss, the Scott also argued that the indorsement on the promissory note was fraudulently created because the indorsement, placed on the back page of the note, could be seen through the prior page of the note (CP 249), upside-down and backward. RP, Vol. 2, 12:21-13:2, CP 247–50. There was no challenge to the actual indorsement located on the back page of the note. CP 250. This argument is nonsensical. In any event, Wells

Fargo and Freddie Mac's motion to dismiss was based upon the Scotts' own Complaint and the promissory note they attached as an exhibit.

On November 28, 2017, the trial court dismissed the Scotts' claims against Wells Fargo and Freddie Mac in their third complaint for three, independent reasons.

First, the court granted Wells Fargo's and Freddie Mac's motion because the Scotts' claims, the same as those they asserted in their first Complaint, were barred by issue and claim preclusion. CP 425–432. Specifically, the court determined, in comparing the first and third Complaints, that the vast majority of the material in both was identical, and there was no significant difference between the two Complaints—indeed they both alleged that Wells Fargo was not the beneficiary of the deed of trust because it did not own the loan. CP 427. The trial court determined that the elements of claim preclusion were met as to Wells Fargo. *Id.* Concerning Freddie Mac, the trial court determined there was privity between Wells Fargo and Freddie Mac. *Id.*

Second, the court dismissed the Scotts' claims because they failed to serve their Complaint. CP 427–29.

Third, in considering the Consumer Protection Act violation claim, the trial court converted Wells Fargo and Freddie Mac's motion to dismiss to a motion for summary judgment. CP 429. The trial court then determined that the Scotts' claim that Wells Fargo lacked authority to appoint

NWTS as successor trustee had no merit under *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 359 P.3d 771 (2015), and *Bain v. Metro Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012). CP 431.

On December 1, 2017, the trial court held a hearing on NWTS's motion to dismiss, and granted NWTS's motion as well. CP 434.

The Scotts appealed the trial court's order dismissing the claims against Wells Fargo and Freddie Mac. CP 436–37.⁸

IV. STANDARDS OF REVIEW

Where the trial court rules on a motion to dismiss under CR 12(b)(4) and (5) based on undisputed facts, review is de novo. *In re Estate of Tuttle*, No. 45917-5-II, 2015 Wash. App. LEXIS 1892, at *13 (Ct. App. Aug. 11, 2015)(citing *Outsource Servs. Mgmt.*, 172 Wn. App. at 807; see *Streeter-Dybdahl*, 157 Wn. App. at 412).

Whether service of process was proper is a question of law that is reviewed de novo. *Zaitsev v. Keller*, No. 74626-0-I, 2017 Wash. App.

⁸ NWTS filed a separate motion to dismiss plaintiffs' Complaint against it. CP 205-337. The order granting NWTS' motion to dismiss is not part of the record, and the Scotts did not designate that order for review on appeal—their notice of appeal only appeals the November 28, 2017, trial court ruling, which granted Wells Fargo and Freddie Mac's motion to dismiss. The Scotts, however, devote a portion of their brief to addressing the NWTS dismissal. Even if they did appeal that order, NWTS is currently in receivership and all actions against it are currently stayed pursuant to the receivership proceeding pending under King County Superior Court Cause No. 18-2-08146-7.

LEXIS 1781, at *6 (Ct. App. July 31, 2017) (citing *Streeter-Dybdahl*, 157 Wn. App. at 412) (reviewing whether dismissal of plaintiff’s claims should be dismissed under CR 12(b)(5) due to insufficient service and under CR 12(b)(4) due to insufficient process.).

Dismissal under CR 12(b)(6) is reviewed de novo. *Kelley v. Pierce Cty.*, 179 Wn. App. 566, 572, 319 P.3d 74, 77 (2014). (“We apply the de novo standard of review to a superior court’s decisions under CR 12(b)(6).” citing *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005)).

Summary judgment is reviewed de novo. *Castro v. Stanwood School Dist. No. 401*, 151 Wn.2d 221, 224 (2004), citing *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 854 (1992). The interpretation of a statute, like the statute of limitations, is “a matter of law subject to de novo review.” *Castro*, 151 Wn.2d at 224; citing *State v. Karp*, 69 Wn. App. 369, 372 (1993).

V. SUMMARY OF ARGUMENT

Regarding the failure to serve the Complaint, the Court should disregard the Scotts’ waiver argument because they raise it for the first time on appeal. They abandoned the only argument they made in the trial court, that service was valid. Further, Wells Fargo and Freddie Mac never waived the defense of failure to serve the Complaint.

The Court should disregard the Scotts' new argument regarding res judicata and collateral estoppel because their argument that the prior dismissals were not final judgments is raised for the first time on appeal, and further the Scotts' claims were same in the first and third Complaints—the Scotts alleged Wells Fargo was not the beneficiary of the deed of trust because it did not own the loan.

The trial court correctly dismissed the Scotts' Consumer Protection Act violation claim because Wells Fargo need not own the loan to enforce the promissory note and deed of trust.

The Court can reject the Scotts' constitutionality claim because the Scotts never raised it in the trial court, the record does not support review, the Scotts failed to give notice of the claim to the Washington State Attorney General, the Scotts did not address the highly deferential standard, and because the Deeds of Trust Act is consistent with the deed of trust.

VI. LEGAL ANALYSIS AND ARGUMENT

- A. **Regarding the failure to serve the Complaint, the Court should disregard the Scotts' waiver argument because they raise it for the first time on appeal. They abandoned the only argument they made in the trial court, that service was valid. Further, Wells Fargo and Freddie Mac never waived the defense of failure to serve the Complaint.**

After filing their third Complaint, the Scotts handed Wells Fargo and Freddie Mac's attorney a copy of the Complaint, sent a copy to the attorney's office, and sent another copy by certified mail to the attorney's office. CP 47–48. The Scotts were advised, in person and in writing, that the parties' attorney was not authorized to accept service of process of the complaint. CP 50. Delivering copies of the complaint to the parties' attorney is not valid service. RCW 4.28.080.

When a motion to dismiss under CR 12 is made, all defenses then available to the moving party must be joined in the motion. CR 12(g). The defenses of lack of personal jurisdiction and insufficient service of process are only waived if omitted from a CR 12 motion or responsive pleading, which they were not. CR 12(h)(1)(B); *Violante v. White*, 26 Wn. App. 391, 392, 612 P.2d 828 (1980)). Wells Fargo and Freddie Mac asserted their failure to serve defense in their motion to dismiss. CP 197–98.

On appeal, the Scotts abandoned their erroneous argument made in the trial court that delivery of the complaint in the manner they provided it constituted valid service. Rather, they now argue, for the first time on appeal, that Wells Fargo and Freddie Mac waived the defense of lack of service, despite having filed a motion to dismiss due to lack of service. AOB 2. Because waiver is raised by the Scotts for the first time on appeal, this argument can be disregarded. RAP 2.5(a); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549, 553 (1992).

Further, the defense was not waived. The Scotts contend that the trial court's decision to convert Wells Fargo and Freddie Mac's motion to dismiss into a summary judgment motion gave the court jurisdiction over the parties in order to render a final judgment on the merits of a case. AOB 2. According to the Scotts, Wells Fargo and Freddie Mac needed to appeal the summary judgment ruling in their favor to preserve this defense. The Scotts cite no authority for this erroneous argument, and it is nonsensical. This Court need not consider claims unsupported by legal authority or the record. *Olympic Stewardship Found. v. Env'tl. & Land Use Hr'gs Office*, 199 Wn. App. 668, 747, 399 P.3d 562, 599 (2017) (citing RAP 10.3(a)(6); *Cowiche Canyon*, 118 Wn.2d at 809).

The trial court dismissed the Scotts' Complaint with prejudice based upon the Scotts' failure to serve the Complaint. CP 439–41. The Scotts' only response asserted in the trial court to Wells Fargo and Freddie Mac's motion to dismiss in this regard was to assert they had served the Complaint. Given that the Scotts abandoned the only argument they made in the trial court, raised for the first on appeal a new argument of waiver, and have not established waiver, this Court should affirm the trial court's dismissal of the Scotts' Complaint with prejudice on this basis alone.

B. The Court should disregard the Scotts' new argument regarding res judicata and collateral estoppel because their

argument that the prior dismissals were not final judgments is raised for the first time on appeal, and further the Scotts' claims were same in the first and third Complaints—the Scotts alleged Wells Fargo was not the beneficiary of the deed of trust because it did not own the loan.

Wells Fargo and Freddie Mac moved to dismiss the Scotts' third Complaint given the two prior dismissals of their claims. CP 195–97. The Scotts responded and claimed the previous orders were entered due to deception by counsel. CP 341–46. They further argued that a revision they made in their second “Revised Complaint,” as compared to the original Complaint, was material. CP 346–47.⁹

The Scotts abandoned the arguments they made in the trial court regarding res judicata and collateral estoppel about the dismissal orders being entered due to deception of counsel. Instead, for the first time on appeal, they raise the argument that the prior dismissals were not final judgments. AOB 2–3. This argument can be disregarded. RAP 2.5(a); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549, 553 (1992).

Furthermore, the Scotts' claims in both the first and third Complaints were the same. In both Complaints, the Scotts alleged that Wells

⁹ The “material change” they argue they made to their second Complaint was not included in the subject, third Complaint, so the argument they made in the trial court was nonsensical and irrelevant.

Fargo was not the beneficiary of the deed of trust because it did not own the loan. CP 10–11, 137–38. The laundry list of changes listed by the Scotts (AOB 10–11) do not change their primary claim, alleged in all Complaints, that Wells Fargo was not the beneficiary of the deed of trust because it did not own the loan.

The trial court did not err when it dismissed the Scotts’ claims under collateral estoppel and res judicata.

C. The trial court correctly dismissed the Scotts’ Consumer Protection Act violation claim because Wells Fargo need not own the loan to enforce the promissory note and deed of trust.

Ms. Scott signed a promissory note in which she promised to pay Wells Fargo Bank, N.A., the sum of \$151,158.00. CP 13. The Scotts also signed a deed of trust to Wells Fargo Bank, N.A. Wells Fargo was the defined “Lender” and beneficiary of the instrument. CP 17, 18. The Scotts further agreed, in the deed of trust, that it would be governed by Washington law, and that all rights and obligations contained in the deed of trust were subject to the requirements and limitations of Washington law. CP 27 ¶16. Wells Fargo never assigned the deed of trust, it was always the Lender and beneficiary of the instrument. It was never alleged that Freddie

Mac held the promissory note at any time. Freddie Mac owned the loan. CP 6–7 ¶¶ 3.9 and 3.12.

The Scotts argued in the trial court and on appeal that Wells Fargo held the note, but did not own the loan, and therefore it could not commence foreclosure. AOB 3, 47, CP 7 ¶ 3.12, 353. They further argued in the trial court, as well as now on appeal, that because Wells Fargo held the note, not Freddie Mac, *Freddie Mac* could not foreclose. AOB 47, CP 353. Yet, they also argue that Wells Fargo did not establish that it held the note. AOB 11–12, CP 350–51. The Scotts’ argument is based upon their own assertion that Wells Fargo held the note, and their arguments to the contrary to their own pleadings can be ignored. They never alleged in their Complaint (CP 3–46) that Wells Fargo did not hold the note. They only claimed they pleaded was that Wells Fargo did not own the loan. CP 7 ¶¶ 3.12 and 3.14.

Further, the Scotts also never pleaded any claim or issue regarding the form of the beneficiary declaration (CP 272) and the claimed typographical error contained in it they now raise for the first time on appeal. CP 3–46.¹⁰ They never took issue with the beneficiary declaration in re-

¹⁰ Northwest Trustee filed its own motion to dismiss, shortly after Wells Fargo and Freddie Mac filed their motion to dismiss. CP 205–337. In support of its motion, Northwest Trustee filed the beneficiary declaration that the Scotts now take issue with. CP 272. That

sponse to Wells Fargo and Freddie Mac's motion to dismiss. CP 338–354. As this issue was not raised in the trial court, it can also be disregarded on appeal.

In any event, Wells Fargo's declaration filed by NWTs provided that it held note. The declaration stated it was actual holder of the promissory note or "other obligation evidencing the above-referenced property." CP 272 (emphasis provided). RCW 61.24.030(7) provides that a trustee must have a declaration that the beneficiary is the holder of the promissory note "or other obligation secured by the deed of trust." *Id.*, (emphasis provided). While the beneficiary declaration that the Scotts now take issue with on appeal said "property" instead of "deed of trust," the Scotts' argument in this regard is specious because: 1. They repeatedly assert that Wells Fargo held the note; and 2. There is no dispute as to the instruments at issue, because the Scotts attached the promissory note, as well as the deed of trust, to their Complaint. CP 13, 17. The instrument is a promissory note, and not some "other obligation." Further, the note is "secured by the deed of trust," as evidenced by the documents the Scotts filed. *Id.* The

document was never referenced nor discussed in any manner in the Scotts' opposition to Wells Fargo and Freddie Mac's motion, or even at the hearing. Never having had an opportunity to address the claimed error in the trial court, the Scotts cannot now argue this new issue for the first time on appeal.

beneficiary declaration does not refute the fact that Wells Fargo held the promissory note.

Wells Fargo is the “Lender” on the deed of trust, which, under the terms of the instrument (CP 17–18), *and* Washington’s Deeds of Trust Act, RCW 61.24.005(2), is the note holder.

Also, under RCW 62A.3-301, Washington law defines a “person entitled to enforce an instrument” as:

(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.**

(Emphasis added).

All issues raised in this appeal relating to loan ownership and enforcement of the deed of trust have been put to rest under the Washington Supreme Court’s decisions in *Brown v. Dep’t of Commerce*, 184 Wn.2d 509, 359 P.3d 771 (2015), and *Bain v. Metro Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012).

The Washington Supreme Court determined that the holder of a note is the beneficiary of the deed of trust in *Bain v. Metro. Mortg. Grp.*,

Inc., 175 Wn.2d 83, 285 P.3d 34 (2012). There, MERS was the named beneficiary and nominee for the lender in the deed of trust, and it appointed a successor trustee. *Id.*, 175 Wn.2d at 89–90. The Court was asked to answer a certified question from the district court as to whether MERS was the lawful beneficiary of the deed of trust, if it never held the note. The Court held that under the plain language of the Deeds of Trust Act, the beneficiary of the deed of trust is the holder of the obligation. *Id.* at 98–99. The holder, in turn, is the party in possession of the instrument payable to bearer or in possession of the instrument is made payable to an identified party. *Id.* at 104.

In another lengthy analysis and decision, the Washington Supreme Court examined the role of Freddie Mac, the loan owner in that case as well, in *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 524, 359 P.3d 771 (2015). In examining and discussing sales of loans and the legislative history of the Deeds of Trust Act, the Court held that the legislature's clear purpose was to ensure the party with authority to enforce and modify the promissory note is the party who forecloses. *Id.*, 184 Wn.2d at 543. Accordingly, Freddie Mac, the loan owner in *Brown*, was not the party entitled to enforce the promissory note, only the holder was.

The Scotts urge that this Court decide that *Brown* was wrongly decided. AOB 2, 4, 5, 11, 12, 16, 18, 19, 20, 33, 34, 39, 40, 41, 45–47. However, an intermediate court is bound to follow the Supreme Court. *State v.*

Smith, 124 Wn. App. 417, 434 n.8, 102 P.3d 158, 167 (2004)(An intermediate appellate court does not have authority to overrule the Supreme Court).

Further, the Scotts have not presented any rational basis to reverse the Supreme Court. The Court in *Brown* stated:

Freddie Mac's practice of splitting note ownership from note enforcement is at the heart of this case. Freddie Mac owns Brown's note. At the same time, a servicer ... holds the note and is entitled to enforce it. As we will describe below, **Washington's Uniform Commercial Code (UCC) authorizes this division of note ownership from note enforcement.**

Id. at 523 (emphasis added). These are the same circumstances in the present case. AOB 3. There is no basis for reversal of the Court's decisions.

Nothing in the Scotts' deed of trust mandates any other outcome. Paragraph 13 of their deed of trust simply provides that the covenants and agreements of the instrument shall bind, except as provided in Paragraph 20, and benefit the successors and assigns of the Lender. CP 26. Paragraph 20 of deed of trust provides:

if the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, **the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser** unless otherwise provided by the Note purchaser.

CP 28, ¶ 20 (emphasis added).

Nothing in Paragraph 20 of the deed of trust remotely requires that a party be both the holder of the promissory note and owner of the loan to enforce the deed of trust. Again, the deed of trust named Wells Fargo as the “Lender,” and Wells Fargo never assigned the deed of trust. CP 17. The note was payable to Wells Fargo (CP 13), and then indorsed by Wells Fargo in blank (CP 247–50), and held by Wells Fargo (CP 272). The deed of trust defines the “Lender” as the beneficiary of the deed trust, and RCW 61.24.005(2) defines the beneficiary as the holder of the promissory note. In Paragraph 16 of the deed of trust, the Scotts agreed that the deed of trust was subject to the requirements of Washington law. CP 27.

Paragraphs 22 and 24 of the deed of trust also do not address note ownership in any respect. CP 29. These paragraphs outline the Lender’s remedies under the deed of trust in the event of default. Nothing in either paragraph changes the definition of “Lender” as the beneficiary, and that the beneficiary is the holder of the promissory note. Neither paragraph purports to conflict with Washington law that provides the holder of an instrument can enforce the same.

Here, Wells Fargo held the promissory note and Freddie Mac owned the loan. AOB 3. Based on the precedent set forth in *Brown*, Wells Fargo was authorized to enforce the promissory note by appointing a suc-

cessor trustee of the deed of trust, and commencing foreclosure. The trial court did not err when it dismissed the Scotts' claims pursuant to *Bain and Brown, supra*.

The Scotts contend, again for the first time on appeal, that Wells Fargo never provided the trustee with the requisite proof that it was the actual holder of the note under RCW 61.24.030(7). AOB 12. The Scotts suggest that the two beneficiary declarations executed independently failed to satisfy the form requirements of RCW 61.24.030(7)(a). Again, Wells Fargo never had to establish that it complied with RCW 61.24.030(7) because the Scotts never pleaded there was a violation of RCW 61.24.030(7).

In any event, the declaration entitled "Beneficiary Declaration Pursuant to Chapter 61.24 RCW and Foreclosure Loss Mitigation Form," (CP 45–46), in pertinent part, stated: "The undersigned beneficiary or authorized agent for the beneficiary hereby represents and declares under penalty of perjury that [...] the beneficiary or beneficiary's authorized agent has exercised due diligence to contact the borrower as required under RCW 61.24.031(5) and the borrower did not respond."

This document was attached to the Notice of Default as the "Foreclosure Loss Mitigation Form" required under RCW 61.24.031. CP 41–46.

This document complied verbatim with the statute's requirements for the language contained in the foreclosure loss mitigation declaration. RCW 61.24.031(9).

The second declaration at issue (CP 272) provided to the trustee¹¹ stated that Wells Fargo was the actual holder of the note and authorized to instruct the trustee to proceed with foreclosure. The declaration stated: "The undersigned, under penalty of perjury declares as follows: Wells Fargo Bank, N.A. is the actual holder of the Promissory Note or other obligation evidencing the above-referenced property." *Id.* Again, nothing in this negates the fact that Wells Fargo was the actual holder (a fact the Scotts allege repeatedly in the trial court and on appeal) of the promissory note. There is no dispute about the instruments at issue—the Scotts attached the promissory note and deed of trust to their complaint. CP 13, 17.

In satisfaction of the Deeds of Trust Act's requirements, the Beneficiary Declaration Pursuant to Chapter 61.24 RCW and Foreclosure Loss Mitigation Form (CP 88–89) and the Beneficiary Declaration (CP 272) were executed prior to the execution and transmission of the Notice of Default (CP 84–89, 169–74), and execution and recording of the Notice of

¹¹ The Scotts never pleaded that this declaration was deficient either in their Complaint nor in opposition to Wells Fargo and Freddie Mac's motion to dismiss. The declaration was filed by Northwest Trustee in support of its separate motion to dismiss.

Trustee's Sale. CP 91–95. Both declarations satisfied the requirements of RCW 61.24.031 and .030 respectively. They are not in conflict with one another, as the Scotts suggest.

The arguments the Scotts make under RCW 62A.9A-203, were rejected by Division II in *Malloy v. Quality Loan Serv. of Wash.* Nos. 75136-1-I, 76331-8-I, 2017 Wash. App. LEXIS 2800, at *1 (Ct. App. Dec. 11, 2017) (unpub.).¹² There, the Malloys executed a promissory note and deed of trust in favor of Quicken Loans Inc., and subsequently defaulted on their monthly payments. *Malloy* at *1-2. Through subsequent assignments, Green Tree became the beneficiary of the deed of trust. Green Tree executed an appointment of successor trustee, appointing Quality Loan Service of Washington as the successor trustee. *Id.* at *2.

Green Tree executed a “Declaration of Beneficiary,” which stated that it was “the actual holder of the promissory note,” and Quality issued a Notice of Default. *Id.* A Notice of Trustee's Sale was subsequently issued, and shortly before sale, the Malloys filed suit alleging violations of the Deeds of Trust Act and Consumer Protection Act. *Id.* at *3.

Just as the Scotts do, the Malloys argued that Green Tree was not the holder and the owner of the note, and that *Brown* and *Bain* conflict

¹² GR 14.1 permits citation of unpublished opinions of the Court of Appeals.

with RCW 62A.9A-203, were wrongly decided, and were unconstitutional. *Malloy* at *5. All of their arguments were rejected.

The court in *Malloy* held that RCW 62A.9A-203 was expressly addressed by the Washington Supreme Court in *Brown*, namely that a the note holder can enforce a deed of trust even if the holder is not the owner. *Malloy* at *5. The Court followed the decision in *Brown, supra*.¹³

Just as the Scotts argue that the successor language in the deed of trust require that the lender both hold and own the promissory note, the Malloys argued that the terms of the note required Green Tree to be both the holder and owner to be entitled to enforce the deed of trust. *Id.* at *5-6. The Malloys argued that the promissory note, which stated: “The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the ‘Note Holder,’” supported this assertion. *Id.* at *6.

The Court disagreed, and determined that the promissory note did not require a foreclosing entity to be both the owner and holder of the note. *Id.* And it further held that the promissory note did not change the

¹³ *River Stone Holdings NW, LLC v. Lopez*, 199 Wn. App. 87, 97, 395 P.3d 1071 (2017) (“We reject Lopez’s argument that *Brown* must yield to what Lopez believes is an inconsistent statute. The court in *Brown* expressly discussed the requirements of RCW 62A.9A-203. *Brown*, 184 Wn.2d at 528-29. Nevertheless, the court held that a holder of a deed of trust that is not the owner can enforce a deed of trust. *Brown*, 184 Wn.2d at 540. We are bound to follow *Brown*.”). *Malloy* at *5 n.18 (Ct. App. Dec. 11, 2017).

“holder” under the Uniform Commercial Code or who the “beneficiary” is under the Deeds of Trust Act. *Id.* The Court held:

Under the DTA, the “beneficiary” is “the holder of the instrument or document evidencing the obligations secured by the deed of trust.” The “holder” of a note is “[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.”

Here, the record establishes that Green Tree possessed the note. In its “Declaration of Beneficiary,” Green Tree declared it was “the actual holder” of the Malloys' note. The Malloys do not allege otherwise in their complaint. Nor do they allege that the note was not endorsed in blank or payable to Green Tree.

Id.

Here, the Scotts make the same argument under the terms of the deed of trust. The Scotts assert that the deed of trust follows a sale of the note and of the mortgage debt. AOB 25. However, just as in *Malloy*, the sale of a loan does not impair the note holder’s authority to enforce the note, appoint a successor trustee under the deed of trust, and commence foreclosure.

The deed of trust, the Deeds of Trust Act, RCW 62A.3-412, *Brown*, *Bain*, and *Malloy* are all consistent – that the noteholder is the party entitled to enforce the obligations secured by the deed of trust. If a loan is sold, the holder still has authority to enforce the note. The noteholder remains the party to whom payments must be made, and the party entitled to

enforce the note, regardless of who owns it. *Malloy* at *8. The holder has authority to appoint a trustee and foreclose. *Id.*

Wells Fargo held the note. AOB 3, 24. Wells Fargo is therefore the entity to whom Ms. Scott was to make her monthly loan payments, and also the party entitled to enforce the note. Wells Fargo had authority to foreclose and appoint a trustee. This Court should affirm the trial court's dismissal of the Scotts' Consumer Protection Act claim.

D. The Court can reject the Scotts' constitutional claim because the Scotts never raised it in the trial court, the record does not support review, the Scotts failed to give notice of the claim to the Washington State Attorney General, the Scotts did not address the highly deferential standard, and because the Deeds of Trust Act is consistent with the deed of trust.

The Scotts assert, for the first time on appeal, a claim that somehow RCW 61.24.030(7)(a) is unconstitutional. AOB 41, 47–49.

The general rule is that appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); *Cowiche*, 118 Wn.2d 801, 809 (1992).

1. The Scotts' attack on the constitutionality of RCW 61.24.030(7)(a) is procedurally deficient for failure to notify the Washington State Attorney General.

RCW 7.24.110 requires notification to the state attorney general

when there is a constitutional challenge to state legislation. *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 846, 347 P.3d 487, 492 (Division 1, 2015). Dismissal of constitutional claims challenging the facial constitutionality of a state statute is appropriate where the state attorney general has not been notified. *Id.* (citing *Kendall v. Douglas, Grant, Lincoln, & Okanogan Counties Pub. Hosp. Dist. No. 6*, 118 Wn.2d 1, 11-12, 820 P.2d 497 (1991) (service on the attorney general is mandatory and a prerequisite); *Camp Fin., LLC v. Brazington*, 133 Wn. App. 156, 160, 135 P.3d 946 (Division 3, 2006) (attorney general must be served when a party challenges the constitutionality of a statute)).

The Scotts did not notify the Washington State Attorney General of any constitutional claims. The Scotts' attack on the constitutionality of RCW 61.24.030(7)(a) is thus deficient, and dismissal of this claim on that ground alone is appropriate.

2. The Scotts' claimed constitutional errors do not warrant review under RAP 2.5(a)(3) as they are simply not plausible; the constitutional claims are meritless and reviewing them would be a waste of judicial resources.

RAP 2.5(a)(3) is an exception to the general rule that parties cannot raise new arguments on appeal, and as such the court construes the exception narrowly by requiring the asserted error to be (1) manifest and (2) truly of constitutional magnitude. *State v. WWJ Corp.*, 138 Wn.2d 595,

602, 980 P.2d 1257, 1261 (1999); *State v. McFarland*, 127 Wash. 2d 322, 333, 899 P.2d 1251 (1995) (quoting *State v. Scott*, 110 Wash. 2d 682, 688, 757 P.2d 492 (1988)). RAP 2.5(a)(3) was not designed to allow parties "a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *Id.*; *Scott*, 110 Wash. 2d at 687 (quoting *State v. Valladares*, 31 Wash. App. 63, 76, 639 P.2d 813 (1982), *aff'd in part, rev'd in part*, 99 Wash. 2d 663, 664 P.2d 508 (1983)). If the record from the trial court is insufficient to determine the merits of the constitutional claim, then the claimed error is not manifest and review is not warranted. *Id.*; *McFarland*, 127 Wash. 2d at 333 (citing *State v. Riley*, 121 Wash. 2d 22, 31, 846 P.2d 1365 (1993)).

An alleged error is manifest only if it results in a concrete detriment to the claimant's constitutional rights, *and* the claimed error rests upon a plausible argument that is supported by the record. *State v. WWJ Corp.*, 138 Wn.2d 595, 602-03, 980 P.2d 1257, 1261 (citing *State v. Lynn*, 67 Wash. App. 339, 345, 835 P.2d 251 (1992)). To determine whether a newly claimed constitutional error is supported by a plausible argument, the court must preview the merits of the claimed constitutional error to see if the argument has a likelihood of succeeding. *Id.* The policy behind RAP 2.5(a)(3) is that appellate courts will not waste their judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits. *Id.*

The Scotts' constitutional argument hinges on their allegation that the deed of trust to this dispute requires the lender to be the holder and owner of the promissory note. As discussed above, this is simply not the case. The plain language of paragraph 22 of the deed of trust does not require the lender to be holder and owner of the note, and thus no plausible argument exists that the statute destroys the deed of trust contract. CP 264. The Scotts' constitutional argument cannot prevail on the merits as the deed of trust contract simply does not create the obligations and rights alleged to be violated by the Scotts. The Court should accordingly not review this new claim.

3. *Washington law does not require that lender be the owner and the holder of the note as a condition to foreclosure, the Deeds of Trust Act does not impose such an obligation, and it is illogical to interpret the deed of trust in this case to impose such an obligation. There are simply no viable constitutional claims.*

As discussed above, it is well established under Washington law that the holder of a promissory note is entitled to enforce that obligation. *Brown v. Dep't of Commerce*, 184 Wn.2d 509, 524-25, 359 P.3d 771 (2015); *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 104, 285 P.3d 34 (2012); *Trujillo v. Nw. Tr. Servs., Inc.*, 181 Wn. App. 484, 502, 326 P.3d 768 (2014), *rev'd on other grounds*, 183 Wn.2d at 820. The holder of the note is not necessarily the owner, and ownership of a note is irrelevant to the power to enforce it. *Brown*, 184 Wn.2d at 524-25. The holder of the

note has authority to enforce the deed of trust because the deed of trust follows the note. *Bain*, 175 Wn.2d at 104 (The Deeds of Trust Act contemplates that the security instrument will follow the note, not the other way around.)

4. *Brown upheld the constitutionality of the Deeds of Trust Act. A highly deferential standard of rationality review is required, and based upon the same, Brown's challenge to the constitutionality of the Deeds of Trust Act was rejected.*

Brown challenged the Department of Commerce's interpretation of the Deeds of Trust Act as an unlawful agency action under RCW 34.05.570(4)(c)(i) because it was unconstitutional. *Brown*, 184 Wn.2d at 545. The Court set forth the standard of review, and stated:

[W]e review the constitutionality of the DTA provisions at issue under the highly deferential standard of rationality review because the provisions are economic legislation that do not involve fundamental rights. Accordingly, "the legislative classification will be upheld unless it rests on grounds wholly irrelevant to achievement of legitimate state objectives," *State v. Shawn P.*, 122 Wn.2d 553, 561, 859 P.2d 1220 (1993), and "a statutory classification will be upheld if any conceivable state of facts reasonably justifies the classification," *id.* at 563-64. A statute is not invalid because it is over- or underinclusive in achieving the legislature's purpose unless no conceivable facts and justifications save the law from being wholly irrational. *See Am. Legion Post No. 149 v. Dep 't of Health*, 164 Wn.2d 570, 609-10, 192 P.3d 306 (2008).

Id.

While the constitutional challenges in *Brown* differ from those the Scotts attempt to assert on appeal, the highly deferential standard of

review applies. The Scotts have neither addressed nor provided any argument for overcoming that standard.

Furthermore, by the terms of the deed of trust, the Scotts agreed that Washington law, which includes the Deeds of Trust Act, controls the instrument. The Scotts agreed that all rights and obligations contained in the deed of trust are subject to all requirements and limitations of Washington law. CP 27 ¶ 16. The provisions of the deed of trust, therefore, do not and cannot conflict with the Deeds of Trust Act, rather the deed of trust is subject to the Act and consistent with it.

In any event, there simply exists no contractual agreement that a party must be the holder and owner of the note to enforce the obligation.

The constitutional claims should be rejected.

VII. CONCLUSION

The Scotts abandoned their only response made in the trial court regarding failure to serve their Complaint. While they clearly failed to complete any valid service of process, in the trial court they only argued that providing a copy of the Complaint to counsel of record, and mailing copies to counsel's office, was, in fact, valid service. On appeal, they abandon this erroneous argument and argue only that Wells Fargo and Freddie Mac waived this defense. This argument is equally erroneous and should be disregarded and rejected.

The Scotts never raised the issue in the trial court that their claims were barred by res judicata and collateral estoppel because the previous dismissals were not final judgments. Their new argument regarding this issue is one raised for the first time, and can be disregarded. Their third Complaint was based upon the same basic claim as the others—that Wells Fargo was not the beneficiary of the deed of trust because it did not own the loan. The trial court did not err when it dismissed the Scotts’ claims that had been made for the third time.

The issues raised in this case are controlled by *Bain* and *Brown*. The Scotts have presented the same argument that was rejected by the Washington Supreme Court in both cases. They have erroneously attempted to redefine the term “Lender,” a defined term in their deed of trust that is consistent with the UCC and the Washington Deeds of Trust Act. Their arguments are baseless and without merit.

Finally, the Scotts’ claim that the Deeds of Trust Act is unconstitutional is frivolous. This was also raised for the first time on appeal and unsupported by the record. The claim cannot be reviewed to any extent because the Scotts did not notify Washington’s Attorney General of the claim. They also failed to address the deference given to the legislature, and how or why that could be overcome. The Deeds of Trust Act provisions are also consistent with the Scotts’ deed of trust, and thus the Scotts

have not shown that the statute impaired any right to contract in any manner.

The Scotts failed to demonstrate any reversible error by the trial court. Wells Fargo and Freddie Mac respectfully request that this Court affirm the trial court's decision dismissing the Scotts' claims.

RESPECTFULLY SUBMITTED this 11th day of March 2019.

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CERTIFICATE OF SERVICE

I, Tamorah Gere, certify that on this 11th day of March, 2019, I caused the foregoing Amended Brief of Respondents Wells Fargo Bank, NA and Federal Home Loan Mortgage Corporation to be delivered to the following parties in the manner indicated below:

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