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NO. 68545-7-1  
COURT OF APPEALS STATE OF WASHINGTON  
DIVISION I

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Bank of America NA, as successor by merger to Lasalle Bank NA, as trustee to  
Wamu Mortgage Pass-Through Certificates Series 2006 AR11 Trust, 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  
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2012 OCT -5 PM 2:08

CLERK OF COURT  
STATE OF WASHINGTON  
REPUBLIC, WA 99166

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## **IDENTIFICATION OF PARTIES**

Plaintiff and now Respondent: <sup>1</sup>Bank of America NA, as successor by merger to Lasalle Bank NA, as trustee to Wamu Mortgage Pass-Through Certificates Series 2006 AR11 Trust <sup>2</sup> 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> Plaintiff’s attorney’s have referred to Plaintiff, and will probably continue to refer to Plaintiff as “Bank of America”. This is a misleading and inaccurate reference. Bank of America is not the trustee of the Trust and is not the plaintiff.

<sup>2</sup> All documents filed by plaintiff subsequent to the summons and complaint have an additional party, JP Morgan Chase Bank NA in the caption header. This addition is done without notification to Mr. Short or leave of the court. Mr. Short has objected to this corruption of the caption header and contends all documents filed in this format should have been rejected by the trial court for filing.

## 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 310-315} motion for summary judgment and declaration of Ms. Urquiti {CP 116} that were partial, incomplete, not sworn, not certified and not original in contradiction to WCCR 54(c) 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. Urquiti {CP 111 } 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. Urquiti {CP 111} 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 Ms. Urquiti {CP 111} 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. 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 declarations of Ms. Urquiti {CP 111} that were corrupt as to format and form?
- 1.7 Did the trial court err when it made a finding at the hearing on Trust's motion for summary judgment {VP 02/03/2012} that Trust was not suing on the promissory note and therefore not required to comply with the rules of evidence regarding a promissory note in particular WCCR 54(c)?
- 1.8 Did the trial court err when it made a finding that an assignment of a deed of trust {CP 343-344} 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 Whatcom County Superior Court. 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 Local Rule WCCR 54(c) succinctly addresses 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.

The trial court Judge made statements in a dialogue with Mr. Short at the summary judgment hearing 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 Mura was presiding at the hearing.

The following is the verbatim exchange that took place per the {VP 02/03/2012, page 10, line 11 - page 12, line 5}:

**THE COURT: Yeah. So they're not suing on the note, sir. They're just suing to realize on the security for the note.**

**MR. SHORT: My----my reading of the local court rule WCCR 54(c) is that because it's their paper, they're ---- they're required to provide a live copy of that to the----to the Court, which I don't believe they've done.**

**THE COURT: If they're suing on the note, you're correct. They're not suing on the note. They're not seeking a judgment against you personally. They're seeking to foreclose on the security which secures the note. There's not a judgment against you personally.**

**MR. SHORT: They're seeking attorney's fees and what's to keep a subsequent party from suing on the basis of the note if they don't possess it?**

**THE COURT: Well, they're not suing on the note. If somebody tries to sue you on the note later, then you can raise whatever defenses you have. The deed of trust provides for the authority for them to get attorney's fees, the deed of trust does. They're not suing on the note.**

Judge Mura's repeated statement "They're not suing on the note", and the statements "they're not seeking a judgment against you personally" and "There's not a judgment against you personally", indicates that the trial court judge had confusion about the essential elements requisite to properly adjudicate the action before him.

For Trust had in their complaint specifically requested at their prayer for relief {CP 307, line 1-19 items 1-3}, for judgment against the borrower on the note and if Mr. Short failed to pay the judgment forthwith, Trust could foreclose on the security for the promissory note.

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 Whatcom County on April 28, 2010 against Mr. Short 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. 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. Trust asserted that as current holder of the promissory note that they had a right to foreclose under the deed of trust. {CP 303}

Mr. Short answered Trust's complaint and initiated discovery 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. 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. Urquiti who made a supporting declaration. {CP 111}

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, 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;
- Trust was not the holder of the promissory note;
- Trust's witnesses were not competent or credible;
- Trust's witness' declarations were not in compliance with RCW 9A.72.85 or the court rules and should be stricken as inadmissible;
- That documentary evidence was not submitted as required by court rules and/or the rules of evidence i.e. sworn or certified papers, except where exempted by rule e.g. public records.

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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. Mr. Lin tacitly withdrew his declaration after being challenged by Mr. Short regarding its truthfulness.

- That the deed of trust was improperly assigned and it's execution highly irregular.

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

Mr. Short made a Motion for Reconsideration. The court denied said motion.

Mr. Short filed this appeal.

Trust presented a Judgment of Foreclosure. The Judge signed the Judgment of Foreclosure over the objections of Mr. Short.

Mr. Short moved the court to vacate summary judgment based on a letter from Bank of America requesting that they be removed from the suit. The court denied said motion.

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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-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.

<sup>2</sup>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) appears to contemplate this;

**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, therefore no judgment can be granted. Trust counters that they have a witness {CP 115, line 8, item 16} 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 Chase to put the promissory note in a secure envelope and send it via a secure courier to the Whatcom County Superior Court.

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<sup>2</sup> Mr. Short posited this situation to the trial court judge at the hearing on summary judgment. The verbatim exchange per {VP 02/03/2012 pg 10 line 23-pg11 line 5}

**MR. SHORT: They're seeking attorney's fees and what's to keep a subsequent party from suing on the basis of the note if they don't possess it?**

**THE COURT: Well, they're not suing on the note. If somebody tries to sue you on the note later, then you can raise whatever defenses you have. The deed of trust provides for the authority for them to get attorney's fees, the deed of trust does. They're not suing on the note.**

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 WCCR 54(c), RCW 56(e) and ER 1002 and allowed into evidence and consideration by the court facsimiles, speculation and testimony not carrying the quality of proof or having the fitness to induce a finding of no material facts in dispute.

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## 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 299} 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 111} 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 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...

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<sup>1</sup> Ms. Urquidi and Mr. Lin's 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 as well as other objectionable non-conformities. After Mr. Short objected, Ms. Urquidi submitted a second declaration, 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.

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 111}

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 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. Urquiti's declarations {CP 111} will reveal no such documents and no such testimony.

Declarant, Ms. Urquiti introduces herself as a duly authorized agent and signor for Bank of America, NA as successor by merger to Lasalle Bank NA, as Trustee to WaMu Mortgage Pass-Through Certificates Series 2006 AR11 Trust, and its servicing agent JP Morgan Chase Bank, NA {CP 111}.

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

Declarant, Ms. Urquiti 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. Urquiti’s declarations will reveal corruption of the caption header where a party, JP Morgan Chase Bank

NA, who is not listed in Trust's complaint, {CP 303} is apparently added as an additional plaintiff by the conjunction "and", this without leave of the court and over the objections of Mr. Short.

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 304, line 17, item 6}, motion for summary judgment and the supporting declaration's of Ms. Urquiti {CP 113 line 3-9, item 9} state as fact that on 0/9/25/2008 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 247, 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 113, line 21, item 14} 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.

## CONCLUSION

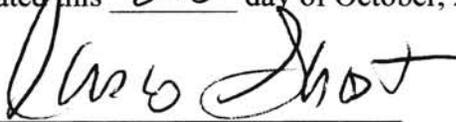
The trial court erred in granting summary judgment because Trust has presented only disputed, conflicting, and inadmissible evidence, which type of evidence is insufficient to support a finding on the essential element of a foreclosure action, which in his case means to find as undisputed fact, Trust is the holder of a promissory note executed by Mr. Short.

## RELIEF REQUESTED

Mr. Short requests that this court remand the case back to the trial court with instructions to the court that:

1. An original promissory note must be submitted to the trial court prior to the court making a finding that a party is the holder of a promissory note.
2. The witnesses in this case are not competent and their testimony should not be considered by the court and must be stricken from the record.

Dated this 2nd day of October, 2012

  
\_\_\_\_\_  
Christopher L. Short  
Appellant

COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

Bank of America, NA as successor by	)	Case No. 102010374
Merger of LaSalle Bank NA, as Trustee	)	Case No: 68545-7-1
to WaMu Mortgage Pass-Through	)	
Certificates Series 2006-AR 11 Trust	)	DECLARATION OF
	)	SERVICE
Respondents,	)	
	)	
vs	)	
	)	
	)	
Christopher L. Short; Washington	)	
Mutual Bank; Unknown Parties in	)	
Possession; or Claiming Right to	)	
Possession; and Unknown Occupants	)	
And Does 1-10 inclusive	)	
	)	
Appellants.	)	
	)	

I certify that on October 2, 2012, I sent by United States Mail a copy of the attached Appellant's Opening Brief on Appeal to:

The Court of Appeals  
Division I  
One Union Square  
600 University Street  
Seattle, WA 98101 4170  
Attn: JacQueline

And:

:

Ann T. Marshall and Barbara L. Bollero (individually)  
Bishop, White, Marshall & Weibel, P.S.  
720 Olive Way, Suite 1201

Seattle, WA 98101-1801

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 2, 2012

A handwritten signature in black ink, appearing to read "Chris Short", written in a cursive style.

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