

No. 291243

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STEVEN F. SCHROEDER,  
a married man dealing with his sole and separate property,  
Plaintiff/Petitioner,

v.

EXCELSIOR MANAGEMENT GROUP, LLC,  
and CRAIG G. RUSSILLO, Trustee,  
Defendants/Respondents.

**BRIEF OF APPELLANT**

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## **I. Assignments of Error**

### **A. Assignments of Error**

1. The Trial Court's denial of Mr. Schroeder's Motion for Partial Relief from the Order of April 7, 2009 was error. The Trial Court should have granted this motion.
2. The Trial Court's denial of Mr. Schroeder's Motion for Reconsideration of Order Denying His Motion For Partial Relief Re Order of April 7, 2009 was error. The Trial Court should have granted this motion.

### **B. Issues Pertaining to Assignments of Error**

1. Because an order bearing the signature of an attorney who does not have the client's authority to enter the order does not bind the client, the Court should vacate such an order under CR 60(b)(1) and CR 60(b)(11).
2. Because Mr. Schroeder timely pursued judicial relief upon discovery of the disputed portions of the April 7, 2009 Order, this Court should reject the argument that he ratified those disputed portions.
3. Because Mr. Schroeder's motion under CR 60 in the same case is not a collateral attack, this Court should reject the Defendants' defenses of res judicata and collateral estoppel.
4. Because the granting of Mr. Schroeder's motion would remove a necessary precondition to a nonjudicial foreclosure and would enable Mr. Schroeder to move to set aside the alleged Trustee's sale, this Court should reject the argument that Mr. Schroeder's motion is moot.
5. The purported agreement between the parties lacked a meeting of the minds to support the alleged agreement.

6. The purported agreement between the parties was an illegal violation of the Deeds of Trust Act and, therefore, unenforceable.
7. Because the Order denying Mr. Schroeder's Motion For Partial Relief Re Order of April 7, 2009 was entered due to a procedural irregularity under CR 59(a)(1), by surprise under CR 59(a)(3), and contrary to law under CR 59(a)(7), the Plaintiff is entitled to reconsideration of that order.

## **II. Statement of the Case**

In December of 2008, Mr. Schroeder owned a two hundred acre parcel in Evans, Washington, which is in Stevens County. CP at 3. Mr. Schroeder had granted a deed of trust to Excelsior Management Group, LLC, in 2007. CP at 3.

The trustee on the deed of trust, Mr. Craig Russillo, scheduled a trustee's sale for January 9, 2009. CP at 4. Before the trustee's sale, however, Mr. Schroeder filed a complaint to require that the deed of trust be foreclosed as a mortgage, on December 31, 2008. CP at 3-5.

Before Mr. Schroeder was born, the disputed property belonged to his parents. CP at 34 (¶8). Mr. Schroeder "was raised on this property" and has "always worked the property

for agricultural purposes.” CP at 34 (§8). Filing with the Internal Revenue Service, Mr. Schroeder declares his “profit or loss from farming with the principal product being beef and hay.” CP at 34 (§9); CP at 1-26 (Exhibit B, Schedule F). Mr. Schroeder has also provided photographs to show “farming activities that now exist and have always existed on the property.” CP at 34 (10); CP at 1-26 (Exhibit C).

Counsel for the parties came to a negotiated resolution of this case, as documented in a “Stipulated Motion and Order of Dismissal with Prejudice” entered on April 7, 2009. CP at 35-37. At the time of the entry of this Order, Mr. Schroeder was not aware of all of the terms of this Order. CP at 44-45.

Mr. Schroeder did not know that his “prior attorney had stipulated to an order as far back as April of last year [2009] that supposedly waived the statutory requirement that [his] property only be foreclosed judicially.” CP at 44. Mr. Schroeder “never authorized the supposed waiver of judicial

foreclosure” and “would not have authorized this supposed waiver, if [he] had been asked at the time.” CP at 44.

Mr. Schroeder was also unaware that his “prior attorney had stipulated that [he] would never again be allowed to allege that” he uses his “property for an agricultural purpose.” CP at 45. If Mr. Schroeder had been asked at the time, he “would not have authorized this part of the stipulated order, either.” CP at 45.

Mr. Schroeder did not learn until February of 2010 that his “prior attorney had stipulated to an order that [his] property could be foreclosed non-judicially and need not be foreclosed judicially under any future deed of trust with certain parties.” CP at 45. Mr. Schroeder “did not willingly consent to this supposed waiver of the statutory requirement of judicial foreclosure.” CP at 45.

In February of 2010, Mr. Schroeder learned that his “prior attorney had stipulated to a dismissal ‘with prejudice’ in this action, which may hinder [his] ability to pursue [his] claims

against [the lender] in a separate lawsuit.” CP at 45. Mr. Schroeder “certainly never authorized [his] prior attorney to injure [his] opportunity to pursue [the lender] in a separate lawsuit.” CP at 45.

On February 16, 2010, Mr. Schroeder executed a declaration identifying the above portions of the April 7, 2009 order that he never authorized. CP at 44-46. He discovered all of these unauthorized portions in the week before he executed the declaration. CP at 44-45 (¶¶ 5, 8, 14, and 16).

A hearing on Mr. Schroeder’s motion for partial relief was initially set for March 2, 2010. CP at 40. At the Defendants’ request and by agreement of the parties, the hearing was re-set to March 23, 2010. CP at 47.

The hearing that had been set for March 23, 2010 was not held and has not been re-set. See CP at 82.

At the same time, Mr. Schroeder was defending against a motion for summary judgment in a separate case, Schroeder v.

Haberthur, Stevens County Case No. 2010-2-00054-1. CP at 79.

On one hand, Mr. Schroeder needed to be able to argue that the property was agricultural and that—as agricultural property—it may not be foreclosed non-judicially and may only be foreclosed judicially as an important part of his defense against summary judgment. CP at 79. A failure to present this argument could waive it and extinguish it forever.

On the other hand, Mr. Schroeder is subject to a court order, the Order of April 7, 2009, which forbids him from making the argument that the property is agricultural and that, as security, it may only be foreclosed judicially. CP at 35-37. If Mr. Schroeder presents this argument in Schroeder II, he could be found in contempt.

Mr. Schroeder brought this dilemma to the attention of the Trial Court in two ways. In Schroeder II, he filed a motion to continue the summary judgment hearing pursuant to CR 56(f). CP at 79. In this case, he filed, as an alternative motion,

a motion to stay the efficacy of the disputed provisions of the problematic order. CP at 78-79.

The hearing on the motion to stay efficacy was set for April 6, 2010, the same day as the motion for summary judgment and the motion to continue. CP at 80. As Mr. Schroeder wished to conduct further discovery before a hearing on the motion for partial relief, he did not set a hearing on his motion for partial relief. CP at 82.

On April 6, 2010, the trial court denied Mr. Schroeder's motion to stay efficacy and his unset motion for partial relief. CP at 88-89. Mr. Schroeder timely filed a motion for reconsideration. CP at 81-86. On May 11, 2010, the trial court denied Mr. Schroeder's motion for reconsideration. CP at 90-91. Mr. Schroeder timely appealed. CP at 87.

### **III. Summary of Argument.**

The long-standing law in the State of Washington is that an attorney cannot surrender a substantial right of a client. Barton v. Tombari, 120 Wash. 331, 336, 207 P. 239 (1922).

Any such purported surrender is invalid and subject to removal upon motion for such relief. CR 60(b).

Mr. Schroeder did not authorize the disputed provisions of the April 7, 2009 Order. The Trial Court erred in denying his motion for partial relief from them.

The long-standing rule in the State of Washington is that provisions to a contract “which conflict with the terms of a legislative enactment are illegal and unenforceable.” Machen, Inc. v. Aircraft Design, Inc., 65 Wn. App. 319, 333, 828 P.2d 73 (Div. 3, 1992) (citing Hederman v. George, 35 Wn.2d 357, 212 P.2d 841 (1949)). This rule applies even if the other party has performed or received a benefit from the bargain. Cascade Timber Co. v. N. Pac. Ry. Co., 28 Wn.2d 684, 708, 184 P.2d 90 (1947).

The disputed provisions of the April 7, 2009 Order were illegal violations of RCW 61.24.030(2). The Trial Court erred in denying Mr. Schroeder’s motion for partial relief from them.

#### IV. Argument

***A. Because an order bearing the signature of an attorney who does not have the client's authority to enter the order does not bind the client, the Court should vacate such an order under CR 60(b)(1) and CR 60(b)(11). (Both Assignments of Error.)***

On April 7, 2009, the trial court entered an order that had been stipulated to by Mr. Schroeder's prior attorney and by counsel for Respondents herein. CP at 35-37. Mr. Schroeder did not know that certain provisions were in the order. CP at 44-45. Mr. Schroeder did not discover that those provisions were in the order until February of 2010. CP at 44-45. Pursuant to CR 60's allowance for a motion for "Relief from Judgment or Order," Mr. Schroeder filed a motion for partial relief on February 16, 2010. CP at 38-39.

An attorney has "general authority" to "adopt any course which seems to him best calculated to secure the object for which he [the attorney] is employed." Barton v. Tombari, 120 Wash. 331, 336, 207 P. 239 (1922) (citing 6 C.J. 660, note A). The general authority of an attorney does not extend to binding

the client to any “surrender in whole or in part of any substantial right.” Id. This has been the law in the State of Washington for eighty-eight years and remains unchanged.

This Division of the Court of Appeals has framed the distinction between the general authority of the attorney and the inability of the attorney to surrender the client’s substantial rights in another way. “An attorney is impliedly authorized to stipulate to, and waive, procedural matters in order to facilitate a hearing or trial.” In re Coggins, 13 Wn. App. 736, 739, 537 P.2d 287 (Div. 3, 1975).

Without specific authorization, an attorney “is without authority to waive any substantial right of his client.” Id. In Coggins, the court addressed two of the petitioner’s assignments of error. Coggins, 13 Wn. App. at 738. The first was not an error. Id. The other involved the inability of the petitioner to refute “the findings and conclusions of the trial court.” Id.

This inability was caused by the absence of “a means by which an adequate statement of facts could be prepared for review.” Id. This absence was due to the waiver at the trial court of “the presence of a court reporter” by the petitioner’s trial counsel. Id. The Coggins court found that the waiver of court reporting by the petitioner’s trial counsel did not bind the petitioner (Id. at 739), reversed the trial court’s decision, and remanded for a new trial (Id. at 741).

In Morgan v. Burks, 17 Wn. App. 193, 199, 563 P.2d 1260 (1977), a “dismissal order resulted from serious misunderstandings between attorney and client” in which the client did not “authorize their attorneys to bind them to the settlement and dismissal.” The clients did not give their informed consent to what the attorneys were doing. Morgan, 17 Wn. App. at 199. The absence of such authority or informed consent “is reason enough to vacate the dismissal order under CR 60.” Id. (citations omitted). The court specifically relied on CR 60(b)(1) and CR 60(b)(11). Id., at 197-198.

The statute on the general authority of attorneys, RCW 2.44.010, does not create authority for an attorney to surrender a “client’s substantive rights.” Id. at 199-200 (citations omitted). Without express authority, informed consent, or ratification, an attorney may not “waive, compromise or bargain away a client’s substantive rights.” Id. at 200.

The difficult question is what is a "substantial right". In this jurisdiction, substantial rights have been held to have been compromised by surrendering property without securing a rescission of the contract to purchase []; settlement of a tort cause of action []; not recording the testimony necessary for review in a parental deprivation proceeding []; stipulating to a contingent consent judgment []; stipulating that the client is mentally ill without a hearing.

Graves v. P.J. Taggares Co., 94 Wn.2d 298, 304-305, 616 P.2d 1223 (1980) (citations omitted).

The Respondents may attempt to raise the alleged apparent authority of Mr. Schroeder’s prior counsel as a defense on this issue. An agent, they might say, who has the authority “to perform particular services for a principal” also has “the

implied authority to perform the usual and necessary acts essential to carry out the authorized services.” See King v. Riveland, 125 Wn.2d 500, 507, 886 P.2d 160 (1994) (quoting Walker v. Pacific Mobile Homes, Inc., 68 Wn.2d 347, 351, 413 P.2d 3 (1966)).

The Respondent’s argument assumes and requires that this general rule under agency law somehow beats the specific rule for attorney-client relationships. Such assumption defies logic. A specific rule for attorney-client relationships would obviously have priority over a general rule under agency law.

A trial court’s denial of a motion to vacate will be overturned on appeal if the court abused its discretion. See Haley v. Highland, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). A trial court abuses its discretion when its decision is based on untenable grounds or for untenable reasons. DeYoung v. Cenex Ltd., 100 Wn. App. 885, 894, 1 P.3d 587 (2000).

Mr. Schroeder was unaware of the disputed provisions and did not authorize them. CP at 44-46. The disputed

provisions clearly pertain to the kinds of substantive rights that require specific authorization and informed consent by the client.

For this reason, the attorney's signature on the disputed provisions is ineffective. Mr. Schroeder should be granted partial relief from the April 7, 2009 order by way of the vacation of the disputed provisions.

***B. Because Mr. Schroeder timely pursued judicial relief upon discovery of the disputed portions of the April 7, 2009 Order, this Court should reject the argument that he ratified those disputed portions. (Both Assignments of Error.)***

On April 7, 2009, the trial court entered an order that had been stipulated to by Mr. Schroeder's prior attorney and by counsel for Respondents herein. CP at 35-37. Mr. Schroeder did not know that certain provisions were in the order. CP at 44-45. Mr. Schroeder did not discover that those provisions were in the order until February of 2010. CP at 44-45. Pursuant to CR 60's allowance for a motion for "Relief from Judgment or Order," Mr. Schroeder filed a motion for partial relief on February 16, 2010. CP at 38-39.

The Respondents herein may claim that Mr. Schroeder ratified the disputed portions of the April 7, 2009 order. Ratification is “the subsequent adoption and affirmance by one person of an act which another, without authority, has previously assumed to do for him while purporting to act as his agent.” Northwest Poultry v. Fry Co., 27 Wn.2d 35, 54, 176 P.2d 324 (1947) (quoting 1 Mechem on Agency (2d ed.) 260, §347). Another form of ratification is implicit ratification, which occurs if

the corporate principal, with full knowledge of the material facts (1) receives, accepts, and retains benefits from the contract, (2) remains silent, acquiesces, and fails to repudiate or disaffirm the contract, or (3) otherwise exhibits conduct demonstrating an adoption and recognition of the contract as binding.

Smith v. Hansen, Hansen, & Johnson, 63 Wn. App. 355, 369, 818 P.2d 1127 (Div. 2, 1991) (quoting Barnes v. Treece, 15 Wn. App. 437, 443, 549 P.2d 1152 (Div. 1, 1976)). Whether the principal’s acts “demonstrate an intent to affirm the

contract” is the “key question.” Id. (quoting Barnes, 15 Wn. App. at 443-444.)

The facts show no action by Mr. Schroeder that could possibly be an adoption or affirmance of the disputed portions of the April 7, 2009 order! For this reason, nothing that Mr. Schroeder has done could possibly be the first form of ratification above.

All of the forms of implied ratification require that the principal have “full knowledge of the material facts.” The record demonstrates that Mr. Schroeder did not know that the disputed portions of the April 7, 2009 order even existed until February of 2010. For this reason, how could he possibly have ratified that of which he had no knowledge? It is impossible.

Even more decisive against the Respondents’ ratification defense is the fact that Mr. Schroeder filed his motion for partial relief mere days after discovering the disputed portions of the April 7, 2009 order. His filing this motion is as clear a

repudiation or disavowal of the disputed portions as one can imagine.

Consequently, the Respondent's defense of ratification has no merit. This Court should reject the ratification defense.

***C. Because Mr. Schroeder's motion is under CR 60, this Court should reject the Defendants' defenses of res judicata and collateral estoppel. (Both Assignments of Error.)***

On April 7, 2009, the trial court entered an order that had been stipulated to by Mr. Schroeder's prior attorney and by counsel for Respondents herein. CP at 35-37. Pursuant to CR 60's allowance for a motion for "Relief from Judgment or Order," Mr. Schroeder filed a motion for partial relief on February 16, 2010. CP at 38-39.

Respondents may claim that Mr. Schroeder's motion for partial relief is barred by res judicata or collateral estoppel.

Res judicata applies when "the decision in question becomes final." Marriage of Aldrich, 72 Wn. App. 132, 138, 864 P.2d 388 (Div. 2, 1993). When res judicata applies, it prevents re-litigation by collateral attack. Id. A collateral attack

occurs when a party files a motion against the final decision “in a different action” than the one in which the final decision was entered. Id.

A motion for partial relief from an order filed in the same action cannot possibly constitute a collateral attack and is, therefore, immune from the defenses of res judicata and collateral estoppel. Because Mr. Schroeder filed his motion for partial relief in the same action as the April 7, 2009 order, his motion is immune from these defenses of preclusion.

Consequently, this Court should reject the Respondents’ defenses of collateral estoppel and res judicata. These defenses do not apply.

***D. Because the granting of Mr. Schroeder’s motion would remove one of the necessary preconditions to a nonjudicial foreclosure and would enable the Plaintiff to move to set aside the alleged Trustee’s sale, this Court should reject the argument that Mr. Schroeder’s motion is moot. (Both Assignments of Error.)***

The Respondents may argue that an alleged trustee’s sale of the disputed property has made Mr. Schroeder’s issues moot and, thus, properly subject to dismissal.

If all issues in a case are moot, as a general rule, the case should be dismissed. Sorenson v. Bellingham, 80 Wn.2d 547, 558, 496 P.2d 512 (1972) (citations omitted). A case is moot if its issues are all purely academic. State v. Turner, 98 Wn.2d 731, 733, 658 P.2d 658 (1983) (quoting Grays Harbor Paper Co. v. Grays Harbor County, 764 Wn.2d 70, 73, 442 P.2d 967 (1968)). A case is moot if it only involves abstract propositions or if “the substantial questions involved in the trial court no longer exist.” Sorenson, 80 Wn.2d at 558.

Dismissal of a case with all moot issues is not appropriate if the case involves “matters of continuing and substantial public interest.” Id. Whether the public interest is sufficient depends on criteria such as “the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question.” People ex rel. Wallace v. Labrens, 411 Ill. 618, 622, 104 N.E.2d 769, 30 A.L.R.2d 1132 (1952) (quoted in National

Elec. Contractors Ass'n v. Seattle School Dist. 1, 66 Wn.2d 14, 20, 400 P.2d 778 (1965)). This exception only applies “where the real merits of the controversy are unsettled and a continuing question of great public importance exists.” Sorenson, 80 Wn.2d at 558 (citations omitted).

A criminal appeal is generally not moot even where the appealing criminal defendants have served their sentences. State v. Turner, 98 Wn.2d at 733. The rationale for the rejection of a mootness claim in such an event is that service of a sentence does not erase a judgment for fines and possibly other collateral consequences. *Id.*

“The central question of all mootness problems is whether changes in the circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaningful relief.” City of Sequim v. Malkasian, 157 Wn.2d 251, 259, 138 P.3d 943 (2005) (quoting 13A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533.3 at 261 (2d ed. 1984)).

A case is not moot even if the best remedy is unavailable, as long as some remedy is available. Church of Scientology of Cal. v. United States, 509 U.S. 13, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992) (cited by Malkasian, 157 Wn.2d at 259).

The claim that an issue is moot “is directed at the jurisdiction of the court.” Citizens For Financially Responsible Gov't v. Spokane, 99 Wn.2d 339, 350, 662 P.2d 845 (1983). Because mootness is jurisdictional, it “may be raised at any time.” Citizens, 99 Wn.2d at 350 (citing CR 12(h)(3)).

Among other things, a nonjudicial foreclosure requires the deed of trust to allege that the subject property is not used for agricultural purposes. RCW 61.24.030(2). The Deeds of Trust Act does not consider such an allegation valid if it is not true at the time the deed of trust is executed and if it is not true at the time of the trustee’s sale. RCW 61.24.030(2).

When this case was first filed in 2008, Mr. Schroeder showed that the disputed property was agricultural. CP at 33-34. Mr. Schroeder, however, is no longer allowed to “allege

that the subject property is used for agricultural purposes.” CP at 36. Were the disputed provisions vacated as unauthorized by Mr. Schroeder or void as against public policy, Mr. Schroeder could then properly pursue a separate action to set aside the trustee’s sale or a motion to such end in an action that already exists. See Cox v. Helenius, 103 Wn.2d 383, 385, 693 P.2d 683 (1985).

Although the requested partial vacation of the April 7, 2009 order would have provided more expeditious relief if it had occurred before the trustee’s sale, remedies still remain that Mr. Schroeder could pursue with such relief now.

Although Mr. Schroeder has a remedy available, the Respondents argue that this case is moot. For the above reasons, a mootness claim is not well-founded. This Court should reject the Respondents’ argument on this issue.

***E. The purported agreement between the parties lacked a meeting of the minds to support the alleged agreement. (Both Assignments of Error.)***

On April 7, 2009, the trial court entered an order to which Mr. Schroeder's prior attorney and counsel for Respondents had stipulated. CP at 35-37. Mr. Schroeder did not know that certain provisions were in the order. CP at 44-45. Mr. Schroeder did not discover that those provisions were in the order until February of 2010. CP at 44-45.

The alleged agreement on the disputed provisions is only valid if the parties have a meeting of the minds on those provisions. See Sea-Van Investments v. Hamilton, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994). "A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent." Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911) (per L. Hand, J.) (quoted in Everett v. Estate Of Sumstad, 95 Wn.2d 853, 855, 631 P.2d 366 (1981)).

The “mutual assent of the parties” is “essential to the formation of a contract. Washington Shoe Mfg. Co. v. Duke, 126 Wash. 510, 516, 218 P. 232, 37 A.L.R. 611 (1923). Such assent “must be gathered from their outward expressions and acts, and not from an unexpressed intention.” Id.

To determine whether the parties have had a meeting of the minds sufficient to support a contract, one first inquires “into the outward manifestations of intent by a party to enter into a contract” and then imputes “an intention corresponding to the reasonable meaning of a person's words and acts.” Everett, 95 Wn.2d at 855.

Mr. Schroeder never saw the April 7, 2009 order until after it was entered. CP at 44-45. For this reason, he could not have manifested any intent on the basis of which one could assert a meeting of the minds regarding the disputed provisions of the order he did not see until February of 2010.

The disputed provisions of the April 7, 2009 order are not supported by a meeting of the minds and are, therefore, invalid.

Consequently, the trial court erred in declining to vacate the disputed portions of the April 7, 2009 Order.

***F. The purported agreement between the parties was an illegal violation of the Deeds of Trust Act and, therefore, unenforceable. (Both Assignments of Error.)***

On April 7, 2009, the trial court entered an order that had been stipulated to by Mr. Schroeder's prior attorney and by counsel for Respondents herein. CP at 35-37.

The April 7, 2009 Order purported to waive the statutory requirement that Mr. Schroeder's property only be foreclosed judicially. Id. The April 7, 2009 Order commanded Mr. Schroeder to never again allege that he uses his property for an agricultural purpose. Id. The April 7, 2009 Order purported to permit the disputed property to be foreclosed non-judicially. Id. The April 7, 2009 Order purported to waive the requirement that the disputed property be foreclosed judicially under any future deed of trust with certain parties. Id.

Pursuant to CR 60's allowance for a motion for "Relief from Judgment or Order," Mr. Schroeder filed a motion for partial relief on February 16, 2010. CP at 38-39.

RCW 61.24.030 provides that it "shall be requisite to a trustee's sale" that the trustee meet a specific list of seven conditions. The second condition is the following:

That the deed of trust contains a statement that the real property conveyed is not used principally for agricultural purposes; provided, if the statement is false on the date the deed of trust was granted or amended to include that statement, and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially. Real property is used for agricultural purposes if it is used in an operation that produces crops, livestock, or aquatic goods;

RCW 61.24.030(2).

The above statute requires the deed of trust to allege that the subject property is not used for agricultural purposes. RCW 61.24.030(2). The Deeds of Trust Act does not consider such an allegation valid if it is not true at the time the deed of trust is executed and if it is not true at the time of the trustee's sale. Id.

“Contractual provisions which conflict with the terms of a legislative enactment are illegal and unenforceable.” Machen, Inc. v. Aircraft Design, Inc., 65 Wn. App. 319, 333, 828 P.2d 73 (Div. 3, 1992) (citing Hederman v. George, 35 Wn.2d 357, 212 P.2d 841 (1949)). A “contract that is contrary to the terms and policy of an express legislative enactment is illegal and unenforceable.” Tanner Elec. v. Puget Sound, 128 Wn.2d 656, 669, 911 P.2d 1301 (1996) (citations omitted). The illegality of an agreement is a question of law that is reviewed de novo. Fallahzadeh v. Ghorbanian, 119 Wn. App. 596, 601, 82 P.3d 684 (2004).

Like an illegal instrument, an instrument to which it is “intimately connected” is also tainted and unenforceable. Sherwood & Roberts-Yakima, Inc. v. Leach, 67 Wn.2d 630, 636, 409 P.2d 160 (1965) (citations omitted). In an illegal contract, a party has no obligation to perform **even if the other party has performed or received a benefit from the bargain.** Cascade Timber Co. v. N. Pac. Ry. Co., 28 Wn.2d 684, 708,

184 P.2d 90 (1947) (citing Pomeroy's SPECIFIC PERFORMANCE OF CONTRACTS (3d ed.) page 651, § 286) (emphasis added).

The court may not enforce an agreement that violates public policy. In re Marriage of Hammack, 114 Wn. App. 805, 810-811, 60 P.3d 663 (2003) (citations omitted). A party may use CR 60(b)(11) to vacate such an agreement. Id. (citations omitted).

In Goldberg v. Sanglier, 96 Wn.2d 874, 639 P.2d 1347 (1982), the court found that Sanglier has misrepresented the source of funds to a third party. Goldberg, 96 Wn.2d at 880. This misrepresentation was a violation of securities law. Id. at 881. Following the rule of in pari delicto (an exception to the above rule), the Goldberg court allowed the plaintiffs to pursue recovery on the illegal contracts because to do otherwise would provide no “legal recourse” for “unwary investors who enter questionably legal transactions” and encourage “opportunists” to “draw such unwary persons into questionable investment schemes, return their initial investment under fraudulent

pretenses, and dupe them out of their profits, all with full assurance that they will be insulated from legal recourse” (Id. at 884) and because allowing recovery would deter the unwary opportunistic petitioners “from entering questionable transactions by the scars of this regrettable experience” and would “justly require[]” the opportunistic transgressors “to disgorge profits accruing to them from their improper behavior,” as they were “the primary transgressors of the law with respect to this transaction” (Id. at 888).

Simply stated, the above factors from Goldberg are whether legal recourse exists, whether illegal conduct would be encouraged, whether questionable conduct would be deterred, and whether a party would profit from its illegal behavior.

The rule of in pari delicto, however, only applies if the parties are at equal fault. Mr. Schroeder was unaware that his previous counsel had negotiated a resolution which included illegal provisions. CP at 44-45. As such, the parties are not “of

equal guilt,” and the rule of in pari delicto does not apply and cannot save the Respondents. Goldberg, 96 Wn.2d at 882.

The general rule for illegal contracts also has an exception for business statutes. A violation of a statute that regulates business does not make the contract void “unless the act expressly provides for invalidation of conflicting contract provisions.” Smith v. Skone & Connors, 107 Wn. App. 199, 208, 26 P.3d 981 (Div. 3, 2001) (citations omitted). When a “statute imposes a penalty for violations of its requirements, the penalty is exclusive of any other.” Id. (citations omitted).

In this case, the disputed provisions of the April 7, 2009 Order receive no assistance from the business statute exception for two reasons. First, the applicable statute RCW Ch. 61.24 is not a business statute. The violated statute is not in RCW Title 18 or RCW Title 19. The violated statute is also not in a specialized title related to an industry or occupation. It is not a business statute. For this reason, the business statute exception does not apply.

Second, the availability of the business statute exception hinges on the statutory penalties. The statutory penalties weigh against the availability of the business statute exception for two reasons. First, if the statute does not impose any penalty for violation of its requirements, it cannot exclude other penalties, as the last quotation from Smith shows. Second, if the statute does impose a penalty, it prevents precisely what the Respondents have done to the disputed property in this case, namely, pursue non-judicial foreclosure on property that the debtor alleges is agricultural. CP at 34.

Some statutes specify that they may not be waived. See, e.g., RCW 59.18.230(1).<sup>1</sup> Other statutes specifically state that provisions may be waived. See, e.g., RCW 62A.1-102(3).<sup>2</sup>

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<sup>1</sup> “Any provision of a lease or other agreement, whether oral or written, whereby any section or subsection of this chapter is waived except as provided in RCW 59.18.360 and shall be deemed against public policy and shall be unenforceable.”

<sup>2</sup> “The effect of provisions of this Title may be varied by agreement, except as otherwise provided in this Title and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Title may not be disclaimed by

RCW 61.24.030(2) requires the deed of trust to allege that the subject property is not used for agricultural purposes. RCW 61.24.030(2) does not consider such an allegation valid if it is not true at the time the deed of trust is executed and if it is not true at the time of the trustee's sale. The above statute does not specifically state that no party may waive its provisions.

The legislature, however, has made clear its intent that the agricultural prohibition be immune to waiver by voiding the allegation of non-agricultural use when the allegation is "false on the date the deed of trust was granted or amended to include that statement, and false on the date of the trustee's sale." RCW 61.24.030(2).

In short, the disputed provisions of the April 7, 2009 Order are illegal. Because the disputed provisions are illegal, the Respondents may not enforce them. For the same reason, the trial court should grant partial relief to Mr. Schroeder by

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agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable."

vacating these disputed provisions from the April 7, 2009 Order.

***G. Because the Order denying Mr. Schroeder's Motion For Partial Relief Re Order of April 7, 2009 was entered due to a procedural irregularity under CR 59(a)(1), by surprise under CR 59(a)(3), and contrary to law under CR 59(a)(7), Mr. Schroeder is entitled to reconsideration of that order. (Assignment of Error No. 2.)***

The hearing on the motion to stay efficacy was set for April 6, 2010, the same day as the motion for summary judgment and the motion to continue. CP at 80. As Mr. Schroeder wished to conduct further discovery before a hearing on the motion for partial relief, he did not set a hearing on his motion for partial relief. CP at 82.

On April 6, 2010, the trial court denied Mr. Schroeder's motion to stay efficacy and his unset motion for partial relief. CP at 88-89. Mr. Schroeder timely filed a motion for reconsideration. CP at 81-86. On May 11, 2010, the trial court denied Mr. Schroeder's motion for reconsideration. CP at 90-91. Mr. Schroeder timely appealed. CP at 87.

A trial court's denial of a motion for reconsideration will be overturned on appeal if the court abused its discretion. See Wagner Dev. v. Fidelity & Deposit, 95 Wn. App. 896, 906, 977 P.2d 639 (Div. 2, 1999) (citing Perry v. Hamilton, 51 Wn. App. 936, 938, 756 P.2d 150 (Div. 3, 1988)). A trial court abuses its discretion when its decision is based on untenable grounds or for untenable reasons. Wagner Dev., 95 Wn.2d at 906 (citing State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), cert. denied, 118 S. Ct. 1193 (1998); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Reconsideration of the trial court's denial of Mr. Schroeder's motion for partial relief is appropriate under CR 59(a)(7), as is more particularly shown under the appropriate sections earlier in this brief.

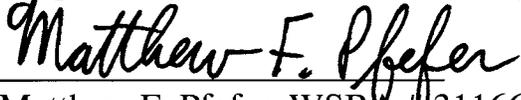
The trial court's ruling on the unset motion for partial relief was a procedural irregularity and a surprise which Mr. Schroeder did not expect. The trial court has provided no grounds or reasons in support of its denial of Mr. Schroeder's

motion for reconsideration. The trial court should have reconsidered its denial of Mr. Schroeder's motion for partial relief.

### **V. Conclusion**

The trial court erred in denying Mr. Schroeder's motion for partial relief and erred in denying Mr. Schroeder's motion for reconsideration. The evident absence of authority on the part of Mr. Schroeder's prior counsel to enter the disputed provisions of the April 7, 2009 Order and the patent illegality of those same provisions mandate relief from those provisions under CR 60(b). This Court should reverse the trial court's erroneous orders and remand to the trial court for entry of an order granting partial relief from the April 7, 2009 Order.

Respectfully submitted this 25<sup>th</sup> day of August 2010.



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