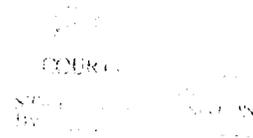


No. 296334



COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

EXCELSIOR MORTGAGE EQUITY FUND II, LLC,  
an Oregon limited liability co.,  
Plaintiff-Respondent,  
v.  
STEVEN F. SCHROEDER,  
Defendant-Appellant.

**BRIEF OF APPELLANT**

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Attorneys for Defendant-Appellant Schroeder  
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## **I. Introduction**

In this unlawful detainer matter, the Plaintiff's case depends on the occurrence of an alleged Trustee's Sale it has not proven. The Plaintiff has chosen not to identify any first-hand percipient witnesses of this alleged sale.

The Trial Court erroneously granted total summary judgment to the Plaintiff even though the Plaintiff's motion was only a basis for partial summary judgment, even though the Plaintiff's purported evidence was riddled with incompetent hearsay, even though the Plaintiff chose not to request summary judgment on Mr. Schroeder's remaining affirmative defenses, and even though the Trial Court did not even have jurisdiction because the Plaintiff chose not to provide required statutory notice under RCW 59.12.030.

This Court should reverse the Trial Court's erroneous rulings and remand for further proceedings.

## **II. Assignments of Error**

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

1. The Trial Court's overruling the objection of Defendant Schroeder to the June 18, 2010 Declaration of Phillip J. Haberthur was error. Objection, CP 162-163; Ruling, CP 164-165. The Trial Court should have sustained this objection.

2. The Trial Court's Order Granting Plaintiff's Motion for Summary Judgment Against Steven F. Schroeder on December 7, 2010 was error. CP 168-170. The Trial Court should have denied this motion.

3. The Trial Court's denial of Mr. Schroeder's Motion to Dismiss on December 7, 2010 was error. CP 171-172. The Trial Court should have granted this motion.

4. The Trial Court's granting a Final Order and Judgment on December 7, 2010 was error. CP 173-174.

The Trial Court should not have entered this Final Order and Judgment in favor of Plaintiff Excelsior.

5. The Trial Court's Order for Writ of Restitution on December 7, 2010 was Error. CP 175-177. The Trial Court should have denied this motion.

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

1. Because the Plaintiff has never proven that a Trustee's Sale actually occurred, any summary judgment is error. The Trial Court should have denied summary judgment as well as any other relief for the Plaintiff.

2. Because hearsay evidence is inadmissible on a summary judgment motion, the Trial Court should have sustained the objection of Defendant Steven F. Schroeder.

3. Because the Plaintiff's motion for summary judgment was only a partial motion, Mr. Schroeder was not required to produce any evidence for its affirmative

defenses. Because the affirmative defenses of Mr. Schroeder remain unresolved to this day, an order granting summary judgment, an order for writ of restitution, and a final order and judgment were all error. The Trial Court should not have granted summary judgment, ordered the issuance of a writ of restitution, or granted a final order and judgment.

4. Because the Plaintiff has failed to follow the explicit statutory procedure of the Unlawful Detainer Act to acquire jurisdiction for the Trial Court over Mr. Schroeder, no relief is proper for the Plaintiff. This Court should decline to follow the erroneous decision of Division I in Savings Bank of Puget Sound v. Mink, 49 Wn. App. 204 (1987). The Trial Court should have granted Mr. Schroeder's Motion to Dismiss, should have denied the Plaintiff's motion for summary judgment, should have

refused to grant an order for writ of restitution, and should have declined a final order and judgment for the Plaintiff.

5. No Contract Entitles the Plaintiff to Attorney Fees and Litigation Expenses.

6. Because any judgment should identify Mr. Schroeder's capacity correctly, a judgment that fails to identify him as a married person in his separate capacity is in error.

### **III. Statement of the Case**

At the time the complaint in this matter was filed, the Plaintiff claimed that it owned property located at the street address of 1184 Hodgson Road (some times misspelled Hodgeson Road) in Evans, WA 99126 (hereinafter, "disputed property"). CP 1.

At the time the complaint in this matter was filed, Mr. Schroeder was in possession of the disputed property. CP 1-2, ¶2.1. At the same time, the Plaintiff

claimed that it was entitled to possession of the disputed property. CP 1.

The Plaintiff claims that their Trustee sold the disputed property at a Trustee's Sale. CP 1. Whether the property was actually sold at an alleged Trustee's Sale is disputed. CP 185-186.

The Plaintiff admits that it has not served any formal notice to quit the premises on any Defendant, including Mr. Schroeder. CP 102, lines 6-8 and footnote 20 (where the Plaintiff opines that no "formal notice to quit" is necessary or a "jurisdictional prerequisite"); CP 103-104.

Mr. Schroeder answered the Complaint on July 19, 2010. CP 152-156. The Answer brings forward numerous affirmative defenses. CP 154-155.

Of these affirmative defenses, the Trial Court has ruled on two and ruled against Mr. Schroeder's defense that the "Plaintiff's claim may be premature and barred for

failure to meet or comply with statutory prerequisites” and that the “Plaintiff’s claim may be barred for lack of subject matter jurisdiction.” CP 154-155 (¶¶ 6.1 and 6.4); CP 205-206; compare CP 186, lines 15-18.

The Plaintiff also dismissed its claim for damages. This dismissal mooted Mr. Schroeder’s affirmative defense that the Plaintiff failed to mitigate their damages. CP 186 (line 21)-187 (line 2).

#### **IV. Summary of Argument.**

Although the Plaintiff claims that it is entitled to possession of the disputed property, the Plaintiff has chosen not to provide any even remotely adequate proof that a Trustee’s Sale occurred.

Because the Plaintiff has chosen not to meet the plain statutory prerequisites in bringing this Unlawful Detainer action, the Plaintiff is entitled to no relief. All

relief that the Trial Court granted to the Plaintiff was in error.

Because Mr. Schroeder still has numerous affirmative defenses that the Trial Court has not resolved, the Trial Court should not have granted a motion for summary judgment, a final order and judgment, or an order for writ of restitution.

## V. Argument

***A. Because the Plaintiff has never proven that a Trustee's Sale actually occurred, any summary judgment is error. The Trial Court should have denied summary judgment as well as any other relief for the Plaintiff. (The Second, Third, Fourth, and Fifth Assignments of Error.)***

Mr. Phillip J. Haberthur is both the supposed grantor of the purported Trustee's Deed and the declarant who supposedly authenticates the purported Trustee's Deed. CP 185 (15-17). He was not present at the time of the alleged Trustee's Sale. Id.

Mr. Schroeder asked the Plaintiff to identify all of its witnesses. CP 120. The Plaintiff chose not to identify anyone who actually conducted the alleged Trustee's Sale. The Plaintiff has never identified anyone who has first-hand, percipient knowledge that any Trustee's Sale of the disputed property ever occurred. CP 185 (17-19).

The Plaintiff may seek to rely on some supposed dispositive presumption that, if an alleged Trustee's Deed exists, then a Trustee's Sale must have occurred. Such a presumption does not apply in this case.

RCW 61.24.040(7) provides that the Trustee's Deed

shall recite the facts showing that the sale was conducted in compliance with all of the requirements of this chapter and of the deed of trust, which recital shall be prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value

No party to this case is a "bona fide purchaser[]" or "encumbrancer[] for value." For this reason, the alleged Trustee's Deed is conclusive evidence of nothing.

**B. *Because hearsay evidence is inadmissible on a summary judgment motion, the Trial Court should have sustained the objection of Defendant Steven F. Schroeder. (The First, Second, Fourth, and Fifth Assignments of Error.)***

A declaration in support of a motion for summary judgment must be made on personal knowledge. CR 56(e); LCR 16(e)(4).

Mr. Phillip J. Haberthur states that his declaration dated June 16, 2010 is “based upon [his] own personal knowledge and/or is based upon the records and files [his] company maintains on this matter.” CP 23.

Mr. Schroeder objected to Mr. Haberthur’s declaration and to the exhibits to that declaration. CP 162-163.

The Trial Court overruled the objection with a cursory explanation. CP 164-165.

Mr. Haberthur incorporated nine separate exhibits into his declaration and chose not to identify which of the

exhibits were based upon personal knowledge and which of them were based upon his alleged business records.

The alleged Trustee's Deed is Exhibit A. CP 25-29. Mr. Haberthur chose not to identify whether he is proffering this exhibit on his own personal knowledge or as an alleged business record. As he was not present for the purported Trustee's Sale on February 19, 2010, he could not be stating that "the Successor Trustee then and there sold at public auction to said Grantee, the highest bidder therefore, the property herein above described" on the basis of his own personal knowledge. CP 185 (absence); CP 27, ¶10 (quote).

Moreover, the alleged Trustee's Deed is not a business record.

A reason that the alleged Trustee's Deed is not a business record is that it is not a mundane clerical record that is properly immune from cross-examination.

Admissible business records are the “routine product of an efficient clerical system” and include “payrolls, accounts receivable, accounts payable, bills of lading and the like.” New York Life Ins. Co. v. Taylor, 147 F.2d 297, 300 (1945) (cited with approval by Young v. Liddington, 50 Wn.2d 78, 83 (1957) and Welfare of J.M., 130 Wn. App. 912, 923-924 (Div. 3, 2005)). “Cross-examination is unimportant in a case of systematic routine entries made by a large organization where the skill of observation or judgment is not a factor.” New York Life Ins. Co., 147 F.2d at 301.

A business record is a mundane clerical record that is properly immune from cross-examination. The alleged Trustee’s Deed is not a mundane clerical record that is properly immune from cross-examination. For this reason, the alleged Trustee’s Deed is not a business record.

The above rationale may also apply to other exhibits

proffered by the Plaintiff as well.

Exhibit B is a Notice of Trustee's Sale. CP 30-37. The reason this exhibit is not a business record is that consists of information received from a third party. As such, the information takes the notice out of the realm of a business record under Chapter 5.45 RCW. See State v. Barringer, 32 Wn. App. 882 (1982). This same deficiency infects the alleged Trustee's Deed (Exhibit A) and may apply to other exhibits proffered by the Plaintiff as well. The Notice of Trustee's Sale is not a business record.

According to Mr. Haberthur, Exhibit C is a "proof of service." CP 24, lines 1-2. The first two pages of Exhibit C consist of two separate purported declarations by the same alleged employee of Eastern Washington Attorney Services. CP 38-39.

Even if these documents were actually created by someone on behalf of Eastern Washington Attorney

Services, they could not possibly constitute business records of Mr. Haberthur. Information received from a third party is not a business record. As these declarations constitute information received from a third party, they cannot be business records. See State v. Barringer, 32 Wn. App. 882 (1982).

Mr. Haberthur is not a custodian or other qualified witness for Eastern Washington Attorney Services and, therefore, cannot authenticate any documents from Eastern Washington Attorney Services. As these declarations are not authenticated, they are not admissible. RCW 5.45.020; CP 38-39.

The third page of Exhibit C appears to be some sort of photograph. CP 40. The Plaintiff has done nothing to authenticate this photograph. It is not a business record. It is also inadmissible. RCW 5.45.020.

The fourth page of Exhibit C purports to be a

declaration of mailing. CP 41. The purported declaration does not state that it is “true and correct.” The purported declaration also omits the place of its signing. As the declaration is not in proper form, it is inadmissible. GR 13; RCW 9A.72.085.

Exhibit G is unsigned. CP 89-90. As such, it is inadmissible.

Exhibits F, H, and I are declarations of Mr. Schroeder. CP 45-88, 91-95. The Trial Court ruled that these declarations as well as the unsigned Exhibit G were admissible on the basis of International Ultimate, Inc., v. St. Paul Fire & Marine Insurance Co., 122 Wn.App. 736 (2004). CP 165. The Trial Court’s ruling was in error for two additional reasons. First, the cited case refers to documents obtained during discovery, not documents obtained some other way. Id. at 747-751. Second, the rule from International Ultimate only relates to

identification and authentication. Id. at 748 (holding that “authentication may be satisfied when the party challenging the document originally provided it through discovery”). This rule does not satisfy the hearsay exception for business records. The Plaintiff is still required to demonstrate that the documents actually fall within the hearsay exception.

The only exhibits to Mr. Haberthur’s declaration that could possibly be admissible business records are Exhibits D and E, both of which were created by Mr. Haberthur. None of the remaining Exhibits are admissible on a motion for summary judgment. The Trial Court should have sustained the objection of Mr. Schroeder.

***C. Because the Plaintiff’s motion for summary judgment was only a partial motion, Mr. Schroeder was not required to produce any evidence for its affirmative defenses. Because the affirmative defenses of Mr. Schroeder remain unresolved to this day, an order granting summary judgment, an order for writ of restitution, and a final order and judgment***

**were all error. (The Second, Fourth, and Fifth Assignments of Error.)**

1. The Plaintiff's motion for summary judgment was only a motion for partial summary judgment.

The Plaintiff pled three theories of relief in its complaint. CP 1-4. The first theory of relief under the complaint is non-judicial foreclosure. *Id.* The second theory of relief under the complaint is waste. CP 3, line 10.

The Plaintiff alleges that Mr. Schroeder is “in unlawful detainer of the Premises” pursuant “to RCW 59.12.030(3).” CP 3, line 14. Unlawful detainer based on that provision can only occur after “notice in writing requiring in the alternative the payment of the rent or the surrender of the detained premises . . . that has remained uncomplished with for the period of three days after service thereof.” RCW 59.12.030(3).

The Plaintiff only moved for summary judgment based on the non-judicial foreclosure theory of relief that it

pled in the complaint. CP 96-102 (esp. 101). The Plaintiff did not move for summary judgment based on its theories of waste or unpaid rent. For this reason, its motion for summary judgment was only a motion for partial summary judgment, whether titled as such or not.

2. A motion for partial summary judgment does not require the non-moving party to prove its affirmative defenses.

A party can employ summary judgment against affirmative defenses. Gould, Inc. v. Continental Cas. Co., 822 F. Supp. 1177 (E.D.Pa. 1993); Koch Industries, Inc. v. United Gas Pipe Line Co., 700 F. Supp. 865 (M.D.La. 1988). The Plaintiff chose not to file any motion for summary judgment on any of the remaining affirmative defenses.

A party defending against summary judgment need not produce evidence regarding claims or defenses for which no party is requesting summary judgment. See Higgins v. Scherr, 837 F.2d 155 (4th Cir. 1988) (stating

that the non-movant is "not required to prove his entire case upon the mere incantation by Scherr [the moving party] of 'summary judgment' as to but one aspect") (citing Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2554 (1986)).

3. The Trial Court never resolved the affirmative defenses of Mr. Schroeder and dismissed them as a side effect of its order granting summary judgment, its order for writ of restitution, and its final order and judgment.

Although the scope of the summary judgment that the Trial Court's ruling enables is that of a partial summary judgment, the order granting summary judgment is written as if it was granting a total summary judgment. CP 168-170. The Plaintiff and the Trial Court treated the summary judgment as if it were a total summary judgment. The Plaintiff proposed and the Trial Court signed a Final Order and Judgment as well as an Order for Writ of Restitution, as if the Trial Court had granted total summary judgment.

The Final Order and Judgment and the Order for Writ of Restitution presuppose that the Trial Court has granted total summary judgment. Because no party has moved for relief related to Mr. Schroeder's remaining affirmative defenses and because the Trial Court has never addressed them properly, their dismissal either directly or by implication is inappropriate.

Consequently, this Court should conclude that the Plaintiff is not entitled to a total summary judgment (if the Plaintiff is even entitled to any summary judgment at all).

For these reasons, the Trial Court's entry of the Final Order and Judgment and granting of the Order for Writ of Restitution were in error.

***D. Because the granting of the Plaintiff's motion for summary judgment was contrary to the explicit requirements of Chapter 59.12 RCW, this Court should reverse the summary judgment and the Trial Court's other rulings that depend on the summary judgment. (The Second, Third, Fourth, and Fifth Assignments of Error.)***

Adequate statutory notice "is a jurisdictional

condition precedent to an unlawful detainer action for breach.” Sullivan v. Purvis, 90 Wn. App. 456 (Div. III, 1998) (holding that Pend Oreille County Superior Court lacked subject matter jurisdiction due to missing statutory notice) (citing Sowers v. Lewis, 49 Wn.2d 891, 895 (1957)).

“Unlawful detainer is in derogation of common law.” Sullivan, 90 Wn. App. at 459. The “statutes create a summary action.” *Id.* This summary action allows the plaintiff in an unlawful detainer case to avoid “further lengthy proceedings [] to obtain possession.” People’s National Bank of Washington v. Ostrander, 6 Wn. App. 28, 31 (Div. III, 1971) (discussing unlawful detainer proceedings after non-judicial foreclosure).

“In order to take advantage of the [Unlawful Detainer] act’s provisions for summary restitution, however, the landlord must strictly comply with its

requirements.” Sullivan, 90 Wn. App. at 459 (citing Housing Auth. v. Terry, 114 Wn.2d 558, 563-64 (1990)). A “notice that does not give the tenant the alternative of performing the covenant [in the case of an alleged covenant breach] or surrendering the premises does not comply with the provisions of the statute.” Sullivan, 90 Wn. App. at 459.

Without such proper notice under the Unlawful Detainer Act, “the court has no authority to adjudicate the controversy.” Id. (citing Sower, 49 Wn.2d at 894; Kelly v. Schorzman, 3 Wn. App. 908, 912-913 (1970)). If the court purports to adjudicate the controversy in the absence of proper notice (even with consent of all parties!), the court’s orders are void due to the lack of subject matter jurisdiction. Sullivan, 90 Wn. App. at 459 (citing Marley v. Department of Labor & Ind., 125 Wn.2d 533, 538 (1994)).

A party is guilty of unlawful detainer if that party

meets one (or more) of seven different scenarios. RCW 59.12.030. The bases for unlawful detainer as defined in RCW 59.12.030(2)-(6) all require notice as a mandatory precondition to filing suit. The bases for unlawful detainer as defined in RCW 59.12.030(1) and RCW 59.12.030(7) do not require any notice before filing a complaint in unlawful detainer.

No one alleges that Mr. Schroeder is committing or permitting “any gang-related activity” under RCW 59.12.030(7). The basis for unlawful detainer that the Plaintiff is left with to use against Mr. Schroeder is the following:

A tenant of real property for a term less than life is guilty of unlawful detainer either:  
(1) When he or she holds over or continues in possession, in person or by subtenant, of the property or any part thereof after the expiration of the term for which it is let to him or her.

RCW 59.12.030(1) (excluding second sentence). The root

concept of this provision is that the landlord **leased** the property to the tenant for a **specific term** which has **expired**. This provision would clearly not apply without a **lease** and without a **specific term** which has **expired**.

A Plaintiff may maintain an unlawful detainer action against someone even without a “conventional relation of landlord and tenant.” Lake Union Realty Co. v. Woolfield, 119 Wash. 331, 334, 205 Pac. 14 (1922). In such a case, the pertinent provision of the Unlawful Detainer Act would not be a provision that requires a conventional relation of landlord and tenant, but a provision that does not require such.

The Plaintiff asserts that “a formal notice to quit the premises is not a jurisdictional prerequisite to an unlawful detainer action following a trustee’s sale upon foreclosure on the property.” CP 102, lines 6-8. In support of this assertion, the Plaintiff cites a Court of Appeals decision

from Division One, Savings Bank of Puget Sound v. Mink, 49 Wn. App. 204 (Div. 1, 1987).

According to Mink, “the Legislature intended to preserve the summary nature of foreclosure actions permitted under RCW 61.24 in referring purchasers to the unlawful detainer statutes for the removal of ‘reluctant’ former owners.” Id. at 208. Mink determined to apply “RCW 59.12.030(1) to these proceedings” because such application purportedly “is consistent with the spirit and intent of the Legislature.” Id.

Implicit is the notion that the Legislature would have amended RCW 61.24, had the idea been suggested. Implicit, therefore, is also the notion that the Legislature meant to amend RCW 61.24, but neglected to do so. For this reason, implicit also is the notion that the Legislature should have amended RCW 61.24, but did not decide to do so.

All of the above implications from Mink involve the court's choosing to legislate where the Legislature is silent. Instead, this Court should "ascertain and give expression to the intent of the Legislature." Id. at 207, footnote 3 (citation omitted). To find that intent, the Court should consider the statutory language first and then consider the reason the Legislature enacted the law. Id.

For the above reasons, this Court should decline to follow the erroneous decision of Division I in Mink.

The basis for unlawful detainer upon which the Plaintiff relies is RCW 59.12.030(1). The unambiguous language of that provision clearly does not apply to Defendant Schroeder who has no **specific term** which has **expired** and not even a **lease** with the plaintiff.

Because the Plaintiff has failed to follow the explicit statutory procedure of the Unlawful Detainer Act to acquire jurisdiction for the Trial Court over Mr. Schroeder,

no relief is proper for the Plaintiff. The Trial Court should have granted Mr. Schroeder's Motion to Dismiss, should have denied the Plaintiff's motion for summary judgment, should have refused to grant an order for writ of restitution, and should have declined a final order and judgment for the Plaintiff.

**E. *No Contract Entitles the Excelsior Defendants to Attorney Fees and Litigation Expenses. (The Fourth Assignment of Error.)***

In its motion for attorney fees and costs, the Plaintiff did not identify any bases for its request.

Mr. Schroeder suggested that the Plaintiff might be relying for its claim for attorney fees and costs on a provision from its Deed of Trust. CP 191-192.

In the event suit or action is instituted to enforce or interpret any of the terms of this Trust Deed, . . . the prevailing party shall be entitled to recover all expenses reasonably incurred at, before and after trial and on appeal whether or not taxable as costs, including, without limitation, attorney fees, witness fees (expert and otherwise),

deposition costs, copying charges and other expenses. . . .

Id.; CP at 68 (Article 2, § 23 (in pertinent part)).

Attorney fees and litigation expenses were improper for the Plaintiff. Neither party claims that Mr. Schroeder breached a contract. See CP 1-4 (Complaint); CP 152-156 (Answer).

The Plaintiff is allowed attorney fees and litigation expenses for “suit or action . . . to enforce or interpret any of the terms of this Trust Deed.” This action was not to enforce or interpret any of those terms. The Plaintiff is not entitled to any attorney fees or litigation expenses.

Moreover, as the Plaintiff drafted the Trust Deed, this Court must interpret ambiguous terms in it against the Plaintiff. Forbes v. Am. Bldg. Maint. Co. West, 148 Wn. App. 273, ¶28 (2009) (citing Felton v. Menan Starch Co., 66 Wn.2d 792, 797, 405 P.2d 585 (1965)). Additionally, the contract that the Plaintiff drafted could have provided

that no ambiguity therein would be construed against the drafter. City of Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, ¶29 (2009). In short, the ambiguity opposes the Plaintiff's request. For this reason, this Court should reverse the Trial Court's granting the Plaintiff attorney fees or litigation expenses.

The Plaintiff oddly claims that it is entitled to attorneys' fees, costs, and expenses under RCW 59.18.410. CP 3, line 19 (Plaintiff's Complaint). Although the Plaintiff's Complaint based its claim for attorney fees under the Residential Landlord Tenant Act, the Plaintiff later denied that the Residential Landlord Tenant Act applied! CP 100-101.

The Trial Court's granting of attorney fees and litigation expenses to the Plaintiff was error. Consequently, this Court should reverse the Trial Court's granting of such fees.

***F. Because any judgment should identify Mr. Schroeder's capacity correctly, a judgment that fails to identify him as a married person in his separate capacity is in error. (The Fourth Assignment of Error.)***

The Appellant is Steven F. Schroeder, a married man dealing with his sole and separate property. Mrs. Schroeder is not a party to this case and has never been a debtor on any obligation with respect to the Plaintiff. Mr. Schroeder's defenses herein have been for himself in his separate capacity. Any judgment entered against Mr. Schroeder in this case should identify the judgment debtor as a married man in his separate capacity. See Stockand v. Bartlett, 4 Wash. 730, 31 P. 24 (1892).

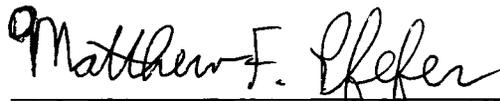
## **VI. Conclusion**

The Plaintiff's entire case for unlawful detainer depends on the occurrence of an alleged Trustee's Sale it has not proven. The Plaintiff has not even identified any first-hand percipient witnesses of this alleged sale.

Even though the Plaintiff's purported evidence was riddled with improper hearsay, even though the Plaintiff chose not to request summary judgment on Mr. Schroeder's remaining affirmative defenses, and even though the Trial Court lacked jurisdiction without the mandatory notice, the Trial Court erroneously granted total summary judgment to the Plaintiff.

This Court should reverse the Trial Court's erroneous rulings and remand for further proceedings.

Respectfully submitted this 7<sup>th</sup> day of June 2011.



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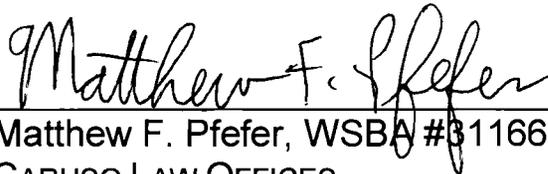
(509) 323-5210

## DECLARATION OF SERVICE

Pursuant to GR 13, I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am the attorney of record for the Plaintiff, am over the age of 18, am competent to testify, and make these statements upon my own personal knowledge.
2. I have written agreements with Phillip J. Haberthur as attorneys for Respondent allowing service by email.
3. I served the Brief of Appellant on June 7, 2011 via email to PHaberthur@schwabe.com, HDumont@schwabe.com, RHigbie@schwabe.com, and CRussillo@schwabe.com.

Signed this 7<sup>th</sup> day of June 2011 in Spokane, Washington.



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