

**FILED**

**AUG 01 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 296334

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

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EXCELSIOR MORTGAGE EQUITY FUND II, LLC,  
an Oregon limited liability company,  
Plaintiff/Respondent

v.

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

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RESPONDENT'S BRIEF

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Bradley W. Andersen, WSBA # 20640  
Phillip J. Haberthur, WSBA #38038  
Attorneys for Respondent,  
Excelsior Mortgage Equity Fund, II, LLC

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**TABLE OF CONTENTS**

	<u>Page</u>
I. INTRODUCTION .....	1
II. STATEMENT OF ISSUES .....	3
III. COUNTERSTATEMENT OF THE CASE.....	5
A. Excelsior forecloses on property and provides Schroeder with required notices regarding possession of property. ....	5
B. Schroeder refuses to vacate the premises.....	7
C. Excelsior Moves for Summary Judgment on Its Unlawful Detainer Claim. ....	7
IV. ARGUMENTS.....	11
A. The Standard Of Review Is De Novo. ....	11
B. Excelsior Was Entitled to Possession 20 Days After Trustee’s Sale.....	11
C. The Trial Court did not Err in Denying Schroeder’s Objection to the Haberthur Declaration.....	15
1. Schroeder’s objection was not timely.....	15
2. Haberthur’s Declaration was admissible. ....	15
D. Excelsior Was Not Required to Move for Summary Judgment Against Schroeder’s Affirmative Defenses in Order to Prevail on its Motion for Summary Judgment. ....	16
E. Excelsior is Entitled to Its Fees and Costs Before the Trial Court and on Appeal. ....	19
V. CONCLUSION.....	20

## TABLE OF AUTHORITIES

Page

### CASES

<i>Accord Harrison v. Emerald Outdoor Adver., LLC (In re: Emerald Outdoor Adver., LLC)</i> , 444 F.3d 1077 (9 <sup>th</sup> Cir. Wash. 2006).....	14
<i>Burmeister v. State Farm Ins. Co.</i> , 92 Wn. App. 359, 365, 966 P.2d 921 .....	17
<i>Christensen v. Ellsworth</i> , 162 Wn.2d 365, 371, 173 P.3d 228 (2007).....	15
<i>City of Lakewood v. Pierce County</i> , 144 Wn.2d 118, 125, 30 P.3d 446 (2001).....	11
<i>Gould, Inc. v. Continental Cas. Co.</i> , 822 F. Supp. 1177 .....	19
<i>Haslund v. Seattle</i> , 86 Wn.2d 607, 547 P.2d 1221 (1976).....	19
<i>Hisle v. Todd Pac. Shipyards Corp.</i> , 151 Wn.2d 853, 860, 93 P.3d 108 (2004).....	11
<i>Hous. Auth. v. Terry</i> , 114 Wn.2d 558, 569, 789 P.2d 745 (1990).....	15
<i>Koch Industries, Inc. v. United Gas Pipe Line Co.</i> , 700 F. Supp. 865 (M.D.La. 1988).....	19
<i>Laffranchi v. Lim</i> , 146 Wn. App. 376, 383, 190 P.3d 97 (2008).....	14
<i>Marriage of Tang</i> , 57 Wn. App. 648, 653, 789 P.2d 118 (1990).....	12
<i>Mayer v. STO Industries, Inc.</i> , 156 Wn.2d 677, 684, 132 P.3d 115 (2006).....	12
<i>Peoples National Bank v. Ostrander</i> , 6 Wn. App. 28, 491 P.2d 1058; 1971 .....	14
<i>Raymond v. Pacific Chemical</i> , 98 Wn. App. 739, 992 P.2d 517 (1999).....	16
<i>Savings Bank of Puget Sound v. Mink</i> .....	13, 14
<i>Veit v. Burlington N. Santa Fe Corp.</i> , 171 Wn.2d 88, 99, 249 P.3d 607 (2011).....	11

## TABLE OF AUTHORITIES

	<u>Page</u>
<b><u>STATUTES</u></b>	
49 Wn. App. 204, 741 P.2d 1043 (1987).....	13
RCW 4.84.330 .....	20, 21
RCW 59.12 .....	13, 14
RCW 59.12.030 .....	13, 14, 15
RCW 61.24 .....	12, 13
RCW 61.24.040 .....	2
RCW 61.24.060 .....	12, 13, 20
RCW Chapter 59.12.....	3, 13, 14, 15

## I. INTRODUCTION

Appellant Steven Schroeder, despite clear precedent, claims the trial court did not have jurisdiction to remove him from the property he lost due to a foreclosure. He also claims the court should not have considered the Trustee's declaration because the Trustee was not physically present during the foreclosure sale. Finally, he claims a trial court cannot grant summary judgment if there are affirmative defenses, even if Schroeder failed to raise those affirmative defenses at summary judgment. Schroeder's positions are flawed on all counts.

Excelsior acquired the Property at a Trustee's Sale when Schroeder defaulted on his loan with Excelsior. Schroeder admits he received all of the required foreclosure notices and that Excelsior was the party that acquired the Property at the Trustee's Sale.

Washington law provides that Excelsior was entitled to possession of the Property twenty (20) days after the Trustee's Sale. Following the Trustee's Sale, Excelsior agreed to give Schroeder additional time to vacate the Property so he could remove his belongings. Even after granting him this grace period, Schroeder still refused to vacate the premises. Excelsior then initiated this unlawful detainer action to have Schroeder evicted. Schroeder inexplicably claims that Excelsior did not provide him with the requisite notice to vacate. Schroeder's argument is

completely without merit.

Excelsior provided Schroeder no less than **three (3)** notices that he would need to vacate the premises twenty (20) days following the Trustee's Sale. **First**, Excelsior served Schroeder with a Notice of Foreclosure after he failed to cure the defaults. **Second**, Schroeder was served with a Notice of Trustee's Sale. These Notices contained express language taken directly from RCW 61.24.040 stating that the purchaser at the Trustee's Sale shall be entitled to possession of the Property on the 20<sup>th</sup> day following the sale and that the sale would deprive Schroeder of his interest in the Property. And **third**, after it acquired the property at the Trustee's Sale, Excelsior agreed, as memorialized by a March 16, 2010 letter, to allow Schroeder to remain until April 1, 2010.

Despite these many notices, Schroeder argues that he was entitled to yet another notice from Excelsior. Schroeder fails to identify what this mysterious notice should provide. For example, Schroeder does not have any right or ability to "cure" a default as he was foreclosed of his interest in the property. What exactly would this notice provide and how would it be different from the numerous notices previously provided to Schroeder? Would it provide Schroeder with additional time to remain in possession of the Property?

Schroeder wants this court to ignore the clear statutory language of

RCW 61.24.060. He also wants this Court to ignore its own prior rulings, Division I's opinions, and Eastern District of Washington's cases and rule that the borrower/grantor of a deed of trust is entitled to an additional notice before a court acquires jurisdiction. Finally, Schroeder does not raise an issue of fact in his response to Excelsior's motion for summary judgment. Instead, he presents purely legal objections that find no support in Washington law. For these reasons, this Court should affirm the trial court's ruling.

## **II. STATEMENT OF ISSUES**

Excelsior does not assign any errors, but restates the issues on appeal as follows:

1. Under RCW 61.24.060, a purchaser is entitled to possession of the foreclosed property 20 days after a Trustee's Sale if the Trustee provided the required notices. Schroeder concedes he received the required notices. Was Excelsior entitled to take possession of the Property?

2. When Notices under RCW 61.24.040 and RCW 61.24..060 have been provided, superior court judges have jurisdiction under RCW 59.12 to evict former owners of foreclosed property. Schroeder received the required notices, but refused to leave the property. Did the Superior Court have jurisdiction to order Schroeder to vacate the Property?

3. A party is entitled to seek summary judgment on one or more of its claims. A party opposing summary judgment must put forth reasons, including facts to support affirmative defenses, why summary judgment is not appropriate. Schroeder failed to establish any material issues of fact or explain why Excelsior was not entitled to immediate possession. Was Excelsior entitled to summary judgment on its unlawful detainer action?

4. An objection to evidence offered in support of summary judgment must be timely asserted. Schroeder waited until the day of the summary judgment hearing to object to the Trustee's affidavit. Did the trial court err when it considered the Trustee's affidavit?

5. The rules of evidence allow the Trustee of a foreclosure sale to authenticate the documents related to the foreclosure and sale. In this case, the Trustee submitted a Declaration authenticating the Notices that were served on Schroeder and the Trustee's Deed conveying the property to Excelsior. Did the trial court err when it allowed the Trustee's Declaration?

6. A party that successfully enforces a contract containing an attorneys' fee provision is entitled to its attorneys' fees and costs. Excelsior had to sue Schroeder to vacate the property foreclosed upon as part of the Deed of Trust and Promissory Note signed by Schroeder.

These documents contain attorneys' fees provisions. Is Excelsior entitled to recover its attorneys' fees and costs for having to sue to obtain possession of the collateral?

### **III. COUNTERSTATEMENT OF THE CASE**

Excelsior offers the following counterstatement of the case.

#### **A. Excelsior forecloses on property and provides Schroeder with required notices regarding possession of property.**

Schroeder was the prior owner of the Property commonly known as 1184 Hodgson Road, Evans, Washington.<sup>1</sup> Schroeder had borrowed money from Excelsior which was secured by a Deed of Trust. After Schroeder's default on the loan obligations, Excelsior non-judicially foreclosed his interest in the Property.<sup>2</sup>

Schroeder was notified well in advance of the Trustee's Sale that his right to occupy the Property would terminate on the 20th day following the sale if he failed to cure the defaults identified in the Notice of Default and Notice of Trustee's Sale.<sup>3</sup> The Notice of Trustee's Sale contains the following recital: "The purchaser at the Trustee's Sale shall be entitled to possession of the property on the 20th day following the sale, as against

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<sup>1</sup> CP 10; CP 45.

<sup>2</sup> CP 25-37.

<sup>3</sup> CP 35.

the borrower and grantor under the Commercial Deed of Trust and Assignment of Rents....”<sup>4</sup> The Notice of Trustee’s Sale further advised Schroeder that “[a]fter the 20th day following the sale the purchaser has the right to evict occupants who are not tenants by summary proceedings under chapter 59.12 RCW.”<sup>5</sup>

The Notice of Trustee’s Sale was recorded on November 12, 2009 under Stevens County Assessor’s No. 2009 0010037 and was also posted at the Property on November 17, 2009.<sup>6</sup> Moreover, Schroeder was personally served with the Notice of Trustee’s Sale and Notice of Foreclosure on November 17, 2009.<sup>7</sup> Schroeder concedes that he received the Notice of Foreclosure and Notice of Trustee’s Sale.<sup>8</sup>

On February 19th, Excelsior Mortgage Equity Fund II, LLC purchased the Property at the Trustee’s Sale.<sup>9</sup> Excelsior acquired title to the Property through a Trustee’s Deed recorded on March 4, 2010 under Auditor’s File Number 2010 0001554.<sup>10</sup>

After the February 19, 2010 Trustee’s Sale, Schroeder asked for an

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<sup>4</sup> CP 35.

<sup>5</sup> CP 35.

<sup>6</sup> CP 30, 38-39.

<sup>7</sup> CP 38.

<sup>8</sup> CP 46-47.

<sup>9</sup> This Court has previously held that the Trustee’s Sale was valid.

<sup>10</sup> CP 25-29. The Property is legally described in the Trustee’s Deed.

extension of time to remain on the Property through April 1, 2010.<sup>11</sup> On March 16, 2010, Excelsior sent written notice to Schroeder confirming that Schroeder agreed to vacate the Property on or before April 1, 2010.<sup>12</sup>

**B. Schroeder refuses to vacate the premises.**

Despite the ample notices to Schroeder, he refused to vacate the Property by April 1, 2010.<sup>13</sup> Another notice was then mailed to Schroeder on April 28, 2010 stating the tenancy had terminated.<sup>14</sup>

Schroeder remained in possession of the Property and refused to surrender the Property to Excelsior – despite the parties’ agreement that he would vacate by April 1, 2010.<sup>15</sup>

**C. Excelsior Moves for Summary Judgment on Its Unlawful Detainer Claim.**

Because Schroeder refused to vacate the premises, Excelsior sued Schroeder and his tenant, Anthony Bell, for unlawful detainer on April 28, 2010.<sup>16</sup> In support of its motion, Excelsior relied upon the Declaration of Phillip Haberthur in Support of Plaintiff’s Motion for Summary Judgment

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<sup>11</sup> CP 42-43.

<sup>12</sup> *Id.*

<sup>13</sup> CP 2.

<sup>14</sup> CP 44.

<sup>15</sup> CP 1-4.

<sup>16</sup> Bell has not appealed and therefore his right of tenancy is not at issue in Schroeder’s appeal. CP 1-4.

(the “Haberthur Declaration”).<sup>17</sup> Haberthur was the Successor Trustee of the non-judicial foreclosure.<sup>18</sup> The Haberthur Declaration included several exhibits, including the Trustee’s Deed issued to Excelsior following the Trustee’s Sale and the various Notices that were sent to Schroeder.<sup>19</sup> Haberthur, as Successor Trustee, and with first-hand knowledge of the information regarding the foreclosure, had executed the Deed and the various Notices.<sup>20</sup>

In addition to having the court evict Schroeder, Excelsior sued for waste.<sup>21</sup> Schroeder filed his Answer to the Complaint on July 19, 2010 (the “Answer”), the day before the hearing on Excelsior’s Motion for Summary Judgment.<sup>22</sup> Schroeder’s Answer admitted that he was still in possession of the Property.<sup>23</sup>

Schroeder raised the following affirmative defenses: (1) failure to meet or comply with statutory prerequisites; (2) Schroeder’s actions were justified; (3) Excelsior failed to mitigate its damages; and, (4) Excelsior’s

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<sup>17</sup> CP 23-24.

<sup>18</sup> CP 25.

<sup>19</sup> CP 25-29.

<sup>20</sup> CP 25-29.

<sup>21</sup> Excelsior alleged that its damages may include waste and the fair rental value of the Property during the time it was unlawfully detained.

<sup>22</sup> CP 152-56.

<sup>23</sup> CP 153.

claim was barred for lack of subject matter jurisdiction; (5) Excelsior was not the real party in interest; and, (6) Excelsior lacked capacity to sue.<sup>24</sup>

Schroeder raised the following concerns in his Answer, but he conceded that they were not affirmative defenses but were “excuses” for his actions: (1) Schroeder had too many personal belongings left on the Property to have moved in the time since the Trustee’s Sale; (2) Schroeder claims that the property he wanted to move his personal items to is inaccessible without an easement; and, (3) Schroeder did not know the boundary of his Property and he was concerned he would not adequately move items off Excelsior’s property.<sup>25</sup>

Excelsior moved for summary judgment on June 18, 2010.<sup>26</sup>

Schroeder filed a Motion to Dismiss Claims against Steven F. Schroeder on June 23, 2010 (after Excelsior’s Motion for Summary Judgment was filed).<sup>27</sup> The arguments raised in the Motion to Dismiss were nearly identical to those raised in Schroeder’s Response to Excelsior’s Motion for Summary Judgment.<sup>28</sup> At the summary judgment hearing, Excelsior confirmed that it was not seeking summary judgment

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<sup>24</sup> CP 154-55.

<sup>25</sup> CP 155.

<sup>26</sup> CP 218-19; CP 96-102.

<sup>27</sup> CP 103-109.

<sup>28</sup> *Id.*

on its waste claim nor was it seeking unpaid rents – Excelsior simply wanted Schroeder evicted from the property.<sup>29</sup> To be clear, Excelsior voluntarily withdrew any claims of waste or rent at the hearing on its Motion for Summary Judgment.<sup>30</sup>

The trial court granted Excelsior’s Motion for Summary Judgment and ordered Schroeder off the Property.<sup>31</sup> The trial court also denied Schroeder’s Motion to Dismiss.<sup>32</sup> The trial court further denied Schroeder’s untimely objection to the Haberthur Declaration on the merits. The trial court stated in a letter ruling that Haberthur, as Trustee, is a “custodian or qualified witness as to the identity and mode of preparation of the exhibits.”<sup>33</sup> After all, Haberthur signed the exhibits.

Schroeder now appeals the trial court’s denial of his (1) Motion to Dismiss; and, (2) the trial court’s granting of Excelsior’s Motion for Summary Judgment.

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<sup>29</sup> This assumes that Excelsior was moving for unlawful detainer on the basis of waste and unpaid rent rather than these being the basis for an element of damages.

<sup>30</sup> CP 168-169.

<sup>31</sup> *Id.*

<sup>32</sup> CP171-72.

#### IV. ARGUMENTS

##### A. The Standard Of Review Is De Novo.

An appellate court reviews a summary judgment de novo.<sup>34</sup>

Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.<sup>35</sup> An appellate court considers all facts and reasonable inferences from them in the light most favorable to the nonmoving party.<sup>36</sup>

An appellate court reviews a trial court's evidentiary rulings under an abuse of discretion standard.<sup>37</sup> A court only abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds.<sup>38</sup>

##### B. Excelsior Was Entitled to Possession 20 Days After Trustee's Sale.

Under RCW 61.24.060(1), Excelsior was entitled to possession of the Property 20 days after the Trustee's Sale:

The purchaser at the Trustee's Sale shall be entitled to possession of the property on the twentieth day following the sale, as against the borrower and grantor under the deed of trust and anyone having

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<sup>33</sup> CP 164-65.

<sup>34</sup> *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

<sup>35</sup> CR 56(c).

<sup>36</sup> *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 125, 30 P.3d 446 (2001).

<sup>37</sup> *Veit v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 99, 249 P.3d 607 (2011).

<sup>38</sup> *Mayer v. STO Industries, Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006); *In re Marriage of Tang*, 57 Wn. App. 648, 653, 789 P.2d 118 (1990).

an interest junior to the deed of trust, including occupants who are not tenants, who were given all of the notices to which they were entitled under this chapter.

When a buyer at a Trustee's Sale seeks to remove the former owner from the foreclosed property, the law *does not* require any additional notice beyond those required in the Notice of Default, Notice of Trustee's Sale, and Notice of Foreclosure.<sup>39</sup> Schroeder concedes, as he must, that he timely received all required notices under RCW 61.24.<sup>40</sup>

In this appeal, Schroeder seems to argue that the notices required by RCW 61.24 are not sufficient.<sup>41</sup> He argues that a superior court judge does not have jurisdiction to evict a former owner of foreclosed property unless the new owner gives notice under a mysterious statutory provision.

Schroeder's argument is not new. This theory has been tried in *Savings Bank of Puget Sound v. Mink*.<sup>42</sup> In *Mink*, the former owner also refused to vacate the property after the Trustee's Sale. After waiting the required 20 days, the new owner sued for unlawful detainer under RCW Chapter 59.12. *Mink* claimed – exactly as Schroeder does here – that he was entitled to a separate notice of eviction under RCW 59.12.030(2)-(6). The court disagreed and ruled that the notice of Trustee's Sale required

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<sup>39</sup> See RCW 61.24.060(1).

<sup>40</sup> CP 46-47; *see also* CP 38-41.

<sup>41</sup> Brief of Appellant, pp. 20-26.

under RCW 61.24 was more than sufficient to provide the court jurisdiction. The court of appeals specifically held that no additional notice was required as a prerequisite to the new owner suing for unlawful detainer.<sup>43</sup>

*Mink* explained that 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. RCW 61.24 provides for detailed notices and provides opportunities to cure for the defaulting property owner. *An additional notice prior to commencement of an unlawful detainer action would be superfluous.*”<sup>44</sup> Indeed, neither RCW 61.24 nor RCW 59.12 expressly requires further notice to a foreclosed property owner.

The Washington Supreme Court has stated numerous times that the purpose of the notice is to provide the tenant with “at least one opportunity

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<sup>42</sup> 49 Wn. App. 204, 741 P.2d 1043 (1987).

<sup>43</sup> Importantly, the court expressly analyzed the six traditional circumstances under which a tenant may be guilty of unlawful detainer (RCW 59.12.030(1) to (6)).<sup>43</sup> The court held the Deed of Trust statute, RCW 61.24.060, authorized an unlawful detainer proceeding under RCW 59.12.030(1), which requires no notice to quit prior to commencement of the action. This is because “detailed notice requirement [to the grantor] for each stage of the foreclosure proceeds are set forth in [RCW 61.24].”

<sup>44</sup> *Mink*, 49 Wn. App. at 208 (emphasis added); see also *Laffranchi v. Lim*, 146 Wn. App. 376, 383, 190 P.3d 97 (2008) (“The purchaser at a Trustee’s Sale may commence an unlawful detainer action to obtain possession under chapter 59.12 RCW without first providing notice.”). *Accord Harrison v. Emerald Outdoor Adver., LLC (In re: Emerald Outdoor Adver., LLC)*, 444 F.3d 1077 (9<sup>th</sup> Cir. Wash. 2006). See also *Peoples National Bank v. Ostrander*, 6 Wn. App. 28, 491 P.2d 1058; 1971 (court

to correct a breach before forfeiture of a lease under the accelerated restitution provisions of RCW 59.12.”<sup>45</sup> Accordingly, proper statutory notice under RCW 59.12.030 is a “jurisdictional condition precedent” to the commencement of an unlawful detainer action.<sup>46</sup>

Additional notices after the foreclosure sale, and upon or after the 20th day following it, simply would not make sense. As stated in *Christensen*, the entire point of a notice under the Unlawful Detainer statute is to provide the possessor with an opportunity to cure. Here, there is nothing to cure. Schroeder has been foreclosed, he has no right or interest in the property, and he must vacate the premises.

Excelsior was not required to provide Schroeder with any further notice to quit in order to vest the trial court with jurisdiction or to obtain possession of the Property. Accordingly, Excelsior was entitled to summary judgment on its claim for unlawful detainer when Schroeder refused to vacate the Property by April 1, 2010.

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recorded some results in court in *Mink*).

<sup>45</sup> *Christensen v. Ellsworth*, 162 Wn.2d 365, 371, 173 P.3d 228 (2007) citing *Hous. Auth. v. Terry*, 114 Wn.2d 558, 569, 789 P.2d 745 (1990).

<sup>46</sup> *Christensen*, 162 Wn.2d at 372.

C. **The Trial Court did not Err in Denying Schroeder's Objection to the Haberthur Declaration.**

1. Schroeder's objection was not timely.

Schroeder waited until July 20, 2010, the day of the summary judgment hearing, to object to the Haberthur Declaration on the basis that the exhibits included inadmissible hearsay evidence.<sup>47</sup> An objection to evidence offered for purposes of summary judgment must be timely.<sup>48</sup> In *Raymond v. Pacific Chemical*, the court held that the plaintiff's objection to the defendant's declaration, made at oral argument, came too late in the proceedings.

Similarly, in this case, Schroeder did not file his objection until the **morning** of the summary judgment hearing.<sup>49</sup> Schroeder offers no reason or excuse for his inexplicable delay. The court therefore did not err in denying Schroeder's objection to the Haberthur Declaration.<sup>50</sup>

2. Haberthur's Declaration was admissible.

Even though it was not timely, the trial court did consider, but

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<sup>47</sup> CP 162-163.

<sup>48</sup> *Raymond v. Pacific Chemical*, 98 Wn. App. 739, 992 P.2d 517 (1999), *rev'd on other grounds*, 143 Wn.2d 349, 20 P.3d 921 (2001) (plaintiff's objection to defendant's declarations, made at oral argument, came too late).

<sup>49</sup> CP 162-163.

<sup>50</sup> Schroeder did not ask the trial court to strike the Haberthur Declaration. Instead, he merely filed an objection and failed to ask for relief of any kind. CP 162-63.

ultimately denied, Schroeder's objection.<sup>51</sup> A trial court's ruling on a motion to strike (or objection) is within the trial court's sound discretion.<sup>52</sup>

Schroeder was not challenging the Trustee's Sale itself. The only Exhibits Schroeder was challenging are the Notice of Trustee's Sale signed by Haberthur (CP 30-37); the March 16, 2010 letter signed by Haberthur (CP 42-43); the Notice to Occupants signed by Haberthur (CP 44); and the Trustee's Deed, also signed by Haberthur (CP 25-29).

Moreover, Schroeder concedes that he received the notices. The trial court did not abuse its discretion in considering documents executed by the person making the declaration.

**D. Excelsior Was Not Required to Move for Summary Judgment Against Schroeder's Affirmative Defenses in Order to Prevail on its Motion for Summary Judgment.**

Schroeder continues to offer confusion instead of legal reasoning when he states that Excelsior only moved for partial summary judgment on its Complaint for Unlawful Detainer. The Complaint moved for unlawful detainer pursuant to Schroeder's failure to vacate the Property 20 days after the Trustee's Sale.<sup>53</sup> Indeed, this was the only basis presented

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<sup>51</sup> CP 164-65.

<sup>52</sup> *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 365, 966 P.2d 921 (1998).

<sup>53</sup> CP 1-4.

to the trial court in Excelsior's Motion for Summary Judgment.<sup>54</sup>

Schroeder actually filed his Answer, and raised several affirmative defenses, **the day before the Summary Judgment hearing.**<sup>55</sup>

In other words, Schroeder complains that Excelsior did not move for summary judgment against affirmative defenses that he raised for the first time less than 24-hours before the summary judgment hearing and more than a month after Excelsior filed its Motion for Summary Judgment. Excelsior is not clairvoyant and could not anticipate his defenses. Further, the "affirmative defenses" that Schroeder complains were not considered by the trial court are not affirmative defenses.

Regardless, Schroeder apparently complains that Excelsior should not have been able to voluntarily dismiss claims of waste and unpaid rent, assuming they were actually part of Excelsior's Complaint. In reviewing his Answer, this Court can easily determine that the "excuses" of: (1) too much property; (2) difficult to traverse property; and, (3) failure to know your own property boundary relate in no way to Excelsior's right to possession and damages for waste and unpaid rent.

Along these same lines, Schroeder attempts to turn the burden of proof on its head and state that Excelsior was required to move for

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<sup>54</sup> CP 218-19.

<sup>55</sup> CP152-156.

summary judgment on all of Schroeder's affirmative defenses. In other words, Schroeder claims no burden or obligation for proving his own affirmative defenses.

In reliance on this novel theory, Schroeder cites to two federal cases (one from Pennsylvania and the other from Louisiana). Schroeder's position is rather bold as he states that this Court need not follow the precedent from Division I, of all places! In reality, the cases Schroeder relies upon do not actually support his position. The cases Schroeder cites merely state that a party may move on summary judgment against an affirmative defense – it does not say that they must, or that failure to do so means that the Plaintiff is not entitled to summary judgment.<sup>56</sup>

Moreover, Washington cases are clear that the party raising an affirmative defense has the burden of proving the elements of the defense.<sup>57</sup> Putting aside Schroeder's illogical argument regarding the burden of proving the defense, this Court must take a step back and review exactly what Schroeder alleges is improper.

Schroeder argues that summary judgment was improper because no one moved for summary judgment to dismiss affirmative defenses that Schroeder did not assert in his response. What, exactly, are the

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<sup>56</sup> See *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).

affirmative defenses related to if the claims were dismissed? Excelsior properly moved for summary judgment and it was up to Schroeder to raise any defenses he felt were appropriate. Excelsior is entitled to summary judgment as a matter of law on its claim for unlawful detainer.

Finally, the hearing on the Motion for Summary Judgment occurred on July 20, 2010.<sup>58</sup> The Court's Order Granting Summary Judgment was entered on December 7, 2010.<sup>59</sup> This is important for two reasons: (1) the Order Granting Summary Judgment states that the Court considered the pleadings on file, including Schroeder's Answer (listed as #2 on the list of pleadings considered); and (2) Schroeder had over four months to properly file an objection or move for summary judgment on his affirmative defenses.<sup>60</sup> The trial court did consider the affirmative defenses before granting summary judgment to Excelsior.

**E. Excelsior is Entitled to Its Fees and Costs Before the Trial Court and on Appeal.**

Schroeder argues the trial court should not have awarded fees to Excelsior because Excelsior's Complaint for Unlawful Detainer did not involve the enforcement or interpretation of the Deed of Trust. His

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<sup>57</sup> *Haslund v. Seattle*, 86 Wn.2d 607, 547 P.2d 1221 (1976); *see also* CR 8(c).

<sup>58</sup> CP 168-69.

<sup>59</sup> *Id.*

<sup>60</sup> CP 155-56.

arguments fail because Excelsior was required to file suit to acquire possession as part of the enforcement of the Deed of Trust at issue in this case and Excelsior had a right to be reimbursed for its legal fees.

Under RCW 4.84.330, a court must award the prevailing party their attorney's fees where the parties have an agreement with an attorney's fee provision. The Promissory Note and Deed of Trust both contain an attorney fee provision. Excelsior prevailed before the trial court and therefore was entitled under the parties' attorneys' fee provision to recover its legal fees. For the same reason, and under RAP 18.1, it is entitled to its fees on appeal.

**V. CONCLUSION**

Judge Nielson did not abuse his discretion in denying Schroeder's objections to the Haberthur Declaration. And Judge Nielson properly granted summary judgment on Excelsior's Motion for Summary Judgment. Because Washington law is well settled and RCW 61.24.060 clearly provides that Excelsior was entitled to possession on the 20th day

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following the Trustee's Sale, Excelsior is entitled to summary judgment on its claim of unlawful detainer. Excelsior is also entitled to its fees and costs before the trial court and on appeal.

Dated this 28th day of July, 2011.

SCHWABE, WILLIAMSON & WYATT, P.C.

By:   
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Excelsior Mortgage Equity Fund II,  
LLC

**CERTIFICATE OF SERVICE**

I hereby certify that on the 28th day of July, 2011, I caused to be served the foregoing **RESPONDENT'S BRIEF** on the following party at the following address:

Matthew F. Pfefer  
Caruso Law Offices  
1426 W Francis Avenue  
Spokane, WA 99205

Via email at [mail@carusolaw.biz](mailto:mail@carusolaw.biz) and [Matthew@MatthewPfefer.com](mailto:Matthew@MatthewPfefer.com) per our written agreement of service.



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Phillip J. Haberthur