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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 30333-1

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.

REPLY BRIEF OF APPELLANT

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I. Introduction

The Respondent's Brief bets its case on the claim that Mr. Schroeder abandoned his personal possessions due to his inability to remove them within a so-called "reasonable time." The supposed landowner chose not to identify any legal authority for the rule it seeks to apply.

Legally, the supposed landowner wishes to overstretch the court's limited statutory unlawful detainer jurisdiction, ignore the legal effect of a writ of restitution, quote the wrong unlawful detainer chapter, virtually excise Title 8 from the Rules of Appellate Procedure, ignore the procedural background, and carelessly re-write the law on abandonment in the State of Washington.

Factually, the supposed landowner misreads a written estimate, ignores the effect of the supersedeas proceeding, and disregards Mr. Schroeder's extensive efforts to remove his personal possessions.

This Court should reverse the Trial Court's erroneous ruling and remand for the parties to pursue this dispute before a court with general jurisdiction rather than special summary statutory jurisdiction under the Unlawful Detainer Act.

Alternatively, this Court should reverse the Trial Court's erroneous ruling and remand for Mr. Schroeder to continue removing his belongings unless and until he chooses to abandon them.

II. Factual Corrections

A. The Facts about the Estimate

Bekins Northwest sent Mr. Schroeder an estimate dated March 10, 2010. CP 22. That estimate was later filed in the trial court by the supposed landowner as Exhibit D to a declaration by Ben Wiltgen, allegedly "the Senior Vice President for Excelsior Mortgage Equity

Fund, II, LLC.”¹ CP 11. That estimate contemplates four people working and excludes a tremendous amount of the movable personal items. CP 22.² Contrary to the Brief of Respondent, Mr. Schroeder did not make an “admission” that “he only needed three months.”³

As it was Excelsior who filed this written estimate in the court file as an exhibit to a declaration, CP 11, 22, Mr. Schroeder properly mentioned that Excelsior provided this estimate to the trial court.⁴ The Brief of Respondent claims that “Schroeder alleges that Excelsior obtained this written estimate.”⁵ As just explained, Schroeder never alleged any such thing. Obtaining a document (from a potential service provider) and providing a document (to

¹ Excelsior Mortgage Equity Fund, II, LLC is the supposed landowner (“Excelsior”).

² Mr. Schroeder discusses in much more detail the scope of the estimate in his Brief of Appellant, pages 4-6. The Brief of Respondent fails to address this discussion.

³ The Brief of Respondent makes this claim on page 4.

⁴ Brief of Appellant, page 4.

⁵ The Brief of Respondent makes this claim on page 20, footnote 42.

the court) are not the same things!

Excelsior also states as follows: "Schroeder provided Excelsior with a written estimate stating that it would take 90 days to remove the great bulk of the Personal Property. Accordingly, this Court need not adopt a new rule of law-it can rely upon Schroeder's own estimates." Brief of Respondent, page 20 (footnote omitted).

Because the estimate contemplates the actions of "4 people" in that time frame, clearly states that the time frame of "90 days" is a "minimum" and subject to increase based on the "the actual productivity and progress of the scope of work" and excludes "the cars and many items that we are just prohibited to move," Excelsior misleads with its quotation from the estimate and uses the estimate in a manner that does not make any sense. See CP 22. This Court should ignore Excelsior's misreading of the

estimate.

B. The Facts about the Procedural Background

Excelsior filed a Motion to Dispose of Personal Property in which Excelsior chose not to identify any rule on which the motion was based. CP 1-8.

Excelsior's motion does not appear to have been a motion to dismiss under CR 12(b), for judgment on the pleadings under CR 12(c), for more definite statement under CR 12(e), to strike under CR 12(f), for default under CR 55, for summary judgment under CR 56, or for relief from judgment or order under CR 60. What kind of motion was Excelsior's Motion to Dispose of Personal Property?

Excelsior chose not to address this question before the trial court or in its Brief of Respondent. Mr. Schroeder has no idea what the procedural basis is of Excelsior's Motion to Dispose. In Excelsior's discussion of the

standard of review,⁶ Excelsior presupposes without proof a procedural background that fits its proposed standard of review.

If this Court agrees with Excelsior that the Court is deciding a question of law on a de novo standard of review,⁷ this Court may not need to determine the procedural basis for Excelsior's Motion to Dispose. If this Court uses some other standard of review, this Court will need to figure out a procedural basis for Excelsior's Motion to Dispose in order to determine the proper standard of review.

C. The Facts about the Supersedeas Procedure

On November 15, 2011, the trial court entered an order granting Excelsior's objection to the supersedeas bond. CP 294-295. Enforcement of the trial court's

⁶ Brief of Respondent, pages 12-14.

⁷ The "de novo standard is best applied when the appellate court stands in the same position as the trial court and may make a determination as a matter of law." State v. Ortega, 120 Wn. App. 165, 171, 84 P.3d 935 (2004) (citing State v. Garza, 150 Wn.2d 360, 366, 77 P.3d 347 (2003)).

decision is stayed for an additional seven “days after the entry of an order declaring the supersedeas deficient” to enable the appellant to furnish “a proper bond or supplemental bond or cash.” RAP 8.1(e).

For this reason, enforcement of the trial court’s decision was stayed until late November of 2011. In Excelsior’s “timeline,” Excelsior states that Mr. Schroeder’s property was “deemed abandoned” on October 15, 2011.⁸ The facts regarding the supersedeas procedure contradict Excelsior’s timeline. For this reason, the timeline in the Brief of Respondent is false.

D. The Facts about Removing Personal Property

Mr. Schroeder has undertaken extensive efforts to remove his personal property from the allegedly foreclosed two hundred acre parcel. CP 37-134. The Respondent’s Brief states that Mr. Schroeder “made no attempt” to comply with some notice from Excelsior that

⁸ Brief of Respondent, page 12.

he remove his personal possessions.⁹ Mr. Schroeder's Declaration and the extensive pictures attached to it prove that Excelsior's statement on this subject is totally false.

III. Argument

A. This Court should reject Excelsior's feeble attempts to somehow squeeze its motion to dispose within the limited narrow scope of the superior court's statutory jurisdiction under an unlawful detainer summons.

Excelsior chose to discuss the relief it received from the trial court (upon its request) as the trial court's finding that Mr. Schroeder abandoned, forfeited, or relinquished his ownership of his personal possessions.¹⁰ At the same time, Excelsior chose to discuss this exact same occurrence as property that Excelsior never "claimed" or over which Excelsior never sought "ownership"¹¹ and

⁹ Brief of Respondent, page 10.

¹⁰ See Brief of Respondents, e.g., 3, 5 ("relinquish"), 5 ("forfeited"), 6 ("relinquish"), 8, 9 ("abandoning"), 11, 12 ("abandoned"), 13 ("relinquish"), and 18 ("abandoned").

¹¹ Brief of Respondents, page 13, lines 6-7.

property regarding which Mr. Schroeder could somehow “file a lawsuit for conversion or some other theory.”¹²

This last statement is amazing. Excelsior would have the Court believe that a separate action for conversion or replevin by Mr. Schroeder would somehow evade defenses of collateral estoppel or res judicata when the trial court here specifically stated that “Steven F. Schroeder has **abandoned** any personal property or belongings remaining on the Real Property after October 15, 2011.” CP 141 (Finding No. 7) (emphasis added).

Citing the language of the Deed of Trust, Excelsior also claims that it now owns the items claimed by Mr. Schroeder. Brief of Respondent, pages 1-2. The first problem with Excelsior’s claim is that the vast majority of the personal possessions in dispute are not covered by the language of the deed of trust. One could proceed through the Declaration of Schroeder, compare the items

¹² Brief of Respondents, page 17, lines 17-18.

he discusses with the list from the deed of trust, and find that most of the items could not possibly have been the subject of the trustee's sale (if it occurred). The second problem with this claim is that Excelsior has continually been telling Mr. Schroeder to remove his items from the two-hundred acre farm¹³ and, for this reason, has waived its rights (if it ever had any such rights) to claim ownership of these items. Consequently, this Court should reject Excelsior's claim that it owns the disputed personal belongings.

As applied to leases, abandonment "involves an absolute relinquishment of premises by a tenant, and consists of act or omission and an intent to abandon." Tuschoff v. Westover, 65 Wn.2d 69, 395 P.2d 630 (1964).

"Abandon" is defined as 'to cease to assert or exercise an interest, right, or title to esp[ecially] with the

¹³ Excelsior says this repeatedly in its Brief. See the "Summary of Case" (pages 1-5) and the "Counterstatement of the Case" (pages 6-12).

intent of never again resuming or reasserting it' and 'to give up . . . by leaving, withdrawing, ceasing to inhabit, to keep, or to operate often because unable to withstand threatening dangers or encroachments.'" WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2 (1993) (cited in State v. J.P., 130 Wn. App. 887, 895-896 (2005) (brackets from court)). "'Abandoned' is defined as 'given up: DESERTED, FORSAKEN <<an [abandoned] child> <<an [abandoned] house>.'" WEBSTER'S, 2 (cited in State v. J.P., at 896 (brackets from court)).

Alleging that the Mr. Schroeder's personal possessions were deemed abandoned **and** that Mr. Schroeder retains rights in them (in a desperate attempt to save jurisdiction), Excelsior is flatly contradicting itself.

Excelsior is seeking to re-define the term "abandonment" as if it was a label for the court to impute, rather than a conclusion for the court to affirm or deny

based on the actual evidence of whether the owner continues to assert ownership and what intent the owner demonstrates.

This Court should deny Excelsior's attempts to re-write the Court's order or re-define the terms the Court used. This Court should also reject Excelsior's attempts to allow the trial court to find imputed or virtual abandonment **contrary** to fact.

Excelsior further alleges that the provision in the Complaint that seeks "such additional relief as this Court may deem just and proper" assist its case.¹⁴ Excelsior cannot explain how Mr. Schroeder could possibly identify affirmative defenses to Excelsior's Motion to Dispose or how Mr. Schroeder could possibly conduct discovery regarding Excelsior's Motion to Dispose on the basis of such language in the complaint. That language simply tells Mr. Schroeder nothing about Excelsior's legal theory

¹⁴ Brief of Respondent, page 15.

regarding his personal property and should be ignored.

“The purchaser shall also have a right to the summary proceedings to obtain possession of real property provided in chapter 59.12 RCW.” RCW 61.24.060(1). This only means that the purchaser has the **option** of pursuing an unlawful detainer action. The Deeds of Trust Act never limits the purchaser’s options to such a remedy. Instead, the purchaser could certainly file a lawsuit for ejectment under chapter 7.28 RCW with a twenty-day summons. See Brief of Appellant, 9-10.

Excelsior also alleges that its use of the Unlawful Detainer Act is required by the Deeds of Trust Act. The “new owner following a trustee’s sale **must** use RCW 59.12.” Brief of Respondent, 16 (emphasis added). “Excelsior filed an action for unlawful detainer as **required** by the Deeds of Trust Act to obtain full possession of the Property.” Brief of Respondent, 2

(emphasis added). These statements by Excelsior are blatantly false.

Excelsior alleges for the first time that, in the Order Granting Plaintiff's Motion to Dispose of Personal Property, the trial court "modified the Final Order and Judgment." Brief of Respondent, 17. When the trial court entered the above order and still today, the Final Order and Judgment remain on review in Case Number 296334-III. For this reason, the trial court's authority is limited by Title 7 of the Rules of Appellate Procedure.

"If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision." RAP 7.2(e). Here is another reason the trial court lacked authority to enter the order.

The trial court lacked jurisdiction to grant Excelsior's motion to dispose of Mr. Schroeder's personal belongings. This Court should reverse the Trial Court and remand for the parties to pursue this dispute before a court with general jurisdiction rather than special summary statutory jurisdiction under the Unlawful Detainer Act.

B. This Court should reject Excelsior's attempts to ignore the effects of the execution of a writ of restitution.

Excelsior has a brief discussion of the application of the writ of restitution. Brief of Respondents, 18-20. Excelsior chose not to mention, explain, or distinguish Port of Longview v. Int'l Raw Mats, 96 Wn. App. 431 (1999), which Mr. Schroeder cited. Brief of Appellant, 10-12.

Port of Longview involved "a small office on the second floor of one of the dock buildings for \$150 plus tax per month" which the tenant continued to use. 95 Wn.

App. at 434-435. This case involves two hundred acres of land in which Mr. Schroeder continues to store his belongings, while diligently working to remove them.

The rule of Port of Longview clearly applies. Id. at 446 (holding that a “writ of restitution does not have any immediate effect on the tenant's property interests”).

If this Court adopts some sort of test that asks whether a reasonable time has passed, this Court will need to determine when the clock starts counting the reasonable time.¹⁵ Excelsior alleges without any authority that the clock should start on the day of the alleged foreclosure. Brief of Respondent, 20. The above rule of Port of Longview should be applied to start the clock when the writ of restitution is executed (assuming that one considers any clock at all).

¹⁵ Mr. Schroeder disagrees with such a test. On his view, the proper test is whether he has actually abandoned his personal belongings. As the facts clearly show, he has not abandoned them. See Brief of Appellant, pages 18-20.

“Defendant Steven F. Schroeder is excluded from entering the Real Property for any reason unless otherwise agreed to in writing between the parties.” CP 142. Even if one considers “reasonable time” and Excelsior has finally had a writ of restitution executed on the premises, the clock should be tolled while Mr. Schroeder is excluded from the premises.

If this Court determines that the procedural basis for Excelsior’s motion was that of summary judgment, then RAP 9.12 applies. In that case, Mr. Schroeder objects to this Court’s consideration of the Writ of Restitution which was allegedly served and executed during the pendency of this appeal and which Excelsior has designated in the Clerk’s Papers.

The unlawful detainer statute at issue in this case is RCW 59.12.030. CP 257. Although Excelsior cites RCW

59.16.010,¹⁶ Mr. Schroeder is not aware of Excelsior ever before arguing that this section is the basis for Excelsior's action. The statute Excelsior cites for the first time here, RCW 59.16.010, is not relevant to these proceedings.

C. As Excelsior has chosen not to satisfy the requirements of RAP 18.1, Excelsior is not entitled to any attorney fees on appeal.

“The party must devote a section of its opening brief to the request for the fees or expenses.” RAP 18.1(b). That section must include adequate citation to authority and more than minimal argument. Wilson Court v. Tony Maroni's, Inc., 134 Wn.2d 692, 710-711 fn. 4, 952 P.2d 590 (1998). Argument and citation to authority are required. Id.

Here follows Excelsior's section on attorney fees in its entirety:

Under RCW 4.84.330, a court must award the prevailing party their attorney's fees where the parties have an agreement with an

¹⁶ Brief of Respondent, page 109, footnote 41.

attorney's fee provision. The Promissory Note and Deed of Trust both contain an attorney's 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.

Notably, Excelsior chose to cite only RAP 18.1 and RCW 4.84.330. Excelsior chose not to cite to any other statutes, any case law whatsoever, or other authorities in this section. Also absent from this section is any required citations to the record.

RCW 4.84.330 does not apply. The attorney's fees that this section makes mandatory are the attorney's fees that this section creates, namely, attorney fees for the disadvantaged party in a unilateral contract that would not otherwise provide such fees. The "attorney's fees" that are not waivable are those created solely by the addition of reciprocity to an otherwise unilateral provision.

Because Excelsior has chosen not to adequately support its request for attorney fees on appeal, this Court

should deny attorney fees on appeal to Excelsior, even if Excelsior prevails.

IV. Conclusion

Disposal of personal property is beyond the limited scope of the superior court's statutory jurisdiction under an unlawful detainer summons.

Mr. Schroeder has not abandoned his belongings.

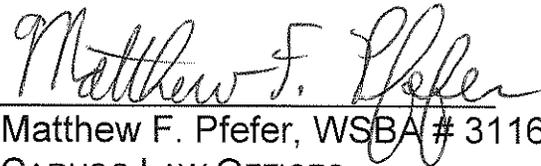
For these two reasons, the Trial Court erroneously granted Excelsior's motion to dispose of personal property.

This Court should reverse the Trial Court's erroneous ruling and remand for the parties to pursue this dispute before a court with general jurisdiction rather than special summary statutory jurisdiction, under the Unlawful Detainer Act.

Alternatively, this Court should reverse the Trial Court's erroneous ruling and remand for Mr. Schroeder to

continue removing his belongings, unless and until he chooses to abandon them.

Respectfully submitted this 25th day of April 2012.

A handwritten signature in cursive script that reads "Matthew F. Pfefer". The signature is written in black ink and is positioned above a horizontal line.

Matthew F. Pfefer, WSBA # 31166

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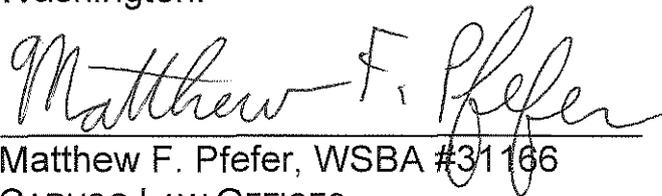
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DECLARATION OF SERVICE

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 Reply Brief of Appellant on April 25, 2012 via email to PHaberthur@schwabe.com, HDumont@schwabe.com, RHigbie@schwabe.com, and CRussillo@schwabe.com.

Signed this 25th day of April 2012 in Spokane, Washington.



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