

Court of Appeals No. 333361-1-III  
Consolidated with Case No. 34551-3-III

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION III

STEVEN F. SCHROEDER

Appellant

v. PHILLIP J. HABERTHUR, as Trustee of a deed of trust, EXCELSIOR  
MANAGEMENT GROUP, an Oregon limited liability company, EXCELSIOR  
MORTGAGE EQUITY FUND II, LLC, a limited liability company, JAMES HANEY,  
and CLS MORTGAGE INC,

a Washington Corporation,

Respondents

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REPLY BRIEF OF APPELLANT

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**FILED**

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COURT OF APPEALS  
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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION III

STEVEN F SCHROEDER	)	Case No: 333361 consolidated with No. 34551-
Appellant	)	3-III
vs.	)	
PHILLIP J. HABERTHUR, as Trustee of a	)	REPLY BRIEF OF APPELLANT
deed of trust, EXCELSIOR MANAGEMENT	)	
GROUP, an Oregon limited liability company,	)	
JAMRS HANEY, and CLS MORTGAGE,	)	
INC. a Washington Corporation,	)	
Appellees	)	

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## ISSUES

1. Did the Trial Court err in ruling that the property was not used for agricultural purposes on the day of the signing of the deed of trust and the day of the trustee's sale?
2. Did the trial Court err in granting summary judgment to Excelsior dismissing Mr. Schroeder'

## REPLY STATEMENT OF FACTS

In its introduction, Respondent states that The Supreme Court in its prior decision in this case stated that only if Excelsior knew the property was being used for agricultural purposes on both of the relevant dates, then Schroeder could pursue his other causes of action (Brief of Respondent p1, citing Schroeder v. Excelsior Mgmt. Group, 177 Wn 2d 94 (2013) . This is inaccurate, the Court said that if the property was being used for agricultural purposes on the relevant dates, the sale was void and if the sale was void, Schroeder could pursue his other causes of action. It did not limit Schroeder's right to

pursue his causes of action to Excelsior's knowledge. Id at 177 Wn 2d, 115. Respondents states at p2, that because the trial court's conclusion that the trustee's sale was valid was supported by substantial evidence, it should be affirmed. This too is incorrect. In this case, the trial court's conclusion that the land was not used for agricultural purposes is wrong. Schroeder disputes the conclusion that the land was not used primarily for agricultural purposes.

Schroeder's challenges are not limited to findings of fact Nos. 28 and 19 and conclusion of law no. 41 (Br. of Respondent, p2, 13). Mr. Schroeder's argument is premised on the fact that he not only raised timber on the property but he also engaged in other agricultural activities on the land. Mr. Schroeder on appeal reasserts his position that he was advised apparently by Mr. Haney on the first loan that he would not be required to begin making payments until after a year had elapsed on the first loan only to be notified that payments were required immediately. The default proceedings based upon this misunderstanding forced Mr. Schroeder into the position of obtaining

the second (2009) loan on less favorable terms that Mr. Schroeder was not able to repay. It is obvious that Mr. Schroeder takes issue with Finding of Fact no. 32, (Schroeder had no difficulty reading), 33, that Mr. Schroeder fully understood the representations made when he signed the 2009 deed of Trust and No. 33 that Mr. Schroeder was not coerced into signing the documents. Mr. Schroeder testified that in 2009 he believed he was signing a mortgage and instructed his attorney accordingly (RP 875).

Excelsior makes many references to the fact that it had no idea that the land was being used for agricultural purposes on the relevant dates. This is irrelevant as to the fact that the land was actually being used for agricultural purposes. In the first appeal on this matter (Schroeder I), the Supreme court held that it didn't make any difference, at least as to this issue, as to what the parties thought at the time of the signing of the Deed of Trust and the sale. The statutory prohibition on non-judicial foreclosures of agricultural land is non-waivable and if the land was being used for agricultural purposes on

the relevant dates, the sale was void. “The difficulty with the defendants’ waiver argument is that RCSW 62.24.030 is not a rights-or-privileges creating statute. ...it is a requisite of the trustee’s sale... that the property not be used for agricultural purposes.” Among other things listed by the Statute, this provision is a limit on the Trustee’s power to foreclose non-judicially. Schroeder v. Excelsior, *id* at 177 Wn. 2d 106-107. Moreover as the Court noted that the record “strongly suggests” that the statement (of no agricultural use) was false on the relevant dates *id* at p. 105. It is also true that both at the time of the signing of the 2009 deed of trust and at the time of the Sherriff’s sale, Excelsior had reason to know the land was being used for agricultural purposes. In his 2008 lawsuit, against Excelsior based on the first (2007) loan, Schroeder alleged that the property was being used for agricultural purposes ( FF 14, CP 165-174 and EX 144 Br. Respondent, p8). Neither James Haney who referred Schroeder to Excelsior in 2007 nor Excelsior ever inspected the property prior to either loan. Respondent argues that Schroeder knew that Excelsior was not taking

any interest in crops but Excelsior did place a lien on the harvestable timber. As part of the deed of trust (Ex 46).

## **ARGUMENT**

### **I. Timber is a Crop and its presence constitutes agricultural use.**

Respondent admits that in 1998 the legislature amended the deed of Trust Act to drop the word “farming” from the statute. The statute previously allowed non-judicial foreclosure when the land was not being used “principally for agricultural or farming purposes.” Brief of respondent, p. 17. The legislature in 1998 dropped the word farming so the statute now provides that it shall be a requisite of the trustee’s sale that the deed of trust must provide a statement was not being used primarily for agricultural purposes and if that statement was false on the day the deed was granted and on the date of the trustee’s s sale, the property must be foreclosed judicially RCW 61.24.030 (1). Had the legislature intended to limit the term agricultural to be limited to

actual farm crops, it would have done so rather than making the statute more generally apply to a multitude of agricultural purposes which would include such activities such as growing timber. Citations to the Executive Summary prepared by Gordon Tanner regarding the 1998 amendments are not helpful as to an intent to exclude timber as the legislature chose not to exclude timber in defining the requirements for a trustee's sale 61.24.030, or in defining the word "crop". Any language in Mr. Tanner's summary to the effect that timber was not a crop was not adopted by the legislature.

Although the Tanner article was cited by the Court of Appeals in Gardner v. First Heritage Bank 175 Wn App. 650, 661 (, (brief of respondent p. 16), Respondent has cited no authority for citing as a basis for interpreting the statute. Schroeder has already argued that the seasonal nature of crops applies to crops that take more than one year to mature such as Christmas trees. (brief of Appellant, p. 11, "... the speed with which a plant matures does not change its characterization as a crop" citing Rainer National Bank v. Security State Bank, 59 Wn.

App. 161,164 (1990) which in turn cited then definition of “crop” from Webster’s Third New International Dictionary p. 540 (3d Ed. 1969).

Respondent states that except for Christmas trees, there is no authority that timber is considered a crop. There is no authority that timber is not considered a crop and as the Supreme Court stated in Schroeder I, the deed of trust act must be “...construed in favor of borrowers because of the relative ease with which lenders can forfeit the borrowers’ interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales.” Schroeder id at 177 Wn 2d, 104-105 citing Udall v. T.D. Escrow Servs. Inc. 159 Wn 2d 903, 915-916 (2007).

Given the absence of a definition of the term “crops” in the deed of trust statute, the appropriate interpretation of the term agricultural use would be to include rather than exclude other growing things such as timber and Christmas trees.

In addition to the examples provided in Schroeder’s opening brief of other statutory instances where timber is considered a crop are

the following: RCW 36.15.050 (g)(1) which requires that local agricultural and fishing products be purchased with state money which defines agricultural products as “ "agricultural products" includes dairy products, timber and lumber, and products manufactured in the state from timber and lumber;”. The Natural Resource Conservation Services defines Agricultural land as follows: “land that has the best combination of physical and chemical characteristics for producing food, feed, fiber, forage, oilseed, livestock, timber, and other agricultural crops... N.R.C.S 3.5.1 NRCS Website.”

Respondent’s argument that timber is not included because a judicial foreclosure gives the borrower one year to harvest crops then in the ground is also without merit. Mr. Schroeder could have, given the property notice elected to harvest some or all of his timber during that period of time. Any tax deferral would have to be made up and the same would be true if the land was lost to Mr. Schroeder by foreclosure (sale of the land) RCW 84.37.080.

Excelsior knew that Mr. Schroeder claimed the land was being used for agricultural purposes when it made the second loan to him in 2009 yet made the loan without ever inspecting the property. The Supreme Court stated "...the record strongly suggests that the Excelsior group was strongly aware of the agricultural character of the property at the time of the first settlement" and that any reliance by Excelsior on any statements to the contrary would have been unreasonable." Schroeder at 177 Wn. 2 109 . In 2009, Schroeder had filed to restrain the pending non-judicial foreclosure claiming that the land was used for agricultural purposes (Ex. 144, FF 13-14).

## **II. Schroeder used the property for other agricultural uses in addition to growing timber.**

The trial court found that Schroeder also used the property for scrap metal, welding and mechanical work a residence, headquarters for the logging business Finding of Fact No. 27. In addition the Court found that Schroeder did seasonally use the property to maintain some

cows, and used the pole barn to store hay for his cows. FF no. 28. Mr. Schroeder testified that the timberland was also used for other purposes such as tree farming, and grazing (RP 393-394). He also constructed a hay barn on the property in 2004 (RP 368). In February and March of 2009, Mr. Schroeder was “halving and feeding calves on the land’ (RP 389). He was doing the same in February of 2010 (RP 389). Storing hay, raising cattle and grazing cattle all constitute agricultural use. (RP 699). According to the Stevens County Assessor’s office, the tax deferment is available for commercial timber or commercial farming crops (Testimony of Vicki Nielsen RP 678). It can therefore be harvested and when it is harvested, the tax is due. Even under this program, it is acceptable to use the timberland for grazing and in fact grazing is beneficial to the timber growth (RP 699). Accordingly, more than the 20 or so non-timbered acres are used for agricultural purposes other than timber.

**III. Excelsior was not entitled to summary judgment on Schroeder’s claims.**

Excelsior argues that this court should not consider Schroeder's argument that Excelsior through the actions of its trustee, Phil Haberthur, breached its fiduciary to Mr. Schroeder by non-judicially foreclosing on agricultural property because this issue was raised for the first time on appeal. It has already been argued that Excelsior knew or should have known that in 2009 Mr. Schroeder has in a lawsuit claimed the property was being used for agricultural purposes. As Excelsior's attorney at the time and as the trustee, Mr. Haberthur knew that this claim was being made and knew the claim had been made when he sold the property to his client Excelsior in 2010 Trustee's Deed Ex. 153). Because the Deed of trust foreclosure is conducted without review or confirmation by the Court, the fiduciary duty owed by the trustee to the grantor of the deed is extremely high Cox v. Helenius, 103 Wn 2d 383,388 (1985). In dismissing Excelsior's argument that Mr. Schroeder was barred by equitable estoppel from asserting his claim against Excelsior, The Supreme Court stated that given this knowledge by Excelsior (and Mr. Haberthur) that reliance by

Excelsior on Statements of Non-agricultural use in 2009 would not have been reasonable. Schroeder, id at p. 109. The Court went on to dismiss Excelsior's public policy claims of fraud by Mr. Schroeder, stating that "this was a remarkable statement" by Excelsior prepared the documents and if the land was in fact agricultural, Excelsior had adequate notice and therefore was complicit in any fraud. Schroeder, id at 109-110. Given this knowledge by Excelsior, and given Excelsior's lack of curiosity as to what the land actually looked like, it is apparent that Excelsior knowingly foreclosed on agricultural property and if Excelsior foreclosed on agricultural property knowingly or not, Mr. Schroeder's claims survive.

Mr. Schroeder's claims also because he established that Excelsior made the loans knowing that he would probably not be able to pay them back resulting in Excelsior taking possession of and that far exceeded in value the obligation owed it. For the reasons stated in his opening brief, Mr. Schroeder reaffirms his argument that the actions of Excelsior violated the consumer protection act

Mr. Schroeder did not waive his claims by failing to restrain the trustee's sale. If the property was used for agricultural purposes and the trustee's sale was void, Mr. Schroeder's claims survive because the trial court in granting summary judgment presumed that the trustee's sale was valid. Even if the trustee's sale was valid, Mr. Schroeder's claims are valid as he demonstrated that Excelsior increased the loan costs in 2009, took most of Mr. Schroeder's equity making it impossible to obtain other financing to pay off Excelsior and required the 2007 loan to be paid off immediately in monthly payments rather than deferring the payments for a year as Mr. Haney advised Mr. Schroeder. (see Br. of Appellant p.6).

Waiver only applies to actions to vacate the sale, not to other claims brought in the case. Schroeder id at 177 Wn 2d 114.

## CONCLUSION

The trustee's sale of the property to his client, Excelsior was void. The land was used for agricultural purposes in the March April period of the signing of the deed of trust and in February 2010 when the trustee's sale occurred. Growing timber is an agriculture use in and of itself and the property was at the relevant times used for agricultural purposes other than raising timber. Obviously the timber was present on both the relevant dates as well. If the sale was void then Schroeder's claims survive. The Trustee had a fiduciary duty to Mr. Schroeder to act impartially and violated that duty by improperly selling the property to his client, Excelsior knowing or having reason to know that the property was being used for agricultural purposes. The breach of this duty by the trustee has always been a part of Mr. Schroeder's case and has been argued at the trial level. Mr. Schroeder presented sufficient evidence to overcome summary judgment by establishing the above conduct as well as the predatory nature of the loans made by Excelsior.

Mr. Schroeder respectfully requests that this court reverse the trial court's determination that the land was not used for agricultural purposes on the relevant dates, declare the trustee's sale void, restore the property to Mr. Schroeder, award Mr. Schroeder attorney fees and costs and remand Mr. Schroeder's claims to the Superior Court for a full evidentiary hearing on the merits.

Respectfully submitted this 18<sup>th</sup> day of April, 2017

A handwritten signature in black ink, appearing to read 'John C. Perry', written over a horizontal line.

John C. Perry WSBA 16041

Attorney for Steven F Schroeder

**FILED**

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION III

STEVEN F SCHROEDER	)	Case No: 333361 and 345513
Appellant	)	CERTIFICATION OF SERVICE
vs.	)	OF REPLY BRIEF
PHILLIP J. HABERTHUR, as Trustee of a	)	
deed of trust, EXCELSIOR MANAGEMENT	)	
GROUP, an Oregon limited liability company,	)	
JAMRS HANEY, and CLS MORTGAGE,	)	
INC. a Washington Corporation,	)	
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On April 18, 2017 I caused to be served electronically a copy of. Appellant's Reply Brief addressed to the following:

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Enclosed is Mr. Schroeder's Proof of Service of Reply Brief

Thank you

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