

FILED

No. 333361

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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, JAMES HANEY, and CLS MORTGAGE,

INC. a Washington Corporation,

Respondents

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The Trial Court's 2015 trial decision in error because the land was used for Agricultural purposes during the time periods set forth in the Statute.

2. The Trial court's order on summary judgment dismissing Mr. Schroeder's claims was in error because the law of the case requires a trial on the issue and because the fact that the land was used for agricultural purposes renders the non-judicial foreclosure of the land invalid and constitutes a violation of the consumer protection act, the trustee had a conflict of interest and Excelsior's financial practices harmed Mr. Schroeder.

STATEMENT OF THE CASE

Mr. Schroeder appeals two decisions of the trial court entered in the same Superior Court Case No. 10-2-00054-1 The first is an appeal of the trial court's decision on remand from the Supreme Court after a bench trial in which the court held that the property was not primarily used for agricultural purposes at the relevant times ,that the trustee's sale was valid and Excelsior was entitled to title to the property (CP 164), Schroeder Excelsior Management Group LLC, et al, 177 Wn 2d 94 (2013). This decision by the court was timely appealed to the trial court on May 14, 2015 (CP p.224-228). The second is an appeal of the trial Court's order

granting summary judgment to Excelsior dismissing Mr. Schroeder's claims against Excelsior and other defendants based on violations of the Consumer Protection Act, the Washington Mortgage Broker Practices Act, Unconscionability, The Real Estate Settlement Practices Act, Civil Conspiracy and seeking Injunctive relief to prevent the completion of the Trustee's sale and awarding attorneys' fees. (CP 402-404) (CP 165-174). This court stayed the 2015 appeal to allow the Summary Judgment matter to be heard. Mr. Schroeder filed an appeal of the summary judgment on June 30, 2013. The Trial court, on motion by Mr. Schroeder, consolidated the appeals.

Mr. Schroeder appeals the 2015 order approving the nonjudicial foreclosure and the Findings and Concussions in support thereof, the 2016 order granting summary judgment and dismissing Plaintiff's claims and the order awarding attorneys' fees and approving the sale of the property by Excelsior after the non-judicial foreclosure.

Steven Schroeder borrowed \$371, 250 from Excelsior mortgage on June, 12, 2007 (Ex. 135), Excelsior secured the note with a deed of trust (Ex.138). Mr. Schroeder had previous loans on the property including one he was set to pay off when a group named timber haulers Mr. Schroeder owed approximately \$265,000 to Timber Haulers Inc. on the land when he came to Mr. Haney and CLS for a loan

to cover that amount. (Testimony of Steven Schroeder, February 6, 2015, Report of Proceedings (RP p. 553). Mr. Schroeder had to borrow money to pay off Timber Haulers who was foreclosing on the property so he contacted CLS and worked with James Haney, a loan officer there.¹ (RP pp. 544-545). Mr. Haney contacted Excelsior to make the loan as CLS declined to make the loan. As part of that process, an appraisal was performed on the 200 acres which valued the property at \$675,000 (Ex 2) Excelsior reviewed this property as part of its loan process (Testimony of Craig Sayers RP p. 770) and was thus aware of the value of the property. Despite the amount owing on the Timber Haulers' debt being only \$265,000, the amount of the Excelsior loan in 2007 was \$317,250 with 15.2% interest or approximately \$50,000 more than he needed (Ex 135). Mr. Schroeder stated that he signed the loan documents without realizing that these payments were due. It was not until he received a call from Cheryl Villarreal at Excelsior in 2008 that he was made aware that payments were due. Excelsior had access to Mr. Schroeder's tax returns which were admitted at Trial and demonstrated that he could not afford to service this loan. In 2000, for example, Mr. Schroeder showed a loss of \$55,607 as his adjusted gross income a Schedule loss of \$20,714, and a

¹ James Haney and CLS Mortgage have not filed a motion for summary judgment nor did Mr. Haney participate other than as a witness in the 2015 Trial. CLS was dismissed after a bankruptcy.

loss from farming of \$121,133 in 2005, he showed an AGI loss of 31,683 a schedule C profit of \$13,704 and a loss from farming of \$13, 833. (Trial Ex 121, 125). By the end of 2008 and into 2009 when Mr. Schroeder signed the new note with Excelsior the amount had grown to \$425,700, (Ex. 148) Although Mr. Schroeder did not speak to Excelsior prior to the 2007 loan, Excelsior did determine the loan amount and the terms of the loan, had reviewed both the appraisal and Mr. Schroder's income and made the loan nonetheless. (Testimony of Craig Sayers RP 775-776, Plaintiff's Exhibit 2.) During the period of the nonjudicial foreclosure Defendant Phillip Haberthur served as both Trustee and as counsel to the beneficiary of the deed of trust, (RP 706). Haberthur conducted the foreclosure and sale of the property to his client, representing Excelsior through the 2010 appeal to the Supreme Court. During the 2015 Trial, Haberthur appeared as a witness in his capacity of Trustee, however his law partner, Bradley Anderson represented Excelsior at Trial and through the current proceedings.

I The Trial Court's April 2015 judgment for the for Defendant's was in error

A. Standard of Review

. The findings and conclusions from the bench Trial are reviewed to determine whether challenged findings of fact are supported by

substantial evidence and whether those findings support the conclusions of law. Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003). The party claiming error must show that a finding of fact is not supported by substantial evidence. Fisher Props., Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369, 798 P.2d 799 (1990). Substantial evidence is a quantum of evidence sufficient to persuade a rational and fair-minded person that the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). persuasiveness of the evidence. Boeing Co. v. Heidi, 147 Wn.2d 78, 87, 51 P.3d 793 (2002). We then review whether the Findings of fact support the conclusions of law. Proctor v. Huntington, 146 Wn.App. 836, 844-45, 192 P.3d958 (2008).

B. Standing timber is a crop requiring judicial foreclosure of the property.

One of the requisites of a nonjudicial foreclosure of a deed of Trust is that the deed contain a statement that the property was not used principally for agricultural purposes and if the statement is false on the date the deed of Trust is granted or amended to include that statement and false on the date of the Trustee's sale, the property must be foreclosed judicially. Agricultural purposes is defined as the production of crops, livestock or aquatic goods. RCW 61.24.030 (2). The date of the signing of

the deed of Trust in this case is March 31, 2009 (Ex. 117) and the Date of the Trustee's sale is February 26, 2010 (Ex 153). The non-timbered portion of the property was at all relevant times used for agricultural purposes including but not limited to a feedlot (RP 614), a hay barn (RP 368), a farm equipment storage area (RP 446), the use and distribution of animal manure, the raising of hogs (RP 462), and the production of timber for eventual harvesting (RP 680). Cattle graze throughout the property including the treed area.

The Court found that the property consists of 90% growing commercial timber (CP 402-404, Finding 2). This was based on the testimony of an Administrative assistant in the Stevens County Assessor's office who testified that for years 180 acres of the 200 acre parcel in this case has been enrolled in the county's designated forest land program (Id at Finding No. 3, RP p. 667) Mr. Schroeder also testified that twenty acres is used for various farm activities and 80 acres is in timber. The forested area was also used for cattle grazing.

There are numerous instances in the law in which timber is treated as a crop. The relevant portion of the Washington Tax Code provides:

(a) The amount of additional tax is equal to the difference between the property tax paid as "open space land," "farm and agricultural land," or "timberland" and the amount of property tax otherwise due and payable for the seven years last past had the land not been so classified RCW 84.34.108.

The art or science of cultivating the ground, and raising and harvesting crops, often including also feeding, breeding and management of livestock; tillage, husbandry; farming in a broader sense, the science and art of the production of plants and animals useful to man, including to a variable extent the preparation of these products for man's use and their disposal by marketing or otherwise. In this broad use it includes farming, horticulture, forestry, dairying, sugar making, etc.

State v. Christensen 18 Wn 2d 7, 22, 137 P 32d 512 (1943 (quoting

WEBSTER'S NEW INTERNATIONAL DICTIONARY, 2d ed., s.v.

"agriculture" (from Stuart v. Kleck, 129 F 2d 400,402, (9th Cir. 1942).

Forestry is here included within the definition of agriculture.

Timber is also classified as a crop for the purposes of determining the rights of a life tenant. Since "...cutting the timber is the mode of cultivation (of timber,), the timber is not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land". M.C. Dransfield, Annotation, Timber Rights or Life Tennant, 51 A.L.R. 2d 1374, 1375-1376 (1957). The "timber is cut down periodically in due course is looked upon as the annual profits of the estate and therefore goes to the tenant for life." Id, cited by Ames v. Ames 184 Wn. App 827,853,

340 P 3d 232 (2014).

A seasonal harvest of timber, like a harvest of any other crop, is precisely the sort of interest the longer judicial redemption period and the one year redemption period were designed to protect. Nor does the fact that timber may be harvested more irregularly affect its classification as a crop.

Washington's uniform Commercial Code also recognizes timber as a crop. Growing Crops or timber, both to be severed from the land, are defined as goods under the U.C.C. and must *be the subject of a separate* U.C.C. filing to be secured RCW 62A.2-107 (emphasis added).

The Supreme Court has looked to the Dictionary definition of crop in a U.C.C. case where "crop" is not defined by the code. Crop is defined as a "...plant or animal or animal product that can be grown and harvested extensively for profit or existence" Rainer National Bank v. Security State Bank 59 Wn. App.161, 164, 796 P.2d. 443 (1990) citing Webster's Third New International Dictionary 540 (3d Ed. 1969). The court held that Christmas trees are plants grown and harvested extensively for profit and are a crop for the purposes of the U.C.C. stating "...Although many plants mature and are harvested annually, the speed with which a plant matures does not change its characterization as a crop." Id.

The parties agree that 80-90 % of the land is timbered. Findings of fact and Conclusions of law (It is clear that timber is a crop and is considered an agricultural use under the statute. The Court's conclusion of law no. 41 (CP144-154, p. 10) that timber does not constitute a crop is incorrect. The Trustee's sale is void and the property must be foreclosed judicially.

C. The property was used for agricultural purposes on the relevant dates.

The entire property, including the timbered portion, was used as for cattle grazing. This constitutes agricultural use as the production of livestock is included in the definition of agricultural use RCW 61.24.030 (2). The statute states in order for the beneficiary to rely on non-judicial foreclosure, the property must not be used principally for agriculture on the relevant date's id. The statute doesn't define principally. Principal is defined by the dictionary as "more than anything else, mainly" Miriam Webster n.d. 4 Nov. 2016. Although the Trial court found that Mr. Schroeder used the property for other purposes as well (storing antique vehicles, storing scrap metal, etc. (CP144-154 p. 8,, Finding no. 28-29), the Court also found that Mr. Schroeder did graze cattle and did use the 20% of the property that wasn't used to grow timber for an office for the

timber operation id. These findings are not supported by substantial evidence. The Court ignored the fact that the 10-20% of the land that was not used for timber was used for a cattle feedlot, hay storage (the barn was built for that purpose by Mr. Schroeder in 2004), manure processing and storage of farm equipment Infra. Other than a reference to some hay storage, this testimony is not referred to in the Court's findings. When these facts are combined with the fact contained in the findings that cattle grazed in the timber, it is clear that the property was used "more than anything else" for agricultural purposes. Since timber is a crop and thus an agricultural purpose under the statute, the timber alone qualifies the land as agricultural. Even if timber were not a crop, the uses described above constitute agricultural use of the land.

II. Summary Judgment was Improperly Granted

A. Standard of Review

Summary judgment is reviewed *de novo*, the reviewing court engaging in the same inquiry as the lower court. Korslund v. DynCorp Tri-Cities Servs., Inc., 156 Wn.2d 168, 177, 125 P.3d 119 (2005). Summary judgment is appropriate only if the "pleadings, depositions, answers to interrogatories . . . together with the affidavits . . . show that there is no genuine issue as to any material fact" and that "the moving party is

entitled to a judgment as a matter of law." CR 56(c). A material fact is one on which the outcome of the litigation depends. Schmitt v. Langenour, 162 Wn.App. 397, 404, 256 P.3d 1235 (2011). When determining whether a Trial is necessary, we view facts in the light most favorable to the nonmoving party, here, Brown. Labriola v. Pollard Group, Inc., 152 Wn.2d: 828, 833, 100 P.3d 791 (2004). If reasonable minds could reach different conclusions about a fact, a genuine issue of material fact exists and the case cannot be resolved as a matter of law. Michael v. Mosquera-Lacy, 165 Wn.2d 595, 601, 200 P.3d 695 (2009).

1. Summary Judgment is precluded by the Law of the Case.

In the appeal of this case to the Supreme Court, the Court reversed the Trial Court's granting of summary judgment dismissing not only the validity of the Trustee's sale of the property, but also the Trial court's order granting summary judgment dismissing Mr. Schroeder's claims against defendants for damages based on the Washington Mortgage Broker Practices Act, the Consumer Protection Act, Unconscionability, the Real Estate Settlement Practices Act and Civil Conspiracy, Schroeder v. Excelsior Management Group LLC, et al. 177 Wn 2d 94, 113-115, (2013). The Trial court was bound by that determination and Mr.

Schroeder is entitled to Trial on these issues, Coy v. Raabe, 77 Wn.2d 322, 325, 462 P.2d 214 (1969) (acknowledging the binding effect of determinations made by the appellate court on further proceedings in the Trial court. on remand). The fact that on remand, the Trial court has held that the land was not used for agricultural purposes does not alter the binding effect of the Supreme Court's reversal of summary judgment dismissing Mr. Schroeder's claims. Frizzell v. Murray, 179 Wn. 2d 301, 311-312 (2013) (waiver of challenge to a non-judicial foreclosure does not preclude going forward with damages claims for fraud, consumer protection act, etc).

The issue in the Trial in this matter from which the findings of fact are taken was pursuant to the remand from the Supreme Court, whether or not the land was used for agricultural purposes on the relevant dates. The Trial court at the beginning of the Trial framed the issue succinctly, stating that the purpose of the hearing was to determine whether at relevant times, the property was used for agricultural purposes. (RP, p. 3). Mr. Schroeder's claims for monetary damages and other relief were not litigated in the Trial. "... A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions

of fact not actually litigated and determined in the first action”.

Restatement of Judgments § 68 (1942).

Accordingly, Excelsior’s arguments to the effect that it had no knowledge that the land was to be used for agricultural purposes and that Mr. Schroeder waives any claims because he signed documents stating that he relied on no representations by Excelsior are not supported by fact as those issues have not been litigated and to the extent that the court made findings to that Mr. Schroeder stated that he did not rely on representations by Excelsior these findings were not necessary to the issue of agricultural use.

Mr. Schroeder alleges that defendants including Excelsior, Haney and CLS mortgage misled him into agreeing to loans that were excessive, unable to be repaid and wrongfully foreclosed non-judicially on agricultural property. Mr. Schroeder also alleges that Mr. Haberthur serving as both Trustee and attorney for Excelsior breached his fiduciary duty to the grantor of the deed of Trust, Mr. Schroeder, by selling the property knowing that Mr. Schroeder claimed the property was used for agricultural purposes and thus prejudicing Mr. Schroeder. Mr. Haberthur was familiar with Mr. Schroeder’s complaint and the fact that Mr. Schroeder claimed the land was used for agricultural purposes (RP 712,

testimony of Phillip Haberthur). Haberthur never went out to the property at any time (RP 738), Despite the knowledge that Mr. Schroeder claimed that the property was being used for agricultural purposes, Mr. Haberthur proceeded with the Trustee's sale granting a Trustee's deed client and the beneficiary of the Deed of Trust, Excelsior Mortgage (RP 731, Ex. 153). Since the sale Mr. Schroeder was prejudiced by being unable to enter or use the property for any of the purposes he used it for prior to the sale. The Supreme Court in this case has previously stated its concern about this conflict situation. Schroeder v. Excelsior, at 177 Wn 2d 94, 101 fnt3. The court noted that , at a minimum, the Trustee owes a duty to act in good faith and "owes a fiduciary duty to act impartially to fairly represent the interests of both the lender and debtor " Id , citing Klem v. Wash. Mutual Bank, 176 Wn. 2d 771,790, 295 P3d 1179 (2013).

Mr., Schroeder had originally sued Excelsior not only for damages alleging violations of the Consumer Protection Act, the Washington Mortgage Broker Practices Act, Unconscionability, The Real estate Settlement Practices Act, Civil Conspiracy and seeking Injunctive relief to prevent the completion of the Trustee's sale and awarding attorneys' fees. In June of 2016, the Court granted summary judgment to Excelsior dismissing Mr. Schroeder's claims (CP 402-404), granting Excelsior's motion to sell the property, (CP 453-456), granting attorney's fees and

costs (CP), along with the court's conclusions of law and ruling on Excelsior's motion for attorneys' fees and costs (CP 231). The order granting attorneys' fees and the conclusions of law supporting that order are dependent on the validity of the Court's ruling that the property was not used for agricultural purposes.

Mr. Schroeder owed approximately \$265,000 to Timber Haulers Inc. on the land when he came to Mr. Haney and CLS for a loan to cover that amount. (RP p.553). Mr. Schroeder had to borrow money to pay off Timber Haulers who was foreclosing on the property so he contacted CLS and worked with James Haney, a loan officer there.² (RP pp. 544-545). Mr. Haney contacted Excelsior to make the loan as CLS declined to make the loan. As part of that process, an appraisal was performed on the 200 acres which valued the property at \$675,000 Plaintiff's Trial exhibit 2, Appraisal of Am-Pac Appraisal service. Excelsior reviewed this property as part of its loan process (Testimony of Craig Sayers RP p. 770) and was thus well aware of the value of the property. Despite the amount owing on the Timber Haulers' debt being only \$265,000, the amount of the Excelsior loan in 2007 was \$317,250 with 15.2% interest or approximately \$50,000 more than he needed (Trial

² James Haney and CLS Mortgage did not file a motion for summary judgment.

Exhibit 135). Mr. Schroeder has testified that he was led to believe perhaps by Mr. Haney, that he would not need to make payments until after the lapse of a year at which time he would begin making payments. He stated that he signed the loan documents without realizing that these payments were due. It was not until he received a call from Cheryl Villarreal at Excelsior in 2008 that he was made aware that payments were due. Excelsior had access to Mr. Schroeder's tax returns which were admitted at Trial and demonstrated that he could not afford to service this loan. In 2000, for example, Mr. Schroeder showed a loss of \$55,607 as his adjusted gross income a Schedule loss of \$20,714, and a loss from farming of \$121,133 in 2005, he showed an AGI loss of 31,683 a schedule C profit of \$13,704 and a loss from farming of \$13, 833. (Trial Ex 121, 125). By the end of 2008 and into 2009 when Mr. Schroeder signed the new note with Excelsior the amount had grown to \$425,700, See March 30, 2009 settlement statement attached as exhibit to Declaration of Steven Schroeder (Ex. 150).

.Although Mr. Schroeder did not speak to Excelsior prior to the 2007 loan, Excelsior did determine the loan amount and the terms of the loan, had reviewed both the appraisal and Mr. Schroder's income and made the loan nonetheless.

As to the 2009 loan, Excelsior had already started foreclosure proceedings on the 2007 loan when Mr. Schroeder filed a lawsuit to enjoin the foreclosure and compel Excelsior to Foreclose Judicially as the property was being used for agriculture on December 31, 2008. The parties resolved this matter with the issuance of a new note in the amount of \$425,700.00. (Trial Exhibit 148). This again included excessive fees. Excelsior charged a loan origination fee of \$19, 156.00, loan administration fee of \$2,128.50 and an Administration fee of \$1,250.00. id. This represents the sum of \$22,534.50 being charged by Excelsior independent of any principal or interest. Mr. Schroeder's income had not significantly improved since the 2007 loan. His 2008 tax return shows an AGI loss of 74, 255, a Schedule C gain of \$19,937 and a loss from farming of \$7,508. Despite this (Trial Ex 128). Mr. Schroeder had tried to obtain financing to pay off the property but was unsuccessful due to the size of the Excelsior lien (RP, 612)..

Mr. Schroeder testified at Trial in this matter that Excelsior would not let him log or generate any revenue off the property. (RP 574). He stated that he spoke with an individual named Cheryl "Liver"³ at

³ A letter to Mr. Schroeder from Excelsior identifies his contact person there as Cheryl Villarreal (Ex 140)

Excelsior who told him that he was not to take any timber or sell anything else off the property.

Consumer Protection Act

RCW 19.86.093 permits an injured party to bring an action under the consumer protection act. To prevail on an action for damages under the CPA, the plaintiff must establish (1) an unfair or deceptive act, (2) in trade or commerce, (3) that affects the public interest, (4) injury to plaintiff in his or her business or property, and (5) a causal link between the unfair or deceptive act complained of and the injury suffered. Hangman Ridge Training Stables Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986). To prove that an act or practice is deceptive, neither intent nor actual deception is required. The question is whether the conduct has "the capacity to deceive a substantial portion of the public." Hangman Ridge, 105 Wn.2d at 785.

The Supreme Court held in this case that non-judicially foreclosing on land that the beneficiary knows or should know is agricultural land has the capacity to be unfair or deceptive under the consumer protection Act. Schroeder v. Excelsior 177 Wn. 2d 94 at p.114. The court further stated that Mr. Schroeder still needed to prove that the actions of defendants were unfair or deceptive in this case Id. They were and the record on summary judgment demonstrates that. When Mr. Schroeder entered into

this relationship with Excelsior and Mr. Haberthur, he had every right as a consumer to expect that they would honor the requirements of the statute and not basically compel him to state that the land wasn't being used for agriculture and to waive the requirement, a practice the Supreme Court in Schroeder specifically disapproved of. The Trustee, while acting as the attorney for Excelsior, went ahead with the non-judicial foreclosure despite the fact that the land was being used for a timber crop and the other agricultural uses discussed above. The public interest is impacted by Excelsior's conduct because Excelsior frequently engages in making similar loans in Oregon and Washington as made clear by the testimony of Craig Sayer, a principal of Excelsior:

“So Excelsior, as I mentioned previously, is in the business of extending loans to individuals and entities that are incapable or (sic) receiving real estate financing at that Time through a bank, or individuals and entities that want to move quicker than a bank will typically afford. The fund itself, Excelsior, is comprised of 228 individual investors”.
Sayers (RP 760).

To the extent that the Court dismissed this case against James Haney. The court did so in error. James Haney did not move for summary judgment and his liability was not argued during summary judgment (See Final judgment of Dismissal (CP 405-406), Order Granting Summary Judgment (CP 402-404.

Haney and Excelsior also engaged in unfair practices when instead of deferring the 2007 loan payments for a period of time as Schroeder was advised by Haney, the loan required payments immediately. The loan was also for more than Schroeder needed to borrow. Excelsior engaged in unfair or deceptive acts when it significantly increased loan costs and the loan amount being fully aware that Mr. Schroeder could not pay off the loan under those terms. Also Excelsior took most of Mr. Schroeder's equity making it impossible to find a loan on terms that he could pay back. It is clear that the transaction's occurred in trade or commerce. The public interest is impacted because this isn't an isolated transaction. Excelsior is in the business of extending loans to people have a hard time obtaining conventional loans or want a faster turnaround time than can be provided by banks (Testimony of Craig Sayer, infra).

Underlying all causes of action is Mr. Schroeder's claim that the property was agricultural, the Trustee and beneficiary violated the act by non-judicially foreclosing on property knowing that Mr. Schroeder had claimed it was agricultural (at a minimum the fact that a majority of the property was timbered), and foreclosed anyway in violation of the Deed of Trust Act (DTA) The grantor of a deed of Trust does have a cause of action for damages for violation of the Deed of Trust act. Frias v. Asset Foreclosure Services 118 Wn 2d 412,426-427, 334 P 3d 529 (2014) (non-

waivable causes of action under the DTA) are limited to post sale actions).

III. MR. SCHROEDER IS ENTITLED TO ATTORNEY FEES BELOW AND ON APPEAL

The court awarded Excelsior Attorneys' fees in the amount of \$95,000 based on provisions in the deed of Trust and promissory note. Both documents provide that the prevailing party may be awarded its attorney fees (order Granting Attorneys' fees and costs)⁴. Should this court reverse the Trial court's ruling and hold that the land was used for agricultural purposes at the time of the signing of the deed of Trust and at the time of the issuance of the Trustees' deed, the attorneys' fee award of the court should also be reversed. Should this be the case, Mr. Schroeder requests attorney fees for the matters before the Trial court as the prevailing party. Mr. Schroeder is also entitled to attorneys' fees in the event he prevails before this court on his claims that Excelsior violated the consumer protection act and the deed of Trust act.

Mr. Schroeder is also entitled to recover his attorney fees and costs on appeal should he prevail. If a prevailing party is entitled to recover attorney fees in the Trial court, that party is also entitled to fees and costs

⁴ This Order was requested in Plaintiff's designation of clerk's Papers but doesn't appear to have been indexed by the clerk. A supplemental request will be made.

on appeal RAP 18.1, Deed of Trust.

CONCLUSION

The Trial court's decision of February 2015 must be reversed because the land was used for agricultural purposes at the time of the signing of the deed of Trust and at the time of the non-judicial foreclosure and issuance of the Trustee's deed. There is no dispute and the Trial court found that 80-90% of the land was timber. The DTA prohibits non-judicial foreclosure of land that is used for agricultural purposes which includes crops, livestock, etc. Timber is a crop and therefore within the definition of agricultural purposes in the statute. Moreover, the remainder of the property was also used for agricultural purposes such as keeping livestock, storing hay, and other agricultural uses. The timbered portion of the land was also used for the grazing of cattle. Accordingly either the timber alone or the timber plus the clearly agricultural use of the non-timbered portion of the land constitute agricultural use.

Summary judgment also must be reversed. The Supreme Court had already reversed summary judgment regarding Mr. Schroeder's claims once holding that Mr. Schroeder was entitled to a Trial on his claims. The second summary judgment motion was barred by *res judicata*. Moreover, Mr. Schroeder established the elements of a consumer protection act claim

based on the improper sale of the land in a non-judicial foreclosure and the Trustee's and by extension his principal Excelsior, breached the duty owed to Mr. Schroeder in a manner that could be deceptive. Mr. Schroeder was entitled to rely on the impartiality and fiduciary responsibility the Trustee owed to both parties and did rely on these duties. These violations of the DTA were also violations of the Consumer Protection Act for the same reasons. In addition to these reasons, Excelsior loaned money to Mr. Schroeder they knew he couldn't pay back on the terms extended and significantly increased his debt load on the property by charging exorbitant interest and fees.

Mr. Schroeder was damaged by the conduct of Excelsior and the Trustee. He has incurred substantial attorney fees and costs as a result of their actions and lost his use of the property. He is entitled to damages and costs of Attorney fees in the Trial court and on appeal.

By:

A handwritten signature in black ink, appearing to read "John C. Perry", is written over a horizontal line. The signature is stylized and somewhat cursive.

JOHN C. PERRY WSBA 16041

Attorney for Appellant

FILED

NOV 29 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON IN AND FOR
THE COUNTY OF STEVENS

STEVEN F SCHROEDER)	Case No: 10-2-00054-1
Plaintiff)	
vs.)	CERTIFICATE OF SERVICE OF NOTICE
)	OF APPEAL AND MOTION TO
PHILLIP J. HABERTHUR, as Trustee of a)	CONSOLIDATE APPEALS,
deed of trust, EXCELSIOR MANAGEMENT)	
GROUP, an Oregon limited liability company,)	
JAMES HANEY, and CLS MORTGAGE,)	
INC. a Washington Corporation,)	
Defendants)	

CERTIFICATION OF SERVICE

On November 29, 2016, I caused to be served by electronic means the BRIEF OF APPELLANT addressed to the following:

William R. Spurr
Law office of William R. Spurr
1001 4th Avenue Suite 4400
Seattle, WA 98154-1192

Bradley W. Anderson
Landerholm P.S.
805 Broadway St. Suite 1000
PO Box 1086
Vancouver, WA 98666

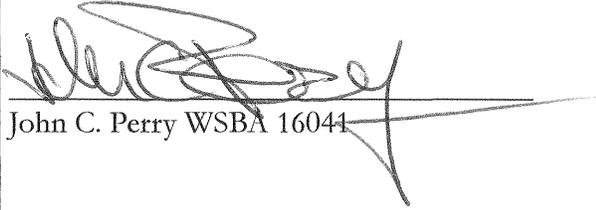
Phillip Haberthur
c/o Bradley W. Anderson
Landerholm P.S.
805 Broadway St. Suite 1000
PO Box 1086
Vancouver, WA 98666

CERTIFICATE OF SERVICE-1

John C. Perry
Attorney
1309 W. Dean Suite 101
Spokane, WA 99201
(509) 328-2188

1 I affirm that the information contained in this Declaration is true and correct.

2
3 Dated this 29th day of November, 2016 at Spokane, Washington

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5 A handwritten signature in black ink, appearing to read 'John C. Perry', is written over a horizontal line. The signature is stylized and extends to the right of the line.

6 John C. Perry WSBA 16041

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28 CERTIFICATE OF SERVICE-2

John C. Perry
Attorney
1309 W. Dean Suite 101
Spokane, WA 99201
(509) 328-2188

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