

Court of Appeals No. 33336-1-III  
Consolidated with Case No. 34551-3-III

FILED  
JAN 13, 2017  
Court of Appeals  
Division III  
State of Washington

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

---

STEVEN F. SCHROEDER,

Appellant,

v.

PHILLIP J. HABERTHUR, as trustee of a deed of trust, EXCELSIOR  
MANAGEMENT GROUP, LLC, an Oregon limited liability company,  
EXCELSIOR MORTGAGE EQUITY FUND II, LLC, and limited  
liability company, JAMES HANEY, and C.L.S. MORTGAGE, INC., a  
Washington corporation,

Respondents.

---

**RESPONDENTS' BRIEF**

---

BRADLEY W. ANDERSEN, WSBA No. 20640  
LANDERHOLM, P.S.  
805 Broadway Street, Suite 1000  
P.O. Box 1086  
Vancouver, WA 98666-1086  
(360) 696-3312  
Of Attorneys for Respondent  
Excelsior Mortgage Equity Fund, II, LLC

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
<b>I. INTRODUCTION</b> .....	1
<b>II. APPELLANT’S ASSIGNMENTS OF ERROR</b> .....	2
<b>III. STATEMENT OF THE ISSUES</b> .....	2
<b>IV. COUNTER STATEMENT OF FACTS</b> .....	3
<b>A. Property formerly owned by Schroeder’s Parents</b> .....	3
<b>B. Schroeder knew the difference between a deed of trust and mortgage</b> .....	4
<b>C. Schroeder reacquires Property and obtains loans from Excelsior</b> ..	4
<b>D. Schroeder obtains new loan from Excelsior</b> .....	8
<b>E. Schroeder’s use of Property when 2009 loan was obtained</b> .....	10
<b>F. Schroeder defaults on 2009 Loan</b> .....	11
<b>G. Schroeder Appeals</b> .....	12
<b>H. The Trial Court’s Findings of Fact</b> .....	12
<b>I. Trial Court’s Decision/Conclusions of Law</b> .....	13
<b>V. ARGUMENTS</b> .....	15
<b>A. Standard of Review</b> .....	15
<b>B. Schroeder Challenges the use of the Property at the two relevant times</b> .....	15
<b>C. Timber is not considered a crop under the Deed of Trust Act</b> .....	18
<b>D. Properties with no principal use do not satisfy the “principally used for agricultural purposes” express requirement</b> .....	21
<b>E. The Property had many uses, and no singular principal use</b> .....	22
<b>F. Excelsior is Entitled to Summary Judgment on Schroeder’s Remaining Claims</b> .....	24
<b>1. Schroeder Cannot Prove a CPA Violation</b> .....	27
<b>2. The loan transaction was not procedurally or substantively unconscionable</b> .....	28
<b>3. Excelsior did not violate the Real Estate Settlement Practices Act</b>	29

4. Excelsior was not in a civil conspiracy with anyone .....	30
5. Schroeder waived his claims.....	33
6. Excelsior is entitled to its attorneys' fees and costs on appeal .	35
VI. CONCLUSION .....	36

## TABLE OF AUTHORITIES

	<u>Page</u>
<b>Cases</b>	
<i>Alexander v. Sanford</i> , 181 Wn. App. 135, 325 P.3d 341 (2014).....	31
<i>Burnside v. Simpson Paper Co.</i> , 123 Wn.2d 93, 864 P.2d 937 (1994).....	15
<i>City of Tacoma v. State</i> , 117 Wn.2d 348, 816 P.2d 7 (1991).....	15
<i>Davis v. Dep't of Labor &amp; Indus.</i> , 94 Wn.2d 119, 615 P.2d 1279 (1980).....	2
<i>Del Rosario v. Del Rosario</i> , 152 Wn.2d 375, 97 P.3d 11 (2004).....	26
<i>Frizzell v. Murray</i> , 179 Wn.2d 301, 313 P.3d 1171 (2013).....	34, 35
<i>Gardner v. First Heritage Bank</i> , 175 Wn. App. 650, 303 P.3d 1065 (2013).....	16, 17, 21, 22
<i>Gossen v. JP Morgan Chase Bank</i> , 819 F.Supp.2d 1162 (2011) .....	31
<i>Nelson v. McGoldrick</i> , 127 Wn.2d 124, 896 P.2d 1258 (1995).....	29
<i>Plein v. Lackey</i> , 149 Wn.2d 214, 67 P.3d 1061 (2003).....	33
<i>Reiber v. City of Pullman</i> , 918 F.Supp.2d 1091, 96 Empl.Prac. Dec. P44,726 (2013).....	31
<i>Robel v. Roundup Corp.</i> , 148 Wn.2d 35, 59 P.3d 611 (2002).....	15
<i>Rogich v. Dressel</i> , 45 Wn.2d 829, 278 P.2d 367 (1954).....	29
<i>Schroeder v. Excelsior Mgmt. Group, LLC</i> , 177 Wn.2d 94, 297 P.3d 677 (2013).....	1, 12, 25, 28
<i>Schroeder v. Fageol Motors</i> , 86 Wn.2d 256, 544 P.2d 20 (1975).....	29
<i>Shepard v. Holmes</i> , 185 Wn. App. 730, 345 P.3d 786 (2014) .....	27
<i>Skagit State Bank v. Rasmussen</i> , 109 Wn.2d 377, 745 P.2d 37 (1987).....	26
<i>State v. Brown</i> , 92 Wn. App. 582, 965 P.2d 1102 (1998).....	28

*Sunnyside Valley Irrigation Dist. v. Dickie*,  
149 Wn.2d 873, 73 P.3d 369 (2003)..... 15  
*Yakima Cnty. (W. Valley) Fire Prot. Dist. No. 12 v. Yakima*,  
122 Wn.2d 371, 858 P.2d 245 (1993)..... 30

## I. INTRODUCTION

On February 28, 2013, the Washington Supreme Court remanded this Deed of Trust Act case to the Stevens County Superior Court to conduct a fact-finding hearing to permit the Appellant, Steven Schroeder, the opportunity to prove his property had been “used principally for agricultural purposes” on both the date he granted the Deed of Trust (March 31, 2009) and the date the trustee conducted the trustee's sale (February 19, 2010) (the “relevant dates”).<sup>1</sup> If Schroeder could prove his case, then the 2010 trustee’s sale would be deemed void and his rights to the property reinstated.

The Supreme Court further stated that if Excelsior knew at the time of the trustee’s sale that the property had been used for agricultural purposes on both of the relevant dates, then Schroeder could pursue his other causes of action. The Court also remanded the matter to allow Schroeder the opportunity to engage in discovery and pursue those other claims.

Fast forward to 2017. The trial court has now held a three-day fact-finding hearing in which Schroeder was given an opportunity to present his case. At the close of the case, the trial court found the property had **not** been used principally for agricultural purposes. Significantly, the trial court found the property was principally used to grow commercial timber. The trial court therefore upheld the 2010 trustee’s sale and ruled it was

---

<sup>1</sup> *Schroeder v. Excelsior Mgmt. Group, LLC*, 177 Wn. 2d 94, 297 P. 3d 677 (2013).

valid. Because it is supported by substantial evidence, the trial court's decision upholding the trustee's sale should be affirmed.

Further, after allowing Schroeder three additional years (2013-2016) to engage in more discovery, and because the trustee's sale was upheld, the trial court properly dismissed Schroeder's related claims on summary judgment.

This Court should therefore affirm the trial court's entire decision.

## II. APPELLANT'S ASSIGNMENTS OF ERROR

Appellant has only challenged the trial court's Findings of Fact numbers 28 and 29, and Conclusion of Law number 41.<sup>2</sup> Excelsior does not assign any errors and will instead focus only on the Findings and Conclusions challenged by Schroeder.<sup>3</sup>

## III. STATEMENT OF THE ISSUES<sup>4</sup>

Excelsior states the issues on appeal as follows:

1. A prerequisite to non-judicial foreclosures under Washington's Deed of Trust Act is that the property **not be** principally used for agricultural purposes on both the date the deed of trust was granted and the date of the trustee's sale. In this case, the trial court found the property was principally used to grow merchantable timber and not for

---

<sup>2</sup> Br. of App., p.12. Schroeder did not formally assign any errors to the Findings or Conclusions in the opening of his brief, as required by RAP 10.3. The Appellant's Assignments of Error appear to designate every ruling by the trial court, but the Brief only addresses those set forth above that were expressly challenged by Schroeder.

<sup>3</sup> "Unchallenged findings of fact become verities on appeal." *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 123, 615 P.2d 1279 (1980).

<sup>4</sup> Appellant did not provide a Statement of the Issues in his Brief.

agricultural purposes on both of the relevant dates. Does substantial evidence support the trial court's decision?

2. The Deed of Trust Act prohibits non-judicial foreclosures of property used principally for agricultural purposes on both of the relevant dates. The trial court here found that the property was primary used to grow commercial timber. Did the trial court err in ruling that commercial timber is not an agricultural use as intended under the Deed of Trust Act?

3. Summary Judgment can be granted if there are no disputed facts and the moving party is entitled to judgement as a matter of law. Despite having more than three years to conduct discovery and pursue his claims, Schroeder failed to demonstrate genuine issues of material fact. Is Excelsior entitled to Summary Judgment on the remaining claims?

4. The Deed of Trust and other loan documents contain an attorney fee provision for the prevailing party. Is Excelsior entitled to its attorneys' fees and costs if it prevails on appeal?

#### **IV. COUNTER STATEMENT OF FACTS**

##### **A. Property formerly owned by Schroeder's Parents**

Schroeder's parents owned the 200-acre subject Property before Schroeder purchased it from his mother in 1987 for \$40,000.<sup>5</sup> In 2000, Schroeder ran into financial troubles and was at risk of losing the Property through a Sheriff's Sale.<sup>6</sup> Schroeder sold the Property to a friend to raise

---

<sup>5</sup> RP 517.

<sup>6</sup> RP 484.

money to pay off his creditors.<sup>7</sup> He then re-acquired the Property in 2007 through a series of transactions.<sup>8</sup> At various times, Schroeder had borrowed money and used the Property as collateral to secure the loan.<sup>9</sup>

**B. Schroeder knew the difference between a deed of trust and mortgage**

Schroeder had a series of loans from 1993 to 2007.<sup>10</sup> He testified at trial that he knew the difference between a deed of trust and a mortgage; he knew that lenders had to use a mortgage on agricultural land; and that deeds of trust could only be used on property that was not agricultural in nature, where no farming or agricultural uses were taking place.<sup>11</sup> Indeed, Schroeder provided examples at trial of other lands he had owned in which he and the lender used a mortgage because the land was used for agricultural purposes.<sup>12</sup>

**C. Schroeder reacquires Property and obtains loans from Excelsior**

Schroeder reacquired the Property in 2007.<sup>13</sup> The Property consists of 200 acres, which is mostly sloped with land that is generally located on a mountainside.<sup>14</sup> At all relevant times, the Property was 90% comprised of growing commercial timber with the remaining 20 acres comprised of a

---

<sup>7</sup> RP 489.

<sup>8</sup> RP 543-44.

<sup>9</sup> RP 523-24, 540, and 587.

<sup>10</sup> RP 523-24, and 540.

<sup>11</sup> RP 490.

<sup>12</sup> RP 554.

<sup>13</sup> FF #1 and RP 540.

<sup>14</sup> FF #2.

home-site, outbuildings, a pole-barn built in 2004, and open fields or meadows.<sup>15</sup>

One Hundred Eighty (180) of the 200 acres have been enrolled in the Stevens County current-use tax deferred program as “designated forest land.”<sup>16</sup> The remaining 20 acres is taxed as improved land due to the dilapidated house, outbuilding, pole barn and other improvements.<sup>17</sup>

County Deputy Assessor Vicki Neilson testified that the Property was properly designated as forest land, and was not suitable as designated agricultural land.<sup>18</sup> She also confirmed that Schroeder had received significant tax breaks by having his Property registered in the County’s current use program as designated **forest land**.<sup>19</sup>

In 2007, Schroeder needed to obtain a loan to reacquire the Property. He visited James Haney, a mortgage broker, at CLS Mortgage.<sup>20</sup> Haney, an experienced loan officer, was experienced with financing rural loans and knew the difference between agricultural and non-agricultural land.<sup>21</sup> He also knew CLS would not be interested in lending on agricultural property.<sup>22</sup> Schroeder went to CLS because he had borrowed money from CLS in the past, and Haney was familiar with his other properties and the subject Property.<sup>23</sup>

---

<sup>15</sup> FF #2.

<sup>16</sup> FF #3 and RP 684-85.

<sup>17</sup> FF#3 and RP 687-88.

<sup>18</sup> RP 677, 680, 682, 690, and 699.

<sup>19</sup> FF #4 and RP 682.

<sup>20</sup> FF #5 and RP 648.

<sup>21</sup> FF #5 and RP 632-33.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, and RP 640.

Haney interviewed Schroeder about the Property, reviewed the records, and determined the Property was not “farm” property and did not require special review.<sup>24</sup> Haney testified that Schroeder never made any representations to him regarding the Property being used for agricultural purposes, and Haney had no knowledge that Schroeder was claiming otherwise.<sup>25</sup>

When CLS denied Schroeder’s loan, Haney forwarded Schroeder’s application to Excelsior.<sup>26</sup> Haney knew Excelsior did not make agricultural loans. Had Haney known Schroeder’s Property was being used for agricultural purposes, or that Schroeder was claiming it was agricultural property, he would have referred Schroeder to someone else.<sup>27</sup> Haney did not tell Excelsior the Property was being used for agricultural purposes.<sup>28</sup>

Excelsior approved Schroeder’s loan request and lent him \$317,250 under the terms of a Promissory Note.<sup>29</sup> On June 12, 2007, Schroeder executed a Promissory Note (“Note”), promising to repay the loan within 12 months.<sup>30</sup>

Schroeder also granted Excelsior a Deed of Trust to secure the Promissory Note.<sup>31</sup> The Deed of Trust included a statement that the

---

<sup>24</sup> FF #6, and RP 637, 657-59.

<sup>25</sup> *Id.*

<sup>26</sup> FF #7 and RP 663.

<sup>27</sup> *Id.*; and RP 659, 664.

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

<sup>29</sup> FF #8.

<sup>30</sup> *Id.*

<sup>31</sup> FF #9.

Property was not being used for agricultural activities.<sup>32</sup> Excelsior reasonably believed the Property was used mainly to maintain the old homestead and to grow commercial timber.<sup>33</sup> Excelsior also had no reason to believe Schroeder was not being truthful at the time he signed the 2007 Deed of Trust.<sup>34</sup> Excelsior further had no reason to believe the Property was being principally used for agricultural purposes.<sup>35</sup>

Around the same time, Schroeder obtained a separate loan from Numerica Credit Union and secured the loan through two of his other properties.<sup>36</sup> Schroeder granted Numerica a mortgage on one parcel and a Deed of Trust on the other parcel because Schroeder knew a mortgage was required for the one parcel that was used for agricultural purposes, but not his other parcel.<sup>37</sup>

In 2008, Schroeder defaulted on the Excelsior loan.<sup>38</sup> Excelsior therefore initiated a non-judicial foreclosure of the Deed of Trust due to his default.<sup>39</sup> A Trustee's Sale was set for January 9, 2009. However, before the date for the Trustee's Sale, Schroeder filed a lawsuit to try to stop the sale.<sup>40</sup>

---

<sup>32</sup> *Id.*, and Ex. 109.

<sup>33</sup> *Id.*, and RP 779.

<sup>34</sup> *Id.*, and RP 809.

<sup>35</sup> *Id.*, and RP 664, 767, and 800.

<sup>36</sup> FF #10., and RP 552-54.

<sup>37</sup> *Id.*, and Ex. 184.

<sup>38</sup> FF #12 and Ex. 143.

<sup>39</sup> Ex. 152.

<sup>40</sup> FF ##13-14, and Ex. 144.

In his 2008 lawsuit, Schroeder alleged that because the property was agricultural, Excelsior needed to conduct a judicial foreclosure.<sup>41</sup> To avoid Schroeder's challenge, and to avoid any delays, Excelsior initiated a separate lawsuit on January 29, 2009, to judicially foreclose the Property.<sup>42</sup>

**D. Schroeder obtains new loan from Excelsior**

While the two lawsuits were pending, Schroeder and his attorney approached Excelsior about granting Schroeder an additional year to repay the loan.<sup>43</sup> Excelsior agreed, but only if Schroeder would (1) dismiss his lawsuit, (2) agree to not allow the Property to be used for agricultural purposes, and (3) sign a new Deed of Trust and other loan documents to confirm his previous promise and representations that the Property was not being used, and would not be used, for agricultural purposes until the loan was repaid.<sup>44</sup> Schroeder agreed, the loan was extended, and the foreclosure lawsuit dismissed.<sup>45</sup>

On March 31, 2009, Schroeder signed a new Note and Deed of Trust.<sup>46</sup> This new Deed of Trust included a specific provision where Schroeder warranted that the "Property has not been used, and will not be used, for agricultural purposes."<sup>47</sup> Excelsior required Schroeder to execute

---

<sup>41</sup> FF #14, CP 165-174, and Ex. 144.

<sup>42</sup> FF #15 and Ex. 146.

<sup>43</sup> FF #16., and RP 585, 587.

<sup>44</sup> *Id.*, and RP 689-89, 806.

<sup>45</sup> *Id.*

<sup>46</sup> RP 592 and Ex. 148.

<sup>47</sup> RP 593 and Ex. 117.

a new Loan Agreement for the 2009 Loan.<sup>48</sup> Section 3.1.6 expressly provides that “[e]very representation, warranty, covenant and agreement contained in every Loan Document...are true and accurate in all material respects.”<sup>49</sup> Schroeder signed an Affidavit of Business Purposes in which he again represented that the proceeds of the loan were not being used for agricultural purposes and that the Property had not been used, and would not be used, for agricultural purposes.<sup>50</sup> Schroeder also signed a Certificate and Authorization where he certified under penalty of perjury that the representations he had made in the Deed of Trust were true and complete.<sup>51</sup>

Schroeder testified that his attorney (Matthew Sanger, WSBA #6717) advised him on the loan documents.<sup>52</sup> He knew he was signing a Deed of Trust and not a mortgage.<sup>53</sup> He also knew he had signed documents stating Excelsior was relying upon his representations and statements, and that it was a crime to make false statements on the loan documents.<sup>54</sup>

Schroeder also testified that he had not borrowed the funds for agricultural purposes (e.g., farm equipment).<sup>55</sup> He instead used the money

---

<sup>48</sup> Ex. 200.

<sup>49</sup> FF #19 and Ex. 200.

<sup>50</sup> *Id.*, Ex. 204, and RP 601-02.

<sup>51</sup> *Id.*, and Ex. 203.

<sup>52</sup> RP 603.

<sup>53</sup> RP 603.

<sup>54</sup> RP 604-05.

<sup>55</sup> RP 601-02.

to repay other debt.<sup>56</sup> Schroeder also knew Excelsior was not taking any security interest in crops because there were no crops on the Property.<sup>57</sup>

In addition to signing a new Deed of Trust, Schroeder's attorney executed a Stipulated Motion and Order of Dismissal with Prejudice ("Order of Dismissal").<sup>58</sup> The Order of Dismissal provided that Schroeder: (1) shall not be allowed to again allege that the Property is used for agricultural purposes; and (2) any future Deed of Trust executed by Schroeder to Excelsior need not be judicially foreclosed and may be foreclosed non-judicially under RCW 61.24.<sup>59</sup> While the Washington Supreme Court held that Schroeder could not waive his statutory rights, the trial court found the Order of Dismissal as further and corroborative evidence of Schroeder's various representations to Excelsior.<sup>60</sup> Because it was the truth, Excelsior believed the Property was not being used for agricultural purposes.<sup>61</sup>

#### **E. Schroeder's use of Property when 2009 loan was obtained**

When he obtained the 2009 loan, the Property was still in the designated timber tax classification.<sup>62</sup> Schroeder did not harvest any of the timber from the Property but would occasionally clear some brush and cut firewood.<sup>63</sup> Schroeder mainly used the Property for scrapping metal,

---

<sup>56</sup> RP 601-02.

<sup>57</sup> RP 594.

<sup>58</sup> Ex. 147.

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

<sup>60</sup> FF #22.

<sup>61</sup> RP 809.

<sup>62</sup> RP 687-88.

<sup>63</sup> RP 394 and 401.

welding, storing logging equipment, and storing antique vehicles.<sup>64</sup> He never took hay off the 200 acres.<sup>65</sup>

One of the primary uses was to store cars; Schroeder estimated he had over \$1 million in cars stored on the Property.<sup>66</sup> He also stored logging equipment for his logging business.<sup>67</sup> He kept spare tires on the Property.<sup>68</sup>

#### **F. Schroeder defaults on 2009 Loan**

After signing the new loan documents, Schroeder defaulted on the new loan, therefore prompting Excelsior to once again initiate non-judicial foreclosure to collect on the Promissory Note.<sup>69</sup> Excelsior, after giving all of the required notices, set a Trustee Sale. However, Schroeder once again sued to try to stop the Trustee Sale.<sup>70</sup>

Once again, Schroeder claimed the Property was principally being used for agricultural purposes and therefore had to be judicially foreclosed.<sup>71</sup> The trial court initially granted an *ex parte* Temporary Restraining Order, but quickly vacated the TRO once it learned the facts.<sup>72</sup> The Trustee proceeded with the trustee's sale, and the property was sold to Excelsior as the highest bidder on February 29, 2010.<sup>73</sup>

---

<sup>64</sup> RP 418.

<sup>65</sup> RP 425 and 427.

<sup>66</sup> RP 437.

<sup>67</sup> RP 462.

<sup>68</sup> RP 476 and RP 506-07.

<sup>69</sup> FF #23 and Ex. 152.

<sup>70</sup> Ex. #152 and CP 158-164.

<sup>71</sup> CP 158-164.

<sup>72</sup> FF #25.

<sup>73</sup> FF #26 and Ex. 153.

### **G. Schroeder Appeals**

Schroeder appealed the trial court's order dissolving the Restraining Order. The Washington Supreme Court reversed and directed the trial court to hold a hearing to determine whether the Property was used principally for agricultural purposes at the two relevant times (when the Deed of Trust was granted and on the date of the Trustee's Sale).<sup>74</sup>

### **H. The Trial Court's Findings of Fact**

In 2015, after a three day hearing, the trial court found the Property was principally used to grow commercial timber and not for agricultural purposes.<sup>75</sup> While the Property's principal use was to grow commercial timber, the trial court found that Schroeder used the Property for many other purposes, including storing and selling a large number of antique vehicles, storing and processing scrap metal, renting out a space for a trailer, welding and mechanical work, a residence, headquarters for Schroeder's logging business, and storing personal property.<sup>76</sup> Schroeder did have a few cows on the Property, but they mainly spent much of the year grazing on the surrounding properties as part of the area's Open Range.<sup>77</sup> A large percentage of Schroeder's pole barn was used for non-agricultural purposes.<sup>78</sup>

---

<sup>74</sup> *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013).

<sup>75</sup> FF #27.

<sup>76</sup> FF #28.

<sup>77</sup> FF #29.

<sup>78</sup> *Id.*

The trial court also found Schroeder to be an experienced and smart businessman.<sup>79</sup> Schroeder did not have any problems reading or understanding documents he was asked to review during his testimony. Further, Schroeder testified he knew and understood the difference between a mortgage and deed of trust, and if the property were used principally for agricultural purposes, then Schroeder would need to sign a mortgage. Importantly, Schroeder readily agreed that a Deed of Trust was appropriate given his use of the Property.<sup>80</sup>

The trial court found Schroeder was being truthful when he signed the 2009 Deed of Trust and made other representations that the Property was not being principally used for agricultural purposes. Schroeder did not intend for the Property to be used principally for agricultural purposes.<sup>81</sup> The trial court further found that Schroeder changed his position only to try to avoid Excelsior's non-judicial foreclosure.<sup>82</sup>

Since Schroeder does not challenge these findings, they are binding and verities on appeal.

#### **I. Trial Court's Decision/Conclusions of Law**

The trial court concluded the Property was used principally to grow timber on the two relevant dates.<sup>83</sup> The trial court upheld the Trustee's Sale under the Deed of Trust Act.<sup>84</sup> The trial court further

---

<sup>79</sup> FF #32.

<sup>80</sup> *Id.*

<sup>81</sup> FF #34.

<sup>82</sup> FF #35.

<sup>83</sup> C/L #43.

<sup>84</sup> C/L #45.

quieted title to the Property to Excelsior and awarded Excelsior its attorneys' fees and costs.<sup>85</sup>

A year later, the trial court granted summary judgment to Excelsior on all of Schroeder's remaining claims (Consumer Protection Act, Unconscionability, Violations of the Real Estate Settlement Practices Act, and Civil Conspiracy).<sup>86</sup> Schroeder moved for reconsideration on the grounds that he had changed attorneys and that attorney did not have time to prepare a response to Excelsior's summary judgment motion.<sup>87</sup> The trial court granted Schroeder's Motion for Reconsideration and gave him additional time to present evidence to support his claims.

The trial court later granted Excelsior's Motion for Summary Judgment on June 1, 2016.<sup>88</sup> Excelsior was awarded \$95,000 in attorneys' fees and costs on June 14, 2016, and a Final Order of Dismissal was entered May 31, 2016.<sup>89</sup>

Schroeder appealed the Findings of Fact and Conclusions of Law on May 14, 2015, then that appeal was stayed until the trial court dismissed the remaining claims on summary judgment and issued a Final Order and Judgment on May 31, 2016.<sup>90</sup> Schroeder consolidated the two matters on appeal.

---

<sup>85</sup> CP 154.

<sup>86</sup> CP 274-280.

<sup>87</sup> CP 282.

<sup>88</sup> CP 402-04.

<sup>89</sup> CP 458-463.

<sup>90</sup> CP 224-28.

## V. ARGUMENTS

### A. Standard of Review

On an appeal from a bench trial, an appellate court's review is limited to determining whether substantial evidence supports the trial court's findings of fact and, if so, whether the findings support the trial court's conclusions of law.<sup>91</sup> "Substantial evidence" is "a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true."<sup>92</sup> Unchallenged findings of fact are verities on appeal.<sup>93</sup> This Court defers to the finder of fact on issues regarding witness credibility and the weight of conflicting evidence.<sup>94</sup> This Court reviews *de novo* a trial court's conclusions of law.<sup>95</sup>

Excelsior agrees with the standard of review of summary judgment orders set forth by Schroeder. Such orders are reviewed *de novo* on appeal.<sup>96</sup>

### B. Schroeder Challenges the use of the Property at the two relevant times

On appeal, Schroeder challenges the use of the Property at the two relevant dates: when the Deed of Trust was granted and the Trustee's Sale. The findings are fully supported by the record and evidence presented at trial, as set forth above, and most of the testimony as to the uses of the Property came directly from Schroeder (growing timber, RP 394; storage

---

<sup>91</sup> *City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991).

<sup>92</sup> *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003).

<sup>93</sup> *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

<sup>94</sup> *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 108, 864 P.2d 937 (1994).

<sup>95</sup> *Sunnyside*, 149 Wn.2d at 880.

<sup>96</sup> *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004).

of cars, equipment, and hay, RP 435, 437, 462, 469, 476; did not grow crops, keep cattle, and only had four pigs on 200 acres, RP 425, 474). Schroeder's main argument on appeal is that timber is a "crop," and should be deemed agricultural property. Schroeder is mistaken.

To prevail on appeal, Schroeder must prove that the non-agricultural use statement in his Deed of Trust was "false on the date the deed of trust was granted...and false on the date of the trustee's sale." The statute's use of the double negatives clarifies that the debtor must prove the falsity of the statement at *both* the time the deed of trust was signed *and* at the time of the trustee's sale.<sup>97</sup> To say it more simply, a non-judicial foreclosure is allowed if the statement is true as of *either* the date when the deed of trust is signed or the date of the Trustee's Sale.

Although the Act has seen over 10 amendments since its inception, the relevant and most significant amendments occurred in 1998.<sup>98</sup> The 1998 Amendments were born out of then-Governor Gary Locke's veto of amendments the Washington Legislature passed in 1997.<sup>99</sup> Governor Locke "urged" the drafters of the bill to work together with the Bar

---

<sup>97</sup> See Appendix 1, Gordon Tanner's Executive Summary of 1998 Proposed Amendments to Deed of Trust Act.

<sup>98</sup> *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 303 P.3d 1065 (2013). In 1998, Gordon Tanner, a Stoel Rives attorney, chaired the Deed of Trust Act Working Group Members, which was tasked with providing the Legislature guidance with amendments to the Deed of Trust Act. In connection, the committee drafted The Executive Summary of 1998 Proposed Amendments to the Washington Deed of Trust Act, which Gordon Tanner authored. The Summary provides a brief section-by-section commentary on the bill and it repeats the essential features of the 1998 amendments. *Gardner*, 175 Wn. App. at 661 (footnote 18). The Court in *Gardner* referenced Mr. Tanner's Summary on multiple occasions and even based its reasoning upon the Summary.

<sup>99</sup> Tanner's Summary, page 11A-3.

Association to develop legislation, at which point the “Working Group” was assembled and comprised representatives of consumers, guarantors, title insurers, trustees, financiers, and others interested in the financing of real estate and the foreclosure process.<sup>100</sup>

Of particular importance was the extensive attention the Working Group gave to the exclusion of agricultural land (regarding non-judicial foreclosures).<sup>101</sup> The Working Group considered the unique nature of agricultural land where crops growing on the land could often exceed the value of the underlying ground, and where those crops may not be harvested by the time a trustee’s sale occurred.<sup>102</sup> Because of this unique nature, the 1998 Amendments provided farmers, orchardists, and other owners of agricultural property facing foreclosure, the opportunity to harvest seasonal crops from their land, since under the Act, foreclosure of agricultural property must still be accomplished judicially.<sup>103</sup> Specifically, judicial foreclosure would allow the owners of agricultural land a one-year redemption period.<sup>104</sup>

It is also significant to note that, prior to the 1998 amendments, the Act allowed a non-judicial foreclosure where that property was not being “used principally for agricultural or farming purposes.”<sup>105</sup> The Group determined there was too much confusion regarding figuring out the

---

<sup>100</sup> Tanner’s Summary, pages 11A-3-4.

<sup>101</sup> Tanner’s Summary, page 11A-6.

<sup>102</sup> Tanner’s Summary, page 11A-6.

<sup>103</sup> Tanner’s Summary, page 11A-7.

<sup>104</sup> *Gardner*, 175 Wn. App. 650, 669 (footnote 26) and Tanner’s Summary, page 11A-7.

<sup>105</sup> Tanner’s Summary, page 11A-7.

difference between “agricultural” and “farming” purposes. The Group rectified this problem by tailoring the agricultural use exception to the approach found in the revisions of UCC Article 9 (which were being finalized by the National Council of Commissioners on Uniform State Laws at the time of the Group’s finding).<sup>106</sup> Similar to the language found in the UCC, the 1998 amendments removed “farming” from the statute and replaced it with a definition for “agricultural purposes.”<sup>107</sup> The legislature intended to provide a uniform approach to agricultural uses by having the Deed of Trust Act use the UCC definitions.<sup>108</sup>

**C. Timber is not considered a crop under the Deed of Trust Act**

At all relevant times, the Property was designated timberland as over 80 percent of the Property contains growing timber, resulting in a tax benefit to Schroeder. The County had designated 180 of the 200 acres as timberland, even though Schroeder had the option to have the Property classified or designated as agricultural land.

There can be no doubt that the Property’s main purpose and value is as timberland. This therefore begs the question: is timberland a crop? According to the main drafter of the 1988 Amendments, the County Assessor’s office, and the trial court, the answer is “**no**.”

RCW 61.24.030(2) defines “agricultural purposes” as “an **operation that produces** crops, livestock, or aquatic goods.”<sup>109</sup> While the

---

<sup>106</sup> Tanner’s Summary, page 11A-7.

<sup>107</sup> Tanner’s Summary, page 11A-7 and RCW 61.24.030(2).

<sup>108</sup> Tanner’s Summary, pages 11A-7-9.

<sup>109</sup> Tanner’s Summary, page 11A-7 and RCW 61.24.030(2) (emphasis added).

Legislature may not have expressly defined what constitutes “crops,” it is clear that standing timber was not intended to be included within the scope of that definition.

The undisputed purpose of the agricultural exception to non-judicial foreclosure was to give farmers facing foreclosure the opportunity to harvest seasonal crops from their land by affording them the one-year redemption right that comes with a judicial foreclosure. But commercial timber stands do not lend themselves to annual harvest as contemplated by the term “crop.” Except for perhaps Christmas trees, there is no authority for the proposition that standing timber is considered a “crop” under the act.

The legislature’s use of the word “operation” is also key to fully understand its intent. *Webster’s New World Dictionary* (1995) defines operation to mean: “being in action or at work.” It’s a stretch to include a 30 to 70 year growing cycle as an ongoing operation. Mr. Tanner, the main drafter of the 1998 Amendments, supports this interpretation.

As laid out by Mr. Tanner’s article, the Legislature answered this question by wanting the definition of “agriculture” to be identical to the UCC’s definition of “farm use.” In the “comments” to the UCC, the drafters specifically singled out and excluded “standing timber” from the definition of “farm products.”<sup>110</sup>

---

<sup>110</sup> Tanner’s Summary, page 11A-7 and UCC Article 9-102 (definitions and comments).

The Washington Legislature also revised Title 62A in 2000 to expressly exempt “standing timber” from the definition of “crops.”<sup>111</sup> RCW 62A.9A-102’s Comments verify this interpretation.<sup>112</sup>

As Mr. Tanner noted, “standing timber is not a ‘crop’ under the revised statute, and thus a deed of trust on such land may be non-judicially foreclosed.”<sup>113</sup> It is clear that the Legislature did not intend to include “standing timber” within the definition of “agricultural purposes” under RCW 61.24.030(2).

Therefore, Schroeder cannot claim that the “standing timber” on the Property qualifies as an “agricultural” product, or that the growing of timber is the type of agricultural “operation” that was to preclude a non-judicial foreclosure. Washington case law also supports Excelsior’s position.

///

///

---

<sup>111</sup> RCW § 62A.9A-102(34) “Farm products” means goods, other than standing timber, with respect to which the debtor is engaged in a farming operation and which are: (A) Crops grown, growing, or to be grown, including: (i) Crops produced on trees, vines, and bushes; and (ii) Aquatic goods produced in agricultural operations; (B) Livestock, born or unborn, including aquatic goods produced in aqua cultural operations; (C) Supplies used or produced in a farming operation; or (D) Products of crops or livestock in their unmanufactured states.

<sup>112</sup> Under the “Official Comment” section:

4. Goods-Related Definitions.

a. “Goods”; “Consumer Goods”; “Equipment”; “Farm Products”; “Farming Operation”; “Inventory.” “The revised definition of “farm products” clarifies the distinction between crops and standing timber and makes clear that aquatic goods produced in aqua cultural operations may be either crops or livestock. Although aquatic goods that are vegetable in nature often would be crops and those that are animal would be livestock, this Article leaves the courts free to classify the goods on a case-by-case basis. See section 9-324, comment 11.

<sup>113</sup> Tanner’s Summary, Pages 11A-7-9.

**D. Properties with no principal use do not satisfy the “principally used for agricultural purposes” express requirement**

Division I of the Washington Court of Appeals recently decided a case very similar to the instant case. In *Gardner v. First Heritage Bank*, a developer purchased approximately 153 acres of undeveloped land.<sup>114</sup> The developer platted the land into ten 10-acre lots and three contiguous lots (lots 10, 11, and 12) varying in acreage. The lawsuit eventually involved the three contiguous lots. On lot 10, the developer built his home. On lot 11, the developer and his partner built a large barn facility for a new horse boarding and training business. The developer later obtained a construction loan to begin construction on lot 10 only. The developer secured the loan by signing a deed of trust, which also contained a statement that “lot 10” was not being used principally for agricultural purposes.

A year after obtaining the first loan, the developer refinanced the loan by executing another deed of trust secured by lots 10, 11, and 12. This deed also contained the required statement that the property was not being principally used for agricultural purposes.

Unfortunately, the economic downturn affected the developer, forcing the developer into default. Because of the default, the bank conducted non-judicial foreclosures in succession on each parcel. The developer objected to the non-judicial foreclosure of lot 10 because, he claimed, the property was being used for “agricultural” activities. The

---

<sup>114</sup> 175 Wn. App. 650, 303 P.3d 1065 (2013).

bank argued that while some agricultural activities were occurring on lot 10, the developer was not “principally” using lot 10 for agricultural purposes. The Court agreed with the bank.

The developer argued that he used lot 10 to pasture horses. But the court rejected this argument. The court noted that the developer took out a loan to construct a home for his family, and that the home he built was used by his family as their residence. The court also noted that the paperwork the developer signed represented and warranted that the primary purpose of the loan was “personal, family, or household purposes or personal investment,” and not for agricultural purposes. The fact that the developer was using some of the property for agricultural purposes could not overcome the fact that the property was also being used for other purposes: “Some activity on the property does not establish that it is used ‘principally for agricultural purposes,’ as set forth in the statute.”<sup>115</sup>

**E. The Property had many uses, and no singular principal use**

In this case, Schroeder testified to many and various uses of the Property. He used the Property to store and work on old cars.<sup>116</sup> He also made money from the Property providing mechanical work for customers.<sup>117</sup> He also bragged about how much he could make from his scrap metal operation.<sup>118</sup> And most important of all, 80 percent of the Property is comprised of merchantable timber.<sup>119</sup>

---

<sup>115</sup> *Id.*, at 673.

<sup>116</sup> FF #28.

<sup>117</sup> FF #30.

<sup>118</sup> *Id.*; and RP 439, 437.

<sup>119</sup> FF #2.

Schroeder testified that he does not grow hay or other crops on the Property.<sup>120</sup> Add to this the fact that the documents Schroeder signed also warranted and represented that he was not using the Property for agricultural purposes.<sup>121</sup>

Another key component is the property's owner's subjective intent. While an outsider may view a property as having one purpose, the owner may have a different view. For example, an owner could have his primary residence in town and a vacation home at the coast. To many, the person's vacation home may appear to be the person's primary residence. However, the person who owns the property knows their intentions the best. The "principal" use may often be in the eye of the beholder.

Here, Schroeder represented to the Stevens County Assessor's office that the Property was being primarily used to grow timber.<sup>122</sup> The County Assessor allowed the Property to remain in the Designated Timber Land tax deferred program.<sup>123</sup> He received the tax benefit of having his Property placed in the tax-deferred program.<sup>124</sup> This is key because Schroeder could have also requested that the Property be placed in the County's Agricultural Land Program. But, he did not.

Schroeder promised Excelsior to not allow his Property to be used principally for agricultural purposes. Schroeder knew the difference between a mortgage and a Deed of Trust as early as 2007. If he believed

---

<sup>120</sup> RP 425 and 427.

<sup>121</sup> Exs. 200, 203, and 204.

<sup>122</sup> RP 687-88.

<sup>123</sup> RP 690 and 693.

<sup>124</sup> RP 682.

the Property was truly agricultural, why did he agree to sign Deeds of Trust on Property he claims was agricultural on two separate occasions? It is because he knew that the Property's primary use was not as a working ranch.

Finally, Schroeder represented to Excelsior, and to the Court, he was not principally using the Property for agricultural purposes.<sup>125</sup> More importantly, in return for not having his Property foreclosed upon, and to have a one-year extension, Schroeder also promised to not allow the Property to be "principally" used for agricultural purposes for at least the one-year duration of the loan.

Only on the eve of the Trustee's Sale in February 2010, three months after he received notice from Excelsior that they intended to foreclose on the Property, did Schroeder attempt to put the brakes on the process by claiming that, despite his promises, the Property actually was being used primarily to raise cows.

This is not indicative of an individual that truly believes he was using the Property for agricultural purposes. It instead is more consistent with a man who wants to manipulate the system to protect his current needs.

**F. Excelsior is Entitled to Summary Judgment on Schroeder's Remaining Claims**

Schroeder also appeals the trial court's granting of Excelsior's summary judgment motion. His primary argument on appeal is that the

---

<sup>125</sup> Ex. 147.

“law of the case” precluded the trial court from granting Excelsior’s motions for summary judgment.<sup>126</sup> But, the Washington Supreme Court held it was in error to dismiss the remaining claims on summary judgment on the basis of waiver resulting from his failure to restrain the trustee’s sale if the sale was void.<sup>127</sup>

Importantly, the Supreme Court noted that Schroeder was entitled to a continuance and time to conduct discovery and develop his claims.<sup>128</sup> The Court further stated that it was error to dismiss the claims for damages on “summary judgment at that stage of the proceedings.” The Court did not hold that Schroeder was entitled to a trial on those claims as Schroeder argues.

Following the Supreme Court’s ruling, discovery was conducted. More than three years elapsed from the date the case was published to the time the trial court granted Excelsior’s summary judgment motions. Further, a three-day trial on the merits regarding the use of the Property on the two critical dates occurred. Schroeder had sufficient time to develop his theories and defenses, and to put forth admissible evidence to defeat Excelsior’s motions.

As to the actual merits, Schroeder alleges that non-judicially foreclosing agricultural land violates the Deed of Trust Act, and gives rise to damages.<sup>129</sup> Schroeder also alleges, for the first time, that the trustee

---

<sup>126</sup> Br. of App., p.14.

<sup>127</sup> 177 Wn.2d 94, 113-15, 297 P.3d 677 (2013).

<sup>128</sup> *Id.* at 114.

<sup>129</sup> Br. of App., p. 17.

breached a duty owed to Schroeder by allegedly foreclosing non-judicial property.<sup>130</sup> However, the only claim asserted against the trustee was for injunctive relief, and Schroeder cannot raise new claims or theories of liability on appeal.<sup>131</sup>

Schroeder next argues that he was not aware that he had to make payments on his loan, when the loan documents he signed state otherwise, and the fees and interest charged by Excelsior were excessive, in his opinion.<sup>132</sup> Schroeder was capably represented by his attorney when he obtained the second loan from Excelsior.<sup>133</sup> He is charged with having read all of the loan documents, and he signed all of the loan documents stating that he read and understood them.<sup>134</sup>

The trial court specifically found that Schroeder is an experienced businessman.<sup>135</sup> Since this was a commercial loan, the usury laws do not apply.<sup>136</sup> Next, Schroeder complains that Excelsior should have turned down his offer to make a new loan in 2009 because he lacked the income to repay the loan.<sup>137</sup> These arguments do not support his claims for violation of the Consumer Protection Act, Unconscionability, Violation of the Real Estate Settlement Practices Act, Violation of the Mortgage

---

<sup>130</sup> *Id.*

<sup>131</sup> Wash. R. App. P. 2.5(a).

<sup>132</sup> Br. of App., p.18-20.

<sup>133</sup> RP 603.

<sup>134</sup> *See Del Rosario v. Del Rosario*, 152 Wn.2d 375, 385, 97 P.3d 11 (2004) (parties have duty to read contracts they sign) and *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 381, 745 P.2d 37 (1987) (party that voluntarily signs document cannot attempt to later avoid it by claiming ignorance about its contents).

<sup>135</sup> FF# 32 and 33.

<sup>136</sup> RCW 19.52.080.

<sup>137</sup> Br. of App., p.20.

Brokers Practices Act, or Civil Conspiracy. Excelsior is entitled to summary judgment dismissing these claims as a matter of law.

**1. Schroeder Cannot Prove a CPA Violation**

For Schroeder to successfully claim that Excelsior's conduct violated the CPA, he must prove, by a preponderance of the evidence, each of the following: (1) an unfair or deceptive act or practice (2) occurred in trade or commerce, (3) affecting the public interest, (4) and injures the plaintiff in his business or property, and (5) the injury is causally linked to the unfair or deceptive act.<sup>138</sup>

Schroeder's only alleged "deceptive practice" is that Excelsior purportedly non-judicially foreclosed agricultural property. Schroeder's claim fails as a matter of law unless he can convince this court to reverse the trial court's Findings of Fact and Conclusions of Law regarding the use of the Property. Schroeder is the party responsible for claiming, in multiple documents, that the Property was not used for agricultural purposes then later retracting those statements in a last ditch effort to save his land. Excelsior acted well within its bounds throughout its business interactions with Schroeder. Because Schroeder guaranteed the Property was not used for agricultural purposes, proceeding with the foreclosure of the land when Schroeder failed to make his payments was not an unfair act by Excelsior.

---

<sup>138</sup> *Shepard v. Holmes*, 185 Wn. App. 730, 345 P.3d 786 (2014).

Schroeder also admits he never spoke to or relied upon any representations made by Excelsior. He instead relied upon his own review of the documents; Excelsior made no representations outside of what is contained in the four corners of the documents. Moreover, Schroeder admits that he was represented by legal counsel during the negotiations of the second Loan Documents.

As stated above, the Supreme Court in this matter has already held that, unless Schroeder can prove that the Trustee's Sale was void, his CPA claim must fail, at least on the ground that Excelsior engaged in unfair or deceptive conduct regarding the foreclosure.<sup>139</sup>

**2. The loan transaction was not procedurally or substantively unconscionable**

Schroeder's Brief does not contain any analysis on his unconscionability claim, which is reason enough to deny his appeal. Nonetheless, it appears that Schroeder's arguments are the same: he was stuck with a loan with high loan fees. In examining an unconscionability claim, the Court considers the circumstances at the time the contract was made.<sup>140</sup> To prevail, a party must prove that the terms of the contract "shock the conscience," are "monstrously harsh," or "exceedingly

---

<sup>139</sup> *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d at 114, "Similarly, the act of a loan servicer or other beneficiary to proceed with a non-judicial foreclosure on land it knows or should know to be agricultural land in clear violation of the statute has the capacity to be unfair or deceptive. However, it remains for Schroeder to prove that this was actually unfair or deceptive under the facts of this case."

<sup>140</sup> *State v. Brown*, 92 Wn. App. 582, 965 P.2d 1102 (1998).

calloused.”<sup>141</sup> In other words, the terms must be so unfair as to be shocking.

On both the 2007 and 2009 loans, Schroeder obtained exactly what he bargained for, and he was represented by an attorney on the second loan. On the 2009 loan, Schroeder got what he wanted – a one-year loan extension, and to avoid foreclosure. He also knew what would be required of him and what would happen if he could not repay the loan within 12 months.<sup>142</sup>

The Court cannot relieve Schroeder from an agreement with Excelsior as he is perfectly competent to contract, and the consideration is not so inadequate as to be constructively fraudulent or unfair.<sup>143</sup> This is particularly true when, as here, the court found Schroeder to be “an experienced and smart businessman.” There is nothing in the terms that would “shock” the court’s conscience. Schroeder’s claim should therefore be dismissed.

### **3. Excelsior did not violate the Real Estate Settlement Practices Act**

Schroeder claims Excelsior had predatory lending practices and that Excelsior failed to inquire into his ability to pay before making the loan, among other things. First, because he never spoke to Excelsior, Schroeder cannot point to any representations made by Excelsior. He also signed an Affidavit expressly stating that he was only relying upon the

---

<sup>141</sup> *Nelson v. McGoldrick*, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995).

<sup>142</sup> *Schroeder v. Fageol Motors*, 86 Wn.2d 256, 260, 544 P.2d 20 (1975).

<sup>143</sup> *Rogich v. Dressel*, 45 Wn.2d 829, 843, 278 P.2d 367 (1954).

representations made in the Loan Documents; he was not relying upon any other representations.

Second, after defaulting on the first promissory note with Excelsior, Schroeder hired a lawyer who negotiated a new or extended loan. Excelsior and Schroeder's lawyer, as well as Schroeder, agreed to the terms of the second Promissory Note. Schroeder again signed these at a title company and is presumed to know what he signed, especially considering that he signed those while represented by his attorney.<sup>144</sup>

Although Schroeder defaulted again, and Excelsior was forced to foreclose his property as an equitable and financial remedy, the company's conduct was rooted in a desire to help Schroeder maintain his land, which is why Excelsior agreed to the "second chance" promissory note. The company's actions cannot, in any way, be deemed deceptive or illusive. Excelsior did its best to help a man whom simply could not uphold his end of the deal. Excelsior acted in good faith, and well within the bounds of the Real Estate Settlement Practices Act.

#### **4. Excelsior was not in a civil conspiracy with anyone**

Again, Schroeder fails to include any arguments or analysis to support his civil conspiracy claim. But, to prevail in a claim of civil conspiracy, Schroeder must prove by clear, cogent, and convincing

---

<sup>144</sup> "Where a party has signed a contract without reading it, that party cannot successfully argue that mutual assent was lacking as long as the party was not deprived of the opportunity to read the contract, the contract was 'plain and unambiguous,' the party was capable of understanding the contract, and no fraud, deceit, or coercion occurred." *Yakima Cnty. (W. Valley) Fire Prot. Dist. No. 12 v. Yakima*, 122 Wn.2d 371, 389, 858 P.2d 245, 255 (1993).

evidence that: (1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators contracted to accomplish the conspiracy.<sup>145</sup>

Civil conspiracy is not a cause of action, but rather a theory of liability to hold others responsible for a wrongful act.<sup>146</sup> Civil conspiracy is not, by itself, an actionable claim; plaintiff must be able to show an underlying actionable claim accomplished by the conspiracy for the civil claim of conspiracy to be valid.<sup>147</sup>

Here, Schroeder pleads no facts showing that Excelsior: (a) combined with anyone for an unlawful purpose; (b) used unlawful means to accomplish a lawful purpose; (c) entered into an agreement to accomplish any conspiracy; or (d) caused through a conspiracy the violation of a separate independent claim.<sup>148</sup> Schroeder's claim is not plausible on its face, as he cannot prove by clear, cogent, and convincing evidence the two elements necessary to succeed in a civil conspiracy argument. Excelsior acted well within its bounds as a lender when dealing with Schroeder on all accounts, and his allegations of civil conspiracy lack sufficient factual matter to state a claim.

Excelsior did not act in concert with James Haney, CLS Mortgage, or the trustee. This Court found that Mr. Haney had no knowledge that

---

<sup>145</sup> *Alexander v. Sanford*, 181 Wn. App. 135, 325 P.3d 341 (2014).

<sup>146</sup> *Reiber v. City of Pullman*, 918 F.Supp.2d 1091, 96 Empl.Prac. Dec. P44,726 (2013).

<sup>147</sup> *Id.*

<sup>148</sup> *Gossen v. JP Morgan Chase Bank*, 819 F.Supp.2d 1162 (2011).

Schroeder claimed the Property was being used principally for agricultural purposes.<sup>149</sup> When CLS denied Schroeder's loan, it forwarded his application to Excelsior.<sup>150</sup> Mr. Haney would not have forwarded the application if he believed the Property was used for agricultural purposes.<sup>151</sup> Excelsior had no reason to believe the Property was being used for agricultural purposes.<sup>152</sup> Schroeder knew he should have signed a mortgage instead of a deed of trust if the Property was being principally used for agricultural purposes – but he never raised this issue with Excelsior, nor did he ask to sign a mortgage.<sup>153</sup>

After he defaulted on the first loan, Schroeder approached Excelsior about a one-year extension.<sup>154</sup> Excelsior agreed, subject to several conditions. Schroeder again represented and warranted that he was not using the Property for agricultural purposes, which Excelsior reasonably believed.<sup>155</sup> Neither CLS nor Mr. Haney was involved with the second loan.

In the end, Schroeder's civil conspiracy claim is implausible given the facts of this case and his failure to prove that Excelsior's business conduct has been anything but ethical and proper. No other defendants were involved in the second loan, and CLS and Haney were minimally

---

<sup>149</sup> Findings, ¶ 6.

<sup>150</sup> *Id.* at ¶ 7.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at ¶¶ 8, 9, 10.

<sup>153</sup> *Id.* at ¶ 11.

<sup>154</sup> *Id.* at ¶ 16.

<sup>155</sup> *Id.* at ¶¶ 19, 20.

involved in the first loan. Excelsior is entitled to summary judgment on Schroeder's civil conspiracy claim.

#### **5. Schroeder waived his claims**

It is undisputed that Schroeder failed to restrain the trustee's sale, and the property was foreclosed. As a result, Schroeder's claims against the defendants are waived by operation of law. Schroeder may argue that the Washington Supreme Court rejected this waiver argument previously, but that would be erroneous.

When it analyzed Excelsior's waiver argument in 2013, the Supreme Court assumed the trustee's sale was void. However, when the trial court found that the Property factually had not been used "principally" for agricultural purposes, this assumption was not borne out. Put differently, if the Property was not being principally used for agricultural purposes on both relevant dates, then Schroeder's claims are waived.

Moreover, while the Supreme Court vacated the Order Dissolving the Temporary Injunction, Schroeder has never posted the required bond to have the Temporary Injunction put in effect.<sup>156</sup> Thus, under *Plein*,<sup>157</sup> Schroeder's claims relating to the trustee's sale are waived.

The Supreme Court also stated, perhaps in *dicta*, that there was no support in the law for Excelsior's claim that the claims for damages were

---

<sup>156</sup> No record of payment is reflected by the Court or Clerk's office.

<sup>157</sup> *Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003).

barred because Schroeder failed to restrain the sale.<sup>158</sup> However, as it admitted in a later Opinion (*Frizzell v. Murray*, 179 Wn.2d 301, 311, 313 P.3d 1171 (2013)) the Supreme Court did not consider other relevant statutes to determine whether the other claims for damages (and not just those related to the sale) are waived.

In *Frizzell*, the Washington Supreme Court stated “[i]n *Schroeder*, where we held that RCW 61.24.040(1)(f)(IX) did not foreclose damage actions, it was unnecessary to consider RCW 61.24.127(1) because we determined that if Schroeder’s property was primarily agricultural, then the trustee lacked the statutory power to foreclose nonjudicially.” The Court continued “[t]he statutory provisions for enjoining a nonjudicial foreclosure sale, including the waiver provision, were inapplicable, thus rendering RCW 61.24.127(1) inapplicable.”<sup>159</sup> In other words, the Court assumed that the Trustee, by not treating the Property as agricultural in our case, had failed to comply with the Deed of Trust Act, and therefore RCW 61.24.127(1)’s waiver provision did not apply.

But a simple review of RCW 61.24.127(3)-(4) clearly demonstrate that its non-waiver provisions do not apply. The Statute provides:

**Failure to bring civil action to enjoin foreclosure  
— Not a waiver of claims.**

(1) The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages asserting:

---

<sup>158</sup> *Schroeder*, 177 Wn.2d at 114.

<sup>159</sup> *Id.* at 311.

- (a) Common law fraud or misrepresentation;
- (b) A violation of Title 19 RCW;
- (c) Failure of the trustee to materially comply with the provisions of this chapter; or
- (d) A violation of RCW 61.24.026.

\* \* \* \* \*

(3) This section applies only to **foreclosures of owner-occupied residential** real property.

(4) This section **does not apply to the foreclosure of a deed of trust used to secure a commercial loan.**

In other words, failure to enjoin the foreclosure sale of a commercial loan is grounds for a borrower to have waived their civil claims. The Trustee **did** comply with the Deed of Trust Act, and because we know that RCW 61.24.127(1)'s anti-waiver **does not** apply to commercial loans,<sup>160</sup> the fact that Schroeder failed to stop the Trustee's Sale means he waived his other claims against Excelsior.

**6. Excelsior is entitled to its attorneys' fees and costs on appeal**

The Promissory Note and Deed of Trust signed by Schroeder include provisions that permit the prevailing party to recover their attorney fees and costs incurred in enforcing the terms of those agreements. In this case, Schroeder has tried to prevent Excelsior from enforcing its rights under the Deed of Trust. Therefore, to the extent Excelsior prevails on this appeal, it is entitled to recover its reasonable legal costs and fees.

---

<sup>160</sup> Unlike in *Frizzell*, this case involves a commercial and not a residential loan.

VI. CONCLUSION

Out of an abundance of caution, the Washington Supreme Court instructed the trial court to hold a fact-finding hearing to afford Schroeder an opportunity to prove that his property had been used for agricultural purposes and therefore could not be sold under Washington's Deed of Trust Act. Schroeder was given his day in court.

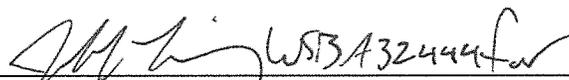
However, because Schroeder could not prove his claims, the trial court upheld the trustee's sale. The trial court further found that Schroeder could not produce sufficient evidence to support his other claims.

The trial court's dismissal of Schroeder's case should be affirmed.

DATED this 13th day of January, 2017.

Respectfully Submitted,

LANDERHOLM, P.S.

  
BRADLEY W. ANDERSEN, WSBA No. 20640  
Attorneys for Respondents

