

86433-1

NO. 29124 - 3 - III

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioner,

vs.

EXCELSIOR MANAGEMENT GROUP, LLC,
and CRAIG G. RUSSILLO, Trustee,

Respondents.

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STATE OF WASHINGTON
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ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals' decision in this case does not warrant the review of this Court. This case has no reach beyond the immediate parties – and it certainly does not resolve, create, or address a split among the Court of Appeals' divisions. What the Court of Appeals decision does do is require parties to give full effect to (and honor) their written agreements. This is, and should remain, the law in Washington. Accordingly, Excelsior respectfully requests that this Court deny the Petition for Review.

In June 2007, Petitioner Steven F. Schroeder borrowed money from Excelsior Management Group, LLC. To secure the commercial loan, Schroeder granted a Deed of Trust on his property. In the Deed of Trust, Schroeder “warranted” that the property was not being used for agricultural purposes, and promised that it would not be used for such purposes in the future.

When Schroeder defaulted on the loan, Excelsior initiated a non-judicial foreclosure of the property. But just before the sale was set to occur, Schroeder filed this lawsuit to try and stop the Trustee's Sale. Despite his express warranty to the contrary, Schroeder alleged for the first time that the property was being used for agricultural property. He

therefore claimed that Excelsior had to conduct a judicial foreclosure.¹

To avoid unnecessary delay, and even though it disputed Schroeder's claim, Excelsior voluntarily stopped its non-judicial foreclosure and initiated a judicial foreclosure (the "Foreclosure Lawsuit").² Shortly after Excelsior filed its Foreclosure Lawsuit, Schroeder wanted to stop the foreclosures and settle both cases. He therefore agreed to sign a new commercial loan and Deed of Trust. In return, Excelsior agreed to stop the foreclosure and give Schroeder a second chance by providing a new commercial loan with a new maturity date. However, Excelsior insisted that Schroeder agree that his Property was not principally used for agricultural purposes so that if Schroeder defaulted again, Excelsior could conduct a non-judicial foreclosure.

On March 31, 2009, Schroeder signed a new Promissory Note³ and Deed of Trust.⁴ He again warranted in the new loan documents that the property was not being used principally for agricultural purposes, and promised that it **would not be used for such purposes in the future.**

In addition to the new loan documents, the parties, through their

¹ RCW 61.24.030 prohibits non-judicial foreclosure of agricultural properties.

² CP 52. *Excelsior Mortgage Equity Fund II, LLC v. Steven Schroeder*, Stevens County Superior Court #2009-2-00048-2.

³ CP 213-216; CP 170-73.

⁴ CP 213-16; CP 174-197.

respective attorneys, executed a Stipulated Motion and Order of Dismissal with Prejudice on April 7, 2009 (“Stipulated Order of Dismissal”). In the Stipulated Order of Dismissal, Schroeder agreed, consistent with the new loan documents, that the property was not principally used for agricultural purposes. Schroeder also agreed that in the case of any future foreclosures he would not be allowed to claim that the property was being used for agricultural purposes. Excelsior relied upon Schroeder’s warranties and waiver when it agreed to stop its judicial foreclosure and provide him with a new loan.

In 2009, Schroeder defaulted on the new Promissory Note. Consistent with the Deed of Trust and Stipulated Order of Dismissal, Excelsior proceeded with a non-judicial foreclosure. But again, Schroeder filed a last minute lawsuit (“Schroeder II”) to try to stop the foreclosure sale.⁵ And despite his warranties to the contrary, Schroeder again claimed that Excelsior had to conduct a judicial foreclosure because the property was being used for agricultural purposes.

But realizing he could not stop the Trustee’s Sale without setting aside the April 7, 2009 Stipulated Order of Dismissal, Schroeder tried to set aside the dismissal by claiming his attorney had entered the Stipulated

⁵ *Steven Schroeder v. Phillip Habberthur*, Stevens County Superior Court #2010-2-00054-1.

Order of Dismissal without his knowledge or consent.

On April 6, 2010, the trial court denied Schroeder's Motion to vacate. The trial court later denied Schroeder's Motion for Reconsideration.

The Court of Appeals affirmed the trial court's summary dismissal of Schroeder's Motion to Vacate in an unpublished opinion. The Court of Appeals held that "there is nothing that would prohibit Mr. Schroeder from waiving whatever rights he may have by statutory or even, generally, by constitutional mandate."⁶ Schroeder argues that this unpublished opinion conflicts with an opinion from Division II; however, a quick comparison of the cases shows that there is no conflict. Accordingly, Schroeder presents no basis for his arguments and no compelling reason that would warrant this Court granting review. This Court should therefore deny the petition for review.

II. ISSUES PRESENTED FOR REVIEW

1. When a party signs a document in which they expressly warrant that certain facts exist, they are bound by those warranties. Division III reaffirmed the rule that a party may waive statutory or even constitutional rights, and no other appellate cases contradict this holding. Should this Court grant review to determine whether a party that

⁶ Opinion, p.9.

knowingly waives the right to allege that property is not, and will not, be used principally for agricultural purposes, be allowed to renege on those warranties and claim a fact that is contrary to the expressed warranties?

2. A waiver is the intentional relinquishment of a known right. Schroeder waived his right to claim that his property was being used for agricultural purposes in return for Excelsior agreeing to stop the pending foreclosures and extend Schroeder's loan. Did Schroeder waive his right to claim that the property was being used for agricultural purposes?

3. An unpublished opinion that addresses only a motion to vacate does not impact or affect a substantial public interest. In this case, Schroeder's motion to vacate a stipulated order of dismissal with prejudice has no reach or impact between these parties. Should this Court grant review of a case that does not impact the public interest?

III. RESPONDENTS' COUNTERSTATEMENT OF THE CASE

A. 2007 Loan and 2008 Lawsuits.

On June 12, 2007, Schroeder executed a Promissory Note ("Note") payable to Excelsior Management Group, LLC ("Excelsior").⁷ As security for the Note, Schroeder executed a Deed of Trust in favor of

⁷ CP 35; CP 58.

Excelsior.⁸ The Deed of Trust was recorded on June 14, 2007 with the Auditor of Stevens County, Washington, under Auditor's File No. 2007 0006505.⁹ In the Deed of Trust, Schroeder specifically warranted that the property was not being used principally for agricultural purposes.¹⁰ He also promised not to permit the property to be used for agricultural purposes in the future without Excelsior's consent.¹¹

In 2008, Schroeder defaulted on the loan, and Excelsior initiated a non-judicial foreclosure of the Deed of Trust.¹² A Trustee's Sale was set for January 9, 2009. But, before the date for the Trustee's Sale, Schroeder filed this lawsuit to stop the sale ("Schroeder I").

In his Complaint, Schroeder alleged that the property was used for agricultural purposes and Excelsior needed to conduct a judicial foreclosure.¹³ This was contrary to the express warranties contained in the loan documents. Simply to sidestep Schroeder's challenge, and to avoid any delays, Excelsior initiated a judicial foreclosure on January 29, 2009 to avoid the issue and conduct a judicial foreclosure of the Property.¹⁴

⁸ CP 35; 62.

⁹ *Id.*

¹⁰ CP 67.

¹¹ *Id.*

¹² CP 8.

¹³ CP 3-5.

¹⁴ CP 52-57.

B. Schroeder settles both lawsuits by signing new Loan Documents and a Stipulated Order of Dismissal with Prejudice.

After Excelsior filed its Foreclosure Lawsuit, the parties reached a settlement. Excelsior agreed to withdraw the foreclosure action, and in return, Schroeder agreed to sign a new Promissory Note and Deed of Trust and to withdraw any claims that the Property was used for agricultural purposes.¹⁵ The new loan was again for commercial purposes.

1. New Loan, Deed of Trust and Promissory Note

On March 31, 2009, Schroeder signed a new Note and Deed of Trust.¹⁶ This new Deed of Trust includes a specific provision where Schroeder warrants that the "Property has not been used, and will not be used, for agricultural purposes."¹⁷ Excelsior also required Schroeder to execute a new Loan Agreement for the 2009 Loan. 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."¹⁸ Schroeder once again warranted that the property was not principally being used for agricultural purposes, and promised that it would not be used for such purposes in the future.

¹⁵ CP 213-215; CP 170-197.

¹⁶ *Id.*

¹⁷ CP 182.

¹⁸ CP 201.

2. Stipulated Order of Dismissal

In addition to signing a new Deed of Trust, Schroeder's attorney Matthew K. Sanger (WSBA#6717) executed a Stipulated Motion and Order of Dismissal with Prejudice ("Order of Dismissal").¹⁹ Schroeder claimed that his attorney entered this Order without his consent, but the evidence does not support Schroeder's claim.

During his deposition, Mr. Schroeder admitted to having received a copy of the Order of Dismissal from his prior attorney before the Stipulated Order was entered.²⁰ Schroeder testified that he provided the Order of Dismissal to his new attorney, Matthew Pfefer, and therefore admitted it had been in his possession.²¹ Schroeder also testified that he received a copy of his attorney's March 30, 2009 letter enclosing a draft of the Order of Dismissal.²² He also admitted he discussed this Order of Dismissal with Mr. Sanger *before* Mr. Sanger executed the Order.²³ Finally, Schroeder testified that he went through the Order of Dismissal with Mr. Sanger before it was filed.²⁴

¹⁹ CP 10.

²⁰ CP 123-24; CP 136-39.

²¹ CP 146.

²² *Id.*

²³ CP 147.

²⁴ CP 146-47.

The Stipulated Order of Dismissal was eventually signed by Judge Allen Nielson on April 7, 2010. The Stipulated Order of Dismissal contains eight simple paragraphs and provides that Schroeder:

- 1) Has knowingly waived any and all right he may have to judicial foreclosure of the subject property on the grounds it is used for agricultural purposes;
- 2) Shall not be allowed to again allege that the subject property is used for agricultural purposes;
- 3) Any future deed of trust executed by Schroeder to [Excelsior], an associated company or assigns, need not be judicially foreclosed but may be foreclosed non-judicially in accordance with RCW 61.24; and,
- 4) The matter was dismissed with prejudice.²⁵

C. **Schroeder again Defaults but claims, once again, that the Property is being used for agricultural purposes.**

After signing the new loan documents, Schroeder defaulted on the new loan, therefore prompting Excelsior to, once again, initiate a non-judicial foreclosure to collect on the Promissory Note. Excelsior set a Trustee Sale date but Schroeder once again sued to try and stop the

²⁵ CP 36-37.

Trustee Sale.²⁶ Schroeder again claimed that the property was principally being used for agricultural purposes and therefore had to be judicially foreclosed.²⁷

D. Schroeder tries to vacate the April 7, 2009 Stipulated Order of Dismissal.

Excelsior countered that the court should not intercede because Schroeder had specifically warranted and represented in the new Deed of Trust and in the Stipulated Order of Dismissal that the property was not being used for agricultural purposes. Schroeder responded by moving to vacate the April 7, 2009 Stipulated Order of Dismissal on the basis that his attorney did not have the authority to sign the Stipulation.

E. Court Denies Schroeder's Motion to Vacate and Motion to Stay Effects of Stipulated Order.

After hearing the arguments and testimony from both sides, the Court denied Schroeder's Motions.²⁸ Schroeder then moved for reconsideration. But after hearing argument from counsel, the Court denied Schroeder's Motion for Reconsideration.²⁹ Schroeder then appealed the trial court's denial of his (1) Motion to set aside the April 7,

²⁶ Stevens County Superior Court Cause No. 2010-2-0054-1 ("Schroeder II"). Incidentally, Schroeder did not contest that he was not in default under the 2010 Note, instead, his defense rested in attempting to force Excelsior into a judicial foreclosure.

²⁷ Schroeder II.

²⁸ CP 108-110.

²⁹ CP 119-120.

2009 Order; and (2) his Motion for Reconsideration.

F. **Court of Appeals Affirms the Trial Court's Rulings.**

The Court of Appeals, in an unpublished opinion, affirmed the trial court's ruling and summary dismissal of Schroeder's Motion to Vacate. Notably, the Court of Appeals found that Schroeder repeatedly knowingly waived the right to claim that his property was principally used for agricultural purposes—after finding that Schroeder had promised and warranted that he would not use his property for agricultural purposes without Excelsior's consent. The Court of Appeals also held, in Schroeder's argument, that the agricultural provision could not be waived was meritless and lacked any authority.

Because the Court of Appeals' decision was correct and does not present any significant issues of law requiring this Court's review, this Court should deny petitioners' request for further review.

IV. **ARGUMENT**

A. **The Court of Appeals' Decision Does Not Warrant Further Review.**

Schroeder claims review is appropriate because the Court of Appeals' Decision (1) conflicts with prior decisions of the Court of Appeals; and (2) presents issues of substantial public importance. Schroeder is wrong on both accounts, and he essentially asks this Court to

ignore the waiver rule and adopt a new rule of law not intended by the legislature.

B. The Court of Appeals' Decision Followed Longstanding Washington Law and Should Not Be Disturbed.

1. Schroeder failed to present a valid Basis Under CR 60(b) to Vacate the Stipulated Order of Dismissal.

CR 60(e)(1) *requires* the party seeking to set aside a judgment to state and prove the grounds “upon which relief is asked.” This case was dismissed with prejudice by Stipulated Order of the Court on April 7, 2009. Schroeder could not prove his claim that his attorney lacked the authority to enter the Stipulated Order. After conducting a hearing, the Judge found in Excelsior’s favor. Plain and simple, the evidence did not support Schroeder’s allegations and he failed to present a basis for vacating the Stipulated Order.

“A written stipulation signed by counsel on both sides of a case is binding on the parties and the court.”³⁰ Under the law, Schroeder must prove that the trial court abused its discretion in denying the Order of Dismissal *and* proving that his prior attorney lacked the required authority to execute the Order of Dismissal. Because the facts demonstrate that Schroeder’s attorney acted with both the implied and express authority to

³⁰ *Riordan v. Commercial Travelers Mut. Ins. Co.*, 11 Wn. App. 707, 714-15, 525 P.2d 804 (1974).

execute the Order of Dismissal, the trial court acted appropriately when it denied Schroeder's motion.

Schroeder's attorney acted with both actual and apparent authority in signing the Stipulated Order. Schroeder now concedes this point and argues that this Court should accept review because the Court of Appeals' decision conflicts with a factually and legally distinguishable case from Division II.

C. **The Court of Appeals' Decision From *Albice v. Premier Mortgage Services of Washington, Incorporated.***³¹

The Court of Appeals in this case held that "there is nothing that would prohibit Mr. Schroeder from waiving whatever rights he may have by statutory or even, generally, by constitutional mandate." Indeed, even now, Schroeder cannot cite to any authority for his position that the non-agricultural provision could not be waived. And, it is important to note, that Schroeder warranted that he would not use his property principally for agricultural purposes—the waiver was inserted to prevent him from again failing to honor his promises.

Schroeder attempts to argue that he could not have waived any provisions of the Deed of Trust Act because such a waiver would be "illegal." Schroeder induced Excelsior into dismissing its lawsuit for

³¹157 Wn. App. 912, 239 P.3d 1148 (2010).

judicial foreclosure and advancing him a new loan on the basis that it would be allowed to non-judicially foreclose his property at a later date if he were to default on the new loan. Schroeder further promised that he would not permit the property to be used for agricultural purposes without Excelsior's consent. Schroeder gained a valuable right in return for his waiver. It would be unjust for Schroeder to now renege on his waiver.

Schroeder cannot cite to any case that supports his position. The best he can do is cite to several irrelevant cases for the general proposition that contractual provisions that conflict with the terms of a legislative enactment are illegal and unenforceable.³²

Moreover the waiver of statutory rights, even constitutional rights, is not new to Washington. Washington allows broad waiver provisions familiar to any attorney: waivers of the right to a jury trial; waivers of the right to trial at all (i.e. arbitration agreements), and waivers of liability (i.e. exculpatory clauses). The rights waived in these contexts are indisputably greater than a right to judicial foreclosure, especially when the Deed of Trust Act provides ample protection in the form of non-judicial foreclosure procedures. As this Court recently stated, "Generally,

³² *Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn. App. 319, 333, 828 P.2d 73 (1992); *overruled by Waterjet Tech Inc., v. Flow Int'l Corp.*, 140 Wn.2d 313, 996 P.2d 598 (2000).

statutory rights can be waived[.]”³³ The notion of waiver, especially when a party gains a valuable right, does not offend public policy. Schroeder’s argument that the Court of Appeals’ decision somehow conflicts with a Division II opinion is without merit. Indeed, this Court has granted review of *Albice*, which makes the decision and holding of questionable value.

Albice conflicts with and thwarts the legislative intent of the Deed of Trust Act (the “Act”). The Act establishes the procedures for non-judicial foreclosures as a time-efficient alternative to judicial mortgage foreclosure proceedings.³⁴ A proper foreclosure action extinguishes the debt and transfers title to the property to the beneficiary of the deed or to the successful bidder at a public foreclosure sale.³⁵ This Court has articulated the three basic objectives of the Act:

First, the non-judicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles.³⁶

In *Albice*, the borrower obtained a loan that was serviced through

³³ *Wynn v. Earin*, 163 Wn.2d 361 (2008).

³⁴ *Glidden v. Municipal Auth of Tacoma*, 111 Wn.2d 341, 346, 758 P.2d 487 (1988).

³⁵ *In re Marriage of Kaseburg*, 126 Wn. App. 546, 558, 108 P.2d 1278 (2005).

³⁶ *Cox v. Heknius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985) (citation omitted).

Premier Mortgage Services.³⁷ As part of the loan, the borrowers granted a deed of trust over their property to the lender. After the borrower defaulted on the loan, the lender initiated non-judicial foreclosure of the property. After sending out the Notice of Trustee's Sale and Notice of Foreclosure and obtaining a sale date, the borrower and lender agreed to a forbearance agreement with a payment schedule to bring the default current.³⁸ The forbearance agreement provided that the lender could postpone the trustee's sale indefinitely. The lender then postponed the trustee's sale a total of six times.

The lender eventually conducted the trustee's sale, which occurred more than 161 days past the original sale date.³⁹ The borrower filed a lawsuit to invalidate the sale for several reasons, including that the sale was conducted beyond the statutorily mandated bar of 120 days beyond the original sale date.⁴⁰ Division II held that the parties could not adjust the mandated bar of 120 days of continuances beyond the original sale date.

Albice is distinguishable. The procedures at issue in *Albice* are designed to ensure that the trustee's sale occurs within a reasonable period

³⁷ 157 Wn. App. at 918.

³⁸ *Id.*

³⁹ *Id.* at 919.

⁴⁰ *Id.*; see also RCW 61.24.040.

of time in order to avoid prejudice to the borrower and guarantors.

Allowing for unlimited continuances does not accomplish the goals of the Act: the process is no longer inexpensive and efficient, and it does not promote the stability of land titles because the property is in foreclosure limbo for an unlimited amount of time. It also works an unfairness to the borrower because presumably default interest is being applied to the balance—thus making it more difficult to cure a default and increasing the deficiency against the guarantors, if any.

Second, the trustee sale notices go stale and other potential bidders lose track of the sale date without new publications or additional notices directly provided to them. This reduces the chance of other bidders appearing and bidding on the property. Further, the language for the continuance in *Albice* provided that the lender had the right to continually postpone the trustee's sale—presumably indefinitely.

This is completely different than what is at issue in this case. Here, Schroeder first promised and warranted that the property was not principally used for agricultural purposes. He then warranted and promised that **he would not use** the property in the future for agricultural purposes without first obtaining Excelsior's consent. And, because Schroeder had gone back on his word once before, Excelsior required that Schroeder waive the right to require a judicial foreclosure in case of a

future default. Schroeder's waiver is completely different than the multiple continuances in *Albice*.

The agricultural provision contained in RCW 61.24.030(2) already contains conditions on its application—indicating its limited value. For this provision to apply, if the statement that the property is not being used principally for agricultural purposes is false on the date the deed of trust was signed *and* false on the date of the trustee's sale then the property may be foreclosed judicially. In other words, a party cannot frustrate a non-judicial foreclosure by planting crops, placing livestock, or initiating the operation of aquatic goods on their property if the property was not used in this manner when the deed of trust was executed. This evidences the fact that this requirement may be waived by the landowner.

Here, Excelsior required that Schroeder not use his property for agricultural purposes as a condition of extending the loan to him. He warranted that he would not use the property in this manner, and the loan closed. Excelsior took an extra precaution by requiring that Schroeder put his promise in the Stipulated Order of Dismissal. This is completely different than the facts of *Albice* and the Court of Appeals' decision does not conflict with the holding from Division II.

D. The Court of Appeals' Decision Does Not Present Issues of Substantial Public Importance.

While the case is certainly important to the parties, it does not

present any issues of substantial public importance. How will an unpublished opinion have any impact or reach beyond the involved parties—especially when this fact pattern is unlikely to arise again? Schroeder's tenuous argument is that a tidal wave of foreclosures are sweeping Washington and allowing a trustee's sale under these circumstances would upset the food chain in Washington. Nonsense.

Allowing a party to renege on their multiple promises, including a Stipulated Order that was entered with prejudice, would have a much greater impact on the public interest. If parties were not required to honor their agreements, then the proverbial apple cart would be upset with impunity. Indeed, Schroeder devotes very little of his Petition to this issue as he knows it is not a strong argument. As explained above, the Legislature envisioned that this requirement would be waived as it was subject to abuses by property owners that were in default and facing foreclosure. Lenders rely upon borrowers to truthfully and accurately make representations to them as part of the loan process—rewarding a borrower that makes false statements should not be permitted.

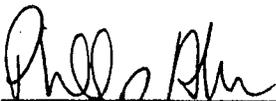
V. CONCLUSION

There is no authority that prevents Schroeder from waiving his right to have his property judicially foreclosed—especially if it requires Schroeder to keep his promises to Excelsior. This case does not warrant further review by this Court and Schroeder's Petition for Review should

be denied.

Dated: September 26, 2011

SCHWABE, WILLIAMSON & WYATT, P.C.

By: 
Phillip J. Haberthur, WSBA #38038
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Attorneys for Respondents
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Craig G. Russillo

CERTIFICATE OF SERVICE

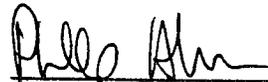
I hereby certify that on the 26th day of September, 2011, I caused to be served the foregoing **ANSWER TO PETITION FOR REVIEW** on the following party at the following address:

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by:

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Phillip J. Haberthur