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AUG 25 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 291243

**FILED**  
AUG 30 2011  
CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
*[Signature]*

SUPREME COURT  
OF THE STATE OF WASHINGTON

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

v.

EXCELSIOR MANAGEMENT GROUP, LLC,  
and CRAIG G. RUSSILLO, Trustee,  
Defendants/Respondents.

**PETITION FOR REVIEW**

Of Court Of Appeals, Case No. 29124-3-III

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**ORIGINAL**

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A. IDENTITY OF PETITIONER

Steven F. Schroeder asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Court of Appeals entered its opinion in this matter on June 23, 2011. A copy of the decision is in the Appendix at pages A-1 through 11.

The Petitioner timely filed his motion for reconsideration on July 13, 2011. The Court of Appeals, Division III, denied the motion for reconsideration on July 26, 2011. A copy of the order denying Petitioner's motion for reconsideration is in the Appendix at page A-12.

C. ISSUES PRESENTED FOR REVIEW

1. Does this decision of the Court of Appeals that a grantor of a deed of trust may "waive" his "right" to a judicial foreclosure of agricultural property under RCW

61.24.030(2) conflict with the holding of Albice v. Premier Mortgage Services, 157 Wn. App. 912 (Division II, 2010) that a trustee may not continue the trustee's sale for more than the one hundred twenty days allowed by RCW 61.24.040(6) even if the grantor specifically allows such continuance?

2. Should the Court follow the Deed of Trust Act and find that the performance by a trustee on a deed of trust of a non-judicial foreclosure of agricultural property in contravention of RCW 61.24.030(2) is an invalid act?

#### D. STATEMENT OF THE CASE

Steven F. Schroeder, the appellant landowner herein, borrowed funds against a 200-acre parcel of property in Stevens County, Washington in 2007. CP 3. Mr. Schroeder defaulted on the loan in 2008. CP 4. When Excelsior Management Group LLC, the lender, pursued non-judicial foreclosure, Mr. Schroeder sued to require a

judicial foreclosure. CP 3-5. Excelsior filed a judicial foreclosure action in response. CP 52-57.

Without foreclosing, the parties negotiated a settlement. The settlement involved an order of dismissal (in April of 2009) with a provision whereby Mr. Schroeder's previous counsel purported to allow a future non-judicial foreclosure of Mr. Schroeder's agricultural property. CP 35-37. Mr. Schroeder also signed a substitute deed of trust (in March of 2009) which stated that the property was not used for agricultural purposes. CP 136-137. (The earlier deed of trust included the same statement.)

Mr. Schroeder timely filed a motion to vacate in February of 2010 on the grounds that such an agreement was simply unenforceable under RCW 61.24.030(2) and that he never authorized his attorney to execute this agreement. CP 38-39.

Without analyzing the language of RCW 61.24.030(2), RCW 61.24.030, or RCW Ch. 61.24, without recognizing that merely because a statute does not specify that a "right" cannot be waived does not mean that the "right" is waivable, and without considering that the non-judicial foreclosure of agricultural property would be an ultra vires act of the trustee, the trial court denied the motion to vacate and denied the motion to reconsider. CP 88-89; 119-120.

Similarly, the court of appeals affirmed the trial court in its opinion and denied the motion to reconsider without analyzing the pertinent language at all, without distinguishing the "right" in question from other non-waivable rights, and without noticing that the trustee is powerless to conduct a non-judicial foreclosure of agricultural property. A-\_\_ through \_\_; A-\_\_ through \_\_.

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E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A tidal wave of foreclosures is sweeping the State of Washington. In its path lies the agricultural industry on which all of Washington depends for our daily nourishment. This petition involves both of these critical and timely arenas. For these reasons, this petition involves an issue of substantial public interest that the Supreme Court should determine.

RCW 61.24.030 provides that it "shall be requisite to a trustee's sale" that the trustee meet a specific list of seven conditions. The second condition is the following:

That the deed of trust contains a statement that the real property conveyed is not used principally for agricultural purposes; provided, if the statement is false on the date the deed of trust was granted or amended to include that statement, and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially. Real property is used for agricultural purposes if it is used in an operation that produces crops, livestock, or aquatic goods;

RCW 61.24.030(2).

The above statute requires the deed of trust to allege that the subject property is not used for agricultural purposes. RCW 61.24.030(2). The Deeds of Trust Act, RCW Ch. 61.24, does not consider such an allegation valid if it is not true at the time the deed of trust is executed and if it is not true at the time of the trustee's sale. Id.

Amazingly, the opinion of the Court of Appeals never once discusses the actual language of the statute in question.

The illegality of an agreement is a question of law that is reviewed de novo. Fallahzadeh v. Ghorbanian, 119 Wn. App. 596, 601, 82 P.3d 684 (2004).

Contractual "provisions that conflict with the terms of a legislative enactment are illegal and unenforceable." Brief of Respondent, page 30. The parties do not dispute this clear truth.

Excelsior goes on to assert that waivers of statutory rights are allowed in the State of Washington. Id. at 31. Remarkably, Excelsior chose not to explain at all how the undisputed rule about illegal provisions interfaces with the supposed rule about waivers of statutory rights.

Some statutes specify that they may not be waived. See, e.g., RCW 59.18.230(1).<sup>1</sup> Other statutes specifically state that provisions may be waived. See, e.g., RCW 62A.1-102(3).<sup>2</sup>

The crucial task for this Court is to determine the proper place for the statutory protections of RCW 61.24.030(2) on the spectrum between RCW 62A.1-

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<sup>1</sup> "Any provision of a lease or other agreement, whether oral or written, whereby any section or subsection of this chapter is waived except as provided in RCW 59.18.360 and shall be deemed against public policy and shall be unenforceable."

<sup>2</sup> "The effect of provisions of this Title may be varied by agreement, except as otherwise provided in this Title and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Title may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable."

102(3) and RCW 59.18.230(1). Excelsior has chosen not to provide this Court any tools or arguments to make that determination.

The legislature, however, has made clear its intent that the agricultural prohibition be immune to waiver by voiding the allegation of non-agricultural use when the allegation is "false on the date the deed of trust was granted or amended to include that statement, and false on the date of the trustee's sale." RCW 61.24.030(2).

Agriculture benefits from judicial foreclosures because the borrower in a judicial foreclosure under Chapter 61.12 RCW "may redeem the property from the purchaser at any time . . . within one year after the date of the sale." RCW 6.23.020(1)(b).<sup>3</sup> This is important for agriculture because it provides "farmers and other owners of agricultural property facing foreclosure the opportunity

to harvest seasonal crops from their land.” Craig Fielden, “An Overview of Washington’s 1998 Deed of Trust Act Amendments,” Bar News.<sup>4</sup>

1. Does the Court of Appeals’ decision here Conflict with Division One?

In Albice v. Premier Mortgage Services, 157 Wn. App. 912 (2010), the Borrowers and the Lender entered into a forbearance agreement that purported to “retain” in the Lender “the right to continually postpone the foreclosure.” Albice, 157 Wn. App. 912, ¶ 25.

RCW 61.24.040(6) states that the “trustee has no obligation to, but may, for any cause the trustee deems advantageous, continue the sale for a period or periods not exceeding a total of one hundred twenty days” and

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<sup>3</sup> The time period for redemtion may be only eight months if, among other things, the “property is not used principally for agricultural or farming purposes.” RCW 6.23.020(1)(a).

<sup>4</sup> Viewed online at

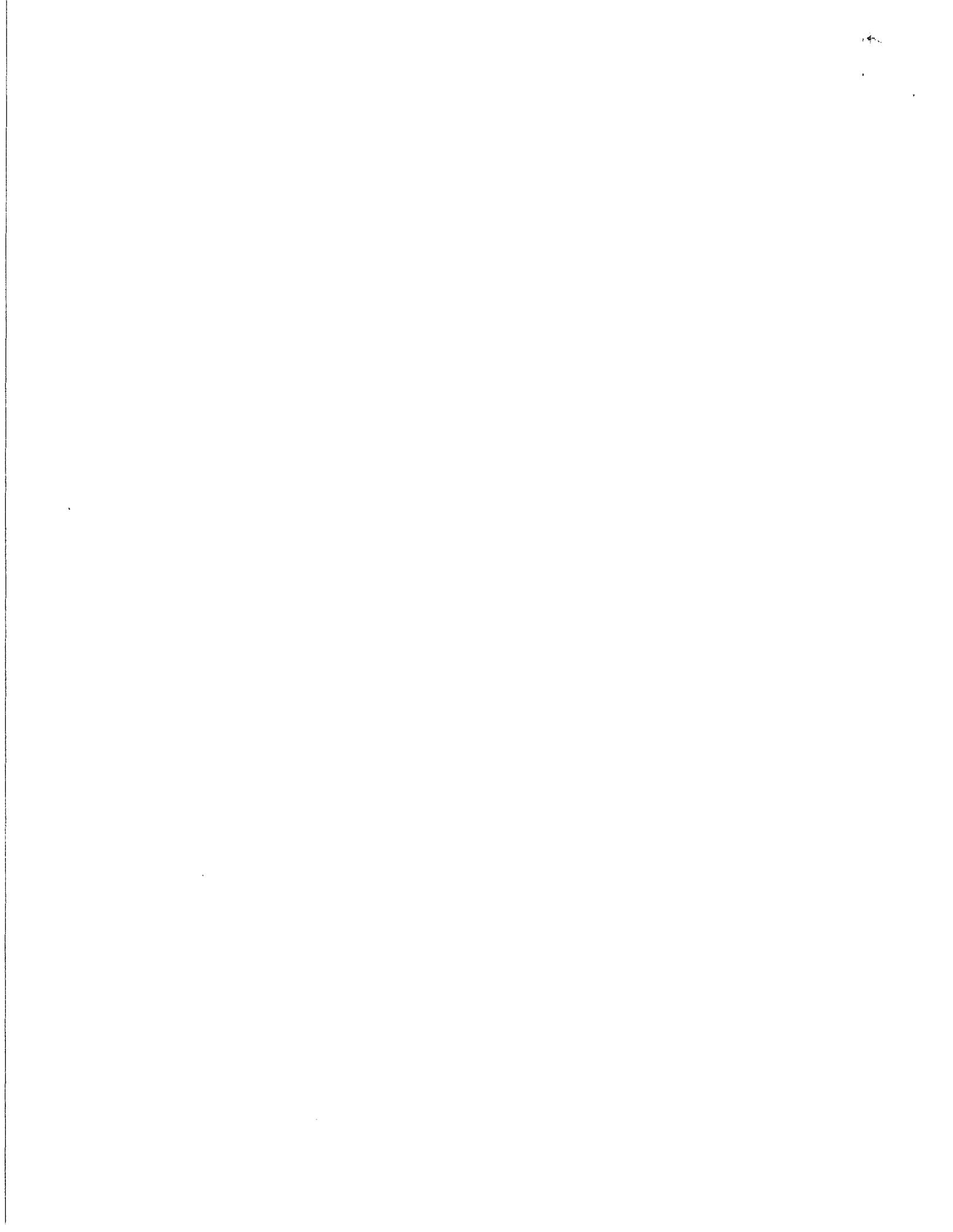
<http://www.wsba.org/media/publications/barnews/archives/jul-98-overview.htm> on March 3, 2010.

goes on to explain the manner in which the trustee can continue the sale.

RCW 61.24.040(6) “divests a trustee of authority to conduct a sale more than 120 days from the date in the Notice of Trustee Sale.” Albice, 157 Wn. App. 912, ¶ 27.

In Albice, the “trustee held the sale 161 days after the date set forth in the Notice of Trustee Sale, well beyond the statutorily mandated 120-day limit. Accordingly, the sale was void.” Albice, 157 Wn. App. 912, ¶ 28.

In Albice, the Court of Appeals found that the agreement between the Borrower and the Lender that the trustee could indefinitely postpone the trustee’s sale was not an enforceable agreement because it violated the statute. Similarly, the alleged agreement between the Borrower (Appellant) and the Lender (Respondent Excelsior) that the trustee could foreclose non-judicially



on agricultural property was not an enforceable agreement.

The agreement at issue in Albice involves a violation of RCW 61.24.040, which identifies how a “deed of trust foreclosed under this chapter shall be foreclosed.” The alleged agreement in this case involves a violation of RCW 61.24.030, which identifies the necessary preconditions for a trustee’s sale (what “shall be requisite to a trustee’s sale”). The language of “requisite[s]” to a trustee’s sale is stronger language than the language that introduces RCW 61.24.040.

Additionally, the provision in Albice states that the “trustee has no obligation to, but may, for any cause the trustee deems advantageous, continue the sale for a period or periods not exceeding a total of one hundred twenty days.” RCW 61.24.040(6). This context suggests that the 120-day limit applies to the postponements that the trustee can make “for any cause the trustee deems

advantageous." The context itself does not suggest that the 120-day limit applies to agreed postponements.

The statutory provision in this case is far stronger! "It shall be requisite to a trustee's sale" that "the deed of trust contains a statement that the real property conveyed is not used principally for agricultural purposes; provided, if the statement is false on the date the deed of trust was granted or amended to include that statement, and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially." RCW 61.24.030(2). This provision states that, even if the parties agree to say that the property is not agricultural, the trustee still does not have the authority to conduct a trustee's sale.

For these reasons, the agreement in Albice is arguably less of a statutory violation and less likely to be found unenforceable than the alleged agreement in this case.

2. Is the Court of Appeals' Allowing the Trustee of a Deed of Trust to Conduct a Non-Judicial Foreclosure of Agricultural Property Without Statutory Authority an Issue of Substantial Public Interest?

"Ultra vires acts are those done 'wholly without legal authorization or in direct violation of existing statutes.'" Dep't of Labor & Indus. v. Kantor, 94 Wn. App. 764, 779 (1999) (citations omitted). Although Kantor and the cases it cites refer to ultra vires acts of government agencies, the same principle applies to the actions of private individuals.

In 1947, Edward Hudson left his employment with the Boeing Airplane Company to become a vice-president of Alaska Airlines, Inc. Hudson v. Alaska Airlines, 43 Wn.2d 71, 71-72 (1953). The salary authorized by the board of directors for Hudson's position as vice-president was ten thousand dollars per year. Id. at 72. The then-President of Alaska Airlines told Hudson that he would be paid a secret additional thirty-five hundred dollars per year from the New York office. Id.

These secret additional funds were never paid. Id. Mr. Hudson sued for these secret additional funds. Id. The court found that Mr. Hudson "was an officer of the corporation and, as such, a fiduciary, not a mere employee. He therefore cannot rely upon an ultra vires act of another officer." Id. at 74. Even outside the context of government action, no party may rely on an ultra vires act. The Court should not give legal effect to an ultra vires act by a trustee, either.

Similarly, in interpreting California law, Division One found that a trustee in Washington had no authority to sell a condo in California "without a request from a beneficiary and agreement of all other beneficiaries, which he did not have, legal title notwithstanding." State v. Jacobson, 74 Wn. App. 715, 720, 876 P.2d 916 (1994). On the basis of the fact that the trustee "did not have the authority to

exercise his trustee, power, his transfer of title to the [grantees] constituted an unauthorized act." Id.<sup>5</sup>

Based on the clear limitations of RCW 61.24.030(2) (which do not empower the trustee on a deed of trust to perform a non-judicial foreclosure), the trustee's transfer of agricultural property by means of a non-judicial foreclosure would be an ultra vires act. The opinion of the Court of Appeals allows the trustee on a deed of trust to perform this very sort of ultra vires act. This Court should follow the Deed of Trust Act and reverse the Court of Appeals.

#### F. CONCLUSION

This petition lies at the intersection of the tidal wave of foreclosures sweeping the State of Washington and the safety and stability of the entire agricultural industry. For

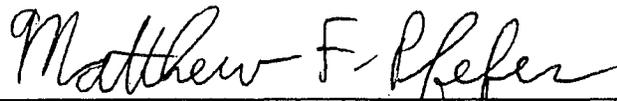
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<sup>5</sup> On the specific facts of Jacobson (as California law applied to them), the transfer of title by the trustee constituted a "theft by taking." Id. at footnote 3. Under different facts, the transfer of title would have been an "exertion of unauthorized control of the property of another under RCW 9A.56.020." Id. at footnote 3.

these reasons, this petition involves an issue of substantial public interest that the Supreme Court should determine.

In conclusion, Mr. Schroeder asks this Court to reverse the opinion of the Court of Appeals based on the very words of RCW 61.24.030(2) as well as the holding and rationale of Division 2 in Albice v. Premier Mortgage Services, 157 Wn. App. 912 (2010).

Respectfully submitted this 25<sup>th</sup> day of August 2011.



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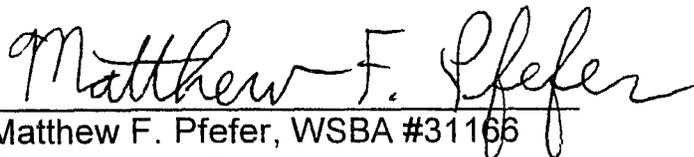
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## DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am the attorney of record for the Plaintiff, am over the age of 18, am competent to testify, and make these statements upon my own personal knowledge.
2. I have a written agreement with Phillip J. Haberthur of Schwabe, Williamson & Wyatt, P.C., as attorneys for Defendants allowing service by email.
3. I served the document to which this declaration is attached on the date of this declaration via email to PHaberthur@schwabe.com, HDumont@schwabe.com, RHigbie@schwabe.com, and CRussillo@schwabe.com.

Signed this 25<sup>th</sup> day of August 2011 in Spokane, Washington.



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**FILED**

JUN 27 2011

JUN 23 2011

In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**STEVEN F. SCHROEDER,**

**Appellant,**

v.

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

**Respondents.**

**No. 29124-3-III**

**Division Three**

**UNPUBLISHED OPINION**

SWEENEY, J. — The appellant landowner here agreed as part of a new negotiated promissory note and deed of trust to waive any right to judicial foreclosure. He did so to avoid judicial foreclosure. So, after he failed to make payments the lender started nonjudicial foreclosure proceedings. The landowner then sued to stop that proceeding and claimed that the land was used for agricultural purposes and that he was therefore entitled to judicial foreclosure. We conclude that the landowner validly waived any right to judicial foreclosure and we therefore affirm the trial judge’s summary dismissal of his suit.

FACTS

Steven F. Schroeder owned a 200-acre parcel of property in Stevens County, Washington. In 2007, Mr. Schroeder borrowed money from Excelsior Management Group, LLC. The loan was secured by a deed of trust on the property. The deed of trust warranted that the property was not being used principally for agricultural purposes, and would not be used for such purposes in the future without Excelsior's consent.

In 2008, Mr. Schroeder defaulted on the loan. Excelsior started nonjudicial foreclosure proceedings on the property pursuant to the deed of trust. The trustee scheduled a sale in January 2009. Mr. Schroeder sued in Stevens County to stop the sale. He claimed that the property was agricultural and, therefore, only subject to judicial foreclosure. Excelsior responded by filing an action to judicially foreclose on the property.

The parties negotiated a settlement prior to foreclosure. Excelsior agreed to stop the judicial foreclosure action if Mr. Schroeder signed a new promissory note and a deed of trust. Mr. Schroeder also agreed to waive any right to request judicial foreclosure in the future by a claim that the property was being used for agricultural purposes. And he agreed not to use the property for agricultural purposes without Excelsior's agreement. Mr. Schroeder signed the new promissory note and deed of trust. The new deed of trust

again warranted that the “[p]roperty has not been used, and will not be used, for agricultural purposes.” Clerk’s Papers (CP) at 182.

In April 2009, the parties memorialized the agreement in a stipulated motion and order of dismissal (Order). Mr. Schroeder’s attorney signed the Order. It read in part:

1. Schroeder 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. Schroeder 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 nonjudicially in accordance with RCW Chapter 61.24.

CP at 36. The court then dismissed Mr. Schroeder’s suit with prejudice.

Mr. Schroeder again defaulted on the new loan and Excelsior again started nonjudicial foreclosure proceedings. And Mr. Schroeder again sued in Stevens County Superior Court to stop the trustee’s sale by claiming that the property was being used for agricultural purposes and, therefore, Excelsior had to judicially foreclose. Excelsior moved for summary judgment based on Mr. Schroeder’s failure to prevent the foreclosure sale of the subject property.

In February 2010, Mr. Schroeder moved to *vacate* the Order on the ground that he never authorized his attorney to execute the agreement. The motion was set for hearing on March 2, 2010. Mr. Schroeder later reset the hearing for March 23, 2010, but the motion never proceeded to hearing. Mr. Schroeder also filed a CR 56(f) motion to

continue the summary judgment hearing for further discovery. As an alternative to the continuance motion, Mr. Schroeder filed a motion to stay the effects of the Order. The motion to stay was substantially similar to the previous motion to vacate.

In April 2010, the trial court held a single hearing on both the motion to stay and the motion to vacate. Excelsior combined its response to both motions because they presented essentially the same argument—that Mr. Schroeder never authorized his attorney to execute the Order. Excelsior argued that Mr. Schroeder actually knew of the Order, discussed it with his attorney, and authorized his attorney to sign it. Excelsior urged that Mr. Schroeder should be bound by the Order regardless of whether he requested temporary relief (motion to stay) or permanent relief (motion to vacate). The court denied both of Mr. Schroeder's motions. The court also granted Excelsior's summary judgment motion in April 2010.

Mr. Schroeder moved for reconsideration of only the order denying his motion to vacate the Order. The court denied the motion. Mr. Schroeder appeals the trial court's denial of his (1) motion to vacate the 2009 stipulated order of dismissal and (2) his motion for reconsideration.

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DISCUSSION

AUTHORITY OF ATTORNEY TO AGREE TO DISMISSAL TERMS

We review a trial court's decision to deny a motion to vacate an order of dismissal for abuse of discretion. *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Attorney Authority

Mr. Schroeder argues that the trial court erred by denying his motion to vacate the order of dismissal because his attorney surrendered a substantial right without his authorization. See CR 60(b)(11); *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 616 P.2d 1223 (1980).

CR 60(b)(11) allows a trial court to relieve a party from a final judgment, order, or proceeding for "[a]ny other reason justifying relief from the operation of the judgment." The use of CR 60(b)(11) requires extraordinary circumstances. *State v. Gamble*, 168 Wn.2d 161, 169, 225 P.3d 973 (2010). Extraordinary circumstances involve "reasons which are extraneous to the action of the court or go to the regularity of its proceedings." *State v. Dallas*, 126 Wn.2d 324, 333, 892 P.2d 1082 (1995).

The incompetence or neglect of a party's own attorney is generally not sufficient grounds for relief from a judgment in a civil action. *Haller v. Wallis*, 89 Wn.2d 539, 547,

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Schroeder v. Excelsior Management Group, LLC

573 P.2d 1302 (1978); *see also Graves v. P.J. Taggares Co.*, 25 Wn. App. 118, 126, 605 P.2d 348, *aff'd*, 94 Wn.2d 298, 616 P.2d 1223 (1980) (attorney's unauthorized surrender of substantial rights warranted vacation of judgment); *Morgan v. Burks*, 17 Wn. App. 193, 563 P.2d 1260 (1977) (upholding vacation of settlement and order of dismissal entered without client's authorization). An attorney is impliedly authorized to stipulate to, and waive, procedural matters in order to facilitate a hearing or trial; but, in his capacity as an attorney, he is without authority to waive any substantial right for his client unless specifically authorized to do so. *See In re Adoption of Coggins*, 13 Wn. App. 736, 739, 537 P.2d 287 (1975). There is no showing of either incompetence or neglect here. Of course, the surrender of substantial rights by an attorney contrary to a client's instructions may be grounds for vacating a judgment. But there is no showing of that on this record either.

Mr. Schroeder signed the original deed of trust. That document specifically warranted that the property was not being used principally for agricultural purposes, and would not be used for such purposes in the future without Excelsior's consent. Mr. Schroeder later sued claiming that Excelsior could not conduct a nonjudicial foreclosure because the property was agricultural. But then, he signed another deed of trust and promissory note and again warranted that the property had not been used, and would not

Appendix  
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be used, for agricultural purposes. The order of dismissal is consistent with the warranties Mr. Schroeder made in the loan documents.

Mr. Schroeder's attorney signed the order of dismissal to prevent judicial foreclosure of Mr. Schroeder's property. Mr. Schroeder claims he had no knowledge of the order or its provisions. But he received a copy of the order prior to its entry, along with a letter from his attorney outlining several proposed changes. Mr. Schroeder admitted he discussed the order with his attorney. And Mr. Schroeder's attorney fully explained the order to Mr. Schroeder and believed he was acting with authority when he executed it. Mr. Schroeder's response was that he never really opened or read the communications from his attorney because he does not read well. Mr. Schroeder, nonetheless, personally and repeatedly authorized documents that waived any claimed right that his property was used for agricultural purposes. And simply refusing to read, or otherwise ignoring, legal documents does not generate a defense to the implications of those documents. See *Nat'l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 912, 506 P.2d 20 (1973) (Washington adheres to the general contract principle that parties have a responsibility to read the contracts they sign). All parties to this contract had duties of good faith and fair dealing. *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 647, 211 P.3d 406 (2009).

Appendix  
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Mr. Schroeder relies on *Graves* for the proposition that an attorney is without authority to waive a substantial right of a client unless special authority is given. 94 Wn.2d at 303-04. *Graves* is distinguishable. That case involved an attorney who failed to appear in a summary judgment motion, failed to present any evidence at trial, and failed to advise his clients of a \$131,200 memorandum order against them. *See Graves*, 94 Wn.2d at 300-01. That is not this case. Mr. Schroeder admitted he received all written communications from his attorney and discussed those writings, including the stipulated order, by telephone. And Mr. Schroeder's attorney had Mr. Schroeder's permission to sign the order. This client is bound by his lawyer's written agreement; it was not necessary that the client appear in court or approve the deal in writing. *State ex rel. Turner v. Briggs*, 94 Wn. App. 299, 304, 971 P.2d 581 (1999).

Validity of the Agreement

Mr. Schroeder next challenges the validity of the agreement itself. He first argues that he never saw the stipulated order until after it was entered and therefore he never manifested any intent to be bound. He urges that there was no "meeting of the minds." Br. of Appellant at 24. And he argues that the stipulated order is invalid because it violates the deeds of trust act (ch. 61.24 RCW).

Whether an enforceable contract exists is a question of law that we review de novo. *In re Estate of Krappes*, 121 Wn. App. 653, 660, 91 P.3d 96 (2004). An

enforceable contract requires a “meeting of the minds” on the essential terms of the parties’ agreement. *McEachern v. Sherwood & Roberts, Inc.*, 36 Wn. App. 576, 579, 675 P.2d 1266 (1984). Acceptance follows from the offeree’s communication by word, sign, or writing to be bound by the offerer’s terms. *Plouse v. Bud Clary of Yakima, Inc.*, 128 Wn. App. 644, 648, 116 P.3d 1039 (2005). And there is nothing that would prohibit Mr. Schroeder from waiving whatever rights he may have by statutory or even, generally, by constitutional mandate. “[W]aiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right.” *Peste v. Peste*, 1 Wn. App. 19, 24, 459 P.2d 70 (1969) (quoting *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954)).

Here, to avoid judicial foreclosure Mr. Schroeder agreed, in consideration for a new note and new deed of trust, that Excelsior could nonjudicially foreclose. To do so he had to represent, and did represent, that the property was not and would not be used for agricultural purposes without Excelsior’s permission. That is the intentional and voluntary waiver of a known right. Mr. Schroeder received all written communications from his attorney, including the stipulated order and discussed those writings by telephone. And he does not argue otherwise; he simply says he did not read them. That failure does not affect the validity of these manifest exchanges of promises for adequate consideration.

MOTION FOR RECONSIDERATION

Mr. Schroeder next contends that the trial court improperly ruled on his motion to vacate during the summary judgment hearing because he intended to conduct further discovery. Mr. Schroeder argues that he intentionally did not set the motion for hearing. He contends that the trial court's ruling on the unset motion amounts to a procedural irregularity under CR 59(a)(1), surprise under CR 59(a)(3), and is contrary to law under CR 59(a)(7). Mr. Schroeder concludes that the trial court abused its discretion by denying his motion for reconsideration.

We review a trial court's ruling on a CR 59 motion for reconsideration under the abuse of discretion standard. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002). The trial court properly refused to vacate the stipulated order, it then also properly denied Mr. Schroeder's motion for reconsideration of that order. His motion to vacate was almost identical to the motion for stay that was set for hearing. Mr. Schroeder offered testimony and argument when the court heard the two motions. And there is no showing on what or how any additional discovery would have changed things here. There was no abuse of discretion.

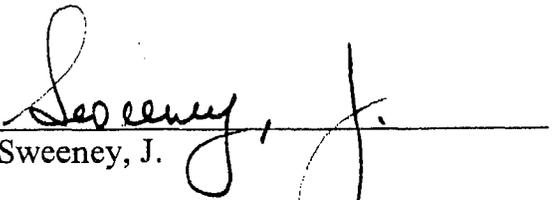
No. 29124-3-III  
Schroeder v. Excelsior Management Group, LLC

ATTORNEY FEES

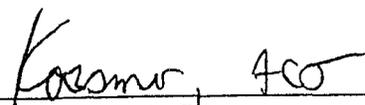
Excelsior requests fees and costs. And the promissory note and deed of trust provide for fees and costs. It is then entitled to attorney fees and costs on appeal. RAP 18.1.

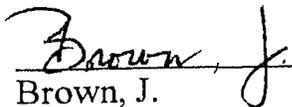
We affirm the judgment of the trial court and we award Excelsior fees and costs on appeal.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

  
Sweeney, J.

WE CONCUR:

  
Korsmo, A.C.J.

  
Brown, J.

Appendix  
A-11



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**Subject:** Schroeder Petition for Review

**From:** "Matthew F. Pfefer" <matthew@matthewpfefer.com>

**Date:** Thu, Aug 25, 2011 1:51 pm

**To:** "Phillip Haberthur" <PHaberthur@schwabe.com>, "Craig Russillo" <CRussillo@schwabe.com>, "Randi Higbie" <RHigbie@schwabe.com>, "Heather Dumont" <HDumont@schwabe.com>

**Attach:** Schroeder Appendix Opinion.pdf

Schroeder Appendix Order.pdf

2011\_0825 schroeder pet sct review.pdf

Attached.

Regards,

Matthew F. Pfefer

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