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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 291243

COURT OF APPEALS, DIVISION III
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.

REPLY BRIEF OF APPELLANT

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I. Introduction

The subject matter of this appeal is not whether Appellant Steven F. Schroeder had an obligation to repay a loan to Respondent Excelsior Management Group, LLC. The subject matter of this appeal is not whether the disputed property was security for a monetary obligation of Mr. Schroeder to Excelsior. The subject matter of this appeal is not whether Excelsior had a right to perform a judicial foreclosure of the disputed property.

Instead, the subject matter of this appeal is whether Excelsior had a right to perform a non-judicial foreclosure of the disputed property.

Within this subject matter, the specific focus of this appeal is whether Excelsior somehow received a right to perform a non-judicial foreclosure of the disputed property 1) due to the purported surrender of Mr. Schroeder's substantial right to a judicial foreclosure by his prior counsel without the knowledge or approval of Mr. Schroeder, 2) due to a purported agreement where the parties did not have a meeting of the minds, and 3) due to a purported agreement in violation of Chapter 61.24 RCW, the Deeds of Trust Act (which is, therefore, unenforceable).

II. Disputed Facts

A. New Factual Disputes

In the attempts of Respondent Excelsior Management Group, LLC, to malign Appellant Schroeder, Excelsior makes numerous factual misstatements that do not seem to be dispositive of anything. Appellant Schroeder offers the following corrections.

Excelsior states that Mr. Schroeder “offered to sign a new loan and deed of trust.” Respondent’s Brief, page 1. That statement is patently false. The offer was, in fact, made by Excelsior’s counsel, Mr. Russillo, to prior counsel for Mr. Schroeder. CP at 320-321.

Excelsior notes that Mr. Schroeder filed a “Motion for Order Staying Certain Provisions of Order Dated April 7, 2009” Respondent’s Brief, page 12. This motion was “filed as an **alternative** motion to the Plaintiff’s CR 56(f) Motion to Continue the Summary Judgment in Schroeder v. Haberthur, Stevens County Case No. 2010-2-00054-1.” CP at 79 (emphasis in original). Excelsior erroneously states that the Motion to Stay purported “to be in the alternative to Excelsior’s Motion for Summary Judgment.” Brief of Respondent, page 12.

Excelsior claims without citation that the Plaintiff’s motion for partial relief was heard on April 6, 2010. Brief of Respondent, page 13. Mr. Schroeder disputes this characterization.

Mr. Schroeder filed his motion for relief on February 16, 2010. The memorandum in support of that motion not only specifically mentioned CR 60 twice, CP at 42, lines 8 and 11, but also cited two appellate decisions. Moreover, the motion for reconsideration and reply for reconsideration both cited CR 60(b)(11). CP at 81, 83, 84, and Reply.

Excelsior, however, states that “Only now on appeal does Schroeder argue that his motions were CR 60(b) Motions.” Brief of Respondent, page 15. Excelsior also states that Mr. Schroeder’s motions have procedural problems because they fail to state their basis. As the previous paragraph shows, this alleged failure is a figment of Excelsior’s imagination.

Excelsior makes the amazing claim that Mr. Schroeder argues “that he no longer has any obligation to perform, i.e., pay back the loan, because his waiver was ‘illegal.’” Respondent’s Brief, page 29. Excelsior is merely trying to confuse the issue. No one disputes that Mr. Schroeder still owed Excelsior (subject to offsets for his claims against them). Indeed, Mr. Schroeder states that he wants “to pay for my farm and get it back.” CP at 149 (page 71, lines 10-11).

B. Old Factual Disputes

On December 31, 2008, Excelsior began negotiations with Mr. Schroeder, through counsel, by offering a replacement loan and deed of

trust. CP at 320-321. In late March and early April of 2009, those negotiations resulted in the approval by Excelsior and by counsel for both parties of replacement loan documents, replacement security documents, and a stipulation and order of dismissal. No one disputes that Mr. Schroeder discussed these documents with his prior attorney.

The disputed factual questions are whether Mr. Schroeder knew that these documents would

- 1) purport to waive his statutory right to judicial foreclosure where the property being foreclosed is used for agricultural purposes (#1 of the order);
- 2) purport to not allow him to again allege that the property is used for agricultural purposes (#2 of the order);
- 3) purport to waive his right to judicial foreclosure of any future deed of trust executed by him to the defendant, an associated company or assigns (#3 of the order); and
- 4) make the dismissal of that action “with prejudice.”

Mr. Schroeder’s prior attorney “sent stuff to me in the mail and I just let it build up.” CP at 142 (page 43, lines 10-11).

Mr. Schroeder was asked, “You don’t read the communications from your lawyer?” Id. (at line 12).

“Not very much, no. I just call him on the phone.” Id. (at line 13).

Mr. Schroeder explained that he “don’t read very well.” CP at 138 (page 26, line 22).

“Did he [Mr. Schroeder’s prior attorney] frequently or generally copy you on these letters?” CP at 144 (page 53, lines 16-17).

“He sent me – yeah, he done pretty good. I mean I got them. I never did open them, but I got them. I just knew what they were, so there wasn’t no point in opening them. I mean he’d tell me on the phone, ‘Well, I sent them a letter asking for what you needed.’ I said, ‘Okay. Great. We’ll see what happens.’” Id. (page 53, lines 18-24).

When Mr. Schroeder’s prior attorney mailed correspondence to Excelsior’s counsel, Mr. Schroeder’s prior attorney supposedly mailed a copy of same to Mr. Schroeder. CP at 126-129. Mr. Schroeder spoke with his prior attorney about the letters as they were sent. CP at 144 (page 53). For this reason, it was not necessary for Mr. Schroeder to even open the mail he received from his prior attorney. CP at 142 (pages 42-43).

Mr. Schroeder only found out in early February of this year that his “prior attorney had stipulated to an order as far back as April of last year that supposedly waived the statutory requirement that [his] property only be foreclosed judicially.” CP at 44, ¶5. The Plaintiff states unequivocally that he never authorized the purported waiver of judicial foreclosure, CP at 44, ¶6, and that he never authorized an order that purports to prevent him

from ever alleging that he uses the disputed farm for agricultural purposes, CP at 45, ¶12 (referring to ¶8).

The Plaintiff states without equivocation that he did not consent to allow any future deed of trust between the parties or related entities to be foreclosed nonjudicially or purport to waive the statutory requirement for judicial foreclosure. *Id.*, ¶14-15. The Plaintiff also states without ambiguity that he “certainly never authorized [his] prior attorney to injure [his] opportunity to pursue Defendant EXCELSIOR MANAGEMENT GROUP, LLC, in a separate lawsuit.” *Id.*, ¶17.

When asked if he was aware of a provision in a document for the second loan, Mr. Schroeder volunteered, “I’ve never read this. I’ve never read this.” CP at 137 (page 22, line 18).

Mr. Schroeder also stated, “I never asked him to do anything because I don’t know what I’m doing.” CP at 147 (page 62).

III. Summary of Argument.

Mr. Schroeder’s prior attorney purported to surrender a substantial right of Mr. Schroeder without authorization.

Excelsior disagrees. In support of its disagreement, Excelsior trots forth three weak arguments. First, Excelsior attempts to replace the correct specific legal context of the attorney-client relationship with the incorrect legal context of generic agency law. Second, Excelsior now argues that the

content of the documents on the second loan make whether Schroeder knew about the disputed provisions of the April 7, 2009 order irrelevant. Third, Excelsior thoroughly misreads the deposition testimony. Mr. Schroeder's claims are not moot.

Excelsior has chosen not to even attempt more than the most cursory of a rebuttal of Mr. Schroeder's careful explanation as to why the disputed provisions of the April 7, 2009 order are illegal.

Finally, Excelsior has chosen not to adequately support its claim for entitlement to recovery for legal fees and costs incurred in this appeal.¹

IV. Argument

A. An order bearing the signature of an attorney who does not have the client's authority to enter the order does not bind the client.

1. This Court should apply the specific rule for attorney-client relationships instead of generic agency law.

Excelsior gives lip service to the correct specific legal analysis by referring to "substantial rights." Brief of Respondents, page 16. Despite this, Excelsior then goes on to spend four pages arguing generic agency law. Pages 20-23.

Excelsior assumes that the general rule under agency law somehow beats the specific rule for attorney-client relationships. Such assumption

¹ Mr. Schroeder's Motion for Reconsideration properly resolved a procedural irregularity from the hearing of April 6, 2010. See Brief of Respondent, page 26.

defies logic. A specific rule for attorney-client relationships would obviously have priority over a general rule under agency law.

2. Mr. Schroeder's signature on the new loan documents resolves nothing.

a) Mr. Schroeder's signature on the new loan documents proves nothing as to his knowledge or intent.

Mr. Schroeder did not read the loan documents before signing them. In his own words, "I've never read this. I've never read this." CP at 137 (page 22, line 18). Indeed, Mr. Schroeder explained that he "don't read very well." CP at 138 (page 26, line 22).

For this reason, Mr. Schroeder did not know that the documents that he did not read were representing that the property was not being used for agricultural purposes. Excelsior's statement that Mr. Schroeder knew such is patently false. See Brief of Respondents, page 24. As noted above, Mr. Schroeder's deposition testimony refutes this claim. When Excelsior stated that "Schroeder has never denied this critical fact," Excelsior was adding another lie to its pile of fabrications. *Id.*

Mr. Schroeder's deposition testimony makes crystal clear that he did not read the documents for the second loan and that he relied upon his previous attorney's having reviewed and approved those documents. For this reason, a statement in those un-read loan documents that the property was not being used for agricultural purposes proves nothing.

b) As a matter of law, no statement in the new loan documents could ever disprove agricultural use of the disputed property.

The statute is crystal clear and needs no interpretation.

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). Per the statute, statements in the loan documents do not determine the propriety of a nonjudicial foreclosure. Instead, the consistent principal use of the property controls whether a nonjudicial foreclosure is allowed.

3. The deposition testimony supports the partial relief that Mr. Schroeder seeks.

This case presents two contrasting themes to illustrate the nature of the negotiations that led to the April 7, 2009 order. When Mr. Schroeder opposed Excelsior's attempt to conduct a non-judicial foreclosure of the disputed property, he caught Excelsior with its hand in the cookie jar. When that happened, Excelsior offered a "new work-out loan" to lure Mr. Schroeder into dismissing Schroeder I. CP at 320-321. Excelsior's then counsel, Mr. Russillo, made that offer to Mr. Schroeder's prior attorney. Id. The "new work-out loan" was Excelsior's suggestion and not requested by Mr. Schroeder.

According to Excelsior, “Schroeder induced (or conned) Excelsior into dismissing its lawsuit for 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 we [sic] were to default on the new loan.” Brief of Respondent, page 29 (parenthetical comment in original).

This characterization misleads for three reasons. As has already been shown, the new loan was Excelsior’s idea. This is the first reason Excelsior’s characterization misleads.

Mr. Schroeder knew that Excelsior was receiving benefits from the new loan and from dismissing its lawsuit. Those benefits had nothing to do with a non-judicial foreclosure. Instead, Mr. Schroeder knew that Excelsior would benefit because they would be able to roll their attorney fees into the new loan. This is the second reason Excelsior’s characterization misleads.

Both Mr. Schroeder and Excelsior were agreeing to dismiss their lawsuits. Both sides initiated their own lawsuits. Both sides lose something by dismissing their own lawsuit. The dismissal of both lawsuits is a wash and does not provide any net benefit for Mr. Schroeder. This is the third reason Excelsior’s characterization misleads.

In support of its misleading characterization, Excelsior has to distort the deposition testimony.

Excelsior states that “the truth, as revealed by his and his attorney’s depositions, is that Schroeder authorized his attorney to enter the Stipulated Order of Dismissal so he could get an extension of his loan.” Brief of Respondent, page 19.

The depositions state otherwise.

Mr. Schroeder’s deposition testimony is that his previous attorney sent him documents in the mail that he never opened and did not read. CP at 142 (page 43) and 144 (page 53).

Mr. Schroeder did not read these documents because he “don’t read very well.” CP at 138 (page 26, line 22). Mr. Schroeder also did not read these documents because his previous attorney had already told him what was in the unopened envelopes “so there wasn’t no point in opening them.” CP at 144 (page 53).

Excelsior cannot refute Mr. Schroeder’s position that he never authorized the disputed portions of the April 7, 2009 order. Indeed, Excelsior had an opportunity during its depositions of Mr. Schroeder and his previous attorney to ask Mr. Schroeder or his previous attorney about each of these disputed provisions. Excelsior chose not to do so.

The closest Excelsior came to asking Mr. Schroeder about **each** provision was to ask the following:

Q. Did Mr. Sanger discuss his proposed changes with you before he sent this letter to me around that time? That would be March 30th.

A. Whatever he discussed with me, I don't really – I don't recall it all because there was so much.

Q. Is it possible you two discussed this?

A. But if – Yeah, I'm sure he did.

CP at 146 (page 61).

Excelsior should have asked Mr. Schroeder if his previous attorney told him that the proposed order would prevent him from again alleging that the property is used for agricultural purposes. Excelsior should have asked Mr. Schroeder if his previous attorney told him that the proposed order would waive Mr. Schroeder's statutory right to judicial foreclosure where the property being foreclosed is used for agricultural purposes. Excelsior should have asked Mr. Schroeder if his previous attorney told him that the proposed order would waive his right to judicial foreclosure of any future deed of trust executed by him to the defendant, an associated company or assigns. Finally, Excelsior should have asked Mr. Schroeder whether his attorney told him that the proposed order would dismiss his case against Excelsior "with prejudice" and would prevent him from bringing Excelsior to justice in the future.

Excelsior asked Mr. Schroeder none of this.

Excelsior asked Mr. Schroeder's previous attorney the following:
"Looking at paragraph No. 2, 'Schroeder shall not be allowed to again

allege that the subject property is used for agricultural purposes.' Is it correct to say that you fully discussed that issue with Mr. Schroeder before you would have signed this?" CP at 160 (page 24, lines 7-12).

The closest Excelsior came to asking Mr. Schroeder's previous attorney about **each** provision was the following:

"Q. Do you believe you fully explained the effect that this would have on any future foreclosure to Mr. Schroeder? A: Yes." CP at 160 (page 25).

Excelsior should have asked Mr. Schroeder's previous attorney if he told Mr. Schroeder that the proposed order would prevent him from again alleging that the property is used for agricultural purposes. Excelsior should have asked Mr. Schroeder's previous attorney if he told Mr. Schroeder that the proposed order would waive Mr. Schroeder's statutory right to judicial foreclosure where the property being foreclosed is used for agricultural purposes. Excelsior should have asked Mr. Schroeder's previous attorney if he told Mr. Schroeder that the proposed order would waive his right to judicial foreclosure of any future deed of trust executed by him to the defendant, an associated company or assigns. Finally, Excelsior should have asked Mr. Schroeder's previous attorney if he told Mr. Schroeder that the proposed order would dismiss his case against

Excelsior “with prejudice” and would prevent him from bringing Excelsior to justice in the future.

Excelsior chose not to ask Mr. Schroeder’s previous attorney any of these questions.

Since Mr. Schroeder did not read the mail, anything he was sent in the mail cannot prove that he agreed or ratified anything.

Since Mr. Schroeder did not read the documents for the second loan, but relied upon his previous attorney’s having reviewed and approved those documents, those documents cannot prove that Mr. Schroeder agreed or ratified anything.

On the first loan, Excelsior tried to trap Mr. Schroeder into an illegal nonjudicial foreclosure and failed. Mr. Schroeder has always insisted that the statute be followed. He did so in the filing of the 2008 case, in his declaration, and in his deposition. He has never wavered from this firm position. This Court should reject Excelsior’s hollow allegations otherwise.

B. Because this Court’s removal of the disputed provisions would provide meaningful relief by empowering Mr. Schroeder to set aside the trustee’s sale (if any), none of Mr. Schroeder’s claims are moot.

- 1. Excelsior has provided no factual support for its mootness argument.**

Excelsior has asked this Court to dismiss Mr. Schroeder’s appeal as a matter of law because Mr. Schroeder’s claims and this appeal are

supposedly moot. Brief of Respondent, page 27. Excelsior's argument for this conclusion is rather opaque.

Excelsior's argument starts by announcing that "the Property has already been foreclosed (on February 19, 2010)." Id. Excelsior cites no support for this claim. What Excelsior might be able to cite from the record of this appeal is unclear. Excelsior has designated a Declaration of Craig G. Sayers and an Amended Declaration of Craig G. Sayers. Both of these documents state that "a Trustee's Sale occurred on February 19, 2010." CP at 168 and 215. Both of these declarations also state that a Trustee's Deed for the disputed property is attached. Id. Excelsior does not appear to have designated any document which includes the Trustee's Deed. Additionally, neither the supposed grantor of the purported Trustee's deed (Mr. Phillip J. Haberthur) nor the declarant (Mr. Craig G. Sayers) was present at the time of the alleged Trustee's Sale. Indeed, Excelsior has never identified anyone who has first-hand, percipient knowledge that any trustee's sale of the disputed property ever occurred. Excelsior has chosen not to make such identification in this matter, in the Stevens County case that Mr. Schroeder filed in 2010, or in the Stevens County Unlawful Detainer case that Excelsior filed in 2010.

The first reason that Mr. Schroeder's claims are not moot is that Excelsior's mootness argument has no factual support. The clerk's papers

that Excelsior has designated do not appear to provide a factual basis on which to build its mootness argument. Moreover, Excelsior has chosen not to file proof that any trustee's sale actually occurred in any trial court case.

2. **For the sake of argument, even if Excelsior could prove that a trustee's sale of the disputed property occurred, on the facts of this case, the authorities that Excelsior cites do not support its argument that Mr. Schroeder waived his rights and that Mr. Schroeder's claims are therefore moot.**

A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive. It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage. The right, advantage, or benefit must exist at the time of the alleged waiver. The one against whom waiver is claimed must have actual or constructive knowledge of the existence of the right. He must intend to relinquish such right, advantage, or benefit; and his actions must be inconsistent with any other intention than to waive them.

Bowman v. Webster, 44 Wn.2d 667, 669, 269 P.2d 960 (1954).

When a debtor decides not to file an action contesting a trustee's sale or files an action contesting a trustee's sale without seeking an order preventing the sale, Washington courts have decided to impute or presume waiver. The Defendants argue for mootness on the alleged basis that Mr. Schroeder has somehow waived his rights, even though he filed an action against them before the trustee's sale, even though his action contested the trustee's sale, even though he sought an order preventing the sale, and

even though he received an order preventing the sale. This Court should reject the Defendants' argument.

a) Bowcutt Opposes the Defendants' Claim that Mr. Schroeder Waived his Rights.

In Bowcutt v. Delta N. Star Corp., 95 Wn. App. 311, 976 P.2d 643 (1999), a court commissioner "issued an ex parte TRO based on the imminence of the impending trustee's sale," which was set for the next day. 95 Wn. App. at 315-316.

In this case, the Court has the authority to grant the injunction under Chapter 19.86 RCW, the Consumer Protection Act. The purpose of the Act is to protect a "person who is injured in his or her business or property." RCW 19.86.090. For this reason, the Court has the authority to follow Bowcutt and "proceed under the injunction power of RCW Title 7, which places the terms of the injunction squarely within the sound discretion of the court. RCW 7.40.080." Bowcutt, 95 Wn. App. at 321. This is precisely what the Court did. CP at 283-284.

Bowcutt shows that a grantor on a deed of trust has two appropriate bases for enjoining a trustee's sale **in addition to** RCW 61.24.130, a statute that provides for injunctive relief as well as Article 4, §6, of the Constitution of the State of Washington. Consequently, it is appropriate for Mr. Schroeder to follow the procedure outlined in Chapter

7.40 RCW under the Consumer Protection Act and under Article 4, §6, of the Constitution of the State of Washington. Following this procedure is precisely what Mr. Schroeder has done. CP at 283-284.

Consequently, Bowcutt opposes Defendant' claim that Mr. Schroeder waived his rights.

b) Mr. Schroeder Never Waived Any of His Rights.

In Brown v. Household Realty Corp., 146 Wn. App. 157, 189 P.3d 233 (2008), the plaintiffs filed their lawsuit two years after the trustee's sale. For this reason, any statement in Brown about the procedural requirements of RCW 61.24.130 is dictum. Brown is about a motion to restrain a trustee's sale under RCW 61.24.130. It is not about a motion for an ex parte restraining order under CR 65(b) and RCW Chapter 7.40.

In Plein v. Lackey, 149 Wn.2d 214, 67 P.2d 1061 (2003), the plaintiff never sought an order stopping the trustee's sale. 149 Wn.2d at 226. Also, in Plein, the plaintiff never received an order stopping the trustee's sale. Id.

In In re Marriage of Kaseburg, 126 Wn. App. 546 (2005), the spouse who was raising issues relative to the underlying obligation "did not challenge the foreclosure proceedings." 126 Wn. App. at 548. In Kaseburg, the spouse who was raising issues relative to the underlying

obligation “did not contest the foreclosure proceedings.” 126 Wn. App. at 550.

In People’s National Bank of Washington v. Ostrander, 6 Wn. App. 28 (1971), the “defendants chose to wait until after the sale on September 25, 1970 . . . to assert their claimed defense.” 6 Wn. App. 32. In Koegel v. Prudential Mut. Sav. Bank, 51 Wn. App. 108 (1988), the trustee’s sale was held on June 13, 1986, and the plaintiff filed suit on June 27, 1986, after the trustee’s sale had already occurred. Koegel, 51 Wn. App. at 110. In Hallas v. Ameriquest Mortg. Co., 406 F.Supp.2d 1176 (D.Or. 2005), the plaintiff “failed to bring an action to obtain a court order enjoining the sale.” 406 F.Supp.2d at 1179. According to Hallas, the cases cited by the defendant show that

the waiver provision of the Deed of Trust Act applies to prevent the borrower/grantor from raising such claims when the borrower/grantor has notice of the claim before the sale, has notice of the sale, and **fails to initiate litigation to stop the sale.**

406 F.Supp.2d at 1181 (emphasis added). In Hallas, the plaintiff “obviously failed to bring any action to stop the sale before the sale occurred, raising her claims only later [].” 406 F.Supp.2d at 1182.

These are two different procedural paths to a restraining order. The procedural path of an ex parte restraining order under CR 65(b) and

Chapter 7.40 RCW is validated by Bowcutt v. Delta N. Star Corp., 95 Wn. App. 311, 319, 976 P.2d 643 (1999).

In this case, the Plaintiff filed his lawsuit before the trustee's sale, actually sought an order stopping the trustee's sale twice, and **received** such an order on February 16, 2010. CP at 283-284. Consequently, Brown, Plein, Kaseburg, Ostrander, Koegel, and Hallas do not support the Defendants' claims that Mr. Schroeder somehow waived his rights or that his claims are somehow moot.

3. Because this Court can still provide meaningful relief for Mr. Schroeder, his claims are not moot.

Although Mr. Schroeder has a remedy available, the Respondents argue that this case is moot. For the above reasons, a mootness claim is not well-founded. This Court should reject the Respondents' argument on this issue.

C. The disputed provisions of the April 7, 2009 Order conflict with the terms of a legislative enactment (Deeds of Trust Act) and are illegal and unenforceable.

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.

Excelsior mentions several areas of potential waiver: “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).” *Id.* None of these areas of waiver involve any provisions that violate any statute! They are all irrelevant.

Excelsior also cites a general statement that statutory rights can generally be waived. *Id.* (citing Wynn v. Earin, 163 Wn.2d 361 (2008)). The most cursory review of this case demonstrates that it has nothing to do with terms of any alleged contract or agreement. Moreover, the case bases its conclusion on rulings that run back to 1906 “in the analogous area of the statutory physician-patient privilege.” Wynn, 163 Wn.2d at 381.

Pointing to no place in Wynn that involves a supposed agreement, Excelsior also identifies no analogous area in previous judicial decisions. Consequently, Wynn is irrelevant.

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

² “Any provision of a lease or other agreement, whether oral or written, whereby any section or subsection of this chapter is waived except as

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.1-102(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).

In short, the disputed provisions of the April 7, 2009 Order are illegal. Because the disputed provisions are illegal, the Respondents may not enforce them.

D. Excelsior has chosen not to adequately support its claim for entitlement to recovery for legal fees and costs incurred in this appeal.

Here follows Excelsior’s section on attorney fees in its entirety:

The Promissory Note and Deed of Trust signed by Shroeder [sic] include provisions that permit the prevailing party to recover their [sic] fees incurred in enforcing the

provided in RCW 59.18.360 and shall be deemed against public policy and shall be unenforceable.”

³ “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.”

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.

Notably, Excelsior chose not to cite to any statutes, case law, or other authorities in this section. Also absent from this section is any citations to the record.

Although Excelsior “did include a separate section in its brief devoted to the fees issue as required by RAP 18.1(b),” Excelsior chose not to provide any citation to authority and only provided minimal argument. See Wilson Court v. Tony Maroni’s, Inc., 134 Wn.2d 692, 710-711 fn. 4, 952 P.2d 590 (1998). Argument **and** citation to authority are required. *Id.* Because Excelsior has chosen not to adequately support its request for attorney fees on appeal, this Court should deny attorney fees on appeal to Excelsior, even if Excelsior prevails.

If Excelsior wished to include the prevention of the enforcement of the Trust Deed as a basis for attorney fees and litigation expenses, it could have done so. If this suit “tried to prevent Excelsior from enforcing its rights under the Deed of Trust” and the contract allows attorney fees for a party who enforces its rights, such a provision is ambiguous. As Excelsior drafted the Trust Deed, this Court should interpret vague terms in it against Excelsior. Forbes v. Am. Bldg. Maint. Co. West, 148 Wn. App.

273, 288 ¶ 28 (2009) (citing Felton v. Menan Starch Co., 66 Wn.2d 792, 797, 405 P.2d 585 (1965)). Additionally, the contract that Excelsior drafted could have provided that no ambiguity therein would be construed against the drafter. City of Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, ¶29 (2009). In short, the ambiguity opposes Excelsior's request. For this reason, the Court should deny Excelsior any attorney fees or litigation expenses, even if Excelsior prevails.

V. Conclusion

Contending that Mr. Schroeder's prior attorney was authorized to surrender a substantial right of Mr. Schroeder without authorization, Excelsior trots forth three weak arguments. First, Excelsior applies the wrong field of law to the issue. Second, Excelsior relies on the unread new loan documents, which cannot prove anything as a matter of law. Third, Excelsior distorts the deposition testimony.

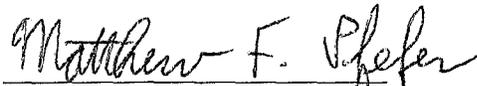
Excelsior has chosen not to even attempt more than the most cursory of a rebuttal of Mr. Schroeder's careful explanation as to why the disputed provisions of the April 7, 2009 order are illegal. Excelsior has not even attempted to refute Mr. Schroeder's explanation as to why the disputed provisions are unenforceable because they are not supported by a meeting of the minds.

Because this Court can still provide meaningful relief, Mr. Schroeder's claims are not moot.

Finally, Excelsior has chosen not to adequately support its claim for entitlement to recovery for legal fees and costs incurred in this appeal, should it prevail.

This Court should reverse the trial court's erroneous orders and remand to the trial court for entry of an order granting partial relief from the April 7, 2009 Order.

Respectfully submitted this 1st day of February 2011.



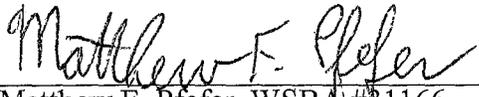
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DECLARATION OF SERVICE

Pursuant to GR-13, 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 written agreements with Phillip J. Haberthur as attorney for Respondents allowing service by email.
3. I served the Reply Brief of Appellant on February 1, 2011 via email to PHaberthur@schwabe.com, HDumont@schwabe.com, RHigbie@schwabe.com, and CRussillo@schwabe.com.

Signed this 1st day of February 2011 in Spokane, Washington.


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