

NO. 86433-1

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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SUPPLEMENTAL BRIEF OF RESPONDENTS

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I. INTRODUCTION

Schroeder expressly declared and warranted to Excelsior in a signed and notarized Deed of Trust that the encumbered property was not being “used **principally** for agricultural purposes” and it would not be so used in the future without Excelsior’s consent. Excelsior relied upon these representations of fact and his promise when it approved the loan.

But in a desperate (and repeated) attempt to exploit a statute designed to protect farmers, Schroeder admits that he lied to Excelsior because he now claims the property was actually being “used principally” as a “working farm.” Yet, Schroeder does not claim Excelsior was a co-conspirator in his fraud or was attempting to undermine the statute.

This was not Schroeder’s first attempt to manipulate the law. In 2009, Schroeder sued to try and stop the Trustee’s Sale by alleging that the property was a “working farm,” despite his prior representations and warranties to the contrary. But when Excelsior called his bluff and proceeded to seek judicial foreclosure, Schroeder begged for a second chance.

Excelsior agreed to a new loan provided Schroeder signed a new Deed of Trust to **again** represent, in a notarized document, that the property was actually not being “principally” used for agricultural purposes. Schroeder also “warranted” in the new Deed of Trust that the

Property would not be used for such purposes in the future. The parties further memorialized this agreement in the form of a Stipulated Order of Dismissal **with prejudice** in which Schroeder **again** agreed not to use the property for agricultural purposes and promised never to “allege” such use in the future as a means to prevent Excelsior from proceeding with a non-judicial foreclosure.

When he defaulted on the new loan, Schroeder tried yet again to stop the Trustee’s Sale by claiming that he was using the property principally for agricultural purposes. He again claimed he had lied in the Deed of Trust, Stipulated Order of Dismissal, and the other loan documents. Schroeder again did not allege that Excelsior was a party to his fraud. The trial court rejected Schroeder’s shenanigans and ordered the Trustee to proceed with the sale. The court of appeals upheld this result.

Schroeder’s prior representations and warranties were clear, unambiguous, and contained within a notarized document. Excelsior relied upon these statements when it approved the loan and when it decided not to proceed with the judicial foreclosure. Schroeder should be estopped from now claiming a fact contrary to the representations he made in the Deed of Trust. He should also not be allowed to renege on promises made in the Stipulated Order of Dismissal. Further, reversal of the Court

of Appeals will greatly affect the stability of land titles because virtually any sale could later be set aside on the same grounds. This court should therefore uphold the trial court and the Court of Appeal's decisions in this case.

II. ISSUES PRESENTED FOR REVIEW

1. A party is bound by the terms of a settlement agreement to the same extent as any other contract. To avoid judicial foreclosure, Schroeder stipulated in court that in the event he defaulted on the new loan, he would not claim the property was being "used principally for agricultural purposes." Can Schroeder renege on his Stipulation and assert a claim he had released by settlement?

2. Under the doctrine of res judicata, a dismissal with prejudice pursuant to a settlement agreement acts as a final judgment on the merits and is given preclusive effect. The trial court dismissed Schroeder's claim the property was "used principally for agricultural purposes" with prejudice pursuant to the parties' Stipulation. Does res judicata prohibit Schroeder from re-alleging this claim?

3. A party is bound by representations of fact they make in a written and notarized agreement. They must also abide by their promise not to permit their property to be used for certain purposes in the future. Here, Schroeder signed a deed of trust in which he expressly declared that his property was not currently being "used principally for agricultural purposes" and further promised that it would not be used for agricultural purposes in the future. Can Schroeder retract those representations or renege on his promise and now claim that the property was and is being used principally for agricultural purposes?

4. The Deed of Trust Act provides the exclusive means to restrain a trustee's sale. Failure to restrain the sale results in a complete bar/waiver of all claims related to a commercial loan. Schroeder failed to properly restrain the trustee's sale. Are his claims barred and this appealed rendered moot?

III. STATEMENT OF THE CASE

Excelsior largely agrees with the Court of Appeal's recitation of the facts in its opinion and those facts Excelsior supplied in its Response Brief and Answer to the Petition for Review.

IV. ARGUMENT

A. Standard of Review.

Because the trial court and the Court of Appeals resolved this case on summary judgment, this court's review is *de novo*.¹ Although not raised in his Petition, Schroeder may impermissibly try to challenge his attorney's authority to enter the Stipulated Order of Dismissal. Excelsior objects to the new argument, but if allowed, this Court must defer to the trial court's determination under the abuse of discretion standard of review when ruling on a motion to vacate a final judgment under CR 60(b).² A court only abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds.³

Also, to the extent it is necessary under this Review to interpret RCW 61.24.030(2), the court should carry out the legislative intent.⁴ And

¹ *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000).

² *Morris v. Maks*, 69 Wash App 865, 850 P2d 1357 (1993) (trial court's decision to enforce a settlement agreement pursuant to CR 2A and RCW 2.44.010 is subject to the abuse of discretion standard of review).

³ *Mayer v. STO Industries, Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

⁴ *Cockle v. Dep't of Labor and Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001).

when the statute's words are plain and unambiguous, the Court need only construe the statute as written.⁵

B. Schroeder Warranted and Represented That His Property Was Not Presently Being Used, And Would Not Be Used In the Future, Principally for Agricultural Purposes in the Stipulated Order of Dismissal.

After Schroeder sued to try and stop the first Trustee's Sale, Excelsior called his bluff and filed its own lawsuit to conduct a judicial foreclosure.⁶ The parties settled the lawsuit by having Schroeder sign a new Promissory Note and Deed of Trust.⁷ Schroeder specifically represented the current use of the property and warranted not to allow the property to be "principally" used for agricultural uses in the future.

The parties agreed to confirm their settlement by entering into a Stipulated Order of Dismissal with Prejudice.⁸ The Stipulation provides that Schroeder expressly waived any right to claim that the property had to be foreclosed judicially because the property was being used principally for agricultural purposes and agreed not to assert a claim in the future that the subject property was used for agricultural purposes.⁹

⁵ *Leasing Inc. v. City of Tacoma*, 139 Wn.2d 546, 552, 988 P.2d 961 (1999) (internal citations omitted).

⁶ CP 52-57.

⁷ CP 165-205.

⁸ CP 35-37.

⁹ CP 36.

1. Schroeder is Bound by the Stipulated Order of Dismissal.

Like any other settlement agreement, a stipulation entered into by the parties and accepted by the court is a contract and will be enforced as such.¹⁰ When the requirements of CR 2A and/or RCW 2.44.010 are met, the stipulation is binding on the parties and must be enforced by the courts.¹¹ Indeed, “the law favors the private settlement of disputes and is inclined to view them with finality.”¹² Moreover, when a party agrees to release a party from a particular claim, the courts will enforce that release and bar the party from raising that claim in the future.¹³

The essential elements of a valid settlement agreement are met here: the Stipulated Order of Dismissal was in writing and signed by the party or his attorney.¹⁴ Schroeder is therefore bound and he cannot now renege on its terms.

¹⁰ *Stottlemyre v. Reed*, 35 Wn. App. 169, 172, 665 P.2d 1383 (1983).

¹¹ *Cook v. Vennigerholz*, 44 Wn.2d 612, 269 P.2d 824 (1954); *Morris*, 69 Wn. App. at 868.

¹² *Snyder v. Tompkins*, 20 Wn. App. 167, 173, 579 P.2d 994 (1978) (An agreement is binding on the parties and will not be reviewed on appeal unless the party contesting it can show that the stipulation was a product of fraud or that the attorney overreached his authority.); *Haller v. Wallis*, 89 Wn.2d 539, 573 P.2d 1302 (1978) (Once a client has designated an attorney to represent him, the court and other litigants are entitled to rely upon that authority.).

¹³ *Nationwide Mutual Fire Ins. Co v. Watson*, 120 Wn.2d 178, 840 P.2d 851 (1992).

¹⁴ Although Schroeder initially challenged his attorney’s authority to enter the Stipulated Order of Dismissal, he did not raise that issue in his Petition before this Court.

2. Schroeder's Claims are also Barred by Res Judicata, Collateral Estoppel and Equitable Estoppel.

Schroeder's claim that the property was "used principally" for agricultural purposes is also barred under the doctrine of res judicata. "Res judicata ensures the finality of judgments."¹⁵ "[D]ismissal 'with prejudice' is equivalent to an adjudication upon the merits and will operate as a bar to a future action," especially when entered as part of a settlement.¹⁶

The Stipulated Order of Dismissal in this case 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.¹⁷

¹⁵ *Mellor v. Chamberlin*, 100 Wn.2d 643, 645, 673 P.2d 610 (1983); *Maib v. Maryland Cas. Co.*, 17 Wn.2d 47, 52, 135 P.2d 71 (1943) (Res judicata is designed to curtail the re-litigation of the same claims or causes of action and is designed to prevent piece-meal litigation by prohibiting parties from litigating new matters that were, or could have been, considered in a previous action.).

¹⁶ *Maib v. Maryland Cas. Co.*, 17 Wn.2d 47, 52, 135 P.2d 71 (1943).

¹⁷ CP 36-37.

Therefore, in addition to the parties' CR 2A settlement agreement, res judicata bars Schroeder from now claiming that the Property was or is being "used principally" as a farm or ranch. He agreed to release Excelsior from that particular claim and therefore could not be permitted to raise it in connection with the second foreclosure.

Schroeder's current claim is also barred under the doctrine of equitable estoppel. This doctrine prevents a party from making a later claim where (1) one party has made an admission, statement, or act inconsistent with the later claim; (2) another party reasonably relies on that admission, statement, or act; and (3) the relying party would be injured if the first party is allowed to contradict or repudiate the admission, statement, or act.¹⁸

Excelsior was prepared to proceed with litigating its claim for judicial foreclosure and/or to contest Schroeder's claim that the property was being used "principally" for agricultural purposes.¹⁹ But Schroeder requested a new short term loan and agreed to abandon his factual claim that Excelsior had to conduct a judicial foreclosure because of the property's agricultural use in the event of a future default. Excelsior

¹⁸ *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 599, 957 P.2d 1241 (1998).

¹⁹ See CP 320-21. Excelsior denied Schroeder's claim that the property was being used principally for agricultural purposes.

reasonably relied upon Schroeder's representation of fact and his promise not to assert this claim in the future. This was because Excelsior wanted to prevent him from committing fraud and asserting false statements to induce them to make the new loan. Schroeder is barred from asserting a claim contrary to what he represented to Excelsior and the Court.

C. **Schroeder Cannot Assert Claims That Are Contrary to the Representations Or Warranties That He Made In the Deed Of Trust.**

Under RCW 61.24.030(2), a trustee sale can only occur if 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, and false on the date of the trustee's sale, then the deed of trust must be foreclosed judicially."

The purpose of this provision is twofold: (1) to prevent non-judicial foreclosures of property actually being "principally used" for agricultural purposes; and (2), to prevent borrowers from circumventing the lender's contractual right to foreclose non-judicially by changing the use before the trustee's sale.²⁰

Agricultural lenders primarily use mortgages to secure agricultural property because mortgages (and judicial foreclosures) permit a borrower

²⁰ 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.

to redeem their property at any time within one year after the foreclosure sale, while the Deed of Trust Act expressly denies post-sale redemption rights.²¹

1. Schroeder is lawfully bound by his representation of facts and his promise to not allow the Property to be used in the future “principally” for agricultural purposes.

This case does not involve whether Schroeder was required to waive statutory rights afforded farmers. This case instead asks whether Schroeder can get away with perpetuating fraud on both Excelsior and the Court and assert a claim inconsistent with his prior representations. Excelsior was not intending to lend Schroeder money for agricultural purposes and it certainly did not want to take a Deed of Trust on property that was exempt from non-judicial foreclosures.

Therefore, the Deeds of Trust specifically required Schroeder to make an affirmative representation whether the property was or was not being used “principally” for agricultural purposes.²² Schroeder was also required to promise (warrant) that he would not, without Excelsior’s consent, allow the property to be used “principally” for such purposes in the future.²³

²¹ RCW 6.23.020 and RCW 61.24.050. Post-sale redemption rights for agricultural property are important because losses from a single crop failure may force a farmer into default.

²² CP 182.

²³ *Id.*

At the time he signed and notarized the documents, Schroeder was certainly in the best position to know whether the Property was being “used principally” for agricultural purposes. What more can a lender do but to rely upon the affirmative representations, warranties, and promises of their borrower regarding the use of the property at the time the deed of trust is granted? Lenders must be able to rely upon the representations of their borrowers.

If the law precluded a lender from relying upon the property owner’s declaration about the current use of their property then how would a lender be able to rebut the borrower’s representation that the property was or was not being principally used as a farm or ranch? What would lenders look for if they visited the site?

The statute does not define “principally” used, so does a lender count chickens, goats, horses, acres being farmed to make a determination as to the Property’s principal use?²⁴ Further, a site visit would not prevent unscrupulous borrowers from temporarily hiding cattle or misrepresenting the current or future uses of their property in order to obtain a loan. This Court should not tolerate and reward such antics from a borrower, especially where there are no allegations that Excelsior was privy to any such trickery or was attempting to undermine the statute.

²⁴ Webster’s defines “principal” or “principally” to mean “most important.” *Webster’s Ninth New Collegiate Dictionary*, page 935 (1983). How does one determine what is “most important?”

2. The Court of Appeals' Decision Promotes the Purposes of the Deed of Trust Act.

Permitting Schroeder to exploit a statute designed to protect farmers would invite other borrowers to fraudulently represent the current use of the property to their lenders to avoid a non-judicial foreclosure. Such a result would frustrate the purposes of the Deed of Trust Act and only promote fraud on lenders. This Court has set forth the three 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.²⁵

Excelsior is not in the business of lending money on agricultural property, and it was careful to avoid entering into any loan agreements that may trigger the need for a costly judicial foreclosure.²⁶ Schroeder should not be allowed to so easily convert a Deed of Trust into a mortgage through his deceptive conduct. Moreover, upholding the trial court and the court of appeals will serve to promote the stability of land titles because title companies and third parties could rely upon the finality of a

²⁵ *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985) (internal citations omitted).

²⁶ The one-year redemption period is unpalatable for lenders that must move non-performing loans off their inventory sheets. Schroeder agreed to this requirement.

trustee's sale.

D. The Court of Appeals' Decision Does Not Conflict With *Albice v. Premier Mortgage Services of Washington, Incorporated.*

This Court is currently reviewing Division II's case of *Albice v. Premier Mortgage Services of Washington, Inc.*²⁷ The relevant issue in that case is whether the trustee's sale could be continued for more than 120 days in violation of RCW 61.24.060(6).²⁸

Schroeder claims the Court of Appeal's decision in this case is at odds with Division II's opinion in *Albice*. Excelsior disagrees. The issue in this case is whether a borrower can change their mind (or commit fraud) on a representation of fact, while the issue in *Albice* is whether the parties can agree to extend the statutory authority of the Trustee. The *Albice* case is distinguishable and therefore not at odds with the present case.

Unlike *Albice*, Schroeder's representations and warranties related to an issue of current and future fact. It was not a waiver of a statutory right—it was a representation of fact and a contractual agreement by Schroeder that the property was and would not be “principally” used for agricultural purposes.

The procedures at issue in *Albice* are designed to ensure that the

²⁷ 157 Wn. App. 912, 239 P.3d 1148 (2010), *review granted*, 170 Wn.2d 1029, 249 P.3d 623 (2011).

²⁸ *Id.* at 926.

trustee's sale occurs within a reasonable period of time in order to avoid prejudice to the borrower and guarantors. Schroeder was not asked to **waive** any statutory rights. He instead was asked to represent, one way or the other, whether the property was "used principally" for agricultural purposes. He also agreed not to allow the property to be used for such purposes in the future without Excelsior's consent. He is simply being asked to stand by the representations he made and to abide by his agreement.

Any waiver that may have occurred involved only the waiver of Schroeder's ability to use the property for agricultural purposes because he had contractually agreed that he would refrain from doing so during the one-year term of the Loan. Schroeder did not waive his statutory rights.²⁹ At worse, he waived the right to use his property "principally" for agricultural purposes. This case is therefore different than *Albice*.

E. Schroeder Waived His Right to Challenge the Sale and the Appeal is Moot.

Regardless how the Court views Schroeder's arguments, his appeal was rendered moot when Schroeder failed to challenge the sale by availing himself of his presale remedies.³⁰ Under the Deed of Trust Act's Waiver

²⁹ "[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) citing *Bowman v. Webster*, 44 Wn.2d 667, 269 P.2d 960 (1954).

³⁰ CP 168; the property was sold at Trustee's Sale on February 19, 2010.

Doctrine, waiver occurs when a party (1) receives notice of the right to enjoin the sale; (2) has actual or constructive knowledge of a defense to foreclosure before the sale; and, (3) fails to bring an action to enjoin the sale.³¹

Schroeder does not dispute that he received all presale notices of the sale and foreclosure, that the notices conformed with the requirements of RCW 61.24.040, or that the notices informed him of his right to enjoin the sale. Therefore, because Schroeder failed to restrain the sale, his claims are barred and therefore the claims he has raised in this appeal are moot.³²

F. Excelsior Is Entitled To Its Reasonable Legal Costs.

The Promissory Note and Deed of Trust permit the prevailing party to recover their legal fees.³³ Therefore, if Schroeder does not prevail, Excelsior is entitled to its reasonable fees and costs.

V. CONCLUSION

This court should not condone Schroeder's antics in this case simply to allow him to avoid the lender's remedy of a non-judicial foreclosure. Absent fraud by the lender, a borrower should not be allowed to misrepresent the "principal" use of their property to secure a loan only

³¹ *Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003).

³² *Id.*

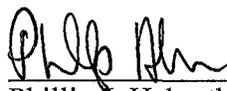
³³ CP 171; 192.

to change their position later to force a judicial foreclosure. Moreover, a party that releases a claim as part of a settlement agreement should not be permitted to go back on that promise and pursue that claim.

The Court of Appeals' decision should therefore be affirmed.

Dated: February 6, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 2012, I caused to be served the foregoing **SUPPLEMENTAL BRIEF OF RESPONDENTS** on the following party at the following address:

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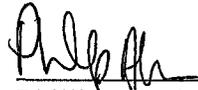
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