

**FILED**

MAR 28 2012

NO. 30333-1

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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EXCELSIOR MORTGAGE EQUITY FUND II, LLC, an Oregon limited  
liability company,

Plaintiff-Respondent,

vs.

STEVEN F. SCHROEDER, an individual,

Defendant-Appellant.

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RESPONDENT'S BRIEF

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**TABLE OF CONTENTS**

**Page**

I. INTRODUCTION .....1

    A. Summary of Issues.....1

    B. Summary of Case.....1

II. STATEMENT OF ISSUES .....5

III. COUNTERSTATEMENT OF THE CASE.....6

    A. Pre-Eviction Background.....6

    B. Unlawful Detainer Proceedings.....8

    C. Motion to Dispose of Personal Property .....10

IV. ARGUMENTS.....12

    A. Standard of Review.....12

    B. Trial Court Retained Authority to Rule on Motion to Dispose  
    of Property. ....14

    C. Writ of Restitution Not Applicable Under the Circumstances. ....18

    D. Schroeder had reasonable amount of time to remove Personal  
    Property.....20

    E. Excelsior is Entitled to Its Attorneys’ Fees and Costs on  
    Appeal.....21

V. CONCLUSION.....21

## TABLE OF AUTHORITIES

### Page

#### CASES

<i>Cole v. Haveyland, LLC</i> , 163 Wash. App. 199, 258, P 3d 70 (2011).....	13
<i>In re Marriage of Tang</i> , 57 Wn. App. 648, 653, 789 P.2d 118 (1990).....	14
<i>Keller v. Keller</i> , 52 Wn.2d 84, 86, 323 P.2d 231 (1958).....	15
<i>Mayer v. STO Industries, Inc.</i> , 156 Wn.2d 677, 684, 132 P.3d 115 (2006).....	14
<i>Munden v. Hazelrigg</i> , 105 Wn.2d 39, 45, 711 P.2d 295 (1985).....	16
<i>Rogers Potato Serv., LLC v. Countrywide Potato, LLC</i> , 152 Wn.2d 387, 391, 97 P.3d 745 (2004).....	14
<i>Sunnyside Valley Irrigation Dist. v. Dickie</i> , 149 Wn.2d 873, 879-90, 73 P.3d 369 (2003) .....	14

## **I. INTRODUCTION**

### **A. Summary of Issues**

How long does the former owner of non-residential real estate have to remove his personal property from real estate surrendered through foreclosure? Did the trial court abuse its discretion when it determined that 19 months was a sufficient amount of time? And can the trial court, as part of an unlawful detainer action, require the former owner to either remove his personal property from the Property within a reasonable deadline or risk having the property sold or otherwise disposed by the new owner? Those are the questions at issue in this case.

### **B. Summary of Case**

Appellant Steven F. Schroeder obtained a commercial loan (“Loan”) from Respondent Excelsior Mortgage Equity Fund II, LLC (“Excelsior”) which was secured by a Deed of Trust over the subject commercial real property (“Property”). After Schroeder defaulted, Excelsior foreclosed and acquired the property at the Trustee’s Sale. Pursuant to RCW 61.24.060(1), Excelsior was entitled to take possession of the Property on the twentieth day following the Trustee’s Sale. Arguably, Excelsior’s foreclosure included the items now claimed by

Schroeder and are owned by Excelsior.<sup>1</sup>

Because Schroder had accumulated and stored an enormous amount of personal property on the Property, Excelsior could not take complete possession of the Property.<sup>2</sup> Excelsior and Schroeder therefore agreed to allow Schroeder an additional 40 days to remove his belongings from the Property. When Schroder failed to remove everything to which he was claiming by the deadline, Excelsior filed an action for unlawful detainer as required by the Deeds of Trust Act to obtain full possession of the Property.

After a hearing, the trial court ruled that Schroeder was in “unlawful detainer” and ordered that Excelsior was entitled to “immediate possession” of the Property. However, and in spite of the court’s order, Schroeder continued to assert ownership of the items still being stored on the Property which prevented Excelsior from exercising full dominion and control over the property.

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<sup>1</sup> CP 205-06. The Deed of Trust includes “fixtures, machinery, equipment located on the property, including, without limitation, personal property required for the maintenance and operation of the property...” as part of the collateral granted by Schroeder.

<sup>2</sup> This included hundreds of rusted-out vehicles, old equipment, vehicle parts, bicycles, bicycle parts, old tires, dilapidated household appliances, and other miscellaneous junk (the “Personal Property” or “stuff”). In using the word “junk” we are mindful of the adage that “one’s person’s junk is another person’s treasure” and therefore don’t intend, by using the term “junk”, to disparage Mr. Schroeder.

Excelsior again tried to cooperate with Schroeder to allow him sufficient time to remove whatever he wanted from the premises. But after another three and one-half months passed, Excelsior grew frustrated with Schroeder's lackadaisical efforts to clear the property. Excelsior, therefore, sent Schroeder a Notice of Sale or Disposal of Abandoned Property on March 25, 2011.<sup>3</sup> This Notice provided Schroeder an additional 45 days to remove whatever he wanted and warned that any items remaining on the Property after the deadline would be sold or otherwise disposed of by Excelsior. The Notice further advised that, even after the 45-day deadline, Schroeder could continue to request, in writing, the return of specific items at any time before they were sold or disposed.

Schroeder again failed to remove the items within the 45-day deadline. But rather than disposing of the items, Excelsior decided, out of an abundance of caution, to file a Motion to Dispose of the Personal Property on May 24, 2011. Excelsior wanted the trial court to set a reasonable time for Schroeder to either remove, or relinquish a claim to, the personal property.

After a hearing on July 5, 2011, the trial court determined that Schroeder's failure to remove the personal property meant Excelsior was

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<sup>3</sup> CP 20-21.

being deprived of its right to full possession of the Property as the court had previously ordered. The court entered an Order on September 24, 2011 that provided Schroeder until October 15, 2011 to remove whatever additional personal property he wanted from the Property.<sup>4</sup> The trial court further authorized Excelsior to dispose of any “remaining items by whichever means” it deemed appropriate. Schroeder appealed the Order, but he failed to post a satisfactory appellate bond.

In total, Schroeder had 19 months from the Trustee’s Sale (February 20, 2010) to remove whatever personal property he wished from the Property.

In this appeal, and despite his own admission that he only needed three months, Schroeder claims 19 months was not long enough to remove his personal property. He also claims the trial court did not have jurisdiction to “liquidate” the personal property. He claims, without any legal authority, that the Sheriff needed to serve him with a Writ of Restitution before Excelsior could actually “acquire legal possession” of the Property. And finally, Schroeder claims that despite the 19 months, he never “abandoned” the personal property.

Under RCW 61.24.060(1), Excelsior was entitled to legal

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<sup>4</sup> CP 140-43.

possession of the Property on the 20th day following the Trustee's Sale. The trial court, therefore, had jurisdiction under the Unlawful Detainer statutes to grant Excelsior possession of the Property. And when Schroeder, despite notice, a court order, and more than 19 months, refused to either remove, or relinquish an interest in, the personal property, Excelsior was justified to dispose of the items.

The trial court did not exceed its jurisdiction when it gave Schroeder additional time to remove whatever belongings he wanted from the Property. And since Schroeder was no longer in physical possession of the Property, service of a Writ of Restitution by the Sheriff was unnecessary. Finally, by failing to remove his personal belongings from the Property within 19 months of the Trustee's Sale, or within the reasonable deadline established by the trial court, Schroeder forfeited the right to continue to claim an interest in those items.

## **II. STATEMENT OF ISSUES**

Excelsior does not assign any errors, but restates the issues on appeal as follows:

1. Under the Deeds of Trust Act, a person who acquires real property at a Trustee's Sale is entitled to take possession of that property within 20 days of the Sale, and if the former owner fails to relinquish possession of the real property, the new owner can sue for Unlawful Detainer. In this case, Schroeder failed, after 19 months, to remove his personal belongings from Excelsior's real property. Did the trial court

abuse its discretion when it ruled that, after 19 months, Excelsior could dispose of any personal property that Schroder had failed to remove?

2. Under the Unlawful Detainer statutes, a trial court has jurisdiction to order possession of foreclosed real property in the person who acquired the property at a Trustee's Sale. In this case, Schroeder refused to either remove, or relinquish his interest in, certain personal property left behind on the real property. Did the trial court abuse its authority when it gave Schroeder 19 months to either remove, or relinquish his interest in, the personal property?

3. A trial court retains authority to enforce, clarify or modify prior rulings and orders. In this case, the trial court granted possession of the real property to Excelsior. But when Schroeder later failed to remove, or relinquish interest in, the personal property, the court modified its Final Order and Judgment to give Schroeder a reasonable deadline to either remove, or relinquish interest in, his belongings. Did the trial court abuse its authority?

4. The owner of commercial property in a non-residential context has the authority to store or dispose of property left behind (or foreclosed) by the former occupant. Here, after 19 months, Schroeder, despite repeated notices and a court order, failed to remove or relinquish his interest in certain personal property that he left on the property following the foreclosure sale. Did Excelsior have the right to dispose of these items?

### **III. COUNTERSTATEMENT OF THE CASE**

Excelsior offers the following counterstatement of the case.<sup>5</sup>

#### **A. Pre-Eviction Background.**

Excelsior is the legal owner of the real property located at 1184

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<sup>5</sup> Excelsior incorporates this Court's Ruling from *Excelsior Mortgage Equity Fund, II, LLC v. Steven F. Schroeder et al.*, No. 29633-4-III, 2012 Wash. App. Lexis 108 (2012).

Hodgson Road, Evans, Washington 99126 (the “Property”).<sup>6</sup> Excelsior acquired the Property by virtue of a trustee’s sale that occurred on February 19, 2010.<sup>7</sup> Before Excelsior acquired the Property at foreclosure, Schroeder had owned the Property for decades.<sup>8</sup> During his ownership of the Property, Schroeder accumulated and stored an enormous volume of personal property on the Property, including hundreds of old rusted-out vehicles, numerous rusted bicycles, old and rusted car and bicycle parts, old tires, dilapidated household appliances, and other miscellaneous junk (collectively referred to herein as the “Personal Property”).<sup>9</sup> This Personal Property is located both inside the buildings on the Property and outside strewn over the 200 acres of property. In addition, Schroeder has continued to keep animals on the Property, including but not limited to approximately two dozen cows, several horses, and a large bull (collectively referred to herein as the “Animals”).<sup>10</sup>

Twenty (20) days after the foreclosure sale, Excelsior was legally

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<sup>6</sup> CP 12, ¶ 2.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*, ¶3.

<sup>10</sup> *Id.*

entitled to possession of the Property.<sup>11</sup> However, due to the volume of Personal Property and Animals that Schroeder needed to remove from the Property, Excelsior agreed to extend the time for possession to April 1, 2010.<sup>12</sup>

Schroeder no longer occupied the Property, but he failed to remove his Personal Property and Animals, thus abandoning them on the Property.<sup>13</sup> On April 28, 2010, approximately one month after Schroeder was to have vacated the Property, Excelsior sent an additional notice stating that any tenancy was terminated and requiring Schroeder to vacate the Property.<sup>14</sup> Undeterred, Schroeder's possessions remained on the Property. As a result, Excelsior had no choice but to file an Unlawful Detainer action in order to obtain possession of the Property.

**B. Unlawful Detainer Proceedings.**

On April 30, 2010, Excelsior filed a Complaint for Unlawful Detainer.<sup>15</sup> The action was resolved at summary judgment by the trial court's entry of the Final Order and Judgment and an Order for Writ of

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<sup>11</sup> RCW 61.24.060(1).

<sup>12</sup> *Id.*, ¶4; CP 17-18.

<sup>13</sup> CP 12, ¶ 3.

<sup>14</sup> CP 12-13 ¶5; CP 19.

<sup>15</sup> CP 255-58.

Restitution on December 7, 2010.<sup>16</sup> The Final Order and Judgment granted immediate possession to Excelsior and the Order for Writ of Restitution provided Excelsior with an avenue for seeking the Stevens County Sherriff Office's assistance with removing Schroeder, if need be.<sup>17</sup> Excelsior did not seek a Writ of Restitution pursuant to the Order because Schroeder was not occupying the Property.<sup>18</sup> However, Schroeder has left behind much of his Personal Property and Animals, apparently abandoning the Personal Property.<sup>19</sup>

On March 25, 2011, in an effort to finally clear the Property of all of Schroeder's junk, Excelsior sent Schroeder a Notice of Sale or Disposal of Abandoned Property.<sup>20</sup> This Notice provided Schroder with 45 days to remove anything of value he had stored on the Property. Pursuant to this

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<sup>16</sup> CP 3. At the time of foreclosure and the subsequent Unlawful Detainer suit, Schroeder had a tenant named Anthony Bell who was residing on the Property in a mobile home. Bell was originally named in the Unlawful Detainer action. However, after Bell voluntarily relinquished possession of the Property, this Court entered an Agreed Order on February 16, 2010, memorializing the same and dismissing the causes of action against Bell.

<sup>17</sup> CP 3. This Court affirmed the trial court's ruling in an unpublished opinion issued on January 24, 2012. A copy this Court's ruling is attached.

<sup>18</sup> CP 11-16; ¶¶3, 6.

<sup>19</sup> CP 13, ¶ 8.

<sup>20</sup> CP 15, ¶14; CP 20-21.

Notice, Schroeder had until May 12, 2011 to remove the Personal Property. Just prior to issuing the Notice, a representative of Excelsior went to the Property to see if Schroeder had made any attempt to remove the Personal Property and Animals from the Property.<sup>21</sup> Not only had Schroeder made no attempt to comply with the Notice, but he also acted indignant towards Excelsior's representative, insinuating that he had no intentions of removing the Personal Property and Animals from the Property.<sup>22</sup>

**C. Motion to Dispose of Personal Property**

After Schroeder failed to comply with the 45-day Notice by either removing the Personal Property or seeking further relief, Excelsior moved the trial court for an Order allowing it to dispose of the personal property remaining on the Property.<sup>23</sup> The hearing was originally set for May 31, 2011, but was eventually moved to July 5, 2011.<sup>24</sup> Schroeder filed a response before the hearing.<sup>25</sup> The trial court granted Excelsior's Motion and entered an Order on September 26, 2011 that allowed Excelsior to

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<sup>21</sup> CP 13, ¶8.

<sup>22</sup> CP 13-15, ¶¶8-13.

<sup>23</sup> CP 1-8.

<sup>24</sup> CP 9-10; CP 24-26.

<sup>25</sup> CP 27-36.

dispose of the Personal Property. However, the trial court gave Schroeder one more chance and provided him until October 15, 2011 to remove the Personal Property.<sup>26</sup> Anything left on the Property after that date would be deemed abandoned by Schroeder.<sup>27</sup> The reasoning behind the trial court's ruling is made abundantly clear when reviewing the timeline of this case in chronological order:

- February 19, 2010: Excelsior acquires the Property via foreclosure sale
- March 9, 2010: Excelsior is entitled to possession of the Property (20 days after the foreclosure sale)
- April 1, 2010: First deadline given by Excelsior to remove personal property
- April 28, 2010: Excelsior sends *Notice to Vacate*
- April 30, 2010: Unlawful detainer action filed
- December 7, 2010: Court enters summary judgment against Schroeder, granting immediate possession to Excelsior
- February 16, 2011: Tenant Anthony Bell voluntarily vacates the Property, obviating the need for a *Writ of Restitution*
- March 25, 2011: Excelsior sends *Notice of Sale or Disposal of Property*, giving Schroeder an additional 45-days to remove personal property
- May 12, 2011: Deadline given by Excelsior to remove personal property

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<sup>26</sup> CP 140-43.

<sup>27</sup> *Id.*

- May 23, 2011: *Motion to Dispose of Personal Property* filed by Excelsior
- July 5, 2011: Hearing on *Motion to Dispose of Personal Property*
- September 24, 2011: *Order Granting Motion to Dispose of Personal Property* entered.
- October 15, 2011: Schroeder's last day of legal possession; property deemed abandoned.
- February 9, 2012: Excelsior obtains Writ of Restitution.
- February 15, 2012: Sheriff files Return of Writ of Restitution.

Schroeder posted a woefully inadequate appeal bond with the trial court. Excelsior objected to the \$500 bond, and the trial court granted Excelsior's Objection and set the bond amount at \$24,400.<sup>28</sup> Schroeder has failed to satisfy the appeal bond requirement, thus there is no bond in place. Schroeder now appeals the trial court's Order granting Excelsior's Motion to Dispose of Personal Property.<sup>29</sup>

#### IV. ARGUMENTS

##### A. **Standard of Review.**

In an effort to have this court review this matter *de novo*, Schroeder tries to characterize the issue as one of jurisdiction rather than one that involves an abuse of discretion. But because the consequences of

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<sup>28</sup> CP 294-95.

<sup>29</sup> CP 140-42; CP 162.

the trial court not having jurisdiction are so “draconian,” this court should use caution before deciding whether there is in fact a question of jurisdiction.<sup>30</sup>

Schroeder wants to characterize the court’s ruling as one involving competing claims to the personal property left behind when Schroeder lost the Real Property to foreclosure. But Excelsior has never claimed, nor asked the court to determine, ownership of these items. Excelsior instead wanted the court’s assistance, under RCW 59.12, to acquire full possession of the Real Property, and to establish a reasonable deadline in which Schroeder needed to remove his belongings.

The issue, therefore, is not whether the court had jurisdiction to restore Excelsior possession of the Real Property but whether the trial court abused its discretion when it: (1) determined that Schroeder was in “unlawful detainer”; and (2) established a reasonable deadline for him to either remove or relinquish interest in the personal property.

The trial court determined, as a matter of fact, that 19 months was sufficient for Schroeder to either remove or relinquish an interest in the personal property. Appellate review of a trial court’s findings of fact is

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<sup>30</sup> “Because the consequences of a court acting without subject matter jurisdiction are draconian and absolute, appellate courts must use caution when asked to characterize an issue as jurisdictional or a judgment as void.” *Cole v. Haveyland, LLC*, 163 Wash. App. 199, 258, P 3d 70 (2011).

reviewed under a substantial evidence standard, which is defined as a quantum of evidence sufficient to persuade a rational, fair-minded person that the premise is true.<sup>31</sup> If that standard is satisfied, a reviewing Court will not substitute its judgment for that of the trial court even though it may have resolved a factual dispute differently.<sup>32</sup> In addition, Appellate courts review a trial court's discretionary decisions under an abuse of discretion standard. And a court can only be said to abuse its discretion when its decision is manifestly unreasonable or is based on untenable grounds.<sup>33</sup>

**B. Trial Court Retained Authority to Rule on Motion to Dispose of Property.**

Schroeder claims the trial court lacked jurisdiction to rule on Excelsior's Motion to Dispose of Personal Property because the matter was originally brought under the unlawful detainer statutes—which provide limited jurisdiction. Schroeder is mistaken. The trial court retains jurisdiction to enforce its own decisions, and because possession was at issue (the Personal Property interfered with Excelsior's right of

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<sup>31</sup> *Rogers Potato Serv., LLC v. Countrywide Potato, LLC*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004).

<sup>32</sup> *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-90, 73 P.3d 369 (2003).

<sup>33</sup> *Mayer v. STO Industries, Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006); *In re Marriage of Tang*, 57 Wn. App. 648, 653, 789 P.2d 118 (1990).

possession), the trial court retained authority.<sup>34</sup> Excelsior did not seek to have the trial court determine ownership of the Personal Property as Schroeder suggests.

After the 45-day notice period expired, Excelsior returned to Court to enforce the Final Order and have the trial court determine what rights, if any, Schroeder would have to enter the Property for purposes of removing the Personal Property. This is the very issue—possession—that the trial court was asked to resolve in the unlawful detainer action. Schroeder’s claimed right of ownership of the Personal Property directly interfered with Excelsior’s right of possession because Excelsior was denied the right of possession so long as the Personal Property remained on the Property.

Schroeder also argues that the relief requested was not specified on the Summons and Complaint for Unlawful Detainer. Actually, the relief was included because Excelsior requested “such additional relief as this Court may deem just and proper” in addition to having Excelsior determined to have immediate possession of the Property.<sup>35</sup> Moreover, unlawful detainer actions include not only possession, but also “related

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<sup>34</sup> See *Keller v. Keller*, 52 Wn.2d 84, 86, 323 P.2d 231 (1958).

<sup>35</sup> CP 258.

issues such as restitution of the Property and rent.”<sup>36</sup>

As stated above, possession of the Property was THE ISSUE in the unlawful detainer action, and the Personal Property that Schroeder purports to own directly interfered with Excelsior’s possession of the Property. Ben Wiltgen of Excelsior stated that Excelsior needs to clear the Property of the cars and other items to be able to put the Property on the market.<sup>37</sup> The trial court retained jurisdiction, and the issue was within the scope of the trial court’s jurisdiction as the sole issue was about possession. Schroeder’s attempts to muddy the waters with apparently competing claims of ownership of the Personal Property do not change this fact.

Interestingly, Schroeder cannot point to a statutory procedure that should have been followed under these circumstances. The Deed of Trust Act (RCW 61.24 *et seq.*) expressly provides that the new owner following a trustee’s sale must use RCW 59.12 to remove any occupants or tenants. RCW 59.12 does not contain the same provisions as provided in the Residential Landlord-Tenant Act (RCW 59.18).

There is no statutory guidance for the how the new owner is to deal

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<sup>36</sup> *Munden v. Hazelrigg*, 105 Wn.2d 39, 45, 711 P.2d 295 (1985).

<sup>37</sup> CP 15.

with abandoned property in the non-residential context. Presumably, the safest approach would be to follow the guidance of the residential context (RCW 59.18.310) and provide more than enough notice to the former occupant by sending a notice that the property will be disposed of after a certain period.

In the case at bar, Excelsior was overly-cautious in giving Schroeder more than the amount of notice that is required for *residential* evictions (only 30 days required, RCW 59.18.310), despite the fact that this was not a residential eviction. In doing so, Excelsior went above and beyond what is required by law to ensure that Schroeder had been given all possible legal protection. In response, Schroeder made little to no effort to remove the Personal Property. Schroeder cannot now complain that his rights were somehow violated.

The trial court clarified Schroeder's rights and, by entry of the Order disposing of the Personal Property, modified the Final Order and Judgment. Trial courts maintain jurisdiction to modify prior orders.<sup>38</sup> It was up to Schroeder to file a lawsuit for conversion or some other theory—simply filing an appeal in this matter does not resolve the issues that he believes exist.

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<sup>38</sup> CR 60(b) contemplates this very fact.

**C. Writ of Restitution Not Applicable Under the Circumstances.**

Although possession was formerly restored to Excelsior, Schroeder continued to store his Personal Property on the Property, thus preventing Excelsior from obtaining complete and unfettered possession. Without knowing for certain if the Personal Property was abandoned, Excelsior sent the 45-day Notice to Schroeder. After that period passed, Excelsior returned to Court to enforce the Final Order and have the trial court resolve the issue of possession.

Since Schroeder was not occupying the Property after the Final Order and Judgment was entered (Excelsior does not believe Schroeder lived on the Property), Excelsior therefore needed to deal with the enormous amount of junk Schroeder left behind after the trustee's sale.<sup>39</sup> Excelsior believed the items were abandoned, but the only safe way to proceed was to send the 45-day Notice to Schroeder and allow him permission to be on the Property to remove any items that he wanted to keep.

Contrary to Schroeder's alleged arguments, a writ of restitution is not designed to block re-entry by a party. The writ is designed to restore property to the owner by ordering all others to vacate the Property.

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<sup>39</sup> CP 012-16.

Indeed, after the October 15, 2011 deadline had passed, Excelsior obtained and served a writ of restitution on Schroeder to order him from the Property.<sup>40</sup>

Excelsior did not serve the Writ of Restitution following the Final Order and Judgment because the writ of restitution is a simply a tool that is available to the owner in the event that the occupants do not vacate the Property on their own accord. In fact, even after a writ of restitution is issued, the occupants may still vacate the premises after the sheriff posts the notice, which obviates the need for the sheriff to physically evict the occupants. It is only when the occupants fail or refuse to leave the premises that the sheriff will execute on a writ of restitution.

Moreover, the unlawful detainer action is aimed at removing people from the premises. The very statute defining unlawful detainer specifies that “any person who shall, without permission of the owner and without having any color of title thereto, enter upon the lands of another, and shall refuse to remove therefrom” is guilty of unlawful detainer.<sup>41</sup> Clearly, the statute contemplates removal of people from the premises – not personal property. Therefore, Schroeder’s failure to remove his

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<sup>40</sup> CP 309-310; CP 308.

<sup>41</sup> RCW 59.16.010.

personal property does not require a writ of restitution to resolve.

**D. Schroeder had reasonable amount of time to remove Personal Property.**

What is a reasonable amount of time to remove possessions from the property following a trustee's sale? RCW 61.24.060(1) provides that the purchaser at a trustee's sale is entitled to possession on the 20th day following the sale. Schroeder had over 602 days from the date of the trustee's sale (February 20, 2010) to October 15, 2011 to remove the Personal Property. Six Hundred Two (602) days equates to one year, seven months, and 25 days to remove the Personal Property. Is that a reasonable amount of time?

Schroeder provided Excelsior with a written estimate stating that it would take 90 days to remove the great bulk of the Personal Property.<sup>42</sup> Accordingly, this Court need not adopt a new rule of law—it can rely upon Schroeder's own estimates. Ninety (90) days is a reasonable amount of time as evidenced by Schroeder's own letter. Six Hundred Two (602) days is more than reasonable. The trial court did not abuse its discretion in finding that 602 days was more than reasonable for Schroeder to

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<sup>42</sup> CP 22. Curiously, Schroeder alleges that Excelsior obtained this written estimate. Nothing could be further from the truth, as shown by the document itself. The documents begins "Dear Steve, It was our pleasure to meet you this morning at the farm." It ends, "Thank you for your time today and interest." Appellant's Brief, p. 4.

remove whatever items he wanted and to cease interfering with Excelsior's right of possession.

**E. Excelsior is Entitled to Its Attorneys' Fees and Costs on Appeal.**

Under RCW 4.84.330, a court must award the prevailing party their attorney's fees where the parties have an agreement with an attorney's fee provision. The Promissory Note and Deed of Trust both contain an attorney's fee provision. Excelsior prevailed before the trial court and therefore was entitled under the parties' attorneys' fee provision to recover its legal fees. For the same reason, and under RAP 18.1, it is entitled to its fees on appeal.

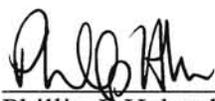
**V. CONCLUSION**

Schroeder had 19 months to remove whatever personal property he wanted from the Property. The trial court had jurisdiction to grant Excelsior possession of the Property, which included the right to determine how long Schroeder had to remove his personal property. The court did not abuse its discretion when it determined that 19 months was a sufficient amount of time for Schroeder to either remove or relinquish an interest in the personal property left on the repossessed property.

The court should therefore uphold the trial court's decision and/or determine that Excelsior was justified to dispose of the left over items.

Dated: March 26, 2012

SCHWABE, WILLIAMSON & WYATT, P.C.

By:   
Phillip J. Haberthur, WSBA #38038  
Attorneys for Plaintiff-Respondent,  
Excelsior Mortgage Equity Fund II,  
LLC

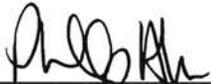
## CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of March, 2012, I caused to be served the foregoing **RESPONDENT'S BRIEF** on the following party at the following address:

Matthew F. Pfefer  
Caruso Law Offices  
1426 W Francis Avenue  
Spokane, WA 99205  
E-Mail: 'mail@carusolaw.biz'; Matthew@MatthewPfefer.com

by:

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\_\_\_\_\_  
Phillip J. Haberthur

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

EXCELSIOR MORTGAGE EQUITY  
FUND II, LLC, an Oregon limited  
liability company,

Respondent,

v.

STEVEN F. SCHROEDER, a married  
man, and ANTHONY BELL, an  
individual,

Appellant.

No. 29633-4-III

Division Three

UNPUBLISHED OPINION

Brown, J. — Steven F. Schroeder appeals the trial court’s summary decision to grant possession of real property in Stevens County to Excelsior Mortgage Equity Fund, II, LLC, a purchaser at a trustee’s sale under RCW 61.24.060. Mr. Schroeder contends the trial court erred in (1) asserting jurisdiction, (2) improperly considering the trustee’s declaration, (3) failing to first address his affirmative defenses, and (4) awarding Excelsior its attorney fees. We reject his contentions, and affirm.

FACTS

This is the third time these parties and this dispute have reached this court. See *Schroeder v. Excelsior Mgmt. Group, LLC*, noted at 162 Wn. App. 1027, 2011 WL

No. 29633-4-III  
*Excelsior Mortgage v. Schroeder*

2474337 (*Schroeder I*); *Schroeder v. Haberthur*, noted at \_\_ Wn. App. \_\_, 2011 WL 4599661 (*Schroeder II*).

In 2007, Mr. Schroeder borrowed money from Excelsior Management Group LLC,<sup>1</sup> which was secured by a deed of trust for the purchase of property in Stevens County. *Schroeder II*, 2011 WL 4599661, at \*1. After Mr. Schroeder's default on the loan obligations, Excelsior nonjudicially foreclosed his interest in the property. Mr. Schroeder was notified of the trustee's sale and that his right to occupy the property would terminate on the 20th day following the sale if he failed to cure the defaults identified in the notice of default and notice of trustee's sale. The notice of trustee's sale states, "The purchaser at the Trustee's Sale shall be entitled to possession of the property on the 20th day following the sale, as against the borrower and grantor under the Commercial Deed of Trust and Assignment of Rents." Clerk's Papers (CP) at 35. The notice of trustee's sale further advised Mr. Schroeder "[a]fter the 20th day following the sale the purchaser has the right to evict occupants who are not tenants by summary proceedings under chapter 59.12 RCW." CP at 35.

The notice of trustee's sale was recorded on November 12, 2009, with the Stevens County Assessor and posted at the property on November 17, 2009. Mr. Schroeder was personally served with notice on November 17, 2009. On February 19, Excelsior purchased the property at the trustee's sale.<sup>2</sup> Excelsior acquired title to the

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<sup>1</sup> Excelsior Management Group LLC is the manager of the respondent Excelsior Mortgage Equity Fund II LLC.

property through a trustee's deed recorded on March 4, 2010.

Mr. Schroeder asked for a time extension to remain on the property through April 1, 2010. On March 16, 2010, Excelsior sent written notice to Mr. Schroeder confirming that Mr. Schroeder agreed to vacate the property on or before April 1, 2010. Mr. Schroeder refused to vacate the premises. Another notice was then mailed to Mr. Schroeder on April 28, 2010, stating the tenancy had terminated. Mr. Schroeder remained in possession of the property and refused to surrender it to Excelsior.

Excelsior sued for unlawful detainer, relying upon the declaration of Phillip Haberthur, the successor trustee of the nonjudicial foreclosure. Mr. Haberthur's declaration included several attachments, including the trustee's deed issued to Excelsior following the trustee's sale and the various notices sent to Mr. Schroeder.

Mr. Schroeder answered and eventually asserted multiple affirmative defenses. Excelsior requested summary judgment. On the day of the summary judgment hearing, Mr. Schroeder objected to Mr. Haberthur's declaration. The trial court granted Excelsior's summary judgment request and ordered Mr. Schroeder off the property. The court denied Mr. Schroeder's objection to Mr. Haberthur's declaration, stating in a letter, "Mr. Haberthur is a custodian or qualified witness as to the identity and mode of preparation of these documents. It is evident they were made in the regular course of

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<sup>2</sup> This court has already determined, "Mr. Schroeder failed to restrain the trustee's sale as required under RCW 61.24.130 and necessarily waived any right he had to contest the sale after the fact." *Schroeder II*, 2011 WL 4599661, at \*4.

his business at the time of their execution.” CP at 164. Mr. Schroeder appeals.

## ANALYSIS

### A. Jurisdiction

The issue is whether the trial court had subject matter jurisdiction over this matter. Mr. Schroeder contends he was not given adequate notice under the unlawful detainer act, chapter 59.12 RCW.

Determining subject matter jurisdiction is a question of law reviewed de novo. *In re Marriage of Kastanas*, 78 Wn. App. 193, 197, 896 P.2d 726 (1995). Subject matter jurisdiction is the authority to hear and determine the class of action to which the case belongs. *Spokane Airports v. RMA, Inc.*, 149 Wn. App. 930, 943, 206 P.3d 364 (2009), *review denied*, 167 Wn.2d 1017 (2010).

Generally, notice is a prerequisite to courts obtaining jurisdiction. But, “[t]he purchaser at a trustee’s sale may commence an unlawful detainer action to obtain possession under chapter 59.12 RCW without first providing notice.” *Laffranchi v. Lim*, 146 Wn. App. 376, 383, 190 P.3d 97 (2008) (citing *Sav. Bank of Puget Sound v. Mink*, 49 Wn. App. 204, 208, 741 P.2d 1043 (1987)).

In *Mink*, the former owner refused to vacate the property after the trustee’s sale.

After waiting the required 20 days, the new owner sued for unlawful detainer under chapter 59.12 RCW. Mr. Mink claimed—exactly as Mr. Schroeder does here—that he was entitled to a separate notice of eviction under RCW 59.12.030(2)-(6). The court disagreed and ruled that the notice of trustee’s sale required under chapter 61.24 RCW was more than sufficient to provide the court jurisdiction. The *Mink* court specifically held that no additional notice was required as a prerequisite to the new owner suing for unlawful detainer. *Mink*, 49 Wn. App. at 208. Mr. Schroeder argues *Mink* was wrongly decided. We disagree. The legislature intended to preserve the summary nature of foreclosure actions permitted under chapter 61.24 RCW in referring purchasers to the unlawful detainer statutes. Chapter 61.24 RCW provides for detailed notices and provides opportunities to cure for the defaulting property owner. Any additional notice prior to an unlawful detainer action would be unnecessary.

In sum, additional notices after the foreclosure sale, and upon or after the 20th day following it, simply would not make sense. Excelsior was not required to provide Mr. Schroeder with any further notice to quit in order to vest the trial court with jurisdiction or to obtain possession of the property. Excelsior was entitled to summary judgment on its claim for unlawful detainer when Mr. Schroeder refused to vacate the property; Mr. Schroeder has been foreclosed, has no right or interest in the property, and he must vacate the premises.

#### B. Trustee’s Declaration

The issue is whether the trial court erred by abusing its discretion in denying Mr. Schroeder's objection to Mr. Haberthur's declaration and attachments. Mr. Schroeder contends the attachments were not based on Mr. Haberthur's personal knowledge.

Initially, Excelsior argues the objection was untimely. All evidentiary objections must be timely and specific. ER 103(1). Generally, "the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. While Mr. Schroeder's objection should have been made earlier, the trial court did address the issue and filed a letter opinion to support its ruling. Therefore, this issue has been sufficiently preserved for our review.

A trial court's ruling on a motion to strike is within the trial court's sound discretion. *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 365, 966 P.2d 921 (1998). Declarations offered in opposition to a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." CR 56(e). Mr. Schroeder does not challenge the trustee's sale itself. Instead, he challenges the notice of trustee's sale signed by Mr. Haberthur; the March 16, 2010 letter signed by Mr. Haberthur; the notice to occupants signed by Mr. Haberthur; and the trustee's deed signed by Mr. Haberthur. A person executing a document would certainly have personal knowledge of the documents as contemplated by CR 56(e). Moreover, it is evident these documents were made during the regular

course of business; thus, justifying their admissibility under the business records exception. See ER 803(a)(6) (records of regularly conducted business activity are not inadmissible as hearsay).

Given the above, the court had tenable grounds to admit Mr. Haberthur's declaration and the attached documents.

#### C. Affirmative Defenses

The issue is whether the trial court erred by not first considering Mr. Schroeder's affirmative defenses when granting summary judgment in favor of Excelsior.

We review a trial court's summary judgment grant de novo. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 65, 837 P.2d 618 (1992). Summary judgment is proper where no genuine issues of material fact remain and the moving party is entitled to judgment as a matter of law. CR 56(c).

The complaint requested unlawful detainer based on Mr. Schroeder's failure to vacate the property 20 days after the trustee's sale. The same basis was presented for summary judgment. Mr. Schroeder answered and raised several affirmative defenses the day before the summary judgment hearing and approximately one month after the summary judgment motion. Even so, the trial court noted in its summary judgment order it had considered Mr. Schroeder's answer.

Mr. Schroeder attempts to place the burden of proof on Excelsior by arguing it was required to request summary judgment on all of Mr. Schroeder's affirmative defenses. In other words, Mr. Schroeder claims no burden or obligation for proving his own affirmative defenses. In reliance on this novel theory, Mr. Schroeder cites two federal cases, *Gould, Inc. v. Continental Cas. Co.*, 822 F. Supp. 1172 (E.D. Pa. 1993); *Koch Indus., Inc. v. United Gas Pipe Line Co.*, 700 F. Supp. 865 (M.D. La. 1988). But these cases allow a party to move on summary judgment against an affirmative defense—they do not hold that a party must make such motion or that failure to do so means that the requesting party is not entitled to summary judgment. *Gould*, 822 F. Supp. at 1177; *Koch Indus.*, 700 F. Supp. at 867. Moreover, in Washington the party raising an affirmative defense has the burden of proving the defense elements. *August v. U.S. Bancorp*, 146 Wn. App. 328, 343, 190 P.3d 86 (2008). The court's summary judgment order shows Mr. Schroeder's defenses were considered; the trial court did not err. In short, Mr. Schroeder did not meet his affirmative defense burden.

#### D. Capacity and Attorney Fees

Mr. Schroeder contends the judgment was incorrectly entered because it does not identify him as a married man "in his separate capacity." Appellant's Br. at 30. While the trial court pleadings identify Mr. Schroeder as a married man, it is clear he is the sole individual involved. None of the pleadings refer to his wife. And, this court's record identifies Mr. Schroeder as a married man dealing with his sole and separate

property. Given all, Mr. Schroeder fails to raise an error that would warrant reversal.

Mr. Schroeder contends the trial court erred in its attorney fee award to Excelsior because no breach of contract is shown; thus, the trial court could not award attorney fees under the deed of trust. We have decided otherwise. The deed of trust provides for reasonable attorney fees in any “suit or action . . . instituted to enforce or interpret any of the terms” of the deed of trust. CP at 191. RCW 4.84.330 provides that in “any action on a contract,” the prevailing party shall be entitled to reasonable attorney fees. Based on this statute, this court has held when a grantee successfully defends an action based on a deed of trust, the grantee is entitled to attorney fees. *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 140-41, 157 P.3d 415 (2007). Accordingly, Excelsior was entitled to attorney fees for the unlawful detainer action.

Excelsior requests fees on appeal under RAP 18.1 and the deed of trust. RAP 18.1 permits recovery if applicable law grants to a party the right to recover. A contract provision for attorney fees is a recognized right to recover in Washington. The deed of trust includes a provision awarding attorney fees to the prevailing party. As the prevailing party on appeal, Excelsior is entitled to its fees and costs.

Affirmed.

A majority of the panel has determined 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.

No. 29633-4-III  
*Excelsior Mortgage v. Schroeder*

Brown, J.

WE CONCUR:

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Sweeney, J.

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Siddoway, J.