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JAN 18 2011

STAMPER, RUBENS,

No. 290352

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.

PHILLIP J. HABERTHUR, as trustee;  
EXCELSIOR MANAGEMENT GROUP, LLC;  
EXCELSIOR MORTGAGE EQUITY FUND, II, LLC;  
JAMES HANEY; and CLS MORTGAGE, INC.,  
Defendants/Respondents.

**BRIEF OF APPELLANT**

Matthew F. Pfefer, WSBA # 31166  
CARUSO LAW OFFICES  
Attorneys for Plaintiff/Petitioner Schroeder  
1426 W Francis Ave. 2<sup>nd</sup> Floor  
Spokane Washington 99205  
(509) 323-5210

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## **I. Assignments of Error**

### **A. Assignments of Error**

1. The trial court's granting of the Defendant's Motion to Dissolve the Temporary Restraining Order on February 19, 2010 was error. The trial court should have denied this motion.
2. The trial court's denial of Mr. Schroeder's Motion for Continuance on April 6, 2010 was error. The trial court should have granted this motion.
3. The trial court's granting of the Defendants' Motion for Summary Judgment on April 14, 2010 was error. The trial court should have denied this motion.
4. The trial court's granting a Final Order and Judgment on May 27, 2010 was error. The trial court should not have executed this Final Order and Judgment in favor of the Excelsior Defendants.

5. The trial court's granting a Final Order and Judgment on May 27, 2010 was error. The trial court should not have executed this Final Order and Judgment in favor of Defendant Haney.

**B. Issues Pertaining to Assignments of Error**

1. Because an ex parte temporary restraining order under CR 65(b) requires no notice to the opposing party, the amount of notice the Trustee received cannot support dissolving the ex parte temporary restraining order.

2. Because RCW 61.24.130 is not the only way to defend against a trustee's sale, use of an ex parte temporary restraining order to defend against a trustee's sale cannot support dissolving the ex parte temporary restraining order.

3. Because Mr. Schroeder has not delayed in seeking evidence, because Mr. Schroeder has stated what evidence he seeks, and because the evidence sought

would raise a genuine issue of material fact, the trial court should have granted Mr. Schroeder's motion for the summary judgment to be continued.

4. Because the granting of the Defendants' motion for summary judgment was not supported by any cases and occurred in spite of a genuine issue of fact, this Court should overturn the summary judgment.

5. No Contract Entitles the Excelsior Defendants to Attorney Fees and Litigation Expenses.

6. Because the Law and the Facts Provide Reasonable Grounds for this Action, the trial court's unsupported finding of frivolousness and granting of fees for such was error

7. Because any judgment should identify Mr. Schroeder's capacity correctly, a judgment that fails to identify him as a married person in his separate capacity is in error.

## **II. Statement of the Case**

At the time the complaints in this matter were filed, Mr. Schroeder owned property located at the street address of 1184 Hodgson Road (or Hodgeson Road) in Evans, WA 99126, as his sole and separate property. CP at 8, ¶ 2; at 3, ¶ 2.

### **A. The First Transaction with Excelsior**

On June 12, 2007, Mr. Schroeder executed a promissory note payable to the order of Defendant Excelsior Management Group, LLC (the “2007 Note”). CP at 8, ¶ 3. The 2007 Note did not require any payments for twelve months. CP at 9, ¶ 4. As security for the payment of sums lent under the 2007 Note, Plaintiff executed a Deed of Trust to Defendant Excelsior Management Group, LLC (the “2007 Trust Deed”). CP at 9, ¶ 5.

Defendant James Haney and Defendant C.L.S. Mortgage, Inc. were the mortgage brokers who assembled the above transaction. CP at 9, ¶ 7. All of the

acts of Defendant James Haney were done as an agent of Defendant C.L.S. Mortgage, Inc. CP at 9, ¶ 8.

Defendant Excelsior Management Group, LLC, Defendant Excelsior Mortgage Equity Fund II, LLC, Defendant James Haney, or Defendant C.L.S. Mortgage, Inc. are the “Lender Defendants.”

During the above transaction, Defendant James Haney told Mr. Schroeder that, after twelve months of no payments, Mr. Schroeder would need to begin making payments on the note. CP at 9, ¶ 9.

On June 22, 2007, Defendant Excelsior Management Group, LLC, assigned all of its rights, title, and interest in the 2007 Trust Deed to Defendant Excelsior Mortgage Equity Fund II, LLC, an Oregon limited liability company. CP at 9, ¶ 10.

Defendant Excelsior Management Group, LLC, was the manager of Defendant Excelsior Mortgage Equity Fund II, LLC. CP at 9, ¶ 11.

In approximately the middle of 2008, an agent of either Defendant Excelsior Management Group, LLC, or Defendant Excelsior Mortgage Equity Fund II, LLC, contacted Mr. Schroeder and asked when he was going to pay off the note completely. CP at 9, ¶ 12.

This contact from an agent of Excelsior was the first time Mr. Schroeder was told anything about an immediate requirement that he pay off the note completely. CP at 9, ¶ 13. At the time of this contact, Mr. Schroeder expected to begin making payments on the note, rather than being immediately required to pay off the note completely. CP at 10, ¶ 14.

#### **B. The First Litigation with Excelsior**

On December 31, 2008, Mr. Schroeder filed a

Complaint for Deed of Trust to be Foreclosed as a Mortgage in Stevens County Superior Court, and was issued cause number 2008-2-00657-1. CP at 13, ¶ 40.

On April 7, 2009, the action described in the previous paragraph was dismissed by stipulation. CP at 13, ¶ 41.

The stipulated dismissal purports to waive Mr. Schroeder's right to judicial foreclosure of the property and purports to permit any future deed of trust executed by the Mr. Schroeder to Excelsior or a related entity to be foreclosed nonjudicially.<sup>1</sup> CP at 13, ¶ 42.

The stipulated dismissal also purports to bar Mr. Schroeder from alleging that the property is used for agricultural purposes. CP at 13, ¶ 43.

These disputed provisions are pertinent because a nonjudicial foreclosure is only available under the Deeds

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<sup>1</sup> The text at the citation states "judicially." That was an error. The text should read "nonjudicially."

of Trust Act, Chapter 61.24 RCW, for deeds of trust that assert that the property is not agricultural and only then if that assertion is not false at the time of the execution of the deed of trust and at the time of the trustee's sale. RCW 61.24.030(2).

Mr. Schroeder did not review the stipulated dismissal before its entry and was not aware of the provisions referred to in the previous two paragraphs until the second week of February in 2010. CP at 13, ¶ 44.

Mr. Schroeder was represented in this litigation by Matthew K. Sanger. CP at 95.

### **C. The Second Transaction with Excelsior**

On March 31, 2009, Mr. Schroeder executed a deed of trust on this property to Defendant Excelsior Mortgage Equity Fund II, LLC (the "2009 Trust Deed"). CP at 10, ¶ 15.

In late February or in March of 2009, Mr. Schroeder received documents from Defendant Excelsior Management Group, LLC, with a cover letter from Ben Wiltgen, who is identified as a processor for Defendant Excelsior Management Group, LLC. CP at 10, ¶ 18. The first document is a “Mortgage Loan Commitment.” CP at 10, ¶ 19. The Mortgage Loan Commitment states that the “REPAYMENT TERMS” include “AMORTIZATION” at “12 months interest only.” CP at 10, ¶ 20. The second document is a “GOOD FAITH ESTIMATE.” CP at 10, ¶ 21. The Good Faith Estimate states that the lender receives a “Loan Origination Fee” of \$18,900.00, a “Loan Acquisition Fee” of \$2,100.00, and a Document Administration Fee of \$1,250.00. CP at 10, ¶ 22.

The third document is a “TRUTH IN LENDING DISCLOSURE STATEMENT.” CP at 10-11, ¶ 23. The Truth-in-Lending Disclosure Statement states that the

total "AMOUNT FINANCED" will be \$395,032.00. CP at 11, ¶ 24.

The Truth-in-Lending Disclosure Statement further states that the loan will require Mr. Schroeder to make 11 payments of \$4,550.00 each per month beginning "05/01/2009." CP at 11, ¶ 25. Finally, the Truth-in-Lending Disclosure Statement states that the loan will require Mr. Schroeder to make a final payment in the amount of \$424,550.00 on "04/01/2010." CP at 11, ¶ 26.

Never in this process did the Lender Defendants make any inquiries as to Mr. Schroeder's ability to make the payments he was agreeing to make in the loans they brought to him. CP at 11, ¶ 27. The fees and other expenses incurred by the Lender Defendants and added to the amount owed on the property have stripped so much equity from the property that re-financing is impossible. CP at 11, ¶ 28.

The Lender Defendants are believed to have engaged in numerous transactions where the Lender Defendants used their fees and expenses to strip equity from properties of borrowers. CP at 11, ¶ 29. The Lender Defendants knew or should have known that such borrowers were unable to make the payments as they became due. Id.

Mr. Schroeder has made numerous attempts to re-finance the property to satisfy the obligation thereunder. CP at 11-12, ¶ 30. Each such attempt has failed due to the lack of equity in the property due to the fees and other expenses amassed by the Lender Defendants. CP at 12, ¶ 31.

Mr. Schroeder told the Lender Defendants that his sources of income were farming and logging, which included his logging timber from the property. CP at 12, ¶ 32.

In spite of the fact that the Lender Defendants knew that logging timber from the property is a major source of income for Mr. Schroeder, the Deed of Trust gives Defendant Excelsior Management Group, LLC, and Defendant Excelsior Mortgage Equity Fund II, LLC, a security interest in the “timber to be cut” on the property. CP at 12, ¶ 33.

Defendant Excelsior Management Group, LLC, and Defendant Excelsior Mortgage Equity Fund II, LLC, through their agents, have instructed Plaintiff that he may not log timber from the property because of their security interest. CP at 12, ¶ 34.

The security interest of Defendant Excelsior Management Group, LLC, and Defendant Excelsior Mortgage Equity Fund II, LLC, in the “timber to be cut” on the property has made it impossible for Mr. Schroeder to make the payments. CP at 12, ¶ 35.

At the time this lawsuit began, Defendant Phillip Justin Haberthur was the trustee of the 2009 Trust Deed. CP at 12, ¶ 36; at 4, ¶ 6. The Trustee executed a Notice of Foreclosure and Notice of Trustee's Sale on November 6, 2009. CP at 13, ¶¶ 45-46.

**D. The Original Complaint in the Second Excelsior Litigation**

Mr. Schroeder based his original complaint on different facts involving the 2009 Trust Deed.

Mr. Schroeder's parents initially purchased the property in question in 1959. CP at 4, ¶ 9. When Mr. Schroeder's parents purchased the property in question, the property was a working ranch, where sheep were raised. CP at 4, ¶ 10.

Throughout the over fifty years of ownership by the Schroeder family, a Schroeder has always resided on the property in question. CP at 4, ¶ 11. Throughout the over fifty years of ownership by the Schroeder family, the

property in question has always been used as a working ranch. CP at 4, ¶ 12. While this case was pending in the trial court, Mr. Schroeder raised cattle on the property in question. CP at 4, ¶ 13.

The 2009 Trust Deed states that “The Property has not been used, and will not be used, for agricultural purposes.” Section 8, last sentence (Page 9); CP at 4, ¶ 14; at 13, ¶39. RCW 61.24.030 provides that a trustee may not foreclose on agricultural land non-judicially. For this reason, the Original Complaint argued that the trustee on the 2009 Trust Deed may only foreclose that deed judicially. CP at 5.

The Original Complaint asked for an order restraining the trustee’s sale under RCW 61.24.130, a preliminary injunction, and a permanent injunction. CP at 6. Mr. Schroeder noted his motion to restrain the trustee’s sale (which sale was scheduled for Friday, February 19,

2010) for Tuesday, February 16, 2010. CP at 87, ¶ 12; at 89.

Defendant Haberthur, the Trustee of the 2009 Trust Deed, was served with the original complaint and related documents pertinent to Mr. Schroeder's motion to restrain the trustee's sale under RCW 61.24.130 on February 8, 2010 at 3:20 pm. CP at 52. Defendant Haberthur made a telephone call to Mr. Schroeder's counsel around 3:30 pm. CP at 86, ¶ 4.

Defendant Haberthur informed Mr. Schroeder's counsel that the parties had already litigated the issue of whether the property could be foreclosed judicially. CP at 89. Defendant Haberthur asked that the complaint be dismissed with prejudice. Id. Although Mr. Schroeder's counsel asked Defendant Haberthur to postpone the trustee's sale set for February 19, 2010, Defendant Haberthur chose to keep the sale set for that date. CP at

87, ¶¶ 10-11; at 45, lines 25-26.

#### **E. The Amended Complaint in the Second Excelsior Litigation**

The abusive, predatory lending practices of the Lender Defendants were the basis of the Verified Amended Non-Superseding Complaint for Injunctive and Equitable Relief and For Damages, filed on February 16, 2010. CP at 8-17.

Pursuant to CR 65(b), Mr. Schroeder appeared on February 16, 2010 before the trial court and requested an ex parte temporary restraining order due to the imminency of the pending trustee's sale. CP at 43-44. Based on the Lender Defendants' abusive, predatory lending practices, the temporary restraining order also set a hearing on March 2, 2010 for the Trustee to show cause why the Court should not enter a preliminary injunction. CP at 44.

The trial court entered the ex parte temporary

restraining order on February 16, 2010. CP at 43-44.

The Excelsior Defendants and the Trustee Defendant moved to dissolve the ex parte temporary restraining order. CP at 45, lines 16-19. The trial court dissolved the ex parte temporary restraining order on February 19, 2010. CP at 45-51. On his own behalf and on behalf of the Excelsior Defendants, the Trustee Defendant sent his proposed order dissolving the order to the trial court. Id. The Trustee Defendant's office faxed the proposed order from Vancouver, Washington to the trial court on February 19, 2010. CP at 49. The Trustee Defendant was not physically present before the trial court during the hearing on his motion to dissolve the restraining order. During that hearing, the Trustee Defendant was at his office in Vancouver, Washington.

Shortly thereafter, the Trustee Defendant and the Excelsior Defendants filed a motion for summary

judgment. See CP at 57, *et seq.* The remaining defendants joined the motion as well. See CP at 118 (¶ 17) and 119 (¶ 33).

With his response to the motion for summary judgment, Mr. Schroeder also moved the Court to continue the hearing on summary judgment (CP at 54-56) and to consolidate this case with another involving Mr. Schroeder and an Excelsior Defendant (CP at 90-91). The Defendants opposed both Mr. Schroeder's motion to consolidate and his motion to continue the summary judgment. See, e.g., CP at 119 (¶ 23, 29, 30).

At the hearing on April 6, 2010, the Court denied Mr. Schroeder's motions for consolidation (CP at 111-113) and continuance (CP at 114-116) and granted the Defendants' motion for summary judgment. The Court signed the Order granting Summary Judgment on April 14, 2010. CP at 117-123.

Mr. Schroeder appealed the summary judgment on May 11, 2010. CP at 132.

Mr. Schroeder opposed a later motion by the Excelsior Defendants and Defendant Haney for improper attorney fees. CP at 124-130. The Court granted most of the requested attorney fees on May 27, 2010. CP at 140-143.

### **III. Summary of Argument.**

In opposing the abusive, predatory lending practices of the Lender Defendants, Mr. Schroeder has followed the model laid out for him by Bowcutt v. Delta N. Star Corp., 95 Wn. App. 311, 976 P.2d 643 (1999). Following Bowcutt means that Mr. Schroeder has not waived his rights due to the trustee's sale (if one occurred).

The Defendants argue 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, reverse the above erroneous orders of the trial court, and remand for further proceedings.

#### **IV. Argument**

**A. *Because an ex parte temporary restraining order under CR 65(b) requires no notice to the opposing party, the amount of notice the Trustee received cannot support dissolving the ex parte temporary restraining order. (The First Assignment of Error.)***

A court may grant a "temporary restraining order" "without written or oral notice to the adverse party or his attorney" under some circumstances. CR 65(b)

The Trustee may argue that the ex parte temporary restraining order was somehow "unfair" because of when he discovered that the ex parte temporary restraining order was pending. Because the Trustee's argument flatly contradicts CR 65(b), it is not well taken. This Court

should find that the trial court's dissolution of the ex parte temporary restraining order was error.

**B. *Because RCW 61.24.130 is not the only way to defend against a trustee's sale, use of an ex parte temporary restraining order to defend against a trustee's sale cannot support dissolving the ex parte temporary restraining order. (The First Assignment of Error.)***

In Bowcutt v. Delta N. Star Corp., 95 Wn. App. 311, 976 P.2d 643 (1999), the trustee's "foreclosure sale was set for May 16, 1997." 95 Wn. App. at 315. On May 15, 1997, a court commissioner "issued an ex parte TRO based on the imminence of the impending trustee's sale." 95 Wn. App. at 315-316.

**Injunctive relief is available to enjoin a trustee's sale apart from the Deeds of Trust Act, RCW 61.24.** 95 Wn. App. at 319. In Bowcutt, the plaintiffs based their request for injunctive relief on the Washington Criminal Profiteering Act, RCW 9A.82. Id. In this case, the Plaintiff

based his request for injunctive relief on the Washington Consumer Protection Act, RCW 19.86.

The superior court has original jurisdiction in all cases in equity. CONST. art. IV, § 6. Its inherent powers encompass all the powers of the English chancery court. Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 415, 63 P.2d 397 (1936). The Legislature is constitutionally prohibited from abrogating or restricting these equitable powers.

The writ of injunction is the "strong arm of equity." So any legislation that diminishes the superior court's constitutional injunctive powers is void. State v. Werner, 129 Wn.2d 485, 496, 918 P.2d 916 (1996) (citing Blanchard, 188 Wash. at 415). And we narrowly read exceptions to superior court jurisdiction. Orwick v. City of Seattle, 103 Wn.2d 249, 251, 692 P.2d 793 (1984). Unless the Legislature clearly indicates its intention to limit jurisdiction, statutes should be construed as imposing no limitation. In re Marriage of Major, 71 Wn. App. 531, 534, 859 P.2d 1262 (1993).

Bowcutt, 95 Wn. App. at 319.

In this case, the Court has the authority to grant the injunction under 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.

“CR 65(b) empowers the court to grant a TRO without notice if immediate and irreparable loss will result before the adverse party can be heard. **RCW 61.24.130 cannot divest the court of this constitutionally-derived equitable power.** Werner, 129 Wn.2d at 496 (citing Blanchard, 188 Wash. at 415).” Bowcutt, 95 Wn. App. at 321-322 (emphasis added).

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 (which was the Criminal Profiteering Act in Bowcutt and is the Consumer Protection Act here) as well as Article 4, §6, of the Constitution of the State of Washington. It is from this constitutional grant of equitable power to the superior court that the Legislature has derived the Washington Injunction Act, RCW Chapter 7.40. Consequently, it is appropriate for Mr. Schroeder to follow the procedure outlined in RCW Chapter 7.40 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.

To illustrate the legal issues involved here, if Mr. Haberthur provides directions to his office, those directions do not require a guest to take that route to his office or prevent a guest from taking a different route to his office. You can arrive at the same destination in more than one way.

The Trustee argues that an ex parte temporary restraining order is somehow an improper method of preventing a trustee's sale. As such argument flatly contradicts Bowcutt, it has no merit. This Court should find that the trial court's dissolution of the ex parte temporary restraining order was error.

***C. Because Mr. Schroeder has not delayed in seeking evidence, because Mr. Schroeder has stated what evidence he seeks, and because the evidence sought would raise a genuine issue of material fact, the trial court should have granted Mr. Schroeder's motion for the summary judgment to be continued. (The Second Assignment of Error.)***

Where a party knows of material evidence and shows good reason why the party cannot timely obtain the evidence to oppose summary judgment, "the court has a duty to give the party a reasonable opportunity to complete the record before ruling on the case." Coggle v. Snow, 56 Wn App. 499, 784 P.2d 554 (1990). The trial court should consider the following factors in deciding a motion for continuance: 1) whether the party moving for a

continuance has a good reason for the delay (if any) in obtaining the evidence; 2) whether the party moving for a continuance states what evidence would be established through the additional discovery; and 3) whether the evidence sought would raise a genuine issue of fact. Id.

1. Mr. Schroeder clearly identifies the evidence sought.

The Excelsior Defendants' loan file will reflect their knowledge that the disputed farm is agricultural. For instance, that loan file will include the appraisal of the disputed farm. That Appraisal states that the "Present Land Use" is "25% 1 Family" and "75% **Ag** and timberland." CP 24 (emphasis added).

2. Such evidence would raise a genuine issue of material fact.

Where a grantor on a trust deed brings suit before the trustee's purported initiation of foreclosure, the sale is void. Cox v. Helenius, 103 Wn.2d 383, 385, 693 P.2d 374 (1985). In such a circumstance, the waiver doctrine does

not apply after the foreclosure sale. Plein v. Lackey, 149 Wn.2d 214, 228 footnote 5, 67 P.2d 1061 (2003) (discussing Cox). This holding of Cox clearly implies that a non-judicial foreclosure does not always eliminate post-sale remedies.

3. Mr. Schroeder has not delayed.

Mr. Schroeder believes that Excelsior knew all along that the disputed property was agricultural. CP at 94. Amazement was an appropriate reaction when Excelsior's counsel declined to concede that the disputed property was agricultural. Id. The discovery will show that, in fact, Excelsior has known all along that the disputed property is agricultural. CP at 94-95. Excelsior's offer to re-write the note with Mr. Schroeder was based on Excelsior's recognition that it had been caught with its hand in the cookie jar in proceeding with a trust deed that purported to allow a non-judicial foreclosure. CP at 95. A

non-judicial foreclosure of agricultural land is illegal. RCW 61.24.030(2).

Excelsior knew that what it was trying to do was illegal. Correspondence between Mr. Schroeder's former attorney, Matthew Sanger, and Excelsior's attorney reflects that Mr. Sanger knew that what Excelsior was trying to do was illegal, as well. CP at 95. In Mr. Sanger's own words, "I just didn't want to sign my name to a stipulation that I did not believe factually true." CP at 95. Mr. Schroeder knew nothing of this.

I never did open them [mail from Mr. Sanger], 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." [CP at 95.]

Excelsior tries to portray the re-writing of the note as some kind of special favor they were doing for Mr. Schroeder. CP at 95. In fact, however, re-writing the note was their idea in the first place. CP at 95. As Mr.

Schroeder put it, “out of the blue Excelsior Management Group said that they wanted to rewrite the note.” CP at 95. As part of those settlement negotiations, Mr. Sanger states that Mr. Schroeder understands that the “note will be secured by the same deed of trust instead of a mortgage.” CP at 95. Mr. Sanger opines that a dismissal with prejudice would have had the effect of waiving the statutory requirement that a deed of trust on agricultural land be foreclosed judicially. CP at 95-96. Notably, Mr. Sanger concedes that the letter in question does not specifically state that it is waiving any such right. CP at 95. Mr. Sanger also concedes that Mr. Schroeder would not “have understood that he was giving up his right of redemption” based on this specific language. CP at 96.

Mr. Haberthur asked Mr. Schroeder as follows: “Was it your understanding that Excelsior wanted the right to foreclose non-judicially if you were to default on the

second note?” CP at 96. Mr. Schroeder astutely addressed that question by attacking its presupposition. “It’s impossible,” he said. Id.

These depositions occurred on March 11, 2010. CP at 96. Even if Mr. Schroeder Plaintiff had sent his discovery requests the next day, service on them would not have been valid until three court days after mailing. CR 6(e); CR 6(a), last sentence. Service would not have been effective until March 17, 2010. No response would have been due until April 16, 2010. CR 33(a); CR 34(b) (which also applies to a subpoena to a party requiring production of documents per CR 45(a)(3)).

For this reason, even if Mr. Schroeder had started discovery immediately after the deposition, he still would not be entitled to receive the information sought until well after the time for which the summary judgment hearing is scheduled.

Excelsior states incorrectly that Mr. Schroeder knew “about his potential claims since April 2009, or, at the very least, from the time Excelsior initiated the foreclosure.” CP at 96. Excelsior provides no support for this bogus claim. In fact, the Plaintiff did not know that the **content** of the April 7, 2009 order purported to waive his right to a non-judicial foreclosure until the second week of February 2010. CP at 96-97.

The fact that Excelsior initiated a non-judicial foreclosure on the disputed property again merely shows that they are trying to get away with pulling from the cookie jar cookies to which they are not entitled. This motion is just another step in that process. Although Excelsior’s initiation of a non-judicial foreclosure would be consistent with a purported prior waiver, as alleged, such initiation does not prove anything or demonstrate that the

Plaintiff “knew” pertinent facts on which it can base a waiver claim.

This case began on February 8, 2010. CP at 1. The summary judgment hearing was set for April 6, 2010. Id. This hearing was set for less than two months after the case was filed. Thus, the party moving for a continuance has not delayed in obtaining the evidence.

4. Denial of Continuance was Error.

With a summary judgment hearing set less than two months after the filing of this lawsuit, the non-moving party has not delayed discovery. This meets the first factor. The evidence is clearly identified above, meeting the second factor. Also, the information sought is relevant. This meets the third factor.

Consequently, this Court should conclude that denial of continuance was error. None of the factors supports denying continuance.

**D. *Because the granting of the Defendants' motion for summary judgment was not supported by any cases and occurred in spite of a genuine issue of fact, this Court should overturn the summary judgment. (The Third Assignment of Error.)***

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 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.

1. *Bowcutt* Opposes Summary Judgment for the Defendants.

In *Bowcutt*, 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 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.

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 RCW Chapter 7.40 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.

Consequently, Bowcutt opposes summary judgment for the defendants.

2. 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. Memorandum, page 6, line 3. 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 43-44. Consequently, Brown, Plein, Kaseburg, Ostrander, Koegel, and Hallas do not support summary judgment for the Defendants.

3. Summary Judgment for the Defendants was Improper.

Although Bowcutt shows that an ex parte temporary restraining order is an appropriate means of preventing a trustee's sale (and, thus, avoiding waiver), the trial court awarded summary judgment to the Defendants on the basis of alleged waiver. For the above reasons, summary judgment was and is improper. This Court should reverse the trial court's grant of summary judgment for the Defendants.

**E. *No Contract Entitles the Excelsior Defendants to Attorney Fees and Litigation Expenses. (The Fourth Assignment of Error.)***

Excelsior bases its claim for “attorneys’ fees and costs as the prevailing party” on the “Deed of Trust executed by the Plaintiff and Defendants.” CP at 125.

In the event suit or action is instituted to enforce or interpret any of the terms of this Trust Deed, . . . the prevailing party shall be entitled to recover all expenses reasonably incurred at, before and after trial and on appeal whether or not taxable as costs,

including, without limitation, attorney fees, witness fees (expert and otherwise), deposition costs, copying charges and other expenses. . . .

CP at 125 (Article 2, § 23 (in pertinent part)). For two reasons, attorney fees and litigation expenses were improper for the Excelsior Defendants. First, Mr. Schroeder does not claim that Excelsior breached a contract. CP at 1-17 (Original Complaint and Amended Complaint).

Excelsior is allowed attorney fees and litigation expenses for “suit or action . . . to enforce or interpret any of the terms of this Trust Deed.” This action was not to enforce or interpret any of those terms. Excelsior is not entitled to any attorney fees or litigation expenses.

Indeed, this suit attempted to **prevent** the enforcement of “the terms of the Trust Deed.” If Excelsior wished to include the prevention of the enforcement of the Trust Deed as a basis for attorney fees and litigation

expenses under Article 2, § 23, it could certainly have included language to do so in its Trust Deed.

Moreover, as Excelsior drafted the Trust Deed, this Court must interpret ambiguous terms in it against Excelsior. Forbes v. Am. Bldg. Maint. Co. West, 148 Wn. App. 273, ¶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.

The second reason that this Court should deny attorney fees and litigation expenses to Excelsior is that, ***even if*** the plaintiff's claims were contractual ***and if*** the

Trust Deed's "Attorney Fees" section included suits to prevent its enforcement, any such attorney fees and litigation expenses "shall become a part of Indebtedness" and would be an obligation secured by the Trust Deed. CP at 125 (Art. 2, §23). All Defendants allege that the disputed parcel was sold at a Trustee's Sale on February 19, 2010. Any Indebtedness left over after a Trustee's Sale would be a deficiency, for which this Court may not enter a judgment under the Deed of Trusts Act, Chapter 61.24 RCW. For this reason, the Court should deny Excelsior any attorney fees or litigation expenses.

The trial court's granting of attorney fees and litigation expenses to the Excelsior Defendants was error. Consequently, this Court should reverse the trial court's granting of such fees.

***F. Because the Law and the Facts Provide Reasonable Grounds for this Action, the trial court's unsupported finding of frivolousness and granting of***

***fees for such was error. (The Fourth and Fifth Assignments of Error.)***

Defendant Haney asserts that “Plaintiff’s claims against Defendant CLS and Defendant Haney, if any, were completely extinguished when Plaintiff modified his loan with Excelsior in the Spring of 2009.” CP at 126. Defendant Haney has provided no authority to support this assertion whatsoever. CP at 126.

Indeed, this assertion defies logic. If the grantor (borrower) lacks the funds to pay off the deed of trust and is defending against a foreclosure, the grantor would be caught in a dilemma. On one hand, the grantor could lose the property at a trustee’s sale and potentially waive any claims. On the other hand, the grantor could save the property by re-financing the property or modifying the loan and, on Defendant Haney’s unsupported view, waive any claims. In no event could the grantor preserve its claims, if Defendant Haney’s unsupported view is correct.

An award of attorney fees for a defendant based on the frivolousness of the plaintiff's claims is only available if the court can deem the action as a whole frivolous. Biggs v. Vail, 119 Wn.2d 129, 136-137, 830 P.2d 350 (1992). A plaintiff's claims are frivolous if the plaintiff's claim is not supported by rational argument on the law or facts. As no defendant has provided any argument or evidence, apart from Defendant Haney's unsupported assertion above, Mr. Schroeder's claims are not frivolous. The unsupported statement by the trial court that Mr. Schroeder's claims are frivolous is manifestly unreasonable.

The Washington State Supreme Court has held twice that Attorney Fees are not available for one defending against a claim under the Consumer Protection Act. See Sato v. Century 21, 101 Wn.2d 599, 681 P.2d 242 (1984); Vogt v. Seattle-First National Bank, 117 Wn.2d 541, P.2d 1364 (1991). To the extent that any

party is entitled to attorney fees at all, any such fees must be segregated from fees related to Mr. Schroeder's claim under the Consumer Protection Act. For this reason, this Court should deny all defendants any attorney fees or litigation expenses for any time spent on Mr. Schroeder's claim under the Consumer Protection Act.

In short, the trial court's award of attorney fees on the basis of the alleged frivolousness of Mr. Schroeder's claims is and was error. This Court should reverse the trial court's award of such and remand for further proceedings.

***G. Because any judgment should identify Mr. Schroeder's capacity correctly, a judgment that fails to identify him as a married person in his separate capacity is in error.***

The Plaintiff is Steven F. Schroeder, a married man dealing with his sole and separate property. Mrs. Schroeder is not a party to this case and has never been a debtor on any obligation with respect to any of the

defendants. The Plaintiff's claims herein have been for himself in his separate capacity. Any judgment entered against Mr. Schroeder in this case should identify the judgment debtor as a married man in his separate capacity. See Stockand v. Bartlett, 4 Wash. 730, 31 P. 24 (1892).

***H. As the plaintiff in a Consumer Protection Act case , Mr. Schroeder is entitled to attorney fees and costs under Chapter 19.86 RCW, upon his prevailing.***

A "successful plaintiff in a Consumer Protection Act case can "recover the actual damages sustained by him . . . together with the costs of the suit, including a reasonable attorney's fee . . ." Nordstrom, Inc. v. Tampourlos, 107 Wn.2d 735, 743, 733 P.2d 208 (1987) (quoting RCW 19.86.090). Mr. Schroeder has a claim in this case under the Consumer Protection Act. CP at 14. For this reason, Mr. Schroeder is entitled to his attorney fees and costs upon his successful completion of this matter.

## **V. Conclusion**

The trial court erred in granting the Excelsior Defendants' motion to dissolve the ex parte temporary restraining order, erred in denying Mr. Schroeder's motion for continuance of summary judgment, erred in granting the Defendants' motion for summary judgment, and erred in awarding attorney fees to the Excelsior Defendants and to Defendant Haney.

The fact that CR 65(b) provides for the issuance of an ex parte temporary restraining order without notice opposes the dissolution of such an order on the basis that its issuance without notice was somehow "unfair." If litigants do not like a court rule, they can ask the Supreme Court to change it.

Additionally, Bowcutt stands unequivocally against the dissolution of the ex parte temporary restraining order and unequivocally against the granting of summary judgment against Mr. Schroeder. This Court should

reverse the trial court's erroneous orders and remand to the trial court for further proceedings so Mr. Schroeder can bring these abusive, predatory lenders to justice.

Respectfully submitted this 18<sup>th</sup> day of January 2011.

A handwritten signature in cursive script that reads "Matthew F. Pfefer".

Matthew F. Pfefer, WSBA # 31166

CARUSO LAW OFFICES

Attorneys for Plaintiff/Petitioner Schroeder

1426 W Francis Ave. 2<sup>nd</sup> Floor

Spokane Washington 99205

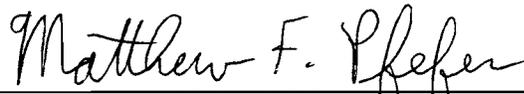
(509) 323-5210

## 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 and Dianne K. Rudman as attorneys for Respondents allowing service by email.
3. I served the Brief of Appellant on January 18, 2011 via email to [PHaberthur@schwabe.com](mailto:PHaberthur@schwabe.com), [HDumont@schwabe.com](mailto:HDumont@schwabe.com), [RHigbie@schwabe.com](mailto:RHigbie@schwabe.com), [CRussillo@schwabe.com](mailto:CRussillo@schwabe.com), and [rudmanlawoffice@gmail.com](mailto:rudmanlawoffice@gmail.com).

Signed this 18<sup>th</sup> day of January 2011 in Spokane, Washington.



Matthew F. Pfefer, WSBA #31166  
CARUSO LAW OFFICES  
Attorneys for Appellant  
1426 W Francis Ave  
Spokane WA 99205  
(509) 323-5210