No. 308910

DIVISION III, COURT OF APPEALS
OF THE STATE OF WASHINGTON

PHILLIP KAIREZ and CAROLYN KAIREZ, husband and wife,

Appellants,

v.

BUDGET FUNDING 1, LLC, a California corporation; BENTON FRANKLIN TITLE COMPANY; WELLS FARGO FOOTHILL INC., a California corporation; and CITY OF PASCO, a municipal corporation formed under the laws of the State of Washington,

Respondents.

APPEAL FROM FRANKLIN COUNTY SUPERIOR COURT

The Honorable Judge Craig J. Matheson

BRIEF OF RESPONDENT BUDGET FUNDING I, LLC

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I. INTRODUCTION

Philip and Caroline Kairez ("Appellants") initiated a quiet title action relating to real property in Franklin County, Washington against a host of defendants, including Budget Funding 1, LLC ("Budget"). CP 191-196. In addition to seeking to quiet title to the Property, Appellants also alleged causes of action for negligence and violations of the Consumer Protection Act against each of the defendants. Budget moved against Appellants for summary judgment, arguing there were no genuine issues of material fact on any of the proffered claims, and judgment should be ordered as a matter of law. The Franklin County Superior Court granted the motion only as to Budget, leaving undisturbed Appellants' claims against each of the remaining named defendants. Appellants have initiated this appeal as to the summary judgment pertaining to Budget.

II. ASSIGNMENT OF ERROR

A. Assignments of Error

Budget does not assign any error to the trial court's dismissal of the Appellants' case by way of summary judgment. Even taken in a light most favorable to Appellants, there are simply no genuine issues of material fact to decide, and this case was properly disposed of as a matter of law.

B. Issues Pertaining to the Assignment of Error

Appellants fail to discuss any issues pertaining to the assignment of error in this matter, under RAP 10.3 (4). However, Budget recognizes the following primary issues that pertain to this case:

1. Can a corporation bind itself to a deed of trust, claiming an interest in real property as security for a debt, where the recorded instrument itself fails to reflect the corporate desire to convey the property?

2. Do the doctrines of ultra vires, ratification and apparent authority apply where there is no disagreement that an individual could bind a corporation as an agent, yet simply failed to do so in fact by express writing in the record?

3. Can a Consumer Protection Act and negligence claim survive summary judgment where there is no established relationship between the alleged parties to a particular transaction sufficient to satisfy the requisite elements of each cause of action?

III. STATEMENT OF THE CASE

The property that is the subject of this dispute is an apartment complex in Pasco, Washington, located at 604 Yakima Street. (the

"Property").[1] In April 2006, NRK Investments, LLC ("NRK"), a Washington limited liability company, contracted to purchase the Property from James and Krista Gottula (the "Gottulas"). CP 101-106. This real estate contract (the "Gottula Contract") was recorded on April 11, 2006, in Franklin County under Recording No. 1680903. CP 101-106. Contemporaneous with the recording of the Gottula Contract, the Gottulas executed a fulfillment deed to be recorded when the contract was paid in full. CP 107. Nicholas Kairez ("Nicholas"), the son of the Appellants, was the sole member of NRK. CP 12. NRK is no longer an active corporation in the State of Washington. CP 79; 155. Importantly, Nicholas was not personally a named party to the Gottula Contract, which was executed only by NRK.

A short time after NRK purchased the Property, Appellants agreed to lend Nicholas $50,000.00. This agreement was memorialized in an undated promissory note (the "Note") signed by Nicholas. CP 108-109. At that time, Nicholas also personally executed a deed of trust (the "Deed of Trust") that identified the Property as the collateral for the loan. The Deed of Trust was recorded on May 17, 2006 in Franklin County under

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[1] The legal description of the property is Lots 1, 2, and 3, Block 4, Gerry's Addition to Pasco, according to the Plat thereof recorded in Volume "B" of Plats, Page 18, records of Franklin County, Washington.

Recording No. 1682850. CP 110-114. Nicholas is listed as the grantor on the plaintiffs' Deed of Trust. CP 110-114. In April 2007, Appellants and Nicholas attempted to amend the Note terms to include an additional $40,000.00, by recording an amendment to the Note on April 11, 2007 (the "Amendment"). CP 115-116. NRK is not mentioned at all in the Deed of Trust or the Amendment.

Both the Note and the Amendment identify Nicholas as the "maker". CP 108-109; 115-116. NRK is not mentioned in the Note or Amendment. CP 98. There is no express language in either the Note or the Deed of Trust that Nicholas intended to bind NRK to the Note, subsequent amendments or Deed of Trust. Each of these documents bears Nicholas' personal signature in his individual capacity, and is void of any reference to NRK.

Shortly after the Amendment was recorded, NRK sought financing from Budget and offered the Property as collateral for a prospective loan. CP 98. Budget agreed to extend a loan to NRK (the "Budget Loan"), and Nicholas executed numerous loan documents to memorialize a loan in the amount of $263,250.00. CP 98. These documents included a Loan Agreement and Disbursement Instructions, an Adjustable Rate Note, a deed of trust (the "Budget Deed of Trust") and an Assignment of Rents. The Budget Deed of Trust was recorded in Franklin County under Recording

No. 1708310. In contrast to the Note, Amendment and Deed of Trust, each and every of these referenced documents contained a signature block for "NRK Investments LLC", and a corresponding signature line for Nicholas as "Manager". CP 117-143. Budget prepared these loan documents exclusively for execution by NRK, and in anticipation of signature by Nicholas solely as an authorized agent of NRK. CP 98.

When escrow was closed and the Budget Loan was funded, a portion of the loan proceeds was specifically slated to be used to satisfy the remaining balance on the Gottula Contract. CP 98. The Gottulas were paid from the Budget Loan proceeds, as reflected in the settlement statement showing a disbursement to the Gottula's agent, Title Management. CP 98; 144-145.

The Budget Loan proceeds were also specifically intended to dispose of the Deed of Trust. As an initial matter of record, the Deed of Trust encumbered the Property, and so Budget directly contacted Caroline Kairez prior to closing the Budget Loan and asked her to provide the amount needed to satisfy the Deed of Trust. CP 149. Caroline Kairez promptly supplied a payoff amount of $70,402 and instructions for wiring of the funds at closing. CP 149; 151. Accordingly, when the Budget Loan was funded, the exact sum of $70,672.00 was wired by Benton Title into a bank account designated by Appellants. CP 149-150. Benton Title

received written confirmation of the receipt of the wire into the Appellants' account. CP 149-150; 152. Budget recorded the Budget Deed of Trust to secure its interests in the Property on September 14, 2007.

Budget would not have funded the loan to NRK had it not been secured by a first position deed of trust. CP 98-99. This meant all prior encumbrances of record, whether valid or not, had to be discharged before Budget allowed the loan to close. CP 98-99. Yet, Appellants failed to remove or reconvey the Deed of Trust as an encumbrance of record on the Property after receiving the full $70,672.00 payoff. CP 99. From the correspondence with Budget relating to the Budget Loan and their own payoff, the Appellants were fully informed that the Budget Loan was taking place for the purpose of a new loan on the Property.

NRK defaulted on the Budget Loan in April 2009. CP 99. Without payments on the Budget Loan coming in, Budget initiated foreclosure proceedings. CP 99. The designated trustee conducted the foreclosure sale (the "Sale") on December 18, 2009 as provided by RCW 61.24, and Appellants were not included in the mailing list for the Notice of Trustee's Sale. CP 99. The Property was ultimately conveyed to Budget as the successful bidder at the sale. CP 99; 146-147.

The Appellants were aware that the trustee sale of the Property was occurring, and even requested a copy of the trustee sale guarantee from

Benton Franklin Title Company. Appellant Brief at 5. Yet, Appellants took no action to delay or stop the foreclosure by Budget. CP 99. Instead, in January, 2011, more than a year after the foreclosure sale and more than three years after receiving funds from Budget to satisfy the Deed of Trust, Appellants filed this suit for quiet title to the Property.

IV. ARGUMENT

Appellants never held a valid security interest in the real property, which is the subject of this action, since Nicholas only bound himself personally by the Note, Amendment and Deed of Trust. Because Nicholas failed to bind NRK, and without a real interest in the Property, Appellants have no basis on which to request relief for quiet title. Moreover, having accepted substantial payment from Budget toward the debt secured by their deed of trust, they cannot now be heard to claim an unpaid portion of their debt remains secured by the Property. Finally, there was never any direct interaction between Budget and the Appellants that would give rise to any negligence claim or a claim under the Consumer Protection Act. Consequently, there are no genuine issues of material fact in the record , and summary judgment is appropriate to dismiss Appellants' claims as a matter of law.

A. Standard of Review.

A motion for summary judgment is properly granted where "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." CR 56(c). All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. *Sherman v. State,* 128 Wn.2d 164, 183, 905 P.2d 355 (1995). Questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion. *Ruff v. County of King,* 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995).

On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court. A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Lybbert v. Grant County, State of Wash.,* 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

B. Appellants Never Had An Interest In The Property

It is beyond dispute that one can convey real property only so far as he holds an interest in such property. A person cannot convey a greater interest in real estate than he or she owns. *Firth v. Lu,* 146 Wn.2d 608, 615, 49 P.3d 117 (2002); *Simons v. Lee James Finance Co.*, 56 Wn.2d 234, 237 351 P.2d 509 (1960). A deed of trust signed by one without a valid interest

in the property is a nullity and without force or effect. *Pennock v. Coe*, 64 U.S. 117, 121, 16 L. Ed. 436 (1859); See, also, *Kiniski v. Archway Motel, Inc.*, 21 Wash. App. 555, 564, 586 P.2d 502 (1978) (observing mortgage signed by officer without authorization had no effect on corporate property).

In the case where real property is owned by a corporate entity, the conveyance must reflect the grantor is executing the deed of trust in his capacity as an agent of the entity in whom the property is vested. It is not sufficient that the instrument is signed by an authorized agent; the instrument itself must reflect the corporate desire to convey the property. In other words, if the signature block does not clearly indicate the signing individual is acting in a corporate capacity, the signature only binds the individual. *Griffin v. Union Savings and Trust, Co.*, 86 Wash. 605, 610, 150 P. 1128 (1915); *Kiniski*, 21 Wash. App. at 555. See, also, *Ekstrom v Dierssen*, Inc. 180 Wash. 493, 496, 40 P.2d 138 (1935) (mortgage bearing corporate signature and acknowledgment deemed to bind corporation).

Here, the Property was never owned by Nicholas. At all material times it was owned by NRK. Only NRK contracted to buy the Property from the Gottulas. Only NRK was entitled to a deed under the Gottula Contract. Only NRK was named on the fulfillment deed signed by the Gottulas. After April 2006, when the Gottula Contract was signed, only NRK could offer the Property as security for a loan.

The Appellants' Deed of Trust was not executed by NRK. Nothing in the Note or the Amendment refers to NRK. The only conclusion that can be drawn from the face of the loan documents is that Nicholas signed the Deed of Trust in his individual capacity. Because he had no personal interest in the Property, the Deed of Trust was therefore ineffective to create a lien against the Property. Stated another way, the Appellants never had any lien on Property because Nicholas personally never had the right to grant such lien.

Without a lien on the Property, Appellants have no basis to assert any title to the Property. They had no "record superior interest" that this Court can recognize in a quiet title action. Any claims for quiet title therefore should be dismissed on summary judgment as a matter of law.

C. Appellants Cannot Rely On An Undisclosed Subjective Intent To Suggest That Nicholas' Signature In His Personal Capacity Can Bind NRK.

Appellants insist they intended to bind NRK all along when executing loan documents with their son, Nicholas. To the contrary, and consistent with the trial court's findings on summary judgment, Budget asserts the documents speak for themselves and require no further explanation in an investigation of intent. Appellant's arguments rest on the undisclosed intentions of the parties, as stated in their declarations on summary judgment, CP 35-82, to raise issues of material fact over the

clear and unambiguous text of the written documents. Asking the court to adopt this approach, and find a triable issue of fact, contradicts the law of contract interpretation long established in this state.

The trial court's reasoning is sound, and supported by Washington law. Washington follows the objective "manifestation theory" of contract interpretation. Under this approach, the court "attempt[s] to determine the parties' intent by focusing on the *objective manifestations of the agreement*, rather than the *subjective intent* of the parties." *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503-504, 115 P.3d 252, 266-67(2005) [emphasis added]. When interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. *City of Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 355 (1981). Furthermore, "surrounding circumstances and other extrinsic evidence can be used to determine the meaning of *specific words and terms used.* However, they cannot be used to show an intention independent of the instrument or to vary, contradict or modify the written word. *Hearst, supra,* at p. 503. (emphasis in original).

The court's inquiry, then in interpreting a contract, begins by imputing an intention corresponding to the reasonable meaning of a person's words and acts. *City of Everett, supra,* 95 Wn.2d at p. 855.

Given that the written contract is itself an objective manifestation, it is deemed to have been read by the parties who signed it, and it may not be contradicted – even if the offered evidence would otherwise be an objective manifestation. As the court made clear in *BNC Mortgage, Inc. v. Tax Pros*, when affirming a lower court's summary judgment of dismissal, one cannot manufacture a material issue of fact by presenting evidence on undisclosed intent. *BNC Mortgage, Inc. v. Tax Pros,* 111 Wash. App. 238, 46 P.3d 812 (2002) (overruled on other grounds by *Columbia Cmty. Bank v. Newman Park, LLC*, 155 Wash. App.634, 279 P.3d 869 (2012)).

Contrary to the objective intention manifested by the documents on record, Nicholas "freely admits he intended all along to bind NRK" and that the Appellants "have a like understanding." CP 79. Assuming the truth of that fact for purposes of their argument, the simply question remains: why did the Appellants then not manifest this intention in the very Note and Deed of Trust meant to solidify that intent? From the face of the Note, Deed of Trust, and Amendment, it is clear Nicholas did *not* intend to bind NRK, since he did not include a signature block for NRK. The documents show, unambiguously, that Nicholas was personally liable to his parents under those instruments, and not NRK. Appellants admitted in summary judgment that Nicholas formed NRK to acquire the Property.

CP 35. Appellants also admitted the documents pertaining to their loan were signed by Nicholas and not by the vested owner of the collateral, NRK. CP 35. Appellants further admitted they knew NRK was the owner of the Property at the time they accepted the Deed of Trust from Nicholas, secured by the Property, even though at the time the parties entered into the documents pertaining to the loan, Nicholas had no personal interest in the Property. CP 79. In this case, the Appellants accepted the Note and Deed of Trust from Nicholas without a corporate signature. They did this *knowing* Nicholas had by then formed NRK and bound NRK to purchase the property from the prior owners. Months later they amended their note and *again* did nothing to properly bind NRK to the note and deed of trust.

Simply put, Nicholas failed to observe the necessary corporate formalities to bind NRK, and Appellants were not only well apprised of this failure, but endorsed it by not demanding some change to the recorded documents. Nicholas' bare assertion of his subjective intention to bind NRK to the Note and Deed of Trust cannot trump the contradictory manifestation of his intention in the written record. As stated above, in the context of summary judgment, this contradictory subjective manifestation *cannot alone be sufficient to raise a genuine issue of material fact. BNC Mortgage, Inc. v. Tax Pros, Inc.*, 111 Wash. App. 238, at 249 [emphasis

added]. The simple record speaks for itself, and the trial court made no error in finding no genuine issue of material fact on this subject.

D. Although Nicholas Had The Authority To Bind NRK, The Record Clearly Indicates He Simply Failed To Do So In This Transaction. Therefore, The Doctrines Of Ratification, Ultra Vires And Agent Authority Cannot Apply.

Appellants unsuccessfully argue that Nicholas did in fact bind NRK to the Note, Deed of Trust and Amendment. This argument fails predominantly in that it seeks to sneak three legal theories under one umbrella – that just because Nicholas *could* bind NRK through these documents, he *did* bind them. In this case, the hole in the umbrella is too large to cover these theories, and the argument is refuted by the clear and unambiguous facts of record.

First, Appellants falsely argue Budget's position hinges on a claim that "Nick Kairez was not authorized to encumber the Pasco Property on behalf of NRK, because he didn't follow the appropriate or necessary procedures." CP 89 and Appellants' Brief at 13-14. Then Appellants make the claim that Budget's argument is therefore "... akin to an *ultra vires* claim." CP 89; Appellants' Brief at 13. This couldn't be further from the truth.

"Ultra vires acts are those performed with no legal authority and are characterized as void on the basis that no power to act existed, even

where proper procedural requirements are followed. Ultra vires acts cannot be validated by later ratification or events." *S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 123, 233 P.3d 871 (2010). The rationale for the ultra vires doctrine is 'the protection of those unsuspecting individuals whom the entity represents.' *Hunter v. City of Bainbridge Island,* 104 Wash. App. 1032 (2001). This rationale makes absolutely no sense in application to the facts of this case, and Budget is certainly not relying on the doctrine to support its arguments. The trial court did not err in finding this argument a misnomer. This case is immediately distinguishable from all the cases cited by Appellant on this issue for the simple reason that Budget is not alleging (1) that Nicholas lacked the capacity to sign for NRK or (2) that any procedural irregularity occurred in this case at all. Nicholas had both absolute authority to bind himself and absolute authority to bind NRK, but elected in fact only to bind himself to the Note, Deed of Trust and Amendment.

Appellants place their faith in the doctrine of ultra vires in the hope this Court will apply case law that prevents a corporation from avoiding a contract from which it benefited. This argument is only a distraction from the simple fact that the Note, Deed of Trust and Amendment all fail to indicate that NRK is a party at all. Only Nicholas, as an individual, remains liable to his parents, the Appellants, for the

alleged sums he borrowed. Budget is not seeking to avoid any contract at all with the Appellants, since no contract existed between them in the first place. The doctrine of ultra vires may be something for NRK to allege against Nicholas, but has nothing to do with Budget. In that vein, Appellants' argument might make some sense if NRK was seeking to disavow a contract in which it was otherwise clearly bound by name and signature. *See*, *Millett v. Mackie Mill Co.*, 193 Wash. 477, 480-81, 76 P.2d 311 (1938) (corporation argued ultra vires to disavow contract). But that is not what the Appellants are asking in this instance. Quite the opposite, Appellants want a contract enforced that never existed in the first place, and seek to distract the Court's focus by claiming Budget seeks an application of the ultra vires doctrine to support its legal arguments. Budget does not at all rely on an ultra vires defense, and instead seeks only to have the Note and Deed of Trust between Nicholas and the Appellants interpreted and enforced as written.

Second, Appellants attempt to merge the above ultra vires argument with a leap to the conclusion that "[b]y retaining and using the benefit obtained, the corporation ratifies the contract, and the corporation's creditors also are bound by its ratification." Appellants' Brief at 15, CP 89. Appellants go so far as to classify the ratification as "obvious". Appellants' Brief at 15, CP 90.

Yet, there is simply no genuine issue of material fact on this claim since the signed documents speak to the contrary, without need for any further interpretation or finding. Ratification is a doctrine intended to bind a corporation to a contract which is otherwise unenforceable or void, or subject to rescission. See, e.g., *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wash. App. 787, 793-94, 150 P.3d 1163 (2007) (citing rule for ratification of voidable contracts); *In re Auburn Ace Holdings, LLC*, C09-0909RSL, 2010 WL 1141457 (W.D. Wash. Mar. 22, 2010) (holding that ratification occurred even if officer lacked authority). It has no bearing in this case.

Most importantly, like the ultra vires argument, the ratification argument is merely a distraction from the simple facts of the clear written record – that Nicholas could have bound NRK to the recorded instruments, but simply failed to do so in fact. NRK cannot ratify the actions of Nicholas with regards to the Note, Deed of Trust and Amendment. Since Nicholas was both individual and sole agent of NRK, his claim that he meant to ratify as NRK the relevant documents is only self-serving. The recorded documents speak for themselves, and bear no indication NRK meant to be bound at all to the transactions. The discussion of ratification is inapplicable to these facts, leaving no genuine issue to decide.

There is no dispute Nicholas entered a valid and binding contract with his parents, the Appellants. The doctrine of ratification is simply not applicable in this instance. The record itself contradicts any argument attempting to justify an application of ratification to these facts. Nicholas admits he created NRK to acquire the Property. CP 78. Consistent with this formation he executed a land contract with the prior owners, the Gottulas, in the name of NRK and properly bound NRK to that agreement with a suitable signature block. CP 101-106. Yet the record reflects that just one month after observing all of these corporate formalities, Nicholas completely disregarded them and executed the Note and Deed of Trust in his name personally. Many months later, when amending the note, he *again* signed in his individual capacity. Clearly Nicholas understood the method for binding NRK to a contract, but chose not to bind NRK to the Note and Deed of Trust for the Appellants.

The sole case cited by Appellants to support the ratification argument as being within the sole province of the trier of fact is completely irrelevant to this matter. In *Barnes v. Treece,* a vice president publicly announced he would pay $100,000.00 to any person that located a crooked punchboard. *Barnes v. Treece*, 15 Wash. App. 437, 440, 549 P.2d 1152, 1155 (1976) (citing *In re Estate of Richardson*, 11 Wash. App. 758, 525 P.2d 816 (1974)). An individual stepped forward, having seen the offer,

and presented two rigged punchboards and was denied the reward. He brought a breach of contract claim against the vice president and the corporation. The whole case hinged on a discussion of whether an expression could be intended as a joke or understood by a reasonable person as an actual offer. It had nothing to do with whether a signature by an individual could bind a corporation. The Court of Appeals affirmed the lower court's decision that the corporation did not impliedly ratify the vice presidents unauthorized contract. The facts of the case are not only distinguishable from the facts of the present case, but its holding has no bearing on whether NRK ratified Nicholas' contracts. It certainly has no application on whether Budget, totally unrelated in corporate connection to NRK or Nicholas, ratified the Note, Deed of Trust or Amendment. Importantly, the *Barnes* Court did not disturb the trial court's finding that the corporation did not ratify the offer from the vice president. The Court only mentioned in passing that whether there was an "objective manifestation of mutual assent to form a contract" was a matter for the trier of fact. *Barnes v. Treece*, 15 Wash. App. 437, at 1155. The holding had nothing to do with whether ratification of a contract was a matter for the trier of fact. Regardless of whether such an issue belongs with the trier of fact, it does not matter to this case, since NRK (and certainly not Budget)

cannot claim to seek to ratify any of the relevant recorded documents to this transaction.

Third, Appellants argue Nicholas had "... authority to encumber NRK property". CP 88; Appellants' Brief at 13. In support of the conclusion the Appellants subjective understanding of the Note, Deed of Trust and Amendment were to secure an interest in the Property. This subjective intent argument is dealt with at length in section B, *Supra*. Appellants raise this argument again here, however to support a different conclusion – that the issue of agent authority is one for the trier of fact. However, that, like the argument for application of ratification, the pitch for agent authority as a genuine issue of material fact is a red herring in this case. The issue is not whether Nicholas had the authority to bind NRK. Undisputedly, he did retain that authority. The issue is that he chose not to bind NRK, instead only binding himself personally on the Note, Deed of Trust and Amendment.

Appellants only cite *Louron Industries* for the proposition that the trier of fact must decide whether an agent has apparent authority. CP 88-89. *Louron Indus., Inc. v. Holman*, 7 Wash. App. 834, 837, 502 P.2d 1216, 1218 (1972). However, the *Louron* case dealt exclusively with the issue of specific performance on enforcing a real estate transaction. There is a brief discussion of apparent agent authority in the case, but no holding

at all that a court cannot decide the matter on summary judgment, if there are no genuine issues of material fact. While whether apparent authority exists may normally be a question for the trier of fact, a court has discretion to rule on summary judgment as well. *See Hansen v. Horn Rapids O.R.V. Park of the City of Richland*, 85 Wash. App. 424, 430, 932 P.2d 724, 728 (1997) (Court of Appeals affirmed trial court's summary judgment against plaintiff alleging apparent authority and vicarious liability).

The important point here is that there is no need for a discussion of whether Nicholas was acting with actual or apparent authority for NRK. Appellants desire to engage in that conversation is the red herring. As has been reiterated at length, *Supra.*, Nicholas had the authority whether actual or apparent, to bind NRK. The Note, Deed of Trust and Amendment are all missing NRK's signature block or any reference at all to a corporate seal of approval. Instead, Nicholas signed the recorded documents in his individual capacity, leaving only himself liable on the contracts with his parents. There is nothing to be inferred from this conclusion, other than what the written record itself reflects.

E. Appellants Are Barred From Claiming A Continuing Property Interest In The Property Since They Gave Budget A Precise Payoff Amount For The Remaining Balance Owed On Their Loans Attached To The Property, And That Amount Was Paid In Full.

Appellants cannot claim a continuing interest in the Property because they accepted from Budget an agreed amount ($70,000.00) to satisfy their loan to Nicholas. CP 148-151. Appellants wrongly claim there is some genuine factual dispute as to the nature of the payment of $70,000.00. The trial court recognized no issue in this respect, for the simple reason that the Appellants (through Carolyn Kairez) received a payoff request from escrow and responded with specific directions with a sum certain and instructions where to send the funds. CP 149-150. Escrow employees relied on this information when closing the loan from Budget to NRK. CP 149-150. Despite this conduct, the Appellants amazingly now claim they never intended to accept a lesser sum for satisfaction of their lien. They were given an absolute opportunity to represent a payoff amount of their full invested interest in the Property, and expressed that amount as $70,000.00 to Budget. Now, years after Nicholas defaulted on the payments on the Note, and years after the Sale, the Appellants want more money. Their subjective desire for such funds does not present a genuine issue of material fact. Whether they are entitled such funds from their son, Nicholas, or from another named

defendant is a separate issue, and does not mean at all that they have a right to claim the sum from Budget.

Washington law does not permit a prior lien holder to tender a payoff amount to a refinancing lender, accept the payment amount tendered, and then later assert a continuing lien on that property. This is particularly true when the payoff amount represents a substantial portion of the debt. In *Jones v. Curtiss*, the plaintiffs sought to collect on the balance of a note left unpaid by a refinancing transaction by foreclosing on a second mortgage executed after the refinancing transaction closed. *Jones v. Curtiss*, 20 Wn.2d 470, 147 P.2d 912 (1944). The original note was $800, and the plaintiffs there received $565 in the refinance transaction, and submitted a signed satisfaction of mortgage into escrow. Several months later they accepted a second mortgage from the defendants to secure the balance of the note unpaid in the refinancing transaction. When the defendants defaulted on that mortgage, they filed suit to collect on the balance on the note. *Jones v. Curtiss*, 20 Wn.2d 470, at 472-473.

Affirming the dismissal of the action by the trial court, the Supreme Court held the second mortgage was invalid and unenforceable. *Id.*, at 479. Acknowledging that the plaintiffs had been paid a substantial portion of their debt, and that the refinance lender was unaware of any continuing debt, the Court recognized several theories that supported dismissal, but

specifically that: "The execution and delivery of a written consent to take a lesser sum than the original debt out of the proceeds of the loan in full settlement thereof would, when received, result in accord and satisfaction....". *Id.*

The documentary evidence in this case includes a statement from Appellants with a payoff amount of $70,402, which included instructions for wiring that money. CP 148-151. It is undisputed that the Appellants actually received the sum of $70,672 from the Budget Loan proceeds, nearly 80% of the outstanding balance of the loan to Nicholas. The record amply demonstrates that Budget would not have funded the loan to NRK had there been any indication that the lien on the Property would not be released by plaintiffs. Applying the *Jones* case, Appellants here should not be permitted to maintain a lien on the Property when the documentary evidence shows they agreed to accept less.

Appellants claim *Jones* cannot apply to these facts because there is no written accord and satisfaction from Appellants acknowledging satisfaction of the debt in the Note. Appellants' Brief at 17. That argument neglects to acknowledge the real message of *Jones*, which is summarized as follows:

> The appellants received a substantial part of the indebtedness owing to them. It is a proper inference to

> draw that, inasmuch as they had received nothing on the debt, they, appellants, were willing to encourage the making of the HOLC loan so that as much as possible of the debt could be liquidated out of its proceeds; and, on the other hand, the HOLC, in conformity with its general policy in making a loan, desired to have all of the secured indebtedness against the property fully liquidated, to the end that the borrower would be better able to repay such loan as it came due; and, therefore, it was the intention of all parties that, when the appellants received the HOLC bonds and cash, in the aggregate of $565.86, the original debt would be entirely liquidated.

Jones v. Curtiss, 20 Wn.2d 470, at 480. The Court in *Jones* concluded:

> Where a secured creditor agrees wholly to relinquish and release his claim against a debtor in consideration of receiving a specified sum from an HOLC loan to the debtor, he cannot, as a part of the same transaction, make a secret arrangement with his debtor to keep the indebtedness intact in whole or in part and stand by and permit the loan to be closed, become a beneficiary and later seek to realize upon his claim

Id. Thus, *Jones* is directly applicable to this case, and cannot be distinguished in the way Appellants so claim.

As argued in summary judgment, Appellants should be estopped from claiming a continuing security interest in the Property, having accepted payoff of the very amount they supplied to escrow. Equitable estoppel requires three elements: (1) conduct, acts, or statements by the party to be estopped are inconsistent with a claim afterward asserted by that party, (2) the party asserting estoppel took action in reasonable reliance

upon that conduct, act, or statement, and (3) the party asserting estoppel would suffer injury if the party to be estopped were allowed to contradict the prior conducts, act, or statement. *Sorenson v. Pyeatt,* 158 Wn.2d 523, 538, 146 P.3d 1172 (2006). The doctrine applies in quiet title actions, being, as our high court observed, one "by which a party may be prevented from setting up his legal title because he has through his acts, words, or silence led another to take a position in which the assertion of the legal title would be contrary to equity and good conscience." *Id.*

As the record makes clear, there is no dispute that the Appellants actually received at least $70,402 from the Budget loan proceeds.[2] This payment represented more than 75% of the initial loan balance of $90,000. Appellants knew or should have known their payoff statement would be relied upon by the escrow agent and Budget as assurance of Appellants' willingness to release their lien upon tender of the payoff. They further knew or should have known Budget would not have paid such a substantial portion of the loan balance, and, indeed, would not have funded the loan to NRK at all, but for Appellants' assurance the payment completely discharged their Deed of Trust. Now, years later and well after Budget

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[2] The actual amount paid to the plaintiffs was $70,672, slightly more than requested. CP 148-151.

expended the effort and expense to foreclose its lien on the Property, Appellants claim their interest is ongoing.

Alarmingly, Appellants argued at the trial court level and again now, that if any party is estopped, it is Budget for allegedly failing to document the terms of the release of the Plaintiffs deed of trust. Appellants' Brief, at 18. This argument presents no genuine issues of material fact at all, and the trial court did not err in dismissing it on summary judgment as a matter of law. Appellants cannot reasonably claim any reliance on Budget for any representations in the transaction, where the Appellants had no reason to seek any representations in the first place. Under Washington law, Budget has no duty to demand a reconveyance of the Deed of Trust. Once the obligation is satisfied, as it was in this case, the beneficiary (Appellants) must deliver the Note and Request for Reconveyance to the Trustee. Appellants simply did not do so in this case, after accepting their own demanded payoff amount. And now they are attempting to pawn off a reconveyance responsibility on Budget in the form of an equitable estoppel argument. The issue is not whether the request for reconveyance was made, but rather that the debt was satisfied as paid in full, and that the Appellants cannot reasonably claim otherwise.

In closing the transaction with NRK, Budget in fact required all prior encumbrances on the Property other than taxes be removed or paid off

before escrow was permitted to fund the loan to NRK. CP 95-100. These closing instructions provided plain guidance to escrow as to conditions for funding its loan to NRK. If the simple and straightforward conditions were not met, it was through no act or omission of Budget. Budget reasonably believed when it funded the Note it would be secured by an insurable first position deed of trust. CP 98-99.

Even if the above argument were not true, Appellants cannot assert a lien balance on the Property higher than $90,000.00. Appellants assert their real note balance is not $90,000 but a sum considerably larger ($149,104.30) because of advances made to Nicholas prior to December 2008. The actual amount owed by Nicholas for loans from his parents, the Appellants, beyond $90,000.00, cannot create a larger lien on the Property; at least not so as to acquire a priority over Budget's lien. The long-standing rule in Washington is that voluntary advances gain priority based on the date they are made, not based on the original date of the note or the securing deed of trust. *Nat'l Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 896-897, 506 P.2d 20 (1973).

Here, neither their Note, nor their Amendment, nor their Deed of Trust required that the Appellants loan Nicholas more than the stated note balance. CP 44-52. Neither the original Note nor the Amendment provided for any interest. As is clearly evident from Caroline Kairez' declaration, the

Appellants increased the note balance through advances they simply were not obligated to make, and added more than $59,000 to a note that provided for *zero interest*. CP 57. To the extent the Appellants' lien had priority over the Budget Deed of Trust, that priority was capped at $90,000.

F. Appellants' Negligence And Consumer Protection Act Claims Were Properly Dismissed On Summary Judgment, Since Appellants Cannot Establish Any Real Connection Or Interaction With Budget Giving Rise To A Relationship Or Duty.

The Appellants' argument to avoid dismissal of its claims for negligence and violations of the Consumer Protection Act ("CPA") fail for the simple reason that no material facts support the elements for these causes of action. Even stretching the alleged facts in the supporting affidavits to the furthest implications, they give no rise to facts to a CPA or negligence claim against Budget. The record establishes no actual relationship between Budget and the Appellants in this case. Without supporting facts to establish at least some relationship or causal link, these claims must be dismissed as a matter of law.

The CPA declares unlawful unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. RCW 19.86.020. A CPA claim in the insurance context requires (1) an unfair or deceptive practice, (2) in trade or commerce, (3) that impacts the public interest, (4) which causes injury to the party in his

business or property, and (5) which injury is causally linked to the unfair or deceptive act. *Anderson v. State Farm Mut. Ins. Co.,* 101 Wash. App. 323, 330, 2 P.3d 1029, 1033 (2000) (citing *Industrial Indem. Co. of the Northwest, Inc. v Kallevig,* 114 Wn.2d at 920-921, 792 P.2d 520 (1990)). The public interest element may be established by showing a violation of a statute containing a legislative declaration of public interest impact. *Hangman Ridge Training Stables, Inc., v. Safeco Title Ins. Co.,* 105 Wn.2d 778, 791, 719 P.2d 531 (1986).

Whether specific conduct gives rise to a CPA claim is a question of law. *Id.*; *See Also, Indoor Billboard, Inc. v. Integra Telecom of Washington, Inc.,* 162 Wn.2d 59, 74, 170 P.3d 10 (2007). Moreover, a CPA claimant must establish that "but for" the alleged unfair or deceptive practice, he or she would not have suffered injury. *Indoor Billboard,* 162 Wn.2d , at 84. In the context of mortgage practices, a plaintiff cannot rest a CPA claim on acts or practices that are done in a good faith belief that the mortgage practices are lawful. *Perry v. Island Savings and Loan Ass'n*, 101 Wn.2d 795, 810, 684 P.2d 1281(1984).

In the most elementary sense, the Appellants claim fails in that there is nothing deceptive about the Sale and Budget's acquisition of the Property. There was no simply no relationship between Budget and the Appellants other than the demand for payoff amount on the Deed of Trust.

And that process was handled throw escrow. As argued above at length, the Appellants never had an interest in the Property to begin with, since the Deed of Trust was ineffective to secure any such claim. The relationship between Budget and the Appellants was limited to a single transaction through an escrow company where the payoff amount was supplied and then paid.

Appellants Deed of Trust was paid in full, consistent with their own specific instructions to Emerald City Escrow. The CPA does not define "unfair or deceptive act or practice," but "[i]mplicit in the definition of 'deceptive' under the CPA is the understanding that the practice misleads or misrepresents something of material importance. *Nguyen v. Doak Homes, Inc.*, 140 Wash. App. 726, 734, 167 P.3d 1162, 1166 (2007) (citing *Holiday Resort Cmty. Ass'n v. Echo Lake Assoc.,* 134 Wash. App. 210, 226, 135 P.3d 499 (2006)). That Appellants claim that they were mislead, having provided and then accepted an agreed payoff amount, is the real act of deception in this case. Again, Budget relied on Appellants representation that the figure provided by Carolyn Kairez to Emerald City Escrow was accurate and complete. CP 148-151.

Secondarily, the facts of this case do not give rise to a cause of action affecting the public interest. This entire transaction is essentially a private dispute over a single piece of property, and has nothing to do with

a larger public interest (*see, e.g., Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., supra; Lightfoot v. MacDonald,* 86 Wash. at 334, 544 P.2d 88 (attorney-client); *Short v. Demopolis,* 103 Wn.2d 52, 691 P.2d 163 (1984) (attorney-client); *Salois v. Mutual of Omaha Ins. Co.,* 90 Wn.2d 355, 581 P.2d 1349 (1978) (insurer-insured); *McRae v. Bolstad,* 101 Wn.2d 161, 676 P.2d 496 (1984) (realtor-property purchaser); *Bowers v. Transamerica Title Ins. Co.,* 100 Wn.2d 581, 675 P.2d 193 (1983) (escrow closing agent-client)). Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest. *Lightfoot v. MacDonald, supra.* Such is the case here, where the Note, Deed of Trust, Amendment, and subsequent Sale of the Property is simply a private real estate transaction, truly affecting nobody else. The uniqueness of this particular situation, and the allegations made by the Appellants against Budget have no chance of affecting anybody but the parties at hand (and perhaps the other named defendants), thus failing to meet the public interest element of a CPA claim. The CPA claim fails to give rise to a genuine issue of any material facts, and is ripe for dismissal as a matter of law.

Appellants' negligence claim against Budget fails for very similar reasons. They again assert a "mysterious disappearance" of their lien after the Sale. Appellants' Brief at 26. There is nothing mysterious about the

facts here. The Appellants accepted the Deed of Trust as security for their Note knowing the grantor, their son Nicholas, had no personal interest in the Property. The Appellants then accepted $70,762 from the loan proceeds from Budget, knowing Budget was providing a loan to refinance the debt secured by the Property. Later the Appellants learned of the foreclosure and chose not to act to secure their own interest, failing to object at all to the Sale of the Property.

It is well understood that any negligence claim rests on a showing of duty flowing from the defendant(s) to the plaintiff, a breach of that duty, and causation. *Michaels v. CH2M Hill, Inc.,* 171 Wn.2d 587, 605, 257 P.3d 532 (2011). During a nonjudicial foreclosure, it is the duty of the trustee designated under the deed of trust to notify any parties entitled to notice. *See*, RCW 61.24.040(1). Once properly notified of a foreclosure, a junior lienor must take affirmative steps to restrain the sale or that lienor's defenses to foreclosure are deemed waived. RCW 61.24.130; *Cox v. Helenius*, 103 Wn.2d 383, 388, 693 P.2d 683 (1985). Thus, while a trustee must proceed in good faith and with due regard for all parties affected by the foreclosure, the foreclosing lender *does not owe any separate duty* to protect other lien holders.

Even a generous and forgiving read of the Appellants' complaint will not reveal an actionable negligence claim against Budget. The

Complaint simply fails to identify what duty Budget owed in this instance to the Appellants. Neither the pleadings nor the record before this court reveal any interaction between Budget and the Appellants; nor would it, for Budget loaned money not to the plaintiffs but to NRK, an entity in which Appellants had no interest. If any duty was owed to Appellants during the foreclosure process, it was the duty to notify them of the trustee's sale, and that was a duty owed *by the trustee*, not Budget. Budget owed no separate duty to protect the Appellants' lien.

Even assuming the statutory obligation to notify other lienors of foreclosure amounts to a cognizable duty under tort law, it is hard to fathom how any breach of that duty was a proximate cause of harm to the Appellants. As explained above, if there was a failure to follow the statutory duty to notify plaintiffs, it was Budget, not the Appellants, that was harmed by failure, since Budget bore the risk that the Property remained encumbered by the Deed of Trust. In other words, the mere fact of foreclosure could not have harmed Appellants' position as either a senior lien holder or an omitted junior lien holder.

Appellants allegations fail to show any duty or any harm arising from a breach of duty. The trial court's ruling should be affirmed, and the Appellants' negligence claim dismissed as a matter of law.

V. CONCLUSION

The trial court was correct in dismissing each of Appellants' claims on summary judgment as a matter of law. The record does not support a finding that there are genuine issues of material fact to carry this matter to trial for a trier of fact. The decision should be affirmed, and the case dismissed as to Budget with prejudice.

RESPECTFULLY SUBMITTED this 27th day of December, 2012.

FIDELITY NATIONAL LAW GROUP,
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BY _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the date given below I cause to be served the foregoing on the following individuals in the manner indicated via Federal Express Overnight Mail and E-mail:

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Dated: December 27, 2012

Kristen Linton,
Legal Assistant