NO. 92373-6
SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 71544-5-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CITY OF KENT,

Appellant,

and

BEL AIR & BRINEY, A General Partnership; NICK BRINEY, A Single Man; and ROGER BELAIR, A Married Man,

Respondents.

BRIEF IN RESPONSE TO PETITION FOR REVIEW

THE HUNSINGER LAW FIRM
Attorney for Respondents BEL AIR & BRINEY; NICK BRINEY; AND ROGER BELAIR

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I. INTRODUCTION

The ruling by the Court of Appeals prohibiting Petitioner City of Kent from foreclosing its equitable lien is entirely consistent with Washington state law applying the doctrine of equitable subrogation.

Washington's "liberal application" of the doctrine allows equitable subrogation to be awarded only to the extent that it is necessary to prevent the unjust enrichment of a junior lienholder. Junior lienholder Bel Air & Briney will receive no windfall if Kent is denied the right to foreclose on its equitable lien. Because there is no conflict with any decision of the Washington State Supreme Court or Court of Appeals, and because review of the Court of Appeals ruling would not further a substantial public interest, Kent's Petition for Review should be denied.

II. ISSUES REGARDING THE ASSIGNMENT OF ERROR

1. Should the owner of real property who has an equitable lien thereon have the right to foreclose that lien even though a junior lienholder would not be unjustly enriched if that right were denied, and in fact would be materially prejudiced if it were allowed?

2. Does Kent have the right to foreclose its equitable lien

using the same procedures as that of a sheriff's sale, which has no application whatsoever to a lien created by equitable subrogation?

III. SUPPLEMENTAL STATEMENT OF THE CASE

The Statement of the Case presented in the Petition for Review is supplemented as follows:

The Deed of Trust securing Bel Air & Briney's $134,000 loan to Hoang Tran ("Tran") was recorded on June 15, 2007, three months after Kent received a preliminary commitment from Pacific Northwest Title Company of Washington, Inc. ("PNWT") with respect to Parcel C owned by Tran. (CP 100)

When the sale of Parcel C closed on January 31, 2008, seven months after the recording of Bel Air & Briney's second Deed of Trust, PNWT issued a title insurance policy to Kent, which failed to include the exception for the Bel Air & Briney second Deed of Trust. (CP 101) As of January 31, 2008, the amount owing to Bel Air & Briney under the Promissory Note and secured by the Bel Air & Briney Deed of Trust was $143,305.42. (CP 100) Tran had timely made all of the payments to Bel Air & Briney. (CP 118)

Had Tran's debt to Bel Air & Briney been paid at closing as it should have been, Tran would have still received almost $50,000 in net sale proceeds. (CP 100) But Bel Air & Briney received no

funds: the entire $143,305 that was supposed to have been paid to Bel Air & Briney was instead disbursed to Tran. (CP 100) After the MortgageIt loan and closing costs were paid, Tran received a total of $193,499.50. (CP 100)

Tran never informed Bel Air & Briney of the Parcel C sale, let alone that he had pocketed $143,305 that should have gone to Bel Air & Briney in return for the reconveyance of its Deed of Trust. (CP 101) Bel Air & Briney was not aware of the sale of Parcel C until July of 2012. (CP 101)

After the Parcel C sale in January 2008 Tran made the next six monthly payments to Bel Air & Briney on time. (CP 101) In June 2008 Tran asked for and obtained another six month extension to December 2008, Tran made one additional payment -- $1,535 in July 2008 -- and one, final one in October 2008 for $1,835, following requests for payment from Nick Briney, a Bel Air & Briney partner, but Bel Air & Briney never received any more money from Tran despite Mr. Briney's attempts to contact him. (CP 101)

Because of the suddenly declining values of real property in the Seattle area and all over the country beginning in late 2008, the equity in the other three parcels securing the Promissory Note vaporized, and Tran defaulted on his debts on the other three

parcels. (CP 101-102)

Mr. Briney located the owners of Parcel C and met with them on July 14, 2012, becoming convinced that they had no money to pay Bel Air & Briney. (CP 102) Following that conversation Mr. Briney contacted the City of Kent and had numerous discussions with representatives of both the City and PNWT, which he learned had issued the title insurance policy regarding the Tran transaction. (CP 102)

Kent notified PNWT of Bel Air & Briney's claim. (CP 103) First American Title Insurance Company, as successor to PNWT, has acknowledged the claim and is providing the defense on behalf of the City of Kent, including paying the City of Kent's costs incurred in connection with this litigation. (CP 103)

IV. ARGUMENT

A. Every Application of the Equitable Subrogation Doctrine in the State of Washington Has Been Awarded in Order to Prevent the Property's Owner or a Junior Lienholder From Receiving a Windfall.

At page 9 of its Petition, Kent correctly states that in 2013, this Court "adopted §7.6 of the Restatement (Third) [of Property] in full", in *Columbia Cmty. Bank v. Newman Park, LLC,* 177 Wn.2d 566, 580, 304 P.3d 472 (2013). Section 7.6 states as follows:

(a) One who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage ***to the extent necessary to prevent unjust enrichment.*** Even though the performance would other-wise discharge the obligation and the mortgage, they are preserved and the mortgage retains its priority in the hands of the subrogee.

(b) By way of illustration, ***subrogation is appropriate to prevent unjust enrichment*** if the person seeking subrogation performs the obligation

(1) in order to protect his or her interest;
(2) under a legal duty to do so;
(3) on account of misrepresentation, mistake, duress, undue influence, deceit, or other similar imposition; or
(4) upon a request from the obligor or the obligor's successor to do so, if the person performing was promised repayment and reasonably expected to receive a security interest in the real estate with the priority of the mortgage being discharged, ***and if subrogation will not materially prejudice the***

> ***holders of intervening interests in the real estate.*** *Id.,* page 580 (emphasis added)

Six years earlier, in *Bank of America, N. A. v. Prestance,* 160 Wn.2d 560, 160 P.3d 17 (2007), this Court initiated its liberal application of the equitable subrogation by awarding it even though the petitioner had knowledge of the junior lien before advancing funds.

In doing so, the Court discussed the windfall usually reaped by a second lienholder when the first lienholder's debt is satisfied, enabling the second lienholder to move up the priority ladder. Because of the risks of foreclosure of the first-priority mortgagee, ". . . second–priority mortgages often include terms to help alleviate this risk, such as higher interest rates. It is unfair then to allow a second-priority mortgagee to take a first-priority but still enforce the previously bargained-for terms. He gains the security of a first-priority loan, while keeping the favorable conditions of a second-priority loan." *Id.*, p. 565, fn. 4

Nevertheless, this Court emphasized that under §7.6 "[e]quitable subrogation ***should never be allowed*** if a junior interest is materially prejudiced, but if the junior interests are

unaffected, then there is no reason to deny it." *Id.*, page 572 "Equitable doctrine is a broad doctrine and should be followed whenever justice demands it ***and where there is no material prejudice to junior interest.***" *Id., page 581* (emphasis added in both)

In *Newman Park* the Supreme Court eliminated another anachronistic restriction to the equitable subrogation doctrine by holding that it also applied to a "volunteer", i.e. a lender who had no prior interest in the encumbered property. However, its liberal application of §7.6 remained limited to instances where it was required "to prevent unjust enrichment [of the junior lienholder]", citing *Prestance. Newman Park* at page 574

Not surprisingly, every case in the state of Washington cited by Kent in which equitable subrogation has been awarded involved overwhelming evidence that it was necessary to prevent an unearned windfall by an owner or junior lienholder.

In *Burgert v. Carolina*, 32 Wash. 62, 65-66, 71 P. 74 (1903), the guardian of the property's owners paid the real property taxes out of her own funds.

In *City of Spokane v. Security Savings Soc.,* 46 Wash. 150, 89 P. 466 (1907), the City paved and graded city streets and

established an assessment district in which the property owners were required to pay an annual assessment to the City for those improvements. Some property owners failed to pay the assessments for four years so the City paid them in order to protect its lien.

In *Stone v. Marshall*, 52 Wash. 375, 100 P. 858 (1909), an owner of a one-half interest in property paid all of the real property taxes for the entire parcel for several years.

In *Olson v. Chapman,* 4 Wn. 2d 522, 104 P.2d 344 (1940), an owner of a one-third interest in property paid all of the real property taxes for the entire parcel for 14 years.

In *Coy v. Raabe,* 69 Wn. 2d 346, 418 P.2d (1966) the owner leased property to Coy who had an option to buy it. The owner instead sold the property to Raabe, who as part of the purchase satisfied an IRS lien owed by the owner that encumbered the property. Coy successfully sued to enforce his option to purchase, but Raabe was equitably subrogated to the IRS lien he paid off for the benefit of the owner.

In each of the above cases, a third party paid an obligation owed by the owners of the property, who would undisputedly been unjustly enriched had they not been ordered to reimburse the

"donors". Next came the refinancing cases: *Prestance* and *Newman Park, supra.*

In *Prestance,* Washington Mutual had the first mortgage and Bank of America's mortgage was in second position. The property owner applied to Wells Fargo Bank for a loan, a portion of which was to pay off Washington Mutual's debt. Wells Fargo was aware of Bank of America's second mortgage because it was disclosed on the preliminary title commitment issued by a title insurance company. Wells Fargo nevertheless made the loan to the property owner, expecting the proceeds to pay off both debts, thus establishing its mortgage in first position. Washington Mutual's mortgage was paid off and removed from the title but Bank of America's debt was not paid. Consequently its mortgage advanced to the first position.

Wells Fargo sued to equitably subrogate its mortgage ahead of Bank of America's mortgage. Bank of America contended that Wells Fargo's mortgage should not step into first position because it was aware of Bank of America's junior deed of trust when it made the loan. This Court disagreed and granted equitable subrogation, since "Bank of America offers no principled reason why it should receive an unearned windfall at [Wells Fargo's] expense. . ."

Prestance, at page 582

In *Newman Park,* Newman Park, LLC owned real estate that was encumbered by a first mortgage in favor of Hometown National Bank ("Hometown") in the amount of $400,000. One of Newman Park's principals borrowed $1.5 million from Columbia Community Bank ("Columbia Community"), $400,000 of which was used to pay off the Hometown debt, so Columbia Community's mortgage securing the $1.5 million loan was in first position. Columbia Community was unaware that the borrower did not have the authority to use Newman Park's property as collateral (he presented the bank with forged documents ostensibly demonstrating that authority). When the borrower defaulted on the loan, Newman Park sued to invalidate Columbia Community's mortgage.

Columbia Community contended that its mortgage was valid or, alternatively, it should at least be awarded an equitable lien against the Newman Park property in the amount – $400,000 – that it paid Hometown since (1) Newman Park received that benefit by having its debt to Hometown paid by Columbia Community; and (2) Columbia Community was defrauded into making the loan by one of Newman Park's principals. This Court agreed with Newman

Park that the mortgage was invalid but granted Columbia Community a $400,000 equitable lien to eliminate Newman Park's potential windfall.

The other two cases cited by Kent in its Petition involved the non-judicial foreclosure sale of deeds of trust.

In *Worden v. Smith,* 176 Wn. App. 309, 314 P.3d 1125 (2013), the junior lienholder was awarded surplus funds paid by a third party buyer at the non-judicial sale foreclosing the defaulted senior deed of trust. The junior lienholder erroneously allowed the $65,000 in delinquent real property taxes to be paid out of the surplus before receiving the remainder of the proceeds. The property was redeemed by a third party, who opposed the junior lienholder's request for equitable subrogation with respect to that $65,000. The Court of Appeals awarded the lien to the junior lienholder to prevent the redemptioner-owner from receiving the $65,000 windfall.

Finally, *In Re Greer,* 2008 WL 2655805 (2008), has nothing to do with equitable subrogation

B. Here, to the Contrary, Bel & Briney Will Not be Unjustly Enriched if it is Able to Foreclose on Its Deed of Trust and Kent Is Barred from Foreclosing on its Equitable Lien.

In its ruling in this case, *Bel Air & Briney v. City of* Kent, _____ P.3d _____ (09/14/15), 2015 WL 5330512, the Court of Appeals upheld the trial court's award of an equitable lien to Kent in the amount it paid to satisfy the first deed of trust to prevent the alleged "windfall" Bel Air & Briney would have otherwise received by moving from second to first in lien priority, citing *Prestance* and *Newman Park.*

In its Petition at page seven, Kent acknowledges, as it must, that it must prove that "Bel Air & Briney will reap an unearned windfall . . ." in order for equitable subrogation to apply. However, the City never explains how Bel Air & Briney would receive such an "unearned windfall"; instead it bases its Petition on its irrelevant claim that it will be harmed if equitable subrogation is not applied.

It is undisputed that:

- Since 2007 Bel Air & Briney has had a second deed of trust against Parcel C securing the Tran debt;
- Had Tran defaulted on the debt secured by the first deed of trust, MortgageIt could have foreclosed and unless Bel Air & Briney paid the amount the lender was owed at the trustee's sale ($196.894.17 as of January 31, 2008), its second deed of trust would have been extinguished;

- Instead, in January 2008 the first deed of trust was paid in full;
- Tran defaulted on the debt to Bel Air & Briney in late 2008;
- Bel Air & Briney has the right to foreclose on its second deed of trust;
- If Bel Air & Briney forecloses, at the trustee's sale it will have the right to "credit bid" the amount it is owed and if neither the owner (Kent) nor any third party pays more than that amount, Bel Air & Briney will take title to Parcel C. (Petition, p. 12);
- However, no third party will purchase Parcel C at the sale because in addition to paying the purchase price, the prospective buyer's ownership interest will be subject to Kent's senior lien of $196,894.17. (Petition, p. 13) Bel Air & Briney will therefore very probably take title to the property.

Kent contends in its Petition at page 13 that if it is allowed to foreclose its deed of trust Bel Air & Briney "will reap the windfall" because it could "foreclose its lien, eliminate Kent's title, ***and resell the property for full value*** because the buyer will have no fear of losing its property in a subsequent foreclosure by Kent and therefore no reason to direct that any of the proceeds of the sale

be paid to Kent." (emphasis added)

The proposition that BelAir & Briney could resell the property for full value is absurd, because its ownership will be subject to the City of Kent's equitable senior lien. According to the record before this Court, "the full value" of Parcel C is $110,000. The first $196,894.17 in net proceeds from any sale (after deductions for real estate excise taxes and up to 10% of the gross sale price in closing costs) will be paid to Kent in order for the buyer to obtain clear title. (CP 388)

Having the right to foreclose on a lien to take title to a piece of property worth $110,000 that is encumbered by a $197,000 lien owned by someone else could not possibly constitute a "windfall" to Bel Air & Briney, and thus even under the most liberal application of §7.6, equitable subrogation is not appropriate.

Moreover, allowing Kent to foreclose would ***materially prejudice*** Bel Air & Briney, an outcome this Court stated "should never be allowed" in *Prestance,* at 572. If Kent foreclosed on its senior lien, it would "credit bid" its $197,000 lien and receive title to the property free and clear of all liens unless someone paid more, in cash, at the auction. Bel Air & Briney would not throw $197,000 in good money after the unpaid $134,000 loan it had already made

to Tran on property that Kent contends is worth $110,000, and no third party would pay $197,000 for that "opportunity" either.

Under Kent's proposed scenario, Bel Air & Briney's second deed of trust would be extinguished, causing it to lose its only chance to perhaps some day recover a small portion of its loss, by holding onto the property unless or until a buyer was willing to pay more than $197,000 for the property: Bel Air & Briney would be entitled to the (probably meager) surplus.

As stated earlier in this Response, in *Prestance* this Court explained that because of the risks of foreclosure of the first-priority mortgagee, ". . . second-priority mortgages often include terms to help alleviate this risk, such as higher interest rates" *Id.*, p. 565, fn. 4. But Bel Air & Briney did not believe, nor would any other junior lender believe, that it could also face the risk of foreclosure of a senior deed of trust ***that not only had never been in default, but had been paid in full.*** Few if any lenders would ever make a loan under such circumstances. But that is the outcome Kent seeks here. There is no reason to believe that Tran ever missed a payment to MortgageIt, and he timely made every payment to Bel Air & Briney through the date of the sale. And yet, Kent wants to foreclose on that senior lien, extinguishing Bel Air & Briney's

second deed of trust.

As Kent states in its Petition at page 9, in *Prestance* at page 580 this Court stated that one of the public policy reasons for applying a liberal approach to equitable subrogation was that "by facilitating more refinancing, equitable subrogation helps stem the threat of foreclosure."

Here, however, public policy mitigates strongly against granting Kent's request for equitable subrogation. The facts of this case are limited to instances where a purchaser (not a refinancing lender) pays off a senior lienholder but a junior lienholder's debt is not satisfied due to the title insurer's error. Under this Court's liberal application of §7.6, the purchaser/owner will be equitably subrogated in the amount of the purchase price used to satisfy the senior lienholder. If this Court were to allow that owner to foreclose its senior equitable lien to extinguish the junior lien, even though the senior lien was never in default and was in fact fully paid off, willingness to lend money to owners of property in return for a second deed of trust will be severely limited.

Every case in the state of Washington in which equitable subrogation has been applied prevented a property owner or junior lienholder from reaping a clear and obvious unearned windfall.

Here, Bel Air & Briney will receive no windfall whatsoever if it is not applied, and it will be materially prejudiced if it is imposed.

C. Moreover, Here the Holder of the Equitable Lien Also Owns the Property, Granting Kent Significant Benefits Not Available to the Equitable Lienholders in the Other Equitable Subrogation Cases.

In every case cited by Kent, equitable subrogation was awarded to someone who did not own the property encumbered by the equitable lien. This is a critical distinction from the facts in this case.

In its Petition, Kent claims that "[f]oreclosure is the *sine qua non* of a lien." (page 7); "the only way to enforce a lien is through foreclosure" (page 11); "[w]ithout foreclosure, there is nothing . . . that will compel anyone to pay off the lien" (p. 12); and "a lien does not create a 'right to proceeds from . . . any sale'. It creates a right to foreclose and that is all." (p. 13)

Each of those statements is probably true with respect to those who were awarded equitable liens in *Burgett, City of Spokane, Stone, Olson, Prestance, Newman Park,* and *Worden.* In each case someone else owned the property (in *Olson* and *Stone* the liens were against the interests of the lienholders' co-tenants). If they were denied the right to foreclose on their liens and the

owners of the property made no attempt to clear title by sale or using it as collateral for a loan, the lienholders might be unable to compel the conversion of their liens to real money.

That is, however, not true for the City of Kent. As the owner of Parcel C, it can at any time choose to sell the property and keep the first almost $197,000 of the proceeds. Kent is technically correct when it disagrees with the statements made by the Court of Appeals below and the Arizona Supreme Court in *Sourcecorp, Inc. v. Norcutt,* 229 Ariz. 270, 276, 274 P.3d 1204 (2012) that the owner will have a right to proceeds "from any sale", noting such would not necessarily be the case if Bel Air & Briney foreclosed on its junior lien. As Kent says in its Petition at page 11, "[t]here is no 'right to proceeds from a sale' other than that established by private contract."

But the City strangely fails to state the obvious: as the owner it has the "right to proceeds from a sale by private contract" by deciding to sell the property for what the property is worth and in so doing, receive the proceeds up to $196,894.17.

In his concurring opinion, Judge Cox correctly notes that the City "holds two distinct interests in its property": it holds title via the deed from Tran, and it holds a first equitable lien through its

satisfaction of the first deed of trust. *Bel Air & Briney, supra, concurring opinion, pp. 2 – 3* These dual interests distinguish this case from all other equitable subrogation cases the City cites in its Petition.

This is also why the Court of Appeals was correct when it distinguished all the other equitable subrogation cases from this one, because the latter "ordered foreclosure [in order for the petitioners] to recover the amounts owed" whereas here, Kent pursued foreclosure "for the sole purpose of eliminating a subordinate lien." *Id., p. 12*

It is true, as Kent's Petition states at page 15, that Illustration 21 to §7.6 states that where a purchase is involved and the second lien is not paid off, equitable subrogation is appropriate and the purchaser/senior lienholder "may enforce the first mortgage against [the junior lienholder]."

However, Illustration 21 does not support Kent's claim that it should be allowed to foreclose on its lien because (a) in Illustration 21 the owner lied to the purchaser by stating the property was only encumbered by a first mortgage; and (b) "enforce" the first mortgage does not necessarily mean "foreclose". In fact, Illustration 21 contains a second paragraph that discusses the first paragraph

quoted by Kent in the Petition, explaining merely that " . . . if the cash price paid by the grantee included the second mortgage balance, subrogation to, rather than extinction of, the first mortgage will result in order to prevent unjust enrichment of the second mortgagee." There is no discussion of the equitable mortgage's "enforcement".

As stated earlier, enforcing the first mortgage includes all priority rights under the recording statute, particularly the right to receive all proceeds from the purchaser's sale of the property of the full amount of the lien before the junior lienholder receives any money. Illustration 21 does not address the issue before this Court, the right to foreclose the equitable lien.

D. Moreover, Kent is Not Prejudiced By Being Prevented from Foreclosing on its Lien Because It Has Up to $392,000 in Title Insurance With Which to Satisfy Bel Air & Briney's Second Lien.

As stated *supra,* equitable subrogation is simply not available if, as is the case here, it is not necessary to prevent a windfall. But even if there were such a potential windfall, "[t]he doctrine of equitable subrogation is an equitable one, having for its basis of complete and perfect justice between the parties without regard to form, and its purpose and object is the prevention of

injustice . . ." *Prestance* at 565

Knowing that this Court has so far declined to consider the availability of title insurance as a factor in determining the application of equitable subrogation, the Court of Appeals nevertheless ended its analysis of the equitable purpose of subrogation as follows: "To the extent that Bel Air & Briney's lien adversely affects the City's equity or renders the Property less marketable, we neither address nor foreclose any claims the City may have against its title insurer." *Bel Air & Briney, p. 15*

First American Title Insurance, through its predecessor, insured that Kent obtained clear title when it purchased Parcel C. Kent paid a premium for that insurance policy. The coverage amount was $392,500, the same amount as the purchase price. First American Title is contractually required to compensate Kent for damages up to $392,500 caused by its failure to discover the existence of the Bel Air & Briney deed of trust and to ensure that it was reconveyed at the time of closing. That is why First American Title is paying the attorneys who have represented Kent so vigorously in this matter.

Kent paid $392,500 for clear title to Parcel C. Bel Air & Briney merely wanted, and wants to have, its loan to Tran paid off.

No court, including this one, can compel First American Title to fulfill the objectives of both innocent victims of its error by paying Bel Air & Briney to reconvey its deed of trust, but it makes no sense to fail to take that potential outcome into consideration when deciding whether to agree with Kent's (irrelevant) claim that it will be prejudiced if it is not allowed to foreclose on its equitable lien.

Finally, if this Court believes that review of the Court of Appeals decision would further a substantial public interest, it should also grant review of the Court of Appeals' award of equitable subrogation to Kent in the first place, as its refusal to expressly take into consideration the availability of title insurance ignores "the purpose and object" of equitable subrogation: "the prevention of injustice."

E. There is No Legal Authority for Kent's Foreclosure of its Equitable Lien Via the Sheriff's Sale Statute.

Kent is correct when it states in its Petition at page 16 that its proposal that the sheriff sale statute, RCW 6.21, be used to foreclose on its equitable lien was "in response to a complaint by Bel Air & Briney that it did not know what procedure Kent would use to foreclose."

There were two fundamental reasons for this "complaint" by

Bel Air & Briney. First, there was (and is) not a single case in this state discussing how an equitable lien is to be foreclosed. Kent acknowledged this in its Supplemental Brief in the Court of Appeals at page 8: "[t]he issue of the mechanics of how to foreclose an equitable lien arising under the doctrine of equitable subrogation has apparently not risen to the appellate level in Washington, . . ."

Second, the Judgment authorizing the foreclosure of Kent's equitable lien merely ordered that, "[t[he Property be sold by the Sheriff of King County, Washington, in the manner provided by law for foreclosures and in accordance with the practice of this Court; . . ." (CP 280, 410), whatever that meant.

To be fair to Kent and to the trial court, both were attempting to implement a procedure for which there was no statutory authority and no precedent in common law. In its Petition at pages 13 – 14 Kent cites all five cases in which a Washington appellate court has mentioned the possibility of the foreclosure of an equitable lien: *Burgert*, *City of Spokane*, *Stone, Olson,* and *Worden*, *supra.* None discusses the process by which foreclosure would take place, none states that foreclosure actually occurred, and none involves an equitable lien held by the owner of the property. Kent was required to invent a process entirely out of whole cloth, the trial court

accepted it, and the Court of Appeals rightly concluded that its use of RCW 6.21 is utterly inapplicable.

Kent is now asking this Court to establish, for the first time in the history of the state of Washington, the appropriate mechanism for the foreclosure of an equitable lien. Presumably, the process for foreclosing an equitable lien granted to a refinancing lender is governed by statutes pertaining to the type of lien involved. But a lien held by the owner of the property is a distinct anomaly: as the Court of Appeals pointed out, foreclosing to remove a junior lien is different (and far more rare and problematic) than foreclosing on a lien to recover money owed by the owner of that property.

It should not be a surprise, therefore, that this is a case of first impression in the state of Washington. It should also not be a surprise that the only published case in all of the United States where §7.6 is applied reached the same conclusion as did the Court of Appeals did here: the owner/equitable lienholder should not be permitted to foreclose, because doing so was not necessary to prevent an unearned windfall by the junior lienholder. *Sourcecorp, supra*

V. SUMMARY

The Court of Appeals opinion does not conflict with a single ruling of any court in the state of Washington. Reviewing the case will not further a substantial public interest because of its extremely limited scope, involving only instances where property is ostensibly acquired with clear title by someone who later discovers it remains encumbered by a junior lien. Finally equity can only be accomplished by the denial of Kent's petition to foreclose its equitable lien.

DATED this 12th day of November, 2015.

THE HUNSINGER LAW FIRM
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By: _____
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on November 12th, 2015 I arranged for service of the foregoing Brief of Appellants to the Court and to opposing counsel to this action as follows:

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DATED this 12th day of November, 2015, at Seattle, Washington.

REGINA M. JOYCE

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Supreme Court Case No.: 92373-6
City of Kent v. Bel Air & Briney

Attached is the Respondent's Brief in Response to Petition for Review.

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