

No. 39168-6-II  
DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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HUNTER CREST TWIN OAKS,  
Plaintiff-Appellant,

vs.

JP MORGAN CHASE BANK, NA, as the Assignee of Certain Assets and  
Liabilities of Washington Mutual Bank by the F.D.I.C.,  
Defendant-Respondent.

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ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT  
(Hon. Brian Tollefson)

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**RESPONDENT'S BRIEF**

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## INTRODUCTION

Daniel Hunter obtained a loan to finance his limited liability company's project and successfully use that company's property as collateral? Hunter Crest argues at great length about how the deed of trust was signed, what the bank did or did not know, and whether it is fair to Hunter Crest to encumber its property. In all of its submissions, however, Hunter Crest fails to address the fundamental ground upon which the Superior Court granted summary judgment: *Daniel was the managing member of his limited liability company, the company had knowledge that the Property was being used as a collateral and of the terms of the financing, Hunter Crest failed to object and consented to Daniel's use of the Property as collateral for the loan, and, therefore, Hunter Crest is barred from bringing its claim after the loan was disbursed and management of the LLC changed.* Washington law does not sanction the use of business entities as a shell game to benefit from misrepresentations.

We can speculate on Daniel's reasons for misrepresenting how title was vested — he may have thought a personal loan would be processed faster than one to a limited liability company; lacked sophistication about financing and entities; or thought it was irrelevant because he had full management and control of the limited liability company. Regardless of why Daniel proceeded the way he did, the critical point is that Daniel had

actual authority to encumber the property and through his actions and knowledge, so did his company agree and consent. In fact, even after this lawsuit began, the limited liability company's surviving member, Dean Hunter, endorsed Daniel's financial and management decisions.

### **COUNTER-STATEMENT OF ISSUES**

1. Did the Superior Court correctly decided that the deed of trust executed by Daniel Hunter is a valid encumbrance on property owned by his limited liability company, Hunter Crest Twin Oaks, LLC?

2. Should the Superior Court's judgment be affirmed because Hunter Crest has failed to address, and thereby abandoned any right to challenge, the substantive legal theories underlying the lower court's ruling?

3. Should the Court of Appeals reject Hunter Crest's legal and factual arguments raised for the first time on appeal?

4. Alternatively, should the deed of trust be reformed to reflect the parties' intention that Hunter Crest's property be encumbered?

5. Did Hunter Crest waive any argument based on CR 19 by failing to raise it in the trial court?

6. Are third parties who were not participants in the underlying transaction and do not hold title to the property at issue “necessary parties” within the meaning of CR 19?

### STATEMENT OF FACTS

Daniel Hunter and his father, Dean Hunter, formed Hunter Crest Twin Oaks, LLC (“Hunter Crest”), on or about August 11, 2006.<sup>1</sup> Hunter Crest is a single-asset limited liability company formed for the sole purpose of holding title to, and developing, the property located at 8719 Custer Road SW, Lakewood, Washington (“Property”). Daniel<sup>2</sup> intended to develop the Property by remodeling an existing house and building a second, new residence.<sup>3</sup> Daniel was the managing member of Hunter Crest, was managing the project, and handled all of Hunter Crest’s business and development of the property, including financing.<sup>4</sup> Daniel’s father, Dean Hunter, the other company’s other member, saw this project as an opportunity for Daniel to develop something on Daniel’s own: Dean purposefully tried to be hands-off as much as possible.<sup>5</sup> Daniel

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<sup>1</sup> CP 11

<sup>2</sup> We refer to Daniel Hunter and Dean Hunter by their first names without intending any disrespect

<sup>3</sup> CP 256; *see also* CP 8 (¶ 3)

<sup>4</sup> CP 262-63, 267-68.

<sup>5</sup> CP 263

unquestionably had actual authority to encumber Hunter Crest's Property, as each member of a limited liability company is an agent of the company pursuant to RCW 25.15.150(1). On the practical level, Dean also agreed that Daniel should have complete control managing the project.

Daniel had perfect credit and it was not unusual for him to open new accounts.<sup>6</sup> On January 26, 2007, Daniel obtained a line of credit secured by the Property through a deed of trust in favor of the bank.<sup>7</sup> Moses Staton, a loan-origination officer for the bank, interviewed Daniel to obtain information in connection with the loan, which Staton then forwarded to the bank's processing department.<sup>8</sup> When asked whether title to the property was held in a trust or entity, Daniel replied, "No."<sup>9</sup> Daniel confirmed that title was vested in his name.<sup>10</sup>

On January 26, 2007, as part of the loan's closing, Daniel executed a document entitled, "Property Affidavit and Agreement."<sup>11</sup> In this notar-

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<sup>6</sup> CP 94, lines 15 – 17

<sup>7</sup> CP 199-217

The line of credit was provided through a loan from Washington Mutual Bank ("Washington Mutual"), certain of whose assets, including this loan, were assigned to Respondent JP Morgan Chase Bank, NA as the Assignee of Certain Assets and Liabilities of Washington Mutual Bank by the F D I C , ("Chase"), which is now the real party in interest. To minimize confusion, we will refer to the lending institution variously as "Chase," "lender," and "bank."

<sup>8</sup> CP 133-34.

<sup>9</sup> CP 163-164, 234.

<sup>10</sup> *Id*

<sup>11</sup> CP 219-22

ized document, Daniel made numerous representations under oath, including:

- Daniel was signing the affidavit to induce the bank to make the loan.
- Title to the Property was vested in “DANIEL HUNTER.”
- Daniel was the only owner of the Property.
- Daniel would “comply with any request by the Bank or agent of the Bank to correct documentation errors or oversights, if any, that occur in the loan documents.”
- Daniel had not and would not “execute any instrument that would adversely affect the title or interests of the Bank.”
- There were no recorded and/or unrecorded deeds or adverse interests with respect to the Property.
- Daniel again acknowledged that the affidavit was made “for the purpose of inducing the Bank to close and to disburse any funds on the above described representations. Signers warrant that all these statements shall be true and correct at settlement and Borrower shall notify the Bank of any changes in these representations and agreements before Loan closing. Signers intend for the Bank to rely on these representations and agreements.”
- Daniel acknowledged and agreed that “The Bank and its employees, as well as any attorney involved with this transaction, are hereby authorized to rely on these continuing declarations, representations, and agreements.”

Finally, also on January 26, 2007, Daniel executed the deed of trust, encumbering the Property. Under Paragraph 3 of the deed of trust,

entitled “Representations of Grantor,” Daniel again represented that he was “the owner of the Property.”<sup>12</sup>

Daniel repeatedly represented to the lender that he personally owned the Property. And, in fact, he had full authority to encumber the Property on behalf of Hunter Crest.<sup>13</sup> Based upon his representations that title was vested in his name, the deed of trust was prepared reflecting Daniel Hunter as the grantor and does not indicate that Daniel signed it as Hunter Crest’s managing member.

Dean testified that Daniel did a good — even an “excellent” — job through the planning and the permitting of the Property.<sup>14</sup> He said that Daniel had a handle on how he was managing things.<sup>15</sup> Dean said, “It seemed like I was fading fast and he was rising to the occasion.”<sup>16</sup> Dean also testified that Daniel did a good job on issues relating to financing.<sup>17</sup> He knew that Daniel had a line of credit with Chase.<sup>18</sup> Dean estimated that Daniel put “\$50,000 - \$100,000, maybe more” into the project on the Property.<sup>19</sup>

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<sup>12</sup> CP 51, Para 3.

<sup>13</sup> CP 219-21, CP 234 (Comments section).

<sup>14</sup> CP 91

<sup>15</sup> CP 95

<sup>16</sup> CP 97.

<sup>17</sup> CP 94, 96-97.

<sup>18</sup> CP 99

<sup>19</sup> CP 98.

Daniel died from cancer in October 2007.<sup>20</sup> Shortly before his death, Daniel signed a document attempting to remove himself from Hunter Crest: Daniel's resignation in August 2007 described himself as "the managing partner" of Hunter Crest and his father as "the equity contributing member."<sup>21</sup>

After Daniel's death, Dean became the sole member of Hunter Crest. Douglas Hales, an attorney, became the manager of Hunter Crest.<sup>22</sup>

**THE BANK HAD NO KNOWLEDGE TITLE WAS VESTED IN HUNTER CREST**

Hunter Crest's arguments on appeal are largely founded on a single premise: Chase received several title reports and proceeded with the transaction despite actual knowledge that Daniel was misrepresenting his power to provide a valid security interest in the Property.<sup>23</sup> Hunter Crest, however, can make this argument only by misrepresenting the facts. In the trial court, Hunter Crest relied on Chase's purported receipt of a single title report; on appeal, Hunter Crest, confusingly and erroneously, alleges that the bank received possibly as many as three different title reports.

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<sup>20</sup> CP 27

<sup>21</sup> CP 25

<sup>22</sup> CP 103-10

<sup>23</sup> See, e.g., Appellant's Opening Brief, 13-15, 26, 38, 42-43, 45-46

The bank did not require title insurance for this loan.<sup>24</sup> Rather, the bank used a process called “Instant Title.”<sup>25</sup> Among other things, the Instant Title process required the bank to obtain certain declarations regarding title from *the loan applicant*.<sup>26</sup> In this transaction, Moses Staton obtained the information for the title declaration from Daniel, and it was Daniel’s information regarding the vested owner that was given to the bank’s fulfillment department.<sup>27</sup> The bank receives no information from a third party under the Instant Title process, and did not in this instance.<sup>28</sup> Indeed, the bank did not require a title report for the type of loan Daniel was requesting at the time he applied.<sup>29</sup> Had there been any indication that

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<sup>24</sup> CP 161

<sup>25</sup> CP 162-63

<sup>26</sup> CP 163. The “Instant Title” channel used for this loan relies on the borrower’s declaration to determine title to the property serving as collateral (CP 164-64) Contrary to Hunter Crest’s characterizations, “Instant Title” is not a separate report, as was explained in deposition. *See* CP 166-67

<sup>27</sup> *Id*

<sup>28</sup> CP 166.

<sup>29</sup> CP 168. The bank never received a title report from First American Title Insurance Company. Hunter Crest assumes such a report exists because First American recorded the deed of trust and attached a legal description that mentions Hunter Crest. *See* Appellant’s Opening Brief, 13-14. First American never gave a title report to Chase or informed the bank that Hunter Crest held title to the Property. CP 432.

First American is not Chase’s agent, so the title company’s knowledge is not imputed to the bank. “A prerequisite of an agency is control of the agent by the principal. Washington courts have consistently cited the Restatement of Agency for the proposition that an agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control.” *Blodgett v Olympic Sav and Loan Ass’n*, 32 Wn App. 116, 128, 646 P 2d 139 (1982) (internal citations omitted) Hunter Crest failed to establish any agency relationship between the bank and any title company

Daniel Hunter was the owner of a limited liability company that actually held title to the Property, then the bank would not have used the Instant Title process.<sup>30</sup> Instead, the lender would have required documentation from the entity to confirm that Daniel had the right to secure a loan with the Property, and that would have been sent to an underwriter for review and approval.<sup>31</sup> Obtaining a title report was not part of Staton's duties, but he did request title information from "Group 9."<sup>32</sup> Group 9 is not a title product or a title report.<sup>33</sup> The bank was not actually aware that Hunter Crest was the title owner of the Property.<sup>34</sup>

Someone did order a title report on the Property from Puget Sound Title Company, and it well could have been Moses Stanton. The title company's records, however, show the report was not even ordered until February 2, 2007, *after* the loan had closed.

Hunter Crest falsely states, "Puget Sound Title faxed the title report to [Chase]. CP 174, 366."<sup>35</sup> The "title report" cited by Hunter Crest is actually a preliminary commitment for title insurance prepared by

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<sup>30</sup> CP 165-66.

<sup>31</sup> CP 165

<sup>32</sup> CP 140

<sup>33</sup> CP 167-68

<sup>34</sup> CP 169, 198, 432

<sup>35</sup> Appellant's Opening Brief, 15

Puget Sound Title.<sup>36</sup> And, the preliminary commitment at CP 174-80 was found among *Daniel's* papers by his parents after he died.<sup>37</sup> Furthermore, there is no evidence that the lender received the Puget Sound Title commitment or that it was sent to the bank.<sup>38</sup> Chase has no title report or copy of the Puget Sound Title commitment in its file.<sup>39</sup> Notably, the fax number in the header of the preliminary commitment found in Daniel's paperwork is not the fax number for the bank recorded in Puget Sound Title's file.<sup>40</sup> Puget Sound Title has no records confirming the preliminary commitment was sent to the bank:<sup>41</sup>

Q. Okay. So just to be clear for the record, there's no fax confirmation sheet that you have in your file –

A. Correct.

Q. – today indicating that this was faxed.

A. Correct.

...

Q. Is it fair to say that you can't tell one way or the other whether the commitment was actually submitted to the client in this case?

A. That is true.

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<sup>36</sup> CP 322-28, 351-54, 368-75

<sup>37</sup> See CP 290 (¶ 10), 320-28

<sup>38</sup> CP 432.

<sup>39</sup> CP 432.

<sup>40</sup> Compare CP 174 with CP 365.

<sup>41</sup> CP 358, 359.

Puget Sound Title never issued a final policy on this loan.<sup>42</sup>

Hunter Crest reveals the absence of any factual foundation for its assertions when it baldly states, “[Chase] prepared the loan and security instrument for Daniel Hunter with full knowledge that he did not own the Property,” yet is unable to provide any citation to the record for this critical allegation.<sup>43</sup>

Obviously, if Chase never received a preliminary commitment or a title report, it could not produce them in discovery, it is not guilty of spoliation for having destroyed documents it never had, and it cannot be charged with possessing the information contained in those documents.<sup>44</sup> Consequently, all arguments by Hunter Crest based on Chase’s purported receipt of information from the title company simply have no factual basis.<sup>45</sup> The trial court was correct in granting summary judgment.

#### **HUNTER CREST ALLOWED ITS PROPERTY TO BE USED AS SECURITY.**

At all relevant times, Daniel was the manager, an agent, and a member of Hunter Crest. As such, his knowledge about the Chase loan,

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<sup>42</sup> CP 350, 355, 360, 362.

<sup>43</sup> See Appellant’s Opening Brief, 12.

<sup>44</sup> See, e g , Appellant’s Opening Brief, 14, 15, 23, 39-40 Hunter Crest did not assert CR 56(f) in opposition to the motion for summary judgment

<sup>45</sup> See, e g , Appellant’s Opening Brief, 16, 23, 37-38

his repeated representations that title was vested in him upon which he agreed the bank would rely, and his use of the Property as security for the loan are chargeable to Hunter Crest.

Consequently, Hunter Crest knew the Property was being used as security and knew that Daniel was representing that he personally held title to the Property. Hunter Crest stood by while Daniel withdrew \$196,000 from the line of credit secured by the Property. By allowing Daniel to take those actions, Hunter Crest consented to both the loan and the deed of trust.

Dean, the other member of Hunter Crest, knew that Daniel was taking out loans to finance the development and intentionally chose to let Daniel handle all aspects of the project, including financing and management.<sup>46</sup> Although Daniel was acting as manager, nothing in Hunter Crest's operating agreement prevented Dean from intervening and exercising managerial powers to terminate the loan. Dean had no complaints with how Daniel handled the same.

There is no indication that the proceeds from the loan were used inappropriately.<sup>47</sup> Hunter Crest presented no evidence to demonstrate that

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<sup>46</sup> CP 94-97

<sup>47</sup> CP 289-91 (¶¶ 6, 14)

Daniel diverted proceeds from the Chase loan for his personal use.<sup>48</sup> In sum, Hunter Crest knowingly accepted the benefit of the Chase loan and now wants to escape repaying it.

### **PROCEDURAL HISTORY**

After Daniel died and Dean hired Hales to act as Hunter Crest's manager, Hunter Crest filed an action to set aside the deed of trust Daniel granted and give the company title to the Property free and clear of the Chase deed of trust. Directly contrary to every representation made by Daniel, and after all the funds had been disbursed from the line of credit, Hunter Crest alleged that it owned the Property, not Daniel, and asserted that the Deed of Trust was not an effective conveyance. Hunter Crest further sued the bank for slander of title for recording the deed of trust Daniel signed, and requested damages. Hales, acting as counsel for Hunter Crest, represented the company throughout the litigation in Superior Court, including preparing the complaint and presenting the

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<sup>48</sup> Hunter Crest submitted some random documents found in Daniel's papers concerning draws and payments on the Chase loan (CP 316-19), but these show only that, by August 22, 2007, Daniel withdrew at least \$177,000 of the \$193,000 line of credit. As Daniel's father and another member of Hunter Crest, Dean had full access to Daniel's personal records after his death as well as Hunter Crest's accounting records, yet Hunter Crest failed to present any evidence to support its assertion (*see, e.g.*, Appellant's Opening Brief, 16) that Daniel used any of the Chase loan proceeds for his personal expenses, much less \$177,000 in the seven months between the loan's closing and Daniel's demise

company's arguments on the cross-motions for summary judgment.<sup>49</sup>

Hunter Crest now argues that Hales was a necessary party to the lawsuit.

Hunter Crest filed a motion for summary judgment in May 2008, and the trial court denied it. Chase subsequently filed its own motion for summary judgment in February 2009.<sup>50</sup> Its motion presented the following issues:

1. Daniel had actual authority to encumber the Property, and failure to indicate his capacity on the deed of trust does not invalidate the deed of trust;
2. Because Daniel had full management and control of Hunter Crest and was an agent of it, his company knew that the Property was being used as security for the loan, and its later claim to invalidate the deed of trust was barred by waiver, laches, estoppels, acquiescence and corporate disregard;
3. Alternatively, if the court did not grant summary summary judgment on those grounds, the deed of trust should be reformed, and

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<sup>49</sup> CP 3, 7, 125, 151, 186, 191, 196, 288, 344, 446, 447, 450, 469, 482, 483.

<sup>50</sup> Chase intervened as a defendant at the same time as the motion for summary judgment was heard. CP 445-46 Hunter Crest filed no opposition to Chase's motion to intervene and does not contest it here, accordingly, its innuendo of impropriety about the intervention (*see* Appellant's Opening Brief, 22) is a red herring

4. Finally, Hunter Crest's slander-of-title claim should be dismissed.

Hunter Crest argued in response to the summary-judgment motion that the lender received a title report from Puget Sound Title showing that title was vested in Hunter Crest, that the deed of trust did not identify Hunter Crest as the grantor, that the legal description was not attached when Daniel signed it and did not comply with the statute of frauds, and that the deed of trust should not be reformed. Hunter Crest cross-moved for summary judgment. Judge Brian Tollefson granted Chase's motion for summary judgment and request for attorney fees, and denied Hunter Crest's second motion for summary judgment.<sup>51</sup>

Hunter Crest timely filed a notice of appeal in April 2009. Appellant Hunter Crest Twin Oaks, LLC, filed a petition in bankruptcy in June 2009, which caused a stay of the appeal. The bankruptcy was terminated in December 2011.

## ARGUMENT

### I. Standard of Review is De Novo

The Court of Appeals reviews a motion for summary judgment *de novo*. Summary judgment is appropriate if the pleadings and other matters

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<sup>51</sup> CP 448-51, CP 481-82.

on file, together with any affidavits submitted with the motion, demonstrate (a) the absence of any genuine issues of material fact, and (b) that the moving party is entitled to judgment as a matter of law. A material fact is one upon which the outcome of the litigation depends in whole or in part. The Court considers all facts submitted and the reasonable inferences therefrom in the light most favorable to the non-moving party. See *Marshall v. Thurston County*, 165 Wn.App. 346, 350, 267 P.3d 491 (2011); CR 56. “If ... the plaintiff ‘fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,’ then the trial court should grant the motion [for summary judgment].” *Young v. Key Pharms., Inc.*, 112 Wash.2d 216, 225, 770 P.2d 182 (1989) (quoting *Celotex Corp v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

## **II. Hunter Crest Has Presented Numerous Arguments Not Raised in Superior Court**

It is axiomatic that a matter not presented to the trial court will not be considered when presented to an appellate court. See *Orkney v. Valley Cement Co.*, 43 Wn.2d 338, 344, 261 P.2d 114 (1953).

Many of Hunter Crest’s legal and factual arguments in its Opening Brief are newly raised. The appendix to this brief is a chart of these

arguments. Nothing listed in the Appendix should be permitted to serve as a basis for reversing or modifying the judgment granted to Chase.

### **III. Hunter Crest Has Waived Any Appeal on the Theories of Waiver, Estoppel, Laches, and Acquiescence**

In moving for summary judgment, Chase argued that Hunter Crest's challenge to the deed of trust was barred on the theories of waiver, estoppel, laches, and acquiescence.<sup>52</sup> Hunter Crest has not discussed any of these theories in its opening brief.

Washington courts have consistently held that a party waives issues not fully argued in appeals briefs, rejecting attempts by litigants to incorporate by reference arguments contained only in trial court briefs. *See, e.g., U.S.W. Commc'ns, Inc. v. Utils. & Transp. Comm'n*, 134 Wash.2d 74, 111-12, 949 P.2d 1337 (1997).

*In re Guardianship of Lamb*, 173 Wn.2d 173, 183 n.8, 265 P.3d 876 (2011). Issues not addressed in an opening brief are deemed abandoned. *See Westmark Dev. Corp. v City of Burien*, 140 Wn.App. 540, 553-54, 166 P.3d 813 (2007)

Each of these theories provide an independent basis for affirmance.<sup>53</sup> Having abandoned any challenge to them (apparently in preference for arguments not presented to the Superior Court), Hunter Crest cannot obtain any relief on appeal.

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<sup>52</sup> CP 244-47

<sup>53</sup> See discussion at 21-27, *infra*

**IV. The Deed of Trust is Valid Because Daniel Hunter Had Authority To Encumber the Property**

Daniel had actual authority to encumber Hunter Crest's property. Indeed, Hunter Crest concedes this point.<sup>54</sup>

The Washington Legislature has mandated that management of the business or affairs of a limited liability company shall be vested in the members unless the certificate of formation vests it in a manager. See RCW 25.15.150(1)(a). The statute further provides:

*[E]ach member is an agent of the limited liability company for the purpose of its business and the act of any member for apparently carrying on in the usual way the business of the limited liability company binds the limited liability company unless the member so acting has in fact no authority to act for the limited liability company in the particular matter and the person with whom the member is dealing has knowledge of the fact that the member has no such authority. Subject to any provisions in the limited liability company agreement or this chapter restricting or enlarging the management rights and duties of any person or group or class of persons, the members shall have the right and authority to manage the affairs of the limited liability company and to make all decisions with respect thereto.*

RCW 25.150.150(1)(b) (emphasis added).

Hunter Crest's Certificate of Formation identifies Daniel and Dean as the founding members, and it does not vest management in a manager.<sup>55</sup>

By operation of law, then, Daniel was an agent of Hunter Crest with "the

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<sup>54</sup> See Appellant's Opening Brief, 11.

<sup>55</sup> CP 11

right and authority to manage the affairs of the limited liability company and to make all decisions with respect thereto.” RCW 25.150.150(1). Consequently, Daniel had actual authority to grant a deed of trust on the Property on behalf of Hunter Crest.

**V. The Deed of Trust is Valid: Indicating Capacity of the Individual Executing the Instrument is Not Necessary**

Unable to dispute Daniel’s authority to encumber the Property, Hunter Crest instead attacks the deed of trust’s validity because the identity of the grantor and the signature line do not indicate Daniel signed it as a member of the limited liability company. This argument, however, does not avail Hunter Crest. An instrument conveying an interest in real property is not set aside merely because it does not indicate on its face that it was signed in a certain capacity.

In *Clearwater v. Skyline Const. Co , Inc.*, 67 Wn.App. 305, 835 P.2d 257 (1992), *rev. denied*, 121 Wn.2d 1005, 848 P.2d 1263, Lidia Panasiuk was the president and sole shareholder of Skyline Construction Company, which held title to some property. About a week before the Clearwaters sued Skyline, Panasiuk, knowing that a lawsuit was imminent, executed and recorded a quit-claim deed conveying the property out from her corporation, to herself. Panasiuk signed the quit-claim deed as “Lidia Panasiuk,” not as “Lidia Panasiuk, President of Skyline Construction

Company.” Shortly after filing the lawsuit against Skyline, the Clearwaters obtained a prejudgment writ of attachment on the property. Although she attended a hearing on the writ, Panasiuk did not inform the trial court that she had conveyed title from the corporation to herself. Skyline and Panasiuk subsequently filed a motion to discharge the writ of attachment, arguing that the property actually belonged to Panasiuk, as evidenced by the quit-claim deed. The trial court determined that Skyline was estopped from disclaiming ownership based on its failure to disclose the deed to Panasiuk to the Court at the hearing.<sup>56</sup> See *Clearwater*, 67 Wn.App. at 308-11, *supra*.

On appeal, the Clearwaters succeeded in obtaining a reversal of the ruling regarding the fraudulent conveyance. Similar to Hunter Crest’s claim here, the Clearwaters also challenged the transfer on the ground that the quit-claim deed was invalid on its face because it did not reflect Panasiuk’s capacity on the signature line. The Court of Appeals summarily rejected this argument in a footnote:

The Clearwaters contend that the quitclaim deed was not properly executed under RCW 64.04.020, which requires, *inter alia*, that the deed be signed by the grantor, because Panasiuk failed to sign *as president of Skyline*. This contention is without merit. See 26 C.J.S. Deeds § 34

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<sup>56</sup> This part of the Superior Court’s ruling was not reviewed because the Court of Appeals held the transfer of title was a fraudulent conveyance

(1956) (grantor who signs by wrong name may not avoid deed where its execution by grantor is shown).

*Id.*, at 320 n.9 (emphasis in original).

Daniel took out a loan to finance Hunter Crest's construction project on the Property. He signed a deed of trust on the Property as security for that loan. He had actual authority to sign the deed of trust for Hunter Crest. The fact that the deed of trust does not specify that he was signing as a member of Hunter Crest does not alter his actual authority to do so nor provide a basis for invalidating the deed of trust.

#### **VI. Hunter Crest is Estopped from Challenging the Deed of Trust's Validity**

Daniel borrowed money from Chase to finance Hunter Crest's construction project. Indeed, Hunter Crest implicitly admits that this was the purpose of the loan: "If Daniel Hunter wouldn't have died and *if the housing market would've continued to skyrocket*, then the bank's reckless actions [in making the loan to Daniel] would have paid off."<sup>57</sup> Appellant's Opening Brief, 43 (emphasis added).

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<sup>57</sup> Besides being an argument first raised on appeal, Hunter Crest's speculative musings and rhetorical questions concerning the reasonableness of the lender's decision to make the loan (*see* Appellant's Opening Brief, 41-43) once again rely on the false premise that Chase received reports from the title company. *See* discussion at 7-11, *supra*. Hunter Crest also asserts that the company could not have received a loan because it lacked a credit history, citing to CP 139. *See* Appellant's Opening Brief, 42. Nothing on CP 139 supports Hunter Crest's assertion. Curiously, if supported by the record, Hunter Crest's own argument would suggest an explanation for Daniel's actions. because  
(*cont'd on following page*)

In essence, Hunter Crest stands before this Court to argue that: (i) it should not have to repay a loan obtained by its managing member to finance a company project, (ii) because that managing member misrepresented to the lender that he personally owned the Property being given as security, (iii) notwithstanding the fact that he had full authority to complete the transaction on behalf of Hunter Crest with no need to misrepresent title. More succinctly, Hunter Crest — acting through Daniel — obtained a loan by representing that Daniel owned the Property, and now it wants to avoid the loan by claiming that it is actually Hunter Crest who owns the Property.

Washington courts will not countenance this type of shell game.

Estoppel occurs when three elements are present:

(1) an admission, statement or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement, or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act.

*Mid-Town Ltd. Partnership v. Preston*, 69 Wn.App. 227, 234, 848 P.2d 1268, *rev. denied*, 122 Wn.2d 2006, 859 P.3d 603 (1993). An individual who dominates and controls a corporation by necessity acts with the implied knowledge, consent and ratification of that corporation. *See*

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*(footnote cont'd from previous page)*

Hunter Crest could not get financing based on its own creditworthiness, Daniel “loaned” the company his own good credit rating to acquire a line of credit for Hunter Crest’s use

*Standard Fire Ins. v. Blakeslee*, 54 Wn.App. 1, 6-7, 771 P.2d 1172 (1989).

And, the corporation will be estopped from repudiating the individual's actions. See *Platts, Inc. v. Platts*, 49 Wn.2d 203, 298 P.2d 1107 (1956).

In *Platts, Inc. v. Platts*, 49 Wn.2d 203, *supra*, a corporation challenged a lien placed on its property as part of a divorce decree in a prior action. The lien was created to secure payment by Willard Platts, individually, of \$7,500 awarded to Beatrice Platts in the same decree. Willard Platts himself suggested that the lien be placed on the property in question. Willard Platts owned 99.7% of the stock of W.G. Platts, Inc., and was practically and entirely in control of the business and affairs of the corporation. *Id.*, at 205. After the divorce decree was entered, Mr. Platts's corporation, W.G. Platts, Inc., filed an action to set aside the very lien Mr. Platts had suggested, now claiming that the corporation actually owned the property, and because the corporation was not a party to the divorce proceeding, no lien could be placed on its property in that action. *Id.*, at 204. The Court rejected the claim:

Not only did Willard G. Platts control and use the corporation as a tool or instrumentality for carrying out his own plans and purposes, but he acquiesced in and consented to the divorce decree. To permit the corporation now to repudiate his *and consequently its* acquiescence in the imposition of a lien upon the corporate property, and to say that it should not be bound thereby, would be unconscionable and a denial of justice.

*Id.*, at 209 (emphasis added).

Daniel Hunter, Crest's managing member, obtained a loan to finance Hunter Crest's project and used his company's property as security. Daniel represented to the lender that title to the property was vested in himself, rather than Hunter Crest. The bank provided the loan based upon these representations. Through Daniel's control of Hunter Crest, that company knew the Property was being encumbered as security for the loan, and consented to the loan and the deed of trust. Hunter Crest cannot stand by and remain silent while the loan is made and the proceeds used to improve its property, and then later attempt to repudiate the very deed of trust its manager granted as security for the loan. If the Court were to allow this, injury to Chase would result because its loan would then be unsecured.

**VII. Because Hunter Crest Knew and Consented to the Property's Being Used as Security for the Loan, Its Claims are Barred by Laches, Waiver, and Acquiescence**

The theories of laches, waiver, and acquiescence are based upon the same facts as the estoppel argument. They provide further grounds for affirming the Superior Court's judgment.

Laches is an implied waiver arising from knowledge of a given state of affairs and failure to act on it in a timely fashion. *See Buell v. Bremerton*, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972). The elements of laches are:

(1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that cause of action; [and] (3) damage to the defendant resulting from the unreasonable delay.

*Buell*, 80 Wn.2d at 522, *supra*.

Obviously, Hunter Crest knew through Daniel, its managing member, that the Property was being used as security for the loan. Even Dean, the other member, knew Daniel had obtained the loan.<sup>58</sup> Hunter Crest consented to the deed of trust and made no objection to the encumbrance. It was 14 months after the loan was made, six months after Daniel died, and after Hunter Crest granted a deed of trust to Hales, that Hales — acting as Hunter Crest’s manager *and* attorney — determined to challenge the validity of the Chase deed of trust. If this Court were to invalidate the deed of trust, Chase would be damaged because it released funds with the understanding its loan would be secured by the Property and its loan would now be unsecured.

Hunter Crest’s claims are also barred by waiver. A waiver is the intentional and voluntary relinquishment of a known right. *See Mid-Town Partnership v. Preston*, 69 Wn.App. at 233, *supra*. Waiver may result from an express agreement or be inferred from circumstances indicating an intent to waive. *See Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). Again, Hunter Crest knew that the Property was being used

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<sup>58</sup> CP 99

for security for the loan, and made no objection. Hunter Crest's claims regarding the validity of the deed of trust have been waived.

Finally, Hunter Crest acquiesced to the loan and the deed of trust, and it cannot now invalidate the deed of trust. The Court in *De Boe v. Prentice Packing & Storage Co.*, 172 Wash. 514, 20 P.2d 1107, 1110 (1933), held:

[A]cquiescence is some act, not deliberately intended to ratify a former transaction known to be voidable, but recognizing the transaction as existing, and intended, in some extent at least, to carry it into effect, and to obtain or claim the benefits resulting from it. ... As acquiescence is thus a recognition of and consent to the contract or other transaction as existing, the requisites to its being effective as a bar are, knowledge or notice of the transaction itself, knowledge of the party's own rights, absence of all undue influence or restraint, and consequent freedom of action; ... When a party with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity.

*Id.*, at 520-521. Here, Hunter Crest knew about the loan through its managing agent Daniel Hunter, and knew that the Property would be used as security for it. Hunter Crest did nothing to stop the transaction and

challenged the transaction only after management of Hunter Crest changed. Hunter Crest therefore acquiesced to the Property's being encumbered by the Chase deed of trust, and it cannot now seek to set it aside.

**VIII. Alternatively, The Deed of Trust Should Be Reformed to Reflect that Daniel Hunter Was Acting in His Capacity as a Member of Hunter Crest**

Chase moved for summary judgment on the ground that the deed of trust, as recorded, was valid and encumbered the Property. Chase also made the alternative argument that, if the Superior Court concluded the deed of trust was defective, it should reform the instrument as necessary to make it valid.<sup>59</sup>

The order granting summary judgment does not reform the deed of trust and makes no reference to reformation.<sup>60</sup> Because the lower court's ruling is not based on that theory, Hunter Crest's arguments here attacking reformation do not present a ground for reversal.<sup>61</sup> On the other hand, this Court can *affirm* on any ground supported by the record. *See Skinner v*

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<sup>59</sup> CP 246-47

<sup>60</sup> CP 448-49

<sup>61</sup> *See* Appellant's Opening Brief, 25-27. This is also relevant to Hunter Crest's request to move the deed of trust's effective date so as to put it behind other liens. The Superior Court rejected all of Hunter Crest's arguments and ruled the deed of trust a valid encumbrance on the Property without any revision to the original transaction. Obviously, altering the deed of trust's recording date by judicial decree to move it from February 22, 2007, to March 13, 2009, would constitute a substantial revision of the original transaction.

*Holgate*, 141 Wn.App. 840, 849, 173 P.3d 300 (2007), citing *State v. Costich*, 152 Wash.2d 463, 477, 98 P.3d 795 (2004).

Reformation is appropriate if one party has made a unilateral mistake because of fraud or inequitable conduct by the other party. See *Washington Mut. Sav. Bank v. Hedreen*, 125 Wn.2d 521, 525, 886 P.2d 1121 (1994). Reformation is not barred because the party's unilateral mistake was caused by negligence "except under extreme circumstances." *Id.*, at 531.

The mere fact that a mistaken party could have avoided the mistake by the exercise of reasonable care does not preclude either avoidance or reformation. Indeed, since a party can often avoid a mistake by the exercise of such care, the availability of relief would be severely circumscribed if he were to be barred by his negligence....

*Id.*, quoting Comment (a), Restatement (Second) of Contracts, § 157 (ellipsis in original).

*Hedreen* granted reformation because the borrower, Hedreen, prepared a Master Lease that covered less space in the building than he had promised to the lender. The bank did not catch the discrepancy when its employee and its attorney reviewed the Master Lease. See *id.*, at 523-24. The Supreme Court held that Hedreen had a duty to disclose the discrepancy to the bank, and his failure to do so constituted inequitable conduct justifying reformation. See *id.*, at 529.

Here, Daniel and Chase agreed that the bank would make a loan secured by the Property.<sup>62</sup> Daniel affirmatively misrepresented that he personally held title to the Property. Hunter Crest, through Daniel, knew of the misrepresentation. Hunter Crest knew that Daniel was taking out the loan to improve the Property owned by Hunter Crest. Daniel — and Hunter Crest — allowed the bank to close the loan without disclosing that, in fact, title to the Property was vested in Hunter Crest. Daniel, both personally and as a member and manager of Hunter Crest, had a duty to disclose to the bank the true state of title to the Property. His misrepresentation constitutes inequitable conduct justifying reformation of the deed of trust.

**IX. Hunter Crest Cannot Obtain Appellate Relief Based on Its Election Not to Join Douglas Hales — Its Manager and Attorney — and Raban Construction Services**

Hunter Crest's final argument for reversal is that relief could not be granted because other parties holding deeds of trust on the Property were absent from this lawsuit. The beneficiaries of those other deeds of trust are Douglas Hales — Hunter Crest's Manager and attorney of record in the Superior Court — and Raban Construction Services. Given that

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<sup>62</sup> In one of its newly raised arguments, Hunter Crest asserts that the deed of trust is "extrinsic evidence" that cannot be considered to show that the bank and Daniel intended to secure the loan with the Property. *See* Appellant's Opening Brief, 36. Far from being extrinsic evidence, the deed of trust is a core element of the entire contractual relationship.

Hales authorized the action for Hunter Crest, prepared the complaint, and prosecuted the lawsuit on its behalf, Hunter Crest's objection that it elected not to include Hales and Raban should not be heard.<sup>63</sup>

The deeds of trust to Hales and Raban were signed on April 4, 2008, by "Douglas W. Hales, Manager for Grantor, Hunter Crest Twin Oaks, LLC."<sup>64</sup> Hales signed Hunter Crest's Complaint on April 7, 2008, and it was filed in Pierce County Superior Court on April 9, 2008.<sup>65</sup> The deeds of trust also were recorded on April 9, 2008.<sup>66</sup> Hales served an Amended Complaint on behalf of Hunter Crest on February 10, 2009.<sup>67</sup>

Hales obviously knew about the lawsuit and both deeds of trust. Except for wanting to avoid the complication of simultaneously being (a) a party, (b) a creditor of Hunter Crest, (c) the attorney for Hunter Crest, and (d) the Manager of Hunter Crest, there is no reason why Hales could not have joined himself when he prepared Hunter Crest's pleading. Furthermore, being fully aware that a judgment favorable to Chase would

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<sup>63</sup> Hunter Crest's brief states, "Hales and Raban request reversal of the summary judgment order in favor of the bank, and request reversal of the denial of HCTO's summary judgment motion. Alternatively, Hales and Raban request that the trial court decision either be vacated and remanded for trial if factual questions remain, or be partially reversed to make the effective date of validity of the deed of trust March 13, 2008 [sic] so that the decision does not prejudice non-parties to the action." Appellant's Opening Brief, 23 *Hales and Raban are not parties to this lawsuit or this appeal*. Accordingly, they have no standing to request relief

<sup>64</sup> CP 300-09

<sup>65</sup> CP 1-3.

<sup>66</sup> CP 300, CP 305

<sup>67</sup> CP 192-96.

be prejudicial to his personal interests, there is no reason why he could not have timely moved to intervene before the motions for summary judgment were heard.<sup>68</sup>

Of course, while there may be no reason why Hales *could* not intervene, there almost certainly is a reason why he *did* not intervene. Hales was vigorously representing Hunter Crest and presenting the same evidence and arguments on the company's behalf that he would present if he were a party himself. Having nothing additional to argue, and given that a victory for Hunter Crest would also be a victory for Hales personally, Hales presumably concluded that he had no need to add himself as a party to the lawsuit.

Hales also chose as Hunter Crest's attorney not to add Raban as a party. One obvious implication of a ruling that the Chase deed of trust is valid is that Raban's deed of trust is subordinate to the bank's interest, yet Hunter Crest never joined Raban as a plaintiff or a defendant. Hunter Crest served its Amended Complaint in February 2009 and still did not include Raban (or Hales) as parties.

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<sup>68</sup> Chase's motion, filed and served on February 13, 2009, expressly requested a declaration that its deed of trust was a valid lien in first position on the Property. CP 236, 237. Thus, Hales was on notice of the relief being sought by the bank at least four weeks before the motion was heard

Hunter Crest deliberately elected to omit Hales and Raban as parties. Further, Hunter Crest did not oppose summary judgment by arguing that it had failed to join necessary parties. Hunter Crest waived this argument below and should not be allowed to use its strategic decisions in the trial court as a grounds for reversal on appeal.

Should this Court address the merits, Hunter Crest's argument under CR 19 fails.

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

CR 19(a). As the party urging invocation of CR 19, Hunter Crest has the burden of proving indispensability. *See Matheson v. Gregoire*, 139 Wn.App. 624, 634-35, 161 P.3d 486 (2007), *rev. denied*, 163 Wn.2d 1020, 180 P.3d 1292 (2008).

The present lawsuit sought to determine the validity of Chase's deed of trust. The Court could, and did, provide complete relief on that question as between Hunter Crest and Chase — the grantor and

beneficiary, respectively, of the deed of trust and the parties to this lawsuit — without joining Hales or Raban. By declaring that the Chase deed of trust is a valid encumbrance on Hunter Crest's property, the Court resolved all issues between Hunter Crest and Chase. Thus, CR 19(a)(1) is not applicable.

This point is critically important. Hunter Crest is invoking CR 19 as a basis for modifying the Superior Court's declaration that the Chase deed of trust is a valid lien on Hunter Crest's property. Hales and Raban cannot say or do anything to affect that decision. The Superior Court also declared the Chase deed of trust to be in first position. Perhaps Hales and Raban might be able to challenge that ruling in a subsequent lawsuit addressing a claim other than whether Hunter Crest's interest in the Property was encumbered, which may raise issues of collateral estoppel or *res judicata*, but that is not a basis for reversing, or modifying, the Court's ruling on the respective rights of Chase and Hunter Crest.

Furthermore, Hunter Crest has not presented any factual support for concluding that CR 19(a)(2) requires joinder of Hales or Raban. As a practical matter, Hales, of course, cannot argue that his ability to protect his interest was impaired or impeded: he fully participated in the litigation as Hunter Crest's attorney and had complete control over what arguments were presented to the Court. Yet, when the motions for summary

judgment were presented to Superior Court, Hales put in no evidence addressing CR 19.<sup>69</sup> In fact, while Hales, as Hunter Crest's attorney, mentioned the existence of other secured creditors in responding to Chase's motion for summary judgment, he did not cite any evidence or legal arguments relating to CR 19.<sup>70</sup>

Hales was personally aware of the Chase deed of trust when he executed, and accepted, the deed of trust benefiting himself on Friday, April 4, 2008, just one business day before he signed Hunter Crest's complaint on Monday, April 7, 2008. Having actual notice that the Chase deed of trust already encumbered the Property, Hales could not claim any priority for his interest if the Court deemed the Chase deed of trust valid. Thus, Hunter Crest cannot produce any evidence in support of a finding that Hales is a necessary party.

Hunter Crest's failure to provide any evidence about Raban again prevents a finding that Raban is a necessary party. Hales also signed the deed of trust benefiting Raban on Friday, April 4, 2008. Hunter Crest's argument that Raban is a necessary party has no weight if Raban was on constructive notice of the Chase deed of trust. The deed of trust was

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<sup>69</sup> CP 122, 333

<sup>70</sup> CP 283.

recorded and, as such, provides constructive notice.<sup>71</sup> Hales, presumably, disclosed the existence of the Chase deed of trust so as not to mislead Raban about whether it was receiving a first, second, or third position on the Property. Hunter Crest presented no evidence in the Superior Court to establish the lack of constructive notice or addressing Raban's actual notice, which is critical to determining whether Raban is a necessary party. Thus, Hunter Crest did not meet its burden of proof under CR 19.

### **REQUEST FOR ATTORNEY FEES**

The deed of trust provides for an award of attorney fees in any action taken to prosecute or defend the lien created by that instrument.<sup>72</sup> Superior Court awarded attorney fees to Chase.<sup>73</sup> The bank hereby requests an award of attorney fees on appeal pursuant to RAP 18.1.

### **CONCLUSION**

Daniel Hunter, a member and the manager of Hunter Crest, obtained a loan from Chase for the purpose of improving property owned by Hunter Crest. As collateral for that loan, Daniel gave a deed of trust on

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<sup>71</sup> The litigation guarantee obtained by Hales shortly after commencing this lawsuit includes the Chase deed of trust. CP 36.

<sup>72</sup> CP 19 (¶ 9).

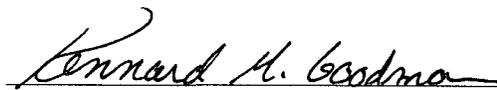
<sup>73</sup> CP 481-82

the property to be improved, although he misrepresented that title to the property was vested in him. Daniel had full authority to encumber Hunter Crest's property — a point conceded by Hunter Crest. Dean Hunter, Daniel's father and the only other member of Hunter Crest, has never claimed that he would have objected if Dean had asked for permission to encumber the property. Indeed, Hunter Crest never repudiated Daniel's loan and the security interest he granted until it started this action six months after Daniel died and after its new manager, Douglas Hales, had executed deeds of trust on the Property in favor of himself and another company.

Accordingly, Chase respectfully requests that the Court of Appeals affirm the grant of summary judgment and award Chase its attorney fees pursuant to RAP 18.1.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of April, 2012.

BISHOP, WHITE, MARSHALL & WEIBEL, P.S.



Ann T. Marshall, WSBA #23533

Kennard M. Goodman, WSBA #22823

**APPENDIX A**

**ARGUMENTS FIRST RAISED  
IN APPELLANT'S OPENING BRIEF**

The following chart sets out the factual and legal arguments in Appellant’s Opening Brief that are raised for the first time on appeal. A comment is provided when additional information may be necessary for the context of Chase’s objection.

Chase contends that all such arguments should be deemed waived and disregarded by the Court of Appeals. *See Orkney v. Valley Cement Co.*, 43 Wn.2d 338, 344, 261 P.2d 114 (1953). The presentation of new factual assertions is especially egregious because, by waiting until the appeal to raise them, Hunter Crest denied Chase the opportunity to present evidence to refute the new contention.

Hunter Crest’s brief in response to Chase’s 2009 motion for summary judgment can be found at CP 279-88. Hunter Crest also had unsuccessfully moved for summary judgment in July 2008; although not listed in the order granting Chase’s motion and, hence, not considered by the Superior Court in ruling for Chase, Hunter Crest’s briefs filed in support of its own summary-judgment motion can be found at CP 4-7 and CP 181-86.

<b>ARGUMENT/ASSERTION</b>	<b>LOCATION IN BRIEF</b>	<b>COMMENTS</b>
The lender charged Daniel \$55.00 for a “Property Verification Report.”	13, 30, 37	All of Hunter Crest’s arguments below about what knowledge the lender purportedly had about title relied solely on the Puget Sound Title preliminary commitment found in Daniel’s papers. Hunter Crest never referred to the Property Verification Report or to information purportedly provided by First American.
The lender obtained a title product from First American Title Insurance Company.	14, 23, 38, 40	<i>See</i> preceding Comment.

ARGUMENT/ASSERTION	LOCATION IN BRIEF	COMMENTS
“It appears from the Comment Summary that the bank skipped the Property Verification Report, title insurance, and appraisal in a rush to close the loan.”	13	Hunter Crest never asserted that either the lender skipped anything or that it was in a rush to close the loan.
CR 19: Necessary parties are missing from the lawsuit	18, 20-21, 48-51	Hunter Crest never argued below that summary judgment should be denied, or delayed, because necessary parties to the lawsuit were absent.
Granting judgment to Chase effectively created a hybrid consumer-commercial loan that the bank could not otherwise make legitimately.	20	Had this been raised below, Chase would have presented evidence explaining the different procedures for loans to individuals and for entities. <i>See, e.g.</i> , CP 165-66.
Deed of trust should be made valid only as of March 13, 2009.	20-21	This is related to the CR 19 argument (see above).
Chase’s appropriate remedy is an equitable lien.	27-31	
Contract interpretation, expressed intention of the parties, and extrinsic evidence.	31-39	
Agency and Imputation of Agent’s Knowledge	34	The existence, and scope, of agency is manifestly a fact-intensive issue that was never presented to the Superior Court.

ARGUMENT/ASSERTION	LOCATION IN BRIEF	COMMENTS
Presumptions and Spoliation	39-41	Hunter Crest did not raise spoliation, much less request sanctions or the benefit of any presumptions based on spoliation. Had it been, Chase would have had an opportunity to specifically address how it could not be guilty of spoliation for documents that never existed or that it never received. <i>See, e.g.,</i> discussion at 7-11, <i>supra</i> .
The lender had no rational basis for making this loan.	41-43	
Hunter Crest could not have received a loan itself.	42	

No. 39168-6-II

DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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HUNTER CREST TWIN OAKS,

Plaintiff-Appellant,

vs.

JP MORGAN CHASE BANK, NA, as the Assignee of Certain Assets and Liabilities of  
Washington Mutual Bank by the F.D.I.C.,

Defendant-Respondent.

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ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT  
(Hon. Brian Tollefson)

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**CERTIFICATE OF SERVICE OF  
RESPONDENT'S BRIEF**

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JP Morgan Chase Bank, NA, as the Assignee  
of Certain Assets and Liabilities of  
Washington Mutual Bank by the F.D.I.C.*

12 APR 26 AM 11:35  
STATE OF WASHINGTON  
BY \_\_\_\_\_ DEPUTY

I hereby certify that I have this day served copies of the following document upon the parties of record below in this proceeding by electronic mail and U.S. Mail.

RESPONDENT'S BRIEF

DATED this 25<sup>th</sup> day of April, 2012.

  
Darla Trautman

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