

No. 41206-3

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DIVISION II
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STATE OF WASHINGTON
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DEPUTY

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

MATTHEW HAGWOOD and BONNIE P. HAGWOOD,
Appellant

v.

JOHN RUMSEY and CHERRIE RUMSEY
Respondents

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

A. RCW 26.16.030(6) DOES NOT RELIEVE THE RESPONDENTS OF THE JOINDER REQUIREMENT AS EXECUTING A PROMISSORY NOTE SECURED BY A DEED OF TRUST AGAINST THE FAMILY DWELLING IS NOT WITHIN THE ORDINARY COURSE OF BUSINESS.

The Respondents incorrectly argue that RCW 26.16.030(6) allows for an enforceable deed of trust without spousal joinder based upon activities occurring within the ordinary course of business. Brief of Respondent, page 6-7. RCW 26.16.030(6) provides that:

Neither person shall acquire, purchase, sell, convey, or encumber the assets, including real estate, or the good will of a business where both spouses or both domestic partners participate in its management without the consent of the other:
PROVIDED, That where only one spouse or one domestic partner participates in such management the participating spouse or participating domestic partner may, in the ordinary course of such business, acquire, purchase, sell, convey or encumber the assets, including real estate, or the good will of the business without the consent of the nonparticipating spouse or nonparticipating domestic partner.

When addressing the issue of joinder for the sale of real property, analogous to encumbrance, professor Harry M. Cross in *Equality for Spouses in Washington Community Property Law -- 1972 Statutory*

Changes, 48 Wash. L. Rev. 527, 535-37 (1973), observes that the exceptions to this statute should be strictly construed and concludes that:

If both spouses do not "join" or "participate" in the transaction, the new law should give the nonjoining spouse power to disaffirm the transaction and recover community funds paid the seller. The purchase transaction, in a community property context, is beyond the power of one spouse acting alone.

Respondent asserts that RCW 26.16.030(6) allows Mr. Hagwood to encumber real property without obtaining joinder from his spouse at the time of contracting. However, to reach such a conclusion, the respondent must rely on mere assumptions. The above statute is applicable only if one spouse is engaged in the management of the business. Here, the trial court made no finding that Ms. Primm was a nonparticipating or participating spouse. Nonparticipation is an extremely narrow finding and arguably, such things as mere encouragement to Mr. Hagwood in the overall furtherance of the community business would be adequate to overcome nonparticipation. However, there is no evidence that Ms. Primm encouraged Mr. Hagwood to obtain this specific loan. Furthermore, the encumbrance must be done in the "ordinary course of such business."

Pledging the family dwelling as security is not within the ordinary course of the Hagwood's business. Respondents argue that obtaining a loan is within the ordinary course of the Hagwood's business. However,

such an argument overreaches the statute's intent and misstates the facts. The court must instead look to see if it is within the "ordinary course of business" to obtain a loan *secured by a deed of trust against the family dwelling*. Once again, the trial court made no finding that a loan secured by a deed of trust against the family home is within the ordinary course of business.

In *Pixton v. Silva*, 13 Wn. App. 205, 534 P.2d 135 (1975), the court addressed whether the acquisition of a new dairy farm by a dairy operator, the husband, could legally bind the community under the ordinary course of business exception of RCW 26.16.030(6), when the wife did not joined in the transaction. The court ruled that even if the husband were the sole manager of the couple's present dairy business, "the sale of a community dairy in one area and the purchase of a . . . community dairy in another area is not 'in the ordinary course of *such* business.'" *Pixton*, at 210.

The Respondents offer no evidence that it was common business practice of the Hagwood's to encumber the family dwelling to allegedly finance other business endeavors. If pledging the family home as security was within the ordinary course of business, one would expect the respondents to offer proof of other loans secured by the family home. Therefore, when examining the present facts against a narrow definition of

“ordinary course of business,” as seen in *Pixton* and supported by Professor Cross, it is necessary to conclude that the facts require joinder for a valid deed of trust and no business exception applies to the facts.

B. MS. PRIMM HAS NOT AUTHORIZED, CONSENTED TO, OR RATIFIED THE PROMISSORY NOTE OR DEED OF TRUST EXECUTED BY MR. HAGWOOD.

Ratification in community property law rests on principles of agency. *Smith v. Dalton*, 58 Wn. App. 876, 881, 795 P.2d 706 (1990).

"Ratification is the affirmance by a person 'of a prior act which did not bind him but which was done or professedly done on his account.'" *Smith*, at 881. There has been no "joinder" in a transaction when the participation is insufficient to amount to ratification. *Pixton*, at 534. In *Geoghegan v. Dever*, 30 Wn.2d 877, 194 P.2d 397 (1948), the court adopted the following rule regarding ratification:

"In order that her conduct or acts may operate as a ratification, it is essential that the wife should have full knowledge of all the facts and a reasonable opportunity to repudiate the transaction; and the retention of benefits after acquiring knowledge of the facts does not amount to a ratification if at that time conditions are such, without the fault of the wife, that she cannot be placed in statu[s] quo or cannot repudiate the entire transaction without loss." (Emphasis added).

The acceptance or retention of benefits derived from an agent's unauthorized act does not amount to a ratification of such act if the principal, in accepting such proceeds or benefits, does not have knowledge of all the material facts surrounding the transaction. See 3 Am. Jur. 2d *Agency* § 195, at 698 (1986). See also *Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wn. App. 355, 369, 818 P.2d 1127 (1991). In the present case it is undisputed, nor is there any finding by the trial court to the contrary, that Ms. Primm did not have full knowledge regarding the terms of the loan or that she even knew Mr. Hagwood had obtain the loan; therefore, she could not have knowingly ratified the loan secured by the family dwelling.

Respondents argue that Ms. Primm should now be estopped from avoiding the promissory note and deed of trust. Brief of Respondent, 12. A wife will be estopped to avoid or deny the validity of a mortgage of community property signed only by her husband if she has knowledge of the transaction, participates in and encourages the transaction, and does not question or object to rights asserted by the mortgagee, but acquiesces in and accepts the benefits of the mortgage proceeds. *Sander v. Wells*, 71 Wn.2d 25, 426 P.2d 481 (1967).

The court in *Sanders* explicitly requires knowledge, participation, and no objection by the non-joining spouse in order to use estoppel.

Therefore, all three factors must be present to find estoppel. Here, as argued above, Ms. Primm lacked knowledge of the terms, never participated in the process, and objected to the mere idea of the loan. Furthermore, the Rumseys, although aware that Mr. Hagwood was married, never made any effort to include Ms. Primm in the promissory note or deed of trust formation. Even if the court were to conclude that Ms. Primm assented to the loan, the non-joining spouse is not estopped from attacking a mortgage, given by her husband as security for his loan, merely by assenting thereto. *Olson v. Springer*, 60 Wash. 77, 110 P. 807 (1910).

The Respondents argue that Ms. Primm should now be estopped from avoiding liability since she did not disaffirm the loan and deed of trust immediately after formation. The court has consistently held that the delegation of authority to manage community property does not cloak the managing spouse with authority to enter into a transaction that specifically requires the involvement of both parties. *Marston v. Rue*, 92 Wash. 129, 131, 159 P. 111 (1916). Since the loan was made directly to Mr. Hagwood, Ms. Primm was not in a position to repudiate the loan, as she had no power to void the transaction and return the funds in her husband's possession. Similarly, the Respondents only recently took measures to enforce the deed of trust, and at such time Ms. Primm immediately

attempted to avoid the enforceability of the improperly executed deed of trust.

In *Nichols Hills Bank v. McCool*, 104 Wn.2d 78, 701 P.2d 1114 (1985) the court addressed the issue of ratification and estoppel when the husband gifted community credit to their son without the consent of his wife. Although the statute in *Nichols* dealt with “consent” instead of “joinder,” the requirement of consent in a gift situation is essentially a joinder requirement and therefore a proper analogy. Cross, *The Community Property Law in Washington*, 49 Wash. L. Rev. 729, 789 (1974).

In *Nichols* the wife knew of the terms of the agreement and even helped draft the necessary documents to be signed by her husband; however the court deemed that this did not amount to ratification and “consent” as the wife felt that she was powerless to stop the transaction. In the present case, the record shows that Ms. Primm only learned of the existence of the loan sometime after the documents were executed and did not become fully aware of the terms until the recent dissolution proceeding. Therefore, it is unclear as to what steps the Respondents believe that Ms. Primm could have taken to stop or repudiate the promissory note and deed of trust.

C. MS. PRIMM WAS NOT UNJUSTLY ENRICHED BY THE RESPONDENT'S LOAN TO MR. HAGWOOD AND UNJUST ENRICHMENT DOES NOT CURE A DEED OF TRUST LACKING SPOUSAL JOINDER.

Respondent argues that it would result in unjust enrichment for this court to hold that an improperly executed deed of trust may be voided by Ms. Primm; however, such an argument fails to acknowledge accepted legal principles. Brief of Respondent, 12. In the present case there are two different documents before the court, a deed of trust and a promissory note. As argued above, the deed of trust lacks joinder and thus Ms. Primm should be permitted to void the document. Even if the court were to conclude that Ms. Primm was unjustly enriched by the loan, the Respondent cites no legal authority, and Ms. Primm is not aware of any, to suggest that unjust enrichment can cure the encumbrance of real property lacking proper joinder, to hold otherwise would create a new exception to the community property joinder requirements.

As for the promissory note, “three elements must be established in order to sustain a claim based on unjust enrichment: a benefit conferred upon the defendant by the plaintiff; an appreciation or knowledge by the defendant of the benefit; and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the

defendant to retain the benefit without the payment of its value.” *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008).

Ms. Primm testified, and Respondent asserts, that she did not participate in the management of the community’s joint checking account; therefore, she lacks knowledge of any possible benefit received due to the Respondent’s loan to Mr. Hagwood. Ms. Primm did not testify that she knew the funds were placed into the joint checking account, nor did she testify that she balanced the checking account as be aware of a sudden influx of funds.

Furthermore, the Rumsey’s dealt exclusively with Mr. Hagwood and loaned the funds to directly to him, not Ms. Primm or the community. If Mr. Hagwood used the loaned money in a way that ultimately benefited Ms. Primm, the Rumsey’s recourse is limited to Mr. Hagwood, the party who they contracted with and gave the funds to. Furthermore, Ms. Primm’s payments towards the loan during the dissolution proceedings do not establish acceptance or retention of the benefit as the benefit was already conferred to Mr. Hagwood and Ms. Primm had no ability to repudiate or otherwise return any benefits she may have received.

D. SHOULD THE COURT CONCLUDE THAT THE DEED OF TRUST IS UNENFORCIABLE AND THE PROMISSORY NOTE IS ENFORCIABLE, THE RESPONDENTS ARE NOT ENTITLED TO ATTORNEY’S FEES AS A PREVAILING PARTY.

It appears that Respondents believe that they are entitled to attorney's fees under the theory of being a prevailing party in the event that the court finds that the deed of trust is unenforceable and the promissory note is enforceable. However, the cases that the Respondents cite as authority are not on point for the facts presented. It is well settled law in Washington that absent a contractual provision, statutory provision, or a well recognized principle of equity to the contrary, a court has no authority to award attorney fees to the prevailing party. See *North Pac. Plywood, Inc. v. Access Rd. Builders, Inc.*, 29 Wn. App. 228, 236, 628 P.2d 482 (1981).

In *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984) General American Window successfully defended a breach of contract claim brought by the Plaintiff Herzog Aluminum on the basis that there was not a "meeting of the minds" as to form a valid contract. After successfully defending the suit, General American Window sought attorney's fees as allowed by the underlying contract and RCW 4.84.330. RCW 4.84.330 provides:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties,

the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

The court in *Herzog* ultimately awarded full attorney's fees to Herzog as allowed in the contract as a prevailing party.

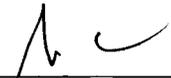
Herzog is easily distinguished from the present case. Respondents argue that if the deed of trust is unenforceable and promissory note is enforceable, then they should be entitled attorney's fees as a prevailing party. However, this mischaracterizes the holding of *Herzog*. The deed of trust and promissory note are two separate contracts, should the deed of trust be invalid, there exists no further right of action on that contract and Respondents right of recovery is limited to the promissory note. Therefore, even if the promissory note is enforceable, the Respondents are not a "prevailing party" under the deed of trust.

CONCLUSION

RCW 26.16.030(6) does not excuse spousal joinder in the present case as obtaining a loan secured by a deed of trust against the family home is not in the "ordinary course of business." Furthermore, the respondents have not presented sufficient evidence to allow a trier of fact to conclude that Ms. Primm authorized, ratified, or otherwise consented to the promissory note or deed of trust.

DATED the 18th day of January 2011.

RESPECTFULLY SUBMITTED,



Robert Helland, WSBA # 9559
Attorney for Appellant.

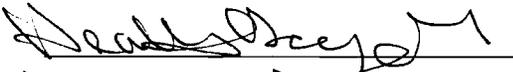
Declaration of Transmittal

Under penalty of perjury under the laws of the State of Washington
I affirm the following to be true:

On this date I transmitted the original document to the Washington
State Court of Appeals, Division II by personal service, and delivered a
copy of this document via ABC Legal Services to the following:

Douglas Kiger
4717 S 19th St #109
Tacoma WA 98405

Signed at Tacoma, Washington on this 18 day of January,
2011.


Heather Denych

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In *Nichols* the wife knew of the terms of the agreement and even helped draft the necessary documents to be signed by her husband; however the court deemed that this did not amount to ratification and “consent” as the wife felt that she was powerless to stop the transaction. In the present case, the record shows that Ms. Primm only learned of the existence of the loan sometime after the documents were executed and did not become fully aware of the terms until the recent dissolution proceeding. Therefore, it is unclear as to what steps the Respondents believe that Ms. Primm could have taken to stop or repudiate the promissory note and deed of trust.

C. MS. PRIMM WAS NOT UNJUSTLY ENRICHED BY THE RESPONDENT'S LOAN TO MR. HAGWOOD AND UNJUST ENRICHMENT DOES NOT CURE A DEED OF TRUST LACKING SPOUSAL JOINDER.

Respondent argues that it would result in unjust enrichment for this court to hold that an improperly executed deed of trust may be voided by Ms. Primm; however, such an argument fails to acknowledge accepted legal principles. Brief of Respondent, 12. In the present case there are two different documents before the court, a deed of trust and a promissory note. As argued above, the deed of trust lacks joinder and thus Ms. Primm should be permitted to void the document. Even if the court were to conclude that Ms. Primm was unjustly enriched by the loan, the Respondent cites no legal authority, and Ms. Primm is not aware of any, to suggest that unjust enrichment can cure the encumbrance of real property lacking proper joinder, to hold otherwise would create a new exception to the community property joinder requirements.

As for the promissory note, “three elements must be established in order to sustain a claim based on unjust enrichment: a benefit conferred upon the defendant by the plaintiff; an appreciation or knowledge by the defendant of the benefit; and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the

defendant to retain the benefit without the payment of its value.” *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008).

Ms. Primm testified, and Respondent asserts, that she did not participate in the management of the community’s joint checking account; therefore, she lacks knowledge of any possible benefit received due to the Respondent’s loan to Mr. Hagwood. Ms. Primm did not testify that she knew the funds were placed into the joint checking account, nor did she testify that she balanced the checking account as be aware of a sudden influx of funds.

Furthermore, the Rumsey’s dealt exclusively with Mr. Hagwood and loaned the funds to directly to him, not Ms. Primm or the community. If Mr. Hagwood used the loaned money in a way that ultimately benefited Ms. Primm, the Rumsey’s recourse is limited to Mr. Hagwood, the party who they contracted with and gave the funds to. Furthermore, Ms. Primm’s payments towards the loan during the dissolution proceedings do not establish acceptance or retention of the benefit as the benefit was already conferred to Mr. Hagwood and Ms. Primm had no ability to repudiate or otherwise return any benefits she may have received.

D. SHOULD THE COURT CONCLUDE THAT THE DEED OF TRUST IS UNENFORCIABLE AND THE PROMISSORY NOTE IS ENFORCIABLE, THE RESPONDENTS ARE NOT ENTITLED TO ATTORNEY’S FEES AS A PREVAILING PARTY.

It appears that Respondents believe that they are entitled to attorney's fees under the theory of being a prevailing party in the event that the court finds that the deed of trust is unenforceable and the promissory note is enforceable. However, the cases that the Respondents cite as authority are not on point for the facts presented. It is well settled law in Washington that absent a contractual provision, statutory provision, or a well recognized principle of equity to the contrary, a court has no authority to award attorney fees to the prevailing party. See *North Pac. Plywood, Inc. v. Access Rd. Builders, Inc.*, 29 Wn. App. 228, 236, 628 P.2d 482 (1981).

In *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984) General American Window successfully defended a breach of contract claim brought by the Plaintiff Herzog Aluminum on the basis that there was not a "meeting of the minds" as to form a valid contract. After successfully defending the suit, General American Window sought attorney's fees as allowed by the underlying contract and RCW 4.84.330. RCW 4.84.330 provides:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties,

the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

The court in *Herzog* ultimately awarded full attorney's fees to Herzog as allowed in the contract as a prevailing party.

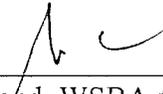
Herzog is easily distinguished from the present case. Respondents argue that if the deed of trust is unenforceable and promissory note is enforceable, then they should be entitled attorney's fees as a prevailing party. However, this mischaracterizes the holding of *Herzog*. The deed of trust and promissory note are two separate contracts, should the deed of trust be invalid, there exists no further right of action on that contract and Respondents right of recovery is limited to the promissory note. Therefore, even if the promissory note is enforceable, the Respondents are not a "prevailing party" under the deed of trust.

CONCLUSION

RCW 26.16.030(6) does not excuse spousal joinder in the present case as obtaining a loan secured by a deed of trust against the family home is not in the "ordinary course of business." Furthermore, the respondents have not presented sufficient evidence to allow a trier of fact to conclude that Ms. Primm authorized, ratified, or otherwise consented to the promissory note or deed of trust.

DATED the 18th day of January 2011.

RESPECTFULLY SUBMITTED,



Robert Helland, WSBA # 9559
Attorney for Appellant.

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STATE OF WASHINGTON

Declaration of Transmittal

Under penalty of perjury under the laws of the State of Washington

I affirm the following to be true:

On this date I transmitted the original document to the Washington State Court of Appeals, Division II by personal service, and delivered a copy of this document via ABC Legal Services to the following:

Douglas Kiger
4717 S 19th St #109
Tacoma WA 98405

Signed at Tacoma, Washington on this 18 day of January,
2011.


Heather Denych