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SUPREME COURT
STATE OF WASHINGTON

NO. 87174-4

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SUPREME COURT
OF THE STATE OF WASHINGTON

BY RONALD R. CARPENTER

CLERK

NO. 41470-8-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

COLUMBIA COMMUNITY BANK,

Respondent/Cross Appellant,

v.

NEWMAN PARK, LLC

Appellant/Cross Respondent.

COLUMBIA COMMUNITY BANK'S ANSWER
TO PETITION FOR REVIEW

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ORIGINAL

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I. INTRODUCTION

The Court of Appeals affirmed the trial court's order granting summary judgment in favor of Columbia Community Bank ("CCB") under the doctrine of equitable subrogation. The trial court applied the doctrine of equitable subrogation to prevent Newman Park, LLC ("Newman Park") from reaping an unearned windfall at CCB's expense.

The Court should deny Newman Park's Petition for Review because it fails to meet the criteria set forth in RAP 13.4(b). The Court of Appeals' decision is consistent with the Court's decision in *Bank of America v. Prestance Corp.*, 160 Wn.2d 560, 160 P.3d 17 (2007). Thus, there is no conflict with a decision of the Court, under RAP 13.4(b)(1).

Further, the Court of Appeals' decision is not in conflict with a decision by the other divisions of the Court of Appeals. Rather, the Court of Appeals (Division Two) recognized that the Court's decision in *Bank of America* required a different result than the Court of Appeals had reached in its prior decision in *BNC Mortgage, Inc. v. Tax Pros, Inc.*, 111 Wn. App. 238, 46 P.2d 812 (2002) (Division Two). The Court of Appeals merely applied the most current state of the law on equitable subrogation. This does not create a conflict under RAP 13.4(b)(2).

Lastly, Newman Park has failed to demonstrate that review of this case would further a substantial public interest as required by RAP

13.4(b)(4). Newman Park merely states cursorily that this matter relates to loans and refinance transactions. However, this was a fairly fact specific case that was decided based upon well-established precedent. Therefore, Newman Park has failed to show that grounds exist for the Court to accept review under RAP 13.4(b)(4).

II. STATEMENT OF FACTS

A. Factual Background

1. Creation of Newman Park

On September 24, 2004, Joseph Sturtevant sent Rick Goode, Kurt Rylander, Jeff Sunshine, Jim Schroeder, Bill Lowry, and Brian Allen an email regarding his “Olympia project,” and enclosed a draft Operating Agreement. (CP 645-47) These investors had invested with Sturtevant before (CP 645) and all accepted Sturtevant’s invitation to participate in this project, which was subsequently known as “Newman Park.”

The investors subsequently signed the 11-page Operating Agreement (CP 649-60). Pursuant to the Operating Agreement, the following entities and persons were Members of Newman Park, LLC: Landmark Development Ventures, Inc., Brian and Maya Allen, Jeffrey and Katherine Sunshine, Jim and Jean Schroeder, Kurt and Suzy Rylander, Rick and Chrisie Goode, and William Lowry. (CP 649 at ¶ 2.1)

The Operating Agreement contains the following provisions that

are pertinent to the claims in this action. Paragraph 1.3 of the Operating Agreement, provides,

1.3 **Nature of Business.** The LLC shall acquire, own, develop, sell and complete a residential subdivision project known as Newman Park situated in Olympia, Thurston County Washington, known as follows:

3822 Wiggins Road SE (Tax Parcel 11829330300)

Member Joseph Sturtevant is 100% responsible for satisfactory real estate development and project completion. The LLC may also engage in buying, selling, developing, improving, renting and generally dealing with real estate and in any other lawful business permitted by the Act or the laws of any jurisdiction in which the LLC may do business. The LLC shall have the authority to do all things necessary or convenient to accomplish its purpose and operate its business.

(*Id.* ¶ 1.3) (Emphasis Added). Paragraph 1.6 provides that Sturtevant shall be the initial registered agent and states, “Sturtevant shall be the Managing Member of the LLC.” (*Id.* ¶ 1.6) (Emphasis added.) Paragraph 8.2 provides, “Joseph Sturtevant, acting as manager of the LLC, shall not be liable to the LLC or its Members for monetary damages for his conduct, as manager” (CP 653 at ¶ 8.2.) Paragraph 10.1 similarly provides, “Joseph Sturtevant is the Managing Member and the registered agent of the LLC.” (*Id.* ¶ 10.1.) Despite descriptions of Sturtevant as the “Managing Member,” the Operating Agreement does not list Sturtevant as a member of the LLC. (CP 649 at ¶ 2.1) The Operating Agreement lists

Landmark, which is solely owned by Sturtevant, as a member. (*Id.*)

Other than Landmark, none of the other members did any work on the development or management of the project or Subject Property from inception in 2004 until August or September 2009. (CP 817-21) Rather, the other members relied solely upon Sturtevant/Landmark to complete the project. (*Id.*)

On or about October 7, 2004, Sturtevant executed an Application for Employer Identification Number for Newman Park, LLC. He signed the application as, "Joseph Sturtevant, Managing Member." (CP 662) On October 18, 2004, Sturtevant filed an Application to Form a Limited Liability Company with the Washington Secretary of State. (CP 664) The form provides, "MANAGEMENT OF LLC IS VESTED IN ONE OR MORE MANAGERS," with a Yes or No box. The "Yes" box was checked. (*Id.*) Sturtevant signed the application as "Managing Member." (*Id.*) The Washington Secretary of State issued a certificate of formation for Newman Park on October 18, 2004. (CP 666)

2. Purchase of the Subject Property

Subsequently, Sturtevant negotiated the purchase of the real property located at 3822 Wiggins Road SE, Thurston County (the "Subject Property") from Catherine N. Johnson. (CP 668) As part of this transaction, Sturtevant, on behalf of Newman Park, took out a loan from

Hometown National Bank (“Hometown”) for \$393,100. Newman Park granted a deed of trust on the Subject Property to Hometown, which was recorded under Thurston County Auditor’s No. 3697246. (CP 670-77) Sturtevant executed the deed of trust on behalf of Landmark, “Manager of Newman Park, LLC.” (CP 677)

Sturtevant also executed a real estate tax affidavit, a HUD-1 settlement statement, closing instructions, a company resolution, and a promissory note. (CP 679-99) Sturtevant executed these documents on behalf of Landmark, the “Manager” or “Managing Member” of Newman Park. (CP 679, 685-87, 691, 693-94, 699)

In connection with this transaction, Sturtevant provided Hometown copies of Newman Park’s Application to Form a Limited Liability Company (CP 664) the Certificate of Formation (CP 666) and a 10-page Operating Agreement dated October 19, 2004 (CP 701-10). This Operating Agreement states that Landmark is the sole Member with a 100 percent ownership interest. (*Id.*) It was executed only by Sturtevant on behalf of Landmark. (*Id.*) It otherwise contains the same provisions as the 11-page Operating Agreement cited above, including the provision naming Sturtevant as the “Managing Member.” (*Id.*)

On February 21, 2005, after the closing, Sturtevant sent the investors an email providing copies of the following: “LLC formation

documents (LLC Application, Certificate of Formation, SS-4) -Final Closing HUD (we closed on the land in December) -Deed transferring title to Newman Park LLC -Deed of Trust with Hometown Bank.” (CP 712) (Emphasis added.) In response to discovery, Newman Park produced no records of any objection to Sturtevant’s purchase of the Subject Property, his granting a deed of trust to Hometown, or Landmark executing the deed of trust as Newman Park’s agent. (CP 719-44)

Newman Park submitted declarations from Brian Allen, Maya Allen, Rick Goode, William Lowry, Kurt Rylander, Susan Rylander, Jim Schroeder, Jean Schroeder, Jeffrey Sunshine, and Kathleen Sunshine, which each stated, “By no later than February 21, 2005, I was aware of the loan taken out with Hometown Bank to purchase the property that Newman Park, LLC owns in Thurston County, Washington. I ratified and approved of that transaction.” (CP 619-40)

3. CCB’s Loan to Trinity and Payoff of Hometown’s Loan to Newman Park

In February 2008, Trinity Development, LLC (“Trinity”) borrowed \$1,500,000 from CCB. Sturtevant was the Managing Member of Trinity. As collateral for the loan, Sturtevant granted a deed of trust on his personal residence and Sturtevant (on behalf of Landmark) executed a Deed of Trust on the Subject Property for Newman Park. (CP 795-802)

In connection with this transaction, Sturtevant provided CCB copies of Newman Park's Application to Form a Limited Liability Company, the Certificate of Formation, and a 10-page Operating Agreement dated October 19, 2004. (CP 851, 853, 855-64) This Operating Agreement states that Landmark is the sole Member with a 100 percent ownership interest. (CP 855-64) Sturtevant executed it on behalf of Landmark. (*Id.*) Sturtevant had previously submitted these same documents to Hometown. Additionally, Sturtevant provided a certificate of formation and an operating agreement for Trinity, and a certificate of incorporation and Bylaws and Corporate Resolutions for Landmark. (CP 866-69, 871-81, 883, 885-903)

Based on the information provided, CCB believed that Sturtevant was the sole beneficial owner and Managing Member of Newman Park and had authority to grant the Deed of Trust on the Subject Property as collateral for the loan to Trinity. (CP 848 at ¶ 4) It is customary in the industry for banks to rely upon such documents for establishing ownership of an entity and the authority of the agent to act for the principal. (*Id.* ¶ 5) CCB had no reason to believe that Sturtevant did not have authority. (*Id.* ¶ 6)

In connection with this loan, Hometown provided a payoff statement on February 28, 2008. (CP 804) The HUD-1 settlement

statement shows that \$403,127.67 of the CCB loan proceeds were for “Payoff to Hometown National Ba[nk].” (CP 806-10) On March 4, 2008, Clark County Title, who did the closing, sent Hometown a letter enclosing the payoff check. (CP 812-13) Subsequently, on April 3, 2008, Hometown recorded a full reconveyance, Thurston County Auditor No. 4001619. (CP 815)

B. Procedural History

On or about March 5, 2010, CCB filed its Complaint for Declaratory Judgment, Equitable Subrogation, and Unjust Enrichment. (CP 4-8) CCB sought an order declaring the CCB Deed of Trust valid, and a judgment against Newman Park under the doctrines of equitable subrogation and unjust enrichment. (*Id.*)

On or about March 10, 2010, Newman Park filed its Complaint for Declaratory Relief and Damages. (CP 460-62) Newman Park sought an order declaring the CCB Deed of Trust invalid. (*Id.*)

Newman Park filed a motion for summary judgment on the validity of the CCB Deed of Trust. The Court granted Newman Park’s motion for summary judgment on April 15, 2010, ruling that Sturtevant lacked actual or apparent authority to grant the CCB Deed of Trust. (CP 72-73)

On July 2, 2010, CCB filed a motion for summary judgment under the doctrines of equitable subrogation and unjust enrichment, seeking

recovery of its payoff of the Hometown loan. (CP 229-35) Newman Park opposed the motion, arguing that CCB was a mere volunteer. (CP 382-97) The trial court granted CCB's motion for summary judgment on July 30, 2010, awarding CCB a lien and judgment in the principal amount of \$411,483.78, plus interest. (CP 409-11)

On October 12, 2010, Newman Park moved for attorneys' fees as the prevailing party. (CP 412-17) The trial court denied Newman Park's motion for fees on October 22, 2010. (CP 438-39)

On November 17, 2010, Newman Park filed a Notice of Appeal of the trial court's order granting summary judgment under the doctrine of equitable subrogation (CP 409-11) and order denying attorneys' fees to Newman Park (CP 438-39). (CP 440-49) On December 1, 2010, CCB filed a Notice of Cross-Appeal of the trial court's order granting summary judgment in favor of Newman Park on the invalidity of CCB's Deed of Trust. (CP 72-73)

On February 22, 2012, the Court of Appeals affirmed the trial court in all respects. Newman Park now petitions for review of the Court of Appeals' decision that affirmed the trial court's order granting summary judgment to CCB under the doctrine of equitable subrogation.

III. ARGUMENT

A. **The Court of Appeals' Decision is Consistent with the Court's Prior Decisions and does not Present a Conflict Under RAP 13.4(b)(1).**

The Court of Appeals' decision is consistent with the prior decisions of the Court. There is no conflict, pursuant to RAP 13.4(b)(1), to warrant the Court's review of the Court of Appeals' decision.

Generally, “[s]ubrogation is the substitution of one person in place of another . . . so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities.” *Bank of America v. Prestance Corp.*, 160 Wn.2d 560, 565, 160 P.3d 17 (2007). Washington has adopted the Restatement (Third) of Prop.: Mortgages § 7.6’s principle of subrogation in the mortgage context, which states generally, “If a senior mortgage is released of record and, as part of the same transaction, is replaced with a new mortgage, the latter mortgage retains the same priority as its predecessor . . .” *Id.*; *Kim v. Lee*, 145 Wn.2d 79, 89, 31 P.3d 665 (2001). In other words, a lender who pays off another’s debt may be equitably subrogated to the position of the original party. The doctrine is designed “to avoid a person’s receiving an unearned windfall at the expense of another.” Restatement (Third) of Property: Mortgages § 7.6, cmt. a.

Here, at the time CCB made its loan to Trinity, Hometown had a first-position deed of trust on the Subject Property. CCB paid off Hometown's loan, which totaled \$403,127.67, out of the loan proceeds. CCB also paid property taxes in the amount of \$8,356.11. By virtue of these payoffs, CCB stepped into the shoes of Hometown, at least as to the value of its interest in the Subject Property. Accordingly, CCB is entitled to an equitable lien in the amount that it paid—\$411,483.78, plus interest. This would return Newman Park to the position it would have been in had Sturtevant/Landmark not granted the Deed of Trust to CCB.

Newman Park argues that equitable subrogation does not apply pursuant to the “volunteer rule.” Newman Park cites *BNC Mortgage, Inc. v. Tax Pros, Inc.*, 111 Wn. App. 238, 46 P.2d 812 (2002) for the proposition that the doctrine of equitable subrogation does not apply to a “volunteer.”¹ However, *BNC Mortgage* was decided before the Court's

¹ The portion of the *BNC Mortgage* opinion that Newman Park relies upon is dicta. The court noted that the first issue was whether the lien of BNC's deed of trust was prior to the lien of Tax Pros' 1999 judgment. The second issue was whether the lien of Ford's deed of trust was prior to the lien of Tax Pros' 1999 judgment and, if so, whether BNC should be equitably subrogated to Ford's lien. On the second issue, the court found that Ford's deed of trust was subordinate to Tax Pros' 1999 judgment, thereby rendering it unnecessary for the court to decide the equitable subrogation issue. Dictum is not the rule of law and cannot be relied upon as precedent. See, e.g., *State ex rel. Hoppe v. Meyers*, 58 Wn.2d 320, 329-30, 363 P.2d 121 (1961) (“dictum in that case . . . should not be transformed into a rule of law”); *DCR, Inc. v. Pierce County*, 92 Wn. App. 660, 683 n. 16, 964 P.2d 380 (1998) (“Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed;” “Dicta is not controlling precedent.”); *In re Roth*, 72 Wn. App. 566, 570, 865 P.2d 43 (1994) (“Dicta is language not necessary to the decision in a particular case.”).

decision in *Bank of America v. Prestance Corp.*, 160 Wn.2d 560, 565, 160 P.3d 17 (2007). In *Bank of America*, the Court expressly held that equitable subrogation was available in the refinance context and it adopted the Restatement (Third) of Prop.: Mortgages § 7.6. In so holding, the Court implicitly rejected the volunteer rule in the refinance context.

The volunteer rule and equitable subrogation in the refinance context cannot coexist. Indeed, the Court could not have reached the conclusion it reached in *Bank of America* if the volunteer rule remained intact. The court in *BNC Mortgage* applied the volunteer rule as follows:

BNC was a volunteer here. It was not under any duty or compulsion to loan money to the [property's owner] or to pay [the prior encumbrance]. It had no interest in the [property's owner]'s residence that it needed to protect. It did not act under any duty or compulsion, but instead chose freely and voluntarily to avail itself of a business opportunity. Its hopes were to achieve a profit and, quite understandably, to secure itself against loss. That it may not realize those hopes is not by itself sufficient to warrant a judicial alteration of Washington's long-settled scheme of lien priorities.

BNC Mortgage, 111 Wn. App. at 254-55.

Under this formulation, no refinance lender would be entitled to equitable subrogation. All refinance lenders offer loans without any duty or compulsion to do so, and for the express purpose to achieve a profit. In *Bank of America*, for example, Wells Fargo was not under any duty or compulsion to loan money to the property owner or to pay off the

Washington Mutual loan. Wells Fargo did so to avail itself of a business opportunity and to achieve a profit. Wells Fargo then paid off the Washington Mutual loan to secure itself against any loss. Under *BNC Mortgage's* formulation, whose dicta Newman Park urges this Court to follow, Wells Fargo would not be entitled to be equitably subrogated.

Yet, the Court reached the opposite conclusion: “We adopt § 7.6 of the *Restatement (Third)* and hold WFB West is equitably subrogated to Washington Mutual’s first-priority lien, regardless of either its actual or constructive knowledge of intervening interests.” *Bank of America*, 160 Wn.2d at 582. Implicit in the Court’s holding is that the volunteer rule is not compatible with refinance transactions. If it were, the Court could not have reached the holding that it did.

This principle is consistent with holdings in other jurisdictions. *See, e.g., Eastern Savings Bank v. Pappas*, 829 A.2d 953, 961 (D.C. App. 2003) (holding refinance lender was entitled to equitable subrogation and did not act as a volunteer)²; *Lamb Excavation, Inc. v. Chase Manhattan Mortgage Corp.*, 95 P.3d 542, 547 (Ariz. 2004) (holding refinance lender did not act as a volunteer in paying off prior construction loan, as its

² This court further noted, “This theory that the purchaser is a volunteer is, we think, entitled to little weight. The purchaser is advancing his money intending to get something for it, to wit, a title unencumbered by the lien to be discharged. It is hardly in accord with reality to say that he pays officiously, as an intermeddler.” *Id.* at 961, n.14.

motive was commercial); *Hicks v. Londre*, 125 P.3d 452, 457 (Co. 2006) (“Suffice it to say that ‘[a] person who lends money to pay off an encumbrance on property and secures the loan with a deed of trust on that property is not a volunteer for purposes of equitable subrogation.’”); *Mort v. United States*, 86 F.3d 890, 894 (9th Cir. 1996) (same); *Katsivalis v. Serrano Reconveyance Co.*, 70 Cal.App.3d 200, 128 Cal.Rptr. 620, 625 (1977) (lender that granted new mortgage was not a volunteer and entitled to equitable subrogation even though the mortgage was invalid under California law).

Further, the comments to Section 7.6 of the Restatement expressly state that the volunteer rule is inapplicable to these types of loan transactions. In *Bank of America*, the Court unqualifiedly adopted Section 7.6.³ Comment b to Section 7.6 makes clear that the Restatement has rejected the volunteer rule:

Prior case law has often indicated that one who pays as a “volunteer” is not entitled to subrogation. However, the meaning of the term “volunteer” is highly variable and uncertain, and has engendered considerable confusion. This Restatement does not adopt the “volunteer” rule, but instead requires simply that the subrogee pay to protect some interest . . .

³ As noted in Justice Owen’s dissent, “In the present case, the majority adopts without qualification the doctrine of equitable subrogation set forth in Section 7.6 . . . of the *Restatement (Third) of Property: Mortgages* (1997).” *Bank of America*, 160 Wn.2d at 583.

While the concept of “interest” is broadly defined, it does not cover every conceivable payor. A true “intermeddler” who has no legitimate need or reason to pay the mortgage debt is not entitled to subrogation.⁴

Restatement (Third) of Prop.: Mortgages § 7.6 cmt. b. (Emphasis added.)

Under the Restatement’s approach, a payor simply needs to protect some interest. “Interest” is broadly defined, and so long as there is a legitimate need or reason for a payor to pay the mortgage, the payor is entitled to protection under the doctrine. *See also, First Commonwealth Bank v. Heller*, 863 A.2d 1153, 1159 n.9 (Pa. 2004) (“The Restatement does not adopt the ‘volunteer’ rule but rather requires that the subrogee pay to protect some interest . . . In the context of refinancing a mortgage, the mortgagee would clearly pay previous liens in order to protect its own interests, i.e., to gain first priority.”)

Here, CCB had a legitimate need or reason to payoff the Hometown loan. CCB’s Deed of Trust on the Subject Property secured \$1.04 million of the \$1.5 million loan. CCB and Sturtevant, Newman Park’s manager, negotiated a payoff of the Hometown loan as part of the CCB loan transaction. Paying off the Hometown loan (thus putting CCB

⁴ The Restatement’s example of a “true intermeddler” can be found at *Norton v. Haggett*, 85 A.2d 571 (Vt. 1952). There, a man wishing to harass the defendant paid the defendant’s mortgage, thinking he would become the holder of the note. He had no agreement with any party to the mortgage, or any connection to it, and paid it without consent. There was no legitimate reason or need for him to pay the mortgage (in fact, he did so in bad faith). Therefore, the court found that he was an intermeddler and not entitled to equitable relief.

in first position) protected CCB's interest because it eliminated the possibility that CCB, a junior lien holder, would have to take on additional debt later in order to satisfy the Hometown encumbrance, a senior lien, in the event of a future default. (CP 252) Paying off the Hometown loan to gain first priority thus protected CCB's interest by minimizing the overall risk of the loan. Therefore, CCB is entitled to be equitably subrogated to Hometown.

Additionally, the standard urged by Newman Park is contrary to the stated policy of the Court. Newman Park argues that the Court should restrictively apply the doctrine of equitable subrogation. However, the Court held that the doctrine should be liberally applied to prevent injustice:

Equitable subrogation is a broad doctrine and should be followed wherever justice demands it and where there is no material prejudice to junior interest. A liberal approach is in line with the doctrine's equitable rationale and is becoming the more accepted rule . . . Bank of America offers no principled reason why it should receive an unearned windfall at WFB West's expense.

Bank of America, 160 Wn.2d at 581-82. (Emphasis added.) Again, the purpose of the doctrine is "to avoid a person's receiving an unearned windfall at the expense of another." Restatement (Third) Property § 7.6, cmt. a.

Here, justice demands that Newman Park not reap a significant

windfall at the expense of CCB. Just as in *Bank of America*, Newman Park has failed to offer a principled reason why it should receive an unearned windfall. The Court should not place Newman Park in a better position than it was in when CCB made its loan. This requires an equitable lien in CCB's favor for the encumbrances CCB paid on Newman Park's behalf.

In sum, the Court of Appeals properly applied the Restatement (Third) Property § 7.6, which the Court adopted in *Bank of America*. There is no conflict between the Court of Appeals' decision and any decision of this Court. Therefore, Newman Park has failed to meet the criteria required by RAP 13.4(b)(1) for the Court to accept review.

B. The Court of Appeals' Decision does not Conflict with Another Decision of the Court of Appeals Under RAP 13.4(b)(2).

Newman Park has similarly failed to show that the Court of Appeals' decision conflicts with another decision of the Court of Appeals, as required by RAP 13.4(b)(2).

Newman Park cites no split of opinion among the divisions of the Court of Appeals. *Cf. State v. Jones*, 172 Wn.2d 236, 257 P.3d 616 (2011) (Court accepted review to resolve conflict between Division Two and Division Three); *State v. Clarke*, 156 Wn.2d 880, 34 P.2d 188 (2006) (Court accepted review to resolve conflict between divisions); *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999) ("We accept review to

resolve a conflict existing between the divisions of the Court of Appeals.”).

Rather, Newman Park alleges that the Court of Appeals’ decision in this case conflicts with an earlier opinion from the same division in *BNC Mortgage, Inc. v. Tax Pros, Inc.*, 111 Wn. App. 238, 46 P.3d 812 (2002) (Division Two). In that case, the Court of Appeals stated in dicta that the volunteer rule precluded the application of the doctrine of equitable subrogation. However, *BNC Mortgage* was decided in 2002. The Court decided *Bank of America*, which adopted Section 7.6 of the Restatement, in 2007. In this case, the Court of Appeals simply applied the most current statement on the law of equitable subrogation. The Court of Appeals explained its decision as follows:

After our decision in *BNC Mortgage, Inc.*, 111 Wn. App. at 238, the Washington Supreme Court considered the volunteer rule in *Bank of America*, 160 Wn.2d 560. In *Bank of America*, the Court held that equitable subrogation was available in the refinance context and, as previously discussed, adopted *Restatement (Third) of Property Mortgages* § 7.6, which rejects the “volunteer rule.” *Bank of Am.*, 160 Wn.2d at 560-64. And our Supreme Court did not limit its adoption of the *Restatement* or attempt to preserve the volunteer rule. We now conclude that the volunteer rule is no longer a defense where a mortgagee pays off another mortgage holder. We therefore affirm the order granting partial summary judgment to Columbia on the basis of equitable subrogation.

(Opinion at 10-11.) Applying the most current statement of the law does not create a “conflict” with prior decisions of the Court of Appeals. Thus, Newman Park has failed to meet the requirements of RAP 13.4(b)(2).

C. Newman Park has failed to Demonstrate that Review Would Further a Substantial Public Interest Under RAP 13.4(b)(4).

Newman Park has not demonstrated that review of the Court of Appeals’ decision would further a “substantial” public interest, as required by RAP 13.4(b)(4). Newman Park’s only briefing on this requirement is the following conclusory statement: “The Supreme Court should also take review because the issue presented is a matter of public interest because it relates to the refinancing of loans and concerns an issue that the Supreme Court did not address in *Bank of America . . .*” (Petition at 7.)

The simple fact that this case relates to the “refinancing of loans” does not create a “substantial” public interest. The Court of Appeals’ decision is based on the unique facts of this particular case. The impact of the decision is not likely to be felt by broader segments of the population. Although this case does concern refinancing of loans, it is not a typical refinance transaction. Indeed, as Newman Park noted in its Petition, “this was not a normal refinance transaction” and “This was also not a refinance transaction that an ordinary homeowner might make.” (Petition at 15.)

Further, the Court already implicitly rejected the volunteer rule in refinance transactions in its holding in *Bank of America*. As discussed

above, the Court expressly adopted the Restatement (Third) of Prop.: Mortgages § 7.6, which rejects the volunteer rule. Additionally, the Court could not have reached the decision it did in *Bank of America* if the volunteer rule survived the adoption of Section 7.6. The Court of Appeals properly recognized that “the volunteer rule is no longer a defense where a mortgagee pays off another mortgage holder.” (Opinion at 10-11.) There is simply no substantial public interest that would be furthered by review of the Court of Appeals’ decision.

IV. CONCLUSION

The Court should deny review under RAP 13.4(b)(1), (2) and (4) and affirm the decision of the Court of Appeals.

Respectfully submitted, this 18th day of April, 2010.

SOCIUS LAW GROUP, PLLC

By 
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Adam R. Asher, WSBA #35517
Attorneys for Columbia Community Bank

V. CERTIFICATE OF SERVICE

I certify that on the 19th day of April, 2011, I caused a true and correct copy of this COLUMBIA COMMUNITY BANK'S ANSWER TO PETITION FOR REVIEW to be served on the following in the manner indicated below:

Ben Shafton
Caron, Colven, Robison & Shafton
900 Washington Street, Suite 1000
Vancouver, WA 98660
(360) 699-3001

- | | |
|-------------------------------------|-----------------|
| <input checked="" type="checkbox"/> | U.S. Mail |
| <input type="checkbox"/> | Facsimile |
| <input type="checkbox"/> | Legal Messenger |
| <input type="checkbox"/> | Hand Delivery |
| <input checked="" type="checkbox"/> | Email |

Counsel for Newman Park, LLC

By: *Linda L. McKenzie*
Linda McKenzie, Legal Assistant