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NO. 71544-5-1

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

BEL AIR & BRINEY, a general partnership; NICK BRINEY, a single man; and ROGER B. BEL AIR and CANDACE A. BEL AIR, husband and wife,

Appellants,

and

CITY OF KENT,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The superior court correctly applied well-established Washington law regarding equitable subrogation to this case. Equitable subrogation has been applied in the owner-purchaser context since 1940. And the factors enunciated by the Washington Supreme Court as recently as last year weigh in favor of its application. Moreover, title insurance is not a factor considered by the Washington courts.

Bel Air & Briney would receive an unearned windfall from the City of Kent's payoff of the senior lien. The application of the doctrine would not prejudice Bel Air & Briney as it would remain in the same position it was when the senior lien was paid off. The fact that the City of Kent had title insurance is of no import to this analysis. The trial court applied the doctrine of equitable subrogation under settled precedent and Bel Air & Briney cannot present any persuasive cases or theories to establish otherwise.

II. ISSUES REGARDING THE ASSIGNMENTS OF ERROR

1. Did the trial court correctly apply the doctrine of equitable subrogation in accordance with recent case law where the City of Kent paid off the first mortgage when it purchased the subject property and the hard-money lender holding the junior lien retained its second-position?

2. Did the trial court correctly refuse to expand the equitable subrogation analysis beyond those factors prescribed by the Washington Supreme Court to consider the existence of title insurance?

III. STATEMENT OF THE CASE

A. Factual Background

1. *The City of Kent planned to build a community pool*

The plaintiff-respondent, the City of Kent, began purchasing properties on a certain city block in Kent to develop an Aquatic Center in 2006. CP 69, ¶ 13. One of the parcels on the block belonged to Hoang Tran. CP 68-69, ¶¶ 7 and 14. Instead of acquiring the property by eminent domain, the City of Kent initiated negotiations for a sale in 2006. CP 69, ¶ 14. The negotiations continued through 2007, eventually resulting in a Purchase and Sale Agreement dated November 26, 2007. *Id.*

2. *Bel Air & Briney made a hard-money loan to Ms. Tran*

The defendant-appellant, Bel Air & Briney, a general partnership between Roger L. Bel Air and Nick Briney, is a hard-money lender. CP 65, ¶ 1; CP 117, ¶ 1. Mr. Bel Air and Mr. Briney formed their business over 35 years ago, initially flipping real estate, then purchasing discounted contracts, and then making hard money loans. CP 117, ¶ 2.

In June 2007, Bel Air & Briney loaned $134,000 to Ms. Tran and two other individuals at a 12 percent interest rate. CP 66, ¶ 2; CP 73; CP 118, ¶ 4. The loan term was only six months, with monthly interest-only payments until a balloon payment was due on December 13, 2007. *Id.* Bel Air & Briney granted a six-month extension six days before the

balloon payment was due, to June 13, 2008. CP 66, ¶ 3; CP 118, ¶ 7. When Bel Air & Briney granted the borrowers their first six-month extension, it increased the loan amount by $9,500, a seven percent loan fee, which equates to an additional 14 percent annual rate of interest on top of the existing 12 percent rate. CP 66, ¶ 3. The monthly payments increased due to the additional interest for the increased principal amount. *Id.*

Two weeks after the balloon payment would have been due, Bel Air & Briney granted an additional extension, to December 13, 2008. CP 66 ¶ 4; CP 118, ¶ 7. On the second six-month extension, another $10,000 was added to the principal, bringing the total principal amount to $153,000. CP 66, ¶ 4. This was another seven percent loan fee, which equates to an additional 14 percent annual rate of interest on top of the prior 14 percent plus 12 percent rate. *See id.* The monthly payments were again increased to reflect the increase in interest. *Id.*

Bel Air & Briney received regular monthly payments from Ms. Tran from July 2007 through July 2008. CP 66, ¶ 5; CP 118, ¶ 7. It also received a payment in October 2008 which included a late-payment fee. *Id.* After Ms. Tran defaulted, the interest rate increased to 24 percent. CP 66, ¶ 2.

3. *Bel Air & Briney took junior positions on four parcels of real property to secure its loan but three of its four liens have been extinguished by foreclosure or released*

Bel Air & Briney secured its loan with a deed of trust recorded on June 15, 2007 which encumbered four properties, referred to as Parcels A, B, C, and D. CP 66-68, ¶ 6; CP 118, ¶ 5. When it accepted the deed of trust, Bel Air & Briney knew that each of the four parcels were already serving as collateral for one or more other loans, and thus its deed of trust would be in a junior position on each parcel. CP 68-69, ¶ 8; CP 118, ¶ 5. It was in second-position behind a deed of trust securing a $189,000 debt on Parcel C (310 Naden Avenue South, Kent, Washington), which is the subject of this lawsuit. CP 69, ¶ 12; CP 118, ¶ 5. It was also in second-position behind a $550,000 debt on Parcel A and in third position behind debts in the approximate amounts of $241,500 and $260,000 on Parcels B and D, respectively. CP 118, ¶ 5.

Bel Air & Briney no longer holds its junior interests on Parcels A, B, and D. CP 69, ¶¶ 9-11; CP 119, ¶ 9. Due to the decreasing values of real property beginning in late 2008 and Ms. Tran's loss of her equity in Parcels A, B, and D, Ms. Tran defaulted on her debts on these parcels. CP 119, ¶ 9. In September 2009, the senior liens on Parcel A and Parcel D foreclosed, eliminating Bel Air & Briney's junior liens. CP 69, ¶¶ 9-10; CP 119, ¶ 9. In July 2012, Parcel B was sold at a short-sale. CP 69, ¶ 11;

CP 119, ¶ 9. Bel Air & Briney negotiated a payment of $3,500 from the sale in return for releasing its junior security interest. *Id.*

4. *The City of Kent purchased the property and paid off MortgageIt, Inc.'s loan*

Three months before Bel Air & Briney recorded its deed of trust in June 2007, the City of Kent received a preliminary commitment for title insurance. CP 69-70, ¶ 17. The preliminary commitment included a special exception for a deed of trust to MortgageIt, Inc., securing a loan for $189,000, recorded on November 15, 2005. *Id.* It did not include an exception for Bel Air & Briney's deed of trust, which had not yet been recorded. CP 70, ¶ 18.

Ms. Tran did not inform the City of Kent of Bel Air & Briney's deed of trust at any time. CP 70, ¶ 21.

The sale of Parcel C from Ms. Tran to the City of Kent closed on January 31, 2008. CP 69, ¶ 15. The City of Kent paid cash of $392,500. *Id.* MortgageIt, Inc. was paid $196,894.17 from the sale proceeds in satisfaction of its outstanding lien. CP 70, ¶ 19. Ms. Tran received $168,499.50 at closing, and another $25,000 later after release of a holdback, for a total of $193,499.50. CP 69, ¶ 15.

After closing, the title insurance company issued a title insurance policy to the City of Kent dated January 31, 2008. CP 70, ¶ 20. As the

policy was based upon the preliminary commitment issued in March 2007, it did not include an exception for Bel Air & Briney's deed of trust. *Id.*

5. *Four years after Ms. Tran ceased making payments to Bel Air & Briney and only after a real estate agent contacted Mr. Briney about releasing Bel Air & Briney's lien on another parcel, Mr. Briney researched the status of Parcel C*

In July 2012, almost four years later after Ms. Trans' last payment in October 2008 and four and a half years after the sale of Parcel C in January 2008, Mr. Briney contacted the City of Kent about Bel Air & Briney's deed of trust. CP 70, ¶¶ 22 and 23; CP 120, ¶ 13. It was the first time the City of Kent learned of the deed of trust. CP 70, ¶ 23.

Mr. Briney was only spurred into action by a call from a real estate agent regarding a short-sale of Parcel B. CP 120, ¶ 11. He negotiated a payment of $3,500 in return for releasing Bel Air & Briney's junior security interest on Parcel B. CP 69, ¶ 11; CP 119, ¶ 9. The release of this interest meant that the only collateral securing the loan which had been in default for almost four years was Parcel C. *See* CP 69 ¶¶ 9-12; CP 119, ¶¶ 9-10. He attempted to contact Ms. Tran, who had not made any payments since October 2008, about Parcel C. CP 66, ¶ 5; CP 120, ¶¶ 11-12.

When he was unsuccessful in reaching Ms. Tran, he reviewed the King County records and learned that Ms. Tran had sold Parcel C to the

City of Kent on January 31, 2008. CP 120, ¶ 11. Shortly thereafter, Mr. Briney met with Ms. Tran. CP 120, ¶ 12. He believed that she had no money to pay Bel Air & Briney. CP 118-19, ¶ 8; CP 120, ¶ 11. Therefore, he got in touch again with the City of Kent. CP 120, ¶ 13.

Bel Air & Briney took no actions in reliance on the reconveyance of the MortgageIt deed of trust. CP 70, ¶ 24.

The City of Kent obtained an appraisal of Parcel C indicating that its as-is fair market value on October 30, 2012 was $110,000. CP 71, ¶ 26; CP 120-21, ¶ 15.

B. Procedural History

1. *The trial court granted the City of Kent an equitable lien*

The City of Kent filed a complaint for declaratory relief on April 30, 2013. CP 1-5. The parties agreed on a stipulated set of facts, and both filed Motions for Summary Judgment. CP 65-97; CP 15-64 and 151-165 for Respondent; CP 98-116, 117-150, and 166-220 for Appellants. On January 21, 2014, the trial court entered an order on the cross-motions, granting the City of Kent's motion and denying Bel Air & Briney's motion. CP 221-26. The court stated that, "[w]hile the court is troubled by the present situation, where both the City and BAB were in effect innocent victims of market forces, it appears from the appellate decisions in Washington State that the doctrine of equitable subrogation should be

applied in this case." CP 225. In analyzing the equities, the court concluded that "BAB would indeed have experienced an unearned windfall at the time of the City's purchase of the property, if BAB's security interest in the property advanced to first-position solely because the City caused the first mortgage to be satisfied as a condition of its purchase of the property." *Id.*

On the issue of title insurance, the court was "unaware of any authority for the proposition that [recourse against the title insurer] is a proper factor on which the court should deny application of the doctrine of equitable subrogation." CP 225, fn. 2.

2. *Bel Air & Briney appealed the summary judgment order granting equitable subrogation*

Bel Air & Briney filed a motion for reconsideration of the order and a notice of appeal of the summary judgment order simultaneously. CP 235-242; CP 227-234. The motion was denied on April 9, 2014. CP 282-284. The court stated it:

> is unable to find that applying the doctrine of equitable subrogation is prejudicial to the defendants in this case to the degree that equitable subrogation should not be applied.
>
> ...
>
> the defendants would have received an unearned windfall if the doctrine of equitable subrogation were not applied. While the City likely would have required BAB's lien to be satisfied from the sale proceeds if the City had known of BAB's security interest at or before closing, the City had

> no affirmative duty to do so. Moreover, BAB was not prejudiced by the City's purchase of the property, since BAB's security interest remained precisely the same as it would have been if the City had not purchased the property. The subsequent decline in Parcel C's value was not the fault of any party, and BAB has not cited any authority in support of its argument that equity requires the court to assign the risk of loss to the City because the City had title insurance, which presumably would be liable to the City for the amount of BAB's security interest.

CP 282-83 (emphasis in original).

At the same time it entered its order, the trial court entered a judgment in favor of the City of Kent, although it had not been presented to the court. CP 285-288; CP 295-296, ¶¶2-5. The judgment ordered equitable subrogation in favor of the City of Kent:

> ORDERED, ADJUDGED and DECREED that City of Kent is equitably subrogated in the amount of $196,894.17 to the first-position lien held by MortgageIt as of January 30, 2008...
>
> ORDERED, ADJUDGED and DECREED that any interest in the Property held by Bel Air & Briney is subordinate to City of Kent's lien on the Property...

CP 286. It also ordered foreclosure of the City of Kent's equitable lien by means of a sheriff's sale. CP 287.

3. *The parties dispute whether an equitable subrogee has the right to foreclosure*

Bel Air & Briney filed a motion for reconsideration of the judgment. CP 289-294. It argued that the City of Kent could not foreclose its equitable lien. *Id.* The court reversed course, stating "the

portions of the Judgment (pp 3-4) that grant the City the right to foreclose on its equitable mortgage are vacated and stricken," and granted the motion. CP 346-348.

The next day, Bel Air & Briney served a notice of default, initiating a foreclosure of its junior lien. CP 364-374.

The City of Kent filed a motion for reconsideration of the court's order granting the motion for reconsideration and amending the judgment. CP 349-361. The court requested additional briefing from the parties, heard oral argument, and requested further briefing on the issue of the City of Kent's right to foreclosure. As of the date of this brief, the trial court has not issued an order on the City of Kent's motion. If the court denies the motion, the City of Kent plans on filing a notice of appeal regarding the foreclosure issue and supplementing the clerk's papers accordingly. However, because this issue has not been appealed as of this date, the City of Kent does not address it in this brief.

IV. SUMMARY OF ARGUMENT

The trial court correctly applied the doctrine of equitable subrogation. Both factors adopted by the Washington Supreme Court in *Columbia Community Bank v. Newman Park, LLC*, 117 Wn.2d 566, 305 P.2d 472 (2013) weigh in favor of the doctrine's application. Without it, Bel Air & Briney would have received a windfall from the City of Kent's

payoff of the senior lien. Further, it is not prejudiced by remaining in its second-position behind the City of Kent, which steps into the shoes of MortgageIt. Lastly, the fact that the City of Kent purchased title insurance is of no relevance to the doctrine of equitable subrogation. This analysis is required by the recent Washington case law and supported by cases from other jurisdictions with a similar approach as this state.

V. ARGUMENT

A. Standard of Review

Appellate courts review summary judgment decisions de novo, performing the same inquiry as the trial court. *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 854, 827 P.2d 1000 (1992). Summary judgment should be granted if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. CR 56; *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

The trial court correctly granted the City of Kent's motion for summary judgment and denied Bel Air & Briney's cross-motion for summary judgment.

B. Washington's Adoption of the Restatement's Approach Anticipates the Application of Equitable Subrogation in the Purchaser-Owner Context

The Washington Supreme Court recently discussed the doctrine of equitable subrogation in *Columbia Community Bank v. Newman Park, LLC*, 117 Wn.2d 566, 305 P.2d 472 (2013). The Court expressly adopted in full the liberal application of equitable subrogation enunciated in Restatement (Third) of Property: Mortgages § 7.6 Subrogation (1997) ("Restatement"). *Columbia Community Bank*, 117 Wn.2d at 580. The Restatement approach is "the more simple and clear approach" and "the more well-reasoned rule" than the various approaches adopted by other jurisdictions. *Id.*, 117 Wn.2d at 570 and 581.

The Court adopted the Restatement approach because it embodies the Washington courts' principles regarding equity, and equitable subrogation in particular. The Court explained that "Washington courts embrace a long and robust tradition of applying the doctrine of equity" and the Restatement approach is "[i]n accordance with our prior case law, with the modern trend, and with our traditional robust reading of the doctrine of equity." *Id.*, 117 Wn.2d at 569-570.

The Restatement provides:

> (a) One who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment. Even though the performance

> would otherwise discharge the obligation and the mortgage, they are preserved and the mortgage retains its priority in the hands of the subrogee.
>
> (b) By way of illustration, subrogation is appropriate to prevent unjust enrichment if the person seeking subrogation performs the obligation:
>
> > (1) in order to protect his or her interest;
> >
> > (2) under a legal duty to do so;
> >
> > (3) on account of misrepresentation, mistake, duress, undue influence, deceit, or other similar imposition; or
> >
> > (4) upon a request from the obligor or the obligor's successor to do so, if the person performing was promised repayment and reasonably expected to receive a security interest in the real estate with the priority of the mortgage being discharged, and if subrogation will not materially prejudice the holders of intervening interests in the real estate.

Restatement § 7.6. The comment elaborates upon this rule: "Subrogation is an equitable remedy designed to avoid a person's receiving an unearned windfall at the expense of another." *Id.*, cmt. a.

In other words, the court determines whether application of the doctrine of equitable subrogation (1) prevents a windfall for the party objecting to the application of the doctrine, and (2) will not materially prejudice the party objecting to the application of the doctrine.

The Restatement includes an illustration that is analogous to the facts of this case, namely where a purchaser pays off a seller's loan but fails to satisfy, or obtain a discharge of, a junior lien.

> [Illustration No. 21:] Mortgagor holds Blackacre subject to two mortgages, held respectively by Mortgagee-1 and Mortgagee-2. Mortgagor sells Blackacre to Grantee, falsely stating to Grantee that Blackacre is subject only to the first mortgage and promising that Mortgagor will pay and satisfy that mortgage obligation with the proceeds of the sale. Grantee, believing this statement, makes no title examination and is unaware of the existence of the second mortgage. Grantee completes the purchase. Mortgagor uses the proceeds of the sale to satisfy the first mortgage but does not satisfy the second. Grantee is entitled to be subrogated to the rights of Mortgagee-1 as against Mortgagee-2 and may enforce the first mortgage against Mortgagee-2.
>
> Illustration 21 states that the grantee lacks knowledge of the intervening lien. However, knowledge is not necessarily fatal to the grantee's claim of subrogation, if equity would nonetheless dictate the recognition of subrogation. See the discussion in Comment *e*, infra. Moreover, the grantee's right to subrogation is not lost even if the second mortgage was recorded and the grantee might be held to have had constructive notice of it under the applicable recording act. Although the grantee may have examined the title carelessly or may have made no title examination at all, if the cash price paid by the grantee included the second mortgage balance, subrogation to, rather than extinction of, the first mortgage will result in order to prevent unjust enrichment of the second mortgagee.

Restatement § 7.6 cmt. d. In this example, the Mortgagor is Ms. Tran, Mortgagee-1 is MortgageIt, Mortgagee-2 is Bel Air & Briney, and Grantee is the City of Kent. Thus because the City of Kent paid off MortgageIt's

first-position mortgage and paid Ms. Tran cash sufficient to pay off Bel Air & Briney's second-position lien, the City of Kent is equitably subrogated to the extent it paid off MortgageIt's first-position mortgage and Bel Air & Briney remain in second-position despite the fact that the City of Kent had title insurance.

C. Washington Courts Have Long Applied Equitable Subrogation in the Owner-Purchaser Context

Even before adopting the Restatement approach, the Washington courts have applied equitable subrogation to purchasers and owners of real property. In *Coy v. Raabe*, Coy leased property from McClellan with an option to purchase the property. 69 Wn.2d 346, 419 P.2d 728 (1966). Raabe subsequently purchased the property from McClellan. As part of the purchase, Raabe paid the Internal Revenue Service to have tax liens removed from the property. Raabe was not aware of the lease-option held by Coy. Coy sued to enforce his purchase option. The Washington Supreme Court held that Raabe, the purchaser-owner, was equitably subrogated to the claims of the United States government that he had paid. In turn, the Court allowed Coy to enforce his option, subject to his paying "such sum as shall be necessary to make defendants Raabe whole." *Id.*, 69 Wn.2d at 351. The Court explained that "[w]ere we not to grant subrogation, plaintiff would be unjustly enriched at the expense of the

Raabes, who paid off the encumbrances against the property plaintiff is now obtaining." *Id.*

In *Olson v. Chapman*, 4 Wn.2d 522, 104 P.2d 344 (1940), Olson contracted to purchase an undivided one-third interest in property owned by Martha Reese on December 19, 1913. From 1915 to 1928, Olson, and his estate after he died, paid the full amount of taxes levied on the property. Later, an administrator was appointed for Olson's estate and authorized to commence a lawsuit to recover the share of taxes that should have been paid by the owners of the other two-thirds of the property. The Supreme Court held that a tenant in common who pays taxes on the jointly owned property is entitled, through equitable subrogation, to a lien on the interest held by the property's co-owner.

Thus, application of the doctrine to equitably subrogate the City of Kent, which purchased and owns the property just as the purchaser-owner in *Raabe* and the tenant-in-common in *Olson*, is appropriate.

D. Under the Restatement Approach, the City of Kent is Entitled to the Application of Equitable Subrogation

The parties do not dispute that the City of Kent lacked knowledge of Bel Air & Briney's lien. Tran did not inform the City of Kent of the Bel Air & Briney deed of trust at any time. CP 70, ¶ 21. In fact, City of Kent did not learn of the Bel Air & Briney deed of trust until more than four years after it purchased Parcel C. CP 70, ¶¶ 22-23. Nevertheless,

knowledge is not a factor that Washington courts consider in analyzing the doctrine of equitable subrogation. In *Bank of America, N.A. v. Prestance Corp.*, the Court noted that "[c]reating distinctions between constructive notice and actual knowledge is dangerous; the recording act demands constructive knowledge be tantamount to actual knowledge. Otherwise why should one bother investigating the records before acquiring a new mortgage if his ignorance—no matter how willful—could possibly behoove him?" *Bank of America, N.A. v. Prestance Corp.*, 160 Wn.2d 566, 570 fn. 8, 160 P.3d 17 (2007). *See also* Restatement § 7.6 cmt. d ("knowledge is not necessarily fatal to the grantee's claim of subrogation, if equity would nonetheless dictate the recognition of subrogation").

Thus, the analysis turns on whether there would be a windfall or material prejudice.

1. *Bel Air & Briney Would Receive a Windfall if City of Kent was Not Equitably Subrogated*

When a first lienholder's debt is satisfied, the second lienholder reaps a windfall when it is enabled to move from second-position to first-position without taking any action to warrant such an advancement. *Prestance Corp.*, 160 Wn.2d at 572; *Columbia Community Bank*, 117 Wn.2d at 575. For example, in *Prestance Corp.*, the Court explained that "Bank of America could have assumed Washington Mutual's first-priority mortgage instead of taking a second-priority position. But Bank of

America accepted the risks inherent in its security and does not deserve an unearned windfall simply because Sugihara refinanced." *Id.* Lenders who take a second-position lien often bargain for favorable terms, such as higher interest rates. *Prestance Corp.*, 160 Wn.2d at fn. 4. They do this to offset the risk inherent in a second-position lien: a foreclosure of the first mortgage that erases the junior liens but does not yield any surplus funds to be paid to the second-position lender. *Id.* The *Prestance Corp.* Court explained:

> If the first-priority mortgagee forecloses, then a second-priority mortgagee knows he can recover any surplus remaining only after the first-priority mortgagee has been fully satisfied. Therefore, second-priority mortgages often include terms to help alleviate this risk, such as higher interest rates. It is unfair then to allow a second-priority mortgagee to take a first-priority but still enforce the previously bargained-for terms. He gains the security of a first-priority loan, while keeping the favorable conditions of a second-priority loan.

Id.

Whenever this situation arises, Washington courts find that there would be a windfall that necessitates the application of the doctrine of equitable subrogation. *Columbia Community Bank*, 117 Wn.2d at 571 ("CCB was aware that HNB had a priority security interest in the Newman Park property, so CCB required Sturtevant to use $400,000 of CCB's $1.5 million loan to pay off HNB fully as a condition of CCB loaning

Sturtevant the new money. Through this transaction, essentially a refinance, CCB expected to acquire the first priority security interest in the property."); *Prestance Corp.*, 160 Wn.2d at 572 ("Bank of America could have assumed Washington Mutual's first-priority mortgage instead of taking a second-priority position. But Bank of America accepted the risks inherent in its security and does not deserve an unearned windfall simply because Sugihara refinanced."); *Coy*, 69 Wn.2d 346 (purchaser equitably subrogated to extent paid off federal tax liens on the property); *Olson*, 4 Wn.2d 522 (co-tenant equitably subrogated to extent of paid off property taxes).

Without equitable subrogation in favor of the City of Kent, Bel Air & Briney would be given an unwarranted windfall by its lien being elevated from second-position to first.

First, without equitable subrogation, Bel Air & Briney would receive a windfall because it would advance in priority despite the fact that it negotiated a high interest rate to offset the risk of taking a second-position lien and took no action to warrant an advance in priority. In June 2007, Bel Air & Briney loaned $134,000 in return for a promissory note with an initial interest rate of 12 percent. CP 66, ¶ 2; CP 118, ¶ 4; CP 73. When Bel Air & Briney granted Ms. Tran her first six-month extension, it increased the loan amount by $9,500, a seven percent loan fee, which

equates to an additional 14 percent annual rate of interest on top of the existing 12 percent rate. CP 66, ¶ 3; CP 118, ¶ 7. On the second six-month extension, another $10,000 was added to the loan. CP 66, ¶ 4; CP 118, ¶ 7. This is another seven percent loan fee, which equates to an additional 14 percent annual rate of interest on top of the prior 14 percent plus 12 percent. After Tran defaulted, the interest rate increased to 24 percent. CP 66, ¶ 2. (The interest alone now totals nearly two times Bel Air & Briney's original investment.)

Second, the Restatement, adopted in full by the Washington Supreme Court, provides that where "the cash price paid by the grantee included the second mortgage balance, subrogation to, rather than extinction of, the first mortgage will result in order to prevent unjust enrichment of the second mortgagee." Restatement § 7.6 cmt. d; *Columbia Community Bank*, 117 Wn.2d at 580. At the closing of the sale of Parcel C, Ms. Tran received sufficient cash to pay off the debt owed to Bel Air & Briney. CP 69, ¶¶ 15-16. There is no legal support for Bel Air & Briney's argument that these facts establish that Bel Air & Briney would not have received a windfall.

Subrogating the City of Kent to MortgageIt's security position in the amount the City of Kent paid to satisfy that loan—$196,894.17—

protects the City of Kent's interests while avoiding any inequitable windfall to Bel Air & Briney.

Bel Air & Briney's framing of the issue as whether it would gain an unearned windfall from the purchase is not supported by the case law. Appellant's Brief at p. 24. In fact, this approach completely misses the point of equitable subrogation. It is not that Bel Air & Briney received a windfall from the *purchase* by the City of Kent, it is that it received a windfall from the *payoff of the senior lien*. The Court in *Columbia Community Bank* described how equitable subrogation works as follows:

> In the refinancing context, it is generally not the debtor who would become unjustly enriched by the payment of his or her debt by a third party; rather, it is the junior lienholder. The reason is that, absent subrogation, the third party's payment would bump the number two security interest into the number one position without the junior lienholder having taken any action to warrant such an advancement. [Citation omitted.] We prevent this unjust enrichment by subrogating the party paying off the priority interest to the party who held that interest, to the extent of the former lienholder's interest at the time.

177 Wn.2d at 575.

Bel Air & Briney would be unjustly enriched if it were to suddenly enjoy a first lien position solely because the City of Kent paid off MortgageIt, the first lienholder.

2. *Bel Air & Briney Was Not Materially Prejudiced by the Court's Order Equitably Subrogating the City of Kent*

A junior interest is not materially prejudiced if it is unaffected by the equitable subrogation of a party to the senior interest. *Prestance*

Corp., 160 Wn.2d at 571 ("[e]quitable subrogation should never be allowed if a junior interest is materially prejudiced, but if the junior interests are unaffected, then there is no reason to deny it"); *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 254 P.3d 835 (2011) ("[i]n *Prestance*, the second-position creditor, Bank of America, was not prejudiced because it maintained its second priority position and was thus in no worse position than it would have been in had the refinance lender never made its loan.") A junior interest is unaffected if it remains in the position it bargained for and the terms of the senior interests are not changed to the detriment of the junior interest, such as where the terms of the refinanced loan include higher interest or a longer loan term. *Prestance Corp.*, 160 Wn.2d at 571; *Bank of Am. v. Babu*, 340 S.W.3d 917, 926 (Tex. 2011) ("A junior lienholder does not suffer prejudice merely because it is not elevated in priority.") The determination of whether subrogation prejudices the junior interest is made at the time of the transaction supporting subrogation. *Babu*, 340 S.W.3d at 926 (discussing Texas law which, just as Washington law does, includes prejudice as a factor in the balance of equities). "The consequences of subsequent transactions or events are not relevant to the inquiry." *Id.*

Equitable subrogation of the City of Kent will not cause any prejudice to Bel Air & Briney. It knowingly bargained for a second-

position lien on Parcel C as security for its loan and extracted significant interest and fees from Ms. Tran in doing so. CP 66, ¶¶ 2-4; CP 118, ¶¶ 4-7. It did nothing in reliance on the reconveyance of MortgageIt's mortgage. CP 70, ¶ 24. Reinstating the senior lien through subrogation will simply leave Bel Air & Briney in precisely the same position it held at the closing of the City of Kent's purchase of the property when the City of Kent paid off MortgageIt's mortgage.

E. Washington's Recent Case Law Supports Application of Equitable Subrogation

The recent cases in Washington analyzing equitable subrogation in the context of refinances of loans secured by real property are informative even though the refinance situation is factually distinct from that at issue here. In a refinance case, the party seeking equitable subrogation is the refinancing lender; the party objecting can either be the property owner or a junior lienholder. *Columbia Community Bank*, 117 Wn.2d 566 (property owner-debtor was objecting party). "In the refinancing world, equitable subrogation is considered a tool by which real property lenders, or lienors, may replace the prior, senior lien position of an earlier in time lender by paying off that prior lender's loan." *Id.*, 117 Wn.2d at 574.

In the most recent case, *Columbia Community Bank*, a refinancing lender was equitably subrogated to the first-position lender's interest. *Columbia Community Bank*, 117 Wn.2d at 583. There, Joseph Sturtevant

owned a company with a 39 percent interest in Newman Park, LLC. *Id.*, 117 Wn.2d at 571. With the knowledge and ratification of the other limited liability company members, Sturtevant negotiated a $400,000 loan from Hometown National Bank secured by Newman Park, LLC's property. *Id.* Four years later, Sturtevant negotiated, on behalf of another company with no connection to Newman Park, LLC, a $1,500,000 loan from Columbia Community Bank. *Id.* The loan was secured by a deed of trust on the Newman Park, LLC property despite the fact that Sturtevant did not have authority to encumber it. *Id.* In order to protect its security interest, Columbia Community Bank required that a portion of its loan be used to retire the Hometown National Bank loan, which put Columbia Community Bank's security interest in the Newman Park, LLC property in first-position. *Id.* When the borrower defaulted and Columbia Community Bank attempted to foreclose its deed of trust, Newman Park, LLC objected that it had never authorized the security interest. *Id.*, 117 Wn.2d at 572. It was only when Newman Park, LLC initiated a lawsuit to prevent the foreclosure that Columbia Community Bank learned Sturtevant had misrepresented his authority. *Id.*

The Supreme Court of Washington affirmed the holdings of the trial court and appellate court that Columbia Community Bank held an equitable lien against Newman Park, LLC's property to the extent its loan

proceeds were used to retire the Hometown National Bank loan. *Columbia Community Bank*, 117 Wn.2d at 572-73. The Court reasoned that equitable subrogation was appropriate because Sturtevant presented forged documents to Columbia Community Bank—a scenario expressly contemplated by the Restatement, and no one would be prejudiced. *Id.*, 117 Wn.2d at 582-83.

The Court noted that "[s]ubrogation applies in many contexts, and while the overall purpose of preventing unjust enrichment is the same, many times the requirements will be tailored to the particular nuances of the situation." *Columbia Community Bank*, 117 Wn.2d at fn. 7.

In the second most recent case, *Prestance Corp.*, 160 Wn.2d 560, 160 P.3d 17 (2007), which also arose out of a refinancing, the Washington Supreme Court began adopting the liberal application of equitable subrogation as enunciated in the Restatement. In this case, Wells Fargo Bank refinanced a first-position loan with the expectation that its security interest would be in first-position over other liens. The Supreme Court held "a lender can be equitably subrogated to a first-priority lien despite having actual or constructive knowledge of junior lienholders. *Prestance Corp.*, 160 Wn.2d at 562.

> Equitable subrogation is a broad doctrine and should be followed whenever justice demands it and where there is no material prejudice to [a] junior interest. A liberal approach

> is in line with the doctrine's equitable rationale and is becoming the more accepted rule, in no small part because of the immense benefits it holds for homeowners.

Id., at 581-82.

The factors of an unearned windfall and no material prejudice, which necessitate the application of equitable subrogation in the refinance context, also warrant application of the doctrine in this context.

F. Courts in Other Jurisdictions Apply Equitable Subrogation in Similar Contexts

Cases from those jurisdictions which have also adopted the Restatement approach or use a similar approach are informative. Illustration 21 from the Restatement, discussed above, is based upon *Dixon v. Morgan*, 154 Tenn. 389, 285 S.W. 558 (1926). *See* Restatement § 7.6 cmt. d. Dixon purchased property from Morgan and repaid a first mortgage, unaware that there were junior liens upon the property. Dixon relied on Morgan's representation as to encumbrances and did not conduct a title search. The Tennessee Supreme Court held that Dixon was equitably subrogated to the mortgage he had paid off, notwithstanding that a proper search of the public records would have disclosed the junior liens.

Just as the Washington courts have done, the Second Circuit has applied equitable subrogation in the purchaser context. In *Pipola v. Chicco*, 274 F.2d 909 (2d Cir. 1960), Pipola purchased a property encumbered by a first-position mortgage and a second-position IRS lien.

Pipola obtained a purchase-money loan and used some of the proceeds to pay off the seller's mortgage. *Pipola*, 274 F.2d at 910-11. The Second Circuit held that Pipola, as well as Pipola's lender, was equitably subrogated to the interest of the mortgagee paid off at closing.

> In paying off North New York's mortgage, both Yorkville and plaintiffs conferred a benefit on the government as a result of a mistake of fact, to wit, their ignorance of the government's tax lien. We say that both conferred this benefit, for while Yorkville advanced the monies, plaintiffs became liable to Yorkville for them. To prevent unjust enrichment of the government, equity will preserve for the benefit of Yorkville and plaintiffs the senior encumbrance which they caused to be discharged.

Id. at 915.

The Supreme Court of Arizona has also applied equitable subrogation in the purchaser context. In *SourceCorp, Inc. v. Norcutt*, 229 Ariz. 270, 274 P.3d 1204 (2012), the Norcutts purchased a home subject to a first-position mortgage and, unbeknownst to the Norcutts, a second-position judgment lien. The first-position mortgage was paid off at closing. The judgment creditor attempted to hold a sheriff's sale to foreclose on its judgment lien. The Arizona Supreme Court held that payment of the pre-existing debt to protect the concurrently acquired interest in the property was sufficient to justify applying equitable subrogation. *Id.* at 274, 274 P.3d at 1208. The Court rejected SourceCorp's argument that equitable subrogation applies only if there is

an agreement that a subsequent lender will be substituted for the prior lender.

> Equitable subrogation, however, does not turn on contractual principles, but instead on the concern to prevent unjust enrichment. That goal is served by allowing subrogation when a party pays a mortgage to protect an interest in the property, irrespective of an express or implied agreement that the party will succeed to the position of the prior lienholder.

Id. at 275, 274 P.3d at 1209.

G. The Cases Cited by Bel Air & Briney from Virginia are Not Persuasive

Bel Air & Briney's reliance on two cases from Virginia, *Centreville Car Care, Inc. v. North Am. Mortgage Co.*, 263 Va. 339, 559 S.E.2d 870 (2002) and *Gregory v. Internal Revenue Service*, 2012 WL 5426533 (W.D.Va. 2012), is misplaced: Virginia applies a standard for determining prejudice substantially different from Washington's law of equitable subrogation. *Centreville* is a statement of Virginia law, and *Gregory* just follows *Centreville*.

These two cases make no mention of, much less analyze, the Restatement approach or any similar approach. This is critical because the key concepts underlying *Centreville*'s ruling are inconsistent with the Restatement, which was adopted "in full" by the Washington Supreme Court. *See Columbia Community Bank*, 177 Wn.2d at 583. Because the

Virginia cases do not follow the Restatement approach, they do not reflect Washington law, and, therefore, are not persuasive.

To begin, *Centreville*'s conclusion that the junior lienor was prejudiced because the borrower received sales proceeds is rejected by the Restatement. *Centreville Car Care, Inc.*, 263 Va. at 347. As discussed above, the Restatement expressly approves granting equitable subrogation to the purchaser when a senior lien is paid off and the purchaser receives sufficient funds at closing to pay off the junior lien, but fails to do so. Restatement § 7.6 cmt. d.

Second, *Centreville*'s distinction between a lender and a purchaser is not reflected in the Restatement. *Centreville Car Care, Inc.*, 263 Va. at 346. As discussed above, the Restatement approves granting equitable subrogation to an owner in circumstances such as the present. Restatement § 7.6 cmt. d. Whether negligence is committed by the purchaser or by the purchaser's title insurer makes no difference. (See below for a full discussion of this issue.)

Next, *Centreville* attributes the title-examiner's negligence in failing to discover the encumbrance to the buyer as a reason to deny equitable subrogation. As discussed in more detail below, Washington has adopted a different approach. If *actual* knowledge of a junior lien will not bar equitable subrogation (*see Prestance Corp.*, 160 Wn.2d at 562), then

the negligent failure to discover the junior lien cannot be adequate to prevent the relief. *See also* Restatement § 7.6 cmt. e ("subrogation can be granted even if the payor had actual knowledge of the intervening interest").

Last, *Centreville* concluded that prejudice results because it defeats the junior lienor's expectation to be elevated into first-position. The Restatement emphatically rejects this concept:

> Subrogation to a mortgage is usually of importance only when a subordinate lien or other junior interest exists on the real estate. If no such interest existed, the subrogee could simply sue on the obligation, obtain a judgment lien against the real estate, and execute on it. However, if an interest exists that is subordinate to the mortgage in favor of some other person, such a judgment lien would be inferior to it in priority and might have little or no value. In this setting the subrogee wants more than a lien; he or she wants a lien with the priority of the original mortgage, and this is precisely what subrogation gives. The holders of intervening interests can hardly complain about this result, for they are no worse off than before the senior obligation was discharged. If there were no subrogation, such junior interests would be promoted in priority, giving them an unwarranted and unjust windfall.

Restatement § 7.6 cmt. a (emphasis added). Nor does Washington recognize this as a basis for finding prejudice; to the contrary and consistent with the Restatement, Washington considers the elevation in position to be a windfall to the junior lienor. *Credit Bureau Corp v. Beckstead*, 63 Wn.2d 183, 186-87, 385 P.2d 864 (1963).

Ultimately, the premise that leaving a junior lienor in a junior position constitutes prejudice proves too much. The entire point of equitable subrogation is to prevent a junior lienor from rising in priority. Under *Centreville*'s analysis, leaving the junior lienor in its subordinate position would always be prejudicial. Therefore, equitable subrogation could never be granted because, by definition, it causes prejudice that prevents its application.

H. The Existence of Title Insurance is Not Relevant to the Equitable Subrogation Analysis

The fact that the City of Kent had title insurance has nothing to do with whether it is entitled to equitable subrogation. Bel Air & Briney argue that they have been prejudiced by the actions of the City of Kent's title insurer and that it somehow bars equitable subrogation for the City of Kent. Appellant's Brief at pp. 33-40. First and foremost, the title insurance company is not a party to this case. It would have been unjust and an error of law for the trial court to effectively enter a judgment against a non-party.

In any event, the actions of a non-party title insurer have no bearing on the doctrine of equitable subrogation. The notion that the cause of Bel Air & Briney's loss is the "negligence" of the title insurance company is completely unfounded. First, a title insurance policy is a contract of indemnity. *Courchaine v. Commonwealth Land Title Ins. Co.*, 174 Wn. App. 27, 35, 296 P.3d 913 (2012). As such, it is governed by the

law of contract not tort. The policy provides that, in the event of a claim against an insured's title, it will defend against the claim and, if unsuccessful, indemnify the insured against its loss. CP 91. Under the policy, the title company has the right to attempt to perfect the insured title at its expense. CP 92, ¶5. Further, if it pays a loss, it has subrogation rights to pursue all the claims and defenses of its insured to recover its payment. CP 93, ¶13(a). Thus, the City of Kent's claims and defenses in this case do not simply disappear because it has title insurance. If the company paid the loss, it could assert those same claims against Bel Air & Briney anyway, and it could do so in the name of the City of Kent. *Id.*

Second, the concept of negligence by the title insurance company is also totally inapposite because title commitments are not abstracts of title. Title insurance companies have no general duty to search and disclose potential or known defects in title. *Barstad v. Stewart Title Guar. Co.*, 145 Wn.2d 528, 534-35, 39 P.3d 984 (2002). "A preliminary commitment is a statement submitted to the potential insured establishing the terms and conditions upon which the title insurer is willing to issue a title policy. [Citation omitted.] The statement is merely an offer to issue the title insurance subject to the stated conditions." *Id.* at 536. "[R]eports are not abstracts of title, nor are any of the rights, duties, or responsibilities applicable to the preparation and issuance of an abstract of title applicable to the issuance of any report." RCW 48.29.010(3)(c). "[A] title insurer is not required to except anything from coverage." *Courchaine*, 174 Wn. App. at 35. Accordingly, when the City of Kent's title insurer issued its

preliminary commitment it was not providing a statement as to the condition of title. It was offering the terms of a contract upon which it would insure title. The concept of negligence is completely inapplicable in this context. The fact that the commitment did not contain a coverage exception for the Bel Air & Briney deed of trust (which was not recorded at that time) merely means that the title company undertook, perhaps unwittingly, to insure the City of Kent's title against any potential claim regarding Bel Air & Briney's deed of trust. In this case, the reason it was not in the commitment was because it was not recorded. By the time the policy issued, it was recorded. But, at that point, the title company could not unilaterally add an exception. *Kim v. Lee*, 145 Wn.2d 79, 99, 31 P.2d 665 (2001) (Sanders, J., dissenting). There may be other reasons why a recorded encumbrance might be omitted. For example, a company might choose to insure around an encumbrance because it believes that it is invalid or it might get an indemnity agreement from the seller to do so.

Third, even if the title company could be deemed negligent for omitting an encumbrance from a preliminary commitment or title policy, which is not possible under RCW 48.29.010 and *Barstad*, 145 Wn.2d 528, it would not owe a duty to Bel Air & Briney, which was not a party to the title insurance contract. Bel Air & Briney cites no authority and the City of Kent knows of none that creates a duty from a title insurer or an escrow agent to a third-party lender to insure that its loan gets paid off in a transaction where the title insurer has a contract with the buyer, and the escrow agent has a contract with the buyer and seller. The bottom line is

that there is no evidence in the record of the title company's negligence and, moreover, there is no legal basis for a finding of negligence anyway.

In any event, negligence, even by the party claiming equitable subrogation, is not a bar to the application of the doctrine of equitable subrogation in Washington. In *Prestance Corp.*, the Court held that a party can be equitably subrogated to a first-priority lien, "regardless of either its actual or constructive knowledge of intervening interests." 160 Wn.2d at 582. In so holding, the Court rejected the approach taken by those courts (like Virginia) that deny equitable subrogation on a showing of negligence.

> For practical purposes, this rule swallows the doctrine and is widely criticized. A more recent Alabama Supreme Court case rejected this approach: "If all persons who negligently confer an economic benefit upon another are disqualified from equitable relief because of their negligence, then the law of restitution, which was conceived to prevent unjust enrichment, would be of little or no value."

160 Wn.2d at 568 (quoting *Ex Parte AmSouth Mortgage Co., Inc.*, 679 So.2d 251, 255 (Ala. 1966).)

Finally, the policy reason cited by the Supreme Court favoring a liberal application of the equitable subrogation doctrine, namely that it reduces title insurance premiums, is valid, but was not the basis of the court's order on the cross-motions for summary judgment anyway. CP 225, fn. 2. The court mentioned in a footnote that one reason cited by the Supreme Court for adopting the Restatement's position on equitable subrogation is that "when a jurisdiction adopts the liberal view of equitable subrogation, the insurance premium is greatly reduced. These

savings eventually benefit homeowners because title insurance premiums are mostly passed on to them." CP 225, fn. 2 (quoting *Prestance, Corp.*, 160 Wn.2d at 581.) Bel Air & Briney devotes a significant portion of its brief attempting to debunk this relatively minor point. First, Bel Air & Briney wrongly states that the Court "abandoned this fanciful notion" in *Columbia Community Bank*. Appellant's Brief at p. 36. On the contrary the *Columbia Community Bank* Court quoted this part of *Prestance Corp.* in support of its decision. *Columbia Community Bank*, 117 Wn.2d at 580-81. The fact that it noted that "billions of dollars" in savings "maybe" was "overstated" is hardly a retreat and definitely not an abandonment. *Id.*

Bel Air & Briney then goes on to argue, "[e]ven if it were true, the alleged potential savings to consumers would not be applicable to the facts of this case." Appellant's Brief at p. 37. Bel Air & Briney supports this argument with a lengthy discussion of the law review article cited by the *Prestance Corp.* Court, Grant S. Nelson and Dale A. Whitman, *Adopting Restatement Mortgage Subrogation Principles: Saving Billions of Dollars for Refinancing Homeowners*, 2006 BYU L. Rev. 305. This whole discussion misses the point. The liberal approach to equitable subrogation adopted by the Restatement saves homeowners money in title insurance premiums. It is irrelevant whether the "billions" in savings comes from refinancing or some other application of the doctrine. Washington has adopted the Restatement approach and it is now the law of the state. The fact that it is the law of the state is why the City of Kent is entitled to equitable subrogation in this case. The court cited this part of the

Prestance Corp. decision in this case merely to point out that the Supreme Court adopted the Restatement approach knowing that it would reduce title insurance claims; in fact that was one of the reasons stated in support of its decision. Having said that, it would be a direct contradiction for the courts to adopt a title insurance exception to the equitable subrogation doctrine, as advocated by Bel Air & Briney in this case.

Further, the case of *Kim v. Lee*, which Bel Air & Briney relies upon to support its argument regarding title insurance, has been rendered inapplicable by subsequent decisions. Appellant's Brief at pp. 22-23; *Kim v. Lee,* 145 Wn.2d 79, 31 P.3d 665 (2001). Its denial of equitable subrogation based upon prior knowledge by a title insurer cannot be reconciled with more recent Supreme Court decisions. Compare *Kim,* 145 Wn.2d 79 with *Prestance Corp.*, 160 Wn.2d 560, and *Columbia Community Bank*, 117 Wn.2d 566.

In *Kim*, the Changs purchased a home for their daughter, Ms. Lee, and her husband in December 1995 in Yakima. The loan was made by Sterling Trust Company to the Changs and was secured by the home, which was also in their name. In April 1997, Kim obtained a judgment against the Lees in a King County lawsuit; he recorded the judgment in Yakima county the following month. The Changs quit-claimed a one-half interest in the property to the Lees in December 1997. Finally, the Lees obtained a loan of their own from Pioneer Bank to pay off the Changs, who quit-claimed their remaining interest in the property to the Lees. The Lees executed a promissory note and deed of trust in April 1998, and the

deed of trust was recorded that same month. Pioneer Bank obtained a preliminary commitment from Yakima Title, which did not show Kim's judgment lien, and Yakima Title issued a title policy that also did not have an exception for Kim's judgment lien. Kim eventually sought to collect on the judgment, asserting that his judgment lien was now in first-position because the Sterling Trust deed of trust had been reconveyed. Yakima Title intervened, *acting in its own name*, to prevent Kim from foreclosing. *See Kim,* 145 Wn.2d at 82-85. The Supreme Court ruled that equitable subrogation was potentially applicable in the circumstances, but it could not be invoked by the title company for its own benefit:

> The doctrine of subrogation does not apply to relieve a title insurance company of its contractual obligation because a title insurance company not only receives consideration for rendering an expert opinion, but also for acting as an insurer of its accuracy.

Id. at 92-93.

Two key propositions underlying the decision in *Kim* have since been rejected by the Supreme Court. First, *Kim* held that actual knowledge of the junior lien prevents equitable subrogation by "discount[ing] the purpose of the recording statute." *Id.* at 90-91. In *Prestance Corp.*, the Supreme Court expressly held that equitable subrogation is available "despite having *actual* or constructive knowledge of junior lienholders." *Prestance Corp.*, 160 Wn.2d at 562. Second, *Kim* denied relief to the title company on the premise that issuing a preliminary commitment is tantamount to giving an expert opinion as to the state of

title. *See Kim*, 145 Wn.2d at 92. Just five months later, however, the Washington Supreme Court ruled that "title insurance companies have no general duty to disclose potential or known title defects in preliminary commitments." *Barstad*, 145 Wn.2d at 528. The *Barstad* court also noted that this limitation has been codified by the Legislature several years earlier in RCW 48.29.010(3), that the codification did not substantially alter existing law or practice, and therefore the statute should be applied retroactively. *See id.* at 535-41. Thus, the Supreme Court itself removed much of *Kim*'s theoretical underpinnings.

Furthermore, the funds to pay title insurance claims do not come from some untapped well-spring of money. Title insurance, like other forms of insurance, is a socio-economically established system of spreading risk. The money to pay claims comes from the premiums paid by all of us who purchase insurance. It is a business, often times but not always for profit, that employs thousands of hard-working people who make a living administering this elaborate system of spreading risk. For sure, title insurance companies examine title as part of its process. But this is not because they owe some duty to third parties such as secured lenders like Bel Air & Briney; it is to reduce risk and, thereby, costs and premiums. Policies contain other provisions that contain costs, such as subrogation rights. If a title insurance company pays a claim, it has a contractual right to step into the shoes of the insured and assert all of the insured's rights to recover the payment, including equitable subrogation.

For these reasons, the existence of title insurance is not a proper ground for denying equitable subrogation. The commentators agree:

> Decisions that take the view that subrogation is unnecessary because the refinancing lender's loss will be paid by a title insurance are outrageous. Such decisions have the long-run effect of raising title insurance costs in order to give unwarranted windfalls to a few intervening lienholders.

2 Grant S. Nelson & Dale A. Whitman, *Real Estate Finance Law*, Ch. 10, § 10.6, p. 27 (5th ed. 2007).

VI. CONCLUSION

The trial court correctly applied the doctrine of equitable subrogation. Bel Air & Briney raises no new cases and identifies no new cases or theories that indicate that the trial court erred. Bel Air & Briney would reap an unearned windfall if it was elevated to first-position solely because the City of Kent paid off MortgageIt. Had the City of Kent not paid off MortgageIt, it would still be the senior lien on the property and Bel Air & Briney would get nothing from a foreclosure. Equitable subrogation does not prejudice Bel Air & Briney. Rather, it preserves the status quo ante and prevents a windfall to Bel Air & Briney at the City of Kent's expense. The fact that the City of Kent has title insurance is completely irrelevant. The City of Kent's title insurer owes no contractual or tort duty to Bel Air & Briney to pay off its lien now or earlier, when the sale closed. As a matter of law, the title insurer was not negligent in issuing its preliminary commitment for title insurance or title insurance policy and there are no facts in the record to establish negligence anyway.

Respectfully submitted this 16th day of July, 2014

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VII. CERTIFICATE OF SERVICE

I certify that on the 16th day of July, 2014, I caused a true and correct copy of this Brief of Respondent to be served on the following in the manner indicated below:

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