

NO. 41470-8-II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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COLUMBIA COMMUNITY BANK,

Respondent and Cross Appellant

v.

NEWMAN PARK, LLC,

Appellant and Cross Respondent

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NEWMAN PARK, LLC,

Appellant and Cross Respondent,

v.

COLUMBIA COMMUNITY BANK,

Respondent and Cross Appellant.

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APPEAL FROM THE SUPERIOR COURT

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HONORABLE PAULA CASEY

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BRIEF RESPONDING TO CROSS APPEAL  
AND REPLY BRIEF

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## INTRODUCTION

In this Brief, Newman Park, LLC (Newman Park) will begin by responding to the arguments that Columbia Community Bank (CCB) made in support of its cross-appeal. It will then reply CCB's response to Newman Park's appeal.

Newman Park has already given an extensive factual statement in its opening brief. It will incorporate any necessary factual issues and citations to the record in the course of its discussion here.

## RESPONSE TO CCB'S CROSS-APPEAL

### I. Introduction.

Joseph Sturtevant, in his capacity as president and secretary of Landmark Development Ventures, Inc. (Landmark), executed a Deed of Trust on Newman Park's property as security for a loan that CCB made to Trinity Development-Northwest, LLC (Trinity). The trial court properly granted summary judgment holding that Landmark lacked actual and apparent authority to execute the Deed of Trust. The trial court also properly granted summary judgment to the effect that the doctrine of comparative innocence could not validate the Deed of Trust.

II. Response to Assignments of Error and Issues Presented.

CCB's Assignment of Error No. 3 is the sole assignment of error related to its cross appeal. It reads:

Assignment of Error No. 3: The trial court erred in granting Newman Park's Motion for Partial Summary Judgment and in entering judgment invalidating the CCB Deed of Trust.

Newman Park submits that the following are the issues germane to this

Assignment of Error:

1. Can Landmark be considered an agent of Newman Park when Newman Park's Certificate of Authority vests management in one or more managers and Newman Park's Operating Agreement does not identify Landmark as a manager?
2. Did Landmark have actual authority to execute the Deed of Trust?
3. Did Landmark have apparent authority to execute the Deed of Trust?
4. Can the doctrine of comparative innocence serve to validate the Deed of Trust?
5. Is CCB entitled to an award of attorney's fees?

III. Standard of Review.

An appellate court reviews an order granting summary judgment *de novo* engaging in the same inquiry as did the trial court. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In determining

whether there is a genuine issue of material fact, the Court must view all facts and inferences from those facts in the light most favorable to the nonmoving party. However, when reasonable people can reach only one conclusion on the basis of the facts presented, summary judgment is appropriate. *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 604-605, 238 P.3d 1129 (2010); *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn.App. 649, 240 P.3d 162 (2010); *Humleker v. Gallagher Bassett Services, Inc.*, 159 Wn.App. 667, 674, 246 P.3d 249 (2011).

The issues presented by CCB's cross appeal will depend entirely on the construction of documents. A review of these documents can lead to only one conclusion. Therefore, summary judgment on their interpretation is proper. *Tanner Electric Cooperative v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996); *Save Columbia CU Committee v. Columbia Credit Union*, 134 Wn.App. 175, 181, 139 P.3d 386 (2006).

In summary, reasonable persons could reach only one conclusion based on the facts presented. These facts demonstrate that the Court properly granted Newman Park's motion for summary judgment to invalidate the Deed of Trust.

IV. Argument.

a. CCB Prepared the Loan Documents.

Two of the documents that are critical in the analysis of the validity of the Deed of Trust are the Deed of Trust itself and the “Limited Liability Company Resolution to Borrow/Grant Collateral.” CCB prepared these documents. (CP 261-262; CP 325-350-particularly, CP 349-350; CP 351-360) For our purposes, the terms of these documents are not ambiguous. They must therefore be given their plain and ordinary meaning. *Honeywell, Inc. v. Babcock*, 68 Wn.2d 239, 243, 412 P.2d 511 (1966); *Mattingly v. Palmer Ridge Homes, LLC*, 157 Wn.App. 376, 394, 238 P.3d 505 (2010). CCB could have chosen to formulate the loan documents differently, and a different formulation may have had a different result. It is bound by the documents that exist. It is in no position to complain when it prepared the documents.

b. The Existence of Other Projects Has No Relevance.

Material submitted in support of or in opposition to a summary judgment motion must be admissible. CR 56(e). CCB has pointed out that some of Newman Park’s Individual Members were involved with other projects with Mr. Sturtevant. Parenthetically, there is no other project in which each of Newman Park’s members participated. Information concerning projects other than Newman Park and

participation of the Individual Members in those projects is not admissible and therefore should not be considered.

Evidence of other actions cannot be submitted to show a trait of character for the purpose of proving acts in conformity therewith on a particular occasion. ER 404. It would appear that CCB is attempting to offer evidence of participation in other projects for this precise purpose — to show that the Individual Members routinely relied on Mr. Sturtevant to manage projects in which they were involved. The evidence is not admissible under ER 404 for that reason and should not be considered.

The evidence could conceivably be admissible to show a routine practice of an organization. ER 406. In this case, the organization in question would have to be Newman Park and not some other entity or project. Since the evidence shows nothing about Newman Park's actions or activities, they are not admissible under ER 406.

Finally, the documents prove nothing. In this case, Mr. Sturtevant obtained a loan for Trinity, a company in which no Individual Member had any interest, by pledging Newman Park's property and increasing the debt that property secured from approximately \$400,000.00 to \$1,040,000.00. CCB has produced no evidence of any Individual Member consenting to such mischief by Mr. Sturtevant in any transaction related to any other project.

c. Landmark Was Not an Agent of Newman Park.

The Deed of Trust in question was executed by Landmark. Mr. Sturtevant signed as president and secretary of that corporation. As a matter of law, Landmark was not an agent of Newman Park and therefore could not execute the Deed of Trust.

A limited liability company can only act through its agents. When the Certificate of Formation of a limited liability company states that the company is to be managed by managers, no member, acting solely in the capacity as a member is an agent of the limited liability company. As RCW 25.15.150(3) states:

If the certificate of formation vests management of the limited liability company in a manager or managers, no member, acting solely in the capacity as a member, is an agent of the limited liability company.

In that circumstance, the manager acts as the company's agent in accordance with the authority given by the company's Operating Agreement. RCW 25.15.150(2).

Newman Park's Certificate of Formation indicates that the company's management will be vested in one or more managers. (CP 539) Its Operating Agreement mentions Landmark as a member and nothing else. Since the Certificate of Formation vests Newman Park's management in one or more managers, and since Landmark is a member

— but not a manager — of Newman Park according to the company’s Operating Agreement, Landmark cannot be considered an agent of Newman Park as a matter of law. Since it is not an agent of Newman Park, it certainly was without authority to execute the Deed of Trust. That document is therefore invalid.

CCB appears to contend that Landmark could be considered to be Newman Park’s manager. It is not referred to in that way in the company’s Operating Agreement or in any document submitted to the Secretary of State. The Operating Agreement refers to Mr. Sturtevant “manager” in Paragraph 8.2 and “managing member” in Paragraph 1.6. He is referred to as both “manager” and “managing member” in Paragraph 10.1. (CP 471, 475) Mr. Sturtevant is referred to as “manager” in annual statements made to the Secretary of State except for one place where he refers to himself as “managing member.” (CP 128-35) By contrast, the Operating Agreement refers to Landmark only as a member and not as a manager. There is simply no evidentiary support for the proposition that Landmark may have been a manager of Newman Park.

CCB points out that when Newman Park purchased the property at issue, Mr. Sturtevant signed loan documents that described Landmark as Newman Park’s manager or “managing member.” Brief of Respondent/ Cross Appellant, pps. 39-40 That fact merely goes to show

that the entity that prepared the documents—the lender, Hometown National Bank—believed that Landmark was Newman Park’s manager. The ratification of the transaction by Newman Park’s members only shows that they were willing to allow transactions that they knew about and that were in the company’s interest—such as a loan for the purchase of company property—regardless of the status of the person signing the agreement. It does nothing to show that Landmark was in fact Newman Park’s manager.

CCB then goes on to state that Mr. Sturtevant was acting in his capacity as Newman Park’s manager when he executed the Deed of Trust. The signing designation on the Deed of Trust is clear and unambiguous and refutes that assertion. It reads:

Newman Park, LLC

Landmark Development Ventures, Inc., Member  
of Newman Park, LLC, by:

---

Joseph Sturtevant, President and Secretary of  
Landmark Development Ventures, Inc.

This can only be read one way—Mr. Sturtevant was executing the document only as president and secretary of Landmark and not in any other capacity.

CCB cannot contend that Mr. Sturtevant's signature was meant to be in his capacity as manager because such an argument would contradict the terms of the Deed of Trust in violation of the parol evidence rule. This rule precludes the admission of evidence that would contradict or vary the terms of any written document or instrument. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999). This rule applies to instruments affecting real property and prohibits contradicting the terms of such agreements by parol. *City of Seattle v. Nazarenes*, 60 Wn.2d 657, 374 P.2d 1014 (1962) — concerning easements; *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d 873, 73 P.3d 369 (2003) — concerning easements; *Hollis v. Garwall, Inc.*, *supra*, — concerning restrictive covenants. The parol evidence rule also applies to issues related to the capacity of the person signing the document. *Farmers State Bank of Newport v. Lamon*, 132 Wash. 369, 231 P. 952 (1925) — defendant was not allowed to introduce parol evidence to show that a corporation was solely liable on a promissory note when he executed the note without any reference to his being a corporate officer.

In support of its position, CCB has chosen to cite the Court's unpublished opinion in *Valley/50<sup>th</sup> Avenue, LLC v. Stewart*, 128 Wn.App. 1014 (2005). The reference to that decision should be stricken because unpublished citation should not be cited. GR 14.1(a). This Court

has previously admonished parties against citing unpublished opinions. *Johnson v. Allstate Insurance Co.*, 126 Wn.App. 510, 519-20, 108 P.3d 1273 (2005).

There is no genuine issue of material fact on the controlling question presented here. The Deed of Trust was executed by Landmark. Landmark was a member of Newman Park but not its manager. Newman Park's Certificate of Formation vests management of the company in one or more managers. Therefore, Landmark cannot be an agent of Newman Park. Since the Deed of Trust was executed by someone other than an agent of Newman Park, it is invalid. The trial court's court decision finding a lack of agency on the part of Landmark to execute the Deed of Trust was unquestionably proper.

d. Landmark Lacked Actual Authority.

Even if Landmark could be considered an agent of Newman Park for the purposes of execution of the Deed of Trust, it lacked actual authority to sign the document.

Actual authority refers to the objective manifestations of authority given to an agent by the principal. *Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wn.App. 355, 818 P.2d 1127 (1991). The only objective manifestations of authority that anyone has discussed are contained in Newman Park's Operating Agreement. The terms of the Operating

Agreement — altered or otherwise — clearly demonstrate that Landmark had no actual authority to pledge Newman Park's property to secure CCB's loan to Trinity. The Agreement states in Paragraph 2.2:

The members shall not cause the Company to do any of the following without the consent of Members holding an eighty percent interest:

(1) Mortgage, pledge, or grant a security interest (collectively the "pledge") in any Company property to the extent that the secured indebtedness from such pledge would exceed \$50,000.00 in the aggregate.

(CP 475) Landmark held a thirty-nine percent membership interest in Newman Park. The other members (Individual Members) owned the balance, or sixty-one percent. (CP 471-2) None of the Individual Members consented to this transaction. None of them knew about it until June of 2009 when the loan to Trinity was already in default. (CP 467-597-616) In short, members holding eighty percent of the membership interest did not consent to the pledge of Newman Park's property to secure the loan to Trinity. Therefore, Landmark lacked actual authority to execute the Deed of Trust.

CCB's argument to the contrary appears to be based on its incorrect contention that Landmark can be considered Newman Park's manager despite the absence of any support for that proposition in the Operating Agreement. Even if Landmark could be considered a manager,

it was also one of Newman Park's members. The Operating Agreement prohibited it from pledging Newman Park's property without the consent of members holding an eighty percent membership interest. Apparently, CCB is arguing that Landmark, as manager, could do something that Landmark, as Member, could not do. That, of course, is an absurd result that is clearly unreasonable. As such, it is an interpretation of Newman Park's operating agreement that cannot be adopted. *Patterson v. Bixby*, 58 Wn.2d 454, 458, 364 P.2d 10 (1961); *McIntyre v. Fort Vancouver Plywood Co. Inc.*, 24 Wn.App. 120, 124, 600 P.2d 619 (1979); *Forest Marketing Enterprises, Inc. v. State, Department of Natural Resources*, 125 Wn.App. 126, 132, 104 P.3d 40 (2005).

Reasonable minds can reach only one conclusion here if Landmark lacked actual authority to execute the Deed of Trust. The trial court's conclusion to that effect was entirely proper.

e. Mr. Sturtevant Lacked Actual Authority.

Despite the clear language of the Deed of Trust, CCB contends that Mr. Sturtevant in his capacity as Newman Park's manager executed the Deed of Trust. Even if that is so, Mr. Sturtevant lacked actual authority to do so.

Mr. Sturtevant was Newman Park's manager as the Operating Agreement states in Paragraphs 8.2 and 10.1. His authority as

manager was constrained, however, by the following language in Paragraph 8.2:

Joseph Sturtevant shall perform all managerial acts with utmost good faith, disclosure, and fair dealing.

(CP 475) The Operating Agreement, like any other contract must be construed as a whole. *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 510 P.2d 221 (1973); *Salvo v. Thatcher*, 128 Wn.App. 579, 587, 116 P.3d 1019 (2005). Any managerial power that Mr. Sturtevant possessed as manager was limited by the language of Paragraph 8.2. If he acted as manager in pledging Newman Park's property to secure a loan by CCB to Trinity—an entity in which no Individual Member had any interest—he breached Paragraph 8.2 by not disclosing what he was doing to the Individual Members and acting for the benefit of another entity, Trinity. No reasonable person could come to any other conclusion. That means he lacked the authority to execute the Deed of Trust.

As manager, Mr. Sturtevant owed a fiduciary responsibility to Newman Park under the terms of RCW 25.15. *Dragt v. Dragt/Detray, LLC*, 139 Wn.App. 560, 574, 161 P.3d 473 (2007) The language of Newman Park's Operating Agreement must be interpreted in light of that principle because the existing law is part of and must be read into every contract. *Tanner Electric Cooperative v. Puget Sound Power & Light Co.*,

*supra*; *Cornish College of the Arts v. 1000 Virginia, Ltd. Partnership*, 158 Wn.App. 203, 223, 242 P.3d 1 (2010). The Operating Agreement must be given a reasonable construction as opposed to one that would lead to absurd results. *Byrne v. Ackerlund*, 108 Wn.2d 445, 739 P.2d 1138 (1987); *Forest Marketing Enterprises, Inc. v. State, Department of Natural Resources, supra*. Allowing Mr. Sturtevant to execute a Deed of Trust that pledged Newman Park's property to secure a loan to Trinity obviously breaches that fiduciary duty. That is the only conclusion that any reasonable person could reach. For this reason as well, the Operating Agreement simply cannot be interpreted to authorize Mr. Sturtevant, as manager, to execute the Deed of Trust.

Interpreting the Operating Agreement to sanction Mr. Sturtevant's execution of the Deed of Trust would violate a number of principles concerning an agent's duty to his principal. An agent is authorized to do only that which is reasonable for him to infer that the principal desires him to do given the facts as he knows them. Restatement (Second) *Agency* §33. General expressions of agency are limited in application to acts done in connection with the business to which the authority primarily relates. Restatement (Second) *Agency* §37(1). Finally, and most importantly, an agent's authority is limited to that which benefits the principal. Restatement (Second) *Agency* §39. There is nothing in the

Operating Agreement that allows it to be interpreted contrary to these rules and to allow Mr. Sturtevant to pledge Newman Park's real property for a loan to Trinity.

Once again, reasonable minds could reach only one conclusion here. Mr. Sturtevant did not have actual authority to execute the Deed of Trust.

f. Apparent Authority Is Absent.

i. Introduction.

The trial court concluded that Landmark lacked apparent authority to execute the Deed of Trust. This conclusion was correct.

Apparent authority requires proof of (1) an objective manifestation of authority from the principal to the third person as opposed to actions or statements from the agent relating to his or her authority; (2) evidence that the principal had knowledge of the act that was being committed by the agent; (3) evidence of reliance — that the person claiming apparent authority actually believed that the agent had authority to act for the principal; and (4) the reliance must be justifiable. *King v. Riveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994); *State v. French*, 88 Wn.App. 586, 595-96, 945 P.2d 752 (1997). As will be discussed below, these elements are absent.

ii. Landmark Was Not an Agent.

As noted above, Landmark was not an agent of Newman Park as a matter of law. Therefore, CCB can also not rely on apparent authority.

iii. Newman Park Made No Manifestation.

The only possible objective manifestation from Newman Park would be its Operating Agreement. The version of Newman Park's Operating Agreement that CCB received cannot be deemed a manifestation by Newman Park because it was altered to eliminate reference to the Individual Members.

This point is critical. If CCB had known that Newman Park had other Individual Members holding a sixty-one percent interest in the company, it would not have made the loan. (CP 270)

CCB appears to suggest that since Newman Park's true Operating Agreement — the one that CCB never saw — refers Mr. Sturtevant as manager that the company had placed Mr. Sturtevant in such a position of authority as to vest him with apparent authority. That argument fails for one simple reason — the Deed of Trust was executed by Landmark as a member, not by Mr. Sturtevant as a manager.

CCB cannot pick and choose among the provisions of the Operating Agreement. It is well established that a contract must be

viewed as a whole and in a way that effectuates all of its provisions. *Colorado Structures, Inc. v. Insurance Company of the West*, 161 Wn.2d 577, 588, 167 P.3d 1125 (2007); *Salvo v. Thatcher, supra*. Therefore, only the entirety of the Agreement can be said to convey the principal's true intent. That intent here was to demonstrate the existence of eleven Individual Members as well as Landmark. The absence of that language from the document provided to CCB precludes it from serving as any objective manifestation.

In the final analysis, the only alleged objective manifestation is an altered version of Newman Park's Operating Agreement. CCB acknowledges that if it had seen the true and correct Operating Agreement — the one listing the Individual Members — it would not have made the loan to Trinity. Because the version supplied to CCB was altered, it cannot amount to Newman Park's objective manifestation.

CCB suggests that the Deed of Trust from the loan to Hometown National Bank was a manifestation that Landmark was a member. There is no showing that Newman Park prepared this document, however. It was likely prepared by Hometown National Bank. Something not prepared by Newman Park cannot amount to its manifestation.

iv. The Individual Members Had No Knowledge of the Proposed Transaction.

It is undisputed that no Newman Park member other than Landmark and Mr. Sturtevant as “manager” or “managing member” knew of the transaction before the Deed of Trust was executed. For this reason alone, apparent authority is absent.

CCB may claim that knowledge existed because Mr. Sturtevant, Newman Park’s manager, knew what he was doing and the knowledge of an agent is imputed to the principal. That rule does not apply, however, when the agent is acting adversely to the principal. Restatement (Second) *Agency* §§ 280, 282. Mr. Sturtevant was clearly acting adversely to Newman Park by using its property to secure a loan to Trinity, another entity. And that loan would increase the debt load on Newman Park’s property from approximately \$400,000.00 to \$1,040.00. Therefore, Mr. Sturtevant’s knowledge cannot be attributed to Newman Park.

v. CCB Did Not Rely on Any Manifestation.

1. CCB Agreed to Make the Loan Before It Received the Altered Version of Newman Park’s Operating Agreement.

As indicated, the only possible manifestation of authority that came from the principal, Newman Park, was the altered version of its Operating Agreement. CCB did not rely on it to make the

loan. It had already committed to make the loan before it even received the altered Operating Agreement.

CCB agreed to make the loan to Trinity in early February of 2008. It sent a commitment letter to Mr. Sturtevant. Mr. Sturtevant then signed and returned it on February 11, 2008. At that point in time, Bradley Volchok, CCB's loan officer, believed that CCB was required to make the loan to Trinity if the contingencies in the commitment letter were satisfied. (CP 256-257; CP 295-300) Importantly, the commitment letter did not condition the making of the loan on CCB obtaining and reviewing a copy of Newman Park's Operating Agreement. In point of fact, CCB did not receive the Operating Agreement until February 22, 2008, after it had already agreed to make the loan. (CP 258, 303-314) In short, CCB believed that it had already committed to make the loan before it obtained the Operating Agreement. Reasonable people could reach only one conclusion based on these facts—CCB did not rely on anything in the Operating Agreement to make the loan to Trinity and accept Newman Park's property as security.

2. CCB Did Not Rely on Any Supposed Authority Possessed by Landmark.

Mr. Volchok, made the following statement in his declaration:

Based upon the documents presented by Sturtevant and his representations, CCB, through me and the loan documentation support team, actually and subjectively, believed that Sturtevant was the Managing Member of Newman Park, LLC and that he had authority to grant the Deed of Trust to secure the loan to Trinity.

(CP 848) This is the only evidence of actual reliance that CCB has given. It is not helpful to CCB because Landmark — not Mr. Sturtevant — executed the Deed of Trust. In other words, the person who Mr. Volchok believed had authority to execute the Deed of Trust was Mr. Sturtevant in his capacity as Newman Park's manager or managing member. But Mr. Sturtevant did not execute the deed of trust in that capacity. He did so a president and secretary of Landmark.

CCB has also argued that the Deed of Trust executed for the Hometown National Bank loan amounted to a manifestation from Newman Park. There is no evidence that anyone at CCB relied on it to make the loan or to have Landmark execute the Deed of Trust. Mr. Volchok could not even remember seeing any documents from Hometown National Bank prior to 2009. (CP 249)

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3. CCB Required a Statement of Actual Authority.

CCB required the execution of the document entitled "Limited Liability Company Resolution to Borrow/Grant Collateral" in connection with the loan. The document was executed in the following way:

Landmark Development Ventures,  
Inc., Member of Newman Park, LLC,  
by:

---

Joseph Sturtevant, President and  
Secretary of Landmark Development  
Ventures, Inc.

The document stated in pertinent part:

**RESOLUTIONS ADOPTED** At a meeting of the Company, duly called and held on February 28, 2008, at which a quorum was present and voting, or by other duly authorized action in lieu of a meeting, the resolutions set forth in this Resolution were adopted.

**ACTIONS AUTHORIZED** The authorized entity listed above may enter into any agreements of any nature with Lender (defined as CCB), and those agreements will bind the Company (defined as Newman Park). Specifically, without limitation, the authorized entity is authorized, empowered, and directed to do the

following for and on behalf of the Company:

**Grant Security** To mortgage, pledge, . . . and deliver to Lender any property now or hereafter belonging to the Company or in which the Company now or hereafter may have an interest, including without limitation all of the Company's real property. . . as security for the payment of any loans, any promissory notes, and any other or further indebtedness of Trinity Development-Northwest, LLC, to Lender at any time owing, however the same may be evidenced. . .

**Execute Security Documents** To execute and deliver to Lender the forms of mortgage, deed of trust, pledge agreement. . . and other security agreements. . . which Lender may require and which shall evidence the terms and conditions under and pursuant to which such liens and encumbrances, or any of them, are given. . .

(CP 499) Reasonable minds could reach only one conclusion based on the execution of this document — that CCB did not rely on any apparent authority that anyone possessed. Rather, it sought a document indicating that Landmark—as member of Newman Park and not as a manger—had

actual authority to pledge Newman Park's real property for the loan to Trinity.

When a lender requires the execution of a document such as the Limited Liability Company Resolution to Borrow/Grant Collateral, apparent authority is absent. In *National Bank of Bossier City v. Nations*, 465 So.2d 929 (La.App. 1985), the Bank loaned money to Reed Nations and took security in the form of a mortgage on property owned by Columbia Pulp Co., Inc. a corporation of which Mr. Nations was president and majority stockholder. In the same way that CCB asked for the execution of the Limited Liability Company Resolution to Borrow/Grant Collateral, the Bank asked for a corporate resolution from Columbia Pulp Co., Inc. authorizing the mortgage. Mr. Nations forged the signature of the corporation's secretary on the resolution. The Bank contended that Mr. Nations had apparent authority to pledge the company's property because he was the corporation's president. The Court found such a conclusion to be "legally erroneous." 465 So.2d at 933. It held that the Bank had not relied on any apparent authority because it sought a statement of actual authority. The Court stated:

In our opinion, the concept of apparent authority does not apply to this case. The record is completely devoid of evidence to suggest that (the Bank) relied on any of (Mr. Nation's) indicia

of authority. In fact, the evidence that (the Bank) sought actual authority through a corporate resolution is not just clear, but blinding. . . Where, as here, the third person demands actual authority, and refuses to execute the instruments of indebtedness and security until he receives such authority, it strains the credibility to argue reliance on apparent authority.

465 So.2d at 933-934. The Court came to the same conclusion on similar facts in *Marsh Investment Corp. v. Langford*, 490 F.Supp. 1320 (D.C. La. 1980).

CCB claims that this holding is limited because of certain aspects of Louisiana corporate law. However, the Court's holding was not based on the matters that CCB cites. Rather, it had to do with simple and basic principles of the laws of agency in general and apparent authority in particular.

There can be no doubt here. CCB's requirement that the Limited Liability Company Resolution to Borrow/Grant Collateral be executed eliminates the element of reliance in any claim that either Mr. Sturtevant or Landmark had sufficient apparent authority to validate the execution of the Deed of Trust.

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4. Any Reliance by CCB Was Not Reasonable.

When facts exist that would put a reasonably prudent person on notice that an agent might lack authority, that person's reliance on any apparent authority is absent. *State v. French, supra*, 88 Wn.App. at 595-596. CCB was presented with a number of "red flags" that should have caused it to question Mr. Sturtevant's authority.

First of all, the altered Operating Agreement that Mr. Sturtevant provided contained Paragraph 2.2, which precluded encumbering company property in excess of \$50,000.00 without the consent of members holding an 80% membership interest. It also provided that Landmark was the sole member of Newman Park. The juxtaposition of these provisions should have alerted CCB that Landmark was not Newman Park's sole member. There would be no reason for the requirement of a super majority of Newman Park's membership to approve any encumbering of the property if the company had only one member. And, as Mr. Volchok has indicated, CCB would not have made the loan if it knew of the Individual Members. (CP 270)

For reasons that are hardly clear, CCB did not obtain tax returns for Newman Park. Had it done so, it would have learned of Newman Park's Individual Members as each received Form K-1. (CP 556-79)

Finally, the very nature of the transaction was so unusual so as to call for more vigilance on CCB's part. An agent's authority does not include the ability to make unusual or extraordinary contracts or to pledge or to sell the company's business. Restatement (Second) *Agency* §73(b). A lender must be cautious when property of one entity is being used to secure a debt incurred by another. As the Court stated in *Marsh Investment Corp. v. Langford, supra*:

. . . The resolution in this case purported to allow Langford to mortgage the property of the corporation to secure his personal indebtedness. The Bank should have been all the more cautious when faced with the prospect of using corporate property to secure a personal debt, especially the personal debt of a stranger to the corporation.

490 F.Supp. at 1325. There can be no doubt that any reliance shown by CCB was not reasonable.

5. Conclusion.

Reasonable minds could only conclude that apparent authority was absent. There is no objective manifestation from Newman Park. Newman Park's Individual Members knew nothing of the transaction. CCB cannot be said to have relied on Landmark's authority to execute the Deed of Trust. Finally, any reliance was not justifiable.

g. The Doctrine of Comparative Innocence Will Not Validate the Deed of Trust.

The trial court concluded that the doctrine of comparative innocence did not apply as a matter of law. Its conclusion was proper and should be affirmed.

The doctrine of comparative innocence provides that where one of two equally innocent persons must suffer, that one whose act or neglect made the fraudulent act possible must bear the loss occasioned thereby. Before the doctrine can apply, however, the Court must find some voluntary act or neglect on the party to be estopped by the doctrine. *Stohr v. Randle*, 81 Wn.2d 881, 882, 505 P.2d 1281 (1973).

The doctrine is inapplicable to charge a purported principal with acts of an agent when no agency is found to exist. *Bergin v. Thomas*, 30 Wn.App. 967, 638 P.2d 621 (1981). In that case, Mr. and Mrs. Thomas sold their clothing store to their son. He defaulted on certain obligations to vendors, and the assignee of one of those vendors sued both the son and the parents for the amounts owed. The assignee claimed that the son was agent for the parents and invoked the doctrine of comparative innocence. The Court concluded that the son was not the parents' agent. On that basis, it noted that the doctrine of comparative innocence had no further applicability. 30 Wn.App. at 972.

The Deed of Trust in this case was executed by Landmark. As a matter of law, and based on RCW 25.15.150(3), it was not an agent of Newman Park. It also lacked actual and apparent authority to enter the transaction. Therefore, the doctrine of comparative innocence does not apply.

The doctrine of comparative innocence requires the demonstration of some act or neglect on the part of Newman Park. CCB can point to none. The trial court concluded that Newman Park had done everything it could to restrain the acts of Landmark by placing Paragraph 2.2 — the provision that required approval of 80% of membership interest to authorize encumbering company property—into the Operating Agreement. (RP 80-81)

CCB does not appear to contest this assertion. Rather, it contends that Newman Park did not properly rein in Mr. Sturtevant, not Landmark. This argument must fail because Landmark as member — not Mr. Sturtevant as manager — executed the Deed of Trust.

Finally, the doctrine of comparative innocence is not available to a party whose own acts occasioned the loss. *Bergin v. Thomas, supra*, 30 Wn.App. at 972. As noted above, the presence of Paragraph 2.2 in the altered Operating Agreement Mr. Sturtevant provided put CCB on notice that Newman Park might have other members who

might well not have consented to the transaction. Secondly, and inexplicably, CCB failed to request Newman Park's tax returns. The latter would have shown that Newman Park had other members — the Individual Members. And, CCB has conceded that it would not have made the loan had it known of the existence of the Individual Members.

The doctrine of comparative innocence is an equitable doctrine. Therefore the person asserting the doctrine must show the absence of an adequate remedy at law. *Sorenson v. Pyeatt*, 158 Wn.2d 523, 146 P.3d 1172 (2006). CCB has an adequate remedy at law here — suit against Trinity for the amounts due under the promissory note executed on its behalf.

Each of these reasons taken by itself shows that the doctrine of comparative innocence cannot be used to validate the Deed of Trust. Together, the conclusion is inescapable. The trial court correctly determined that the doctrine of comparative innocence cannot serve to validate the Deed of Trust.

h. CCB's Attorneys' Fees.

CCB claims that it is entitled to an award of attorneys' fees. Its claim is necessarily dependent on it prevailing on the issues raised in its appeal. Since it cannot prevail, it is not entitled to an award of attorneys' fees either before the trial court or on appeal.

i. Conclusion.

The trial court properly granted summary judgment invalidating the Deed of Trust. On the facts presented, reasonable minds could only conclude that there was no actual or apparent authority by either Landmark or Mr. Sturtevant to execute the document. Furthermore, the doctrine of comparative innocence could not operate to rescue CCB. This ruling by the trial court must be affirmed.

REPLY ON NEWMAN PARK'S APPEAL

I. Introduction.

The trial court's judgment in CCB's favor was improper on the basis of unjust enrichment and equitable subrogation because CCB was a volunteer and because no alleged enrichment of Newman Park by CCB was unjust. Furthermore, CCB is not entitled to relief based on the doctrine of equitable subrogation because this case does not present an issue of priority between competing creditors. CCB's arguments plainly ignore these simple concepts and must be rejected.

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II. CCB Is Not Entitled to Relief under the Doctrine of Equitable Subrogation.

a. Introduction.

CCB's argument on the doctrine of equitable subrogation must be rejected because of two fundamental flaws. First of all, the doctrine of equitable subrogation does not apply here. Secondly, the Court's opinion in *Bank of America, N.A. v. Prestance Corporation*, 160 Wn.2d 560, 160 P.3d 17 (2007), cannot be interpreted to do away with the requirement that a party claiming the benefits of equitable subrogation cannot be a volunteer.

b. The Doctrine of Equitable Subrogation Applies Only to Disputes Over Priority.

As pointed out at Brief of Appellant, pps. 27-28, the doctrine of equitable estoppels does not apply here since this is not a dispute over priority. CCB has not come to terms with that simple concept.

In *Bank of America, N.A. v. Prestance Corporation, supra*, the Court adopted the requirements for equitable subrogation as stated in Restatement (Third) *Property* §7.6. That portion of the Restatement is contained in Chapter 7 of Restatement (Third) *Property: Mortgages*, which is entitled "priorities." The introductory note to that Chapter states:

Chapter 7 consists of 8 sections dealing with common and sometimes troublesome mortgage priority issues and related concerns.

Notions of priority deal with the respective rights between creditors to the fruits of a debtor's property. Such questions have no application here where the rights of other creditors are not at issue. This is made clear in *comment a* to Restatement (Third) *Property: Mortgages* §7.6 as follows:

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. . .

Since this case does not involve a priority dispute between competing creditors, the doctrine of equitable subrogation is simply not applicable. Rather, CCB's claim must rise or fall on the doctrine of unjust enrichment.

Stated another way, the Court in *Bank of America, N.A. v. Prestance Corporation, supra*, must be deemed to have adopted all of Restatement (Third) *Property* §7.6. That necessarily includes the comments and other indication in the Restatement that the section is limited to disputes over priority between creditors.

CCB has identified a number of cases from other jurisdictions dealing with equitable subrogation. None of these detract from the conclusion that equitable subrogation is a doctrine applicable to

disputes involving priority. In *Mort v. United States*, 86 F.3d 890 (9<sup>th</sup> Cir. 1996); *Lamb Excavation, Inc. v. Chase Manhattan Mortgage Corp*, 208 Ariz. 478, 95 P.3d 542 (Ariz.App. 2004); *Hicks v. Londre*, 125 P.3d 452 (Colo. 2005); and *Eastern Savings Bank v. Pappas*, 829 A.2d 953 (D.C.App 2003), the priority dispute was between creditors. In *Katsivalis v. Serrano Reconveyance Co.*, 70 Cal.App.3d 200, 138 Cal.Rptr. 620 (1977), the priority dispute was between the lender and the property owner's homestead exemption.<sup>1</sup>

CCB has not refuted this basic fact—the doctrine of equitable subrogation does not apply here.

c. *Bank of America, N.A., v. Prestance Corporation Did Not Eliminate the Notion That a Person Seeking Equitable Subrogation Cannot Be a Volunteer.*

CCB also argues that the Court in *Bank of America, N.A. v. Prestance Corporation, supra*, eliminated the requirement that a person seeking equitable subrogation cannot be a volunteer. The Court's opinion, however, contains no discussion of that issue. The majority opinion does not mention *BNC Mortgage, Inc. v. Tax Pros, Inc.*, 111 Wn.App. 238, 46 P.3d 812 (2002), a case in which equitable subrogation was denied to a creditor deemed by the Court to be a volunteer. An opinion is not

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<sup>1</sup> Under California law at that time, a property for which a homestead declaration had been filed could not be subject to execution to satisfy any encumbrance placed on the property after the homestead declaration was filed of record. 70 Cal.App. 3d at 209 *fn* 3.

controlling on any legal that is not discussed in the opinion. Rather, the merits of the theory must wait for a case where that theory is properly raised. *Berschauer/Phillips Construction Co. v. Seattle School District No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994). Since the issue is not discussed in *Bank of America v. Prestance Corporation, supra*, the Court's opinion in that case cannot stand for the proposition that volunteers—such as lenders under no compulsion to make a loan, as here—can take advantage of the doctrine of equitable subrogation.

Furthermore, *Bank of America, N.A., v. Prestance Corp, supra*, cannot be said to have overruled *BNC Mortgage, Inc. v. Tax Pros, Inc. supra, sub silentio*. A later decision cannot overrule an earlier one *sub silentio* unless the opinion directly contradicts the rule of law stated in the earlier case. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009). For example, in *Safeco Insurance of America v. Butler*, 118 Wn.2d 383, 403, 823 P.2d 499 (2002), the Court noted its ruling in *Roller v. Stonewall Insurance Co.*, 115 Wn.2d 679, 685, 801 P.2d 207 (1990), to the effect that the term “accident” in a liability insurance policy was an objective term as opposed to one to be determined from the standpoint of the insured and indicated that it amounted to overruling a contrary notion expressed in *Federated American Insurance Co. v. Strong*, 102 Wn.2d 665, 669, 689 P.2d 68 (1984). There is no statement at all—

much less a clear statement—in *Bank of America, N.A., v. Prestance Corporation, supra*, contradicting the rule set out in *BNC Mortgage, Inc., v. Tax Pros, Inc., supra*, that a party cannot be a volunteer and still obtain relief under the doctrine of equitable subrogation. The decision in *Bank of America, N.A., v. Prestance Corporation, supra*, cannot be said to have overruled the decision in *BNC Mortgage, Inc., v. Tax Pros, Inc. supra*.

For all these reasons, *Bank of America, N.A. v. Prestance Corporation, supra*, cannot be said to address the question of whether a lender who is a volunteer retains equitable subrogation rights or stand for the proposition that a lender who is a volunteer can obtain relief under the doctrine of equitable subrogation.

d. Denying Relief to Volunteers or Intermeddlers Inheres in the Rule Concerning Equitable Subrogation.

The rule in Restatement (Third) *Property* §7.6 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 disposition; 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.

(Emphasis added) (CP 319).

The key and critical language here is the requirement that equitable subrogation can only be employed to prevent unjust enrichment. In Washington, a party can claim relief on the basis of unjust enrichment only if that party is not a volunteer. And, as has been stated, this rule applies to lenders who claim relief based on equitable subrogation. *BNC Mortgage, Inc., v. Tax Pros, Inc., supra*, discussed in detail in Brief of Appellant, pps. 25-27.

While CCB attempts to distinguish or otherwise undercut the Court's decision in *BNC Mortgage, Inc., v. Tax Pros, Inc., supra*, it cannot and does not contest the primary notion that unjust enrichment

relief can only be awarded to persons who are not volunteers under Washington law. Until the rules for determining unjust enrichment are changed, therefore, no lender who is a volunteer is entitled to relief on the doctrine of equitable subrogation.

As discussed at length in the Brief of Appellant, pps. 15-22, CCB was a volunteer. For that reason, any enrichment of CCB cannot be considered to be unjust enrichment. Since equitable subrogation is only allowed to prevent unjust enrichment, it is not applicable here.

e. Conclusion.

CCB cannot rely on the doctrine of equitable subrogation for these reasons and for those stated in the Brief of Appellant.

II. CCB Is Not Entitled to Relief under the Doctrine of Unjust Enrichment.

a. CCB Was a Volunteer.

As discussed in the Brief of Appellant, pps. 13-15, a volunteer is not entitled to relief under the doctrine of unjust enrichment. In *Ellenburg v. Larson Fruit Co.*, 66 Wn.App. 246, 251-52, 835 P.2d 225 (1992), the Court set out three factors to determine whether a person should be considered a volunteer. These are (1) whether the benefit was conferred at the request of the person benefitted; (2) whether the party benefitted knew of the payment but stood back and let the party make the

payment; and (3) whether the benefits were necessary to protect the interests of the party who conferred the benefit or the party who benefitted thereby. Newman Park showed how these demonstrate that CCB was in fact a volunteer at Brief of Appellant, pps. 20-22. CCB has presented a conflicting analysis at Brief of Respondent/Cross Appellant, p. 27-28. CCB's approach should not be adopted.

First of all, CCB claims that Newman Park requested the benefit by negotiating with CCB for the payoff of the loan from Hometown National Bank solely because Mr. Sturtevant was its manager and he was involved in the discussions of CCB's loan to Trinity. However, Mr. Sturtevant's actions cannot be attributed to Newman Park for the simple reason that he was acting without actual or apparent authority and in breach of his duties under the Operating Agreement and under law all as discussed above. Furthermore, the assertion that Mr. Sturtevant negotiated payment of the obligation to Hometown National Bank is at odds with the facts. CCB, on its own and for its own reasons, opted to require the payment of the loan to Hometown so it "wouldn't be subordinate behind another bank on the property" and have to pay off that other bank in the event of a default on the loan to Trinity. (CP 254)

Secondly, CCB claims that Newman Park had knowledge of the transaction and took no action, once again, because Mr. Sturtevant

knew of the transaction. Mr. Sturtevant's knowledge cannot be attributed to Newman Park, however, because he was acting adversely to its interests. Restatement (Second) *Agency* §§280, 282.

Finally, the payment to Hometown was not necessary because CCB was not required to make the loan to Trinity. It chose to do so to realize a profit and to take advantage of other and further transactions it anticipated would be forthcoming from its relationship with Mr. Sturtevant.

It should be clear that CCB was a volunteer in this transaction. Therefore, it cannot take advantage of the doctrine of unjust enrichment.

b. Any Enrichment Is Not Unjust.

If one looks at the matter as a whole, one must conclude that there is nothing unjust in any benefit conferred by CCB in paying off the loan to Hometown National Bank.

CCB entered into the transaction to make a profit on the loan to Trinity. It also believed that it would profit from other banking business that it would receive in the future from Mr. Sturtevant. It made a loan of \$1.5 million and obtained an appraisal that set the value of Newman Park's property at \$4.2 million. (CP 259-60; CP 317-20) Therefore, CCB stood to make a tidy profit even if the loan was not repaid

by foreclosing on property nearly three times the value of its loan. It made a loan that can be most charitably described as “unusual” because Newman Park’s property was being used to secure a loan to Trinity. This one factor should have given CCB considerable pause in making the loan. In short, CCB took a considerable risk in making this loan but stood to make a considerable profit even if the loan was never repaid. There is nothing unjust when a business entity takes a substantial risk with promise of making a substantial profit and then loses. Any enrichment of Newman Park cannot be considered unjust under the circumstances.

IV. Newman Park Substantially Prevailed and Should Receive an Award of Attorney’s Fees.

CCB contends that there was no substantially prevailing party because, while Newman Park invalidated the Deed of Trust, CCB obtained a judgment based on equitable subrogation and unjust enrichment. It has cited a number of cases in support of its position. None can be said to govern our case because, as they all appear to acknowledge, whether a party is deemed substantially prevailing depends on the specific facts of each case. As the Court noted in *Rowe v. Floyd*, 29 Wn.App. 532, 535 *fn.* 4, 629 P.2d 925 (1981), a determination as to who is the substantially prevailing party turns upon the substance of relief accorded to the parties. In that case, the plaintiffs had contracted to sell an orchard to the

defendants. They sought to forfeit that contract. The Court did not allow the forfeiture but granted them a money judgment. It found that the plaintiffs had prevailed because they had received a money judgment. However, it also found that the defendants had prevailed because they had averted forfeiture of the real estate contract. The Court of Appeals affirmed. It stated:

Based on the record stated, we affirm.

29 Wn.App. at 535.

Under the unique facts of this case, it is clear that Newman Park must be considered the substantially prevailing party. As noted in the Brief of Appellant, p. 33, the invalidation of the Deed of Trust reduced CCB's claim against the land by \$1.5 million. On that basis, Newman Park must be deemed the prevailing party. The trial court erred by not allowing Newman Park an award of attorney's fees.

#### CONCLUSION

The trial properly invalidated the Deed of Trust given to CCB to secure its loan to Trinity. It erred, however, in granting judgment to CCB on the basis of equitable subrogation and unjust enrichment. The trial court's judgment should be affirmed insofar as it invalidated the Deed of

Trust. The judgment on CCB's behalf allowing a money judgment and an equitable lien on Newman Park's property, should be reversed.

DATED this 22 day of April, 2011.

  
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BEN SHAFTON, WSB #6280  
Of Attorneys for Newman Park, LLC

APPENDIX

RCW 25.15.150 ..... 44

Restatement (Second) Agency §280 ..... 45

Restatement (Second) Agency §282 ..... 45

(1) Unless the certificate of formation vests management of the limited liability company in a manager or managers: (a) Management of the business or affairs of the limited liability company shall be vested in the members; and (b) each member is an agent of the limited liability company for the purpose of its business and the act of any member for apparently carrying on in the usual way the business of the limited liability company binds the limited liability company unless the member so acting has in fact no authority to act for the limited liability company in the particular matter and the person with whom the member is dealing has knowledge of the fact that the member has no such authority. Subject to any provisions in the limited liability company agreement or this chapter restricting or enlarging the management rights and duties of any person or group or class of persons, the members shall have the right and authority to manage the affairs of the limited liability company and to make all decisions with respect thereto.

(2) If the certificate of formation vests management of the limited liability company in one or more managers, then such persons shall have such power to manage the business or affairs of the limited liability company as is provided in the limited liability company agreement. Unless otherwise provided in the limited liability company agreement, such persons:

(a) Shall be designated, appointed, elected, removed, or replaced by a vote, approval, or consent of members contributing, or required to contribute, more than fifty percent of the agreed value (as stated in the records of the limited liability company required to be kept pursuant to RCW 25.15.135) of the contributions made, or required to be made, by all members at the time of such action;

(b) Need not be members of the limited liability company or natural persons; and

(c) Unless they have been earlier removed or have earlier resigned, shall hold office until their successors shall have been elected and qualified.

(3) If the certificate of formation vests management of the limited liability company in a manager or managers, no member, acting solely in the capacity as a member, is an agent of the limited liability company.

Restatement (Second) *Agency* §280:

If an agent has done an unauthorized act or intends to do one, the principal is not affected by the agent's knowledge that he has done or intends to do the act.

Restatement (Second) *Agency* §282:

1) A principal is not affected by the knowledge of an agent in a transaction in which the agent secretly is acting adversely to the principal and entirely for his own or another's purposes, except as stated in Subsection (2).

(2) The principal is affected by the knowledge of an agent who acts adversely to the principal:

(a) if the failure of the agent to act upon or to reveal the information results in a violation of a contractual or relational duty of the principal to a person harmed thereby;

(b) if the agent enters into negotiations within the scope of his powers and the person with whom he deals reasonably believes him to be authorized to conduct the transaction; or

(c) if, before he has changed his position, the principal knowingly retains a benefit through the act of the agent which otherwise he would not have received.

NO. 41470-8-II  
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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COLUMBIA COMMUNITY BANK,

Respondent

v.

NEWMAN PARK, LLC,

Appellant

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NEWMAN PARK, LLC,

Appellant,

v.

COLUMBIA COMMUNITY BANK,

Respondent.

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APPEAL FROM THE SUPERIOR COURT

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HONORABLE PAULA CASEY

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AFFIDAVIT OF MAILING

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