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I. INTRODUCTION

In September 2004, Joseph Sturtevant (“Sturtevant”), a real estate developer, presented the Members of Newman Park, LLC (“Newman Park”) with an offer to invest in his real estate development project in Thurston County. The project consisted of purchasing real property, developing it, selling it, and distributing the profits. All of the Members had invested in Sturtevant’s projects on prior occasions. As was always the case with his projects, the Members were passive investors and played no role in managing or developing the Subject Property. Rather, the Members relied wholly upon Sturtevant, and his solely owned company, Landmark Development Ventures, Inc. (“Landmark”), to complete the project and obtain a return on their investments.

Sturtevant created the LLC, purchased the Subject Property, and negotiated a loan on behalf of Newman Park from Hometown Bank without any oversight or participation by the Members. The Members did not make any resolutions concerning Sturtevant’s authority to complete these transactions, nor did they do so in any of the prior projects. Rather, the Members granted Sturtevant unfettered control to complete such transactions.

A few years later, in 2008, Sturtevant obtained a loan from Columbia Community Bank (“CCB”) for \$1.5 million and pledged the

Subject Property as collateral for the loan, just as he had done before. At Sturtevant's suggestion, CCB applied some of the proceeds of its loan to payoff existing encumbrances of Newman Park, including the Hometown Bank deed of trust and property taxes.

The economic downturn and substantial decline of the real estate market hit before Sturtevant was able to complete the project. Once it became obvious to the Members that Sturtevant would not complete the project and that they would not obtain a return on their investment, they sought to invalidate CCB's Deed of Trust on the ground that Sturtevant lacked actual or apparent authority to act on Newman Park's behalf. Newman Park further seeks to avoid paying the over \$400,000 that CCB paid to remove prior encumbrances, resulting in a substantial windfall to Newman Park.

For the reasons set forth below, CCB requests that the Court prevent an unearned windfall to Newman Park by affirming the trial court's order granting summary judgment to CCB on its equitable subrogation and unjust enrichment claims. The material facts are not in dispute. CCB conferred a significant benefit upon Newman Park when it paid off the Hometown Bank loan in the amount of \$403,127.67 and property taxes in the amount of \$8,356.11. Newman Park is not entitled to reap the benefits of CCB's payoff of the above encumbrances. If the

Court finds that the CCB Deed of Trust is invalid, then Newman Park must be returned to the position it was in before Sturtevant granted the CCB Deed of Trust: ownership of the Subject Property encumbered by back taxes and the Hometown loan (plus interest).

Moreover, CCB requests the Court affirm the trial court's denial of Newman Park's motion for attorneys' fees. Newman Park is not the "prevailing party" in this litigation. It is well settled in Washington that where each party prevails on a major issue, neither party is the "prevailing party" and each party is required to bear its own costs. Here, both CCB and Newman Park prevailed on major issues. Therefore, no fee award is appropriate for either party.

Lastly, CCB requests that the Court reverse the trial court's order granting summary judgment in favor of Newman Park, which invalidated CCB's Deed of Trust. There are genuine issues of material fact concerning the authority of Sturtevant and Landmark to act on behalf of Newman Park. Taking all favorable inferences from the evidence presented in CCB's favor, a jury could find that Sturtevant and Landmark had actual or apparent authority as Newman Park's agents to execute the CCB Deed of Trust. Accordingly, the trial court erred in granting summary judgment in favor of Newman Park.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

Assignment of Error No. 1: The trial court properly granted CCB's Motion for Partial Summary Judgment Re: Equitable Subrogation and Unjust Enrichment and entered judgment in favor of CCB.

Assignment of Error No. 2: The trial court correctly denied Newman Park's Motion for Attorneys' Fees.

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.

B. Issues Pertaining to Assignments of Error

Assignment of Error No.1:

1. Should the Court apply the doctrine of equitable subrogation or unjust enrichment to prevent an unearned windfall to Newman Park?

2. Does the volunteer rule apply to refinance transactions?

3. Is CCB a volunteer?

Assignment of Error No. 2:

1. Did the trial court properly deny attorneys' fees when both parties prevailed on major issues?

Assignment of Error No. 3:

1. Do genuine issues of material fact exist concerning Sturtevant/Landmark's actual authority to grant the CCB Deed of Trust?
2. Do genuine issues of material fact exist concerning Sturtevant/Landmark's apparent authority to grant the CCB Deed of Trust?
3. Do genuine issues of material fact exist concerning which party is liable under the comparative innocence doctrine?

III. STATEMENT OF THE CASE

A. Factual Background

1. Creation of Newman Park

On September 24, 2004, Joseph Sturtevant sent Rick Goode, Kurt Rylander, Jeff Sunshine, Jim Schroeder, Bill Lowry, and Brian Allen an email regarding his "Olympia project." (CP 645-47) The email provided,

My Olympia project is now available for investors (finally). I am seeking \$300k to \$400k and would like commitments on October 4th with LLC formation and funding by October 13th.

The included cover attachments cover the project but please contact me with your questions. I would be happy to meet with any or all of you to go over everything in more detail. You have all invested with me before so you know the program. The biggest difference with this project is we are not taking the project through construction so we do not have to borrow as much money as we usually do.

Let me know your level of interest as soon as you can so I can get things in order. Thanks again for your interest and I hope I can continue to get you nice returns on your investment.

(CP 645) (Emphasis Added). The above investors all accepted Sturtevant's invitation to participate in this project, which was subsequently known as "Newman Park."

Included among the documents circulated was an 11-page Operating Agreement, which the Members signed. (CP 649-60) The Members and their respective percentages of ownership are as follows:

NAME	CONTRIBUTION	PERCENTAGE
Landmark Development Ventures, Inc.	Contract Assignment	39.00%
Brian & Maya Allen	\$100,000	13.55%
Jeffrey & Katherine Sunshine	\$100,000	13.55%
Jim & Jean Schroeder	\$100,000	13.55%
Kurt & Suzy Rylander	\$50,000	6.778%
Rick and Chrisie Goode	\$50,000	6.778%
William Lowry	\$50,000	6.778%

(CP 649 at ¶ 2.1)

The Operating Agreement contains the following provisions that are pertinent to the claims in this action. Paragraph 1.3 of the Operating Agreement, provides,

1.3 Nature of Business. The LLC shall acquire, own, develop, sell and complete a residential subdivision project

known as Newman Park situated in Olympia, Thurston County Washington, known as follows:

3822 Wiggins Road SE (Tax Parcel 11829330300)

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

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

Other than Landmark, none of the other members did any work on the development or management of the project or Subject Property from

inception in 2004 until August or September 2009. (CP 817-21) Rather, the other members relied solely upon Sturtevant/Landmark to complete the project. (*Id.*)

Paragraph 2.2 of the Operating Agreement provides:

2.2 Other Business of Members.

.....

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 in the aggregate.
- (2) Incur or refinance any indebtedness for money borrowed by the Company, if after such financing, the aggregate indebtedness of the Company would exceed \$50,000. . . .

(CP 649 at ¶ 2.2.)

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

checked. (*Id.*) Sturtevant signed the application as “Managing Member.”

(*Id.*) The Washington Secretary of State issued a certificate of formation for Newman Park on October 18, 2004. (CP 666)

Subsequently, Sturtevant negotiated the purchase of the real property located at 3822 Wiggins Road SE, Thurston County (the “Subject Property”) from Catherine N. Johnson. (CP 668) As part of this transaction, Sturtevant, on behalf of Newman Park, took out a loan from Hometown National Bank (“Hometown”) for \$393,100. Newman Park granted a deed of trust on the Subject Property to Hometown, which was recorded under Thurston County Auditor’s No. 3697246. (CP 670-77) Sturtevant executed the deed of trust on behalf of Landmark, “Manager of Newman Park, LLC.” (CP 677)

Sturtevant also executed a real estate tax affidavit, a HUD-1 settlement statement, closing instructions, a company resolution, and a promissory note. (CP 679-99) Sturtevant executed these documents on behalf of Landmark, the “Manager” or “Managing Member” of Newman Park. (CP 679, 85-87, 91, 93-94, 99)

In connection with this transaction, Sturtevant provided Hometown copies of Newman Park’s Application to Form a Limited Liability Company (CP 664) the Certificate of Formation (CP 666) and a 10-page Operating Agreement dated October 19, 2004 (CP 701-10). This

Operating Agreement states that Landmark is the sole Member with a 100 percent ownership interest. (*Id.*) It was executed only by Sturtevant on behalf of Landmark. (*Id.*) It otherwise contains the same provisions as the 11-page Operating Agreement cited above, including the provision naming Sturtevant as the “Managing Member.” (*Id.*)

On February 21, 2005, after the closing, Sturtevant sent the investors an email providing copies of the following: “LLC formation documents (LLC Application, Certificate of Formation, SS-4) -Final Closing HUD (we closed on the land in December) -Deed transferring title to Newman Park LLC -Deed of Trust with Hometown Bank.” (CP 712) (Emphasis added.) In response to discovery, Newman Park produced no records of any objection to Sturtevant’s purchase of the Subject Property, his granting a deed of trust to Hometown, or Landmark executing the deed of trust as Newman Park’s agent. (CP 719-44)

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

2. Members' Other Dealings with Sturtevant

All the investor-members had prior dealings with Sturtevant. As Sturtevant stated in his September 24, 2004 email, "You have all invested with me before so you know the program." (CP 645)

Jeffrey Sunshine had invested in the following other "programs" of Sturtevant: (1) Sunset Meadows, (2) Teal Point Ridge, (3) Southview Heights, (4) ProLand, and (5) Ridgeway Butte. (CP 732-33) Kurt and Susan Rylander also invested in (1) Teal Pointe Ridge, (2) ProLand, and (3) Ridgeway Butte. (*Id.*) Brian and Maya Allen invested in (1) ProLand, (2) Southview Heights, and (3) Julie's Court. (*Id.*) Jim and Jean Schroeder invested in (1) Teal Point Ridge, (2) ProLand, and (3) Ridgeway Butte. (*Id.*) Rick and Christine Goode participated in (1) Woodridge Development, LLC, (2) Teal Point Ridge, and (3) Ridgeway Butte. (*Id.*) Lastly, William Lowry participated in Julie's Court. (*Id.*)

In these projects, like the Newman Park project, the members relied wholly upon Sturtevant to manage and complete the project and to get a return on their investment. The Members stated in discovery responses as follows: "the Individual Members were investors and did not involve themselves with management or development." (CP 819)

Sturtevant stated that the difference between Newman Park and the prior "programs" was that "with this project [] we are not taking the

project through construction so we do not have to borrow as much money as we usually do.” (CP 645) This evidences that in other projects, like in Newman Park, Sturtevant took out loans to complete the project. Indeed, “Investor Prospectuses” for three prior projects confirm that the investors contemplated taking out loans. These include a January 25, 2002 prospectus for Sunset Meadows, a September 5, 2002 prospectus for Julie’s Court, and a February 11, 2003 prospectus for Teal Pointe Ridge. (CP 746-76) All three prospectuses indicate that the LLC’s activities included “Land acquisition and payments.” (*Id.*) The Sunset Meadows prospectus further states, “Our business plan provides that all borrowed funds will be repaid within one year from completion of the project” (CP 748) The Teal Point Ridge prospectus also states, “Profits will come out of the sales of the lots and the existing home after the bank loan is repaid.” (CP 767) The Julie’s Court prospectus states, “Additional financing will be provided by a local bank to construct the project and purchase the property.” (CP 756) All prospectuses include a Pro Forma that estimates loan and financing costs. (*Id.*)

CCB requested in Request for Production No. 7 that the Members produce all corporate resolutions for the prior business dealings. (CP 734) CCB made this request in order to see if the investors authorized the loan transactions for Newman Park and for the other programs, such as Julie’s

Court, Teal Point Ridge, and Sunset Meadows. Despite producing nearly 16 inches of documents, Newman Park did not produce any corporate resolutions. Based on this production, CCB concludes that there were no corporate resolutions related to any loan transactions for Newman Park or the other programs.

This course of conduct continued even after Newman Park was created. In June 2006, Sturtevant offered the Ridgeway Butte program. (CP 778-93) The Investor Package contemplates financing up to \$4.7 million for the land. (CP 782) Again, Newman Park produced no corporate resolutions for this project (or any other).

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

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

In connection with this transaction, Sturtevant provided CCB copies of Newman Park's Application to Form a Limited Liability Company, the Certificate of Formation, and a 10-page Operating Agreement dated October 19, 2004. (CP 851, 853, 855-64) This

Operating Agreement states that Landmark is the sole Member with a 100 percent ownership interest. (CP 855-64) Sturtevant executed it on behalf of Landmark. (*Id.*) Sturtevant had previously submitted these same documents to Hometown. Additionally, Sturtevant provided a certificate of formation and an operating agreement for Trinity, and a certificate of incorporation and Bylaws and Corporate Resolutions for Landmark. (CP 866-69, 871-81, 883, 885-903)

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

In connection with this loan, Hometown provided a payoff statement on February 28, 2008. (CP 804) The HUD-1 settlement statement shows that \$403,127.67 of the CCB loan proceeds were for “Payoff to Hometown National Ba[nk].” (CP 806-10) On March 4, 2008, Clark County Title, who did the closing, sent Hometown a letter enclosing the payoff check. (CP 812-13) Subsequently, on April 3, 2008,

Hometown recorded a full reconveyance, Thurston County Auditor No. 4001619. (CP 815)

B. Procedural History

On or about March 5, 2010, CCB filed its Complaint for Declaratory Judgment, Equitable Subrogation, and Unjust Enrichment. (CP 4-8) CCB sought an order declaring the CCB Deed of Trust valid, and a judgment against Newman Park under the doctrines of equitable subrogation and unjust enrichment. (*Id.*) Newman Park denied that CCB had any interest in the Subject Property through its deed of trust, or by virtue of the doctrines of equitable subrogation or unjust enrichment. (CP 9-11)

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

Newman Park filed a motion for summary judgment on the validity of the CCB Deed of Trust. Following a hearing, the Court granted Newman Park's motion for summary judgment on April 15, 2010, ruling that Sturtevant lacked actual or apparent authority to grant the CCB Deed of Trust. (CP 72-73) CCB filed a Motion for Reconsideration (CP 74-86) on April 26, 2010, which the trial court denied on June 4, 2010 (CP 159-

60). Newman Park did not receive a money judgment against CCB. (CP 435-37)

On July 2, 2010, CCB filed a motion for summary judgment under the doctrines of equitable subrogation and unjust enrichment. (CP 229-35) Newman Park opposed the motion, arguing that CCB was a mere volunteer. (CP 382-97) Newman Park contended that CCB was not entitled to a lien on the Subject Property despite CCB's payoff of Newman Park's prior encumbrances, which totaled \$411,483.78. (*Id.*) Following a hearing, the Court granted CCB's motion for summary judgment on July 30, 2010, awarding CCB a lien and judgment in the principal amount of \$411,483.78, plus interest. (CP 409-11)

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

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

IV. 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's denial of Newman Park's motion for attorneys' fees is reviewed for abuse of discretion. *Skimming v. Boxer*, 119 Wn. App. 748, 754, 82 P.3d 707 (2004). The Court's inquiry is "whether the court's conclusion was the product of an exercise of discretion that was manifestly unreasonable or based on untenable grounds or reasons." *Id.*

B. Trial Court Properly Granted Summary Judgment Under the Doctrines of Equitable Subrogation and Unjust Enrichment

1. Equitable Subrogation Should be Applied to Prevent an Unearned Windfall to Newman Park

Generally, "[s]ubrogation is the substitution of one person in place of another . . . so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities." *Bank of America v. Prestance Corp.*, 160 Wn.2d 560, 565, 160 P.3d 17 (2007). Washington has adopted the Restatement (Third) of

Prop.: Mortgages § 7.6's principle of subrogation in the mortgage context, which states generally, "If a senior mortgage is released of record and, as part of the same transaction, is replaced with a new mortgage, the latter mortgage retains the same priority as its predecessor . . ." *Kim v. Lee*, 145 Wn.2d 79, 89, 31 P.3d 665 (2001). In other words, a lender who pays off another's debt may be equitably subrogated to the position of the original party. The doctrine is designed "to avoid a person's receiving an unearned windfall at the expense of another." Restatement (Third) of Property: Mortgages § 7.6, cmt. a.

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

2. Newman Park was Unjustly Enriched and Must Pay Restitution to CCB

CCB is alternatively entitled to damages and an equitable lien

under the doctrine of unjust enrichment. A party must make restitution when it has been unjustly enriched at the expense of another. *Chemical Bank v. WPPSS*, 102 Wn.2d 874, 909, 691 P.2d 524 (1984). “Unjust enrichment, or quantum meruit, is a contract implied at law requiring a party to make restitution to the extent he has been unjustly enriched.” *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn. App. 719, 731, 741 P.2d 58 (1987) (quoting *Truckweld Equip. Co. v. Olson*, 26 Wn. App. 638, 646, 618 P.2d 1017 (1980)). Unjust enrichment arises when money or property has been placed in one person’s possession such that in equity and good conscience he should not retain it. *Molander v. Raugust-Mathwig, Inc.*, 44 Wn. App. 53, 722 P.2d 103 (1986) (citing *Family Med. Bldg., Inc. v. D.S.H.S.*, 104 Wn.2d 105, 112, 702 P.2d 459 (1985)). “For the doctrine of unjust enrichment to apply, some benefit must be conferred on one party to the detriment of the other and denying recovery would result in an unfair result.” *Id.* at 61.

Here, there can be no genuine debate that Newman Park was unjustly enriched. Based on the representations of Sturtevant and Landmark, CCB paid off Newman Park’s prior loan to Hometown in the amount of \$403,127.67 and paid property taxes totaling \$8,356.11. Had CCB not made its loan, Newman Park would still owe Hometown and Thurston County the amount CCB paid, and Newman Park would still be

paying interest to Hometown. Therefore, it would be unjust for Newman Park to reap a significant windfall at the expense of CCB. Denying restitution to CCB would result in an extremely unfair result because Newman Park would be put in a better position than it would have been had CCB never made its loan.

3. The Volunteer Rule does not Apply to Refinance Transactions

Newman Park argues that equitable subrogation does not apply pursuant to the “volunteer rule.” Newman Park cites *BNC Mortgage, Inc. v. Tax Pros, Inc.*, 111 Wn. App. 238, 46 P.2d 812 (2002) for the proposition that the doctrine of equitable subrogation does not apply to a “volunteer.” However, *BNC Mortgage* was decided before the Washington Supreme Court’s decision in *Bank of America v. Prestance Corp.*, 160 Wn.2d 560, 565, 160 P.3d 17 (2007).¹ In *Bank of America*, the

¹ The portion of the *BNC Mortgage* opinion that Newman Park relies upon is also dicta. The court noted that the first issue was whether the lien of BNC’s deed of trust was prior to the lien of Tax Pros’ 1999 judgment. The second issue was whether the lien of Ford’s deed of trust was prior to the lien of Tax Pros’ 1999 judgment and, if so, whether BNC should be equitably subrogated to Ford’s lien. On the second issue, the court found that Ford’s deed of trust was subordinate to Tax Pros’ 1999 judgment, thereby rendering it unnecessary for the court to decide the equitable subrogation issue.

Dictum is not the rule of law and cannot be relied upon as precedent. See, e.g., *State ex rel. Hoppe v. Meyers*, 58 Wn.2d 320, 329-30, 363 P.2d 121 (1961) (“dictum in that case . . . should not be transformed into a rule of law”); *DCR, Inc. v. Pierce County*, 92 Wn. App. 660, 683 n. 16, 964 P.2d 380 (1998) (“Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed;” “Dicta is not controlling precedent.”); *In re Roth*, 72 Wn. App.

Court expressly held that equitable subrogation was available in the refinance context and it adopted the Restatement (Third) of Prop.: Mortgages § 7.6. In so holding, the Court implicitly rejected the volunteer rule in the refinance context.

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

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

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

Under this formulation, no refinance lender would be entitled to equitable subrogation. All refinance lenders offer loans without any duty or compulsion to do so, and for the express purpose to achieve a profit. In

566, 570, 865 P.2d 43 (1994) (“Dicta is language not necessary to the decision in a particular case.”).

Bank of America, for example, Wells Fargo was not under any duty or compulsion to loan money to the property owner or to pay off the Washington Mutual loan. Wells Fargo did so to avail itself of a business opportunity and to achieve a profit. Wells Fargo then paid off the Washington Mutual loan to secure itself against any loss. Under *BNC Mortgage's* formulation, whose dicta Newman Park urges this Court to follow, Wells Fargo would not be entitled to be equitably subrogated.

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

This principle is consistent with holdings in other jurisdictions. See, e.g., *Eastern Savings Bank v. Pappas*, 829 A.2d 953, 961 (D.C. App. 2003) (holding refinance lender was entitled to equitable subrogation and did not act as a volunteer)²; *Lamb Excavation, Inc. v. Chase Manhattan*

² This court further noted, “This theory that the purchaser is a volunteer is, we think, entitled to little weight. The purchaser is advancing his money intending to get

Mortgage Corp., 95 P.3d 542, 547 (Ariz. 2004) (holding refinance lender did not act as a volunteer in paying off prior construction loan as its motive was commercial); *Hicks v. Londre*, 125 P.3d 452, 457 (Co. 2006) (“Suffice it to say that ‘[a] person who lends money to pay off an encumbrance on property and secures the loan with a deed of trust on that property is not a volunteer for purposes of equitable subrogation.’”); *Mort v. United States*, 86 F.3d 890, 894 (9th Cir. 1996) (same); *Katsivalis v. Serrano Reconveyance Co.*, 70 Cap.App.3d 200, 128 Cal.Rptr. 620, 625 (1977) (lender that granted new mortgage was not a volunteer and entitled to equitable subrogation even though the mortgage was invalid under California law).

Further, the comments to Section 7.6 of the Restatement expressly state that the volunteer rule is inapplicable to these types of loan transactions. In *Bank of America*, the Court unqualifiedly adopted Section 7.6.³ Comment b to Section 7.6 makes clear that the Restatement has not adopted the volunteer rule:

Prior case law has often indicated that one who pays as a

something for it, to wit, a title unencumbered by the lien to be discharged. It is hardly in accord with reality to say that he pays officiously, as an intermeddler.” *Id.* at 961, n.14.

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

“volunteer” is not entitled to subrogation. However, the meaning of the term “volunteer” is highly variable and uncertain, and has engendered considerable confusion. This Restatement does not adopt the “volunteer” rule, but instead requires simply that the subrogee pay to protect some interest . . .

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

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

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

Here, CCB had a legitimate need or reason to payoff the

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

Hometown loan. CCB's Deed of Trust on the Subject Property secured \$1.04 million of the \$1.5 million loan.. CCB and Sturtevant, Newman Park's manager, negotiated a payoff of the Hometown loan as part of the CCB loan transaction. Paying off the Hometown loan (thus putting CCB in first position) protected CCB's interest because it eliminated the possibility that CCB, a junior lien holder, would have to take on additional debt later in order to satisfy the Hometown encumbrance, a senior lien, in the event of a future default. (CP 252) Paying off the Hometown loan to gain first priority thus protected CCB's interest by minimizing the overall risk of the loan. Therefore, CCB is entitled to be equitably subrogated to Hometown.

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

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

Bank of America, 160 Wn.2d at 581-82. (Emphasis added.) Again, the

purpose of the doctrine is “to avoid a person's receiving an unearned windfall at the expense of another.” Restatement (Third) Property § 7.6, cmt. a.

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

4. CCB is not a Volunteer

Even if the volunteer rule was applied in this case, CCB is not a volunteer. Under the antiquated rule, courts look to the following circumstances to determine whether a person acted as a volunteer: (1) Whether the benefits were conferred at the request of the party benefited; (2) Whether the party benefited 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 benefited thereby. *Ellenburg v. Larson Fruit Co.*, 66 Wn.

App. 246, 251-52, 835 P.2d 225 (1992).⁵

First, Newman Park specifically negotiated the payoff of the Hometown loan as part of the CCB loan. It is undisputed that Newman Park was manager-managed. Sturtevant was a manager of Newman Park. Sturtevant negotiated the payoff of the Hometown loan on behalf of Newman Park. In January 2008, Sturtevant sent Brad Volchok an email informing him that Sturtevant owed \$394k on a first to Hometown Bank, and he suggested, "It might be worth you guys taking them out and having 1st position(?)." (CP 280) Subsequently, Sturtevant accepted a loan commitment under which CCB would receive "1st Deed of Trust on Newman Park property located at 3822 Wiggins Road SE, Olympia, WA 98501" as collateral. (CP 297-300) In sum, Newman Park's manager specifically negotiated for a payoff of Newman Park's encumbrances.

Second, Newman Park had knowledge of the transaction, stood back, and let CCB payoff the Hometown loan. Again, Newman Park is manager-managed. One of its managers, Joseph Sturtevant, had actual knowledge of CCB's payoff. Landmark, a 39 percent owner of Newman Park, also had actual knowledge of the payoff. Whether or not Sturtevant

⁵ In *Ellenburg*, the court had little trouble finding that Larson Fruit was acting as a volunteer because it knew there was a pending lawsuit and was specifically told not to distribute any funds. Despite that warning, it did so anyway. Under these circumstances, the court held that Larson Fruit was a volunteer.

and Landmark had authority to grant an encumbrance on the Subject Property, pursuant to RCW 25.15.150, is irrelevant to the issue of whether or not Newman Park, the entity, had knowledge of the transaction. Newman Park had knowledge of the transactions through its managers.

Third, CCB's payoff of the Hometown loan was necessary to protect its interest. As indicated above, a payoff of the Hometown loan minimized CCB's overall risk because it eliminated the possibility that CCB, a junior lien holder, would have to take on additional debt later in order to satisfy the Hometown encumbrance, a senior lien, in the event of a future default. (CP 252) Under the foregoing circumstances, CCB was not acting as a mere volunteer.

Furthermore, it is generally accepted that a payor whose payment was induced by fraud or deceit is not a volunteer. *See, Nelson & Whitman, Real Estate Finance Law* § 10.4 n.2 (5th ed.). This concept is also incorporated in Section 7.6(b) of the Restatement (Third): "By way of illustration, subrogation is appropriate to prevent unjust enrichment if the person seeking subrogation performs the obligation: . . . (3) on account of misrepresentation, mistake, duress, undue influence, deceit, or other similar imposition." Restatement (Third) of Prop.: Mortgages § 7.6.

Here it is undisputed that Sturtevant and Landmark presented a falsified Operating Agreement to CCB to reflect that Landmark was the

sole member. (CP 303-12) CCB relied upon the falsified Operating Agreement to make its loan and pay off Hometown. (See CP 847-49) Such deceit by Sturtevant and Landmark creates an exception to the volunteer rule—if it even applies. For the foregoing reasons, the trial court properly granted summary judgment in favor of CCB on its equitable subrogation and unjust enrichment claims.

C. Trial Court Properly Denied Newman Park’s Motion for Attorneys’ Fees

Newman Park is not the “prevailing party” in this action. In general, a prevailing party is one who receives an affirmative judgment in his or her favor. *Piepkorn v. Adams*, 102 Wn. App. 673, 686, 10 P.3d 428 (2000); *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). In this case, Newman Park contended that CCB had no valid interest in the Subject Property, which necessitated CCB to commence this lawsuit. CCB demonstrated that it had an interest in the Subject Property under the doctrine of equitable subrogation. The trial court entered a judgment against Newman Park and in favor of CCB in the amount of \$411,483.78, plus interest. Newman Park did not receive a money judgment in its favor. Therefore, under the net affirmative judgment rule, CCB is the prevailing party in this action, and Newman Park is not entitled to its attorneys’ fees.

Newman Park argues that it is entitled to attorneys' fees because it prevailed on one of the major issues—the validity of the CCB Deed of Trust. However, CCB also prevailed on a major issue—a claim of lien under the doctrine of equitable subrogation. It is well-settled law that if both parties prevail on major issues, neither is the “prevailing party,” and an attorneys' fees award is not appropriate. *See, e.g., American Nursery Prods. v. Indian Wells Orchards*, 115 Wn.2d 217, 235, 797 P.2d 477 (1990) (citing *Sardam v. Morford*, 51 Wn. App. 908, 756 P.2d 174 (1988)); *Rowe v. Floyd*, 29 Wn. App. 532, 535, 629 P.2d 925 (1981); *Puget Sound Serv. Corp. v. Bush*, 45 Wn. App. 312, 320-21, 724 P.2d 1127 (1986); *Hertz v. Riebe*, 86 Wn. App. 102, 105, 936 P.2d 24 (1997).

For instance, in *Rowe v. Floyd*, the suit arose when the buyers failed to make a \$20,000 payment in a contract to buy orchard land. *Rowe*, 29 Wn. App. at 533. The plaintiffs sued for the full \$20,000 and for forfeiture of the defendants' interest in the land. *Id.* The defendants alleged that they were not in default and, citing a clause requiring adjustment if frost damage diminished the crop, offered to pay \$833 to the plaintiffs. *Id.* The trial court found that defendants were entitled to a reduction of \$3,525 in the amount of the missed payment. *Id.* The trial court dismissed the forfeiture claim but ordered defendants to pay \$16,475 to plaintiffs. *Id.* The trial court ordered both parties to bear their own

costs and attorneys' fees, and both parties appealed. *Id.* at 533-34.

The Court of Appeals affirmed the trial court's denial of fees to both parties reasoning that both parties had prevailed on major issues. On the one hand, the plaintiffs' claim for forfeiture was dismissed, but plaintiffs obtained a judgment for an amount 20 times higher than defendants had offered. On the other hand, defendants successfully resisted the forfeiture complaint, but their tendered offer was woefully inadequate. The court held, "Under the circumstances, we agree with the decision of the trial court that the parties bear their own costs and fees. . . . neither or both prevailed." *Id.* at 535.

Here, CCB sought to foreclose its Deed of Trust, and it requested a determination that the CCB Deed of Trust was valid or that it was entitled to a judgment under the doctrines of equitable subrogation and unjust enrichment. Newman Park denied both claims, and it sought a determination that CCB's Deed of Trust was invalid. While Newman Park prevailed on the validity of the CCB Deed of Trust issue (thus precluding a foreclosure), CCB nevertheless obtained a judgment for \$411,483.78 on its equitable subrogation claim—a claim that Newman Park had flatly rejected. Thus, like in *Rowe*, both parties prevailed on major issues. Therefore, neither party is the "prevailing party," and the parties should bear their own costs and fees.

The cases cited by Newman Park are distinguishable. For instance, Newman Park cites *Day v. Santorsola*, 118 Wn. App. 746, 76 P.3d 1190 (2003)⁶ as an illustration of how a party can be a substantially prevailing party even though that party did not succeed on all of its claims. In *Day*, the lot owners sued a subdivision construction committee that denied its building plans. The principal relief sought was a determination that they were entitled to build their house pursuant to certain limitations, though they asserted claims for breach of contract, breach of fiduciary duty, declaratory judgment, and damages. *Id.* at 753. The subdivision did not file any counterclaims. Following a bench trial, the trial court ruled that the Days could build their house, but declined to award damages. The trial court also awarded fees to the Days as the prevailing parties. *Id.* at 754. The Court of Appeals affirmed the award of attorneys' fees because the Days were afforded the principal relief they sought: "to build a house nearly in accordance with the house they sought to have approved." *Id.* at 770.

The Days received the principal relief they sought. The subdivision construction committee, on the other hand, lost on nearly all

⁶ The facts and holding in *Piepkorn v. Adams*, 102 Wn. App. 673, 10 P.3d 428 (2000), which Newman Park also cites, is nearly identical; and is therefore distinguishable on the same basis.

of the issues, except on the Days' claim for damages. The subdivision had not filed any counterclaims. Under those facts, a court could easily find that because the Days received the principal relief sought that they substantially prevailed.

Here, however, there is no clear winner. Both Newman Park and CCB prevailed on major issues. Newman Park prevailed on its claim to invalidate the Deed of Trust, and CCB prevailed on its claim for a judgment and lien on the Subject Property with interest totaling nearly \$500,000. In circumstances like this, where both parties substantially prevail, the rules set forth in *Rowe v. Floyd*, and other cases cited by CCB, are instructive. Under those cases, because both parties prevailed on major issues, neither party is the "prevailing party," and the parties should bear their own costs and fees. The trial court did not abuse its discretion in so ruling.

D. Trial Court Erred in Granting Newman Park's Motion for Summary Judgment and Invalidating CCB's Deed of Trust

When ruling on a motion for summary judgment, a court must view the evidence and all reasonable inferences from the evidence in the light most favorable to the nonmoving party, which on this issue is CCB. *See, e.g., Lamon v. McDonnell Douglas Corp.*, 91 Wn.2d 345, 588 P.2d 1346 (1979); *Roger Crane & Associates, Inc. v. Felice*, 74 Wn. App. 769, 875 P.2d 705 (1994). Further, a court can only grant a motion for

summary judgment if, from all the evidence, reasonable persons could reach but one conclusion. *See Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982). Here, considering all the evidence, and taking all inferences in the light most favorable to CCB, a jury could easily conclude that Sturtevant and Landmark had actual or apparent authority to execute the CCB Deed of Trust.

1. Genuine Issues of Material Fact Exist as to Whether Landmark/Sturtevant had Actual Authority

An agent's authority to bind his principal may be of two types: actual or apparent. *King v. Riveland*, 125 Wn.2d 500, 507, 866 P.2d 160 (1994). Actual authority may be express or implied. Implied authority is actual authority, circumstantially proved, which the principal is deemed to have actually intended the agent to possess. *Id.* Actual authority depends on objective manifestations made by the principal to the agent. *Id.* "One authority states that the most usual example of implied actual authority is found in those instances where the agent has consistently exercised some power not expressly given to the agent and the principal, knowing of the same and making no objection, has tacitly sanctioned continuation of the practice." *Id.* (citing Harold G. Reuschlein and William A. Gregory, *Agency and Partnership* § 15, at 40-41 (1979)).

Here, Sturtevant and Landmark were undeniably agents of

Newman Park. Sturtevant signed the CCB Deed of Trust, just as he did for all the other loan documents pertinent to this case. Sturtevant negotiated the loan transactions with CCB and Hometown. It was with Sturtevant that the Members placed their investments in this program and others. It was with Sturtevant that the Members placed management authority of Newman Park and the entities in the other programs. It was with Sturtevant that the Members communicated. Whether Sturtevant signed as Member Sturtevant, Manager Sturtevant, or Sturtevant on behalf of Landmark, does not change the fact that Sturtevant signed the applicable agreements. As it is undisputed that Sturtevant was the manager of Newman Park, it follows that an agent of Newman Park signed the CCB Deed of Trust.

Yet, the trial court accepted Newman Park's hyper-technical argument that an "agent" of Newman Park did not execute the CCB Deed of Trust because Sturtevant signed it for Landmark, of which he was sole owner, not for himself as "manager." In the Court's oral ruling on April 15, 2010, it stated that it found no ambiguity in the Operating Agreement concerning Sturtevant's and Landmark's position and authority. (RP 75-77) Finding no ambiguity that Sturtevant was the "manager," the Court stated,

Once I determine that Joseph Sturtevant is the manager, the manager did not sign in his capacity as a manager the Deed of Trust in question. Accordingly, with respect to the theory of actual authority, Landmark Development Ventures through its president had no authority to sign the Deed of Trust on behalf of Newman Park.

(RP 77, Ln. 6-12)

Contrary to the trial court's ruling, there are issues of fact concerning Landmark's authority. As a starting point, RCW 25.15.150(3) provides, "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." (Emphasis added.) The statute does not say that, if an LLC is manager-managed, then no member can act as an agent. Rather, it states that no member is an agent if he is acting solely in the capacity as a member. In other words, if a member is also a manager, the fact that he executed a document only as a member is immaterial.

In *Valley/50th Avenue, LLC v. Stewart*, Valley argued a deed was unenforceable because it was signed by its member, Rose, as a Valley Member rather than as Manager.⁷ After citing RCW 25.15.150(3), the

⁷ See *Valley/50th Avenue, LLC v. Stewart*, 2005 WL 1502021 (Wn. App. Div. 2). While the Court of Appeals decision was unpublished, the Washington Supreme Court subsequently reviewed the case. The Court issued its published opinion on May 30, 2007. *Valley/50th Avenue, LLC v. Stewart*, 159 Wn.2d 736, 153 P.3d 186 (2007). One of the issues presented was whether "the signature on the deed fell short of the requirements of RCW 25.15.150 and therefore failed to bind Valley." *Id.* at 743. While the Court did

Court of Appeals rejected that argument. The court noted that Rose did not act solely as a member; he was also a manager. Therefore, the technical way Rose signed the deed was immaterial, and his signature was sufficient to bind Valley. The same is true here. The technical way that Landmark (Sturtevant) signed the CCB Deed of Trust is immaterial if Landmark was not acting solely in its capacity as Member. If it was also acting as a manager of Newman Park, its signature is sufficient to bind the LLC.

Under the evidence presented, there is a genuine issue of fact as to whether Landmark had actual authority as Newman Park's manager. The following facts are significant:

- Paragraph 1.3 of the Operating Agreement states, "Member Joseph Sturtevant is 100% responsible for satisfactory real estate development and project completion." (CP 649 at ¶ 1.3) (Emphasis added.)
- Paragraph 1.6 of the Operating Agreement states, "Sturtevant shall be the Managing Member of the LLC." (*Id.* ¶ 1.6)
- Paragraph 2.1 of the Operating Agreement lists Landmark as a member holding a 39% interest. (*Id.* ¶ 2.1) Sturtevant solely owns Landmark.
- The Operating Agreement does not list Sturtevant as a Member.

not address this issue directly, it held as follows: "We affirm the holdings of the Court of Appeals not inconsistent with this opinion." *Id.* at 747. By virtue of this published affirmation, the holding of the Court of Appeals is authoritative.

- Paragraph 10.1 of the Operating Agreement provides, “Joseph Sturtevant is the Managing Member and the registered agent of the LLC. It is agreed by all members that Joseph Sturtevant is authorized to act on behalf of the LLC as the manager and representative.” (CP 653 at ¶ 10.1.) (Emphasis added.)

The Operating Agreement states in several places that Sturtevant is the “Managing Member.” There is no dispute that Sturtevant was not a “member.” One interpretation could be that there was simply a mistake in drafting the agreement and the parties intended only Sturtevant to be the manager, not a “managing member.” The trial court adopted this interpretation. However, another equally plausible interpretation is that the Members intended there to be a “managing member.” Because Landmark was the member, not Sturtevant, the Members really intended that Landmark was the “managing member.” Another equally plausible interpretation is that, in the eyes of the Members, Landmark and Sturtevant were one in the same, alter egos of one another. Therefore, the Members ignored the phraseology in the agreement of who was “member” and who was “manager” or “managing member” and simply intended Sturtevant and Landmark to have whatever authority was necessary to complete the development.

All of the above interpretations are reasonable from the evidence and inferences drawn therefrom. “In the contract interpretation context,

summary judgment is improper if the parties' written contract, viewed in light of the parties' other objective manifestations, has two or more reasonable but competing meanings." *Diamond B. Constructors, Inc. v. Granite Falls School Dist.*, 117 Wn. App. 157, 161, 70 P.3d 966 (2003). Therefore, summary judgment is inappropriate, and CCB is entitled to present its arguments to a jury.

Furthermore, the subsequent conduct of the parties further supports CCB's position that Landmark had actual authority.⁸ Consider the following facts:

- In late 2004, Sturtevant and Landmark entered into a loan transaction with Hometown Bank ("Hometown") on behalf of Newman Park. Sturtevant executed the deed of trust on behalf of Landmark, "Manager of NEWMAN PARK, LLC." (CP 670-77)
- Sturtevant also executed a real estate excise tax affidavit, a HUD-1 settlement statement, closing instructions, a company resolution, and a promissory note on behalf of Landmark, "Managing Member" of Newman Park. (CP 679, 685-87, 691, 693-94, 697, 699)
- After the fact, the Members submitted declarations that they ratified this transaction. (CP 619-40)

⁸ The intent of the parties regarding the meaning of a disputed contract term may be discerned from the "actual language of the disputed provisions, the contract as a whole, the subject matter and objective of the contract, the circumstances in which the contract was signed, the later acts and conduct of the parties, and the reasonableness of the parties' interpretations." *Id.* (citing *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990) (Emphasis added.)).

- The Members have never objected to Landmark executing the documents as the “Manager” or “Managing Member.” Nor have the Members repudiated Landmark’s authority as such for future dealings following the Members’ ratification.

The fact that the Operating Agreement does not expressly name Landmark as a “manager” in the Operating Agreement, but the Members ratified Landmark’s execution of the Hometown deed of trust in its capacity as “manager” or “managing member” is significant. First, it supports the conclusion that the Members actually believed that Sturtevant and Landmark were alter egos and that they intended for Landmark to be the manager of the LLC. Second, it is a post-Operating Agreement grant of authority to Landmark to negotiate these types of transactions on Newman Park’s behalf. There is no evidence in the record that the Members objected to Landmark executing the documents as “manager,” nor did the Members repudiate Landmark’s authority to negotiate such transactions in the future.

After considering all of the evidence, and the favorable inferences drawn therefrom, a jury could reasonably conclude that the Members intended Landmark to have authority to execute encumbrances, such as the deed of trust granted to CCB, or that they granted such authority post-formation. Summary judgment is therefore inappropriate on the question of Landmark’s actual authority.

2. Genuine Issues of Material Fact Exist as to Whether Landmark/Sturtevant had Apparent Authority

The existence of apparent authority is a question of fact that is to be decided by the trier of fact. *See, e.g., Debentures, Inc. v. Zech*, 192 Wash. 339, 349, 73 P.2d 1314 (1937) (“The apparent authority of an agent . . . ordinarily . . . is a question of fact for the jury’s determination.”); *see also, Hoglund v. Meeks*, 139 Wn. App. 854, 866, 170 P.2d 37 (2007) (same); *Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wn. App. 355, 362, 818 P.2d 1127 (1991) (same); WPIC 50.02.01. Accordingly, the issue of apparent authority is not properly decided on summary judgment. Rather, this issue must be decided after a trial.

Addressing the merits, apparent authority, like actual authority, requires an objective manifestation made by the principal. *King*, 125 Wn.2d at 507. However, such manifestations are made to a third person. *Id.* Such manifestations will support a finding of apparent authority if they (1) cause the one claiming apparent authority to actually, or subjectively, believe that the agent has authority to act for the principal, and (2) the claimant’s actual, subjective belief is objectively reasonable. *Id.* (citing *Smith*, 63 Wn. App. at 364.) The Restatement (Second) of Agency states the following concerning objective manifestations:

The information received by the third person may come directly from the principal by letter or word of mouth, from

authorized statements of the agent, from documents or other indicia of authority given by the principal to the agent, or from third persons who have heard of the agent's authority through authorized or permitted channels of communication. Likewise, as in the case of [actual] authority, apparent authority can be created by appointing a person to a position, such as that of manager or treasurer, which carries with it generally recognized duties; to those who know of the appointment there is apparent authority to do the things ordinarily entrusted to one occupying such a position, regardless of unknown limitations which are imposed upon the particular agent.

Restatement (Second) of Agency § 27. cmt. a, at 104 (1958). (Emphasis added.) Further, apparent authority may be found from an agent's actions taken with the principal's knowledge. *Emrich v. Connell*, 41 Wn. App. 612, 621-22, 705 P.2d 288 (1985), *reversed on other grounds by* 105 Wn.2d 551, 716 P.2d 863 (1986).

In this case, there were objective manifestations by Newman Park of Sturtevant's/Landmark's authority. First, the Operating Agreement provides, "Member Joseph Sturtevant is 100% responsible for satisfactory real estate development and project completion. The LLC may also engage in buying, selling, developing, improving, renting and generally dealing with real estate. . . ." (CP 649 at ¶ 1.3) Further, in several paragraphs, the Operating Agreement names Sturtevant as the "Manager"

or “Managing Member” of Newman Park.⁹ (CP 649 at ¶ 1.6; CP 653 at ¶¶ 8.2, 10.1). The appointment of Sturtevant as a “manager” is significant.

As noted above, “apparent authority can be created by appointing a person to a position, such as that of manager or treasurer, which carries with it generally recognized duties; to those who know of the appointment there is apparent authority to do the things ordinarily entrusted to one occupying such a position.” Restatement (Second) of Agency § 27. cmt. a, at 104 (1958).

By naming Sturtevant as a “manager,” Newman Park conveyed to third parties that Sturtevant was an agent who could act on behalf of the LLC. RCW 25.15.150(3) provides, “If the certificate of formation vests management authority of the limited liability company in a manger or managers, no member, acting solely in the capacity as a member, is an agent of the limited liability company.” In other words, the managers of the LLC were its agents.

Second, the public record contains objective manifestations by

⁹ Both the 11-page Operating Agreement that Newman Park contends is genuine and the 10-page Operating Agreement that Newman Park contends Sturtevant altered provide that Sturtevant is the Managing Member. Newman Park cannot argue that the entire 10-page Operating Agreement is a statement of the agent, not of Newman Park. Only the provisions that Sturtevant changed are statements of the agent. The unaltered portions remain statements of Newman Park.

Newman Park of Sturtevant/Landmark's authority to negotiate loans and grant encumbrances. In December 2004, Sturtevant negotiated the purchase of the Subject Property and the loan from Hometown. Sturtevant executed the loan documents and the deed of trust on behalf of Landmark, the "manger" or "managing member" of Newman Park. The deed of trust was then recorded in Thurston County, putting all others, including CCB, on notice of Sturtevant/Landmark's agency authority on behalf of Newman Park. The members of Newman Park all submitted declarations that they "ratified and approved" this transaction.

By virtue of his position as manager, the public record, the Operating Agreement, and its experience, CCB actually and subjectively believed, that Sturtevant/Landmark had authority to act on behalf of the LLC.

Further, this belief by CCB was objectively reasonable. Indeed, Sturtevant provided the same documentation to Hometown when Newman Park purchased the Subject Property. Hometown, like CCB, believed that Sturtevant had authority to grant the Deed of Trust. That Hometown came to the same conclusion with the same documents evidences that CCB's subjective belief was objectively reasonable.

Taking all inferences in favor of CCB, a jury could conclude that such objective manifestations invested Sturtevant/Landmark with apparent

authority. Therefore, genuine issues of material fact exist that preclude summary judgment.

In its April 15, 2010 oral ruling, the trial court held that apparent authority was absent in this case because CCB asked for a corporate resolution from Newman Park in the course of closing the transaction.

(RP 76-77) The Court stated,

So the next question becomes is there something other than actual authority that we can look to to preserve the Deed of Trust? I think that question is answered by the bank's requirement that there be a resolution from Newman Park, LLC with respect to the authority to proceed with the loan. I agree with the plaintiff's argument that the request for a resolution indicated that the bank was looking for who had actual authority before approving the loan and affixing the Deed of Trust to land of Newman Park, LLC.

(RP 77, Ln 13-23) Newman Park's argument, which the Court accepted, purports to be based on the Louisiana Court of Appeals decision in *National Bank of Bossier City v. Nations*, 465 So.2d 929 (La. App. 1985).

However, *Nations* does not stand for the broad proposition that a bank's request for a corporate resolution destroys the doctrine of apparent authority. *Nations* merely stands for the proposition that if a corporate resolution is all the bank relied upon, apparent authority is absent. In *Nations*, the court reasoned that the record failed to show any evidence to support the bank's reliance on apparent authority in making its loan: "The record is completely devoid of evidence to suggest that NBBC relied on

any of Reed's indicia of authority." *Id.* at 935. There was no evidence of any objective manifestations from the principal. In fact, the agent simply said, "since he was president, he could get the corporation to pledge the land for his debt." *Id.* at 931. (Emphasis added.) Under these facts, when the bank asked for a corporate resolution, it sought actual authority, and was not relying on the agent's apparent authority. The reasoning in *Nations* was therefore appropriate under those facts. It does not stand for the broad proposition that apparent authority is destroyed any time a bank requests a corporate resolution.

Here, unlike in *Nations*, the record is not devoid of evidence from which to infer that CCB relied upon the apparent authority of Sturtevant and Landmark. Nor is the record devoid of any evidence of objective manifestations of Newman Park. To the contrary, the Operating Agreement provides objective manifestations of Newman Park that Sturtevant and Landmark had authority to act on Newman Park's behalf. By placing Sturtevant/Landmark in the position(s) of "manager" or "managing member," Newman Park held them out as having apparent authority. Such manifestations were bolstered by the public record, which contains the Hometown deed of trust that Landmark executed as the "manager" of Newman Park. Based on such information, CCB actually and subjectively believed that Sturtevant/Landmark had authority to grant

the CCB Deed of Trust. Under these facts, the Court cannot conclude, as did the *Nations* court, that the record is devoid of evidence of apparent authority. Therefore, the doctrine of apparent authority is not destroyed simply by a request for a corporate resolution.

Moreover, the portion of the *Nations* opinion cited by Newman Park and upon which the trial court relied is dictum. The court held that apparent authority did not apply to the mortgage or sale of corporate property, under Article 2997 of the Louisiana Civil Code. *Id.* at 935-37; *see also, Tedesco v. Gentry Development, Inc.*, 521 So.2d 717, 721 (La. App. 1988) (“[I]n *Nations*, this court clearly stated that the doctrine of apparent authority was not applicable to the mortgage or sale of corporate property where Article 2997 applied.”) Article 2997 requires an express mandate to encumber corporate property. LA. CIV. CODE ANN. art. 2997. Because actual authority (an express mandate) is required, the court held that the doctrine of apparent authority was inapplicable. Therefore, the court’s comment, which was relied upon by Newman Park, that a request for a corporate resolution (*i.e.*, for actual authority) negated apparent authority was mere dictum. Dictum is not the rule of law and cannot be relied upon as precedent. Out-of-state dictum should carry even less weight. For these reasons, the trial court erred in relying on this out-of-state authority, and in ruling that apparent authority was absent as a matter

of law.

3. Genuine Issues of Material Fact Exists Regarding Which Party is Liable Under the Comparative Innocence Doctrine

Genuine issues of material fact exist on CCB's claim under the doctrine of comparative innocence. This doctrine provides that where one of two equally innocent persons must suffer from a third party's fraud, the one whose actions enabled the fraudulent act must bear the loss. In *Stohr v. Randle*, 81 Wn.2d 881, 882, 505 P.2d 1281 (1973), the Court explained,

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. This maxim is applied where two parties make claim to the same property, the conflict in claims having arisen as a result of the fraud of a third party.

(quoting *Ketner Bros, Inc. v. Nichols*, 52 Wn. 2d 353, 356, 324 P.2d 1093 (1958)).

Issues of fact exist as to which party's act or neglect made the fraudulent act possible. Newman Park argues that CCB should have been more diligent in making its loan, but it was Newman Park's unfettered grant of authority to Sturtevant that caused the loss in this case.

Newman Park placed Sturtevant in a position to negotiate transactions on its behalf. It did so without any oversight or accountability. The Members describe themselves as investors who did not involve themselves with management of the LLC. This lack of

participation is evidenced by Sturtevant's transaction with Hometown. Sturtevant provided Hometown the same document that Newman Park now alleges he falsified. Yet, the Members ratified and approved that transaction. They apparently did so without asking to see any of the documents that Sturtevant was submitting to Hometown. Had the Members not given Sturtevant unfettered control to complete such transactions, they could have avoided this dispute. By giving him unfettered control, the Members made Sturtevant's fraud possible and they must bear the loss occasioned thereby.

Because factual issues exist regarding which party should bear the risk of Sturtevant/Landmark's alleged fraud under the comparative innocence doctrine, the trial court erred in granting summary judgment.

E. CCB is Entitled to Attorneys' Fees on Appeal

CCB seeks an award of attorneys' fees on appeal pursuant to RAP 18.1. In Washington, a prevailing party may recover attorney fees if authorized by statute, equitable principles, or by agreement between the parties. *Thompson v. Lennox*, 151 Wn. App. 479, 484, 212 P.3d 597 (2009). Here, CCB's Deed of Trust provides for fees to the prevailing party "at trial and upon appeal." (CP 521) Therefore, if CCB prevails on appeal it is entitled to costs and its reasonable attorneys' fees.

V. CONCLUSION

The Court should affirm the trial court's order granting summary judgment in CCB's favor on its equitable subrogation and unjust enrichment claim and the trial court's order denying Newman Park's motion for attorneys' fees. The trial court properly applied the doctrine of equitable subrogation to prevent a substantial unearned windfall to Newman Park. Further, as both CCB and Newman Park prevailed on major issues, the trial court properly declined to award fees to either party.

However, the Court should reverse the trial court's order granting summary judgment in favor of Newman Park, which invalidated CCB's Deed of Trust. There are genuine issues of material fact concerning Sturtevant and Landmark's actual and apparent authority to act on behalf of Newman Park. Finally, issues of fact remain under the doctrine of comparative innocence.

Respectfully submitted this 24th day of March, 2011

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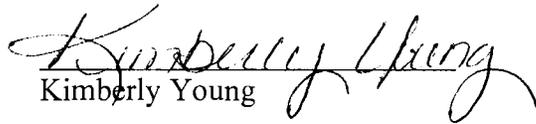
VI. CERTIFICATE OF SERVICE

I certify that on the 24th day of March 2011, 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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