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NO. 41470-8-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

COLUMBIA COMMUNITY BANK,

Respondent/Cross-Appellant,

vs.

NEWMAN PARK, LLC,

Appellant.

**REPLY BRIEF OF CROSS-APPELLANT
COLUMBIA COMMUNITY BANK**

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I. INTRODUCTION

The investors in Newman Park, LLC (“Newman Park”) gave Joseph Sturtevant (“Sturtevant”) unfettered control over the Newman Park project as they had done numerous times before in other projects.

Columbia Community Bank (“CCB”) loaned over a million dollars to Sturtevant taking as partial security a Deed of Trust to the Newman Park Property. In hindsight, it appears that Sturtevant abused the authority granted to him. However, CCB, which relied in good faith upon the actual and apparent authority conferred upon Sturtevant, should not suffer a million dollar loss at the hands of Sturtevant and his business partners.

Taking all inferences from the evidence presented in CCB’s favor, a reasonable jury could and likely will find that Sturtevant and his company, Landmark Development Ventures, Inc. (“Landmark”), had actual and/or apparent authority as Newman Park’s agents to execute the CCB Deed of Trust. The ambiguities in the Operating Agreement, Newman Park’s ratification of Landmark’s grant of a deed of trust to Hometown Bank, and the Newman Park members’ prior dealings with Sturtevant and Landmark create triable issues concerning Sturtevant’s and Landmark’s authority.

Genuine issues of material fact also exist on the applicability of the comparative innocence doctrine. Newman Park placed Sturtevant in a

position to negotiate transactions on its behalf. It did so without any oversight or accountability. By giving him unfettered control, the Members made Sturtevant's fraud possible and they must bear the loss occasioned thereby. CCB should be entitled to present its defense under the comparative innocence doctrine to the jury.

Summary judgment is therefore inappropriate. CCB respectfully requests that the Court reverse the trial court's decision granting Newman Park's motion for summary judgment.

II. ARGUMENT

A. **Evidence of Members' Other Investment Programs is Admissible and Relevant to the Scope of Authority that the Members Routinely Conferred Upon Landmark and Sturtevant**

Newman Park objects to the consideration of certain evidence of the Members' prior business dealings with Joseph Sturtevant. This objection is without merit. ER 404 deals with the admission of "character" evidence. These documents were not submitted to show the "character" of the Members. "The term *character* is normally thought to encompass a person's general tendencies with respect to honesty, temperance, and peacefulness . . ." 5D Karl B. Tegland, Washington Practice: Courtroom Handbook of Evidence at 232 (2009-10 ed.) Rather, they are designed to show a prior course of dealing and performance

between themselves and Joseph Sturtevant. ER 404 is therefore inapplicable.

This type of evidence is admissible in the context of proving actual or apparent authority. It has long been the rule that agency may be inferred from a course of dealing or conduct. *See Debentures, Inc. v. Zech*, 192 Wash. 339, 349, 73 P.2d 1314 (1937). Further, in *King v. Riveland*, 125 Wn.2d 500, 507, 866 P.2d 160 (1994), the Court stated, “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 continuance of the practice.” (citing Harold G. Reuschlein and William A. Gregory, *Agency and Partnership* § 15, at 40-41 (1979) (Emphasis added)). Proof of this form of actual authority necessarily requires course of performance and course of dealing evidence. Without the admission of such evidence, a party would never be able to show a consistent exercise of power by the agent without an objection by the principal. It defies logic that the *King* Court would cite an example of actual authority if the evidence required to prove such authority were inadmissible.

Furthermore, ER 406 provides,

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Courts have admitted evidence of the usual or customary business practices under ER 406. *See, e.g., Heigis v. Cepeda*, 71 Wn. App. 626, 632-33, 862 P.2d 129 (1993) (evidence admissible that insurance adjuster always advised claimants in double claim situations that she represented the adverse party); *Meyers v. Meyers*, 5 Wn. App. 829, 834-35, 491 P.2d 253 (1971) (evidence admissible that the usual practice of a notary public is to ask for identification before she notarized the signature). Here, evidence that the Members routinely permitted Joseph Sturtevant to negotiate loan transactions on their behalf without their express approval should similarly be considered as evidence of a habit, routine, or practice. For the foregoing reasons, the Court should consider evidence of the Members' participation in other programs.

B. Issues of Fact Exist that Preclude Summary Judgment on Landmark's and Sturtevant's Actual Authority

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 authority to execute the CCB Deed of Trust.

In the Court's oral ruling on April 15, 2010, it stated that it found no ambiguity that Sturtevant was the "manager" and then, relying on RCW 25.15.150(3), held that because Landmark, not Sturtevant, signed the CCB Deed of Trust, Landmark had no actual authority. CCB disagrees with the trial court's rationale on two points. First, courts have recognized that the technical way an agent signs a deed on behalf of a manager-managed LLC is immaterial under certain circumstances. Second, there is an ambiguity in the Operating Agreement concerning Landmark's authority.

The decision in *Valley/50th Avenue, LLC v. Stewart* is illustrative on the first point.¹ There, Valley argued that a deed was unenforceable

¹ Contrary to Newman Park's contention and threat of sanctions, the holding in *Valley/50th Avenue* is authoritative. While the Court of Appeals decision was

because it was signed by its member, Rose, as a Valley Member rather than as Manager. After citing RCW 25.15.150(3), the 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 Sturtevant and Landmark 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.

This brings us to the second point. There are genuine issues of material fact concerning whether Landmark was intended to be a manager of Newman Park. The Operating Agreement states in several places that Sturtevant is the “Managing Member,” even though he is not listed as a member in the Operating Agreement. A reasonable inference from this ambiguity is that Newman Park intended for there to be a “managing member.” And because Landmark was the member, not Sturtevant, the

unpublished, the case was subsequently reviewed by the Washington Supreme Court. 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 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.

Members really intended Landmark to be the “Managing Member.” This ambiguity cannot simply be ignored, as urged by Newman Park. All reasonable inferences must be drawn in favor of CCB. Further, in the contract interpretation context, summary judgment is improper if the parties’ written contract 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).

CCB’s interpretation is supported by subsequent objective manifestations of Newman Park. When an ambiguity exists in a contract, the intent of the parties regarding the meaning of a disputed contract term may be discerned from the “actual language of the disputed provision, 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.))

Specifically, Landmark acted as the “manager” and “Managing Member” of Newman Park in connection with the Hometown Bank loan. The Newman Park Members unconditionally ratified this transaction. (CP 619-40.) This evidences that Newman Park intended Landmark to act as its manager. Further, Newman Park’s ratification is a post-Operating

Agreement grant of actual authority for Landmark to negotiate loan transactions on Newman Park's behalf.

Moreover, the Members' involvement with Sturtevant and Landmark in other dealings cannot be ignored. The Members participated in other "programs" of Sturtevant and Landmark.² (CP 645, 732-33.) Proland, for instance, was one such program. The Summary of Offering for this program states, "The Manager of the Company will be Joseph Sturtevant with Landmark Development Ventures, Inc. (LDV)." (CP 146-47.) It goes on to provide,

The Manager of the Company will be Landmark Development Ventures, Inc. LDV, Inc. was formed in 2004 as a Washington Corporation and was created to act as the **Manager** of various limited liability companies which exist to own, construct, develop or improve real estate, and to operate commercial property. The sole manager and member of LDV is Joseph Sturtevant.

(CP 146) (Emphasis added.) This offering, which most of the Members accepted, evidences that Sturtevant and Landmark are one in the same.

² Jeffrey Sunshine had invested in the following other "programs" of Sturtevant and Landmark: (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.*)

Sturtevant is the “manager” “with Landmark.” It further acknowledges Landmark’s role as “manager” for other limited liability companies, one of which was surely Newman Park. After considering all of the evidence, and the favorable inferences drawn therefrom, a jury could reasonably conclude that the Members intended Landmark to be the manager with authority to execute encumbrances, such as the deed of trust granted to CCB, or that they granted such authority post-formation. Thus, summary judgment is inappropriate on the question of Landmark’s actual authority.

Newman Park argues that, even if Landmark were an agent, it nevertheless lacked authority to sign the document. (Newman Park’s Brief Responding to Cross Appeal and Reply Brief at 10-11.) Newman Park relies upon the following provision of the Operating Agreement:

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.)

However, this provision, on its face, only limits what the “members” can do. It is not an express limitation of the authority of the managers. The Operating Agreement does not contain any general limitations on the authority of the managers. Rather, it broadly 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. . . .” (*Id.* ¶ 1.3).

Even if Paragraph 2.2 could be read as a limitation on the managers’ authority, there is a question of fact as to whether the Members waived its application. While the Members of Newman Park now wish to enforce this provision, their prior course of performance evidences their waiver of this requirement.

As it relates to this project, Sturtevant and Landmark negotiated the purchase of the Subject Property and obtained a loan from Hometown, which was secured by a deed of trust for \$393,100.00. According to Newman Park’s argument, granting such an encumbrance would require prior consent of the Members holding an 80 percent interest, pursuant to Paragraph 2.2. Despite this requirement, there were no resolutions authorizing Sturtevant/Landmark to take such action.

Sturtevant/Landmark granted the deed of trust to Hometown on December 14, 2004. They obtained no prior resolution from the Members. After the fact, on or about February 21, 2005, the Members were informed about the Hometown deed of trust, and made no objection that a resolution was not first made. The fact that the Members now assert they ratified this transaction, does not change the fact that they previously ignored the requirements of Paragraph 2.2, which they now seek to enforce.

Further, it appears in most of Sturtevant's other "programs" that he took out loans on behalf of the LLCs. (CP 746-76.) Despite such loans, the Members were not able to produce a single copy of a resolution authorizing Sturtevant or Landmark to grant such encumbrances. (CP 734.)

As noted above, "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." *King*, 125 Wn.2d at 507. This is precisely the situation we have in this case. Despite the purported requirement that 80 percent of Members approve the grant of an encumbrance, in practice, Sturtevant and Landmark had previously encumbered the Subject Property, and the properties in the other "programs," without first

obtaining the consent of the Members. The Members had full knowledge of Sturtevant's conduct, yet failed to object or otherwise require prior approval as is contemplated by Paragraph 2.2. This amounts to a tacit sanctioning of Sturtevant's authority. At the very least, genuine issues of material fact exist on this issue.

Lastly, Newman Park argues that Sturtevant lacked actual authority because he owed Newman Park a fiduciary duty of good faith, disclosure, and fair dealing. (Newman Park's Br. Responding to Cross-Appeal and Reply Br. at 13.) Newman Park argues that any conceivable breach of that duty should be read into the Operating Agreement as an implied limitation on his authority. This argument is without merit. Sturtevant may well have breached his fiduciary duties in connection with the transactions at issue. But, this is a completely different issue from the level of authority Newman Park conferred upon him at the outset. If the Members gave Sturtevant authority to encumber the Subject Property, then he had actual authority to do so. If he hypothetically breached some duty in connection with exercising that authority, such a breach may give rise to a claim by the Members. However, a breach does not somehow automatically reverse the original grant of authority.

If the Members wanted to limit Sturtevant's authority or require that he first disclose all loan transactions, it could have included those

provisions in the Operating Agreement. They chose not to. Rather, the Operating Agreement simply states,

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.

(CP 649 at ¶ 2.2.) The Members gave Sturtevant unfettered control to complete any transactions necessary to develop the Subject Property and complete the project. Such authority is not limited after the fact by his alleged fiduciary duties.

For all the forgoing reasons, the trial court erred in granting Newman Park's motion for summary judgment on the issue of actual authority. The Court should reverse and remand this issue for trial.

C. Issues of Fact Exist that Preclude Summary Judgment on Landmark's and Sturtevant's 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).

Before going further, it is important to note that Newman Park has misstated the elements of apparent authority. Contrary to Newman Park's assertion, there is no requirement that "[t]here must be some evidence that the principal had knowledge of the act that was being committed by the agent." (Newman Park's Br. Responding to Cross-Appeal and Reply Br. at 15.) The Washington Pattern Jury Instructions, WPIC 50.02.01, contain no such element, and it is based on the same authority that Newman Park purports to rely upon: *King*, 125 Wn.2d 500 and *State v. French*, 88 Wn. App. 586, 945 P.2d 752 (1997).³

³ Newman Park's confusion likely stems from a partial quote contained in *French*. *French* quotes a statement in *Mauch v. Kissling*, 56 Wn. App. 312, 316, 783 P.2d 601 (1989) that "there must be evidence the principal had knowledge of the act which was being committed by its agent." *French*, 88 Wn. App. at 595. *Mauch* made this statement based on the Washington Supreme Court decision in *Larson v. Bear*, 38 Wn.2d 485, 490, 230 P.2d 610 (1951). In *Larson*, the Court explained a number of ways apparent authority can be found:

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. . . ." (*Id.* ¶ 1.3) Further, in several paragraphs, the Operating Agreement names Sturtevant as a "Manager" or "Managing Member" of Newman Park.⁴ (*Id.* ¶¶ 1.6, 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

An agent may have what is termed "apparent" authority. It exists when, though not actually granted, the principal knowingly permits the agent to perform certain acts, or where he holds him out as possessing certain authority; or, as sometimes expressed, when the principal has placed the agent in such position that persons of ordinary prudence are led to believe and assume that the agent is possessed of certain authority, and to deal with him on reliance of such assumption.

Larson, 38 Wn.2d at 490. Thus, after tracing the quote in *French* to its source, *Larson*, it is clear that knowledge of the principal is not an "element" that must be proven by the party asserting apparent authority. Rather, it is simply one circumstance of many that could create apparent authority. The other circumstances cited in *Larson* that create apparent authority are present in this case and are discussed below.

⁴ Both the 11-page Operating Agreement that Newman Park contends is genuine and the 10-page Operating Agreement that Newman Park contends was altered provide that Sturtevant is the Managing Member. Newman Park's argument that the entire 10-page Operating Agreement is a statement of the agent, not of Newman Park, is erroneous. Only the provisions that Sturtevant changed could be said to be statements of the agent. The unaltered portions remain statements of Newman Park.

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 manager 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 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. The loan documents and the deed of trust were all executed by Sturtevant on behalf of Landmark, the “manager” 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. (CP 848.)

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.

Newman Park argues that Paragraph 2.2 of the Operating Agreement, which states that approval of 80 percent of the Members is required for encumbrances such as the one granted to CCB, should have put CCB on notice that Sturtevant lacked authority. However, the Operating Agreement provided to CCB stated that Landmark was the sole member. Therefore, it was reasonable for CCB to conclude that Paragraph 2.2 did not have any significance to the loan transaction.

Furthermore, Newman Park's own argument highlights that questions of fact exist here. Newman Park cites several things that it contends CCB should have done differently related to the transaction, such as requiring tax returns. (Newman Park's Br. Responding to Cross-Appeal and Reply Br. at 25-26.) In other words, Newman Park asserts

CCB should have been more diligent. CCB disputes that contention and instead contends that it was reasonably diligent, based on industry practices, in making this loan. The central question therefore is reasonableness under the circumstances. On the evidence before the Court, it cannot be said that CCB was unreasonable as a matter of law.

Taking all inferences in favor of CCB, a jury could conclude that such objective manifestations conferred Sturtevant/Landmark with apparent authority. Therefore, genuine issues of material fact exist that preclude summary judgment.

Newman Park cites *National Bank of Bossier City v. Nations*, 465 So.2d 929 (La. App. 1985) for the proposition that apparent authority does not apply because CCB sought a corporate resolution (*i.e.* actual authority) from Newman Park. There are no cases in Washington that support this proposition. Further, the section of *Nations* that Newman Park relies upon is dictum.

Significantly, *Nations* 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.⁵ LSA-C.C. Art. 2997. Because actual authority (an express mandate) is required, the Court held that the doctrine of apparent authority was inapplicable. Therefore, the comment, which is quoted 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.⁶ Out-of-state dictum should carry even less weight.

Additionally, *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.” *Nations*, 465 So.2d at 935.

⁵ There is no analogous requirement in Washington’s LLC statute.

⁶See, e.g., *State ex rel. Hoppe v. Meyers*, 58 Wn.2d 320, 329-30, 363 P.2d 121 (1961) (“dictum in that case . . . should not be transformed into a rule of law”); *DCR, Inc. v. Pierce County*, 92 Wn. App. 660, 683 n. 16, 964 P.2d 380 (1998) (“Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed;” “Dicta is not controlling precedent.”); *In re Roth*, 72 Wn. App. 566, 570, 865 P.2d 43 (1994) (“Dicta is language not necessary to the decision in a particular case.”).

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.

For all of the foregoing reasons, the trial court erred in granting Newman Park's motion for summary judgment on the issue of apparent authority. There are obvious factual issues that must be resolved by the trier of fact after a trial.

D. Issues of Fact Exist Regarding the Applicability of the Doctrine of Comparative Innocence

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 act or neglect made the fraudulent act possible must bear the loss occasioned thereby. 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)).

Newman Park asserts this doctrine is inapplicable because once a Court finds that agency is missing, the doctrine has no further applicability. It relies upon the decision in *Bergin v. Thomas*, 30 Wn. App. 967, 638 P.2d 621 (1981). However, as discussed *supra*, Sturtevant/Landmark was acting as an agent of Newman Park. At the very least, issues of material fact preclude summary judgment on this issue.

Newman Park next alleges that CCB cannot demonstrate a voluntary act or neglect on the part of Newman Park. To the contrary, 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 LLCs. This lack of participation is evidenced by Sturtevant's transaction with Hometown. Sturtevant provided Hometown the same document that Newman Park now alleges was 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. In sum, the Members were passive investors that wholly relied upon Sturtevant to get a return on their investments. They gave him whatever authority he needed to accomplish that goal. By giving him unfettered

control, the Members made Sturtevant's fraud possible and must bear the loss occasioned thereby.

Newman Park next asserts that the doctrine does not apply because CCB could have prevented the loss, again citing *Bergin v. Thomas*. However, this is not the holding of *Bergin*. The Court simply noted, "Either [party] could have prevented the loss." *Id.* at 972. Its actual holding was based on its finding that agency was absent. In this case, both parties have arguments for how the other could have prevented the loss and ultimately which party was more responsible and should bear the risk of loss. This central question must be decided by a trier of fact after hearing all the testimony and reviewing all the exhibits.

Because factual issues exist regarding which party, CCB or Newman Park, should bear the risk of Sturtevant/Landmark's alleged fraud under the comparative innocence doctrine, summary judgment is not appropriate.

E. Citations to Restatement (Second) Agency

Newman Park cites and attaches to its appendix the Restatement (Second) Agency §§ 280 and 282. Newman Park relies upon these provisions to support its argument that certain knowledge of an agent is not imputed to its principal. However, the above-cited sections are not the most recent statements of authority on this issue. The Restatement (Third)

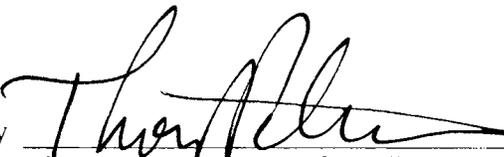
Agency is the current Restatement on agency. Restatement (Third) Agency §§ 5.03 and 5.04 replace former sections 280 and 282. Section 5.04 provides that notice is imputed to the principal, even if the agent is acting adversely to the principal, “when necessary to protect the rights of a third party who dealt with the principal in good faith.” CCB requests that the Court evaluate this issue in light of the provisions in Restatement (Third) Agency.

III. CONCLUSION

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 23rd day of May, 2011

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I. CERTIFICATE OF SERVICE

I certify that on the 23rd day of May 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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