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SUPREME COURT  
OF THE STATE OF WASHINGTON

NO. 41470-8-II

COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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COLUMBIA COMMUNITY BANK,

Respondent/Cross Appellant,

v.

NEWMAN PARK, LLC

Appellant/Cross Respondent.

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COLUMBIA COMMUNITY BANK'S SUPPLEMENTAL BRIEF

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## I. INTRODUCTION

Newman Park, LLC seeks to reap a \$411,483.78<sup>1</sup> windfall at the expense of Columbia Community Bank (“CCB”). CCB respectfully requests that the Court affirm the trial court’s and Court of Appeals’ decisions applying equitable subrogation to prevent this injustice.

The members of Newman Park are experienced real estate investors, most of whom had invested with Joseph Sturtevant in prior real estate development projects.<sup>2</sup> Mr. Sturtevant was the manager of Newman Park and was solely responsible for completing the development.<sup>3</sup> The members were passive investors and had no role in management or development.<sup>4</sup> In 2004, Mr. Sturtevant negotiated the purchase of the Subject Property.<sup>5</sup> Newman Park purchased the Subject Property with a loan from Hometown National Bank (“Hometown”), which was secured by a first-position deed of trust.<sup>6</sup>

CCB is a small community bank with four offices located in Washington County, Oregon. In 2008, Mr. Sturtevant approached CCB about obtaining a refinance loan. Mr. Sturtevant pledged the Subject

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<sup>1</sup> This amount does not include accrued interest.

<sup>2</sup> CP 635; 732-33

<sup>3</sup> CP 649-60

<sup>4</sup> CP 819

<sup>5</sup> CP 668

<sup>6</sup> CP 670-99

Property as collateral for most of the \$1.5 million loan that he negotiated.<sup>7</sup> He provided CCB a falsified Operating Agreement and misrepresented himself as being the sole member of Newman Park and as having authority to execute a deed of trust securing CCB's loan against the Subject Property.<sup>8</sup> Concurrent with CCB's loan, CCB paid off the Hometown loan in the amount of \$403,127.67 and property taxes in the amount of \$8,356.11, in order to give CCB's deed a trust a first-priority lien on the Subject Property.<sup>9</sup>

Upon invalidation of CCB's deed of trust, CCB moved for summary judgment, under the doctrine of equitable subrogation, for an equitable lien on the Subject Property for the amount that CCB paid to clear the prior encumbrances. The trial court recognized that denying equitable subrogation would result in a significant and unfair boon to Newman Park. Had CCB not made its loan, Newman Park would have owned the Subject Property subject to the Hometown deed of trust and property taxes. Denying equitable subrogation would give Newman Park a \$411,483.78 windfall, as it would receive the Subject Property free from encumbrances. To prevent Newman Park's unjust enrichment, the trial court properly granted summary judgment in favor of CCB for an

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<sup>7</sup> CP 795-802.

<sup>8</sup> CP 855-64.

<sup>9</sup> CP 806-10.

equitable lien in the amount it paid to clear the encumbrances, and the Court of Appeals affirmed this decision.

Newman Park asks the Court to deny equitable subrogation to CCB and to reverse the trial court's and Court of Appeals' decisions, thus enabling it to retain the property free and clear of liens. Newman Park urges this Court to restrict the application of equitable subrogation to creditor priority disputes and to apply the "volunteer rule" to refinance transactions. Neither argument is consistent with the Court's decision in *Bank of America v. Prestance Corp.*, 160 Wn.2d 560, 565, 160 P.3d 17 (2007), and they should be rejected.

In *Prestance*, the Court adopted the Restatement (Third) of Prop.: Mortgages § 7.6. In so doing, the Court announced it was following the growing trend toward liberal application of the equitable subrogation doctrine to prevent unjust enrichment. Restricting the doctrine to creditor priority disputes is not consistent with this policy. Further, the Restatement itself makes clear that the doctrine applies more broadly than to just creditor disputes. Moreover, recent decisions by the Arizona and Colorado Supreme Courts have applied the doctrine to situations, like the one here, where the dispute is between a creditor, on the one hand, and a property owner, on the other. The Court should retain the policy

announced in *Prestance*, and apply equitable subrogation liberally to prevent unjust enrichment.

The antiquated “volunteer rule” is incompatible with refinance transactions. Newman Park argues that a lender is a volunteer if it makes a loan for the purpose of achieving a profit. Such a rule would disqualify virtually all refinance lenders from seeking protection under the doctrine. Adopting such a rule would require reversal of the decision in *Prestance* and would eviscerate the important public policy considerations discussed in that decision.

To harmonize the “volunteer rule” with the application of equitable subrogation to refinance transactions, the Court has at least two options. The Court could confirm its adoption of the Restatement, which rejects the volunteer rule, and instead focuses on whether the party seeking subrogation paid to protect some interest in the property. Alternatively, the Court could retain the “volunteer rule” but make clear that a refinance lender is not a “volunteer.” Under either alternative, CCB is entitled to protection under the doctrine to prevent unjust enrichment to Newman Park. Therefore, CCB respectfully requests that the Court affirm the trial court’s and Court of Appeals’ decisions.

## II. STATEMENT OF FACTS

CCB incorporates the Statement of Facts contained in its Answer

to Petition for Review as if fully stated herein.

### III. ARGUMENT & AUTHORITY

#### A. Overview of Equitable Subrogation

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.” *Prestance*, 160 Wn.2d at 565. Washington has adopted the Restatement (Third) of Prop.: Mortgages § 7.6’s principle of equitable subrogation in the mortgage context, which states generally, “[i]f 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 a pre-existing encumbrance may be equitably subrogated to the position of the original encumbrance. 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.

#### B. Equitable Subrogation is Not Limited to Creditor Disputes

Equitable subrogation is liberally applied to prevent unjust enrichment. Its application is not limited to just creditor priority disputes. As the Court of Appeals recognized, the Restatement’s general discussion

and examples demonstrate that equitable subrogation applies more broadly than to just setting priorities. *Columbia Community Bank v. Newman Park, LLC*, 116 Wn. App. 634, 644, 279 P.2d 869 (2012). The Court of Appeals quoted the following non-creditor dispute example:

28. Blackacre is owned by A and B, subject to a mortgage held by Mortgagee-1 securing a debt of \$100,000. A and B are tenants in common. A approaches Mortgagee-2 and induces it to make a loan of \$150,000, of which \$100,000 is used to pay off the first mortgage in full. The remaining \$50,000 is used by A for other purposes. B is not a party to this transaction, but A forges B's name on the note and mortgage to Mortgagee-2. Mortgagee-2 is subrogated to the first mortgage to the extent of \$100,000, and can enforce it against B's interest in Blackacre. Mortgagee-2 is not entitled to subrogation with respect to the remaining \$50,000.

Restatement § 7.6. The Court of Appeals reasoned, “This example illustrates that equitable subrogation applies even when a mortgagee pays off the only existing mortgage and the question is not one of priorities but whether the new mortgagee steps into the shoes of the paid-off mortgagee.”<sup>10</sup> *Id.* at 644.

Courts in other jurisdictions have applied the equitable subrogation doctrine in contexts outside of creditor priority disputes. For instance, in *Sourcecorp, Inc. v. Norcutt*, 274 P.3d 1204 (Az. 2012), the Arizona

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<sup>10</sup> The Court of Appeals further noted, “Moreover, the example is similar to the facts here where one person encumbers the property of another but without authority to do so, and misuses some of the loan proceeds; the question then is whether the remaining owner should be enriched by getting the property debt free.” *Id.* at 644-45.

Supreme Court upheld the application of equitable subrogation to a home purchaser over an undisclosed judgment creditor. No creditor priority dispute was involved. Rather, the purchaser paid off a senior mortgage as part of the purchase, which was replaced by a new deed of trust. An undisclosed judgment creditor later sought to foreclose its judgment lien as a senior encumbrance. The court upheld the application of equitable subrogation to put the purchaser in the same position as the senior mortgage he paid off. *See also, Hicks v. Londre*, 125 P.3d 452 (Co. 2006) (home purchaser entitled to equitable subrogation over judgment lien holder for the amount the purchaser paid to the senior mortgages.)

Further, a narrow application of equitable subrogation is not consistent with the Court's stated policy to apply it liberally whenever justice demands it. As the Court noted in *Prestance*, 160 Wn.2d at 565, despite an initial resistance to equitable subrogation, many courts now apply it liberally. "This trend is clearly toward the more liberal approach, and we would be wise to follow it." *Id.* at 576. The Court explained,

Equitable subrogation is a broad doctrine and should be followed whenever 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, in no small part because of the immense benefits it holds for homeowners.

*Id.* at 581-82.

Justice demands a liberal application of equitable subrogation in this case to prevent the unjust enrichment of Newman Park. CCB paid off Hometown's loan, which totaled \$403,127.67, out of the loan proceeds in order to take a priority position. CCB also paid property taxes in the amount of \$8,356.11. Applying equitable subrogation would put Newman Park in the exact same position it would have been in had CCB not made its loan: it would have owned the Subject Property encumbered by the Hometown deed of trust and property taxes. On the other hand, denying equitable subrogation would result in a significant windfall because it would deliver Newman Park the Subject Property free from encumbrances.

**C. The Volunteer Rule is Incompatible with Refinance Transactions.**

In *Prestance*, the Court held that equitable subrogation was available in the refinance context and it adopted the Restatement (Third) of Prop.: Mortgages § 7.6, which rejects the volunteer rule. In so holding, the Court implicitly rejected the volunteer rule in the refinance context. Yet, Newman Park clings to the vestiges of the law that existed before the Court's decision in *Prestance*. Specifically, 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

Court adopted the Restatement § 7.6 in *Prestance*.

The volunteer rule and equitable subrogation in the refinance context cannot coexist. Indeed, the Court could not have reached the conclusion it reached in *Prestance* if the volunteer rule remains 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.

Newman Park urges this Court to find that "a lender who loans to make a profit is a volunteer." (Pet. for Review at 14.) Under this formulation, equitable subrogation would be unavailable in the vast majority of refinance loans. Virtually all refinance lenders offer loans without any duty or compulsion to do so, and for the express purpose to achieve a profit. In *Prestance*, 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<sup>11</sup> Newman Park urges this Court to follow, Wells Fargo would not be entitled to be equitably subrogated.

However, the Court reached the opposite conclusion: "We adopt § 7.6 of the *Restatement (Third)* and hold WFB West is equitably subrogated to Washington Mutual's first-priority lien, regardless of either its actual or constructive knowledge of intervening interests." *Prestance*, 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.

Further, the public policy supporting the adoption of the Restatement § 7.6, as set forth in *Prestance*, would be undermined if a refinance lender was considered a "volunteer." First, the Court noted that by "facilitating more refinancing, equitable subrogation helps stem the threat of foreclosure." Second, a liberal equitable subrogation doctrine can save billions of dollars by reducing title insurance premiums. As the Court explained, "[t]itle insurance primarily ensures there are no

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<sup>11</sup> The portion of the *BNC Mortgage* opinion that Newman Park relies upon is dicta. The court noted that the first issue was whether the lien of BNC's deed of trust was prior to the lien of Tax Pros' 1999 judgment. The second issue was whether the lien of Ford's deed of trust was prior to the lien of Tax Pros' 1999 judgment and, if so, whether BNC should be equitably subrogated to Ford's lien. On the second issue, the court found that Ford's deed of trust was subordinate to Tax Pros' 1999 judgment, thereby rendering it unnecessary for the court to decide the equitable subrogation issue.

intervening liens, and when a jurisdiction adopts the liberal view of equitable subrogation, the insurance premium is greatly reduced. These savings eventually benefit homeowners because title insurance premiums are mostly passed to them.” *Prestance*, 160 Wn.2d at 581 (citing Nelson & Whitman, *Adopting Restatement Mortgage Subrogation Principles: Saving Billions of Dollars for Refinancing Homeowners*, 2006 BYU L.REV. 305, 365-66.)

Neither of these policy goals is furthered by the volunteer rule. The volunteer rule is restrictive. It would discourage refinancing that could help stem foreclosure. Without the protection of equitable subrogation, the risk inherent in making refinance loans will only increase, which in turn could decrease the availability of refinance loans and/or increase the costs to homeowners. Further, without equitable subrogation available to refinance lenders, there would be no savings in title insurance premiums. Instead, the billions of dollars in savings that could be realized through a liberal application of equitable subrogation would be borne by homeowners.

The Restatement and courts in other jurisdictions have offered different approaches to resolving the volunteer rule problem in the context of refinance transactions.

1. **The Restatement Approach Rejects the Volunteer Rule; and Instead Focuses on Payment to Protect Some Interest.**

The Restatement rejects the volunteer rule:

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

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.

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

Other commentators have similarly advocated discarding the volunteer rule. Grant S. Nelson and Dale A. Whitman write,

A critical examination of the reasons offered for using the rule to deny subrogation on payment of a creditor by a third person has revealed them to be so lacking in force as to make reasonable the suggestion that, in order for such a payment to be officious, it must be unnecessary and confer no benefit. Because of the variety and unpredictability of its application, the voluntary payment test is of little value. Except in cases in which the payor clearly intended a gift, it should be discarded. . . .

Grant S. Nelson & Dale A. Whitman, 2 *Real Estate Finance Law* § 10.4 (5th ed. 2010) (emphasis added.)

The Arizona Supreme Court recently reached the same conclusion.

In *Sourcecorp, Inc. v. Norcutt*, 274 P.3d 1204 (Az. 2012), the court held

that the application of equitable subrogation should not turn on whether the person invoking the doctrine is labeled a “volunteer.” *Id.* at 1208. There, Dean and Stacey Norcutt bought a home and satisfied a first mortgage in favor of Zions National Bank in the amount of \$621,000. *Id.* at 1205. The Norcutts were not aware of a \$3 million judgment lien on the property held by Sourcecorp, Inc. against the prior owners of the property. *Id.* at 1206. After the Norcutts bought the property, Sourcecorp initiated a sheriff’s sale to foreclose its judgment lien. *Id.* The Norcutts sued to enjoin the sale. *Id.* The Norcutts argued that they were equitably subrogated to the position of Zions Bank in priority over Sourcecorp. *Id.* The trial court rejected this argument and entered summary judgment for Sourcecorp. *Id.* The court of appeals reversed, holding that the Norcutts were equitably subrogated. *Id.* The Arizona Supreme Court accepted review because the application of equitable subrogation in this context was an issue of first impression. *Id.*

The court recognized that there was some ambiguity in the court of appeals’ decisions regarding the proper standard for equitable subrogation. *Id.* at 1207. Specifically, some court of appeals decisions continued to cite the “majority approach” that requires four primary elements: (1) the party claiming equitable subrogation has paid the debt; (2) the party was not a volunteer; (3) the party was not primarily liable for the debt; and (4) no

injustice will be done to the other party by allowing subrogation. *Id.*  
Conversely, other decisions held that Arizona's approach "appears  
consistent with the Restatement," which rejects the volunteer rule. *Id.*  
(citing *Lamb Excavation, Inc. v. Chase Manhattan Mortg. Corp.*, 95 P.3d  
542, 544-46 (Az. App. 2004)).

The court settled the ambiguity by formally adopting the  
Restatement approach. The Court held,

We agree with the Restatement that equitable subrogation  
should not turn on whether the person invoking the doctrine  
is labeled a volunteer. "[T]he meaning of the term  
'volunteer' is highly variable and uncertain, and has  
engendered considerable confusion." Restatement § 7.6  
cmt. B. Instead, the Restatement appropriately focuses on  
other circumstances of the party seeking to invoke  
subrogation, including whether the party has paid a  
preexisting obligation to protect the party's interest in the  
property. *See* Restatement § 7.6; *see also Dietrich Indus.,  
Inc. v. United States*, 988 F.2d 568 (5th Cir.1993)  
(permitting equitable subrogation without discussing  
whether purchaser was a volunteer); Grant S. Nelson &  
Dale A. Whitman, 2 *Real Estate Finance Law* § 10.7 (5th  
ed. 2010) ("[T]he issue is only whether the payor expected  
that the payment would free the property; if this was the  
grantee's understanding, subrogation should be available.").

*Id.* at 1208. Because the Norcutts paid the preexisting debt to Zions Bank  
to protect their concurrently acquired interest in the property, equitable  
subrogation was available to them. *Id.*

Under this holding, and consistent with the Restatement, the focus  
is on whether the party invoking equitable subrogation paid to protect

some interest. “Such equitable relief may be appropriate, for example, if the person seeking subrogation ‘expected to receive a security interest in the real estate with the priority of the mortgage being discharged.’” *Id.* at 1207; Restatement § 7.6 cmt. e (“The question in such cases is whether the payor reasonably expected to get security with a priority equal to the mortgage being paid.”); *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.”)

CCB paid to protect its own interest in the Subject Property.

CCB’s Deed of Trust on the Subject Property secured \$1.04 million of the \$1.5 million loan. Concurrently, it used a portion of the loan proceeds to pay off the Hometown loan and property taxes in order to gain a priority position in the Subject Property. 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.<sup>12</sup> Paying off the Hometown loan to gain first priority thus protected CCB's interest by minimizing the overall risk of the loan. This is an adequate "interest" under the Restatement, thus entitling CCB to equitable subrogation.<sup>13</sup>

**2. Even States that have Retained the Volunteer Rule have held that Refinance Lenders are not "Volunteers."**

Other states, such as Colorado, have retained the volunteer rule, but do not classify refinance lenders as "volunteers." In *Hicks v. Londre*, 125 P.3d 452 (Co. 2006), the Colorado Supreme Court considered a similar factual situation as the one in *Sourcecorp*. A purchaser bought a home by contributing cash at closing and through a loan that resulted in a deed of trust on the property. *Id.* at 456. The purchaser and lender then discovered that there was a judgment lien filed on the property. *Id.* The judgment lienholder sought to foreclose the lien as a first encumbrance.

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<sup>12</sup> CP 252

<sup>13</sup> An alternative basis under the Restatement is also applicable to this case. The Restatement provides that a party who is fraudulently induced to make a loan is entitled to equitable subrogation. Section 7.6(b) of the Restatement (Third) provides: "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. *See also*, Nelson & Whitman, *Real Estate Finance Law* § 10.4 n.2 (5<sup>th</sup> ed.) (a payor whose payment was induced by fraud or deceit is not a volunteer.).

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.

*Id.* The purchaser and lender argued that they were entitled to move into the priority position of the seller's lenders, which had been paid off at closing, under the doctrine of equitable subrogation. *Id.* The court affirmed the application of equitable subrogation. *Id.*

The court recognized the traditional elements, including the requirement that the subrogee did not act as a volunteer. *Id.* at 456. However, citing the Restatement, the court noted that jurisdictions have adopted somewhat imprecise definitions of a volunteer. *Id.* at 457. The Court then held, "[s]uffice 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 the purposes of equitable subrogation.'" *Id.* (citing *Mort v. United States*, 86 F.3d 890, 894 (9th Cir. 1996) (interpreting Nevada law); see also, *Eastern Savings Bank v. Pappas*, 829 A.2d 953, 961 n.14. (D.C. App. 2003) ("This theory that the purchaser is a volunteer is, we think, entitled to little weight. The purchaser is advancing his money intending to get something for it, to wit, a title unencumbered by the lien to be discharged. It is hardly in accord with reality to say that he pays officiously, as an intermeddler."))

Even if the Court accepted this approach, CCB would not fall within the definition of a "volunteer" by virtue of the fact that it lent

money that, in part, paid off an encumbrance on the Subject Property and CCB secured its loan with a deed of trust on the Subject Property.

**3. Under Either Approach, a Form of the Volunteer Rule Still Exists to Prevent True Intermeddlers from Seeking Equitable Subrogation.**

A true intermeddler is still not entitled to equitable subrogation.

Under the Restatement approach, which focuses on the payment to protect some interest, a true intermeddler does not meet this requisite standard.

“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.”<sup>14</sup>

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

Courts that have restricted the definition of “volunteer” to exclude refinance lenders still preclude true intermeddlers from benefiting from subrogation. *See, e.g., Mort*, 86 F.3d at 894. Hence, under either approach, a true intermeddler cannot seek protection under the equitable subrogation doctrine.<sup>15</sup>

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<sup>14</sup> 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.

<sup>15</sup> However, for the reasons stated above, CCB is not an intermeddler. Newman Park was manager-managed. Its manager, Joseph Sturtevant, approached CCB about obtaining a

**D. No Prejudice Would Result to Newman Park by the Application of Equitable Subrogation.**

“Equitable subrogation should never be allowed if a junior interest is materially prejudiced, but if the junior interests are unaffected, then there is no reason to deny it.” *Prestance*, 160 Wn.2d at 572. *See also*, Restatement § 7.6 cmt. e (“The holders of ... intervening interests can hardly complain [about subrogation]; their position is not materially prejudiced, but is simply unchanged.”); *Lamb Excavation*, 95 P.3d at 547 (“We fail to comprehend the nature of the perceived prejudice or inequity, as it appears the lienholders would remain in the *same* position they occupied before subrogation. . . .”) (Emphasis in original).

Newman Park can show no prejudice from the application of equitable subrogation. The Hometown loan enabled Newman Park to purchase the Subject Property. At the time CCB made its loan, Newman Park owned the Subject Property subject to a deed of trust securing a \$403,127.67 loan balance from Hometown and property taxes in the amount of \$8,356.11. Equitably subrogating CCB to the position held by

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refinance loan. In the context of CCB’s discussions with Sturtevant, he informed CCB of the Hometown loan and suggested, “It might be worth you guys taking them out and having 1st position(?)” (CP 280) Sturtevant, the manager of Newman Park, who negotiated and executed all loan documents with Hometown on behalf of Newman Park (CP 670-99), sought out a loan from CCB and specifically negotiated the payoff of the Hometown loan. CCB then paid \$411,483.78 (CP 806-10) to remove the Hometown deed of trust and property taxes as encumbrances, so as to obtain a priority position for its security for the loan. Regardless of Sturtevant’s authority, these facts cannot support a finding that CCB was an intermeddler.

Hometown puts Newman Park in the precise position it was in before CCB made its loan, a position that it bargained for when it took the loan from Hometown. There is simply no prejudice to Newman Park. On the other hand, denying equitable subrogation would essentially give Newman Park the Subject Property for free, putting it in a significantly better position than it was before CCB made its loan.

#### IV. CONCLUSION

Justice demands the liberal application of equitable subrogation in this case to prevent unjust enrichment to Newman Park. No material prejudice would result, as the application of equitable subrogation would put Newman Park in the exact position it would have been had CCB never made its loan. Newman Park can offer no principled reason for why it should reap a significant windfall at CCB's expense. CCB respectfully requests that the Court affirm the decisions of the trial court and Court of Appeals, awarding CCB an equitable lien.

Respectfully submitted, this 13<sup>th</sup> day of September, 2012.

SOCIUS LAW GROUP, PLLC

By 

Thomas F. Peterson, WSBA #16587

Adam R. Asher, WSBA #35517

Attorneys for Columbia Community Bank

**IV. CERTIFICATE OF SERVICE**

I certify that on the 14<sup>th</sup> day of September, 2012, I caused a true and correct copy of this COLUMBIA COMMUNITY BANK'S SUPPLEMENTAL BRIEF to be served on the following in the manner indicated below:

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

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*Counsel for Newman Park, LLC*

By: Linda McKenzie  
Linda McKenzie, Legal Assistant

## OFFICE RECEPTIONIST, CLERK

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**To:** Linda McKenzie  
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**From:** Linda McKenzie [<mailto:lmckenzie@sociuslaw.com>]  
**Sent:** Friday, September 14, 2012 10:59 AM  
**To:** OFFICE RECEPTIONIST, CLERK  
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**Subject:** Columbia Community Bank v. Newman Park, Case No. 87174-4

RE: Columbia Community Bank v. Newman Park, Case No. 87174-4, COA # 41470-8-II

Dear Filing Clerk:

Attached is Columbia Community Bank's Supplemental Brief to be filed today in the above-referenced matter. Please let me know if you are unable to open the pdf attachment. Thank you.

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Sincerely,  
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