

ORIGINAL

IN THE SUPREME COURT OF OHIO

ABN AMRO MORTGAGE GROUP, INC., PLAINTIFF-APPELLEE

v.

JACOB KANGAH, ET AL., DEFENDANTS-APPELLEES, and

CUYAHOGA COUNTY BOARD OF COMMISSIONERS, DEPARTMENT OF
DEVELOPMENT, DEFENDANT-APPELLANT

CASE NUMBER 09-0553

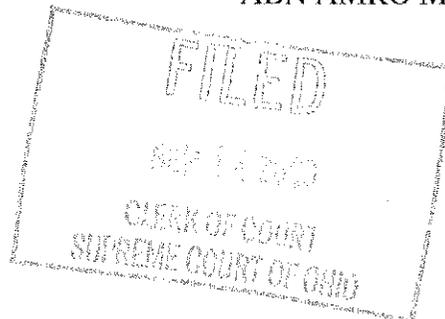
APPEAL FROM THE CUYAHOGA COUNTY COURT OF APPEALS,
EIGHTH APPELLATE DISTRICT

MERIT BRIEF OF PLAINTIFF-APPELLEE ABN AMRO MORTGAGE GROUP, INC.

FILED ON BEHALF OF PLAINTIFF-APPELLEE ABN AMRO MORTGAGE GROUP, INC.

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| | : | Case No. 09-0553 |
| Plaintiff-Appellee, | : | |
| | : | On Appeal from the Cuyahoga County |
| v. | : | Court of Appeals, Eighth Appellate District |
| | : | |
| JACOB KANGAH, | : | |
| | : | |
| Defendant, and | : | |
| | : | |
| CUYAHOGA COUNTY BOARD OF | : | |
| COMMISSIONERS, DEPARTMENT OF | : | |
| DEVELOPMENT, | : | |
| | : | |
| Defendant-Appellant. | : | |

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STATEMENT OF THE CASE

This dispute between ABN AMRO Mortgage Group, Inc. (“ABN”) and Cuyahoga County Board of Commissioners, Department of Development (“CCDOD”) concerns the priority of their respective mortgages on the property located at 20617 Libby Road in Maple Heights, Ohio (“the Property”). (Record 1, 42.)

On November 8, 2006, ABN filed its Complaint for Money Judgment, Foreclosure, and Relief. (Record 1.)

On December 4, 2006, CCDOD filed its Answer and Cross-claim, in which CCDOD asserted that it had the first and best lien on the Property, despite the fact that the CCDOD Mortgage expressly states that it is a “Subordinate Security Instrument.” (Record 17.)

On August 1, 2007, ABN moved for Summary Judgment as to the priority of its mortgage interest in the Property (“ABN’s Motion”). (Record 42.) Thereafter, this matter was stayed because Jacob Kangah filed a Chapter 13 bankruptcy petition. (Record 44.) On October 15, 2007, ABN was granted relief from the automatic stay imposed as a result of the filing of Jacob Kangah’s bankruptcy petition. (See Record 46.) On November 28, 2007, the Trial Court reinstated this case to its active docket. (Record 47.) Thereafter, CCDOD filed a Brief in Opposition to ABN’s Motion, to which ABN filed a Reply. (Record 51, 52.)

On April 8, 2008, Judge Peter J. Corrigan filed a Journal Entry, in which the Trial Court determined that ABN was entitled to priority, applying the doctrine of equitable subrogation (“the April 08, 2008 Entry”). (Supp. 68.)

On April 15, 2008, the Magistrate filed a Decision rendering judgment for foreclosure. (Supp. 69-75.) That Magistrate’s Decision incorporated the April 8, 2008 Entry. (Supp. 72.)

On April 28, 2008, CCDOD filed an Objection to the April 15, 2008 Magistrate’s Decision (“the Objection”), which only objected to the portions of the April 15, 2008 Magistrate’s Decision that embodied the April 8, 2008 Entry. (Record 60.)

On May 5, 2008, CCDOD filed a Notice of Appeal of the April 8, 2008 Entry. (Record 61.)

On May 8, 2008, ABN filed a Motion to Strike the Objection, because (a) the April 15, 2008 Magistrate’s Decision did not decide lien priority—it only applied the determination on lien priority that Judge Corrigan had already decided in the April 8, 2008 Entry, and (b) the Trial Court was deprived of jurisdiction due to the pending appeal to the Eighth District Court of Appeals.

On February 9, 2009, the Eighth District Court of Appeals issued a Decision (“the Eighth District Decision”), in which it carefully analyzed Ohio law and determined that ABN was entitled to priority, applying the doctrine of equitable subrogation. *ABN AMRO Mtge. Grp. v. Kangah*, 180 Ohio App.3d 689, 694, 2009-Ohio-359, 906 N.E.2d 1195, ¶ 22. (Supp. 76-85.) “In the case at hand, we find that the doctrine of equitable subrogation applies because ABN intended to hold the first and best lien on the property, CCDOD agreed to its subordinate security interest, [the third party’s] failure to discover [the CCDOD Mortgage] was a mere mistake, and CCDOD was not prejudiced by its inferior position.” *Kangah*, 2009-Ohio-359, at ¶ 22. (Supp. 82-83.)

On March 18, 2009, the Eighth District Court of Appeals certified the following conflict:

Whether the doctrine of equitable subrogation applies when a prior lien is satisfied with loan proceeds and (1) the party asserting the doctrine intended to hold the first and best lien, and (2) the competing lienholder had the expectation that its interest would be junior at the time that it received its interest, where the party asserting the doctrine had no actual knowledge of the competing lien due to its mistake or the mistake of a third party.

(Supp. 95.)

On April 29, 2009, the Trial Court overruled the Objection. (Supp. 86-93.)

On May 6, 2009, this Court determined that a conflict exists. (Supp. 96.)

On July 23, 2009, CCDOD filed its Merit Brief with this Court (“CCDOD’s Brief”).

Notably, CCDOD’s Brief admitted that CCDOD expected to hold a junior lien position in the Property when it obtained its interest in the Property. (See CCDOD’s Brief p. 1.)

STATEMENT OF THE FACTS

Although this case is before this Court on a narrow question based upon a certified conflict, the facts of this case are important for determining the circumstances in which the doctrine of equitable subrogation applies.

Prior to June 15, 2000, Olga Kolesar was the record owner of the Property. (Supp. 1.) On June 15, 2000, Dennis Kolesar and Audrey Motz, co-executors of the Estate of Olga Kolesar, executed a Fiduciary Deed conveying the Property to Jacob Kangah (“Kangah”) (“the Kangah Deed”). (Supp. 2.) The Kangah Deed was recorded with the Cuyahoga County Recorder’s Office (“the Recorder’s Office”) on July 12, 2000 as Instrument Number 200007120320. (Supp. 2.) On July 5, 2000, Kangah executed a Note in the amount of sixty-eight thousand nine hundred sixteen dollars (\$68,916.00) that was secured by a Mortgage on the Property in favor of First Ohio Mortgage Corporation (“the First Ohio Mortgage”). (Supp. 2.) The First Ohio Mortgage

was recorded with the Recorder's Office on July 12, 2000 as Instrument Number 200007120321. (Supp. 2.)

On July 5, 2000, Kangah executed a Note in the amount of seven thousand five hundred dollars (\$7,500.00) that was secured by a Mortgage on the Property in favor of CCDOD ("the CCDOD Mortgage"). (Supp. 2.) The CCDOD Mortgage was recorded with the Recorder's Office on July 12, 2000 as Instrument Number 200007120323. (Supp. 2.) Significantly, CCDOD referred to the CCDOD Mortgage as a "Subordinate Security Instrument" expressly on the face of the document: "This Subordinate Security Instrument is given to [CCDOD]." (Supp. 19.)

On July 12, 2000, the First Ohio Mortgage was assigned to Countrywide Home Loans, Inc. ("Countrywide") by virtue of an Assignment of Real Estate Mortgage that was recorded with the Recorder's Office as Instrument Number 200007120322. (Supp. 2)

In May 2001, Kangah applied for a loan from ABN in order to refinance his obligations associated with the Property. (Supp. 37.) In order to secure that loan, ABN required Kangah and his wife to execute a Mortgage that would be the first and best lien on the Property. (Supp. 37-38.) First Class Title Agency, Inc. ("First Class") performed title services and the closing of Kangahs' refinance transaction. (Supp. 38.) Thereafter, First Class requested that a title examination be performed, which identified the First Ohio Mortgage, but did not identify the CCDOD Mortgage. (Supp. 38.) ABN did not have actual knowledge that the subordinate CCDOD Mortgage encumbered the Property. (Supp. 39.) Because ABN required that its Mortgage be the first and best lien on the Property, First Class requested a payoff statement from Countrywide for the First Ohio Mortgage, and Countrywide provided a payoff statement showing a balance on its loan of sixty-nine thousand four hundred sixty eight and 60/100 dollars

(\$69,468.60). (Supp. 38.) First Class also verified that the outstanding property taxes for the Property totaled five hundred ninety nine and 05/100 dollars (\$599.05). (Supp. 38.)

On June 12, 2001, Kangah received loan proceeds from ABN totaling seventy-seven thousand dollars (\$77,000.00). (Supp. 38-39.) In return, Kangah gave a Note to ABN that was secured by a Mortgage on the Property in favor of ABN ("the ABN Mortgage"). (Supp. 38.) The ABN Mortgage was executed by Kangah and his wife, Ivory L. Kangah. (Supp. 48.) The ABN Mortgage was recorded with the Recorder's Office on June 19, 2001 as Instrument Number 200106190755. (Supp. 38, 40.)

Because ABN required that the ABN Mortgage be the first and best lien on the Property, sixty-nine thousand four hundred sixty eight and 60/100 dollars (\$69,486.60) of the loan proceeds associated with the ABN Mortgage were used to payoff the First Ohio Mortgage, and five hundred ninety nine and 05/100 dollars (\$599.05) were used to satisfy the outstanding property taxes. (Supp. 38, 49-51.) The balance of the loan proceeds was used to pay the fees and costs associated with the transaction. (Supp. 38-39.)

On November 7, 2001, as a result of the payoff that it received from the loan proceeds associated with the ABN Mortgage, the First Ohio Mortgage was released of record by virtue of a Satisfaction of Mortgage that was recorded with the Recorder's Office as Instrument Number 200111070487. (Supp. 39, 52.) The First Ohio Mortgage no longer encumbers the Property, because the debt that it secured was satisfied with the loan proceeds from ABN. (Supp. 38-39, 52.)

ARGUMENT

THE DOCTRINE OF EQUITABLE SUBROGATION APPLIES WHEN A PRIOR LIEN IS SATISFIED WITH LOAN PROCEEDS AND (1) THE PARTY ASSERTING THE DOCTRINE INTENDED TO HOLD THE FIRST AND BEST LIEN, AND (2) THE COMPETING LIENHOLDER HAD THE EXPECTATION THAT ITS INTEREST WOULD BE JUNIOR AT THE TIME THAT IT RECEIVED ITS INTEREST, WHERE THE PARTY ASSERTING THE DOCTRINE HAS NO ACTUAL KNOWLEDGE OF THE COMPETING LIEN DUE TO ITS MISTAKE OR A MISTAKE OF A THIRD PARTY.

The Trial Court granted summary judgment finding that the ABN Mortgage has priority over the CCDOD Mortgage applying the doctrine of equitable subrogation. (Supp. 68.) The Eighth District Court of Appeals affirmed the Trial Court's decision in the April 8, 2008 Entry. (Supp. 76-85.)

The April 8, 2008 Entry and the Eighth District Decision correctly applied the doctrine of equitable subrogation based upon the facts of this case.

This Court reviews the decisions of lower courts on summary judgment de novo, applying the same standard used by the lower courts. *Doe v. Shaffer* (2000), 90 Ohio St.3d 388, 390, 738 N.E.2d 1243.

Summary judgment is appropriate where (1) there is no genuine issue of material fact to be litigated; (2) reasonable minds can come to but one conclusion and that conclusion is in favor of the moving party; (3) such that the moving party is entitled to judgment as a matter of law. *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St.3d 367, 369-70, 696 N.E.2d 201; *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 295, 662 N.E.2d 264; Civ. R. 56(C). The purpose of summary judgment is to allow the movant to avoid unnecessary litigation when there is no genuine issue for adjudication at trial. *AAAA Enter., Inc. v. River Place Cmty. Urban Redev. Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597.

[The summary judgment standard] was enacted with a view to eliminating from the backlog of cases which clog our courts awaiting jury trials those in which no genuine issue of fact exists. The availability of this procedure and the desirability of its aims are so apparent that its use should be encouraged in proper cases.

North v. Pennsylvania Rd. Co. (1967), 9 Ohio St.2d 169, 224 N.E.2d 757, 38 O.O.2d 410.

In deciding whether to grant a motion for summary judgment, a court must employ a burden shifting analysis. First, the movant must identify evidence which affirmatively demonstrates that the non-movant does not have sufficient evidence to prevail at trial. *Vahilla v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164; *Dresher*, 75 Ohio St.3d at 293. If the movant satisfies this initial burden, the burden then shifts to the non-movant to identify “*specific facts* showing that there is a genuine issue for trial.” *Id.* (emphasis added). Therefore, the non-movant must identify disputed facts that might affect the outcome of the suit under the governing substantive law in order to preclude the entry of summary judgment. *Miller v. Loral Defense Systems, Akron* (1996), 109 Ohio App.3d 379, 383, 672 N.E.2d 227 (citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202, 54 USLW 4755, 4 Fed.R.Serv.3d 1041, 12 Media L. Rep. 2297), appeal not allowed, 76 Ohio St.3d 1437, 667 N.E.2d 987.

I. THE DOCTRINE OF EQUITABLE SUBROGATION APPLIES WHEN A PRIOR LIEN IS SATISFIED WITH LOAN PROCEEDS AND (1) THE PARTY ASSERTING THE DOCTRINE INTENDED TO HOLD THE FIRST AND BEST LIEN, AND (2) THE COMPETING LIENHOLDER HAD THE EXPECTATION THAT ITS INTEREST WOULD BE JUNIOR AT THE TIME THAT IT RECEIVED ITS INTEREST, WHERE THE PARTY ASSERTING THE DOCTRINE HAS NO ACTUAL KNOWLEDGE OF THE COMPETING LIEN DUE TO ITS MISTAKE OR A MISTAKE OF A THIRD PARTY.

Generally, the priority of a mortgage is determined by the time it was placed on the property, in other words the date of its recording. R.C. 5301.23; *Neil v. Kinney* (1860), 11 Ohio St. 58, 65.

However, the general chronological priority rule may be modified where the doctrine of equitable subrogation applies. *State v. Jones* (1980), 61 Ohio St.2d 99, 399 N.E.2d 1215, 15 O.O.3d 132; *Fed. Union Life Ins. Co. v. Deitsch* (1934), 127 Ohio St. 505, 189 N.E. 440, 39 Ohio Law Rep. 653; *Union Trust Co. v. Lessovitz* (1930), 122 Ohio St. 406, 171 N.E. 849, 8 Ohio Law Abs. 336, 32 Ohio Law Rep. 77; *Miller v. Stark* (1900), 61 Ohio St. 413, 56 N.E. 11, 43 W.L.B. 116; *Joyce v. Dauntz* (1896), 55 Ohio St. 538, 45 N.E. 900, 37 W.L.B. 69.

A. THE HISTORY OF THE DOCTRINE OF EQUITABLE SUBROGATION EXPLAINS THAT THE PURPOSES OF THE DOCTRINE OF EQUITABLE SUBROGATION ARE TO PROVIDE PROTECTION FROM FRAUD OR RELIEF FROM MISTAKES AND TO AVOID UNJUST ENRICHMENT.

The doctrine of equitable subrogation permits a party to acquire the rights of another upon payment of an obligation that was owed by the debtor, where equity dictates that the party is entitled to the additional security offered by the priority position. *Jones*, 61 Ohio St.2d at 102. The doctrine of equitable subrogation is supported by a foundation of over one hundred (100) years of precedent from this Court. *See Joyce*, 55 Ohio St. 538; *Stark*, 61 Ohio St. 413; *Lessovitz*, 122 Ohio St. at 418; *Deitsch*, 127 Ohio St. at 510; *Jones*, 61 Ohio St.2d 99.

Simply put, the purposes of the doctrine of equitable subrogation are to provide protection from fraud or relief from mistakes and to avoid unjust enrichment. *Dauntz*, 55 Ohio St. 541; *Deitsch*, 127 Ohio St. at 510; *Jones*, 61 Ohio St.2d 102. More specifically, equitable subrogation exists to provide protection to a party considered junior in time from another encumbrance that should, in all fairness, be considered junior in priority. See *Nat'l City Bank Northwest v. Ledgard* (Sep. 22, 1995), Sixth Dist. No. L-94-352, 1995 WL 557317, at *3, n. 1, citing *Dauntz*, 55 Ohio St. 538. The doctrine is akin to that of unjust enrichment, in that it prevents a party from receiving benefits that it should not rightfully receive. *Williams v. Erie Ins. Group* (1993), 86 Ohio App.3d 660, 665, 621 N.E.2d 770; *Am. Ins. Co. v. Ohio Bureau of Worker's Comp.* (1991), 62 Ohio App.3d 921, 925, 577 N.E.2d 756.

B. THERE ARE THREE (3) VIEWS OF THE DOCTRINE OF EQUITABLE SUBROGATION.

Since this Court's decision in *Jones* in 1980, three (3) views of the doctrine of equitable subrogation have emerged, both in Ohio and elsewhere. Kuehnle & Levy, *Baldwin's Ohio Practice Ohio Real Estate Law* (2008), Section 34:11.50; *Kangah*, 2009-Ohio-359, at ¶¶18-21.

Each of those three (3) views is explained, in turn, below.

1. The Traditional View of the Doctrine of Equitable Subrogation.

For many years, the law of equitable subrogation in Ohio could be boiled down to a prerequisite and two (2) critical elements. This view is referred to in this Brief as the Traditional View. Under the Traditional View, the doctrine of equitable subrogation allows a lender that satisfies a prior lien to step into the shoes of the prior lien that it satisfied, where: (1) that lender had the intent to hold the first and best lien, and (2) the competing lienholder had the expectation that its lien would be junior at the time that it obtained its interest. See *Fed. Home Loan Mortgage Corp. v. Moore* (Sep. 27, 1990), Tenth Dist. No. 90-AP-546, 1990 WL 140556; *Wash.*

Mut. Bank, FA v. Aultman, Second Dist. No. 2006 CA 25, 2007-Ohio-3706; *Cadle Co. No. 2 v. Rendezvous Realty* (Sept. 2, 1993), Eighth Dist. Nos. 63565, 63724, 1993 WL 335444; *TCIF REO GCM, LLC v. National City Bank*, Eighth Dist. No. 92447, 2009-Ohio-4040.

In the underlying case, the Eighth District Court of Appeals applied the Traditional View. *Kangah*, 2009-Ohio-359, at ¶22. (Supp. 76-85.) The Traditional View should be adopted by this Court as the law of Ohio.

Currently, the Second and Eighth Appellate Districts apply the Traditional View.

2. The Moderate View of the Doctrine of Equitable Subrogation.

An increasing number of Courts in Ohio have declined to apply the doctrine under limited circumstances by applying an additional factor, which is referred to in this Brief as the Moderate View. The Moderate View originated in Ohio in 2003, when, for the first time, the Tenth District Court of Appeals found that the doctrine of equitable subrogation did not apply to the facts before it. See *Keybank Nat'l Ass'n v. Adams*, Tenth Dist. No. 02AP-1293, 2003-Ohio-6651, at ¶20. The Tenth District Court of Appeals had previously applied the doctrine of equitable subrogation on two (2) consecutive occasions. See *Moore*, 1990 WL 140556; *First Union Nat'l Bank v. Harmon*, Tenth Dist. No. 02AP-77, 2002-Ohio-4446. The *Adams* Court held that even if the traditional elements of the doctrine are satisfied, the doctrine should not be applied if the party asserting the doctrine had actual knowledge of the competing lien and failed to take adequate steps to protect its interest. *Adams*, 2003-Ohio-6651, at ¶20.

Since the Tenth District's decision in *Adams*, the Tenth District has continued to apply the Moderate View, and several other Ohio appellate courts have also applied the Moderate View. See *Wash. Mut. Bank v. Hopkins*, Tenth Dist. No. 07AP-320, 2007-Ohio-7008, at ¶24; *Fed. Nat'l Mtge. Assoc. v. Webb*, Fifth Dist. No. 2005CA0013, 2006-Ohio-3574, at ¶¶39-40;

Wells Fargo Bank, N.A. v. Dupler, Fifth Dist. No. 06 CA 26, 2007-Ohio-3497; *Fifth Third Bank v. Lorance*, Twelfth Dist. No. CA2006-10-280, 2007-Ohio-4217; *Huntington Nat'l Bank v. Allgier*, Sixth Dist. No. WD-07-061, 2008-Ohio-1289; *Old Republic Nat'l Title Ins. Co. v. Fifth Third Bank*, First Dist. No. 070567, 2008-Ohio-2059, appeal not allowed, 119 Ohio St.3d 1475, 2008-Ohio-4911; *Morequity v. Fifth Third Bank*, First Dist. No. C-080824, 2009-Ohio-2735; *Ford Homes, Inc. v. Bobie*, Twelfth Dist. No. CA2008-09-220, 2009-Ohio-677. See, also, *Wash. Mut. Bank v. Chiappetta* (N.D. Ohio 2008), 584 F. Supp.2d 961.

Currently, the First, Fifth, Sixth, Tenth, and Twelfth Appellate Districts apply the Moderate View of the Doctrine of Equitable Subrogation.

3. The Minority View of the Doctrine of Equitable Subrogation.

CCDOD asserts that any mistake of the lender or any third party service provider should preclude application of equitable subrogation. (See CCDOD's Brief pp. 6, 13.)

Only two (2) Ohio Appellate Courts have ever gone as far as CCDOD asks this Court to go—the Ninth District and the Eleventh District. See *Leppo, Inc. v. Keiffer* (Jan. 31, 2001), Ninth Dist. Nos. 20097 and 20105, 2001 WL 81262; *Associates Financial Services Corp. v. Miller*, Eleventh Dist. No. 2001-P-0046, 2002-Ohio-1610. That View is referred to in this Brief as the Minority View. The Minority View is an anomaly, placing the Ninth and Eleventh Appellate Districts in the extreme minority. The Minority View flies in the face of this Court's precedent that recognizes that two (2) fundamental purposes of the doctrine are to provide relief from mistakes and to prevent unjust enrichment.

Nevertheless, CCDOD argues that any mistakes in the process of ABN securing the ABN Mortgage should preclude any application of the doctrine of equitable subrogation. (See CCDOD's Brief pp. 7-8, 11-13.) In support of that argument, CCDOD cites the above cases

from the Ninth and Eleventh Districts as well as three (3) other decisions from three (3) other Ohio Appellate Courts: *Fifth Third Bank v. Lorance*, Twelfth Dist. No. CA2006-10-280, 2007-Ohio-4217; *Wells Fargo Bank, N.A. v. Dupler*, Fifth Dist. No. 06 CA 26, 2007-Ohio-3497; and *Wash. Mut. Bank v. Loveland*, Tenth Dist. No. 04AP-920, 2005-Ohio-1542. The three (3) additional cases cited by CCDOD are discussed below.

Lorance, *Dupler*, and *Loveland* each applied the Moderate View and are each easily distinguished from the facts of this matter. In *Lorance*, *Dupler*, and *Loveland*, each lender attempting to assert the doctrine of equitable subrogation to gain priority over a prior mortgage had actual knowledge of the prior mortgage and failed to ensure that it was satisfied. *Lorance*, 2007-Ohio-4217, at ¶22; *Dupler*, 2007-Ohio-3497, at ¶30; *Loveland*, 2005-Ohio-1542, at ¶13. As a result, in *Lorance*, *Dupler*, and *Loveland*, the Twelfth, Fifth, and Tenth Appellate Districts, respectively, simply applied the Moderate View to find that the actual knowledge of the lender asserting the doctrine of equitable subrogation precluded its application in those cases. *Lorance*, 2007-Ohio-4217, at ¶22; *Dupler*, 2007-Ohio-3497, at ¶30; *Loveland*, 2005-Ohio-1542, at ¶13.

Besides the two (2) Districts that follow the Minority View, all other Ohio equitable subrogation decisions hold that a simple mistake in a title examination should **not** deprive the lender of its right to assert the doctrine. See, *Aultman*, 2007-Ohio-3706; *Hopkins*, 2007-Ohio-7008, at ¶24; *Webb*, 2006-Ohio-3574, at ¶¶39-40; *Moore*, 1990 WL 140556; *Chiappetta*, 584 F.Supp.2d at 970. See, also, *Harmon*, 2002-Ohio-4446. The view of these Courts was succinctly explained by the Tenth District in 2003: “any alleged negligence by [a] title agent is immaterial [when the competing lienholder] was not misled or injured [because the competing lienholder did not] bargain for or even expect a first lien position.” *Bank One Columbus, N.A. v. Jude*, Tenth Dist. Nos. 02AP-1266, 02AP-1268, 2003-Ohio-3343, at ¶25. “[Ohio] intermediate

state court decisions recognize [a] negligent title search [by a third party] as ‘mistake’ [for purposes of applying equitable subrogation.]” *Chiappetta*, 584 F.Supp.2d at 970.

C. **OTHER STATES HAVE RECOGNIZED THE THREE (3) VIEWS OF EQUITABLE SUBROGATION, AND THE TREND NATIONALLY IS AWAY FROM THE MINORITY VIEW AND IN FAVOR OF THE TRADITIONAL VIEW.**

The Traditional View in Ohio is commonly referred to nationally as “the Restatement Position”. Restatement of the Law 3d, Mortgages, (1997) Section 7.6 Subrogation; Grant S. Nelson and Dale A. Whitman, Adopting Restatement Mortgage Subrogation Principles: Saving Billions of Dollars for Refinancing Homeowners, 2006 B.Y.U. L. Rev. 305.

Courts across the country have adopted and applied the Traditional View. See Restatement of the Law 3d, Mortgages, (1997) Section 7.6 Subrogation; *Bank of America v. Prestance Corp.* (Wash. Sup. Ct. 2007), 160 P.3d 17; *Bank of New York v. Nally* (Ind. Sup. Ct. 2005), 820 N.E.2d 644; *Ameriquest Mtge. Co. v. Land Title Ins. Corp.* (Colo. App. 2007), 2007 WL 2128203, at ** 6-7; *Golden Delta Enterprises v. U.S. Bank* (Mo. App. 2007), 213 S.W.3d 171.

CCDOD’s Brief cites two (2) intermediate appellate court cases from Kansas and Minnesota, respectively, along with a federal court case that attempted to apply Arkansas law. (See CCDOD’s Brief pp. 9-10, citing *Bankers Trust Co. v. United States of America* (Kan. App. 2001), 25 P.3d 877, 882; *Ripley v. Piehl* (Minn. App. 2005), 700 N.W.2d 540, 545, 547; *United States v. Hughes* (8th Cir. 1974), 499 F.3d 322, 323.) Each of the cases cited by CCDOD for this proposition applied the Minority View and pre-date the more recent decisions issued in Missouri and Colorado and by the Supreme Courts of Washington and Indiana. In fact, the trend nationally is toward the Traditional View and away from the Minority View.

As explained below, this trend is supported by the fact that the Minority View contravenes the underlying purposes of the important doctrine of equitable subrogation and essentially eviscerates the doctrine entirely.

D. IF THIS COURT ADOPTS THE MINORITY VIEW OF THE DOCTRINE OF EQUITABLE SUBROGATION, THE DOCTRINE OF EQUITABLE SUBROGATION WILL BE EFFECTIVELY ELIMINATED IN OHIO, AND THIS COURT WILL UPSET STARE DECISIS.

As explained above, this Court has held in five (5) separate decisions issued since 1896 that equitable subrogation exists in Ohio. See *Jones*, 61 Ohio St.2d 99; *Deitsch*, 127 Ohio St. 505; *Lessovitz*, 122 Ohio St. 406; *Stark*, 61 Ohio St. 413; *Dauntz*, 55 Ohio St. 538.

As also explained above, the crux of the Minority View is that **any** mistake precludes application of the doctrine. Whereas precedent of this Court expressly recognizes that one of the fundamental purposes of the doctrine is to provide relief from mistakes. *Jones*, 61 Ohio St.2d at 102; *Dauntz*, 55 Ohio St. 538. Thus, the Minority View, by its very nature, flies in the face of standing precedent of this Court.

Under the Minority View, constructive notice by itself precludes application of this important doctrine. As a practical matter, the Minority View makes application of the doctrine impossible, because priority disputes in which the elements of the Traditional View are satisfied generally only arise if there is a mistake of some sort. The elements of the Traditional View and the Moderate View address situations where one lienholder intended to be senior and another lienholder fortuitously finds itself in a priority position of record. This situation generally only happens in the event of a mistake by someone. If any mistake precludes application of equitable subrogation, then equitable subrogation will not exist, because the doctrine of equitable subrogation generally does not apply unless there is a mistake of some kind. See *Jones*, 61 Ohio

St.2d 99; *Deitsch*, 127 Ohio St. 505; *Lessovitz*, 122 Ohio St. 406; *Stark*, 61 Ohio St. 413; *Dauntz*, 55 Ohio St. 538.

In those situations where the Traditional View or the Moderate View apply, equitable subrogation precludes that other lienholder from receiving a windfall due to a simple mistake.

Thus, Minority View does not really involve application of the doctrine of equitable subrogation. In reality, it addresses deprivation of the doctrine. The Minority View effectively eradicates the existence of a doctrine that this Court has recognized for over a century. See *Jones*, 61 Ohio St.2d 99; *Deitsch*, 127 Ohio St. 505; *Lessovitz*, 122 Ohio St. 406; *Stark*, 61 Ohio St. 413; *Dauntz*, 55 Ohio St. 538.

Stare decisis should not be upset in this case. In order to find the “special justification” to overrule its one hundred years of precedent holding that equitable subrogation exists in Ohio, this Court will apply a three (3) part test. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶¶43, 48.

A prior decision of the Supreme Court may be overruled where (1) the decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence to the decision, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it.

Galatis, 2003-Ohio-5849, at ¶48. Notably, these requirements are independent, and all three (3) must be met for this Court to act inconsistent with its own precedent. *Galatis*, 2003-Ohio-5849, at ¶48.

The justifiably high hurdle for upsetting stare decisis is not satisfied in this case. First, there is no suggestion by Appellant that this Court’s five (5) prior decisions concerning the existence and importance of equitable subrogation in Ohio were wrongly decided or that changes in circumstances justify the elimination of equitable subrogation in Ohio. In fact, as explained

above, the national trend is for equitable subrogation to apply by virtue of application of the Traditional View. And, sound policy reasons exist for limited, yet broader application of this important doctrine.

Second, application of either the Traditional View or the Moderate View does not defy practical workability. Until the Tenth District Court of Appeals issued its decision in *Adams*, the Traditional View was generally applied by trial courts and appellate courts throughout Ohio, and it faces a resurgence throughout the country. Since 2003, many of Ohio's District Courts of Appeals have applied the Moderate View. The Traditional View is more straightforward to apply. However, neither the Traditional View nor the Moderate View is difficult to apply, because the standards have been fleshed out through a great deal of caselaw.

Third, abandoning the law of equitable subrogation in Ohio would create undue hardship for lenders who act reasonably and rely upon the ability to secure loans with the first and best lien on real property. Eliminating equitable subrogation will leave lenders unprotected from the simple mistakes. Meanwhile, competing lienholders that surprisingly find themselves in first lien position of record would benefit from unjust enrichment and unearned windfalls.

Thus, not one (1), much less all three (3) requirements necessary for this Court to abandon its long-standing recognition, acceptance, and application of the doctrine of equitable subrogation are present in this case.

II. EQUITABLE SUBROGATION APPLIES IN THIS CASE, BECAUSE ABN MEETS THE REQUIREMENTS FOR APPLICATION OF THE DOCTRINE OF EQUITABLE SUBROGATION UNDER THE TRADITIONAL VIEW OR THE MODERATE VIEW.

The prerequisite and both elements necessary to apply equitable subrogation under the Traditional View are present in this case. Even if this Court adopts the Moderate View, the doctrine of equitable subrogation should still be applied in this case. Additionally, CCDOD's

tardily-raised arguments that the status of the competing lienholder and the existence of title insurance each somehow affect application of the doctrine of equitable subrogation are without merit.

A. EQUITABLE SUBROGATION APPLIES IN THIS CASE IF THIS COURT APPLIES THE TRADITIONAL VIEW OR THE MODERATE VIEW OF EQUITABLE SUBROGATION.

As explained above, under the Traditional View, the doctrine of equitable subrogation allows a lender that satisfies a prior lien to step into the shoes of the prior lien that it satisfied, where: (1) that lender had the intent to hold the first and best lien, and (2) the competing lienholder had the expectation that its lien would be junior at the time that it obtained its interest. See *Moore*, 1990 WL 140556; *Aultman*, 2007-Ohio-3706; *Cadle Co. No. 2*, 1993 WL 335444; *TCIF REO GCM*, 2009-Ohio-4040.

Here, ABN is entitled to the priority position afforded under the doctrine of equitable subrogation applying the Traditional View. ABN met the prerequisite of the doctrine of equitable subrogation because it satisfied the First Ohio Mortgage in the amount of sixty-nine thousand four hundred sixty-eight and 60/100 dollars (\$69,468.60). (Supp. 38, 49-51.) Next, ABN satisfies the first element of the doctrine because it intended to hold the first and best lien on the Property. (Supp. 38.) Last, ABN satisfies the second element of the doctrine because at the time that CCDOD recorded its mortgage, the First Ohio Mortgage unquestionably had priority over the CCDOD Mortgage. (Supp. 2.) Therefore, CCDOD could have only had the expectation that the CCDOD Mortgage would be junior in priority. (Supp. 2.) CCDOD's expectation that it would be junior in priority is further illustrated by the fact that the CCDOD Mortgage expressly states that it was to be subordinate: "This Subordinate Security Instrument is given to [CCDOD]." (Supp. 19.)

The Trial Court applied the Traditional View when analyzing this case, because it did not evaluate whether ABN had any actual knowledge of the CCDOD Mortgage. (See Supp. 68.)

The Eighth District Court of Appeals extensively researched and analyzed the doctrine of equitable subrogation in the underlying case. *Kangah*, 2009-Ohio-359. (Supp. 76-85.) After doing so, the Eighth District Court of Appeals applied the Traditional View to find that equitable subrogation afforded priority to the ABN Mortgage over the CCDOD Mortgage. *Kangah*, 2009-Ohio-359, at ¶22. (Supp. 82-83.)

Even if this Court applies the Moderate View, ABN meets the requirements for application of the doctrine of equitable subrogation. Under the Moderate View, even if the elements of the Traditional View are satisfied, the doctrine should not be applied if the party asserting the doctrine had actual knowledge of the competing lien and failed to take adequate steps to protect its interest. *Adams*, 2003-Ohio-6651, at ¶20.

Here, ABN *did not* have actual knowledge of the CCDOD Mortgage. (Supp. 39.) CCDOD concedes this fact in CCDOD's Brief: "[t]he [CCDOD] Mortgage is a subordinate security instrument." (CCDOD's Brief p. 1.) Thus, even if this Court considers the additional factor that several Ohio appellate courts have included in their analyses, that factor is not applicable in this case, because ABN did not have actual knowledge of the CCDOD Mortgage. (Supp. 39.) Therefore, even if this Court applies the Moderate View, ABN is entitled to the priority position afforded by the doctrine of equitable subrogation.

Because ABN satisfied the elements of the Traditional View of the doctrine, and because the additional Moderate View factor does not apply in this case, ABN is entitled priority in the amount of the prior lien that it satisfied, in the amount of sixty-nine thousand four hundred sixty-eight and 60/100 dollars (\$69,468.60). (Supp. 38, 29-51.)

CCDOD also asserts that any failure to consult a junior lienholder to allow that lienholder to consciously decide whether to allow subordination renders the doctrine inapplicable. (CCDOD's Brief p. 13.) If CCDOD's position was the law, there would be no doctrine of equitable subrogation in Ohio. The doctrine of equitable subrogation should only apply in limited circumstances where the prerequisite and two (2) requirements of the Traditional View are satisfied. In the vast majority of those cases, the competing lienholder was not contacted, due to a simple mistake by a lender or a third party service provider. *Cadle Co.*, 1993 WL 335444, at *3. Significantly, the Traditional View of the doctrine does not have unlimited application to remedy every mistake, because it only applies when a prior lien is satisfied, when the lender asserting the doctrine intended to hold the first and best lien, and most importantly "when the burdens of the prior intervening mortgage are not increased". *Cadle Co.*, 1993 WL 335444, at *3. In other words, the burden on CCDOD is not increased, because application of the doctrine is limited to the amount of the mortgage that ABN satisfied, an amount to which the CCDOD Mortgage expected to be subordinate. The Moderate View has even more limited application.

If this Court considers the undisputed facts and the applicable legal authority, this Court should reach the same conclusion as the Trial Court and the Eighth District Court of Appeals, which is that ABN is entitled to judgment as a matter of law that the ABN Mortgage is entitled to priority over the CCDOD Mortgage, applying the Traditional View of the doctrine of equitable subrogation. However, even if this Court applies the Moderate View, then the doctrine still applies in this case.

B. THE COMPETING LIENHOLDER'S STATUS DOES NOT AFFECT APPLICATION OF THE DOCTRINE OF EQUITABLE SUBROGATION.

CCDOD asserts on appeal a novel argument that equitable subrogation is not applicable when a lien that was supposed to be junior is held by a political subdivision. (See CCDOD's Brief pp. 13-14.)

This argument fails for two (2) reasons. First, the argument must not be considered by this Court, because it was not raised with the Trial Court in the briefing on ABN's Motion. Second, eligibility and application of equitable subrogation should have nothing to do with the identities of the lienholders.

1. CCDOD waived its right to argue on appeal that equitable subrogation cannot be raised against a political subdivision by not timely asserting this argument before the Trial Court.

"It is a well established principle of law in Ohio that a party cannot raise new issues for the first time on appeal." *McCarthy, Lebit, Crystal & Haiman Co. v. First Union Management, Inc.* (1993), 87 Ohio App.3d 613, 619, fn 1, 622 N.E.2d 1093. See, also, *Addyston Village School Dist Bd. of Edn. v. Nolte Tillar Bros. Constr. Co.* (1943), 71 Ohio App. 469, 49 N.E.2d 99, 38 Ohio Law Abs. 91, 26 O.O. 379; *State Planters Bank & Trust Co. v. Fifty-Third Union Trust Co.* (1937), 56 Ohio App. 309, 10 N.E.2d 935, 24 Ohio Law Abs. 300, 9 O.O. 297; *Hiller v. Shaw* (1932), 45 Ohio App. 303, 187 N.E. 130, 15 Ohio Law Abs. 171, 39 Ohio Law Rep. 112; *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elections* (1992), 65 Ohio St.3d 175, 602 N.E.2d 622; *BancOhio Natl. Bank v. Abbey Lane Ltd.* (1984), 13 Ohio App.3d 446, 469 N.E.2d 958, 13 O.B.R. 536; *Fusselman v. Westfield Ins. Co.*, Ninth Dist. No. 21432, 2003-Ohio-5467; *Bobinsky v. Tippett*, Ninth Dist. No. 21444, 2003-Ohio-3787; *McBroom v. McBroom*, Sixth Dist. No. L-03-1027, 2003-Ohio-5189; *May v. Westfield Village, L.P.*, Fifth Dist. No. 02-CA-051,

2003-Ohio-1751; *Stables v. Bland*, Eleventh Dist. No. 2002-T-0075, 2003-Ohio-1751; *St. Clair v. St. Clair* (Oct. 9, 1985), Ninth Dist. App. No. 3835, 1985 WL 10840; *Atlantic Richfield Co. v. McClellan* (Dec. 7, 1984), Eleventh Dist. App. No. 3396, 1984 WL 6438.

In this case, ABN filed ABN's Motion on August 1, 2007. (Record 42.) Thereafter, the parties extensively briefed the issue of priority of liens to the Trial Court. (Record 51, 52.) After fully considering the arguments asserted in the Briefs that specifically addressed the issue of lien priority, the Trial Court issued its decision on the priority of liens in the form of the April 8, 2008 Entry, which it filed on April 8, 2008. (Supp. 68.) Throughout that process of briefing the issue of lien priority, CCDOD did not once argue that equitable subrogation was not applicable to political subdivisions. (Record 51.) Nor did CCDOD raise that argument at any time before the Trial Court issued the April 8, 2008 Entry. This newly-asserted argument cannot be considered on appeal, because it was not raised with the Trial Court at a time at which the Trial Court could address it before the Trial Court issued the April 8, 2008 Entry.

CCDOD did belatedly raise its political subdivision argument with the Trial Court after the April 8, 2008 Entry was filed, in an Objection to the April 15, 2008 Magistrate's Decision. (Record 60.) However, the Trial Court appropriately did not rule on that Objection until after the Eighth District Decision was issued, due to a lack of jurisdiction while the appeal to the Eighth District Court of Appeals was pending. See *State ex. rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97, 378 N.E.2d 162, 9 O.O.3d 88.

Ultimately, CCDOD did not timely assert this argument before the Trial Court. Therefore, it was waived and this Court should not consider it.

2. **Even if this Court finds that CCDOD's tardily-asserted argument was not waived by CCDOD, then this Court must find that equitable subrogation may be applied regardless of the competing lienholder's status.**

CCDOD argues that equitable subrogation is inapplicable against political subdivisions, because equitable subrogation somehow imposes an implied contract on a political subdivision, which implied contract is unenforceable. (CCDOD's Brief p. 13.)

The doctrine of equitable subrogation is a legal doctrine that is based on fundamental fairness that applies to all liens, regardless of the status, stature, or nature of the party that holds the competing lien that expected to be junior. Whether equitable subrogation applies has nothing to do with the identities of the holders of the applicable liens. The doctrine of equitable subrogation "arises by operation of law ... under such circumstances that [the subsequent lienholder] is in equity entitled to the security or obligation held by the creditor whom he has paid." (See Record 51 p. 5, citing *Chase Manhattan Bank v. Westin*, Twelfth Dist. No. CA2002-12-099, 2003-Ohio-5112, at ¶9, citing *Deitsch*, 127 Ohio St. at 510.) In fact, the doctrine of equitable subrogation achieves equity by establishing priority in accordance with the respective parties' intentions and expectations. See *Webb*, 2006-Ohio-3574, ¶¶39-40; *Cadle Co.*, 1993 WL 335444, at **3-4; *Moore*, 1990 WL 140556, at **2-3.

The essence of CCDOD's argument on this point may be rooted in a fundamental misunderstanding of contractual subrogation versus equitable subrogation. CCDOD incorrectly asserts in its Brief that equitable subrogation is the same as contractual subrogation:

Contracts with political subdivisions must be in writing because they involve taxpayer money. Political subdivisions are accountable to the public for contracts and for their use of taxpayer money. Here, the trial and appellate courts have essentially imposed a contract for subrogation and subordination upon CCDOD without requiring ABN [...] to go through the available processes for securing a contract with CCDOD.

(See CCDOD's Brief p. 14.)

This Court has held that equitable subrogation is not the same as conventional/contractual subrogation. See *Jones*, 61 Ohio St.2d at 101-102.

[Equitable] subrogation arises as a matter of law when one having a [...] fiduciary relation in the premises pays a debt due by another under such circumstances that he is in equity entitled to the security or obligation held by the creditor whom he has paid.

Id., at 102. See, also, *Moore*, 1990 WL 140556, at *2 (“Conventional subrogation is premised on the contractual obligations of the parties, either expressed or implied [but] equitable subrogation arises only by operation of law.”) CCDOD's argument that equitable subrogation imposes an implied contract ignores the significant distinction between contractual subrogation and equitable subrogation, namely that the lack of contractual subrogation is what gives rise to equitable subrogation. *Id.*

In fact, in *Jones*, the competing lienholder was a political subdivision, but this Court did not mention that fact or rely upon it in any way when rendering its decision concerning the application of equitable subrogation in that case. *Jones*, 61 Ohio St.2d at 101-02. Similarly, the fact that a competing lienholder was a political subdivision was not considered by the United States District Court of the Northern District of Ohio in a case analyzing equitable subrogation 2008. See *Chiappetta*, 584 F.Supp.2d 961.

Evaluating the identity, status, and/or nature of the party asserting the doctrine or the party against whom the doctrine is asserted, or discriminating in any other way with respect to party status, would open a “Pandora's Box” as to where Courts should draw this new line. For example, would liens held by quasi-governmental entities be subject to equitable subrogation? What about liens held by cooperatives? Mortgages held by private individuals? Liens held by

charitable organizations? Mortgages held by credit unions? Should judgment lienholders be treated differently? It is evidently impractical to determine whether equitable subrogation applies based upon the identities of the parties with the competing interests. More importantly, distinctions based upon the status of a party should not exist in the eyes of the law. The status of a party should have no bearing on whether an important legal doctrine applies.

C. **THE EXISTENCE OF ALTERNATIVE POTENTIAL RECOVERY RIGHTS SHOULD NOT AFFECT APPLICATION OF THE DOCTRINE OF EQUITABLE SUBROGATION.**

CCDOD alleges that title insurance exists in this case and that the existence of title insurance in this case somehow precludes application of the doctrine of equitable subrogation. (CCDOD's Brief p. 8.) This argument fails for three (3) independent reasons, which are set forth below.

First, CCDOD did not produce evidence that title insurance exists in this case. CCDOD bore the burden of producing evidence for consideration by the lower courts and this Court. See Civ. R. 56(C). No such evidence is contained in the Record. So, whether title insurance exists cannot be considered by this Court in this Appeal. See Civ. R. 56(C); *Blanton v. Cuyahoga County Board of Elections* (2002), 150 Ohio App.3d 61, 65, 779 N.E.2d 788, citing *Martin v. Cent. Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, 590 N.E.2d 411; *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 222, 515 N.E.2d 632.

Second, the existence of title insurance argument was not raised before the Trial Court or the Eighth District Court of Appeals. (Record 51 and Brief of CCDOD filed with the Eighth District Court of Appeals on June 18, 2008.) Therefore, because it is a new issue, it cannot be considered by this Court in this Appeal. See *McCarthy, Lebit, Crystal & Haiman*, 87 Ohio App.3d at 619, fn 1. See, also, *Addyston Village School Dist.*, 71 Ohio App. at 469; *State*

Planters Bank & Trust, 56 Ohio App. at 309; *Hiller*, 45 Ohio App. at 303; *State ex rel. Gutierrez*, 65 Ohio St.3d at 175; *BancOhio*, 13 Ohio App.3d at 446; *Fusselman*, 2003-Ohio-5467; *Bobinsky*, 2003-Ohio-3787; *McBroom*, 2003-Ohio-5189; *May*, 2003-Ohio-1751; *Stables*, 2003-Ohio-1751; *St. Clair*, 1985 WL 10840; *Atlantic Richfield*, 1984 WL 6438.

Third, even if this Court considers CCDOD's tardily-raised argument that lacks an evidentiary basis, whether theoretical recovery rights may possibly exist against a third party should never matter in determining whether an important legal doctrine applies. After this Court decided and remanded *Lessovitz*, 122 Ohio St. 406, the Eighth District Court of Appeals held on remand that "[i]t would be strange if a prospective mortgagee in employing the services of a title company [...] should thereby forfeit the right of [equitable] subrogation." *Union Trust Co. v. Lessovitz* (1931), 51 Ohio App. 69, 73, 199 N.E. 614, 10 Ohio Law Abs. 171, 4 O.O. 499. See, also, *Moore*, 1990 WL 140556, at *3; *Houston v. Bank of America* (Nev. Sup. Ct. 2003), 119 Nev. 485, 489. In fact, precluding application of the doctrine of equitable subrogation in situations where title insurance exists would run counter to public policy by encouraging parties to be less diligent in their transactions.

Whether a legal doctrine may be applied should not be dependent in any way on whether recovery rights may possibly exist. Whether a contract has been breached or whether a party is culpable for negligence is in no way dependent upon other potential recovery rights. This is not the law of real property in Ohio, nor should it be. As a practical matter, whether recovery rights may exist in a lien priority dispute involves a detailed analysis of the precise nature of the contractual relationships involved. Those relationships may vary depending upon many factors, including but not limited to the geographic area of Ohio in which the real property is located, the parties involved, the nature of the transaction, and/or the negotiated terms of the specific

transaction at issue. If proving lack of alternative means of recovery is a prerequisite to application of equitable subrogation, then courts would have to engage in a fairly-involved analysis of contractual rights and/or coverage issues involving third parties to the case, before deciding the merits of the priority dispute. Any such analysis is not necessary, appropriate, or relevant in determining whether the important legal doctrine of equitable subrogation applies. Analogously, holders of mechanics' liens may have recovery available against bonding companies, and judgment creditors could be entitled to recovery against third parties, but potential alternative recovery rights do not have to be decided in cases involving those parties. Likewise, other potential recovery rights should not be considered in determining the priority of liens.

CONCLUSION

In this Appeal, this Court is addressing the following Certified Conflict:

Whether the doctrine of equitable subrogation applies when a prior lien is satisfied with loan proceeds and (1) the party asserting the doctrine intended to hold the first and best lien, and (2) the competing lienholder had the expectation that its interest would be junior at the time that it received its interest, where the party asserting the doctrine has no actual knowledge of the competing lien due to its mistake or the mistake of a third party.

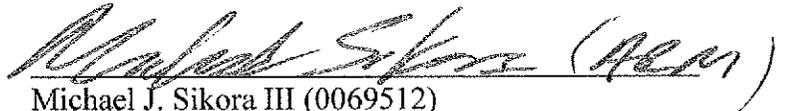
As explained above, the Certified Conflict must be answered in the affirmative. When applying the affirmative response to the Certified Conflict to the facts of this case, ABN meets the requirements of the doctrine of equitable subrogation. ABN meets the requirements of the doctrine of equitable subrogation under the Traditional View or the Moderate View. Only two (2) courts in Ohio have applied the Minority View—perhaps not fully appreciating the ramifications of their decisions. This Court will effectively upset over one hundred years of stare

decisis if it adopts the Minority View and will contravene one of the fundamental purposes of this important doctrine.

Therefore, ABN respectfully requests that this Court resolve the issue posed by the certified conflict in the affirmative and affirm the decision of the Eighth District Court of Appeals and the Trial Court, because summary judgment was properly granted in favor of ABN on the issue of priority based on the application of the doctrine of equitable subrogation.

Respectfully submitted,

SIKORA LAW LLC

A handwritten signature in black ink, appearing to read "Michael J. Sikora III", with a circled "AM" to the right. The signature is written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief of Plaintiff-Appellee ABN AMRO Mortgage Group, Inc. was served by ordinary U.S. mail, postage prepaid, this 14th day of September, 2009, upon the following:

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APPENDIX

Ohio Rule of Civil Procedure 56 1

C

Baldwin's Ohio Revised Code Annotated Currentness

Rules of Civil Procedure (Refs & Annos)

^ Title VII. Judgment

→ Civ R 56 Summary judgment

(A) For party seeking affirmative relief

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. A party may move for summary judgment at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(B) For defending party

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(C) Motion and proceedings

The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party, prior to the day of hearing, may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) Case not fully adjudicated upon motion

If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.