STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1560

Citizens State Bank,
Respondent,

vs.

Raven Trading, Partners, Inc., et al.,
Appellants.

Filed June 2, 2009
Reversed and remanded
Stoneburner, Judge
Crippen, Judge,[*] concurring specially

Hennepin County District Court
File No. 27CV0720358

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Considered and decided by Ross, Presiding Judge; Stoneburner, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

Appellant challenges the district court's invocation of equitable subrogation to hold that respondent's later-recorded mortgage took priority over appellant's mortgage. We conclude that the application of the doctrine of equitable subrogation was an abuse of discretion under the circumstances of this case and therefore reverse and remand.

FACTS

Appellant Raven Trading Partners, LLC, (Raven) recorded a mortgage on property located in Hennepin County. The mortgage acknowledged the existence of two prior mortgages. Ten days later, respondent Citizens State Bank (Citizens) recorded its mortgage on the same property. Citizens entered into its mortgage 50 days prior to execution of the Raven mortgage, and Citizens paid the balances on the prior mortgages. It is undisputed that Raven had no notice of Citizens's mortgage.

Citizens's[1] first attempt to record its mortgage failed due to an incorrect amount for the mortgage-registration tax, and Citizens's delay of approximately 38 days in returning the mortgage to the recorder's office after learning of this mistake resulted in Raven's mortgage being first recorded. Citizens initiated an action against Raven seeking the application of the doctrine of equitable subrogation to give its mortgage priority over Raven's mortgage. On cross-motions for summary judgment, the district court granted summary judgment to Citizens and denied Raven's summary judgment motion. This appeal followed.

[1] Citizens's title company handled the recording for Citizens.

D E C I S I O N

"On appeal from summary judgment when the parties agree that the material facts are not in dispute, appellate review is limited to determining whether the district court erred in its application of the law." *Wells Fargo Home Mortg., Inc. v. Chojnacki*, 668 N.W.2d 1, 3 (Minn. App. 2003). In this case, it is undisputed that, absent application of the doctrine of equitable subrogation, Raven's first-recorded mortgage has priority under Minn. Stat. § 507.34 (2008) (providing that an unrecorded conveyance of real property is void as against a subsequent purchaser whose conveyance "is first duly recorded"). "Public policy dictates that [creditors] must be able to rely on the title [to real property] shown in public records." *Nussbaumer v. Fetrow*, 556 N.W.2d 595, 599 (Minn. App. 1996) (citing *Clark v. Butts*, 73 Minn. 467, 473, 76 N.W. 263, 264 (1898), for the proposition that failure to record leads to expensive litigation and loss of valuable property, and should, therefore, not be encouraged).

Citizens argues that because Raven had notice of the two prior mortgages satisfied by Citizens, strict application of the Recording Act would lead to an inequitable result, and it is entitled to application of the well-established doctrine of equitable subrogation to remedy this inequity. Under the doctrine of equitable subrogation, a person who has discharged the debt of another may be substituted for and obtain the rights and position of the satisfied creditors. *Ripley v. Piehl*, 700 N.W.2d 540, 545 (Minn. App. 2005). In this case, application of the doctrine results in Citizens obtaining the priority of the mortgagors whose mortgages Citizens satisfied and whose mortgages had priority over Raven's mortgage.

The grant of equitable relief is generally within the sound discretion of the district court and will not be reversed on appeal absent clear abuse of discretion. *Id.* at 544. The party invoking an equitable doctrine bears the burden of proving the applicability of the doctrine. *Id.* "Subrogation cannot be invoked where it would work an injustice, violate sound public policy, or result in harm to innocent third parties." *Id.* at 545 (citing *Universal Title Ins. Co. v. U.S.*, 942 F.2d 1311, 1315 (8th Cir. 1991)).

In Minnesota, equitable subrogation will be applied in the interest of substantial justice, "where one party has provided funds used to discharge another's obligation if (a) the party seeking subrogation has acted under a *justifiable or excusable mistake of fact* and (b) injury to innocent parties will otherwise result." *Carl H. Peterson Co. v. Zero Estates*, 261 N.W.2d 346, 348 (Minn. 1977) (emphasis added). And a professional lender, such as a bank, is held to a higher standard than an unsophisticated individual. *Id.* (stating that a bank's failure to consider potential priority conflicts cannot be deemed justifiable as an excusable mistake); *Ripley*, 700 N.W.2d at 544 (citing *Peterson* and *Universal* for the proposition that Minnesota courts impose stricter standards on professionals than lay persons in assessing whether mistakes are excusable for purposes of the doctrine of equitable subrogation).

In this case, Citizens did not act under a mistake of fact in granting a mortgage. Citizens lost priority under the Recording Act by failing to file its mortgage until some 80 days after the mortgage was executed. Losing priority by failing to timely record a mortgage or other conveyance of an interest in real property is a predictable consequence well known to commercial lenders. We recognize that Raven is not injured by the

application of equitable subrogation in this case, but we conclude that Citizens's negligence in failing to timely record its mortgage is not a "justifiable or excusable mistake" that triggers the application of the doctrine. As we said in *Ripley*: "[i]t is axiomatic that as an equitable doctrine, subrogation 'aids the vigilant, and not the negligent.'" 700 N.W.2d at 545 (citation omitted). Under the circumstances of this case, we conclude that the district court abused its discretion by granting summary judgment to Citizens based on equitable subrogation.

Reversed and remanded.

CRIPPEN, Judge (concurring specially)

The district court, despite the fact that appellant Raven Trading, Partners, Inc. (Raven) recorded its second mortgage before respondent Citizens State Bank (Citizens) recorded its mortgage, determined that Citizens' mortgage took priority by reason of equitable subrogation. This historic doctrine is premised on favoring the payor of an earlier first lien, despite its mistake in failing to perfect its own lien before the lien of a party who otherwise would gain a windfall. And authorities preceding *Ripley v. Piehl*, 700 N.W.2d 540 (Minn. App. 2005), *review denied* (Minn. Oct. 18, 2005), validate the result the district court determined in this case.

I concur because our holding is in accord with this court's decision in *Ripley*. The choice to concur is to uphold the tradition of this court, which sits in a single chamber site despite its activity in small panels, to speak as one court and to avoid inconsistent opinions. Thus, I do not propose to affirm the district court, the result that would follow from my conclusion that *Ripley* is not in accord with earlier precedents, many of which the court in *Ripley* did not address.

Our decision today, like *Ripley*, rests on the rationale that the sophisticated mortgagee will be held to an unusually high standard in its exercise of care to protect its interest. *See Carl H. Peterson Co. v. Zero Estates*, 261 N.W.2d 346, 348 (Minn. 1977); *Ripley*, 700 N.W.2d at 545, 547. But *Peterson*, consistent with its precedents, did not permit a party to leap the equitable order of liens and gain a windfall. A windfall occurs, under established rubrics, when a party's lien is given priority that is not premised on any equity of this party that is greater than the equity of a lienholder whose interest arises in a

proper transaction for its payment of liens that clearly have priority over all others. A further discussion of this aspect of *Peterson* is contained later in this opinion. License for the windfall that Raven is awarded erodes a principle of real estate law and practice that has been with us throughout most of Minnesota's history.

Initially, a portion of the facts statement should be recalled. When Raven took its mortgage early in April 2005, it knew that it had a subordinate lien. The mortgage instrument acknowledged on its face that there were two prior liens, the indebtedness that was satisfied by distribution of the proceeds of the Citizens mortgage that was executed in February 2005. Nothing in its circumstances suggests an equitable right to a first lien. That right arises only by reason of the recording act, which has long been subject to the doctrine of equitable subrogation.

I do not dispute Citizens' status as a sophisticated party, and it made a mistake that it has failed to adequately explain. After its evidently excusable mistake of submitting an incorrect check, it failed to resubmit its mortgage until 37 days had passed. This was followed by ordinary delay in the recording process, and the recording occurred 10 days after Raven's more recent mortgage was recorded. And Minnesota law provides that an unrecorded conveyance "shall be void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any part thereof, whose conveyance is first duly recorded." Minn. Stat. § 507.34 (2008). It is undisputed that the application of section 507.34 results in Raven's mortgage taking priority over Citizens' mortgage.

Under the long-recognized precept of equitable subrogation, "a person who has discharged the debt of another may succeed in substitution to the rights and position of the satisfied creditor." *Ripley*, 700 N.W.2d at 545; *see also Elliott v. Tainter*, 88 Minn. 377, 378, 93 N.W. 124, 124 (1903) ("The equitable doctrine of subrogation is well established . . . ."). Citizens bears the burden of proving the doctrine's applicability. *See Ripley*, 700 N.W.2d at 544.

Although equitable subrogation "is a highly favored doctrine, it is not an absolute right, but rather, one that depends on the equities and attending facts and circumstances of each case." *Universal Title Ins. Co. v. United States*, 942 F.2d 1311, 1315 (8th Cir. 1991); *see also Wentworth v. Tubbs*, 53 Minn. 388, 397, 55 N.W. 543, 545 (1893) (stating that the doctrine "is a favorite one with the courts, but its application is regulated by certain well-defined rules").

The supreme court, dealing with the mistake of a sophisticated party but stating the elements of equitable subrogation, has said that the doctrine is applied for a party who "has acted under a justifiable or excusable mistake of fact." *Peterson*, 261 N.W.2d at 348. Taking a cue from this language, additional modern cases have recognized that a sophisticated party—such as a professional lender, a professional mortgage company, or a title company—is "held to a higher standard for the purpose of determining whether it has acted under a justifiable or excusable mistake of fact." *Ripley*, 700 N.W.2d at 545; *see also Universal*, 942 F.2d at 1317 ("[T]he *Peterson* case indicates that the Minnesota courts impose stricter standards on professionals than lay persons in assessing whether mistakes are 'excusable' . . . , especially when the professional relationship arises out of a

commercial transaction involving consideration."), *cited with approval in Ripley*, 700 N.W.2d at 546. Citizens does not dispute that it is a sophisticated party.

The district court acknowledged that the equity of Citizens must be clear and substantial, and superior to that of Raven; that Citizens is to be held to the higher standard appropriate for a professional lender; that the application of the doctrine of equitable subrogation cannot work an injustice; and that the doctrine aids the vigilant, not the negligent. *See Universal*, 942 F.2d at 1315, 1317-18; *Ripley*, 700 N.W.2d at 545. But the district court concluded, consistent with the authorities reviewed here, that the critical facts for purposes of equitable subrogation were Citizens' equity interest that arose at the moment it satisfied the prior mortgages and the absence of a competing equity of Raven:

> [Citizens] paid off two mortgages on the assumption and belief that it would in turn receive a first priority mortgage as collateral for the property. [Raven], on the other hand, lent money on the assumption and belief that it would be a subordinate lender subject to two prior mortgages. It knew that there were two prior mortgages totaling $164,000.00 outstanding on the property and that the Raven Mortgage would not be a first priority mortgage. . . . [Citizens] was unaware of the Raven transaction at the time it advanced funds to [the mortgagor] because the Raven transaction had not yet occurred.

And the district court was properly concerned that Raven would receive a windfall:

> If [Raven] is granted relief, it will receive "windfall" to which it is not entitled. [Raven] also apparently has security in an additional piece of property. [Citizens'] mortgage paid off two prior mortgages that [Raven]'s mortgage was subject to and therefore [Raven] would suffer no harm. [Raven] simply remains in the position anticipated: subordinate to mortgages totaling $164,000.00. It would be

> unjust to give [Raven] a better position than it was to have when it entered into the transaction . . . .

There are numerous reasons to uphold the approach of the district court.

First, this approach renews emphasis on the fact that the equity interest of the claimant arises from the payment of the prior obligation, not the soundness of the claimant's later actions. When a claimant pays a prior obligation out of a good-faith belief that the claimant will receive a first-priority interest, courts will honor this good-faith payment to protect the status quo and to effect substantial justice. *See Elliott*, 88 Minn. at 378, 93 N.W. at 124 (stating that "the true principle" of equitable subrogation is that "where money is so paid, it shall operate in the nature of an assignment of the cancelled lien, to continue it in force to subserve the ends of justice"); *Heisler v. C. Aultman & Co.*, 56 Minn. 454, 459, 57 N.W. 1053, 1054 (1894) ("Upon the payment of the mortgage, plaintiff was entitled to all of the rights of the original mortgagee, and to an assignment of the mortgage."); *Emmert v. Thompson*, 49 Minn. 386, 391-92, 52 N.W. 31, 32 (1892) (stating that doctrine applies "where one . . . has loaned and used his money in good faith"); *Gerdine v. Menage*, 41 Minn. 417, 419, 421, 43 N.W. 91, 92 (1889) (noting that claimant, "when he satisfied the first mortgage, supposed he had acquired title," and that it "would not be inequitable to place the parties *in statu quo*"); *see also Crippen v. Chappel*, 11 P. 453, 455 (Kan. 1886) ("But the right of subrogation . . . is founded upon the facts and circumstances of the particular case, and upon principles of natural justice; and generally, where it is equitable that a person furnishing money to pay a debt should

be substituted for the creditor, or in the place of the creditor, such person will be so substituted."), *cited with approval in Emmert*, 49 Minn. at 392, 52 N.W. at 32.

As a result, equitable subrogation has been historically applied unless the claimant was an interloper—one who had no legitimate reason to pay a prior encumbrance—or where harm would result to an innocent intervening lienholder. *See Emmert*, 49 Minn. at 391, 52 N.W. at 32 (stating general rule that the doctrine "will not be exercised in favor of a volunteer or a stranger who officiously intermeddles, such as a person who . . . , without any interest to protect, liquidates the debt of another"); *Gerdine*, 41 Minn. at 422, 43 N.W. at 93 (stating that "subrogation will not be made where the rights of innocent purchasers have intervened"). Citizens—a party to a legitimate transaction—is not an interloper, and Raven is not an innocent victim.

Second, supporting the district court's holding, the Minnesota Supreme Court has applied equitable subrogation despite a variety of mistakes—some very serious—on the part of claimants of the doctrine. Several cases illustrate these various mistakes, each falling short of the interloper problem. In *Emmert*, a mortgagor misled a mortgagee into believing that the latter would receive a first-priority mortgage once the mortgagee paid off several prior encumbrances. 49 Minn. at 390, 52 N.W. at 31. When the new mortgage was executed, a junior mortgage was of record and became the senior lien when the prior encumbrances were paid. *Id.* at 391, 52 N.W. at 31. The supreme court determined that the mortgagee's mistake "grew out of an error in the abstract books kept by [his] agents; but later, when examining the records in the office of the register of deeds, the error was unnoticed and the mistake undiscovered." *Id.* at 393, 52 N.W. at 32.

The supreme court concluded that this mistake would not bar the application of equitable subrogation and stated that "it is obvious that it would be most unjust and inequitable not to place the parties *in statu quo* with respect to the amounts paid out upon liens which were superior to that held by plaintiff, now being foreclosed." *Id.*

Elliott also involved an error in an abstract. In that case, the mortgagor procured an abstract from a title company and submitted it to the mortgagee as a correct statement of title. 88 Minn. at 379, 93 N.W. at 125. Relying upon the abstract and upon her attorney's examination of it, the mortgagee paid the prior encumbrances in the belief she would receive a first-priority mortgage. *Id.* at 379-80, 93 N.W. at 125. But the abstract failed to mention another prior encumbrance, which took priority upon satisfaction of the other obligations. *Id.* Later the lower-priority mortgage was assigned. *Id.* at 380, 93 N.W. at 125. The assignee did not make an examination of the title of record. *Id.* Despite these failures to examine the property records, the supreme court affirmed the district court's application of equitable subrogation. *Id.* at 381, 93 N.W. at 126.

Hirleman v. Nickels involved an assignee who had purchased a $2,600 mortgage. 193 Minn. 51, 52, 258 N.W. 13, 14 (1934). The owners of the encumbered property executed a second mortgage in the amount of $750, which was expressly made subject to the $2,600 mortgage and duly recorded. *Id.* at 52-53, 258 N.W. at 14. When the assignee's mortgage became due, the assignee attempted to renew her mortgage by executing a satisfaction and accepting a new mortgage note in the same amount with the same interest rate. *Id.* at 53, 258 N.W. at 14. The new mortgage expressly stated that the real estate was subject to "one second mortgage of $750.00 now of record." *Id.*, 258

N.W. at 14-15. The assignee "knew nothing" about the intervening mortgage; she "relied wholly" upon the representations made to her by her transaction company and "acted in good faith and in ignorance." *Id.*, 258 N.W. at 14. The transaction company "freely admitted . . . that someone in [its] office had 'slipped up.'" *Id.* at 54, 258 N.W. at 15. The supreme court noted that "[t]here can be no doubt that the mortgage was mistakenly satisfied." *Id.* Even in light of the serious mistake by the transaction company, the supreme court applied the doctrine of equitable subrogation:

> In equity and good conscience [the second mortgagee] has no other or greater claim than the one she bargained for when she took her present mortgage. That contract then entered into by her still remains as it was. She bargained for and secured a second mortgage, inferior to [the assignee]'s first mortgage of $2,600. She has just that now. She is entitled to nothing more. It would be a sad reflection upon a court of equity if under the circumstances here appearing she were to prevail.

Id. at 58, 258 N.W. at 16.

In *London & Nw. Am. Mortgage Co. v. Tracy*, the plaintiff mortgagee, asked to pay prior liens, was told by the mortgagors that their mother (the defendant), who held a junior mortgage on the property, had agreed to release her mortgage and accept a second mortgage subordinate to the one given to the plaintiff. 58 Minn. 201, 203, 59 N.W. 1001, 1002 (1894). When the transaction occurred, the mortgagors represented to the plaintiff that a satisfaction of the mother's mortgage had been executed, but no such satisfaction had taken place. *Id.* The plaintiff foreclosed its mortgage before it knew that the mother had not satisfied her mortgage. *Id.* The supreme court reasoned that refusing to uphold the plaintiff's lien "would be permitting the second lien holder to profit at the expense of

[the] party [who paid to discharge it], and from his mistake." *Id.* at 204, 59 N.W. at 1002.

In *Gerdine*, the defendant satisfied a first mortgage and foreclosed a second mortgage on "the mistaken notion that [its] foreclosure proceedings were valid and effectual." 41 Minn. at 419, 43 N.W. at 92. But the defendant had improperly conducted the foreclosure sale. *Id.* The supreme court decided that the defendant's mistake in discharging the first mortgage did not bar his claim for equitable relief and that "it is clear that it would not be inequitable to place the parties *in statu quo*." *Id.* at 421, 43 N.W. at 92.

Finally, in *Sucker v. Cranmer*, the plaintiff purchased property at a foreclosure sale. 127 Minn. 124, 125, 149 N.W. 16, 17 (1914). While the year of redemption was running, the plaintiff paid several hundred dollars in unpaid taxes to avoid a statutory penalty. *Id.* But the plaintiff completely failed to file a statutorily required affidavit to preserve his claim for paying the taxes, claiming "mistake and inadvertence."[2] *Id.* Because of plaintiff's omission, the defendants did not reimburse him for his tax payments when they redeemed the property. *Id.* The supreme court concluded that "it would be a gross injustice to permit defendants to profit several hundred dollars from plaintiff's mistake or inadvertence," and applied the doctrine of equitable subrogation. *Id.* at 128, 149 N.W. at 18.

[2] We note that Citizens' 37-day delay (from March 14 through April 20) in resubmitting its mortgage is somewhat similar to the mistake of the *Sucker* plaintiff, except that the latter never filed the document.

These six cases make it evident that the supreme court has applied the doctrine of equitable subrogation despite a variety of serious mistakes made by claimants of the doctrine.[3] And, significantly, in each of these cases not only are the claimants' various mistakes overlooked, but a windfall would result to the intervening mortgagee were the doctrine not applied. In other words, the cases show that a claimant will be excused from its mistake where (1) the claimant made a good-faith payment of a prior obligation, and (2) the intervening mortgagee knew it had a lower-priority mortgage than that of the claimant, i.e., there is no innocent victim whose interests would be harmed by the application of the doctrine.

Third, also favoring the district court's approach, there is no Minnesota Supreme Court decision holding that equitable subrogation must be denied unless the claimant is innocent—that is, making its innocence of mistake or excuse for mistake a condition to recovery.

Peterson is the only example of the supreme court refusing to apply the doctrine of equitable subrogation. 261 N.W.2d at 348. In that case, a bank argued that its 1973 mortgage should be equitably subrogated to its discharged 1970 mortgage on the same property and thus take priority over intervening mechanics' liens. *Id.* The supreme court held that the district court properly denied equitable subrogation, but on two grounds, not solely on the absence of excusable mistake. *Id.*

Thus the supreme court noted that the bank was a "professional lender with knowledge of construction in progress giving rise to inchoate liens for contractors and

[3] It is evident that *Sucker* is not the aberration that Raven argues it to be.

materialmen," and "[i]ts failure to consider potential priority conflicts and to obtain subordination agreements from them, as well as its failure to ascertain that its mortgagor was maintaining insurance in force, cannot be deemed justifiable as an excusable mistake." *Id.* But the court also recognized that the mechanics' lienholders were "innocent parties whose rights could be substantially impaired, if not lost, were equitable subrogation granted to the bank." *Id.* *Peterson* is distinguishable from the cases described above and from the situation here because to excuse the mistake of the *Peterson* claimant would be to allow a sophisticated claimant to trample innocent intervening lienholders.[4]

This court followed *Peterson* in *Wells Fargo Home Mortgage, Inc. v. Chojnacki*, 668 N.W.2d 1, 5-6 (Minn. App. 2003). In *Wells Fargo*, the appellant bank failed to obtain respondent's signature on a mortgage given to the bank by her then-husband. *Id.* at 3. The bank sought to be equitably subrogated to the rights of a higher-priority mortgagee so that it could foreclose upon the property, which was eventually awarded to respondent upon the dissolution of her marriage. *Id.* The respondent in *Wells Fargo* also was an innocent party who would have been harmed by the application of equitable subrogation.

And in *Universal*, the Eighth Circuit cited *Peterson* in deciding that a title-insurance company that had failed to discover a properly recorded federal tax lien was

[4] The district court explained the difference between Raven and an innocent intervening lienholder by use of an illustration from the Restatement. We note that Illustration 30 is consistent with the facts and result of *Peterson*. *See* Restatement (Third) of Prop.: Mortgages § 7.6 cmt. f, illus. 30 (1997).

not entitled to equitable subrogation. 942 F.2d at 1313, 1320. The Eighth Circuit, applying Minnesota law, noted that the title-insurance company was a "professional enterprise[] experienced in the area of secured transactions involving real property" and therefore would be held to a stricter standard in assessing whether its mistake would be excused. *Id.* at 1317. But the Eighth Circuit also declared that awarding equitable subrogation to the title-insurance company would damage an innocent third party—the federal government—by trampling on its preexisting legal right to be paid the full amount of the properly recorded tax lien. *Id.* at 1319. Both *Universal* and *Wells Fargo* are consistent with *Peterson*.[5]

Fourth, the Restatement is consistent with prior Minnesota law. *Contra Ripley*, 700 N.W.2d at 547-48. The Restatement provides:

> (a) One who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment. Even though the performance would otherwise discharge the obligation and the mortgage, they are preserved and the mortgage retains its priority in the hands of the subrogee.
>
> (b) By way of illustration, subrogation is appropriate to prevent unjust enrichment if the person seeking subrogation performs the obligation:
>
> . . . .
>
> (3) on account of misrepresentation, mistake, duress, undue influence, deceit, or other similar imposition . . . .

[5] We also note that *Peterson* cites *Emmert*, *Elliott*, and *Sucker* as good law. 261 N.W.2d at 348 n.1.

Restatement (Third) of Prop.: Mortgages § 7.6 (1997).

The Restatement also provides that "[s]ubrogation is an equitable remedy designed to avoid a person's receiving an unearned windfall at the expense of another." *Id.* cmt. a. The Restatement further emphasizes the importance of the doctrine in avoiding a windfall to an intervening mortgagee, noting that when equitable subrogation is applied, "[t]he holders of intervening interests can hardly complain about this result, for they are no worse off than before the senior obligation was discharged. If there were no subrogation, such junior interests would be promoted in priority, giving them an unwarranted and unjust windfall." *Id.* As already made evident, this emphasis on preventing a windfall to an intervening mortgagee is reflected in Minnesota caselaw. *See Hirleman*, 193 Minn. at 58, 258 N.W. at 16; *Sucker*, 127 Minn. at 128, 149 N.W. at 18; *London*, 58 Minn. at 204, 59 N.W. at 1002.

The Restatement, consistent with *Peterson*, *Wells Fargo*, and *Universal*, also acknowledges that the doctrine should not be applied if an innocent party will be harmed. Restatement (Third) of Prop.: Mortgages § 7.6 cmt. d (stating that claimant may have subrogation "if no prejudice to any innocent person will result"); *id.* cmt. e (stating that "[s]ubrogation will be recognized only if it will not materially prejudice the holders of intervening interests"); *id.* cmt. f ("Since the purpose of subrogation is to prevent unjust enrichment, it will not be granted where it would produce injustice."). This concern for an innocent party is also evident in Minnesota caselaw. *See Peterson*, 261 N.W.2d at 348; *Gerdine*, 41 Minn. at 422, 43 N.W. at 93.

The Restatement, the equities of the situation when Citizens paid the prior mortgages, and the history of the law of equitable subrogation in Minnesota support the district court's concern about awarding a windfall to Raven.

In *Ripley*, this court decided that a sophisticated mortgagee that has made an unexplained personal mistake cannot successfully claim equitable subrogation even in the face of a windfall to the other side. 700 N.W.2d at 548. *Ripley* is not consistent with the history of the principle of equitable subrogation, and before today, *Ripley* has been the only case in the annals of Minnesota law to refuse to apply the doctrine despite a resulting windfall.

Ripley cites *Peterson* for its language declaring that a proper claimant of equitable subrogation "'has acted under a justifiable or excusable mistake of fact.'" 700 N.W.2d at 545 (quoting *Peterson*, 261 N.W.2d at 348). This reference is not an adequate summary of the supreme court's treatment of the doctrine. *Ripley* does not address the types of mistakes that the supreme court has excused, nor does it address the unusual precedential significance of awarding a windfall to the intervening mortgagee.

For the foregoing reasons, I join the majority opinion but write separately to respectfully question the direction that *Ripley* is taking us.