S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

WASHINGTON MUTUAL BANK, F.A.,

Plaintiff-Appellant,

v

SHOREBANK CORPORATION and STANDARD FEDERAL BANK, N.A.,

Defendants-Appellees,

and

HANNA SHINA, a/k/a JOHN SHINA, and JAKLIN SHINA,

Defendants.

FOR PUBLICATION
June 23, 2005
9:10 a.m.

No. 254338
Oakland Circuit Court
LC No. 03-047297-CH

Before: Sawyer, P.J., and Markey and Murray, JJ.

SAWYER, P.J.

Plaintiff appeals from an order of the circuit court granting summary disposition to defendants on plaintiff's complaint seeking recovery on a loan secured by a mortgage. We affirm.

Plaintiff alleges that it made a loan to the Shinas in the amount of $392,000, secured by a mortgage on property located in West Bloomfield. Almost all of the loan proceeds were used to satisfy and discharge a prior first mortgage on the property in favor of Option One Mortgage Corporation. According to plaintiff, it was unaware of the fact that, at the time it made the loan to the Shinas, there were two other mortgages recorded against the property: a $200,000 mortgage in favor of ShoreBank and a $249,000 mortgage in favor of Standard Federal Bank. Plaintiff alleges that the Shinas have defaulted on both of those mortgages, which went into foreclosure. Although both of those mortgages were recorded before the mortgage in favor of plaintiff, both were made after the Option One mortgage.

Plaintiff filed a multi-count complaint. Count One claimed that, under the doctrine of equitable subrogation, the mortgage in favor of plaintiff should be superior to, and have priority over, the mortgages in favor of ShoreBank and Standard Federal. That is, the Washington Mutual mortgage should stand in the place of the Option One mortgage. The trial court granted

summary disposition in favor of defendants, concluding that plaintiff had no legal obligation to pay off the Option One Mortgage and, therefore, it was a volunteer not entitled to equitable subrogation. The trial court also referenced plaintiff's ability to recover under a title insurance policy. Plaintiff's claims against ShoreBank and Standard Federal are the only ones at issue in this appeal. We review the grant of summary disposition de novo. *Beaudrie v Henderson*.[1]

Subrogation comes in two forms, which were described by the Supreme Court in *French v Grand Beach Co*[2] as follows:

> The doctrine of subrogation rests upon the equitable principle that one who, in order to protect a security held by him, is compelled to pay a debt for which another is primarily liable, is entitled to be substituted in the place of and to be vested with the rights of the person to whom such payment is made, without agreement to that effect. This doctrine is sometimes spoken of as 'legal subrogation,' and has long been applied by courts of equity. *Stroh v O'Hearn*, 176 Mich 164, 177 [142 NW 865 (1913)]. There is also what is known as 'conventional subrogation.' It arises from an agreement between the debtor and a third person whereby the latter in consideration that the security of the creditor and all his rights thereunder be vested in him, agrees to make payment of the debt in order to relieve the debtor from a sacrifice of his property due to an enforced sale thereof. It is wholly independent of any interest in the property which the lender may have to protect. It does not, however, inure to a mere volunteer who has no equities which appeal to the conscience of the court.

In *Stroh v O'Hearn*,[3] the Court also noted that the equitable principle of subrogation is not available to volunteers:

> Subrogation is an equitable doctrine depending upon no contract or privity, and proper to apply whenever persons other than mere volunteers pay a debt or demand which in equity and good conscience should have been satisfied by another. It is proper in all cases to allow it where injustice would follow its denial, and in allowing it all injustice should be guarded against so far as possible.

The principle was again applied in *Lentz v Stoflet*.[4] Indeed, even in *Walker v Bates*,[5] a case which cannot be reconciled with *Lentz*, the court acknowledged that subrogation is not available

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[1] 465 Mich 124, 129; 631 NW2d 308 (2001).

[2] 239 Mich 575, 580-581; 215 NW 13 (1927).

[3] 176 Mich 164, 177; 142 NW 865 (1913).

[4] 280 Mich 446, 450; 273 NW 763 (1937).

[5] 244 Mich 582, 587; 222 NW 209 (1928).

to a mere volunteer. See also *Hartford Accident & Indemnity Co v Used Car Factory, Inc*,[6] and *Beaty v Hertzberg & Golden, PC*.[7]

Thus, the question becomes whether plaintiff is properly categorized as a "mere volunteer." Not surprisingly, plaintiff relies on *Walker, supra*, in its argument that it was not a volunteer in paying off the Option One mortgage. The relevant transaction history in *Walker* is as follows:

(1) The Hannas purchase the property at issue and grant a mortgage to Highland Park State Bank;

(2) Plaintiffs sue Henry and Frances Bates, claiming that the Bateses had fraudulently purchased the property with the plaintiffs' money;

(3) Frances Bates contracts to sell the property to Charles Derr and his wife;

(4) The Derrs contract to sell the property to the Howeses, with the Howeses assuming the mortgage given to Highland Park State Bank;

(5) A lis pendens is filed related to the plaintiffs suit against the Bateses;

(6) Frances Bates mortgages the property to Commonwealth-Federal Savings Bank, with the Hannas' mortgage to Highland Park State Bank being paid and discharged;

(7) Frances Bates conveys the property by warranty deed to the Howeses;

(8) A judgment was rendered in favor of the plaintiffs for $6,300 and a lien was placed upon the property;

(9) The action was commenced to foreclose upon the lien.

In the litigation to foreclose the lien, Commonwealth-Federal claimed that it was entitled to be subrogated to the rights of Highland Park State Bank as mortgagee. The analysis by the majority in *Walker*, however, is scant. It essentially consists of quoting much the same material from *French,* that we did above, and then making the following statement:[8]

> The first mortgage was upon the property when the notice of *lis pendens* was filed. No injustice results from subjecting plaintiffs' rights thereto. Their interest in the property is charged with the payment of a mortgage lien of the

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[6] 461 Mich 210, 215-216; 600 NW2d 630 (1999).

[7] 456 Mich 247, 255; 571 NW2d 716 (1997) (for a third party to avoid being classified a mere volunteer, the damage must have been incurred as the result of the third party's fulfillment of a legal or equitable duty owed to the client).

[8] *Walker, supra* at 587.

same amount as that which was on it when the *lis pendens* was filed. The trial court very aptly said:

> "It is immaterial to the plaintiff and wasn't wronging him any, to just simply change from the Highland Park Bank to the Commonwealth Bank."

In short, although the *Walker* majority acknowledged the "mere volunteer" rule by quoting from *French*, it did not engage in any meaningful analysis of the point. Rather, the extent of its analysis rested upon its conclusion that applying the doctrine would not create any injustice to the holder of the lis pendens because it was in no worse a position than it was before remortgaging.

While the majority in *Walker* ignored the volunteer rule, the dissent did not, making the following observation:[9]

> A stranger to the title cannot, by payment of the whole or any portion of a mortgage, become subrogated to the rights of the mortgagee. The Commonwealth-Federal Savings Bank was a stranger to the parties and the title, a volunteer, with no interest in or claim against the parties or the premises which it was in equity entitled to have protected. Under such circumstances, it is not entitled to subrogation to the prejudice of plaintiffs' lien.

Were *Walker* the last word on the subject, we might have to agree with plaintiff that *Walker* compels a conclusion that an entity in plaintiff's position is not a volunteer, though such a conclusion would arise more from the implications of *Walker* than its express holding or analysis. But *Walker* is not the final word on the subject. Rather, it appears that the Supreme Court's opinion nine years later in *Lentz* is the Supreme Court's latest word on the topic of equitable subrogation in the context of mortgages. *Lentz*, like *Walker*, was written by Justice Sharpe. *Lentz*, however, reaches the exact opposite result as *Walker*, despite a similarity in facts.

Specifically, the transactions at issue in *Lentz* were as follows:

(1) William Mexico and his wife give a mortgage in the amount of $4,000 to Rockwood State Bank over a 94.72 acre tract of land;

(2) The Mexicos convey the property to the Stoflets;

(3) The Stoflets mortgage 68.49 acres of the property to Rockwood State Bank;

(4) Rockwood State Bank forecloses upon both mortgages, with the bank acquiring title to the property;

(5) The Stoflets mortgage the 68.49 acre tract to the State Savings Bank of Carleton;

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[9] *Walker, supra* at 584-585 (Potter, J., dissenting).

(6) Rockwood State Bank discharges the mortgages and conveys the property to the Stoflets;

(7) The next day, the Stoflets make payment to Rockwood State Bank with money loaned to them by an agent of the plaintiffs, with a mortgage being granted to the plaintiffs covering the 68.49 acre tract of land as well as two other parcels;

(8) The plaintiffs commence foreclosure on the mortgage and seek a determination that their mortgage be given priority over the mortgage to the State Savings Bank of Carleton on the basis that the plaintiffs' rights should be subrogated to the rights of Rockwood State Bank and its two mortgages on the property under equitable subrogation.

In his analysis, Justice Sharpe again quoted from *French,* as well as three other sources discussing the volunteer rule. The analysis then begins with a discussion of the fact that the new mortgage was in a greater amount and covered additional land, with the ability of the State Savings Bank recovering any deficiency being reduced. The majority opinion,[10] then makes the following observation:

> When plaintiffs loaned the money they had no interests to protect. It was done without any agreement or understanding that they were to enjoy the fruits of subrogation. It was voluntarily done upon their part and to grant it would not leave defendant in its former position. A mere volunteer is not entitled to subrogation.

Interestingly, Justice Sharpe does not even cite his previous opinion in *Walker*, much less explain how it is distinguishable from *Lentz*.

While Justice Sharpe ignores *Walker*, Justice Potter, the author of the dissent in *Walker*, does not. Justice Potter filed a concurring opinion in *Lentz*, which opens with the observation that the effect of the opinion in *Lentz* is to overrule *Walker*.[11] After reviewing several authorities on the issue of the volunteer rule, Justice Potter then makes the following observation:[12]

> This case [*Walker*] holds that a mere stranger to the title who voluntarily advances money to help a fraudulent holder of real estate pay a mortgage placed by him thereon has equities more appealing to the conscience of the court than those of the real but defrauded owner of the real estate with notice of whose rights the money was advanced. This case stands alone. It violates all the principles underlying the cases involving legal or conventional subrogation in England and America. It is not a precedent to be followed, but an accident to be avoided.

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[10] *Lentz, supra* at 451.

[11] *Id.* at 451 (Potter, J., concurring).

[12] *Id.* at 455 (Potter, J., concurring).

We also find guidance in the following observation by Justice Potter in his concurrence:[13]

> Subrogation "from its very nature, never could have been intended for the relief of those who were in a condition in which they were at liberty to elect whether they would or would not be bound." *Gadsden v Brown*, 1 Speer's Eq. (S.C.) 37. This, says the Supreme Court of the United States, is perhaps as clear a statement of the doctrine as can be found anywhere. *Aetna Life Ins. Co. v. Middleport*, 124 U.S. 534 (8 Sup. Ct. 625). This was the rule recognized in *Smith v. Austin*, 9 Mich. 465, and *Kitchell v. Mudgett*, 37 Mich. 81. In *Desot v. Ross*, 95 Mich. 81, complainant was sought to be subrogated. It is said:
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> "She was a stranger to the title, and as such could not, by payment of the whole or any portion of the mortgage, become subrogated to the rights of the mortgagee."
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> The court cited in support of this proposition *Kelly v. Kelly*, 54 Mich. 30, 47; *Shinn v. Budd*, 14 N.J. Eq. 234, 237; *Brice v. Watkins*, 30 La. Ann. 21; and quoted with approval from *Sanford v. McLean*, 3 Paige Ch. (N.Y.) 117, 122 (23 Am. Dec. 773), as follows:
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> " 'It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor as a matter of course, without any agreement to that effect. In other cases the demand of a creditor which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished.' "

We are obligated to follow the most recent pronouncement of the Supreme Court on a principle of law. *Brown v Genessee Co Bd of Commissioners (On Remand)*.[14] The most recent pronouncement of the Supreme Court on this topic would certainly seem to be that the doctrine of equitable subrogation does not allow a new mortgagee to take the priority of the older mortgagee merely because the proceeds of the new mortgage was used to pay off the indebtedness secured by the old mortgage. It is clear to us that, under *Lentz*, plaintiff is a mere volunteer and, therefore, is not entitled to equitable subrogation.

Plaintiff, however, offers other reasons that it should be entitled to apply equitable subrogation. First, plaintiff argues that equitable subrogation should apply because the mortgage was obtained through fraud, the fraud being the Shinas' failure to disclose the mortgages given to

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[13] *Id.* at 452 (Potter, J., concurring).

[14] 233 Mich App 325, 328; 590 NW2d 603 (1998), rev'd on other grounds 464 Mich 430; 628 NW2d 471 (2001).

defendants in their mortgage application to plaintiff. But the cases cited by plaintiff do not support their position.

First, three of the cases did not even involve the question of giving priority of one mortgage over another. In *Linn v Linn*,[15] the mortgagee held two mortgages on a property, which were thereafter replaced by a new mortgage, with the mortgagors being a husband and wife. After the husband's death, the wife denied having executed the mortgage herself. The Court held that the earlier mortgages were to be revived because their discharge was obtained through the supposed execution of the fraudulent new mortgage. For that matter, in *White v Newhall*,[16] the Court ruled against the purported mortgagee, concluding that the proper remedy was for the purported mortgagee to seek an equitable lien.[17] Finally, in *Coulter v Minion*,[18] Minion owned property in Barry County and Lloyd owned property in Grand Rapids. They exchanged the two properties, plus an additional $250 to be paid to Minion. Lloyd had owed a mortgage on the Grand Rapids property and under the agreement Lloyd would mortgage the Barry County property to pay off the Grand Rapids mortgage and pay the $250 to Minion. Minion arranged the mortgage with Coulter. As it turned out, Minion swindled Lloyd as the Barry County property was essentially worthless and Lloyd abandoned it, defaulting on the mortgage. Coulter then sues Minion, seeking to be subrogated to the mortgage on the Grand Rapids property (which now belonged to Minion) to recompense Coulter for her losses due to Minion's fraud. None of those cases dealt with a later mortgage being equitably subrogated to an earlier mortgage to leap ahead of intervening mortgages on the priority list.

On the other hand, in *Eggeman v Harrow*,[19] there was a question of the priority of an intervening mortgage, but it presented a pure question of fraud rather than an application of the volunteer doctrine. In *Eggeman*, the Eggemans gave a mortgage to Harrow covering two lots for $3,000. Thereafter, a new mortgage was made covering only one of the two lots in the amount of $2,000. On the same day, the Eggemans gave a mortgage over the same lot to Miller, Mrs. Eggeman's father. Although it appears that the new mortgage to Harrow was executed first, Mr. Eggeman maneuvered to have the Miller mortgage recorded first. In holding that the Harrow mortgage would have priority, the Court did not engage in a consideration of the application of the volunteer rule to the equitable subrogation doctrine. Rather, the Court concluded that the Miller mortgage was fraudulent in its entirety, noting that there had not, in fact, been any loan from Miller to the Eggemans that it secured, that there was not "any real consideration or equity" behind the mortgage.[20]

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[15] 122 Mich 130; 80 NW 1000 (1899).

[16] 68 Mich 641; 36 NW 699 (1888).

[17] *Id.* at 647.

[18] 139 Mich 200; 102 NW 660 (1905).

[19] 37 Mich 435 (1877).

[20] *Id.* at 439.

Furthermore, any fraud in the case at bar is not materially different than the fraud in *Lentz*. In both *Lentz* and the case at bar, the later mortgage was obtained apparently without disclosing the existence of the earlier mortgage(s). In short, if the volunteer doctrine applies in *Lentz* despite the fraud, then it also applies in the case at bar despite the similar fraud.

Plaintiff also argues that a mistake of fact prevents plaintiff from being considered a volunteer. We disagree. As with the fraud issue, the cases relied upon by plaintiff are not analogous to the case at bar. In *Detroit & Northern Michigan Building & Loan Ass'n v Oram*,[21] the mistake involved was that of a life tenant who mistakenly believed that she owned the real estate in fee and mortgaged the property, paying off the preexisting mortgage. A second mistake occurred when the title abstractor failed to discover that the life tenant was not the owner in fee. The mortgagee sought to be subrogated to the original mortgage, which relief was granted. But the Court's holding very specifically noted two facts: the new mortgage was defective because the life tenant could not grant a mortgage and there were no intervening encumbrances. *Id.* at 499. In the case at bar, on the other hand, the mortgage to plaintiff is not defective and there are intervening encumbrances. Similarly, *Sproal v Larsen*[22] allowed subrogation where the mortgagor no longer held title due to a conveyance occurring between the original mortgage and the subsequent mortgage, with the Court noting the requirement that there be no persons with intervening superior equities in order to apply subrogation.[23] *The Detroit Fire Marine Ins Co v Aspinall*,[24] also represents a case where there was a failed mortgage and no intervening liens to be considered.

Similarly in *Taylor v Roniger*,[25] there was a mistake regarding ownership. The plaintiff bought the property subject to a preexisting mortgage, which he thereafter paid off. But his title was defective because the seller's ex-wife never signed the deed conveying the property to the plaintiff, and therefore she retained ownership (and became sole owner after her ex-husband's death). The Court ultimately held that the plaintiff became the equitable owner of the mortgage he paid off.[26]

Plaintiff's reliance on *French,*[27] is grossly misplaced because a mistake was not at issue and the quotation in plaintiff's brief which refers to subrogation applying in cases of mistake, among others, which plaintiff attributes to *French* is actually from a different source which *French* itself quotes. The issue in *French* was whether the holder of a promissory note secured by a first mortgage could be compelled to accept payment and issue an assignment and

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[21] 200 Mich 485; 167 NW 50 (1918).

[22] 138 Mich 142; 101 NW 213 (1904).

[23] *Id.* at 143.

[24] 48 Mich 238; 12 NW 214 (1882).

[25] 147 Mich 99; 110 NW 503 (1907).

[26] *Id.* at 104.

[27] *Supra*.

subrogation of that note to a new lender. Apparently the new lender in *French* wanted the priority of the first mortgage (which the plaintiff was foreclosing upon due to default by the defendant) and the plaintiff did not want the new lender to obtain priority over the second mortgage because the plaintiff also held bonds secured by the second mortgage. The Court determined that it was equitable to require the plaintiff to issue the assignment and subrogate the new lender to the original mortgage. No mistake was involved. See also *Moore v Smith*,[28] which also involved the right to an assignment, in this case in order to redeem the property following a foreclosure.

Similarly, *Palmer v Sharp*[29] did not involve a mistake; rather, it involved a fraud. Further, while plaintiff does quote a brief passage which references "mistake," that is not the basis of the analysis of that case. In fact, like *Oram*, the Court in *Palmer* specifically noted that for subrogation to apply, there can be no intervening encumbrances.[30] There also was no mistake involved in *Draper v Ashley*,[31] whose facts differ greatly from the case at bar. Indeed, if anything, *Draper* supports defendants' position as the Court specifically noted that "one who pays off a prior incumbrance, and takes a new security for the advance, is not entitled to priority over an intervening incumbrance."[32]

Also, as with the fraud argument, plaintiff overlooks the fact that the mistake in the case at bar is no different than the mistake in *Lentz*. The mistake in both cases is that a new mortgage was granted to pay off a senior mortgage, without the discovery of intervening junior mortgages. Accordingly, there is no basis for distinguishing this case from *Lentz* on the basis of a mistake providing an exception to the volunteer rule.

Next, plaintiff cites *Smith v Sprague*,[33] for the proposition that a mere promise of repayment is sufficient to prevent plaintiff from being regarded as a volunteer. This once again overlooks the fact that the promise of repayment in the case at bar is no different than in *Lentz*, and therefore provides no basis to distinguish *Lentz*. Furthermore, the cases are different. In *Sprague*, there was no issue of providing priority over intervening encumbrances. Rather, the Court used the subrogation doctrine to impose liability on the promissor's widow. Briefly, the defendant and her husband owed money on a mortgage that went into default. The husband borrowed money from his former daughter-in-law to pay off the mortgage, promising to grant the former daughter-in-law a mortgage to secure the debt. But he died without fulfilling his promise. The Court concluded that it was unnecessary to determine if the defendant had agreed with her husband to grant the mortgage to the plaintiff as even if she had not, under equitable subrogation the plaintiff could be subrogated to the prior mortgage that had been paid off. Not

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[28] 95 Mich 71; 54 NW 701 (1893).

[29] 112 Mich 420; 70 NW 903 (1897).

[30] *Id.* at 424.

[31] 104 Mich 527; 62 NW 707 (1895).

[32] *Id.* at 531.

[33] 244 Mich 577; 222 NW 207 (1928).

only was this not a case of granting priority over intervening encumbrances, but also it appears that the exact opposite was true: the subrogation was subject to the intervening encumbrances. Although not discussed in detail in the opinion, in describing the trial court's decree, which was affirmed, the Court stated that, the plaintiff "had decree with respect to the mortgage of $5,000 and subject to incumbrances created in the meantime, and defendant has appealed."[34] Thus, if anything, *Smith* supports defendants' position in the case at bar.[35]

Finally, plaintiff, relying on *Schanhite v Plymouth United Savings Bank*,[36] argues that it should be given priority over the mortgages to defendants in order to prevent unjust enrichment. *Schanhite*, however, does not support plaintiff's position. In *Schanhite*, a mortgage was given to the seller of the property, the Glasses, who thereafter gave two assignments of the mortgage for purposes of securing indebtedness by the Glasses. The first assignment was to State Savings Bank of Ann Arbor and the second to Plymouth United Savings Bank. There are various conveyances of the property subject to the mortgage, with Schanhite eventually purchasing the property, still subject to the mortgage previously given to the Glasses and with Schanhite expressly assuming the indebtedness to the Ann Arbor bank. As part of Schanhite's purchase transaction, he gave a mortgage to the Ann Arbor bank, the proceeds of which are used to pay off the indebtedness from the Glasses to the Ann Arbor bank which Schanhite had assumed and to pay back taxes (the property about to be sold for failure to pay those taxes). At issue is whether the new mortgage to the Ann Arbor bank should have priority over the original mortgage and its assignment to the Plymouth bank. The Court held that it should, but the analysis does not support plaintiff's position in the case at bar. First, the court applied the equitable doctrine of mistake and not equitable subrogation.[37] More to the point, the Court relied upon the well-settled rule that the acceptance by a mortgagee of a new mortgage and his cancellation of the old mortgage does not deprive the mortgagee of priority over intervening liens.[38] Second, the Court noted that the Ann Arbor bank's loan was necessary to pay the back taxes and had the money not been advanced, the property would have been lost to the taxman.[39] Thus, the new mortgage operated to the Plymouth bank's benefit. In other words, the Court in effect restored the original mortgage, essentially correcting the Ann Arbor bank's "mistake" of discharging the original mortgage.[40]

By contrast in the case at bar, we are not presented with a case of the new mortgage being written by the holder of the old mortgage. That is, had the new mortgage been given to Option

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[34] *Id.* at 579.

[35] Interestingly, the unanimous decision in *Smith* was decided the same day as the aberrant decision in *Walker* and cites many of the same authorities.

[36] 277 Mich 33; 268 NW 801 (1936).

[37] *Id.* at 38.

[38] *Id.* at 39.

[39] *Id.* at 40.

[40] *Id.*

One Mortgage and Option One was before us rather than plaintiff, *Schanhite* might provide the authority to revive the original mortgage and give the new mortgage the same priority as the one it was replacing. For that matter, it might be sufficient under *Schanhite* had plaintiff first purchased the Option One mortgage and thereafter wrote the new mortgage. But neither of those situations is present here, and therefore *Schanhite* is inapplicable. For that matter, there is no indication that the mortgage granted by plaintiff was necessary to preserve defendants' security in the property. That is, while defendants certainly have benefited by the new mortgage in that a debt with greater priority was discharged, there is no indication that defendants were about to lose their security interest at the time plaintiff made its loan to the Shinas had the loan not been made. Accordingly, neither of the conditions present in *Schanhite* is present here.

Schanhite is similar to *Wallace v McBride*,[41] another case relied upon by plaintiff. In *Wallace*, the plaintiff had received a fraudulently assigned second mortgage, which eventually was reassigned to the rightful holder. But in the meantime, the first mortgage had been foreclosed and the plaintiff paid the money to redeem the property from the sheriff's sale on that foreclosure. Thereafter, the plaintiff asserted an interest in the property based upon his redemption. The Court held that the plaintiff was entitled to recover the money he paid for the redemption, though equity denied him either interest on the debt.[42] As in *Schanhite*, wherein the Court noted the property would have been lost to taxes, the Court in *Wallace* noted that the holder of the second mortgage would have lost the land to the purchaser at the sheriff's sale of the first mortgage.

In sum, with the exception of *Walker*, we are unaware of any authority to support the application of the doctrine of equitable subrogation to support the general proposition that a new mortgage granted as part of a generic refinancing transaction can take the priority of the original mortgage which is being paid off and give it priority over intervening liens. And as for *Walker*, as Justice Potter stated in his concurrence in *Lentz,*[43] *Walker* "is not a precedent to be followed, but an accident to be avoided." Such priority may be applicable where the new mortgagee is the holder of the mortgage being paid off or where the proceeds of the new mortgage is necessary to preserve the property from foreclosure or other action which would cause the intervening lien holders to lose their security interest. But neither of those circumstances exists here and, therefore, plaintiff is not entitled to be subrogated to the original mortgage and receive priority over the intervening lien holders. Accordingly, the trial court properly granted summary disposition to defendants.

Plaintiff's other issue on appeal is that the trial court erroneously relied upon the existence of title insurance from which plaintiff could seek recovery in ruling against plaintiff. While we do not necessarily disagree with plaintiff that the availability of insurance coverage should have no bearing on the resolution of the substantive question presented in this case,

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[41] 70 Mich 596; 38 NW 592 (1888).

[42] *Id.* at 600-601.

[43] *Supra* at 455.

because we conclude that the trial court properly granted summary disposition in favor of defendants, we need not address this issue.

Affirmed. Defendants may tax costs.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Christopher M. Murray