

NO. A07-1758

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State of Minnesota  
**In Court of Appeals**

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LAKE FOREST TOWNHOMES  
CONDOMINIUM ASSOCIATION,

*Appellant,*

vs.

WASHINGTON MUTUAL BANK, F.A. AND  
JOHN ELFELT AND STACEY ELFELT,

*Respondents.*

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**APPELLANT'S BRIEF**

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## STATEMENT OF LEGAL ISSUES

**1. Whether The District Court Misconstrued the Recording Act Statute, Minn. Stat. § 507.34 to Award Priority to Washington Mutual Over the Association?**

The District Court concluded that the Association was not a bona fide purchaser. As a result, the District Court gave Washington Mutual priority over the Association.

Minn. Stat. § 507.34

*Mavco, Inc. v. Eggink*, 739 N.W.2d 148 (Minn. 2007)

*Nussaumer v. Fetrow*, 556 N.W.2d 595 (Minn. Ct. App. 1997)

**2. Whether Washington Mutual is Estopped from Asserting a Claim to the Property?**

The District Court did not find Washington Mutual to be estopped from asserting a claim to the property despite its failure to raise an objection during the Association's foreclosure when it knew of a defect in title and that the Association was acting without knowledge of the defect.

*Sanborn v. Van Duyne*, 90 Minn. 215, 96 N.W.41 (1903)

*Macomber v. Kinney*, 114 Minn. 146, 128 N.W. 1001 (1910)

**3. Whether The District Court Erred in Awarding Washington Mutual the Property and the Money the Association Escrowed to Redeem the Property?**

The District Court allowed the Washington Mutual to redeem the property from the Elfeldts with the Association's money. The District Court returned the money that Washington Mutual had escrowed to Washington Mutual without a hearing.

## STATEMENT OF THE CASE

This is a case regarding the priority of liens against a town home in Hennepin County. After the property went into foreclosure, a dispute arose regarding the priorities of a lien and two mortgages against the property and the interplay between Minnesota's race-notice recording statute, Minn. Stat. § 507.34, and the community interest statute, Minn. Stat. § 515B.3-116(b).

The property at issue, Unit 5479, CIC 690, Lake Forest Townhomes Condominium, County of Hennepin, State of Minnesota was owned by Helen Witt.

As part of a refinancing, Ms. Witt paid off an existing mortgage and obtained a new mortgage from Tradition Mortgage, LLC and a line of credit secured by a mortgage from Wells Fargo Mortgage. The Wells Fargo mortgage was recorded on December 10, 2003. The Tradition mortgage was recorded January 8, 2004. Tradition later assigned its mortgage to Washington Mutual hereinafter referred to as the "Washington Mutual mortgage."

In May of 2005, the Lake Forest Townhomes Condominium Association filed a lien for unpaid association dues. By operation of Minn. Stat. § 515B.3-116(b), the Association's lien was second in priority to the first mortgage.

Each party foreclosed its interest in the Property with Washington Mutual foreclosing first, followed by the Association and then Wells Fargo. John and Stacey Elfelt bought the sheriff's certificate at the Wells Fargo foreclosure sale.

Following the foreclosure of the Wells Fargo mortgage, a dispute arose regarding the priority of the lien and mortgages. Accordingly, both the Association and

Washington Mutual tendered monies to the Hennepin County Sheriff to redeem from the Elfelts.

Simultaneously, on April 6, 2006, Washington Mutual commenced an action against the Elfelts and the Association seeking a declaration from the Court of Washington Mutual's priority and the right to redeem the Property. The case came on before the Honorable William R. Howard, Judge of Hennepin County District Court. After the Court directed the parties to pay the Elfelts the money necessary to redeem the Property, the Court heard cross-motions for summary judgment on May 3, 2007.

The Court granted Washington Mutual's motion for summary judgment and denied the motion brought by the Association. The Court concluded that Washington Mutual's interest in the Property was superior to the Association's because Wells Fargo had been aware of Washington Mutual's superior interest, consequently the Court reversed the priorities of the Wells Fargo and Washington Mutual mortgages and left the Association in the second position, behind the new first mortgage. The Court concluded that the Association was not entitled to the protections of a bona fide purchaser under the recording statute and thus denied the Association's claim.

Thereafter, on August 1, 2007, the Court directed, via an ex parte order, the release of funds held in escrow by the Hennepin County Sheriff's office to Washington Mutual. As a result, the Association not only lost the right to redeem the Property but the money it had escrowed to redeem the Property. Accordingly, this appeal followed on September 13, 2007.

## STATEMENT OF FACTS

The property at issue is a condominium that is part of the Lake Forest Townhomes Condominium Association (the "Association"). The Association is a Minnesota non-profit corporation. (A-97). The common interest community of Lake Forest Townhomes Condominiums was created April 28, 1994, when a Condominium Declaration, Condominium Number 690, Lakeforest Townhomes Condominium ("Declaration") for the community was recorded at the office of the Hennepin County Recorder. (A-97, 98,100). As a common interest community, the Association is subject to the Minnesota Common Interest Ownership Act ("MCIOA").

The Property was formerly owned by Helen Diane Witta ("Witta"). (A-98). The property owned by Witta is real property located in Hennepin County, Minnesota, legally described as: Unit 5479, CIC 690, Lake Forest Townhomes Condominium, according to the recorded plat thereof, Hennepin County, Minnesota (the "Property"). (Id.). Witta died on or about February 13, 2005. (A-42,46). Prior to her death, Witta refinanced a mortgage from TCF Bank with Tradition Mortgage, LLC ("Tradition"). As part of that refinancing, which occurred in September of 2003, Witta paid off the TCF Mortgage and obtained a mortgage from Tradition and a home equity loan with Wells Fargo. (A-153,154).

Witta was a member of the Association through her ownership of the Property, and thus was obligated to abide by the terms and conditions set forth in the Declaration of the Association. (A-98). As part of the terms and conditions of the Association, Witta was obligated to pay certain dues. (Id.). Witta failed to pay those dues and the

Washington Mutual foreclosed its mortgage at a sheriff's sale on July 21, 2005. (A-42). Washington Mutual was the highest bidder at the foreclosure sale. The six-month statutory redemption period following the Washington Mutual mortgage foreclosure sale expired January 21, 2006. (Id.). No party redeemed from the Washington Mutual mortgage foreclosure sale prior to the expiration of the six-month statutory redemption period. (A-42).

The Association foreclosed its lien at a sheriff's sale on August 16, 2005. (A-43,69). The Association was the highest bidder at the sale. The six-month statutory redemption period following the Association Lien foreclosure sale expired February 16, 2006. (A-43). Prior to the sheriff's sale, on July 21, 2005 the Association sent Washington Mutual a letter advising it that the Association's lien was superior and that Washington Mutual's interest would be erased by the Association's foreclosure. (A-43,81). Washington Mutual did not respond to this correspondence or challenge the Association's assertion that Washington Mutual's interest would be eliminated. Nor did Washington Mutual warn the Association of its contention that its own foreclosure (for which the redemption period had not yet run) would eliminate the Association's lien if the Association did not redeem.

No one redeemed from the Association lien foreclosure sale prior to the expiration of the six-month statutory redemption period. (A-43). Washington Mutual took no steps during the redemption period to protect its interest or challenge the priority of the Association's lien. Furthermore, Washington Mutual took no steps to correct the defect in the recording during the pendency of its own redemption period.

Association filed a lien against the Property. (Id.). To evidence the Association Lien, the Association filed a verified lien statement in the office of the Hennepin County Recorder on May 18, 2005, as Document No. 8584637. (Id.). Pursuant to Minn. Stat. § 515B.3-116(b), the Association's lien took priority over all other interests except the first mortgage on the property.

Thus, there were the following secured liens and/or mortgages encumbering the Property:

1. There was a mortgage in favor of Wells Fargo Bank, National Association, filed December 10, 2003, in the office of the Hennepin County Recorder as Document No. 8248196 ("Wells Fargo Mortgage"). (A-42,47).
2. There was an Assessment Lien in favor of Lake Forest Townhomes Condominium Association ("Association Lien") for unpaid assessments and related charges and collection costs. (Id.).
3. There was a mortgage in favor of Tradition Mortgage, filed January 8, 2004, in the office of the Hennepin County Recorder as Document No. 8269207, and subsequently assigned to Washington Mutual, F.A. ("Washington Mutual Mortgage"). (A-42,54).

The mortgages for the Tradition and Wells Fargo loans were recorded out of order.

Thereafter, Wells Fargo foreclosed the Wells Fargo mortgage at a sheriff's sale on October 6, 2005. (A-43,83). Defendants John Elfelt and Stacey Elfelt were the highest bidders at the sale and received the sheriff's certificate for the Property. (A-43). The statutory redemption period following the Wells Fargo mortgage foreclosure sale was due to expire on April 6, 2006. (Id.).

On April 5, 2006, the Association, through counsel, contacted the Hennepin County Sheriff and obtained the exact dollar amount necessary to redeem the Property as fee owner from the Elfeldts. (A-43,98). On April 6, 2006, pursuant to the instructions of the Hennepin County Sheriff, the Association tendered \$27,300.04 to the office of the Hennepin County Sheriff, as and for the amount necessary to redeem the Property as fee owner. (A-43,92,98). The Association tendered the funds described above prior to the expiration of the six-month statutory redemption period following the sheriff's sale of the Wells Fargo mortgage. (A-44).

Also on April 6, 2006, Washington Mutual guessed at the amount necessary to redeem the Property and tendered such estimated funds to the Hennepin County Sheriff under the representation that Washington Mutual was the fee owner of the Property. (A-17). Washington Mutual then commenced this action asserting a right to redeem the Property and naming the Association and the Elfeldts as defendants. (A-3). Washington Mutual never named Wells Fargo as a defendant despite its contention that Wells Fargo's

mortgage should not have priority over Washington Mutual's mortgage.<sup>1</sup> Washington Mutual also tendered this matter to its title insurer. (A-20).

The District Court directed that the Elfeldts receive the funds necessary to redeem the Property. (A-279). After the Elfeldts were paid, the District Court heard cross motions for summary judgment to determine which party was entitled to redeem the Property. (A-271).

Washington Mutual produced affidavits to establish that Wells Fargo had actual knowledge of the Tradition mortgage at the time that Wells Fargo made its loan to Witta. (A-273). As such, Washington Mutual contended that Wells Fargo did not have priority under Minnesota's Recording Act statute as Wells Fargo had knowledge of a prior, albeit unrecorded, interest. However, no evidence was produced to show that the Association was aware of the priority of the Washington Mutual mortgage. To the contrary, the Association's correspondence showing that the Association believed its lien was superior to the Washington Mutual mortgage was received into evidence. (A-81).

The District Court determined that the Wells Fargo's mortgage did not have priority and granted Washington Mutual's motion for summary judgment, denying the Association's motion. (A-278). The District Court concluded that the Association's knowledge, or lack thereof, was irrelevant to the priority of the Association's lien. (A-279). Because Wells Fargo knew of the prior interest of Washington Mutual, the Court

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<sup>1</sup> Wells Fargo never opposed Washington Mutual's argument. It had no reason to do so as it had already received the money it was owed from the Elfeldts, pursuant to the sheriff's sale. As such, any defenses that Wells Fargo may have had to Washington Mutual were not asserted.

ordered the priorities of the mortgages reversed making the Washington Mutual mortgage the first mortgage. (Id.). Thereafter, by letter dated July 17, 2007, Washington Mutual asked the District Court to order a release of the remaining funds that had been escrowed. (A-280). No hearing was held by the Court on the release of funds. (A-283).

The District Court signed Washington Mutual's proposed order on August 1, 2007. (A-282.) As a result, the money that Washington Mutual had escrowed to redeem the Property was returned to it while the money the Association escrowed to redeem the Property was paid to the Elfeldts.

On September 13, 2007, the Association filed its Notice of Appeal. (A-292).

## ARGUMENT

### **I. Standard of Review.**

Questions of statutory interpretation are reviewed de novo. *Bedow v. Watkins*, 552 N.W.2d 543, 546 (Minn. 1996); *Vlahos v. R&I Construction of Bloomington*, 676 N.W.2d 672, 679 (Minn. 2004). The reviewing court need not defer to the district court's interpretation. *American Nat. Gen. Ins. Co. v. Solum*, 641 N.W.2d 891, 895 (Minn. 2002). "The primary objective of statutory interpretation is to ascertain and effectuate the legislature's intent." *Scott v. Minneapolis Police Relief Ass'n, Inc.*, 615 N.W.2d 66, 71 (Minn. 2000); *Auringer v. State*, 695 N.W.2d 640, 643-644 (Minn. Ct. App. 2005).

The court relies on the plain meaning of the statute unless it is ambiguous. *Auringer*, at 644. "Plain meaning presupposes the ordinary usage of words that are not technically used or statutorily defined, relies on accepted punctuation and syntax, and

draws from the full-act context of the statutory provision.” *Occhino v. Grover*, 640 N.W.2d 357, 359 (Minn. Ct. App. 2002).

An appeal from summary judgment is reviewed de novo to determine if there are genuine issues of material fact and if the district court erred in applying the law. *STAR Ctrs., Inc. v. Faegre & Benson, LLP*, 664 N.W.2d 72, 76 (Minn. 2002). The evidence must be weighed in the light most favorable to the party against whom summary judgment is granted. *Hickman v. SAFECO Ins. Co. of MN*, 695 N.W.2d 365, 369 (Minn. 2005).

**II. The District Court Misconstrued the Recording Act Statute, Minn. Stat. § 507.34 to Award Priority to Washington Mutual Over the Association.**

Minnesota is a race-notice state. *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522 (Minn. 1990); *Miller v. Hennen*, 438 N.W.2d 366 (Minn. 1989). Minn. Stat. § 507.34 provides, in relevant part, as follows:

Every conveyance of real estate shall be recorded in the office of the county recorded of the county where such real estate is situated; and every such conveyance not so recorded 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, and as against any attachment levied thereon or any judgment lawfully obtained at the suit of any party against the person in whose name the title to such land appears of record prior to the recording of such conveyance.

This means that a party that records first has priority of interest unless that party had notice of a prior, contrary interest. A purchaser of real property who has neither actual, implied, not constructive notice of the outstanding rights of another is a bona fide purchaser entitled to the protection of the recording act. *Claflin v. Commercial State Bank of Two Harbors*, 487 N.W.2d 242, 248 (Minn. Ct. App. 1992). Pursuant to Minn.

Stat. § 507.01, a “purchaser” is broadly defined as any person to whom any estate or interest in real estate is conveyed. *See also, Mavco, Inc. v. Eggink*, 739 N.W.2d 148, n. 6 (Minn. 2007).

“Public policy dictates that judgment creditors must be able to rely on the title shown in public records.” *Nussaumer v. Fetrow*, 556 N.W.2d 595, 599 (Minn. Ct. App. 1997). “Under the Minnesota Recording Act, a bona fide purchaser who records first obtains rights to the property which are superior to a prior purchaser who failed to record.” *Mavco, Inc. v. Eggink*, 739 N.W.2d 148, 158 (Minn. 2007) quoting *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 524 (Minn. 1990).

“The recording act serves to shield a record owner’s judgment creditors against claims to the real estate of which the creditors have no notice.” *Nussaumer v. Fetrow*, 556 N.W.2d 595, 598 (Minn. Ct. App. 1997).

The District Court erred in not awarding the Association status as a bona fide subsequent purchaser. The Association, by virtue of its lien, is a “purchaser” within the meaning of Minn. Stat. § 507.34. Furthermore, the Association meets the criteria of a bona fide purchaser as it had no knowledge, actual, implied or constructive, that the mortgages of record at the county recorder’s office were not in the proper order. As such, the Association was entitled to rely upon the order, and thus priority, as it appeared in the county recorder’s office.

In *Nussaumer v. Fetrow*, the court was faced with the question of the priority of a judgment creditor’s lien against a piece of property that had been sold to a third party. The conveyance had not been recorded at the time that lien was filed. The court held that

the lien had priority over the later recorded conveyance because the judgment creditor had a right to rely upon the recording act and the encumbrances that appeared in the county recorder's records at the time the lien was filed. The court reasoned that one of the goals of the recording statute is to "establish [a] priority system to resolve conflicting claims to real estate." *Nussaumer*, 556 N.W.2d at 598 (internal citation omitted). Thus, while a party's knowledge, whether constructive or actual, of a superior claim will remove the party from the protections of the recording act, lack of such knowledge will result in the party being entitled to the protections of the statute.

The Association's lien statement was recorded on May 18, 2005. Pursuant to MCIOA the Association's lien was "prior to all other liens and encumbrances on a unit except . . . any first mortgage encumbering the fee simple interest in the unit." Minn. Stat. § 515B.3-116(b). The Association relied upon the recorder's records showing that the Wells Fargo mortgage was the "first mortgage" on the property. As such, the Association's lien became second in priority to the first mortgage of record on the property.

To conclude otherwise would eliminate the bona fide purchaser protections for community associations. If, as urged by Washington Mutual, the Association's lien was subject to collateral attack against the first mortgage, the recording act would be worthless for community associations. Rather, any time an association filed a lien it would have to redeem from *any* junior lien in the off chance that the "first" mortgage was, at some indefinite later date, held to be junior to another lien. The recording act and MCIOA must be read together and not in isolation. For an association's lien to be "prior

to all other liens” except the “first mortgage” an association must have the ability to determine what encumbrance is the first mortgage. To accomplish this task, an association must be able to rely, like every other party with an interest in real property, upon the priorities as they are recorded in the county recorder’s office.

Here, the Association had no knowledge of a superior claim by Washington Mutual and no evidence to the contrary was ever presented. Rather, the Association relied upon the record as it appeared at the county recorder’s office showing the Wells Fargo mortgage as the first mortgage. The Association had a right, like any other party, to rely upon the county recorder’s record. Of course, if the Association had known that the Washington Mutual mortgage was the proper first mortgage, then the Association would not have the protections of the Recording Act. However, if the Association had had such knowledge, it also could have exercised its right to redeem from Washington Mutual’s foreclosure in order to preserve its lien. The Association never had a chance to redeem from Washington Mutual’s foreclosure because the foreclosure period expired long before the Association became aware of the defect in title.

Furthermore, the Association should have been afforded the protections for a bona fide purchaser under the recording act regardless of whether or not Washington Mutual’s mortgage was deemed the “first” mortgage under a MCIOA analysis. The Association had, in fact, purchased the property at its own foreclosure sale on August 16, 2006. At the time that the Association purchased the property it had no notice that the title it was purchasing was subject to any interest other than the Wells Fargo mortgage that appeared on the records of the county recorder. As such, the Association was entitled to the

protections of Minn. Stat. § 507.34, when it filed its lien and again when it purchased the Property at the foreclosure sale.

The District Court misapplied the recording act when it held that Washington Mutual had the superior interest. The District Court looked to Wells Fargo's interest and concluded that Wells Fargo had actual notice of the priority of Washington Mutual's mortgage. The District Court further concluded that Wells Fargo was not entitled to bona fide purchaser status under Minnesota's Recording Act statute. As a result, the District Court concluded that Washington Mutual held the "first mortgage" and concluded that the Association's argument that it was a bona fide purchaser was "irrelevant" because "[u]nder MCOIA, the Association Lien is junior to any first mortgage regardless of whether or not the Association acted in good faith."

In reaching this conclusion, the District Court ignored the Association's own status as a bona fide purchaser. Thus, while the District Court may have reached the right conclusion as between Wells Fargo and Washington Mutual, the court erred in not continuing its analysis to determine that the Association was a bona fide purchaser and thus entitled to the protections of the recording act statute. Thus, the Court had the power to void Wells Fargo's interest after concluding that Wells Fargo was not a bona fide purchaser. However, the Court erred in making the Association's lien secondary to the "new" first mortgage.

The District Court's decision upends the long settled policy in Minnesota of protecting the interests of parties who, in good faith, rely upon the priorities of encumbrances as they appear in the county recorder's office. Stated differently, a party

that fails to promptly record its interest in real property bears the risk of losing that interest to third parties that do properly record their interests. The decision by the District Court reassigns what was Washington Mutual's mistake to the Association.

The Association was a bona fide purchaser of the Property. Consequently, it did not take subject to Washington Mutual's mortgage. The judgment of the District Court must be reversed because it failed to grant the Association the protections of the recording act for a bona fide purchaser.

### **III. Washington Mutual is Estopped from Asserting a Claim to the Property.**

On August 16, 2005, the Association foreclosed its lien against the Property. At that time, the Association had notified Washington Mutual that, per the County Recorder's office, Washington Mutual's mortgage was junior in position to the Association's lien. The Association went forward with its foreclosure and Washington Mutual took no steps to stop the foreclosure or to redeem from the Association following the foreclosure. As such, Washington Mutual's interest in the Property was extinguished upon the conclusion of the redemption period by virtue of equity and the Recording Act statute.

Estoppel arises when a party "by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence one person induces another to believe certain facts to exist, and such other, having the legal right to do so, relies and acts thereon to such an extent as to be misled to his prejudice." *Sanborn v. Van Dyne*, 90 Minn. 215, 226-227, 96 N.W. 41, 44 (1903).

In *Macomber v. Kinney*, 114 Minn. 146, 128 N.W. 1001 (1910), the Minnesota Supreme Court squarely addressed the obligation to speak when a party is aware of a concealed defect in title when the party knows that third parties are acting, to their detriment, upon that defect. The Court concluded that equitable estoppel can bar a party who deliberately stays silent and allows others to act to their detriment. "No one is permitted to keep silent when he should speak, and thereby mislead another to his injury." *Id.* at 156, 1004.

The *Macomber* case outlined several principals for the application of estoppel. The relevant facts for this inquiry are: (1) that estoppel can consist of silence when there is a duty to speak; (2) fraudulent intent is not required so long as a party knows that it is "natural and probable" that a party will act prejudicially without the knowledge that is being withheld; (3) the silent party must have an obligation to speak and the opportunity to do so; (4) the truth must not have been know by the party seeking estoppel; and (5) the party seeking estoppel must have been misled and relied upon it "in such a manner as to change his position for the worse." *Id.* at 154-155, 1003-1004.

The factors outlined in *Macomber* are all met in the present case. Washington Mutual knew that its mortgage was recorded after Wells Fargo's mortgage. Washington Mutual also knew, due to the Association's letter of July 21, 2005, that the Association believed that the Wells Fargo mortgage was superior to the Washington Mutual mortgage. Washington Mutual knew that the Association was acting, to its detriment, upon this mistaken belief. Washington Mutual had time to act and correct the title but

failed to do so. Finally, the Association had no knowledge of the true priority of the Washington Mutual mortgage.

Washington Mutual slept on its rights by failing to raise its claim of superior title during the pendency of the Association's foreclosure and redemption period. As such, Washington Mutual is estopped from now arguing that it has a right to redeem the Property. That right, if any existed, had to be asserted in opposition to the Association's foreclosure. Failing to exercise the right results in its loss and Washington Mutual being foreclosed from raising the issue anew.

There is no dispute that Washington Mutual was notified by the Association, via letter dated July 21, 2005, that the Association believed Washington Mutual's position to be inferior and that its interest in the Property would be extinguished if it did not act prior to February 16, 2006. At that point, if not earlier, Washington Mutual knew that the record showed that its interest in the Property was junior to that of the Association and Wells Fargo. However, Washington Mutual did not act to assert that it was entitled to priority over the Association. Rather, Washington Mutual accepted the fact that it was in the third position on the Property and allowed the statutory redemption period to expire.

Additionally, the notice to Washington Mutual was given while the six-month redemption period from Washington Mutual's own foreclosure was still ongoing. Thus, even if the Court were to conclude that Washington Mutual was in the first position, it was inequitable for Washington Mutual to sit silently with the knowledge that the Association was mistaken about the priorities of the liens and simply wait for the

Association's right to redeem to expire. Again, estoppel precludes Washington Mutual from remaining silent, when it had a duty to speak, to the detriment of the Association.

The unfairness of the outcome of this case is magnified because the Association took the additional step of advising Washington Mutual, in writing, that it believed that its lien was superior to Washington Mutual's. Washington Mutual took no action and made no response.

At a minimum, Washington Mutual's failure to respond to the Association should be characterized as deceptive. Washington Mutual knew or should have known that the records of the county recorder did not accurately show the true holder of the first mortgage. However, rather than correcting the records of the county recorder or advising the Association that it believed that *its* mortgage was superior, Washington Mutual stayed silent. As a result, the redemption period for Washington Mutual's foreclosure passed. It was only after the redemption period closed that Washington Mutual contended that its mortgage should be treated as superior.

Moreover, when Washington Mutual finally did launch its collateral attack on the Association's lien, it did so without naming the primary party whose interest it was attacking, Wells Fargo. Thus, any arguments that Wells Fargo may have had were never presented to the District Court.

If, as Washington Mutual contends, Washington Mutual's loan should have had priority over all of the other liens, then the Association should have had the right to redeem its interest from Washington Mutual's foreclosure. However, Washington Mutual never provided notice to the Association to allow it to redeem nor would the

Association have had any reason to be concerned about Washington Mutual's foreclosure because, on its face, the records at the county recorder's office showed the Association as having priority. Furthermore, the Elfelts' purchase of the Property in the Wells Fargo foreclosure sale should not have happened. Rather, under Washington Mutual's logic, Wells Fargo interest in the mortgage on the Property was eliminated upon the expiration of the redemption period from Washington Mutual's foreclosure. Yet, Washington Mutual tacitly conceded that Wells Fargo had such an interest because it escrowed money to redeem the Property.

Washington Mutual knew about a defect in title and knew that parties were acting to their detriment based upon on a lack of knowledge of the defect. Nevertheless, Washington Mutual chose to stay silent. Washington Mutual should now be bound by its failure to speak and should be estopped from asserting the superiority of its mortgage. Applying the doctrine of estoppel to the undisputed facts of this case requires reversal of the District Court.

#### **IV. The District Court Erred in Awarding Washington Mutual the Property and the Money the Association Escrowed to Redeem the Property.**

Both the Association and Washington Mutual escrowed funds with the Hennepin County Sheriff's office in order to redeem the Property from the Elfelts. By virtue of its Order dated July 13, 2007, the District Court awarded Washington Mutual the right to redeem the Property. Prior to that conclusion, the District Court directed the parties to pay the Elfelts the amount they were entitled to as holders of the sheriff's certificate. As such, the Court should have directed the return of the money that the Association had

escrowed to the Association as the Court had concluded that the Association was not entitled to redeem the Property. Instead, the District Court directed that the money escrowed with the Hennepin County Sheriff's office be disbursed to Washington Mutual. Thus, Washington Mutual redeemed the Property from the Elfelts with the Association's money.

There is simply no basis for the award of both the Property and money to Washington Mutual. While Washington Mutual had the right, pursuant to the Court's Order, to redeem the Property, it had to do so with its own money. When the Association raised the issue with the District Court, the District Court refused to reconsider the inequity that its award had created.

In response to the Association's challenge to the award of the escrowed funds to Washington Mutual, Washington Mutual contended that the District Court held that Washington Mutual did not "redeem" the Property but was the fee title holder. However, this claim is belied by the Court's own Order of August 1, 2007 which acknowledges that the money was escrowed "for redemption from foreclosure of the mortgage." Furthermore, it is directly contradicted by Washington Mutual's own conduct.

Washington Mutual escrowed money with the Hennepin County Sheriff's office to redeem the Property. Washington Mutual made the decision to escrow the money to redeem the Property before it filed suit. However, if Washington Mutual's argument is accepted, there was nothing for it to redeem from – the Wells Fargo mortgage was extinguished upon the expiration of the redemption period following Washington Mutual's foreclosure.

The District Court's award of both the property and money to Washington Mutual is not supported by law or equity. At a minimum, the award of the escrowed funds to Washington Mutual must be reversed.

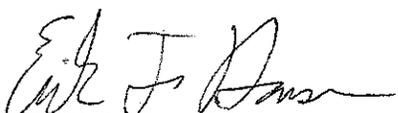
### CONCLUSION

The District Court misapplied Minnesota's Recording Act and MCIOA when it failed to treat the Lake Forest Townhomes Condominium Association as a bona fide purchaser. The District Court compounded the error by not finding Washington Mutual estopped from asserting an interest in the property and in awarding Washington Mutual the property and the funds that the Association escrowed to redeem the property. The Judgment of the District Court must be reversed in its entirety or, at a minimum, the funds originally escrowed by the Association must be returned.

Respectfully submitted,

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Dated: December 13, 2007

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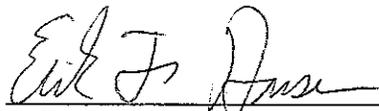
## CERTIFICATE OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 5,121 words. This brief was prepared using Microsoft Word 2002.

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