

NO. A07-1758

State of Minnesota  
In Court of Appeals

LAKE FOREST TOWNHOMES  
CONDOMINIUM ASSOCIATION,

*Appellant,*

v.

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

*Respondents.*

BRIEF AND APPENDIX OF RESPONDENT  
WASHINGTON MUTUAL BANK, F.A.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF ISSUES

- I. As between two mortgages and an association lien, does the mortgage first granted (i.e. the Washington Mutual mortgage) retain its first priority status over the mortgage subsequently granted (i.e. the Wells Fargo mortgage) when the second mortgagee (i.e. Wells Fargo) had actual knowledge of the first mortgage, and retain its first priority status over a homeowners' association lien as mandated by MINN. STAT. § 515B.3-116(b)(ii)?**

The District Court correctly found that the Washington Mutual mortgage retained its first priority status, so that Washington Mutual became the owner of the subject real property (free and clear of the claims of the Association) after foreclosure of its mortgage, without subsequent redemption from its foreclosure sale.

MINN. STAT. § 507.34

MINN. STAT. § 515B.3-116(b)(ii)

- II. Is it improper to argue for the first time on appeal the “estoppel” theory that was not litigated in the trial court, and as to which the Respondent did not submit evidence because the issue had not been joined?**

The District Court did not rule on the estoppel argument raised for the first time by Appellant on appeal, and the Respondent did not submit evidence in response.

*Morton v. Board of Commissioners of Ramsey County*, 301 Minn. 415, 223 N.W.2d 764 (1974).

*Stumne v. Village Sports and Gas*, 309 Minn. 551, 243 N.W.2d 329 (1976).

*Maloney v. Fairview Community Hospital*, 451 N.W.2d 237 (Minn. App. 1990).

- III. Is the Appellant's new estoppel argument insufficient to support reversal of the District Court's decision in any event, because simply based on the Appellant's assertion of an erroneous legal conclusion, and unjustified in view of the record and the response of the Respondent?**

The District Court did not rule on the estoppel argument raised for the first time by Appellant on appeal, and the Respondent did not submit evidence in response.

**IV. Did the District Court properly order the return of Washington Mutual's funds by the Hennepin County Sheriff?**

The District Court, after entry of its Findings of Fact, Conclusions of Law and Order, entered an order directing the Hennepin County Sheriff to refund the \$28,200 which had been tendered by Washington Mutual. The order was entered upon written request of counsel for Washington Mutual, which noted that refund of the money was implicit in the District Court's Findings of Fact, Conclusions of Law and Order. Notice was provided to counsel for the Association.

## FACTS

The Findings of the District Court are not disputed by the Association in its appeal.

The real property which is the subject of this action is a condominium unit described, *to wit*:

Unit 5479, CIC 690, Lake Forest Townhomes Condominium, County of Hennepin, State of Minnesota

(hereinafter the "Real Property"). A-272. Helen Witta owned the Real Property in September, 2003. *Id.* Ms. Witta refinanced her mortgage through Tradition Mortgage, LLC (hereinafter "Tradition"). R-9. John Zydowsky is now and was a Senior Lending Officer at Tradition. R-8. Tradition closed the mortgage refinance transaction with Ms. Witta on October 1, 2003, and was granted the Mortgage executed by Witta dated October 1, 2003. R-9, 13 to 26. The loan was sold and the Mortgage was assigned to Washington Mutual by the Assignment dated October 1, 2003. R-9, 27.

After the three-day rescission period expired, on October 6, 2003, the loan proceeds in the full amount of \$90,000.00 were disbursed and a check sent to TCF Mortgage in the amount of \$86,141.38 as payment in full of the prior TCF Mortgage loan. R-10, A-254. Washington Mutual's loan disbursement of \$90,000 went almost entirely to paying off the TCF Mortgage. TCF Mortgage executed a Satisfaction of Mortgage dated October 27, 2003 and recorded on December 9, 2003. A-255. It satisfied the TCF Mortgage recorded on October 16, 2002. *Id.*

As of October 6, 2003, the only mortgage encumbering the Real Property was the Washington Mutual Mortgage.

Mr. Zydowsky contacted Wells Fargo to obtain a home equity loan in the amount of \$22,500.00 to Ms. Witta at her request, to be secured by a second mortgage on the Real Property. R-10. Mr. Zydowsky told Wells the desired amount, and that Well's mortgage lien would be junior to the mortgage granted to Tradition on October 1, 2003. *Id.* On or about October 17, 2003, Mr. Zydowsky transmitted documents by facsimile to Wells Fargo. R-10 to 11, 28. This included a title insurance commitment transmitted to Wells Fargo in advance of Wells Fargo making the home equity loan for Ms. Witta and it shows, in addition to what Mr. Zydowsky told or explained to Wells personnel, that any mortgage lien granted to Wells would be junior or subject to the \$90,000.00 mortgage to Washington Mutual. *Id.*

On October 24, 2003, Ms. Witta executed a document entitled "EquityLine with FlexAbility Account Agreement and Disclosure Statement" ("Home Equity Line Agreement") and mortgage with Wells dated October 24, 2003, encumbering or creating a lien upon the Real Property ("Wells Mortgage"). A-256 to 260, R-33 to 39. The credit limit of the Home Equity Line Agreement secured by the Wells Mortgage was \$22,500. A-256. As found by the District Court, Wells Fargo had actual knowledge of Washington Mutual's prior mortgage at the time it executed and recorded its Home Equity Mortgage.

The Association did not submit any affidavit testimony or otherwise challenge the facts as set forth in Mr. Zydowsky in his Affidavit.

The Wells Mortgage was recorded on December 10, 2003 in the office of the Hennepin County Recorder. Through inadvertence, Washington Mutual's Mortgage was not recorded until January 8, 2004, after the Wells Mortgage was recorded.

### **Foreclosures**

Washington Mutual foreclosed its Mortgage after default by Witta. The Sheriff's Sale was held on July 21, 2005. A-273. Washington Mutual was the sole bidder and there was no redemption by Witta or other party. *Id.*

The Association, pursuant to a claimed default of certain assessments stated in a Lien Statement in the amount of \$2,038 plus additional attorney fees, costs and interest accrued, recorded on May 18, 2005 ("Association Lien"), and pursuant to the Condominium Declaration, Condominium Number 690, Lake Forest Townhomes Condominium, recorded on April 28, 1994 ("Declaration"), commenced a foreclosure by advertisement of the Association Lien. A-69 to 80. The Sheriff's Sale on the Association Lien was held on August 16, 2005. A-75. The Association was the highest bidder, for \$4,673.70. A-76. The Sheriff's Certificate is dated and was recorded on August 16, 2005. A-69.

A default occurred under the Wells Mortgage. Wells Fargo brought a foreclosure by advertisement on its interest in the Real Property. A-83 to 91. The Sheriff's Sale was held on October 6, 2005. A-84. Defendants John Elfelt and Stacey Elfelt ("Efelts") were the highest bidders at such Sale for the sum of \$26,000. *Id.* The sale was subject to a six month redemption period. *Id.*

In order to further protect its interest in the Real Property, on April 6, 2006, Washington Mutual tendered \$28,200 to the Hennepin County Sheriff to redeem from the Elfelts. A-151 to 152. Washington Mutual had previously asked the Sheriff to confirm the amount required to redeem the Real Property from the Elfelts. A-152. As no response had been received from the Sheriff, Washington Mutual conservatively estimated the amount required to redeem as \$28,200 to ensure that all allowable interest was paid. *Id.*

Washington Mutual commenced the present lawsuit to establish its ownership of the Real Property. The Association claimed a superior interest in the Real Property. The Elfeldts claimed entitlement to payment by the Hennepin County Sheriff of funds tendered in redemption of their interest.

The Association brought a motion for summary judgment in July, 2006. Washington Mutual requested that the District Court continue its consideration of the motion pursuant to Rule 56.06 of the Rules of Civil Procedure to complete discovery on the issue of Wells Fargo's prior notice. The District Court noted in its October 20, 2006 Findings of Fact, Conclusions of Law and Order that there were genuine issues of material fact whether Wells Fargo could be a good faith purchaser or if it had received notice of the Washington Mutual Mortgage prior to executing its mortgage to Ms. Witta. R-7. The District Court held that the issue of whether Wells Fargo had received prior notice was dispositive of the case. *Id.* After additional documents and affidavit testimony were obtained by Washington Mutual to prove Wells Fargo's notice, the

Association renewed its motion. Washington Mutual brought a cross-motion for summary judgment.

The District Court found in favor of Washington Mutual. It held that the Wells Mortgage was junior to the Washington Mutual Mortgage because of Wells Fargo's actual notice of Washington Mutual's "first in time" mortgage in advance of execution or recording of the Wells Mortgage. A-278. The Association did not submit any affidavits or documents to dispute Wells Fargo's actual knowledge. The Association does not challenge in this appeal that the Wells Mortgage was junior to the Washington Mutual Mortgage. The District Court held that since the Washington Mutual Mortgage was a first mortgage, under MINN. STAT. ch. 515B, the Association's lien was junior. A-279. Washington Mutual was thus the holder of all right, title and interest in the Real Property.

#### **STANDARD OF REVIEW**

"Summary judgment [is] a fully appropriate procedural vehicle" for a court to use when applying statutory language to the undisputed facts of a case. When reviewing a summary judgment, this court reviews the record to determine: (1) whether there are any genuine issues of material fact; and (2) whether the trial court erred in its application of the law." *Wallin v. Letourneau*, 534 N.W.2d 712, 715 (Minn. 1995)(citations omitted). Interpretation of a statute to the undisputed facts of a case is a question of law, and the decision of the trial court does not bind the reviewing court. *Id.*

#### **ANALYSIS**

The District Court properly held that Wells Fargo's undisputed actual knowledge of Washington Mutual's prior mortgage meant that Washington Mutual's mortgage was

superior to that of Wells Fargo. Washington Mutual was the holder of the first mortgage. The Association does not disagree with these conclusions of the District Court.

The Association claims that the language of MCOIA should be interpreted to mean an association lien is senior to all liens other than what the Association thinks is the first mortgage. In the alternative, the Association argues for the first time that Washington Mutual should be estopped from asserting its first mortgage because the Association sent a letter to foreclosure counsel for Washington Mutual asserting it had a superior interest. Neither of these arguments support reversal of the District Court's well-reasoned decision that Washington Mutual was the holder of the first mortgage on the Real Property, and that under MINN. STAT. ch. 515B, Washington Mutual's first mortgage was superior to the Association's \$4,673.70 lien as a matter of law.

- I. The mortgage first granted (i.e. the Washington Mutual mortgage) retained its first priority status over the mortgage subsequently granted (i.e. the Wells Fargo mortgage), as the second mortgagee (i.e. Wells Fargo) had actual knowledge of the first mortgage, and retained its first priority status over a homeowners' association lien as mandated by MINN. STAT. § 515B.3-116(b)(ii).**

The Association does not dispute in this appeal that Washington Mutual's Mortgage was superior to the Wells Mortgage. It does not challenge the District Court's Finding that Wells Fargo had actual knowledge of Washington Mutual's Mortgage before the execution or recording of the Wells Mortgage. The District Court properly held that such actual knowledge of Washington Mutual's superior mortgage meant that Wells Fargo was not a good faith purchaser for value under Minn. Stat. § 507.34, citing *Henschke v. Christian*, 228 Minn. 142, 36 N.W.2d 547 (1949), *Clafin v. Commercial*

*State Bank of Two Harbors*, 287 N.W.2d 242 (Minn. App. 1992) and *In re Ocwen Financial Services, Inc.*, 649 N.W.2d 854 (Minn. App. 2002). The Association agrees the District Court “reached the right conclusion” that Washington Mutual’s Mortgage was superior to the Wells Mortgage. Appellant’s Brief, page 13. Washington Mutual undisputedly was the holder of the first mortgage at all relevant times.

The Association acknowledges that prior to any relevant foreclosure activities, there were three liens encumbering the Real Property including:

1. An assessment lien in favor of the Association evidenced by the Declaration, and the Lien Statement dated May 1, 2005, recorded on May 18, 2005 (the “Association Lien”).
2. The mortgage lien evidenced by the Mortgage executed and acknowledged October 1, 2003, in favor of Tradition Mortgage recorded on January 8, 2004, which was assigned to Washington Mutual by the written Assignment dated October 1, 2003, recorded on January 8, 2004 (the “Washington Mutual Mortgage”).
3. The mortgage lien evidenced by the Mortgage executed and acknowledged October 24, 2003, in favor of Wells Fargo Bank, N.A. recorded on December 10, 2003 (the “Wells Mortgage”).

The Association Lien is governed by the Minnesota Common Interest Community Act, MINN. STAT. ch. 515B (2002) (“MCIOA”). Accordingly, and as recognized by the Association and as found by the District Court, although the Association Lien is based upon a Declaration recorded in 1994, as a matter of law it is junior or subordinate to a first priority mortgage lien encumbering the property:

A lien under this section is prior to all other liens and encumbrances on a unit except (i) liens and encumbrances recorded before the declaration . . . , (ii) any first mortgage encumbering the fee simple interest in the unit, . . . , (iii) liens for real estate taxes and other governmental assessments or charges against the unit, and (iv) a master association lien under section 515B.2-121.

MINN. STAT. § 515B.3-116(b) (2002). Thus, the relative priority of these three liens is substantially resolved by determining which mortgage was the first mortgage: The first mortgage has first priority, the Association Lien has second priority, and the second mortgage has third priority.

It is axiomatic that the first mortgage is the first mortgage executed. The Washington Mutual Mortgage was executed on October 1, 2003, three weeks before the Wells Mortgage was executed on October 24, 2003. By virtue of the Washington Mutual Mortgage, Ms. Witta (the property owner) granted or created a mortgage lien on her property, and the lender (initially Tradition Mortgage) fully disbursed the mortgage loan proceeds three weeks before the Wells Mortgage even existed. "First in time, first in right" controls, unless altered or modified by other factors or rules of law. However, in this case, there is no other factor or rule of law by which the Washington Mutual Mortgage became subordinate to the Wells Mortgage.

The Washington Mutual Mortgage did not lose its priority to the Wells Mortgage by virtue of Minnesota's Recording Act. Section 507.34 of the Minnesota Statutes provides:

Every conveyance of real estate shall be recorded in the office of the county recorder 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, . . .

MINN. STAT. § 507.34 (2002). Although the Washington Mutual Mortgage was inadvertently recorded after the Wells Mortgage, Washington Mutual's Mortgage was appropriately held to be the first mortgage. This provision of the Recording Act has been

interpreted from time immemorial as elevating the interest of a junior mortgagee over the interest of the first mortgage if the junior mortgage is recorded first and the junior mortgagee has no notice or knowledge of the senior mortgage. But if the junior mortgagee has knowledge of the senior mortgage when the junior mortgage is recorded, even if the junior mortgage is recorded before the senior mortgage, the junior mortgagee is not a *bona fide* purchaser, and his mortgage remains junior. See *Henschke v. Christian*, 228 Minn. 142, 36 N.W.2d 547 (1949)(noting that one is not a bona fide purchaser and not entitle to protection of recording act if have knowledge of facts that put party on inquiry that would have led to knowledge of prior conveyance); *In re Ocwen Financial Services, Inc.*, 649 N.W.2d 854 (Minn. App. 2002); *Clafin v. Commercial State Bank of Two Harbors*, 487 N.W.2d 242 (Minn. App. 1992); and *Ritchie v. Jennings*, 181 Minn. 458, 461, 233 N.W. 20, 21 (1930)(holding that actual knowledge of a prior interest bars being an “innocent purchaser”). The Minnesota Supreme Court recently demonstrated the significant effect of actual knowledge, reaffirming that a purchaser cannot be a good faith purchaser if it has actual knowledge of a prior unrecorded interest, even in regards to registered land. *In re Collier*, 726 N.W.2d 799 (Minn. 2007).

In this case, there is no issue of fact regarding the notice and knowledge possessed by Wells Fargo when Ms. Witta granted the Wells Mortgage on October 24, 2003, or when it was later recorded on December 10, 2003. Thus, Wells Fargo was not a *bona fide* purchaser for purposes of MINN. STAT. § 507.34 (2002), and the first level priority of the Washington Mutual Mortgage was not lost simply because the Wells Mortgage was recorded first. The District Court held that Wells Fargo’s actual knowledge of the “first

in time” Washington Mutual Mortgage meant that Wells Fargo was not a subsequent purchaser in good faith under MINN. STAT. § 507.34. Thus, the Wells Mortgage was junior to the Washington Mutual Mortgage. Washington Mutual’s Mortgage was a first position mortgage encumbering the Real Property.

The Association does not challenge this analysis or the District Court’s conclusion that the Washington Mutual Mortgage was first. Pursuant to MINN. STAT. Sec. 515B.3-116(b)(1), this means that Plaintiff’s first mortgage was superior to the lien claimed by the Association. Since there was no redemption from Plaintiff’s mortgage foreclosure, Washington Mutual now holds clear fee title to the Real Property.

The District Court’s analysis and application of Minnesota law established the relative priorities of the competing liens in this case as follows: the Washington Mutual Mortgage (first), the Association Lien (second), and the Wells Mortgage (third). Foreclosure of the Association Lien was subject to and did not affect the first priority Washington Mutual Mortgage. Foreclosure of the Wells Mortgage was subject to and did not affect the first priority Washington Mutual Mortgage. Further, the Association’s redemption from the foreclosure of the Wells Mortgage did not elevate the Association to any position senior or prior to the Washington Mutual Mortgage, for at least two reasons.

First, the Washington Mutual Mortgage, containing its date of execution (i.e. October 1, 2003), was recorded January 8, 2004, **before** the Association Lien was executed (May 1, 2005) or recorded (May 18, 2005), **before** the Elfelts purchased at the foreclosure of the Wells Mortgage on October 6, 2005, and **before** the Association tendered redemption funds on or about April 1, 2006. By virtue of this recording, the

entire world (including the Elfelts and the Association) had notice that the Washington Mutual Mortgage was executed first, or was “first in time”. Yet, no-one inquired. Clearly, anyone purchasing at the sale foreclosing the Wells Mortgage or redeeming therefrom took their interests subject to the Washington Mutual Mortgage, which was of record at the time.

Second, Minnesota law is clear with regard to the rights acquired by the purchasers at a mortgage foreclosure sale, and the rights of one redeeming therefrom. The purchasers at a foreclosure sale receive a sheriff’s certificate of sale (*see* MINN. STAT. § 580.12 (2002)), and one redeeming from such a sale receives a certificate of redemption (*see* MINN. STAT. § 580.26 (2002)). The sheriff’s certificate of sale, upon expiration of rights of redemption, operates “as a conveyance to the purchaser or the purchaser’s assignee of all the right , title, and interest of the mortgagor in and to the premises named therein at the date of such mortgage, . . .” (*see* MINN. STAT. § 580.12 (2002)), and in the event of redemption by a junior creditor the certificate of redemption “operates as an assignment to the creditor of the right acquired under such sale, . . .” (*see* MINN. STAT. § 580.27 (2002)). As noted in *City of St. Paul by Housing and Redevelopment Authority of City of St. Paul v. St. Anthony Flats Limited Partnership*, 517 N.W.2d 58 (Minn. App. 1994), “[a] certificate of redemption ‘operates as an assignment of the right acquired under [the mortgage foreclosure] sale.’ *Id.* at 61. The Minnesota Supreme Court in *Gerdin v. Princeton State Bank*, 384 N.W.2d 868 (Minn. 1986) stated:

The purpose of a mortgage foreclosure sale, whether by action or by advertisement, is “to terminate all interests junior to the mortgage being foreclosed

and to provide the sale purchaser with a title identical to that of the mortgagor as of the time the mortgage being foreclosed was executed.”

*Id.* at 871 (citations omitted). Thus, and even totally independent of the record notice of the Washington Mutual Mortgage and its date of execution, when the Efelts purchased at the sale foreclosing the Wells Mortgage, they only received a conveyance of Ms. Witt’s title in the property (*see* MINN. STAT. § 580.12 (2002)), and it was subject to the Washington Mutual Mortgage. And when the Association “redeemed” from the Efelts, it received only an assignment of these rights conveyed to the Efelts by the sheriff’s certificate of sale (*see* MINN. STAT. § 580.27 (2002)). Thus, both the Efelts and the Association were subject to the Washington Mutual Mortgage, because Ms. Witt’s title was subject to the Washington Mutual Mortgage. Otherwise said, neither the Efelts nor the Association could purchase at the foreclosure sale a title better than that of Ms. Witt, and their interests in the property were discharged by foreclosure of the Washington Mutual Mortgage and their failure to redeem therefrom.

The Association attempts to side step the dispositive issue in the case by claiming it was a good faith or bona fide purchaser and had no notice of inconsistent rights of others. It argues that it acquired and foreclosed a lien interest in good faith reliance upon the record of the County Recorder. However, the Association was not a purchaser and did not “acquire” its lien in reliance on any information in the public record. Its lien came into existence by operation of the Declaration and related documents when the former owner of the Real Property failed to pay certain assessments and fees of the Association. Section 8.3 of the Declaration states:

The Association has a lien on a Unit for any assessment levied against that Unit from the time the assessment comes due.

A-113. The Association recorded a Lien Statement on May 18, 2005, alleging a lien for unpaid assessments, fines, and attorney fees and costs in the amount of \$2,913.00. A-60 to 80. The Association was the highest bidder at the sale foreclosing its lien. *Id.* It foreclosed its lien with full knowledge that there was a mortgage senior to its lien on the property. The sheriff's certificate is dated and was recorded on August 16, 2005. *Id.* The Association's lien was recorded subsequent to the recording of the Washington Mutual Mortgage and the Wells Mortgage. The Washington Mutual Mortgage was executed and dated on its face in advance of the Wells Mortgage, and it was evident from the face of the two mortgages that the Washington Mutual Mortgage was a first mortgage and that the Wells Mortgage secured a second position home equity line of credit.

The Association was not a "good faith" or "bona fide" purchaser intended to be protected from unrecorded interests in real property. It is a judgment creditor subject to the special rights and limitations of MCIOA. MCIOA states that a lien such as the one foreclosed by the Association is subject to "any first mortgage encumbering the fee simple interest in the unit". MINN. STAT. § 515B.3-116(b) (2002). Under MCIOA, the Association is granted the significant power that liens for assessments or other charges thereunder are superior to essentially all liens save for a first mortgage. The statute does not state that such liens are superior to all but what an association thinks is the first mortgage. The Association seeks to eliminate even this restriction.

The Association claims that the District Court's decision means that the recording act would be "useless for community organizations". It argues that any association which files a lien will need to redeem from all junior liens to avoid the risk that the first mortgage will later be found junior to another lien. The Association carries the specific facts and holding of the District Court too far. The land title record here clearly showed an issue with the recording of the Washington Mutual and Wells Mortgages. The Washington Mutual Mortgage was dated before the Wells Mortgage. On its face, the Washington Mutual Mortgage was evidently intended to be a first mortgage. The Wells Mortgage secured a home equity line of credit, as could be seen on the document. The District Court's decision in this case will not make the recording act "worthless" to associations. An association faced with questions about the priority of antecedent mortgages has the ability to confirm the status of such mortgages through a variety of means. The relative priority of mortgages and liens are regularly the subject of quiet title litigation and other actions, and the recording act continues to function. Association liens will continue to be superior to all but first mortgages as provided in MCIOA.

The Association cites *Nussbaumer v. Fetrow*, 556 N.W.2d 595 (Minn. App. 1997) to support its argument that the Association's lien was not junior to Washington Mutual's first mortgage. *Nussbaumer* is distinguishable from the facts in this case, and does not support reversal of the District Court's order. *Nussbaumer* involved two judgment lien creditors whose judgments were docketed on August 15 and September 9, 1994, thus becoming liens on all of the judgment debtor's real property under MINN. STAT. § 548.09, subd. 1 (1996). Before the judgments were docketed, the judgment debtor sold certain

unimproved real property. The conveyances were not recorded. *Id.* The Nussbaumers purchased the property and recorded the deed in January, 1995. They then brought a quiet title action, seeking a judgment that their interest in the property was senior to the judgment lien creditors. The trial court held in favor of the judgment lien creditors because they had no notice of the prior unrecorded conveyance of the property. The issue was whether the judgment creditors were put on inquiry notice of the unrecorded deed to the Nussbaumers because of the residence being constructed on the real property and the “for sale” signs posted on site. *Id.* at 598-9. The Court of Appeals found that this was not sufficient to show exclusive or hostile possession of the real property enough to put the judgment creditors on inquiry notice.

In the present case, inquiry notice is not at issue in terms of ownership, and the two mortgages were of record prior to the Association’s lien. Unlike in *Nussbaumer*, the Association had constructive and actual knowledge of the prior Wells Fargo and Washington Mutual mortgages. The particular nature of the Association’s statutory lien is also a distinguishing characteristic. MCIOA defines the priority of various interests in real property in relation to an association lien. By statute, an association lien is generally junior only to a first mortgage lien. It is undisputed that Washington Mutual held a first mortgage lien on the Real Property. Therefore, the District Court properly found that the Washington Mutual mortgage was senior to the Association’s lien.

**II. It is improper for the Association to argue for the first time on appeal the “estoppel” theory that was not litigated in the trial court, and as to which the Washington Mutual did not submit evidence because the issue had not been joined.**

For the first time, the Association argues that Washington Mutual is somehow estopped from asserting its first mortgage priority over the Association’s lien as provided by MCIOA. Such estoppel is based solely on a letter sent on July 21, 2005 to foreclosure counsel for Washington Mutual. The Association did not argue in any of its numerous memoranda of law in support of summary judgment that Washington Mutual was estopped from asserting its priority over the Association’s lien.<sup>1</sup> The Association is barred from raising an estoppel argument in its appeal.

It is well-established that a theory or argument cannot be raised for the first time on appeal. *Morton v. Board of Commissioners of Ramsey County*, 301 Minn. 415, 223 N.W.2d 764 (1974); *Stumne v. Village Sports and Gas*, 309 Minn. 551, 243 N.W.2d 329 (1976); *Greer v. Kooiker*, 312 Minn. 499, 253 N.W.2d 133 (1977)(holding that “an unlitigated issue may not be asserted for the first time on appeal”); *Maloney v. Fairview Community Hospital*, 451 N.W.2d 237, 241 (Minn. App. 1990)(holding that estoppel issue not presented to trial court cannot be raised for first time in appeal); *Barnard-Curtis Co. v. Minneapolis Dredging Co.*, 200 Minn. 327, 274 N.W. 229 (1937)(holding estoppel could not be claimed on appeal because it was not presented to the trial court). As noted in *State v. Modern Recycling, Inc.*, 558 N.W.2d 770 (Minn. App. 1997), “[w]e will not review an issue raised generally before the district court but argued under a new theory

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<sup>1</sup> While estoppel was included with a laundry list of other general equitable affirmative defenses in the Association’s Answer and Counterclaim, the Association has never argued the defense until this appeal.

on appeal.” *Id.* at 772. The Minnesota Supreme Court in *Thiele v. Stich*, 425 N.W.2d 580 (Minn. 1988) stated:

A reviewing court must generally consider ‘only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.’

*Id.* at 582 (citations omitted). The *Thiele* court noted that after the appellant lost her case under one theory, she could not raise an alternate theory for the first time on appeal. The Association should not be permitted to now claim Washington Mutual is estopped from asserting its uncontested first mortgage on the Real Property.

Washington Mutual would be prejudiced if the Association were permitted to argue on appeal that Washington Mutual should be estopped from enforcing its ownership in the Real Property. Washington Mutual did not submit evidence to the District Court in opposition to the Association’s new estoppel argument, for the simple reason that the estoppel argument was not raised in the District Court. Washington Mutual’s foreclosure counsel did in fact respond to the July 21, 2005 letter to counsel for the Association, by email to such counsel. If estoppel had been argued previously, Washington Mutual would have made the email part of the record in the District Court, and this email would then be part of the record before this Court. The Association should not be permitted to present a new issue which was not argued to the District Court.

**III. The Association’s new estoppel argument is insufficient to support reversal of the District Court’s decision in any event, because it is simply based on the Association’s assertion of an erroneous legal conclusion, and unjustified in view of the record and the response of Washington Mutual.**

The Association argues that a July 21, 2005 letter sent by its counsel estops Washington Mutual from claiming title to the Real Property by virtue of its uncontested

first mortgage. This letter, based on an erroneous legal conclusion, is the sole basis of the Association's estoppel claim. Interestingly, the Association characterized its letter in its summary judgment motion as a "warning" to Washington Mutual that it ignored. A-35. Contrary to the Association's representation, Washington Mutual did not ever "accept that it was in third position" on the Real Property. It did not act in bad faith or with intent to deceive. Washington Mutual foreclosed its mortgage. It then commenced the present action to confirm its ownership of the Real Property. The letter is not a sufficient basis to strip Washington Mutual of its first mortgage status, in contradiction of MCIOA. The Association's argument would require the Court to disregard the clear language of MCIOA, which provides that the Association Lien was junior to Washington Mutual's "first mortgage encumbering the fee simple interest in the unit". See MINN. STAT. § 515B.3-116(b) (2002).

The Association claims that Washington Mutual is estopped from arguing it has the right to redeem the Real Property. This is a red herring, as the District Court found that Washington Mutual was the holder of the first mortgage and thus owned the parcel because of Wells Fargo's undisputed actual knowledge, and not because Washington Mutual redeemed the Real Property. Washington Mutual claimed redemption only in the alternative. It tendered funds to the Hennepin County Sheriff to protect its interests in the event such redemption was later deemed necessary. Such tender was in no way an admission that the Wells Fargo Mortgage was senior. Under MCIOA, the Association's lien was junior to the first position Washington Mutual Mortgage.

The Association relies heavily on *Macomber v. Kinney*, 114 Minn. 146, 128 N.W. 1001 (1910). *Macomber* is distinguishable. *Macomber* involved a claim by Warren McComber that an 1881 deed was a forgery or otherwise ineffective and that he was the owner of the subject real property. A deed was recorded in 1881 which purported to convey title of the subject real property in northern Minnesota from Warren McComber to Michael Fink ("Fink deed"). In subsequent years, the property was divided into a number of parcels and purchased by various individuals. In 1892, the plaintiff became aware of the discrepancy in the Fink deed and the spelling of the grantor's name, McComber or Macomber. Plaintiff obtained an abstract of title which showed numerous transfers and a judgment, and was found to know as a matter of law that title to the land appeared from the abstract to have passed from the Fink deed. He did not give notice to any of the current owners. In 1903, plaintiff obtained an extension of the abstract, which showed additional conveyances. Plaintiff did not advise defendants of the problem with the Fink deed and his claimed interest until commencement of his lawsuit in 1906. The court noted a number of facts that supported its decision to deny plaintiff's claims:

Legal knowledge of the defective record title arising from this discrepancy in the spelling of the name in the deed came to plaintiff in 1892. His silence, his failure to take any action at any time is significant. The land in question he practically abandoned. Taxes accrued, but he did not pay them. Squatters settled upon the land, but he took no steps to eject them. Pursuant to the Fink deed, timber was cut from the land without objection or protest by him. The iron excitement increased in the district. The grantees under the Fink deed made extensive explorations after plaintiff knew of the defective title, without arousing him to protesting action. Plaintiff never took possession of the land, paid practically no attention to it by way of visits or otherwise, and exercised no active ownership thereof.

*Id.* at 158, 1005. The court noted the ordinary rule that an owner of land has no obligation to give notice of his title to the public. *Id.* at 154, 1003. Plaintiff waited 14 years to bring his claim and took little action to demonstrate his claimed title in the interim. Under these specific facts, the court held that plaintiff was estopped from claiming title to the subject real property because he was found to have had a duty to inform the defendants of his claimed interest and did not do so to their detriment.

The present case is distinguishable on a number of grounds. Washington Mutual consistently provided notice of its interest in the Real Property. Promptly upon default of its note, Washington Mutual foreclosed upon its mortgage by advertisement. Its mortgage was recorded, as well as the various documents required for the foreclosure. The date the mortgage was executed was clearly evident in the recorded mortgage, which was prior to the date of the Wells Fargo mortgage. In contrast to the numerous subsequent owners who would have been affected if McComber was given title, only the Association claims it would be affected if the District Court's decision is affirmed. Simply put, the facts in *Macomber* clearly showed that equity favored the defendants based on the long inaction by the plaintiff, who had knowledge of the title issue for over 14 years. In the present case, equity does not favor the Association, which was acting as an investor, clearly out to make a large windfall at the expense of Washington Mutual. The estoppel claimed by the Association is based solely on a single letter it sent to foreclosure counsel for Washington Mutual, not 14 years of patient and quiet waiting as in *Macomber*. In addition, as noted previously, Washington Mutual's foreclosure counsel did respond to the letter, although the response is not part of the record due to the

Association's decision not to raise estoppel until this appeal. The Association has not shown the extent of Washington Mutual's knowledge of any issues with relative priority of the mortgages on the Real Property.

Unlike in *Macomber*, the Association was well aware of the issue with Washington Mutual's priority. The fact that the Association sent a letter to counsel for Washington Mutual claiming priority shows that the Association was aware of the issue. The letter itself contained an incorrect legal analysis as to priority. The Washington Mutual Mortgage, containing its date of execution (i.e. October 1, 2003), was recorded January 8, 2004, before the Association Lien was executed (May 1, 2005) or recorded (May 18, 2005), before the Elfelts purchased at the foreclosure of the Wells Mortgage on October 6, 2005, and before the Association tendered redemption funds on or about April 1, 2006. By virtue of this recording, the entire world (including the Elfelts and the Association) had notice that the Washington Mutual Mortgage was executed first, or was "first in time". The Washington Mutual foreclosure was of record, with the sale held on July 21, 2005. The Association had actual and constructive notice that there was a potential issue with priority. Yet, the Association did not inquire further or commence an action to determine priority. Its claimed reliance on Washington Mutual's purported silence is not reasonable. Clearly, anyone purchasing at the sale foreclosing the Wells Mortgage or redeeming therefrom took their interests subject to the Washington Mutual Mortgage, which was of record at the time.

The Association has failed to establish Washington Mutual's knowledge regarding priority and recording issues at the time it sent the July, 2005 letter or when it foreclosed

upon its lien. The Association must establish Washington Mutual's knowledge at that time, and has failed to do so. As stated in *State ex rel. Caffrey v. Metropolitan Airports Commission*, 246 N.W.2d 637 (Minn. 1976):

It is elementary that there can be no estoppel unless the party sought to be estopped had full knowledge of the facts at the time of the conduct claimed to give rise to the estoppel.

*Id.* at 642. Even if Washington Mutual had not responded to the July, 2005 letter, such silence would not be sufficient basis to estop Washington Mutual from asserting its uncontested first mortgage in the Real Property. The title issues were apparent from the mortgages which were of record. As noted in *Conner v. Caldwell*, 208 Minn. 502, 294 N.W. 650 (1940):

Silence is not a fault where there is no duty to speak. Ordinarily mere silence will not work an estoppel where a party's right appears of record. Persons dealing with property are bound to know what the record discloses.

*Id.* at 507, 653. The Association relies on *Sanborn v. Van Duyne*, 90 Minn. 215, 96 N.W. 41 (1903) in support of its estoppel argument. The court in *Sanborn* interestingly found "no room" in that case for application of the equitable doctrine of estoppel. *Id.* at 44.

The Association is barred from claiming for the first time in this appeal that Washington Mutual is estopped from its first position interest in the Real Property. In addition, the Association's estoppel argument fails as a matter of law. The District Court's decision should be affirmed.

**IV. The District Court properly ordered the refund of Washington Mutual's funds by the Hennepin County Sheriff.**

The District Court, after entry of its Findings of Fact, Conclusions of Law and Order, entered an order directing the Hennepin County Sheriff to refund the \$28,200 which had been tendered by Washington Mutual. A-282. The order was entered upon written request of counsel for Washington Mutual, which noted such refund of the money was implicit in the District Court's Findings of Fact, Conclusions of Law and Order. Notice was provided to counsel for the Association. It did not object to the relief requested until after the order had been entered. The District Court appropriately denied the Association's request to stay refund of the money.

The Association claims that the District Court's Findings of Fact, Conclusions of Law and Order awarded Washington Mutual the right to redeem the subject property. *See* Appellant's Brief at page 18. This is wrong. Washington Mutual was held to have a first mortgage, senior to the Association's lien. A-278 to 9. It was not awarded the ability to redeem the Real Property. This would make little sense, as Washington Mutual undisputedly was the holder of the first position mortgage and would have no reason to redeem. This mischaracterization of the Findings of Fact, Conclusions of Law and Order is interesting because the District Court addressed this specific issue in its August 8, 2007 letter that the Association inexplicably failed to include in its Appendix. R. 43 to 44.

The District Court stated:

The Court ruled in its July 17, 2007 Findings of Fact, Conclusions of Law, and Order for Judgment that the mortgage of Washington Mutual Bank, F.A. was superior and senior to the mortgage in favor of Wells Fargo Bank, N.A. In that Order, the Court determined that because the Washington Mutual mortgage was

the first mortgage, Washington Mutual never had any duty or obligation to redeem from foreclosure of the junior Wells Fargo mortgage. As Washington Mutual had no duty to redeem from foreclosure of the junior mortgage, Washington Mutual is entitled to a refund of the \$28,200 it had deposited with the Court.

*Id.* The District Court's analysis of its own Findings of Fact, Conclusions of Law and Order is directly contrary to the Association's incorrect characterization. At no point in the Findings of Fact, Conclusions of Law and Order does the District Court find that Washington Mutual has the right to redeem the Real Property. The Association attempts to turn the Court's Findings which note simply that both the Association and Washington Mutual tendered funds to the Hennepin County Sheriff to redeem the Real Property into an order directing Washington Mutual to redeem from the Association. A-274.

On or about April 6, 2006, both the Association and Washington Mutual tendered checks to the Hennepin County Sheriff. The Association submitted a check for \$27,300.04 to redeem from the Elfeldts, who had purchased the Sheriff's Certificate from the Wells Fargo foreclosure sale. A-43. Washington Mutual, while asserting its first priority mortgage lien and without prejudice thereto, remitted to the Hennepin County Sheriff \$28,200 to complete a "disputed redemption" and pay off all parties. The benefit sought by Washington Mutual was avoidance of litigation cost and expense and litigation risk. However, the Association refused to accept or allow any attempted redemption by Washington Mutual, and stubbornly insisted that Washington Mutual had no interest in the real property.

During the litigation, the Association, Washington Mutual and the Elfeldts executed a Stipulation for Order to Release Funds. R-40 to 42. Pursuant to such

Stipulation, the parties requested that the District Court issue an order directing the Hennepin County Sheriff to issue a check to the Elfeldts in the amount of \$27,300.04 related to the redemption of the Real Property. *Id.* This was precisely the amount tendered previously by the Association to the Hennepin County Sheriff. Counsel for the Association signed this Stipulation, agreeing to the payment to the Elfeldts. An order was subsequently entered and the Elfeldts received a check for \$27,300.04 from the Hennepin County Sheriff.

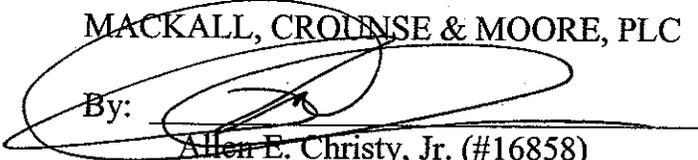
This left the \$28,200 that Washington Mutual had tendered to the Hennepin County Sheriff. As the Association had refused Washington Mutual's tender of the \$28,200 and given the District Court's decision that Washington Mutual's interest was superior to that claimed by the Association, counsel for Washington Mutual requested by letter that the District Court enter an order directing the Hennepin County Sheriff to issue a check to Washington Mutual returning its \$28,200. The District Court properly ordered the return of Washington Mutual's money. The Association is not entitled to these funds, and its appeal should be denied.

### CONCLUSION

The District Court properly applied MCIOA and the Recording Act by finding that Washington Mutual was the holder of the first mortgage, and thus had an interest superior to the Association. The District Court also properly ordered the return of Washington Mutual's funds by the Hennepin County Sheriff. Respondent Washington Mutual Bank respectfully requests that this Court affirm the District Court's judgment and order.

Dated: January 11, 2008.

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