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NO. 69904-1-I  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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BANK OF AMERICA, N.A., successor by merger to BAC HOME  
LOAN SERVICING, LP, formerly known as COUNTRYWIDE  
HOME LOANS SERVICING, LP,  
Appellant,  
vs.  
THE CONDO GROUP, LLC,  
a Washington Limited Liability Company,  
Respondent.

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BRIEF OF RESPONDENT  
THE CONDO GROUP, LLC

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APPEAL FROM KING COUNTY SUPERIOR COURT  
The Honorable Laura Inveen, Case No. 12-2-15042-7 SEA

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APPEAL FROM KING COUNTY SUPERIOR COURT  
THE HONORABLE LAURA INVEEN  
CASE NO. 12-2-15042-7 SEA

 ORIGINAL

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## **I. INTRODUCTION**

This appeal concerns redemption rights following judicial foreclosure of a condominium association's assessment lien against a condominium unit. Specifically, the Plaintiff/Appellant, Bank of America, N.A. (referred to as "BANA"),<sup>1</sup> seeks to quiet title in its favor as a "redemptioneer" based on RCW 6.23 *et seq.* (the "Redemption Statute"). The Respondent, The Condo Group LLC (referred to as "Condo Group"), purchased the unit at sheriff's sale at the underlying foreclosure action.

The Redemption Statute sets forth the circumstances in which a creditor with a lien on the property may "redeem" after a foreclosure sale. *See* RCW 6.23 *et seq.* If permissible, redemption strips title from the foreclosure-sale purchaser and places it in the hands of the redemptioner. *Id.* In unambiguous language, the Redemption Statute provides that BANA cannot redeem because its deed of trust lien was not "subsequent in time" to that of a RCW 64.34.364(3) "super priority" condominium assessment lien, on which the foreclosure sale was based. *See* RCW 6.23.010(1)(b). The "super priority" lien is generally equivalent to six (6) months of condominium assessments.

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<sup>1</sup> BANA alleges it is the successor by merger to BAC Home Loan Servicing, LP, formerly known as Countrywide Home Loans Servicing, LP.

Two recent Division One decisions establish that under the current version of RCW 6.23.010(1)(b), parties in the BANA position are not authorized redemptioners. See *Summerhill Vill. Homeowners Ass'n v. Roughley*, \_\_\_ Wn. App. \_\_\_, 289 P.3d 645 (Wash. Ct. App. 2012); see also *BAC Home Loans Servicing, LP v. Fulbright*, \_\_\_ Wn. App. \_\_\_, 298 P.3d 779 (Wash. Ct. App. 2013).<sup>2</sup>

Notably, BANA (through its predecessor MERS) could have avoided extinguishment of its lien by paying off the “super priority” portion of the subject condominium assessment lien prior to the foreclosure sale. *Summerhill* and *Fulbright* highlight the Legislature’s intent that this option be the sole avenue by which a creditor such as BANA could protect its lien interest under the current version of RCW 6.23.010(1)(b). *Summerhill*, 289 P.3d at 648; *Fulbright*, 298 P.3d at 781-82. BANA (through its predecessor MERS) failed to exercise its right to payoff the “super priority” portion of the lien before the foreclosure sale. Its deed of trust lien was accordingly extinguished.

To “resurrect” its deed of trust lien, BANA argues that RCW 64.34 *et seq.* (the “Condominium Act”) and RCW 65.08 *et seq.* (the “Recording Act”) provide that BANA is an authorized redemptioner. The rationale is that BANA’s purported Deed of Trust was recorded “subsequent in time”

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<sup>2</sup> The Washington Appellate Reports citations for the published *Summerhill* and *Fulbright* opinions is not yet available. Thus, the Pacific Reporter citations are utilized.

to the Condominium Declaration which created the subject condominium. The problem is that both *Summerhill* and *Fulbright* considered and rejected this Condominium Declaration “Recording Perfection” argument.

Frankly, the *Summerhill* and *Fulbright* opinions should fully resolve this appeal. Indeed, BANA essentially concedes as much in a motion filed in a separate action in which it states the very position argued by Condo Group in this Motion. CP 68; CP 136-37 (Motion For Show Cause Order at 5-6, filed in King County Cause No. 12-2-07907-2 KNT).

However, BANA raises two new arguments for the first time on appeal with respect to a recent legislative enactment, Senate Bill 5541 (“SB 5541”). It modifies RCW 6.23.010(1)(b) by changing “subsequent in time” to “subsequent in priority”. *See* SB 5541. SB 5541 does not take effect until July 28, 2013. *Id.*

Specifically, BANA argues that the Court should reinterpret the current version of RCW 6.23.010(1)(b) as though it contained the “subsequent in priority” language of the not-yet-effective SB 5541. In essence, BANA claims that the Legislature “realized” it actually meant “subsequent in priority” in the first place. BANA asks this Court to rewrite the current Redemption Statute accordingly. BANA also argues SB 5541 should apply “retroactively”, despite contrary legislative intent.

Ultimately, this Court should not consider these arguments related to SB 5541 because BANA did not raise them in the trial court below. *See* RAP 2.5(a). Even if considered, these arguments are not persuasive. The current version of RCW 6.23.010(1)(b) applies to this appeal. Accordingly, this Court of Appeals should affirm Judge Inveen’s orders denying BANA’s claim to a redemption right.

## **II. ASSIGNMENTS OF ERROR**

Condo Group accepts Judge Inveen’s orders in this case. Condo Group does not make any assignments of error.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether BANA is an authorized redemptioner under RCW 6.23.010(1)(b) where the Division One *Summerhill* and *Fulbright* cases specifically determined that a deed of trust securing a loan which finances the purchase of a condominium unit is not “subsequent in time” to a lien arising from the unit owner’s subsequent failure to pay assessments.
2. Whether the Court should reinterpret the current Redemption Statute, RCW 6.23.010(1)(b), as though it contained the “subsequent in priority” language of the yet-to-be-effective SB 5541 where the current statute unambiguously reflects the intent of the Legislature.
3. Whether SB 5541 should apply retroactively where (1) there is no indication that the Legislature intended SB 5541 to apply retroactively; (2) SB 5541 is not “curative” because it is a statutory amendment (not a clarification) which modifies clear and unambiguous statutory language; and (3) SB 5541 affects substantive rights provided by an order of confirmation of the sheriff’s sale in a condominium lien foreclosure action.

4. Whether BANA is entitled to raise new arguments related to SB 5541 for the first time on appeal where BANA did not raise them in the trial court below.

#### **IV. STATEMENT OF THE CASE**

##### **A. The Underlying Condominium Lien Foreclosure Action.**

On May 20, 2003, Mill Street Condominiums recorded its Declaration for Condominium in King County, Washington (“Condominium Declaration”). CP 74 (Condominium Declaration). The condominium is comprised of 23 residential units and one (1) commercial unit in a single, four (4) story building located in the Central District of Seattle, Washington. CP 80 (Condominium Declaration at 6, § 2.3.1); CP 142-43. The owners’ association is known as the Mill Street Homeowners Association (“Mill Street HOA”). CP 81 (Condominium Declaration at 10, § 5.1).

The Condominium Declaration provides as follows:

##### **8.16 Lien And Collection Of Assessments.**

**8.16.1 Lien.** The Association has a lien on a Unit for any unpaid Assessment from the time the Assessment is due.<sup>[3]</sup>

**8.16.2 Priority.** A lien under this Section 8.16 shall be prior to all other liens and encumbrances on

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<sup>3</sup> The Assessments are due on the fifth day of each month. CP 85 (Condominium Declaration at 24, § 8.11).

a Unit except: (a) liens and encumbrances recorded before the recording of this Declaration, (b) a Mortgage on the Unit recorded before the date on which the Assessment sought to be enforced became delinquent, and (c) liens for property taxes and other governmental assessments or charges against the Unit.

**8.16.3 Mortgage Priority.** Except as provided in Section 8 16.4 [sic], **the lien shall also be prior to any Mortgagee, to the extent of Assessments for Common Expenses**, excluding any amounts for capital Improvements [sic] and collection expenses, based on the periodic budget adopted by the Association which would have become due during the six (6) months immediately preceding the date of the sheriff's sale in an action for judicial foreclosure by either the Association or a Mortgagee....[emphasis added]

\* \* \*

**8.16.6 Foreclosure.** Any lien for Assessments may be enforced judicially by the Association or its authorized representative in the manner set forth in RCW Ch. 61.12.<sup>[4]</sup>

CP 85-86 (Condominium Declaration at 24-25).

On February 15, 2005 Statutory Warranty Deed, Antony Stately ("Stately") purchased Unit 401 of Mill Street Condominiums ("Unit

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<sup>4</sup> "Association" refers to the Mill Street HOA. CP 76, 81 (Condominium Declaration at 2, § 1.7 and at 10, § 5.1). "Assessment" is defined as "all sums chargeable by the Association against a Unit including, without limitation[:] (a) regular and special assessments for Common Expenses, Commercial Expenses and Residential Expenses (b) interest and late charges on any delinquent account; and (c) costs of collection, including reasonable attorneys' fees, incurred by the Association in connection with the collection of a delinquent Owner's account." CP 76 (Condominium Declaration at 2, § 1.7).

401”), commonly known as 107 20<sup>th</sup> Avenue, Unit 401, Seattle, Washington 98122 and legally described as follows:

UNIT 401, MILL STREET CONDOMINIUMS, A CONDOMINIUM; SURVEY MAP AND PLANS RECORDED IN VOLUME 190 OF CONDOMINIUMS. PAGES 68 THROUGH 74, INCLUSIVE, AND AMENDMENTS THERETO; CONDOMINIUM DECLARATION RECORDED UNDER RECORDING NUMBER(S) 20030520000109, AND AMENDMENTS THERETO, IN KING COUNTY, WASHINGTON.  
Tax Parcel No.: 553030020000

CP 90 (Warranty Deed).

To finance the purchase, Stately executed a promissory note (the “Note”) evidencing a \$256,000.00 loan from Countrywide Home Loans, Inc. (“Countrywide”). CP 172-75. It was secured by a Deed of Trust in favor of Mortgage Electronic Registration System (“MERS”) solely as nominee for Countrywide, or its successors and assigns (the “Deed of Trust”). CP 176-93. The Deed of Trust was recorded on February 18, 2005. CP 176.

Years later, in May of 2009, Stately became delinquent on common condominium assessments owed to Mill Street HOA. CP 112. From that point forward, Stately remained in arrears on assessments and other payment obligations owed to Mill Street HOA. CP 112.

On January 27, 2010, Mill Street HOA recorded a Notice of Claim of Lien For Unpaid Assessments against Unit 401 (the “Mill Street Lien”). CP 94. It was based on Stately’s failure to pay assessments through January 22, 2010 in the amount of \$16,955.36. CP 94.

On November 4, 2010, Mill Street HOA filed suit against Stately to obtain a Judgment for the delinquent condominium assessments and foreclose the Mill Street Lien (“HOA Lawsuit”). CP 96-100 (HOA Lawsuit Complaint). The complaint also named one other defendant, MERS, in the suit. CP 96-100. Again, MERS was the beneficiary of the Deed of Trust as nominee for the lender, Countrywide. CP 176.

On November 29, 2010, the Court entered a Default Judgment, Order and Foreclosure Decree in favor of Mill Street HOA. CP 116-20 (the “Decree/Judgment”). It provided for entry of a principal judgment in the amount of \$21,583.90 against Stately and his property, Unit 401. CP 116-17. In the event the judgment was not paid upon entry, the Order also provided for Unit 401 to be sold by the Sheriff of King County, Washington (the “Sheriff”) at a foreclosure sale. CP 118. It further states:

IT IS FURTHER ORDERED, ADJUGED AND DECREED that the rights of defendant mortgage lenders be adjudged inferior and subordinate to the plaintiff’s lien to the extent of assessments for common expenses....which would have become due during the six months immediately preceding the date of any sheriff’s sale conducted pursuant

to this foreclosure decree...

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if the defendant mortgage lenders, and the persons claiming by, through or under them, do not satisfy the Association's lien priority as described in the preceding paragraph prior to any Sheriff's sale conducted pursuant to this decree, their rights are forever foreclosed;

IT IS FURTHER ORDERED, ADJUGED AND DECREED that the rights of each of the remaining defendants and persons claiming by, through or under them, be adjudged inferior and subordinate to the plaintiff's lien and be forever foreclosed by an sheriff's sale conducted pursuant to this foreclosure decree, except only for the statutory right of redemption allowed by law, if any;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the period of redemption shall be one year from the date of the Sheriff's sale after which time the Sheriff shall issue the Sheriff's deed to the purchaser;

CP 119.

The judgment was never paid. As a result, on February 3, 2011, the Court issued an Order of Sale directing the Sheriff to seize and sell Unit 401. CP 122-24. On April 29, 2011, the Sheriff levied on and sold Unit 401 at public auction to Ray G. Stevenson ("Stevenson"), the highest bidder, for \$33,000.00. CP 146-48 (Certificate of Purchase); CP 126-27 (Sheriff's Return On Sale). The Court confirmed the Sheriff's sale on June 8, 2011. CP 129-30 (Order Confirming Sale).

On June 23, 2011, MERS, as nominee for Countrywide Home Loans, Inc., assigned the Deed of Trust to BAC Home Loans Servicing, LP, formerly known as Countrywide Home Loans Servicing, LP. CP 34; 194 (Assignment). MERS recorded the assignment on July 12, 2011. CP 194.

To reiterate, BANA alleges that at some unidentified later point in time it became the successor to the Deed of Trust “by merger”. CP 2 (Complaint at 2, ¶ 7). Thus, at the time of the April 29, 2011 foreclosure sale, BANA did not have any interest in the Deed of Trust. CP 2.

On July 18, 2011, the Sheriff issued Stevenson a Certificate of Purchase of Real Estate. CP 146-48. Stevenson quit claimed his interest in the Certificate of Purchase for Unit 401 to The Condo Group on December 27, 2011. CP 150-51.

**B. BANA Attempts To Redeem And Files Suit.**

On March 29, 2012, BANA delivered a redemption request letter and supporting documentation to the Sheriff. CP 7-33 (Redemption Request Letter). In the letter, BANA claimed to be a “redemptioner” under RCW 6.23 *et seq.* as the current beneficiary under the Deed of Trust assigned by MERS. CP 7-8. BANA also requested a redemption payoff amount. CP 7-8.

The Sheriff emailed a copy of BANA's redemption request to Stevenson on April 3, 2012. CP 143 (Stevenson Declaration at 2, ¶ 7). The email also included an undated "Notice to Purchaser" letter to Stevenson and a request for additional information. CP 143. Stevenson, a member and authorized representative of The Condo Group, responded that BANA was not an authorized redemptioner. CP 142-43 (Stevenson Declaration at 1-2, ¶ 2, 8); CP 36-37 (April 16, 2012 Letter From Stevenson to Cunio). Based on this position, Stevenson did not provide the redemption payoff amount requested by BANA. CP 143 (Stevenson Declaration at 2, ¶ 8).

On April 18, 2012, the Sheriff notified BANA of Stevenson's letter and the parties' clear dispute over redemption rights. CP 38 (April 18, 2012 Letter from Cunio to Sommer). The notice stated that if BANA tendered funds in the amount it estimated was necessary for redemption, the Sheriff would deposit them in the registry of the Court. CP 38. It further advised that the Sheriff would not issue a Certificate of Redemption to BANA or a Sheriff's Deed to The Condo Group without a court order. CP 38.

On April 23, 2012, BANA tendered an estimated redemption sum of \$41,512.81, which was deposited in the registry of the court. CP 4 (Complaint at 4, ¶ 18); CP 39-42 (April 23, 2012 Letter From Sommer to

Cunio). Two days later, on April 25, 2012, BANA commenced the present lawsuit for declaratory relief. CP 1 (Complaint). Specifically, BANA seeks a judicial decree that it is an authorized redemptioner under RCW 6.23.010 and that it has timely attempted to redeem.<sup>5</sup> CP 5-6 (Complaint at 5, ¶¶ 20 and 25, and at 6, ¶¶ 1-2). In addition, BANA seeks a decree tolling the one-year redemption period thirty (30) days. CP 6 (Complaint at 6, ¶¶ 3-4).

On May 29, 2012, The Condo Group brought a counterclaim to quiet title to Unit 401 in its favor. CP 47 (Answer and Counterclaim at 5). It also seeks a decree from the court stating that BANA is not an authorized redemptioner under RCW 6.23.010(1)(b). CP 47.

Presently, there are five other known pending cases regarding a claim of redemption analogous to this appeal: *BANA v. Nottingham Properties I, LLC*, 11-2-35753-8-KNT; *BANA v. Nottingham Properties I, LLC*, 11-40229-1 SEA; *BANA v. Nottingham Properties I, LLC*, 11-2-26940-0 SEA; *BANA v. Condo Group*, 13-2-02845-0 KNT; *BANA v. Condo Group*, 12-2-08047-8 (Snohomish County). See BANA Opening Brief Appendix Ex. C at 11, n. 3.

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<sup>5</sup> BANA is the only party to this lawsuit claiming to be an authorized redemptioner of Unit 401. Moreover, no party other than BANA has attempted to redeem Unit 401, including but not limited to the judgment debtor, Stately, who made no such attempt. CP 143 (Stevenson Declaration at 2, ¶ 9).

**C. The Legislature Enacts Senate Bill 5541.**

On March 11, 2013, the Legislature passed SB 5541. *See* BANA Opening Brief Appendix Ex. A. It modifies/amends RCW 6.23.010(1)(b) by changing “subsequent in time” to “subsequent in priority”. *See* SB 5541. The new statute does not take effect until July 28, 2013. *See* BANA Opening Brief Appendix Ex. A.

**D. Stay Request and Similar Appeal.**

On April 24, 2013, BANA filed a Motion to stay the deadline for filing its then-pending Opening Appellant Brief. This Court denied the stay request on May 3, 2013.

On May 8, 2013, BANA filed a Petition for Supreme Court Review of *Fulbright* (the “*Fulbright* Petition”). *See* BANA Opening Brief Appendix Ex. C. Condo Group is not a party to the *Fulbright* matter; that case does not involve the subject property. *Id.*; *see also Fulbright*, 298 P.3d 779.

On June 3, 2013, BANA filed a Motion to Modify the May 3, 2013 Ruling Denying the Stay. Condo Group filed a response on June 14, 2013. Decisions on both the Supreme Court *Fulbright* Petition and the Motion to Modify are pending.

## V. ARGUMENT

### A. **Standard of Review.**

BANA seeks review of the order granting summary judgment in favor of Condo Group.<sup>6</sup> Motions for summary judgment are reviewed de novo. *Frisino v. Seattle School Dist. No. 1*, 160 Wn.App. 765, 776, 249 P.3d 1044 (2011) (citation omitted). The appellate court engages in the same analysis as the trial court. *Tanner Electric Cooperative v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 668, 911 P.2d 1301 (1996) (citations omitted). In the trial court, summary judgment is proper if there are no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Id.*

### B. **Introduction.**

In this case, there are no material facts in dispute. BANA concedes that, as a matter of law, it is not an authorized redemptioner under *Summerhill* and *Fulbright*. However, BANA claims those Division One decisions were wrongly decided. In essence, BANA's appeal is a thinly veiled motion for reconsideration attempting to reverse both *Summerhill* and *Fulbright*.

In this regard, *Summerhill* and *Fulbright* both made two determinations adverse to parties in the BANA position. First, those

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<sup>6</sup> BANA accordingly also seeks review of the order denying its request for reconsideration of the summary judgment ruling in favor of Condo Group.

decisions determined that under RCW 6.23.010(1)(b), “subsequent in time” was intended to be interpreted literally. Thus, *Summerhill/Fulbright* declined to reinterpret the phrase to mean “subsequent in priority”. Second, *Summerhill/Fulbright* determined that the Condominium Declaration Recording Date is not the relevant date for determining whether a condominium assessment lien is “subsequent in time”. Rather, an assessment lien “arises” at the time the condominium owner becomes delinquent in paying assessments. *Summerhill*, 289 P.3d at 648, n. 7; *Fulbright*, 298 P.3d. 781-82.

BANA challenges both of these determinations on appeal. Highlighting the absurdity of its position, BANA argues that its purported trust deed lien was “subsequent in time” to the date on which the Mill Street Condominium Declaration was recorded and “perfected”. Again, both *Summerhill* and *Fulbright* considered and rejected this argument.

BANA also makes two arguments based on the recent enactment of SB 5541, which takes effect on July 28, 2013. First, BANA argues that SB 5541 “confirms” that the Legislature actually intended that the current Redemption Statute to extend a right of redemption to parties in the BANA position. See Opening Brief at 11-17. To the contrary, Division One correctly interpreted the current Redemption Statute based on the plain language and legislative history. *Summerhill*, 289 P.3d 645;

*Fulbright*, 298 P.3d. 779.

Indeed, SB 5541 was not a clarification but an amendment which fundamentally changed the unambiguous Redemption Statute. The enactment is not a basis upon which to overrule *Summerhill* and *Fulbright*.

BANA also makes the novel argument that SB 5541 should apply “retroactively” because the enactment is “remedial and curative”. However, there is no indication that the Legislature intended SB 5541 to apply retroactively. SB 5541 was not “curative” and affects substantive rights provided by an order of confirmation of the sale in a condominium lien foreclosure action. Furthermore, the Court should not even consider the arguments related to SB 5541, as they were not raised below.

**C. *Summerhill* and *Fulbright* Expressly Rejected The Condominium Declaration “Perfection” Theory; An Assessment Lien Arises At The Time Of A Delinquency.**

To avoid the result of *Summerhill* and *Fulbright*, BANA engages in a cumbersome analysis of the “interplay” between the Redemption Statute and the condominium assessment lien provisions of the Condominium Act, RCW 64.34.364. *See* Opening Brief at 17-21. Specifically, BANA argues that the date on which an assessment lien is “perfected”, rather than when the lien actually arose, should be used to determine whether a purported redemptioner’s lien is “subsequent in time” to the assessment lien under the Redemption Statute. *Id.*

According to BANA, the Mill Street Lien was supposedly perfected on May 20, 2003; *i.e.* when the Condominium Declaration was recorded. *See* Opening Brief at 17; CP 74 (Condominium Declaration). BANA argues that its trust deed lien was “perfected by recording” in February of 2005. *See* Opening Brief at 17. Thus, BANA argues the lien was “subsequent in time” to the Mill Street Lien “perfected” in 2003, giving rise to a right of redemption. *See* Opening Brief at 17-21.

In this regard, BANA disingenuously contrasts *Summerhill* and *Fulbright* as follows:

Like GMAC in *Summerhill*, Bank of America contended that the Redemption Act authorized redemption by all those whose extinguished liens had been subsequent in priority to the foreclosing lien. **But unlike GMAC, Bank of America also argued that its deed of trust was “subsequent in time” to the condominium lien as a matter of fact and law, because RCW 64.34.364(7) provides that recording of the condominium declaration “constitutes record notice and perfection of the lien for assessments,”** and Bank of America had recorded its deed of trust in 2005, two years after the condominium association recorded its declaration. [emphasis added]

*See* Opening Brief at 9.

In reality, both the *Summerhill* and *Fulbright* Courts specifically considered and rejected the notion that the condominium declaration recording date is the relevant date for determining if an assessment lien is “subsequent in time” for redemption purposes. *Summerhill*, 289 P.3d at

648, n. 7; *Fulbright*, 298 P.3d. 781-82.

Indeed, in response to a motion for reconsideration filed by GMAC, the *Summerhill* court modified its original opinion to include an additional footnote in this regard, as follows:

RCW 64.34.364(7) provides that recording of a condominium association declaration ‘constitutes record notice and perfection of the lien for assessments.’ In a motion for reconsideration, *GMAC contends this provision means any mortgage loan made after the filing of the declaration is subsequent in time for purposes of RCW 6.23.010(1)(b)*. ***We reject this contention. The association’s lien does not arise until the ‘assessment is due.’*** RCW 64.34.364(1). [emphasis and bracketed text added]

*Id.*

The Division One *Fulbright* opinion affirmed the above determination, as follows:

We considered the interaction of these statutes in our recent opinion in *Summerhill*[,] a factually similar case. *Summerhill*, 289 P.3d at 647–49. We adhere to that opinion and rely on it in affirming the trial court's decision in this case. **The only difference between this opinion and *Summerhill* is that here, we have the opportunity to amplify our reasons for holding that a condominium association's superpriority lien for unpaid assessments for common expenses arises after the deed of trust lien on the unit, not before—notwithstanding RCW 64.34.364(7).** [emphasis added and in original; bracketed portion added]

*Fulbright*, 298 P.3d. at 781.

*Fulbright* further clarifies that a condominium association does not have a lien *before* “the time the assessment is due.” *Id.* at 781-82. In other words, a condominium assessment lien does not arise until the assessment is due. *Id.* As such, a deed of trust lien recorded prior to the date on which assessments became delinquent cannot give rise to any redemption rights. *Id.* Such a trust deed lien is not “subsequent in time” to a condominium lien, as required by RCW 6.23.010(1)(b). *Id.*

BANA also argues by analogy that deed of trust for a home equity line of credit (“HELOC”) is created and perfected on the date the HELOC deed of trust is recorded. *See* Opening Brief at 18-19. However, BANA fails to offer any rationale or authority that its HELOC analogy applies to the instant statutory scheme. *Id.*

Furthermore, BANA misplaces reliance on *Malm v. Griffith*, 109 Wash. 30, 33, 186 P. 647, 648 (1919). *See* Opening Brief at 20. Specifically, BANA characterizes *Malm* as follows:

In *Malm*, borrowers granted a second mortgage to a different lender that was recorded. Later that year, the borrower and that lender executed and recorded a deed in lieu of foreclosure. The 1909 mortgagee then recorded her mortgage.

The Court held that the 1909 mortgage was a qualified redemptioner because she “became the holder of a mortgage against the lot, in effect, subsequent in time, because of subsequent recording” to the 1939 mortgage. *Malm*, 109 Wash. at 33; *see also* 2 Wash. State Bar Ass’n,

*Washington Real Property Deskbook* § 20.15(3) at 20-46 (4th ed. 2009).

See Opening Brief at 20.

Certainly, the *Malm* court affirms that a “subsequent in time” analysis applies in some contexts. *Malm*, 109 Wash. at 33. However, *Malm* involved the issue of whether a mortgagee, who took a quitclaim deed from mortgagor in satisfaction of indebtedness without notice of an unrecorded mortgage against land, should take title subject to the right of redemption by a lender whose loan was provided prior to their loan, but whose mortgage was recorded thereafter. *Id.* In other words, *Malm* did not analyze a situation remotely analogous to the present scenario. *Id.*

Ultimately, the only way for a party in the BANA position to avoid elimination of such a trust deed lien is by paying off the delinquent condominium assessments prior to the foreclosure sale. See RCW 6.23.010(1)(b); *Summerhill*, 289 P.3d at 648-49; *Fulbright*, 298 P.3d. 781-82. Unfortunately for BANA, its predecessor MERS failed to do so.

**D. SB 5541 Does Not Reflect The Legislative Intent Of The Applicable Redemption Statute.**

1. SB 5541 Was Not A Clarification But An Amendment Which Fundamentally Changed The Unambiguous Redemption Statute.

Again, SB 5541 amends RCW 6.23.010(1)(b) as follows:

(b) A creditor having a lien by judgment, decree, deed of

trust, or mortgage, on any portion of the property, or any portion of any part thereof, separately sold, subsequent in ((time)) **priority** to that on which the property was sold. The persons mentioned in this subsection are termed redemptioners. [emphasis added]

*See Laws of 2013*, ch. 53, § 1.

Without justification, BANA argues SB 5541 “confirms” that the Legislature originally intended RCW 6.23.010 “to grant redemption rights to Bank of America as the holder of a deed of trust subsequent in priority to the foreclosing lien.” *See* Opening Brief at 11-17. Put another way, BANA argues that the current Redemption Statute should apply the “subsequent in priority” language SB 5541, even though it does not take effect until July 28, 2013. Supposedly, the legislature actually intended for this “priority” rule to apply under the current statute.

To the contrary, right, wrong or indifferent, the present version of RCW 6.23.010(1)(b) reveals an unambiguous intent to bar parties in the BANA position from redeeming. *Summerhill*, 289 P.3d at 648-49; *Fulbright*, 298 P.3d. 781-82. *Summerhill* specifically reached this determination after conducting an exhaustive review of the legislative history. *Summerhill* at 649, n. 18.

Indeed, the *Summerhill* opinion provides as follows:

¶ 17 GMAC also contends a literal reading leads to absurd consequences such as those here, where a stranger to the property is allowed a windfall, the mortgage debtor is

left with a deficiency, and the secured lender is punished. **GMAC urges this court to interpret the provision to grant redemption rights to a creditor having a lien junior to that on which the property was sold.**

¶ 18 The problem with this argument is that the language of the statute is unambiguous, and the expressed legislative intent is consistent with the language. The legislature created the super priority lien and did not amend the redemption statute. **There is no sign of legislative confusion as to the difference between a lien subsequent in time and a lien prior in time but junior in priority.** And it is evident from the official comment that the consequences of that difference were intentional: “As a practical matter, mortgage lenders will most likely pay the assessments ... rather than having the association foreclose on the unit and eliminate the lender's mortgage lien.” [emphasis added]

*Summerhill*, 289 P.3d at 649.

In short, the *Summerhill* court relied on both the plain and unambiguous “subsequent in time” language, as well as an extensive review of the legislative history. *Id.* Based on this thorough analysis, the Court properly determined that the Redemption Statute does not extend a right of redemption to parties in the BANA position. Subsequently, the *Fulbright* court affirmed this determination. *Fulbright*, 298 P.3d 781-82.

BANA misplaces reliance on *Waggoner v. Ace Hardware Corp.* See Opening Brief at 12; see also *Waggoner*, 134 Wash. 2d 748, 755-56 (1998). *Waggoner* provides that a statutory amendment may sometimes reflect the legislative intent for the prior version. *Waggoner*, 134 Wash.

2d at 755-56. However, BANA disingenuously fails to acknowledge that this rule of statutory interpretation applies “where the original enactment was ambiguous to the point that it generated dispute as to what the Legislature intended....” *Id.* at 755 (citation omitted); *see also In re Pers. Restraint of Stewart*, 115 Wn. App. 319, 339-40, 75 P.3d 521 (2003).

Interestingly, BANA itself has previously admitted that *Summerhill* stands for the proposition that under the current version of RCW 6.23.010(1)(b), paying off the Super Lien prior to the Sheriff’s sale was the only way it could avoid having its lien extinguished. In a motion filed in a separate pending action involving an analogous redemption scenario, BANA concedes:

The [*Summerhill*] Court held that since the mortgagee did not pay the Super Lien [*i.e.* the six (6) month “super priority” portion of the assessment lien] *prior* to the sheriff’s sale, the mortgagee was foreclosed, **and the mortgagee was not an eligible redeptioner.** [emphasis and bracketed text added]

CP 136-37 (Motion For Show Cause Order at 5-6, filed in King County Cause No. 12-2-07907-2 KNT).

In that motion, BANA did not argue that there was any “ambiguity” with respect to the *Summerhill* court’s interpretation of RCW 6.23.010(1)(b). To the contrary, BANA was “earnestly trying to comply” with *Summerhill* by allegedly attempting to payoff the Super Lien *prior* to the sale. *Id.* at 6. In short, BANA’s prior actions are consistent with the

position that the Legislature unambiguously intended that the current version of RCW 6.23.010(1)(b) does not extend redemption rights to parties in the BANA position.

2. Summerhill and Fulbright Comport With The Supreme Court Decisions With Which BANA Claims “Conflict.”

Perhaps to create ambiguity which does not exist, BANA also argues that *Summerhill* and *Fulbright* “conflict with salient principles of statutory interpretation announced by the Legislature and the Washington Supreme Court.” *See* Opening Brief at 12. First, BANA claims that *Summerhill/Fulbright* “conflict” with *Rustad Heating and Plumbing Company v. Waldt*, 91Wn.2d 372, 588 P.2d 1153 (1979). *See* Opening Brief at 13. Theoretically, if accurate, this argument could buttress the claim addressed below that SB 5541 applies retroactively. In fact, the Supreme Court cases addressed by BANA are inapplicable to the instant case.

Specifically, in *Rustad*, the Court ruled that a deed of trust is a type or “species” of mortgage under a prior version of the Redemption Statute that did not specifically reference deeds of trust. *Id.* at 376. *Rustad* did not disregard any plain, unambiguous language or rewrite the Redemption Statute as now requested by Bank of America. *Rustad* did not address issues of priority or timing for purposes of redemption. *Id.*

Second, BANA argues that *Summerhill/Fulbright* erred in light of *Millay v. Cam*, 135 Wn.2d 193, 955 P. 791 (1998). *Millay* did not involve any dispute over who was authorized to redeem. Rather, the issue involved the method by which to calculate the redemption amount to be paid, and the procedure used to exercise the redemption right. *Id.* at 196. In this context, the *Millay* Court used the phrase "junior lien creditors" as a convenient shorthand description of the actual statute. *Id.* at 198. There was no issue regarding whether "junior lien creditors" were "subsequent in time" or "subsequent in priority". *Id.*

Frankly, this issue is not raised in most cases. Thus, it is not surprising to see phrases like "junior lienholder" and "subsequent in time" used somewhat interchangeably by courts and secondary authorities. In contrast, *Millay* was not considering the effect of a super priority lien. *Millay*, 135 Wn.2d 193. Nor was there is any indication that the dicta in *Millay* was intended to modify the Redemption Statute. *Id.*

Third, BANA also argues that *Krutz v. Gardner*, 25 Wn. 396, 65 P. 771 (1901) provides a basis for overruling *Summerhill/Fulbright*. The *Krutz* court ultimately determined that the junior lienholder was not eliminated by the lien foreclosure action because it was not named in that action. *Id.* at 399.

Although *Krutz* involved a super-priority public assessment lien, it dealt with the right to equitable redemption before foreclosure of the lien; *i.e.*, the right to pay off the lien before a foreclosure sale occurs. *Id.* at 399-400. As a result, the *Krutz* lienholder could still pay off the public assessment lien to avoid a future foreclosure against its interest. *Krutz* did not involve statutory redemption by a lienholder otherwise eliminated by a foreclosure sale. Simply put, *Krutz* is not a statutory redemption case and has no bearing on this case, *Summerhill* or *Fulbright*. *Krutz* did not address whether all junior lienholders whose liens were extinguished by a foreclosure sale were entitled to redeem.

Furthermore, as BANA points out, secondary authorities tend to use concepts of subsequent in time and priority somewhat interchangeably. Again, this phenomenon is not surprising; in most cases, there is no difference.<sup>7</sup> Ultimately, research does not reveal any Washington Supreme Court decision which addresses redemption rights following foreclosure of a condominium assessment lien. BANA's claim that "conflicts" with Supreme Court decisions warrant reversing *Summerhill* and *Fulbright* is vacuous.

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<sup>7</sup> This analysis is equally applicable to the secondary authority referred to in the footnote cited by BANA in *Olson Eng'g, Inc. v. KeyBank Nat. Ass'n*, 171 Wn. App. 57, 70 (2012).

**E. SB 5541 Does Not Apply “Retroactively”; The Legislature Did Not Intend Retroactive Application, SB 5541 Is Not Curative or Remedial and SB 5541 Affects Substantive Rights.**

BANA argues the rule of SB 5541 should apply retroactively to this case. *See* Opening Brief at 22-25. SB 5541 amends RCW 6.23.010(1)(b) as follows:

(b) A creditor having a lien by judgment, decree, deed of trust, or mortgage, on any portion of the property, or any portion of any part thereof, separately sold, subsequent in ((time)) **priority** to that on which the property was sold. The persons mentioned in this subsection are termed redemptioners. [emphasis added]

*See Laws of 2013*, ch. 53, § 1.

The governor signed SB 5541 on April 23, 2013. *See* BANA Opening Brief Appendix Ex. A. Under the State Constitution, laws passed during any legislative session take effect 90 days after adjournment of the session. *See Washington State Constitution*, Art II, §§ 1(c). The 2013 Regular Session adjourned on April 28, 2013. SB 5541 is not effective until July 28, 2013. *See* BANA Opening Brief Appendix Ex. A.

BANA essentially asks the Court to determine that SB 5541 applies as though it were already effective; *i.e.* as of some date *after* July 28. *See* Opening Brief at 22-25. In this regard, declaratory relief (*i.e.* BANA’s sole claim) is not proper with respect to “potential, theoretical, abstract or academic” interests. *To-Ro Trade Shows v. Collins*, 144 Wn.

2d 403, 411 (2001). The theoretical question as to whether SB 5541 should apply “retroactively” before it actually becomes effective does not present a ripe, justiciable controversy. *Id.* Suspending reality to reach such an “advisory” opinion is beyond the province of the Court. *Id.*

Furthermore, and unfortunately for BANA, *McGee Guest Home, Inc. v. Dept of Soc. & Health Servs.* provides as follows:

**Generally, statutory amendments apply prospectively....**However, an amendment will be applied retroactively if, “(1) the legislature so intended; (2) it is ‘curative’, or (3) it is remedial, provided, however, such retroactive application does not run afoul of any constitutional prohibition.” [emphasis added]

*McGee*, 142 Wn.2d 316, 324 (2000) (en banc) (citations omitted).

BANA cannot satisfy any of these tests for retroactive application; there is no need to address the above constitutionality issue.

First, there is no indication in SB 5541 that the Legislature intended SB 5541 to apply retroactively. *See* SB 5541; *see also* BANA Opening Brief Appendix Ex. B. Historically, the Legislature has provided for specific and/or retroactive applicability dates when that intent was present. For example, an enactment pertaining to partnerships utilizes specific applicability dates at specific times. *See* RCW 25.05.901 and .907. The Legislature chose not to specifically provide for retroactive application by including similar provisions in SB 5541. *See* SB 5541.

Second, *McGee* provides as follows:

An amendment is curative only if it **clarifies** or technically corrects **an ambiguous statute**. [emphasis added]

*McGee*, 142 Wn. at 325 (cited case omitted).

To the contrary, SB 5541 states that it is “amending”, not clarifying RCW 6.23.010. *See* BANA Opening Brief Appendix Ex. A. Further, the SB 5541 Digest likewise indicates it is a “modification”, not a clarification. *See* SB 5541 Digest. Finally, both *Summerhill* and *Fulbright* specifically held that “the language of the statute [*i.e.* RCW 6.23.010(1)(b)] is **unambiguous**”. *Summerhill*, 289 P.3d at 649 (emphasis added); *Fulbright*, 298 P.3d. 779 (emphasis added). As such, SB 5541 is not “curative”. *McGee*, 142 Wn. at 325.

BANA emphasizes that “SB 5541 was enacted in direct response to *Summerhill*.” *See* Opening Brief at 16-17. In this regard, a Division Two opinion is noteworthy:

[L]egislative enactments which respond to **judicial interpretations of a prior statute**, and which materially and affirmatively change that prior statute, are not “clarifications” of original legislative intent. Rather, such enactments are amendments to the statute itself. [emphasis added]

*Marine Power & Equip. Co. v. Washington State Human Rights Comm'n Hearing Tribunal*, 39 Wn. App. 609, 616, 694 P.2d 697 (1985).

Thus, to the extent that SB 5541 was a “direct response” which “rebuked” *Summerhill* as BANA argues, it provides further support that SB 5541 is not a “curative” clarification. *Id.* There is certainly no legislative history provided which indicates that this language was merely to clarify an ambiguity, rather than altering or amending the statutory provision.

Third, *GESA Federal Credit Union v. Mutual Life Insurance Company* (“*GESA*”), provides:

A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right.

*GESA*, 105 Wn.2d 248, 254-55 (1986) (citing *Miebach v. Colasurdo*, 102 Wash.2d 170, 181 (1984)).

In this regard, *Miebach v. Colasurdo* provides:

While RCW 6.24.145 [*i.e.* a notice provision of the Redemption Statute<sup>8</sup>] has a remedial aspect, retroactive application would severely impinge upon the vested right given with an order of confirmation [of a sheriff’s foreclosure sale]. [bracketed text added]

*Miebach*, 102 Wash. 2d at 181.

Likewise, *Fidelity Mutual v. Mark* held that the right to redeem under RCW 6.23.010 is a substantive right. *Fidelity*, 112 Wash.2d 47, 55 (1989). Since RCW 6.23.010 pertains to substantive rights, SB 5541 is

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<sup>8</sup> RCW 6.24.145 has been recodified as RCW 6.23.030. See RCW T. 6, Ch. 6.24, Disp Table.

not “remedial”. *Id.*; *Miebach*, 102 Wash.2d at 181.

In this vein, BANA cites *W.T. Watts, Inc. v. Sherrer* for the general proposition that a sheriff’s certificate of purchase does not pass title. 89 Wn. 2d 245, 248 (1977); *see also* Opening Brief at 24-25. However, BANA omits the other more relevant portions, as follows:

This court has recognized long ago that a sheriff’s certificate of purchase does not pass title but is only evidence of an inchoate interest which may or may not ripen into title.

*W.T. Watts, Inc.*, 89 Wn. 2d at 248.

In this case, Condo Group's inchoate right ripened into a title when no qualified redemptioner redeemed before the one (1) year redemption period expired, on April 29, 2012. CP 147 (Certificate of Purchase); CP 119 (Decree/Judgment); *see also* 6.23.020(1)(b). BANA's attempt to redeem when it was not qualified does not extend the redemption period.<sup>9</sup>

In short, Condo Group has a substantive, if not vested right to title which precludes retroactive application of SB 5541 to this appeal. However, BANA disingenuously argues that a right must be “vested” to avoid statutory retroactivity. *See* Opening Brief at 23-25. As shown above, a party need only establish that the right was “substantive” in

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<sup>9</sup> In this regard, the following cases cited by BANA are also distinguishable: *Gillis v. King Cnty.*, 42 Wn. 2d 373, 377 (1953); *Severson v. Penski*, 36 Wn. App. 740, 744 (1984); *Singly v. Warren*, 18 Wash. 434, 436 (1898); *De Roberts v. Stiles*, 24 Wash. 611, 612 (1901).

nature. Indeed, courts have repeatedly rejected the theory that only a “vested” right may avoid retroactivity. *See, e.g., GESA*, 105 Wn.2d at 254-55.

Without even considering the constitutionality of applying it retroactively, SB 5541 is not a candidate for retroactive application because (1) there is no indication that the Legislature intended it to be retroactive, (2) it is not curative (because the current statute is not ambiguous), and (3) it is not remedial (because it concerns substantive rights). *McGee*, 142 Wn.2d at 324. SB 5541 should apply prospectively. *Id.* It should not govern this appeal. *Id.*

**F. BANA’s SB 5541 Arguments Are Beyond The Scope of Review.**

With respect to the scope of review, the Rules of Appellate Procedure provide as follows:

**(a) Errors Raised for First Time on Review.** The appellate court may refuse to review any claim of error which was not raised in the trial court. [emphasis in original]

*See* RAP 2.5(a).

In this regard, BANA did not raise its above arguments with respect to the impact of SB 5541 in the trial court. Thus, the claims that SB 5541 “confirms” the Legislative intent of the current statute, and/or should be applied “retroactively”, are beyond the scope of review on this

appeal.<sup>10</sup> See RAP 2.5(a); CP 152-67 & 357-67. This Court should not consider them. See RAP 2.5(a).

## V. CONCLUSION

This Court should affirm its *Summerhill* and *Fulbright* decisions. These decisions correctly interpreted the unambiguous “subsequent in time” language of the subject Redemption Statute and rejected BANA’s condominium lien “perfection” argument. Likewise, BANA fails to provide justification for applying SB 5541 retroactively to this appeal. Indeed, Condo Group has a substantive right of title to Unit 401 based on the Order Confirming the Sheriff’s sale. The orders of Judge Inveen should be affirmed.

**RESPECTFULLY SUBMITTED** this 24<sup>th</sup> day of June, 2013.



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<sup>10</sup> The following limited exceptions to this rule do not apply to this appeal: (1) lack of jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. See RAP 2.5(a)(1)-(3).

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2  
3 THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
4 DIVISION I

5 BANK OF AMERICA, N.A., )  
6 Successor by merger to BAC )  
7 HOME LOAN SERVICING, LP, )  
8 Formerly known as COUNTRYWIDE )  
9 HOE LOANS SERVICING, LP, )

NO. 69904-1-I

Appellant, )

v. )

DECLARATION OF  
SERVICE

10 THE CONDO GROUP, LLC, a )  
11 Washington Limited Liability )  
12 Company, )  
Respondent. )

13 I, Leslie Peppard, hereby certify under penalty  
14 of perjury under the laws of the State of Washington  
15 that on June \_\_\_\_\_, 2013, I caused to be filed via  
16 ABC Legal Messengers, the original of the following  
17 pleadings:

1. Brief of Respondent The Condo Group, LLC;  
and
2. Declaration of Service.

18 And served the above pleadings via ABC Legal  
19 Messengers and e-mail upon:

20 Brian S. Sommer  
21 Steven K. Linkon  
22 RCO LEGAL, P.S.  
23 13555 SE 36<sup>th</sup> Street, Ste 300  
24 Bellevue, WA 98006

25  
26  
DECLARATION OF SERVICE - 1

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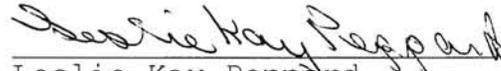
LAW OFFICE OF  
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321 FIRST AVENUE WEST  
SEATTLE, WA 98119  
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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

1 And served the above pleadings via UPS Overnight and  
2 e-mail upon:

3 Douglas E. Winter (PHV)  
4 BRYAN CAVE LLP  
5 1155 F Street, N.W.  
6 Washington DC 20004

7 SIGNED in Seattle, Washington, this 24th  
8 Day of June, 2013.

9   
10 Leslie Kay Peppard

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24 DECLARATION OF SERVICE - 2