

A-09-1708

STATE OF MINNESOTA  
IN THE COURT OF APPEALS

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First Minnesota Bank, a Minnesota bank,  
f/k/a First Minnesota Bank, N.A.,

Plaintiff/Appellant,

vs.

Overby Development, Inc., a Minnesota corporation, and  
Wayne Overby, an individual,

Defendants/Respondents.

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BRIEF OF APPELLANT FIRST MINNESOTA BANK

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**STATEMENT OF LEGAL ISSUE**

1. Whether the trial court erred in determining that an alleged surplus following a foreclosure sale bid should not be awarded to Plaintiff/Appellant pursuant to an application of Minnesota Statutes §§ 581.03, 581.06.

The trial court held that Plaintiff/Appellant must pay the surplus proceeds to Defendants/Respondents.

Apposite Authority:

Minnesota Statutes § 581.06.

## STATEMENT OF THE CASE

On July 3, 2007, Appellant First Minnesota Bank (“First Minnesota”) moved the Cass County district court (the “trial court”), for summary judgment on the claims asserted in First Minnesota’s Complaint against Respondents Overby Development, Inc. (“Overby Development”) and Wayne Overby (“Overby”) (collectively “Defendants”) for Defendants’ defaults on a \$3,600,000.00 loan extended by First Minnesota. (First Minnesota Bank’s Appendix (“A”) 13-35.) On September 6, 2007, the trial court signed the parties’ stipulated Order granting First Minnesota’s motion for partial summary judgment in regard to its claims of breach of loan contracts, breach of guaranty, and foreclosure of mortgage. (A. 262-72.) In response to Defendants’ request that certain parcels within the mortgaged developments be excepted from the stipulated Order because of anticipated sales, those parcels were excluded from the stipulated Order executed by the trial court.<sup>1</sup> (A. 428-29.)

In accordance with the trial court’s foreclosure Order, two foreclosure sales (one for each mortgaged development) were held on December 5, 2007. (A. 273-92.) First Minnesota was the only bidder at each of those sales, and collectively bid only part of the debt outstanding on Overby Development’s Note. (A. 427-28.) First Minnesota’s bids did not include any of the additional out-of-pocket fees or costs it had incurred to continue the maintenance of the abandoned parcels (*id.*), which amounts are properly

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<sup>1</sup> As a result, the trial court’s September 6, 2007 Order was only a partial judgment, in that certain parcels were wholly excepted from both the Order and the subsequent foreclosure sales. (A. 428-29.)

added to the mortgage debt. (A. 518.) As a result of these unpaid and unsatisfied amounts, First Minnesota is still, to date, owed in excess of \$440,000.00 from Defendants. (A. 428, 549-51.)

By its Order dated March 3, 2008, the trial court granted First Minnesota's motion to confirm the two foreclosure sales and to reduce the applicable redemption period for each development to five weeks, given Defendants' abandonment of the property. (A. 378-85.)

Arguing that First Minnesota's bids at the foreclosure sales exceeded the amount due First Minnesota, Defendants brought a motion to declare the foreclosure judgment satisfied and to pay an alleged overbid surplus amount directly to Defendants. (A. 386-420.) Over First Minnesota's objection, the trial court granted Defendants' requested relief and ordered<sup>2</sup> that First Minnesota satisfy the judgment against Overby Development and further pay the "surplus" of \$274,898.30 to Overby Development. (A. 487-92.)

First Minnesota filed a timely appeal of the trial court's May 2, 2008 Order, requesting this Court review two legal issues: (1) whether the trial court erred in determining that First Minnesota must satisfy the deficiency judgment owed by Defendants; and (2) whether the trial court erred in determining that First Minnesota must pay Defendants the alleged surplus from First Minnesota's foreclosure bids. In its

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<sup>2</sup> An Amended Order was issued May 2, 2008 to correct an improper citation in the trial court's original April 23, 2008 Order on this issue. (A. 495-501.)

opinion, filed on March 24, 2009, this Court affirmed in part, reversed in part, and remanded the matter for further findings before the trial court. (A. 502-09.)

Specifically, this Court held that, on the facts, no deficiency judgment existed under Minnesota Statutes § 582.30, because the disjunctive language of § 582.30 determined the amount of the indebtedness based upon “what type of sale occurred.” (A. 505-06.) If a foreclosure sale was conducted by action, this Court held that the indebtedness was then the amount of the “judgment,” rather than the amount of the debt. (A. 506.) Applying this analysis, the Court further held that, in this foreclosure by action, any possible deficiency judgment owed by Defendants was satisfied, because the amount of the judgment was less than the amount bid in at the foreclosure sale. (*Id.*)

Next, this Court analyzed Minnesota Statutes § 581.06, the surplus statute in the foreclosure by action chapter. First, the Court held that First Minnesota’s credit bid at the foreclosure sales constituted a sale for “cash,” pursuant to § 581.05. (A. 506-07.) Accordingly, and with the statutory threshold of a “cash” sale having been met, the Court determined that a surplus did exist as a result of the foreclosure bids exceeding the partial judgment amount. (*Id.*) However, and even though the sale was considered a cash sale that produced a surplus, this Court was “not convinced that the [trial] court applied section 581.06 to achieve a just result” in ordering payment of the surplus to Defendants and, therefore, a remand was required. (A. 508.) In ordering its remand on the surplus issue, this Court reasoned that:

[I]t is *not clear why or how the overbid amount, although technically a ‘surplus,’ belongs to Overby.* It is possible the term mortgage debt in section 581.06 means precisely that. Furthermore, under that section, a

surplus is *not* automatically payable to the mortgagor or the person entitled thereto. We conclude that the district court erred in its strictest application of section 581.06 and hold that to *ensure that justice has been done in this foreclosure sale, this issue must be remanded for further proceedings* as the district court deems appropriate.

(*Id.* (emphasis supplied).)

With those instructions, this case was remanded back to the trial court. (*Id.*) On remand, in an April 22, 2009 letter, the trial court requested the parties submit written arguments regarding their entitlement to the surplus. (A. 510.) Following both parties' submissions (A. 511-32, 533-42), the trial court issued an Order<sup>3</sup> affirming its prior (May 2, 2008) Order and awarding the surplus to Defendants. (A. 556-58.) The trial court alleged that while the "language of the Minnesota Court of Appeals is that the case was reversed in part, the decision merely indicated that the Court of Appeals was not certain that this Court considered all the issues discussed." (A. 557.) The trial court, however, made no further factual findings and simply reaffirmed its prior award to Defendants. (A. 556-58.)

Given the palpable errors in the trial court's interpretation of the statutes and facts that should operate to deny any payment of the alleged foreclosure "surplus" to Defendants, this appeal followed.

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<sup>3</sup> The trial court originally issued its Order on this matter on June 16, 2009. (A. 543-46.) However, upon First Minnesota's request for reconsideration (A. 547-52), the trial court issued an Amended Order on July 14, 2009, correcting a typographical error in its June 16, 2009 Order. (A. 555-58.)

## STATEMENT OF FACTS

A review of the history of this transaction, as well as the attendant prior Orders of both this Court and the trial court, demonstrates that the legally proper interpretation of Minnesota law and the balance of the equities each independently require a reversal of the trial court's most recent Order and an award of the foreclosure surplus to First Minnesota.

By way of factual background, Overby Development gave a Mortgage, Assignments of Rent, Security Agreement, and Fixture Financing Statement (the "Mortgage") dated May 27, 2005 to First Minnesota to secure a Promissory Note dated May 27, 2005 in the original amount of \$3,600,000.00. (A. 36-87.) The Mortgage was recorded on June 1, 2005 as Document No. A000499186 in the Office of the Cass County Recorder. (A. 32-33.)

The property encumbered by the Mortgage is located in Cass County, Minnesota, and includes, among certain other parcels, the following parcels legally described as:

Lots 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 42, 43, 44, 45 and 46, all in Block 1, Waters Edge, Cass County, Minnesota

AND

Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26 and 27, all in Block 1, Overby's Girl Lake Circle, Cass County, Minnesota.

(*Id.*) (hereinafter "the Property"). The Mortgage also granted First Minnesota a security interest in all of Overby Development's personal property and fixtures included on the Property. (A. 33, 88-91.) The security agreement was perfected by a UCC Financing

Statement filed with the State of Minnesota as Filing #200516742743, and in addition to granting a security interest to First Minnesota in the personal property and fixtures located at the Property, Overby Development also assigned its contract rights, leases, rents and personal property related to the Property to First Minnesota (collectively, the "Collateral"). (*Id.*)

To further secure repayment of the funds loaned under the Note and further induce First Minnesota to extend credit to Overby Development, Defendant Overby executed a personal Guaranty on May 27, 2005, under which Defendant Overby guaranteed performance of all the obligations owed by Overby Development to First Minnesota. (A. 33.)

Subsequently, Overby Development defaulted under the terms of the Note, and Defendant Overby further defaulted in payment on the Guaranty. (A. 34, 87, 138-40.) As a result, First Minnesota commenced foreclosure of the Mortgage by action under Minnesota Statutes §581, *et seq.* on or about February 27, 2007. (A. 12.)

On July 3, 2007, First Minnesota moved the trial court for summary judgment on the claims asserted in First Minnesota's Complaint. (A. 13-35.) Considering that Defendants' defaults were not (indeed, could not be) disputed, Defendants agreed to stipulate to First Minnesota's requested relief if First Minnesota agreed to except seven identified parcels from the proposed summary judgment Order in light of anticipated and forthcoming direct sales of those parcels to third parties. (A. 428-29.) Accordingly, while seventy-three parcels of property were included in First Minnesota's initial Complaint herein, First Minnesota agreed to a stipulated partial summary judgment Order

that would grant relief only as to sixty-six of the mortgaged parcels. (*Compare* A. 1-12 *with* A. 262-72.) As a result, the Court's September 6, 2007 Order granting First Minnesota's motion was only a partial judgment, in that certain parcels were wholly excepted from both the summary judgment Order and were, as a result, also excluded from the subsequent foreclosure sales. (A. 262-72.)

Following entry of, and in accordance with, the Court's partial summary judgment Order against Overby Development and Defendant Overby, the Property securing the loan was sold through two foreclosure sales – one for each mortgaged development - conducted by the Sheriff of Cass County on December 5, 2007. (A. 273-92.) The Defendants did not reinstate the Mortgage prior to the foreclosure sales and did not bid at either sale. (A. 428-29.) Furthermore, at the time of December 2007 foreclosure sales, the anticipated sale of the seven parcels excepted from the partial summary judgment Order had not yet occurred, and Defendants had not paid First Minnesota any additional funds towards satisfaction of the mortgage debt owed. (*Id.*) Accordingly, First Minnesota was the only bidder at the sales and placed a total bid of \$3,712,000.00, representing a partial amount due on the Mortgage.<sup>4</sup> (*Id.*)

By its Orders dated March 3, 2008, the trial court granted First Minnesota's motions to confirm the two foreclosure sales and reduce the applicable redemption period for each development to five weeks, given Defendants' abandonment of the

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<sup>4</sup> Importantly, the amounts First Minnesota advanced for protective purposes, in addition to accumulated attorneys' fees and other amounts, were not included as part of the bid placed. (A. 428-29, 549-51.)

Property. (A. 378-85.) However, on April 23, 2008, the trial court also granted Defendants' motion and ordered that First Minnesota pay Defendants \$274,898.32 as a result of an alleged "surplus" overbid at the foreclosure sales, which "surplus" comprised the difference between the amount of the partial summary judgment and the total amount actually bid at the foreclosure sales. (A. 487-92.) When its request for reconsideration of the trial court's Order was denied<sup>5</sup> (A. 493-94, 495-501), First Minnesota appealed. (A. 502-09.)

Specifically, First Minnesota appealed the trial court's May 2, 2008 amended judgment "challeng[ing] the district court's determination that an overbid at the sheriff's sale by the mortgagee satisfied the judgment awarded the mortgagee and produced a surplus to which the mortgagor was entitled." (A. 503.) Reviewing the amended judgment *de novo*, this Court affirmed in part, reversed in part, and remanded the case for further analysis. (A. 502-08.)

While this Court affirmed the trial court ruling that any deficiency judgment was satisfied as a result of the foreclosure bid and further determined that the foreclosure bid produced a surplus, the Court reversed and remanded the trial court's holding in regard to payment of the determined surplus amount. (*Id.*) Under the analysis dictated by the surplus statute, the Court first analyzed whether the underlying debt referenced by the surplus statute was satisfied in this case. (A. 507-08.) To do this, the Court examined

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<sup>5</sup> The trial court did respond to First Minnesota's request for reconsideration in one regard and made one citation correction to its original April 23, 2008 Order in an Amended Order issued May 2, 2008. (A. 495-501.)

whether the term “mortgage debt” as contained in § 581.06 meant “mortgage debt” or “judgment.” (*Id.*) The Court concluded “[i]t is not apparent why the legislature chose ‘mortgage debt’ over ‘judgment amount’ in a chapter that specifically deals with judgments in mortgage-foreclosure actions” and noted that many of the statutes in the foreclosure by action chapter refer to the judgment amount. (A. 508.) Accordingly, the Court declined to rule on the issue, finding instead that the issue had not been sufficiently addressed by the parties. (*Id.*) Nonetheless, the Court refused to refute that the phrase “mortgage debt” contained in § 581.06 “means precisely that.” (*Id.*)

Finally, the Court addressed *who* was entitled to the surplus. (*Id.*) The Court held that the “surplus is not automatically payable to the mortgagor but is deposited with the court ‘for the benefit of the mortgagor *or* the person entitled thereto.’” (*Id.* (emphasis in original).) The Court concluded that the “district court erred in its strictest application of section 581.06 and h[e]ld that to ensure that justice has been done in this foreclosure sale, this issue must be remanded for further proceedings as the district court deems appropriate.” (*Id.*) The Court held that it was “*not convinced* that the [trial] court *accurately applied section 581.06 to achieve a just result.*” (*Id.* (emphasis supplied).) As such, this Court remanded the case on the issue of which party is the proper recipient of the surplus. (*Id.*)

After requesting (A. 510) and reviewing the parties’ submissions on remand (A. 511-32, 533-42), the trial court interpreted this Court’s earlier decision to “merely indicat[e] that the Court of Appeals was not certain that this Court considered all the issues discussed by the Court of Appeals in making its decision,” even though “the

language of the Minnesota Court of Appeals [decision] is that the case was reversed in part.” (A. 545.)

Importantly, the trial court’s Order then wholly failed to provide any examination of the law or the facts presented to the court in the parties’ written briefs. (A. 544-46.) Despite this, the trial court confirmed the prior sales, citing the surplus statute and reasoning that the only other option it had under § 581.06 was to order a resale, which was not available because neither party had made such a request. (A. 545.) The trial court concluded that “[s]ince neither party has requested nor desires a resale, it is appropriate that the sale be confirmed as was previously ordered.” (*Id.*)

Next, the trial court addressed the meaning of “mortgage debt” in § 581.06, holding that “mortgage debt,” as contained in § 581.06, means “the amount of the judgment” based upon Minnesota Statutes § 581.03, which “fixes the amount of the judgment and directs the sheriff to sell the property to satisfy the judgment.” (A. 545-46.) The trial court reasoned that “any other interpretation” would “render judgments uncertain and allow for significant manipulation by the Plaintiff.” (A. 546.)

However, in so holding, the trial court’s opinion failed to provide any explanation of the law or facts First Minnesota highlighted in its written submission. (A. 544-46.) Moreover, the trial court’s opinion completely ignored the plain language of Minnesota Statutes § 581.06, which clearly instructs that the surplus shall go the “mortgagor or the person entitled thereto” and which the Minnesota Court of Appeals went to pains to emphasize in its Opinion.

In response to the trial court's June 18, 2009 Order, First Minnesota promptly sought leave to file a motion for reconsideration under Minnesota Rule of Civil Procedure 52.02 and General Rule of Practice 115.11. (A. 547-52.) In its request, First Minnesota asked that the trial court actually address the facts and law regarding entitlement to the surplus. (A. 547-48.)

In response to First Minnesota's request for reconsideration, the trial court issued an Amended Order and Memorandum dated July 14, 2009. (A. 556-58.) The Amended Order remedied a typographical error in the prior Order but, substantively, refused to provide any additional analysis or information regarding proper distribution of the surplus. (*Id.*) First Minnesota subsequently filed this timely appeal of the trial court's Amended Order and Memorandum.

## **LEGAL ARGUMENT**

### **I. STANDARD OF REVIEW**

On appeal from a final judgment, this Court reviews "whether the evidence sustains the finding of fact and whether the findings of fact sustain the conclusions of law and the judgment." *Minnesota Power & Light Co. v. Carlton County*, 145 N.W.2d 68, 70 n.1 (Minn. 1966) (citing *Olson v. Mullen*, 68 N.W.2d 640 (Minn. 1955)).

Minnesota law is clear that "[w]here the trial court applies the language of a statute to the facts of a case, its conclusion is one of law that does not bind the appellate courts." *See Nhep v. Roisen*, 446 N.W.2d 425, 426 (Minn. Ct. App. 1989) (citing *A.J. Chromy Constr. Co. v. Commercial Conservatorship of Torres*, 260 N.W.2d 579, 582 (Minn. 1977)). *See also Mahoney v. Mahoney*, 433 N.W.2d 115, 116 (Minn. Ct. App.

1988) (confirming the appellate court “is not bound by the ultimate legal conclusions of the trial court”). Accordingly, in this case, and considering First Minnesota appeals only the trial court’s application of Minnesota law to the facts at hand,<sup>6</sup> this Court reviews the Order at issue under a de novo standard of review and need not give deference to the trial court’s decision. *See Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003) (holding that “no deference is given to a lower court on questions of law”).

**II. REVERSAL OF THE TRIAL COURT’S DECISION IS REQUIRED BY MINNESOTA LAW, THE FACTS OF THIS CASE, AND A BALANCE OF THE EQUITIES.**

In its ruling on remand, the trial court made several distinct errors, any one of which independently requires reversal of the trial court’s decision. First, the trial court applied the wrong statutory standard in determining who was entitled to payment of the foreclosure surplus. Further, the correct statutory analysis (which inevitably results in an award of the surplus to First Minnesota) was wholly omitted by the trial court. Finally, the trial court failed to analyze either the parties’ loan contract or the equities of this matter, both of which also result in the payment of the surplus to First Minnesota. On any one or all of these bases, First Minnesota requests reversal of the trial court’s Order.

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<sup>6</sup> An appellate court’s review of the trial court’s application of the incorrect law is also subject to “de novo review.” *See Larson v. Comm’r of Revenue*, 581 N.W.2d 25, 28 (Minn. 1998).

**A. The Trial Court Erred in Its Application of Minnesota's Foreclosure Statutes.**

As its first error, the trial court misapplied Minnesota's surplus statute and misconstrued this Court's previous decision, which requires reversal of the trial court's option. Under well-established Minnesota law, the Minnesota Court of Appeals and the Minnesota Supreme Court have often reversed trial court opinions applying incorrect law. *See, e.g., Matter of Welfare of B.C.G.*, 537 N.W.2d 489, 492 (Minn. Ct. App. 1995) (reversing and remanding when trial court applied wrong statute); *Tower Asphalt, Inc. v. Determan Welding and Tank Serv., Inc.*, 530 N.W.2d 872, 876 (Minn. Ct. App. 1995) (reversing and remanding when trial court applied incorrect statute of limitations); *In re Custody of N.M.O.*, 399 N.W.2d 700, 703 (Minn. Ct. App. 1987) (reversing and remanding where trial court applied "wrong standard of law"); *Grover v. Rilea*, 388 N.W.2d 766, 767-68 (Minn. Ct. App. 1986) (holding same); *Welbon v. Webster*, 94 N.W. 550, 551 (Minn. 1903) (reversing and deciding case on merits in the interests of justice where trial court incorrectly applied law).

In this case, on remand, the trial court opinion states:

The Minnesota Court of Appeals remanded this case to *apply the correct law with respect to the surplus* that was bid in by the Plaintiff at the sheriff sale. Although the language of the Minnesota Court of Appeals is that the case was reversed in part, the decision merely indicated that the Court of Appeals was not certain this Court considered all issues discussed by the Court of Appeals in making its decision.

In reviewing the statute, the Court notes that the language of Minn. Stat. § 581.06 [the surplus statute] requires the Court to confirm the foreclosure sale unless "*it appears upon due examination that justice has not been done.*" However, the only remedy in lieu of confirming the sale as provided in the statute is to order a resale "*on such terms as are just.*"

*Minn. Stat. § 581.06* (2008). Since neither party has requested nor desires a resale, it is appropriate that the sale be confirmed as was previously ordered.

(A. 557 (emphasis supplied).) Paramount to this appeal is the undisputable fact that the trial court erred in applying the wrong statutory language and/or statute on remand. From the language cited in the trial court opinion, it appears the court used the standard contained in Minnesota Statutes § 581.08 (confirmation of sale) to address the surplus issue that is only properly handled under § 581.06. (*Id.*)

Minnesota Statutes § 581.06 does not provide that a court must “confirm the sale unless ‘it appears upon due examination that justice has not been done.’” *Compare* Minn. Stat. § 581.06 *with* A.557. Moreover, Minnesota Statutes § 581.06 does not provide that “the only remedy in lieu of confirming the sale as provided in the statute is to order a resale ‘on such terms as are just.’” *Compare id.* Instead, Minnesota Statutes § 581.06 outlines the proper allocation of any “surplus” remaining from the proceeds of the foreclosure sale shall be made to “the person entitled thereto” after “satisfying the mortgage debt, with costs and expenses.” Minn. Stat. § 581.06.

Here, the trial court’s decision provides no analysis of the surplus statute’s actual language. (A. 557-58.) In analyzing the trial court’s opinion, it is clear that the trial court completely misapplied the Minnesota foreclosure chapter. The language the trial court cites in its opinion is found in Minnesota Statutes § 581.08, which concerns confirmation of a foreclosure sale. *Compare* Minn. Stat. § 581.08 *with* A. 557. Despite the fact that the trial court apparently relied on § 581.08, it is clear from § 581.08’s plain

language that it provides absolutely no direction on how to disburse a foreclosure surplus. *See* § 581.08.<sup>7</sup>

In fact, the distribution of a surplus from the proceeds of the foreclosure sale is entirely separate and distinct from the trial court's power to confirm the sale. Instead of the interchangeable analysis suggested by the trial court, the surplus statute specifically anticipates that a surplus may be the byproduct of a confirmed foreclosure sale and, therefore, codifies self-contained instructions for allocating the surplus remaining after satisfying the underlying foreclosed mortgage. *See* Minn. Stat. § 581.06. Accordingly, the surplus statute's instructions are completely outside any resale processes contained in Minnesota Statutes § 581.08. *See id.*

Based upon this clear statutory rubric, the trial court's opinion in this case is properly reversed, because the trial court committed error in analyzing the wrong statute and, as a result, misconstrued the foreclosure laws. Even though the trial court goes on to cite the standard of § 581.06 correctly later in its opinion, it still does not actually apply the § 581.06 standard, as witnessed by the complete lack of discussion regarding entitlement to the surplus. (A. 557-58.) Accordingly, in applying the wrong statutory standard for award of the foreclosure surplus, the trial court failed or refused to analyze the actual facts of this case – all of which inescapably lead to the conclusion that the

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<sup>7</sup> In whole, Minnesota Statutes § 581.08 provides: "Upon the coming in of the report of sale, the court shall grant an order confirming the sale, or, if it appears upon due examination that justice has not been done, it may order a resale on such terms as are just. If the sale is confirmed, the sheriff shall forthwith execute the proper certificate of sale, which shall be recorded within 20 days after such confirmation."

surplus should be awarded to First Minnesota (as discussed in more detail below). As a result, and considering the long-standing tenants of Minnesota law, First Minnesota requests this Court reverse the trial court decision and, pursuant to proper statutory analysis, remand this case for entry of an order awarding the surplus to First Minnesota.

**B. Defendants Are Not Entitled to the Surplus in this Action, Because the Underlying Mortgage Is Not Satisfied.**

Had the trial court used the proper standard, it is clear from the facts at hand that the determined surplus should be paid to First Minnesota, as the party entitled to such payment both by contract and by an evaluation of the equities. As one of the easiest means of proving this assertion, the Court need look no further than the fact that the Defendants, as defaulting debtors, still owe First Minnesota in excess of \$440,000. (A. 428, 549-51.)

Minnesota's surplus statute provides priority rules for distributing a surplus, which rules apply only when the proceeds of the foreclosure sale satisfy the underlying foreclosed mortgage. *See* Minn. Stat. § 581.06. Well-established law confirms that a "surplus" is comprised of funds left over after satisfying the underlying foreclosed mortgage debt, with costs and expenses. Only *after* satisfaction of the underlying foreclosed mortgage is the surplus applied to junior liens, and, finally, only *after* all junior liens are satisfied, is a delinquent debtor given a chance at the funds. *See* Minn. Stat. § 581.06.

For their part, Defendants attempt to usurp the surplus statute's clear order of priority. This Court should not be persuaded by Defendants' interpretation of the surplus

statute; instead, this Court should follow the plain meaning, the purpose, and judicial interpretation of the surplus statute and find that Defendants are not entitled to the surplus because the underlying mortgage debt is not satisfied.

**1. The Underlying Mortgage Debt in this Action is Not Satisfied; As Such, Defendants Are Not Entitled to the Surplus Pursuant to Minnesota Statutes § 581.06.**

In their trial court submission, Defendants attempt to claim the surplus before their rightful turn when Minnesota's surplus statute is clear and unambiguous. Specifically, the statute provides:

When the sale is for cash, if, *after satisfying the mortgage debt*, with costs and expenses, there is a surplus, it shall be brought into court for the benefit of the mortgagor *or the person entitled thereto*, subject to the order of the court. If such surplus remains in court for three months without being applied for, the judge may direct it to be put out at interest, subject to the order of the court, for the benefit of the persons entitled thereto, to be paid to them upon order of the court.

Minn. Stat. § 581.06 (emphasis supplied). Under the plain language of the statute, any surplus must *first* go to satisfying the underlying foreclosed mortgage debt, and then (*only after* satisfying the underlying foreclosed mortgage) does a court have discretion to distribute the surplus to the “the mortgagor or person entitled thereto.” *Id.* (emphasis supplied).

When a statute's language is clear and unambiguous, the court must interpret the statute according to the plain meaning of its words. *See* Minn. Stat. § 645.16; *Homart Dev. Co. v. County of Hennepin*, 538 N.W.2d 907, 911 (Minn. 1995); *In re Kleven*, 736 N.W.2d 707, 709 (Minn. Ct. App. 2007). A court may not “avoid” the plain meaning of a statute in order to give effect to the spirit of the statute. *See MBNA Am.*

*Bank, N.A. v. Comm'r of Revenue*, 694 N.W.2d 778, 780 (Minn. 2005). Even if the result of the statute's language is harsh, a court may not avoid the statute's plain meaning. See *Minneapolis Public Housing Authority v. Lor*, 591 N.W.2d 700, 704 (Minn. 1999). When analyzing a statute, effect should be given to each provision. See *id.*; see also Minn. Stat. § 645.16.

The plain meaning of the phrase "after satisfying the mortgage debt" and the word "mortgage" contained in § 581.06, are clear and unambiguous. *Shaw Acquisition Co. v. Bank of Elk River*, 627 N.W.2d 365, 367 (Minn. Ct. App. 2001) (interpreting the identical phrase in the foreclosure by advertisement's surplus statute).<sup>8</sup> A dictionary reflects the common usage of words, and the Merriam-Webster dictionary defines "mortgage" as:

a : conveyance of or lien against property (as for securing a loan) that becomes void upon payment or performance according to stipulated terms

a : the instrument evidencing the mortgage b : the state of the property so mortgaged c : the interest of the mortgagee in such property

*Merriam-Webster Online Dictionary*, "Mortgage" available on-line at <http://www.merriam-webster.com/dictionary/mortgage> (last visited on Oct. 9, 2009).

Moreover, Black's Law Dictionary defines "mortgage" as follows:

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<sup>8</sup> The foreclosure by advertisement statute is codified as Minnesota Statute § 580.10, and it provides:

In all cases not provided for in section 580.09, if after sale of any real estate made herein prescribed, there remains in the hands of the officer making the sale any surplus money, *after satisfying the mortgage debt*, with interest, taxes paid, and costs of sale, the surplus shall be paid over by such officer, on demand, to the mortgagor, the mortgagor's legal representatives or assigns.

Minn. Stat. § 580.10 (emphasis supplied).

mortgage (mor-gij), n. 1. A conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void *upon payment or performance according to the stipulated terms*. ... 3. An instrument (such as a deed or contract) specifying the terms of such a transaction ...

Black's Law Dictionary, mortgage (8th ed. 2004) (internal citations and references omitted and emphasis supplied); *see also* Restatement (Third) of Property (Mortgages) § 7.4 (defining “mortgage obligation” as “the amount due and owing on the *mortgage debt*” and “the costs of sale, attorneys’ fees, and other similar items allowable under local laws and the terms of the mortgage” (emphasis supplied)).

Under the plain meaning rule and the clear language of Minnesota Statutes § 581.06, “mortgage” and “judgment” are simply not synonymous. Therefore, this Court should not reach beyond the plain meaning of the surplus statute, which clearly provides that the surplus is distributed to the “mortgagor or person entitled thereto” only *after* the underlying foreclosed mortgage debt is satisfied. It is undisputed that the underlying mortgage debt in this case is not satisfied. (A. 429, 549-51.) Accordingly, on the uncontroverted facts, Defendants are not entitled to the surplus; instead, the plain meaning of § 581.06 requires the funds go first to Plaintiff toward satisfying the underlying foreclosed mortgage debt. The trial court erred in holding to the contrary, and its ruling in this regard should be reversed.

**2. Awarding Defendants the Surplus Would be Against the Legislative Intent of Minnesota Statutes § 581.06.**

Only when a statute’s language is ambiguous may a court go beyond the statute’s plain language. However, in doing so, the court must interpret the statute’s language to

give effect to the legislative intent, because the “object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16 (providing guidance for statutory analysis where statute’s language is ambiguous). Even if this Court determines that the language of § 581.06 is ambiguous (which it is not), this Court must still reverse the trial court decision, because a careful analysis of the legislature’s intent in enacting § 581.06 reveals that Defendants are not entitled to an award of the surplus.

When analyzing the legislative intent of § 581.06, three things become readily apparent. First, in the long history of the § 581.06, the legislature has never amended the key phrase “after satisfying the mortgage debt;” therefore, it is clear that the legislature intended for the underlying foreclosed mortgage debt to be the measuring device for any surplus. Second, the legislature’s use of the term “mortgage debt” in § 581.06 was not unintentional, because when the legislature intended to distinguish the “mortgage debt” from the “judgment” it clearly did so. Finally, even if this Court finds that the judgment amount, and not the underlying foreclosed mortgage debt, is the proper measuring device for determining a surplus, it is still necessary to reverse the trial court because awarding Defendants the surplus goes against the very purpose of the surplus statute – to preserve creditor’s priority in the underlying real property and transfer that priority to the surplus.

First, it is undisputed (and even highlighted by Defendants in their prior submission to the trial court) that since the surplus statute’s codification 143 years ago, the legislature has left the key language “after satisfying the mortgage debt” unchanged. *See* Minn. Stat. § 645.16 (when discerning the statute’s legislative history it is proper to

analyze “former law”); (A. 541.). Although the legislature made other amendments since the enactment of the first surplus statute in 1866, the legislature notably left untouched the key phrase “after satisfying the mortgage debt.” *See id.* In doing so, the legislature made its intent clear. A delinquent debtor is *only* permitted to take from the surplus after the underlying mortgage debt is satisfied. In maintaining this key statutory language, through the surplus statute, the legislature codified a method for protecting lien holders’ secured interests in real property in order to satisfy such liens before permitting delinquent debtors to take any proceeds from a foreclosure sale.

Second, throughout the statutory chapters on mortgage foreclosure, the drafters are careful in their choice of either “judgment” and “mortgage,” often drawing a distinction in treatment. *See e.g.* Minn. Stat. § 582.30 (legislature was distinguishing “mortgage” and “judgment”); Minn. Stat. § 545.16 (providing “[e]very law shall be construed, if possible, to give effect to all its provisions.”). In the surplus statute, the legislature elected only to use the word “mortgage.” Minn. Stat. § 581.06. Alternatively, the legislature could have said “satisfying the mortgage debt or judgment.” Given that the legislature was careful not to interchange the words “mortgage” and “judgment” in other sections of the statute, this Court should treat the words distinctly to reflect the legislature’s obvious intent.

Third, even if this Court finds that the surplus statute’s language is ambiguous, First Minnesota is still the proper recipient of the surplus, because the purpose of Minnesota’s surplus statute is to create priority rules for the disbursement of the surplus in order to ensure that creditors retain their proper priority position. *See* Minn. Stat. §

645.16 (stating it is proper to analyze the “object to be attained” when interpreting a statute).<sup>9</sup>

The Minnesota Supreme Court confirms that the same priority rules that applied to the underlying security apply to the surplus, because the surplus is essentially the underlying security in a new form (cash instead of real property). It is a “well established rule” that, after foreclosure, “the land is converted into money, and this fund being treated as a substitute for the mortgaged estate.” *Brown v. Crookston Agr. Ass'n*, 26 N.W. 907, 907 (Minn. 1886); *Ness v. Davidson*, 52 N.W. 46, 47 (Minn. 1892). Therefore, “[t]he rights of the parties, as they before existed, are not transposed by the sale, and the court will apply the fund in accordance with their rights as they existed in respect to the land.” *Id.* Specifically, the Minnesota Supreme Court also explains:

The surplus arising from a foreclosure sale of the mortgaged premises, remaining in the hands of a mortgagee after the payment of his debt, belongs to the same persons, and *is subject to the same liens, as the land belonged to at the time of the sale. Their respective rights to the surplus are not affected by the sale*, and it must be paid to them according to their rights in the land, as they existed *before the real estate was turned into money* by the sale thereof.

*Perkins*, 77 N.W. at 435 (emphasis supplied); *see also* Restatement (Third) of Property (Mortgages) § 7.4 (noting the “surplus stands in the place of the foreclosed real estate, and the liens and interests that previously attached to the real estate now attach to the surplus”).

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<sup>9</sup> Defendants admit the same in prior submissions when they confirm that the legislature intended for any surplus from the proceeds of the foreclosure sale to go to lienholders “before payment to the mortgagor.” (A. 536-37.)

Accordingly, under all proper analyses of § 581.06, it is inescapable that First Minnesota is legally entitled to payment of the determined surplus and that the trial court decision must be reversed. To hold to the contrary not only defies the clear statutory priority determination, but also practically results in a delinquent debtor usurping the priority rules to take from the proceeds of a foreclosure sale *prior* to satisfying its debts. Clearly, this is contrary to the legislative intent and principles of equity and justice.

**3. Allowing Defendants to Take the Surplus Goes Against the Strong Weight of Precedent.**

Finally, and in addition to First Minnesota's entitlement to the surplus under § 581.06, Minnesota precedent also makes clear that First Minnesota should receive the surplus and that the trial court must, accordingly, be reversed. Case law dating back to the 1880s consistently holds that the proceeds of a foreclosure sale should first go to satisfying the underlying mortgage debt and further confirms Defendants' lack of entitlement to the surplus in the face of nearly half a million dollars in unsatisfied debt to First Minnesota.

First, the Minnesota Court of Appeals recently held that the phrase "*after satisfying the mortgage debt,*" as used in the surplus statute in the foreclosure by advertisement chapter, means just what the plain language of the statute says. *Shaw Acquisition Co. v. Bank of Elk River*, 627 N.W.2d 365, 367 (Minn. Ct. App. 2001). Specifically, the surplus is any money left over *after satisfying* "a simple undivided mortgage." *Id.* (distinguishing construction mortgages with installment payments). The Mortgage in this case is a simple and undivided mortgage (A. 530), and it cannot be

disputed that Defendants continue to owe First Minnesota under the Note and Mortgage. (A. 428, 549-51.) As such, under the clear weight of precedent, this Court's interpretation of the surplus statute, and the facts herein, Defendants are not entitled to the surplus because the underlying mortgage is simply not satisfied even when Defendants get the full benefit of the foreclosure bids.

Furthermore, throughout the long history of case law interpreting the surplus statute, Minnesota courts have consistently held that the underlying mortgage debt is the proper measuring device for determining the presence of a surplus. *See, e.g., Babcock v. Am. Sav. & Loan Ass'n*, 69 N.W. 718, 718 (Minn. 1897) (stating that the mortgagee may bid up to the "amount legally due on his *mortgage*" without owing the mortgagor the surplus (emphasis supplied)); *Perkins v. Stewart*, 77 N.W. 434, 434 (Minn. 1898) (referring to a surplus as the amount bid above the "full amount due on the *mortgage*" (emphasis supplied)); *Brown v. Scandia Building & Loan Ass'n*, 63 N.W. 1040, 1040 (Minn. 1895) (defining the 'surplus' as "the proceeds of the sale over and above the amount due on the *mortgage*" (emphasis supplied)); *Bassett et. al. v. Menage et. al.*, 53 N.W. 1064, 1066 (Minn. 1892) (defining surplus as what remains after satisfying the "liens"); *Cuilerier v. Brunelle*, 33 N.W. 123, 124 (Minn. 1887) (providing the mortgagor takes only after satisfying the "*mortgage* foreclosed" (emphasis supplied)); *Joing v. O&P P'ship*, 82 B.R. 495, 498 (D. Minn. 1987) (holding that a debtor is entitled to the surplus under Minnesota Statutes § 581.06 "after satisfying the debt underlying the foreclosing mortgage out of the proceeds of the foreclosure sale").

Therefore, given the foregoing, the case law is clear that Defendants are not legally entitled to the surplus because First Minnesota's underlying mortgage is not yet satisfied. Accordingly, this Court should properly reverse the trial court's order and remand this case with the instruction to award the surplus to First Minnesota.

**C. First Minnesota Is Entitled to the Surplus in Equity and Under the Loan Contract.**

Even setting aside First Minnesota's clear entitlement to the determined surplus under well-established Minnesota law, an examination of both the loan contract at issue in this litigation and the equities of this situation further requires that this Court reverse the trial court ruling awarding the surplus to Defendants. As discussed *infra*, the language of the surplus statute is clear that when a surplus exists, it should be paid to the "mortgagor or the person entitled thereto." Minn. Stat. § 581.06 (emphasis supplied). The surplus statute's directions for distributing the surplus provide no preference to either the "mortgagor" or the "person entitled thereto." Here, applying principles of contract law or those of equity, it is clear that First Minnesota is the "person entitled" to the surplus.

**1. The Trial Court Did Not Correctly Implement the Requirements of Minnesota Statutes § 581.06.**

As a preliminary matter, the trial court's Order awarding the surplus to Defendants is fundamentally flawed because it does not provide a complete analysis of the requirements of Minnesota Statutes § 581.06. Specifically, the analysis does not reach *which party* is entitled to the surplus. (A. 556-58.) This is because the trial court only

worked through steps one and two of the three-part analysis required by the surplus statute.

A court's analysis of the surplus statute must be three-part. Minn. Stat § 581.06. First, the trial court must determine whether a sale is for "cash." *See* Minn. Stat. § 581.06. In this case, this Court previously held that the sale was for cash, so no analysis of this first step was needed (or undertaken) on remand by the trial court. (A. 506-07.) Second, the trial court must determine whether there is surplus, and, if so, the amount of the surplus. *See* Minn. Stat. § 581.06. Here, the second step was also completed by this Court, which established a surplus in excess of \$274,000 prior to remand. (A. 503, 507.) That left the final step in the required statutory analysis – the determination of *who is entitled to the surplus* – to the trial court upon remand.

Despite the clearly mandated analysis, in its order, the trial court provided no discussion or examination regarding anyone's factual or legal entitlement to the surplus. (A. 557-58.) Instead of analyzing *who* is entitled to the surplus, the trial court (in error) misconstrued the foreclosure statute standards and confirmed the sale, which the court saw as its only option when "neither party has requested a resale." (*Id.*) Had the trial court properly analyzed the third step of the surplus statute, it should have properly concluded that principles of equity and the underlying contract demand that First Minnesota receive the surplus. As such, this Court should reverse the trial court's flawed opinion.

2. **The Parties' Loan Contract Establishes that First Minnesota is Entitled to the Surplus.**

As further support for the conclusion that First Minnesota is the party entitled to the loan proceeds, this Court need look no further than the parties' loan contract underlying this transaction.

Defendants have not disputed that they are in breach of their loan obligations for failure to repay the loan funds extended by First Minnesota. (A. 263-64.) Furthermore, it is undisputed that the terms of the parties' loan contract (in particular the Mortgage) specifically state that First Minnesota is entitled to, among other things, the following as collateral for the loan it extended to Overby Development:

(vi) all hereditaments, easements, appurtenances, estates, rents, *issue, profits*, condemnation awards and *other rights and interests now and hereafter related to the Loan Property*, its improvements and use.

(A. 71 (emphasis supplied).)

As a natural result of this contractual agreement, it is clear that the surplus is "related" to the underlying Loan Property because, as detailed *supra*, after foreclosure, the foreclosed real property is "converted into money" and the funds are treated as "a substitute for the mortgaged estate." *Brown*, 26 N.W. at 907; *Ness*, 52 N.W. at 47. Moreover, under the loan contract, the "proceeds arising from" a foreclosure sale are specifically directed to "pay[ing] the Indebtedness secured hereby with interest, and all legal costs and charges of such foreclosure to the maximum attorney's fees permitted by law, which costs, charges and fees the Mortgagor agrees to pay." (A. 76.) *See also Travertine Corp. v. Lexington – Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004)

(confirming that the goal of contractual interpretation is to divine and enforce the parties' intent as determined by the plain language of the contract) (citing *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320, 323 (Minn. 2003)).

As such, based upon the undisputed terms of the parties' underlying loan contract, First Minnesota is contractually entitled to receive the surplus. Therefore, in properly applying Minnesota Statutes § 581.06, this Court should reverse the trial court decision and finally establish that First Minnesota is the proper recipient of the surplus. Any contrary holding would go against the parties' express contractual agreement.

**3. Principles of Equity Establish that First Minnesota Is Entitled to the Surplus.**

In addition to Minnesota law and the terms of the parties' contract dictating the necessary reversal of the trial court award of the surplus, principles of equity also confirm that First Minnesota is the party entitled to the surplus. In its prior order, this Court reversed and remanded the trial court's determination that First Minnesota was not entitled to the surplus, because this Court was "not convinced that the [trial] court accurately applied section 581.06 to achieve a just result." (A. 508.) This Court noted that the trial court erred in its "strict application" of § 581.06, and remanded the case for further proceedings "to ensure that justice has been done." (*Id.*) The trial court simply failed to heed this Court's direction, as the opinion issued on remand failed to analyze any of the principles of equity at play in this case.

The surplus statute plainly directs that any surplus "shall be *brought into the court for the benefit* of the mortgagor or the person entitled thereto, subject to the order of the

*court.*” Minn. Stat. § 581.06 (emphasis supplied). As such, the trial court has a duty to ensure that the proceeds of the sale that exceed “the mortgage debt, with costs and expenses” are equitably distributed. *See id.* This fact is evidenced by the statutory requirement that the trial court issue an order, which is separate from any other foreclosure orders, concerning disposition of any surplus. *See* Minn. Stat. §§ 581.03, 581.06, 581.08.

Furthermore, Minnesota law “requires consideration of certain equities when deciding to grant relief from foreclosure related errors.” *Anderson v. Peterson’s North Branch Mill, Inc.*, 503 N.W.2d 517, 519 (Minn. Ct. App. 1993) (citing *Peterson v. First Nat’l Bank of Ceylon*, 203 N.W. 53, 56-57 (Minn. 1925) (noting “[i]n matters of contract, equity prevents one from taking unconscionable advantage of another’s mistake. Even a clearly established negligence may not of itself be sufficient ground for refusing relief, if it appears that the other party has not been prejudiced thereby.”)).

As presented in *Peterson v. First Nat’l Bank of Ceylon*, the four equities are:

(1) A blameless plaintiff fallen into serious error, whether of fact or law is immaterial, which promises a disastrous result, wholly unintended by any of the parties to the transaction wherein the mistake occurred; (2) absence of negligence of the person seeking relief; (3) defendants with knowledge of the mistake attempting to secure by inequitable conduct an unconscionable advantage of plaintiff and to enrich themselves unjustly at his expense; (4) the ability of the court to restore the status quo as to all of the interests involved.

*Peterson*, 203 N.W. at 56-57 (applying the four equities and granting equitable relief when mortgagee’s attorney wrongfully bid incorrect amount at foreclosure sale); *Romkey v. Saumweber*, 212 N.W. 816, 816 (Minn. 1927) (relying on *Peterson* and affirming order

to resell property when the notice of foreclosure omitted several parcels in error because court reasoned the underlying “mistake” was so “obvious, and the rectification of it so easy without injury to plaintiff, equity clearly justifies the relief”).

Applying these four *Peterson* equities, this Court has previously held that, in equity, the mortgagor was barred from taking a technical surplus that resulted from the mortgagee’s unintentional overbid. See *Anderson*, 503 N.W.2d at 519 (applying foreclosure by advertisement’s surplus statute when the mortgagee foreclosed its second-priority position mortgage, and, at the foreclosure sale, bid the combined amount of mortgagee’s mortgage and the lien in first position). In applying the first and second equity factors, the *Anderson* court held that the “blameless” mortgagee would “suffer a disaster if not relieved” from its bid. *Id.* at 519. Under the third equity factor, the court held that the mortgagors were attempting to “secure an unconscionable” advantage, even though they were pursuing a “statutory right,” because in their pursuit of the surplus, the mortgagor would be unjustly enriched. *Id.* Finally, under the fourth equity factor, the court found that the mortgagor would not be prejudiced because, in denying the mortgagor the surplus, the court would only deny the mortgagor “an unconscionable advantage,” and “any prejudice” experienced is “insufficient under *Peterson* to preclude equitable relief.” *Id.* As such, the court determined that the mortgagees were “equitably prohibited from recover[ing]” of the surplus. *Id.* at 518.

Although decided before the establishment of the four equities test, the Minnesota Supreme Court case *Lane v. Holmes* is also instructive here. In *Lane*, the court declined to award a delinquent debtor what was technically a “surplus” under the foreclosure

statutes when the mortgagee mistakenly (but in good faith) bid more than the amount due on the mortgage. *Lane v. Holmes*, 57 N.W. 132, 133 (Minn. 1893). The attorney misread the underlying mortgage agreement and believed that, under the agreement, the mortgage incurred interest, which it did not; in reliance on his reading of the mortgage, the attorney bid the principal amount due on the mortgage plus interest, which resulted in an overbid. *See id.*

The *Lane* court held where there are two mistakes “one of law and one of fact” and “where both combined to constitute any injury to a party [the party] is entitled to equitable relief,” “especially if the opposite party will not thereby be injured.” *Id.* at 133-34. In applying this rule, the *Lane* court blatantly denied the mortgagor’s attempt to take the surplus. *Id.* at 133. The court noted that if the mortgagor was allowed to take the surplus, the mortgagor “w[ould] recover a judgment of \$1,032.80 for which [*the mortgagor*] never paid any consideration whatever.” *Id.* (emphasis supplied). As such, the court “ha[d] no hesitation in saying that *such a claim is unconscionable, and it would be reproach to our jurisprudence if the [mortgagee] cannot be afforded relief.*” *Id.* (emphasis supplied).

Based upon the foregoing, even if this Court sets aside the determined statutory priority held by First Minnesota and First Minnesota’s contractual entitlement to this additional payment, the Court should still award First Minnesota the determined foreclosure surplus. Similar to the mortgagees in *Anderson* and *Lane*, First Minnesota acted in good faith in placing its bid at the foreclosure sale. (A. 427-29.) Moreover, like the mortgagees in *Anderson* and *Lane*, First Minnesota’s bid was not negligently made,

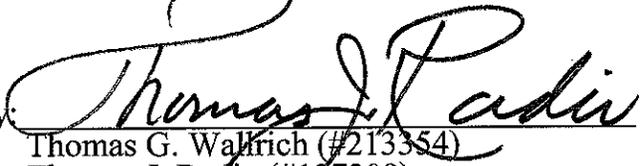
but was instead based upon careful calculation of the mortgage debt. (*Id.*) Furthermore, like the mortgagors in *Anderson* and *Lane*, Defendants here seek to take unconscionable advantage of First Minnesota via the surplus statute, and, in doing so, Defendants would be unjustly enriched. Finally, in prohibiting Defendants from recovering the surplus, this Court would affirm the status quo in placing both parties in their rightful positions. Therefore, under *Anderson* and *Lane*, if this Court finds that First Minnesota's interpretation of the foreclosure laws and its bid were in error, this Court should apply the foregoing to grant First Minnesota relief from its error, and, like the court in *Anderson*, this Court should grant First Minnesota's plea for equitable relief by reversing the trial court decision and awarding First Minnesota the determined foreclosure surplus.

### CONCLUSION

For these reasons, First Minnesota Bank respectfully requests that this Court vacate the judgment, reverse the trial court's Amended Finding of Fact, Conclusions of Law and Order, and remand the matter for entry of an Order awarding First Minnesota Bank the surplus.

Date: October 19, 2009

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