
State of Minnesota
In Supreme Court

DORIS RUIZ,

Plaintiff-Respondent,

vs.

1st FIDELITY LOAN SERVICING, LLC,

Defendant-Appellant.

APPELLANT'S BRIEF, ADDENDUM, AND APPENDIX

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

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STATEMENT OF THE ISSUES

I. MUST ALL PROCEDURAL REQUIREMENTS IN A FORECLOSURE PROCEEDING BE *STRICTLY* COMPLIED WITH, REGARDLESS OF THE INTENT OF THE STATUTE, IDENTITY OF PARTIES TO BE PROTECTED OR ABSENCE OF ANY PREJUDICE FROM THE IRREGULARITY?

The Court of Appeals held in the positive. (ADD. 017.) The trial court held in the negative, and relied upon this Court's precedent for a substantial compliance standard which draws a bright-line that fairly balances individual rights against a state-wide need for certainty in the foreclosure and recording processes. (ADD. 001.) A Petition was timely served and filed with this Court on April 11, 2012. (AA. 182.)

Most apposite cases/statutes:

- *Hudson v. Upper Mich. Land Co.*, 165 Minn. 172, 206 N.W. 44 (1925)
- *Cutting v. Patterson*, 82 Minn. 375, 85 N.W. 172 (1901)
- *Martin v. Bovey*, 30 Minn. 537, 16 N.W. 449 (1883)

II. DID RUIZ HAVE STANDING TO CHALLENGE CURABLE FORECLOSURE PROCEDURES NOT MEANT FOR HER PROTECTION IN THE ABSENCE OF ANY SHOWING OF PREJUDICE?

The Court of Appeals held in the positive. (ADD. 017.) The trial court held in the negative and correctly applied a substantial compliance standard to reach a fair and equitable decision under the totality of circumstances. (ADD. 001.) A Petition was timely served and filed with this Court on April 11, 2012. (AA. 182.)

Most apposite cases/statutes:

- *Holmes v. Crummett*, 30 Minn. 23, 13 N.W. 924 (1882)
- *Bottineau v. Aetna Life Ins. Co.*, 31 Minn. 125, 16 N.W. 849 (1883)
- *Hudson v. Upper Mich. Land Co.*, 165 Minn. 172, 206 N.W. 44 (1925)
- *Willard v. Finnegan*, 42 Minn. 476, 9 L.R.A. 50 (1890)
- Minn. Stat. §§ 580.19 (2010), 580.20 (2010), and 580.021 (2010)

STATEMENT OF THE CASE

Ruiz commenced this action in Hennepin County District Court on February 3, 2011, alleging, in part, that the foreclosure was “void” due to the simultaneous recording of a notice of pendency and corrective assignment of mortgage on the morning of first publication, rather than at least one day prior to the date of first publication of the foreclosure notice. (AA. 003.) On May 10, 2011, Ruiz and 1st Fidelity brought cross-motions for summary judgment on all issues. (ADD. 001.) The district court granted 1st Fidelity’s dispositive motion in its entirety, holding that despite any irregularities, Ruiz did not have standing to challenge the foreclosure under Minn. Stat. §§ 580.02 or 580.032 because the public at large and junior creditors, not Ruiz, were the beneficiaries of those statutes. (ADD. 12-13, 23-24.) The district court further reasoned that Ruiz did not suffer prejudice for defects under the statutes. (ADD. 13.) The district court applied a substantial compliance standard, consistent with longstanding Minnesota Supreme Court precedent from the 1800s through 1925, (ADD. 013), and agreed that substantial compliance concerns whether there has been prejudice to the party that is intended to benefit from the statutory requirement.” (ADD. 010).

The Court of Appeals reversed the district court order by reasoning that it was bound to a strict compliance standard discussed in dicta in a recent case decided by this Court. (ADD. 022.) The Court of Appeals then applied the strict compliance standard and ruled that the recordings of the notice of pendency and the corrective assignment of mortgage simultaneous with the first date of publication were both untimely by at least one

day. (ADD. 024.) The Court of Appeals went further by ruling that “the foreclosure proceeding is void” for failure to satisfy the strict compliance requirement. (ADD. 025.)

1st Fidelity petitioned this Court to accept this case for further review on April 11, 2012, because the Court of Appeals’ decision erroneously ignored the statutory scheme of foreclosures that are presumptively valid by statute, ignored the historical weight of substantial compliance case law in foreclosure matter, ignored the role and importance of the Curative Act, and created uncertainty throughout the state of Minnesota among real estate practitioners, title examiners, and the title insurance industry about whether a foreclosure is deemed valid, voidable or void for minor defects. (AA. 182.)

STATEMENT OF FACTS

This action involves minor defects in a non-judicial foreclosure of real property located at Avenue South, Minneapolis, Hennepin County, Minnesota, legally described as:

Lot 8, Auditor’s Subdivision No. 209, Hennepin County, Minnesota (“**Property**”). (ADD. 001-02, ¶ 1.) The Property is a duplex encompassing two street addresses, Avenue South (“**Upper Unit**”) and Avenue South (“**Lower Unit**”). (ADD. 001-02, ¶ 1.) On June 30, 2005, Ruiz executed and delivered to Chase Bank USA, NA a promissory note in the principal amount of \$273,600.00 (“**Note**”). (ADD. 002, ¶ 2.) Concurrently, to secure the indebtedness evidenced by the Note, Ruiz executed and delivered to Chase Bank USA, NA a mortgage, which was recorded by the Hennepin County Recorder on August 2, 2005 as Document No. 8625952 (“**Mortgage**”). (ADD. 002, ¶ 2.)

The Mortgage was subsequently assigned to JP Morgan Chase Bank, NA, which Assignment of Mortgage was filed with the Hennepin County Recorder on June 12, 2006 as Document No. 8810396 (“**First Assignment**”). (ADD. 002, ¶ 2.)

In September of 2008, Ruiz defaulted under the terms of the Note and Mortgage by failing to make payments as they became due. (ADD. 002, ¶ 3.) As a direct result, 1st Fidelity commenced a foreclosure by advertisement. (ADD. 002, ¶ 3.) On or about March 17, 2010, a breach letter and a Pre-Foreclosure Counseling Notice were sent to Ruiz by Certified and regular U.S. Mail. (ADD. 002-03, ¶ 4.) The United States Postal Service confirmed delivery of this mailing. (ADD. 002-03, ¶ 4.)

Prior to commencement of the foreclosure, the Mortgage was assigned to 1st Fidelity on September 21, 2009, which Assignment of Mortgage was filed with the Hennepin County Recorder on November 17, 2009 as Document No. 9445515 (“**Second Assignment**”). (ADD. 002, ¶ 2; ADD. 031-32.) A corrective assignment, dated May 3, 2010, was recorded solely to correct 1st Fidelity’s full legal name, 1st Fidelity Loan Servicing, LLC, on May 18, 2010 as Document No. 9513852. (ADD. 2, ¶ 2; ADD. 034-36.) Simultaneously on May 18, 2010, a Notice of Pendency of Proceeding and Power of Attorney to Foreclose Mortgage (“**Notice of Pendency**”), authorizing the law firm of Wilford & Geske, PA to foreclose the Mortgage on behalf of 1st Fidelity was filed with the Hennepin County Recorder and recorded as Document No. 9513853. (ADD. 3, ¶ 6; ADD. 037-40.) The Notice of Pendency listed the May 3, 2010 corrective assignment and in all capital letters, described it as a “CORRECTIVE ASSIGNMENT:” (ADD. 039.)

In accordance with Minn. Stat. § 580.03, the Notice of Mortgage Foreclosure Sale (“**Notice of Sale**”) was published for six consecutive weeks in a legal newspaper, beginning on May 18, 2010. (ADD. 003, ¶ 6; AA. 099.) The sheriff’s sale was originally scheduled for June 30, 2010. (ADD. 003-04, ¶ 8; AA. 099.) On May 22, 2010, Ruiz was personally served with the Notice of Sale while occupying only the Lower Unit (Minn. Stat. § 580.03), and also was served with a copy of the Homestead Designation Notice (Minn. Stat. § 582.041), Help for Homeowners in Foreclosure Notice (Minn. Stat. § 580.041), and Foreclosure Advice to Tenants Notice (Minn. Stat. § 580.042). (ADD. 003, ¶ 7; AA. 097.) At the time of service, the Upper Unit was found to be vacant and unoccupied. (ADD. 003, ¶ 7; AA. 098.) These determinations were made by Scott Belcher, an experienced real estate agent in foreclosure properties with Keller Williams Realty, and Merlin Pettigrew, and experienced contractor who has dealt with vacant properties, based upon their in-person observations. (AA. 098; AA. 108-09; AA. 170-71.) On May 28, 2010, Ruiz served and filed an Affidavit of Postponement, pursuant to Minn. Stat. § 580.07, Subd. 2, that automatically postponed the June 30, 2010 sale for five months to November 30, 2010, in exchange for a reduction of the redemption period from six months to five weeks. (ADD. 003-04, ¶ 8; AA. 083-87.) Ruiz correctly attached a copy of the Notice of Sale to her Affidavit of Postponement, which Notice of Sale expressly listed the full name of “1st Fidelity Loan Servicing, LLC” as an assignee in two places: “And assigned to: 1st Fidelity Loan Servicing, LLC” and “ASSIGNEE OF MORTGAGEE: 1st Fidelity Loan Servicing, LLC.” (AA. 086-87.) The sheriff’s sale occurred on November 30, 2010 and the Property was sold to 1st Fidelity

subject to the five week redemption period. (ADD. 3-4, ¶ 8; AA. 104-05.) No redemption was made by Ruiz or any other party and 1st Fidelity became the fee owner of the Property upon expiration of the redemption period on January 4, 2011. (ADD. 003-04, ¶¶ 8-9.)

Additional factual circumstances were raised before the district court and the Court of Appeals, relating to 1st Fidelity securing the vacant Upper Unit by changing the lock on the door, but offering to provide Ruiz a key to the Upper Unit when she claimed possession of it, followed by Ruiz forcibly breaking into the Upper Unit and then claiming damages relating to retaking possession by force. (ADD. 014-15, 026-27.) The claims and defenses relating to possession after the end of the redemption period were remanded to the district court for further proceedings, but are not a part of the appeal before this Court. (ADD. 027, AA. 182.)

1st Fidelity seeks a reversal of the decision of the Court of Appeals and requests that this Court affirm the district court's decision in its entirety.

STANDARD OF REVIEW

On appeal, the Supreme Court applies a *de novo* standard of review to the district court's grant of summary judgment and application of law. *Citizens State Bank v. Raven Trading Partners, Inc.*, 786 N.W.2d 274, 277 (Minn. 2010); *Kratzer v. Welsh Companies, LLC*, 771 N.W.2d 14, 18 (Minn. 2009) (citing *Zip Sort, Inc. v. Comm'r of Revenue*, 567 N.W.2d 34,37 (Minn. 1997)). The Court must determine whether there are any genuine issues of material fact and whether a party is entitled to judgment as a matter of law. *Citizens State Bank*, 786 N.W.2d at 277; *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (citing *K.R. v. Sanford*, 605 N.W.2d 387, 389 (Minn. 2000)). On review, the

evidence must be viewed in the light most favorable to the party against whom summary judgment was granted. *Kratzer*, 771 N.W.2d at 18. In addition, the Court will affirm summary judgment if it can be sustained on any grounds. *Brecht v. Schramm*, 266 N.W.2d 514, 520 (Minn. 1978).

ARGUMENT

I. FORECLOSURE ARE PRESUMPTIVELY VALID BECAUSE AN ACTION MUST BE COMMENCED TO INVALIDATE A SALE, IRREGULAR FORECLOSURES ARE VOIDABLE, NOT VOID.

The Court of Appeals erred in its “strict compliance” interpretation of Minnesota’s foreclosure statutes under *Moore v. Carlson* and overlooking a series of this Court’s decisions from the 1800s and 1925 that instead apply a substantial compliance standard. *See supra* Part II.) Further, the Court of Appeals erred by conclusively determining the foreclosure sale is void instead of voidable, despite this Court’s authority that merely renders such foreclosure voidable.¹ *Willard v. Finnegan*, 42 Minn. 476, 9 L.R.A. 50 (1890). In so doing, the Court of Appeals also bypassed the Curative Act and clear legislative intent that presumes the validity of foreclosure sales. (ADD. 017-27.)

The district court properly applied a substantial compliance analysis, and gave full force and effect to this Court’s substantial compliance standard and Minnesota legislative

¹ Under this Court’s substantial compliance standard, a “voidable” sale cannot be deemed “voided” unless and until there is an adjudication of statutory noncompliance that causes “... prejudice to the party that is intended to benefit from the statutory requirement.” (ADD. 010-11.) “In other words, the standing to challenge noncompliance depends on whether that party was the intended beneficiary of the statute.” (ADD. 012.)

intent. Undoubtedly, the overwhelming theme throughout Minnesota's foreclosure statutes demonstrates that although certain defects may be cured, or in some circumstances may vitiate a foreclosure, an irregular foreclosure is presumptively valid until shown otherwise. Chaos will ensue as a result of uncertainty throughout the real estate community if foreclosure sales are not presumptively valid. In fact, the real estate community has already felt a statewide impact due to the Court of Appeals' decision because title examiners, title insurers, and junior lienholders can no longer rely upon the face of documents recorded in county property records.²

The Minnesota legislature has adopted several express statutory provisions that cure defects in a mortgage foreclosure proceeding. *See, e.g.*, Minn.Stat. §§ 580.025, 580.032, 580.041, 580.042, 580.20, 580.21, 582.25 and 582.27. Therefore, legislative intent dictates that a potentially flawed foreclosure is voidable rather than strictly void. According to the reasoning of a local bankruptcy judge, “[b]y strict, literal definition, a void instrument or transaction is one which is wholly ineffective, inoperative, and incapable of ratification. A void act, would, therefore, have no force or effect ‘so that nothing could cure it.’” *In re Oliver*, 38 B.R. 245, 247 (Bankr. D. Minn. 1984) (quoting *Black’s Law Dictionary*, 1411 (5th ed. 1979)). “The word voidable, on the other hand, describes a defective transaction or act

² Despite *Pole v. Trudeau*, 516 N.W.2d 217 (Minn. Ct. App. 1994), that requires a court order before a lender can abandon a prior foreclosure proceeding, and re-foreclose a mortgage, upon information and belief, title companies are now believed to be taking the position that foreclosures involving issues raised in this *Ruiz* case are automatically void, and that no court order is necessary before a re-foreclosure can be commenced.

that may be declared void, yet may be cured by confirmation or ratification.” *Id.* Thus, where the Curative Act will allow for curing any minor defects at issue in this case by the mere passage of time, and in accordance with legislative intent, the Court of Appeals erred by declaring the foreclosure sale void and failing to require Ruiz to establish that she had standing to raise the irregularities under statutes enacted for the benefit of persons in her place, and further, failing to require Ruiz to demonstrate prejudice from any statutory noncompliance.

Through the plain language of these curative provisions (which reflect legislative intent), and a prior decision of this Court, a potentially defective foreclosure proceeding is voidable - not void. In *Willard*, 42 Minn. 476, 9 L.R.A. 50, this Court held that a foreclosure sale in which separate tracts of land were sold as one, even though it was required that separate tracts be sold separately, was not void, but voidable. “A sale under a power contained in a Mortgage is made by the mortgagee or his agent pursuant to the convention of the parties. Viewed from a practical standpoint...a sale contrary to the statute is merely voidable when fraud, prejudice, or other good cause for vacating is shown.” *Id.* at 478-79. The *Willard* decision remains good law and sheds light upon the fact that certain defects can be cured and do not deem the defective foreclosure sale immediately void.

A “strict compliance” standard contravenes statutory construction due to the Minnesota Legislature’s enactment of the numerous curative provisions and the presumptive validity of foreclosures. If courts rule that a foreclosure by advertisement is void for failure to strictly comply with all of the foreclosure statutes, the defects outlined in the Curative Act

and related statutes of limitations are incapable of being cured by the passage of time. Because Minn. Stat. § 645.16. requires that “[e]very law shall be construed, if possible, to give effect to all its provisions,” the application of an “automatically void” approach would completely abrogate these statutes and usurp the legislature’s intent and ability to enact legislation.

A. Section 580.19 Creates A Prima Facie Presumption That A Foreclosure Is Valid In The Absence Of A Challenge.

From the start, foreclosures conducted under Minnesota law are valid. Minn. Stat. § 580.19 creates a rebuttable presumption that the holder of the sheriff’s certificate has complied with all necessary statutory provisions. “Every sheriff’s certificate of sale made under a power to sell contained in a mortgage shall be prima facie evidence that all requirements of law in that behalf have been complied with...” Minn. Stat. § 580.19 (emphasis added). “Prima facie” evidence is “[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.” *Black’s Law Dictionary*, 638-639 (9th ed. 2009).

Here, the Court of Appeals held that there is no room for errors or discrepancies in the foreclosure process. Rather, the court opined that “strict compliance” is the proper standard and anything but strict compliance results in a “void” foreclosure – as opposed to voidable. (ADD. 025.) This holding negates the provisions of Minn. Stat. § 580.19, which creates a rebuttable presumption of validity; a presumption that may only be overcome if a challenge is raised and, presumably, won. Therefore, “strict compliance,” cannot reasonably be applied as the proper standard without running contrary to legislative intent.

B. Sections 580.20 and 580.21 Provide Timeframes In Which Challenges to Certain Defects Must be Commenced.

In addition to the presumption created by Minn. Stat. § 580.19, other statutory sections within Chapter 580 address the validity of foreclosures. “By statute, a foreclosure sale shall not be held invalid for defect in either notice of the sale or the sale itself ‘unless *the action* in which the validity of such sale is called into question be commenced, or the defense alleging its validity be *interposed*, with reasonable diligence, and not later than five years after the date of such sale.’” *Pole v. Trudeau*, 516 N.W.2d 217, 220 (Minn. Ct. App. 1994) (citing Minn. Stat. §580.20 (1992) and Minn. Stat. § 580.21 (1992)).

Specifically, Minn. Stat. §580.20 provides that:

No such sale shall be held invalid or be set aside by reason of any defect in the notice thereof, or in the publication or service of such notice, or in the proceedings of the officer making the sale, unless the action in which the validity of such sale is called in question be commenced, or the defense alleging its invalidity be interposed, with reasonable diligence, and not later than five years after the date of such sale....

(2010) (emphasis added). In addition, Minn. Stat. § 580.21 provides in pertinent part that:

No such sale shall be held invalid or set aside unless the action in which its validity is called in question be commenced, or the defense alleging its invalidity be interposed, within 15 years after the date of such sale....

(2010) (emphasis added). It is axiomatic in light of these statutes of limitation that it was not the legislature’s intent to automatically void any foreclosure sale in which a defect has occurred. However, it is this intent that the Court of Appeals overlooked in its absolute “strict compliance” application in this matter. Both statutes require an affirmative objection in a judicial proceeding within specified time periods. It follows, then, that if a challenge is not

made, the foreclosure sale is validated by the passage of time.

In this case, the decision of the Court of Appeals should not be allowed to judicially eviscerate the provisions of Minn. Stat. §§ 580.20 or 580.21 and the legislature's role in enacting legislation by the issuance of its decision. Even though these statutes do not apply to the facts in this case (as Ruiz lodged her objection timely), the decision by the Court of Appeals arguably undermines the authority of the legislature by ignoring its intent in these statutory provisions.

C. Section 582.25 Requires A Challenge To An Underlying Foreclosure Before Certain Defects Invalidate A Foreclosure.

Minn. Stat. § 582.25, commonly referred to as the “Curative Act,” provides further support for the presumptive validity of a foreclosure by advertisement. Minn. Stat. § 582.25 cures numerous minor defects in the foreclosure process, and without a challenge, ensures their validity. Moreover, the Curative Act requires an affirmative objection be commenced within a specified time period in order to invalidate a sale in which certain, enumerated defects are present. Importantly, the Curative Act states “[e]very mortgage foreclosure sale by advertisement in this state under power of sale contained in any mortgage duly executed and recorded in the office of the county recorder or registered with the registrar of titles... is, after expiration of the period specified in section 582.27, hereby legalized and made valid...”

Minn. Stat. § 582.25 (emphasis added).

The Court of Appeals recently opined on the application of the Curative Act despite its failure to do so in this case. In *Gallaher v. Titler*, No. A11-1338, 2012 WL 1470220. *1 (slip copy) (Minn. Ct. App. April 30, 2012), a property owner brought an action alleging that

an assessment-lien foreclosure was invalid because it occurred before the end of the last day of the six-week publication requirement. The Court of Appeals stated that “[u]nder Minn. Stat. §§ 582.25 and 582.27, subd. 1(A), if a person does not object to an enumerated defect within one year after the expiration of the redemption period, section 582.25 cures that defect and legalizes the defective foreclosure sale.” *Id.* at *4 (emphasis added). Accordingly, and subsequent to *Ruiz*, the Court of Appeals not only relied upon, but adopted the provisions of the Curative Act. *Id.* Maintaining the decision of the Court of Appeals in *Ruiz*, where it entirely fails to mention the Curative Act, would unintentionally conflict or contravene the statute’s application, particularly in light of this more recent case.

Supporting the presumptive validity of foreclosures (i.e. foreclosures are voidable, not void), the *Gallaher* court discussed the difference between a statute of limitations and a statute of repose. “Section 582.25 is a statute of repose.” *Id.* at *5 (citing *Weston v. McWilliams & Assocs. Inc.*, 716 N.W.2d 634, 641 (Minn. 2006) (“[A] statute of limitations limits the time within which a party can pursue a remedy...whereas a statute of repose limits the time within which a party can acquire a cause of action...A statute of repose is intended to terminate the possibility of liability after a defined period of time, regardless of the potential plaintiff’s lack of knowledge of his or her cause of action. Such statutes reflect the legislative conclusion that a point in time arrives beyond which a potential defendant should be immune from liability for past conduct” (quotation omitted)). Because the Curative Act is a statute of repose, once the cited defect has been present without challenge for the enumerated amount of time, the foreclosure is validated and any potential challenge is

silenced. It would be contradictory to consider a foreclosure void by application of strict compliance where a statute of repose considers the same foreclosure valid unless challenged (i.e. voidable). *See also, In re Oliver*, 38 B.R. 245.

1st Fidelity admits Ruiz commenced her challenge within the applicable statutes of limitation and statute of repose and so she is entitled to a judicial determination regarding the validity of her foreclosure sale. These statutory provisions were not discussed or even cited by the Court of Appeals when it decided the foreclosure was void rather than voidable. In so doing, the Court of Appeals effectively invalidated these long-standing legislative provisions and has thrown the real estate community into a state of flux.

II. SUBSTANTIAL COMPLIANCE WAS THE APPROPRIATE STANDARD, AND REQUIRED RUIZ TO SHOW SHE WAS THE INTENDED BENEFICIARY TO BE PROTECTED BY A STATUTE AND THAT SHE SUFFERED PREJUDICE DUE TO ANY NONCOMPLIANCE.

This Court historically reviews foreclosure proceedings using a substantial compliance standard, which necessarily required Ruiz to show she was intended to be protected by the applicable statutes and that she was prejudiced as a direct result of any noncompliance by 1st Fidelity. This Court has admittedly referred to “strict compliance” requirements,³ but the standard of substantial compliance has continued in application more recently than *Moore* or

³ *Peaslee v. Ridgway*, 82 Minn. 288, 84 N.W. 1024 (1901) (holding that erroneous mortgage recording date in notice of sale invalidated foreclosure because irregularity would serve against interests of junior lienholder) (citing *Martin v. Bovey*, 30 Minn. 537, 16 N.W. 449, (1883)); *Moore v. Carlson*, 112 Minn. 433, 128 N.W. 578 (1910) (holding that complete lack of reference to two assignments of mortgage in notice of sale invalidated foreclosure based upon reasoning that there is some “value to the mortgagor” in receiving the information so he would be able to consider how to act with respect to his rights).

Peaslee. See, e.g., *Hudson v. Upper Mich. Land Co.*, 165 Minn. 172, 206 N.W. 44, (1925).

The Court of Appeals in this matter, however, did not articulate an equitable justification for applying a stricter standard especially where Ruiz did not have standing to challenge the foreclosure because she was not the intended beneficiary of the statute and because she suffered no prejudice resulting from the defects.

Instead, the Court of Appeals summarily disregarded *Hudson* due to the age of the case (1925), relying on *Moore* (1910) instead, because *Moore* was referred to in dicta in the 2009 *Jackson* case. Based solely on these considerations, the Court of Appeals concluded that all of Chapter 580 must be strictly adhered to without exception or regard for the nature of the error, the impact the error has on the borrowers, or whether anyone has been prejudiced by noncompliance. (ADD. 017-26.) The court, in so holding, contravenes prior opinions and holdings of this Court in this and other areas of law involving adherence to statutory requirements.

The substantial compliance standard was established in the 1800s and applied as recently as 1925 by this Court to determine the validity of non-judicial foreclosures. The Court of Appeals failed to address, reconcile or even distinguish such cases other than summarily deciding not to apply them in this case. Importantly, these substantial compliance cases have not been abrogated by subsequent decisions. For instance, this Court previously stated,

[a]n examination of the adjudicated cases in this state, as well as in other jurisdictions in which this method of foreclosure has been permitted, will demonstrate that the courts have very properly and uniformly held that the power and authority to sell must be exercised substantially in accordance with

the statute, or the sale will be invalid.

Backus v. Burke, 48 Minn. 260, 267-68 51 N.W. 284, 284 (1892) (emphasis added). This rule is consistent with this Court's statements in many other cases from this same time period. See *Martin v. Bovey*, 30 Minn. 537, 539, 16 N.W. 449, 449-450 (1883) ("In foreclosing under the power of sale, what the statute requires must be substantially complied with."); *Mason v. Goodnow*, 41 Minn. 9, 11, 42 N.W. 482, 483 (1889) ("what the statute requires must be substantially complied with"); *Richards v. Finnegan*, 45 Minn. 208, 208-09 47 N.W. 788, 788 (1891) ("[t]he requirements of the statute must be substantially complied with."); *Swain v. Lynd*, 74 Minn. 72, 75, 76 N.W. 958, 959 (1898) ("in order to constitute a valid foreclosure, all the requirements of the statute must be substantially complied with."); *Cutting v. Patterson*, 82 Minn. 375, 85 N.W. 172 (1901) ("in order to constitute a valid foreclosure all of these statutory requirements must be complied with, substantially," and "[t]he words in question cannot be construed so narrowly, so as to defeat the real object intended").

Even in modern times, 1992, the Court of Appeals relied on the substantial compliance standard, when it discussed in detail and re-affirmed that a foreclosure by advertisement "must comply, at least substantially, with the statutory requirements." *Farm Credit Bank of St. Paul v. Kohlen*, 494 N.W.2d 44, 46 (Minn. Ct. App. 1992) (quoting *Gerdin v. Princeton State Bank*, 384 N.W.2d 868, 872 (1986)).

Even the past cases articulating a "strict compliance" standard seem to analyze the facts using substantial compliance concepts. For instance, this Court has labeled its analysis

“strict compliance,” but then considered the purpose of the statute and whether the complaining party was prejudiced in some way. See *Moore v. Carlson*, 112 Minn. 433, 128 N.W. 578 (1910); *Peaslee v. Ridgway*, 82 Minn. 288, 84 N.W. 1024 (1901) (citing *Martin*, 30 Minn. 539, 16 N.W. 449 (1883)); and *Clifford v. Tomlinson*, 62 Minn. 195, 64 N.W. 381 (1895). This Court in *Clifford*, perhaps using “strict compliance” in name only, actually addressed prejudice, and explained why the mortgagor was damaged by the foreclosure defect to support its holding that the sale was invalid. *Clifford*, 62 Minn. at 197-98, 64 N.W. at 382. In its 1901 decision in *Peaslee*, this Court suggested that “strict compliance” with foreclosure statutes must be followed, that prejudice was not important, but then cited to many of the aforementioned cases, like *Mason*, *Richards*, and *Backus*, specifically stating that one must comply substantially with foreclosure requirements. *Peaslee*, 82 Minn. at 290, 84 N.W. at 1025. The *Peaslee* court also expressly relied upon the substantial compliance case of *Martin*. *Id.* at 291, 1025. Therefore, the rule from *Peaslee*, although framed using the term of “strict compliance,” is actually a rephrasing and application of the substantial compliance standard. Even the *Peaslee* court’s phrasing of the rule contemplates that those defects that are not a clear departure from the terms and requirements do not invalidate the foreclosure.⁴

⁴In analyzing appellate decisions involving substantial compliance and strict compliance in redemption cases, the Court of Appeals was led to the conclusion that “these two strains of thought are complementary rather than contradictory.” *Sieve v. Rosar*, 613 N.W.2d 789, 793 (Minn. Ct. App. 2000). The court went on to explain that “[w]hile the essential elements of the statute must be strictly adhered to, failure to comply with the more formal requirements may be overlooked.” *Id.* Furthermore, “whether a purchaser may challenge noncompliance

Moreover, the reliance of the Minnesota Court of Appeals on *Moore*, without discussion of the more recent decision in *Hudson*, calls into question the analysis supporting its “strict compliance” approach. Although the Court of Appeals stated that *Moore* adopted a “strict compliance” standard in foreclosures by advertisement, it was not this Court’s most recent word on the standard applicable in such cases. In 1925, *Hudson* applied a “substantial compliance” application in analyzing a foreclosure defect, using very similar phrasing to the rule in *Peaslee*, and relied on a substantial compliance analysis. *Hudson*, 165 Minn. at 177, 206 N.W. at 46. Although the court in *Hudson* invalidated the foreclosure based on a showing of prejudice, the case remains most important for applying the correct analysis that draws a bright-line based on prejudice.

Without question, *Hudson* is this Court’s most recent precedential discussion of the applicability of the substantial compliance standard (fifteen years after *Moore*). In *Jackson*, any discussion of strict or substantial compliance was irrelevant to the outcome because no assignments of the beneficial owners of the promissory notes were ever recorded, before or after the first date of publication, or even after the foreclosure sale itself. 770 N.W.2d at 492-93.

The substantial compliance standard involves a two-part analysis. This Court first looks to the purpose of the statute and the persons intended to be protected from statutory noncompliance, and then, if the statute is directed toward protecting the challenging party,

with a particular statutory requirement depends on whether the requirement was intended for the benefit of the purchaser.” *Id.*

the Court must determine whether the challenging party actually suffered prejudice by a defect. *See, e.g., Holmes v. Crummett*, 30 Minn. 23, 25, 13 N.W. 924, 924 (1882); *Bottineau v. Aetna Life Ins. Co.*, 31 Minn. 125, 128, 16 N.W. 849, 850 (1883). This Court has traditionally drawn the line between those cases where minor defects were insubstantial and created no prejudice, (*id.*), and those where the defect was prejudicial enough to cause harm to the challenging party (*see, e.g., Martin*, 30 Minn. 537, 16 N.W. 449; *Spencer v. Annon*, 4 Minn. 542, 4 Gil. 426 (1860)). The district court in the case at bar properly applied substantial compliance and dismissed all of Ruiz' claims based on a lack of prejudice, because she was not the intended beneficiary of the applicable statutes. (ADD. 012-13.) Because the district court decision was consistent with the historical decisions of this Court, its order should be affirmed in all respects.

A. As A Threshold Matter, The Court Must Determine The Purpose Of The Statutes And Whether Ruiz Was Intended To Be Protected.

The requirement for Ruiz to show she was intended to be protected by a statute goes directly to determining whether Ruiz had standing to raise any alleged foreclosure defects. If Ruiz' challenge relates to a statute that was not designed to provide her with any information or a direct benefit, she cannot bring that challenge because non-compliance with the statute is irrelevant to her rights.

This Court expressed its 'intended beneficiary' requirement in *Holmes*, where it set forth the first principle:

It is a general principle that compliance with the prescribed statutory requirements is necessary to make a valid statutory foreclosure; and the statute must undoubtedly be observed as to all steps in the proceeding which are

calculated to protect the interests of the party whose rights are in question...

Holmes, 30 Minn. at 25, 13 N.W. at 924 (holding that mortgagor could not challenge the mortgagee's failure to serve notice upon tenant because mortgagor received separate notice); *See also Kohlen*, 494 N.W.2d at 46.⁵ In upholding the validity of the foreclosure, the court went further to explain that although it will consider the object of the statutory requirement, "it is not enough to warrant the granting of relief, to one seeking to have a foreclosure set aside, . . . that there has been an omission of some prescribed act which cannot have affected him, and cannot have been prescribed for his benefit." *Id.* This Court followed the requirement again forty-eight years later in *Hudson*, when it expressed

[t]he case is one for the application of the general rule that foreclosure by virtue of a power of sale is not valid, unless there has been an observance of all statutory requirements calculated to protect the interests of the party whose rights are affected...

Hudson, 165 Minn. at 176-77, 206 N.W. at 46. Although some cases during this period of time use the term or phrase "strict compliance," a careful review of the Court's opinion reveals that it in fact looked to which parties were affected by a potential defect. Even in *Peaslee*, this Court considered the aim of the statute when it stated that "[t]he object of this requirement [of stating the mortgage recording information] is to furnish those interested in

⁵ The application of the first prong of substantial compliance in *Holmes* was recently addressed and applied in a recent opinion of the Hon. Donovan W. Frank of the Federal Court – District of Minnesota. *Badrawi v. Wells Fargo Home Mortgage, Inc.*, 2012 WL 2178966, Civil No. 12-128 (DWF/JJG) (D. Minn. June 14, 2012) (holding that "publication and recording requirements of Minn. Stat. § 580.032 do not exist to protect mortgagor's interests, and Plaintiff cannot void a foreclosure based on the non-compliance of that statute.")

the foreclosure of the mortgage with definite and specific information as to where the record of the instrument may be found.” *Peaslee*, 82 Minn. at 291, 84 N.W. at 1025. Therefore, despite the “strict compliance” label of its analysis, the *Peaslee* court actually relied on the first prong of the substantial compliance standard in rendering its decision.

This first consideration of standing is a necessary step in the analysis because it requires the challenging party to show that it has the right to dispute the foreclosure. In other words, if the challenging party is not the protected party of the statute, he or she does not have the legal authority to raise the defect, and is not entitled to establish the existence of prejudice. Therefore, a challenging party must show the statute is intended for that party’s benefit in order to invalidate a foreclosure. As discussed below, Ruiz was not the intended beneficiary of sections 580.02 and 580.32. (*See supra* Part III A and B.)

B. Ruiz Must Also Demonstrate She Suffered Prejudice.

Even if Ruiz had standing to contest noncompliance with the relevant statutes, she still must show she suffered prejudice as a result of the noncompliance. In *Bottineau*, this Court opined that “[m]ere irregularities in judicial sales, or sales under powers, (unless the statute so provides that they shall render the sales void,) do not affect their validity, unless they may operate to prejudice some party interested.” *Bottineau v. Aetna Life Ins. Co.*, 31 Minn. 125, 128, 16 N.W. 849, 850 (1883). The only complaining party in *Bottineau* was the mortgagor, who asserted a defect in the foreclosure when the mortgagee sold property at the sheriff’s sale that was not covered by the mortgage. *Id.* There was shown to be no prejudice to the mortgagor or his ownership rights because the error in including additional parcels did not

influence the resulting bids. Therefore, this Court held the foreclosure was valid. *Id.* This second prong of substantial compliance was again relied upon in *Hudson*, well after its decision in *Moore*, when the Court stated:

[A]lthough mere irregularities do not avoid the sale unless the statute so provides, nevertheless it may be avoided if the irregularities operate to prejudice the rights of a party in interest.⁶

Hudson, 165 Minn. at 177, 206 N.W. at 46. Finally, in *Kohnen*, the Court of Appeals held that service of the foreclosure notice was not required upon a subordinate tenant located on the property, and that the tenant was ultimately not prejudiced by the fact that he didn't receive service directly. 494 N.W.2d at 48.

Even cases using a “strict compliance” label have discussed whether the challenging party has suffered prejudice. In *Clifford*, this Court examined prejudice and discussed why the mortgagor was injured by the mortgagee's failure to include the correct date of the mortgage in its notice. *Clifford v. Tomlinson*, 62 Minn. 195, 197-98, 64 N.W. 381, 382 (1985). This Court in *Peaslee* generally found prejudice is not important, but then stated that the adopted rule is “that statutes must be strictly pursued, and a clear departure from the terms and requirements of the statutes vitiates the proceedings.” 82 Minn. at 290, 84 N.W. at 1025. This phrasing expressly leaves room to determine that defects not clearly departing

⁶ Similarly, after *Moore*, this Court in *Rambeck* held in the context of post-foreclosure redemption that if the redemptioner (i.e. the interested party the statute was designed to protect), had all the information he was entitled to have, regardless of whether the redemption documents were untimely recorded, there could be no prejudice and the statute was substantially complied with. *Rambeck v. Labree*, 156 Minn. 310, 315, 194 N.W. 643, 645 (1923).

from the requirements of the statute do not invalidate the foreclosure. Therefore, regardless of the labels used, the review of mortgage foreclosure defects necessarily includes an examination of whether the challenging party suffered prejudice.

As discussed below, although substantial compliance cases that invalidate the foreclosure exist, these cases are factually distinguishable from this case because Ruiz cannot show she was prejudiced by the recording of the Notice of Pendency and corrective assignment of mortgage on the same morning as first publication. (*See supra* Part III A and B.)

The substantial compliance standard, in the context of a mortgage foreclosure, is consistent and logical with the principles of damages and redress. Allowing a borrower to invalidate a foreclosure sale without demonstrating any harm resulting from the alleged deficiency violates common principles of recovery in the law. The doctrines of negligence, contract law, fraud, etc., require there to be harm before relief will be granted. A party must suffer damage before they are compensated. *See Valspar Refinish, Inc. v. Gaylord's, Inc.*, 764 N.W.2d 359, 368 (Minn. 2009) (holding that damages are an element of a successful fraud claim); *Furlev Sales and Assoc., Inc. v. North Am. Auto. Warehouse, Inc.*, 325 N.W.2d 20 (Minn. 1997) (holding that damages must be sustained in order to prevail on a contractual interference claim); *Jensen v. Duluth Area YMCA*, 688 N.W.2d 574, 578-79 (Minn. Ct. App. 2004) (holding that a breach of contract claim fails as a matter of law if the claiming cannot establish damages).

C. The Court of Appeals Erred In Holding That Strict Compliance Is Absolute By Relying On Dicta In *Jackson*, Overlooking *Jackson's* Distinguishable Facts And Ignoring This Court's Long-Standing Application of Substantial Compliance.

The district court properly concluded that minor errors in the foreclosure process were inconsequential, were not prejudicial to Ruiz, and substantially complied with Minnesota Statutes. The Court of Appeals, however, relied heavily - if not solely - on *Jackson* and erroneously held that strict compliance is absolute, and that a foreclosure with minor, non-prejudicial defects is void – not voidable. (ADD. 025.) It must be the other way around. Under a *de novo* review of rulings of law, the Court of Appeals' decision must be reversed.

The decision in *Jackson*, despite its brief discussion of the history of foreclosure by advertisement, is not directly on point for strict compliance in this case. In fact, *Jackson* is not factually similar to this case. While *Jackson* mentions the term strict compliance, this Court was not asked to directly rule on whether a foreclosing party must strictly comply with Minnesota Statutes or whether substantial compliance was sufficient. And, although *Jackson* briefly mentions requisites of recording under Minn. Stat. § 580.02, it was also not asked to directly consider whether the recording of mortgage assignments was subject to a precise timing requirement. Instead, the issues raised in *Jackson* centered on whether an Assignment of the Note in a mortgage transaction involving MERS must be recorded at all in order to foreclose a mortgage. 770 N.W.2d at 489. The Court of Appeals even acknowledged that *Jackson's* discussion of strict compliance was dicta. (ADD. 022.) As such, the discussion of “strict compliance” in *Jackson* must not have any precedential effect on the disposition of the proper standard on appeal in the present case. Although it recognized that it “must apply the

foreclosure by advertisement statutes as they have been written by the legislature and as they have been applied and interpreted in the past,” (770 N.W.2d at 502-03), this Court did not discuss (since it was unnecessary to the outcome of that case) or otherwise review or apply its long history of cases applying substantial compliance in foreclosure matters. Thus, the Court of Appeals improperly great deference to the dicta in *Jackson*, which was clear error and reversible under a *de novo* review.

D. Sections 580.02 and 580.032 Are Directory, Rather Than Mandatory, And Therefore Compliance With Foreclosure Requirements Must Only Be Substantial.

In other contexts, the question of whether substantial compliance with a statute is sufficient has turned on the particular statutory provision involved and whether that provision is mandatory or directory.⁷ To determine whether a statute is mandatory or directory, a court

⁷ *Manco of Fairmont, Inc. v. Town Bd. Of Rock Dell Township*, 583 N.W.2d 293, 295 (Minn. Ct. App. 1998); *see also Jenkins v. Board of Ed. Minneapolis Special Sch. Dist. No. 1*, 228 N.W.2d 265 (Minn. 1975) (holding that compliance with Minnesota Statutes Section 466.55 should be evaluated under a substantial compliance standard); *Olander v. Sperry & Hutchinson Co.*, 293 Minn. 162, 197 N.W.2d 438 (1972); *State v. Neisen*, 173 Minn. 350, 217 N.W. 371 (1928) (holding that although the publication is mandatory, the 30-day time requirement is directory and so substantial compliance applied. In so deciding, the Court stated, “[h]ere substantially the same service would be given by a publication soon after the expiration of the 30-day period.”); *Young v. 2911 Corp.*, 529 N.W.2d 715 (Minn. Ct. App. 1995); *R.M. Parranto Co., Inc. v. Bernick*, 354 N.W.2d 600 (Minn. Ct. App. 1984) (holding the doctrine of substantial compliance is to be applied in determining whether actions taken under Minnesota Statutes Section 82.33 subd. 2 and Minnesota Rules 2088.3800 subp. 2 were proper.); *Power Line Task Force, Inc. v. Northern States Power Co.*, No. A04-144, 2004 WL 2659837, *1 (Minn. Ct. App. Nov. 23, 2004) (unpublished) (holding that, “[a]s mandated for statutory requirements having no consequence for non-compliance, Xcel energy only had to “substantially comply” with Minn. Stat. § 116C.576.”)

should look at whether the statute “expresses the consequences of a failure to comply with its provisions.” *Manco of Fairmont, Inc. v. Town Bd. Of Rock Dell Township*, 583 N.W.2d 293, 295 (Minn. Ct. App. 1998) (citing *Sullivan v. Credit River Township*, 217 N.W.2d 502, 507 (1974)). If the statute expresses consequences, it is mandatory and strict compliance is required. *Id.* If the statute does not express consequences for failure to comply with its terms, the statute is directory and a court should apply a substantial compliance standard when determining whether a party has met the requirements of the relevant statute. *Id.* The fact a statute uses terms such as “shall,” “must,” or “may” does not always denote whether a statute is mandatory or directory. *In re Trusteeship of First Minneapolis Trust Co.*, 202 Minn. 187, 191, 277 N.W. 899, 902 (1938). These terms are “elastic and frequently treated as interchangeable.” *Id.*

In applying a standard of substantial compliance, this Court specifically contemplated the directory nature of the foreclosure statute. In *Bottineau*, the Court held that “mere irregularities in judicial sales, or sales under powers, (unless the statute provides that they shall render the sales void,) do not affect their validity unless they may operate to prejudice some party interested.” *Bottineau*, 31 Minn. at 128, 16 N.W. at 850 (emphasis added). In *Hudson*, this Court stated in its analysis “that mere irregularities do not avoid the sale unless the statute so provides...” *Hudson*, 165 Minn. at 177, 206 N.W. 46 (emphasis added). These cases demonstrate that the foreclosure statute is directory, and therefore substantial compliance is the proper standard to apply.

Although the facts used to determine whether a party has substantially complied with a

statute will vary from case to case, the Court of Appeals has also held that the doctrine of substantial compliance may be utilized when the party has acted in good faith, there was no intent to undermine the purpose of the procedures, and those intended to be protected by the procedures have not been prejudiced. *Manco of Fairmont*, 583 N.W.2d at 295. Again, this standard is the same as the standard discussed in the various substantial compliance cases in the mortgage foreclosure context; namely that the protected party must suffer prejudice from a procedural defect before a sale will be invalidated. *See Holmes*, 30 Minn. 23, 13 N.W. 924; *Bottineau*, 31 Minn. 125, 16 N.W. 849.

Under the cases outlined above, it is clear that a standard requiring “strict compliance” with each and every statutory provision regarding the foreclosure of a mortgage is not required and that an analysis of each provision must be done in order to determine whether the requirements in that particular section are mandatory or directory. Here, this analysis was not completed by the Court of Appeals. In analyzing the provisions of sections 580.02 and 580.032, neither statute is mandatory. Rather, both statutes are directory. Neither statute provides any express consequence for failure to record an assignment of mortgage or notice of pendency before first publication. In fact, section 580.02 does not even require the assignment of mortgage to be recorded prior to the first date of publication. Certainly, the statutes do not state a foreclosure sale is void for failure to comply with these provisions.

Because the statutes are directory, substantial compliance is the appropriate standard. The district court utilized this standard and appropriately determined the alleged errors in the foreclosure process were inconsequential, were not detrimental to Ruiz, and substantially

complied with relevant Minnesota Statutes. The Court of Appeals, on the other hand, failed to conduct this analysis and determined Chapter 580 must be analyzed using a “strict compliance” standard and apparently will void any sale even for *de minimus* noncompliance.

E. Substantial Compliance Has Long Been The Proper Standard For Foreclosure Redemption Disputes.

Similar to pre-sale foreclosure requirements, Minnesota courts have routinely applied the substantial compliance standard in the post-sale area of redemptions, and have expressly held that formal defects do not invalidate the action when those defects do not prejudice the rights of parties. In these cases, the validity of redemption depends on whether the redemptioner has substantially complied with statutory redemption procedures. *Sieve v. Rosar*, 613 N.W.2d 789, 793 (Minn. Ct. App. 2000). To promote certainty in real estate transactions, redemption statutes are interpreted strictly according to their terms. *In re Petition of Brainerd Nat'l Bank*, 383 N.W.2d 284, 289 (Minn. 1986). Such strict construction, however, does not preclude redemption when formal defects do not prejudice the rights of junior lienors. *Sieve*, 613 N.W.2d at 792.

Many of the cases in the area of redemption from a mortgage foreclosure sale also discuss whether a statute is mandatory or directory and what the difference means when a defect in the redemption process has occurred. Consistent with the case law cited above, this Court has held that if a statute is mandatory, strict compliance must be followed, but that timing requirements are typically directory “unless the limitation of time is essential to the protection of private rights.” *Rambeck v. Labree*, 156 Minn. 310, 313, 194 N.W. 643, 645. (1923); *see also Taber v. Rathbun*, 168 Minn. 370, 373, 210 N.W. 95, 96 (1926).

The recording of an affidavit of amount due and a certificate of redemption have been found to be essential to an effective redemption, as these documents inform a junior lienholder of important information necessary to complete a junior redemption during a short window of time. *Taber*, 168 Minn. at 372, 210 N.W. at 96. However, even under this time-sensitive process, strict compliance with redemption statutes is not necessarily required, provided the failure to strictly comply does not prejudice the rights of junior lienors (emphasis added). *Sieve*, 613 N.W.2d at 792. Thus, in *Rambeck*, when a senior lienor recorded an affidavit of amount due one day after the 24-hour statutory deadline, but junior lienors had not proceeded with redemption during this period, the redemption was deemed valid based on the senior lienor's substantial compliance with statutory requirements before the junior lienholder acted to exercise any rights. 156 Minn. at 314, 194 N.W. at 645.

A redemptioner is unlikely to meet the threshold of substantial compliance, however, when statutory violations prejudice or compromise the rights of junior lienors. For example, in *Coffman v. Christenson*, when a senior lienor recorded a certificate of redemption five days after the four-day statutory deadline, and junior lienors had proceeded with redemption before the senior lienor's certificate was recorded, the senior lienor's redemption was invalidated. 102 Minn. 460, 463, 113 N.W. 1064, 1065 (1907).

The rationale that, despite a “strict construction” standard at the outset for post-sale foreclosure redemption issues, formal defects that do not prejudice the rights of junior lienors, the same can and should be consistently applied to pre-sale foreclosure requirements. Despite the desire to comply with statutes strictly, there are occasions where such an absolute

application provides a disservice and runs contrary to the object to be accomplished by the statutory proceeding. Therefore, the substantial compliance standard that has already been applied by this Court in foreclosure matters, and well-established in the area of post-sale redemptions, should continue to be the standard applied to compliance with the statutes.

III. UNDER THE SUBSTANTIAL COMPLIANCE STANDARD, 1ST FIDELITY'S FORECLOSURE REMAINS VALID.

Under a proper application of the substantial compliance standard, 1st Fidelity is entitled to a reversal of the Court of Appeals ruling with instructions that the district court's order be affirmed in all respects. The notice of pendency statute, section 580.032, was not intended to protect or benefit Ruiz and she was not prejudiced from the one day delay in recording the Notice of Pendency. The foreclosure requisites statute, section 580.02, was not enacted to protect Ruiz with respect to the recording of any assignments of mortgage. She already knew the name of her lender, and she was not prejudiced by any aspect of the assignment of mortgage process. Ruiz indisputably had actual knowledge of the foreclosure sale and the full name of her own lender well in advance of the foreclosure sale. In fact, she immediately stepped into the foreclosure process within six (6) days of being served with the Notice of Sale, and ten (10) days after the corrective assignment and Notice of Pendency were recorded with the county. (AA. 083-87.) In this short period of time, she successfully educated herself about her legal rights, obtained and filled out the Affidavit of Postponement and actually followed the statutory provisions for postponing her sheriff's sale from May 30, 2010 to November 30, 2010.

In fact, Ruiz correctly attached a copy of the Notice of Sale to her affidavit that recited her lender's full name, 1st Fidelity Loan Servicing, LLC, in two places. (ADD. 086-87.) Ruiz cannot complain that she lacked any information to which she was entitled. As a matter of law, Ruiz cannot claim she was prejudiced from not receiving pertinent information. She possessed all of this information by at least May 22, 2010, if not before, even though her foreclosure sale didn't occur for more than 6 months.

Ruiz possessed all information she was entitled to have to make an informed decision about reinstating or redeeming from the foreclosure sale (that assumes she was even an intended beneficiary to any of the applicable statutes, which she was not). *See Rambeck*, 156 Minn. at 315, 194 N.W. at 645. In each instance where this Court has invalidated a foreclosure proceeding by the application of a substantial compliance standard, prejudice to the challenging party actually resulted from the defect.⁸ These cases differ from the facts

⁸ *See Hudson*, 165 Minn. 172, 206 N.W.44 (junior lien holder prejudiced because the sheriff's certificate was not recorded within twenty days after sale, which would adversely affect the junior's right to timely redeem); *Cutting*, 82 Minn. 375, 85 N.W. 172 (mortgagor in possession of property, who is entitled to know that proceedings have been instituted and that sale scheduled, prejudiced by failure to receive service of notice of foreclosure); *Swain*, 74 Minn. 72, 76 N.W. 958 (occupant of property, and those with related interests, prejudiced by failure to serve occupant with notice of sale because affected parties will not be advised of the sale); *Backus*, 48 Minn. 260, 51 N.W. 284 (parties with interest in property prejudiced when assignment of mortgage to foreclosing mortgage was not recorded until fourteen days AFTER the sheriff's sale); *Richards*, 45 Minn. 208, 47 N.W. 788 (parties intending to bid at sheriff's sale prejudiced when sale was conducted fifteen minutes prior to time indicated on notice); *Mason*, 41 Minn. 9, 42 N.W. 482 (parties with interest in property prejudiced because notice of sale did not state separate amounts due on multiple lots covered by the mortgage, which would prevent parties from knowing amounts individually owed for each parcel); *Martin*, 30 Minn. 537, 16 N.W. 449 (interested parties to property prejudiced when notice of foreclosure failed to state when the mortgage was recorded, because without such

present here, where Ruiz was not intended to be protected by the applicable statutes and as a matter of law, could not have been prejudiced as a result of any defects. The simultaneous recording of the Notice of Pendency and corrective assignment of mortgage as the first date of publication did not prevent her from understanding her rights in foreclosure, did not prevent her from exercising her right to postpone the sale date (which she did), or from knowing the amount claimed or who was entitled to foreclose on the scheduled date of sale.

Under these undisputed facts, Ruiz could not establish any prejudice as a matter of law, even assuming any irregularities in the recording of the Second Assignment or the corrective assignment.

Based on the clear lack of prejudice and lack of legislative intent to protect Ruiz under sections 580.02 or 580.032, Ruiz was not entitled to successfully challenge the foreclosure process under the substantial compliance standard. This Court's past decisions confirm that substantial compliance is the appropriate standard. Moreover, because these statutes do not prescribe consequences for non-compliance or otherwise invalidate the foreclosure, the directory nature of these statutes also requires that a substantial compliance standard be applied in this case.

information the interested parties would not know whether their interests are affected or whether they should act); *Spencer*, 4 Minn. 542, 4 Gil. 426 (mortgagor prejudiced by failure of notice to state amount claimed to be due because mortgagor will not know amount due and defect will discourage competition at the sheriff's sale).

A. The Notice of Pendency Was Only Recorded One Day Late, Which Substantially Complied With Section 580.032, Since Ruiz Was Not Prejudiced By The Extra Day or Intended to Benefit from the Statute.

Minnesota Statutes section 580.032 admittedly requires a Notice of Pendency to be recorded *before* the first date of publication. 1st Fidelity indisputably recorded its Notice of Pendency on the same morning as first publication, i.e., one day late, but this recording delay of one day does not invalidate the foreclosure since Ruiz indisputably was not harmed or prejudiced by the short delay. And Ruiz was not the intended beneficiary of section 580.032, which is designed to give notice to junior creditors. Ruiz simply had no standing to complain about the one day delay in recording the Notice of Pendency.

Section 580.032 was enacted solely to protect junior creditors with redeemable interests. The purpose of recording the Notice of Pendency pursuant to section 580.032 is to provide constructive notice of the impending foreclosure to junior creditors (like second mortgages and mechanics lienholders), similar to the effect of a notice of *lis pendens* for a judicial proceeding. It creates a cut-off point in time by which certain junior lienholders must file a Request for Notice before they are entitled to receive notice of any future foreclosure proceeding. The mere fact that the legislature buried this requirement in the middle of a statute otherwise aimed solely at addressing notices to junior creditors with redeemable interests provides support that the recording of the notice pendency was not intended by the legislature to protect the borrower or mortgagor. *See* Minn. Stat. § 580.032.

Without question, the Notice of Pendency is not served on the mortgagor. *Id.* Other than recording the Notice of Pendency, this statute only contains service requirements for

mailing notice to those junior creditors filing Requests for Notice of foreclosure, and provides for specific remedies if notice is not provided by mail. Minn. Stat. § 580.032, subds. 1, 4, and 6. Again, owner-occupants receive notice of the foreclosure via other methods (which Ruiz undisputedly received more than 6 months prior to the sale that she scheduled herself). *See* Minn. Stat. §§ 47.20, 580.021, 580.03, and 580.041; (AA. 063, Mortgage, ¶ 22.) In short, Ruiz has no right to assert a claim as an intended beneficiary of section 580.032, subd. 3.

Minnesota Statutes section 582.25, the Curative Act, provides for the validation of foreclosure sales as against a variety of objections after a certain period of time (dependent on the nature of the objection), typically one year after the expiration of the redemption period. Specifically, the Act validates a foreclosure where “the notice of pendency...as required by section 580.032 was not filed for record before the first date of publication of the foreclosure notice, but was filed before the date of sale.” Minn. Stat. § 582.25 (22). In addition, Section 582.25 (13) provides that a foreclosure is validated as to registered land where no notice of pendency is memorialized “at the time of or prior to the commencement of such proceedings.” (Emphasis added). The Curative Act provides evidence of a legislative intent to treat any delay as minor where the Notice of Pendency is recorded on or after the first date of publication but before the date of the sheriff’s sale. In the present case, the Notice of Pendency was recorded only one day late (and more than 6 months before the sale) which undoubtedly fall well within the range of substantial compliance from a timeline perspective. The absence of an intention by the legislature to protect Ruiz under section

580.032, as well as an absence of any prejudice, puts 1st Fidelity's substantial compliance beyond reasonable question.

Ruiz does not dispute that she was served with the Notice of Mortgage Foreclosure Sale on May 22, 2010 pursuant to Minn. Stat. § 580.03. In fact, only six days later, she filed an Affidavit of Postponement under Minn. Stat. § 580.07, postponing the Sheriff's Sale for five months. (AA. 083-87.) There is simply no basis on which Ruiz could claim she was prejudiced by the one day delay in recording of the Notice of Pendency. Because the purpose of the statute was substantially met and Ruiz suffered no prejudice, the resulting foreclosure must not be invalidated.

B. 1st Fidelity Recorded Both The Second Assignment And Corrective Assignment Strictly And Substantially In Compliance With Section 580.02.

Minnesota Statutes section 580.02 sets forth the requirements for foreclosure, and in relevant part expressly states that “[t]o entitle any party to make such foreclosure, it is requisite: * * * (3) that the mortgage has been recorded and, if it has been assigned, that all assignments thereof have been recorded...” The statute plainly states that all assignments of mortgage must be of record as a “requisite” to “make such foreclosure.” *Id.* It remains undisputed that the Second Assignment was recorded more than one year before the November 30, 2010 sale, albeit only “1st Fidelity” was included in the name of the assignee. (ADD. 031-33.) It is further undisputed that the corrective assignment was recorded on May 18, 2010, the same day as the first date of publication and more than 6 months before the sale. (ADD. 034-36.) Even if strict compliance were required, all assignments were

indisputably recorded more than 6 months prior to the foreclosure sale.

By the time the sheriff or any member of the public wished to appear at the sheriff's sale, or redeem from the sheriff's sale, all assignments were clearly of record, which further means that 1st Fidelity met the purpose of the statute before the sale date. Without identifying a specific deadline, this Court in *Jackson* noted that the record must contain sufficient information, without the aid of extraneous evidence, to put the title of the assignee of a mortgage beyond doubt. 770 N.W.2d at 497-98 (quoting *Soufal v. Griffith*, 159 Minn. 252, 255, 198 N.W. 807, 808-09 (1924)). Neither the *Jackson* court nor the Minnesota legislature expressed or imposed a precise deadline for accomplishing the recording of all assignments of mortgage. In contrast, section 580.032 demonstrates that the legislature was capable of imposing such a deadline if it wished any assignments of mortgage to be recorded prior to the date of the first legal publication. However, the legislature chose not to impose a similar timing requirement in section 580.02 for the recording of assignments.

The Court of Appeals judicially imposed a deadline of the first date of publication for recording all assignments of mortgage and held 1st Fidelity to a "strict compliance" standard. (ADD. 024.) Even *Jackson* says nothing about timing other than that the recording of all assignments of the mortgage is simply "a condition precedent to the right to foreclose by advertisement." 770 N.W.2d at 496. Without the precision of a specific deadline, the Court of Appeals erred in holding that assignments must be recorded prior to the date of the first

publication. Section 580.02 simply does not impose that deadline.⁹ Also, the absence of clear consequences to meet an unspecified deadline in the statute must require only a substantial compliance standard for determining 1st Fidelity's compliance. This means that Ruiz must establish that she was an intended beneficiary of the statutory requirement, and that she was prejudiced by any noncompliance. As a matter of law, she cannot demonstrate either intended beneficiary status or prejudice under the facts in the record.

Ruiz is also not an intended beneficiary of section 580.02, at least with respect to the requirement that all assignments be of record. She already had actual knowledge of the name of her lender. Only non- parties to the mortgage need to search the county property records to find out if there have been any assignments of the mortgage.

The September 21, 2009 recording of the Second Assignment, which omitted "Loan Servicing, LLC" from 1st Fidelity's name, but was accurate and complete in all other respects, constituted substantial compliance, particularly from Ruiz's standpoint. Ruiz indisputably knew the actual name of her lender, as most borrowers do know the name of their lender, and the record before this Court fully demonstrates she had access to the full name when she attached a copy of the Notice of Sale to her Affidavit of Postponement on May 27, 2010, and then recorded the affidavit with attachment on May 28, 2010. (ADD.

⁹ The Court of Appeals' holding that the assignment of mortgage must be recorded prior to the first date of publication is perhaps incongruous with the legislature's requirement in Minn. Stat. § 580.05, requiring that the power of attorney to foreclose, which provides the authority of an attorney to foreclose, may be recorded at any time prior to sale. More importantly, this statute also evidences that the legislature knew how to specify a timing requirement for the recording of a foreclosure notice where it so desired.

083-87.) Based on these undisputed facts, and as a matter of law, Ruiz cannot demonstrate any prejudice from the omission of part of 1st Fidelity's name in the Second Assignment.¹⁰

Establishing a precise deadline for recording all assignments of mortgage, in the absence of any statutory provision, may go beyond the needs of this specific case, and better left to the legislature. However, for purposes of this case, based on Ruiz's lack of prejudice from any alleged delay in recording the corrective assignment, Ruiz had no standing to contest any alleged irregularities with the Second Assignment or the corrective assignment. She was not the intended beneficiary of the statute requiring the recording of all assignments since she already knew the full identity of her mortgage lender. Thus, for purposes of any dispute raised by Ruiz, she cannot contest the timing of the assignment recording as a matter of law based on the undisputed facts of this case.

Even if recording prior to publication is required, the legislature suggests that same-

¹⁰ The Court of Appeals reasoned that 1st Fidelity produced no authority that the Second Assignment was legally sufficient without the complete name. (ADD. 024-25.) Generally, however, Minnesota has approved of the use of corrective documents to fix errors in prior recorded documents, and the corrective document is connected with and will relate back to the date of the corrected document. *See Brown v. Morrill*, 45 Minn. 483, 48 N.W. 328 (1891) (holding that parties to mortgage were equitably entitled to record corrective mortgage and that the corrective document related back to the time of the execution and delivery of the corrected mortgage...and that junior creditor with knowledge of recording of corrected mortgage, although technically defective, had no claim for priority); *Minnesota Standards for Title Examinations*, No. 58 (Minn. State Bar Ass'n 2009) (stating in part that "[w]here a mortgage has been rerecorded, whether or not it has been changed to correct a defect, an assignment, a satisfaction or assignment, satisfaction or release which describes only one of the recordings is sufficient"). Even if the Second Assignment cannot stand on its own, the corrective assignment relates back to the corrected assignment and fully cured any defect as of May 18, 2010, which strictly complied with the requirement in section 580.02 that all assignments must be of record to "make such foreclosure."

day recording is permissible. The Curative Act validates a foreclosure even if the notice of foreclosure sale “was published only three, four or five times, or that it was published six times but not for six weeks prior to the date of sale.” Minn. Stat. § 582.25 (3)(a). Therefore, the legislature acknowledges that less than six weeks’ notice is at most, a minor defect in the foreclosure process. In this case, even assuming that Ruiz was intended to benefit from the recording of the assignment of mortgage (which she is not), the same-day recording of the assignment of mortgage means the notice of foreclosure sale was properly published for five weeks. There is also no dispute that one less week of publication did not prejudice or otherwise harmed Ruiz. The minor defect of recording an assignment of mortgage on the same day as first publication should not serve to invalidate the foreclosure. The purpose of the statute was unquestionably met and Ruiz was already provided the information of the entity entitled to foreclose.

IV. ALL REMAINING ISSUES DISMISSED BY SUMMARY JUDGMENT WERE PROPERLY DECIDED BY THE DISTRICT COURT AND SHOULD BE AFFIRMED IN THEIR ENTIRETY.

The remaining issues in this matter, including the mailing of the pre-foreclosure counseling notice and the alleged lockout following the expiration of the redemption period, were properly decided by the district court. The Court of Appeals, however, incorrectly determined that it did not need to reach the issue of the notice because of the technical defects of the foreclosure. (ADD. 026.) Had the Court of Appeals upheld the foreclosure, it would have had to uphold the district court’s determination that the pre-foreclosure counseling notice was properly mailed to Ruiz. Ruiz provided no opposing, non-conclusory

evidence to demonstrate that she did not receive the letter. The letter was provided as required by statute because it was sent to her (AA. 077-82.). There is no requirement in section 580.021 that she be in receipt of the letter. If receipt was required, the legislature presumably would have been able to dictate the service of the letter was required, as it does for other foreclosure notices.

Moreover, the district court properly determined that Ruiz could not survive summary judgment on the issue of the lockout because she caused her own damage. Minn. Stat. §§ 582.031 and 582.032 subd. 7 provide the ability of a lender to secure the premises when it is vacant. Most importantly, the district court correctly determined that Ruiz was not entitled to reimbursement for damages because she undisputedly caused her own damages by breaking back into the unit less than 12 hours after it was secured. (ADD. 014-15.) Ruiz was also offered a key to the unit (which she does not dispute) and instead took it upon herself to forcefully regain entry. (ADD. 015.) Therefore, the district court did not improperly weigh the evidence in the record, but correctly determined that the dispositive issue of Ruiz breaking back into the property precluded her from recovery.

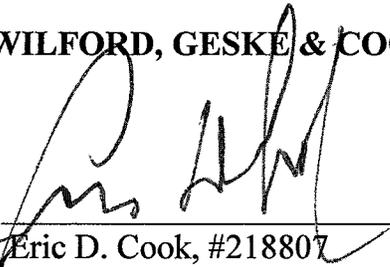
Based upon these correct decisions by the district court, in the event this Court decides in favor of 1st Fidelity, the remaining decisions by the district court should also be affirmed in their entirety.

CONCLUSION

Based upon the foregoing arguments, 1st Fidelity Loan Servicing, LLC respectfully requests the Court reverse the decision by the Court of Appeals and affirm the decision by the District Court where it upheld the mortgage foreclosure and dismissed Ruiz' case in its entirety and with prejudice.

Respectfully submitted,

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs.1 and 3, for a brief produced with a proportional font, Times New Roman, at 13 point type. Including footnotes, the length of this brief is 11,906 words. This brief was prepared using Microsoft Word 2010.

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