

NO. A11-1081

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State of Minnesota  
*In Supreme Court*

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Doris Ruiz,

*Plaintiff-Respondent,*

vs.

1st Fidelity Loan Servicing, LLC,

*Defendant-Appellant.*

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**BRIEF OF RESPONDENT DORIS RUIZ**

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## STATEMENT OF LEGAL ISSUES

### I. DID HOMEOWNER DORIS RUIZ HAVE STANDING TO CHALLENGE A DEFECTIVE FORECLOSURE THROUGH A QUIET TITLE ACTION?

The Court of Appeals held in the positive. (Index to Appellant's Addendum ("ADD.") 017) The trial court held in the negative.(ADD. 001)

#### **Most apposite cases/statutes:**

- *Backus v. Burke*, 48 Minn. 260 (Minn. 1892)
- *Clifford v. Tomlinson*, 64 N.W. 381 (Minn. 1895)
- *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487 (Minn. 2009).
- *Moore v. Carlson*, 128 N.W. 578 , 579 (Minn. 1910)
- *Thorpe v. Merrill*, 21 Minn. 336 (Minn. 1875)
- Minn. Stat. § 559.01
- Minn. Stat. § 580.02(3)
- Minn. Stat. § 580.02(4)
- Minn. Stat. § 580.032

### II. DOES A STRICT COMPLIANCE STANDARD CONTINUE TO APPLY TO FORECLOSURES BY ADVERTISEMENT WHERE FORECLOSING PARTIES HAVE ALTERNATIVE METHODS TO FORECLOSE?

The Court of Appeals held in the positive. (ADD. 017) The trial court held in the negative by ignoring foreclosure by advertisement case law and instead relying on redemption and eminent domain law. (ADD. 001)

**Most apposite cases/statutes:**

- *Clifford v. Tomlinson*, 64 N.W. 381 (Minn. 1895)
- *Dana v. Farrington*, 4 Minn. 433 (Minn. 1860)
- *Hudson v. Upper Michigan Land Company*, 206 N.W.44 (Minn. 1925)
- *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487 (Minn. 2009)
- *Moore v. Carlson*, 128 N.W. 578 (Minn. 1910)
- *Peaslee v. Luretta Ridgway*, 84 N.W. 1024, 1026 (Minn. 1901)
- *Sheasgreen Holding Co. v. Dworsky*, 231 N.W. 395, 396 (Minn. 1930)
- Minn. Stat. § 580.25

## STATEMENT OF THE CASE

Plaintiff-Respondent Doris Ruiz (“Homeowner”) initiated this action in Hennepin County District Court in February 2011. A June 2011 order for judgment and judgment in favor of Defendant-Appellant 1st Fidelity Loan Servicing, LLC (“Foreclosing Party”) dismissed all of Homeowner’s claims on Foreclosing Party’s pre-discovery motion to dismiss, or in the alternative for summary judgment, filed in lieu of an answer (Foreclosing Party’s Addendum (“Add.”) 001).

Aside from making disputed factual findings regarding Foreclosing Party’s forced entry and Foreclosing Party’s providing a pre-foreclosure notice, the trial court held Foreclosing Party’s noncompliance with nonjudicial foreclosure by advertisement statutes immaterial through a “substantial compliance” standard, validating the sheriff’s sale. *Id.* The trial court further questioned whether Homeowner had standing to challenge violations of the foreclosure statutes. *Id.*

The court of appeals reversed the district court after applying this Court’s long-standing strict statutory compliance standard for nonjudicial foreclosures by advertisement. Add. 017. The court of appeals held Foreclosing Party’s failure to timely record the notice of pendency or an operative assignment (both

explicitly required by statute) made the foreclosure proceeding void. The court of appeals found it unnecessary as moot the issue of whether Homeowner was provided with the requisite pre-foreclosure notice and remanded Homeowner's wrongful/forcible eviction claim, noting that Homeowner provided sufficient evidence for a finder of fact to conclude that the property was not vacant.

### STATEMENT OF FACTS

Foreclosing Party's recitation of relevant facts in its principal brief includes numerous disputed factual claims. Homeowner appealed from the trial court's grant of summary judgment, making reliance on disputed factual allegations therein inappropriate. Add. 001.

The real estate at issue, located at Avenue South, Minneapolis, Minnesota, is legally described as: Lot 8, Auditor's Subdivision No. 209, Hennepin County, Minnesota (the "Subject Property"). Foreclosing Party's Appendix ("AA.") 003.

Foreclosing Party caused a sale of the Subject Property pursuant to an attempted nonjudicial foreclosure by advertisement of its mortgage encumbering the Subject Property. Add. 3, ¶ 8. A sheriff's sale occurred on November 30, 2010. Add. 3, ¶ 8.

Homeowner granted a mortgagee's interest in the Subject Property to Chase Bank USA, N.A by mortgage dated June 30, 2005, recorded with the Hennepin County Recorder on August 2, 2005 as Document Number 8625952 (the "Mortgage"). AA. 051-052. The Mortgage was assigned by Chase Bank USA, N.A. to JPMorgan Chase Bank, N.A. by an assignment of mortgage dated May 25, 2006, recorded June 12, 2006 with the Hennepin County Recorder as document number 8810396 (the "First Assignment"). AA. 074-075.

On September 21, 2009, the Mortgage was assigned by JPMorgan Chase Bank, N.A. to an unknown entity "1st Fidelity." Add. 032. This assignment was filed for record with the Hennepin County Recorder on November 17, 2009 as document number A9445515 (the "Second Assignment"). Add. 031-032. Public records do not indicate whether the unknown entity referred to as 1st Fidelity was actually Foreclosing Party or whether it reassigned the Mortgage to any other party. An entity "JP Mortgage Chase Bank, N.A." (emphasis added) purported to have assigned the Mortgage to Foreclosing Party by an assignment of mortgage recorded with the Hennepin County Recorder on May 18, 2010 as document number A9513852 (the "Third Assignment"). Add. 034-036.

A Notice of Foreclosure was published for the first time in the legal newspaper *Finance and Commerce* in the morning of May 18, 2010. AA. 099. It was only after that first publication that the Third Assignment was recorded. Add. 034-036. Also after first publication, Foreclosing Party filed a Notice of Pendency of Foreclosure with the Hennepin County Recorder as document number A9513853. Add. 037-040. Both documents were statutorily required to be filed prior to the date of first publication. Minn. Stat. §§ 580.02, 580.032.

Foreclosing Party claims in its recitation of “undisputed” facts that the required pre-foreclosure counseling notice was sent to Homeowner “by Certified and regular U.S. Mail” and that “[t]he United States Postal Service confirmed delivery of this mailing.” Appellant’s Br. 4. However, the parties dispute whether a statutorily required pre-foreclosure counseling notice was actually sent or “provided” to Homeowner prior to May 18, 2010. Add. 7-8, ¶ 18. Homeowner testified by affidavit that she had “never seen the document produced by” Foreclosing Party purporting to be the pre-foreclosure notice alleged to have been sent by Foreclosing Party. AA 136, ¶13. Homeowner alleged that she “kept all correspondence that [she had] received from 1st Fidelity Loan Servicing, LLC and its agents... [and the Preforeclosure Counseling

Notice] is not among those papers. AA 136, ¶ 14. The breach letter dated March 17, 2010 does not make any reference to the inclusion of the Preforeclosure Counseling Notice. AA078-079. Even if the United States Postal Service may be able to confirm that *a letter* was delivered to Homeowner during this approximate time period, the post office is unable to confirm the *contents* of any letter delivered during this time.

Additionally, Homeowner and her family claim occupancy of the entire Subject Property at all relevant times. AA 134-36, ¶¶ 1-12. While this case was pending in the trial court, Homeowner presented utility bills demonstrating her actual occupancy of the entire Subject Property. AA 138-60. The trial court weighed the evidence presented by both sides and made a determination and resolved the factual dispute by concluding that Homeowner did “not adequately rebut Defendant’s evidence.” Add. 015.

### STANDARD OF REVIEW

Summary judgment shall be rendered if the record shows “that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03. “In the summary judgment context, the extent to which the facts are disputed is an important substantive

element, because when the facts are disputed, summary judgment is inappropriate.” *City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 23 (Minn. 2011) (citing *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002)). The Minnesota Supreme Court has further held:

Summary judgment may be granted only if, after taking the view of the evidence most favorable to the nonmoving party, the movant has clearly sustained his burden of proving that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. Although summary judgment is intended to secure a just, speedy, and inexpensive disposition, it is not intended as a substitute for trial where there are fact issues to be determined.

*Vacura v. Haar’s Equipment, Inc.*, 364 N.W.2d 387, 391 (Minn. 1985) (citing *Sauter v. Sauter*, 70 N.W.2d 351 (Minn. 1955)). “The district court must view the evidence in the light most favorable to the nonmoving party.” *Grondahl v. Bulluck*, 318 N.W.2d 240, 242 (Minn. 1982). “[A reviewing court’s] standard of review for summary judgment is de novo.” *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co.*, 615 N.W.2d 819, 827 (Minn. 2000).

## ARGUMENT

### **I. A Party Foreclosing a Mortgage by Advertisement is Required to Strictly Comply With All Foreclosure by Advertisement Statutes.**

The district court determined that substantial compliance with Minnesota's foreclosure by advertisement statutes is sufficient to effectuate a valid foreclosure. Add. 10, ¶ 23. In making this determination, the district court ignored the unambiguous language from the Minnesota Supreme Court, relied on unrelated areas of law, and misinterpreted dated and archaic dicta. The Court of Appeals correctly reversed this decision, holding that a standard of strict compliance has been applied by the Supreme Court since at least 1910. Add. 021-23.

**A. Minnesota judicial precedent requires strict compliance.**

Numerous cases exist in Minnesota in the area of foreclosure by advertisement that make clear that a party conducting such a foreclosure is required to strictly comply with its statutory requirements. As recently as 2009, the Minnesota Supreme Court reaffirmed its position spanning more than a century requiring strict compliance with Minnesota's foreclosure by advertisement statutes:

Foreclosure by advertisement was developed as a non-judicial form of foreclosure designed "to avoid the delay and expense of judicial proceedings." Because foreclosure by advertisement is a purely statutory creation, the statutes are strictly construed. We require a foreclosing party to "show exact compliance" with the terms of the

statutes. If the foreclosing party fails to strictly comply with the statutory requirements, the foreclosure proceeding is void.

*Jackson v. Mortgage Electronic Registration Systems, Inc.*, 770 N.W.2d 487, 494 (Minn. 2009) (citations omitted). This conclusion is consistent with the clear precedent established by prior case law.

Beginning no later than 1860, this Court has held that strict compliance is mandatory for a party foreclosing a mortgage by advertisement. When a mortgagee “resorts to the power contained in the mortgage, thus taking the remedy in his own hands, by an *ex parte* proceeding, it is but reasonable that he should be kept strictly within the terms of the power, and held to a rigid observance of all the requirements of the statutes which regulate its exercise.” *Spencer v. Annan*, 4 Minn. 542, 544 (Minn. 1860).

Also in 1860, the Court held that “[t]he statutory modes of transferring the title from a party to his real estate, and vesting it in another by way of... mortgage sales are so numerous, and so facile of execution, that it is the duty of courts to require a strict compliance with the law in each case in every essential requirement.” *Dana v. Farrington*, 4 Minn. 433, 437 (Minn. 1860).

In 1895, the Court again reaffirmed this position: “foreclosure by advertisement is a statutory remedy, and all the essential requisites must be

strictly pursued, or the proceedings will be held void.” *Clifford v. Tomlinson*, 62 Minn. 195, 197 (Minn. 1895). The Court considered that allowing a foreclosing party to take ownership of property after committing a seemingly minor and technical error is unacceptable as it would only lead to the allowance of even more errors. *Id.* The Court found:

To hold that a difference of two days in the date renders the foreclosure invalid may seem somewhat technical, but we have no discretion to exercise, as the requirements of the statute are absolute. The proceeding is one in derogation of common law, and the remedy must be strictly and closely pursued. It is not a hardship to require of the mortgagee that he make the notice definite and certain, and especially should this be done where proprietary rights are involved.

*Id.* Speaking of foreclosures by advertisement, the Court held that “[s]uch a method of foreclosure is a cheap and simple one, and the insertion of an erroneous date of the mortgage in the notice of foreclosure is inexcusable, and a foreclosure under such circumstances is illegal and void. *Id.* at 198.

The Court again engaged in a discussion of the standard to be applied in measuring the validity of foreclosures by advertisement in 1901. The Court specifically held that the “question whether such defects are of a prejudicial character is not considered important.” *Peaslee v. Ridgway*, 84 N.W. 1024, 1026 (Minn. 1901). In *Peaslee*, the Court was considering the validity of a foreclosure

by advertisement that listed in both the power of attorney and the notice of sale that the mortgage had been recorded on page 237 of the requisite book; the mortgage had actually been recorded on page 537. *Id.* at 1024-25. The Court exercised a standard of strict compliance in evaluating the error in both documents. The Court concluded that because the “[power of attorney] statute makes no special provisions as to the form and contents of the power of attorney” that “[a]ny power, therefore, properly executed, whatever its form, which will furnish the protection contemplated by the statute... is sufficient.” *Id.* at 1025. This differs significantly from situations where a statute has specific requirements, as in the instant matter.

The Court made this distinction clear: “[t]he same defect in the notice of foreclosure presents an entirely different question. This court has very uniformly held parties to a strict compliance with the statutes in the matter of the foreclosure of mortgages by advertisement... The court has adopted the rule that the statutes must be strictly pursued, and a clear departure from the terms and requirements of the statutes vitiates the proceedings. *Id.* Because the applicable statute at issue in *Peaslee* provided specifically that the date of the mortgage, as well as the time and location of its recordation, be included in the notice of sale,

the foreclosing party was required to strictly comply with that statutory requirement. *Id.* In other words, when a statute is clear in what it requires, strict compliance is required; when a statute is ambiguous as to what specifically is required, only the purpose of the statute must be met.

In 1910, this Court was presented with a question as to the validity of a foreclosure sale by advertisement where the foreclosing party argued that its errors did not cause any prejudice to the homeowner. The Court rejected the contention that what the statutes require need not be strictly followed. In making this holding, the Court stated: “[f]oreclosure by advertisement is purely a statutory creation. One who avails himself of its provisions must show an exact and literal compliance with its terms; otherwise he is bound to profess without authority of law. If what he does failed to comply with the requirements of the statute, it is void.” *Moore v. Carlson*, 112 Minn. 433, 434 (Minn. 1910).

The Court again discussed the standard to be applied when a party attempts to foreclose a mortgage by advertisement in 1930. At that time, this Court found that foreclosure by advertisement is a proceeding that “is purely in rem and rests upon statutory authority. The requirement is specific and definite. The proceeding is inherently of such character that a strict compliance with the

statute is necessary. *Sheasgreen Holding Co. v. Dworsky*, 181 Minn. 79, 80 (Minn. 1930). The Court in *Sheasgreen* found that the failure to timely record the power of attorney resulted in the proceedings being void. *Id.*

Numerous cases have clarified that strict compliance with statutory requirements are mandated to effectuate a valid foreclosure sale and it would be infeasible to discuss each and every one of them. A non-exhaustive list of additional Supreme Court cases that support strict compliance include: *Jackson v. Mortgage Electronic Registration Systems, Inc.*, 770 N.W.2d 487 (Minn. 2009); *Dunning v. McDonald*, 54 Minn. 1, 5 (Minn. 1893) (holding that every step of the foreclosure process must be regular to effectuate a valid foreclosure); *Mason v. Goodnow*, 42 N.W. 482, 483 (Minn. 1889) (after making passing reference to the phrase substantial compliance, held that the specific requirements of the notice of sale must be strictly complied with); *Richards v. Finnegan*, 47 N.W. 788 (Minn. 1891) (after making passing reference to the phrase substantial compliance, held that acting 15 minutes too early invalidated a foreclosure sale); *Sander v. Stenger*, 136 N.W. 4 (Minn. 1912); *Aldinger v. Close*, 201 N.W. 625 (Minn. 1925); *Hudson v. Upper Michigan Land Co.*, 206 N.W. 44 (Minn. 1925); *Hamel v. Corbin*, 72 N.W. 106

(Minn. 1897); *Finley v. Erickson*, 142 N.W. 198 (Minn. 1913); and *Klotz v. Jeddloh*, 276 N.W. 244 (Minn. 1937).

**B. Case law does not support a substantial compliance standard.**

The majority of the cases cited by Foreclosing Party as allegedly supporting a standard of substantial compliance do not engage in any analysis of the appropriate standard, rely on dated and archaic dicta, merely mention the term substantial compliance in passing, or revolve around statutes that do not contain specific and exact requirements. For example, the case of *Farm Credit Bank of St. Paul v. Kohnen*, 494 N.W.2d 44 (Minn. Ct. App. 1992) dealt with the service of the foreclosure notice on the occupant of land. The statute at issue in that case did not specify what it means to occupy land and did not provide any guidance in resolving potential disputes and ambiguities when multiple occupants of property exist. *See also Holmes v. Crummett*, 20 Minn. 23 (Minn. 1882). Other cases cited by Foreclosing Party only mention the phrase substantial compliance, but do not discuss what substantial compliance means. In part, *see, Mason v. Goodnow*, 42 N.W. 482 (Minn. 1889); *Richards v. Finnegan*, 47 N.W. 788 (Minn. 1891); *Swain v. Lynd*, 74 Minn. 72 (Minn. 1898); *Martin v. Baldwin*, 16 N.W. 449 (Minn. 1883); and *Skartum v. Koch*, 174 Minn. 47 (Minn. 1928). Many

of the cases cited by Foreclosing Party also were cases that resulted in a finding that the sales in question were invalid for failure to even substantially comply with the statutory requirements. It may be a different situation if the Court had found that despite errors, a sheriff's sale was still valid and not void.

**1. Foreclosing Party relies on cases supporting a standard of strict compliance.**

Foreclosing Party relies on multiple cases that explicitly mandate a standard of strict compliance, yet attempt to construe these cases as actually supporting a standard of substantial compliance.

First, Foreclosing Party suggests that the Court utilized strict compliance in name only in *Clifford v. Tomlinson*. Appellant's Br. 17. This suggestion is erroneous. The Court in *Clifford* was explicit in its holding that a party foreclosing a mortgage by advertisement is required to strictly comply with all statutory requirements. *See supra* section I(A). However, the Court merely went a step further in its analysis to demonstrate that the foreclosing party failed to even substantially comply with its statutory requirement. Noting that the foreclosing party had presented a laundry-list of citations, not all of which were based on Minnesota law, the Court found that the error was "not even a substantial compliance with [the statute's] requirements. The wrong date cannot

be substantially the same as the correct one.” *Clifford*, 62 Minn. at 198. When read in context of the entire decision, the Court demonstrates that even if it were to adopt a substantial compliance standard (a possibility which the Court declined to do), the error in this case was not even in substantial compliance with the statute.

Second, Foreclosing Party contends that because the Court in *Peaslee* cited several cases that mentioned the phrase “substantial compliance,” that means that “[t]herefore, the rule from *Peaslee*... is actually a rephrasing and application of the substantial compliance standard.” Appellant’s Br. 17. Like in *Clifford*, the Court in *Peaslee* is very explicit in setting out a standard of strict compliance that must be met by parties attempting to foreclose by advertisement. *See supra* section I(A). Foreclosing Party is attempting to portray statements in *Peaslee* such as “whether such defects are of a prejudicial character is not considered important” as actually meaning that prejudice is required to be demonstrated. *See Peaslee*, 84 N.W. at 1026. Further, the Court in *Peaslee* did not utilize a standard of substantial compliance; rather, it noted that the “legislature never so intended” for foreclosing party’s interpretation to be accurate because it would make the statute at issue “meaningless.” *Id.* at 1025. Regardless, the fact that the

*Peaslee* court cited to alleged substantial compliance cases yet still professed a standard of strict compliance demonstrates the Court was applying a standard distinctly different from the substantial compliance supported by Foreclosing Party.

Third, Foreclosing Party erroneously attempts to portray the case of *Moore v. Carlson* as actually supporting a substantial compliance standard. Appellant's Br. 17. Like the *Clifford* and *Peaslee*, the *Moore* Court unequivocally supported the requirement that a foreclosing party strictly adhere to its statutory requirement. *See supra* section I(A).

Finally, Foreclosing Party incorrectly portrays *Holmes v. Crummett* as holding as valid a foreclosure with an error. In that case, there were two different parties residing on one tract of land: the mortgagor and a lessee. Only the mortgagor was served with notice of the foreclosure sale. *Crummett*, 30 Minn. at 25. As the mortgagor was one of the occupants of the land and had actually been served with notice, there was no cause of action for him to claim a deficiency unless he was somehow prejudiced by the failure to serve the tenant with notice. *Id.* The statute does not require that every single occupant of the lone parcel of property be served with notice; service on one party was sufficient. *See also*

*Casserly v. Morrow*, 101 Minn. 16, 19 (Minn. 1907) (discussing the Court's holding in *Crummett*).

**C. Strict compliance is the legislative intent.**

Foreclosing Party erroneously alleges that because of the existence of Minnesota Statutes §§ 580.19 and 582.25, requiring strict compliance with the foreclosure by advertisement statutory framework “cannot reasonably be applied as the proper standard without running contrary to legislative intent.”

Appellant's Br. 9-10. Minnesota Statute section 580.19 is a rule of evidence and not substantive law that allows, when challenged, *prima facie evidence* of the sheriff's certificate and legal requirements, which may be rebutted by the allegations contained in the complaint and the evidence used to support those allegations. If a fact finder ultimately determines that the foreclosing party failed to strictly comply with all statutory requirements, the rebutted presumptive validity is demonstrated to be inaccurate. If the legislature intended this statute, or any other, to make a sale valid rather than void, it could have explicitly stated so, as it does in the curative acts embodied by Minnesota Statutes section 582.25.

Merely because there are statutes of limitation and a statute of repose imposed for certain defects in the foreclosure process, that does not indicate that

strict compliance is not required. The statute provides that if the statutory period to object has expired, a defective foreclosure is “legalized and made valid and effective,” implying that if the statutory period to object has not yet expired, the defective foreclosure is NOT “legalized and made valid and effective.” Minn. Stat. § 582.25. In fact, the way this curative act is drafted, supports that the foreclosure is immediately void immediately upon defect.

**D. *Hudson* supports a strict standard.**

The district court incorrectly characterized dated and archaic dicta present in *Hudson v. Upper Michigan Land Company*, 206 N.W.44 (Minn. 1925) to support the conclusion that substantial compliance is all that is required to effectuate a valid foreclosure by advertisement. Add. 10-11. In reaching this conclusion, the district court selected just a portion of one sentence of the opinion and ignored the context of the full decision, including *Hudson’s* invalidation of the sale at issue in that case. Foreclosing Party continues to rely on this inappropriately isolated portion of one sentence in arguing that *Hudson* supports substantial compliance as it applies to Homeowner.

First, in *Hudson*, the Court invalidated the sale at issue for failure of strict compliance. The Court in *Hudson* stated in *dicta* that “a 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*, 206 N.W. at 46 (*emphasis added*).

The *Hudson* Court continued with its analysis, stating "that the omission of any required act prejudicial to a party in interest will render the attempted foreclosure ineffectual; and that, although 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.*" *Id.* (*emphasis added*). Read in the context of the entire sentence, the dicta regarding "mere irregularities" in *Hudson* still found that all statutory requirements calculated to protect the interests of the *party whose rights are affected* must be followed, regardless of whether prejudice has been shown.

Further, the Court contemplated two separate parties: a party whose rights are affected and a party in interest. Homeowner is a party whose rights are affected as she owned and occupied the Subject Property at all relevant times, including today. Owners of land would always be a party in interest. A junior lienholder is an example of a party that would fall into the second category, being a party in interest that may have to demonstrate prejudice in order to

maintain an action under this alleged new standard set forth by *Hudson's* dicta. Yet the bidding public is put at the disadvantage in every case where there is a defect under such a standard, as a public bidder would not be able to determine (as would perhaps a mortgagor, mortgagee, lienholder, or insider) whether a defect apparent on the face of the title, the notice or learned through investigation of the foreclosure process would cause a sale to be void or valid. If the system is intended to encourage public bidders, a standard other than a bright-line invalidation advantages insiders and frustrates public bidders and therefore that purpose. Homeowner concurs with the proposition forwarded by the Minnesota Land Title Association, the Minnesota Bankers Association, and the Minnesota Association of Realtors that a clear departure from the essential requirements of the statute will vitiate the proceeding and that all "requirements that benefit anyone with an interest in the property" must be complied with. Br. of Minnesota Land Title Assoc., et al. as Amicus Curiae, p. 19.

**E. Redemption law is irrelevant.**

Foreclosing Party relies on the area of redemption law to support its claim that substantial compliance should be applied to the area of foreclosures by advertisement. However, redemption is irrelevant for present purposes as

substantial case law exists in the area of foreclosure by advertisement and because redemption is not equivalent to foreclosure by advertisement. Foreclosure by advertisement is a remedy that exists in derogation of common law which arises by statute. Statutes which exist in derogation of common law are strictly construed. *See, e.g., Kersten v. Minnesota Mut. Life Ins. Co.*, 608 N.W.2d 869, 873 (Minn. 2000); *Enghusen v. H. Christiansen & Sons, Inc.*, 259 Minn. 442, 448 (Minn. 1961). Redemption, on the other hand, is a distinct process with differing equities and a foundation in common law. One who seeks to redeem from a foreclosure sale does not take from a person in possession of the property or from the title owner of the property, but instead from the highest bidder at a sale. The court in *Sieve* was careful to limit its ruling to a narrow issue: “Substantial compliance with the statutory redemption requirement” may be “all that is necessary to effect a valid redemption,” (*See Sieve*, 613 N.W.2d at 793) but the present case deals with the nonjudicial foreclosure process rather than post-foreclosure redemption.

Even the case law cited by Foreclosing Party indicates that strict compliance with the foreclosure statutes are required. “The record notice required in the redemption procedure is essential to preserving these rights and

we have required strict compliance with the notice provisions of the statute.” *In re Petition of Brainerd Nat’l Bank*, 383 N.W.2d 284, 289 (Minn. 1986).

## **II. Foreclosing Party Failed the Statutory Requirements.**

### **A. Foreclosing Party failed to timely record the notice of pendency.**

“[W]hether the district court properly construed a statute is reviewed de novo.” *State ex rel. Graham v. Klumpp*, 536 N.W.2d 613, 615 (Minn. 1995) (citing *Hibbing Educ. Ass’n v. Public Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn. 1985)). “When the words of a law in their application to an existing situation are clear and free from ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.” Minn. Stat. § 645.16. “Any person in possession of real property personally or through the person’s tenant, or any other person having or claiming title to vacant or unoccupied real property, may bring an action against another... for the purpose of determining such adverse claim and the rights of the parties.” Minn. Stat. § 559.01.

Minnesota Statute § 580.032, subd. 3 requires a foreclosing party to “record a notice of the pendency of the foreclosure with the county recorder or registrar of titles in the county in which the property is located *before the first date of publication* of the foreclosure notice but not more than six months before the first

date of publication.” (*emphasis* added). Minn. Stat. § 580.032, subd. 3.

Foreclosing Party does not dispute the fact that it failed to strictly adhere to its statutory requirements. It is undisputed that the notice of pendency was not recorded in a timely fashion; rather, it was recorded one day late. Add. 037, AA 099. An application of the plain language of Minnesota Statute § 580.032, subd. 3 to the present case results in a finding that Foreclosing Party failed to comply with its statutory requirements.

**1. The Curative Act clarifies that Foreclosing Party’s attempted foreclosure is illegal and does not serve to cure the defects.**

Minnesota Statute § 582.25 (the “Curative Act”) provides that certain deficiencies in the foreclosure by advertisement process are “legalized and made valid and effective to all intents and purposes” after “one year after the last day of the redemption period of the mortgagor[.]” Minn. Stat. § 582.27 (specifying time period of one year). Minnesota Statute § 582.25(22) is directly on point with the present case and legalizes a deficiency where “the notice of pendency of the foreclosure 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.”

Prior to the expiration of the statute of limitations, a sale containing a defect is not legal, valid, or effective. As this action has been brought within one year of the expiration of the redemption period, the Curative Act has not operated to legalize and make valid and effective the sheriff's sale of the Subject Property.

The district court erred in assuming that because the statute of limitations is one year "as opposed to a much longer period of time" that the errors are less important. Add. 9. The statute of limitations, whatever its length, cannot marginalize Homeowner's valid claim and prevent her from asserting her rights when the limitation period has not yet expired. The legislature has provided a one year period where the homeowner is rightfully entitled to dispute errors in the foreclosure process. The redemption period on the Homeowner's property expired on January 4, 2011. Add. 4. On February 3, 2011, Homeowner brought the present action against the Foreclosing Party. *Id.* As such, the curative provisions have no impact.

**B. Foreclosing Party failed to timely record all assignments.**

Similarly, Foreclosing Party failed to timely record all assignments.

“To 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.” Minn. Stat. § 580.02. It is “a *condition precedent* to the right to foreclose by advertisement” that all assignments of the mortgage to be foreclosed have been recorded. *Jackson*, 770 N.W.2d at 496 (*emphasis added*) (quoting *Soufal v. Griffith*, 198 N.W. 807, 808 (Minn. 1924)). A “Notice of Pendency of Proceeding and Power of Attorney to Foreclose Mortgage... initiate[s] the foreclosure by advertisement.” *Molde v. Citimortgage*, 781 N.W.2d 36, 43 (Minn. Ct. App. 2010). The mortgage and all assignments must be recorded prior to initiation of foreclosure proceedings so that the record, “without the aid of extraneous evidence” prevents the title of the assignee from being in doubt. *Soufal*, 198 N.W. at 809. Further, prior to the initiation of foreclosure by advertisement, all prerequisite conditions must be met, which includes recordation of all assignments:

As the law now stands there can be no fair question that the pendency of such an action suspends for the time being the right to take any step towards foreclosing the mortgage by advertisement. The first publication of the notice is as necessary as the last to the validity of the foreclosure, and **hence the right to proceed must exist from the first publication up to the sale.** The revision commission did not indicate an intention to change the prerequisite conditions for foreclosure by advertisement.

*Aldinger v. Close*, 161 Minn. 404, 405 (Minn. 1925) (**emphasis added**).

Foreclosing Party fails to treat the requirements of Minnesota Statutes § 580.02 as prerequisite conditions for foreclosure by advertisement, including the requirement that all assignments already be recorded to entitle a party to initiate foreclosure by advertisement proceedings. In particular, Foreclosing Party erroneously states that “[e]ven if strict compliance were required, all assignments were indisputably recorded more than 6 months prior to the foreclosure sale.” Appellant’s Br. 35-36. Foreclosing Party continued with its erroneous analysis, stating that “[b]y 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... Neither the *Jackson* court nor the Minnesota legislature expressed or imposed a precise deadline for accomplishing the recording of all assignments of mortgage.” Appellant’s Br. 36. “In fact, section 580.02 does not even require the assignment of mortgage to be recorded prior to the first date of publication.” Appellant’s Br. 27.

The respondent in *Aldinger* forwarded the same argument forwarded by Foreclosing Party in the present case: that merely prior to the day of the sheriff’s sale, the conditions required by what is now Minnesota Statutes § 580.02 be

fulfilled. Respondent in that case argued “that the sale is the foreclosure and what takes place before that are only preliminary incidents, so that, if no action is pending on the day of sale, the requisite of the statute in that respects is not wanting.” *Aldinger*, 161 Minn. at 405. When considering if respondent’s argument was sound, the Court replied, “We cannot concur. The requisites called for must exist when the first step is taken in the foreclosure. If not, the right to proceed to do what is necessary for a valid sale is suspended.” *Id.* See also *Merrick v. Putnam*, 73 Minn. 240, 243 (Minn. 1898) (finding that an assignment after commencement of foreclosure by advertisement proceedings prevents a valid sale from occurring unless a completely new sale is begin, regardless of whether the assignment is recorded prior to the sale.).

In the present case, Foreclosing Party failed to record all assignments prior to first publication of the foreclosure notice. The Second Assignment was to an unknown entity known only as “1st Fidelity.” Add. 032. The Mortgage was then apparently later assigned from a second unknown entity known only as “JP Mortgage Chase Bank, N.A.” to Foreclosing Party. Add. 034-036. It is unclear how this unknown entity came to own the Mortgage and why that assignment was not recorded. Regardless, the Mortgage was apparently subjected to the

Third Assignment. The Third Assignment was not recorded until May 18, 2010, at least one day too late. Add. 034-036. First publication of the foreclosure notice had already occurred earlier in the day on May 18, 2010. AA. 099. As Foreclosing Party failed to satisfy the conditions precedent mandated by Minnesota Statutes § 580.02 prior to the commencement of foreclosure proceedings, it cannot claim to have executed a valid foreclosure sale.

**C. The title record does not make clear the right of Foreclosing Party to cause a foreclosure by advertisement.**

Before a party is entitled to initiate foreclosure by advertisement proceedings, “the title of an assignee of a mortgage [must] appear of record, and of record in such manner that evidence extraneous to the record will not be needed to put it beyond reasonable question. *Soufal*, 198 N.W. at 808 (Minn. 1924). “If the record, without the aid of extraneous evidence, does not put the title of the assignee of a mortgage beyond doubt, he cannot foreclose by advertisement.” *Id.* at 809. “[T]he record shall be so complete as to satisfactorily show the right of the mortgagee or his assigns to invoke its aid.” *Id.* (quoting *Benson v. Markoe*, 42 N.W. 787, 787 (Minn. 1889).

In the present case, the record does not put the title of Foreclosing Party beyond doubt. When examining the title record, it is apparent that the Mortgage

was originally owned by Chase Bank USA, N.A. and was later assigned to JPMorgan Chase Bank, N.A. AA. 051-052, 074-075. The Second Assignment was from JPMorgan Chase Bank, N.A. to "1st Fidelity." Add. 032. Nothing in the title record demonstrates that the entity "1st Fidelity" is the same as 1st Fidelity Loan Servicing, LLC. Entities with "1st Fidelity" in their name abound. Similarly, nothing in the title record demonstrates that "1st Fidelity" transferred the Subject Property to any other entity, whether that be JPMorgan Chase Bank, N.A. or JP Mortgage Chase Bank, N.A. Despite this lack of evidence of an assignment from 1st Fidelity, the unknown entity "JP Mortgage Chase Bank, N.A." appears in the title records for the first time in the Third Assignment. Add. 034-036. It is unknown how JP Mortgage Chase Bank, N.A. came to own the Mortgage and under what authority it purports to be legally able to assign the Mortgage to Foreclosing Party.

As a result of the poorly and incorrectly executed and recorded assignments of the Mortgage, several critical questions remain as to the proper ownership of the Mortgage: If the Second Assignment was actually valid, as Foreclosing Party claims, how can any party other than "1st Fidelity" assign the Mortgage? Who is JP Mortgage Chase Bank, N.A.? How did JP Mortgage Chase

Bank, N.A. acquire an ownership interest in the Mortgage? Is 1st Fidelity the same as Foreclosing Party? If the Second Assignment was legally sufficient, why is there the recordation of an additional assignment?

It is only with the use of extraneous evidence that an individual examining the title records would be able to determine if “1st Fidelity” is the same entity as Foreclosing Party. It is unclear if an individual examining the title records would be able to resolve the remaining discrepancies even with the assistance of extraneous evidence. In short, the title record in this case is far from clear and does not demonstrate that Foreclosing Party is the proper owner of the Mortgage.

### **III. Homeowner Has Standing to Challenge the Foreclosure Proceedings on All Three of the Defective Foreclosure Counts.**

When a foreclosure sale is advertised and bidders are solicited, errors in the foreclosure process “would necessarily deter bidders and stifle competition at the sale.” *Backus v. Burke*, 48 Minn. 260, 268 (Minn. 1892). When errors in the foreclosure by advertisement process exist, “[i]ntended purchasers at the sale might be deterred from bidding, upon such an error, and thus the mortgagor be injured, because in case of a deficiency, he would be liable.” *Clifford*, 62 Minn. at 198. Even in cases where no deficiency is possible due to Minnesota Statutes §

582.30, eliminating errors in the foreclosure by advertisement process is always for the benefit of the mortgagor as the mortgagor is entitled to the surplus. Eliminating errors in the foreclosure by advertisement process “is important to the mortgagor, because it is for his interest that the title should be as marketable as it may be, since he may be liable for a deficiency; and it is important to the mortgagor, or those claiming under him, because they may be entitled to a surplus.” *Thorpe v. Merrill*, 21 Minn. 336, 338 (Minn. 1875). Further, even when no deficiency is allowed by statute, mortgagors are impacted by a lower sale price as it may create a salable interest in the property. If the high-bid at the sheriff’s sale is for less than the value of the property, a mortgagor could sell his/her rights in the property to a foreclosure purchaser. Such foreclosure reconveyances have been specifically considered by the legislature. See Minn. Stat. § 325N, generally and § 325N.01(11), specifically.

For these reasons alone, Homeowner should be found to have standing through to challenge the validity of a foreclosure by advertisement in the case at bar. Regardless, Homeowner has standing through multiple avenues.

**A. The statutes at issue are intended to protect Homeowner.**

- 1. The Preforeclosure Notice indisputably is for the benefit of Homeowner.**

Minnesota Statutes § 580.02(4) requires that to entitle any party to foreclose a mortgage by advertisement, it must comply with section 580.021 before recording a notice of pendency under section 580.032. Minn. Stat. § 580.02(4). Section 580.021 requires that a foreclosing party provide the mortgagor with a preforeclosure counseling notice contained in a form prescribed by section 580.022.

Foreclosing Party has made no argument that the Preforeclosure Notice is not for the protection of Foreclosing Party. Accordingly, Homeowner has standing to challenge the validity of the Sheriff's Sale pursuant to this statute.

**2. Minnesota Statutes § 580.02(3) is for the benefit of Homeowner.**

Foreclosing Party repeatedly claims that the recordation of all assignments prior to the commencement of foreclosure proceedings is not intended to protect Homeowner. "The foreclosure requisites statute, section 580.02, was not enacted to protect or benefit [Homeowner] with respect to the recording of any assignments of mortgage." Appellant's Br. 30. "[T]hat assumes [Homeowner] was even an intended beneficiary to [Minnesota Statutes §§ 580.02 and 580.032], which she was not... [Homeowner] was not intended to be protected by the

applicable statutes.” *Id.* at 31-32. “As a matter of law, [Homeowner] cannot demonstrate... intended beneficiary status... [Homeowner] is also not an intended beneficiary of section 580.02, at least with respect to the requirement that all assignments be of record.” *Id.* at 37. “[Homeowner] was not the intended beneficiary of the statute requiring the recording of all assignments.” *Id.* at 38. “In this case, even assuming that [Homeowner] was intended to benefit from the recording of the assignment of mortgage (which she is not)...” *Id.* at 39.

Foreclosing Party’s repeated statement that Minnesota Statutes § 580.02 is not intended to benefit Homeowner is conclusory. Foreclosing Party fails to cite a single legal authority that would indicate the soundness of this conclusion.

Such conclusory statements must be rejected as this Court has already ruled on numerous occasions that section 580.02 and the recordation of all assignments is important for a mortgagor. Quoting *Backus*, 48 Minn. at 269 (Minn. 1892), Justice Page has recently stated that “for obvious reasons [the recordation of all assignments] was important, *not only to the parties to the mortgage itself* and to the assignees...” *Jackson*, 770 N.W.2d at 504 (Page, J., dissenting). The operative portion of *Jackson* and *Burke* was subsequently

acknowledged and cited by Foreclosing Party while this case was still pending in the trial court. AA 025.

The Supreme Court has further ruled on this matter on multiple occasions. In considering the requirement that all assignments be recorded pursuant to what is now codified as Minnesota Statutes § 580.02(3), this court held: “[I]t was for obvious reasons important, not only to the parties to the mortgage itself... that some permanent and accessible evidence of the existence and contents of the mortgage, and of the title to the same, should be provided.” *Soufal*, 198 N.W. at 809 (Minn. 1924) (quoting *Morrison v. Mendenhall*, 18 Minn. 232, 236 (Minn. 1872). “That purpose would not be accomplished if the record did not furnish all the evidence needed to show the title of an assignee seeking to foreclose by advertisement.” *Soufal*, 198 N.W. at 809. “To name the various assignees is not without value to the mortgagor. He is entitled to know the history of the transaction, and to consider in connection with his action the various assignments which affect the title of the person seeking to foreclose by advertisement.” *Moore*, 112 Minn. at 434.

Perhaps the clearest statement from the Supreme Court on how section 580.02 is intended to benefit the homeowner came in 1875:

We do not at all assent to the doctrine of the authorities cited by counsel for plaintiff, to the effect that the statute, in requiring a mortgage to be recorded before foreclosure by advertisement, has in mind the protection and benefit of the purchaser at the foreclosure sale only. The requirement is for the benefit of all parties interested, and, among others, of the mortgagor and those who claim under him. That the record should correctly show the authority of the mortgagee or his assigns to sell, is important to the mortgagor, because it is for his interest that the title should be as marketable as it may be, since he may be liable for a deficiency; and it is important to the mortgagor, or those claiming under him, because they may be entitled to a surplus.

*Thorpe*, 21 Minn. at 338. Foreclosing Party does not respond to the Court's unambiguous prior rulings on this issue.

**3. Minnesota Statutes § 580.032 is for the benefit of Homeowner.**

Similar to its discussion regarding section 580.032, Foreclosing Party provides only conclusory statements to support its contention that this statute had no intention to benefit Homeowner. The only legal citation Foreclosing Party provides to this effect is to an unpublished federal district court case now on appeal to the 8th Circuit. *Badrawi v. Wells Fargo Home Mortgage, Inc.*, 2012 WL 2178966, Civil No. 12-128 (DWF/JJG) 2012. Foreclosing Party's reliance on *Badrawi* is inappropriate under the Mortgage, which states that the Mortgage is governed by "Applicable Law." The only case law included as Applicable Law is

“final, non-appealable judicial opinions.” *See supra*, § III(B); AA. 052. *Badrawi* is currently on appeal to the 8th Circuit as Case Number 12-2656.

Section 580.032 was enacted in 1992, which is relatively recent in the scheme of Minnesota’s foreclosure by advertisement statutes. Accordingly, there is little discussion in the courts as to the party intended to be protected.

However, just as Foreclosing Party erred in assuming that section 580.02 was only for the benefit, it is error to assume that section 580.032 has such a narrow purpose.

The notice of pendency alerts the entire world to the existence of a foreclosure by advertisement of the property in question. The requirement that a foreclosing party record a notice of pendency into the public record, rather than mail or otherwise deliver the notice to junior creditors, demonstrates that this requirement is intended for the benefit of more parties than just junior creditors. Putting the notice of pendency in the public record alerts all potential buyers of the foreclosure. As discussed above, *supra* § III, having potential purchasers aware of a sale benefits the mortgagor, as the mortgagor may be liable for a deficiency, is entitled to a surplus, and could potentially sell his or her interest post-sale.

Additionally, the notice of pendency is the first document required to be recorded that indicates a foreclosure of a mortgage and puts the public on notice of this fact. This necessarily means that as this statute is intended for the public at large, including the mortgagor. Because the mortgagor only receives a notice of pendency via public record, Foreclosing Party's failure to timely record the notice is problematic for both the public at large and the mortgagor. To hold that the mortgagor is incapable of maintaining a cause of action for noncompliance with this statute, when every single potential purchaser in the world would have a potential claim, would be an absurd result.

Further, section 580.032, subd. 3 works in conjunction with section 580.02 to provide a bright line requirement: prior to the time the notice of pendency is appropriately recorded, a mortgagor must be provided with a pre-foreclosure counseling notice. Thus, a mortgagor looking to the public record should be able to determine if his or her rights related to the preforeclosure notice were violated or protected up until that point. Additionally, the timeliness requirement of this affirmative step by the foreclosing party of recording the notice of pendency also protects property owners from lien-holders feigning foreclosure without intent of accomplishing the same.

Regardless, an examination of the purpose of this Minnesota statute is unnecessary as there can be no finding that the statute is ambiguous. *See* Minn. Stat. § 645.16. The statute unambiguously requires that a party wishing to have the statutory benefit of a foreclosure by advertisement must record a notice of pendency prior to the date of the first publication. Minn. Stat. § 580.032, subd. 3.

**B. Homeowner has standing under the contract.**

The Mortgage provides that it “shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in [the Mortgage] are subject to any requirements and limitations of Applicable Law.” AA. 061, § 16. “If Lender invokes the power of sale... the Property shall be sold at public auction in the manner prescribed by Applicable Law.” AA. 063, § 22. “Applicable Law” is defined the Mortgage as including “all controlling applicable... state... statutes... as well as all applicable final, non-appealable judicial opinions.” AA. 052.

In the present case, Homeowner is a party to the Mortgage contract and is entitled to receive the benefits of her bargain. *See, e.g., Cederstand v. Lutheran Borthershood*, 117 N.W.2d 213, 220 (Minn. 1962) (Stating that a contractual promise must be the product of a bargain, where bargain “means a negotiation resulting

in the voluntary assumption of an obligation by one party upon condition of an act or forbearance by the other.”). As part of this bargain, Homeowner and Foreclosing Party agreed that if a condition of default existed that entitled Foreclosing Party to invoke remedy of the power of sale, a sale would only occur in the manner prescribed by applicable law. Applicable law in this case includes the foreclosure procedures set forth by Minnesota Statutes § 580.032, subd. 3, which requires Foreclosing Party to record a notice of pendency prior to the date of first publication of the foreclosure notice.

**C. Homeowner has standing under Minnesota Statutes § 559.01.**

“Any person in possession of real property personally or through the person’s tenant, or any other person having or claiming title to vacant or unoccupied real property, may bring an action against another... for the purpose of determining such adverse claim and the rights of the parties.” Minn. Stat. § 559.01.

As Homeowner has been in possession of the Subject Property at all relevant times and claims title to the Subject Property, the district court’s finding that standing was lacking is without merit pursuant to the plain language of Minnesota Statute § 559.01. The language used in section 559.01 indicates an

intention to infer standing on an individual in possession of real property to bring claims related to title and proper ownership. Even if a party were required to demonstrate specific standing under every particular section of the foreclosure by advertisement statutory framework (a burden which Homeowner contends has been successfully accomplished), the purpose of section 559.01 would remain to be seen. A party would have a right to bring an action to determine its adverse claim under the particular statute or other acceptable legal theory, rendering section 559.01 meaningless. The intention of the legislature is that every statute shall have meaning. *See* Minn. Stat. § 645.16.

**IV. Sections 580.02 and 580.032 are Mandatory.**

Foreclosing Party contends that Minnesota Statutes §§ 580.02 and 580.032 are directory, rather than mandatory. In making its argument, Foreclosing Party overreaches in its analysis of the Court's ruling in *Manco of Fairmont, Inc. v. Town Board of Rock Dell Township*, 583 N.W.2d 293, 295 (Minn. Ct. App. 1998). While the Court actually stated that when a statute expresses consequences, it is mandatory and strict compliance is required, it does not state that neglecting to explicitly state the consequences for failure to comply automatically makes the statute directory. Regardless, the foreclosure by advertisement statutes express

consequences for failure to comply with the requirements and do not use terms such as “may” and “shall” interchangeably.

**A. The consequence for statutory noncompliance is invalidation.**

“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... not later than five years after the date of such sale.” Minn. Stat. § 580.20. “No such sale shall be held invalid or set aside unless the action in which its validity is called in question be commenced... within 15 years after the date of such sale.” Minn. Stat. § 580.21.

The legislature has enacted two separate statutes to set forth the statute of limitations for the invalidation of foreclosure sales by advertisement. Section 580.20 sets a limitations period of five years for specified violations; section 580.21 sets a limitations period of 15 years for remaining violations not otherwise accounted for in the statutory framework.

That the statutory framework is set up so that the remedy for all violations of the foreclosure by advertisement statutes is invalidation unless otherwise noted is made clear by statutes not at issue in this case. “The omission of all or

some of the information required by this section from the notice shall not invalidate the foreclosure of the mortgage.” Minn. Stat. § 580.025. “No mortgage foreclosure sale under this chapter is invalid because of failure to comply with this section. Minn. Stat. § 580.042, subd. 5(a). “If a person foreclosing a mortgage by advertisement fails to mail a notice of the sale in accordance with subdivision 4, the failure does not invalidate the foreclosure.” Minn. Stat. § 580.032, subd. 5.

Presumably, if the violations of the statutes were not intended to invalidate foreclosure proceedings, the legislature would have no need to go out of its way to insert such language into these statutes. Rather, the legislature would be going out of its way to insert language into specific statutes to specify that certain defects result in the invalidation of foreclosure sales if the general rule was that statutory violations do not impact a sale’s validity. The only place in chapter 580 aside from sections 580.20 and 580.21 where the legislature references errors invalidating sales is in section 580.041, subd. 4. Even in that section, the legislature was merely shortening the statute of limitations period for bringing an action under section 580.041.

Further, section 580.032, subdivision 5 is particularly useful in determining if the legislature intended for violations of section 580.032, subdivision 3. With

subdivision 5, the legislature specifically stated that violations of subdivision 4 do not invalidate foreclosure sales. Had the legislature wanted to specify that a violation of subdivision 3, which is the subdivision at issue in this case, did not invalidate a foreclosure sale, it would have done so.

**B. The language used in sections 580.02 and 580.032 is not inconsistent and terms are not used interchangeably.**

“When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.” Minn. Stat. § 645.16. It is only when “the words of a law are not explicit [that] the intention of the legislature may be ascertained by considering” various other factors. *Id.* When dealing in questions of statutory construction, “[o]rdinarily, the word ‘may’ is directory and ‘shall’ is mandatory in meaning.” *In re Trusteeship of First Minneapolis Trust Co.*, 277 N.W. 899, 901 (1938). The Court went on to explain that when a statute uses words such as “may,” “shall,” “must,” and “will” interchangeably and without discrimination, it is without significance which one is used. *Id.* at 902.

As a preliminary matter, there has been no finding that Minnesota Statutes §§ 580.02 and 580.032, subd. 3 are not clear and free from all ambiguity. No such finding could be made as these statutes leave no doubt as to what is required.

Because of this lack of ambiguity, the Court need not even engage in an analysis of the meaning of the statutes.

Regardless, section 580.02 does not use any vague or interchangeable language. It provides that “to entitle” a party to cause a foreclosure by advertisement, “it is requisite” that the preconditions are satisfied. The statute is mandatory and not directory; if a foreclosing party does not satisfy its prerequisites, it is not entitled to cause a foreclosure sale by advertisement.

While section 580.032 does make use of the words “shall,” “may,” and “must,” the statute does not do so indiscriminately and Foreclosing Party has presented the Court with no reason to depart from using these terms’ ordinary and common meanings. *In re Trusteeship*, 277 N.W. at 902. Section 580.032 consistently sets forth the duties and obligations of a party attempting to foreclose a mortgage. A foreclosing party shall timely record a notice of pendency and shall timely mail a notice of sale to requesting parties. Only the failure to timely mail notice is specified by the legislature as a violation that does not invalidate the foreclosure. The legislature does not depart from the consequence of invalidation set forth in sections 580.20 and 580.21 for violations related to section 580.032, subd. 3.

Because of the consistency of section 580.032, this case is dissimilar from the one in *In re Trusteeship of First Minneapolis Trust Co.* The Court found that under the statute at issue in that case, the term “may” was used in regulating the powers and duties of building and loan associations, state banks, and trust companies, whereas the word “shall” was used with respect to savings banks and the investment of accumulations by trust companies. *In re Trusteeship*, 277 N.W. at 902. The Court reasoned that it could “hardly be thought that the duty to observe the provisions of the statute is less obligatory upon state banks and building and loan associations than it is upon savings banks.” *Id.* It was for this reason that the Court found “[t]he use of the word ‘may’ is not decisive.” *Id.*

As there is no inconsistency or interchangeability of the terms used in the statutes at issue in this litigation, there is no reason for the Court to depart from using the ordinary and common meanings of the words contained in the statutes. The common and ordinary words contained in the statutes indicate that the obligations of Foreclosing Party are mandatory, not directory.

**V. The Sale of the Subject Property is Void.**

**A. The point is moot.**

“It is well established that this court will hear only live controversies and will not pass on the merits of a particular question merely for the purpose of setting precedent.” *In re Inspection of Minnesota Auto Specialties, Inc.*, 346 N.W.2d 657 (Minn. 1984). “If the court is unable to grant effectual relief, the issue raised is deemed to be moot resulting in dismissal of the appeal. Moreover, the court does not issue advisory opinions, nor decide cases merely to establish precedent.” *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989) (internal citations omitted).

In the present case, Foreclosing Party concedes that Homeowner timely filed her appeal. *See, e.g.*, “[Foreclosing Party] admits [Homeowner] commenced her challenge within the applicable statutes of limitation and statute of repose.” Appellant’s Br. 14. Thus, even if Homeowner was required to file a lawsuit for the invalidation of the sheriff’s sale of the Subject Property, that prerequisite has indisputably been satisfied. Regardless of whether the foreclosure process was, prior to challenge, void or voidable is irrelevant and the Court of Appeals was correct to characterize the sale as void. Because of this, the distinction of whether the sheriff’s sale was void or voidable is moot.

**B. In the alternative, the sale was void.**

“Every mortgage foreclosure sale by advertisement in this state under power of sale ... is, after expiration of the period specified in section 582.27, *hereby legalized and made valid and effective* to all intents and purposes, as against any or all of the following objections.” Minn. Stat. § 582.25.

The language used by the legislature in section 582.25 indicates that foreclosure sales subject to defects in the foreclosure process are not legal, valid, or effective prior to the expiration of the statutory time period. A defective foreclosure sale remains defective; the only thing that changes is whether a homeowner is able to assert his or her rights. The mere fact that a statute of limitations or statute of repose exists does not mean impact the merits of a situation. Rather, they merely provide a cut-off timeframe within which rights must asserted. As an example of this, if an individual commits theft, the expiration of the statute of limitations for theft does not mean that the action was not illegal; it merely means that the individual committing the theft may assert the statute of limitations as a defense to avoid consequences.

Additionally, numerous cases classify errors in the foreclosure process as making a foreclosure sale void, as opposed to voidable. *See, e.g., Backus v. Burke*, 48 Minn. 260 (Minn. 1892); *Cassery v. Morrow*, 101 Minn. 16 (Minn. 1907); *Peaslee*

*v. Ridgway*, 84 N.W. 1024 (Minn. 1901); *Swain v. Lynd*, 74 Minn. 72 (Minn. 1898);  
*Martin v. Baldwin*, 16 N.W. 449 (Minn. 1883); and *Sheasgreen Holding Co. v.*  
*Dworsky*, 181 Minn. 79 (Minn. 1930).

**VI. Public Policy Favors Strict Compliance.**

**A. Strict compliance results in less uncertainty and litigation.**

It is not in the best interests of the public to allow mortgage companies to take title to real property without judicial oversight and without requiring the mortgage companies to adhere to all statutory requirements. Applying a standard of substantial compliance to foreclosures by advertisement would create a great uncertainty following foreclosure by advertisement. Every time there is any irregularity in any sale, a question would be raised as to whether or not the foreclosure process still substantially complied with the foreclosure statutes. Such an uncertainty will spark additional and much more prolonged litigation regarding whether compliance was substantial, whereas the question is simple when the appropriate standard of strict compliance is applied.

For example, in the present case, it is indisputable that Foreclosing Party failed to strictly comply with its statutory requirements for multiple reasons. Under the appropriate strict compliance standard, the foreclosure sale of the

Subject Property is readily identified as being void. However, to change Supreme Court precedent and apply a substantial compliance test would complicate and prolong the litigation. In a substantial compliance test, not only would the errors have to be identified, but the Court would have to engage in a case-by-case analysis of each mortgagor's particular circumstance and have the factual question of whether or not prejudice exists resolved. Given that such factual circumstances and questions would generally be unable to be resolved on a motion for summary judgment, trials would be assured in the majority of cases.

The Court has already acknowledged this benefit of strict compliance with redemption laws, stating: "The Real Property Council... has rightly noted that recognizing an exception to strict enforcement of the redemption laws would endanger the predictability essential in the rules governing real estate transactions." *In re Petition of Brainerd Nat'l Bank*, 383, N.W.2d at 289.

Additionally, determining prejudice is made nearly impossible by the nature of the violations in many cases. To appropriately determine prejudice, the courts will be forced to engage in a determination, *post facto*, of whether the errors present in the case actually deterred potential bidders from bidding at the sale, whether all bids would have remained the same as they would have been

had all statutory requirements actually been complied with, and whether the mortgagor would have been able to sell his or her rights in the property in a post foreclosure reconveyance. The resolution of these questions is difficult to impossible and would require all parties involved to engage in hypotheticals. It is impossible to know with much certainty what a party or public bidder would have done in the past had circumstances been different.

Additionally, the amicus parties contend that “lenders may need to foreclose all mortgages by action, which could flood the overburdened and underfunded judicial system with thousands of new cases each year.” Br. of Minnesota Land Title Assoc., et al. as Amicus Curiae, 23. “Mortgagees would have no other choice but to foreclose by judicial action.” Br. of Minnesota Credit Union Network as Amicus Curiae, 8-9. However, the Court has already addressed such concerns, stating: “If such embarrassing consequences flow from mistakes of this character, the best remedy we can suggest is to be more careful, and not make them. There can be no possible difficulty in examining the proof sheets and having the whole matter correct.” *Dana v. Farrington*, 4 Minn. 433, 437 (Minn. 1860). Demanding that a party foreclosing on a mortgage strictly comply

with the clear statutory requirements that are before it prior to allowing the foreclosing party to avail itself of a statutory remedy is a small burden.

**B. Substantial compliance encourages foreclosures with greater errors.**

Allowing parties to foreclose by advertisement under a substantial compliance standard encourages the completion of foreclosures with greater errors. Such a practice is not in the best interests of the public, particularly in light of the plain and simple statutory requirements. Allowing Foreclosing Party to hold its foreclosure of the Subject Property as valid creates questions as to where the new line will be drawn as far as acceptable and unacceptable foreclosure errors. The legislature has already drawn that bright line for the Court: failing to record the notice of pendency prior to the first date of publication is not allowed. Failing to record all assignments prior to the first date of publication is now allowed. If the Court is to allow these errors, what would stop the Court from allowing Foreclosing Party to be two days late, or one week late, or fail to record the requisite documents at all?

This issue was already considered by the Courts. "If the true date can be disregarded... even though it be a difference of only two days, then we do not see why an erroneous date where the difference would be much greater might not be

substituted.... we have no discretion to exercise, as the requirements of the statute are absolute.” *Clifford*, 62 Minn. at 197.

**VII. Summary Judgment Was Inappropriate on the Issues of Forcible Eviction and the Preforeclosure Counseling Notice.**

Foreclosing Party alleges that the Court must conclude that the preforeclosure counseling notice required to be provided to her was actually sent to her. Appellant’s Br. 39. In doing so, Foreclosing Party is asking the Court to resolve a factual dispute, inappropriate for a motion for summary judgment. Foreclosing Party alleges that there “is no requirement in section 580.021 that [Homeowner] be in receipt of the letter.” *Id.* at 40. However, this contradicts the plain language of the statute: “Before the notice of pendency... is recorded, a party foreclosing a mortgage must provide to the mortgagor” a preforeclosure counseling notice as prescribed in section 580.022. It is unclear how a notice may be actually provided if not received. Further, Homeowner has presented sufficient evidence to contradict the conclusory statements by Foreclosing Party that it did provide Homeowner with the notice. Homeowner testified via affidavit that she had never seen the preforeclosure counseling notice allegedly sent to her, that she has kept all correspondence that she had received from Foreclosing Party, and that the preforeclosure counseling notice was not

included. AA 136. A Court may not resolve this factual dispute on summary judgment.

Similarly, a factual dispute still exists relating to Homeowner's claim of forcible eviction. The Court of Appeals correctly determined that there was a dispute of material fact regarding whether the Subject Property was vacant or occupied. Add. 027. Homeowner presented sufficient factual testimony that she occupied the property, including informing an agent of Foreclosing Party that her family occupied both units in the duplex and that normal items demonstrating occupancy would have been readily apparent to Foreclosing Party when it entered into the Subject Property to change the locks. Add. 026, AA. 134-35. Even Foreclosing Party's evidence acknowledges that Foreclosing Party was informed that Homeowner occupied the entire Subject Property prior to the locks being changed. Add. 027, AA109. Homeowner also submitted utility bills demonstrating actual occupancy of the Subject Property. Add. 026, AA. 134-160. Thus, the district court's conclusion that half the Subject Property was vacant was a resolution of a material factual dispute inappropriate for summary judgment.

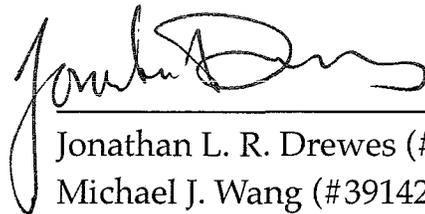
Further, there is no reason to treat the two halves of the Subject Property as separate. Although a duplex, the Subject Property consists of one tract of land that is covered by one mortgage, subject to one foreclosure, with one legal description. Foreclosing Party has presented no authority at any stage of this litigation to indicate it is appropriate to treat the Subject Property as two separate and distinct parcels of land.

### CONCLUSION

Based on the foregoing arguments, Plaintiff-Respondent Doris Ruiz respectfully requests the Court uphold the decision of the Court of Appeals and reverse the decision by the District Court.

Respectfully submitted,

Date: 7/30/12



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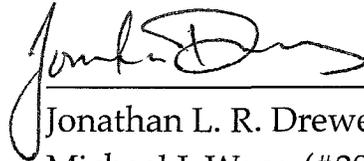
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**CERTIFICATION OF COMPLIANCE WITH RULE 132**

The undersigned counsel certifies that this brief meets the requirements set out in Rule 132 of the Minnesota Rules of Appellate Procedure. This brief contains 11,657 words, excluding the portions exempted by Rule 132.01, Subd. 3.

This brief complies with the typeface style requirements of Rule 132.01. The brief is written in proportionally spaced typeface using Pages '09 in font size 13 and Palatino font.

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