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COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

OCWEN LOAN SERVICING, LLC,

Appellant,

vs.

MICHAEL E. and ROCIO BAUMAN, husband and wife,

Respondents/Cross Appellants.

BRIEF OF RESPONDENTS/CROSS-APPELLANTS BAUMAN

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A. INTRODUCTION

A trial court cannot, by invoking “equity,” grant a substantive statutory right of redemption to a party not named in the redemption statute. Michael and Rocio Bauman purchased two parcels of real property at a public foreclosure sale conducted by Cross Valley Water District (“Cross Valley”). Cross Valley was foreclosing its lien for unpaid water service charges. The foreclosure sale was conducted under the statute governing real property sales to recoup unpaid taxes. That statute grants a post-sale statutory right of redemption only to minors or persons declared legally incompetent.

Apparently by mistake, the trial court ordering the foreclosures and sales stated in the judgments that they were subject to a right of redemption found in a completely inapplicable statute, RCW 35.50.270. That statute only applies to foreclosures to recoup local improvement assessments, not utility charges. Ocwen Loan Servicing LLC (“Ocwen”) claimed to have a right of redemption based on this erroneous order and its alleged rights or standing under deeds of trust recorded against each property, and sued the Baumans. The trial court found there was no statutory right of redemption under RCW 35.50.270, but concluded that it would be inequitable to deny redemption to anyone but minors or incompetents given the language of the foreclosure judgments. However,

the court concluded that Ocwen had no standing based on the undisputed evidence presented.

Although the trial court came to the right decision, it should have done so on the grounds that Ocwen lacked statutory standing, as well as lacked evidence to demonstrate it had rights to enforce the deeds of trust in question. Also, the trial court should have corrected the legal error of the foreclosure court and ordered that the only right of redemption here is available to minors or incompetents who are owners of the property. The Baumans should have the security of knowing that only the laws actually applicable to the sale are enforceable going forward.

B. ASSIGNMENT OF ERROR ON CROSS-APPEAL

(1) Assignment of Error

1. The trial court erred in concluding that there was an equitable right of redemption under RCW 35.50.270 in its multiple orders dated March 16, 2015.

(2) Issue Related to Assignment of Error

1. May a trial court invoking equity grant a substantive statutory right of redemption that the Legislature has not granted?

C. STATEMENT OF THE CASE

Cross Valley commenced a foreclosure action against Patricia and Bruno Bonvicini (“Bonvicini”) against real property they owned (the “Bonvicini Property”) to foreclose its statutory lien for delinquent water

service charges. CP 1573, 1569. At almost the same time, Cross Valley commenced separate a foreclosure action against James L. Turner (“Turner”), another owner of real property (the “Turner Property”), also for delinquent water service charges. CP 930, 1576.

Cross Valley successfully foreclosed on the Bonvicini and Turner properties. CP 923, 1578. It obtained a judgment and order for sale of each of the properties. *Id.* Both judgments ordered the properties to be sold “to the highest and best bidder for cash as provided by RCW 84.64.080 and RCW 57.20.135.¹” CP 924, 1579.

RCW ch. 84.64 is the tax lien foreclosure statute. Although RCW 84.64.080 facially establishes the statutory foreclosure procedure for recouping unpaid property taxes, it is also a proper foreclosure statute for selling properties to recoup unpaid utility charges. Water districts have a statutory lien for unpaid water service charges. RCW 57.08.081(3). There are two options available to judicially foreclose the statutory lien: (1) bring a typical civil lien foreclosure action under RCW 57.08.081(4); or (2) foreclose the water district lien in the same manner as a property tax lien under RCW ch. 84.64. RCW 57.08.005(22) authorizes water districts to exercise any powers granted to cities and counties with respect to the

¹ RCW 57.20.135 is simply a statute authorizing the water-sewer districts to appoint a treasurer to conduct the district’s fiscal matters.

“operation of and fixing rates and charges for waterworks.” RCW 36.94.150 provides that a lien for delinquent water charges “shall be foreclosed in the same manner as the foreclosure of real property tax liens.”

RCW ch. 84.64 provides a statutory right of redemption after the property has been sold.² In fact, that provision immediately precedes RCW 84.64.080, and states in relevant part:

If the real property of any minor, or any person adjudicated to be legally incompetent, be sold for nonpayment of taxes, the same may be redeemed at any time within three years after the date of sale upon the terms specified in this section....

RCW 84.64.070(5). Thus, if the property owner is a minor or has been adjudged legally incompetent, a three-year post-sale statutory right of redemption exists. Otherwise, RCW ch. 84.64 provides no other post-sale right of redemption.

Despite the fact that the sales were properly ordered to be conducted according to RCW 84.64.080, the foreclosure judgments erroneously stated that the properties were subject to the two-year post-sale right of redemption created in RCW 35.50.270. CP 925, 1580. However, that statute applies only to foreclosures to recoup local

² As has historically been the case at common law, a property holder always has the right to redeem the property *before* the sale. RCW 84.64.070(1).

improvement assessments. RCW 35.50.270. The foreclosure actions here were both for unpaid water service charges and did not involve local improvement assessments. CP 1569-74.

Both the Bonvicini and Turner properties were sold to the Baumans at a public auction on March 13, 2012. CP 934, 1987. On March 11, 2014, Ocwen filed two complaints against the Baumans relating to the Bonvicini and Turner properties. CP 977, 2028. Ocwen claimed the right to redeem the properties under the Bonvicini and Turner Deeds of Trust. CP 979, 2030. Ocwen sought to claim a right of redemption under RCW 35.50.270 that was erroneously included in the foreclosure judgments. *Id.*

After discovery, the Baumans moved for summary judgment. CP 936-57, 1990-2008. They argued that the inclusion of the post-sale redemption right created in RCW 35.50.270 was a legal error by the superior court that ordered each of the foreclosures. *Id.* The Baumans also argued that Ocwen had not demonstrated it was the legal beneficiary under the deeds of trust in question. *Id.* They contended that Ocwen thus lacked standing to claim any right of redemption. *Id.*

The trial court agreed with the Baumans that the right of redemption under RCW 35.50.270 did not apply to the foreclosures here, because they were not foreclosures to recoup local improvement

assessments. CP 6, 1536. The trial court further concluded that no right of redemption was available to anyone but a minor or incompetent owner. *Id.* Nevertheless, the trial court concluded that it would be inequitable to deny a right of redemption, because reference to the statute was included in the orders of foreclosure and sale. CP 7, 1537.

Despite having granted a post-sale right of redemption under RCW 35.50.270 on equitable grounds, the trial court concluded that Ocwen had not demonstrated a genuine issue of material fact regarding its standing to exercise a right of redemption for either property. CP 9, 1539. It dismissed Ocwen's claims on summary judgment. *Id.*

Ocwen moved for reconsideration on each order, presenting new evidence that was available to it when it filed its response to the summary judgment motions. CP 639-649, 1522-32. Ocwen offered no argument that the evidence was unavailable at the time it filed its summary judgment response. *Id.* The Baumans opposed each motion and filed motions to strike the new evidence. CP 40, 1019. The trial court granted the Baumans' motions to strike and denied Ocwen's motions for reconsideration. CP 11-13, 997-99.

D. SUMMARY OF ARGUMENT

The trial court properly dismissed Ocwen's claim on the grounds that Ocwen failed to create a genuine issue of material fact regarding its

standing to exercise any right of redemption, but should also have dismissed on the grounds that only minors and legal incompetents had statutory standing to redeem. The redemption period of RCW 35.50.070 did not apply, and the controlling statute, RCW 84.64.070, only authorizes minors and legal incompetents, not institutions like Ocwen, statutory standing to redeem.

The trial court also erred in granting an equitable post-sale right of redemption contrary to the plain language of RCW 35.50.270 and 84.64.070. Equity cannot be applied to contravene the Legislature's enactment of a substantive statutory rights of redemption.

E. ARGUMENT OF RESPONDENT

The trial court correctly ruled on summary judgment that Ocwen failed to demonstrate a genuine issue of material fact regarding whether it had standing to claim a right of redemption under the Bonvicini and Turner deeds of trust. CP 9, 1539.

(1) Ocwen Lacked Standing Based on the Applicable Redemption Statute, As Well As the Evidence Presented

This Court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 683, 732 P.2d 510 (1987). Summary judgment is proper

if the records on file with the trial court show “there is no genuine issue as to any material fact” and “the moving party is entitled to a judgment as a matter of law.” CR 56(c). This Court, like the trial court, construes all evidence and reasonable inferences in the light most favorable to the nonmoving party. *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 142, 500 P.2d 88 (1972); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). This Court considers solely evidence and issues the parties called to the trial court’s attention. RAP 9.12. *Keck v. Collins*, 181 Wn. App. 67, 78-79, 325 P.3d 306, 311-12, *review granted*, 181 Wn.2d 1007, *aff’d*, 357 P.3d 1080 (2015).

(a) Standard of Review

Washington courts apply a two-part test to determine whether a party has standing conferred by a statutory regime. *Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc.*, 169 Wn. App. 111, 118, 279 P.3d 487, 491 (2012), *citing Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 186, 157 P.3d 847 (2007); *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004). The first inquiry is whether the interest asserted is within the zone of interests the statute in question protects. *Nelson*, 160 Wn.2d at 186; *Grant County*, 150 Wn.2d at 802. The second is whether the party seeking standing has suffered an injury in fact. *Nelson*, 160 Wn.2d at 186; *Grant County*, 150 Wn.2d at

802. “Both tests must be met by the party seeking standing.” *Branson v. Port of Seattle*, 152 Wn.2d 862, 875–76, 101 P.3d 67 (2004); *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986) (noting that even if the plaintiffs could show adequate injury, they would fail the zone of interest test).

(b) Ocwen Does Not Have Standing Because It Is Neither a Minor nor Incompetent, nor Acting on Behalf of a Minor or Incompetent³

Based on the undisputed facts below and the plain language of the applicable redemption statute, Ocwen had no statutory right to redeem the property, thus it is not in the zone of interests the redemption statute was enacted to protect, nor has it been injured by the “denial” of redemption to which it had no right.

Redemption signifies the process of canceling and annulling a defeasible title, such as is created by a mortgage, by paying the debt or fulfilling other conditions. *Mark*, 112 Wn.2d at 51; *Tacoma v. Perkins*, 42 Wn.2d 80, 85, 253 P.2d 957 (1953). In other words, a borrower is granted the right to buy back the property if all of the debts owed are paid. C. BARRETT PASQUINI, *The Tax Consequences of the Statutory Right of*

³ Although the trial court did not resolve standing on this ground, this Court has authority to affirm on any ground sufficiently developed in the record. *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003); *Bennett v. Hardy*, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990). The Baumans raised this argument below. CP 663-67.

Redemption in Property Foreclosures, 48 Wm. & Mary L. Rev. 1497, 1507 (2007).

Historically, a borrower could redeem foreclosed property only prior to its sale. This was an equitable right, after default in the performance of a mortgage, to redeem the estate within a reasonable time upon payment of the debt. *Fid. Mut. Sav. Bank v. Mark*, 112 Wn.2d 47, 51, 767 P.2d 1382 (1989). However, once property was sold, there was no common law right to redeem the property. *Id.*

Approximately half the states have adopted some form of a statutory right of redemption. PASQUINI, 48 Wm. & Mary L. Rev. at 1507. Now, depending upon the applicable statute, a mortgagor has an equity of redemption before foreclosure, and the right of redemption, only if provided by statute, after the foreclosure and sale. *Id.*, citing 9 G. THOMPSON, *Real Property* § 4822 (1958); 3 C. WILTSIE, *Real Property Mortgage Foreclosure* § 1060 (5th rev. ed. 1939).

Only those parties identified with the right in the relevant statute, or their successors, may claim the statutory right of redemption. *Mark*, 112 Wn.2d at 51; *Burdick v. Kimball*, 53 Wash. 198, 202, 101 P. 845 (1909). In *Burdick*, our Supreme Court examined an older version of the tax lien redemption statute, which stated that only “minor heirs” and incompetent persons had the right to redeem. *Burdick*, 53 Wash. at 200.

The appellant, a minor who did not inherit the property via will but instead was deeded it in trust, was not allowed to take advantage of the redemption statute. *Id.* at 201. The Court said that regardless of how unfair the outcome seemed, the Court could not adopt a “liberal construction” of a statute that was contrary to the clear language of a statute:

The right to redeem at all is a right granted by the statute. Without a statutory enactment the right would be cut off absolutely. It is a right that is purely *ex gratia*, and the Legislature, in conferring this right, could confer it burdened with any conditions which it saw fit to impose.

Id. at 202, quoting *Knipe v. Austin*, 13 Wash. 189, 43 P. 25 (1895).

Here, there is not even a question of “liberal construction” of the statute. Ocwen does not even arguably have a statutory right of redemption. Both foreclosures and sales were the result of a failure to pay water service charges. CP 882, 1918. Both sales were conducted pursuant to RCW 84.64.080, the tax lien foreclosure statute. CP 882, 1918.⁴ The only post-sale statutory right of redemption that exists in the tax lien foreclosure context is a three-year right of redemption for minors and legally incompetent persons:

⁴ Again, the orders authorizing the sales also references RCW 57.20.135, but that statute simply authorizes the water-sewer districts to appoint a treasurer to conduct the district’s fiscal matters.

If the real property of any minor, or any person adjudicated to be legally incompetent, be sold for nonpayment of taxes, the same may be redeemed at any time within three years after the date of sale upon the terms specified in this section, on the payment of interest at the statutory rate per annum charged on delinquent general real and personal property taxes on the amount for which the same was sold, from and after the date of sale, and in addition the redemptioner must pay the reasonable value of all improvements made in good faith on the property, less the value of the use thereof, which redemption may be made by themselves or by any person in their behalf.

RCW 84.64.070(5). It is undisputed that Turner and Bonvicini were not minors or legally incompetent persons. It is undisputed that Ocwen is neither a minor nor incompetent person. Only owners that are minors or incompetents have a statutory right of redemption under RCW ch. 84.64. Lienholders do not have any post-sale redemption right under RCW 84.64.070(5).

Because Ocwen is not a minor or incompetent owner, it is not in the zone of interests RCW 84.64.270 was enacted to protect. It also has suffered no injury from the Baumans' refusal of redemption, because it had no right to redeem. Ocwen thus has no standing to bring its claim. Summary judgment could also have been granted for Ocwen's lack of standing on this alternate ground.

- (c) Ocwen Did Not Present Evidence Demonstrating It Was the Holder of the Notes and Thus the Legal Beneficiary of the Deeds of Trust During the Relevant Time Period

Despite the fact that RCW 84.64.270 provides a post-sale right of redemption only to minors and legally incompetent persons, the trial court decided that the legal beneficiary of the Bonvicini and Turner Dees of Trust had an equitable right to redeem⁵ because the judgments and orders of sale against Bonvincini and Turner mistakenly stated that RCW 35.50.270, the statutory provision allowing a two-year right of redemption for foreclosures to recoup local improvement assessments, applied to the sales. CP 6, 1536.

Even assuming *arguendo* that a court could grant Ocwen the post-sale right to redeem as a matter of equity, Ocwen did not demonstrate a genuine issue of material fact regarding whether it was the holder of the notes and thereby the legal deed of trust beneficiary during the statutory redemption period. *See Bain v. Metro. Mortgage Grp., Inc.*, 175 Wn.2d 83, 98-99, 285 P.3d 34 (2012). The trial court ruled that Ocwen presented no evidence, other than a bare assertion, that it was the holder of the Bonvicini and Turner notes on or before March 13, 2014. *Id.*

- (i) Ocwen Did Not Create a Genuine Issue of Material Fact that it Was the Holder of the Turner Note During the Relevant Time Period

⁵ The trial court's legal error in finding an equitable right to redeem despite clear statutory provisions to the contrary is challenged *supra* in the Baumans' cross appeal.

The Turner Deed of Trust was recorded on November 17, 2009, and originally named Mortgage Electronic Registration Systems, Inc. (“MERS”) as the beneficiary. CP 724-43. MERS subsequently assigned the beneficiary’s interest to GMAC by an assignment recorded in the Snohomish County real property records on April 11, 2011. CP 744. Although the assignment to GMAC was not recorded in the real property records until April 11, 2011, it appears that GMAC acquired ownership of the loan secured by the Turner Deed of Trust at an earlier, undisclosed time. CP 745. GMAC placed the loan secured by the Turner Deed of Trust in Government National Mortgage Association (“Ginnie Mae”) guaranteed securities Pool Number 892068, in which GMAC acted as the “Issuer” of mortgage-backed securities guaranteed by Ginnie Mae. *Id.* That was accomplished by a Schedule of Subscribers and Ginnie Mae Guaranty Agreement dated January 14, 2010 (the “Ginnie Mae Guaranty Agreement”). *Id.* Pursuant to Ginnie Mae Guaranty Agreement, GMAC assigned and conveyed to Ginnie Mae all of its “right title and interest in the pooled mortgages identified and described in the attached Schedule of Pooled Mortgages.” *Id.* The Schedule of Pooled Mortgages lists the loan to Turner that is secured by the Turner Deed of Trust. *Id.* The effective date of the transfer was January 21, 2010. *Id.*

As required by the Schedule of Pooled Mortgages attached to the Ginnie Mae Guaranty Agreement, the Turner loan documents (including the Turner Note) were apparently delivered to Ally Bank Document Custody pursuant to a Ginnie Mae form of Master Custodial Agreement. CP 879-80. The Master Custodial Agreement produced by Ocwen appears to govern all Ginnie Mae pools in which Ocwen is the “Issuer,” but it does not specify the particular pools for which it is applicable. CP 879-80. Under ¶ 8 of the Master Custodial Agreement produced, the Custodian (Ally Bank) is to “maintain continuous custody and possession of all documents deposited with it on behalf of Ginnie Mae until the mortgage notes are paid in full.” CP 880. Pursuant to ¶ 13, the Master Custodial Agreement “is for the benefit of and enforceable by Ginnie Mae.” *Id.*

The Ocwen discovery responses contained numerous claims that Ocwen is now the Issuer for Pool Number 892068, but the only documentation produced for the summary judgment motion that shows Ocwen as the Issuer for Pool Number 892068 is a marginally legible copy of a computer screen shot, but the screen shot has a June 2014 date, three months after the end of the court-imposed redemption period, and does not indicate when Ocwen acquired such status. CP 863. Ocwen failed to

produce a servicing agreement in place for Pool Number 892068, or an approval of Ocwen as issuer by Ginnie Mae.

Ocwen argues that in order to survive summary judgment, it was only required to submit an affidavit stating that it was the holder of the Turner note. Br. of Appellant at 18. Ocwen states that under RCW 62.A.3-301, it has demonstrated that it is the “person entitled to enforce the note,” and thus met its summary judgment burden.

Even assuming *arguendo* Ocwen produced some evidence that it currently holds the note, that is not the “material fact” on summary judgment. This is a redemption action, and the “material fact” at issue is whether Ocwen became the holder of the note on or before March 13, 2014. Its own documentation stated that Ocwen could not become the holder until Ginnie Mae approved Ocwen as the issuer for the Turner pool. CP 880. However, Ocwen provided no evidence, either in the form of an agreement or in the form of an affidavit, that Ginnie Mae approved Ocwen by the March 13, 2014 date.

Apparently recognizing that being the current holder of the note is meaningless without producing evidence of the date it became the holder, Ocwen also argues on appeal that it created an “inference” sufficient to survive summary judgment that it acquired the servicing rights to the Turner note “sometime before June 2014.” Br. of Appellant at 22. Ocwen

avers that a trial must therefore be had to determine whether it in fact acquired the rights before March 13, 2014. *Id.* Ocwen claims that it was not required to produce “proof” of when it acquired its holder status on summary judgment, only to produce evidence sufficient to create an inference that it acquired that status by the required date. *Id.*

In order to create a genuine issue of material fact, Ocwen had to produce evidence that Ginnie Mae approved Ocwen as the issuer for the pool containing the Turner loan on or before March 13, 2014. This proposition, if true, should be easily demonstrated with a written document. Ocwen has never produced that document. Instead, Ocwen relies on the affidavit of Tonya Tillman. Br. of Appellant at 17-18. However, even that affidavit does not say that Ginnie Mae approved Ocwen as the issuer for the Turner pool on or before March 13, 2014. CP 713-17. Instead, the Tillman affidavit states that Ocwen purchased assets from GMAC and thereby “became the Issuer” of the pool. CP 716. Tillman then claims that Ocwen is currently the holder of the note, but does not state the date that status was acquired. CP 717. Tillman also offers no testimony or documentation discussing the date of Ginnie Mae’s approval of Ocwen as issuer prior to March 13, 2014, which was required for Ocwen to demonstrate standing.

Thus, Ocwen seeks to prove the existence of a written document (the Ginnie Mae approval of Ocwen as issuer) with parol and circumstantial evidence. Although the terms of a written agreement may be illuminated through the use of parol and circumstantial evidence, the *existence* of a written agreement, particularly the date that agreement was reached, can only be proved by the writing itself or by evidence of the terms and mutual intention of both parties to the transaction. *Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wn. App. 846, 851, 22 P.3d 804, 807 (2001).

Ocwen cannot create a genuine issue of material fact by simply declaring that it is the current issuer of the pool, without producing the agreement and/or an affidavit stating the date on which it legally became the issuer. *See Dwinell's Cent. Neon v. Cosmopolitan Chinook Hotel*, 21 Wn. App. 929, 933, 587 P.2d 191, 193 (1978); *Lundgren v. Kieren*, 64 Wn.2d 672, 677, 393 P.2d 625 (1964). Ocwen failed to meet its burden on summary judgment, and dismissal for lack of standing was property granted.

- (ii) Ocwen Did Not Create a Genuine Issue of Material Fact that It Was the Holder of the Bonvicini Note During the Relevant Time Period

The Bonvicini Deed of Trust secures a Note from Bonvicini in the face amount of \$240,555, dated June 20, 2005 (the “Bonvicini Note”). CP 1957-59. The Bonvicini Deed of Trust was recorded on June 27, 2008, and originally named MERS as the beneficiary. CP 1912-15. MERS subsequently assigned the beneficiary’s interest to GMAC by an assignment recorded in the Snohomish County real property records on September 23, 2010. CP 1916. GMAC remains as the record beneficiary in the real property records. *Id.*

The Baumans’ counsel received discovery responses and documents from Ocwen’s counsel indicating that (1) GMAC and other affiliated parties filed a Chapter 11 Bankruptcy Petition in the Southern District of New York on May 14, 2012, and (2) the loan secured by the GMAC Deed of Trust (the “Bonvicini Loan”) (a) is insured by the Federal Housing Administration (“FHA”) (b) was owned by GMAC until the bankruptcy petition date, (c) became an asset of the bankruptcy estate on the petition date, and (d) was transferred to ResCap Liquidating Trust (“ResCap”) as of February 1, 2014. CP 1960-64. In support of such claim, Ocwen also produced a Notice of Transfer of Ownership letter from ResCap indicating that loans not insured by FHA were being transferred to ResCap as of February 1, 2014, and that FHA loans were expected to transfer to ResCap later in 2014. CP 1973-80. Ocwen failed to produce

any other documentation for transfer of the Bonvicini Loan from the bankruptcy estate of GMAC to ResCap or anyone else. Ocwen did not produce a Custodial Agreement pursuant to which the Bonvicini Note was held by any third party.

Ocwen has also asserted that a Power of Attorney it produced supports its claim to be note holder status without actual possession of the Bonvicini Note. CP 1848-49. The Power of Attorney (actually denominated as a Limited Power of Attorney) does not make any mention of particular assets to which it applies. *Id.* Ocwen also claims to be the servicing agent for ResCap, but it has not produced any servicing agreement between Ocwen and ResCap, or any assignment to ResCap of any servicing agreement with Ocwen.

As with the Turner note, Ocwen argues on appeal that despite the lack of documentation, it created a genuine issue of material fact regarding whether it became the holder of Bonvicini note during the redemption period. Br. of Appellant at 20. Ocwen cites the Tillman affidavit and “inferences” therefrom demonstrated it. Br. of Appellant at 20. Ocwen claims that, despite failing to produce the actual documents demonstrating that it was the holder of the Bonvicini note on or before March 13, 2014, the trial court should have inferred that such documents exist.

Again, the Tillman affidavit is not sufficient to create a genuine issue of material fact regarding whether Ocwen became the holder of the Bonvicini note during the redemption period. Tillman's affidavit states that a servicing agreement "grants Ocwen the authority to sue to enforce or collect on the Bonvicini loan." CP 1590. However, the servicing agreement does not make any reference to the Bonvicini loan. CP 1361-1457. Also, because it was undisputed that the Bonvicini note was in the possession of Ally Bank, Ocwen was required to provide evidence that Ally Bank was the custodian on behalf of Ocwen. Ocwen did not provide the Custodial Agreement pursuant to which the Bonvicini Note was held.

Again, Ocwen sought to prove the existence of a written agreement without providing the writing. Again, Ocwen seeks the benefit of "inferences" despite its failure to support its bare assertions with evidence. Because Ocwen failed to document its apparent claim that Ally Bank or Ally Bank Documents Custody held the Bonvicini note on behalf of Ocwen, rather than for GMAC, GMAC's bankruptcy estate, ResCap or some other party, Tillman's bare assertions in her affidavit fail to create a genuine issue of material fact.

Even assuming the trial court could have equitably granted to Ocwen a statutory right to which it was not entitled, Ocwen failed to document its claim that it became the holder of either note and legal

beneficiary of the deed of trust on or before the expiration of the redemption period. Summary judgment was properly granted.

(2) The Trial Court Did Not Manifestly Abuse Its Discretion in Denying Ocwen's Motion for Reconsideration or Striking Evidence Submitted for the First Time in Connection Therewith

After the trial court ruled on summary judgment that Ocwen had lacked standing because it failed to create a disputed issue of material fact on the subject, Ocwen moved for reconsideration and submitted two additional affidavits, calling them "supplemental documentation." CP 641. The new affidavits and documentation were offered by Sean Bishop and Jeanne Rourke. CP 51-58, 633-36. The Baumans opposed reconsideration and moved to strike the two new declarations. CP 40, 1019. The trial court denied Ocwen's motion and struck the declarations. CP 11-13, 997-99.

On appeal, Ocwen cites to these rejected affidavits in its statement of the case without acknowledging that they were stricken and need to be segregated from consideration of Ocwen's argument on the initial summary judgment ruling. *See, e.g.*, Br. of Appellant at 6-7 n.2. This Court should be cognizant of the fact that neither the Rourke "Document Custodian" affidavit, nor the Bishop affidavit, nor the new documentation, were considered by the trial court in connection with the summary

judgment ruling or the motion for reconsideration. They are only relevant in connection with this Court's consideration of Ocwen's challenge to the order striking those two affidavits.

(a) Standard of Review

This Court reviews a superior court's order denying reconsideration, and its order striking evidence submitted in connection with a motion for reconsideration, for a manifest abuse of discretion. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002); *In re Marriage of Tomsovic*, 118 Wn. App. 96, 108, 74 P.3d 692, 698 (2003). Such decisions are addressed to the sound discretion of the trial court. *Perry v. Hamilton*, 51 Wn. App. 936, 938, 756 P.2d 150 (1988). A trial court manifestly abuses discretion when its decision is based on untenable grounds or reasons. *Martini v. Post*, 178 Wn. App. 153, 161, 313 P.3d 473, 478 (2013); *Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland*, 95 Wn. App. 896, 906, 977 P.2d 639 (1999).

(b) This Court Should Disregard Ocwen's Inadequately Briefed Arguments Regarding the Orders Striking Its Evidence and Denying Reconsideration

When a party fails to argue on appeal how new evidence would change the trial court's summary judgment determination, this Court need not consider it. *Fishburn v. Pierce Cty. Planning & Land Servs. Dep't*,

161 Wn. App. 452, 473, 250 P.3d 146 (2011). *See also, Bohn v. Cody*, 119 Wn.2d 357, 368, 832 P.2d 71 (1992) (appellate court will not consider inadequately briefed argument); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (argument unsupported by citation to the record or authority will not be considered); RAP 10.3(a)(6).

Ocwen does not actually cite to the record or offer any legal analysis to explain how its new declarations are supportive of the proposition that it had standing. Br. of Appellant at 23-29. The only citations to the record in Ocwen's entire argument regarding the order striking its declarations and denying reconsideration are citations to the trial court's orders. *Id.* Ocwen simply refers this Court to the "scores of documents" that it claims support its argument. *Id.* at 24. The section also contains no reference to any authority, other than the CR 59 standard. *Id.*

This Court is not obligated to engage in a wild goose chase through the record to discover whether Ocwen's argument is correct. This Court should refuse to consider Ocwen's challenges on the orders striking the new evidence and denying reconsideration.

- (c) It Was Not a Manifest Abuse of Discretion to Refuse to Consider Ocwen's New Declarations on the Grounds that Ocwen Did Not Anticipate It Would Lose on Summary Judgment

Reconsideration is warranted if the moving party presents new material evidence that could not have been produced prior to judgment. CR 59(a)(4). However, evidence presented for the first time in a motion for reconsideration, without a showing that the party could not have obtained the evidence earlier, does not qualify as newly discovered evidence. *See Morinaga v. Vue*, 85 Wn. App. 822, 831, 935 P.2d 637 (1997).

The trial court concluded that (1) Ocwen's new evidence was available before the summary judgment hearing, (2) no explanation was offered for Ocwen's failure to produce the new evidence earlier, and (3) many of the documents produced in connection with the reconsideration motion had not been produced in discovery. CP 12.

Ocwen does not claim or argue on appeal that the two new declarations submitted on reconsideration could not have been produced earlier. Br. of Appellant at 22-24. Ocwen's explanation for why it did not submit the declarations in connection with the original summary judgment motion is that it did not anticipate that it was going to lose:

Ocwen could not have possibly anticipated that the Court would depart from the normal summary judgment standard and set the bar so high the first time around.

Id. at 24.

...[N]o reasonable person could have anticipated that Ocwen's initial response to the summary judgment motion would be deemed inadequate.

Id. In other words, Ocwen did not produce the additional evidence because Ocwen mistakenly believed its original evidence was sufficient.

Summary judgment is not the moment to hold back evidence. Ocwen knew that the Baumans were challenging Ocwen's inability to document its status as beneficiary of the deeds of trust. CP 946-55, 2004-06.

Ocwen's incredulity is insufficient grounds to reverse the trial court's decision. It is reasonable and well within the trial court's discretion to refuse to admit new evidence on reconsideration, when no explanation or excuse is offered.

(d) It Was Not a Manifest Abuse of Discretion to Deny Reconsideration on the Grounds that Ocwen Failed to Produce Evidence that It Was the Holder of the Note

Ocwen argues that the new declarations establish what the trial court claimed Ocwen had failed to demonstrate on summary judgment: a genuine issue of material fact regarding standing. Br. of Appellant at 26-29. However, as the trial court concluded, Ocwen still failed to present any evidence to support the critical fact, explained *supra*, that it was the

holder of the notes and beneficiary of the deeds of trust *before* the end of the redemption period, March 13, 2014. CP 12, 995.

Ocwen's new evidence on reconsideration ostensibly sought to cure its previous failures on the critical issue of fact: establishing that it had the legal right to enforce the notes on or before March 13, 2014. CP 1010.

However, the new evidence did not document the critical facts. Instead, it merely rehashed Ocwen's failed attempts to create "inferences" that were insufficient to overcome summary judgment in the first place. With respect to the Bonvicini note, Ocwen produced a "custodial affidavit" that contained mere conclusory statements with no supporting documentation. CP 633-36. The custodial affidavit with respect to the Turner loan showed that it was not released to Ocwen until December 15, 2014, well after the expiration date. CP 635. Ocwen also failed to provide any evidence of who actually owned the Bonvicini loan on the expiration date. With respect to the Turner note, Ocwen presented insufficient new evidence that it was the holder of the note before the expiration of the redemption period. CP 51-57. Instead, the affidavit stated that Ocwen "acquired the right to possess the note." *Id.*

Again, Ocwen's declaratory assertions are insufficient to create a genuine issue of material fact. *Dwinell's*, 21 Wn. App. at 933; *Lundgren*,

64 Wn.2d at 677. The trial court correctly granted summary judgment on the grounds that Ocwen failed to demonstrate a genuine issue of material fact regarding its standing to sue.

F. ARGUMENT OF CROSS-APPELLANT

The trial court erroneously concluded that Ocwen, or any other potential successors in interest to Bonvincini or Turner, have the statutory right of redemption under RCW 35.50.270. This error should be corrected, or it could prejudice the Baumans in the future. RAP 2.4(a). In order to fully resolve this matter and clear the Baumans' titles, they request that this Court grant the affirmative relief of reversing the trial court's equitable ruling granting the right of redemption under RCW 35.50.270.

(1) Standard of Review

"[T]he question of whether equitable relief is appropriate is a 'question of law,' and like all issues of law ... review is de novo." *Bank of Am. NA v. Prestance Corp.*, 160 Wn.2d 560, 564, 160 P.3d 17 (2007) (quoting *Niemann v. Vaughn Cmty. Church*, 154 Wn.2d 365, 374, 113 P.3d 463 (2005)).

(2) A Court Cannot Equitably Confer a Right of Redemption When None Exists in Statute

Historically, courts of equity had jurisdiction over certain matters, but the jurisdiction was not exercised where there was an adequate remedy at law and the case presented no special ground of equitable jurisdiction. *Gatudy v. Acme Const. Co.*, 196 Wash. 562, 567, 83 P.2d 889, 892 (1938). A trial court's equitable jurisdiction in, for example, marriage dissolution, was granted by statute. *In re Marriage of Farmer*, 172 Wn.2d 616, 625, 259 P.3d 256 (2011).

Now, there are not separate courts of equity and law, but equitable relief is available if there is no adequate remedy at law. *Orwick v. Seattle*, 103 Wn.2d 249, 252, 692 P.2d 793 (1984). Although equity will not suffer a wrong without a remedy, equity follows law and cannot provide a remedy where legislation expressly denies it. *Stephanus v. Anderson*, 26 Wn. App. 326, 334, 613 P.2d 533 (1980).

A court may not provide relief in a foreclosure decree that grants rights beyond those statutory rights provided by the Legislature. *Schroeder v. City of Raymond*, 117 Wash. 238, 200 P. 1092 (1922); *aff'd per curiam* in *Schroeder v. Coshun*, 117 Wash. 238, 204 P. 180 (Wash. 1922), 200 P. 1092. In *Schroeder*, like in this case, there was a foreclosure decree with a provision contrary to the applicable foreclosure statute. The Supreme Court held that "the court had no power to grant other than the statutory relief; hence the language of the decree which goes

beyond what the statute directs is of no force or effect.” 117 Wash. at 243, 200 P. at 1093.

Historically, equitable principles could never be utilized to relieve a party from the failure to properly exercise the privilege of redemption. Our Supreme Court held in 1960 that because redemption rights are statutorily created and not subject to the application of equitable principles:

The right to redeem property sold under execution is not an equitable right created or regulated by principles of equity. It is a creature of statute and depends entirely upon the provisions of the statute creating the right.

Kuper v. Stojack, 57 Wn.2d 482, 483, 358 P.2d 132 (1960), *overruled in part by GESA Fed. Credit Union v. Mut. Life Ins. Co. of New York*, 105 Wn.2d 248, 254, 713 P.2d 728 (1986). In *Kuper*, the Court concluded that equitable principles could never be applied in any redemption proceedings.

Later, in *GESA Fed. Credit Union v. Mutual Life Ins. Co.*, 105 Wn.2d 248, 254, 713 P.2d 728 (1986), the Supreme Court softened the stringent *Kuper* rule by explaining that procedural and technical provisions in the redemption statutes, such as time limitations and notice provisions, could be subject to the application of equitable principles. The *GESA* Court rejected the strict *Kuper* line of cases. It fashioned an

equitable exception to the redemption statute and held that the right of redemption is not forfeited where the party redeeming has the substantive right to redeem, but violates some procedural restriction of the redemption process. *GESA*, 105 Wn.2d at 254–56. The court rejected the argument that applying equitable principles to the redemption statute would foment litigation and delay title determinations after foreclosure. *Id.* It recognized that the administrative advantages of inflexibly applying the redemption statute did not outweigh the resulting injustice in a particular case.

However, despite *GESA*'s more lenient rule regarding procedural errors committed in the redemption process, the Supreme Court has always held fast to the principle that equity cannot confer a *substantive statutory right of redemption* contrary to the language of the statute in question. *Mark*, 112 Wn.2d at 54-55. In that case, the Marks owned real estate that was subject to liens held by Fidelity, Whittall, and the Internal Revenue Service. *Id.* at 52-53. Fidelity bought the property at a sheriff's sale, subject to redemption, for \$62,650. Several months later, the Marks assigned their right to redeem to a third party, Westside. *Id.* They also executed a quitclaim deed by which they purported to convey to Westside their remaining interest in the land. *Id.* The deed was ineffective, however, because the Marks failed to acknowledge or record it as required

by Washington's real estate transfer statutes. *Id.* Based on the assignment and invalid deed, Westside then attempted to redeem as the Marks' "successor in interest." Rejecting this attempt, the Washington Supreme Court held that "the naked right to redeem" could not be separated from "the debtor's reversionary interest in the property," and that a person could not succeed to a judgment debtor's right to redeem unless he or she successfully acquired the judgment debtor's underlying interest in the land. *Id.*

Distinguishing *GESA*, the *Mark* court clarified that although procedural violations of the redemption statutes could be remedied through equitable means, the lack of a substantive right court not be conferred in equity. The *Mark* court cited *GESA* for the proposition that "[a] statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right." *Id.* at 55. The Court clarified that the equitable remedy available in *GESA* was not available to the redemption claimant in *Mark*, because the party claiming the right of redemption was not the actual successor in interest to the debtor, and thus had no statutory right to redeem:

In *GESA*, our resort to equity was proper because the statute at issue was remedial. Here, however, the statute at issue creates a substantive right. Consequently, we may not alter the scheme the Legislature has established.

It may seem harsh to deny equity.... However, to balance the equities in every unsuccessful case of redemption would create confusion in a highly complex area of law. The rights established by the Legislature must remain exclusive if they are to remain reliable.

Id.

Mark is good law to this day. This Court just recently applied *Mark* to deny equitable relief in the redemption context, when the case involved the issue of a substantive right to redeem as opposed to procedural deficiencies. *P.H.T.S., LLC v. Vantage Capital, LLC*, 186 Wn. App. 281, 292, 345 P.3d 20 (2015). In that case, Vantage purchased property at a sheriff's sale subject to a one-year right of redemption to a purchaser making the "highest qualifying offer." *P.H.T.S.*, 186 Wn. App. at 285. The statute mandated that the highest qualifying offer must be accepted. 364 days later, a real estate broker listed the property for \$170,000 as "for sale by owner" and simultaneously conveyed an offer of purchase to Vantage for \$70,000. *Id.* Vantage opposed the purchase, and P.H.T.S. filed a declaratory judgment action to force the sale. Vantage argued *inter alia* that P.H.T.S. should be denied the right to redeem based on equitable considerations, because the P.H.T.S. broker who listed the property had violated his statutory duty of good faith. *Id.* at 292. Without examining the merits of the allegations of ethical breach, this Court held

that equity could not be applied to deny P.H.T.S. the substantive statutory right to redeem granted to it by the Legislature. *Id.*

(3) The Trial Court Erred When It Invoked Equity to Confer on Ocwen the Two-Year Redemption Period of RCW 35.50.270, a Substantive Right It Did Not Possess According to that Statute

Again, both foreclosures and sales were the result of a failure to pay water service charges. CP 882, 1918. Both sales were conducted pursuant to RCW 84.64.080, the tax lien foreclosure statute. CP 882, 1918.⁶ The only post-sale statutory right of redemption that exists in the tax lien foreclosure context is a three-year right of redemption for minors and legally incompetent persons:

If the real property of any minor, or any person adjudicated to be legally incompetent, be sold for nonpayment of taxes, the same may be redeemed at any time within three years after the date of sale upon the terms specified in this section, on the payment of interest at the statutory rate per annum charged on delinquent general real and personal property taxes on the amount for which the same was sold, from and after the date of sale, and in addition the redemptioner must pay the reasonable value of all improvements made in good faith on the property, less the value of the use thereof, which redemption may be made by themselves or by any person in their behalf.

RCW 84.64.070(5).

⁶ Again, the orders authorizing the sales also references RCW 57.20.135, but that statute simply authorizes the water-sewer districts to appoint a treasurer to conduct the district's fiscal matters.

RCW 35.50.270 states that “In foreclosing local improvement assessments, all sales shall be subject to the right of redemption within two years from the date of sale.” The statute is an alternate method of foreclosure, with different notice provisions and other substantive rights, that is only available when the property owner is delinquent in paying such assessments. *See Brower v. Wells*, 103 Wn.2d 96, 101, 690 P.2d 1144 (1984).

The right of redemption granted in RCW 35.50.270 is not a procedural technicality, it is a substantive right that the Legislature has not granted to Ocwen in law, thus it cannot be granted to Ocwen in equity. *Mark*, 112 Wn.2d at 54-55.

Whether as a simple mistake or a decision to invoke equity, neither the court in the foreclosure action nor the trial court in the present matter were authorized to apply the redemption period for local improvement assessment foreclosures to the sales of the Bonvicini or Turner properties, which were sold to pay water service charges. The trial court’s ruling should be reversed.

(4) Even Assuming the Trial Court Could Grant Such a Right, It Is Inequitable to Grant It in this Case

Even if this Court believes that equity could confer a substantive statutory right of redemption on Ocwen, the trial court should not have

done so in this case. This Court reviews a trial court's actions in fashioning equitable remedies for abuse of discretion. *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006).

The trial court's sole basis for imposing an equitable remedy in Ocwen's favor was the presumption that the Baumans benefited from the erroneous reference to RCW 35.50.270 in the original foreclosure judgments. CP 6. The trial court reasoned that the Baumans probably paid a lower price at auction for the properties because the erroneous redemption provision was referenced, and that the Baumans were on notice that the provision was included in the order of sale. *Id.*

Ocwen presented no evidence that the Baumans actually benefited from inclusion of the erroneous redemption provision. The trial court reached that conclusion based on mere speculation. Also, the trial court ignored the fact that the Baumans had no hand in creating the original erroneous foreclosure judgment and were forced to spend a great deal in legal fees defending their title from a trial court's mistake in a matter to which they were not parties.

Any imagined "benefit" in purchase price was negated by having to go to court to resolve a legal error that was made in a case to which the Baumans were not parties. Equity has been satisfied by having to defend

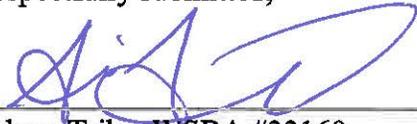
against Ocwen's action, in which Ocwen had no standing to bring its claim.

G. CONCLUSION

Although the trial court reached the right result, this Court can and should correct the record and not allow one legal error to be compounded with another. This case should have been dismissed on multiple grounds, and the trial court's order granting equitable standing should be reversed.

DATED this 7th day of December, 2015.

Respectfully submitted,



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DECLARATION OF SERVICE

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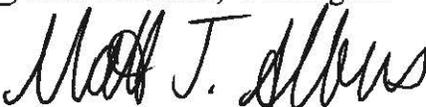
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: December 7th, 2015 at Seattle, Washington.



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