

71913-1

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No. 71913-1

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

MORGAN COURT OWNERS ASSOCIATION,

Respondent,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as TRUSTEE
FOR MORGAN STANLEY ABS CAPITAL I INC. TRUST 2007-NC2
MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2007-NC2,

Appellant.

Appeal from the Superior Court for King County
Cause No. 13-2-14604-5 KNT

APPELLANT'S REPLY BRIEF

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COURT OF APPEALS
DIVISION I

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I. REPLY ARGUMENT

In seeking to quiet title, Morgan Court invoked the trial court's *equity* jurisdiction. A court sitting in equity need not rigidly enforce property rules when doing so would be inequitable. Doing equity between all parties, rather than rigidly applying property rules, must be the singular focus of these proceedings.

Morgan Court concedes in its response that it was not a bona fide purchaser and that the price it paid for the condominium unit ("Unit") at the sheriff's sale was grossly inadequate. Resp. Br. at 13. Through these concessions, Morgan Court has narrowed the issues to be decided in this appeal to the following: (1) what qualifies as "slight circumstances indicating unfairness" in the context of a foreclosure sale that resulted in a condominium being sold for less than 5% of its fair market value?; and (2) whether the trial court erred in failing to consider whether such circumstances existed.

Morgan Court argues that Washington courts recognize only two "slight circumstances indicating unfairness" in this context: (1) violations of statutes governing the judicial foreclosure process; and (2) "misconduct" on the part of the buyer or the foreclosing party. Morgan Court asserts that because neither of these circumstances

occurred here, the trial court's judgment quieting title to the \$210,000 Unit in Morgan Court for a mere \$8,818.17 was equitable "as a matter of law." Resp. Br. at 1.

But the Washington Supreme Court has long recognized a third category of "slight circumstances indicating unfairness" that neither the trial court nor Morgan Court has properly considered. As explained over 80 years ago in *Mellen v. Edwards*, the concept of "slight circumstances indicating unfairness" also includes a foreclosing party deliberately "further[ing] a selfish purpose" and "enrich[ing] himself at the expense of [others]." 179 Wash. 272, 284, 37 P.2d 203, 207 (1934).

Morgan Court explains that refusing to delay the foreclosure sale for one month while a \$210,000 offer was pending was in its "best interest" because it allowed Morgan Court to collect the full amount of its judgment rather than just the amount of its statutory super priority lien. Resp. Br. at 20. Thus, Morgan Court admits that it made a deliberate, calculated decision to enrich itself at the expense of Deutsche Bank. In view of this admission, this case should be remanded to the trial court with instructions to fashion an alternative

remedy that makes Morgan Court whole without extinguishing Deutsche Bank's entire interest in the property.

In the alternative, the case should be remanded to allow the trial court to perform an equitable analysis in the first instance. Critically, the trial court never considered whether "slight circumstances indicating unfairness," when considered *in addition to* the grossly inadequate sale price, warranted an exercise of its equitable discretion to fashion an equitable remedy. This analysis was absolutely required under well-established Washington Supreme Court precedent. On the existing record, the trial court's judgment cannot stand.

A. Doing equity, rather than mechanically applying property rules, should be the focus of these proceedings.

In actions at law, property rules are characterized by "all-or-nothing relief" awarded to the party with valid legal title. *Proctor v. Huntington*, 169 Wn.2d 491, 496, 238 P.3d 1117, 1119 (2010). In proceedings in equity, by contrast, a court's power and duty to do equity "*transcends* the mechanical application of property rules." *Id.* at 501 (emphasis added); *Arnold v. Melani*, 75 Wn.2d 143, 152, 449 P.2d 800, 806 (1968) ("[W]hen an equitable power of the court is

invoked, to enforce a right, the court must grant equity in a meaningful manner, not blindly.”).

Since Morgan Court continues to maintain that it is entitled to the same “all-or-nothing” relief erroneously granted by the trial court, it bears repeating that this action to quiet title is a proceeding in equity. *Kobza v. Tripp*, 105 Wn. App. 90, 95, 18 P.3d 621, 624 (2001). One of the foundational principles of equity is that courts need not enforce legal rights when doing so would be inequitable. *Proctor*, 169 Wn.2d at 500-01; *see also Arnold*, 75 Wn.2d at 152 (“There is no question but that equity has a right to step in and prevent the enforcement of a legal right whenever such an enforcement would be inequitable.”) (citation omitted); *Holmes Harbor Water Co. v. Page*, 8 Wn. App. 600, 605, 508 P.2d 628, 631 (1973) (“When one party uses a legal right to invoke [a] court’s equitable power as a weapon of oppression rather than in defense of a just claim, the court may recognize circumstances that justify refusing to enforce the legal right.”).

To be clear, Deutsch Bank is not asking for “all-or-nothing” relief. Instead, mindful of the equitable maxim that “he who seeks equity must do equity,” *Malo v. Anderson*, 62 Wn.2d 813, 817, 384

P.2d 867, 870 (1963), Deutsche Bank seeks an equitable remedy that makes Morgan Court whole without extinguishing Deutsche Bank's entire interest in the property. For example, this Court could remand the case with instructions to enter judgment allowing Deutsche Bank to purchase the Unit from Morgan Court for the full amount Morgan Court paid for the property at the foreclosure sale, plus interest and associated costs. That result does equity. Quieting title in Morgan Court for less than 5% of the Unit's actual value simply because Morgan Court claims valid legal title does not. Doing equity, rather than reflexively applying property rules, must be the focus of these proceedings.

B. Deutsche Bank's equitable arguments are fully preserved.

Contrary to Morgan Court's assertions, Deutsche Bank did not waive its argument that Morgan Court acted inequitably by refusing to delay the foreclosure sale. *See* Resp. Br. at 7-8, 16. Deutsche Bank presented extensive documentation of the property owner's request to delay the sale—and Morgan Court's denial of that request—in support of its opposition to Morgan Court's motion for summary judgment. CP 253-75. Included among these materials was an email documenting that Morgan Court received the request before

the foreclosure sale (CP 255); a copy of the executed purchase and sale agreement (CP 259-70); a letter certifying that the prospective third-party buyer had pre-approved financing (CP 272); proof that the mortgage servicer had agreed to the \$210,000 purchase price (CP 257); and email correspondence from Morgan Court's counsel advising Morgan Court to press forward with the sale (CP 253-54, 273-75). These materials were by no means "buried" in the trial court record as Morgan Court suggests. Resp. Br. at 7. Indeed, the trial court purported to have considered them. RP 2, 28; CP 398.

Moreover, contrary to Morgan Court's suggestion, Deutsche Bank did in fact raise this argument in the trial court. In its opposition to Morgan Court's motion for summary judgment, under the heading "Facts Regarding Equity and the Interests of the Parties," Deutsche Bank explained:

[Morgan Court] management was fully aware that they were foreclosing on a lender's interest in the Unit and, on the advice of counsel, *strategically proceeded with the sale in an expedient fashion in order to avoid providing additional time for a lender to challenge the sale.* (Edling Dec., Ex. 3 at 44, 66).

CP 310 (emphasis added). This paragraph also included a footnote referencing Morgan Court's counsel's position that delaying the sale "could have provided lenders with additional opportunities to

challenge the underlying proceedings.” CP 310. Thus, Deutsche Bank has properly preserved its argument that Morgan Court acted inequitably by refusing to delay the foreclosure sale while a \$210,000 offer was pending. RAP 9.12 (on appeal of order granting summary judgment, appellate court must consider all evidence and arguments recited by trial court as having been considered); *Wash. Fed’n of State Emp., Council 28, AFL-CIO v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993) (on appeal of a summary judgment ruling, appellate court considers all evidence and issues called to the trial court’s attention).

Finally, even if this Court were to conclude that the argument was not properly raised, it should exercise its discretion to reach the merits of the argument because the argument is “arguably related” to an issue raised by Morgan Court. *See Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, 160 P.3d 1089, 1091 (2007) *aff’d*, 166 Wn.2d 264, 208 P.3d 1092 (2009) (“Generally, failure to raise an issue before the trial court precludes a party from raising it on appeal. But if an issue raised for the first time on appeal is ‘arguably related’ to issues raised in the trial court, a court may exercise its discretion to consider newly-articulated theories for the first time on

appeal.”) (citations omitted). In the trial court, Morgan Court cited several cases for the proposition that “Washington Courts have repeatedly held that inadequate price alone is not a sufficient basis to set aside a judicial foreclosure sale.” CP 331 (citing *Home Owners’ Loan Corp. v. Callahan*, 2 Wn.2d 604, 98 P.2d 1077 (1940), *N. Sav. & Loan Ass’n v. Taylor*, 190 Wash. 535, 69 P.2d 810 (1937), *Wash. Mut. Sav. Bank v. Horn*, 186 Wash. 75, 56 P.2d 995 (1936), and *Atwood v. McGrath*, 137 Wash. 400, 242 P. 648 (1926)). The trial court expressly relied upon this line of authority in awarding summary judgment to Morgan Court (albeit without considering whether other factors, in addition to price, warranted a ruling in Deutsche Bank’s favor). RP 32-33 (stating that the issue of a “windfall” resulting from an inadequate sale price “has been brought before the courts in other cases and the sole issue of the amount of [the] sale by itself is not . . . [a] reason to set aside a foreclosure”). Since Deutsche Bank’s present argument relies upon this same line of authority, consideration of the argument is necessary to reach a proper decision. See *Freedom Found. v. Wash. State Dep’t of Transp.*, 168 Wn. App. 278, 293 n.14, 276 P.3d 341, 349 (2012) (explaining that while courts normally will not consider issues raised for the first time

on appeal, they have “inherent authority to consider issues not raised by the parties if doing so is necessary to a proper decision”) (citations omitted); *Bale v. Allison*, 173 Wn. App. 435, 453 n.9, 294 P.3d 789, 799 (2013) (addressing new iteration of argument raised on appeal where litigants “drew the [trial] court’s attention to the cases they now cite” for the new proposition advanced).

C. Morgan Court has conceded that it was not a bona fide purchaser and that the sale price of \$8,818.17 was grossly inadequate.

The trial court awarded summary judgment to Morgan Court on the ground that Deutsche Bank failed to satisfy the legal standard for invalidating a judicial foreclosure sale.¹ RP 32-33. To prevail on a claim to invalidate a foreclosure sale, a party must demonstrate (1) that the buyer was not a bona fide purchaser; (2) that the sale price was grossly inadequate as compared to the property’s fair market value; and (3) that there were “slight circumstances indicating unfairness” surrounding the sale. *Roger v. Whitham*, 56 Wash. 190,

¹ The trial court appears to have been under the mistaken belief that Deutsche Bank was seeking to have the foreclosure sale invalidated. See RP 32-33 (noting that “the sole issue of the amount of [the] sale by itself . . . is not [a] reason to set aside a foreclosure”). In fact, Deutsche Bank was asking the court to leave the sale undisturbed and fashion an equitable remedy in lieu of *quieting title*. See, e.g., CP 306 (arguing that Morgan Court “does not have superior equitable title, and [that the court] should fashion other relief than that requested by [Morgan Court]”); CP 315 (advocating for “an equitable remedy, wherein Deutsche Bank as Trustee can be permitted to purchase the Unit for the amount [Morgan Court] can prove it has been

193, 105 P. 628, 629 (1909); *Miebach v. Colasurdo*, 102 Wn.2d 170, 177-78, 685 P.2d 1074, 1079 (1984); *Casa del Rey v. Hart*, 110 Wn.2d 65, 71, 750 P.2d 261, 264 (1988). When all three of these elements are satisfied, a court sitting in equity may exercise its discretion to invalidate the sale and fashion an alternative remedy that more appropriately balances the parties' equitable claims to title in the property. *Miebach*, 102 Wn.2d at 179.

As a threshold matter, the parties agree that cases addressing the standard for invalidating a foreclosure sale provide the appropriate legal framework. To be clear, however, Deutsche Bank is not seeking to invalidate the foreclosure sale that occurred in this case. Instead, Deutsche Bank is seeking - as it did below - the *lesser* remedy of an order allowing it to purchase the Unit from Morgan Court for the price Morgan Court paid for the Unit at the foreclosure sale, plus interest and associated costs.

Deutsche Bank previously outlined the reasons why Morgan Court does not qualify as a bona fide purchaser and why the sale of the Unit for a mere \$8,818.17 was grossly inadequate as compared to its fair market value of at least \$210,000. *See* Opening Br. at 19-23.

damaged”).

Morgan Court appropriately concedes that these two issues are not in dispute. Resp. Br. at 13 (“Morgan Court has not claimed and does not claim bona fide purchaser status, and the foreclosure sale price was substantially below the apparent market value.”). In view of this concession, the only remaining issue in dispute is whether the foreclosure sale took place under “slight circumstances indicating unfairness” such that it would be inequitable to quiet title in Morgan Court.

D. Morgan Court’s deliberate pursuit of its own best interests at the expense of Deutsche Bank’s interest qualifies as a “slight circumstance indicating unfairness.”

Morgan Court insists throughout its response that the sale of the property for \$8,818.17 was equitable because there was no “irregularity or misconduct” in connection with the sale. Resp. Br. at, *e.g.*, 1, 2, 3, 5, 14, 15, 21. Morgan Court’s position is that there are only two categories of “slight circumstances indicating unfairness” that can justify equitable intervention in this context: (1) “irregularities” such as failure to comply with the statutory notice requirements governing foreclosure sales; and (2) overt “misconduct” such as fraud or collusion. *See* Resp. Br. at 10-11 (“In the cases where sales have been set aside, the “slight circumstances indicating

unfairness” have always involved some sort of irregularity or misconduct by the foreclosing creditor or the foreclosure buyer.”). Morgan Court is wrong.

1. Casa del Rey does not limit “slight circumstances indicating unfairness” to “irregularities” in the sale process.

Morgan Court argues that *Casa del Rey v. Hart*, 110 Wn.2d 65, 750 P.2d 261 (1988) limits the concept of “slight circumstances indicating unfairness” to procedural “irregularities” during the foreclosure sale process. Resp. Br. at 12. *Casa del Rey* does no such thing.

Casa del Rey involved a creditor foreclosing on an apartment complex to satisfy a judgment for past due child support payments. 110 Wn.2d at 67-69. Because the judgment was unrelated to the debtor’s interest in the apartment complex, the creditor was required by statute to attempt to satisfy the judgment from the debtor’s personal property before foreclosing on the apartment complex. *Id.* at 72 (citing RCW 6.17.100). The creditor, however, made no effort to even search for personal property owned by the debtor. *Id.* at 67. Finding these facts nearly identical to those at issue in *Miebach v. Colasurdo*, the court held that this “irregularity” in the foreclosure

process was a “slight circumstance indicating unfairness” that called for an equitable invalidation of the sale. *Id.* at 73. In summarizing its holding, the court stated:

RCW 6.17.100 requires a search for personal property before such an execution may be instituted; we believe that statute requires an actual good faith search, not merely a letter stating that such a search has been conducted. . . . Because no evidence of a good faith search was presented in this case, we find that the sheriff’s sale . . . was invalid.

Id. at 73-74.

As noted by Morgan Court itself, *Casa del Rey* arises in the specialized context of a creditor’s failure to attempt to satisfy a judgment from personal property before executing on real property (a requirement which both parties agree has no application to this case). Resp. Br. at 11. It is not surprising that a violation of this statutory requirement, which is designed to “eliminate any possibility one’s home will be sold to satisfy a small debt,” *Miebach*, 102 Wn.2d at 179, qualifies as a “slight circumstance indicating unfairness.” But *Casa del Rey* does not suggest that such a violation is the *only* cognizable form of “slight circumstance indicating unfairness” in the foreclosure context.

Instead, *Casa del Rey* stands for the unremarkable proposition that irregularities in the sale process are sufficient, but not necessary, to satisfy the “slight circumstances indicating unfairness” standard. In other words, the case simply applies the “slight circumstances indicating unfairness” test in the context of a procedural irregularity.² It does not replace that test with a new “irregularities” test as Morgan Court suggests.

2. Deliberate enrichment of oneself at the expense of others is a “slight circumstance indicating unfairness.”

In its opening brief, Deutsche Bank cited *Washington Mutual Savings Bank v. Horn*, 186 Wash. 75, 56 P.2d 995 (1936) and *Mellen v. Edwards*, 179 Wash. 272, 37 P.2d 203 (1934) for the proposition that a creditor who uses the judicial foreclosure process to advance its own interests at the expense of others has engaged in unfair conduct of the type that warrants invalidation of a foreclosure sale. Opening Br. at 27. Tellingly, Morgan Court made no effort to address this line of authority in its response.

² It bears noting that at least three of the cases cited in conjunction with *Casa del Rey*'s procedural irregularity analysis apply the “slight circumstances indicating unfairness” test in the context of foreclosures in which violations of procedural statutes governing the foreclosure process were *not* at issue. See 110 Wn.2d at 71-72 (citing *Roger v. Whitham*, 56 Wash. 190, 105 P. 628 (1909), *Triplett v. Bergman*, 82 Wash. 639, 144 P. 899 (1914), and *Miller v. Winslow*, 70 Wash. 401, 126 P. 906 (1912)).

Mellen involved a foreclosure sale at which a property worth approximately \$1,750 was sold for \$950 after the defendant defaulted on her mortgage. 179 Wash. at 274-75. After reviewing cases from other jurisdictions, the court reaffirmed the general rule that “mere inadequacy of price” is not a valid basis for invalidating a foreclosure sale. *Id.* at 283. However, the court then proceeded to consider whether there were “other things, even though slight,” that might tip the scales of equity in the defendant’s favor. *Id.* at 283-84. The court answered that question in the negative. In so holding, the court found it significant that the purchaser had not advanced his own interests to the detriment of the defendant:

The other things as shown by the record are not things for which the appellant is responsible. They exist in a sense, it is true, but they are the result of general conditions and *it does not here appear that the appellant has taken advantage of them to further his own interests.*

... [T]here is nothing in the record, as we read it, which indicates *a deliberate and willful attempt upon the part of the appellant to take advantage of the general situation to further a selfish purpose and to enrich himself at the expense of the respondents.*

Id. at 284 (emphasis added).

Although the facts of the case did not warrant equitable intervention,³ the implication of the court's holding is clear: a foreclosing party that deliberately enriches itself at the expense of others has engaged in precisely the type of conduct that warrants equitable intervention. *Id.* at 284. In other words, such conduct is a "slight circumstance indicating unfairness" that calls for a court sitting in equity to refuse to quiet title in the foreclosing party. In view of this authority, Morgan Court cannot maintain that only "irregularities" or "misconduct" are sufficient to satisfy the "slight circumstances indicating unfairness" standard.

Here, Morgan Court has openly admitted to deliberately pursuing its own best interests at the expense of Deutsche Bank. Resp. Br. at 17-18, 20. As previously indicated in Deutsche Bank's opening brief, Morgan Court, on the advice of its counsel, insisted on moving forward with a sheriff's sale shortly after it learned that a third party with approved financing had offered to purchase the Unit for \$210,000. CP 253-75; Opening Br. at 2, 6-9. In its response,

³ The fact that the court engaged in a "slight circumstances indicating unfairness" analysis where the property at issue was sold for approximately 50% of its market value underscores the trial court's failure to do so here, where the Unit was sold for less than 5% of its market value.

Morgan Court offers the following explanation for its decision to press forward with the sale:

Any further delay could have *worked against Morgan Court's interest* by extending the time in which Deutsche Bank could pay just the limited, six-month priority amount (\$1,225.32), and then foreclose the Obeng Deed of Trust, without any further payment to Morgan Court. Proceeding with the sheriff's sale and bidding the full amount due [\$8,818.17] *was in Morgan Court's best interest, since that ended Deutsche Bank's option to pay just part of what was due.*

Resp. Br. at 20 (emphasis added).

In the context of a proceeding in which the court is charged with doing equity, this is a rather striking admission. Morgan Court, by its own admission, made a calculated decision to move forward with the sheriff's sale—despite knowing that the sale would prejudice Deutsche Bank to the tune of \$200,000—so that it could recover \$7,592.85 in excess of its statutory super priority lien.⁴ This is a clear and straightforward example of a party using the foreclosure process to advance its own interests at the expense of other creditors.

Morgan Court argues that Deutsche Bank suffered no real prejudice because it could have simply exercised its statutory right of redemption after the sale. Resp. Br. at 20. But that reasoning is

⁴ \$7,592.85 represents the total amount that Morgan Court stood to gain above and beyond its super priority lien in the amount of \$1,225.32 ($\$8,818.17 - \$1,225.32 =$

circular. By its own admission, Morgan Court's purpose in pressing forward with the foreclosure sale was to gain an advantage over Deutsche Bank. Having obtained that advantage, Morgan Court cannot turn around and claim that Deutsche Bank was not prejudiced. The fact is that Morgan Court deliberately refused to delay the sale for one month so that Deutsche Bank would be forced to pay \$8,818.17 rather than \$1,225.32 to protect its interest in the property. *See* Resp. Br. at 17-18, 20.

In sum, a creditor deliberately using the foreclosure process to further its own interests at the expense of other creditors is a "slight circumstance indicating unfairness" that, when coupled with a grossly inadequate purchase price, demands an alternative equitable remedy to quieting title. *Mellen*, 179 Wash. at 284. Since Morgan Court has openly admitted to using such tactics in connection with the sale of the Unit, the trial court's judgment quieting title in Morgan Court must be vacated and the case remanded for entry of a judgment that actually balances the equities.

\$7,592.85).

E. A foreclosing party's full compliance with RCW Chapter 6.21 does not preclude a court from exercising its equitable discretion to set aside an unequitable foreclosure sale.

As noted above, Morgan Court has repeatedly asserted that it “complied with all applicable legal requirements for the foreclosure action and sale.” Resp. Br. at 1. In making these assertions, Morgan Court suggests that its compliance with RCW Chapter 6.21 rendered its purchase of the Unit for less than 5% of its fair market value equitable *per se*. To the extent Morgan Court is advancing such an argument, the argument is foreclosed by *Mellen*.

Mellen, as noted above, involved a challenge to a foreclosure sale at which a property worth approximately \$1,750 was sold for \$950. 179 Wash. at 274-75. Before turning to the merits of the challenge, the Washington Supreme Court carefully explained that a party's full compliance with applicable foreclosure statutes does not deprive a court of its equitable discretion to invalidate a sheriff's sale. *Id.* at 280 (explaining that even when a foreclosure sale is otherwise lawful, “[i]t is still the court's privilege to withhold sanction of a sale which frustrates the aim of our foreclosure act”). This extended discussion forecloses any argument by Morgan Court that its full compliance with RCW Chapter 6.21 rendered the sale equitable *per*

se. As *Mellen* explains, such a rule would “tie the hands of the court” and “invi[t]e a recrudescence of the former harsh remedy of strict foreclosure.” *Id.* (quoting *Fed. Title & Mortg. Guar. Co. v. Lowenstein*, 113 N.J. Eq. 200, 234, 166 A. 538, 540 (Ch. 1933)); *accord Miebach*, 102 Wn.2d at 178-79 (invalidating foreclosure sale despite the fact that foreclosing party had “complied with the then-existing notice requirements of RCW 6.24.010 (sheriff’s sales) and RCW 6.24.140 (redemption)”).

Morgan Court also suggests that Deutsche Bank forfeited its right to an equitable remedy by first failing to pay off Morgan Court’s six-month super priority lien prior to the foreclosure sale, and then by failing to redeem the property within one year after the sale. Resp. Br. at 6, 9, 18. If equitable relief were afforded to Deutsche Bank under these circumstances, Morgan Court asserts, “pretty much any foreclosure of a condominium lien [would be] somehow rendered unfair.” Resp. Br. at 18.

Deutsche Bank acknowledges that it did not pay off Morgan Court’s super priority lien before the foreclosure sale or exercise its right to redeem the property within one year thereafter. Nevertheless, Deutsche Bank did not forfeit its right to pursue equitable relief.

First, courts sitting in equity must refrain from rigidly applying property rules in a manner that results in “all-or-nothing” relief. *Proctor*, 169 Wn.2d at 496, 501. If the facts and circumstances of a particular case would make it unjust to enforce a legal right, “[t]here is no question but that equity has a right to step in.” *Arnold*, 75 Wn.2d at 152.

Second, forfeiture arguments are strongly disfavored in equity proceedings. *See Deming v. Jones*, 173 Wash. 644, 648, 24 P.2d 85 (1933) (“The law does not favor forfeitures, and *equity abhors them.*”) (emphasis added). Even when a party has engaged in “carelessness and inefficient business methods [that] would not ordinarily be excusable,” its conduct must be “weighed in the scales against a forfeiture of rights which are valuable out of all proportion to the harm which [the opposing party] ha[s] suffered by the careless conduct.” *Id.*

Finally, and most importantly, the argument that Deutsche Bank somehow forfeited its right to equitable relief turns the concept of fairness on its head. Once again, Deutsche Bank readily admits that, as a result of its failure to pay off the super priority lien or redeem the property, Morgan Court is entitled to whatever equitable

relief would make it whole. But Morgan Court is not interested in being made whole; instead, Morgan Court wants to own the \$210,000 Unit free and clear for \$8,818.17. It is that result, rather than Deutsche Bank's request for appropriate equitable relief, that is unfair.

F. At a minimum, the case must be remanded to the trial court to perform a balancing of the equities in the first instance.

The trial court wholly failed to recognize that its power to do equity "transcends the mechanical application of property rules." *Proctor*, 169 Wn.2d at 501. Instead, the trial court mechanically applied property rules, finding that Morgan Court had followed all statutory formalities, that Deutsche Bank had failed to "protect" its interest, and that the "windfall" to Morgan Court was irrelevant:

I find that the plaintiff in this matter, Morgan Court, has followed the requirements of the statute by allowing the proper waiting time as the redemption period required to be expired . . . and that they did not act any sooner than when they were allowed to act[.]

I also find that the defendants failed to protect the deed of trust before this sheriff's sale, and that . . . the deed of trust was eliminated because of defendant's inaction to protect it.

* * *

Also [the] defense position that there is . . . a windfall, that issue has been brought before the courts in other cases and the sole issue of the amount of [the] sale by itself is not -- is not [a] reason to set aside a foreclosure.

RP 31-33.

Conspicuously absent from this analysis is any discussion of whether the sale occurred under “slight circumstances indicating unfairness” that, when considered *in addition to* the exceedingly low sale price, warranted an exercise of the court’s equitable discretion to fashion an alternative remedy. That line of analysis is absolutely required under longstanding Washington Supreme Court precedent. *Mellen*, 179 Wash. at 283; *Roger*, 56 Wash. at 193; *Miebach*, 102 Wn.2d at 177-78; *Casa del Rey*, 110 Wn.2d at 72. Given that the trial court wholly failed to perform this analysis, its judgment cannot stand.

Deutsche Bank respectfully submits that the record is sufficiently developed for this Court to conclude that Deutsche Bank is entitled to an equitable remedy that makes Morgan Court whole without extinguishing Deutsche Bank’s entire security interest—for example, a judgment allowing Deutsche Bank to purchase the Unit from Morgan Court for the full amount Morgan Court paid at the foreclosure sale, plus interest and associated costs. In the event that

the Court disagrees, however, Deutsche Bank requests that the case be remanded to the trial court with instructions to perform a substantive balancing of the parties' competing equitable claims to title in the property and to fashion whatever equitable remedy it may deem appropriate.

II. CONCLUSION

The trial court failed to recognize that its duty to do equity transcends mechanical application of property rules. By failing to consider whether "slight circumstances indicating unfairness" were present in connection with the sale of the condominium for less than 5% of its fair market value, the trial court committed reversible error. Morgan Court does not (and cannot) deny that the trial court failed to perform this mandatory analysis.

Moreover, Morgan Court has admitted that it deliberately enriched itself at the expense of Deutsche Bank. Under longstanding Washington Supreme Court precedent, such conduct qualifies as a "slight circumstance indicating unfairness" that warrants equitable intervention. Accordingly, this Court should vacate the judgment quieting title in Morgan Court and remand the case to the trial court with instructions to fashion an equitable remedy that makes Morgan

Court whole without depriving Deutsche Bank of its entire interest in
the property.

RESPECTFULLY SUBMITTED this 5th day of
November, 2014.

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CERTIFICATE OF SERVICE

I certify that on November 5th, 2014, I caused to be served the foregoing APPELLANT'S REPLY BRIEF on the following and in the manner described below:

Michael Gene Fulbright Law Office of Michael Fulbright 1409 140th Place NE, Suite 102 Bellevue, WA 98007 Email: mike@fulbrightlegal.com <i>Attorneys for Respondent</i>	<input type="checkbox"/> U.S. Mail, Postage Prepaid <input checked="" type="checkbox"/> Federal Express Overnight <input type="checkbox"/> UPS 2 Day Shipping <input checked="" type="checkbox"/> E-mail per Agreement <input type="checkbox"/> Courier (hand delivery)
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