

IN THE FLORIDA SUPREME COURT

**Case No. SC17-954
DCA No. 2D15-5198**

**THE BANK OF NEW YORK MELLON FKA
THE BANK OF NEW YORK AS SUCCESSOR
TRUSTEE TO JP MORGAN CHASE BANK N.A.
AS TRUSTEE ON 10N BEHALF OF THE CERTIFICATE-
HOLDERS OF THE CWHEQ INC. CWHEQ
REVOLVING HOME EQUITY
LOAN TRUST SERIES 2006-D
*Petitioner***

v.

**DIANNE D. GLENVILLE A/K/A DIANE
D. GLENVILLE A/K/A DIANE GLENVILLE
and MARK S. GLENVILLE,
*Respondent***

*On Discretionary Review from the
Second District Court of Appeal – L.T. Case No. 2D15-5198*

ANSWER BRIEF OF RESPONDENT

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RECEIVED, 10/30/2017 05:08:26 PM, Clerk, Supreme Court

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ISSUE PRESENTED

Respondent, **DIANNE D. GLENVILLE A/K/A DIANE D. GLENVILLE A/K/A DIANE GLENVILLE and MARK S. GLENVILLE** (“Glenville”) largely agrees with Petitioner’s statement of the “Issue Presented”. The parties agree that the question before the Court is: **when does a “sale” occur as the term is utilized in *Florida Statutes*, Section 45.031.**

Petitioner’s contention that the issue for consideration by this Court is “When is a foreclosure ‘sale’ deemed to have been *completed* . . .” is **NOT** correct since the term “*completed*” does not appear anywhere in Section 45.031 and plays no part in the Second District Court’s analysis.

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, **THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK AS SUCCESSOR TRUSTEE TO JP MORGAN CHASE BANK N.A. AS TRUSTEE ON BEHALF OF THE CERTIFICATE-HOLDERS OF THE CWHEQ INC. CWHEQ REVOLVING HOME EQUITY LOAN TRUST SERIES 2006-D's** (“BONY”) statement of case and facts is incomplete. It understates the record evidence supporting affirmance and thus, Respondent, **DIANNE D. GLENVILLE A/K/A DIANE D. GLENVILLE A/K/A DIANE GLENVILLE and MARK S. GLENVILLE** (“Glenville”) accordingly restates the relevant record evidence.

This is an appeal from an opinion issued by the Second District Court of Appeal [Appendix 1] that affirmed the entry of Final Judgment granting Glenville’s Verified Claim for Mortgage Foreclosure Surplus Motion at the November 2, 2015 evidentiary hearing. (R2;408-409)

This appeal arises from a dispute over the disbursement of surplus proceeds from a foreclosure sale. Dianne and Mark Glenville (the record property owners) (R2;225-338) as well as Florida Housing Finance Corporation (the holder of an unsatisfied mortgage) (R2;320-321) and BONY filed claims for Surplus funds from Mortgage Foreclosure (R2;339-342).

JP Morgan Chase filed a foreclosure suit against Glenville in May 2014. In the complaint, JP Morgan Chase asserted that BONY and Florida Housing were junior lienholders (R1;2-27). In January 2015, BONY filed an answer, admitting that it was a junior lienholder and stating that it would be entitled surplus funds generated by a foreclosure sale (R1;89-91). In March 2015, Diane Glenville filed her Answer to the Complaint admitting that she was the record owner of the property and indicating that she was without knowledge to the interests of BONY or Florida Housing (R1;105-110). A Final Judgment of Foreclosure was entered against Glenville on March 28, 2015 (R2;286-290). The final judgment of foreclosure included the following language, as required by section 45.031 (1), Florida Statutes (2015):

IF THIS PROPERTY IS SOLD AT PUBLIC AUCTION, THERE MAY BE ADDITIONAL MONEY FROM THE SALE AFTER PAYMENT OF PERSONS WHO ARE ENTITLED TO BE PAID FROM THE SALE PROCEEDS PURSUANT TO THIS FINAL JUDGMENT. IF YOU ARE A SUBORDINATE LIENHOLDER CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS. IF YOU ARE THE PROPERTY OWNER, YOU MAY CLAIM THESE FUNDS YOURSELF.

A foreclosure sale was held on Thursday, July 2, 2015, (R2;311-312) and resulted in a surplus of \$86,093.27¹, which was placed in the court registry. The Certificate of Sale was issued by the clerk on Monday, July 6, 2015 and the Certificate of Title was issued on Tuesday, July 14, 2015² (R2;317-319) The certificate of disbursements was filed on July 29, 2015, and included the following language as required by Section 45.031 (7)(b):

If you are a person claiming a right to funds remaining after the sale, you must file a claim with the clerk no later than 60 days after the sale. If you fail to file a claim, you will not be entitled to any remaining funds. After 60 days, only the owner of record as of the date of the lis pendens may claim the surplus.

The only claim to be made during this sixty-day period was submitted by Florida Housing in the amount of \$20,573.64. (R2;320-321) On September 1, 2015 (the 61st day after the July 2, 2012 foreclosure sale) Glenville filed a Verified Claim to Mortgage Foreclosure Surplus Funds. (R2;335-338) In the motion, Glenville admitted that Florida Housing's claim was timely filed. A day later, BONY filed its claim to surplus funds on September 2, 2015, *the 62nd day after the July 2, 2015 foreclosure sale*. (R2;339-342) BONY's claim asserted that it was entitled to the disbursement of all of the surplus funds because its 2nd mortgage

¹ On September 17, 2015, the trial court entered an order disbursing an additional \$391.84 to the Plaintiff in the foreclosure action. (R2;372-373)

² The foreclosure sale took place on Thursday, July 2, 2015. The Clerk's office was closed on Friday, July 3, 2015 for the Independence Day holiday. The Certificate of Sale was issued by the clerk on Monday, July 6, 2015 and the Certificate of Title was issued only 8 days later, on Tuesday, July 14, 2015, which evidences that the Manatee County Clerk measured the date for the issuance of the Certificate of Title from the July 2, 2015 date of the actual foreclosure sale, as would be proper for all applications of the sale date in Section 45.031.

against the property was recorded 7 years prior to Florida Housing's recorded mortgage. Attached to BONY's claim were *unauthenticated* copies of a note and mortgage in favor of the original lender, Home Loan Center Inc. dba Lending Tree Loans, a California Corporation, and an unauthenticated copy of the third mortgage in favor of Florida Housing.

At the November 2, 2015 evidentiary hearing on the parties' competing claims for the surplus funds, BONY failed to provide any evidence in support of its claim for surplus funds. It presented no witness testimony and presented no documentary evidence to support its claim to the surplus funds.

Finding that the only timely claim to surplus funds was submitted by Florida Housing, and finding that Glenville was the record title holder as of the date of the recording of the lis pendens, the trial court granted Florida Housing's claim in the amount of \$20,573.64 and Glenville's Claim for Disbursement of Mortgage Foreclosure Surplus in the amount of \$69,991.29. (R2;408-409)

BONY filed its appeal arguing that the date that starts the 60-day time period for filing a claim to the surplus funds is actually the date of the issuance of the Certificate of Sale, not the date of the actual foreclosure sale as set forth in Section 45.031. (R2;410-413).

The Second District Court of Appeal affirmed the trial court's order finding that the language in Section 45.031 is clear and unambiguous and that the word

“sale” as utilized in Section 45.031 (1) means the actual sale date, not the date that the Certificate of Sale is issued [Appendix 2]. BONY filed a Motion for Rehearing/Motion for Rehearing En Banc and Request for Certification, arguing for the first time that the trigger for the 60-day surplus funds claims window is the clerk’s issuance of the Certificate of Title, not the Certificate of Sale as previously argued.

The Second District Court of Appeal withdrew its initial opinion and in its substitute opinion, once again affirmed the trial court’s order finding the language in Section 45.031 to be clear and unambiguous [Appendix 1]. The Second DCA ruled that the word “sale” as utilized in Section 45.031 (1) means the actual sale date, not the date that the Certificate of Title is issued, certifying conflict with the Fourth District Court of Appeal’s opinion in *Straub v. Wells Fargo Bank, N.A.*, 182 So. 3d 878 (Fla. 4th DCA 2016).

It should be noted that although the Second DCA certified the conflict in its decision in *Glenville* with the Fourth DCA’s decision in *Straub* and this Court granted jurisdiction based on this conflict, no real conflict actually exists. Article V, § 3(b)(3) of the Florida Constitution enables the Supreme Court to review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. However, BONY, the appellant in the Second DCA and *Straub*,

the appellant in the Fourth DCA, were really arguing two different points. BONY argued that the term “sale” as it is used in Section 45.031 (1) should be interpreted as Certificate of Sale. Straub argued that the term “sale” should be interpreted as Certificate of Title. As such, no direct conflict actually exists.

SUMMARY OF THE ARGUMENT

The Second DCA's decision in *Glenville* should be affirmed and its opinion adopted by this Court. A strict interpretation of Section 45.031 clearly and expressly provides that a subordinate lienholder's claim must be submitted within 60 days of the sale; not 60 days from the date of issuance of the Certificate of Sale as BONY initially argued or 60 days from the issuance of the Certificate of Title as the *Straub* court ruled and BONY now argues. If the legislature intended to permit the filing of a claim for surplus funds within 60 days of the issuance of the Certificate of Sale or Certificate of Title by the clerk, it could have done so in the 2006 amendments to Section 45.031. It did not, thus evidencing its clear intent to cut off claims to the surplus funds within 60 days of the actual sale date. For this court to interpret the language of Section 45.031 to permit BONY's otherwise untimely claim would constitute an unpermitted judicial expansion of the statutory deadline for filing a claim for surplus funds. Any such expansion of the time for filing a claim for surplus funds should be reserved for the legislature.

Additionally, the legislative intent behind the 2006 amendments to Section 45.031 that added the 60-day window for subordinate lienholders to file a claim to surplus funds is very clear: the amendments were intended to set a 60-day deadline for filing claims for surplus funds where there was previously none.

The language of the 2006 amendments to Section 45.031, when read in context with other sections amended in the same bill, clearly mandate that any claim filed by subordinate lienholders must be filed within 60 days of the public auction. The 2006 amendments also make it clear that, pursuant to Section 45.031, there is a rebuttable presumption that the record title owner of the property is entitled to the surplus proceeds from the sale after any subordinate lienholders who timely filed claims have been paid. A reading of the House of Representatives Staff Analysis makes the Legislature's intention irrefutable.

The Fourth DCA erred finding that the word "sale" as used in Section 45.031 means "Certificate of Title" because its interpretation is in conflict with a long line of cases and years of custom and usage by the circuit court clerks throughout the State of Florida. The adoption of the Fourth DCA's interpretation of the word "sale" to mean "Certificate of Title" in Section 45.031 would cause a wholesale change to the procedures for holding all types of judicial sales, not just foreclosure sales.

Finally, notwithstanding the outcome of this court's interpretation of the word "sale" in Section 45.031, BONY is not entitled to any portion of the surplus funds simply because BONY failed to introduce any evidence at the trial court's

evidentiary hearing held on November 2, 2015 to determine entitlement to the surplus funds.

ARGUMENT

I. The language of Section 45.031 is clear and unambiguous but the rules of statutory construction also require the Court to affirm the decision of the Second District Court of Appeal and strictly construe Section 45.031 so that a subordinate lienholder MUST file a claim within 60 days of the actual foreclosure sale.

The rules of statutory construction are the means by which courts seek to determine legislative intent only when that intent is not plain and obvious enough to be conclusive. *Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So.2d 1 (2004). It is well settled that legislative intent is the polestar that guides a court's statutory construction analysis. *See State v. Rife*, 789 So.2d 288, 292 (Fla.2001); *McLaughlin v. State*, 721 So.2d 1170, 1172 (Fla.1998). In determining that intent, this Court has explained that "we look first to the statute's plain meaning." *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So.2d 898, 900 (Fla.1996). Normally, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." *Holly v. Auld*, 450 So.2d 217, 219 (Fla.1984).

Applying the plain meaning of the word “sale” to the instant cases would require that this Court adopt the Second DCA’s analysis. Throughout Section 45.031, the term “sale” is used differently from the terms “Certificate of Sale” and “Certificate of Title”.

Section 45.031 (1) states:

45.031 Judicial sales procedure.—In any sale of real or personal property under an order or judgment, the procedures provided in this section and ss. 45.0315-45.035 may be followed as an alternative to any other sale procedure if so ordered by the court.

(1) FINAL JUDGMENT.—

(a) In the order or final judgment, the court shall direct the clerk to sell the property at public sale on a specified day that shall be not less than 20 days or more than 35 days after the date thereof, on terms and conditions specified in the order or judgment. A sale may be held more than 35 days after the date of final judgment or order if the plaintiff or plaintiff’s attorney consents to such time. The final judgment shall contain the following statement in conspicuous type:

IF THIS PROPERTY IS SOLD AT PUBLIC AUCTION, THERE MAY BE ADDITIONAL MONEY FROM THE SALE AFTER PAYMENT OF PERSONS WHO ARE ENTITLED TO BE PAID FROM THE SALE PROCEEDS PURSUANT TO THIS FINAL JUDGMENT.

IF YOU ARE A SUBORDINATE LIENHOLDER CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS.

The word “sale” in Section 45.031 (1) is used eight (8) times. The word “sale” in the entirety of Section 45.031 is used fifty-nine (59) times. Notwithstanding the repeated use of the word “sale” in the statute, Petitioner and the Straub court believe that “sale” as it pertains to the start of the 60-day timeclock for a subordinate lienholder to file a claim to surplus funds should be the one and only time that the word “sale” should be interpreted to mean either “Certificate of Sale” or “Certificate of Title.” That contention just makes absolutely no logical sense.

Although the statutory language is clear and unambiguous and there is no need to resort to the rules of statutory construction, the Second DCA’s interpretation of Section 45.031 in Glenville is supported by its legislative history. See Diamond Aircraft Indus., Inc. v. Horowitch, 107 So.3d 362, 367 (Fla.2013) (“In instances of an ambiguity in statutory language, we may resort to the rules of statutory construction, which permit us to examine the legislative history to aid in our determination regarding legislative intent.”).

A review of the 2006 amendments to Section 45.031, when language establishing a 60-day deadline from the sale was inserted into the statute, makes the meaning of the word “sale” in section 45.031(1) quite clear. See Laws of Florida 2006-175. [Appendix 3] Prior to the 2006 amendment, there was no time limit for a subordinate lienholder to file a claim for surplus funds.

The preamble to HB 65 (2006) expressly states that it is:

An act relating to foreclosure proceedings; amending s. 45.031, F.S.; revising procedures and requirements for judicial sales; creating s. 45.032, F.S.; providing for disbursement of surplus funds after a judicial sale; providing definitions; *establishing a rebuttable presumption of entitlement to surplus funds in certain filings; providing legislative intent*; providing requirements and procedures for disbursement of surplus funds by the clerk of court . . .

In the 2006 amendments, section 1 was amended to require certain statements in the Final Judgment, including for the first time, the 60-day window for subordinate lienholders to file a surplus funds claim, language identical to the current version of Section 45.031.

45.031 Judicial sales procedure.—In any sale of real or personal property under an order or judgment, the procedures provided in this section and ss. 45.0315-45.035 following procedure may be followed as an alternative to any other sale procedure if so ordered by the court.

(1) FINAL JUDGMENT SALE BY THE CLERK —

(a) In the order or final judgment, the court shall direct the clerk to sell the property at public sale on a specified day that shall be not less than 20 days or more than 35 days after the date thereof, on terms and conditions specified in the order or judgment. A sale may be held more than 35 days after the date of final judgment or order if the plaintiff or plaintiff's attorney consents to such time. The final judgment shall contain the following statement in conspicuous type:

IF THIS PROPERTY IS SOLD AT PUBLIC AUCTION, THERE MAY BE ADDITIONAL MONEY FROM THE SALE AFTER PAYMENT OF PERSONS WHO ARE ENTITLED TO BE PAID FROM THE SALE PROCEEDS PURSUANT TO THIS FINAL JUDGMENT.

IF YOU ARE A SUBORDINATE LIENHOLDER CLAIMING A RIGHT TO FUNDS REMAINING AFTER THE SALE, YOU MUST

FILE A CLAIM WITH THE CLERK NO LATER THAN 60 DAYS AFTER THE SALE. IF YOU FAIL TO FILE A CLAIM, YOU WILL NOT BE ENTITLED TO ANY REMAINING FUNDS.

(b) If the property being foreclosed on has qualified for the homestead tax exemption in the most recent approved tax roll, the final judgment shall additionally contain the following statement in conspicuous type:

IF YOU ARE THE PROPERTY OWNER, YOU MAY CLAIM THESE FUNDS YOURSELF. YOU ARE NOT REQUIRED TO HAVE A LAWYER OR ANY OTHER REPRESENTATION AND YOU DO NOT HAVE TO ASSIGN YOUR RIGHTS TO ANYONE ELSE IN ORDER FOR YOU TO CLAIM ANY MONEY TO WHICH YOU ARE ENTITLED. PLEASE CHECK WITH THE CLERK OF THE COURT, (INSERT INFORMATION FOR APPLICABLE COURT) WITHIN TEN (10) DAYS AFTER THE SALE TO SEE IF THERE IS ADDITIONAL MONEY FROM THE FORECLOSURE SALE THAT THE CLERK HAS IN THE REGISTRY OF THE COURT.

IF YOU DECIDE TO SELL YOUR HOME OR HIRE SOMEONE TO HELP YOU CLAIM THE ADDITIONAL MONEY, YOU SHOULD READ VERY CAREFULLY ALL PAPERS YOU ARE REQUIRED TO SIGN, ASK SOMEONE ELSE, PREFERABLY AN ATTORNEY WHO IS NOT RELATED TO THE PERSON OFFERING TO HELP YOU, TO MAKE SURE THAT YOU UNDERSTAND WHAT YOU ARE SIGNING AND THAT YOU ARE NOT TRANSFERRING YOUR PROPERTY OR THE EQUITY IN YOUR PROPERTY WITHOUT THE PROPER INFORMATION. IF YOU CANNOT AFFORD TO PAY AN ATTORNEY, YOU MAY CONTACT (INSERT LOCAL OR NEAREST LEGAL AID OFFICE AND TELEPHONE NUMBER) TO SEE IF YOU QUALIFY FINANCIALLY FOR THEIR SERVICES. IF THEY CANNOT ASSIST YOU, THEY MAY BE ABLE TO REFER YOU TO A LOCAL BAR REFERRAL AGENCY OR SUGGEST OTHER OPTIONS. IF YOU CHOOSE TO CONTACT (NAME OF LOCAL OR NEAREST LEGAL AID OFFICE) FOR ASSISTANCE, YOU SHOULD DO SO AS SOON AS POSSIBLE AFTER RECEIPT OF THIS NOTICE.

(c) A copy of the final judgment shall be furnished by the clerk by first class mail to the last known address of every party to the action or to the attorney of record for such party. Any irregularity in such mailing, including the failure to include this statement in any final judgment or order, shall not affect the validity or finality of the final judgment or order or any sale held pursuant to the final judgment or order. Any sale held more than 35 days after the final judgment or order shall not affect the validity or finality of the final judgment or order or any sale held pursuant to such judgment or order thereto.

In the 2006 amendments, a heading to section 45.031 (2) was added describing the section as “Publication of Sale” and going on to describe procedures for publication of the sale in the newspaper. If the term “Certificate of Sale” or “Certificate of Title” was substituted for the word “sale” in this subsection, it would make the provision nonsensical.

(2) PUBLICATION OF SALE.—Notice of sale shall be published once a week for 2 consecutive weeks in a newspaper of general circulation, as defined in chapter 50, published in the county where the sale is to be held. The second publication shall be at least 5 days before the sale. The notice shall contain:

- (a) A description of the property to be sold.
- (b) The time and place of sale.
- (c) A statement that the sale will be made pursuant to the order or final judgment.
- (d) The caption of the action.
- (e) The name of the clerk making the sale.
- (f) A statement that any person claiming an interest in the surplus from the sale, if any, other than the property owner as of the date of the lis pendens must file a claim within 60 days after the sale.

~~The clerk shall receive a service charge of up to \$60 for services in making, recording and certifying the sale and title that shall be assessed as costs.~~ The court, in its discretion, may enlarge the time of

the sale. Notice of the changed time of sale shall be published as provided herein.

In the 2006 amendments, a heading to Section 45.031 (3) was added describing the section as “Conduct of Sale” and new language was added as follows: “The sale shall be conducted at public auction at the time and place set forth in the final judgment.” Clearly, with the addition of this language, the legislature intended the word “sale” to mean the “public auction” and not the issuance of the “Certificate of Sale” or “Certificate of Title” by the clerk.

~~(3)(2)~~—CONDUCT OF SALE; DEPOSIT REQUIRED.—The sale shall be conducted at public auction at the time and place set forth in the final judgment. The clerk shall receive the service charge imposed in s. 45.035 for services in making, recording, and certifying the sale and title that shall be assessed as costs. At the time of the sale, the successful high bidder shall post with the clerk a deposit equal to 5 percent of the final bid. The deposit shall be applied to the sale price at the time of payment. If final payment is not made within the prescribed period, the clerk shall readvertise the sale as provided in this section and pay all costs of the sale from the deposit. Any remaining funds shall be applied toward the judgment.

Perhaps the 2006 amendments to section 45.031 (4) are the most instructive.

In 2006, the language to subsection 4 was amended to now state:

(4)(3) CERTIFICATION OF SALE.—After a sale of the property the clerk shall promptly file a certificate of sale and serve a copy of it on each party ~~not in default~~ in substantially the following form . . . (emphasis added)

The legislature’s intent in the use of the word “sale” could not have possibly meant “Certificate of Sale” because that term is separately used in this provision to have a distinct and different meaning. The word “sale” could not possibly have been meant to be “Certificate of Title” because it would be illogical to have the Certificate of Title issued prior to the Certificate of Sale, as instructed by 45.031 (4).

The legislature fully understood the concepts of “sale”, “certificate of sale” and “certificate of title” when enacting these amendments. However, they used each of these terms separately, to each mean separate things. “It is, of course, a general principle of statutory construction that the mention of one thing implies the exclusion of another; *expressio unius est exclusio alterius*.” *Thayer v. State*, 335 So.2d 815, 817 (Fla.1976). Therefore, it would be completely improper to use these terms interchangeably or to assume that the legislature meant “Certificate of Sale” or “Certificate of Title” when it referred to the conduct of the actual sale.

Additionally, The House of Representatives Staff Analysis summary on the HB 2006-175 (including the 2006 Amendments to Section 45.031) states:

Effect of Bill

The bill attempts to address problems and abuses in the handling of surpluses from foreclosures.

Disbursement of Surplus Funds

This bill creates s. 45.032, F.S. to provide for disbursement of surplus funds after a judicial foreclosure sale. The bill creates a rebuttable presumption that the owner of the property that was foreclosed, as of the date of the filing of the lis pendens, is entitled to surplus funds unless some other person proves entitlement to the funds. The bill provides a method to rebut the presumption.

Fla. H.R Comm. on Just., HB 65 (2006) Staff Analysis 3 (Apr. 20, 2006). [Appendix 4]

Because Section 45.031 includes a presumption that benefits the homeowner, this Court should interpret Section 45.031 in favor of the homeowner.

In summary, legislative intent must be derived primarily from the words expressed in the statute. If the language of the statute is clear and unambiguous, courts enforce the law according to its terms and there is no need to resort to rules of statutory construction. “Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.” *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 454 (Fla.1992).

Finally, under fundamental principles of separation of powers, courts cannot judicially alter the wording of statutes where the Legislature clearly has not done

so. A court's function is to interpret statutes as they are written and give effect to each word in the statute. *Florida Dep't of Revenue v. Florida Mun. Power Agency*, 789 So. 2d 320, 324 (Fla. 2001).

As such, this Court should apply the clear meaning of the word “sale” and use common sense when evaluating the legislative intent. Common sense dictates that the 60-day window for a subordinate lienholder to file a surplus funds claim starts on the date of the actual foreclosure sale, and not the issuance of the Certificate of Title. *See School Bd. of Palm Beach County v. Survivors Charter Schools, Inc.*, 3 So.3d 1220, 1235 (Fla. 2009)(“we are not required to abandon either our common sense or principles of logic in statutory interpretation” (citing *Bautista v. State*, 863 So.2d 1180, 1185 (Fla.2003)). (applying a “common-sense approach” to statutory interpretation in order to give effect to legislative intent). Therefore, this Court must adopt the Second DCA’s clear meaning and common sense analysis in *Glenville* and quash the Fourth DCA’s decision in *Straub*.

II. The Fourth DCA erred finding that the word “sale” as used in Section 45.031 means “Certificate of Title” because its interpretation is in conflict with a long line of cases throughout the State of Florida.

In *Straub*, the Fourth DCA cites several cases that are 80 to 110 years old to interpret the word “sale” as it is used in Section 45.031 (1). However, it fails to acknowledge that each and every one of these cases was decided prior to the 2006

amendments to Section 45.031 which, for the first time, added a statutory 60-day surplus funds claims deadline. The legislature is presumed to know the judicial constructions of a law when enacting a new version of that law and when a statute is designed to change common law and does so in explicit terms, it must be strictly construed. Essex Ins. Co. v. Zota, 985 So.2d 1036 (Fla. 2008).

Since the 2006 amendment to the statute, the authority on a party's entitlement to surplus funds is clear - if a subordinate lienholder fails to file a claim to surplus funds within 60 days of the actual foreclosure sale, that party is not entitled to surplus funds. See Dever v. Wells Fargo Bank, N.A., 147 So. 2d 1045 (Fla. 2nd DCA 2014) (counting the 60-day period in Section 45.031 to commence on the date of the actual foreclosure sale); Matthews v. Branch Banking & Trust Co., 139 So. 2d 498 (Fla. 2nd DCA 2014) (also counting the 60-day period in Section 45.031 to commence on the date of the actual foreclosure sale).

Even the Fourth DCA has previously ruled that the 60-day window for a subordinate lienholder to file a claim to the foreclosure sale surplus starts on the date of the actual foreclosure sale. In Saulnier v. Bank of America, 187 So.3d 854 (Fla. 4th DCA 2015), a subordinate lienholder failed to file within the 60-day calculated from the actual foreclosure date. Bank of America argued that it was entitled to an extension of that period because it not receive a copy of the final judgment or certificate of disbursements. The Fourth DCA found that the failure

to file within 60 days of the actual sale date is an absolute bar to a claim for surplus, because a party receives actual notice of the date of the foreclosure sale by receipt of a copy of the Final Judgment and receives constructive notice of the foreclosure sale date by posing of pleadings on the court docket. *Id.*

Likewise, caselaw interpreting other subsections of Section 45.031 interpret the term sale to mean the actual foreclosure auction date. See *Karapetyan v. Deutsche Bank National Trust Co.*, 220 So.3d 542 (Fla. 3d DCA 2017) (calculating the timing of the publication of notice of foreclosure in Section 45.031(2) from the date of the actual foreclosure sale); *Castello Development, LLC v. Aurora Loan Services, LLC*, 285 So.3d 515 (Fla. 4th DCA 2012) (reviewing clerk's refusal to issue certificate of title and certificate of sale after foreclosure sale for lack of publication of notice of sale prior to the period set forth in Section 45.031).

Here, the plain language of Section 45.031 (1) and prior caselaw interpreting Section 45.031 decided after the 2006 statutory amendments requires the filing of a claim for surplus funds be filed no later than 60 days after the actual foreclosure sale. Here, the clear evidence in the record indicates that the foreclosure sale occurred on July 2, 2015 and thus, the 60 day deadline to file a claim expired on August 31, 2015. Because BONY did not file its claim until September 2, 2015, the 62nd day after the sale, its claim is untimely and is barred under the plain

language of Section 45.031 (1). As such, the Second DCA’s opinion affirming the trial court’s order directing the clerk to disburse funds to Florida Housing and to Glenville must be approved.

III. This Court should affirm the decision of the trial court and the Second DCA because BONY failed in its evidentiary burden at the trial court level by failing to introduce ANY evidence at the statutorily required evidentiary hearing and failed in its burden at the appellate level for its failure to supply the appellate court with a transcript of the trial court hearing.

Pursuant to Section 45.031, there is a rebuttable presumption that the owner of record of property that is the subject of a foreclosure sale is entitled to the surplus proceeds from the sale. It is the subordinate lienholder’s burden to introduce evidence at the evidentiary hearing to overcome this presumption.

Section 45.032, Florida Statutes, provides guidance as to the procedures to be followed when disbursing surplus funds after a foreclosure sale. Section 45.032 provides in relevant part:

45.032 Disbursement of surplus funds after judicial sale.—

- (1) For purposes of ss. 45.031-45.035, the term:
 - (a) “Owner of record” means the person or persons who appear to be owners of the property that is the subject of the foreclosure proceeding on the date of the filing of the lis pendens. *In determining an owner of record, a person need not perform a title search and examination but may rely on the plaintiff’s allegation of ownership in the complaint when determining the owner of record. (emphasis added)*

(2) There is established a rebuttable legal presumption that the owner of record on the date of the filing of a lis pendens is the person entitled to surplus funds after payment of subordinate lienholders who have timely filed a claim. (emphasis added)

(3)(b) If any person other than the owner of record claims an interest in the proceeds during the 60-day period or if the owner of record files a claim for the surplus but acknowledges that one or more other persons may be entitled to part or all of the surplus, the court shall set an evidentiary hearing to determine entitlement to the surplus. (emphasis added)

In the instant case, an evidentiary hearing pursuant to Section 45.032 (3)(b) was held on November 2, 2015. At this hearing, BONY submitted no evidence in support of its claim to the surplus funds. The trial court accordingly made several findings of fact:

1. Subordinate Lienholder Florida Housing Finance Agency (“Florida Housing”) has submitted a timely claim for the sum of \$20,573.64.

2. Subordinate Lienholder The Bank of New York, as Successor Trustee to JP Morgan Chase Bank, N.A. Trustee (“BONY”), has submitted a claim for surplus funds but BONY’s claim was not submitted within 60 days of the foreclosure sale held on July 2, 2015 and therefore, pursuant to Section 45.031, BONY’s is not entitled to any of the surplus funds.

3. Other than the claims to surplus funds filed by Florida Housing and BONY, there have been no other claims to the surplus funds.

4. Dianne D. Glenville and Mark S. Glenville were the owners of record of the subject property as of the date of the filing of the lis pendens in this action and are entitled to all remaining surplus funds not disbursed to Florida Housing.

Here, it is BONY's burden to overcome the presumption in favor of the homeowner. Because BONY did not provide a copy of the trial transcript to the appellate court, BONY failed in its burden and there is no evidence to indicate that the trial court abused its discretion in making these findings of fact.

The most basic, black letter principle of appellate law is that the trial court's decision arrives before an appellate court cloaked with a "presumption of correctness and the burden is on the appellant to demonstrate error." *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150, 1152 (Fla.1979). This principle is particularly applicable here because the trial court's order can only be reversed based upon a determination that the trial court abused its discretion in making its findings of fact. Without a copy of the evidentiary hearing transcript, it is simply impossible for this court to conclude that the trial court abused its discretion in this case.

As the Florida Supreme Court explained,

In appellate proceedings the decision of a trial court has the presumption of correctness and the burden is on the appellant to demonstrate error.... When there are issues of fact the appellant necessarily asks the reviewing court to draw conclusions about the evidence. *Without a record of the trial proceedings, the appellate*

court cannot properly resolve the underlying factual issues so as to conclude that the trial court's judgment is not supported by the evidence or by an alternative theory. Without knowing the factual context, neither can an appellate court reasonably conclude that the trial judge so misconceived the law as to require reversal. The trial court should have been affirmed because the record brought forward by the appellant is inadequate to demonstrate reversible error.

Applegate, 377 So.2d at 1152 (emphasis added).

Judge Padovano has also noted, “the absence of a transcript is likely to present a serious problem if the order is one that turns on an issue of fact or the proper exercise of judicial discretion. In either of these events, it may be impossible to evaluate the order without reference to a full record of the testimony and other evidence.” Philip J. Padovano, Florida Appellate Practice § 18:3, at 342 (2012 ed.). We have both events here. This court is being asked by BONY to review an order that implicates both issues of fact and a trial court's discretion. If any type of order requires a transcript in order to conduct a meaningful review, it is precisely this type of order which turns on issues of fact and the proper exercise of judicial discretion.

Because the trial court order is “cloaked with a presumption of correctness”, and BONY failed to overcome this presumption, this court must adopt the Second DCA's opinion and the trial court's order directing the clerk to disburse funds to Florida Housing and to Glenville.

CONCLUSION

The Second DCA's decision in *Glenville* should be approved and its opinion adopted by this Court. A strict interpretation of Section 45.031 clearly and expressly provides that a subordinate lienholder's claim must be submitted within 60 days of the sale; not 60 days from the date of issuance of the Certificate of Sale as BONY initially argued or 60 days from the issuance of the Certificate of Title as the *Straub* court ruled and BONY now argues. This Court should apply logic and common sense in reviewing the foreclosure sale procedures established in the 2006 amendments to Section 45.031 and find that the word "sale" in Section 45.031(1) means the actual sale or public auction. To interpret this section in any other way would lead to a wholesale change in the foreclosure sale procedures used by each and every circuit court clerk in the State of Florida and would run contrary to a multitude of opinions that are consistent with the Second District Court's analysis.

As such, this Court should approve the Second District Court's opinion in *Glenville* and disapprove the Fourth District's opinion in *Straub*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been e-filed with the e-portal for the Second District Court of Appeal and that true and correct copies of the foregoing were sent by eservice on October 30, 2016 to the parties listed below:

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CERTIFICATE OF COMPLIANCE WITH FONT STANDARDS

I CERTIFY that this brief was prepared using Times New Roman 14-point font.

/s/ Sheryl A. Edwards

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