

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

TERRY CASE,)	
)	
Plaintiff-Appellee,)	No. E2021-00378-SC-R11-CV
)	
vs.)	On Appeal from the
)	Chancery Court of
WILMINGTON TRUST, N.A., AS)	Hamilton County
TRUSTEE FOR TRUST MFRA)	(Chancellor Atherton)
2014-2, ET AL.)	No. 20-0144
)	
Defendant-Appellant)	

AMICI CURIAE BRIEF OF THE TENNESSEE BANKERS
ASSOCIATION AND THE TENNESSEE MORTGAGE BANKERS
ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT

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INTRODUCTION

The Tennessee Bankers Association and the Tennessee Mortgage Bankers Association (the “Amici”) submit this *Brief*, pursuant to Tenn. R. App. P. 31, in support of the *Brief of Appellant* filed by *Wilmington Trust, N.A., as Trustee for MFRA Trust 2014-2*.

The Amici closely monitor decisions of Tennessee’s trial and appellate courts that impact financial institutions and mortgage lenders in the State of Tennessee. Faced with any decision that presents a risk of substantial and negative impact on the lending industry, the Amici have a duty to both their member financial institutions and to their members’ customers to advocate on their behalf.

The Amici believe that the opinion issued in this matter on June 28, 2022 (the “Opinion”) by the Tennessee Court of Appeals presents such a risk to the banking, mortgage, and title industry.

The Opinion evaluates the underlying borrower’s claim for “wrongful foreclosure” in a way that draws its authority from several disparate sources of authority and mandates a remedy—rescission of the underlying sale—that is expressly disfavored under Tennessee’s foreclosure statutory scheme.

As a result, the Opinion introduces a danger of uncertainty of title for unnumerable past, present, and pending foreclosure sales.

STATEMENT OF INTEREST

The Tennessee Bankers Association is a Tennessee nonprofit corporation serving as the principal trade association of the banking industry in the State of Tennessee. The TBA coordinates advocacy programs on both the state and national levels. It monitors and helps develop legislative and judicial agendas related to the banking industry, provides regulatory updates to members, researches legal questions posed by members, and serves as a liaison between member banks and state and federal governing bodies and regulatory agencies.

In addition, the TBA provides continuing education, disseminates information on all facets of the financial services industry, and promotes the public image of financial institutions.

The Tennessee Mortgage Bankers Association is a Tennessee nonprofit corporation representing the real estate finance industry in Tennessee. Its members include real estate finance companies, mortgage companies, mortgage brokers, commercial banks, thrift institutions, credit unions, life insurance companies, and others in the mortgage lending field. The TNMBA seeks to promote ethical, efficient, and professional business practices in mortgage financing.

As a member of the National Mortgage Bankers Association, which boasts more than 2,200 members nationwide, the TNMBA also provides the Tennessee real estate finance community with a voice in both state and federal government. As an advocate, the TNMBA supports the enactment of legislation and judicial decisions that enable

mortgage lenders to best serve the needs of individuals and businesses seeking mortgage financing in Tennessee.

Both Amici have an educated, on-the-ground perspective as to how the Opinion could adversely impact Tennessee financial institutions and the customers those institutions serve.

The Amici submit this brief in order to emphasize the importance of the issues raised in this case and believe that their perspective will be useful to the Court.

ARGUMENT

Under the developing case law, a party seeking to challenge a non-judicial foreclosure in Tennessee can choose between at least three different legal theories—all under the general name of “wrongful foreclosure”—with each version having different elements, applications, and remedies, even where the challenge is based on the same set of facts.

The confusion is largely due to the fact that a lender’s authority to foreclose is based on two separate, and not always consistent, sources: Tennessee’s foreclosure statutes (Tenn. Code Ann. §§ 35-5-101, *et. seq.*); and the contractual terms of the lender’s deed of trust. While those two systems are often aligned, lenders and borrowers struggle when presented with the differences.

Similarly, trial and appellate courts are often faced with fact-intensive foreclosure challenges that don’t fit exclusively under either of the systems. In some cases, even though both may allege failure to comply with contractual requirements, Tennessee courts sometimes consider “wrongful foreclosure” as a “breach of contract” claim; in other cases, the same allegations are considered “independent and distinct from a contract claim.”

The outcome reached in the Opinion reflects the challenges of navigating the different systems and the variety of directions that the case law interpreting these issues follows.

In light of the potential disruption to the banking, mortgage, and title industry, the Amici ask that the Supreme Court carefully and fully

consider the risks that the Opinion poses. For the reasons set forth below, the Amici request that the Tennessee Supreme Court reverse the Court of Appeal's judgment on the merits. The record before the Court supports a finding that there was no breach of the deed of trust and, even if a technical breach were found, that rescission is not the appropriate (or exclusive) remedy when the alleged breach results in no actual damages to the claimant.

If allowed to stand, the Opinion would substantially and negatively change Tennessee's foreclosure process, result in continued confusion about the finality of foreclosure sales, and call into question the status of title of thousands of properties conveyed at past, pending, and future foreclosure sales.

I. The Court of Appeals applied Tenn. Code Ann. § 35-5-101(f) in a way that renders the statute's text meaningless and will apply beyond the narrow dispute in this case.

- A. By the enactment of Tenn. Code Ann. § 35-5-101(f), the General Assembly expressly provided lenders rights to postpone foreclosure sales when those rights were not, otherwise, provided under deeds of trust.

Tenn. Code Ann. § 35-5-101(f) was enacted in 2011 to provide a much-needed clarification on a critical foreclosure issue. Specifically, this statute provides the terms by which a foreclosing trustee may

postpone a pending foreclosure sale, even when the relevant deed of trust is silent on the trustee's ability to postpone or adjourn the sale. *Id.*

Prior to its enactment, unless the relevant deed of trust contained language *expressly* allowing a continuance, Tennessee lenders and foreclosure practitioners were unsure about their ability to postpone sales and unsure about the process by which a sale could be postponed. Some case law provided that foreclosure sales could only be held on the scheduled date, unless all parties expressly agreed to a continuance. *See, generally, Jameson v. Kimbrough*, 354 S.W.2d 458, 461 (Tenn. 1962). Even then, lenders agonized over how long sales could be continued, whether a new newspaper advertisement must be published, and what types of notice must be provided to a borrower.

This uncertainty led to a general reluctance to postpone foreclosure sales, and this rigidity cut short lenders' and borrowers' ability to fully negotiate resolutions of pending sales or complete other consensual work-outs of the defaulted debts. Generally, prior to Tenn. Code Ann. § 35-5-101(f)'s enactment, once a sale date was set, the foreclosure proceeded on that original date unless cancelled by the lender or by the automatic stay resulting from a bankruptcy filing. During the Great Recession, this forced countless properties into foreclosure that, with more time, might have been avoided.

The Tennessee General Assembly's amendment to add Tenn. Code Ann. § 35-5-101(f) provided clarity about a lender's ability to postpone sales, even in situations where the deed of trust was otherwise silent. This statute provides the exact terms to be followed to lawfully postpone a pending foreclosure sale. Among other provisions, Tenn.

Code Ann. § 35-5-101(f)(3) allows a foreclosing trustee to continue a sale without written notice sent to the debtor where the postponement is for less than 30 days.

B. The Court of Appeal’s application of Tenn. Code Ann. § 35-5-101(f)(3) disregards the plain text of the statute and will create confusion.

The specific danger presented by the Opinion is that, in reaching its ultimate result, the Court of Appeals emphasized obscure terms contained in the underlying deed of trust to overcome the express text in the applicable Tennessee statute (Tenn. Code Ann. § 35-5-101(f)). By doing so, the Opinion risks practical abrogation of the Tennessee General Assembly’s intent in enacting the statute.

(1) This deed of trust does not contain a prohibition on foreclosure postponements.

In this action, there is no question that postponement or adjournment of a foreclosure sale was not “contractually prohibited” under the operative deed of trust. Instead, this deed of trust is silent as to postponements of pending foreclosure sales. As a result, this deed of trust is exactly the type of instrument that Tenn. Code Ann. § 35-5-101(f) was designed for.

- (2) The Opinion disregards the text of Tenn. Code Ann. § 35-5-101(f)(3), looking, instead, to generic text in the deed of trust regarding written notices.

Despite this clear statutory text, the Court of Appeals nevertheless denied the trustee’s ability to postpone the sale without written notice.

The Court of Appeals based its logic on a general provision in the deed of trust that requires any notices to the borrower to be made “in writing.” Citing this general provision, the Court of Appeals found that, while an oral announcement of “short” continuances may be allowed under Tenn. Code Ann. § 35-5-101(f)(3), such an oral announcement did not satisfy the “writing” requirement in the deed of trust. As a result, the oral notice made pursuant to Tenn. Code Ann. § 35-5-101(f)(3) was deemed defective.

Under the Opinion’s reasoning, then, any deed of trust with a “written notice” provision would prevent the application of Tenn. Code Ann. § 35-5-101(f)(3), even though this statute was crafted to apply where deeds of trust were otherwise silent. This strained interpretation of the “written notice” provision would, in essence, subvert the purpose of the General Assembly in enacting the postponement statute. This generic “written notice” provision appears in the boilerplate text of virtually any deed of trust.

The Opinion will cause confusion and return Tennessee lenders to the precise state of uncertainty that Tenn. Code Ann. § 35-5-101(f)(3) was enacted to eliminate. The Opinion imposes obligations on

foreclosure trustees that exceed those clearly stated in the operative statute, which governs situations where the deed of trust is silent on foreclosure postponements. By focusing its analysis on a close and nuanced reading of the general “written notice” provision, the Court of Appeals has created an outcome where the Court’s exception swallows the General Assembly’s rule.

II. Recission of sales is a remedy that is disfavored by the Tennessee General Assembly, and the Opinion’s mandate of that remedy creates a risk to the lending and title industry.

Tennessee’s jurisprudence related to wrongful foreclosure has long vexed litigants and courts about what elements must be established and what remedies are available.

As stated in the Opinion (as well as most Tennessee cases considering the issue), a borrower’s allegation of “wrongful foreclosure” means different things in different contexts. Sometimes, it’s a defense to an eviction action. Sometimes, it’s a breach of contract allegation based on the terms of the deed of trust instrument. Sometimes, it’s an independent claim (not arising under any breach of contract theory) based on an allegation that the foreclosing party failed to follow the deed of trust or Tennessee foreclosure statutes.

In each of these contexts, a party asserting “wrongful foreclosure” draws from disparate lines of authority for the elements of the claim it is presenting.

The law on “wrongful foreclosure” is confusing to courts and litigants because it has evolved in piece-meal fashion, drawing some aspects from breach of contract theories based on mortgage instruments and others from statutory construction based on Tennessee’s foreclosure statutes. The claim can have different elements—and drastically different remedies—depending on which of Tennessee’s two non-judicial foreclosure systems is at issue. Because all Tennessee foreclosures must satisfy both systems, a litigant can cobble together an argument from the amorphous case law in nearly any direction.

A. Tennessee courts have noted the ambiguity related to claims of wrongful foreclosure and nevertheless established authority despite this ambiguity.

In the most recent Tennessee opinion considering wrongful foreclosure claims, the Court of Appeals looked at these various applications. See *Bank of New York Mellon v. Chamberlain*, No. M202100684COAR3CV, 2022 WL 3026908, at *12 (Tenn. Ct. App. Aug. 1, 2022)(“Wrongful foreclosure may be asserted as its own cause of action, an affirmative defense to an unlawful detainer action, or as a theory of a breach of contract or tort claim.”)(citations omitted).

While doing so, the court expressly recognized that “[t]here are no specific elements for a wrongful foreclosure claim under Tennessee law” and then looked at a recent survey of Tennessee law from the federal courts for guidance. *Id.* (citing *Amodio v. Ocwen Loan Servicing, LLC*, No. 3:18-CV-00811, 2018 WL 6727106, at *3 (M.D. Tenn. Dec. 21, 2018).

In crafting relief in the *Chamberlin* matter, the Court of Appeals cited the Opinion currently being considered by this Court as its authority for two critical propositions. First, “[w]ithin a wrongful foreclosure cause of action, there is no requirement that a borrower establish damages as with a breach of contract claim” and, second, “a trustee’s mere failure to comply with the terms of a deed of trust will render the foreclosure sale invalid.” *Id.* at *13.

From decades of ambiguity, the Opinion has provided undeserved certainty to an unsettled issue of law. As noted in Wilmington’s Brief, the majority of other states that have considered these issues hold that the extraordinary remedy of rescission is only warranted, if at all, where the challenged defect prejudiced or otherwise harmed the defaulting borrower. In short, rescission may be an available remedy, but rarely is rescission a mandated remedy.

B. The Tennessee General Assembly has clearly expressed a statutory preference against rescission.

When the Tennessee General Assembly has spoken, it has crafted statutes that preserve the sanctity of title and expressly prohibited attacks on title, even in the face of technically defective sales.

For instance, Tenn. Code Ann. § 35-5-106 expressly precludes rescission as a remedy for statutory foreclosure violations (providing that “[s]hould the officer, or other person making the sale, proceed to sell without pursuing the provisions of this chapter, the sale shall not, on that account, be either void or voidable.”). Instead, under Tenn. Code

Ann. § 35-5-107, a borrower’s recovery for defects under the statutes is limited to monetary damages (providing that “[a]ny officer, or other person, referenced in § 35-5-106 who fails to comply with this chapter commits a Class C misdemeanor and is, moreover, liable to the party injured by the noncompliance, for all damages resulting from the failure.”). In a July 2022 opinion, the Tennessee Court of Appeals wrote “it is clear that in enacting [§ 35-5-106], the General Assembly intended to eliminate the uncertainty with land titles resulting from foreclosure sales.” *See Daniels v. Trotter*, No. E202001452COAR3CV, 2022 WL 2826848, at *4 (Tenn. Ct. App. July 20, 2022); *see also Doty v. Fed. Land Bank of Louisville*, 169 Tenn. 496, 89 S.W.2d 337, 339 (1936).

C. Mandating rescission, without any showing of harm, would be disruptive to the lending and real estate markets in Tennessee.

Borrowers who are impacted by an improper or defective foreclosure process should certainly have claims and remedies for those actions. The Amici do not argue that this Court must deny aggrieved borrowers post-foreclosure relief in such circumstances. Instead, the Amici are concerned about the potential disruption to the foreclosure, lending, and title markets presented by this developing line of cases, which would *require* rescission of property transfers, without consideration of any other factors (including harm to the borrower, elapsed time after the foreclosure, or the rights of innocent third parties).

The Opinion’s statements regarding the law on wrongful foreclosures is the exact outcome that the Tennessee General Assembly sought to avoid by enacting Tenn. Code Ann. § 35-5-106. Because of the interplay of Tennessee’s dual-track foreclosure system, the mandate of rescission in the deed of trust track of the process would necessarily cause a ripple effect into the statutory foreclosure track. Under the Opinion, title to every foreclosed property would remain uncertain until the statutory expiration of all conceivable wrongful foreclosure claims—up to 6 years after the sale.

Legal authority that mandates rescission based on technical defects (without any showing of harm) would introduce uncertainty into the Tennessee real-estate market by creating undue clouds on title on every foreclosed real property. Title companies would not insure foreclosed properties. Potential buyers would be reluctant to bid at foreclosures. Bidders would exploit the uncertainty, resulting in depressed foreclosure sale prices and higher deficiency balances.

The Amici do not argue that rescission should never be a potential remedy for a borrower asserting a wrongful foreclosure challenge under a deed of trust. Instead, a foreclosing lender’s action to enforce its rights under a deed of trust should be analyzed as a breach of contract action, and the lender’s actions should be tested according to the elements of a breach of contract claim and subject the lender to the available remedies, which include—*but are not limited to*—rescission.

The Opinion erroneously provides that, in response to a wrongful foreclosure challenge, rescission is the exclusive remedy, without consideration of actual damages suffered by the borrower, other

relevant facts, and elucidation of the proper elements of a breach of contract claim. The Opinion introduces dangerous precedent that would be harmful to Tennesseans.

CONCLUSION

The Court of Appeals Opinion in this case subverts powers that the General Assembly expressly provided to trustees and creditors under Tenn. Code Ann. § 35-5-101(f). Further, if allowed to stand, the authority resulting from the Opinion, including the potential for rescission of sales, will cause substantial harm to lenders and unnecessarily create clouds on title that will, effectively, impair the transfer of foreclosed properties for up to 6 years under Tennessee law.

Based on the foregoing, the Amici request that the Supreme Court vacate the Opinion of the Court of Appeals and hold that the trustee acted correctly in following the requirements of Tenn. Code Ann. § 35-5-101(f) and, in order to secure uniformity of decision given the conflicts between the various decisions considering these issues, clarify Tennessee case law that a claim of wrongful foreclosure is founded upon breach of contract theories.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, I certify that this Brief complies with the requirements of Section 3.02 of Rule 46.

According to the word count in Microsoft Word, there are 2,983 words in this Brief.

/s/ David M. Anthony
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on the following via **the ECF filing system's electronic mail pursuant to Tennessee Supreme Court Rule 46, Section 4.01**, to:

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