IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

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

APPLICATION FOR PERMISSION TO APPEAL OF WILMINGTON TRUST, N.A., AS TRUSTEE FOR MFRA TRUST 2014-2

Edmund S. Sauer (BPR No. 29966)
Alex McFall (BPR No. 33949)
BRADLEY ARANT BOULT CUMMINGS LLP
1600 Division Street, Suite 700
Nashville, TN 32703
(615) 252-2374 (phone)
(615) 252-6355 (fax)

Counsel for Wilmington Trust, N.A., as trustee for MFRA Trust 2014-2

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

JUDGMENT OF THE COURT OF APPEALS

The Court of Appeals issued its decision on June 28, 2022. A copy of the Court of Appeals' judgment and opinion are attached as Addendum 1. Defendant-Appellant Wilmington Trust, N.A., as trustee for MFRA Trust 2014-2, filed a petition for rehearing, which the Court of Appeals denied on July 12, 2022. A copy of the Court of Appeals' order denying the petition for rehearing is attached as Addendum 2.

INTRODUCTION

Tennessee wrongful-foreclosure law is in a state of disarray. Neither this Court nor the General Assembly has even recognized an independent cause of action for wrongful foreclosure by name, let alone articulated the claim's elements, limitations period, or available remedies. Indeed, the only point on which Tennessee courts seem to agree is that a wrongful-foreclosure claim under Tennessee law has "no specific elements." *See* Slip. Op. 12; *accord Amodio v. Ocwen Loan Servicing, LLC*, No. 3:18-CV-00811, 2018 WL 6727106, at *3 (M.D. Tenn. Dec. 21, 2018); *Bank of New York Mellon v. Chamberlain*, No. M2021-00684-COA-R3-CV, 2022 WL 3026908, at *13 (Tenn. Ct. App. Aug. 1, 2022).

The resulting confusion runs deep. Some Tennessee courts treat wrongful foreclosure as a contractual claim. *See, e.g.*, *Thornley v. U.S. Bank, N.A.*, No. M2014-00813-COA-R3-CV, 2015 WL 3989380, at *4 (Tenn. Ct. App. June 30, 2015). Other courts classify it as a fraud claim. *See, e.g.*, *Davis v. Williams*, No. E2010-01139-COA-R3-CV, 2011 WL 335069, at *4 (Tenn. Ct. App. Jan. 31, 2011); *Hulan v. Coffee Cnty. Bank*, No. M2018-00358-COA-R3-CV, 2019 WL 354870, at *3 (Tenn. Ct. App. Jan. 28, 2019); *Foster v. Fed. Nat. Mortg. Ass'n*, No. E2012-02346-COA-R3-CV, 2013 WL 3961193, at *3 (Tenn. Ct. App. July 31, 2013). And at least one court even classified wrongful foreclosure as a personal-injury claim. *See Whitsey v. Williamson Cnty. Bank*, 700 S.W.2d 562, 565 (Tenn. Ct. App. 1985). As a result of this confusion, wrongful-foreclosure actions are inconsistently and unpredictably analyzed across the state on a case-by-case basis, under different sets of legal rules and guiding principles.

The Tennessee General Assembly has adopted a non-judicial foreclosure framework to regulate mortgage foreclosures. That statutory framework provides that defects in the statutory foreclosure process can give rise to an action for monetary damages. *See* Tenn. Code Ann. § 35-5-107. But the General Assembly specifically rejected the uncertainty and expense associated with voiding or setting aside foreclosure sales. *See id.* § 35-5-106 (providing that statutory defects in foreclosure process "shall not" render sale "void or voidable"); *see also Smith v. Hughes*, 639 S.W.3d 627, 648 (Tenn. Ct. App. 2021) ("It is apparent that the legislature did not want uncertainty concerning land titles to prevail."). Nevertheless, some Tennessee courts continue to recognize common law wrongful-foreclosure actions seeking rescission of a foreclosure sale where the borrower alleges violations of a Deed of Trust's notice provisions, either as a standalone claim or as a defense in a post-foreclosure detainer action. *See* Slip. Op. 12.

In doing so, Tennessee courts are divided on whether a borrower can obtain rescission of a foreclosure sale based on a technical violation of the Deed of Trust's notice provisions without even alleging that he or she suffered harm as a result of the violation. That important legal issue is cleanly presented for review here. The Court should grant review to clarify Tennessee wrongful-foreclosure law, resolve the existing conflict, and join the overwhelming number of states holding that the extraordinary and costly remedy of rescission is only warranted, if at all, where the challenged defect prejudiced or otherwise harmed the defaulting borrower. Setting aside foreclosure sales based on harmless defects accomplishes nothing, other than increased uncertainty

regarding property ownership and costlier mortgages for Tennessee homeowners.

This case illustrates quite well the senselessness of mandating rescission when the alleged notice defect causes no harm. Plaintiff Terry Case has not made a mortgage payment on the property—valued at more than $1 million—since July 2013. At the time of the challenged foreclosure sale rescheduled for March 2020, Mr. Case owed over $851,000 on the Loan, attested under penalty of perjury just months prior to the sale that he had just $75.00 in total financial assets, and had no equity in the property. Fay Decl., R. Vol. III at 339 ¶ 11; Petition, R. Vol. XIII at 1864; Motion for Relief from Stay, R. Vol. XII at 1763 ¶¶ 5, 6. Indeed, Mr. Case has gone through *eight* bankruptcies during the life of this Loan.

Mr. Case's wrongful-foreclosure claim alleges that he was not given written notice of the rescheduled foreclosure sale of his property. But Mr. Case does not—and cannot—allege that he was in a position to pay off the Loan or bid on the property at the rescheduled foreclosure sale. In fact, he elected to bring his wrongful-foreclosure claim seeking damages—and only damages—based on Wilmington and the trustee's failure to provide him with written notice. Am. Compl., R. Vol. I at 83–84. Nevertheless, the Court of Appeals held that he is entitled to rescission of the foreclosure sale, even though he elected not to pursue such relief and made no allegation and submitted no proof that the defect harmed him in any way.

Review is warranted to "secure uniformity of decision" on the "important question of law" presented here: whether Tennessee law

requires trial courts to set aside foreclosure sales based on technical notice defects that do not cause any harm or prejudice. Tenn. R. App. P. 11(a)(1), (2). Review is further warranted to clarify Tennessee wrongful-foreclosure law more generally, an area of the law that is becoming even more important as COVID-19 foreclosure moratoriums and forbearances expire and Tennessee residential foreclosure rates increase. Real estate practitioners, the lower courts, and litigants will all benefit from definitive guidance from this Court on these issues.

This case gives the Court an opportunity to resolve another "important question of law"—namely, the proper interpretation of the Fannie Mae/Freddie Mac Uniform Tennessee Deed of Trust, a form document that governs approximately $93.6 billion in unpaid principal mortgage debt on more than 500,000 residential mortgage loans across Tennessee. Tenn. R. App. P. 11(a)(2). Specifically, without the benefit of briefing, the court of appeals *sua sponte* held that the Deed of Trust requires formal written notice of all foreclosure-sale postponements. That interpretation, however, directly conflicts with Tenn. Code Ann. § 35-5-101(f), which authorizes oral notice of postponements of less than 30 days, like the 25-day postponement at issue here. If allowed to stand, the Court of Appeals' interpretation will impose needless administrative burdens on numerous mortgagees across the state, frustrating section 35-5-101(f)'s oral-notice provision and the intended efficiencies of Tennessee's non-judicial foreclosure system.

QUESTIONS PRESENTED FOR REVIEW

1. Does Tennessee recognize an independent cause of action for wrongful foreclosure to set aside a foreclosure sale based entirely on a procedural defect in the sale that causes no harm or prejudice?

2. Tennessee Code Annotated § 35-5-101(f) allows foreclosure-sale postponements of less than 30 days to be announced orally. Does the Fannie Mae/Freddie Mac Uniform Tennessee Deed of Trust, which secures over 500,000 residential mortgage loans in Tennessee, nevertheless require written notice of such postponements?

The Court reviews these pure questions of law, and the chancery court's summary judgment, *de novo*. *Rye v. Women's Care Ctr. of Memphis*, *MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015).

STATEMENT OF THE RELEVANT FACTS

In July 2007, Terry Case obtained a mortgage loan to finance the purchase of real property now valued at over $1 million. The repayment of the mortgage loan was secured by a Deed of Trust, which was assigned to Wilmington in March 2016 (the Note and Deed of Trust are the "Loan"). Note, R. Vol. II at 158–63; Deed of Trust, R. Vol. I at 20–35; Assignment, R. Vol. II at 165–66.

The Deed of Trust is a Fannie Mae/Freddie Mac Uniform Deed of Trust, which is one of several uniform instruments that mortgagees nationwide must use when originating a residential mortgage loan in order for that loan to be eligible for purchase by Freddie Mac or Fannie Mae. The Uniform Deed of Trust contains independent notice requirements to exercise the power of sale, but also contains an Applicable Law provision, which provides that compliance with Tennessee's statutory notice provisions satisfies the Deed of Trust's notice provisions. *See* Deed of Trust, R. Vol. I at 29 ¶ 15 ("If any notice required by [the Deed of Trust] is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under [the Deed of Trust].").

Mr. Case filed for bankruptcy eight times during the life of the Loan, was accused of "abusing the bankruptcy process" by a bankruptcy trustee, and was eventually barred from filing another bankruptcy for two years by a bankruptcy court—an order he violated just four months later when he filed his sixth bankruptcy. After Mr. Case defaulted on his mortgage loan, Wilmington was granted relief from the automatic stay to foreclose in Mr. Case's eighth bankruptcy. Motion for Relief from Stay,

R. Vol. XIII at 1911–15; 1914 ¶ 7. Fay Servicing, LLC ("Fay"), as servicer for Wilmington, noticed and set a foreclosure sale for February 24, 2020. *See* Notice of Trustee's Sale, R. Vol. III at 392–413. Mr. Case does not dispute that he received notice of the originally scheduled foreclosure sale. Resp. to SUMF, R. Vol. XIV at 2083 ¶ 8; 2084 ¶ 13.

Days prior to the scheduled sale, Mr. Case filed this action in Hamilton County Chancery Court, and obtained a temporary restraining order enjoining the foreclosure sale until March 4, 2020, the date of the hearing on Mr. Case's request for injunctive relief. *See* Compl., R. Vol. I at 10–19; Motion to Enjoin, R. Vol. I at 56–57; Order, R. Vol. I at 59–60. As a result, Wilson & Associates appeared at the time and place of the scheduled sale (February 24, 2020) and announced that the foreclosure sale was postponed to March 23, 2020, at 3:00 p.m.—just 25 days later. *See* Resp. to SUMF, R. Vol. XIV at 2084 ¶ 15; Burnette Aff., R. Vol. I at 125 ¶ 4. Neither Mr. Case nor his attorney attended the March 4 hearing on Mr. Case's request for injunctive relief. Order, R. Vol. I at 67.

Accordingly, the chancery court entered an order dissolving the temporary restraining order, and the foreclosure sale was completed on March 23, 2020, at which time the total amount owed on the Loan exceeded $851,000. *Id.*; Fay Decl., R. Vol. III at 339 ¶ 11. Mr. Case does not allege that he made any attempt—or had the financial ability—to pay off the Loan prior to or at the foreclosure sale. In fact, months earlier, he attested under penalty of perjury that he had just $75.00 in "total financial assets." Resp. to SUMF, R. Vol. XIV at 2085 ¶ 20; Petition, R. Vol. XIII at 1864.

Following the sale, Mr. Case amended his complaint to join Wilmington and assert a claim for "wrongful foreclosure for compensatory damages," among others. *See* Am. Compl., R. Vol. I at 76–87. The amended complaint did not request that the foreclosure sale be rescinded. *Id.* The chancery court subsequently granted summary judgment to Wilmington and Wilson & Associates, holding that the sale complied with Tennessee law and the Deed of Trust's notice provisions. Order, R. Vol. XV at 2112–18. The chancery court further held that Mr. Case was not entitled to written notice of the sale postponement because Tennessee law required an oral announcement only, and that Mr. Case failed to establish that he suffered any damages due to the purported breaches of the Deed of Trust. *Id.*

The Court of Appeals not only reversed the trial court's judgment, but it also rescinded the foreclosure sale that had occurred more than two years prior. Slip. Op. 21. The Court held that Wilmington and Wilson & Associates did not strictly comply with the Deed of Trust's notice requirements and that Mr. Case was not required to show any harm, prejudice, or even the ability to pay off the Loan to warrant rescission. Without the benefit of briefing on the issue, the Court of Appeals also held that the Deed of Trust required formal written notice of the foreclosure sale's postponement, and that the Deed of Trust's "Applicable Law" exception is not triggered because "Tennessee law did not require notice of [a] postponement" less than 30 days. *Id.* at 17.

Wilmington filed a Petition for Rehearing, explaining that the Court of Appeals' Opinion creates a cause of action for Mr. Case that he never pled—namely, wrongful foreclosure for rescission, as opposed to

Mr. Case's pleaded claim for "wrongful foreclosure for compensatory damages." Wilmington also explained that the Court's *sua sponte* interpretation of the Deed of Trust conflicted with the Deed's plain terms and Tennessee mortgage law. The Court denied Wilmington's Petition for Rehearing on July 12, 2022.

REASONS SUPPORTING REVIEW

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE WHETHER A SHOWING OF HARM IS REQUIRED TO SET ASIDE A FORECLOSURE SALE.

Residential mortgage foreclosure is the process by which a mortgagee may, following a borrower's default, sell the real property identified in the deed of trust to satisfy the unpaid mortgage debt. Tennessee, like approximately 30 other states, is primarily a non-judicial foreclosure state, meaning that foreclosures ordinarily proceed without costly court involvement or intervention. *See, e.g.*, *Smith*, 639 S.W.3d at 639 ("[T]he public policy of the state is to allow foreclosure through non-judicial sale.").

The General Assembly has adopted a statutory non-judicial sale framework to promulgate this public policy. *See* Tenn. Code Ann. §§ 35-5-101 *et seq*.; *Threadgill v. Wells Fargo Bank, N.A.*, No. E2016-02339-COA-R3-CV, 2017 WL 3268957, at *2 (Tenn. Ct. App. Aug. 1, 2017) ("The almost exclusive means of foreclosure in the State of Tennessee has been nonjudicial, as outlined in Tennessee Code Annotated §§ 35–5–101 *et seq*."). As part of the statutory framework, the General Assembly: (1) explicitly precludes rescission as a remedy for statutory foreclosure violations (Tenn. Code Ann. § 35-5-106); (2) limits a borrower's recovery

for statutory violations to monetary damages (*id.* § 35-5-107); and (3) and expressly conditions relief on the borrower's ability to establish "damages resulting from the [violation]" to eliminate uncertainty regarding land titles following foreclosure sales. *Id.*; *see also Smith*, 639 S.W.3d at 648.

Important policy considerations underlie the General Assembly's protection of foreclosure-sale finality. Certainty of title is essential to the Tennessee real-estate market and a functioning nonjudicial foreclosure scheme. A rule that would render foreclosure sales void or voidable based on trivial defects would inject substantial uncertainty into the title of every parcel of land sold in foreclosure. Bidding at foreclosure sales would be chilled—potential buyers would be discouraged from purchasing foreclosed properties if sales could be set aside based on technical defects in the foreclosure process.

Nonetheless, some Tennessee courts have held that Tennessee common law recognizes a standalone "no elements" wrongful-foreclosure claim that authorizes the same recission relief foreclosed by statute. *See* Slip. Op. 12; *Amodio*, 2018 WL 6727106, at *3; *Chamberlain*, 2022 WL 3026908, at *13. But even those courts that have recognized recission claims have adopted divergent views regarding what must be shown to obtain such relief. As explained below, Tennessee courts are sharply divided on whether a borrower can obtain rescission of a foreclosure sale based on a technical violation of the Deed of Trust's notice provisions without showing—or even alleging—that he or she suffered any harm or prejudice as a result of the violation.

A. Consistent with The Majority Rule Nationwide, Some Tennessee Courts Have Held That Rescission Is Warranted Only Where the Defect Causes Harm.

In Tennessee, as elsewhere, litigants seeking judicial relief generally must show that they suffered harm as a result of the challenged conduct. *See, e.g.*, *ARC Lifemed, Inc. v. AMC–Tennessee, Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005) (breach-of-contract claims); *Northland Ins. Co. v. State*, 33 S.W.3d 727, 730 (Tenn. 2000) (tort claims); *Fisher v. Hargett*, 604 S.W.3d 381, 415 (Tenn. 2020) (injunctive relief). Indeed, showing that the plaintiff has suffered a concrete harm redressable by the court is generally necessary to bring a claim in the first place. *See City of Memphis v. Hargett,* 414 S.W.3d 88, 98 (Tenn. 2013) (discussing Tennessee's standing doctrine and its requirement of a redressable concrete injury); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) (explaining that "an injury in law is not an injury in fact" and "only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue" in federal court).

Tennessee's statutory foreclosure framework is no different. In fact, the General Assembly specifically limited recovery for violations of the non-judicial foreclosure statute to "damages resulting from the [violation]." *See* Tenn. Code Ann. § 35-5-107; *see also Smith*, 639 S.W.3d at 648 (holding that, even if the defendant had not shown compliance with the deed of trust's notice provisions, rescission would not be appropriate because it is precluded by statute).

Consistent with these principles, some Tennessee courts have held that recission of a foreclosure sale is only warranted if the defect harmed, prejudiced, or otherwise impaired the borrower's ability to challenge the

sale. For example, in *Thornley v. U.S. Bank, N.A.*, No. M201400813COAR3CV, 2015 WL 3989380 (Tenn. Ct. App. June 30, 2015), a borrower sued to challenge a foreclosure sale based on alleged defects in the foreclosure process. *Id.* at *2–4. Specifically, the borrower asserted a claim for "wrongful foreclosure/breach of contract" based on the defendants' failure to comply with the notice provisions of the Deed of Trust. *Id.* at *2–4.

The Court of Appeals (McBrayer, J.) affirmed the denial of summary judgment to the borrower because she "failed to show how the technical defect in the notice prejudiced her by impairing her ability to either prevent or contest the foreclosure sale." *Id.* at *4 (citing *Fontenot v. Wells Fargo Bank, N.A.*, 129 Cal. Rptr. 3d 467, 480 (Cal. Ct. App. 2011) ("[P]laintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests.")); *see also McCord v. Goldman Sachs Mortg. Corp.*, No. 3:12-CV-1191, 2014 WL 1317653 (M.D. Tenn. Mar. 27, 2014) (granting summary judgment to lender on claim alleging breach of deed of trust because, although the notice technically omitted information required by the deed, the plaintiffs could not show they suffered damages as a result of the omission).

This view accords with the prevailing rule nationwide. In fact, the overwhelming majority of non-judicial foreclosure states (25 of the 30) require a showing of harm of some type before setting aside a non-judicial foreclosure sale. *See, e.g.*, *Gilroy v. Ryberg*, 667 N.W.2d 544, 555 (Neb. 2003) (collecting nationwide case law on issue and holding that "[i]f the party did not suffer any harm from the alleged defect, there is no

justification for imposing the additional costs associated with setting aside the sale."); *Kim v. JPMorgan Chase Bank, N.A.*, 825 N.W.2d 329, 337 (Mich. 2012) (holding that a sale will only be set aside upon a showing of prejudice to the borrower); *Young-Allen v. Bank of Am., N.A.*, 839 S.E.2d 897, 900 (Va. 2020) ("This Court, however, has never held that equitable rescission is available in cases where a plaintiff fails to plead that he or she incurred any damages or suffered any harm caused by an alleged breach of a deed of trust. Rescission based upon a breach of contract is not a cause of action in itself, but rather a remedy.").[1] As the Tennessee Court of Appeals recognized in *Thornley*, even traditionally borrower-friendly states like California require a showing of harm before setting aside a foreclosure sale. *See Thornley*, 2015 WL 3989380, at *4 (citing *Fontenot*, 129 Cal. Rptr. 3d at 480).

This approach makes sense. If the defaulting party suffered no harm, there is no justification for imposing the uncertainty and substantial costs associated with setting aside and redoing the foreclosure sale. Moreover, if the defaulting party cannot show (and does not even allege) an ability to pay the defaulted balance due on the mortgage, rescission would effectively provide no remedy at all because the Deed of Trust would simply be re-foreclosed immediately.

[1] A list of the states that have addressed this issue is collected in Addendum 3 at the end of this Application.

B. In Contrast, Other Tennessee Courts (Including the Court of Appeals Here) Have Mandated Rescission Even Absent Evidence of Harm or Prejudice.

Other Tennessee courts have taken a sharply different approach, authorizing rescission even where the defect did not harm the borrower. For example, in *Bank of New York Mellon v. Chamberlain*, No. M2019-00876-COA-R3-CV, 2020 WL 563527 (Tenn. Ct. App. Feb. 5, 2020), the Court of Appeals remanded the case to determine whether a notice was sent to the correct address even though the borrower had been in default for years and no attempts to pay off the loan were made between the borrower's prior action seeking to enjoin the sale and the sale. *Id.* at *2.

The Court of Appeals went further in the present case by holding that rescission is not only allowed but mandated, even where the defect did not harm the borrower or otherwise prejudice his or her ability to challenge the sale. Slip. Op. 12. The Court of Appeals found "no legal authority in Tennessee that requires a plaintiff raising a wrongful foreclosure claim to establish any other element than the creditor's failure to strictly comply with the terms of the Deed of Trust." *Id.* at 14. And the Court of Appeals placed no limitations on "failure to strictly comply," conceivably encompassing errors as inconsequential as a typographical error. Slip. Op. 14.

These courts appear to be operating under the misimpression that rescission is required under this Court's opinions in *Henderson v. Galloway*, 27 Tenn. 692 (Tenn. 1848), and *Progressive Bldg. & Loan Ass'n v. McIntyre*, 89 S.W.2d 336 (Tenn. 1936). But those cases do not even recognize a common law claim for wrongful foreclosure to rescind and thus do not address the issue presented here. In any event, under

modern contract principles a showing of harm or prejudice is required to obtain relief. *See, e.g.*, *ARC Lifemed*, 183 S.W.3d at 26. This Court has never held—nor would it make sense to hold—that an alleged breach of a deed of trust's notice provisions confers upon the borrower not only a breach-of-contract claim, but also a distinct wrongful-foreclosure claim for rescission that relieves the defaulting party of showing harm resulting from the purported breach.

Additionally, the Court of Appeals' opinion tries to sweep away its conflict with *Thornley* by claiming that this case is "factually distinguishable." Slip. Op. 13. The borrower in *Thornley*, the Court of Appeals notes, asserted a claim "titled 'wrongful foreclosure/breach of contract.'" *Id.* But the fact that the claim in *Thornley* was captioned both wrongful foreclosure and breach of contract does not diminish the Court of Appeals's dismissal of both aspects of the claim for failing to allege any harm.

The Court of Appeals in this case went even further than prior cases in another important respect. The Court of Appeals held the trial court in error for failing to set aside the foreclosure sale even though Mr. Case did not even seek rescission. Am. Compl., R. Vol. I at 83–84. In fact, Mr. Case affirmatively elected to seek only damages—a remedy that necessarily presumes the validity of the foreclosure sale rather than seeks to set it aside. And the Court of Appeals did so despite other Court of Appeals panels repeatedly rejecting this practice of creating claims for parties as "inappropriate." *See, e.g., Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291, 300 (Tenn. Ct. App. 2001) (recognizing that courts "must stop short of reading a claim into a pleading where none

exists"); *Rampy v. ICI Acrylics, Inc.*, 898 S.W.2d 196, 198 (Tenn. Ct. App. 1994) ("It is inappropriate for the court to create a claim where none exists.").

C. The Court Should Grant Review To Clarify That Tennessee Does Not Permit—Let Alone Require—Rescission Based on Harmless Defects.

The Court should grant review to resolve the conflict among Tennessee courts, explicate Tennessee wrongful-foreclosure law, and align Tennessee's common law with the General Assembly's intent. As the overwhelming majority of states to address this issue have determined, there is no use in rescinding a foreclosure sale if the outcome would have been the same regardless of the alleged defect. Claims alleging breach of a Deed of Trust, like any other contract, should be required to show harm.

Allowing independent wrongful-foreclosure claims to mandate rescission based on trivial and harmless defects would disrupt the Tennessee real-estate market by clouding title to countless properties that have been sold by foreclosure. This would increase the risks of costly litigation, and deter bidders from buying properties in foreclosure without an even more substantial discount than is already demanded for such properties. The resulting increase in administrative costs and litigation expenses would frustrate legislative intent and the efficiencies to be gained from Tennessee's non-judicial, non-rescission foreclosure framework. The Court should grant review, clarify Tennessee wrongful-foreclosure law, and hold that Tennessee does not authorize—let alone mandate—rescission of a foreclosure sale based on a harmless procedural defect.

II. THE COURT OF APPEALS OPINION INCORRECTLY INTERPRETS THE DEED OF TRUST AND POSTPONEMENT STATUTE.

This Court should also grant review to resolve another important legal issue. The Court of Appeals' opinion misinterprets an important provision in the Fannie Mae/Freddie Mac Uniform Tennessee Deed of Trust, which secures over 500,000 residential mortgage loans in Tennessee, to impose burdensome notice requirements inconsistent with Tennessee law. Without the benefit of briefing on the issue, the Court of Appeals' opinion holds that the Deed of Trust's standard terms require mortgagees across the state to provide written notice of foreclosure-sale postponements of less than thirty days, even though the General Assembly has authorized *oral* notice of such postponements and the Deed of Trust provides that compliance with state notice requirements is sufficient. Deed of Trust, R. Vol. I at 29 ¶ 15.

Specifically, Tenn. Code Ann. § 35-5-101(f) requires notice of postponements of less than 30 days, like the one at issue here, to "be announced at the date, time and location of each scheduled sale date." Thus, Tennessee law does not require written notice of such postponements; an oral announcement "at the date, time, and location of each scheduled sale date" is sufficient. Although the Tennessee Uniform Deed of Trust generally requires notices to be in writing, it separately provides that, "[i]f any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument." Deed of Trust, R. Vol. I at 29 ¶ 15. This provision allows mortgagees to satisfy their notice obligations by complying with uniform state notice

requirements, without the complications and expense associated with doing more. Thus, complying with Tennessee state law's oral notice requirement necessarily satisfies the Deed of Trust's notice requirement as well.

The Court of Appeals' opinion, however, nevertheless holds that the Deed of Trust requires lenders to provide written notice of all sale postponements. According to the Court of Appeals, the Deed of Trust's "Applicable Law" provision is not triggered because "Tennessee law [does] not require notice of [a] postponement" less than 30 days. Slip Op. 18. But that mistakenly assumes that the only type of notice is written notice. The Deed of Trust's "Applicable Law" provision does not contain any requirement that the particular manner of notice provided by state law be the same as what is provided under the Deed of Trust.

Indeed, it would make little sense to interpret the Deed of Trust—as the Court of Appeals does—to require written notice of a postponement, unless the default statutory law also requires written notice, in which case the Deed of Trust's duplicative written notice requirement is displaced. To do so renders the "Applicable Law" exception meaningless because, if the statutory and contractual notice obligations are identical, the "Applicable Law" exception does not relieve the noticing party of any notice obligation under the Deed of Trust. The far more natural reading—consistent with the provision's plain language and regulatory intent—is that the Deed of Trust requires notices to be in writing unless state law prescribes a different manner of notice.

If allowed to stand, the reach of the Court of Appeals' mistaken interpretation of the Deed of Trust's "Applicable Law" provision will

extend far beyond this case, imposing needless administrative burdens on the approximately 500,000 Tennessee loans secured by the Uniform Deed of Trust. This important question of law and public interest warrants review. *See* Tenn. R. App. P. 11(a)(2), (3).

III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE PURE LEGAL ISSUES PRESENTED.

Finally, this case is an ideal vehicle for clarifying Tennessee wrongful-foreclosure law and resolving both of the pure legal issues presented. This is a factually straightforward case, and there are no factual disputes related to what notices were or were not sent that might complicate the Court's analysis. Additionally, the appellate record contains everything the Court needs to decide these unresolved legal issues. The fact that the Court of Appeals decided the second issue *sua sponte* makes this issue no less deserving of this Court's review. *See, e.g.*, *Osborne v. Mountain Life Ins. Co.*, 130 S.W.3d 769, 774 (Tenn. 2004) (considering issue raised by Court of Appeals *sua sponte*).

CONCLUSION

The Court should grant review in this case to secure uniformity of decision and resolve these two issues of significant importance.

Respectfully submitted,

s/Edmund S. Sauer
Edmund S. Sauer (BPR No. 29966)
Alex McFall (BPR No. 33949)
BRADLEY ARANT BOULT CUMMINGS LLP
1600 Division Street, Suite 700
Nashville, TN 32703
(615) 252-2582 (phone)
(615) 252-6380 (fax)

CERTIFICATE OF COMPLIANCE

Pursuant to Tennessee Supreme Court Rule 46, I certify that this application complies with the requirements of Section 3.02 of Rule 46. According to the word count in Microsoft Word, there are 4,967 words in this brief (with permitted sections excluded).

s/Edmund S. Sauer
Edmund S. Sauer

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being forwarded via U.S. Mail, postage prepaid**,** on this the 12th day of September 2022 to:

Buddy B. Presley, Jr., Esq.
THE PRESLEY LAW FIRM
1384 Gunbarrel Road, Suite B
Chattanooga, TN 37421

s/Edmund S. Sauer

Edmund S. Sauer