

IN THE SUPREME COURT OF OHIO

SHARON WILBORN, et al.,

Appellants,

v.

BANK ONE CORPORATION, et al.,

Appellees.

Case No. 07-0558

On Appeal from the Mahoning
County Court of Appeals,
Seventh Appellate District
(C.A. No. 04-MA-182)

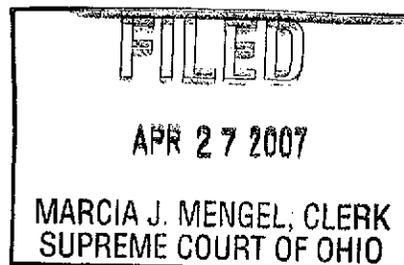
MEMORANDUM IN OPPOSITION TO JURISDICTION
OF APPELLEE WASHINGTON MUTUAL BANK, FA
(SUCCESSOR TO DEFENDANT HOMESIDE LENDING, INC.)

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STATEMENT OPPOSING JURISDICTION

This appeal raises no issues of great public or general interest and does not warrant review by the Supreme Court of Ohio. Appellants' Proposition of Law No. 1 is a façade erected to trick the Court into believing that the ruling below threatens long-standing Ohio law, and Proposition of Law No. 2 then seeks a radical change in Ohio law that would harm Ohio borrowers and increase home foreclosure rates.

In their first Proposition of Law, appellants restate a traditional principle of law: provisions in residential mortgages that require a defaulting borrower to pay the lender's attorney fees upon foreclosure are not legally enforceable. Appellants pretend that this principle was violated in the rulings by the lower courts in this case and seek jurisdiction on that basis. But even appellants' own Memorandum shows that this Proposition of Law does not apply to any of the claims asserted by appellants. Some of those appellants agreed to pay their lenders' attorney fees under an entirely different mortgage provision that allows a delinquent borrower to reinstate the loan and avoid foreclosure by making overdue payments and repaying the lender for the expenses caused by the borrower's default, including the attorney fees the lender incurred in the foreclosure action prior to its dismissal. Another appellant, Ms. van Gulijk, agreed to pay the foreclosure attorney fees of her lender, appellee Washington Mutual Bank, in a new transaction in which Washington Mutual agreed to enter into a new mortgage with a much lower interest rate and an extended term. Other appellants also entered into loan modifications, forbearance agreements, and refinancing arrangements.

Appellants claim that their Proposition of Law No. 1 applies to one appellant, Ms. Wilborn, and should be reviewed by the Court on that basis. In fact, Ms. Wilborn,

like the other appellants, was not ordered to pay foreclosure attorney fees upon default; instead, the foreclosure proceedings were terminated when Ms. Wilborn entered into a new mortgage with a different lender and paid off her original mortgage. Accordingly, Proposition of Law No. 1 is wholly irrelevant to the claims of every appellant in this case. The Court should not waste its time and resources reviewing a legal principle that affects neither the parties nor the rulings below.

In their second Proposition of Law, appellants ask the Court to vastly expand the common law rule described above, which prohibits agreements to pay the lenders' attorney fees upon default and foreclosure, so that parties are also prohibited from agreeing to pay attorney fees in order to avoid default and foreclosure.

Appellants' Proposition of Law No. 2 does not apply to all appellants. For example, Ms. van Gulijk's claims against her lender, appellee Washington Mutual Bank, would not be resurrected even if this Court agreed with appellants that attorney fee requirements in reinstatement provisions cannot be enforced, because she did not reinstate her mortgage and, thus, did not pay attorney fees pursuant to a reinstatement provision. Appellants specifically argue that their Proposition of Law No. 2 should be adopted, and attorney fees prohibited, when "[n]o new mortgage is taken out [and] the original one remains in force." Memorandum in Support of Jurisdiction, at 14. In the cases of Ms. van Gulijk and some of the other appellants, a new mortgage was taken out, and the original mortgage did not remain in effect. In those cases, there is no reason for the Court to review the rulings below because they would have to be affirmed even if the Court adopted appellants' propositions of law. There is also no reason for the Court to review the rulings below in the remaining cases, which properly follow Ohio

law and allow defaulting buyers to avoid foreclosure and forced sales of their homes by repaying the lenders the expenses caused by their defaults. Accordingly, the Court should decline to exercise its discretionary jurisdiction in this matter.

STATEMENT OF THE CASE AND FACTS

Each of the eleven appellants defaulted on a mortgage contract with one of the appellee lenders (or one of their predecessors in interest) by failing to make the required loan payments. When the lenders brought foreclosure actions against them, the appellants responded in a variety of different ways.

Most of the appellants chose to avoid foreclosure by exercising their contractual right, under the terms of their mortgages, to pay the overdue amounts and the lenders' costs and attorney fees and thereby reinstate their mortgages. Other appellants did not reinstate their mortgages. Ms. Wilborn, who had a line of credit with appellee Bank One, chose to avoid foreclosure by obtaining a new mortgage from a different lender and then paying Bank One the balance due on its mortgage and its foreclosure costs and attorney fees. Ms. van Gulijk avoided foreclosure by renegotiating the terms of her mortgage with her lender, a predecessor of appellee Washington Mutual Bank, and then paying the balance due on the original mortgage and the foreclosure costs and fees.

After appellants reinstated, refinanced, or renegotiated their loans, their lenders voluntarily terminated the foreclosure proceedings against their mortgaged properties. Appellants later filed this putative class action against the lenders and against a law firm that had represented lenders in foreclosure proceedings. Appellants' Complaint asserts claims for "violation of public policy" (First Cause of Action), "unjust enrichment" (Second Cause of Action), and "conspiracy" (Third Cause of Action). In each cause of

action, appellants maintain that their promises to pay the lenders' foreclosure attorney fees, in exchange for the lenders' agreements to terminate foreclosure proceedings and reinstate their loans, are legally unenforceable. See First Amended Class Action Complaint, Oct. 9, 2003.

Appellees moved to dismiss all causes of action for failure to state a claim, pursuant to Civil Rule 12(B)(6), and the trial court granted the motions. See Judgment Entry, July 21, 2004. It acknowledged that "contracts for the payment of attorney fees upon default in payment of a debt are not enforceable," but it held that delinquent borrowers can lawfully agree to pay their lenders' attorney fees in pending foreclosure proceedings in order to avoid default "in the context of a reinstatement of a mortgage." (Id., at 3; emphasis added.)

The Court of Appeals affirmed that ruling. See Opinion, Feb. 12, 2007; Journal Entry, Feb. 12, 2007. Like the trial court, it recognized that a mortgage provision that requires payment of foreclosure attorney fees upon default is "void as against public policy." 2007-Ohio-596, ¶ 14. But it also agreed with the trial court that this rule does not apply to the facts of the present case, in which appellants voluntarily chose to pay their lenders' attorney fees in order to terminate foreclosure proceedings and keep their properties:

[A]ppellants were not, and are not, obliged to seek reinstatement of the loan. If appellants seek reinstatement of the loan, the payment of attorney fees is merely a condition for reinstatement, not an obligation that arises in connection with the enforcement of the contract.

2007-Ohio-596, ¶ 35. Appellants now appeal from that ruling. Notice of Appeal, Mar. 29, 2007.

Appellee Washington Mutual Bank is filing this separate brief in opposition to jurisdiction because the causes of action asserted against it by Ms. van Gulijk arise from unique factual circumstances that place her outside the scope of both of appellees' propositions of law. First, Ms. van Gulijk was not ordered to pay her lender's attorney fees upon foreclosure. Second, she did not reinstate her mortgage after she defaulted on her payments or pay foreclosure attorney fees in connection with any such reinstatement. Instead, Ms. van Gulijk renegotiated her loan and entered into an entirely new mortgage with her lender, at a much lower interest rate (6.75% vs. 8.375%) and with an extended loan term, in exchange for her promise to pay the outstanding balance on the original mortgage and the foreclosure costs and attorney fees that her lender had incurred prior to the renegotiation of the mortgage.

In light of these unique facts, Washington Mutual separately moved the trial court to dismiss Ms. van Gulijk's claims. See Motion to Dismiss, Dec. 12, 2003. However, the trial court subsequently dismissed all claims against all appellees generally, after holding that a mortgage reinstatement may lawfully be conditioned upon payment of the lenders' foreclosure attorney fees; it did not address the fact that Ms. van Gulijk never reinstated her mortgage. See Judgment Entry, *supra*. The Court of Appeals similarly addressed only the reinstatement of a mortgage, rather than the renegotiation of a mortgage, when it affirmed the trial court's ruling. See Opinion, *supra*.

In their Memorandum in Support of Jurisdiction, appellants continue to ignore the fact that Ms. van Gulijk did not reinstate her mortgage and, thus, did not pay attorney fees in connection with a (purportedly illegal) reinstatement provision of a mortgage. Appellants' propositions of law are unrelated to Ms. van Gulijk's renegotiation claims

against Washington Mutual, and her appeal accordingly should be denied even if the Court agreed to consider the reinstatement issues they raise. Moreover, the Court should also decline jurisdiction with respect to the claims of the appellants who reinstated their mortgages, as set forth below.

ARGUMENT

Response to Proposition of Law No. 1:

The legality of mortgage provisions requiring defaulting borrowers to pay their lenders' attorney fees upon foreclosure is irrelevant to any claim asserted in this case.

In their first Proposition of Law, appellants contend that it is against public policy to enforce provisions in residential mortgages that require defaulting borrowers to pay the lenders' attorney fees after the mortgages are foreclosed. See Memorandum in Support of Jurisdiction, at 8. They argue that this legal principle applies to the claims brought by just one of the eleven appellants, Sharon Wilborn. (Id., at 12.)

Washington Mutual agrees that this Proposition of Law is wholly irrelevant to the claims asserted by the other ten appellants, who challenge the terms of reinstatements or renegotiations that allowed them to avoid foreclosure and the forced sales of their properties, rather than provisions requiring them to pay their lenders' attorney fees upon foreclosure and the forced sales of their properties. Every appellant except Ms. Wilborn reinstated or renegotiated a mortgage with the same lender, and the foreclosure actions against them were terminated. Accordingly, appellants concede that the outcome of the claims of these ten appellants would be the same regardless of whether this Court endorsed or rejected appellants' Proposition of Law No. 1.

Washington Mutual disagrees, however, with appellants' contention that this Proposition of Law applies to the factual circumstances of the sole remaining appellant, Ms. Wilborn. Bank One filed a foreclosure action when Ms. Wilborn failed to make the required loan payments, but it voluntarily discontinued the foreclosure action because Ms. Wilborn refinanced her loan through a different lender. In the cases appellants rely upon, the courts held that a provision in a mortgage that allows a lender to recover its attorney fees against a defaulting borrower cannot be enforced in a foreclosure judgment against the borrower. See, e.g., *Leavans v. Ohio Nat. Bank* (1893), 50 Ohio St. 591, syllabus (cited in appellants' Memorandum in Support of Jurisdiction, at 8):

A stipulation in a mortgage to the effect that, in case an action should be brought to foreclose it, a reasonable attorney fee, to be fixed by the court, for the services of the plaintiff's attorney in the foreclosure action, should be included in the decree, and paid out of the proceeds arising from the sale of mortgaged property, is against public policy and void.

The legal rule adopted in *Leavans* is similar to appellants' Proposition of Law No. 1, and it has nothing to do with the factual circumstances surrounding Ms. Wilborn's claims in the present case. The terms of her mortgage are substantially different than the mortgage provisions that the Court refused to enforce in *Leavans*, and, most importantly, Ms. Wilborn's mortgage was not foreclosed; there was no decree of foreclosure that awarded attorney fees to Bank One, and her property was not sold to pay a foreclosure judgment. Ms. Wilborn refinanced her loan with another lender and retained her property.

Accordingly, appellants' Proposition of Law No. 1 has no more relevance to Ms. Wilborn's claims than it does to the claims of the other ten appellants. None of the appellants in this case – including Ms. Wilborn – were ordered to pay their lenders'

foreclosure attorney fees upon foreclosure. The legal principle that appellants assert in their first Proposition of Law accordingly does not apply to any of the claims asserted by any of the appellants, and it therefore does not warrant the exercise of this Court's discretionary jurisdiction.

Response to Proposition of Law No. 2:

The Court should not create a new rule of law that prohibits defaulting borrowers from agreeing to pay their lenders' foreclosure attorney fees in exchange for the opportunity to reinstate, refinance, or renegotiate their mortgages and avoid foreclosure.

In their second Proposition of Law, appellants ask this Court to judicially legislate a new rule of law that would prohibit defaulting borrowers from negotiating with their lenders to avoid foreclosure by reinstating, refinancing, or renegotiating their mortgages, in exchange for their payment of the outstanding loan balance and the attorney fees their lenders incurred in the foreclosure proceedings. See Memorandum in Support of Jurisdiction, at 12. Appellants pretend that this would be merely a minor, logical extension of the legal principle described in *Leavans*, supra, that voids mortgage provisions authorizing lenders to collect their attorney fees in a foreclosure judgment.

The Court should reject appellants' Proposition of Law No. 2. As set forth below, there are important differences between (1) borrowers who are forced to pay attorney fees in a judgment at the completion of foreclosure proceedings, and (2) borrowers who voluntarily agree to pay attorney fees in order to reinstate, refinance, or renegotiate their mortgages and thereby avoid forced sales of their property. The legal prohibition against attorney fees that appellants seek here would eliminate these alternatives to foreclosure because lenders would have to pay the attorney fees caused by the borrowers' default out of their own pockets and, thus, would always lose money on

these transactions. This would cause significant harm to Ohio borrowers by denying them options that presently prevent foreclosure and allow them to keep their homes.

Not surprisingly, appellants' Proposition of Law has been squarely rejected by Ohio state and federal courts that have addressed it. For example, in *Davidson v. Weltman, Weinberg & Reis* (S.D. Ohio 2003), 285 F.Supp.2d 1093, 1100-101, 1102, the Court first cited *Leavans, supra*, and *Miller v. Kyle* (1911), 85 Ohio St. 186, for the proposition that Ohio law "preclude[s] any stipulation in a note for attorney's fees upon the default of the debtor," although it observed that "the continued vitality of that [rule] is in doubt". However, the *Davidson* Court then squarely rejected the same argument appellants make here: that this rule should be extended beyond mortgage provisions that require defaulting borrowers to pay attorney fees upon foreclosure, to prohibit entirely different mortgage provisions that allow defaulting borrowers to reinstate, refinance, or renegotiate their mortgages and save their homes if they agree to reimburse their lenders for the attorney fees caused by their default:

At the heart of Plaintiff's argument is the premise that payment of attorney's fees due to default is synonymous with the payment of attorney's fees in the context of reinstatement This premise is faulty.

* * * *

[T]he mortgagor has no obligation to seek reinstatement of his mortgage. To the contrary, he may, inter alia, decide to allow the foreclosure proceedings to continue Thus, the reinstatement provision in the mortgage creates no obligation to pay attorney's fees upon default. Consequently, the payment of attorney's fees as a condition of reinstatement does not implicate the public policy concern in *Miller* regarding the imposition of a penalty against the debtor upon default

285 F.Supp.2d at 1102, 1103 (original emphasis). Accordingly, "a provision in a mortgage which requires the payment of attorney's fees as a condition of reinstatement is allowed under Ohio law." 285 F.Supp.2d at 1103.

The Court of Appeals for the Second Appellate District reached the same conclusion in *Washington Mutual Bank v. Mahaffey*, 154 Ohio App.3d 44, 2003-Ohio-4422. It explained:

Mahaffey cites a number of Ohio cases holding that provisions in a mortgage instrument for the payment of attorney fees, as part of the borrower's obligations upon foreclosure, is against public policy and void.

In our view, all these cases are distinguishable. Mahaffey's obligation to pay attorney fees is not provided in the mortgage instrument in this case an as obligation upon foreclosure but as a condition of reinstatement of the loan [H]e is not entitled by law to reinstate a mortgage loan once it is in default The bank chose to provide in its contract with Mahaffey for the possibility that the loan might be reinstated . . . upon certain conditions. One of these is the payment of attorney fees. We see nothing against public policy in imposing the requirement of the payment of attorney fees expended in foreclosure proceedings as a condition of reinstatement of a mortgage loan.

154 Ohio App.3d at 51-52, 2003-Ohio-4422 at ¶¶ 38-39 (emphasis added).

Appellants argue that the reasoning and holdings of these courts should be rejected because they are "based upon the incorrect assumption that the payment of attorney fees when a mortgage is 'reinstated' is somehow a new transaction between the parties that is entirely separate and distinct from the mortgage." (Memorandum in Support of Jurisdiction, at 13.) Neither the *Davidson* court nor the *Mahaffey* court "assumed" that a reinstatement of a mortgage is completely unrelated to the mortgage or to the default. (Id.) Both courts recognized that (1) a borrower has no obligation to

reinstate a mortgage; and (2) a borrower who wants to reinstate a mortgage, and move forward as if no default had ever occurred, cannot reasonably expect or require the lender to simply absorb the costs and attorney fees that resulted from the borrower's default. The word "reinstate" means "[t]o place again in a former state or position; to restore." Black's Law Dictionary (7th ed. 1999), at 1290. Here, appellants want to reinstate their mortgage rights without making their lenders whole.

Appellants cite two decisions by bankruptcy courts in support of their contention that attorney fee provisions of reinstatement agreements are unenforceable, *In re Landrum* (Bankr. S.D. Ohio 2001), 267 Bankr. Rptr. 577, and *In re Lake* (Bankr. N.D. Ohio 2000), 245 Bankr. Rptr. 262. Both decisions predate the opinions in *Davidson*, *supra*, and *Mahaffey*, *supra*, and have been rejected by courts in later cases. In *Davidson*, for example, the United States District Court for the Southern District of Ohio discussed the earlier decisions in both *Landrum* and *In re Lake*, but it nevertheless held that "a provision in a mortgage which requires the payment of attorney's fees as a condition of reinstatement is allowed under Ohio law." 285 F.Supp.2d at 1103.

Moreover, appellants' contention that reinstatement provisions fall within the common law prohibition against attorney fee awards upon foreclosure because "[n]o new mortgage is taken out – the original one remains in force" (*id.*, at 14) is disingenuous as to appellants like Ms. Wilborn and Ms. van Gulijk, who did in fact obtain new mortgages by refinancing or renegotiating their original mortgages.

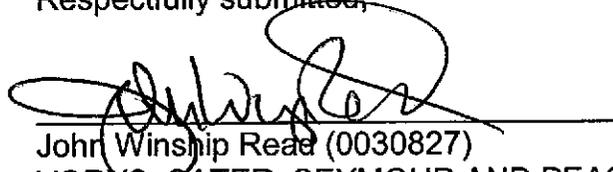
In short, the rulings below dismissing some of the appellants' claims are correct by appellants' own reasoning, and the rulings below dismissing the claims of the

remaining appellants are correct as a matter of settled Ohio law. None of the appellants' claims warrant further review by this Court.

CONCLUSION

This case does not raise any issues of public or great general interest. Ohio does not need a new rule of law that would prevent defaulting borrowers from agreeing to pay their lenders' foreclosure attorney fees in exchange for reinstatement of the mortgages and an end to the foreclosure proceedings. State and federal courts in Ohio have previously considered this precise issue and have agreed that attorney fee provisions in the context of a voluntary reinstatement do not raise the same public policy concerns as attorney fee provisions in the context of an involuntary foreclosure and forced sale of the mortgaged property. Appellee Washington Mutual Bank respectfully asks the Court to decline jurisdiction over this matter.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on this 21 day of April, 2007, the below-signed attorney served the above Memorandum in Opposition to Jurisdiction of Appellee Washington Mutual Bank, FA (Successor to Defendant Homeside Lending, Inc.) via first-class U.S. mail, postage prepaid, upon:

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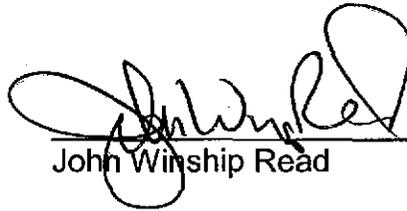
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