Supreme Court of the State of Wisconsin

No. 2013AP544

The Bank of New York Mellon, fka The Bank of New York, as Trustee for CWABS, Inc. Asset-Backed Certificates, Series 2007-13,
Plaintiff-Respondent-Petitioner,

v.

Shirley T. Carson,
Defendant-Appellant,

Bayfield Financial LLC and Collins Financial Services,
Defendants.

On appeal from the January 17, 2013 Final Order of the Circuit Court for Milwaukee County, Case No. 11-CV-1330, Honorable Jane V. Carroll presiding, reversed by District I of the Wisconsin Court of Appeals on November 26, 2013

BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER BANK OF NEW YORK, AS TRUSTEE FOR CWABS, INC. ASSET-BACKED CERTIFICATES SERIES 2007-13

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INTRODUCTION

In the decision under appeal, the Court of Appeals interpreted a provision in a foreclosure statute in a manner that directly contradicts the way it had previously interpreted the identical language in a neighboring provision. The decision has broad implications that were not contemplated by the legislature or manifested in the statutory language, and it should be reversed.

The foreclosure process in Wisconsin is a statutory process. Upon default, a lender must obtain a foreclosure judgment under WIS. STAT. § 846.10(1), and then wait out a statutory "redemption period" before seeking a sheriff's sale of the mortgaged property. *See id.* § 846.16. The length of the redemption period before the sale is dictated by the type of the property, whether a deficiency judgment is sought against the borrowers, and whether the property is abandoned. The purpose of the delay before the sale is to allow a borrower one last chance to redeem the property before it is sold. *See id*. § 846.13.

For residential property in which a deficiency judgment is waived, WIS. STAT. § 846.101(2) provides that "the sale of such mortgaged premises shall be made upon the

expiration of 6 months from the date when such judgment is entered." If the Court makes an affirmative finding upon proper evidence that the property is abandoned, WIS. STAT. § 846.102 provides that "the sale of such mortgaged premises shall be made upon the expiration of 5 weeks from the date when such judgment is entered." If a deficiency judgment is waived against commercial property, WIS. STAT. § 846.103(2) provides that "the sale of the mortgaged premises shall be made upon the expiration of 3 months from the date when such judgment is entered." In each provision the statutory language is identical except for the length of the redemption period—but the Court of Appeals has interpreted two of the provisions in diametrically opposite fashion, giving rise to this appeal.

In *Deutsche Bank Nat. Trust Co. v. Matson*, No. 2012AP1981, unpublished slip op. (Wis. Ct. App. July 30, 2013), *review denied*, 2014 WI 14, 843 N.W.2d 707,[1] the Court of Appeals determined that under WIS. STAT. § 846.103, a lender was not required to hold a foreclosure sale

[1] *See* A.33-44. Pursuant to WIS. STAT. § (Rule) 809.19(2)(a) and § (Rule) 809.23(3)(c), a copy of the *Matson* opinion and other unpublished decisions cited in this brief are included in the Appendix.

on a rental property. The Court of Appeals held that "the most reasonable reading of [§ 846.103] is that it directs Deutsche Bank to proceed in a certain manner *if* the property is in fact sold. The [statute] describes the sheriff's sale process should it actually occur; it does not force Deutsche Bank to conduct a sale. . . ." *Matson*, No. 2012AP1981, unpublished slip op., ¶ 15 (citing *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶¶ 15-17, 262 Wis. 2d 720, 665 N.W.2d 155 (use of the word "shall" can be directory, not mandatory)).

Here, however, the Court of Appeals held that WIS. STAT. § 846.102 *does* force a lender to conduct a sale at the end of the five-week redemption period. In the case at bar, Defendant-Appellant Shirley T. Carson defaulted on her mortgage loan, abandoned her home, and allowed the property to fall into disrepair. She then sought to have the trial court use its contempt authority to force the owner of her loan (Plaintiff-Respondent-Petitioner Bank of New York, as Trustee for CWABS, Inc. Asset-Backed Certificates, Series 2007-13; hereinafter "the Trustee") to bring the property to a foreclosure sale, notwithstanding its evident determination that the condition of the property precluded any prospect of

recovery and could simply saddle the Trustee with the property's costly liabilities.

The circuit court properly held that it had no authority to force the Trustee to take the property to sale against its wishes, R.26:14, A.27, but the Court of Appeals reversed, holding that the Trustee must sell the abandoned property. Construing *the same language* in Section 846.102 as is found in Section 846.103, the Court of Appeals in this case held that the word "shall" should be "presumed mandatory," and construed the statute to "direct[] the court to ensure that an abandoned property is sold without delay." Ct. App. Op., ¶ 13, A.10. The Court of Appeals purported to base this holding on "what the legislature had in mind when it drafted WIS. STAT. § 846.102," but it did not rely on the legislative history of § 846.102 or any other part of the foreclosure statute in making this determination. *Id*., ¶ 14. Instead, it cited a City of Milwaukee municipal ordinance. *Id*.

The Court of Appeals' holding is not supported by the plain language of the statute or by the more general policy considerations invoked by the Court. There is not a word in the plain text of § 846.102 or § 846.103—or § 846.101 (the subsection of the foreclosure law under which this case was

originally brought)—evincing a legislative intent to ensure that properties in foreclosure are to be "sold without delay." Quite the contrary, the manifest purpose of the three-month period in WIS. STAT. § 846.103(2), the five-week period in § 846.102, and the parallel six-month period in § 846.101(2) is to *create* delay: they are called "redemption periods," and they are designed to *prohibit* a foreclosing lender from bringing a property to sale until the specified period of time has elapsed, in order to give defaulted borrowers one last chance to settle the debt, avoid foreclosure, and recover their homes.

It is true that the statute reflects a general *assumption* that a foreclosing lender would bring the property to sale at some point after the expiration of that period—but until the Court of Appeals issued its opinion in this case, there was no precedent of any kind for the proposition that a foreclosing lender could be *forced* to do so. The Court of Appeals in *Matson* correctly determined that there was "no provision in Chapter 846, and no relevant case law, establishing a deadline by which a plaintiff who obtains a judgment of foreclosure must advance a property to a sheriff's sale." *Matson*, No. 2012AP1981, unpublished slip op., ¶ 17. The Court of

Appeals erred when it reached the opposite result in the case at bar. This Court should reverse.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. **Does WIS. STAT. § 846.102 require the plaintiff in a foreclosure action to sell the subject property "without delay" upon the expiration of the redemption period, notwithstanding that the Court of Appeals previously construed identical statutory language in WIS. STAT. § 846.103 to permit—but not to require—the plaintiff to bring the property to sale?**

The circuit court concluded that WIS. STAT. § 846.102 does not require the plaintiff to sell the subject property after a judgment of foreclosure by any specific time, other than the statutory five-year limit on the execution of judgments. R.26:12-13, A.25-26.

The Court of Appeals held that § 846.102 "directs the court to ensure that an abandoned property is sold without delay, and it logically follows that if a [defendant] to a foreclosure moves the court to order a sale, the court may use its contempt authority to do so." Ct. App. Op., ¶ 13, A.10.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Argument and publication both will be appropriate.

STATEMENT OF THE CASE

Defendant-Appellant Shirley T. Carson took a $52,000 mortgage loan secured by her property at 1422 West Concordia Avenue in Milwaukee, Wisconsin on June 19, 2007, and defaulted on the loan within months. R.1:3-19. As part of a program to help borrowers like Ms. Carson who are experiencing financial difficulty, on June 23, 2008, Countrywide Home Loans Servicing LP—then the servicer of the loan—and Ms. Carson agreed to a loan modification that would cure the default and recapitalize the overdue balance as principal, with a modest ($27.44) increase in Ms. Carson's monthly payments. R.1:20-22. Ms. Carson again defaulted almost immediately, and on January 25, 2011, the Trustee, which held Ms. Carson's note and mortgage, filed for foreclosure in Milwaukee County Circuit Court. R.1:3-5. The Trustee brought its action under WIS. STAT. § 846.101, and waived its right to collect a deficiency judgment from Ms. Carson. R.1:4.

Ms. Carson did not contest the foreclosure or file any responsive pleading. Thus, on April 27, 2011, the Trustee moved the Circuit Court for a default judgment, which the

Court granted. R.7; R.14, A.29-32. The judgment entered by the Court on June 6, 2011 provided, *inter alia*:

- "That all of the material allegations of [Petitioner's] complaint are proven and true," R.14:1 ¶ 1, A.29;

- That $81,356.59 was "due to the plaintiff under the terms of the note and mortgage," R.14:2 ¶ 2, A.30;

- That Ms. Carson was to "remain entitled to possession of the mortgaged premises ….to the date of confirmation of sale," R.14:3 ¶ 9, A.31; and

- That "all parties . . . are enjoined from committing waste upon the premises," R.14:3, ¶13, A.31.

The Court then ordered that the property "shall be sold at public auction under the direction of the sheriff, at any time after three month(s) from the date of entry of judgment." R.13:2 ¶ 6, A.30; *see also* R.13:4, A.32 ("Redemption period granted by this court: three months.").

Despite remaining in legal possession of the property during this period (*see* WIS. STAT. § 846.17 (providing that title remains with the mortgagor until confirmation of sheriff's sale by trial court)), Ms. Carson had in fact vacated and abandoned the property, claiming she could no longer afford its upkeep. R.15:3, A.3. As a consequence, the property fell into disrepair, was vandalized, and accumulated

trash and other debris. *Id.* It also collected numerous building-code violations and associated fines. *Id.* With the property in this condition, the Trustee elected not to bring it to sale, leaving Ms. Carson in possession. *Id.*

On November 25, 2012, Ms. Carson's attorney filed a motion in the Circuit Court pursuant to WIS. STAT. §§ 806.07(g) and (h) asking the Court to exercise its discretion and equitable powers to amend the June 16, 2011 judgment (i) "to include a finding that the mortgaged property is abandoned," and (ii) to "order that the sale of the mortgaged premises shall be made upon the expiration of 5 weeks from the date of entry of the amended judgment." R.15:2. In support of the motion, Ms. Carson stated that she was unable to continue maintaining the property or to pay fines that had accrued as a result of its deteriorating condition, and "ask[ed] the Court to require the plaintiff to sell the abandoned property as the natural consequence of filing a foreclosure action." R.15:4-5. Thus, the motion essentially sought to convert the judgment into a § 846.102 judgment, which requires "an affirmative finding upon proper evidence being submitted that the mortgaged premises have been abandoned by the mortgagor." WIS. STAT. § 846.102(1). Neither Ms.

Carson nor the Trustee had previously attempted to make that showing when the Trustee filed the original foreclosure action.

The Circuit Court did not address whether an exercise of its equitable powers pursuant to WIS. STAT. § 806.07(g) and (h) was warranted because it found that even if it entered a finding of abandonment, it did not have the power to *force* the Trustee to bring the property to a foreclosure sale if the Trustee had made the business decision that it was not beneficial to do so. R.26:13, A.26. Specifically, the Court stated that it could find no Court of Appeals or Supreme Court decisions that addressed "this issue of whether or not the court can order a bank to sell a property subsequent to the judgment of foreclosure within a certain period of time," and thus found that without any precedent for ruling otherwise, the general rule that "a plaintiff can't be compelled to execute a judgment that they have obtained" was controlling. R.26:12-13, A.25-26. The Court acknowledged that the "shall" phrasing in the statute appeared to be "mandatory language," but held that even if that were the case, the statute "doesn't have any specific end to that timeline. It doesn't say it shall be sold within a specific time; it simply says 'shall be

sold.'" R.26:12, A.25. In the absence of such a provision, the Court pointed out that WIS. STAT. § 815.04 "talks about the execution of judgments, and they can be executed at any time within five years." R.26:13, A.26.

The Court of Appeals reversed, holding that the trial court "could have . . . decided to amend the judgment to a foreclosure of an abandoned property as described by § 846.102." Ct. App. Op., ¶ 12, A.9. The Court said that it was basing this decision on "the plain language of the statute," which it construed to "direct[] the court to ensure that an abandoned property is sold without delay." *Id.* ¶ 13, A.10. The Court then stated that "it logically follows that if a party to a foreclosure moves the court to order a sale, the court may use its contempt authority to do so." *Id*. The Court found WIS. STAT. § 815.04 inapplicable because it was "unreasonable to interpret a statute that mandates a sale 'upon the expiration of five weeks' to mean a sale may be made at any time within five years." *Id.*, ¶ 15, A.11. The Court also cited a public-policy interest in "preserving the condition and appearance of residential properties" and "prevent[ing] neighborhood blight." *Id.*, ¶ 14, A.10.

STANDARD OF REVIEW

As this appeal presents a pure question of statutory construction, this Court's review is *de novo*. *Wisconsin v. Gilbert* (*In re Gilbert*), 2012 WI 72, ¶ 14, 342 Wis. 2d 82, 816 N.W.2d 215, *cert. denied*, 133 S. Ct. 560.

"Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute." *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. This Court interprets such language "in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 46. It also interprets a statute's text in light of its scope and purpose, which the Court seeks to ascertain chiefly "from the text and structure of the statute itself, rather than extrinsic sources. . . ." *Id.* ¶ 48.

ARGUMENT

The Court of Appeals erred when it construed WIS. STAT. § 846.102 to "direct[] the court to ensure that an abandoned property is sold without delay." Ct. App. Op., ¶

13, A.10. This holding is at odds with a prior Court of Appeals decision interpreting identical statutory language to produce the opposite result, and it is neither supported by the plain language of the statute nor justified by the public-policy considerations invoked by the Court in reaching its decision.

I. The Court of Appeals Erred in Failing to Adhere to Its Own Reasoning from the *Matson* Case.

Various subsections of the foreclosure statute—WIS. STAT. §§ 846.101, 846.102, and 846.103—all contain substantively identical language pertaining to the statutory redemption period, although the particular length of time differs depending on whether the property is an owner-occupied one to four family residence, another type of property, or an abandoned property. There is no statutory justification for the Court of Appeals to have held here that Section 846.102 requires a sale after having held in *Matson* that the same language in Section 846.103 permits a sale but does not require it.

Matson involved a foreclosure action on a rental property in which, "[r]ather than sell the property at a sheriff's sale . . . , Deutsche Bank decided to terminate its lien on the property [and] forgive Matson's underlying debt,

establishing free and clear ownership for Matson. This was because Matson—who, despite the judgment's indications to the contrary, believed he had no claim to the property—abandoned the property before the end of the redemption period, leaving it in a state of disrepair, decreased value, and with outstanding property taxes and code violations." *Matson*, No. 2012AP1981, unpublished slip op., ¶ 1. Matson brought a motion asking the Court to use "its contempt authority" to "force Deutsche Bank to sell the property rather than give title to him," which the circuit court denied. *Id*. ¶¶ 1, 10. The Court of Appeals affirmed, holding:

> Contrary to what Matson argues, WIS. STAT. § 846.103(2) does not require Deutsche Bank to sell the property at the end of the three-month redemption period. Like the trial court's order, the statute . . . describes a particular process ***should a sheriff's sale actually occur***. . . .
>
> The statute does not force a plaintiff to sell the property in question. Indeed, Matson points to no provision in Chapter 846, and no relevant case law, establishing a deadline by which a plaintiff who obtains a judgment of foreclosure must advance a property to a sheriff's sale. ***While the statutory language of WIS. STAT. § 846.103(2) would appear to presume a plaintiff such as Deutsche Bank would sell property at a sheriff's sale, it does not require that it do so.***

Id. ¶¶ 16-17 (emphasis added). In other words, the statute merely provided that *if* the property is to be sold, the foreclosure sale must take place after the redemption period has elapsed. But nothing in the statute *mandates* that the

property be sold, "much less that . . . it be sold immediately upon the expiration of the three-month redemption period." *Id.* ¶ 18. The Court of Appeals reaffirmed this holding in a case involving another Matson rental property, *Arch Bay Holdings LLC-Series 2008B v. Matson*, No. 2013AP744, unpublished slip op., ¶ 18 (Wis. Ct. App. Mar. 18, 2014), A.55 ("adopting and incorporating by reference our analysis in *Deutsche Bank*" and its conclusion that "WIS. STAT. § 846.103(2) 'describes a particular process should a sheriff's sale actually occur,' but 'does not require Deutsche Bank to sell the property at the end of the three-month redemption period'").

Matson's reasoning is equally applicable to WIS. STAT. § 846.102. The statutory language itself is identical:

WIS. STAT. § 846.102	**WIS. STAT. § 846.103(2)**
[J]udgment shall be entered as provided in s. 846.10 except that the sale of the mortgaged premises shall be made upon the expiration of 5 weeks from the date when such judgment is entered.	[J]udgment shall be entered as provided in this chapter, except that . . . the sale of the mortgaged premises shall be made upon the expiration of 3 months from the date when such judgment is entered.

It is a well-established principle of statutory construction that "an interpretation which ascribes different meanings to the same word as it variously appears in a statute" must be

rejected "unless the context clearly requires such an approach." *Wilson v. Waukesha Cnty.*, 157 Wis. 2d 790, 796, 460 N.W.2d 830 (Ct. App. 1990).

There is no context that would justify giving this language one meaning in WIS. STAT. § 846.102 and a different meaning in WIS. STAT. § 846.103. These two neighboring provisions are part of the same statutory scheme and must be construed together. *See State ex rel. Kalal*, 271 Wis. 2d 633, ¶ 46 ("[S]tatutory language is interpreted in the context in which it is used . . . in relation to the language of surrounding or closely-related statutes . . . ."). "In the mortgage foreclosure context, interpretations of statutes must be based on the context of ch. 846 as a whole, because ch. 846 sets up a comprehensive scheme of foreclosure. . . ." *Harbor Credit Union v. Samp*, 2011 WI App 40, ¶ 23, 332 Wis. 2d 214, 796 N.W.2d 813 (internal quotation marks omitted); *cf. Wenke v. Gehl Co.*, 2004 WI 103, ¶ 41, 274 Wis. 2d 220, 682 N.W.2d 405 (statutes with "shared purpose and subject matter" should be construed "*in pari materia*," and when a phrase appears in both sections, "we assume that the legislature intended the same meaning").

To whatever extent Ms. Carson has urged any public-policy considerations that might lead a court to construe WIS. STAT. § 846.102 differently from WIS. STAT. § 846.103, they are not expressed in the statutory language itself. "[I]t is the language [of the statute] that expresses the legislature's intent," *Crown Castle USA, Inc. v. Orion Constr. Group, LLC*, 2012 WI 29, ¶ 13, 339 Wis. 2d 252, 811 N.W.2d 332, and there is no language in WIS. STAT. § 846.102 evidencing a legislative intent to impose a sale deadline that is not imposed by WIS. STAT. § 846.103. Indeed, the fact that the Court of Appeals in *Matson* and the Circuit Court in this case were both unable to find a single precedent for the proposition that the statutes mandate a sale is a powerful indication that the scheme contemplates no such requirement.

II. The Plain Language of WIS. STAT. § 846.102 Permits, But Does Not Require, a Foreclosure Sale After the Redemption Period Has Elapsed.

The Court of Appeals' determination that WIS. STAT. § 846.102 "directs the court to ensure that an abandoned property is sold without delay" essentially inserts a term into the statutory language that is not there. Ct. App. Op., ¶ 13, A.10. As noted above, the pertinent part of WIS. STAT. § 846.102 provides that if a property is found abandoned "upon

proper evidence being submitted," a "judgment [of foreclosure] shall be entered as provided in s. 846.10 except that the sale of such mortgaged premises shall be made upon the expiration of 5 weeks from the date when such judgment is entered," instead of the 6 months and 3 months specified in WIS. STAT. §§ 846.101 and 846.103, respectively. The Court of Appeals' decision has the effect of re-writing this statutory language to provide that the sale of such mortgaged premises shall be made ***immediately*** upon the expiration of 5 weeks from the date the foreclosure judgment is entered. But that is not what the statute says, and there is nothing in its "scope," "context," or "purpose" that would justify construing it in that fashion. *Kalal*, 271 Wis. 2d 633, ¶¶ 46, 48.

In construing WIS. STAT. § 846.102 to mandate a sale, the Court of Appeals relied on the statute's use of the word "shall," which the Court read as "mandatory." Ct. App. Op., ¶ 13, A.10 (citing *GMAC Mortg. Corp. v. Gisvold*, 215 Wis. 2d 459, 477, 572 N.W.2d 466 (1998)). There are two major problems with this reasoning.

First, the term "shall" in statutory text is *not* necessarily mandatory. "[T]his court has often held that statutory time limits are directory despite the use of the word

'shall.' Consequently, the determination of whether 'shall' is mandatory or directory is not governed by a *per se* rule." *State v. R.R.E.*, 162 Wis. 2d 698, 707, 470 N.W.2d 283 (1991) (citations omitted); *see also* 82 C.J.S. Statutes § 500 (collecting cases construing "shall" as "permissive" rather than mandatory). Given a permissive rather than mandatory construction, WIS. STAT. § 846.102 simply provides that *if* a foreclosure sale is to be held, it cannot be held until 5 weeks after the foreclosure judgment is entered. In context, this permissive construction of WIS. STAT. § 846.102 is more natural than the mandatory construction. That is because, in providing that the sale shall occur "upon the expiration of 5 weeks," the statute nowhere provides any deadline or end date *before* which the sale must occur. The absence of a deadline that "denies the exercise of power after such time," and the absence of any "penalty" for not holding a sale within that time period, are both factors that weigh strongly in favor of a permissive rather than mandatory reading. *Karow v. Milwaukee Cnty. Civil Service Comm'n*, 82 Wis. 2d 565, 571-72, 263 N.W.2d 214 (1978); *see also State v. Rosen*, 72 Wis. 2d 200, 207, 240 N.W.2d 168 (1976) ("In determining whether a statutory provision is mandatory or directory in

character, we have previously said that a number of factors must be examined. These include the objectives sought to be accomplished by the statute, its history, the consequences which would follow from the alternative interpretations, and whether a penalty is imposed for its violation.") (citations omitted); *Eby v. Kozarek*, 153 Wis. 2d 75, 80, 450 N.W.2d 249 (1990) (quoting *Rosen*).

Second—as the trial court pointed out—even if WIS. STAT. § 846.102 were given a mandatory construction rather than a permissive one, it is significant that the statute imposes a start date before which a sale *cannot* be commenced, but does not impose an end date before which the sale *must* be commenced. The legislature certainly knows how to impose such a deadline when it intends to do so. *See*, *e.g.*, WIS. STAT. § 846.04(2), (3) (imposing deadlines for enforcement of deficiency judgments obtained by foreclosure). In the absence of a deadline, the trial court correctly invoked the general rule that a judgment can be executed "at any time within 5 years after the rendition of the judgment." R.26:13, A.26 (citing WIS. STAT. § 815.04). Thus, even if WIS. STAT. § 846.102 mandates a foreclosure sale rather than permits it, WIS. STAT. § 815.04 still gives the Trustee five years to comply with any

such mandate, and the trial court was correct to conclude that it had no power to order the Trustee to hold the sale immediately. In short, the word "immediately" does not appear in the statute, and the Court of Appeals erred in interpreting the statute as if it did.

III. The Public-Policy Considerations Cited by the Court of Appeals Are Misplaced.

The decision below appears to be motivated not so much by the statutory language, but rather by considerations of public policy. In opining as to "what the legislature had in mind when it drafted WIS. STAT. § 846.102," the Court of Appeals did not cite to WIS. STAT. § 846.102 itself, nor even to the legislative history of WIS. STAT. § 846.102, but rather to a Milwaukee Municipal Ordinance. Ct. App. Op., ¶ 14, A.10 (citing Milwaukee Municipal Ordinance § 200-22.5(1.5)). The Court stated that this ordinance shows that "communities have an interest in 'preserving the condition and appearance of residential properties'" and "prevent[ing] neighborhood blight," and that WIS. STAT. § 846.102 should therefore be read to serve that interest. *Id.*

Preserving the appearance of residential properties and fighting neighborhood blight are worthy public policies, and

they may be the policies that the Milwaukee Municipal Ordinance was intended to serve—but they are not the policies that the foreclosure scheme in Chapter 846 was intended to serve. The Court of Appeals erred in construing the redemption-period language in Chapter 846 as though it were intended to serve this purpose (and, as discussed below, it is highly doubtful that the Court's ruling will *in fact* serve that purpose).

To the contrary, the purpose that the statutory redemption periods were intended to serve is very clear: they were intended to delay foreclosure sales to give the homeowner one last opportunity to "avoid the sale of the property by repaying the outstanding indebtedness." *United States v. Davis*, 961 F.2d 603, 606 n.7 (7th Cir. 1992). Far from "ensur[ing] that an abandoned property is sold without delay" (Ct. App. Op., ¶ 13, A.10), the statutory redemption period is intended to *create* delay to give the borrower the opportunity to invoke the right of redemption. The foreclosure statute also aims to create delay by requiring a notice period of "at least 3 weeks prior to the date of sale." WIS. STAT. § 815.31. In the ordinary case, it is highly desirable to have such procedural safeguards in place to

prevent foreclosure sales—often contested—from occurring immediately. Construing the statutory scheme through the lens of the highly unusual circumstances of this case, where it is the *homeowner* who seeks to force a sale, will surely have unforeseen and unwanted consequences.

It is easy to imagine circumstances in which a sale requirement would not serve the interests of either party to a foreclosure. As the Court of Appeals pointed out in *Matson*,

> [R]equiring a sheriff's sale simply does not make sense in circumstances where it is in neither the lender's nor borrower's interest to do so: for instance, when there is a post-judgment loan modification between the lender and borrower, or when the borrower pays the debt shortly after the expiration of the redemption period.

Matson, No. 2012AP1981, unpublished slip op., ¶ 19. Indeed, the whole purpose of the statutory redemption period would be compromised if it were construed to cut short opportunities for the borrower and lender to resolve or renegotiate the underlying debt. That concern may not apply with the same force to the unusual cases like this one and *Matson* where the borrower is the one attempting to force a sale, but in those cases, as the Court of Appeals found in *Matson*, there are other policy considerations cutting against forced sales: "requiring a sheriff's sale essentially puts the borrower in control over the aggrieved lender's recovery, which . . .

creates an incentive for a borrower to commit waste." *Id*. In other words, construing Section 846.102 to require an immediate sale is just as likely to encourage neighborhood blight as to combat it.

If the legislature had wanted to force lenders into foreclosure sales in order to "preserv[e] the condition and appearance of residential properties" and "prevent neighborhood blight" (Ct. App. Op., ¶ 14, A.10), it had ample opportunity to amend the statute to provide as much, but it chose not to do so. Indeed, the legislature *did* amend WIS. STAT. § 846.102 in 2012 and did not add any language to the statute at that time which would have the effect of making a sale mandatory. Its refusal to do so is a strong indication that no such result was intended (or capable of garnering the necessary support). Instead, the amendment encouraged—but did not mandate—faster foreclosure sales by shortening the redemption period from two months to five weeks and the notice period from six weeks to three. *See* Wisconsin Legislative Council Act Memo, 2011 Wisconsin Act 136 [2011 Senate Bill 307] (Mar. 26, 2012), A.62. The amendment also added a provision giving municipalities the right to present evidence of abandonment. *See id*.; WIS. STAT.

§ 846.102(2). To whatever extent the goals of "preserving the condition and appearance of residential properties" and "prevent[ing] neighborhood blight" are manifested in the foreclosure scheme, they are limited to these provisions. Those goals did not find any expression in a requirement that lenders bring properties to sale against their will, nor does anything in the legislative history suggest that the legislature understood the existing language to provide as much. If the legislature had that intent, it was capable of expressing it—as at least one other legislature has done. *See*, *e.g.*, IND. CODE § 32-29-7-3(b), (c) (Indiana foreclosure scheme expressly permitting any party to the judgment to force a sale).

The other reason it was inappropriate for the Court of Appeals to transform Wisconsin's foreclosure scheme into an instrument for combating neighborhood blight is that the legislature already has plenty of other statutory remedies for such conditions and ample tools at its disposal to fight them. As a New York court ruled in another case involving a walkaway property, it had no authority to force the lender "to conclude the foreclosure sale" because "[t]he statutory remedy for such a situation has already been codified in Sec. 1970 of Art. 19-A of the N.Y. RPAPL, which allows the

Town to take title to an abandoned building without consideration as to a pending foreclosure proceeding." *Town of Huntington v. Lagone*, 908 N.Y.S.2d 320, 322 (N.Y. Dist. Ct. 2010).

Wisconsin, likewise, has an array of legislative remedies for conditions caused by abandoned properties. WISCONSIN STAT. § 32.22 provides for municipalities' "immediate condemnation" of "abandon[ed]," "dilapidate[ed]," or "blighted property." WISCONSIN STAT. § 66.1333, the so-called "Blight Elimination and Slum Clearance Act," provides "for the elimination and prevention of substandard, deteriorated, slum and blighted areas and blighted properties through redevelopment and other activities by state-created agencies and the utilization of all other available public and private agencies and resources." *Id*. § 66.1333(2). WISCONSIN STAT. § 66.1331, the "blighted area law," authorizes cities to (1) "acquire by purchase, eminent domain or otherwise, any real or personal property"; (ii) "hold, improve, clear or prepare for redevelopment any such property"; (iii) "sell, lease, subdivide, retain for its own use . . . any such property"; and (iv) "enter into contracts with redevelopers of property . . . regarding the use of the property

in accordance with a redevelopment plan and other covenants, restrictions and conditions that it deems necessary to prevent a recurrence of blighted areas." *Id*. § 66.1331(4)(a). With all of these tools at municipalities' disposal, there was neither any justification nor any necessity for the Court below to use foreclosure law as a mechanism for shifting remedial costs onto lenders that have already been forced to write off good-faith, arm's-length loans.

Courts across the country have resoundingly rejected similar efforts to force lenders to take collateral they do not want:

> Forces remained at work that could make their continued ownership of the real estate uncomfortable—forces like accruing real estate taxes and the desirability of maintaining liability insurance for the premises. But those forces are incidents of ownership. Though the Code provides debtors with a surrender option, it does not force creditors to assume ownership or take possession of collateral.

Canning v. Beneficial Maine, Inc. (In re Canning), 706 F.3d 64, 68 (1st Cir. 2013) (quoting *Canning v. Beneficial Maine, Inc.*, 442 B.R. 165 (Bankr. D. Me 2011)).

> [N]othing in subsection 521(a)(2) remotely suggests that the secured creditor is *required* to accept possession of the [collateral] . . . , as such a reading would be at odds with well-established law that a creditor's decision whether to foreclose on and/or repossess collateral is purely voluntary and discretionary.

In re Pratt, 462 F.3d 14, 19 (1st Cir. 2006).

> Chase's decision whether to foreclose and/or repossess the Property is purely a voluntary and discretionary decision. . . . While Debtors may incur some third party expenses, those expenses are incidents of ownership[.]

In re Arsenault, 456 B.R. 627, 631-32 (Bankr. S.D. Ga. 2011).

> Plaintiff faces continual prosecution for failing to maintain property in which she has no equity, does not wish to possess and which she seeks to surrender to the holder of the deed of trust secured by the property. On the other hand, the secured party apparently has no interest in capturing whatever equity it may have in this property. . . . The Order sought to be enforced did not compel any action on the part of the Bank. All it did was to allow the Bank to proceed to exercise its rights under the deed of trust. To use the vernacular, the Order did not compel it to eat dirt.

Ogunfiditimi v. Deutsche Bank Nat'l Trust Co. (In re Ogunfiditimi), No. 09-34778, 2011 WL 2652371, *1-2 (Bankr. D. Md. July 6, 2011) (A.59-60).

> In this case, the mortgagor executed and recorded a quit-claim deed in order to surrender the property, but no foreclosure took place. This court agrees with [*In re Koeller*, 170 B.R. 1019, 10123 (Bankr. W.D. Mo. 1994)] that the plaintiff could not compel the mortgage holder to accept the surrendered, quitclaimed property. As a consequence, the mortgagor Phillips continues to be the owner of the property, with all the rights and obligations.

In re Phillips, 368 B.R. 733, 744 (Bankr. N.D. Ind. 2007).

> In the instant case, Security Pacific is unwilling to accept title to the realty in its name. Thus, although the Debtors have provided for satisfaction of Security Pacific's secured claim by surrendering its collateral, absent Security Pacific's consent, Debtors may not compel this creditor to accept surrender nor enforce its rights and take title to the realty. . . . Whether to proceed with its remedies is within the sole discretion of Security Pacific, and Debtors may not compel Security Pacific to enforce its rights.

In re Service, 155 B.R. 512, 514 (E.D. Mo. 1993).

If Wisconsin is to adopt a contrary policy, that decision should be reserved for the legislature. *See Lagone*, 908 N.Y.S.2d at 322 ("The Town's argument as to the Bank's lack of 'good faith' efforts to conclude the foreclosure sale is a policy consideration for the legislature, not this Court."); *In re Cormier*, 434 B.R. 222, 224 (Bankr. D. Mass. 2010) (acknowledging "the inadequacy of existing state and federal laws" to address "walk away" properties, but stating that "judges are interpreters and not architects of the law"). Because no such legislative intent is manifest in the statute itself, the decision below should be reversed.

CONCLUSION

For the above-stated reasons, Petitioner respectfully requests that this Court reverse the decision of the Court of Appeals.

Dated this 23rd day of June, 2014.

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CERTIFICATE OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 6194 words.

Dated this 23rd day of June, 2014

/s/Valerie L. Bailey-Rihn

CERTIFICATE OF COMPLIANCE
WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all parties.

Dated this 23rd day of June, 2014

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CERTIFICATE OF SERVICE

I certify that on this day, I caused three correct copies of this brief to be served by U.S. Mail on the following attorneys:

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