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STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2013AP000544

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

RESPONSE BRIEF OF DEFENDANT-APPELLANT SHIRLEY T. CARSON

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TABLE OF CONTENTS

Table of Authorities

Cases Cited

Statutes Cited

Other Laws

INTRODUCTION

The Bank of New York Mellon's introductory description of Wisconsin's statutory foreclosure scheme omits the most significant differences between the foreclosure statute at issue in this case, Wisconsin's "Abandoned premises" statute, Wisconsin Statutes, section 846.102, and other foreclosure statutes, such as section 846.101 for owner occupied premises or section 846.103 for comerical properties. (Pet'r's Br. 1-2.) Sections 846.101 and 846.103 entitle the mortgagor to rents and occupancy "unless he or she abandons the property," and both sections 846.101 and 846.103 permit the plaintiff to elect its redemption period. Section 846.102, on the other hand, allows any party to the litigation or a unit of local government to prove the fact of abandonment, dramatically shortening the redemption period based on the condition of the premises, not on the election of the plaintiff. Wis. Stat. § 846.102. Thus, this case is not just about a private creditor and a private debtor. It is about the legislature's response to an obvious social problem colloquially called "zombie" or "walkaway" foreclosures. *Bank of N.Y.*

Mellon v. Carson, 2013 WI App 153, ¶ 5 n.3, 352 Wis. 2d 205, ¶ 5 n.3, 841 N.W.2d 573, ¶ 5 n.3.

The Bank of New York Mellon's Introduction's argument, at 1, is that the published decision in the present case "directly contradicts" the unpublished decision in *Deutche Bank*, the first *Matson* decision. (Pet'r's Br. 1.) There is, however, no contradiction. The two decisions by the court of appeals involved different statutes, different predicate facts, different procedural postures, different arguments by the foreclosing banks and the defendants, and different holdings by the circuit courts in the two appeals. The results are different because the cases are different.

The following table summarizes the differences:

Difference	*Deutsche Bank*	*The Bank of New York Mellon*
Statute	846.103(2) [Commercial foreclosure]	846.102(1),(2) [Abandoned property]
Conditional clause prior to the "judgment shall be entered" language	"When the plaintiff so elects [to waive judgment for any deficiency . . . and to consent that the mortgagor, unless he or she abandons the property may remain in possession"] Wis. Stat. 846.103(2)	"if the court makes an affirmative finding upon proper evidence being submitted that the mortgaged premises have been abandoned by the mortgagor and assigns" Wis. Stat. § 846.102(1)

Bank's claim of right	None: Mortgage **and** debt satisfied. *Slip op* ¶ 7 (Pet'r's App. 36.)	Sale at any time until 5 years after foreclosure judgment rendered (Pet'r's Br. 20-21.)
Bank's knowledge of abandonment	Unclear. Bank consented to defendant remaining in possession. *Slip Op* ¶ 3 (Pet'r App. 35.)	Prior to moving for default foreclosure judgment. (R 17-3.)
Defendant's Motion	To enforce judgment 7 months after mortgage and debt satisfied *Slip Op.* ¶¶ 1, 7, 9 (Pet'r's App. 33, 36, 37.)	To amend judgment, adjudicate property abandoned under section 846.102 and order sale (Pet'r's App. 5.)
Adjudication of Abandonment	None sought	Sought in post-judgment motion under section 846.102. (Pet'r's App. 5.)
Circuit court order	Motion to enforce judgment denied because judgment vests ownership in defendant until confirmation. *Slip Op.* ¶ 10 (Pet'r's App. 5.)	Motion to amend judgment denied because court has no authority to amend judgment. (Pet'r's App. 26-27, R 26-13-14.)

The differences between section 846.102 and section 846.103 are discussed much more fully in the Argument section of this brief, particularly in light of the familiar rule of construction that statutes are read as a whole and in context. As an introductory matter, however, it is sufficient to point out that the premise of The Bank of New York Mellon's Introduction is wrong. The two nearly

contemporaneous decisions, authored by the same judge, do not "directly contradict[]" each other. (Pet'r's Br. 1.)

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. **Does a circuit court have the authority, under Wisconsin Statutes section 846.102, "upon proper evidence being submitted that the mortgaged premises have been abandoned," to order sale of the abandoned property promptly after expiration of the shortened redemption period?**

The circuit court denied Ms. Carson's motion to find the property abandoned and order a prompt sale, reasoning that it lacked the authority to order that abandoned property be sold. *Bank of N.Y. Mellon v. Carson*, 2013 WI App 153, ¶¶ 7-8, 352 Wis. 2d 205, ¶¶ 7-8, 841 N.W.2d 573, ¶¶ 7-8. (Pet'r's App 6, 26-27.) Because the circuit court determined it lacked authority under section 846.102 to order sale, it did not make the predicate finding that the premises were abandoned. 2013 WI App 153, ¶8.

The court of appeals reversed and remanded with directions to make findings consistent with its opinion. 2013 WI App 153, ¶ 16. The court of appeals held that the circuit court had the authority under section 846.102 to find the property abandoned, to amend the judgment, and

to order sale of the property upon expiration of the five week redemption period. 2013 WI App 153, ¶ 16. The court of appeals observed that the predicate finding of abandonment may be proved, according to the plain language of section 846.102, by any party to the litigation or by a municipal or county government. 2013 WI App 153, ¶ 12. Thus, the court of appeals reasoned that the shortened five week redemption period of section 846.102 depends on the condition of the property, not on the election of the foreclosing plaintiff. 2013 WI App. 153, ¶ 12. The court of appeals recognized that the legislature was cognizant of municipalities' interests in preventing waste and blight when the legislature drafted the abandoned premises statute. 2013 WI App 153, ¶ 14. Finally, the court of appeals explained that those interests were well-expressed in Milwaukee Municipal Ordinance section 200-22.5(1.5). 2013 WI App 153, ¶ 14.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument has been set for September 23, 2014. Publication is appropriate.

STANDARD OF REVIEW

The Bank of New York Mellon's statement of the standard of review is accurate. The circuit court made no findings of fact on the question of abandonment. The court of appeals remanded with directions to make findings of fact on that issue. 2013 WI App 153, ¶ 1.

STATEMENT OF THE CASE

The Bank of New York Mellon's statement of the case omits the evidence that Carson presented to the circuit court to prove that the subject premises was abandoned as defined in section 846.102. As evidence of abandonment, Carson submitted The Bank of New York Mellon's Affidavit of Reasonable Diligence describing its attempts to serve Carson the foreclosure Summons. (R. 6-2.) The Affidavit noted that as of February 3, 2011, "[h]ouse appears to be vacant, garage boarded up – no furniture, snow not shoveled, no footprints in snow." *Id.* As of February 5, 2011, the Affidavit noted the snow was about waist high. *Id.* Further, Carson submitted her own Affidavit stating that she had terminated her utility

accounts at the property. (R. 16-1.) In addition, Ms. Carson submitted evidence of the Bank of New York Mellon's knowledge of abandonment at the time of filing the foreclosure action. On June 29, 2010, (more than six months before filing the foreclosure action in January 2011) BAC Home Loan Servicing LP had registered the property as an Abandoned Property in Foreclosure with the City of Milwaukee. (R. 17-3.)

Ms. Carson also submitted evidence of blight from the abandonment contemporaneous with and, more importantly, after the June 6, 2011 foreclosure judgment: an order dated May 5, 2011, requiring the removal of all garbage and litter from the property, (R. 17-10), reinspection notice dated June 23, 2011, noting that the prior orders were not resolved, (R. 17-15), Advisory Notice dated July 11, 2011, ordering The Bank of New York Mellon to register, inspect and maintain the property, (R. 17-5), Complaint dated July 5, 2011, noting a fire alarm report and ordering the razing of the garage after it was damaged in a fire, (R.17-7), order dated June 20, 2012, requiring the board up of a door to the property after the

property was vandalized, (R. 17-12), and Notice of Violation dated August 21, 2012, ordering the removal of boxes, scrap wood, and loose trash in alleyway and rear yard and removal of all other debris on the property, (R.17-8).

Without a doubt, the property was an abandoned premises within the definition provided by section 846.102. The Bank of New York Mellon stated on the record that that it had "no objection to the finding that the property is abandoned," (Pet'r's App. 18, L. 6-7; R. 26-5, L. 6-7), and the circuit court noted that it did not seem that the fact of abandonment was being challenged. (Pet'r's App. 18-19, L. 21-25, L. 1; R. 26-5-6, L. 21-25, L. 1.) The fact that this property meets the legislature's definition of an abandoned premises is the predicate fact that forms the basis for the court's authority to shorten the redemption period and order a sale of the property. Wis. Stat. § 846.102.

ARGUMENT

I. There is no conflict between the court of appeals' decisions in *Carson* and *Matson*.

The short answer to the Bank of New York Mellon's perceived inconsistency in the *Carson* and *Matson* cases is that Wisconsin Statutes section 846.103 is different from Wisconsin Statutes section 846.102. The difference between these statutes is discussed at length in Section II of this brief. For now, it is sufficient to say that section 846.102 compels a sale, whereas section 846.103 may not. The Bank of New York Mellon's conclusion that "[t]here is no statutory justification for the Court of Appeals to have held [in *Carson*] that [s]ection 846.102 requires a sale after having held in *[Deutsche Bank v.]Matson* that the same language in Section 846.103 permits a sale but does not require it," is wrong. (Pet'r's Br. 13.)

Before allowing The Bank of New York Mellon to deny any possible "statutory justification" for a case the court of appeals recommended for publication, it warrants noting the timing of the three appellate decisions and the

compositions of the panel in each decision. The first *Matson* decision, *Deutsche Bank v. Matson*, was issued on July 30, 2013, by Judges Curley, Fine, and Brennan. (Pet'r's App. 33-34.) The opinion, authored by Judge Curley, held that the foreclosure judgment Matson sought to enforce, issued under section 846.103 [foreclosure on commercial property], did not require the plaintiff to conduct a sheriff's sale. *Deutsche Bank v. Matson*, No. 2012AP1981, slip op., at ¶ 16 (Wis. Ct. App. July 30, 2013). The present case, *Bank of New York Mellon v Carson*, was decided on November 26, 2013, by Judges Curley, Fine, and Kessler. (Pet'r's App. 1.) The opinion, also authored by Judge Curley, held that the circuit court is authorized by section 846.102 [the abandoned premises in foreclosure statute] to order a sale after finding the property abandoned. *Bank of N.Y. Mellon v. Carson*, 2013 WI App 153, ¶ 16, 352 Wis. 2d 205, ¶ 16, 841 N.W.2d 573, ¶ 16.

An inference that Judges Curley and Fine were unaware of their prior *Matson* decision involving *Deutsche Bank* is completely untenable in light of the fact that in *Carson*, The Bank of New York Mellon moved for

summary disposition on the basis of the *Deutsche Bank* decision. Judge Curley denied that motion on August 15, 2013.

The second *Matson* decision, *Arch Bay Holdings LLC-Series 2008B v. Matson*, was decided on March 18, 2014, by Judges Fine, Kessler, and Brennan. (Pet'r's App. 45-46.) The opinion, authored by Judge Kessler, held again that Matson's foreclosure judgment, issued under section 846.103, did not require a sheriff's sale. *Arch Bay Holdings LLC-Series 2008B* v. *Matson*, Case No. 2013AP744, slip op., ¶18. (Wis. Ct. App. March 18, 2014); (Pet'r's App. 54-55). Thus, all three of the judges on the *Carson* panel were also on at least one of the *Matson* panels. All four District I judges were on two of the panels. Consequently, the court of appeals was fully aware of all three decisions and did not view the decisions as conflicting or without statutory justification.

The reason the decisions were different is that the cases were different in several respects. The *Matson* decisions involved arguments that foreclosure judgments issued under section 806.103 compelled the plaintiffs to hold a sheriff's sale. The court of appeals identified the

issue as "whether the language of a particular foreclosure judgment mandates a sheriff's sale." *Arch Bay*, at ¶18; (Pet'r's App. 54.) Similarly, in the earlier *Matson* decision, *Deutsche Bank*, the court of appeals identified Matson's argument as a claim that a judgment issued under section 846.103 compels sale. *Deutsche Bank*, at ¶ 13; (Pet'r's App. 38).

In contrast, the *Carson* case directly posed the question of the court's authority to order the sale of an abandoned, foreclosed property pursuant to the abandoned premises statute, section 846.102. The court's holding in *Carson* was broader than interpreting a particular foreclosure judgment, holding that the trial court had the authority, pursuant to section 846.102, to amend a foreclosure judgment, to make a finding of abandonment, to shorten the redemption period, and to order a sale of an abandoned, foreclosed property. *Bank of N.Y. Mellon v. Carson*, 2013 WI App 153, ¶ 16, 352 Wis. 2d 205, ¶ 16, 841 N.W.2d 573, ¶ 16.

Significantly, both of the judgments in the *Matson* cases, issued pursuant to section 846.103, provided that the properties "shall be sold at public auction under the

direction of the sheriff, *at any time* after three months from the date of entry of judgment." *Arch Bay*, at ¶ 3; (Pet'r's App. 47); *Deutsche Bank*, at ¶ 4 (Pet'r's App. 35) (emphasis added). In the second *Matson* case, decided after *Carson*, the court of appeals specifically noted that "Matson did not seek to reform the judgment to track his view of the statute, but rather sought to enforce the judgment as written." *Arch Bay*,at ¶ 17. There is no suggestion in either *Matson* case that Matson ever attempted to invoke section 846.102.

Ms. Carson, however, did not seek to enforce the foreclosure judgment as originally entered. She moved to amend it. She specifically invoked section 846.102. She submitted evidence and sought a finding of abandonment, which is the predicate factual finding section 846.102 directs the circuit court to make prior to ordering a sale of the property. The *Carson* opinion addressed the text, purpose, and history of the abandoned premises statute, a statute that was not even raised in the *Matson* cases.

Further, in both the *Matson* decisions, by the time Matson sought to enforce the judgments, the lenders had recorded Satisfactions of Mortgages and cancelled the

underlying debts. *Arch Bay*, at ¶ 4; *Deutsche Bank*, at ¶ 7. In the first *Matson* case, prior to Matson's filing his motion, Deutsche Bank "informed Matson that he owned the property free and clear of Deutsche Bank's lien and that Deutsche Bank had no intention of conducting a sheriff's sale." *Deutsche Bank*, at ¶ 8. In *Carson*, on the other hand, The Bank of New York Mellon continues to assert its right to sell the property for up to five years after entry of the foreclosure judgment. (Pet'r's Br. 20-21.)

Thus, there is no inconsistency between these three foreclosure decisions. Matson never invoked section 846.102. Carson did. The court of appeals was aware of the difference and noted it. In *Arch Bay*, the court of appeals, clearly intending not to disturb *Carson's* holding regarding judicial authority and the abandoned premises statute, carefully narrowed its holding to "the question of whether the language of a particular foreclosure judgment mandates a sheriff's sale." *Arch Bay*, at ¶ 18 (Pet'r's App. 54.)

The *Carson* decision and the *Matson* decisions are different because the court of appeals was analyzing

different facts, different procedural postures, and different laws. The decisions are different, not conflicting.

II. When read in context, Wisconsin's abandoned premises statute clearly authorizes the circuit court to order the plaintiff to take an abandoned, foreclosed property to sale because, otherwise, the purpose of the statute is defeated and the recognition of other parties' and municipal governments' interests in subsection (2) is meaningless.

Contrary to The Bank of New York Mellon's position, sections 846.101, 846.102, and 846.103 are not "substantively identical language." (Pet'r's Br. 13.) While it is true that sections 846.101, 846.102, and 846.103, as well as 846.10 all deal with foreclosures and redemption periods in foreclosure, only Wisconsin's abandoned premises statute has anything like its subsection (2). Only subsection 846.102(2) expressly empowers any party to the litigation and "a representative of the city, town or county where the premises is located" to prove that the property is abandoned in order to shorten the redemption period and obtain an order for timely sale. The abandoned premises statute provides in full:

> **(1)** In an action for enforcement of a mortgage lien if the court makes an affirmative finding upon proper evidence being submitted that the mortgaged premises have been abandoned by the mortgagor and assigns, judgment **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. Notice of the time and place of sale **shall** be given under ss. 815.31 and 846.16 and placement of the notice may commence when judgment is entered. In this section "abandoned" means the relinquishment of possession or control of the premises whether or not the mortgagor or the mortgagor's assigns have relinquished equity and title.
>
> (2) **In addition to the parties to the action to enforce a mortgage lien, a representative of the city, town, village, or county where the mortgaged premises are located may provide testimony or evidence to the court under sub. (1) relating to whether the premises have been abandoned by the mortgagor.** In determining whether the mortgaged premises have been abandoned, the court shall consider the totality of the circumstances, including the following:
>
> > **(a)** Boarded, closed, or damaged windows or doors to the premises.
> >
> > **(b)** Missing, unhinged, or continuously unlocked doors to the premises.
> >
> > **(c)** Terminated utility accounts for the premises.
> >
> > **(d)** Accumulation of trash or debris on the premises.
> >
> > **(e)** At least 2 reports to law enforcement officials of trespassing, vandalism, or other illegal acts being committed on the premises.
> >
> > **(f)** Conditions that make the premises unsafe or unsanitary or that make the premises in imminent danger of becoming unsafe or unsanitary.

Wis. Stat. § 846.102 (emphasis added).

The legislature repeatedly used the word "shall" when it crafted the abandoned premises statute. Specifically, the statute provides that an abandoned, foreclosed property "shall" be sold upon the expiration of five weeks. Wis. Stat. § 846.102(1). Generally, "shall" is

presumed mandatory when it appears in a statute. *Karow v. Milwaukee Cnty. Civil Serv. Comm'n*, 82 Wis. 2d 565, 570, 263 N.W.2d 214, 217 (1978). As recently as 2010, this Court explained that the word "shall" in the foreclosure context means "automatically follows . . . by operation of law." *Bank Mut. f/k/a First N. Sav. Bank v. S.J. Boyer Constr., Inc.*, 2010 WI 74 ¶ 51, 326 Wis. 2d 521, ¶ 51, 785 N.W.2d 462, ¶ 51. In a 1998 footnote, this Court cited the abandoned premises statute as an example of the legislature specifically using the mandatory "shall." *GMAC Mortgage Corp. of Pa. v. Gisvold*, 215 Wis. 2d 459, 477 n.11, 572 N.W.2d 466, 476, n.11 (1998). The Court contrasted the use of the mandatory word "shall" with the use of the permissive word "may" throughout the foreclosure statutes. *Id.* As this Court has previously explained, "[w]hen the words "shall" and "may" are used in the same section of a statute, one can infer that the legislature was aware of the different denotations and intended the words to have their precise meanings." *Karow*, at 571. Therefore, when the legislature said sale of an abandoned, foreclosed property **shall** be made upon the expiration of 5 weeks from the date when the judgment is

entered, and notice of the time and place of sale **shall** be given under sections 815.31 and 846.16, and placement of the notice **may** commence when judgment is entered, it is presumed the legislature meant what it said.

This Court, however, has recognized that context may require ascribing different meanings to the same words. *Wood Cnty. v. State Bd. Of Vocational, Technical and Adult Educ. of the State of Wis.*, 60 Wis. 2d 606, 615, 211 N.W.2d 617, 621 (1973); *State v. Hanson*, 2012 WI 4 ¶ 21, 338 Wis.2d 243, ¶ 21, 808 N.W.2d 390, ¶ 21. One of the observations in Wisconsin's leading exposition on statutory construction is:

> Some statutes contain explicit statements of legislative purpose or scope. A statute's purpose or scope may be readily apparent from its plain language or its relationship to surrounding or closely-related statutes—that is, from its context or the structure of the statute as a coherent whole. Many words have multiple dictionary definitions; the applicable definition depends upon the context in which the word is used.

State ex rel. Kalal v. Cir. Ct. of Dane Cnty., 2004 WI 58, ¶ 49, 271 Wis. 2d 633, ¶ 49, 681 N.W.2d 110, ¶ 49. Moreover, "the purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *Id.* at ¶ 44. So, although the general rule is that "shall" is presumed

mandatory, the deadline by which property "shall be sold" may have different meanings in different contexts, depending on the purpose of the statute.

It is the purpose and context of the abandoned premises statute that proves that the legislature's use of "shall" in the abandoned premises statute is both intentional and mandatory. Here, the context is a statute with the obvious purpose of allowing courts to quickly deal with abandoned, foreclosed properties to prevent the social ills of waste and blight. *See*, *Bank of N.Y. Mellon v. Carson*, 2013 WI App 153, ¶ 14, 352 Wis. 2d 205, ¶ 14, 841 N.W.2d 573, ¶ 14. Further, by its plain language, the abandoned premises statute allows foreclosure defendants and municipal and county representatives to prove the fact of abandonment. Wis. Stat § 846.102(2). In this context, "shall" must mean the circuit court has the authority to order a sale, or the purpose of the statute is obstructed and the right of defendants and municipal representatives to present evidence of abandonment is rendered meaningless. The right to present evidence of abandonment is of no use to defendants, or the local municipality, or the county, if

the court lacks the authority to act on the evidence presented.

In contrast, where the predicate fact to determine the redemption period is election by the foreclosing plaintiff, as it is in sections 846.101 and 846 103, the context may well give control of the timing of a sale to the mortgagor. The mortgagor might have any number of reasons for delay. Others, and society in general, however, have an obvious interest in dealing with abandoned properties. The fact that section 846.102 abuts sections 846.101 and 846.103 in the statute book does not negate the fact that only the redemption period in section 846.102 is predicated on a finding of abandonment, as opposed to the election of the mortgagor. When the abandoned premises statute is read in context as a legislative response to a new and growing social ill, the mandatory nature of the word "shall" is apparent.

Yet, The Bank of New York Mellon argues that the word "shall" is ambiguous in the abandoned premises statute, as it could be interpreted to be mandatory, directory, or permissive. (Pet'r's Br. 19.) When statutory language is ambiguous, the Court may turn to extrinsic

sources such as legislative history to determine legislative intent. *State ex rel. Kalal*, at ¶ 51. The recent legislative history of section 846.102 proves that its "shall" is not permissive.

As recently as 2012, the legislature passed 2011 Wisconsin Act 136 to amend section 846.102. The amendment shortened the redemption period for abandoned properties from two months to five weeks and permitted the notice of a sheriff's sale to be published immediately upon entry of judgment. Most importantly, it was this recent amendment that created subsection (2), allowing municipalities, in addition to the parties, to provide evidence of abandonment. Wis. Stat. § 846.102(2). The intent of the amendment is illustrated by its effect: the legislature chose to make the process for taking an abandoned, foreclosed property to sale quicker in order to avoid waste, and, in order to avoid blight, the legislature chose to broaden the categories of people who could ask the court to make a finding of abandonment and who could move for a court-ordered sale.

Thus, the text, purpose, context and the recent legislative history of section 846.102 oppose a permissive reading of the word "shall" and prove the statute grants the court the authority to order a timely sale of an abandoned, foreclosed property. But, The Bank of New York Mellon makes two more specific arguments in favor of a permissive interpretation of "shall." First, it argues that "shall" is permissive because the statute provides no outside time limit for sale. (Pet'r's Br. 20.) Second, it argues "shall" is permissive because the abandoned premises statute lacks a specific punishment for failing to hold a sheriff's sale within a prescribed period of time. (Pet'r's Br. 19.)

The first defect with these arguments is the conflation of the word "directory" with the word "permissive." The Bank of New York Mellon lists the factors to determine whether a time limit is directory and then concludes, based on those factors, that the use of the word "shall" in the abandoned premises statute is permissive. (Pet'r's Br. 18-20.) "Directory" and "permissive" do not mean the same thing, however. This Court has emphasized that a statutory time limit that is

directory "should not be read to imply that the provision is merely discretionary or permissive." *State v. R.R.E.*, 162 Wis. 2d 698, 715, 470 N.W.2d 283, 289 (1991). Ms. Carson is not arguing, and the court of appeals did not hold, that the circuit court is compelled to order the sale on the 36th day after making the predicate finding of abandonment. Once the court makes a finding of abandonment, however, the abandoned premises statute directs the court to direct the plaintiff to bring the property to sale. *See*, *e.g.*, *Eby v. Kozarek*, 153 Wis. 2d 75, 83, 450 N.W.2d 249, 253 (1990) (holding that the 15 day deadline for requesting mediation in a medical malpractice case is directory but also holding that making the request before further litigation is mandatory). That is what the court of appeals directed the circuit court to do on remand: make the finding and use its authority necessarily conferred.

The second defect with The Bank of New York Mellon's arguments is that both an outside time limit and a specific punishment are unnecessary, and may even obstruct the purpose of the abandoned premises statute. If section 846.102 had an outside time limit for sale, plaintiffs like The Bank of New York Mellon would then

argue that the court could not require a sale of the abandoned, foreclosed property prior to the expiration of the *outside* time limit. Indeed, the Bank of New York Mellon makes a version of that argument when it argues that it has five years to complete a sale.[1] A specific statutory punishment is also unnecessary; the lack of a specific statutory punishment does not make obeying a court's order optional. The punishment for failing to comply with a court order is the potential for civil contempt sanctions. Wis. Stat. § 785.02. The lack of a specific punishment leaves the court with the discretion to determine how best to remedy the problem and also leaves room for unintentional and unavoidable delays. An alleged contemnor who lacks the power to comply has good cause for its failure to comply. Wis. Stat. § 785.03. The abandoned premises statute simply empowers the court to address a social ill that affects others besides the mortgagor. Neither the lack of an outside time limit, nor the lack of a specific statutory punishment undercuts the

[1] *See* Pet'r's Br. 20, stating "[t]hus, even if Wis. Stat. § 846.102 mandates a foreclosure sale rather than permits it, Wis. Stat. § 815.04 still gives [Petitioner] five years to comply with any such mandate and the trial court was correct to conclude it had no power to order the Trustee to hold the sale immediately."

legislature's intent to give the court the authority to address waste and blight.

III. The public policy considerations addressed by the court of appeals in *Carson* are the same public policy considerations underlying the legislature's creation of subsection 846.102(2).

The Bank of New York Mellon seemingly concedes that the goals of "preserving the condition and appearance of residential properties" and "prevent[ing] neighborhood blight" are manifested in the provisions of subsection 846.102(2) and nowhere else in Chapter 846's foreclosure scheme. (Pet'r's Br. 25.) In an attempt to criticize the logic of the court of appeals decision, however, The Bank of New York Mellon argues that the court of appeals, in paragraph fourteen of the published opinion, grounded its inference of legislative intent in the actions of the City of Milwaukee. (Pet'r's Br. 4, 21.) This argument overlooks paragraph twelve of the court of appeals' opinion. In paragraph twelve, the court notes the obvious: the legislature, in subsection 846.102(2), empowers local government to prove the predicate fact of abandonment. The legislature recognized the interests of municipalities and counties in preventing waste and blight, and, therefore,

allowed local governments to intervene in foreclosure cases involving abandoned properties. The court of appeals cites the preamble of Milwaukee Municipal Ordinance section 200-22.5(1.5) because that ordinance confirms the interests the legislature clearly meant to protect when it created subsection 846.102(2). Thus, the court of appeals did not infer the legislature's intent from a municipal ordinance. It found the intent from the legislature explicitly empowering municipalities to prove the fact of abandmonment. The consequence of proving abandonment, a dramatically reduced redemption period and sale, is exactly the legislative change that serves local governments' and the public's interests. Those interests are preventing waste and blight, not delaying a foreclosure sale through a redemption period as The Bank of New York Mellon argues. (Pet'r's Br. 22-23.)

The Bank of New York Mellon argues its own public policy concerns, (Pet'r's Br. 22-29), but those concerns do not apply when the premises are abandoned. It is, of course, "easy to imagine circumstances in which a sale requirement would not serve the interest of either party to a foreclosure." (Pet'r's Br. 23.) Foreclosure

defendants trying to keep their properties may seek to redeem during the redemption period, or defend against the lawsuit, or apply for mortgage loan modification, or negotiate with the lender for more time. Nothing in the *Carson* decision impairs such efforts of mortgagors and mortgagees because section 846.102 applies only to abandoned premises. Debtors seeking more time to redeem or renegotiate are not going to abandon their premises. The abandoned premises statutes deals only with those properties about which an adjudication of abandonment, upon proper evidence, has been made.

The Bank of New York Mellon is simply wrong about its other policy concerns as well, namely that the abandoned premises statute "forces" lenders into foreclosure sales and creates an incentive for homeowners to commit waste. Section 846.102 does not compel mortgagees to commence foreclosure actions. If the rational, economic, decision is to walk away from a bad loan with deteriorated security, the abandoned premises statute does not compel the commencement of foreclosure proceedings. Ms. Carson did not compel The Bank of New York Mellon to commence this foreclosure action.

Nor is Ms. Carson in bankruptcy court seeking an order or sanctions against The Bank of New York Mellon for violating the bankruptcy code. *Cf.*, e.g., *In re Canning*, 706 F.3d 64, 66-67 (1st Cir. 2013), *In re Arsenault*, 456 B.R. 627, p. 6-7 (Bankr. S.D. Ga. 2011). Thus, the bankruptcy cases cited by The Bank of New York Mellon, (Pet'r's Br. 27-28), are easily distinguishable.

It is the mortgagees commencing the litigation and then stopping that creates the zombies. Foreclosure is a two-step process. *Bank Mut. v. Boyer*, 2010 WI 74, ¶ 27, 326 Wis. 2d 521, ¶ 27, 785 N.W.2d 462, ¶ 27. Obtaining the judgment of foreclosure stymies any effort to salvage a property already figuratively under water with debt exceeding its value. The abandoned premises statute, thus, provides a remedy to other litigants and to local governments when mortgagees cloud the property with a foreclosure judgment, but then walk away mid-litigation without further communication to the circuit court or the other parties. Courts across the country have certainly not affirmed the mortgagee's right to be dilatory and

uncommunicative once they chose to commence litigation.[2]

The court of appeals decision in *Carson* serves the public interest by fostering communication between the court, litigants to a foreclosure action, and local governments. The possibility of an order pursuant to the abandoned premises statute encourages foreclosure plaintiffs to make rational, self-interested, market-driven economic determinations regarding abandoned properties promptly before unnecessary waste and blight occurs. Prior to filing, lenders may carefully consider whether they should file to foreclose on a property if they have no intention of bringing it to sale. If lenders change their minds about a sale prior to obtaining a judgment, they can seek voluntary dismissal. Wis. Stat. § 805.04. These

[2] The behavior The Bank of New York Mellon asks this Court to approve contrasts starkly with the behavior of most of the lenders in the bankruptcy cases The Bank of New York Mellon cites. For example, the lender in *In re Canning* voluntarily dismissed its foreclosure proceedings early on, making its position clear. The lender also sent the Cannings a letter explaining it "would not initiate and/or complete foreclosure proceedings . . ." 706 F.3d 64, 66 (1st Cir. 2013). The lender in *In re Pratt* never filed a repossession action and informed the borrower that it did not intend to repossess. 462 F.3d 14, 16, 20 (1st Cir. 2006). It appears that in *In re Arsenault* and in *In re Phillips* the lenders did not commence foreclosure actions. 456 B.R. 627 (S.D. Ga. 2011), 368 B.R. 733, 744 (Bankr. N.D. Ind. 2007). *In re Koeller* explains that the lender "had never done anything toward foreclosing the property." 170 B.R. 1019, 1020 (Bankr. W.D. Mo. 1994).

results are particularly desirable because many foreclosure defendants who abandon their homes may do so because they believe their removal is imminent once a foreclosure action is filed or a judgment is entered.

Further, if lenders obtain a foreclosure judgment, but later change their minds regarding foreclosure and sale of the property, they can timely seek relief from that judgment for good cause shown. Wis. Stat. § 806.07. In the meantime, in order to avoid abandonment, waste, and blight, lenders and the courts will presumably do a better job communicating to borrowers facing foreclosure that they should not vacate and abandon their homes prior to a sheriff's sale.

The communication that naturally results from the *Carson* holding will result in greater certainty regarding the legal status of the property and the rights of the parties. Defendants and the court will at least be informed of the lender's intentions and will be able to act accordingly. Without the abandoned premises statute and the communication and certainty it requires, defendants like Carson are left with clouded title and no remedy at law. *See In re Pigg*, 453 B.R. 728, 734-37 (Bankr. M.D. Tenn.

2011) (fashioning an equitable remedy when the bankrupt borrower faces mounting condominium fees in perpetuity and the lender refuses to foreclose or accept a deed in lieu). As the court of appeals observed, this position leaves "properties in limbo for years." *Bank of N.Y. Mellon v. Carson*, 2013 WI App 153, at ¶ 14. Even if Carson could find a buyer for her property, no title insurance can insure clean title with a foreclosure judgment pending. The property becomes an inalienable zombie, which The Bank of New York Mellon does not want and Carson cannot sell or maintain. This is exactly the situation the abandoned premises statute is intended to prevent.

The final defect with The Bank of New York Mellon's public policy arguments is that the court of appeals did not choose which public policy concerns to address with the abandoned premises statute; the legislature did. The legislature chose to address the public policy concerns of preventing waste and blight. That is exactly why the legislature expressly recognized in section 846.102(2) the public's interest in allowing the local government to prove the predicate fact of abandonment. The fact, noted in the Petitioner's brief at 26-27**,** that local

governments have other statutory options for addressing blight does not limit the legislature's ability to address the specific problem of "walkaway" or "zombie" foreclosures through the abandoned premises statute.[3]

At the end of its brief, The Bank of New York Mellon concedes that "walk away" properties are a social ill requiring a legislative response, noting that other judges around the country have lamented "the inadequacy of existing state and federal laws to address 'walk away' properties." (Pet'r's Br. 29.) The laws may be inadequate at the federal level and in other states, but Wisconsin's legislature has chosen to address walkaway properties directly and effectively with the abandoned premises statute.

[3] Thus, The Bank of New York Mellon misstates the New York District Court's holding in *Town of Huntington v. Lagone*, 908 N.Y.S.2d 320 (July 8, 2010). The court did not determine that it could not force the lender to conclude its foreclosure sale *because* the city had a statutory remedy to take title to the property. (*Cf.* Pet'r's Br. 25-26.) The court concluded that the lender's potential lack of good faith in completing the sale was a "policy consideration for the legislature." *Town of Huntington* at 322. In order for the court to have the authority to order a sale, the New York legislature would have to grant the court that authority through a statute like Wisconsin's abandoned premises statute.

CONCLUSION

For the above-stated reasons, Defendant-Appellant Shirley Carson respectfully requests that this Court affirm the decision of the Court of Appeals.

Dated this 14th day of July, 2014.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif fond. The length of this brief is 6,374 words.

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 14th day of July at Milwaukee, Wisconsin.

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April A.G. Hartman, SBN 1054346

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