

No. _____

In the
Supreme Court of the United States

RAINBOW RIDGE RESORT, LLC, WAYNE HILL,
AND WIFE, CORNELIA D. HILL,
Petitioners,

v.

BRANCH BANKING AND TRUST COMPANY,
Respondent.

**On Petition for Writ of Certiorari to the
Supreme Court of Tennessee**

PETITION FOR WRIT OF CERTIORARI

David J.S. Madgett
Counsel of Record
Douglas E. Klein
William Jeffrey Barnes
MADGETT & KLEIN, PLLC
1161 E. Wayzata Blvd.
Suite 314
Wayzata, MN 55391
(612) 470-6529
Dmadgett@madgettlaw.com

Counsel for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Is Tennessee Code Annotated Sec. 35-5-118 unconstitutional as applied, given the lack of due process created by artificially limiting a Defendant's examination on matters that are the subject of the Tennessee Statute?
2. Is Tennessee Code Annotated Sec. 35-5-118 unconstitutional as applied because the statute limits Appellants' rights to petition, pursuant to the First Amendment, by preconditioning a defendant's examination on matters which are the subject of the Statute to those which defendant has raised (in a pleading) as an affirmative defense?

LIST OF PARTIES

The Petitioners in this case are two individuals (Cornelia D. Hill and Wayne Hill, hereafter “the Hills”) and a limited liability company (Rainbow Ridge Resort LLC, hereafter “RRR”). The Petitioners have been subjected to a final deficiency judgment in excess of \$1.8 million following the foreclosure sale of certain commercial properties by Respondent, Branch Banking & Trust Company (hereafter “BB&T”). Branch Banking & Trust Company is a bank holding company headquartered in North Carolina.

RULE 14.1(b)(iii) STATEMENT AS TO RELATED AND PRIOR PROCEEDINGS

The trial court proceedings were initiated by a Complaint filed by Petitioners in the Circuit Court for Sevier County, Tennessee (*Cornelia D. Hill, Wayne Hill, and Rainbow Ridge Resort LLC v. Branch Banking & Trust Company*, Case No. 12CV-1365-1). BB&T, as Plaintiff, thereafter filed a separate action in the Chancery Court for Sevier County, Tennessee (*Branch Banking & Trust Company v. Cornelia D. Hill, Wayne Hill, and Rainbow Ridge Resort LLC*, Case No. 13-9-281) (hereinafter “Appellants”) seeking foreclosure on certain commercial properties and improvements thereon. The two cases were consolidated as both cases concerned the same parties and parcels of real property, and the matters at issue in the two cases arose from the same commercial loan transaction.

The trial court entered an Order of Dismissal in Circuit Court Case No. 12CV-1365-1, and a final judgment of foreclosure in Chancery Court Case

No. 13-9-281. Defendants Cornelia D. Hill, Wayne Hill, and RRR appealed to the Court of Appeals of Tennessee (*Cornelia D. Hill, Wayne Hill, and Rainbow Ridge Resort LLC, Appellants, v. Branch Banking & Trust Company, Appellee*, Case No. E2015-01221-COA-R3-CV). The Court of Appeals affirmed the trial court's Final Judgment on December 28, 2016.

BB&T, as Plaintiff, then filed a separate Deficiency Action (*Branch Banking & Trust Company v. Cornelia D. Hill, Wayne Hill, and Rainbow Ridge Resort LLC*, Case No. 16-3-118), which sought a deficiency judgment against Appellants here. The trial court entered judgment for the deficiency in favor of BB&T against Appellants in an amount exceeding \$1.8 million.

The Appellants appealed the deficiency judgment to the Tennessee Court of Appeals (*Cornelia D. Hill, Wayne Hill, and Rainbow Ridge Resort LLC, v. Branch Banking & Trust Company*, Case No. E2018-00232-COA-R3-CV). The Court of Appeals affirmed the trial court's final judgment. Appellants then sought permission to appeal the Court of Appeals' decision to the Tennessee Supreme Court (*Cornelia D. Hill, Wayne Hill, and Rainbow Ridge Resort LLC, Petitioners, v. Branch Banking & Trust, Respondent*, Case No. E2018-00232-COA-R3-CV). The Supreme Court of Tennessee denied the application on June 19, 2019. (Pet. App. C)

This Petition is timely filed as the final decision of the Tennessee Supreme Court was rendered on June 19, 2019.

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**PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF TENNESSEE**

The appellants, Rainbow Ridge Resort LLC, Wayne Hill, and his wife, Cornelia Hill, respectfully petition for a writ of certiorari to review the decision of the Tennessee Court of Appeals affirming a final order of the Chancery Court of Sevier County, Tennessee, resulting in a deficiency judgment against Petitioners for over \$1.8 million. The Supreme Court of Tennessee denied Petitioners' Tennessee Rule of Appellate Procedure (hereafter "TRAP") Rule 11 Application for Permission to appeal the decision of the Court of Appeals to the Supreme Court of Tennessee.

OPINIONS BELOW

The opinion of the Court of Appeals of Tennessee, dated and filed on February 28, 2019 (Pet. App. C), and the Order of the Supreme Court of Tennessee, dated and filed June 19, 2019 (Pet. App. A), and the Chancery Court's orders (Pet. App. F & G) are unreported and unpublished.

JURISDICTION

The decision of the Tennessee Court of Appeals was entered on February 28, 2019. Pet. App. A. An application for permission to appeal to the Supreme Court of Tennessee, pursuant to TRAP 11, was filed on April 25, 2019. The Court denied the Petitioners' Application to Appeal to the Tennessee Supreme Court on June 19, 2019. (Pet. App. A.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. Petitioners assert that the validity of Tennessee Code Annotated Sec. 35-5-118, as applied by the Tennessee courts, is

repugnant to the Constitution because it violates the First Amendment. As interpreted, the statute denies a party the right to petition a court to address an ongoing dispute that leads to a lawsuit. Specifically, the statute denies a party's right to cross-examine any litigant who has failed to plead an existing affirmative defense. Petitioners similarly assert the statute, as applied, violates due process under the 14th Amendment to the Constitution.

CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS INVOLVED

Relevant parts of Amendments I and XIV of the U.S. Constitution and Tennessee Code Annotated Sec. 35-5-118 are reprinted in the accompanying Appendix. (Pet. App. H.)

STATEMENT OF THE CASE

Petitioners Rainbow Ridge Resort LLC, Wayne R. Hill, and Cornelia D. Hill were real estate developers involved in the development of a vacation cabin resort complex known as Rainbow Ridge on certain commercial properties in Sevierville, Tennessee, owned and operated by Petitioners. Financing for the project was done through a local bank, which was purchased by Respondent during the course of the project. Separate litigation ensued between Petitioners and Respondent, culminating in a final judgment in favor of Respondent on its foreclosure claims.

Pursuant to Tennessee Code Annotated Sec. 35-5-118, Respondent thereafter filed an action for a deficiency judgment against Petitioners based on the loan documents, which included personal guaranty

agreements and a state tax lien. Petitioners answered and asserted several Affirmative Defenses to the deficiency actions that were quite notably stricken by the trial court as not relevant at the time.

Tennessee Code Annotated Sec. 35-5-118 expressly states that any deficiency owed must be reduced by the fair market value of the property. At trial, Respondent established the amount of the deficiency though the testimony of its lead counsel. Counsel's testimony concerned his foreclosure work and the reasonableness of his fees, the condition of the properties, and the foreclosure sale price. (Pet. App. E. P.36-44, 56).

Petitioners' trial counsel sought to cross-examine Respondent's trial counsel concerning the foreclosure sale with the focus upon an appraisal or market valuation of the property as of the sale date. (*Id.*, P.48-49). However, the trial court sustained Respondent's objection to this inquiry on the grounds that this issue, including the condition of the property, had to be first raised in the pleadings as an affirmative defense, notwithstanding the fact that the operative Tennessee Statute contained no such provision requiring the assertion of the adequacy of the foreclosure sale.

Petitioners contend the trial court's refusal to permit Petitioners to inquire into the adequacy of the foreclosure sale price, after Respondent's witness opened the door to these issues, constitutes a denial of due process and infringes upon the Petitioner's Right to Petition guaranteed by the First Amendment to the US Constitution. (*Id.*, 82-84).

I. THE WRIT OF CERTIORARI SHOULD BE GRANTED TO ENSURE THAT FORECLOSURE DEFENDANTS' DUE PROCESS RIGHTS AND PETITIONING ACTIVITY GUARANTEED BY THE FIRST AND FOURTEENTH AMENDMENTS ARE SAFEGUARDED

A. TENN. CODE ANN. SEC. 35-5-118 VIOLATES PROCEDURAL DUE PROCESS AS APPLIED.

This Court has long ago emphasized the importance of establishing and maintaining vigilance of the procedural safeguards that underlie our Constitution. Indeed, Justice Frankfurter noted in wartime that “the history of liberty has largely been the history of observance of procedural safeguards.” (*McNabb v. United States*, 318 U.S. 332, 347 (1943)). This principle applies no less to civil cases.

In the case before us, Tenn. Code Ann. Sec. 35-5-118 governs the manner of seeking a deficiency judgment after a trustee’s or foreclosure sale. Tenn. Code Ann. Sec. 35-5-118(b) provides that in deficiency actions, absent a showing of fraud, collusion, misconduct, or irregularity in the sale process, the deficiency judgment shall be for the total amount of the indebtedness prior to the sale plus the costs of the foreclosure and sale, less the *fair market value of the property* at the time of the sale. The statute further states that the creditor shall be entitled to a rebuttable presumption that the sale price of the property is equal to the *fair market value of the property* at the time of the sale. Most importantly, however, this statute contains no

requirement that the debtor raise or assert an affirmative defense to the creditor's claim as a condition precedent to being permitted to cross-examine the creditor's witnesses on the issues relating to the fair market value of the property.

Tenn. Code Ann. Sec. 35-5-118(c) expressly provides:

To overcome the presumption set forth in subsection (b), the debtor must prove by a preponderance of the evidence that the property sold for an amount materially less than the fair market value of the property at the time of the foreclosure sale.

Nowhere does Section 35-5-118 set forth any requirement that in order to rebut the presumption and "prove by a preponderance of the evidence" a party must first assert any affirmative defense concerning the foreclosure sale; nor is there any requirement in the statute that precludes or limits the ability of the debtor to make his proof through cross-examination; nor is there a statement that such cross-examination is either waived or precluded if an affirmative defense is not asserted.

While the Supreme Court is not a court established to correct errors of law or fact, the opinions below demonstrate that the decisions of the Tennessee courts have undermined the constitutional safeguards to prevent an erroneous deprivation of property in ruling here that Section 35-5-118 prohibits questions regarding the fair market value unless such line of questioning is first pleaded as an affirmative defense.

The establishment of this otherwise undisclosed procedural requirement runs afoul of procedural due process that is meant to “protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.” *Carey v. Piphus*, 435 U.S. 247, 259 (1978). The concept of due process entails establishing or revising procedural schemes to “minimize substantively unfair or mistaken deprivations” by enabling persons to contest the basis upon which a state proposes to deprive them of protected interests. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972); *Matthews v. Eldridge*, 424 U.S. 319, 344 (1976).

Here arbitrary requirements all but assure pro se Defendants will be unable to call into question that fair market value of foreclosed property by cross-examining witnesses regarding the valuations those witnesses propose as fair. As such, the law as interpreted creates a high likelihood of abuse without justification.

The right to cross-examination is central to the observance of one’s procedural due process rights. In safeguarding such rights, this Court has held that: “Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.” *Davis v. Alaska*, 415 U.S. 308, 316 (1974)(reversing an improper limitation of cross-examination). In the criminal context, this Court concluded that the denial of the right of *effective* cross-examination is “constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it,” requiring automatic reversal. *Id.* at 318, citing *Bookhart v. Janis*, 384 U.S. 1, 3 (1966). Yet here, as interpreted, there is no right to

cross examine witnesses under Tenn. Code Ann. Sec. 35-5-118 absent first predicting the substance of testimony, pleading an appropriate affirmative defense, and then successfully maintaining that defense prior to any actual testimony on point.

Due process in this context requires an opportunity for confrontation and cross-examination of witnesses and that legal decisions be made based on the record compared to the elements of the statute, not upon a mere certification from a bank as to the price of a property.

Under Tennessee's current interpretation of Section 35-5-118, a witness, such as Respondent's counsel, can simultaneously serve as counsel of record, Trustee (for foreclosure sale purposes), the person conducting the sale, a factual witness, and Respondent's valuation expert, which, in the aggregate, is not only a questionable conflict of interest and/or appearance of impropriety under the ABA Ethics Rules, but more importantly, lacks due process in that Defendants are provided almost no protections against mistaken or unjustified deprivation of property, particularly if they are denied the right to cross-examine the Respondent's witness as to the scope of his testimony. *Carey v. Piphus*, 435 U.S. 247, 259 (1978); *Matthews v. Eldridge*, 424 U.S. 319, 344 (1976).

At times, the Court has also stressed the dignitary importance of procedural rights, specifically, the worth of being able to defend one's interests even if one cannot change the result. *Carey v. Piphus*, 435 U.S. 247, 266–67 (1978); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Nelson v. Adams*, 529 U.S. 460 (2000).

In this case, however, a person's property may be taken and sold without the court granting so much as an opportunity to question the price.

The trial court's construction of Tenn. Code Ann. 35-5-118, as affirmed by the Court of Appeals of Tennessee, to require the assertion of an affirmative defense as a precondition of and in order to exercise a constitutional right of cross-examination, has no foundation in the law and is repugnant to the First and Fourteenth Amendment to the United States Constitution.

By precluding cross-examination of Respondent's witness on the very matters raised by that witness on direct examination the trial court, the Tennessee Court of Appeals, and the Tennessee Supreme Court acted in a manner causing an unconstitutional application of Tenn. Code Ann. Sec. 35-5-118. As interpreted, the statute places a limitation on cross-examination of a witness who on direct examination opens the door to the intended subjects of inquiry. Petitioners therefore respectfully ask this Court to continue the constitutional right of due process by allowing individuals to examine witnesses regarding the express subject matter of relevant statutes. Certiorari is thus proper to review the decision of the Tennessee Court of Appeals and the Supreme Court of Tennessee's denial of Petitioners' Application to Appeal thereto.

**B. THE TRIAL COURT'S REFUSAL TO
PERMIT CROSS-EXAMINATION
VIOLATES THE PETITION CLAUSE OF
THE FIRST AMENDMENT BY
ESTABLISHING A STANDING GAG
ORDER**

The trial court here prohibited Petitioner from cross-examining Respondent's witness to ascertain and challenge the foundational basis for its deficiency judgment claim. As such, the First Amendment rights of the litigants come into play. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, n. 18 (1984), this Court stated that litigants do not surrender their First Amendment rights at the courthouse door. Indeed, court orders aimed at preventing or forbidding speech "are classic examples of prior restraints". *Alexander v. United States*, 509 U.S. 544, 550 (1993).

Courts have recognized that "[d]espite the fact that litigants' First Amendment freedoms may be limited in order to ensure a fair trial, gag orders still exhibit the characteristic of prior restraint. *United States v. Brown*, 218 F.3d 415 (5th Cir. 2000); *Levine v. U.S. District Court*, 764 F.2d 590, 598-599 (9th Cir. 1985). Prior restraints "face a well-established presumption against their constitutionality." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) ("Any prior restraint on expression comes ... with a 'heavy presumption against its constitutional validity.'")

As such, court orders restricting trial participants' speech are evaluated under the prior restraint doctrine, which requires that the record clearly establish that the speech create a potential for prejudice sufficient to

justify a restriction. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (Addressing gag orders imposed on attorneys). Here, the trial court did nothing to comply with the balancing approach set forth by this court in *Gentile* and restricted the attorney for the Petitioner, and, in fact, all future defendants, from setting forth an enumerated defense. As interpreted, the statute excludes defendants from cross-examination without requiring the court first find that the introduction of such evidence concerning the foreclosure sale price and valuation (or cross examination generally) is substantially likely to cause prejudice.

By interpreting the statute to contain a blanket bar against cross-examination of a litigant, Tennessee courts have interpreted Section 35-5-118 in a manner that deprives defendants of their constitutional right to petition for the redress of grievances under the Petition Clause of the First Amendment and have unconstitutionally limited the free speech of Defendants in deficiency actions. *Boy Scouts of America v. Davis*, 580 U.S. 640 (2002). This constitutes a blanket unconstitutional prior restraint applicable to all future deficiency cases in Tennessee. *Nebraska Press Assn v. Stuart*, 427 U.S. 539 (1976). As such, Tenn. Code Ann. Sec. 35-5-118 should be deemed unconstitutional as applied. The trial court, therefore, committed prejudicial error in excluding the Petitioner's cross-examination of the Respondent's witness.

REASONS FOR GRANTING PETITION

This Petition presents an issue of constitutional interpretation of great importance to the citizens of the State of Tennessee, especially those who are the subject of deficiency judgment liability following the foreclosure of commercial property.

CONCLUSION

For the reasons addressed above, the Petitioners request that the Court grant the petition for a writ of certiorari.

Respectfully Submitted,

David J.S. Madgett

Counsel of Record

Douglas E. Klein

William Jeffrey Barnes

MADGETT & KLEIN, PLLC

1161 E. Wayzata Blvd., Suite 314

Wayzata, MN 55391

(612) 470-6529

Dmadgett@madgettlaw.com

Counsel for Petitioners

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