APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A Order and Notice of Mandate in the Supreme Court of Tennessee (June 19, 2019) . . . . . App. 1

Appendix B Notice of Mandate in the Supreme Court of Tennessee (June 20, 2019) . . . . . App. 3

Appendix C Order in the Court of Appeals of Tennessee (February 28, 2019) . . . . . App. 5

Appendix D Order Denying Motion to Vacate Order and Judgment in the Chancery Court for Sevier County, Tennessee (January 16, 2018) . . . . . App. 49

Appendix E Transcript in the Chancery Court for Sevier County, Tennessee (January 5, 2018) . . . . . App. 52

Appendix F Order and Judgement in the Chancery Court for Sevier County, Tennessee (December 01, 2017) . . . . . App. 79

Appendix G Amended Order in the Chancery Court for Sevier County, Tennessee (November 14, 2017). . . . . App. 84

Appendix H U.S. Const. Amend. I & XIV & Tenn. Stat. § 35-5-118 . . . . . App. 91

Appendix I Application for Permission to Appeal in the Supreme Court of Tennessee (April 26, 2019) . . . . . App. 95

APPENDIX A

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE

No. E2018-00232-SC-R11-CV

[Filed June 19, 2019]

BRANCH BANKING AND TRUST COMPANY	)
	)
v.	)
	)
WAYNE R. HILL ET AL.	)
	)

Chancery Court for Sevier County
No. 16-3-118

ORDER

Upon consideration of the application for permission to appeal of Wayne R. Hill, Cornelia D. Hill, and Rainbow Ridge Resort, LLC and the record before us, the application is denied.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE

No. E2018-00232-SC-R11-CV

[Filed June 19, 2019]

BRANCH BANKING AND TRUST COMPANY	)
	)
v.	)
	)
WAYNE R. HILL ET AL.	)
	)

Sevier County Chancery Court
16-3-118

Date Printed: 06/19/2019
Notice / Filed Date: 06/19/2019

NOTICE - Case Dispositional Decision - TRAP 11 Denied

The Appellate Court Clerk's Office has entered the above action.

James M. Hivner
Clerk of the Appellate Courts

APPENDIX B

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE

No. E2018-00232-SC-R11-CV

[Filed June 20, 2019]

BRANCH BANKING AND TRUST COMPANY	)
	)
v.	)
	)
WAYNE R. HILL ET AL.	)
	)

Sevier County Chancery Court
16-3-118

Date Printed: 06/20/2019
Notice/ Filed Date: 06/20/2019

NOTICE - Mandate - Issued

The Appellate Court Clerk's office has issued the Court of Appeals mandate in its entirety to the trial court clerk in the above-styled appeal. The mandate consists of certified copies of the judgment, any order as to costs, and a copy of the opinion. This action signifies the end of the appeal.

The Appellate Court Clerk's office will not accept any filing from any parties or their counsel after issuance

of mandate except those requesting recall of the mandate, those related to withdrawing the record or portions thereof, and those related to the assessment of costs.

James M. Hivner
Clerk of the Appellate Courts

APPENDIX C

IN THE COURT OF APPEALS OF TENNESSEE AT KNOXVILLE

No. E2018-00232-COA-R3-CV

October 18, 2018 Session

[Filed February 28, 2019]

BRANCH BANKING AND TRUST COMPANY	)
v.	)
WAYNE R. HILL ET AL.	)

Appeal from the Chancery Court for Sevier County
No. 16-3-118
Telford E. Forgety, Jr., Chancellor

In this action for a deficiency judgment following the foreclosure sale of six tracts of real property, some of which were improved by resort cabins, the trial court granted the plaintiff bank's motion for partial summary judgment against the defendant real estate developers and their limited liability company, for which the developers were guarantors, finding that the developers were liable for deficiency balances owed on promissory notes and guaranty agreements, as well as accrued interest, bank charges, late fees, and attorney's

fees. Following a bench trial concerning the amounts owed, the trial court awarded money judgments to the bank in the amounts, respectively, of $1,180,223.77 against the developers as individuals and $144,848.30 against the developers' limited liability company. Finding, *inter alia*, that the developers had failed to properly plead the defense of inadequate foreclosure sales prices, the trial court sustained the bank's objections to the developers' requests to cross-examine the bank's witnesses and introduce additional evidence regarding the adequacy of the foreclosure sales prices and foreclosure process. The trial court subsequently denied the developers' motion to vacate the order granting the money judgments. The developers have appealed. Discerning no reversible error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which JOHN W. MCCLARTY and KENNY W. ARMSTRONG, JJ., joined.

John Frank Higgins, Nashville, Tennessee, for the appellants, Wayne R. Hill, Cornelia D. Hill, and Rainbow Ridge Resort, LLC.

John M. Kizer and W. Morris Kizer, Knoxville, Tennessee, for the appellee, Branch Banking and Trust Company.

OPINION

I. Factual and Procedural Background

The plaintiff, Branch Banking and Trust Company ("the Bank"), initiated the instant action by filing a complaint in the Sevier County Chancery Court ("trial court") on March 18, 2016, seeking a judgment for balances owed on promissory notes and guaranty agreements related to parcels of real property and resort cabins located in the Rainbow Ridge Resort project in Sevierville, Tennessee. The Bank also sought attorney's fees as provided for in the promissory notes at issue. The Bank initially named as defendants Wayne R. Hill and Cornelia D. Hill ("the Hills"); Rainbow Ridge Resort, LLC ("Rainbow Ridge"); Tyler C. Huskey, Successor Trustee ("Mr. Huskey"); the State of Tennessee ("the State"); and Rainbow Ridge Owners Association, Inc. ("the Owners Association"). The defendants involved in this appeal are the Hills and Rainbow Ridge (collectively, "Appellants"). It is undisputed that at all times relevant to this appeal, the Hills were the only members of Rainbow Ridge, a Tennessee limited liability company that had been administratively dissolved by the Tennessee Secretary of State in August 2011.

The Bank's claims against the Hills individually concerned allegations of default related to four promissory notes, identified in the complaint as "Note 4," "Note 9," "Note 14," and "Note 15" (collectively "the Hill Notes"). Attached as exhibits to the complaint were copies of the Hill Notes and corresponding deeds of trust, each of which had each been initially executed in 2005 or 2006 and duly recorded with the Sevier County

Register of Deeds. Each of the deeds of trust included a clause following the specific property description stating: "TOGETHER WITH all rents, all improvements now or hereafter erected on the property, all easements, all fixtures, now or hereafter a part of said property . . . ." Neither the original deeds of trust securing the Hill Notes nor the corresponding successor trustee deeds executed at the time of the foreclosure sales describe specific improvements. However, testimony presented during trial concerning the amounts of the deficiency judgments indicated that by the time of the foreclosure sales, three of the four land parcels encumbered by the Hill Notes (all but that encumbered by Note 4) had each been improved by the construction of a cabin.

At the time of trial, the Bank averred that the principal balance owed on Note 4 was $66,069.77 with accrued interest of $24,317.36 and bank charges of $3,339.38; the principal balance owed on Note 9 was $447,871.82 with accrued interest of $127,229.81 and bank charges of $4,368.00; the principal balance owed on Note 14 was $360,000.00 with accrued interest of $102,267.50 and bank charges of $1,100.00; and the principal owed on Note 15 was $359,040.00 with accrued interest of $101,994.78 and bank charges of $4,529.12.

The claims against Rainbow Ridge and the Hills, jointly and severally, involved a promissory note and guaranty agreement, identified as "the Rainbow Note," executed by the Hills on behalf of Rainbow Ridge in the original principal amount of $800,000.00 in March 2007. The documents pertaining to the Rainbow Note

were also admitted as exhibits at trial. The Rainbow Note was partially secured by two simultaneously executed deeds of trust, encumbering, respectively, an 8.17-acre tract and a 16.8-acre tract of real property. The deeds of trust related to the Rainbow Note were duly recorded. Each deed of trust indicated that it "secure[d] an obligation incurred for the construction of an improvement on land . . . ." The Bank alleged that Rainbow Ridge and the Hills, as guarantors, owed a principal amount on the Rainbow Note in the amount of $723,811.00, with accrued interest by the time of trial in the amount of $139,273.30 and bank charges of $5,575.00. W. Morris Kizer testified that at the time of the foreclosure sale on May 13, 2016, the 16.8-acre tract remained unimproved.[1]

For each of the Hill Notes, the Bank's allegations of default against the Hills included nonpayment of county real estate taxes on the encumbered properties and failure to pay the notes upon maturity. Concerning Note 4, the Bank also averred that the Hills had failed to pay a state tax lien against the encumbered property, the sole property encumbered by a Hill Note that had not been improved by a cabin. As to the Rainbow Note, the Bank's allegations of default against

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[1] During an offer of proof following the trial court's ruling at the close of trial, Mr. Hill stated that at the time of the foreclosure sale, the 8.17-acre tract consisted of 29 lots with one of those lots having a cabin on it. He stated that the "infrastructure" of "water, sewer, cable and electrical" had been added and that the 8.17-acre tract had also been improved by the construction of two swimming pools and a pool house. The record contains no other indication of improvements to the 8.17-acre tract encumbered by the Rainbow Note.

the Hills included nonpayment of county real estate taxes on the encumbered properties, failure to pay a state tax lien against the 8.17-acre tract, failure to pay the Rainbow Note upon its maturity, and the 2011 administrative dissolution of Rainbow Ridge as an LLC.

Based on a "dragnet clause" included in the amended and modified promissory note concerning Note 4, the Bank asserted in its complaint that Note 4 encumbered not only the 9.27-acre tract but also the other tracts encumbered by the Hill Notes and the Rainbow Note. The Bank thereby requested an order directing a judicial foreclosure of the 9.27-Acre Deed of Trust securing Note 4. *See Higdon v. Regions Bank*, No. E2009-01298-COA-R3-CV, 2010 WL 1924019, at *5 (Tenn. Ct. App. May 13, 2010) ("A dragnet clause is defined as 'one which, on its face, purports to include within the coverage of the deed of trust all present and future indebtedness owed by the borrower to the lender in addition to the specific debt being secured by the deed of trust.'" (quoting *In re Lemka*, 201 B.R. 765, 767 n.2 (Bankr. E.D. Tenn. 1996))). The dragnet clause included in the most recently modified version of Note 4 provides in pertinent part:

> [I]n the event of a default under any of the Agreements or any other obligation of Borrowers . . . then any one of the same shall be a material default hereunder, and this Note and any other indebtedness due the Bank by Borrowers shall immediately become due and payable at the option [o]f the Bank without notice, or demand of any kind, which are hereby waived.

An essentially identical dragnet clause is included in the most recently modified version of each of the promissory notes at issue.

Appellants and the Owners Association responded to the complaint by filing a motion to dismiss and subsequent corrected motion to dismiss, asserting, *inter alia*, that the Bank had improperly split its claims because among the claims included in the instant complaint were ones related to cabins and tracts of real property that were the partial subject of litigation pending in the appellate process at the time. As to Mr. Huskey, the Bank had clarified in its complaint that it had named Mr. Huskey as a defendant "solely in his capacity as the successor trustee" under the deed of trust for the 9.27-acre tract securing Note 4 upon an "Appointment of Successor Trustee" executed by the Bank on March 15, 2016, and recorded with the Register of Deeds on the next day. Mr. Huskey did not participate in the filing of the motion to dismiss. The Bank filed a response on August 3, 2016, objecting to the corrected motion to dismiss.

In the related action involving Appellants and the Bank, this Court entered a decision on December 28, 2016. *See Rainbow Ridge Resort, LLC v. Branch Banking & Trust Co.*, 525 S.W.3d 252 (Tenn. Ct. App. Dec. 28, 2016), *perm. app. denied* (Tenn. May 18, 2017) ("*Rainbow Ridge Resort*"). In *Rainbow Ridge Resort*, this Court summarized the underlying facts, procedural history, and ultimate affirmance of the trial court's dismissal of that action, which had been initiated by Appellants against the Bank, as follows:

The facts in this case implicate the doctrine of res judicata. In 2012, a real estate development limited liability company and its members filed suit in the Sevier County Circuit Court against their mortgage lender, Branch Banking and Trust Company (the bank). In that action, the developers alleged, *inter alia*, that the bank was guilty of fraud, breach of contract, and unjust enrichment. That suit involved four separate parcels of real property. While the case in circuit court was pending, the bank sued three individuals in the Sevier County Chancery Court, seeking a declaratory judgment regarding the priority of a security interest in one of the parcels of property at issue in the circuit court case. In the chancery court action, the bank joined the developers as parties. In response, the developers filed a counterclaim in which they repeated allegations included in the circuit court case and asserted other claims derived from the same set of facts. The two cases were later consolidated. In each case, the bank filed a Tenn. R. Civ. P. 12.02(6) motion to dismiss for failure to state a claim. The court heard both motions at a single hearing. On June 8, 2015, the trial court filed two orders—one in the circuit court suit and one by interchange in the chancery court action—granting the bank's motions. The developers appealed only the circuit court order. Unchallenged, the chancery court order became final. The bank later moved to dismiss this appeal, arguing that the doctrine of res judicata barred further litigation. We deferred a ruling on the bank's motion. We now

> hold that the motion has merit. Accordingly, we affirm the trial court's judgment dismissing this case. We do so based upon the doctrine of res judicata.

Id. at 254-55.

Meanwhile in the case at bar, the trial court entered an order on November 4, 2016, approving the voluntary dismissal without prejudice of the Bank's claim against the State and removing the State as a defendant. The Bank filed a "First Amended Complaint" on December 6, 2016, again naming as defendants the Hills, Rainbow Ridge, Mr. Huskey, and the Owners Association, while also adding multiple additional defendants. In its first amended complaint, the Bank sought deficiency judgments against the various defendants, averring that since the filing of the initial complaint, foreclosure sales had taken place pursuant to the deeds of trust securing the promissory notes and guaranty agreements at issue.

On December 30, 2016, Appellants and the Owners Association filed an answer to the first amended complaint, denying or stating that they had insufficient knowledge to admit or deny all substantive allegations and raising eight affirmative defenses, including (1) principles of "accord and satisfaction, assumption of risk, contributory negligence, estoppel, fraud, illegality, setoff, and/or waiver"; (2) lack of ripeness for review due to the pending appellate action; (3) unclean hands; (4) fraud "in materially misrepresenting that the time for performance of the Notes would continue to be granted as it had historically been"; (5) breach of implied covenant of good faith and fair dealing;

(6) failure to mitigate alleged damages; (7) breach of fiduciary duty; and (8) equitable estoppel.[2] The Bank filed a motion to strike these eight affirmative defenses on January 26, 2017, pursuant to Tennessee Rule of Civil Procedure 12.06.[3] Appellants subsequently filed a response, and the Bank filed a supplement to the motion.

On January 27, 2017, the Bank filed a notice of voluntary dismissal without prejudice as to all defendants except the Hills, Rainbow Ridge, Mr. Huskey, and one other individual, Carroll Harrellson. Upon Mr. Harrellson's subsequent crossclaim, counterclaim, and third-party claim, the Bank and Mr. Harrellson reached an agreement as to Mr. Harrellson's real property, memorialized in an order entered, as amended, by the trial court on November 14, 2017, with the Bank voluntarily dismissing its claim against Mr. Harrellson. Within this order, the trial court, finding that Rainbow Ridge had failed to file a responsive pleading, also granted default judgment to Mr. Harrellson on his third-party

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[2] Mr. Huskey did not participate in the filing of the answer to the amended complaint.

[3] Tennessee Rule of Civil Procedure 12.06 provides:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within thirty (30) days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

claim against Rainbow Ridge to quiet title and reform instruments related to Mr. Harrellson's real property.[4]

In the case at bar, the Bank filed a motion for partial summary judgment against the remaining defendants on June 1, 2017, requesting that the trial court enter a judgment as to the liability of the Hills for the unpaid principal balances on the Hill Notes and the liability of the Hills and Rainbow Ridge for the unpaid principal balance on the Rainbow Note. In addition, the Bank requested that the trial court find Appellants liable for corresponding accrued interest, bank charges, late fees, and reasonable attorney's fees.

In an order entered July 18, 2017, the trial court granted the Bank's motion for partial summary judgment, finding Appellants to be liable as alleged by the Bank. Specifically, the court found:

> Defendants Wayne R. Hill and Cornelia D. Hill, as the makers thereof, are jointly and severally liable for the payment of all amounts owed under Note 4, Note 9, Note 14 and Note 15, as the same are defined in the plaintiff's first amended complaint, (a) due to the failure of defendants Wayne R. Hill and Cornelia D. Hill to pay Note 4, Note 9, Note 14 and Note 15 upon their maturity, and (b) due to the failure of defendants Wayne R. Hill and Cornelia D. Hill to pay the taxes on real estate encumbered by deeds of trust executed by defendants Wayne R.

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[4] Mr. Harrellson is not a party to this appeal.

> Hill and Cornelia D. Hill to secure the payment of Note 4, Note 9, Note 14 and Note 15.
>
> Defendant Rainbow Ridge Resort, LLC, as the maker thereof, and defendants Wayne R. Hill and Cornelia D. Hill, as the guarantors thereof, are jointly and severally liable for the payment of all amounts owed under the Rainbow Note, as the same is defined in the [Bank's] first amended complaint, (a) due to the failure of defendants Rainbow Ridge Resort, LLC, Wayne R. Hill and Cornelia D. Hill to pay the Rainbow Note upon its maturity, (b) due to the failure of defendant Rainbow Ridge Resort, LLC to pay the taxes on real estate encumbered by a deed of trust executed by defendant Rainbow Ridge Resort, LLC to secure the payment of the Rainbow Note, and (c) due to the failure of defendants Wayne R. Hill and Cornelia D. Hill to pay the taxes on real estate encumbered by a deed of trust executed by defendants Wayne R. Hill and Cornelia D. Hill to secure the payment of the Rainbow Note.

(Paragraph numbering omitted.) Also on July 18, 2017, following a hearing, the trial court entered a separate order granting the Bank's motion to strike Appellants' and the Owners Association's eight affirmative defenses upon finding the Bank's motion to be "well taken."

The trial court conducted a bench trial regarding the deficiency claims on November 14, 2017. As part of its proof during trial, the Bank presented testimony from W. Morris Kizer regarding the foreclosure sales

related to the requested deficiency judgments, as well as the attorney's fees incurred by the Bank. The Bank also presented testimony from a senior vice president and custodian of records for the promissory notes at issue, Mark Leslie Thomas, regarding the balances owed on the notes and amounts received from the foreclosure sales. On appeal, Appellants assert that the trial court erred by denying their request to cross-examine the Bank's witnesses regarding the adequacy of foreclosure sales prices and the foreclosure process.

The trial court found that Appellants were precluded from a line of questioning regarding defenses they had not pled. Specifically, the court found that Appellants had not pled inadequacy of the foreclosure sales prices under the deficiency statute codified at Tennessee Code Annotated § 35-5-118 (2015). The court also found that Appellants had not pled "commercial unreasonableness" of the foreclosure sales under a statute cited by Appellants' counsel that the court found inapplicable, Tennessee Code Annotated § 47-9-610 (2013). At the conclusion of the Bank's proof, Appellants moved for involuntary dismissal pursuant to Tennessee Rule of Civil Procedure 41.02. The trial court denied the motion.

At the close of all proof and argument, the trial court announced its judgment awarding a total of $1,180,223.77 to the Bank against the Hills and a total of $144,848.30 to the Bank against Rainbow Ridge. Without the trial court judge present, Appellants then made an offer of proof concerning the alleged condition of the subject properties, improvements existing on the

properties at the time of the foreclosure sales, and the manner in which the sales were conducted. Appellants also offered proposed testimony from the Hills to the effect that they allegedly had not received proper notice of the May 13, 2016 foreclosure sales. Appellants' counsel stated that if allowed to, counsel would have questioned W. Morris Kizer and Mr. Thomas regarding whether the properties sold at foreclosure had been appraised prior to sale or submitted to market valuation or studies of marketability, noting Appellants' counsel's anticipation that the answers would have been in the negative.

On December 1, 2017, the trial court entered its "Order and Judgment," finding Mr. Hill and Ms. Hill "jointly and severally liable" to the Bank "in the total amount of $1,180,223.77 on their notes and guaranty agreements and for [the Bank's] attorney's fees" and finding Rainbow Ridge "liable to the [Bank] in the amount of $144,848.30 on its note." Upon the Bank's announcement of voluntary dismissal and pursuant to Tennessee Rule of Civil Procedure 41.01, the trial court dismissed, without prejudice, the Bank's action for judicial foreclosure of the 9.27-acre tract encumbered by Note 4 and the Bank's action against Mr. Huskey.

On December 15, 2017, Appellants filed a motion to vacate the order and judgment, alleging, *inter alia*, that the trial court had violated their due process rights when the court did not allow testimony concerning the adequacy of the foreclosure sales prices and the commercial reasonableness of the foreclosure sales. Appellants thereby argued that the judgment was void, pursuant to Tennessee Rule of Civil Procedure 60.02(3),

and that relief from the judgment was justified pursuant to Rule 60.02(5). The Bank filed a response to the motion on January 4, 2018, and Appellants filed a supplement to the motion the next day. In their supplemented motion, Appellants also requested a new trial, relying on Tennessee Rule of Civil Procedure 59.07. Following a hearing conducted on January 5, 2018, the trial court, treating the motion to vacate as a "[m]otion for relief and for a new trial under TRCP 59," denied the motion in an order entered January 16, 2018. Appellants timely appealed.

II. Issues Presented

Appellants present two issues on appeal, which we have restated slightly as follows:

1. Whether the trial court erred by denying Appellants' motion to vacate the December 1, 2017 order without evidence of any commercially reasonable disposition of the collateral as a prerequisite to seeking a deficiency judgment.

2. Whether the trial court erred by denying Appellants' purportedly fundamental right to cross-examine the Bank's witnesses after the Bank "opened the door" as to foreclosure sales prices.

III. Standard of Review

We review a non-jury case *de novo* upon the record, with a presumption of correctness as to the findings of fact unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); *Bowden v. Ward*,

27 S.W.3d 913, 916 (Tenn. 2000). "In order for the evidence to preponderate against the trial court's findings of fact, the evidence must support another finding of fact with greater convincing effect." *Wood v. Starko*, 197 S.W.3d 255, 257 (Tenn. Ct. App. 2006). The trial court's determinations regarding witness credibility are entitled to great weight on appeal and shall not be disturbed absent clear and convincing evidence to the contrary. *See Morrison v. Allen*, 338 S.W.3d 417, 426 (Tenn. 2011); *Jones v. Garrett,* 92 S.W.3d 835, 838 (Tenn. 2002).

We review questions of law, including those of statutory construction, *de novo* with no presumption of correctness. *Bowden*, 27 S.W.3d at 916 (citing *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 924 (Tenn. 1998)); *see also In re Estate of Haskins*, 224 S.W.3d 675, 678 (Tenn. Ct. App. 2006). Questions of construction involving the Tennessee Rules of Civil Procedure are likewise reviewed *de novo* with no presumption of correctness. *See Green v. Moore*, 101 S.W.3d 415, 418 (Tenn. 2003). Our Supreme Court has summarized the principles involved in statutory construction as follows:

> When dealing with statutory interpretation, well-defined precepts apply. Our primary objective is to carry out legislative intent without broadening or restricting the statute beyond its intended scope. *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002). In construing legislative enactments, we presume that every word in a statute has meaning and purpose and should be given full effect if the obvious intention of the General

> Assembly is not violated by so doing. *In re C.K.G.*, 173 S.W.3d 714, 722 (Tenn. 2005). When a statute is clear, we apply the plain meaning without complicating the task. *Eastman Chem. Co. v. Johnson*, 151 S.W.3d 503, 507 (Tenn. 2004). Our obligation is simply to enforce the written language. *Abels ex rel. Hunt v. Genie Indus., Inc.*, 202 S.W.3d 99, 102 (Tenn. 2006). It is only when a statute is ambiguous that we may reference the broader statutory scheme, the history of the legislation, or other sources. *Parks v. Tenn. Mun. League Risk Mgmt. Pool*, 974 S.W.2d 677, 679 (Tenn. 1998). Further, the language of a statute cannot be considered in a vacuum, but "should be construed, if practicable, so that its component parts are consistent and reasonable." *Marsh v. Henderson*, 221 Tenn. 42, 424 S.W.2d 193, 196 (1968). Any interpretation of the statute that "would render one section of the act repugnant to another" should be avoided. *Tenn. Elec. Power Co. v. City of Chattanooga*, 172 Tenn. 505, 114 S.W.2d 441, 444 (1937). We also must presume that the General Assembly was aware of any prior enactments at the time the legislation passed. *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995).

In re Estate of Tanner, 295 S.W.3d 610, 613-14 (Tenn. 2009).

As to evidentiary questions, "admissibility or exclusion of evidence rests within the sound discretion of the trial court which should be reversed only for abuse of that discretion." *Austin v. City of Memphis*,

684 S.W.2d 624, 634 (Tenn. Ct. App. 1984), *perm. app. denied* (Tenn. Dec. 31, 1984); *see also In re Estate of Greenamyre*, 219 S.W.3d 877, 886 (Tenn. Ct. App. 2005) ("[A] trial court will be found to have 'abused its discretion' only when it applies an incorrect legal standard, reaches a decision that is illogical, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party.") (internal citations omitted).

With respect to a motion to alter or amend, this Court has previously explained that "[w]e review a trial court's denial of a Tenn. R. Civ. P. 59.04 motion to alter or amend a judgment for abuse of discretion." *Robinson v. Currey*, 153 S.W.3d 32, 38 (Tenn. Ct. App. 2004), *perm. app. denied* (Tenn. Dec. 6, 2004) (quoting *Chambliss v. Stohler*, 124 S.W.3d 116, 120 (Tenn. Ct. App. 2003)). Likewise, "[i]n general, we review a trial court's ruling on a request for relief from a final judgment under Rule 60.02 of the Tennessee Rules of Civil Procedure . . . pursuant to the abuse of discretion standard." *Turner v. Turner*, 473 S.W.3d 257, 268 (Tenn. 2015).

IV. Tennessee Code Annotated § 35-5-118

Appellants contend that the trial court erred by denying their motion to vacate the December 1, 2017 order and deficiency judgment because the Bank "failed to satisfy its burden of proof in order to be entitled to a deficiency judgment." Specifically, Appellants argue that the Bank failed to prove that it conducted a "commercially reasonable" foreclosure sale of the real property at issue because it allegedly did not "obtain an independent appraisal of the properties" and did not

"provide notice of disposition of the collateral to Appellants." Acknowledging that they failed to raise in their pleadings the defense of inadequacy of the foreclosure sales prices pursuant to Tennessee Code Annotated § 35-5-118, Appellants assert that the trial court "was bound to apply section 35-5-118 regardless of whether Appellants raised a defense based on this Statute." The Bank contends that the trial court properly found that by failing to raise an affirmative defense of inadequacy of the foreclosure sales prices in their pleadings, Appellants had waived the defense at trial. Upon thorough review of the record and applicable authorities, we determine that the trial court properly applied Tennessee Code Annotated § 35-5-118 and in so doing, did not err by finding that Appellants had waived the defense of inadequacy of the foreclosure sales prices.

It is well settled in Tennessee that "the holder of a note has the right to pursue foreclosure of the corresponding security instrument." *GreenBank v. Sterling Ventures, LLC*, No. M2012-01312-COA-R3-CV, 2012 WL 6115015, at *5 (Tenn. Ct. App. Dec. 7, 2012). As this Court has explained:

> [A] mortgagee who bids in the full amount of the debt at the foreclosure sale accepts the property itself in full payment of the underlying debt, while a mortgagee who bids in less than the full amount of the debt retains its status as a creditor with regard to the deficiency.

First Inv. Co. v. Allstate Ins. Co., 917 S.W.2d 229, 231 (Tenn. Ct. App. 1994), *perm. app. denied* (Tenn. Oct. 2, 1995); *see also GreenBank*, 2012 WL 6115015, at *5.

Enacted by the General Assembly in 2010, Tennessee Code Annotated § 35-5-118 provides in pertinent part:

> (a) In an action brought by a creditor to recover a balance still owing on an indebtedness after a trustee's or foreclosure sale of real property secured by a deed of trust or mortgage, the creditor shall be entitled to a deficiency judgment in an amount sufficient to satisfy fully the indebtedness.
>
> (b) In all such actions, absent a showing of fraud, collusion, misconduct, or irregularity in the sale process, the deficiency judgment shall be for the total amount of 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 creditor shall be entitled to a rebuttable prima facie presumption that the sale price of the property is equal to the fair market value of the property at the time of the sale.
>
> (c) 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 property at the time of the foreclosure sale. If the debtor overcomes the presumption, the deficiency shall be 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 as determined by the court.

Concerning the effect of the 2010 enactment of Tennessee Code Annotated § 35-5-118, this Court has explained:

> The Tennessee General Assembly enacted Tennessee Code Annotated § 35-5-118, effective September 1, 2010, modifying what had been the debtor's standard for rebutting the presumption from "grossly inadequate" to "materially less" in comparison to the fair market value. *See GreenBank*, 2012 WL 6115015 at *6 (citing 2010 Pub. Acts, ch. 1001 § 2); *see also Duke v. Daniels*, 660 S.W.2d 793, 794-95 (Tenn. Ct. App. 1983) (explaining that under the standard in effect prior to 2010, "[w]here such [foreclosure] sale is properly held, the sale price is conclusively presumed to be the value of the property sold; unless, the sale price is so grossly inadequate to shock the conscience of the Court.").

Eastman Credit Union v. Bennett, No. E2015-01339-COA-R3-CV, 2016 WL 1276275, at *5 (Tenn. Ct. App. Mar. 31, 2016).

Regarding application of Tennessee Code Annotated § 35-5-118, this Court has explained:

> This statute, which applies to all trustee or foreclosure sales of real property secured by a deed of trust for which the first foreclosure

> publication is given on or after September 1, 2010, provides that, absent fraud, collusion, misconduct, or irregularity in the foreclosure sale, "the deficiency judgment shall be for the total amount of 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." Tenn. Code Ann. § 35-5-118(b). In such cases, "[t]he creditor shall be entitled to a rebuttable prima facie presumption that the sale price of the property is equal to the fair market value of the property at the time of the sale." *Id.* If a defendant raises inadequacy of the foreclosure price as a defense to the deficiency claim, the defendant "must prove by a preponderance of the evidence that the property sold for an amount materially less than the fair market value of property at the time of the foreclosure sale." Tenn. Code Ann. § 35-5-118(c); *see also Lost Mountain Dev. Co. v. King*, No. M2004-02663-COA-R3-CV, 2006 WL 3740791, at *8 (Tenn. Ct. App. Dec. 19, 2006) ("[T]he issue in deficiency actions is the fair market value of the property at the time it was sold.").

Commerce Union Bank, Brentwood, Tenn. v. Bush, 512 S.W.3d 217, 232-33 (Tenn. Ct. App. 2016), *perm. app. denied* (Tenn. Nov. 16, 2016) (emphasis added).

In the case at bar, Appellants have not expressly alleged fraud, collusion, misconduct, or irregularity in the foreclosure sale process pursuant to Tennessee Code Annotated § 35-5-118(b). Appellants do not

dispute that pursuant to § 35-5-118(b), the Bank is "entitled to a rebuttable prima facie presumption that the sale price[s] of the propert[ies] [are] equal to the fair market value of the propert[ies] at the time of the sale." Instead, Appellants assert that they were denied the opportunity to overcome the statutory presumption when the trial court sustained the Bank's objection at trial to questions concerning whether the properties at issue sold for an amount materially less than their fair market value at the time of the foreclosure sales. *See* Tenn. Code Ann. § 35-5-118(c).

In its final order, the trial court explained its decision to deny Appellants' request to cross-examine witnesses and introduce proof regarding the adequacy of the foreclosure sales prices as follows:

> [Appellants] sought to cross examine the [Bank's] witnesses concerning the adequacy of the foreclosure sales price and sought to introduce other evidence concerning the adequacy of the foreclosure sales price, citing T.C.A. § 47-9-610 et seq. and T.C.A. § 35-5-118 as the basis therefor. The Court sustained the [Bank's] objections to [Appellants'] cross examination of the [Bank's] witnesses on such issue and [Appellants'] introduction of such evidence on the basis that in their answer to the [Bank's] First Amended Complaint, [Appellants] had not pled or asserted the inadequacy of the foreclosure sales price and had not pled or asserted T.C.A. § 47-9-610 et seq. and T.C.A. § 35-5-118, or otherwise placed those matters at issue, and on the further basis that T.C.A.

> § 47-9-610 et seq. has no application to the facts of the case. The Court directed that an offer of proof could be made by [Appellants'] counsel after the Court ruled.

The trial court thereby found that the defense of inadequacy of the foreclosure sales prices was an affirmative defense that Appellants had waived by failing to plead the defense prior to trial. Under the procedural posture and facts of this case, we agree.

Regarding affirmative defenses, Tennessee Rule of Civil Procedure 8.03 provides:

> In pleading to a preceding pleading, a party shall set forth affirmatively facts in short and plain terms relied upon to constitute accord and satisfaction, arbitration and award, express assumption of risk, comparative fault (including the identity or description of any other alleged tortfeasors), discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, statute of repose, waiver, workers' compensation immunity, and <u>any other matter constituting an affirmative defense</u>. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation.

(Emphasis added.) "Failure to ple[a]d an affirmative defense generally results in a waiver of the defense."

ADT Sec. Servs., Inc. v. Johnson, 329 S.W.3d 769, 778 (Tenn. Ct. App. 2009), *perm. app. denied* (Tenn. June 17, 2010).

Tennessee Code Annotated § 35-5-118 does not expressly set forth inadequacy of the foreclosure sales price as an affirmative defense. However, we determine it to be a "matter constituting an affirmative defense," *see* Tenn. R. Civ. P. 8.03, according to the "most commonly understood definition" of an affirmative defense in a pleading of "[a] matter asserted by defendant which, assuming the complaint to be true, constitutes a defense to it," *see Hannan v. Alltel Publ'g Co.*, 270 S.W.3d 1, 6 (Tenn. 2008), *overruled on other grounds by Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235 (Tenn. 2015) (quoting BLACK'S LAW DICTIONARY 60 (6th ed. 1990)). As our Supreme Court further noted in *Hannan*, "an affirmative defense is 'a traditional way for the defendant to defeat the plaintiff's claim by carrying its own burden of proof.'" *Hannan*, 270 S.W.3d at 7 n.3 (quoting Judy M. Cornett, *The Legacy of Byrd v. Hall: Gossiping about Summary Judgment in Tennessee*, 69 Tenn. L Rev. 175, 189-90, 208 (2001)).

Pursuant to Tennessee Code Annotated § 35-5-118(c), the defendant debtor must carry his or her own burden of proof by a preponderance of the evidence to demonstrate that "the property sold for an amount materially less than the fair market value of property at the time of the foreclosure sale." Although meeting this burden does not negate the plaintiff's deficiency claim, it has the potential of lowering significantly, or even eliminating entirely, the amount

of the deficiency judgment awarded by rendering the fair market value of the property to be that "determined by the court" rather than an amount equal to the foreclosure sales price. *See* Tenn. Code Ann. § 35-5-118(c).

We note that prior to the 2010 enactment of Tennessee Code Annotated § 35-5-118, this Court likened the "gross inadequacy" standard then in effect to overcome the presumption that the foreclosure price equaled fair market value to an allegation of fraud committed during the foreclosure proceedings. *Duke v. Daniels*, 660 S.W.2d 793, 794-95 (Tenn. Ct. App. 1983), *perm. app. denied* (Tenn. Nov. 28, 1983) ("Gross inadequacy is merely a method by which one attempts to prove fraud with the aid of a presumption."). The *Duke* Court determined that such an allegation constituted an affirmative defense that must be pled. *Id.* The question at hand in this case, which is a matter of first impression in interpreting Tennessee Code Annotated § 35-5-118, is whether a debtor's allegation of an inadequate foreclosure sales price under the debtor's statutory standard of "materially less" also constitutes an affirmative defense.

Concerning the "materially less" standard, this Court explained in *Eastman Credit Union* in pertinent part:

> Tennessee Code Annotated § 35-5-118 does not provide a definition of the "materially less" standard. *See In re Estate of Tanner*, 295 S.W.3d at 614. ("It is only when a statute is ambiguous that we may reference the broader statutory scheme, the history of the legislation, or other

sources."). This Court has previously examined the legislative history surrounding the enactment of Tennessee Code Annotated § 35-5-118. *See GreenBank*, 2012 WL 6115015 at *6-9 (citing 2010 Pub. Acts, ch. 1001 § 2). This Court summarized in pertinent part:

> It is clear from the foregoing discussion that the Legislative intent in adopting the "materially less" standard was not to lessen the burden on the debtor so much as to negate the presumption that the sale price represents the fair market value. Rather, the term "materially less" still represents "a pretty substantial difference." As [House] Representative [Vance] Dennis further explains: "It's a very difficult burden for the debtor to overcome. . . . You have to show a "strong" difference, a "material" difference."

See GreenBank, 2012 WL 6115015 at *9.

In interpreting the "materially less" standard, this Court "has refrained from establishing a 'bright-line percentage, above or below which the statutory presumption is rebutted.'" *FirstBank v. Horizon Capital Partners, LLC*, No. E2013-00686-COA-R3-CV, 2014 WL 407908 at *3 (Tenn. Ct. App. Feb. 3, 2014) (quoting *GreenBank*, 2012 WL 6115015 at *10-11)). "Instead, this court has opted to consider the percentage difference along with the condition of the property and any other factors that may provide information concerning

> the marketability of the property and the surrounding area." *FirstBank*, 2014 WL 407908 at *3.

Eastman Credit Union, 2016 WL 1276275, at *9-10.

Appellants in this case have not cited and our research has found no Tennessee appellate decisions applying Tennessee Code Annotated § 35-5-118 in which the defense of inadequacy of the foreclosure sales price was considered without the defendant debtor having first pled the defense or the appellate court's having determined that the defense was tried by implied consent. *See, e.g.*, *Commerce Union Bank*, 512 S.W.3d at 221 (defendants raised inadequacy of the foreclosure sales price in their answer to the complaint); *Commercial Bank, Inc. v. Lacy*, 371 S.W.3d 121, 123 (Tenn. Ct. App. 2012), *perm. app. denied* (Tenn. June 20, 2012) (defendant raised inadequacy of the foreclosure sales price as a "defense[] to liability" in his response to the plaintiff's summary judgment motion); *Eastman Credit Union*, 2016 WL 1276275, at *1 ("The defendant debtor asserted as an affirmative defense [in his answer to the complaint] that the lender had purchased the property during a foreclosure sale for a sum materially less than the fair market value."); *Cutshaw v. Hensley*, No. E2014-01561-COA-R3-CV, 2015 WL 4557490, at *3 (Tenn. Ct. App. July 29, 2015) (determining that inadequacy of the foreclosure sales price had been tried by implied consent); *Capital Bank v. Brock*, No. E2013-01140-COA-R3-CV, 2014 WL 2993844, at *2 (Tenn. Ct. App. June 30, 2014) (defendants raised as "an affirmative defense" in their answer to the amended complaint that the plaintiff

bank had "sold the Property . . . at foreclosure for an amount which it knew was less than its market value . . . ."); *Firstbank v. Horizon Capital Partners, LLC*, No. E2013-00686-COA-R3-CV, 2014 WL 407908, at *1 (Tenn. Ct. App. Feb. 3, 2014) (defendant raised inadequacy of the foreclosure sales price in an objection to the plaintiff's summary judgment motion).

Considering this Court's interpretation of a debtor's allegation of an inadequate foreclosure sales price under the previous standard as an affirmative defense, *see Duke*, 660 S.W.2d at 794-95; the legislative history surrounding the 2010 enactment of Tennessee Code Annotated § 35-5-118, *see GreenBank*, 2012 WL 6115015, at *9; the defendant's burden of proof to demonstrate inadequacy of the foreclosure sales price, *see Hannan*, 270 S.W.3d at 7 n.3; and consistent treatment in appellate analysis of a debtor's allegation concerning an inadequate foreclosure sales price as a defense to be raised by the debtor, *see, e.g., Commerce Union Bank*, 512 S.W.3d at 232, we hold that inadequacy of the foreclosure sales price under Tennessee Code Annotated § 35-5-118 is an affirmative defense that either must be properly pled prior to trial or tried by implied consent.

Appellants argue that the Bank "opened the door" to testimony regarding the adequacy of the foreclosure sale prices when W. Morris Kizer testified during trial that he had personally seen the cabin on the property that was encumbered by Note 9. As Appellants acknowledged during trial and the Bank has asserted on appeal, "opening the door" is an evidentiary principle usually applied in the context of criminal

proceedings. *See, e.g.*, *State v. Kendricks,* 947 S.W.2d 875, 883 (Tenn. Crim. App. 1996), *perm. app. denied* (Tenn. May 5, 1997) ("Irrespective of admissibility under Rule 609 [of Tennessee Rules of Evidence], a conviction may be used to contradict a witness who 'opens the door' and testifies on direct examination that he or she has never been convicted of a crime, or to counter some other facet of direct testimony.'" (quoting Cohen, Sheppeard & Paine, *Tennessee Law of Evidence* § 609.1 (3d ed. 1995))). We find Appellants' reliance on this principle as a means of introducing evidence that the trial court found irrelevant to the issues pled in a civil matter to be unavailing. *See* Tenn. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

However, Appellants' argument in this vein may be interpreted as an assertion that the defense of inadequacy of the foreclosure sales prices was tried by implied consent. Tennessee Rule of Civil Procedure 15.02 creates an exception to the general rule that "[j]udgments awarded beyond the scope of the pleadings are void." *See Randolph v. Meduri,* 416 S.W.3d 378, 384 (Tenn. Ct. App. 2011). Rule 15.02 provides in pertinent part:

> Amendments to Conform to the Evidence.— When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such

> amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

In *Cutshaw*, which involved a deficiency action under Tennessee Code Annotated § 35-5-118, the plaintiff lenders argued that the defendant debtors "should be precluded from arguing that the foreclosure sale price was materially less than fair market value, because the [debtors] did not expressly make such an allegation in their answer or other pleading." *Cutshaw*, 2015 WL 4557490, at *3. Upon review, this Court determined that "[t]he record reflect[ed] that both parties, and the trial court, understood that fair market value was at issue under the statute, and thus the issue was fairly tried by implied consent." *Id.* In contrast, upon careful review of the record in the instant action, we determine that the parties did not try the defense of inadequacy of the foreclosure sales prices by implied consent and that, based on the parties' pleadings, the trial court did not anticipate the adequacy of the foreclosure sales prices to be at issue during trial.

During Appellants' cross-examination of W. Morris Kizer, the following exchange occurred in relevant part:

Appellants' Counsel:[5] I would like you to go back to Exhibit 1, which was the summary of May 13th, 2016 foreclosure sales. I want to take these one at a time and ask you a series of questions about them, starting with what you've got reference[d] as Hill note nine. You said that was improved by a cabin?

W. Morris Kizer: Well, the property encumbered to secure Hill note nine was improved by a cabin.

Appellants' Counsel: All right. What was the condition of the cabin as of May 13th of 2016?

W. Morris Kizer: I think the last time I saw the cabin prior to the foreclosure sale would have been several months before that.

Appellants' Counsel: And what was the condition of it at that time?

W. Morris Kizer: I did not go in the interior. The exterior appeared fine. As a matter of fact, there were rental guests there, it appeared,

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[5] Appellants' counsel at trial was William Jeff Barnes, *pro hoc vice*, of Florida and Andrew Farmer of Sevierville. Mr. Barnes conducted this cross-examination.

people moving their bags in and out.

Appellants' Counsel: So it was furnished?

W. Morris Kizer: There were people in there. I assume rental people.

Appellants' Counsel: Did you see those people in there?

W. Morris Kizer: I saw them moving in and out of the building.

Appellants' Counsel: All right. And you said – I'm sorry, I didn't mean to interrupt you. You said this visual inspection was done a few months before the foreclosure sales?

W. Morris Kizer: Yes, sir, I would say three months before.

Appellants' Counsel: All right. So basically March, springtime?

W. Morris Kizer: Early spring, I would say.

Appellants' Counsel: All right. Was anybody with you when you did this visual inspection?

W. Morris Kizer: No.

Appellants' Counsel: Did you actually go into the cabin?

W. Morris Kizer: No, sir.

Appellants' Counsel: All right. Do you know if there was any kind of appraisal or market valuation done of that cabin at any time by [the Bank] or your office?

The Bank's Counsel:[6] Your Honor, I object to this line of questioning insofar as the defendants have not properly raised and pled the affirmative defense predicated on TCA 35-5-118 or for that matter the one that opposing counsel referred to at the beginning of this proceeding I found at TCA 47-9-610. So the objection would be based on relevance.

Appellants' Counsel: Well, Judge, we're kind of putting the cart before the horse with that objection. We don't know until today what Mr. [W. Morris] Kizer was going to testify to, and since he has testified at length with regard to what these properties sold for, and they've raised the issue of what these properties sold for, I think on cross-examination I should be

[6] Counsel acting on behalf of the Bank was John M. Kizer.

allowed to ask him some questions.

Trial Court: Counsel, if you're going to raise an issue of insufficiency of the foreclosure sale of personal property under Article 9 of the Uniform Commercial Code for real property under Title 35, you've got to plead the statute. You've got to put the other side on notice that you've relied upon the statutes. The Rules of Civil Procedure require you to do that.

Appellants' Counsel: But again, Judge, what we're talking about here is we don't – I didn't know before today – and I don't like to not plead things in good faith. I don't like to plead a statutory defense that I don't have a good faith basis for. I've – there were no depositions taken in this case. Mr. [W. Morris] Kizer has testified today for the first time, for over an hour, about these properties and he testified that he prepared the trust deeds. He has just testified he did an inspection. They raised this issue. I think I'm entitled to cross-examine him on that.

If they want to come back later in some kind of motion or memo or whatever and say that, you know, that wouldn't apply because it wasn't raised as a defense, that's fine. But to cut off cross-examination of issues that they've raised in their direct testimony I think would be a denial of due process.

The Bank's Counsel: Your Honor, respectfully –

Trial Court: The objection is sustained. If you're going to take the position that a foreclosure sale or a sale involving the disposal of collateral under Article 9 was an insufficient sale, you've got to raise that, you've got to plead it.

You can't come in on the day of trial – I understand counsel's point that, look, you don't necessarily know exactly everything that's going to come up, or you may not know everything that's going to come up in a trial, but the matter of the sufficiency of the foreclosure sale is something simply that has to be pled. It has to be pled in order to be relied upon. It was not pled

here, and so the objection is sustained.

Appellants' Counsel: Then I would make a ore tenus motion to amend our answer to add those two statutory defenses, because, again, Mr. [W. Morris] Kizer has just testified, he has just raised these issues. He's just put them into evidence.

Trial Court: Counsel, what do you have to say?

The Bank's Counsel: Well, your Honor, I believe that such an amendment would be futile and would only further prolong or delay these proceedings that have been set for trial for this date for a while now, and so I would oppose such a –

Trial Court: The motion is overruled. This lawsuit was filed in March of 2016.

Appellants' Counsel: Right.

Trial Court: It has been pending since March of 2016. The fact that depositions were not taken, discovery was not taken, that's a matter of – they could have been taken. Had any party to

the proceedings wanted to take them, they certainly could have been taken. There was extensive written discovery.

Appellants' Counsel: Well, your Honor, with all due respect, there was extensive written discovery about whether or not my clients signed the notes and the deed of trust and whether the foreclosures happened, that's where the requests for admissions were all grounded upon. There was nothing in those admissions whatsoever with regard to the issue of whether or not there was the proper disposition of this collateral, whether it was under Chapter 35 or under Chapter 47.

Trial Court: Motion to amend is overruled.

* * *

Appellants' Counsel: Your Honor, in light of what you just said, it's our position that this was not an unanticipated series of issues. [The Bank] disposed of the collateral. They should be familiar with the law in that, whether under Chapter 35 or

Chapter 47, so they can't certainly claim surprise. So what I would like to do is I'd like to make an offer of proof for the record as to what I would have asked had I been allowed to ask it.

Trial Court: You can do that, you certainly have that right, and you can do that, but that will come at the end of the day, not during the trial.

Following W. Morris Kizer's testimony, Mr. Thomas testified, acknowledging during cross-examination that he was offering no testimony regarding appraisals or other valuations of the properties at issue.

Appellants essentially contend that they should have been allowed to pursue the defense of inadequacy of the foreclosure sales prices because the Bank should have been prepared for any defense allowed under Tennessee Code Annotated § 38-5-118. We disagree. Even assuming, *arguendo*, that the Bank knew or should reasonably have known that the adequacy of the foreclosure sales could become an issue at trial, we note that the Bank vehemently objected to this line of questioning during trial and was at risk of having its case prejudiced if the trial court had allowed the defense without Appellants having given notice to the Bank prior to trial of their intent to assert the defense. *See Hiller v. Hailey*, 915 S.W.2d 800, 804 (Tenn. Ct. App. 1995), *perm. app. denied* (Tenn. Dec. 18, 1995) ("Generally speaking, trial by implied consent will be

found where the party opposed to the amendment knew or should reasonably have known of the evidence relating to the new issue, did not object to this evidence, and was not prejudiced thereby." (quoting *Zack Cheek Builders, Inc. v. McLeod,* 597 S.W.2d 888, 890-91 (Tenn. 1980) (emphasis added))). We note also that the evidence presented by the Bank regarding the foreclosure sales prices was relevant to an established issue, that of demonstrating the sale price of each property for purposes of calculating the total deficiency judgment. *See Christmas Lumber Co., Inc. v.. Valiga,* 99 S.W.3d 585, 593 (Tenn. Ct. App. 2002), *perm. app. denied* (Tenn. Feb 18, 2003) ("Trial by implied consent is not shown by the presentation of evidence that is relevant to an unestablished issue when that evidence is also relevant to the established issue." (quoting *McLemore v. Powell,* 968 S.W.2d 799, 803 (Tenn. Ct. App. 1997)).

Inasmuch as inadequacy of the foreclosure sales prices was not pled by Appellants or tried by implied consent in this action, we determine that the trial court did not abuse its discretion by finding the defense to be waived.[7] Therefore, we further determine that the trial court did not err by denying Appellants' motion to vacate the December 1, 2017 order without hearing

[7] Appellants have not raised an issue on appeal regarding the trial court's denial of their oral motion, made during trial, to amend their answer to add the statutory defenses they attempted to raise at trial. We will therefore not address this ruling on appeal. *See* Tenn. R. App. P. 13(b) ("Review generally will extend only to those issues presented for review.").

further evidence regarding the adequacy of the foreclosure sales prices.

V. Inapplicability of Tennessee Code Annotated § 47-9-610

Within their issues presented and argument on appeal that the foreclosure sale was "commercially unreasonable," Appellants consistently refer to the "collateral" foreclosed upon, exchanging this term for "properties" early in their argument and apparently referring to the cabins as collateral pursuant to their interpretation of Tennessee Code Annotated § 47-9-610. At trial, Appellants' counsel during opening statements relied in part on Tennessee Code Annotated § 47-9-610(a)-(b), arguing that this statute applied because the properties at issue were "commercial" and "investment" properties such that the "resort cabins" should be treated as collateral that was required by statute to be disposed of in a commercially reasonable manner after Appellants had defaulted on the related promissory notes.

Upon thorough review, we agree with the trial court's determination, made when Appellants' counsel first cited this statute during trial, that this statutory chapter involves secured transactions and does not apply to real property and the improvements, such as the resort cabins at issue here, conveyed as part of the transfer of real property. *See* Tenn. Code Ann. § 47-9-109(d)(11) (2013) (providing that barring exceptions not applicable here, "[t]his chapter does not apply to . . . the creation or transfer of an interest in or lien on real property . . . ."); *Solomon v. First Am. Nat'l Bank of Nashville*, 774 S.W.2d 935, 942 (Tenn. Ct. App.

1989), *perm. app. denied* (Tenn. June 26, 1989) ("As to the sale of realty, the Uniform Commercial Code requirements of a commercially reasonable sale have no application.").

In support of their position that the Uniform Commercial Code requirements apply, Appellants rely heavily on this Court's decision in *R & J of Tenn., Inc. v. Blankenship-Melton Real Estate, Inc.*, 166 S.W.3d 195 (Tenn. Ct. App. 2004), *perm. app. denied* (Tenn. May 9, 2005), *abrogated on other grounds by Auto Credit of Nashville v. Wimmer*, 231 S.W.3d 896 (Tenn. 2007). However, the loan transaction at issue in *R & J*, which was "governed by Tennessee's version of Article 9 of the Uniform Commercial Code," involved the sale at foreclosure of collateral consisting of a boat, a tractor, a truck, and a mobile home. *R & J*, 166 S.W.3d at 198-200. At no point did the *R & J* Court consider real property, or the improvements constructed thereon, to be "collateral" under Tennessee's version of Article 9 of the Uniform Commercial Code. Appellants' reliance on *R & J* is misplaced.

Inasmuch as the Uniform Commercial Code requirements contained within Chapter 9 ("Secured Transactions") of Title 47 ("Commercial Instruments and Transactions") of Tennessee Code Annotated do not apply to transfers of real property, Appellants' reliance on this statutory section is unavailing. *See* Tenn. Code Ann. § 47-9-109(d)(11). Additionally, as the trial court noted, Appellants had not, prior to trial, raised a defense pursuant to Tennessee Code Annotated § 47-9-610 in their pleadings. *See* Tenn. R.

Civ. P. 8.05(1) ("Every pleading stating a claim or defense relying upon the violation of a statute shall, in a separate count or paragraph, either specifically refer to the statute or state all of the facts necessary to constitute such breach so that the other party can be duly apprised of the statutory violation charged.").[8] Appellants are not entitled to any relief under Tennessee Code Annotated § 47-9-610 or its neighboring statutory sections.

VI. Appellants' Remaining Issue

As explained above, we have determined that the trial court did not abuse its discretion by finding that Appellants had waived what we hold to be the affirmative defense of inadequacy of the foreclosure

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[8] We note that the Bank also argues on appeal that when Appellants failed to plead their affirmative defense pursuant to Tennessee Code Annotated § 35-5-118, they failed to comply with Tennessee Rule of Civil Procedure 8.05(1) by failing to allege a violation of § 35-5-118. We do not find this argument persuasive. We have held that Appellants were required to plead the affirmative defense of inadequacy of the foreclosure sales prices pursuant to Tennessee Code Annotated § 35-5-118 and Tennessee Rule of Civil Procedure 8.03. However, we do not determine that such an affirmative defense constitutes an allegation that the Bank "violated" any requirement set forth in the deficiency statute. *See, e.g.*, *City of Memphis v. Shelby Cty.*, 469 S.W.3d 531, 559 n.19 (Tenn. Ct. App. 2015), *perm. app. denied* (Tenn. Aug. 14, 2015) (finding no violation of Rule 8.05 when the plaintiff "sought an interpretation and declaration of the [statute at issue] as it related to the parties' future rights and obligations" rather than alleging a "violation" of the statute). In contrast, Appellants did allege a violation of requirements set forth in Tennessee Code Annotated § 47-9-610 without having properly indicated their reliance on the statute pursuant to Rule 8.05(1).

sales prices pursuant to Tennessee Code Annotated § 35-5-118. We have also determined that the trial court did not err, by finding, as a matter of law, that Tennessee Code Annotated § 47-9-610 was inapplicable to this matter. We therefore conclude that Appellants' remaining issue concerning the trial court's denial of their request to further cross-examine the Bank's witnesses in an effort to establish their unpled affirmative defense is pretermitted as moot.

VII. Conclusion

For the foregoing reasons, we affirm the trial court's judgment in its entirety. This case is remanded to the trial court, pursuant to applicable law, for enforcement of the judgment and collection of costs assessed below. The costs on appeal are assessed against the appellants, Wayne R. Hill, Cornelia D. Hill, and Rainbow Ridge Resort, LLC.

_____

THOMAS R. FRIERSON, II, JUDGE

APPENDIX D

IN THE CHANCERY COURT FOR SEVIER COUNTY, TENNESSEE

No. 16-3-118

[Filed January 16, 2018]

BRANCH BANKING AND TRUST COMPANY	)
	)
Plaintiff,	)
	)
v.	)
	)
WAYNE R. HILL, CORNELIA D. HILL, and RAINBOW RIDGE RESORT, LLC,	)
	)
Defendants.	)

NOTICE OF ENTRY REQUESTED

ORDER DENYING MOTION TO VACATE ORDER AND JUDGMENT

This cause came on for hearing on January 5, 2018 on the Motion of the Defendants to Vacate this Court's Order and Judgment dated December 1, 2017. Although filed citing TRCP 60, the Court treats the Motion to Vacate as a Motion for relief and for a new trial under TRCP 59, and finds that the Motion was

timely filed. The Court heard argument from counsel for the parties and bas reviewed the file, and denies the Motion to Vacate.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendants' Motion to Vacate, which the Court treats as a motion for relief under TRCP 59, be and the same ~~and is~~ hereby is denied.

ENTER, this 16 day of January, 2018.

/s/
CHANCELLOR

APPROVED FOR ENTRY:

/s/
W. Morris Kizer
(BPR No. 1571)
Gentry, Tipton & McLemore, P.C.
P.O. Box 1990
Knoxville, Tennessee 37901
(865) 525-5300
Attorney for Branch Banking and
Trust Company

/s/
Andrew E. Farmer
(BPR No. 26823)
Law Offices of Andrew E. Farmer
121 Court Avenue
Sevierville, Tennessee 37862
865-428-6737
Attorney for Rainbow Ridge Resort, LLC,
Wayne Hill and Cornelia Hill

/s/

W. Jeffrey Barnes (*pro hac vice*)
(FL Bar No. 746479)
W. J. Barnes, P.A.
1515 North Federal Highway
Suite 300
Boca Raton, Florida 33432
561-864-1067
Attorney PHV for Rainbow Ridge Resort, LLC,
Wayne Hill and Cornelia Hill

APPENDIX E

IN THE CHANCERY COURT FOR SEVIER COUNTY, TENNESSEE

NO. 16-3-118

[Dated January 5, 2018]

BRANCH BANKING AND TRUST COMPANY,	)
Plaintiff,	)
vs.	)
WAYNE R. HILL, CORNELIA D. HILL and RAINBOW RIDGE RESORT, LLC,	)
Defendants.	)

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR THE PLAINTIFF:

W. MORRIS KIZER, ESQ.
JOHN M. KIZER, ESQ.
Gentry, Tipton & McLemore, P.C.
Riverview Tower, Suite 2300
900 South Gay Street
Knoxville, Tennessee 37902

FOR THE DEFENDANTS:

WILLIAM JEFF BARNES, ESQ.
W.J. Barnes, P.A.
1515 North Federal Highway
Suite 300
Boca Raton, Florida 33432

[p.2]

(Be it remembered, the following proceedings were held before the Honorable T.E. Forgety, Jr., on January 5, 2018, as follows:)

THE COURT: Counsel?

MR. BARNES: Your Honor, this is our original and supplemented motion to vacate the Order and Judgment dated December 1, 2017.

Just as a preliminary matter, Your Honor, I do apologize for the late submission of the supplemented motion; however, I received -- our motion was filed on December 14th of last year. I received Mr. Kizer's response yesterday afternoon at 4:15 when I got into Sevierville.

So I worked as hard as I could overnight to review it and just to supplement our prior motion based upon something -- at least one thing Mr. Kizer raised in his motion.

And, Your Honor, there is authority for treating a motion filed under Rule 60 as a Rule 59 motion. This is Collins versus Collins, No. M2014-02417-COA-R3-CV, a case from the Court of Appeals at Nashville in 2016, where a similar situation happened.

The husband in that case filed a motion to set aside the final decree citing Rule 60 and

[p.3]

the Court stated that motions filed pursuant to Rule 59 are served within 30 days after judgment has been entered and in view of the fact that that motion was filed within that time period, what the Court decided to do, even though the motion was filed under Rule 60, the Court stated as follows:

We agree that the July 29th motion, having been filed within 30 days after entry of the final decree, was to be treated as a Rule 59 motion, not withstanding the fact that it cited Rule 60 in support of the relief requested, and that cites Ferguson v. Brown 291 S.W.3d 381, Court of Appeals in 2008.

So where does that tie in here? Your Honor, as you know, you entered an Order and Judgment, which is a Final Order, on December 1st of 2017. We filed our motion within 30 days styled under Rule 60 but essentially seeking the type of relief under Rule 59 for a new trial and the reason being this:

As you know, at the trial, Mr. Kizer took the stand right over there and testified as to various trustee foreclosure sales as to properties which had been the subject of underlying litigation to foreclose on those properties.

[p.4]

During the course of that testimony, Mr. Kizer testified as to the value obtained for those properties at

the various foreclosure sales and he also testified that he, himself, conducted these foreclosure sales.

Now, what happens here is that our position is Mr. Kizer opened the door on cross-examination to the subject matter of the sale of the properties.

And I use that term because that's the term that's used in the case law that we've cited in our motion, including State v. Burton, which is cited in paragraph 5 on page 2 of our motion.

Now, the position that seems to have been taken is that because the Hills did not raise issues as to adequacy of price, etc., obtained at the foreclosure sales as an affirmative defense to the action, that that somehow ipso facto precluded any cross-examination of Mr. Kizer as to the foreclosure sales which he testified--

THE COURT: Kim, it's in these boxes. Should be. Go ahead.

MR. BARNES: I'm sorry, Your Honor.

THE COURT: I was looking for --

MR. BARNES: All right. I just didn't

[p.5]

want to interrupt.

THE COURT: I'm multi-tasking here.

MR. BARNES: I see that. I just didn't want to be perceived as interrupting one of those tasks.

THE COURT: Go ahead.

MR. BARNES: In any event, Your Honor, the interesting constitutional issue that we see here is can the fundamental right to cross-examination, which is a constitutionally guaranteed fundamental right, be precluded or abrogated or taken away in some fashion when a witness opens a door to cross-examination on a certain subject matter simply because that subject matter was not raised as a defense in the underlying action?

I have not found any case law that addresses that issue at all on those specific facts and under these specific circumstances.

So, what our argument essentially here is, is that there is grounds, there are grounds for relieving the Hills from the Final Judgment because of the taking away of that fundamental right which implicates due process.

And Mr. Kizer, interestingly enough in

[p.6]

his response, again, which I received yesterday afternoon, states the following: To be found void for purposes of 60.02, sub 3, a judgment must have been rendered by a court lacking jurisdiction over the subject matter or the parties, or acting in some other manner inconsistent with the requirements of due process. Citing Magnavox Company versus B-O-L-E-S ampersand Hite, H-I-T-E, Construction Company, 583 S.W.2d 611 at 613 (Tennessee Court of Appeals 1979).

So Mr. Kizer is acknowledging that our position is something that would provide a basis to declare this Final Judgment void.

So, there is nothing also in the case law, although this, the preclusion of cross-examination issue and the issues of opening door have come up in the criminal case context in the decisional law, Mr. Kizer argues that it's confined solely to criminal cases. That's not what the case law says.

There's nothing in the case law that says, by the way, this whole concept of opening the door and permitting cross-examination applies only to criminal cases or does not apply to civil cases or chancery cases. There's nothing that

[p.7]

says that.

The fact that it may have come up in a decisional law at this point only in the context of a criminal trial does not preclude the use of that argument in a civil case, especially since we're talking about what the courts have consistently referred to in Tennessee as a fundamental right.

Now, again, Your Honor, what is going on here is that BB&T is seeking to and has obtained a judgment in excess of a million dollars against my clients personally on a deficiency claim.

And what happened at the trial, as Your Honor knows, was that there was an objection made when I attempted to cross-examine Mr. Kizer, as I had the

right to do, as to the subject matter of his testimony and that subject matter was the foreclosure sales.

He opened the door. He testified that he obtained certain prices for certain properties. He testified he conducted the sales himself. He thus opened this door to this subject matter area and that's the standard under the case law for opening the door. It's the subject matter.

It's not a specific defense. It's not a

[p.8]

specific element of anything. It's the subject matter. The subject matter of his direct examination, at least in part, was the foreclosure sales, and so my intended cross-examination was on the subject matter of those sales since he did open the door.

Now, Mr. Kizer -- as you know, Your Honor sustained the objection, did not allow me to cross-examine either Mr. Kizer or the other witness.

And there was an offer of proof made on the record but outside the presence of the Court, because Your Honor left the courtroom, went through that room. You didn't hear that.

Yet Mr. Kizer makes an argument in his response that he's reviewed the offer of proof and he thinks that there's nothing in there that would justify relief by this motion.

Well, that's -- again, we're putting the cart before the horse here. Your Honor specifically declined to hear the offer of proof for various and sundry reasons that

are on the record. You told me to put it on the record but now Mr. Kizer says in his response in his humble opinion --

[p.9]

THE COURT: Well, you said the offer of proof, the point there is the offer of proof you make not for the benefit of the trial court, because the trial court has already ruled, you make the offer of proof so that you can show the Court of Appeals what you would have proven if you had been allowed to do so.

So that's why you make an offer of proof, not for the purposes of the trial court. Because the trial court -- if the trial court hadn't ruled it inadmissible, you wouldn't need to make an offer of proof because it would be in evidence.

MR. BARNES: And I understand that 1,000 percent. The point I'm trying to make here is that given that, and I understand the Court's point and understood it at the time.

For Mr. Kizer to make an argument as to the matters in the offer of proof and refer to the transcript in his response to my motion is improper. I would ask that the Court disregard that.

But, again, Your Honor, it's our position here that, and, again, I have not found any case law in Tennessee or anywhere else that addresses these specific facts in this specific situation

[p.10]

where a witness in a civil case opens the door to a subject matter, cross-examination is attempted on that subject matter and it is precluded because of the lack of assertion of a defense on that subject matter previously.

So, this is something new to me in my 29 and three quarter years of practice. But it's grounded on fundamental concepts that have been around for a long time.

And so we would ask that the Court, pursuant to the Collins case, although this motion was filed under Rule 60, treat it as a Rule 59 motion in view of the time that it was filed and the ultimate relief requested because vacating the Final Judgment would mean a new trial.

And the arguments that I made in this motion as to the lack of being able to exercise my client's fundamental rights to cross-examination are a matter which pertain to trial proceedings.

So, we would ask that the Court do that and ask that the Court either, and/or vacate the Final Judgment and order a new trial. Thank you.

THE COURT: Mr. Kizer?

MR. KIZER: Thank you, Your Honor. As an initial matter just responding to Mr. Barnes'

[p.11]

statements about when he received this response, I would represent to the Court that it was hand-delivered to Mr. Farmer's office, who is co-counsel for Mr. Barnes, around noon yesterday. And in any event, I'm not aware of any rule of procedure or local rule that requires a response to be tendered in any given time prior to the date designated for hearing.

Now, this morning, Mr. Barnes filed what he characterizes as a supplemental motion wherein he cites Rule 59 as an additional basis for relief. This judgment, as you know, was initially entered December 1. The time for filing a notice of appeal expired January 3rd, 2018.

BB&T's position, therefore, and this is set forth in our initial response, with regards to a Rule 60.02 motion that was filed two weeks after the entry of the judgment was premature.

Rule 60.02 motions only apply to Final Judgments. This Judgment was not final until the expiration of 30 days following its entry, which was January the 3rd, 2018.

The Rule 60 motion is procedurally improper and any effort to supplement such motion with a claimed Rule 59 motion after the expiration

[p.12]

of the 30 days following the entry of the judgment is in my view a nullity.

I don't believe there's anything in Rule 59 that states that a Rule 59 motion filed after the expiration of 30 days can, quote/unquote, relate back. And so for purposes of any appeal that may be pursued by the Defendants hereafter, our position is that they failed to preserve their right in filing a notice of appeal.

The Rule 60 motion was of no effect because it was premature and the Rule 59 motion is of no effect because it was late.

Now, if you look at the merits --

THE COURT: What about his contention that the Court ought to treat the motion -- it is -- if you, if you look, the style of his motion is Hill Defendants' Motion to Vacate Order and Judgment dated December 1, 2017. That's the caption on the motion.

If you read the first sentence, Defendants Rainbow Ridge Resort, LLC, Wayne R. Hill and wife, Cornelia Hill, hereafter the Hills, by and through their undersigned counsel and pursuant to T.R.C. 60.02(3) and (5), so he does cite 60.02(3) and (5), but that motion, that

[p.13]

motion was filed certainly within 30 days of the entry of the judgment.

MR. KIZER: It was, Your Honor, but when it was filed, the judgment was not final.

THE COURT: I understand that but -- I understand that it wasn't and I understand that Rule 60 motions, strictly speaking, Rule 60 motions deal with final

judgments, not judgments that have not yet become final.

If you file a motion with respect to a judgment that has not yet become final, technically speaking, it's something else. It's a motion for a new trial. It's a motion to alter or amend.

It's, it's something else. It's not a, technically speaking, it's not a Rule 60 motion. I understand that, but he contends that the Court ought to, nevertheless, treat it as a Rule 59 motion.

MR. KIZER: Well, importantly, if you look at, Your Honor, Rule 59.01, as well as Tennessee Rule of Appellate Procedure 4(b), those rules kind of hand-in-hand speak to the types of motions that will, that will extend or toll the period in which certain appellate steps or steps

[p.14]

in the appellate process must be taken, including the filing of a notice of appeal.

You have a Rule 50.02 motion for judgment in accordance with the motion for a directed verdict; under 50.02 to amend or make additional findings of fact; under Rule 59.07 for a new trial; or under Rule 59.04 to alter or amend the judgment.

Now --

THE COURT: And it goes on and says if no other, no other motions will extend the time for the filing of a, will extend the time for finality of the judgment.

MR. KIZER: That's correct, Your Honor.

THE COURT: But now help me out. I think I'm right about this, or at least I think I'm right about it at one point in time.

People at times have filed motions denominated as motions to reconsider, which animal does not exist. Under the Tennessee version of the Rules of Civil Procedure there is not any such thing.

But we've got case law, or at one time we had case law which held that, if I'm not badly mistaken, that the Court could consider a motion

[p.15]

denominated as a motion to reconsider, could consider it a motion for new a trial, which --

MR. KIZER: That's correct, Your Honor. That's my understanding, but I think the case law speaks to you must look to the substance of what is being sought by the motion.

And this motion clearly to me is seeking a vacate, the Court to vacate its order. It's not in substance --

THE COURT: And, by the way, such a motion filed before the judgment becomes final, the Court can do -- before its judgment becomes final, a Court can do anything it wants to do. And for that matter, can do it on its own motion, and I have done it.

For example, on my own motion, I've come in and said, you know, I'm going to amend my findings. I'm going to grant a new trial. I've done that a few times.

So, within the 30-day time period, the Court's still got jurisdiction of the case. Can set its judgment aside, alter, amend on its own motion whether asked to or not.

So, I'll tell you frankly. Honestly, I think his motion, though it does in the first

[p.16]

sentence say that it's a motion filed pursuant to Rule 60, the Court will treat it as a motion for new trial. He asked to vacate the judgment.

Okay. Well, if I do that, if I did that, if I vacated the judgment, what would that mean? What would that necessarily mean if I did it, which is another issue.

But if I did it, if I did that, what would that mean? It would mean a new trial, wouldn't it?

MR. KIZER: I'm not sure, Your Honor. I think Rule 59.07 specifically provides for a motion for a new trial and I don't know the answer to that at this time. Seems to.

THE COURT: Well, what else could it be? I mean, if I vacate the judgment, there's no judgment in the case and that means that the case is yet pending. How would it be resolved? How would it be resolved then?

MR. KIZER: Well, Your Honor, irrespective of this procedural argument that we make, I think if you look at the merits of Mr. Barnes' and the Defendants' motion, it is clear that no such relief is warranted.

Judgment, as you know, is not void in

[p.17]

Tennessee simply because it is wrong. And very recently in Hussey versus Woods, our Supreme Court in the middle of December of 2017 -- this was filed 12/18/17 -- in speaking to sort of the standards that govern Rule 60.02 (3) motions and that is to say motions that are predicated on void judgment, stated that a judgment is not void because it is or may have been erroneous.

A judgment is not void because a party is dissatisfied with the result or chose not to participate in the proceedings. A judgment is not void because a party claims it to be unjust.

Now --

THE COURT: There's no question -- there's no question about that. I mean, never has been any question about that. If the Court has jurisdiction of the subject matter, has jurisdiction of the parties, just the fact that the Court got it wrong, even badly wrong, doesn't mean that the judgment is void. It's not void.

All it means is you've got, to get relief, you've got to appeal. You can't, you cannot get relief after the time for appeal has run. It doesn't make it void, just -- so no question about that.

[p.18]

MR. KIZER: And, similarly, Rule 60.02 (5) case law, construing relief under that particular provision states that this provision is construed very narrowly and for the most extreme or extraordinary cases.

And aside from those standards, we would contend that the Court very correctly ruled that the Defendants could not offer evidence at trial regarding a defense that was not properly asserted.

Among other rules, as Your Honor knows, Rule 805 of the Rules of Civil Procedure requires a party to specifically reference a statute if they're going to rely on that statute in defense of their case. That, of course, was not done in this matter.

And, furthermore, plainly, as Your Honor observed at trial, T.C.A. 47-96-10 has absolutely no application to the facts of this case which dealt with foreclosure and security interests in real property.

The Plaintiffs -- or excuse me, the Defendants have not set forth or cited to any case that would support their position that relief is appropriate under Rule 60.02 (3) or (5) under the

[p.19]

circumstances where the judge exercised his discretion and excluded evidence on the basis that the Court herein excluded the evidence.

The opening the door concept that opposing counsel contends justifies relief is clearly a doctrine that's limited in application under circumstances where a party is able to use otherwise inadmissible evidence to impeach another party who preemptively offers contrary evidence.

And Mr. Barnes acknowledges himself that this is a doctrine that is really limited and has only routinely been applied, if at all, in criminal matters.

Plainly the Defendants in this case were not trying to impeach any witnesses. They were simply trying to develop testimony to support defenses in matters that they never pled or asserted.

And so in summation, Your Honor, the Court correctly excluded the evidence at trial and did not permit the Defendants to cross-examine the Plaintiff's witnesses and otherwise introduce other evidence regarding affirmative defenses that they never asserted.

Even if the Court was incorrect in this

[p.20]

regard, certainly, there's was no abuse of discretion and there was not an error that gave rise to a void judgment or an otherwise exceptional circumstance that would permit relief under Rule 60.02 or a new trial under Rule 59.07 or that would justify the Court's alteration or amendment of the judgment under Rule 59.04.

And, finally, Your Honor, the last argument that is raised in the Plaintiff's response deals with, even if Your Honor abused its discretion, considering the Defendant's offer of proof, there was nothing that was offered during the offer of proof that would ever come to the presumption, of course, to which the Plaintiffs are entitled to under 35-5-118(b).

The presumption being that the foreclosure sales price is equal to the fair market value of the properties at the time of sale for the purposes of calculating the amount of the deficiency balance owed.

The offer of proof is devoid of any particular value opinion as to any value that any of test properties had at the time of foreclosure. Therefore, even if Your Honor was incorrect in excluding that testimony, we now know that that

[p.21]

proffered evidence did not rebut the presumption and, therefore, there would be no harmless error upon further review.

For these reasons, Your Honor, we would respectfully request that the Defendants' motion under Rule 60.02 to vacate the judgment be denied.

THE COURT: You get the last word, Counsel.

MR. BARNES: Thank you, Your Honor.

THE COURT: Very quickly.

MR. BARNES: Briefly. I think Your Honor hit the nail on the head when you were asking counsel questions about what is the practical effect of everything.

And the case law supports the treating of this motion as a Rule 59 motion and, again, in our supplement, paragraph 16, we did cite about 59.07 as grounds, which is a request for a new trial.

THE COURT: Counsel, I'm with you on that. I will treat it as a -- I went back and looked very quickly. Under Rule 59, we got case law, for example, the Tennessee Rules of Civil Procedure do not authorize, quote, motions to reconsider and, therefore, such a motion is construed to be a motion to alter or amend

[p.22]

pursuant to T.R.C.P. 59-04 and McCracken versus Brentwood United Methodist Church, and there are other cases. And then cases that hold that motions are construed based upon their substance and not their title.

MR. BARNES: I thought so, Your Honor, but I never like to presume or assume anything.

THE COURT: And so I'm with you on that one.

MR. BARNES: Okay.

THE COURT: I'm with you on that one. Now, the bigger issue here, the bigger issue, and, by the way, also, of course, Rule 59, 59.05, upon initiative of the Court, within 30 days after the entry of judgment, the Court on its own initiative about may alter or amend the judgment, or the Court may order a new trial for any reason for which it might have granted a new trial on motion of a party where no such motion has been filed.

I could have done that. I can always do that within 30 days. So, I'm with you on that. Your motion is timely as far as that goes.

Now, the merits of this thing, to your point. You, among other things, you say, look, Mr. Kizer testified, offered testimony as to the

[p.23]

value or the amount, the price that the property brought on the foreclosure sale and he did, he did do that.

Well, as a matter of fact, he had to do that in a suit for a deficiency. Obviously, if you're going to get a deficiency judgment, you got to know what the sales price was as the beginning point, don't you? You got to know that.

Just the fact that a party testifies as to what the sales price at the foreclosure sale, that does not necessarily constitute evidence that that was, that the sale price was fair and adequate, does it?

He comes in and says I offered it for sale on the courthouse steps. It brought X number of dollars. As far as that's concerned, they did offer testimony as to that.

But, once again, in a deficiency suit, part and parcel of claiming a deficiency, you got to establish what it brought at the foreclosure at sale and then you got to establish what's the outstanding balance on the note and the difference between the two is the deficiency.

What you're after here on the opening the door argument is that by testifying that the

[p.24]

property brought X number of dollars at the foreclosure sale that opened the door on the issue of whether that was a fair and adequate price for the property, and I don't think so. I don't think it opens that door.

MR. BARNES: Yes and no. If I may interrupt, and I'm sorry to interrupt. But not exactly.

The point I'm trying to make is that because he opened the door on the subject matter of the sales, I should have had been given the opportunity to cross-examine him as to that subject matter.

Now, whether an argument could be made thereafter that based on that cross-examination that those properties did not bring the proper price at sale, that's a different argument and a different procedure.

I'm talking about the very narrow issue of being able to cross-examine him. They can object. They could preserve the objections for the record. We can make the argument later. But I'm talking about the very narrow point in time -- and I know you have to leave.

THE COURT: No. Don't worry about that.

[p.25]

I've got another 30 minutes, so...

MR. BARNES: Well, I don't want to take away from these other folks.

THE COURT: We'll have time to do what we've got to do.

MR. BARNES: I'm talking about that window of time from the time Mr. Kizer took the stand until the time the objection was sustained and I was not allowed to cross-examine. That's it.

Arguments based upon what that cross-examination may have elicited are for a later point in time. It may be the case that Mr. Kizer's testimony on cross-examination would have shown that they did do everything right. We just don't know that and we weren't given the opportunity to inquire about that.

And based upon what he said on cross-examination or would have said, the bank could have made its argument and I could have made my argument and Your Honor could have decided accordingly.

The problem is the process was short-circuited because I wasn't allowed to cross-examine. That's it. That's what this

[p.26]

motion is all about and that's why we're asking, as Your Honor is treating it as a Rule 59 motion, for a new trial to allow me to do that. That's what the substance of this motion is.

THE COURT: Well, thank you very much.

MR. BARNES: You're welcome.

THE COURT: The motion will be overruled. This was a case wherein the bank, BB&T, brought suit for a deficiency judgment. The bank had held a trust deed on some properties, foreclosed on the properties, and the bank alleged that, okay, we foreclosed, conducted a

foreclosure sale and at the foreclosure sale, the properties brought less than the outstanding balance of the indebtedness and, therefore, we're entitled to a deficiency judgment for the difference between the two.

The issue that this motion is aimed at is, and the issue at the trial was whether or not from the Defendant's standpoint, the Hills, whether or not the sale price at the foreclosure sale was a fair and adequate sales price.

In other words, the Hills made the argument at the trial that it was not a commercially reasonable sale, quote/unquote. That term commercially reasonable sale, of course, has

[p.27]

to do with sales under Article 9 of the Uniform Commercial Code.

But the same kind of thing you can have with respect to the sale of a piece of property, a piece of land, which, of course, is not subject to the Uniform Commercial Code, but you can have a similar kind of claim.

We've got a statute in Title 35 of the Tennessee Code that has to do specifically with suits for deficiency judgments and claims that the property did not sell for a fair and adequate price at the foreclosure sale.

So you got -- you got similar -- you have the possibility of similar claims in cases involving foreclosure on real estate as you have with the

repossession and sale of personal property collateral under Article 9 of the Uniform Commercial Code.

But what the Court held at the trial was you didn't plead, you didn't plead that as a defense to this claim for deficiency by the bank, you didn't plead that there was a quote/unquote commercially reasonable sale or that the property, that there was some defect, formal defect in the foreclosure proceedings or that the property

[p.28]

brought less than a fair and adequate suit.

You didn't plead that and you cannot, in as much as you didn't plead that, the Court held that you cannot go into it on the day of the trial without, without notice to the bank that, look, we rely on that theory.

We rely on that doctrine and particularly we rely on the statute in Title 35 that allows you to assert that kind of defense. The Court held that at the trial and I thought it was correct at the time and I think it's correct today.

You can raise that kind of claim, all right, that kind of defense, you can do that but you got to plead it. You got to put the other side on notice that, that you are raising that kind of claim.

Here's the point. An attorney who conducts a foreclosure sale such as Mr. Kizer here, he is an expert about many things. He may not be an expert, and I don't know whether he is or not. He may be an expert on real estate values. But he may not be either.

The point is that he would certainly be entitled to testify as to what was the sale price at the foreclosure sale. He might not necessarily

[p.29]

be entitled to testify as to what a fair and adequate price for the real estate was.

Some attorneys may be experts as to real estate values. Others may not be. The point is, if you're going to raise that kind of issue, the bank, the secured party, might reasonably want to call in an expert.

For example, a real estate appraiser. For example, somebody from the bank who indeed is an expert on the particular matter of real estate values and more specifically the value of the real estate at issue.

So, back to the point. You can raise those kinds of claims but the bank's entitled to notice. They're entitled to have a pleading that tells them we're raising the issue of whether or not the sale was commercially reasonable, quote/unquote, brought a fair and adequate price at the sale.

That wasn't done here so the Court ruled as it did at the trial. And, like I say, I thought I was correct at the time. I think I'm correct on that today.

And as to the matter of the cross-examining, opening the door, well, certain

[p.30]

things, generally speaking, you are not entitled to examine or cross-examine upon an issue that's not raised by the pleadings.

You are entitled to examine or cross-examine on most anything that's raised by the pleadings but you got to first raise it by the pleadings.

Were it otherwise, were it otherwise, you'd be entitled to raise any theory, examine or cross-examine about any theory without any notice to the other party.

For example, that would in effect do away with the requirements of the Rules of Civil Procedure as to pleadings, specifically affirmative defense, wouldn't it? That would do away with it, wouldn't it?

If you're entitled to cross-examine on a theory that you have not asserted, then that'd do away with the requirement that you got to plead affirmative defenses, among other things.

But the rule in the Court's mind is the same affirmative defense. Plaintiffs are not entitled to present evidence on theories that they have not pled. Defense, defendants the same way. So, for those reasons, the Court will overrule the

[p.31]

motion.

MR. BARNES: Thank you, Your Honor.

MR. JOHN KIZER: Thank you, Your Honor.

(Hearing concluded at 11:10 a.m.)

[p.32]

CERTIFICATE

STATE OF TENNESSEE

COUNTY OF KNOX

I, Holly A. Klinger, Licensed Court Reporter and Registered Professional Reporter, do hereby certify that I reported in machine shorthand the above proceedings, that the foregoing pages were transcribed under my personal supervision and constitute a true and accurate record of the proceedings.

I further certify that I am not an attorney or counsel of any of the parties, nor an employee or relative of any attorney or counsel connected with the action, nor financially interested in the action.

Witness my hand and seal this the 13th day of January, 2018.

_____

Holly A. Klinger, RPR
Tennessee LCR #704
Expiration Date: 06/30/2018

APPENDIX F

IN THE CHANCERY COURT FOR SEVIER COUNTY, TENNESSEE

No. 16-3-118

[Filed December 01, 2017]

BRANCH BANKING AND TRUST COMPANY	)
	)
Plaintiff,	)
	)
v.	)
	)
WAYNE R. HILL, CORNELIA D. HILL, and RAINBOW RIDGE RESORT, LLC,	)
	)
Defendants.	)

NOTICE OF ENTRY REQUESTED

ORDER AND JUDGMENT

This cause came on for hearing on November 14, 2017, upon the trial of the case. At the commencement of the trial, the plaintiff announced that it was voluntarily dismissing without prejudice the count stated in its First Amended Complaint for the judicial foreclosure of the deed of trust recorded in Volume 2203, page 520 in the Sevier County Register's

Office ("the Deed of Trust") and its action against Tyler C. Huskey, Successor Trustee.

After the plaintiff rested its case, the defendants moved for the entry of an involuntary dismissal with prejudice pursuant to Rule 41.02 of the Tennessee Rules of Civil Procedure, which was denied.

The defendants sought to cross examine the plaintiff's witnesses concerning the adequacy of the foreclosure sales price and sought to introduce other evidence concerning the adequacy of the foreclosure sales price, citing T.C.A. § 47-9-610 et seq. and T.C.A. § 35-5-118 as the basis therefor. The Court sustained the plaintiff's objections to the defendants' cross examination of the plaintiff's witnesses on such issue and the defendants' introduction of such evidence on the basis that in their answer to the plaintiff's First Amended Complaint, the defendants had not pled or asserted the inadequacy of the foreclosure sales price and had not pled or asserted T.C.A. § 47-9-610 et seq. and T.C.A. § 35-5-118, or otherwise placed those matters at issue, and on the further basis that T.C.A. § 47-9-610 et seq. has no application to the facts of the case. The Court directed that an offer of proof could be made by the defendants' counsel after the Court ruled.

At the conclusion of all proof and the arguments of counsel, the Court rendered oral findings of fact and conclusions of law, holding that defendants Wayne R. Hill and Cornelia D. Hill are jointly and severally liable to the plaintiff in the total amount of $1,180,223.77 on their notes and guaranty agreements and for the plaintiff's attorney's fees, and that defendant Rainbow

Ridge Resort, LLC is liable to the plaintiff in the amount of $144,848.30 on its note. In accordance therewith;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that pursuant to Rule 41.01 of the Tennessee Rules of Civil Procedure, the plaintiff's action for the judicial foreclosure of the Deed of Trust and the plaintiff's action against Tyler C. Huskey, Successor Trustee, are dismissed without prejudice to the refiling of the same.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Branch Banking and Trust Company, the plaintiff herein, is hereby granted and shall have and recover a judgment against defendants Wayne R. Hill and Cornelia D. Hill, jointly and severally, in the amount of $1,180,223.77, for the collection of which execution may issue if necessary.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Branch Banking and Trust Company, the plaintiff herein, is hereby granted and shall have and recover a judgment against defendant Rainbow Ridge Resort, LLC in the amount of $144,848.30, for the collection of which execution may issue if necessary.

The costs of this cause are taxed and assessed against the defendants. The Clerk & Master may mail the bill of costs to Andrew E. Farmer, counsel for the defendants, whose address appears below.

ENTER, this 1 day of Dec., 2017.

/s/
CHANCELOR

APPROVED FOR ENTRY:

/s/
W. Morris Kizer
(BPR No. 1571)
Gentry, Tipton & McLemore, P.C.
P.O. Box 1990
Knoxville, Tennessee 37901
(865) 525-5300
Attorney for Branch Banking and
Trust Company

/s/
Andrew E. Farmer for John Higgins, Attorney of Record for [Rainbow Ridge Resort, LLC, Wayne Hill and Cornelia Hill]
(BPR No. 26823)
Law Offices of Andrew E. Farmer
121 Court Avenue
Sevierville, Tennessee 37862
865-428-6737
Attorney for Rainbow Ridge Resort, LLC,
Wayne Hill and Cornelia Hill

/s/ w/ perm AF
W. Jeffrey Barnes
(FL Bar No. 746479)
W. J. Barnes, P.A.
1515 North Federal Highway
Suite 300
Boca Raton, Florida 33432
561-864-1067

Attorney for Rainbow Ridge Resort, LLC,
Wayne Hill and Cornelia Hill

APPENDIX G

IN THE CHANCERY COURT FOR SEVIER COUNTY, TENNESSEE

No.16-3-118

[Filed November 14, 2017]

BRANCH BANKING AND TRUST COMPANY,

Plaintiff,

v.

WAYNE R. HILL, et al.

Defendants,

and

CARROLL HARRELLSON,

Defendant/ Counter-Plaintiff/ Cross-Plaintiff/ Third-Party Plaintiff

v.

RAINBOW RIDGE RESORT LLC, RAINBOW RIDGE, LLC, BB&T COLLATERAL SERVICE CORPORATION,

BRANCH BANKING AND TRUST COMPANY,)
SYKES & WYNN, PLLC,)
WAYNE HILL, CORNELIA D. HILL,)
MORRIS KIZER, and APRIL BRYAN as)
representative of the Estates of)
FLOYD LAFOLLETTE, EDITH LAFOLLETTE)
and CAROLDENE LAFOLLETTE WHITE.)
)
Counter-Defendants/ Cross-Defendants/)
Third-Party Defendants.)
_____)

AMENDED ORDER AS TO REAL PROPERTY OF CARROLL HARRELLSON

Came the parties indicated below, by and through counsel, and announced their agreement to the Court regarding the Crossclaim, Counterclaim, and Third Party Claim of Carroll Harrellson ("Harrellson").

For the purposes of this Agreed Order, the defined term "Property" shall mean and refer to the following improved real property:

> SITUATE, LYING and BEING in the Fifth (5th) Civil District of Sevier County, Tennessee, being known and designated as **Unit 13 of Rainbow Ridge, Phase 2, a Planned Unit Development,** as shown on plat of record in **Large Map Book 9, Page 76,** Register's Office, Sevier County, Tennessee, to which map specific reference is hereby made for a more particular description.

TOGETHER with the right to the joint use of the 25 foot wide right of way as set out in deed of record in **Book 1373, Page 732,** Register's Office, Sevier County, Tennessee.

The defined term "Harrellson Deed" shall mean and refer to that certain General Warranty Deed from Rainbow Ridge, LLC to Carroll Harrellson, married, dated February 15, 2008, of record at **Book 3023, page 242** in the Sevier County Register of Deeds Office.

The defined term "BB&T Deed of Trust" shall mean and refer to that certain Tennessee Deed of Trust, Security Agreement, and Fixture Filing from Rainbow Ridge Resort, LLC, to BB&T Collateral Service Corporation, as Trustee, dated March 30, 2007, and of record at **Book 2787, Page 460**, in the Sevier County Register of Deeds Office.

The defined term "LaFollette Deed of Trust" shall mean and refer to all of the following: Deed of Trust from Wayne Hill and wife, Cornelia D. Hill to Sykes & Wynn, PLLC, as Trustee, dated March 17, 2004, and of record at **Book 2005, Page 511,** in the Sevier County Register of Deeds Office; Deed of Trust from Wayne Hill and wife, Cornelia D. Hill to Sykes & Wynn, PLLC, as Trustee, dated July 26, 2004, and of record at **Book 2071, Page 208,** in the Sevier County Register of Deeds Office; and Deed of Trust from Wayne Hill and wife, Cornelia D. Hill to Sykes & Wynn, PLLC, as Trustee, dated December 31, 2004, and of record at **Book 2154, Page 201,** in the Sevier County Register of Deeds Office.

The defined term "Phase I Property" shall mean and refer to the following real property: Situate, lying and being in the 5th Civil District of Sevier County, Tennessee, known as Unit 13 of Rainbow Ridge, a Planned Unit Development, as shown on plat of record in **Large Map Book 7**, **Page 181,** Register of Deeds Office, Sevier County, Tennessee, to which map specific reference is hereby made for a more particular description.

It is therefore, ORDERED ADJUDGED and DECREED as follows:

1. That fee simple title and ownership to the Property shall be and hereby is quieted and vested solely in Harrellson.

2. That the Harrellson Deed is hereby corrected and reformed to reference and provide that it conveys the Property, and not the Phase I Property, to Harrellson.

3. That the Harrellson Deed is further corrected and reformed by the deletion of the following sentence from the Harrellson Deed: "Subject to Declaration of Covenants, Conditions, Restrictions, and Easements for Rainbow Ridge, of record in Book 2248, Page 306".

4. That the BB&T Deed of Trust and the lien of the BB&T Deed of Trust, as well as any other lien of record by BB&T Collateral Service Corporation and/or Branch Banking and Trust Company, are released in full with respect to the Property, but no further or otherwise.

5. That the LaFollette Deed of Trust and the lien of the LaFollette Deed of Trust is released in full with respect to the Property, but no further or otherwise.

6. That all parties other than Harrellson and all others claiming by, through or under him, shall have no right, title or interest of any kind in and to the Property.

7. That fee simple title and ownership to the Phase I Property shall be and hereby is divested out of Harrellson.

8. That this Agreed Order may be recorded in the Sevier County Register of Deeds Office and shall serve to vest fee simple title and ownership of the Property solely and exclusively in Harrellson, and to divest title and ownership of Phase I Property from Harrellson.

9. That Rainbow Ridge, LLC, having been served with process, failed to file an answer or other responsive pleading to the Answer, Counterclaim, Cross-Claim, and Third-Party Complaint of Carroll Harrellson; accordingly, judgment by default for the relief and remedies specified herein is entered against Rainbow Ridge, LLC.

10. That the complaint filed by Branch Banking and Trust Company is voluntarily dismissed as to Harrellson, and only Harrellson.

11. That the Court finds there is no just reason for delay and it is, therefore, directed that the Clerk & Master shall enter this Agreed Order pursuant

to Rule 54.02 of the Tennessee Rules of Civil Procedure as a final judgment with respect to the matters set forth herein.

SO ORDERED this 14 day of Nov., 2017.

/s/
CHANCELLOR

APPROVED FOR ENTRY:

/s/
Oliver D. Adams (BPR # 026164)
Bart C. Williams (BPR # 028290)
HODGES, DOUGHTY & CARSON, PLLC
617 Main Street
P. O. Box 869
Knoxville, TN 37901-0869
(865) 292-2307
Attorney for Carroll Harrellson

/s/
Morris Kizer (BPR # 001571)
GENTRY, TIPTON & MCLEMORE
900 S. Gay St., St. 2300
Knoxville, TN 37902
(865) 525-5300
As Successor Trustee and attorney for Branch Banking and Trust Company, BB&T Collateral Service Corporation

/s/
John Frank Higgins (BPR #026845)
1230 Second Avenue South
Nashville, TN 37210
(615) 496-1127

Jeff Barnes, Esq. (FBN No. 746479)
W.J. Barnes, P.A.
1515 North Federal Highway, Suite 300
Boca Raton, FL 33432
(561) 864-1067
Attorneys for Wayne R. Hill, Cornelia D. Hill, and Rainbow Ridge Resort, LLC

/s/
Randolph Sykes (BPR # 000741)
Sykes & Wynn, PLLC
113 Joy Street
Sevierville, TN 37862
(865) 453-7118
Attorney for Sykes & Wynn, PLLC

/s/
Charles S. Sexton (BPR # 006501)
109 Parkway, Suite 2A
Sevierville, TN 37862
(865) 543-4125
Attorney for APRIL BRYAN, representative of the Estates of FLOYD LAFOLLETTE, EDITH LAFOLLETTE and CAROLDENE LAFOLLETTE WHITE.

/s/
Tyler C. Huskey (BPR # 021535)
GENTRY, TIPTON & MCLEMORE
900 S. Gay St., St. 2300
Knoxville, TN 37902
(865) 525-5300
As Successor Trustee

[*** *Certificate of Service Omitted for Purposes of this Appendix* ***]

APPENDIX H

U.S. Constitutional Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Constitutional Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial

officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or

emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Tennessee Code Title 35
Fiduciaries and Trust Estates § 35-5-118

(a) In an action brought by a creditor to recover a balance still owing on an indebtedness after a trustee's or foreclosure sale of real property secured by a deed of trust or mortgage, the creditor shall be entitled to a deficiency judgment in an amount sufficient to satisfy fully the indebtedness.

(b) In all such actions, absent a showing of fraud, collusion, misconduct, or irregularity in the sale process, the deficiency judgment shall be for the total amount of 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 creditor shall be entitled to a rebuttable prima facie presumption that the sale price of the property is equal to the fair market value of the property at the time of the sale.

(c) 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 property at the time of the foreclosure sale. If the debtor overcomes the presumption, the deficiency shall be 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 as determined by the court.

(d)(1) Any action for a deficiency judgment under this section shall be brought not later than the earlier of:

(A) Two (2) years after the date of the trustee's or foreclosure sale, exclusive of any period of time in which a petition for bankruptcy is pending; or

(B) The time for enforcing the indebtedness as provided for under §§ 28-1-102 and 28-2-111.

(2) Nothing contained in this section shall be construed as limiting a person entitled to bring such action from electing to sue on an indebtedness in lieu of, prior to, or contemporaneously with enforcement of a deed of trust or mortgage.

APPENDIX I

IN THE SUPREME COURT OF TENNESSEE

No.: E2018-00232-COA-R3-CV

[Filed April 26, 2019]

BRANCH BANKING AND TRUST COMPANY and CORNELIA D. HILL, his wife,	)
Plaintiff/Appellee,	)
v.	)
WAYNE R. HILL, CORNELIA D. HILL, AND RAINBOW RIDGE RESORT, LLC.	)
Defendants/Appellants	)

APPLICATION FOR PERMISSION TO APPEAL

Appellants, through undersigned counsel and pursuant to Tenn.R.App.P. 11, seek application to this Court for permission to appeal the final decision of the Court of Appeals of Tennessee at Knoxville (hereafter the "COA") to this Court, and state, pursuant to Tenn.R.App.P. 11(b), the following:

1. Date on Which the Judgment was Entered and Whether a Timely Petition for Rehearing Filed

The COA's Opinion were entered and filed on February 28, 2019, with a copy thereof being attached to this Application. No Petition for Rehearing was filed in the COA.

2. Questions Presented for Review and Applicable Standard of Review

This Application arises out of the COA's affirmance of the trial court's Final Judgment in a commercial deficiency and personal guarantor liability action. The COA specifically found that this is a case of first impression on the specific issue of whether, in interpreting Tenn. Code Ann. Sec. 35-5-118, the debtor's allegation of an inadequate foreclosure sales price under the debtor's statutory standard of "materially less" constitutes an affirmative defense (Opinion, page 15). The COA acknowledged that Sec. 35-5-118 "does not expressly set forth inadequacy of the foreclosure sales price as an affirmative defense" (Opinion, page 14).

The COA determined that the inadequacy of the foreclosure sales price under Sec. 35-5-118 is an affirmative defense that must either be properly pled prior to trial or tried by implied consent (Opinion, page 17). The COA acknowledged that the "traditional" way for the defendant to defeat the plaintiff's claim is by the assertion of an affirmative defense (Opinion, page 14). The COA did not, however, take the position that the "traditional" manner of asserting the defense is the exclusive manner in which to do so.

In making its determination, the COA committed two errors: first, by making inadequacy of foreclosure sale price an affirmative defense under the Statute (Sec. 35-5-118) when the Statute contains no such provision, the COA impermissibly added language to a statute which it cannot do as creating statutes is strictly the province of the legislature. This Court has held that a court is not free to add language to a statute nor can it vary the language of a statute. *Reunions v. Jackson-Madison Cnty. Gen. Hosp.*, 549 S.W.3d 77, 87 (Tenn. 2018).

The COA also did not provide for the assertion of the defense on cross-examination after the plaintiff opens the door on the subject of foreclosure sales price, which determination runs afoul of a party's Constitutional right to cross-examination. This Court held in *State v. Echols*, 382 S.W.3d 266-284-85, as follows:

> Cross-examination is a fundamental right afforded by the Confrontation Clause of the Sixth Amendment. A component part of this constitutional protection is the right to establish or to otherwise impeach the credibility of a witness. … The trial court abuses its discretion by unreasonably restricting a defendant's right to cross-examine a witness against him.

There is nothing in the Constitution which confines this right to only criminal matters. There is no issue that Appellee's witness Kizer was "against" Appellants, as by his testimony he sought to attach a combined liability of over $1,325,000.00 to Appellants. The COA's affirmance of the trial court's decision to preclude

Appellants from cross-examination of Appellee's witness Kizer constitutes an unreasonable restriction upon Appellants' Constitutional rights.

The questions presented for review herein are thus:

(a) whether the COA impermissibly added language to a Statute;

(b) whether, in interpreting Tenn. Code Ann. Sec. 35-5-118, the debtor's allegation of an inadequate foreclosure sales price under the debtor's statutory standard of "materially less" constitutes an affirmative defense;

(c) whether the COA's interpretation of the manner by which the defense of inadequacy of foreclosure sales price is raised precludes the assertion of the defense as part of cross-examination after the plaintiff raises the issue in its case-in-chief (especially as the plaintiff [Appellee here] had knowledge, prior to trial, that it intended to present evidence as to foreclosure sales price); and

(d) Whether the COA improperly restricted cross-examination and the application of the principle of "opening the door" to only criminal cases where there is no decisional law which does so and where the evidence proffered by Appellants was relevant to the issue of the adequacy of foreclosure sales price which issue was raised by Appellee's trial witness.

The applicable standard for review by this Court is presented in the discussion of the issues in section 4. of this Application.

3. Facts Relevant to Questions Presented

In a suit for a deficiency judgment, "Tennessee courts *apply* Tennessee Code Annotated Section 35-5-118". *Greenbank v. Sterling Ventures L.L.C.*, No. M2012-01312-COA-R3-CV (Tenn. App. 2012)(emphasis added). If a creditor forecloses upon the security interest in the collateral and conducts a commercially unreasonable sale, there is a presumption that the debtor is damaged to the extent of the deficiency claimed. It is the burden of the secured party to rebut this presumption, and the failure to rebut the presumption with evidence of fair market value in the record results in denial of the secured party's claims for a deficiency judgment. *R&J of Tennessee, Inc. v. Blankenship-Melton*, 166 S.W.3d 195, 210 (TN 2004), reversing trial court's entry of a deficiency judgment and citing *Decatur County Bank v. Smith*, No. CAW1999-02022-COA-R3-CV, 1999 WL 1336042 at *3 (Tenn. App. Dec. 27, 1999) and *In Re Frazier*, 93 B.R. 366, 372 (Bankr. M.D. Tenn. 1988).

Appellee presented a witness at trial (Morris Kizer, who was: (a) Plaintiff's counsel; (b) the attorney who conducted the foreclosure sales; (c) Plaintiff's fact witness at trial as to the foreclosure sales; and (d) was the Plaintiff's "expert witness") who testified as to the foreclosure sales and prices obtained for the properties sold, thus opening the door as to issues surrounding the manner by which the prices were obtained. The COA's affirmance of the trial court's ruling results in an impermissible preclusion of the right to cross-examination and a preclusion from presenting rebuttal

evidence of fair market value of the properties (which properties had been developed by Appellants).

The COA affirmed the lower court's ruling that evidence of the conduct of the foreclosure sales and the adequacy of the prices obtained for the properties was inadmissible. This Court has held that that even if evidence is inadmissible, a party may open the door to admission of that evidence, and a party commonly opens the door by raising the subject of that evidence at trial. *State v. Gomez*, 367 S.W.3d 237, 246 (Tenn. 2012). Tennessee law provides that after a witness has "opened the door", an opposing party should introduce evidence *on the same subject matter* that permits a party to respond to the act of another party by introducing otherwise inadmissible evidence. *State v. Burton*, M2016-00754-CCA-R3-CD (Tenn.App. 2017)(emphasis supplied).

This Court has held that evidence introduced at trial takes the form of testimony of live witnesses *who are subject to cross-examination. Regions Bank v. Thomas*, 532 S.W.3d 330, 352 (Tenn. 2017) citing *Nagerajan v. Terry*, 151 S.W.3d 166, 178 (Tenn.App. 2003). This Court has also held that "[w]hen a party raises a subject at trial, the party 'expand[s] the realm of relevance'; "the opposing party may be permitted to present evidence on the subject"; and further that "'opening the door' is an equitable principle that permits a party to respond to an act of another party by introducing otherwise inadmissible evidence". *State v. Gomez*, 367 S.W.3d 237, 246 (Tenn. 2012).

The COA's affirmance of the trial court's ruling is in direct contradiction to these established principles of

Tennessee law enunciated by this Court which are grounded upon principles of due process.

The COA's opinion fails to fully address Appellee's failure to present any evidence of providing notice of disposition of the collateral to Appellants. On their offer of proof, Appellants Wayne Hill and Cornelia Hill testified that they did not receive any notice of disposition of the collateral. The lower court took the position that Appellants waived their right to contest any issues as to the sale due to the claimed failure to raise such issues in their Affirmative Defenses.

A debtor may waive the right to notification of disposition of the collateral only by an agreement to that effect entered into and authenticated *after default*. *R&J of Tennessee, Inc. v. Blankenship*-Melton, 166 S.W. 3d 195, 200-01, citing *Tenn. Code Annotated* sec. 47-9-611. Appellee presented no evidence of any such agreement. Further, when a secured party undertakes to dispose of the collateral at a public sale, advertising of some sort should be conducted in order to increase competitive bidding and maximize proceeds. *R&J, supra* at 209, citing multiple cases as to insufficiency of notice and improper valuation of the collateral by the creditor instead of seeking an independent appraisal. The COA's opinion did not address these issues although they were briefed.

4. Reasons Supporting Review

Tenn.R.App.P. 11(a) sets forth a non-exclusive list of the character of reasons that will be considered in determining whether to grant permission to appeal, although the Rule specifically provides that the

enumerated factors are neither controlling nor fully measure the court's discretion. Three of these reasons apply here: (a) the need to secure uniformity of decision in view of the Court of Appeals' admission that this is a case of first impression and as the COA's Opinion contradicts established principles of law; (2) the need to secure settlement of important questions of law in view of the Court of Appeals' admission that this is a case of first impression and as the COA's affirmance of the trial court contradicts established principles of law of this Court; and (3) the need to secure settlement of questions of public interest.

The COA's Opinion admits that a trial court abuses its discretion when it applies an incorrect legal standard, reaches a decision which is illogical, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party (Opinion, page 10, citing *In Re Estate of Greenamyre*. 219 S.W.3d 877, 886 (Tenn.Ct.App. 2005). This Court has likewise held. *Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22, 42 (Tenn. 2005).

The COA's affirmance, which strains to create an exception to a statute and restrict the Constitutional right to cross-examination, results in the affirmance of a demonstrated abuse of discretion by the trial court which reached a decision which is illogical as it contradicts established principles of law of this Court, which thus resulted in an injustice to Appellants who respectfully seek permission to appeal this matter in this Court.

Dated April 26, 2019.

Respectfully Submitted

John Frank Higgins (No. 26845)
1230 Second Avenue South
Nashville, TN 37210
(615) 496-1127 (Tel)
(615)-255-6037 (Fax)

W. Jeffrey Barnes
W.J. Barnes, P.A.
1515 Federal Highway Suite 33432
(561) 864-1067 (Tel)
(561) 338-4840 (Fax)
Attorney for Rainbow Ridge
Resort, LLC
Wayne and Cornelia Hill
(Admitted PHV in COA)

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2019, that I am causing the foregoing to be served by certified mail with electronic tracking to the following:

W. Morris Kizer (BPR. No. 1571)
Gentry, Tipton, & McLemore, P.C.
P.O. Box 1990
Knoxville, Tennessee 37901
Attorney for Branch Banking and
Trust Company (Appellee)

John Higgins