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STATE OF MONTANA
Case Number: DA 22-0057

IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 22-0057

THOMAS PENNELL and MINDY PENNELL,

Plaintiffs and Appellants,

-vs-

NATIONSTAR MORTGAGE, LLC d/b/a MR. COOPER; FIRST AMERICAN TITLE COMPANY OF MONTANA, INC.; DANIEL INMAN; and JOHN DOES 1-10,

Defendants and Appellees.

On Appeal from the Montana Second Judicial District Court, Silver Bow County

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MONTANA LAND TITLE ASSOCIATION'S *AMICUS CURIAE* BRIEF

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INTRODUCTION

This action involves a legal issue that will affect Montana's land title industry, including its members' ability to delegate duties and ensure compliance under the Montana Small Tract Financing Act (the "STFA" or the "Act"). As such, the Montana Land Title Association ("MLTA") entered this matter as *amicus curiae* because it has been representing the statewide interests of the land title industry, its customers, and those that rely on Montana's real estate laws, title laws, and recording systems dating back to 1909. The MLTA is a member organization consisting of 81 title insurance agencies across Montana, as well as 6 title insurance underwriters and 14 associate members. As such, MLTA's members conduct or participate in the vast majority of all real estate transactions in Montana.

The purposes and objectives of the MLTA are to: promote the safe and efficient transfer of ownership and interest in real property within the free enterprise system; provide information and education to consumers, to those who regulate, supervise, or enact legislation affecting the land title evidencing industry, and to its members; maintain liaison with users of the services provided by MLTA's members and with the government; and maintain professional standards and ethics. More importantly, MLTA's membership regularly conducts transactions under the STFA, including through acting as trustees. The District Court's ruling affects MLTA's

members throughout Montana, and therefore, the MLTA seeks to represent its members' interests by advocating for this Court to affirm the decision below.

Through this action, and stemming from their arguments on appeal, Plaintiffs/ Appellants Thomas and Mindy Pennell (the "Pennells") are seeking to overly complicate the mechanisms and process of the STFA by eliminating a trustee's capacity to delegate tasks to agents in the efficient completion of the notice requirements prior to conducting a nonjudicial foreclosure sale. Such an interpretation of the STFA would needlessly impose requirements on indenture trustees that run contrary to the Act's purpose. Namely, the STFA was meant to reduce the strain on the financing of improvements upon small tracts. Removing an indenture trustee's ability to delegate duties would drastically curtail a trustee's ability to comply with the requirements of the STFA, and the resulting inability to effectively foreclose on properties, when necessary, would harm the overall process of financing small tract improvements.

As such, the District Court's interpretation of the STFA was proper and should stand. This Court should affirm the summary judgment granted in favor of Defendant/Appellee Nationstar Mortgage LLC ("Nationstar").

AMICUS **STANDARD OF REVIEW**

An *amicus curiae*—meaning "friend of the court"—is "[a] person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a

brief in the action because that person has a strong interest in the subject matter." *Reichert v. State ex rel. McCulloch*, 2012 MT 111, ¶ 25, 365 Mont. 92, 278 P.3d 455 (quoting *Black's Law Dictionary* 98 (Bryan A. Garner ed., 9th ed., Thomson Reuters 2009)); *see also* Mont. R. App. P. 2(2) ("Amicus curiae. One who is not a party, but who, upon invitation or leave of the supreme court granted on motion, files a brief in a pending proceeding because of a strong interest in the subject matter."). An *amicus curiae*, "whether attorney or layman, ... [may] inform the court as to facts or situations that may have escaped consideration or remind the court of legal matter which has escaped its notice and regarding which it appears to be in danger of going wrong." *Reichert*, ¶ 25 (quoting *State ex rel. Bennett v. Bonner,* 123 Mont. 414, 420, 214 P.2d 747, 751 (1950)).

With that, however, "an amicus curiae has no control over the proceedings; he must take the case as he finds it, and it is within the discretion of the court as to whether it will accept the advice or suggestions of an amicus curiae." *Id.* (citing *Bennett,* 123 Mont. at 421, 214 P.2d at 751). The general rule, therefore, is that "amici curiae are not parties and cannot assume the functions of parties, nor create, extend or enlarge issues," and this Court only considers amici's arguments "insofar

as they coincide with the issues raised by the parties to the action."[1] *Id.*, ¶ 26 (citations omitted).

SUMMARY OF ARGUMENT

MLTA, as *amicus curiae*, separately advocates that the District Court's grant of summary judgment to Nationstar should be affirmed on three grounds. First, the Pennells' interpretation of the STFA's notice requirements and trustee duties does not comport with either the language of the statute or this Court's case law on the issue. Second, the Pennells' interpretation would directly undermine the STFA's policy goals, which have been emphasized on multiple occasions by this Court. And third, the District Court's interpretation of the Act reflects the general consensus among other jurisdictions regarding their respective statutory schemes for

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[1] The Court has, however, deviated from this rule in rare instances. *See e.g. Crabtree v. Mont. State Lib.,* 204 Mont. 398, 404, 665 P.2d 231, 234-35 (1983) ("While it is not our custom to address separately issues not raised by the parties, we depart from that practice here because of the widespread impact that the Library and amicus argue our opinion will have on the hiring practices within state and local levels of government."); *Schwinden v. Burlington N., Inc.,* 213 Mont. 382, 389-90, 397-98, 691 P.2d 1351, 1355, 1358-59 (1984) (addressing an issue raised by amicus—namely, whether to overrule a decision we had issued two years earlier—because the prior decision had created an "emergency" for the counties due to the resulting reduction in their tax revenue, and the prior decision was still "the centerpiece of the problem" faced by the Court in *Schwinden*); *State Compen. Ins. Fund v. Sky Country, Inc.,* 239 Mont. 376, 378-79, 780 P.2d 1135, 1136-37 (1989) (declining to address the parties' constitutional arguments in light of an antecedent and potentially dispositive statutory question raised by amicus).

nonjudicial foreclosure sales. Therefore, the District Court correctly interpreted the STFA.

ARGUMENT

I. THE PENNELLS MISINTERPRET HOW THE TRUSTEE MUST PERFORM THE FORECLOSURE NOTICE REQUIREMENTS OF THE STFA.

The Pennells argue that Nationstar and its agents failed to comply with the requirements of the STFA based on their drastic interpretation of the Act's notice requirements regarding exactly what duties a trustee may delegate during the presale process. (*See* Appellants' Br. at 4-14.) Namely, they assert Nationstar and its Trustee improperly delegated the statutory duties set forth in the STFA in three ways: (1) the Trustee *itself* did not send the notice of sale to the Pennells – it instead requested the Mackoff Kellogg firm to have one of its employees mail the notice of sale to the Pennells as required by Mont. Code Ann. § 71-1-315(1)(a); (2) the Trustee did not either post the notice of sale on the property *itself* or delegate the duty of posting the notice of sale to a sheriff or constable – it instead utilized a private process server to post the notice as required by Mont. Code Ann. § 71-1-315(1)(b); and (3) the Trustee *itself* did not publish the notice of sale – instead, the Trustee again hired the Mackoff Kellogg firm to publish the notice of sale as required under Mont. Code Ann. § 71-1-315(1)(c). (*Id.* at 7-8.) As a result, the Pennells proclaim that the sale of their property is invalid and void *ab initio.* (*Id.* at 1.)

To begin, the Pennells **do not** allege or argue that any of the notice requirements under Mont. Code Ann. § 71-1-315 were omitted or substantively incorrect (*i.e.,* each task was in fact completed). They merely assert that the Trustee could not assign those certain tasks to its agents based on their interpretation of the statute. The Pennells' interpretation, however, fails to accurately reflect the language of Mont. Code Ann. § 71-1-315, especially in context with Montana's general agency statutes, and runs contrary to Montana precedent and other persuasive authorities.

The operative statute at issue in this case provides the following:

> A trust deed may be foreclosed by advertisement and sale in the following manner:
>
> (1) The **trustee shall give notice of the sale in the following manner**:
>
> (a) At least 120 days before the date fixed for the trustee's sale, **a copy of the recorded notice of sale must be mailed by certified mail** to:
>
> (i) the grantor, at the grantor's address as set forth in the trust indenture or if the grantor's address is not set forth in the trust indenture at the grantor's last-known address;
>
> …
>
> (b) At least 20 days before the date fixed for the trustee's sale, **a copy of the recorded notice of sale must be posted in some conspicuous place on the property to be sold**. **Upon request of the trustee**, the notice of sale must be posted by a sheriff or constable of the county in which the property to be sold is located.

> (c) **A copy of the notice of sale must be published in a newspaper of general circulation** published in any county in which the property or some part of the property is situated, at least once each week for 3 successive weeks. If there is no newspaper of general circulation published in the county, then copies of the notice of sale must be posted in at least three public places in each county in which the property or some part of the property is situated. The posting or the last publication must be made at least 20 days before the date fixed for the trustee's sale.
>
> …

Mont. Code Ann. § 71-1-315 (emphasis added).

The plain language of the notice provision simply does not support the Pennells' restrictive position on the trustee's ability to delegate the required tasks. Namely, Mont. Code Ann. § 71-1-315(1) generally states that "[t]he trustee shall give notice of the sale." The methods of providing notice in the following subsections then generally state what tasks must be completed, without any explicit mandate whatsoever as to the exact person or entity that must provide the notice, including a mandate that the trustee *itself* must complete those tasks. *See, e.g.,* Mont. Code Ann. § 71-1-315(1)(a) ("At least 120 days before the date fixed for the trustee's sale, a copy of the recorded notice of sale must be mailed by certified mail …"). Moreover, the Pennells interpretation of Mont. Code Ann. § 71-1-315(1)(b)'s posting requirement ignores how the provision is actually structured. It indeed mandates that "the notice of sale must be posted by a sheriff or constable of the county in which the property to be sold is located," but only "[u]pon request of the

trustee." *See* Mont. Code Ann. § 71-1-315(1)(b). Otherwise, the provision **does not** state that the posting may **only** be accomplished by a sheriff or constable. To adopt the Pennells' interpretation of Mont. Code Ann. § 71-1-315 would be to insert substantive terms into the statute that do not exist, in violation of Montana's principles of statutory construction. *See* Mont. Code Ann. § 1-2-101.

Further, the Pennells' interpretation would run contrary to Montana law establishing that a principal can authorize an agent to act on behalf of the principal, and the agent, in turn, can perform any act that the principal could perform. Specifically, Mont. Code Ann. § 28-10-105(2) provides that "[e]very act that, according to this code, may be done by or to any person may be done by or to the agent of the person for that purpose unless a contrary intention clearly appears." As no "contrary intention clearly appears" in Mont. Code Ann. § 71-1-315(1), the trustee was free to utilize its agents to complete the notice requirements.

Notwithstanding the plain and logical reading of the statute, this Court has indeed established precedent that an indenture trustee may delegate the notice duties found under Mont. Code Ann. § 71-1-315(1). In *Knucklehead Land Co. v. Accutitle, Inc.*, 2007 MT 301, ¶¶ 4, 11-16, 340 Mont. 62, 172 P.3d 116, the Court held that an indenture trustee **did not** breach its duties under the STFA where the trustee delegated its notice duties to a law firm. *See also Pilgeram v. Greenpoint*, 2013 MT 354, ¶ 32, 373 Mont. 1, 12, 313 P.3d 839, 846 (Cotter, J., dissenting). Based on the

Knucklehead decision, the U.S. District Court of Montana has repeatedly ruled that an indenture trustee may delegate its duties under Mont. Code Ann. § 71-1-315. *See Diehl v. Recontrust Co.*, No. CV 09-169 M-DWM-JCL, 2010 WL 2175894, at *3-4 (D. Mont. Apr. 22, 2010), *report and recommendation adopted sub nom. Diehl v. Reconstruct Co.*, No. CV 09-169-M-DWM, 2010 WL 2178513 (D. Mont. May 27, 2010), *aff'd sub nom. Diehl v. Nw. Tr. Servs. Inc.*, 420 F. App'x 716 (9th Cir. 2011); *Joseph v. Bank of Am. N.A.*, No. CV-11-129-BLG-RFC, 2012 WL 6100037, at *1-2 (D. Mont. Dec. 7, 2012); *Heffner v. Bank of America,* 2012 U.S. Dist. LEXIS 64668, at *11-12, 2012 WL 1636815, at *4-5 (D. Mont. May 8, 2012); *In re Hofman*, 488 B.R. 157, 167 (Bankr. D. Mont. 2013).

As such, both a plain reading of the STFA's notice statute and Montana case law establish that the District Court correctly interpreted the Act's notice requirements.

II. THE EXPLICIT POLICY GOALS OF THE STFA ESTABLISH THAT THE DISTRICT COURT'S RULING WAS PROPER.

The Montana Legislature enacted the STFA based on pointed policy goals to streamline and reduce obstacles to the foreclosure process for the benefit of both lenders and creditors. To begin, the Act provides the following policy statement:

> Because the financing of homes and business expansion is essential to the development of the state of Montana and because financing of homes and business expansion, usually involving areas of real estate of not more than 40 acres, has been restricted by the laws relating to mortgages of real property and because more financing of homes and

> business expansion is available if the parties can use security instruments and procedures not subject to all the provisions of the mortgage laws, it is the public policy of the state of Montana to permit the use of trust indentures for estates in real property of not more than 40 acres as provided in this part.

Mont. Code Ann. § 71-1-302.

This Court has gone on to further expound on the background and goals of the STFA. According to *First State Bank of Forsyth v. Chunkapura,* 226 Mont. 54, 734 P.2d 1203 (1987), the Act was originally introduced to reduce the strain on the financing of improvements upon small tracts. The Court's decision in *Knucklehead* then summarized as follows:

> Prior to passage of the Act, banks and investors were hesitant to invest in small tracts because when a loan financed by a standard mortgage went into default, funds were obstructed and possession of the property was prohibited for the statutory one-year period of redemption. *Chunkapura,* 226 Mont. at 57, 734 P.2d at 1205. The Act struck a compromise between investors and debtors whereby debtors gave up their rights to possession and redemption while lenders gave up their right to deficiency judgment upon default. *Chunkapura,* 226 Mont. at 57, 734 P.2d at 1205. The result was the trust indenture, whereby a trustee could avoid judicial proceedings and foreclose on property by advertisement and sale. Section 71-1-313, MCA. Under this option, the trustee is subjected to strict notice requirements before crying the sale, and the purchaser is entitled to possession of the property ten days after the sale. Sections 71-1-313, 315, 319, MCA. **In sum, the Act streamlined and reduced obstacles to the foreclosure process**.

Knucklehead, ¶ 13 (emphasis added). And with the enactment of the STFA, this Court has observed as far back as 1987 that "[i]t may be safely said, although it does not appear in this record, that in the time since the enactment of the Small Tract

Financing Act, the use of trust deeds for security purposes has become nearly exclusive in this state." *Chunkapura*, 226 Mont. at 58, 734 P.2d at 1205.

In the well-defined importance of the STFA's policy goals, the Pennells' asserted interpretation of the notice procedures fails even further. They seek to insert additional restrictions on indenture trustees' ability to delegate tasks, which would needlessly and illogically complicate the nonjudicial foreclosure process. Such additional limitations would run directly counter to the STFA's purpose of streamlining and reducing obstacles to the foreclosure process. *See Knucklehead*, ¶ 13. Further, the Pennells' interpretation of the notice provisions would be unreasonable in light of the Act's policy goals while elevating form over substance, in violation of well-established maxims of jurisprudence. *See* Mont. Code Ann. § 1-3-233 ("Interpretation must be reasonable."); Mont. Code Ann. § 1-3-219 ("The law respects form less than substance.").

Consequently, the Pennells' advocated interpretation of the STFA's notice duties should be rejected, while the District Court's interpretation should be adopted in accordance with the purpose and goals of the Act.

III. OTHER JURISDICTIONS HAVE REJECTED SUCH HARSH INTERPRETATIONS OF NONJUDICIAL FORECLOSURE NOTICE PROVISIONS AS ASSERTED BY THE PENNELLS.

The Montana Supreme Court has previously looked to the case law of other states when interpreting the STFA. *See Chunkapura*, 226 Mont. at 60-62, 734 P.2d

at 1206-08 (analyzing similar statutes and related case law from Washington, California, Oregon, Arizona, Utah, Alaska, and Idaho). Accordingly, such extra jurisdictional authorities may be instructive for resolving the present dispute. And while the specific issue at bar has only been considered in a small number of states, those courts have largely sided with the District Court's ruling in this case.

The State of Washington has a Deeds of Trust Act, similar to Montana's Small Tract Financing Act. Wash. Rev. Code § 61.24.005-.24.190. To initiate foreclosure on residential real property, the Washington Act requires two statutory notices: a notice of default and a notice of sale. Wash. Rev. Code § 61.24.030. Either the beneficiary or the trustee may transmit the notice of default. *Id.* at § 61.24.030(8). With that, however, the Washington Court of Appeals held in *McAfee v. Select Portfolio Servicing, Inc.*, 193 Wash. App. 220, 229, 370 P.3d 25, 30 (2016), that a "duly authorized agent" may act on behalf of a beneficiary or trustee to administer and complete the notice of sale provisions without violating the act. *See also Bain v. Metro. Mortg. Grp., Inc.*, 175 Wash. 2d 83, 106, 285 P.3d 34, 45 (2012) ("nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note").

Likewise, Texas courts have long held that foreclosure sale notice duties may be delegated to authorized agents. For example, the Texas Court of Appeals held in *Givens v. Midland Mortg. Co.*, 393 S.W.3d 876, 880-81 (Tex. App. 2012), that a law

firm retained by a lender could deliver notice of a foreclosure sale that was required to be provided by the lender or trustee. (Citing Tex. Prop. Code Ann. § 51.0025). *See also Smith v. San Antonio Joint Stock Land Bank of San Antonio*, 130 S.W.2d 1070 (Tex. Civ. App. 1939), *writ refused* (that substitute trustee under deed of trust did not in person post notices of the sale of realty, but caused sheriff to do so, did not constitute a violation of the rule which forbids a trustee to delegate to another his trust authority, since the posting of the notices was but a "ministerial act").

As for other states, Georgia law also recognizes that agents, including a law firm, are permitted to complete the requisite notice provisions on behalf of the lender for a foreclosure sale. *See Carr v. U.S. Bank, NA*, 534 F. App'x 878, 882 (11th Cir. 2013) (citing *Reese v. Provident Funding Assoc., LLP,* 317 Ga. App. 353, 730 S.E. 2d 551 (2012) (quoting with approval that it is "of no consequence who actually sends the notice, and that task may properly be delegated to a servicing agent (or, as is often the case, an attorney)" (quotation omitted)), *vacated and remanded on other grounds,* No. S12C2028 (Ga. May 20, 2013)).

It may be stated therefore, as a broad general policy among the foregoing states, the lender/trustee has the option of delegating the various notice duties to authorized agents, including law firms, without running afoul of the respective foreclosure sale statutes. This generally recognized policy comports with the

District Court's interpretation of the STFA, and it should likewise be affirmed by this Court.

CONCLUSION

For the reasons stated herein, as well as those asserted by Nationstar in its answer brief, MLTA respectfully requests that this Court reject the Pennells' interpretation of the STFA's notice requirements and affirm the District Court's grant of summary judgment to Nationstar.

DATED this 8th day of July, 2022.

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CERTIFICATE OF COMPLIANCE

I certify under Mont. R. App. P. 11(4)(e) that this brief is double-spaced, has a proportionally-spaced typeface of 14 points, and contains 3,428 words as calculated by Microsoft Word, excluding caption, certificate of compliance, tables of contents and authorities.

By: *_/s/ Jordan W. FitzGerald_*

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