

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
January 20, 2015 Session

**ROBERT W. HALLIMAN ET AL. V. HERITAGE BANK ET AL.**

**Appeal from the Circuit Court for Montgomery County  
No. CT111370     Ross H. Hicks, Judge**

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**No. M2014-00244-COA-R3-CV – Filed April 30, 2015**

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After foreclosing on three lots securing three loans, the mortgagee, Heritage Bank, sought to satisfy the outstanding deficiency by foreclosing on the debtors' family-owned property that additionally secured these obligations. To prevent the impending foreclosure, the debtors commenced this action contending they are not liable for the deficiency because the properties sold at foreclosure for an amount materially less than their fair market value. In its answer, the bank asserted a counterclaim seeking a deficiency judgment and attorneys' fees. At the close of the debtors' case-in-chief, the bank moved for involuntary dismissal pursuant to Tenn. R. Civ. P. 41.02(2). The trial court granted the motion, finding that the debtors failed to prove the fair market value of the three properties at the time of each foreclosure was materially less than the foreclosure sale prices; therefore, the debtors failed to overcome the presumption afforded by Tenn. Code Ann. § 35-5-118(b) that the foreclosure sale prices equaled the fair market value. The court then conducted a trial on the bank's counterclaim for the deficiency and awarded the bank a judgment of \$111,115.66. The trial court also awarded attorney's fees in the amount of \$55,000, which was substantially less than the bank requested. Both parties appeal. The debtors contend the trial court erred in dismissing their claim because they presented sufficient proof that the sale prices were materially less than fair market value; they also contend the bank was not entitled to recover its attorneys' fees. The bank contends the trial court erred by reducing its fee application. We have determined the debtors failed to prove that the sales price for each of the foreclosed properties was materially less than their fair market value at the time of each sale, and we find no error with the award of attorneys' fees. Accordingly, we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Justin Cole Sensing, Clarksville, Tennessee, for the appellants, Robert W. Halliman and Mal Son Halliman.

Joy Anne Boyd and Jonathan Cole, Nashville, Tennessee, for the appellees, Heritage Bank and Michael F. Stalls.

## OPINION

On December 1, 2006, David Reese Construction, LLC, (“DRC”) a general contracting company that builds residential homes, entered into three construction loan agreements with Heritage Bank for the construction of three new homes in Riverbend Landing Subdivision in Clarksville. Each loan was evidenced by a promissory note and secured by a separate lot. The amount loaned for each was \$164,799 for Lot 101; \$211,200 for Lot 102; and \$184,000 for Lot 106.

Construction of homes on each lot was completed by mid-2007; however, DRC was unable to sell the homes and, as a result, failed to pay the notes when they first became due. The company entered into three separate Modification Agreements with Heritage Bank which extended the maturity dates on the foregoing notes to June 30, 2009.

When June 30 arrived, DRC was unable to satisfy any of its obligations, and the bank agreed to enter into another three Modification Agreements to extend the maturity dates to December 31, 2009. Also at this time, Robert Halliman, a managing member of DRC,<sup>1</sup> requested to obtain three new loans with which to construct three residential homes with committed buyers. Heritage Bank approved these loans on the condition that Mr. Halliman provide additional collateral in the form of a \$30,000 certificate of deposit and that he and his wife, Mal Son Halliman, execute a deed of trust pursuant to which their forty-acre tract of undeveloped land in Cumberland County was pledged as additional security for DRC’s obligations.<sup>2</sup> This deed of trust included a cross-collateralization clause permitting Heritage Bank to foreclose upon it should DRC default on any loan agreement it had with the bank. Mr. Halliman additionally executed a guaranty agreement with Heritage Bank, personally guaranteeing all of DRC’s present and future indebtedness including, specifically, the indebtedness on the first three construction loans.

When DRC did not satisfy its obligations on the three loans when they became due on December 31, 2009, Heritage Bank declared the notes to be in default and gave Mr.

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<sup>1</sup> DRC was founded by David Reese in 2001, and, in 2002, when the company reformed as an LLC, Mr. Reese’s stepfather, Robert Halliman, became a managing member.

<sup>2</sup> DRC satisfied these three promissory notes executed by the Hallimans; thus, these loans are not at issue in this appeal.

Halliman notice as the guarantor of all three notes. When Mr. Halliman did not cure the default, Heritage Bank initiated foreclosure proceedings on Lots 101, 102 and 106.

The lots were sold at three separate foreclosure proceedings and Heritage Bank purchased each of the properties. The foreclosure sale prices were as follows: \$180,000 for Lot 101; \$150,000 for Lot 102; and \$185,600 for Lot 106. Because the foreclosure sale prices did not fully satisfy the amounts due and owing on each note, Heritage Bank sought to satisfy the outstanding deficiency by foreclosing on the Hallimans' family owned forty-acre tract. In an effort to enjoin the initiation of foreclosure proceedings, Mr. Halliman, Mrs. Halliman, and DRC, (collectively "Plaintiffs"), filed suit against Heritage Bank and Michael Stalls, senior vice president of Heritage Bank, (collectively "Defendants"), seeking, *inter alia*, to invalidate the forty-acre deed of trust.<sup>3</sup> Heritage Bank filed an answer and additionally asserted breach of contract counterclaims based on Plaintiffs' collective default on the three construction loans in which it sought a deficiency judgment and costs of collection including attorneys' fees.

Trial took place on June 4, 2013. Plaintiffs argued that the deed of trust on the forty-acre tract was invalid and that Heritage Bank was not entitled to a deficiency judgment because the foreclosure sale prices of the properties were materially less than their fair market value. In support thereof, Plaintiffs relied on the testimony of Mr. Halliman that the fair market value of the three properties, calculated at \$93 per square foot, was \$643,793.<sup>4</sup> Plaintiffs also introduced evidence to establish that Heritage Bank sold the properties within seven months of foreclosure for a total of \$590,300.

At the close of Plaintiffs' case-in-chief, Defendants moved to dismiss all of Plaintiffs' claims pursuant to Tenn. R. Civ. P. 41.02(2). The trial court granted the motion, finding that there was no proof that the deed of trust was void or otherwise unenforceable and that Plaintiffs failed to submit proof of the fair market value of the properties at the time of each foreclosure sale. Immediately thereafter, the bank put on proof in support of its counterclaims. Through Mr. Stalls' testimony, the bank introduced the notes, established that they were in default, and established the amount of the deficiency, including interest, all of which was unrebutted. At the close of proof, the trial court ruled that Heritage Bank was entitled to a deficiency judgment in the amount of \$111,115.66 plus its legal expenses. The court instructed Defendants to submit an affidavit and documentation supporting their request for attorneys' fees and expenses, and an order memorializing its findings.

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<sup>3</sup> Plaintiffs brought several additional claims including a claim pursuant to the Tennessee Consumer Protection Act and a claim for intentional infliction of emotional distress.

<sup>4</sup> Specifically, Mr. Halliman testified that Lot 101 had a fair market value of \$227,478, that Lot 102 had a fair market value of \$215,900, and that Lot 106 had a fair market value of \$200,415.

Defendants filed a proposed order along with billing invoices and the affidavit of attorney Jonathan Cole which stated that Defendants incurred \$93,415 in legal fees and expenses. The trial court reviewed the invoices supporting Mr. Cole's figures in his affidavit and awarded Heritage Bank \$55,000 in attorneys' fees and expenses. This appeal followed.<sup>5</sup>

Plaintiffs present two issues for our review. One, they contend the trial court erred in granting Defendants' Tenn. R. Civ. P. 41.02(2) motion to dismiss. Two, they contend the court erred in awarding attorneys' fees in the amount of \$55,000. For its part, Heritage Bank contends the court erred in reducing its application for attorneys' fees from \$93,415 to \$55,000.

## ANALYSIS

### I. TENN. R. CIV. P. 41.02(2)

In an action tried without a jury, the defendant may move for dismissal after the plaintiff has closed its proof "on the ground that upon the facts and the law the plaintiff has shown no right to relief." Tenn. R. Civ. P. 41.02(2). A motion for involuntary dismissal pursuant to Rule 41.02(2) challenges the sufficiency of the plaintiff's proof. *Burton v. Warren Farmers Co-op.*, 129 S.W.3d 513, 520 (Tenn. Ct. App. 2002); *Smith v. Inman Realty Co.*, 846 S.W.2d 819, 821 (Tenn. Ct. App. 1992). A claim may be dismissed pursuant to a Rule 41.02(2) motion if, based on the law and the evidence, the plaintiff has failed to demonstrate a right to the relief it is seeking. *Burton*, 129 S.W.3d at 520 (citing *City of Columbia v. C.F.W. Constr. Co.*, 557 S.W.2d 734, 740 (Tenn. 1977)). Motions under Rule 41.02(2) require less certainty than motions for directed verdict under Rule 50. *Id.* (citing *Inman Realty Co.*, 846 S.W.2d at 822). Thus, a court faced with a Rule 41.02(2) motion need only impartially weigh and evaluate the plaintiff's evidence just as it would after all the parties had concluded their cases and may dismiss the plaintiff's claims if the plaintiff has failed to make out a prima facie case by a preponderance of the evidence. *Id.* at 520-21 (citing *Thompson v. Adcox*, 63 S.W.3d 783, 791 (Tenn. Ct. App. 2001)).

When a motion for involuntary dismissal pursuant to Rule 41.02(2) is presented, the trial judge may determine the facts and "render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court grants the motion for involuntary dismissal, the court shall find the facts specially and shall state separately its conclusion of law and direct the entry of the appropriate judgment." Tenn. R. Civ. P. 41.02(2).

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<sup>5</sup>Plaintiffs do not appeal the trial court's ruling that the deed of trust securing the family owned forty-acre lot was valid and enforceable. Plaintiffs contend that they provided sufficient evidence to prove that the foreclosure sale prices were materially less than fair market value; thus, they assert that the dismissal of their claim that no deficiency is owing was error.

The standard by which the appellate court reviews a trial court's grant of a Rule 41.02 involuntary dismissal is governed by Tenn. R. App. P. 13(d). *Building Materials Corp. v. Britt*, 211 S.W.3d 706, 711 (Tenn. 2007); *Burton*, 129 S.W.3d at 521. This is because the trial court has used the same reasoning to dispose of the motion that it would to make a final decision at the close of all the evidence. *Burton*, 129 S.W.3d at 521. Thus, we review the record on appeal de novo with a presumption that the trial court's factual findings are correct, and we will affirm the trial court's decision unless the evidence preponderates against the trial court's factual determinations or unless the trial court has committed an error of law affecting the outcome of the case. *Id.* We will also give great weight to the trial court's assessment of the evidence because the trial court is in a much better position to evaluate the credibility of the witnesses. *Id.*

Plaintiffs contend that they presented sufficient evidence to survive the motion for involuntary dismissal and show that the foreclosure prices of the properties were materially less than fair market value. Defendants argue that Plaintiffs failed to carry their burden of proof because they did not introduce sufficient evidence to overcome the statutory presumption that the foreclosure price was equal to the fair market value of the property.<sup>6</sup>

When a foreclosure sale of real property secured by a deed of trust fails to satisfy an indebtedness, the creditor may recover a "deficiency judgment in an amount sufficient to satisfy fully the indebtedness." Tenn. Code Ann. § 35-5-118(a) (2010). 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 (which is not alleged here), "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) (2010). 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) (2010);<sup>7</sup> *see also Lost Mountain Dev. Co. v. King*, No. M2004-02663-COA-R3-CV, 2006

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<sup>6</sup> Defendants contend that Plaintiffs "did not offer any substantive argument on the 'materially less' issue at trial," and, therefore, Plaintiffs waived this issue. We respectfully disagree because Plaintiffs' counsel stated in opening argument that Plaintiffs intended to offer evidence that the subject properties sold for materially less than fair market value.

<sup>7</sup> Tenn. Code Ann. § 35-5-118 was enacted pursuant to 2010 Tenn. Pub. Acts, ch. 1001, § 2. Section 2 of the act states that it shall apply to all trustee or foreclosure sales of real property secured by a

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.”).

At the close of Plaintiffs’ case-in-chief, upon the motion of Defendants to dismiss Plaintiffs’ claims pursuant to Tenn. R. Civ. P. 41.02, the trial court held:

With respect to the issue of damages, the applicable statute, Tenn. Code Ann. § 35-5-118, required the Hallimans to prove by a preponderance of the evidence that the properties sold for an amount materially less than the fair market value at the time of foreclosure in order to overcome the presumption that the properties at issue (RiverBend Landing Lots 101, 102, and 106) were sold for an amount materially less than the fair market value. Based on the testimony and proof presented at trial, the Court finds that Plaintiffs failed to produce any evidence about the fair market value of the properties at issue at the time of the foreclosure sales.

Plaintiffs argue that sufficient evidence was presented, and, thus, the dismissal of their claim that the properties sold for an amount materially less than the fair market value was error. In support of this assertion, Plaintiffs rely on the testimony of Mr. Halliman who opined that the fair market value of all three properties was \$643,793; they also rely on the fact that Heritage Bank sold the properties months later for a total of \$590,300. Defendants counter by asserting that Mr. Halliman’s testimony lacks a proper foundation for it was based on the value of other properties in the neighborhood that were not comparable to the subject properties; as for the Bank’s subsequent sales, Defendants point to the fact that none of the sales were “at the time of the foreclosure sale.” Instead, they were months later; thus, the subsequent sales are not relevant.

Mr. Halliman, who is a licensed real estate agent and contractor, as well as a full-time college professor at Austin Peay State University, testified that the fair market value of the properties should be based on a value of \$93 per square foot. He testified that he based this value on the average price for which properties within the same neighborhood had sold within a thirty-day window before or after the date of foreclosure, a practice that was customary among those in residential construction and investment industries. As he explained it, “I did the fair market value calculations the way any other realtor would do. They take the sales price per square foot for homes in the immediate area at the time

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deed of trust for which the first foreclosure publication is given on or after September 1, 2010. Although the record provides conflicting dates for the foreclosure sales, suggesting that one or two of the sales may have occurred prior to September 1, 2010, the parties informed the court at trial that Tenn. Code Ann. § 35-5-118 applied, and the issues were tried on that standard without objection. Prior to the 2010 enactment, the debtor was required to show, by a preponderance of the evidence, that the foreclosure sale price was “grossly inadequate” as compared to the fair market value of the property. *GreenBank v. Sterling Ventures, L.L.C.*, No. M2012-01312-COA-R3-CV, 2012 WL 6115015, at \*6 (Tenn. Ct. App. Dec. 7, 2012); *see also Duke v. Daniels*, 660 S.W.2d 793 (Tenn. Ct. App. 1983).

we're speaking of and do the price per square foot calculations, and that should be the fair market value of the house we're talking about." He further testified that the homes throughout the neighborhood were of similar size with similar amenities. Based on this, Mr. Halliman opined that Lot 101 had a fair market value of \$227,478; Lot 102 had a fair market value of \$215,900; and Lot 106 had a fair market value of \$200,415. As to Lots 101 and 106, he testified that they were brand new homes that had never been lived in and that Lot 102 had been leased to a family for one year prior to foreclosure.

In Tennessee, as in most states, a property owner is automatically deemed qualified to offer an opinion as to the value of his or her own property simply by virtue of owning it. *Sikora v. Vanderploeg*, 212 S.W.3d 277, 284 (Tenn. Ct. App. 2006) (citing *State ex rel. Smith v. Livingston Limestone Co.*, 547 S.W.2d 942, 943 (Tenn. 1977); *Stinson v. Stinson*, 161 S.W.3d 438, 446 (Tenn. Ct. App. 2004)). However, there must be some evidence, apart from mere ownership, that this "value" is a product of reasoned analysis and not based on pure speculation. *Airline Const. Inc. v. Barr*, 807 S.W.2d 247, 256 (Tenn. Ct. App. 1990). Evidence of value may take many forms; the most common are comparable sales and opinion testimony as to value. *Water Auth. of Dickson Cnty. v. Hooper*, No. M2009-01548-COA-R3-CV, 2010 WL 1712968, at \*8 (Tenn. Ct. App. Apr. 29, 2010). In this case, the owner put forth evidence of sales in the neighborhood within thirty days of the foreclosure sale which he classified as comparable. The trial court found this evidence did not show the fair market value of the properties at the time of foreclosure; however, the court did not explain why the evidence did not constitute proof of the fair market value of the properties at the time of each foreclosure sale. We have held that appraisals done within weeks of the foreclosure date is sufficient to show the fair market value of the properties at the time of foreclosure. *State of Franklin Bank v. Riggs*, No. E2010-01505-COA-R3-CV, 2011 WL 5090888, at \*6 (Tenn. Ct. App. Oct. 27, 2011) (appraisal that provided a range of values for the property shortly before the foreclosure sale and after the foreclosure sale was sufficient evidence to show the fair market value of the property at the time of foreclosure). Nevertheless, Mr. Halliman's opinion of the value of the properties does not qualify as an appraisal. Moreover, we note that he made no distinction between the values of each of the three lots; he merely concluded that each should be valued based on \$93 per square foot. He also did not provide a reasonable explanation as to why the value of each home should be based on the same square foot value when they were sold at foreclosure several months apart, and two had never been occupied while one had been rented and lived in for a year.

Plaintiffs also contend that the subsequent sale prices of the properties, which totaled \$590,300, and which is \$53,493 less than Mr. Halliman's valuation, reveals the fair market value of the properties. We find this unpersuasive because these sales occurred three and seven months, respectively, after the foreclosure sales. This is relevant because evidence of fair market value must be "at the time of foreclosure." *Capital Bank v. Brock*, No. E2013-01140-COA-R3-CV, 2014 WL 2993844, at \*6 (Tenn. Ct. App. June 30, 2014) (finding trial court correctly excluded from consideration all valuations

“formed months or even years before or after the time the property was sold at foreclosure”); *FirstBank v. Horizon Capital Partners, LLC*, No. E2013-00686-COA-R3-CV, 2014 WL 407908, at \*3 (finding a lease purchase agreement with an option to purchase that vested seven months following the foreclosure sale did not show fair market value at time of foreclosure); *see also Greenbank v. Thompson*, No. E2010-00160-COA-R3-CV, 2010 WL 5549231, at \*6 (Tenn. Ct. App. Dec. 29, 2010) (“The value of the property prior or subsequent to the foreclosure sale is not relevant.”); *Lost Mountain*, 2006 WL 3740791, at \*8 (“[T]he issue in deficiency actions is the fair market value of the property at the time it was sold.”). Thus, the trial court correctly concluded that the subsequent sale prices were not probative of the fair market values at the time of foreclosure.

Assuming *arguendo* that the evidence Plaintiffs presented regarding fair market value was competent evidence of the value of the properties at the time of the foreclosure sales, this evidence is not sufficient to overcome the statutory presumption in Tenn. Code Ann. § 35-5-118(b) that the foreclosure sale prices represented the fair market value of each property at the time of foreclosure. In prior cases analyzing this statute, we have refrained from establishing a “bright-line percentage, above or below which the statutory presumption is rebutted.” *Sterling Ventures, L.L.C.*, 2012 WL 6115015, at \*10. Instead, we 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 (citing *Sterling Ventures, L.L.C.*, 2012 WL 6115015, at \*11). We have also held that a percentage difference of 20%, without other competent and relevant evidence, is insufficient to rebut the presumption that the foreclosure price was equal to the fair market value of the property at the time of the sale. *Id.* Further, our General Assembly has explained that, “It’s a very difficult burden for the debtor to overcome . . . . You have to show a ‘strong’ difference, a ‘material’ difference.” *Sterling Ventures, L.L.C.*, 2012 WL 6115015, at \*9 (quoting Representative Vance Dennis, the Sponsor of HB 3057 in the Tennessee House of Representatives). Although Mr. Halliman’s personal valuation of the property is approximately 22% more than the aggregate of the foreclosure sales, we find his opinion, without other competent and relevant evidence to support it, fails to rebut the statutory presumption.

With these considerations in mind, we conclude that Plaintiffs failed to make out a prima facie case by a preponderance of the evidence, meaning that Plaintiffs failed to rebut the presumption that the foreclosure price was equal to the fair market value of the properties at the time of each foreclosure sale. Therefore, we find no error with the trial court granting Defendants’ Tenn. R. Civ. P. 41.02 motion to dismiss. *See Burton*, 129 S.W.3d at 520-21; *see also Thompson*, 63 S.W.3d at 791.

Alternatively, Plaintiffs seek a reduction in the amount of the deficiency judgment to prevent what Plaintiffs contend was a windfall to Heritage Bank. Since Heritage Bank



subsequently resold the properties for a total of \$590,300, Plaintiffs contend that the Bank made a windfall of approximately \$75,000; thus, based on contract principles, the deficiency judgment should be offset by this amount. *See Hiller v. Hailey*, 915 S.W.2d 800, 805 (Tenn. Ct. App. 1995) (“In a breach of contract action, the injured party is only entitled to be put in the same position he would have been in had the contract been performed, and he should not profit by the defendant’s breach.”).

We first note that Plaintiffs failed to raise this issue at trial and it cannot be raised for the first time on appeal. *Lobertini v. Brown*, No. M2006-01485-COA-R3-JV, 2008 WL 275883, at \*3 (Tenn. Ct. App. Jan. 31, 2008). Moreover, should we consider this as a properly raised issue, in a suit for deficiency judgment, a creditor is entitled to recover a judgment in an amount sufficient to fully satisfy the indebtedness, Tenn. Code Ann. § 35-5-118(a), and we have already determined that the foreclosure sale prices were not materially less than fair market value at the time of foreclosure. Therefore, the Bank has not been unjustly enriched nor has it received a windfall.

For the foregoing reasons, we affirm the dismissal of Plaintiffs’ claims and the award of a deficiency judgment in the amount of \$111,115.66.

## II. ATTORNEYS’ FEES AND EXPENSES

Defendants contend that the trial court’s award of \$55,000 in attorneys’ fees was unreasonably low based on the \$93,415 in fees the Bank incurred in defending this action and pursuing its deficiency judgment. For their part, Plaintiffs contend that the trial court’s award is excessive in light of the relevant factors in awarding fees.

In its order, the trial court explained the basis for its determination of the amount of reasonable attorneys’ fees to be awarded:

In making its ruling, the Court considers the value of the claim asserted by the Plaintiff and a counter-claim asserted by the Defendant in comparison to the fees requested. The Court reviewed the Affidavit of Jonathan Cole and the billing records submitted in support of the Defendant’s claim for attorney’s fees. The Court considers the fact that the Plaintiff is the one who initiated this action, accusing the Bank Defendant of various types of misconduct, including fraud, duress, unconscionability, and infliction of emotional distress. The Bank Defendant had to defend itself against these and numerous other claims, all of which were found to be unsubstantiated. The Bank then attempted to collect the debt outstanding. The Court finds that the Bank Defendant and its counsel were put to extraordinary demands that were not usual in a normal and customary claim to collect on an outstanding debt.

Accordingly, the trial court awarded the Bank \$55,000 in attorneys' fees and expenses as well as a deficiency judgment in the amount of \$111,115.66.

The determination of reasonable attorneys' fees is necessarily a discretionary inquiry by the trial court. *Keith v. Howerton*, 165 S.W.3d 248, 250 (Tenn. Ct. App. 2005); *Krug v. Krug*, 838 S.W.2d 197, 205 (Tenn. Ct. App. 1992); *Connors v. Connors*, 594 S.W.2d 672, 677 (Tenn. 1980). An appellate court will not substitute its judgment for that of the trial court; consequently, absent an abuse of discretion, the trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001).

The abuse of discretion standard of review envisions a less rigorous review of the trial court's decision and it reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives. *Gooding v. Gooding*, No. M2014-00244-COA-R3-CV, 2015 WL \_\_\_\_, at \*\_\_ (Tenn. Ct. App. Apr. 29, 2015) (citing *Lee Medical, Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010)). Although the abuse of discretion standard does not permit us to second-guess the trial court or to substitute our discretion for that of the trial court, the abuse of discretion standard of review does not immunize a trial court's decision from any meaningful appellate scrutiny. *Id.* (citing *Lee Medical, Inc.*, 312 S.W.3d at 524). "Discretionary decisions must take the applicable law and the relevant facts into account." *Id.* (quoting *Lee Medical, Inc.*, 312 S.W.3d at 524). When reviewing a trial court's discretionary decision, we should determine:

(1) whether the factual basis for the decision is properly supported by evidence in the record, (2) whether the [trial] court properly identified and applied the most appropriate legal principles applicable to the decision, and (3) whether the [trial] court's decision was within the range of acceptable alternative dispositions. When called upon to review a [trial] court's discretionary decision, the reviewing court should review the underlying factual findings using the preponderance of the evidence standard contained in Tenn. R. App. P. 13(d) and should review the [trial] court's legal determinations de novo without any presumption of correctness.

*Id.* (quoting *Lee Medical, Inc.*, 312 S.W.3d at 524-25) (internal citations omitted).

The Tennessee Supreme Court has directed that when determining reasonable attorney's fees the trial courts should consider the factors set forth in *Connors v. Connors* and, when appropriate, the guidelines listed in Supreme Court Rule 8, RPC 1.5. The *Connors* factors include:

1. The time devoted to performing the legal service.
2. The time limitations imposed by the circumstances.

3. The novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly.
4. The fee customarily charged in the locality for similar legal services.
5. The amount involved and the results obtained.
6. The experience, reputation, and ability of the lawyer performing the legal service.

*Connors*, 594 S.W.2d at 676. The Tennessee Supreme Court Rule 8, Rule of Professional Conduct 1.5 lists similar factors to be considered.<sup>8</sup>

Ultimately, the reasonableness of an attorney's fee depends on the particular circumstances of the individual case, as considered in light of the relevant guidelines. *White v. McBride*, 937 S.W.2d 796, 800 (Tenn. 1996); *Howerton*, 165 S.W.3d at 251. "The amount of time expended, and the hourly rate commonly charged by attorneys for doing similar work in the community, while important, are not the only, or even the controlling, factors to be considered." *United Medical Corp. of Tennessee, Inc. v. Hohenwald Bank and Trust Co.*, 703 S.W.2d 133, 136 (Tenn. 1986). "A fee is clearly excessive if 'after review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.'" *Fell v. Rambo*, 36 S.W.3d 837, 852 (Tenn. Ct. App. 2000) (quoting Tenn. S.Ct. R. 8, DR 2-106(B)); *In re Davis's Estate*, 719 S.W.2d 526, 528 (Tenn. Ct. App. 1986)). Conversely, applying the same rationale, a fee would be inadequate if, after review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is substantially below a reasonable fee.

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<sup>8</sup> Factors to be considered in determining the reasonableness of a fee include:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent;
- (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
- (10) whether the fee agreement is in writing.

Tenn. S.Ct. R. 8, RPC 1.5.

Defendants contend that the trial court's order does not provide any basis or reason for reducing Heritage Bank's requested fees from \$93,415 to \$55,000, and that the factors outlined in both *Connors* and Supreme Court Rule 8, Rule of Professional Conduct 1.5 all weigh in favor of awarding the Bank its entire amount of attorneys' fees requested. In particular, Defendants argue that the most significant factor in its favor is the language found in the deeds of trust which authorize Heritage Bank to recover all of its reasonable attorneys' fees incurred in connection with enforcing the secured indebtedness. On the other hand, Plaintiffs contend that the trial court's award of \$55,000 is excessive and that the trial court misapplied the relevant factors found in *Connors* and Tennessee Supreme Court Rule 8.

As we noted above, discretionary decisions must take the applicable law and the relevant facts into account, and we find it significant that the trial court considered the claims asserted by Plaintiffs and the Bank's counterclaim for a deficiency judgment. Particularly, the court noted that Plaintiffs initiated this action and they accused the bank of various types of misconduct, including fraud, duress, unconscionability, and infliction of emotional distress, and the Bank had to defend itself against these and numerous other claims, all of which were found to be unsubstantiated. Moreover, the trial court noted that the Bank, in attempting to collect the outstanding debt, was "put to extraordinary demands that were not usual in a normal and customary claim to collect on an outstanding debt." Nevertheless, in exercising its broad discretion, the court deemed it appropriate to award Heritage Bank a substantial fee of \$55,000.

While the Bank views the reduction of its fee as excessive, Plaintiffs consider the award of a \$55,000 fee excessive. Having considered the factors in *Connor* and Rule 8, as well as the facts of this case, and applying the rationale in *Fell v. Rambo*, we are not "left with a definite and firm conviction that the fee" is either inadequate or excessive. *Fell*, 36 S.W.3d at 852. To the contrary, the decision to award a fee of \$55,000 was a decision among several acceptable alternatives, *Gooding*, 2015 WL \_\_\_\_\_, at \*\_\_, and it is one for which reasonable minds could disagree as to propriety of the decision. *Eldridge*, 42 S.W.3d at 85. Therefore, we affirm the trial court's award of \$55,000 in attorneys' fees and expenses in favor of the Bank.

### IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against Plaintiffs.

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FRANK G. CLEMENT, JR., JUDGE