REL: June 28, 2019

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2018-2019

1160926

Deutsche Bank National Trust Company, as trustee of any specific residential mortgage-backed security (RMBS) at issue, et al.

v.

Walker County et al.

Appeal from Walker Circuit Court
(CV-12-900436)

SHAW, Justice.

Deutsche Bank National Trust Company ("Deutsche Bank"); MERSCORP, Inc., and Mortgage Electronic Registration Systems, Inc. (hereinafter referred to collectively as "MERS"); and CIS

Financial Services, Inc. ("CIS"), the defendants below (all hereinafter referred to collectively as "the defendants"), petitioned this Court for permission, pursuant to Rule 5, Ala. R. App. P., to appeal the trial court's denial of their motions seeking to dismiss the claims of the plaintiffs--Walker County and Rick Allison, in his official capacity as judge of probate of Walker County (hereinafter referred to collectively as "the plaintiffs")--seeking class-based relief on behalf of themselves and all other similarly situated Alabama counties and judges of probate. For the reasons discussed below, we reverse and remand.

Facts and Procedural History

In what the record presently before us describes as a "substantively identical prior pending action," this Court explained the pertinent factual background surrounding the underlying dispute as follows:

> "At issue is a particular aspect of the mortgage-securitization process. The process begins when a borrower secures a note to pay a lender by executing a mortgage on the real property the borrower, or mortgagor, purchases with the loan from the lender, or mortgagee. The mortgage is recorded in the probate office of the county in which the property is located. See §§ 35-4-50, 35-4-51, 35-4-62, 35-4-90, Ala. Code 1975 ('the recording

statutes'). Loans between borrowers and lenders compose the primary mortgage market.

"The note associated with the mortgage is a negotiable instrument, however, under Article 3 of the Uniform Commercial Code, and as such it can be bought and sold. When loans between borrowers and lenders are pooled and sold on the secondary mortgage market, investors benefit by receiving a low-risk investment and borrowers benefit by receiving loans at lower interest rates. Such is the process of securitization.

> "'The process of "securitization" can be described as the process of distributing risk by aggregating debt instruments in a pool, then issuing new securities backed by the entire pool. This reduces the risk of investors' loss from default on any one debt instrument. For mortgage loans, investment banks take pools of real property loans and then use the cash flows from the loan payments to pay the bondholders secured by the underlying mortgage loans. In the residential context, the process of securitization can be boiled down to the pooling of various residential mortgage loans and issuing securities backed by the mortgage loans.
>
> "'The general process of creating a residential mortgage-backed securitization (RMBS) is to first have a lender or lenders originate various mortgage loans to borrowers. Next, the originating lenders transfer these loans to a free-standing entity, known generally as a SPV, specifically created for the securitization. As an independent entity, the SPV is protected from any bankruptcy or insolvency proceedings of the originating lender. The SPV aggregates the mortgage

> loans into pools and issues securities to investors, with the proceeds from the securities being used to pay the originating lender for selling the loans. Thereafter, the investors of these securities receive the proceeds from, and the credit risks of, the mortgage loans in the underlying pool. In many cases, the originating lender will continue to collect the loan payments from the borrowers as they become due and will simply pass the collected monies onto the investors. The investors are protected, by the laws governing assignments, from certain origination and servicing risks assumed by the originating lenders and servicers, and therefore the investors can accept a lower interest rate and yield on the loans.'

"Derrick M. Land, Residential Mortgage Securitization and Consumer Welfare, 61 Consumer Fin. L.Q. Rep. 208, 209 (2007) (footnotes omitted).

"The rights and obligations of the parties in the above-described securitization process typically are set forth in a pooling and servicing agreement ('PSA'). The PSA also explains the role of the trustee that holds the residential mortgage-backed securities ('RMBS'). ...

"Although the development of the secondary mortgage market benefited both investors and mortgagors, the 'recording process became cumbersome to the mortgage industry, particularly as the trading of loans increased.' Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1039 (9th Cir. 2011). This is where MERSCORP and MERS entered the process. MERS was created to streamline the mortgage process through the use of electronic documentation. 'MERS is a private electronic database, operated by MERSCORP, Inc., that tracks the transfer of the "beneficial interest" in home

> loans, as well as any changes in loan servicers.' Cervantes, 656 F.3d at 1038. 'Officially launched in 1997, [MERS] is a corporation owned by its members who are typically also users of the MERS system. It is funded by membership and transaction fees that members pay for use of the system.' Robert E. Dordan, Mortgage Electronic Registration Systems (MERS), Its Recent Legal Battles, and the Chance for A Peaceful Existence, 12 Loy. J. Pub. Int. L. 177, 181 (2010). 'MERS does not solicit, fund, service, or actually own any mortgage loans.' Christopher L. Peterson, Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System, 78 U. Cin. L. Rev. 1359, 1361 (2010). Instead, when a mortgage is executed, the borrower and the lender designate MERS as mortgagee 'acting solely as nominee for the Lender and Lender's successors and assigns.' 'The loan is then assigned to a seller for repackaging through securitization for investors. Instead of recording the assignment to the seller or the trust that will ultimately own the loan, however, the originator pays MERS a fee to record an assignment to MERS in the county records.' Peterson, 78 U. Cin. L. Rev. at 1370. 'The benefit of naming MERS as the nominal mortgagee of record is that when the member transfers an interest in a mortgage loan to another MERS member, MERS privately tracks the assignment within its system but remains the mortgagee of record.' Jackson v. Mortgage Elec. Registration Sys., Inc., 770 N.W.2d 487, 490 (Minn. 2009). Thus, '[t]he MERS system is designed to allow its members, which include originators, lenders, servicers, and investors, to assign home mortgage loans [on the secondary market] without having to record each transfer in the local land recording offices where the real estate securing the mortgage is located.' Id."

Ex parte MERSCORP, Inc., 141 So. 3d 984, 986-88 (Ala. 2013) (footnotes omitted).

Deutsche Bank serves as trustee for numerous residential mortgage-backed security ("RMBS") trusts containing mortgages for properties located in Walker County and other Alabama counties (hereinafter referred to collectively as "the counties"). In this case, the plaintiffs initiated the underlying litigation against Deutsche Bank "seeking to recover the benefit [Deutsche Bank allegedly] received by relying on the real property recording systems of the Counties without compensating the Counties for that benefit." The complaint alleged:

> "In connection with the creation of various [RMBS] trusts that purportedly hold mortgage loans on properties located in the Counties, [Deutsche Bank] represented at the time these trusts were created that they possessed all the rights to certain mortgage loans attached to these properties, free and clear of any encumbrance. ... The Defendants, however, did not record, or cause to be recorded, certain mortgage assignments at the time the trusts were created, nor did they pay the accompanying fees, which are preconditions for enjoying the enumerated benefits and are required by statute. Rather, Deutsche Bank transferred notes to the trusts they administered and recorded the change in note ownership only in the records of [MERS].... Transfers within the MERS system are insufficient to perfect the mortgage for the transferee and incapable of satisfying the requirement that conveyances be recorded."

Thus, according to the plaintiffs, Deutsche Bank had represented "to the public and to RMBS investors that the RMBS trusts had the benefit of perfected mortgages, a benefit that[, according to the plaintiffs,] could only be obtained by properly using the Counties' services for recording assignment." More specifically, the plaintiffs alleged that Alabama law requires mortgage assignments to be recorded; therefore, they maintained, the above-described system used by Deutsche Bank avoids the proper recording of mortgage assignments, along with the payment of the requisite filing fees, and has resulted in lost income to county governments. Based on those claims, the plaintiffs' complaint included, in addition to a request for class certification,[1] counts alleging unjust enrichment, a count seeking declaratory and injunctive relief regarding the legal status of all affected mortgages, and a count seeking a declaration establishing the proper party in interest to foreclosure notes in RMBS trusts administered by Deutsche Bank.

In lieu of an answer, and following an initial stay pending this Court's resolution of the appeal in Ex parte

[1]See Rule 23, Ala. R. Civ. P.

MERSCORP, supra, Deutsche Bank sought dismissal of the plaintiffs' complaint. Among other grounds, Deutsche Bank generally argued that, by means of their complaint, the "[p]laintiffs seek compensation for services never rendered, and an order requiring [Deutsche Bank] to perform acts that are mandated neither by law nor by contract." More specifically, and contrary to the plaintiffs' allegations, Deutsche Bank maintained that under Alabama law there is no mandatory duty to record mortgage assignments.

Deutsche Bank and MERS[2] jointly filed in the trial court a renewed motion to dismiss the plaintiffs' amended complaint again alleging, among other grounds, that Alabama law did not impose a duty to record mortgage assignments--the premise on which, Deutsche Bank and MERS maintained, the plaintiffs' entire case was based. CIS separately filed a substantively similar request also seeking dismissal of the complaint. The plaintiffs argued in response that Alabama law required all

[2]The plaintiffs obtained leave from the trial court to add MERS and CIS, a purported Alabama-based "mortgage servicer" for Deutsche Bank, as additional defendants. The plaintiffs also amended the complaint to add an additional count asserting a claim of civil conspiracy. MERS removed the case to the United States District Court for the Northern District of Alabama; that court later remanded the case.

real-property transactions, including mortgage assignments, to be recorded.

After further filings by the parties and following a hearing, the trial court entered an order denying the defendants' pending dismissal motions. In its order, the trial court initially agreed with the position that "all of Plaintiffs' claims in this case are premised upon whether there is a duty to record mortgage assignments under Alabama law." The trial court held that Ala. Code 1975, § 35-4-50, required mortgage assignments to be recorded. The defendants moved the trial court to certify its order for an interlocutory appeal, which the trial court did. The defendants then petitioned this Court for permission to appeal, which we granted.

Standard of Review

> "This Court has stated the following with regard to permissive appeals pursuant to Rule 5(a), Ala. R. App. P.:
>
> > "'In the petition for a permissive appeal, the party seeking to appeal must include a certification by the trial court that the interlocutory order involves a controlling question of law, and the trial court must include in the certification a statement of the controlling question of law. Rule 5(a), Ala. R. App. P. In

> conducting our de novo review of the question presented on a permissive appeal, "this Court will not expand its review ... beyond the question of law stated by the trial court. Any such expansion would usurp the responsibility entrusted to the trial court by Rule 5(a)." BE & K, Inc. v. Baker, 875 So. 2d 1185, 1189 (Ala. 2003).'"

Century Tel of Alabama, LLC v. Dothan/Houston Cty. Commc'ns Dist., 197 So. 3d 456, 461 (Ala. 2015) (quoting Alabama Powersport Auction, LLC v. Wiese, 143 So. 3d 713, 716 (Ala. 2013)).

Discussion

The sole issue and controlling question of law presented, as certified by the trial court, is "[w]hether, under Alabama law, there is a legal duty to record mortgage assignments."[3] Section 35-4-50, the Code section primarily at issue, provides, in full: "Conveyances of property, required by law to be recorded, must be recorded in the office of the judge of probate."

The trial court couched the issue as follows:

> "There does not appear to be any dispute as to where 'conveyances of property' are to be recorded. They 'shall be recorded in the county in which the property is situated,' [Ala. Code 1975, § 35-4-62];

[3]This Court expressly declined to address this particular issue in Ex parte MERSCORP, 141 So. 3d at 991.

> and, within that county, they 'must be recorded in the office of the judge of probate.' [§ 35-4-50]. This is plainly what §§ 35-4-50 and 35-4-62 provide. But, that is not all that § 35-4-50 provides. Something must be done with the words 'required by law to be recorded.' See City of Montgomery v. Town of Pike Rd., 35 So. 3d 575, 584 (Ala. 2009) ('There is a presumption that every word, sentence, or provision [of a statute] was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also that no superfluous words or provisions were used.').
>
> "Though the parties' arguments largely avoid substantively discussing the import of this particular clause, Defendants' essential position is that these words do not direct that all 'conveyances of property' must be recorded; but rather and only that, if the law requires a given conveyance of real property to be recorded, then the probate judge's office is the place where the recording act should occur. Plaintiffs, on the other hand, contend ... that the plain language of § 35-4-50 simply acknowledges that 'conveyances of property' are simply 'required by law to be recorded' just as the statute states. This Court agrees with Plaintiffs."

(Footnotes and citations omitted.)

The trial court, in a lengthy analysis, held that the punctuation of the Code section rendered the phrase "required by law to be recorded" a nonrestrictive clause:

> "Of the various supporting arguments Plaintiffs make, the most convincing is Plaintiffs' appeal to basic rules of grammar. The group of words 'required by law to be recorded' is a nonrestrictive relative (or, 'adjectival') dependent clause that has been reduced to an adjectival phrase. ... It is 'nonrestrictive' simply because it is set off with

commas, indicating that the clause is not essential to the grammatical or logical completeness of the sentence. If the clause in question were intended to be restrictive, commas would not have offset it. See Garner's Dictionary of Legal Usage (3d ed. [2011]), at 888; see also Douglas Laycock, 'That' and 'Which', 2 Scribes J. Leg. Writing 37, 39 (1991) ('All competent users of English agree that nonrestrictive clauses must be set off with commas and that restrictive clauses must not be set off with commas.'); Wilma R. Ebbitt & David R. Ebbitt, Index to English 224-25 (8th ed. 1990) ('An adjective (or relative) clause or adjective phrase that can be dropped from a sentence without changing or blurring the meaning is nonrestrictive and should be set off by a comma or commas.'); William Strunk Jr. & E.B. White, The Elements of Style 1, 3 (2d ed. 1972) (describing an 'elementary rule[] of usage' that a 'nonrestrictive clause is one that does not serve to identify or define the antecedent noun,' and that '[n]onrestrictive relative clauses are parenthetic,' such that '[c]ommas are therefore needed'); The Chicago Manual of Style, ¶ 5.27 (12th ed. 1969) (instructing that '[i]f a dependent clause following a main clause is restrictive ... it should not be set off by a comma. If it is non-restrictive, it should be set off by a comma.'). ... Under ordinary rules of grammar and common usage, Defendants' view of the statute could only be sustained if commas did not offset the relative clause.

"The difference, though subtle, is significant. A restrictive clause modifies a sentence 'in a quite different way than an identically worded nonrestrictive clause,' Douglas Haycock, 'That' and 'Which', 2 Scribes J. Leg. Writing 37, 39 (1991). This is because a restrictive clause 'identifies a subcategory of the thing described and narrows the sentence to that subcategory,' whereas a nonrestrictive clause 'describes the entire category that has already been named.' Id. at 40. In other

words, the restrictive clause gives us information about the antecedent in order to distinguish it from similar items with which it might be confused. The nonrestrictive clause, in contrast, does not narrow the category covered by--that is, it does not 'restrict' the field of reference to--the antecedent. See, e.g., Richard G, Wydick, True Confessions of a Diddle-Diddle Dumb-Head, 11 Scribes J. Leg. Writing 57, 60-61 (2007).

"Although seemingly academic, the distinction is genuine. By choosing to offset the clause at issue with commas, the Legislature clearly sought to 'describe the entire category previously mentioned' (i.e., all 'conveyances of property'), not distinguish that category from other types of property conveyances. One might wonder, however, 'if the language is so plain, then why is the explanation so academic?'

"The reason is simply to demonstrate beyond any serious doubt that the phrase in question simply cannot be interpreted in the manner that Defendants desire and be grammatically (or logically) correct. In asking the Court to imply restrictive--or even conditional (e.g., 'unless and until,'...)[10]--language into a reading of the phrase 'required by law to be recorded,' they are asking the Court to assume that the words mean something that they simply cannot mean under well-settled grammatical rules. Worse, they ask the Court to presume that the Legislature did not intend the ordinary meaning and construction of the words that it chose to use in enacting this Legislation.

"It is not permissible for this Court to read into § 35-4-50 words or conditions that the Legislature chose not to include. 'It is not proper for a court to read into the statute something which the legislature did not include although it could have easily done so.' Noonan v. East-West Beltline, Inc., 481 So. 2d 237, 239 (Ala. 1986) (emphasis

> added). Instead, in determining the meaning of a statute, this Court must look to 'the plain meaning of the words as written by the legislature.' DeKalb County LP Gas Co., Inc. v. Suburban Gas, Inc., 729 So. 2d 270, 275 (Ala. 1998) (emphasis added).
>
> "....
>
> "Because the words of § 35-4-50 are far from ambiguous, and because, there is clearly a rational way to interpret the Legislature's words as written, this Court declines to turn to extrinsic aids (i.e., the so-called 'secondary' canons of statutory construction) to determine the meaning of this piece of legislation. DeKalb County, 729 So. 2d. at 277. ...
>
> _____
>
> "[10]Defendants argue that § 35-4-50 has no application 'unless and until a conveyance is "required by law to be recorded."' ... Because everyone agrees that § 35-4-50 has to mean something, presumably Defendants believe that there are, in fact, some conveyances that are 'required by law to be recorded.'..."

(Some footnotes omitted.)

On appeal, the defendants urge that the foregoing certified question should be answered in the negative, i.e., that under Alabama's applicable recording statutes and caselaw, the recording of conveyances generally is optional and not mandatory.

In this State's first Code, the Code of 1852, the predecessor to what is now § 35-4-50 stated: "Conveyances of

property required by law to be recorded, must be recorded in the office of the judge of probate." Ala. Code of 1852, § 1268. There was no comma following the word "property," as there is in § 35-4-50. Section 1268 of the 1852 Code simply provided that conveyances that were required by law to be recorded had to be recorded in the newly created probate courts. See Act No. 3, Ala. Acts 1849-50 (creating probate courts).[4] Further, not every instrument could be recorded. See Jesse P. Evans, Alabama Property Rights and Remedies § 5.6[a] at 5-30 (5th ed. 2012) ("The original recording statutes did not allow all instruments to be recorded, but only certain ones mentioned in statutes."), and Sheridan v. Schimpf, 120 Ala. 475, 479, 24 So. 940, 941 (1898).

[4]The early law of this State provided that any deed or conveyance of land "shall be void, and of no effect against a subsequent bona fide purchaser, or mortgagee for a valuable consideration without notice," unless it was "acknowledged or proved and certified, and lodged ... with the clerk of the county court of the county in which the lands ... are situated, for registration," but was valid between the contracting parties to it. Mallory v. Stodder, 6 Ala. 801, 805 (1844) (discussing an act of 1823 and an amending act of 1828). The acts did not require the filing or registering of conveyances, but failure to do so risked the conveyance being rendered void by subsequent, bona fide conveyances. Coster's Ex'rs v. Bank of Georgia, 24 Ala. 37, 62 (1853).

The exact language of § 1268 of the 1852 Code was retained in § 1537 of the Code of 1867. But in the subsequent Code of 1876, the punctuation of the section was altered by the addition of the comma following the word "property,"[5] and it read the same as does its successor, § 35-4-50, today: "Conveyances of property, required by law to be recorded, must be recorded in the office of the judge of probate." Ala. Code of 1876, § 2147 (emphasis added). This wording and punctuation has remained unchanged after subsequent recodifications. See Ala. Code of 1886, § 1791; Ala. Code of 1896, § 985; Ala. Code of 1907, § 3367; Ala. Code of 1923, § 6853; and Ala. Code of 1940, T. 47, § 94.

[5]The indexes to the session laws from 1867 to 1876 reveal no act amending Ala. Code of 1867, § 1537, to add a comma; instead, it appears that the comma was added during the compilation of the Code of 1876. The Code commissioners, in compiling the Code of 1876, were forbidden from changing the "substance or meaning of any of [the 1867 Code's] provisions," but were allowed to "change the phraseology where it is inaccurate, redundant or lacks clearness or precision." Ala. Acts 1876, p. 1, § 2, March 8, 1876. The draft manuscript of the 1876 Code, located in the Alabama Department of Archives and History, contains handwritten alterations to a copy of the Code of 1867. It shows no addition of a comma to the applicable section. Further, the Code commissioners' report for the Code of 1876 does not indicate an alteration to that section.

Again, § 35-4-50 provides: "Conveyances of property, required by law to be recorded, must be recorded in the office of the judge of probate." (Emphasis added.) We will refer to the emphasized clause that is set off by commas as "the clause."

> "'Words used in a statute must be given their natural, plain, ordinary, and commonly understood meaning, and where plain language is used a court is bound to interpret that language to mean exactly what it says. If the language of the statute is unambiguous, then there is no room for judicial construction and the clearly expressed intent of the legislature must be given effect.'"

Blue Cross & Blue Shield of Alabama, Inc. v. Nielsen, 714 So. 2d 293, 296 (Ala. 1998) (quoting IMED Corp. v. Systems Eng'g Assocs. Corp., 602 So. 2d 344, 346 (Ala. 1992)). Furthermore, "'"[t]here is a presumption that every word, sentence, or provision [of a statute] was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also that no superfluous words or provisions were used."'" Richardson v. Stanford Props., LLC, 897 So. 2d 1052, 1058 (Ala. 2004) (quoting Sheffield v. State, 708 So. 2d 899, 909 (Ala. Crim. App. 1997), quoting in turn 82 C.J.S. Statutes § 316, at 551-52 (1953)).

The question before us is whether the clause acts as a restrictive clause or a nonrestrictive clause, the answer to which, the parties contend, impacts the meaning of the Code section.

> "[A restrictive] clause gives essential information about the preceding noun ... so as to distinguish it from similar items ... with which it might be confused. In effect, the clause restricts the field of reference ... hence the term restrictive. Restrictive clauses take no commas (for commas would present the added information as an aside)....
>
> "... [A nonrestrictive] clause typically gives supplemental, nondefining information. ...
>
> "Restrictive clauses are essential to the grammatical and logical completeness of a sentence. Nonrestrictive clauses, by contrast, are so loosely connected with the essential meaning of the sentence that they might be omitted without changing the essential meaning."

Bryan A. Garner, Garner's Dictionary of Legal Usage 888 (3d ed. 2011).

If the clause is a nonrestrictive clause, as the punctuation setting it off by commas suggests, and thus the meaning of § 35-4-50 is not impacted by its removal, then the statute can be read to provide: "Conveyances of property ... must be recorded in the office of the judge of probate." Indeed, this would appear to be the reading given the Code

section by the trial court: that it requires all conveyances to be recorded in the probate office. But as noted in Richardson, supra, we presume that every word, sentence, or provision of a Code section has a purpose or some force and effect; thus, the clause must have some meaning.

The plaintiffs suggest that the clause simply acknowledges, or describes, that conveyances are required by law to be recorded. But if this is the case--that the clause simply acknowledges that conveyances must be recorded--then it is essentially repetitious of the verb phrase, which provides that conveyances "must be recorded," thus rendering the clause superfluous, contrary to Richardson, supra. See also AltaPointe Health Sys., Inc. v. Davis, 90 So. 3d 139, 157 (Ala. 2012) (refusing to read a phrase in a Code section in a manner that would render it "unnecessary, without meaning, and hav[ing] no force and effect"). Further, by referring to the "law" requiring that all conveyances be recorded, § 35-4-50 would seem to be referring to some other law, not the Code section itself. In sum, reading the clause as nonrestrictive, as the punctuation suggests, renders § 35-4-50 ambiguous.

If the language of a statute is not "plain" or is ambiguous, then--and only then--may a court construe or interpret it to determine the legislature's intent. City of Pike Rd. v. City of Montgomery, 202 So. 3d 644, 650 (Ala. 2015) ("Because the plain language of [Ala. Code 1975,] § 11-40-10[,] does not give explicit guidance on this issue, we must ascertain the legislature's intent through other means."); Rice v. English, 835 So. 2d 157, 167 (Ala. 2002) (noting that when the language of a statute creates uncertainty as to its meaning courts may look to the legislative history to determine the legislative intent); and Dennis v. Pendley, 518 So. 2d 688, 690 (Ala. 1987) ("It is the court's function to make clear the intent of the legislature when some degree of ambiguity is found in a statute."). Although we agree that the addition of the comma appears to render the clause "required by law to be recorded" nonrestrictive, the addition of the first comma, without some other alteration to the Code section, renders the Code section ambiguous. We must, therefore, construe and interpret the Code section to determine the legislature's intent.

As the United States Supreme Court has stated: "No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute's meaning. Statutory construction 'is a holistic endeavor,'... and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc., 508 U.S. 439, 455 (1993) (quoting United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988)). Our prior caselaw has criticized the strict application of punctuation in interpreting older statutes:

> "[T]he law-maker may not punctuate correctly, and yet may clearly express his meaning. It is the language, the words of the statute, which must be construed, without indulging in criticisms upon its grammar, or its punctuation. Statutes in the course of legislative procedure are read to the General Assembly, and, as is said, they apprehend them by the ear, not by the eye, which alone can take cognizance of punctuation. ... The punctuation is not their work; to it their attention is not directed. It is most often the work of the draftsman, and not infrequently of the clerk entrusted with the duty of copying, or of the printer in publishing. The ancients were unacquainted with it, and it varies now according to the tastes of scholars and of writers. Resort to it is never had in the construction of statutes, and it is of very doubtful use in the construction of

> writings between individuals. In 3 Dane's Ab. 558, it is said: 'Stops are never inserted in statutes or deeds, but the courts of law in construing them must read them with such stops as will give effect to the whole.' The legislative intention, expressed in the clearest words, would often be defeated, if the courts did not disregard the punctuation, and read their enactments as if they were properly pointed.--Sedg. Stat. & Con. Law, 225, n. Gyger's Estate, In re, 65 Pa. [311,] 312 [(1870)]; Cushing v. Worrick, 9 Gray, 382 [(1857)]."

Danzey v. State, 68 Ala. 296, 298-99 (1880) (emphasis added). Further, "[p]unctuation marks may, in proper cases, be regarded as aids in arriving at the correct meaning of statements in a statute, but in construing statutes, punctuation cannot be accorded a controlling influence. Courts do not hesitate to repunctuate, when it is necessary to arrive at the true meaning." Cook v. State, 110 Ala. 40, 46, 20 So. 360, 361 (1896) (emphasis added).

Caselaw following the repunctuation of the predecessor to § 35-4-50 explains that the purpose of our recording laws is to provide a means to protect and give notice of conveyances, not to create a rote duty to record: Although "[t]here are certain benefits and advantages to be derived from a compliance with the statute of registration," Alabama has "no law which requires a mortgagee to record his mortgage."

George F. Dittman Boot & Shoe Co. v. Mixon, 120 Ala. 206, 209, 24 So. 847, 848 (1898). See Gay v. Rogers, 109 Ala. 624, 628, 20 So. 37, 40 (1896) ("There is no law which requires a mortgagee to have his mortgage recorded. There are certain benefits and advantages to be derived by complying with the statute of registration."). See also Crosland v. Federal Land Bank of New Orleans, 207 Ala. 456, 457, 93 So. 7, 8 (1922), overruled on other grounds, 261 U.S. 374 (1923) (explaining that the payment of a tax that was a condition precedent to recording a mortgage was "purely voluntary" and "entirely optional with the holder, if he seeks to get the benefit or protection of our registration laws by using the public records").

As the defendants note on appeal, the Code sections identified in this case governing recording[6] do not provide any details to support the conclusion that the recording of all conveyances is mandatory under § 35-4-50. There is no indication of who--the conveyor or the conveyee--must record a conveyance; when the recording the should take place; or who is responsible for the failure to record. It is true that the

[6]See Ala. Code 1975, §§ 35-4-50, -51, -57, -62, -63, and -90.

consequences for a failure to record are specified. Alabama Code 1975, § 35-4-63, provides: "The recording in the proper office of any conveyance of property or other instrument which may be legally admitted to record operates as a notice of the contents of such conveyance or instrument without any acknowledgment or probate thereof as required by law." Further, Ala. Code 1975, § 35-4-90(a), provides that conveyances are "inoperative and void as to purchasers for a valuable consideration" unless they are recorded, but an unrecorded conveyance is generally valid between the parties. Smith v. Arrow Transp. Co., 571 So. 2d 1003, 1006 (Ala. 1990) ("A deed that is unrecorded is good between the grantor and grantee, but is void against bona fide purchasers for value, mortgagees, and judgment creditors without notice."). Nevertheless, we have held that § 35-4-90 "certainly do[es] not imply that ... an assignment between mortgagees ... need be recorded." Farris v. Jim Walter Homes, Inc., 519 So. 2d 1338, 1340 (Ala. 1988). See also Sturdivant v. BAC Home Loans Servicing, LP, 159 So. 3d 15, 18 n.4 (Ala. Civ. App. 2011), rev'd on other grounds, Ex parte BAC Home Loans Servicing, LP, 159 So. 3d 31 (Ala. 2013) ("We note that there is no statutory

requirement in Alabama that an assignment of a mortgage be recorded in a probate office before an assignee may institute foreclosure proceedings.").

This statutory scheme is in stark contrast with another statutory recording scheme that is clearly mandatory. The Alabama Residential Mortgage Satisfaction Act, Ala. Code 1975, § 35-10-90 et seq., explicitly requires that certain creditors "shall submit for recording a satisfaction of a security instrument within 30 days after the creditor receives full payment and performance of the secured obligation." Ala. Code 1975, § 35-10-92(a) (emphasis added). A "security instrument" includes a mortgage that provides for an interest in residential real property. Ala. Code 1975, § 35-10-90(b)(5). There is a statutory penalty for failure to file the satisfaction, Ala. Code 1975, § 35-10-92(c), and the creditor can be liable for damages, Ala. Code 1975, § 35-10-92(d). Thus, when recording is mandatory, the legislature provides explicit instructions--who files, when to file, and a penalty for noncompliance--that do not exist in relation to the failure to record under § 35-4-50.

In this case, the errant comma preceding the clause, added in the Code of 1876, is inexplicable and rendered the Code section ambiguous. Nothing indicates that its inclusion was intended to change the meaning of the Code section, and no corresponding change in the law has been recognized. See Rodgers v. Meredith, 274 Ala. 179, 185-86, 146 So. 2d 308, 313-14 (1962) (holding that a change to the "phraseology" of a statute made in its codification would not change its meaning from a mandatory character to a directive character without a clear intent by the legislature to do so), Smith v. City of Pleasant Grove, 672 So. 2d 501, 506 (Ala. 1995) (noting that the legislature's use of a comma instead of a semicolon in a revision of a statute did not alter either the legislature's intent or the interpretation of the statute).

We thus see no intent in the Code section to embrace a mandatory rule that all conveyances, which would include not only real-property conveyances but also apparently all conveyances of personal property,[7] are required to be recorded

[7]See Ala. Code 1975, § 1-1-1(6) (providing that the word "property," unless otherwise apparent from the context, "includes both real and personal property"), and § 35-4-51 (providing that documents purporting to convey real estate and personal property "shall be admitted to record in the office of the probate judge").

in the probate court. Instead, § 35-4-50 simply states that the probate court is where conveyances that are required by law to be filed must be filed. Section 35-4-51, in turn, is the Code section that provides for the recording of conveyances generally, and it places a duty on only the probate court to accept those filings. See Johnson v. Davis, 39 Ala. App. 72, 75-76, 96 So. 2d 432, 436 (1957) (opinion on application for rehearing). The arguments before us demonstrate no legal duty to record mortgage assignments.

Conclusion

The trial court's order, holding that § 35-4-50 imposes a mandatory duty to record all conveyances, is reversed, and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Parker, C.J., and Bolin, Wise, Bryan, Mendheim, Stewart, and Mitchell, JJ., concur.

Sellers, J., concurs specially.

SELLERS, Justice (concurring specially).

I concur with Justice Shaw's well reasoned analysis of Ala. Code 1975, § 35-4-50, and the conclusion reached in the main opinion that that statute does not mandate the recording of mortgage assignments in the probate court, much less the payment of filing and indexing fees. Had the trial court's order stood, the additional costs to Alabama taxpayers would have been significant in that additional origination and transfer costs would have increased the expense of mortgage loans for borrowers. I am persuaded that a stable, efficient, and inexpensive transfer of mortgages on the secondary market is not only in the best interest of Alabama taxpayers, but it is also encouraged by our law. For over a century, counties, real-estate lawyers, title companies, lenders, and loan servicers have understood that the recording of mortgages and mortgage assignments was permissive, not mandatory, and that no one, including Alabama courts, has suggested otherwise. See, e.g., Coster's Ex'rs v. Bank of Georgia, 24 Ala. 37, 62 (1853) (holding that there is "no requirement of the subsequent mortgagee, that he must record his mortgage"); and Farris v. Jim Walter Homes, Inc., 519 So. 2d 1338, 1340 (Ala.

1988) (noting that § 35-4-90, Ala. Code 1975, "certainly do[es] not imply that ... an assignment between mortgagees ... need be recorded").