

# Does surrender in bankruptcy accelerate a debt?

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*McGlinchey's Commercial Law Bulletin is a biweekly update of recent, unique, and impactful cases in state and federal courts in the area of commercial litigation.*

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## Ohio

### Class Certification

*Egbert v. Shamrock Towing, Inc.*, 10th Dist. Franklin No. 20AP-266, 2022-Ohio-474

In this appeal, the Tenth Appellate District affirmed the trial court's decision, agreeing that the proposed class failed to satisfy the predominance requirement of Civ.R. 23(B)(3) as common questions of law or fact did not predominate over questions affecting only individual members of the proposed class.

**The Bullet Point:** Pursuant to Civ.R. 23, there are seven requirements that must be satisfied for a trial court to grant class certification: "(1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impractical; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ.R. 23(B) requirements must be satisfied."

Here, plaintiffs sought certification of their proposed class under Civ.R. 23(B)(3), which contains a predominance requirement. Pursuant to Civ.R. 23(B)(3), a class action may be maintained if Civ.R. 23(A) is satisfied, and if: "(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (a) the class members' interests in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already begun by or against class members; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (d) the likely difficulties in managing a class action." Simply stated, the first requirement for maintaining a class action under Civ.R. 23(B)(3) is that there must be common questions of law or fact that predominate over questions concerning only individual members of the class. As such, "a key purpose of the predominance requirement is to test whether the proposed class is sufficiently cohesive to warrant adjudication by representation."

In this matter, the court determined the proposed class lacked predominance and that important, individualized issues impacted this case and its ability to meet the predominance requirement. As the court explained, for common questions of law or fact to predominate under Civ.R. 23(B)(3), it is not sufficient that such questions merely exist; rather, they must also represent a significant aspect of the case and they must be capable of resolution for all members in a single adjudication. “To meet the predominance requirement, a plaintiff must establish that issues subject to generalized proof and applicable to the class as a whole predominate over those issues that are subject to only individualized proof.”

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## Breach of Fiduciary Duty

*Razavi v. Vasila*, 5th Dist. Delaware No. 21 CAE 06 0032, 2022-Ohio-463

In this appeal, the Fifth Appellate District affirmed the trial court’s decision, agreeing that the breach of fiduciary duty claim failed as there was no evidence of any financial harm to the plaintiff caused by the defendant’s excessive compensation or excessive cash reserves.

**The Bullet Point:** In order to prove a claim for breach of fiduciary duty in Ohio, a plaintiff must establish: “(1) the existence of a duty arising from a fiduciary relationship; (2) a failure to observe the duty; and (3) an injury resulting proximately therefrom.” Breach of fiduciary duty claims have a four-year statute of limitations, and the discovery rule does not apply unless the claim is based on fraud.

Here, all but two of the plaintiff’s claims were barred by the statute of limitations. While the plaintiff’s claims for excessive compensation and excessive cash reserves survived the statute of limitations, the plaintiff failed to prove he suffered any harm. In fact, the plaintiff agreed that he could not identify any portion of the defendant’s compensation that he believed to be excessive, could not identify any portion of the cash reserves that he believed to be excessive, and could not identify any amount of dividends that he should have received. Moreover, the plaintiff presented deposition testimony of a Certified Public Accountant who opined on the unreasonableness of the defendant’s compensation and the high levels of cash reserves, but who could not quantify the extent to which the plaintiff was damaged due to the excessive compensation claim and was unable to provide an opinion concerning the amount of the plaintiff’s damages. The appellate court agreed that the plaintiff failed to prove any financial harm that was caused as a result of the defendant’s actions. Proof of harm is an essential element in order to succeed on a breach of fiduciary duty claim. Consequently, the plaintiff’s breach of fiduciary duty claim could not survive.

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## Duty to Invitee

*Durfor v. W. Mansfield Conservation Club*, 3d Dist. Logan No. 8-21-26, 2022-Ohio-416

In this appeal, the Third Appellate District affirmed the trial court’s decision, agreeing that the plaintiff’s minor child was an invitee on the defendant’s property as the child went onto the property to play sports and have fun, and the defendant did not receive any tangible or economic benefit from the child coming onto its property.

**The Bullet Point:** Under Ohio law, an owner's duty of care depends on whether the injured person is an invitee, a licensee, or a trespasser. A trespasser is "one who enters upon the land of another without invitation or permission purely for his or her own purposes or convenience." Generally, "a landowner owes no duty to a trespasser except to refrain from willful, wanton, or reckless conduct that is likely to injure him." Somewhat similar to a trespasser is a licensee. A licensee is "one who enters the premises of another by permission or acquiescence, for his or her own pleasure or benefit, and not by invitation." A licensee "takes his or her license subject to its attendant perils and risks." As with the trespasser, a landowner generally owes the licensee "no duty except to refrain from wantonly or willfully causing injury and is not liable for ordinary negligence." On the other hand, an invitee is one who "rightfully comes upon the premises of another by invitation, express or implied, for some purpose which is beneficial to the owner." In contrast to the duty owed to a trespasser or a licensee, a landowner "owes a duty to an invitee to exercise ordinary care for the invitee's safety and protection." As the court explained, the distinction between an invitee and a licensee is dependent on whether the guest enters the land for personal benefit or for the benefit of the owner. In order to distinguish the status of an invitee from that of a licensee, the Supreme Court of Ohio has long recognized the economic or tangible-benefit test. Under the tangible benefit test, in order to prove that he or she is an invitee, a plaintiff must establish that the premises owner received a tangible or economic benefit from his or her visit. The type of benefit conferred by an invitee upon the owner or occupier of land must take a tangible or economic form – an invitation alone does not bestow the status of an invitee.

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## Florida

### Statute of Limitations on Foreclosure Actions

*Terra Mar Prop Mgmt v. Wilmington Sav. Fund Soc.*, No. 1D21-1484 (Fla. 1st DCA Feb. 16, 2022)

The First District ruled that a mortgagor's surrender and discharge in bankruptcy does not eliminate the debt itself, nor the mortgagee's future right to foreclose against the property to collect that debt.

**The Bullet Point:** While surrender and discharge in bankruptcy relieve a debtor's personal liability, bankruptcy does not eliminate *in rem* liability or bar subsequent foreclosure after subsequent or ongoing defaults. The creditor's right to foreclose on the mortgage survives the bankruptcy, and continuing defaults after a borrower's discharge in bankruptcy create a continuing window for acceleration and foreclosure.

At issue in this appeal is whether a bankruptcy proceeding triggered the five-year statute of limitations on foreclosure actions and barred a mortgagee from bringing a foreclosure action outside that five-year window. The successor owner of the property argued that the successor mortgagee was barred from filing the current foreclosure action because more than five years had lapsed since the original mortgagor surrendered his interest in the property in a bankruptcy proceeding. This argument was predicated upon the rejected proposition that the surrender of the property accelerated the debt.

The First District, in agreement with the Second and Fourth Districts' recent treatment of the same issue, rejected this argument, holding that a bankruptcy does not trigger a single five-year statute of limitations when

there is a continuing default under the mortgage. Rather, continuing defaults after the borrower's discharge in bankruptcy properly form the basis of a future foreclosure action against a subsequent owner, and every subsequent missed payment constitutes a default triggering a new statute of limitations period. The Court therefore affirmed the final judgment of foreclosure, ruling that the appellant, as subsequent owner of the property, took the property subject to the mortgagee's ongoing rights, unaffected by the bankruptcy surrender or discharge.

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### Service of Process by Publication

*Santiago v. Wilmington Trust*, No. 5D20-2485 (Fla. 5th DCA Feb. 18, 2022)

The Fifth District ruled that service of process by publication in a mortgage foreclosure proceeding was not valid because a diligent search was not performed and the affidavit was legally insufficient.

**The Bullet Point:** Service of process on any known natural person in a mortgage foreclosure proceeding can be obtained through publication only if it is first shown that personal service cannot be had. Where the validity of service of process by publication is disputed, the trial court must resolve (1) whether the affidavit of a diligent search filed pursuant to Florida Statute § 49.041 is legally sufficient and (2) if the plaintiff actually conducted an adequate search to locate the defendant. The court must decide whether the plaintiff reasonably employed the knowledge at its command, made diligent inquiry, and exerted an honest and conscientious effort appropriate to the circumstances to acquire the information necessary to effect personal service on the defendant.

In this appeal, the appellant disputed the validity of service of process by publication, contending that the appellee's predecessor-in-interest failed to conduct a diligent search to locate and personally serve him with process before resorting to service by publication. The Fifth District agreed, holding that the uncontroverted evidence showed that despite being in direct communication with the defendant at the time service of process by publication was effectuated, the plaintiff made no attempt to contact the defendant regarding personal service of process. The Court further concluded that the affidavit for service by publication was legally insufficient for being patently inaccurate because it stated that the appellant's residence was unknown. Accordingly, the service of process by publication was not valid, and the Fifth District remanded the case with directions to the trial court to vacate the clerk's default, the final judgment of foreclosure, and the certificates of sale and title.

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### Jurisdiction to Enforce Settlement Agreements

*Selman v. Progressive*, No. 3D21-0299 (Fla. 3d DCA Feb. 16, 2022)

The Third District reviewed whether the trial court exceeded the limited continuing jurisdiction it had reserved for itself by granting post-judgment relief beyond the terms of the settlement agreement and not contemplated by the final judgment.

**The Bullet Point:** When a trial court approves a settlement agreement and retains jurisdiction to enforce its terms, the extent of the court's continuing jurisdiction is circumscribed by the terms of that agreement. Where the trial court grants relief beyond those terms, the court exceeds the jurisdiction it reserved for itself.

In this appeal, the appellant was involved in an automobile accident that totaled his vehicle which was insured by the appellee. After a disagreement as to the value of the loss, the parties reached a settlement agreement wherein they agreed only to the cash value of the loss. At the hearing on the appellant's motion to enforce the agreement, the trial court ordered that the appellee pay the appellant the agreed settlement amount plus statutory interest, reserving its jurisdiction to enforce the order and the settlement agreement. Subsequent to this final judgment, the appellee informed the trial court it had instead paid the lienholder of the appellant's vehicle, and the trial court entered the challenged order requiring the appellant to repay that amount to the appellee to avoid a windfall.

The Third District found that the trial court exceeded its jurisdiction by entering the challenged order because the settlement agreement did not include any mention of a payment to a lienholder, and the final judgment could not have contemplated a requirement for the appellant to repay the appellee for such payment. The Court held that an interpretation otherwise would not only be contrary to the terms of the parties' settlement agreement and the language of the final judgment, but would also undermine both the finality of judgments and the purpose for including such reservation of jurisdiction provisions in judgments. Accordingly, the Third District reversed the challenged order requiring the appellant to repay the appellee.

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### Personal Jurisdiction Required for Entry of Default Judgment

*JG Contracting v. Tower Innov.*, No. 4D21-442 (Fla. 4th DCA Feb. 16, 2022)

The Fourth District held the trial court erred in entering a default judgment before determining whether it had jurisdiction over the defendant.

**The Bullet Point:** A trial court cannot enter a default judgment against a non-resident defendant without first finding it has jurisdiction over the defendant. Before entering the default judgment, the trial court must engage in analysis of the two-prong jurisdictional test and determine (1) whether the plaintiff alleged sufficient facts to comply with Florida's long-arm statute and (2) whether the defendant had sufficient minimum contacts with the State of Florida to satisfy due process.

In this case, the trial court entered a default judgment without first ruling on the defendant's motion to dismiss for lack of personal jurisdiction. Thereafter, the trial court denied the motion to dismiss based on the prior entry of the default judgment. The defendant's motion to dismiss was supported by sworn affidavits which contradicted the conclusory jurisdictional allegations set forth in the plaintiff's complaint. The Fourth District ruled that upon the defendant filing the affidavits disputing the jurisdictional allegations in the complaint, the burden shifted to the plaintiff to prove by affidavit the basis upon which jurisdiction may be obtained, and if the affidavits could not be reconciled, the trial court should have held a limited evidentiary hearing. Accordingly, the

Fourth District held that the default judgment was prematurely entered and remanded the case with instructions for the trial court to determine whether it had jurisdiction over the defendant.

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### Adequacy of Record on Appeal

*Harris v. HGA-Land*, No. 3D21-0611 (Fla. 3d DCA Feb. 16, 2022)

The Third District affirmed the trial court's entry of final summary judgment quieting title and partitioning property after finding the partial record lacked a transcript of a hearing and did not reflect the filing of any response or affidavit in opposition to the summary judgment motion.

**The Bullet Point:** In appellate proceedings, the decision of the trial court has the presumption of correctness and the burden is on the appellant to demonstrate error. It's the appellant's responsibility to ensure a record adequate to permit resolution of the issues raised on appeal is prepared and transmitted to the appellate court. Therefore, the lack of a trial transcript, or a proper substitute, results in a record that is inadequate to demonstrate reversible error and requires affirmance by the appellate court.

This appeal stems from the trial court's entry of final summary judgment quieting title and partitioning property. The Third District found that the partial record before it lacked a transcript of the hearing and did not reflect the filing of any response or affidavit in opposition to the summary judgment motion. As a result, the Third District affirmed the trial court's entry of summary judgment.

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