The Bullet Point: Ohio Commercial Law Bulletin

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When Can a Class be Certified?

Statute of Limitations of Note Enforcement After Acceleration

***M&T Bank v. Wood*, 2nd Dist. Clark No. 2019-CA-46, 2020-Ohio-10.**

In this appeal, the Second Appellate District found that a claim on a promissory note was not barred by the six-year statute of limitations for such claims, because the lawsuit was filed within six years of the note being accelerated.

The Bullet Point: R.C. 1303.16(A) provides: "Except as provided in division (E) of this section, an action to enforce the obligation of a party to pay a note payable at a definite time shall be brought within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date." What constitutes "acceleration" for statute of limitations has been the subject of significant litigation in Ohio. In Wood, the Second Appellate District found that the act of filing the foreclosure lawsuit was the event of acceleration that triggered the statute of limitation purposes. The Second Appellate District also found that the date a notice of default was mailed was not the trigger date for statute of limitations purposes because the lender sent multiple notices of default, which evidenced that it had not actually accelerated the mortgage loan.

Standing to Foreclose

***U.S. Bank Nat'l Ass'n v. O'Malley*, 8th Dist. Cuyahoga No. 108191, 2019-Ohio-5340.**

In this appeal, the Eighth Appellate District affirmed the trial court's decision finding that a lender had standing to foreclose.

The Bullet Point: To have standing in a foreclosure lawsuit, a lender must establish an interest in the promissory note or the mortgage at the time the lawsuit was commenced. With respect to a promissory note, a party has standing when it is a "party entitled to enforce" the note, which includes a "holder" of the note. A holder, in turn, is one in

physical possession of a note that is endorsed in blank or endorsed specifically to it. While endorsements are typically on the note itself, sometimes they are on an Allonge that is attached to the note. Allonges do not have to be dated to be enforceable. Moreover, a lender is "not required to state, verbatim, that the allonges were physically attached to the note" in order to be considered a holder of the instrument.

Car Dealership Duty of Care

***Burns v. Zurich*, 4th Dist. Ross No. 19CA3676, 2019-Ohio-5255.**

In this appeal, the Fourth Appellate District refused to overturn the trial court's decision finding that a car dealership did not owe a heightened duty of care when allowing prospective purchasers to test drive a vehicle.

The Bullet Point: Relying on case law from outside of Ohio, the Fourth Appellate District noted: Courts across the country have established that "at common law, a dealer who holds a motor vehicle for purposes of sale is not liable for injuries or damages from negligence in the operation of the dealer's vehicle by a prospective purchaser, or one acting for a prospective purchaser, who is seeking to determine whether to purchase such vehicle." The situation also does not give rise to "imputed negligence." "The doctrine of imputed negligence does not ordinarily apply in Ohio, an exception being when parties are engaged in a joint enterprise." "A 'joint enterprise' within the law of imputed negligence is the joint prosecution of a common purpose under such circumstances that each member of such enterprise has the authority to act for all in respect to the control of the agencies employed to execute such common purpose." "'Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interests in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control or management.'"

Mitigation of Damages

***PHH Mortgage Corp. v. Barker*, 3rd Dist. Van Wert No. 15-19-01, 2019-Ohio-5301.**

In this appeal of a foreclosure decision, the Third Appellate District affirmed the trial court's decision to grant a lender summary judgment, finding, among other things, that the borrowers had no absolute right to reinstate the loan, that the lender mitigated its damages, and that Ohio law did not recognize a claim for "wrongful foreclosure."

The Bullet Point: The burden of proof for the affirmative defense of failure to mitigate damages lies with the breaching party. "Under Ohio law, the injured party in a breach-of-contract action has a duty to mitigate damages, meaning that the injured party cannot recover damages 'that it could have prevented by "reasonable affirmative action.'" "An injured party need only use 'reasonable, practical care and diligence, not extraordinary measures to avoid excessive damages.'

FDCPA Class Certification

***Midland Funding LLC v. Colvin*, 3rd Dist. Hancock No. 5-18-15, 2019-Ohio-5382.**

In this appeal, the Third Appellate District reversed a trial court's decision to deny class certification to the defendant consumer under the Fair Debt Collection Practices Act for purportedly filing lawsuits against consumers in counties where they did not reside.

The Bullet Point: Class actions are governed by Rule 23 of the Ohio Rules of Civil Procedure. To maintain a class action, a litigant must satisfy seven things: "(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 impracticable; (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 met." The failure to meet any one of these elements will defeat a request for class certification. "The FDCPA was designed to eliminate abusive debt collection practices, to ensure that debt collectors who abstain from such practices are not competitively disadvantaged, and to promote consistent state action to protect consumers." One issue that concerned Congress when enacting the FDCPA was "forum abuse," or the practice of seeking to "obtain default judgments by filing suit in courts so distant or inconvenient that consumers cannot make an appearance." To that end, the FDCPA prohibited such conduct and requires a debt collector (absent certain exceptions) to file suit either where the contract was signed or where the consumer resides when the lawsuit is commenced.

[Cite as *M&T Bank v. Wood*, 2020-Ohio-10.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

M&T BANK SUCCESSOR BY MERGER TO M&T MORTGAGE CORPORATION	:	Appellate Case No. 2019-CA-46
Plaintiff-Appellee	:	Trial Court Case No. 2015-CV-713
v.	:	(Civil Appeal from Common Pleas Court)
ROBERT C. WOOD, et al.	:	
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 3rd day of January, 2020.

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DONOVAN, J.

{¶ 1} Robert C. and Ann K. Wood appeal from the trial court's May 16, 2019 judgment entry in favor of M&T Bank, successor by merger to M&T Mortgage Corporation ("M&T") on M&T's foreclosure complaint. We hereby affirm the judgment of the trial court.

{¶ 2} On November 9, 2015, M&T filed a complaint for foreclosure "with reformation" against the Woods, the State of Ohio Department of Taxation, and the United States of America. In the first count, M&T alleged that it was the holder of and/or entitled to enforce the promissory note and mortgage deed attached to the complaint. The note, attached as Exhibit A, was dated March 29, 2002; it identified the Woods as borrowers in the amount of $212,900, and M&T Mortgage Corporation as the lender. An "Addendum to Note Construction/Permanent Loan" was attached to the note. The mortgage, attached as Exhibit B, identified the subject property address as 12575 Collins-Arbogast Road in South Vienna, Ohio. Exhibit B further contained documents reflecting the merger of M&T Mortgage Corporation with and into Manufacturers and Trader's Trust Company (also known as M&T Bank) in 2006. Finally, attached as Exhibit C was a Notice of a federal tax lien against the Collins-Arbogast Road property, naming Robert C. Wood as the taxpayer. The complaint provided a lengthy legal description of the property and stated that, "through inadvertence or error," the legal description contained in the mortgage deed did not conform to the legal description set forth in the complaint. The complaint stated that the Woods intended to transfer their interest in the property to M&T, "but that through a scrivener's error, the legal description was not entirely and properly correct." M&T requested reformation of the mortgage deed to include the entire legal description as set forth in the complaint.

{¶ 3} In the second count, M&T alleged that it was entitled to enforce the note because the Woods were in default, and that $211,853.99 was due on the note, plus interest. In the third count, M&T asserted that it was the holder of the mortgage deed securing the payment of the note, and that the mortgage was a "valid and first lien" upon the property.

{¶ 4} A preliminary judicial report was filed on November 9, 2015. The Clark County Treasurer and the U.S. Department of the Treasury filed answers in late 2015, and the Woods filed an answer with a jury demand on December 15, 2015.

{¶ 5} On February 8, 2016, M&T filed a motion for leave to file an amended complaint, in which M&T asserted that it had "lost the Note concerning the loan subject to the foreclosure case" and had not been able to locate it despite its efforts to do so. It therefore sought to amend its complaint "to include and plead a lost Note," as necessary for proper adjudication of the case. On the same day, M&T filed an amended complaint for foreclosure, and the trial court granted the motion for leave to file an amended complaint.

{¶ 6} On March 7, 2016, the Woods filed an answer to the amended complaint. On March 21, 2016, the United States filed an answer to the amended complaint.

{¶ 7} On June 20, 2016, the Woods filed a motion for summary judgment; they also asserted that M&T's complaint should be dismissed with prejudice because it was barred by the applicable statute of limitations, citing R.C. 1303.16(A). The Woods attached Ann Wood's affidavit, which in turn included a letter dated June 23, 2005 from M&T's attorneys regarding the mortgage. (M&T produced the letter in the course of discovery in this case.) The Woods asserted in their motion as follows:

> * * * Plaintiff's letter of June 23, 2005 was in satisfaction of the requirement that it give Defendants thirty days written notice of their right to cure the default prior to calling the entire sum due. This being the case, the sending of such notice was a necessary precondition to foreclosure.
>
> The fact that Defendants did not specifically admit *receiving* the 11-year-old letter is of no matter. As indicated in the Affidavit, Defendants received countless pieces of correspondence from Plaintiff since 2005. Certainly, Plaintiff's production of the letter and their Request to Defendants to admit they received it leads to an inference that Plaintiff sent it, thereby choosing to accelerate the date on which the entire balance was due and owing.

{¶ 8} According to the Woods, "[b]ecause Plaintiff accelerated the due date of the subject note on or about July 23, 2005,[1] it began the tolling of the applicable statute of limitation by which the foreclosure had to be filed" pursuant to R.C. 1303.16(A). Thus, the Woods asserted that the statute of limitations ran out on July 23, 2011, six years later after the letter.

{¶ 9} In her affidavit, Ann Woods averred that M&T's request for admission number 25 asked that the Woods admit receiving a letter from M&T dated June 23, 2005, addressed to them at their home address. With respect to this letter, Ann further averred that the Woods had received "countless pieces of correspondence" from M&T in the years since 2005, and therefore "did not have an independent recollection of receiving the letter," as indicated in their answer to M&T's request for admissions.

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[1] We conclude that the Woods misstate the above date.

{¶ 10} The motion for summary judgment included the June 23, 2005 correspondence from M&T to the Woods (Exhibit C), which provided:

> This shall serve as formal notice that you are presently in default under the terms of your Note and Mortgage/Deed of Trust secured by the property referenced above. Specifically, you have failed to make the payments on this Note as agreed.
>
> To cure this default, you must pay the total amount due at this time of $6273.19 PLUS ADDITIONAL PAYMENTS, FEES AND LATE CHARGES THAT BECOME DUE BETWEEN THE DATE OF THIS LETTER AND THE TIME YOUR PAYMENT IS RECEIVED. Such payment must be received in our office within 30 days from the date of this letter. * * *
>
> If you do not cure this default within 30 days from the date of this letter, your obligation for payment of the entire unpaid balance of the loan will be accelerated and become due and payable immediately. Additionally, foreclosure proceedings may be commenced to acquire the Property by foreclosure and sale. * * *
>
> In the event foreclosure proceedings are initiated, you have certain right(s), including the right to argue that you did keep the promises and agreements under the Note and Mortgage/Deed of Trust, to raise any other applicable defense and to reinstate your loan account after acceleration and before sale.

{¶ 11} On July 15, 2016, M&T filed a memorandum contra the Woods' motion for summary judgment. M&T asserted that "the Note was not *accelerated* until the filing of

the instant action, therefore the applicable statu[t]e of limitations did not [begin] to run until 2015," when M&T filed its complaint in foreclosure. Citing Ann's affidavit, M&T asserted that the fact that it sent "countless pieces of correspondence" to the Woods established that M&T *had not* accelerated the amounts due under the note and mortgage; "Had M&T accelerated the Note, their intentions would have been clear, as an action in foreclosure would have been filed." M&T asserted that "binding case law of the Second District Court of Appeals has addressed the issue of acceleration and found that acceleration requires a 'separate act.' "

{¶ 12} On July 26, 2016, the Woods filed a reply brief in support of their motion for summary judgment,[2] asserting that, if "the General Assembly intended the acceleration date to be the filing of the Complaint, then O.R.C. § 1303.16 would be unnecessary in all cases and there would never be applicability with said section." The Woods argued that "[c]orrespondence from a lender does not equal default. This argument is a red herring."

{¶ 13} On December 1, 2016, M&T filed a motion for leave to file a second amended complaint; the motion stated that it was necessary "to plead and include a Final Construction Loan Modification Agreement as part of the Note." The court granted the motion, and M&T filed its second amended complaint for foreclosure on December 7, 2016. The Woods filed an answer on December 19, 2016.

{¶ 14} On June 15, 2017, M&T filed a motion for leave to file a third amended complaint; M&T sought "to reference as an exhibit a prior loan modification which occurred on this loan, and add an additional and alternative count for ejectment to the

[2] We note that the reply is captioned "Defendants' Motion for Summary Judgment and Memorandum in Support."

complaint." A copy of a third amended complaint for foreclosure was attached to the motion. The first count was for reformation of the mortgage, and the second count was for a declaratory judgment that the mortgage was "a valid and enforceable, first and best mortgage lien on the entire fee simple interest" of the property. The third count was for default on the note, and a fourth count sought foreclosure of the mortgage. Finally, the fifth count sought "ejectment" of the Woods from the premises and that M&T be given possession of the mortgaged property. A "Note Modification Agreement" dated July 9, 2004, was attached to the complaint, which stated that it "supersede[d] and replace[d] in its entirety that certain Addendum to Note between Borrower and Lender of even date with the Note." A copy of the complaint was filed separately on June 28, 2017, and the court granted the motion for leave on the same day. The Woods answered the complaint on July 11, 2017.

{¶ 15} On August 22, 2018, the court issued a notice to M&T to proceed with the prosecution of this matter within 30 days. On November 19, 2018, M&T filed a motion for summary judgment. M&T asserted that it had established that no genuine issues of material fact existed and that it was is entitled to foreclosure on the property. M&T attached "a true and correct copy of its Lost Note Affidavit in accordance with and pursuant to O.R.C. 1303.38." M&T asserted that the Woods were in default under the note and mortgage and that all conditions precedent to foreclosure under the note and mortgage had been met. M&T asserted that it had presented admissible evidence of the amount owed, that it was is entitled to reformation and/or a declaratory judgment concerning the legal description contained in the mortgage, thus correcting the scrivener's error in the legal description. M&T further asserted that acted on the note within the

applicable statute of limitations, and that the default letter was not an acceleration of the note. M&T asserted that it acted on its mortgage within the applicable statute of limitations and that R.C. 1303.16(A) "only applies to prohibit a party from enforcing obligations to pay on the note." M&T asserted that actions on a mortgage "are separately subject to R.C. 2305.06. This statute was amended from a fifteen (15) year statute of limitations to eight (8) years on September 28, 2012," but that "R.C. 2305.06 is not retroactive in its application." Finally, M&T asserted that it was entitled to summary judgment on its claim for ejectment.

{¶ 16} Attached to the motion was an affidavit of Colette Tobler, a "Banking Officer" for M&T. Tobler's affidavit provided in part as follows:

> 2. The averments provided in this affidavit are within the scope of my duties. As part of my position, my job responsibilities include, but are not limited to 1) reviewing the internal record-keeping systems of M&T Bank; 2) reviewing the loan documents; and 3) ensuring the completeness and accuracy of the loan documents and loan histories. In the regular performance of my job functions, I have personal knowledge of the business records maintained by M&T Bank for the purpose of servicing mortgage loans. These records (which include loan document[s], data compilations, electronically imaged documents, and others) are made 1) at or near the time of the occurrence of the matters, 2) recorded by persons with personal knowledge of the information in the business record, or from information transmitted by persons with personal knowledge, 3) kept in the course of M&T Bank's regularly conducted business activities, and 4) created by M&T

Bank as a regular practice. In connection with making this Affidavit, I have personally examined these business records for the loan which is the subject of this case, and I make this Affidavit from my review of those business records and from my personal knowledge of how said records are created and maintained.

3. The business records I reviewed in connection with the making of this Affidavit include but are not limited to the Note (Exhibit "A-1") (which is comprised of the Note, Addendum to Note Construction/Permanent Loan, Construction Loan Agreement, and Note Modification Agreement, collectively herein referred to as "Note"), Lost Note Affidavit (Exhibit "A-2") (which is comprised of Lost Note Affidavit, Note, Addendum to Note Construction/Permanent Loan, Signature/Name Affidavit, and Mortgage, collectively referred to herein as "Lost Note Affidavit"), Mortgage (Exhibit "A-3"), Certificates of Merger (collectively, Exhibit "A-4"), Notices of Default (collectively, Exhibit "A-5"), and Payment History (Exhibit "A-6"). True and accurate copies of the Note, Lost Note Affidavit, Mortgage, Certificates of Merger, Notices of Default, and Payment History are incorporated herein through reference and attached hereto as Exhibits A-1 through A-6, respectively.

4. A review of the business records reveal[s] that Robert C. Wood and Ann K. Wood executed and delivered to M&T Mortgage Corporation a certain note * * * in the original amount of $212,900.00 (See, Exhibit A-1).

5. On March 29, 2009, Robert C. Wood and Ann K. Wood executed

a Mortgage as security for payment of the above-described Note on the real property located as 12575 Collins-Arbogast Road South Vienna, Ohio 45369 * * * (See, Exhibit A-3).

6. Following the execution of the Note and Mortgage for this loan, M&T Mortgage Corporation merged into Plaintiff M&T Bank (See, Exhibit A-4).

7. At the time of the filing of this foreclosure, and continuously since, Plaintiff M&T Bank successor by merger to M&T Mortgage Corporation has been entitled to enforce the promissory Note by virtue of the circumstances attested to in the Lost Note Affidavit * * * . (See, Exhibit A-2).

8. According to M&T Bank's business records, payments have not been made as required under the terms of the Note and Mortgage. The account is presently due and owing for April 1, 2005. (See, Exhibit "A-6").

9. Prior to filing this foreclosure, M&T Bank caused Notice of Default letters dated May 16, 2005, May 24, 2005, and June 23, 2005 to be sent to Borrowers at the Property, via first class mail in accordance with the terms of the Note and Mortgage. (See Exhibit "A-5").

10. Borrowers have not subsequently made payments to bring the loan current or cure the default. Plaintiff has accelerated the account, pursuant to the terms of the Note and Mortgage, making the entire balance due. As a result of the default on the Note and Mortgage, and the acceleration of the debt, there is due and owing a principal balance of $211,853.99, together with interest at the rate of 7.875% per year from

March 1, 2005 or as otherwise adjusted pursuant to the terms of the Note. (See, Exhibit A-6)[.]

* * *

12. M&T Bank has advanced and/or may advance funds for the payment of reasonable and necessary real estate taxes, hazard insurance premiums or otherwise for protection of the property, together with court costs and other expenses incident to this action, the total amount of which will be ascertainable at the time of the foreclosure sale in this matter.

{¶ 17} M&T also attached to the motion for summary judgment a "Lost Note Affidavit" executed by Joshua Wikman, Assistant Vice President of M&T. Wikman stated that he had access to and was familiar with M&T's business records, which were kept "for the purpose of servicing mortgage loans, including the loan that is the subject of this proceeding." Wikman averred as follows:

* * *

4. M&T's regular business is to store notes secured by mortgages and deeds of trust in its Business Records maintained by M&T. After a good faith thorough and diligent annual search of the hard copy Business Records, including the file pertaining to this Loan, the original Note for this Loan was not located and possession of the Note cannot reasonably be obtained as its whereabouts cannot be determined.

5. The Business Records reflect that the Note was in M&T's possession and on behalf and for the benefit of M&T * * * and M&T was entitled to enforce the Note at the time the loss of possession of the Note

occurred.

6. The loss of possession of the original Note is not the result of the original Note being assigned, endorsed, or delivered to another party, cancelled, pledged, hypothecated or otherwise transferred, nor the result of a lawful seizure.

7. A true and correct copy of the original Note, as most recently photo copied by M&T, which is dated March 29th, 2002 identifies M&T as Lender, Robert C Wood and Ann K Wood as Borrowers, and contains a promise by Borrower to "pay U.S. $212,900.00" to lender is attached hereto, incorporated herein, and marked as Exhibit "A".

* * *

{¶ 18} On November 19, 2018, a supplemental final judicial report and a second supplemental final judicial report were filed. On November 29, 2018, M&T filed a notice of filing a lost note affidavit.

{¶ 19} The Woods filed a memorandum in opposition to M&T's motion for summary judgment on April 2, 2019. The Woods asserted that M&T's "proof" was not offered by "witnesses with the requisite personal knowledge" and therefore could not be considered. According to the Woods, M&T had improperly attempted to submit critical documents into the record under the business records exception to the hearsay rule, but the documents nonetheless constituted inadmissible hearsay and could not be considered. The Woods asserted that M&T's affidavits did not satisfy "the necessary assertion in summary judgment affidavits." Further, the Woods asserted that R.C. 1303.16(A) applied and required dismissal of the action. They argued that M&T was not the holder of the note,

that M&T did not establish that it had met the conditions precedent to filing for foreclosure, and that M&T had not established the amount due under the note. Finally, the Woods asserted that, under Ohio law, "considering the equities," foreclosure was not appropriate in this case.

{¶ 20} On April 2, 2019, the Woods filed a motion to strike the affidavit in support of M&T's motion for summary judgment (the affidavit of Colette Tobler). On April 11, 2019, M&T filed a reply in support of its motion for summary judgment and a reply in opposition to the Woods' motion to strike the affidavit.

{¶ 21} On May 16, 2019, the trial court granted summary judgment in favor of M&T. The trial court determined as follows:

> The Court * * * finds that, upon consideration of the Plaintiff[']s MSJ and the Defendants['] MSJ, the affidavits in support, the oppositions and replies filed by the parties, that there are no genuine issues of material fact and Plaintiff is entitled to judgment as a matter of law. * * *
>
> The Court further finds Plaintiff's affidavit submitted in support of Plaintiff's MSJ to be in accordance with Civ.R. 56 and therefore further denies Defendants['] Motion to Strike Affidavit in Support of Plaintiff's Motion for Summary Judgment.
>
> The Court further finds that the Plaintiff has brought this action and all Plaintiff's claims herein within the applicable statutes of limitations and Plaintiff has standing to bring the claims which it asserts. The Court further finds that Plaintiff filed a lost note affidavit in this case and upon review of the same, it conforms in all respects to Ohio Revised Code section 1303.38.

The Court further finds * * * that there is due to the Plaintiff on the Note, Addendum to Note Construction/Permanent Loan, Construction Loan Agreement, and Note Modification Agreement (collectively referred to herein as "Note") set forth in the Third Count of the Third Amended Complaint, the sum of $211,853.99, plus interest at 7.875% per annum from March 1, 2005, for which sum, judgment is hereby rendered in favor of the Plaintiff against the Defendants * * * jointly and severally.

* * *

The Court further finds that in order to secure the payment of the Note, the original mortgagors, [the Woods], * * * executed and delivered to M&T Mortgage Corporation a mortgage as in the Fourth Count of said Third Amended Complaint * * * thereby conveying to it the following described premises * * * :

* * *

The Court further finds that the Mortgage was duly filed with the Recorder of Clark County on April 1, 2002, and thereafter recorded in OR Volume 1527, Page 858 of the Mortgage Records of said County, and thereby became and is a valid first and best mortgage lien upon the Property, subject only to the lien of the Treasurer for taxes; that said conditions in the Mortgage have been broken, and same has become absolute and the Plaintiff is entitled to have the equity of redemption and dower of all the Defendants in and to the Property foreclosed.

The Court further finds upon the Complaint that the legal description

as contained in the Mortgage did not conform to the legal description of the Property which is the subject matter of this action and that it was the intent of the parties to the Mortgage to execute the Mortgage and cause to transfer to Plaintiff all the interest of the Defendants in and to the Property.

The Court therefore further finds and orders that the legal description contained in the Mortgage is hereby reformed and amended to read as set forth in EXHIBIT “A”, attached hereto and incorporated herein.

The Court further finds that the Mortgage otherwise correctly and accurately describes the Property “Parcel ID Number 280-15-05872-103-026” * * *. The Court therefore further finds and declares the Mortgage is a valid and enforceable, first and best mortgage lien on the entire fee simple interest of the Property.

* * *

The Court further finds and takes judicial notice that the State of Ohio, Department of Taxation has a lien against the Property. None of the parties have challenged the amount, validity, or priority of the lien. The interest of the state lienholder shall be transferred to the proceeds of sale and will be paid in accordance with the State’s priority as set forth in the Preliminary Judicial Report.

The Court further finds that the Defendant, The United States of America, claims some right, title, interest or lien upon the Property, as set forth in its pleading filed herein, but that any right, title, interest, claim or lien that they may have is inferior and subsequent to the lien of the Plaintiff.

> The Court makes no finding at this time as to the claim, right, title, interest or lien of the Defendant, The United States of America, as set forth in its pleading filed herein, except to note that such claim, right, title, interest or lien of the hereinabove Defendant is hereby ordered transferred to the proceeds derived from the sale of the Property, after the payment of the costs of the within action, taxes due and payable and the amount hereinabove found due the Plaintiff, and the same is hereby ordered continued until further order.
>
> The Court further finds that the Defendant, The United States of America, shall have the right to redeem within the time periods provided by 28 U.S.C. Section 2410(c).

{¶ 22} The court ordered that unless the amount found to be due was paid within three days from the date of the judgment entry, the "equity of redemption and dower of all the Defendants in and to the Property shall be foreclosed, and the Property sold * * *." Finally, the court found that M&T was entitled to ejectment as requested in its third amended complaint, due to the Woods' default on the mortgage, and that legal title to the property had "been conveyed to [M&T] under the terms of the Mortgage upon the condition of default in payment." The judgment entry provided that "[t]here [was] no just reason for delay" and was stamped "FINAL APPEALABLE ORDER."

{¶ 23} On June 14, 2019, the Woods filed a notice of appeal. On July 22, 2019, this Court issued an order raising a concern as to the finality of the order on appeal:

> This court has identified an issue potentially affecting the finality of the order on appeal. Specifically, it appears that the May 16, 2019

Judgment Entry does not resolve an apparent lien on the property by the United States of America. *See Tax Ease Ohio LLC v. Wells*, 2d Dist. Montgomery No. 27920, 2018-Ohio-4346, ¶ 19, 23-24 (foreclosure decree that inadequately dealt with federal government's lien was not final). However, it is not clear whether the Ohio Supreme Court's recent decision in *Farmers State Bank v. Sponaugle*, Slip Op. No. 2019-Ohio-2518 (June 27, 2019) affects this finality analysis. This court lacks jurisdiction to review an order or judgment that is not final. *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266 (1989).

The parties are therefore ORDERED to address the finality of the order on appeal in their merit briefs. They are reminded that while this appeal is pending, and without a remand from this court, "the trial court is divested of jurisdiction over matters that are inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment." *State ex rel. Electronic Classroom of Tomorrow v. Cuyahoga Cty. Court of Common Pleas*, 129 Ohio St.3d 30, 2011-Ohio-626, 950 N.E.2d 149, ¶ 13 * * *.

{¶ 24} We note that the Woods disregarded this Court's order to brief the final appealable order issue. M&T did address the issue in its brief, concluding that the court's order was final and appealable.

{¶ 25} In *Tax Ease Ohio*, this Court dismissed the appeal of siblings Rick Wells and Joan Wells from the grant of summary judgment in favor of Tax Ease Ohio. Citing *Farmers State Bank v. Sponaugle*, 2d Dist. Darke No. 16 CA 2 (Apr. 18, 2016), and *CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140,

¶ 20, this Court noted that "a judgment entry ordering a foreclosure sale is not a final, appealable order unless, among other things, it determines the priority of all liens against the property and the corresponding amounts due the lienholders." *Tax Ease Ohio* at ¶ 12.

{¶ 26} The trial court's entry in *Tax Ease Ohio* was similar to the one herein and provided in part as follows:

> * * * The Court finds that Defendant United States of America, claims some right, title, interest or lien upon the premises described, as set forth in their Answers filed herein, but that any right, title, interest, claim or liens said Defendant may have are inferior and subsequent to the lien of the Plaintiff. The Court makes no finding at this time as to the right, title, interest or lien of said Defendant as set forth in its pleadings, except to note that such claim, right, title, interest or lien of said Defendant is hereby ordered transferred to the proceeds derived from the sale of said premises, after the payment of the costs of the within action, taxes due and payable, and the amount found due the Plaintiff, and the same is hereby ordered continued until further order.

Id. at ¶ 15.

{¶ 27} In reliance upon *CitiMortgage, Inc. v. Stanley*, 2d Dist. Greene No. 2018-CA-13, 2018-Ohio-4229, this Court conducted the following analysis:

> In *Stanley*, the mortgagee filed a foreclosure action naming the homeowners, another bank, the county treasurer, and the homeowners' association as party-defendants; the homeowners' association filed cross-claims for foreclosure and for unpaid lot assessments. In its judgment

entry, the trial court found, in part, that all necessary parties had been served; that the homeowners and the bank had failed to answer and were in default; that the Greene County Treasurer had "a valid and subsisting first lien" against the property for "accrued taxes, assessments and penalties" in an amount that was "unascertainable at [that] time"; and that the plaintiff-mortgagee was entitled to foreclose on the property and to recover $147,655.62, plus interest and advances made "for taxes, insurance and property protection" in an amount that would be determined after confirmation of sale. The court made "no finding" regarding the validity of the homeowners' association's cross-claims, except to note that such claims were "inferior and subsequent" to the plaintiff-mortgagee's lien, and it ordered the cross-claim for unpaid lot assessments "to be transferred to the proceeds derived from the sale" of the property. *Stanley* at ¶ 3.

The homeowners' association later dismissed its cross-claim for foreclosure and sought a default judgment on its claim for unpaid lot assessments. The trial court granted the motion, finding that the association was entitled to recover $4,401, plus interest, costs, and attorney's fees. *Id.* at ¶ 4. The homeowners subsequently appeared and sought relief from judgment, pursuant to Civ.R. 60(B), which the trial court denied. *Id.* at ¶ 5.

On appeal from the denial of their Civ.R. 60(B) motion, we sua sponte ordered the parties to address whether the trial court had issued a final appealable order. Upon consideration of that issue, we concluded

that the trial court's initial judgment entry was not a final appealable order, because it did not confirm the validity of the homeowners' association's lien or specify the amount due on the lien. *Stanley* at ¶ 11. Nevertheless, we noted that the trial court resolved these issues when it granted the association's subsequent motion for default judgment. We thus concluded that the judgment granting the homeowners' association's motion for default judgment was a final appealable order from which the homeowners could seek relief under Civ.R. 60(B). *Id.*

In this case, the trial court's treatment of the possible claim by the United States government suffers the same infirmities as the initial entry regarding the homeowners' association's claim in *Stanley*. The trial court found that the United States government "claim[ed] some right, title, interest or lien upon the premises described," but the trial court made "no finding" that the United States government, in fact, had a valid claim or lien against the Wellses' property, nor did the court specify the amount of the government's claim or lien. In addition, the trial court made no determination of the priority of the lien that the United States government "may have" in relation to the other governmental claimants. Rather, the trial court merely indicated that any possible right by the United States government was subordinate to Tax Ease Ohio's lien, and it ordered "such claim, right, title, interest or lien of said Defendant [* * * to be] transferred to the proceeds derived from the sale of said premises * * *."

Tax Ease Ohio, 2d Dist. Montgomery No. 27920, 2018-Ohio-4346, at ¶ 20-23.

{¶ 28} This Court concluded that, in the absence of a determination of the validity and priority of the United States' lien, the trial court's judgment entry on appeal was not a final appealable order. *Id.* at ¶ 24. The following was further significant to this Court:

> Moreover, we note that, in her answer, Joan Wells denied that the United States government and the State of Ohio had any lien or other interest in the property and she disputed "all sums claimed by either of them." (Answer ¶ 6.) The Preliminary Judicial Report identified a federal tax lien against Audrey Wells, a prior owner, whose listed address was different from the property at issue; in its answer, the United States stated that "[a]ny interest it has in the property is by virtue of a federal tax lien against taxpayer Audrey Wells." The Notice of Federal Tax Lien itemized four assessments in 2005 and stated that "[f]or each assessment listed below, unless the notice of the lien is refiled by the date given in column (e), this notice shall, on the day following such date, operate as a certificate of release as defined in IRC 6325(a)." For each assessment listed on the Notice, the last day for refiling in column (e) was a 2015 date; the foreclosure complaint was filed in June 2016. Further, the Preliminary Judicial Report reflected that the liens of the State of Ohio and the Ohio Department of Taxation were based on certificates of judgment against Ricky L. Wells, with no address shown.

(Footnote omitted.) *Tax Ease Ohio* at ¶ 25.

{¶ 29} In *Sponaugle*, 157 Ohio St.3d 151, 2019-Ohio-2518, 133 N.E.3d 470, the Ohio Supreme Court "address[ed] once again what constitutes a final, appealable

foreclosure decree." *Id*. at ¶ 1. The Court noted that the Sponaugles' first appeal challenged the trial court's entry of a foreclosure decree in favor of appellant, Farmers State Bank. *Id.* at ¶ 2. The Supreme Court noted that this Court dismissed that appeal for lack of a final, appealable order because the foreclosure decree did not state the amounts owed to two other lienholders. During the first appeal, the Sponaugles property sold at a sheriff's sale. *Id*. at ¶ 2. In a subsequent appeal, the Sponaugles challenged the trial court's order confirming the sale of the property. The Supreme Court noted that this Court "concluded that the law-of-the-case doctrine required adherence to its earlier decision that the foreclosure decree was not a final, appealable order. In the absence of a final, appealable order, [this Court] held that the trial court had no authority to confirm the sale." *Id*. at ¶ 3. The Supreme Court reversed this Court, and concluded that the foreclosure decree against the Sponaugles was a final, appealable order, and reinstated the trial court's confirmation of sale. *Id.* at ¶ 4.

{¶ 30} The *Sponaugle* Court, citing *CitiMortage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, conducted the following analysis:

> *Roznowski* involved a foreclosure decree that included in its damage award the future expenses incurred by the bank for inspections, appraisals, property protection, and maintenance. Even though the decree did not specify the amount of these liabilities, we concluded that it was a final, appealable order: "Each party's rights and responsibilities were fully set forth - all that remained was for the trial court to perform the ministerial task of calculating the final amounts that would arise during confirmation proceedings[.]" [*I*]*d*. at ¶ 20.

Likewise, the foreclosure decree here resolved all the rights and liabilities of the parties. The failure to set out the amount of taxes due to the county does not render the foreclosure decree interlocutory. A court cannot state with certainty the accrued taxes due at the time of a foreclosure decree, since that amount will likely change depending on how long it takes to sell the property. Here, for example, the trial court noted that the amount of taxes due at the time of the foreclosure decree had changed by the time the court entered the confirmation of sale. No judgment of foreclosure and sale would ever be final if we required courts to compute taxes and all future costs as a prerequisite for finality. *Id*. at ¶ 16. If a dispute as to the final amounts due does arise, then parties may challenge those amounts by appealing the confirmation of sale. *Id*. at ¶ 40.

The foreclosure decree is also final with respect to the rights and claims of American Budget Company. The decree describes American Budget as having a "valid and subsisting lien pursuant to its Certificate of Judgment, recorded on November 14, 2012" by the Darke County Clerk of Courts. A certificate of judgment must include, among other things, "*the amount of the judgment and costs*, the rate of interest, if the judgment provides for interest, and the date from which such interest accrues." (Emphasis added.) R.C. 2329.02. By incorporating by reference the certificate of judgment, the foreclosure decree conclusively states the full amount of the Sponaugles' liability to American Budget. The final amount due may change between the time of the foreclosure entry and the time of

the confirmation of sale because of accrued interest or possible penalties. But as with the tax lien, all that remains is the ministerial task of calculating the final amount due after sale of the property. The decree leaves no remaining question as to the rights of American Budget on its lien.

The court of appeals cited *Marion Prod. Credit Assn. v. Cochran*, 40 Ohio St.3d 265, 270, 533 N.E.2d 325 (1988), for the proposition that a trial court errs in allowing the foreclosure and sale of property before all the claims and counterclaims in a foreclosure action have been resolved. In this case, however, there were no claims pending when the trial court entered its foreclosure decree. The Sponaugles dismissed their counterclaims in June 2014, more than 18 months before the January 2016 foreclosure decree. And although the Darke County Treasurer asserted a cross-claim under R.C. 323.11 (tax liens shall attach to real property until paid), R.C. 323.47(B)(1) (if real estate is sold at judicial sale, tax liens must be discharged out of the sale proceeds), and R.C. 5721.10 (state shall have first lien on lands for unpaid tax assessments), the foreclosure decree fully adjudicated the county treasurer's cross-claim in accordance with this statutory scheme: it gave the county treasurer priority over all other lienholders.

The order of foreclosure here determined the extent of each lienholder's interest, set out the priority of the liens, and determined the rights and responsibilities of each party. “Liability is fully and finally established when the court issues the foreclosure decree and all that

> remains is mathematics, with the court plugging in final amounts due after the property has been sold at a sheriff's sale." *Rosnowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, at ¶ 25. Because there were no issues remaining to be determined as to the rights and liabilities of the parties, the foreclosure decree was a final, appealable order.

Sponaugle at ¶ 28-32.

{¶ 31} In addressing the finality issue herein, M&T asserts that *Sponaugle* resolves the issue if "this Court's concern [is] that the May 16, 2019 Judgment Entry does not establish the full monetary amounts owed to the United States." M&T further states:

> * * * If this Court's concern as to the finality of the May 16, 2019 Judgment is the language that specifically makes no finding as to the claim, right, title, interest or lien of the Defendant, United States of America, except to note that said claim, right, title, interest or lien is ordered transferred to proceeds derived from the sale of the Property – then it is not the Ohio Supreme Court's finding in *Sponaugle* that determines the finality of this order, but rather the facts of the case, the Ohio Civil Rules, and R.C. 2505.02 which determine finality.

{¶ 32} M&T further asserts as follows:

> Here, the May 16, 2019 Judgment Entry makes the express determination that there is "no just reason for delay" pursuant to Civ.R. 54(B). Further, the May 16, 2019 Judgment of the trial court makes the express determination that the liens in favor of the State of Ohio, and the United States of America are both inferior to the lien interest of Plaintiff.

The United States of America['s] lien interest was determined transferred to the sale proceeds. The lien interests of the State of Ohio are determined to be paid in accordance with the State's priority as set forth in the Preliminary Judicial Report. Here, the Preliminary Judicial Report sets forth priorities as being: 1) Plaintiff's Mortgage interest; 2) the Federal Tax Lien held by the United States of America; then 3) all four judgment liens in favor of the State of Ohio. Therefore, the May 16, 2019 Judgment Entry also fulfilled R.C. 2505.02 by effecting both the substantial rights of the lien holders and the substantial rights of the title holders to dispute those liens.

While it is true that the January 31, 2018 Judgment Entry in *Tax Ease Ohio LLC* also contains the language "no just reason for delay," there are distinguishing factors between *Tax Ease Ohio LLC* and this instant matter. The first distinction between *Tax Ease Ohio LLC* and this instant matter is that the title holders in *Tax Ease Ohio LLC* specifically disputed the lien interest of the United States of America. Next, in *Tax Ease Ohio, LLC*, the interest of the United States was against Audrey Wells, a prior title holder of the subject property, the address provided for Audrey Wells on the federal lien was different than that of the subject property, and all federal liens were effectively released as of 2015 – the year prior to the complaint being filed in *Tax Ease Ohio LLC*. * * * Further, if the federal liens in *Tax Ease Ohio LLC* were not effectively released, the federal liens were arguably senior to those of Plaintiff, as having been of record from 2007, whereas Tax Ease Ohio, LLC's liens were from 2013, 2014, and 2015. Therefore, there was

just cause to delay the issuance of a final Judgment Entry in *Tax Ease Ohio LLC*, as there were issues of material fact in dispute as to the lien interests of the United States of America. In contrast herein, Appellants do not dispute the liens of either the United States of America, or the State of Ohio as against them, or against their property. Therefore, in this instant matter, there was truly no cause of delay – whereas in *Tax Ease Ohio LLC,* there was a cause to delay.

This matter herein can also be distinguished from *CitiMortgage, Inc. v. Stanley*, 2d Dist. Greene No. 2018-CA-13, 2018-Ohio-4229. In *Stanley*, the lien holder, Shawnee Hills, maintained a cross-claim for unpaid lot assessments in which it sought to determine liability. Therefore, in *Stanley*, Shawnee Hills had claims pending * * * which the original September 15, 2015 Judgment Entry did not substantially resolve, thereby making the November 10, 2015 Judgment Entry the final appealable order. Herein, however, "all that remains is mathematics, with the court [fixing the] final amounts due [the claimants] after the property has been sold," *Roznowski*, at ¶ 25, as the Federal Tax Lien was issued pursuant to 26 U.S.C. § 6321, which specifies that "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

> Therefore, the May 16, 2019 order of foreclosure determined the extent of each lienholder's interest, set out the priority of the liens, and determined the rights and responsibilities of each party. Further, because there were no issues remaining to be determined as to the rights and liabilities of the parties, the foreclosure decree was a final, appealable order.

{¶ 33} We agree with M&T that the trial court's May 16, 2019 Judgment Entry is a final appealable order. The trial court determined that the Woods' mortgage was "a valid first and best mortgage lien upon the property, subject only to the lien of the Treasurer for taxes." The court determined that the "interest of the state lienholder shall be transferred to the proceeds of sale and will be paid in accordance with the State's priority as set forth in the Preliminary Judicial Report." The Preliminary Judicial Report listed the Woods' mortgage, followed by a federal tax lien in the amount of $61,740.53, filed November 29, 2010, against Robert C. Wood, in OR Volume 1918, Page 434 of Clark County records, followed by four judgment liens in favor of the State of Ohio. The answer of the United States of America provided that: "Should the Court find that there are enough monies available from the proceeds of the sale of the property to reach the claim of the United States of America, the exact amount of the monies due and owing will be furnished to the Court at the time," and the trial court ordered the issue "continued until further order." As M&T asserts, the Woods do not dispute the federal lien against them. We conclude that the priority of the liens herein is clear and as follows: 1) the county treasurer; 2) M&T; 3) the federal tax lien, and 4) the judgment liens in favor of the State of Ohio. If the United States of America disputes any amount it receives, it may appeal from the confirmation of sale. Having determined that the decision of the trial court was final and appealable,

we will now address the merits of the Woods' appeal.

{¶ 34} The Woods assert the following assignment of error:

THE TRIAL COURT ERRED IN GRANTING M&T'S MOTION FOR SUMMARY JUDGMENT.

{¶ 35} The Woods assert that R.C. 1303.16(A) was controlling and demands dismissal of the complaint with prejudice, because M&T's June 23, 2005 correspondence accelerated the due date of the note. The Woods assert that the statute of limitations expired on June 23, 2011, six years after the date of the letter.

{¶ 36} The Woods also argue that M&T's "proof" was "not offered by witnesses with the requisite personal knowledge," and thus should not have been considered. According to the Woods, M&T attempted to submit critical documents into the record establishing the elements of foreclosure under the business records exception to the hearsay rule, but such documents should not have been considered because they constituted inadmissible hearsay.

{¶ 37} The Woods further assert that M&T was not the holder of the note, that Tobler's affidavit "should have been struck in its entirety," and that her affidavit failed for the following reasons:

1. Affiant does not identify M&T Bank's role or position in this matter;
2. Affiant never stated she had access to the collateral file;
3. Affiant stated she reviewed the file and did not meet the requirements of Evid.R. 803;
4. Affiant does not explain her job responsibilities which would serve as the foundation for her claim of personal knowledge;

5. Affiant states that she is familiar with the "business records" but does not explain what that is;

6. Since Affiant has not established M&T Bank's role in this matter, she had not properly set forth the amount claimed to be owed;

7. There is no proof the Right to Cure Letters, dated May 16, 2005, May 24, 2005, and June 23, 2005, were received by the Woods.

{¶ 38} The Woods assert that M&T did not establish that it met conditions precedent to filing foreclosure. According to the Woods, the express language of the note (section 7) and mortgage required that notice be given either by first class mail or by delivery to the property address or other address provided by the mortgagee, and M&T did not establish that a proper notice of default was sent to and received by the Woods via first class mail.

{¶ 39} The Woods also argue that M&T did not establish the amount due under the note. They assert that, in her affidavit, Tobler did not acknowledged or certify the records she reviewed to come to the conclusion as to the amount owed. According to the Woods, "the statements made in Paragraphs 8-10 of the Affidavit to the effect that [they were] in default and as to the amount owed" could not be considered evidence and were "meaningless." The Woods argue that the payment history supplied by Tobler was "done with Affiant being custodian of same, which is a violation of the authentication rule promulgated in Civ.R. 56, which render[ed] her incompetent to testify to the matters stated therein."

{¶ 40} Finally, the Woods assert that an action to foreclose on a mortgage and an action to enforce a note are "two separate and distinct actions. Under Ohio law, in

considering the equities, foreclosure is not an appropriate remedy in this case." The Woods argue that the court was required to balance certain factors to determine whether foreclosure was equitable -- such as the efforts made by the homeowners to pay their loan and have their loan reinstated, and the fairness and good faith of the parties. They assert that for M&T, "a multi-billion dollar corporation," the harm it would suffer if equitable relief were denied is "slight."

{¶ 41} As this Court has noted:

> Because appellate review of summary judgment rulings is de novo, we apply the standard set forth in Civ.R. 56(C), pursuant to which summary judgment "shall be rendered forthwith" when: (1) "there is no genuine issue as to any material fact"; (2) "the moving party is entitled to judgment as a matter of law"; and (3) construing the evidence most strongly in favor of the non-moving party, "reasonable minds" could not conclude otherwise. *See also*, *Bonacorsi v. Wheeling & Lake Erie Ry. Co*., 95 Ohio St.3d 314, 2002-Ohio-2220, 767 N.E.2d 707, ¶ 24; *Harless v. Willis Day Warehousing Co*., 54 Ohio St.2d 64, 66, 375 N.E.2d 46 (1978). The movant initially bears the burden of showing that no genuine issues of material fact exist. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115, 526 N.E.2d 798 (1988).
>
> In order to meet this burden, the movant may rely only on those portions of the record properly before the court under Civ.R. 56(C). *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the movant thus provides the court with evidence that no genuine issues of material fact exist, then the non-moving party bears the reciprocal burden,

as stated in Civ.R. 56(E), to establish specific facts showing genuine issues to be tried. *Id.* at 293, 662 N.E.2d 264. The non-moving party "may not rest upon the mere allegations or denials of [the] pleading[s], but must set forth specific facts showing there is [at least one] genuine issue for trial" to satisfy its reciprocal burden. *Chaney v. Clark County Agric. Soc*., 90 Ohio App. 3d 421, 424, 629 N.E.2d 513 (2d Dist.1993), citing Civ.R. 56(E), and *Jackson v. Alert Fire & Safety Equip*., 58 Ohio St.3d 48, 51, 567 N.E.2d 1027 (1991). Whether a fact is "material" depends on the substantive law of the claim being litigated. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Turner v. Turner*, 67 Ohio St.3d 337, 340, 617 N.E.2d 1123 (1993).

* * * To prevail on a motion for summary judgment in a foreclosure action, the plaintiff must prove: " '(1) [it] is the holder of the note and [the] mortgage, or is a party entitled to enforce [them]; (2) if the [plaintiff] is not the original mortgagee, the chain of assignments and transfers; (3) the mortgagor is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due.' " *JP Morgan Chase Bank, N.A. v. Massey*, 2d Dist. Montgomery No. 25459, 2013-Ohio-5620, ¶ 20 , quoting *Wright-Patt Credit Union, Inc. v. Byington*, 6th Dist. Erie No. E-12-002, 2013-Ohio-3963, ¶ 10. * * *

U.S. Home Ownership, LLC, v. Young, 2018-Ohio-1059, 109 N.E.3d 681, ¶ 5-7 (2d Dist.).

1. Statute of Limitations

{¶ 42} R.C. 1303.16(A) provides: "Except as provided in division (E) of this section,

an action to enforce the obligation of a party to pay a note payable at a definite time shall be brought within six years after the due date or dates stated in the note or, if a due date is accelerated, within six years after the accelerated due date."

{¶ 43} As noted in *Bank of New York Mellon v. DePizzo*, 2015-Ohio-4026, 42 N.E.3d 1218, ¶ 18 (11th Dist.):

> * * * While there are limited cases in Ohio interpreting acceleration under R.C. 1303.16(A), courts in other states have noted, in applying UCC 3-118, that acceleration generally requires a separate act, aside from a mere failure to meet a due date, especially when there is language in the note that the lender may give notice of acceleration due to non-payment. *Thompson v. D.A.N. Joint Venture III, L.P.,* M.D. Ala. No. 1:05-CV-938-TFM, 2007 WL 496754, *3 (Feb. 13, 2007) (a debt "does not mature for the purpose of the statute of limitations" until the last installment is due and unpaid if the note contains an acceleration clause that may be, but is not, exercised by the creditor); *Florian v. Lenge*, 91 Conn.App. 268, 880 A.2d 985, 994 (Conn.App.2005) ("[w]hen acceleration of the total unpaid debt is optional on the part of the holder of a note, and the holder has given no indication to the debtor that the entire unpaid balance is presently due, the cause of action does not accrue until that date balance is due pursuant to the particular note or the holder has notified the debtor of an earlier date") (citation omitted). *See also Boulder Capital Group, Inc. v. Lawson*, 2d Dist. Clark No. 2014-CA-58, 2014-Ohio-5797, ¶ 16 (where a lender had the option to accelerate the debt, such a provision was not self-executing and

"[a]cceleration did not and could not take place until the holder exercised the option") (citation omitted).

{¶ 44} While the Woods assert that the note was accelerated pursuant to the June 23, 2005 correspondence, we agree with M&T that this argument is undermined by the fact that M&T had previously advised the Woods that they were in default without initiating foreclosure. As noted above, Exhibit A-5 to Tobler's affidavit contained correspondence to the Woods dated May 16 and 24, 2005, as well as June 23, 2005, advising them that they were in default of payment. The June 23, 2005 correspondence advised the Woods that to cure the default, they "must pay *the total amount due at this time of $6273.19* * * *," and that in the event of their failure to cure this default within 30 days from the date of the letter, their "obligation for payment of the entire balance of the loan *will be accelerated* and become due and payable immediately." In other words, since M&T therein did not indicate to the Woods that the entire unpaid balance of their unpaid debt was *presently* due, M&T's June 23, 2005 correspondence did not trigger R.C. 2303.16(A). We agree with M&T that it did not accelerate the note until the filing of the foreclosure action herein, and R.C. 2303.16(A) did not bar M&T's action against the Woods. Given the specific facts in this case, construing the evidence most strongly in favor of the Woods, and in the absence of a genuine issue of material fact, M&T was entitled to summary judgment on the Woods' statute of limitations argument.

2. Tobler's Affidavit and Evid.R. 803(6)

{¶ 45} Regarding the Woods' arguments addressed to Tobler's affidavit, we conclude that Tobler had personal knowledge sufficient for summary judgment purposes to properly authenticate M&T's business records. Evid.R. 803 lists exceptions to the

hearsay rule and provides:

> (6) Records of Regularly Conducted Activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

{¶ 46} As this Court has previously determined:

> * * * "For a document to be admitted as a business record, it must first be properly identified and authenticated 'by evidence sufficient to support a finding that the matter is question is what its proponent claims.' " *Deutshce Bank Natl. Trust Co. v. Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 30, quoting Evid.R. 901(A). "Authenticating a business record 'does not require the witness whose testimony establishes the foundation for a business record to have personal knowledge of the exact circumstances or preparation and production of the document.' " *Jefferson v. Careworks of Ohio, Ltd.*, 193 Ohio App.3d 615, 2011-Ohio-1940, 953

> N.E.2d 353, ¶ 11 (10th Dist.), quoting *State v. Myers*, 153 Ohio App.3d 547, 2003-Ohio-4135, 795 N.E.2d 77, ¶ 60 (10th Dist.). " 'While the witness need not have personal knowledge of the creation of the particular record in question, and need not have been in the employ of the company at the time the record was made, he must be able to vouch from personal knowledge of the record-keeping system that such records were kept in the regular course of business.' " *State v. Davis*, 62 Ohio St.3d 326, 342, 581 N.E.2d 1362 (1991), quoting *Dell Publishing Co., Inc. v. Whedon*, 577 F.Supp. 1459, 1464, fn. 5 (S.D.N.Y. 1984).

Fifth Third Mtge. Co. v. Campbell, 2d Dist. Montgomery No. 25458, 2013-Ohio-3032, ¶ 8.

{¶ 47} "As noted by the Fifth District, the 'rationale behind Evid.R. 803(6) is that if information is sufficiently trustworthy that a business is willing to rely on it in making business decisions, the court should be willing to rely on that information as well.' *Quill v. Albert M. Higley Co.*, 2014-Ohio-5821, 26 N.E.3d 1187, ¶ 44 (5th Dist.)." *U.S. Bank N.A. v. Stocks*, 2017-Ohio-8108, 98 N.E.3d 1217, ¶ 61. " 'That an affiant relies on business records for her facts does not mean that the facts are not based on personal knowledge.' *Bibbs v. Cinergy Corp.,* 1st Dist. Hamilton No. C-010390, 2002 WL 537628, *2 (April 12, 2002)." *Id.*

{¶ 48} Tobler averred that in her capacity as a Banking Officer, her responsibilities included reviewing M&T's internal record-keeping systems and loan documents, and ensuring the completeness and accuracy of the loan documents and loan histories. She attested to her personal knowledge of M&T's business records for the purpose of servicing mortgage loans. Tobler averred the relevant documents were made at or near

the time of the event, recorded by persons with personal knowledge, and kept in the course of M&T's regularly conducted business activities. She averred that she had personally examined the documents. We conclude that Tobler was able to vouch from personal knowledge of M&T's internal record-keeping systems that the exhibits attached to her affidavit were kept in the regular course of M&T's business and therefore within the above exception to the hearsay rule. Accordingly, the trial court did not err in relying on Tobler's affidavit in granting summary judgment.

3. Standing

{¶ 49} R.C. 1303.38 provides:

> (A) A person not in possession of an instrument is entitled to enforce the instrument if all of the following apply:
>
> (1) The person seeking to enforce the instrument was entitled to enforce the instrument when loss of possession occurred or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred.
>
> (2) The loss of possession was not the result of a transfer by the person or a lawful seizure.
>
> (3) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.
>
> (B) A person seeking enforcement of an instrument under division (A) of this section must prove the terms of the instrument and the person's

right to enforce the instrument. * * *

{¶ 50} The Lost Note Affidavit (Exhibit A-2) to Tobler's affidavit, executed by Joshua Wikman, Assistant Vice President of M&T, established that, like Tobler, Wikman had personal knowledge of the manner in which M&T's business records were created, and that he reviewed and relied upon those records concerning the Woods' loan. Wikman averred that M&T was entitled to enforce the note when the loss of possession occurred, the loss of possession was not the result of assignment, endorsement, or delivery to another party, or an unlawful seizure. Wikman further averred that after a good faith and diligent search of M&T's records, possession of the note could not be reasonably obtained as its whereabouts could not be determined. Wikman's affidavit incorporated a "true and accurate copy of the original Note." The record reflects that the Woods failed to rebut M&T's evidence or set forth facts showing that there was a genuine issue for trial. We conclude that Wikman's unrefuted affidavit established the absence of a genuine issue of material fact on the issue of M&T's standing to enforce the note, and that M&T was accordingly entitled to summary judgment on the issue of its status as the holder of the note.

4. Condition Precedent

{¶ 51} Section 6(C) of the note provides as follows:

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date

must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

{¶ 52} Section 22 of the mortgage provides as follows:

> Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument * * *. The lender shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that the failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. * * *

{¶ 53} The mortgage at section 15 provides: "All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument **shall be deemed to have been given to Borrower when mailed by first class mail** * * *." (Emphasis added).

{¶ 54} As noted above, Tobler averred that, prior to filing its complaint, M&T sent

three notices of default to the Woods "via first class mail in accordance with the terms of the Note and Mortgage" on May 16 and 24, and June 23, 2005. In their motion for summary judgment, the Woods noted that M&T's letter of June 23, 2005 was "in satisfaction of the requirement that it give Defendants thirty days written notice of their right to cure the default prior to calling the entire sum due. This being the case, the sending of such notice was a necessary precondition to foreclosure." The Woods further asserted that the fact that they did not specifically admit *receiving* the 11-year-old letter was "of no matter." Pursuant to section 15 of the mortgage, since the June 23, 2005 correspondence was sent via first class mail, it was deemed to have been given to the Woods. Accordingly, in the absence of a genuine issue of material fact, we conclude that M&T was entitled to summary judgment, having met the condition precedent at issue.

5. Amount Due Under the Note

{¶ 55} Tobler averred that "[a]s a result of the default on the Note and Mortgage, and the acceleration of the debt, there is due and owing a principal balance of $211,853.99 together with interest at the rate of 7.875% per year from March 1, 2005 or as otherwise adjusted pursuant to the terms of the Note." Exhibit A-6, the properly authenticated payment history, reflected that the principal balance on the note had been $211,853.99 since March 2005. A customer account activity statement dated September 18, 2018, reflected a then-current principal balance of $211,853.99. Tobler further averred that M&T Bank had "advanced and/or may advance funds for the payment of reasonable and necessary real estate taxes, hazard insurance premiums or otherwise for protection of the property, together with court costs and other expenses incident to this action, the total amount of which will be ascertainable at the time of the foreclosure

sale in this matter." Construing the evidence in a light most favorable to the Woods, and in the absence of a genuine issue of material fact, we conclude that M&T is entitled to summary judgment on the amount due under the note.

6. Equitable Relief

{¶ 56} As this Court has noted:

> "[B]ecause foreclosure is equitable relief, 'the simple assertion of the elements of foreclosure does not require, as a matter of law, the remedy of foreclosure.' " *PHH Mtge. Corp. v. Barker*, 190 Ohio App.3d 71, 2010-Ohio-5061, 940 N.E.2d 662, ¶ 35 (3d Dist.), quoting *First Natl. Bank of Am. v. Pendergrass*, 6th Dist. No. E-08-048, 2009-Ohio-3208, ¶ 22. Having determined that the [borrowers] defaulted on their note, the question becomes whether foreclosure is a proper remedy.

Wells Fargo Financial Ohio 1, Inc. v. Robinson, 2d Dist. Champaign No. 2016-CA-23, 2017-Ohio-2888, ¶ 19.

{¶ 57} Citing *PHH Mtge.,*the Woods assert that the trial court was required to "balance certain factors" to determine whether foreclosure was equitable, such as the efforts made by the homeowners to pay their loan and have their loan reinstated, and the fairness and good faith of the parties." The Woods also assert that for M&T, "a multi-billion dollar corporation," the harm it would suffer if equitable relief were denied was "slight." As noted above, the principal balance due on the note had not changed since 2005. Construing the evidence in a light most favorable to the Woods, the equities favored foreclosure, and M&T was entitled to summary judgment as a matter of law on its foreclosure complaint.

{¶ 58} The Woods' sole assignment of error is overruled.

{¶ 59} The judgment of the trial court is affirmed.

. . . . . .

WELBAUM, P.J. and FROELICH, J., concur.

Copies sent to:

Michael L. Wiery
Katherine D. Carpenter
Daniel L. McGookey
Kathryn M. Eyster
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State of Ohio Department of Taxation
Gregory Dunsky
Judge Richard J. O'Neill

[Cite as *U.S. Bank, N.A. v. O'Malley*, 2019-Ohio-5340.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

U.S. BANK NATIONAL ASSOCIATION, :

Plaintiff-Appellee, :

No. 108191

v. :

PATRICK J. O'MALLEY, ET AL., :

Defendants-Appellants. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: December 26, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-15-855042

Appearances:

Dinsmore & Shohl L.L.P., H. Toby Schisler, and Alicia Bond-Lewis, *for appellee.*

The Law Office of Grace M. Doberdruk, and Grace M. Doberdruk, *for appellants.*

RAYMOND C. HEADEN, J.:

{¶ 1} Defendants-appellants Patrick and Madeleine O'Malley ("the O'Malleys") appeal the trial court's ruling granting plaintiff-appellee U.S. Bank

National Association's ("U.S. Bank") motion for summary judgment, in part, and granting an in rem foreclosure. For the reasons that follow, we affirm.

I. Factual and Procedural History

{¶ 2} On November 16, 2004, the O'Malleys executed a note payable to Finance America, L.L.C., in the principal amount of $297,600. To secure payment of the note, the O'Malleys executed a mortgage on real property located in Westlake, Ohio ("the property") in favor of Mortgage Electronic Registration Systems, Inc. ("MERS"), acting as a nominee for Finance America, L.L.C. The mortgage was recorded in the Cuyahoga County Recorder's Office on November 19, 2004.

{¶ 3} The note contains two undated allonges.[1] The first allonge attached to the note endorses the note from Finance America, L.L.C. to Bank of America, National Association as successor by merger to LaSalle Bank National Association, as Trustee for Structured Asset Investment Loan Trust, Mortgage Pass Through Certificates, Series 2005-2 ("Bank of America"). The second allonge contains an endorsement from Bank of America to U.S. Bank.

{¶ 4} On June 25, 2009, MERS assigned the note and mortgage to Bank of America. The assignment was recorded with the Cuyahoga County Recorder's Office

[1] An allonge is a slip of paper that may be attached to a negotiable instrument in order to show additional indorsements when the original negotiable instrument is filled with indorsements. *Deutsche Bank Trust Co. v. Jones*, 2018-Ohio-587, 107 N.E.3d 117, ¶ 26 (8th Dist.).

on May 3, 2010. A second assignment of the mortgage dated September 29, 2015, reflects an assignment and transfer from Bank of America to U.S. Bank. The second assignment was recorded on October 30, 2015.

{¶ 5} The O'Malleys failed to make the payments due under the note and, on December 1, 2015, U.S. Bank filed a complaint in foreclosure.[2] The complaint alleged as follows: the note and mortgage were in default; U.S. Bank satisfied the conditions precedent; the entire balance was due and payable; and U.S. Bank was entitled to enforce the note and mortgage. The following documentation was attached to the complaint: the note, two allonges, the mortgage, and the assignments of the mortgage. The O'Malleys filed an answer and counterclaim on January 29, 2016. The counterclaim was dismissed on September 12, 2016, pursuant to U.S. Bank's motion for dismissal. On April 28, 2017, both U.S. Bank and the O'Malleys filed competing motions for summary judgment. After the parties fully briefed the motions, a magistrate rendered a decision on July 14, 2017.

{¶ 6} The magistrate's decision found R.C. 1303.16(A)'s six-year statute of limitations barred U.S. Bank's claim on the note seeking a personal money judgment. However, U.S. Bank's foreclosure action on the mortgage was not barred by the applicable statute of limitations.

{¶ 7} U.S. Bank filed objections to the magistrate's decision on July 24, 2017. Before the deadline passed for the O'Malleys to file their objections,

---

[2] U.S. Bank previously filed foreclosure complaints against the O'Malleys but those are not the subject of this appeal.

the trial court entered an order adopting the magistrate's decision. The O'Malleys subsequently filed their objections on July 28, 2017, as well as a motion to vacate on August 24, 2017. On August 24, 2017, and August 30, 2017, U.S. Bank and the O'Malleys, respectively, filed notices of appeal that were dismissed on August 31, 2017, due to a lack of a final appealable order. On September 21, 2017, the trial court denied the O'Malleys' motion to vacate the trial court's adoption of the magistrate's order.

{¶ 8} On September 25, 2017, the trial court overruled the parties' objections and adopted the magistrate's decision. The O'Malleys filed a notice of appeal on October 17, 2017, and U.S. Bank filed a cross-appeal on October 26, 2017. Those appeals were dismissed on November 1, 2018, for lack of a final, appealable order.

{¶ 9} The trial court's amended judgment entry adopting the magistrate's decision and overruling all objections was filed on January 8, 2019. On February 6, 2019, the O'Malleys filed a timely notice of appeal, presenting the following assignments of error for our review:

> First Assignment of Error: The trial court erred by not finding that appellee U.S. Bank's claim for foreclosure was barred by the statute of limitations and by not granting appellants Patrick and Madeleine O'Malley's motion for summary judgment.
>
> Second Assignment of Error: Appellee was not entitled to judgment as a matter of law because the affidavit of Mark Syphus never stated that appellee U.S. Bank had possession of the original note when the complaint was filed.

> Third Assignment of Error: The trial court erred by granting a judgment of foreclosure because a material issue of fact existed for trial regarding whether the allonges [we]re affixed to the original note.
>
> Fourth Assignment of Error: The trial court erred by granting appellee's motion for summary judgment when the affidavit of Mark Syphus was not made upon personal knowledge and material issues of fact existed for trial.

II. Law and Analysis

A. Standard of Review

{¶ 10} Before a trial court grants a motion for summary judgment, pursuant to Civ.R. 56(C), the court must determine that:

> (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

{¶ 11} On a motion for summary judgment, the moving party's initial burden is to identify specific facts in the record that demonstrate its entitlement to summary judgment. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). If the moving party does not satisfy this burden, summary judgment is not appropriate. If the moving party meets the burden, the nonmoving party has a reciprocal burden to point to evidence of specific facts in the record that demonstrate the existence of a genuine issue of material fact for trial. *Id*. at 293. Where the nonmoving party fails to meet this burden, summary judgment is appropriate. *Id*.

{¶ 12} In a foreclosure action, a plaintiff must prove the following to prevail on a motion for summary judgment:

> (1) that the plaintiff is the holder of the note and mortgage, or is a party entitled to enforce the instrument; (2) if the plaintiff is not the original mortgagee, the chain of assignments and transfers; (3) that the mortgagor is in default; (4) that all conditions precedent have been met; and (5) the amount of principal and interest due.

Deutsche Bank Natl. Trust Co. v. Najar, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, ¶ 17.

{¶ 13} An appellate court applies a de novo standard when reviewing a trial court's decision that granted summary judgment. *Bayview Loan Servicing, L.L.C. v. St. Cyr*, 2017-Ohio-2758, 90 N.E.3d 321, ¶ 11 (8th Dist.).

B. Statute of Limitations

{¶ 14} The note at issue was accelerated in May 2009. The O'Malleys made no payments following the acceleration date, and U.S. Bank filed a complaint on December 1, 2015 ("2015 complaint"). The complaint sought a personal judgment on the note and foreclosure based upon the mortgage. In their motion for summary judgment, the O'Malleys argued U.S. Bank's complaint — both the action on the note and the action on the mortgage — was barred by R.C. 1303.16(A)'s six-year statute of limitations. The trial court found U.S. Bank's action on the note was barred when it was filed outside R.C. 1303.16(A)'s statute of limitation, but U.S. Bank could proceed on its foreclosure action because it was subject to a longer statute of limitations.

{¶ 15} The O'Malleys contend the foreclosure action was subject to R.C. 1303.16(A) and because this action was filed outside R.C. 1303.16(A)'s six-year statute of limitations, the action was barred and the O'Malleys' motion for summary judgment should have been granted. U.S. Bank argues that (1) the foreclosure action is governed by either R.C. 2305.04, which provides a 21-year statute of limitations or R.C. 2305.06, which applies an 8-year statute of limitations and, (2) because the foreclosure action was filed within either the 21-year or 8-year statute of limitations, the trial court did not err when it granted U.S. Bank's motion for summary judgment.

{¶ 16} Upon a mortgagor's default, the mortgagee bank has three separate and independent remedies that it may pursue in an attempt to collect the debt secured by the mortgage: a personal judgment against the mortgagor to obtain the amount owing on the promissory note; an action in ejectment based on the mortgage; and an action in foreclosure based upon the mortgage. *Deutsche Bank Natl. Trust Co. v. Holden*, 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.3d 1243, ¶ 22-24.

{¶ 17} A personal judgment against the mortgagor is an action on the promissory note and is governed by R.C. 1303.16(A)'s six-year statute of limitations. An action in foreclosure is based upon the mortgage, rather than the promissory note, and is subject to a longer statute of limitations.

{¶ 18} The parties agree U.S. Bank filed its complaint six years after acceleration of the note, and as a result, U.S. Bank is barred, pursuant to

R.C. 1303.16(A), from filing an action on the note. However, the tolling of R.C. 1303.16(A)'s statute of limitations on the note did not bar U.S. Bank's foreclosure action on the mortgage.

{¶ 19} Differences exist between a cause of action pursued on a promissory note in comparison to a cause of action for foreclosure on a mortgage. To recover on the note, the mortgagee files an action for personal judgment on the note that was secured by the mortgage. *U.S. Bank Natl. Assn. v. Robinson*, 8th Dist. Cuyahoga No. 105067, 2017-Ohio-5585, ¶ 7. In contrast, a foreclosure proceeding is an in rem, equitable action based upon the mortgage whereby the mortgagee attempts to secure its interest in the property. *Id.* Actions in foreclosure are premised on the fact that:

> [a] mortgage conveys a conditional property interest to the mortgagee as security for a debt, *FirstMerit Bank, N.A. v. Inks*, 138 Ohio St.3d 384, 2014-Ohio-789, 7 N.E.3d 1150, ¶ 23, and upon default, legal title to the mortgaged property passes to the mortgagee as between the mortgagor and mortgagee, *Hausman v. Dayton*, 73 Ohio St.3d 671, 1995 Ohio 277, 653 N.E.2d 1190 (1995), paragraph one of the syllabus.

Holden, 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.3d 1243, at ¶ 23.

{¶ 20} The Ohio Supreme Court found in *Holden* that the distinctions between an action on the note versus an action on the mortgage support its position that the bar of an action on a promissory note secured by a mortgage does not necessarily bar an action on the mortgage. *Id.* at ¶ 25.

{¶ 21} In *Holden*, the individual debtors owned a home; Deutsche Bank ("mortgagee") held a promissory note and mortgage on the home. The promissory

note was discharged in the debtors' bankruptcy proceedings. However, the debtors' bankruptcy discharge did not adversely affect the mortgagee's interest in the mortgage. *Id.* at ¶ 26. Despite a discharge in bankruptcy, the mortgage continued to be security for the debt and the mortgagee could pursue an action on the mortgage. *Id.* at ¶ 27.

{¶ 22} The above-described holding from *Holden* applies in both bankruptcy and nonbankruptcy settings. *Bank of New York Mellon v. Walker*, 2017-Ohio-535, 78 N.E.3d 930, ¶ 23 (8th Dist.). If a mortgagee is unable to enforce a promissory note due to the running of the statute of limitations, the mortgagee still has the right to enforce an action on the mortgage under the longer statute of limitations period set forth in R.C. 2305.04. *Id.* at ¶ 24. "[W]here a party cannot obtain a judgment on the note because of an infirmity that applies only to the note, the party may still seek to enforce the valid obligations contained within the mortgage, including ejectment or foreclosure." *Id.*[3]

{¶ 23} In the instant case, U.S. Bank is barred from obtaining a personal judgment on the note due to the running of R.C. 1303.16(A)'s statute of limitations.

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[3] The *Holden* court stated: "This case is different. It is an outlier, because in this unique case, the secured party, Deutsche Bank, cannot obtain a judgment on the note and the Holdens have no obligation to satisfy it because the bankruptcy court has discharged their obligation in that regard." *Holden*, 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.3d 1243, at ¶ 6. Those same differences were present in *Walker* and are reflected in the case sub judice — both nonbankruptcy cases. Where the statute of limitations on the note has run, the mortgagee has no recourse and the mortgagor is under no obligation to pay the outstanding debt. Filing an action on the mortgage, in those circumstances, is the mortgagee's only option to recover the amount owing.

Despite that bar, U.S. Bank can pursue its foreclosure action on the mortgage based upon the holdings of *Robinson* and *Walker*.[4]

{¶ 24} U.S. Bank's foreclosure claim was not barred by R.C. 1303.16(A)'s statute of limitations. Thus, the trial court did not err when it granted, in part, U.S. Bank's motion for summary judgment and granted U.S. Bank's foreclosure action. For the foregoing reasons, the O'Malleys' first assignment of error is overruled.

C. Standing to Bring the Foreclosure Action

{¶ 25} Within their second assignment of error, the O'Malleys challenge that the trial court erred in granting summary judgment to U.S. Bank because genuine issues of material fact exist as to whether U.S. Bank has standing. Specifically, the O'Malleys argue that the affidavit of Mark Syphus ("Syphus affidavit") attached to U.S. Bank's motion for summary judgment did not state the bank possessed the note and mortgage when the 2015 complaint was filed, and therefore, the bank lacked standing. U.S. Bank argues possession, and therefore, standing was established by affixing the note, allonges, mortgage, and assignments to the 2015 complaint and providing the Syphus affidavit.

{¶ 26} "It is fundamental that a party commencing litigation must have standing to sue in order to present a justiciable controversy and invoke the

---

[4] The O'Malleys cite to *In re Fisher*, 584 B.R. 185 (Bankr.N.D.Ohio 2018), and that court's interpretation of *Holden* to support their argument that "when the statute of limitations expires on the note then a claim under the mortgage is also barred by the statute of limitations." Appellants' brief at 4. *In re Fisher* is not controlling law and we are bound by our own Eighth District precedent — *Walker* and *Robinson* — that applies *Holden* and finds separate statutes of limitation apply to the note and mortgage.

jurisdiction of the common pleas court." *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 41. A party has standing to prosecute a foreclosure action if it establishes either that (1) it was the holder of the note in question, or (2) it was assigned the mortgage. *Deutsche Bank Natl. Trust Co. v. Baxter*, 2017-Ohio-1364, 89 N.E.3d 91, ¶ 14 (8th Dist.).

{¶ 27} Here, U.S. Bank introduced evidence that it was both the holder of the note and was the current assignee of the mortgage at the time it filed the 2015 complaint. Such evidence presented in a foreclosure claim is sufficient to establish standing. *U.S. Bank, N.A. v. Matthews*, 8th Dist. Cuyahoga No. 105011, 2017-Ohio-4075, ¶ 29.

{¶ 28} U.S. Bank attached copies of the following to the 2015 foreclosure complaint: the note and allonges; the mortgage; an assignment of the note and mortgage from Finance America to Bank of America; an assignment of the mortgage from Bank of America to U.S. Bank; and an affidavit signed by both U.S. Bank's vice president, Charles Pedersen, and Bank of America's vice president, Jay Miller ("Pedersen/Miller affidavit"). The Pedersen/Miller affidavit verifies Bank of America and U.S. Bank entered a purchase agreement on November 11, 2010, whereby U.S. Bank acquired assets including the O'Malleys' mortgage-backed transaction.[5]

[5] No evidence was introduced stating the purchased assets transferred on the same date — November 11, 2010 — that Bank of America and U.S. Bank entered the purchase agreement.

{¶ 29} In support of U.S. Bank's motion for summary judgment, the bank attached the Syphus affidavit. In his affidavit, Mark Syphus verifies he is a Document Control Officer with Select Portfolio Servicing, Inc. ("SPS"), the mortgage servicer for U.S. Bank. In this capacity, Syphus has access to SPS's business records, including the records relating to the O'Malleys' loan. Syphus prepared the affidavit based upon his review of those records and his own personal knowledge of how the records are kept and maintained. Syphus attested that U.S. Bank has possession of the note and true and correct copies of the note, mortgage, and assignments of mortgage are attached to his affidavit.

{¶ 30} According to R.C. 1303.31(A)(1), the holder of a note is entitled to enforce the note. The holder of a note includes "'[t]he person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.'" *Matthews*, 8th Dist. Cuyahoga No. 105011, 2017-Ohio-4075, at ¶ 30, quoting R.C. 1301.201(B)(21)(a).

{¶ 31} Attached to the complaint is a copy of the promissory note dated November 16, 2004, as well as two undated allonges indicating the note was negotiated from Finance America to Bank of America and from Bank of America to U.S. Bank. Allonges are not required to be dated. *Jones*, 2018-Ohio-587, 107 N.E.3d 117, at ¶ 27. The Syphus affidavit states U.S. Bank possessed the note when U.S. Bank's motion for summary judgment was filed. Contrary to the O'Malleys' argument, Syphus's affidavit was not required to specifically affirm that U.S. Bank

had possession of the note when the foreclosure action was filed. *See Matthews* at ¶ 30.

{¶ 32} Even though the allonges are undated, and the Syphus affidavit does not specify U.S. Bank had possession of the note at the time the 2015 complaint was filed, the fact that copies of the note and allonges are attached to the 2015 complaint is sufficient evidence to show (1) the note was negotiated to U.S. Bank before it filed the complaint, and (2) U.S. Bank was in possession of the promissory note prior to filing the foreclosure complaint. *Matthews* at ¶ 30. This evidence establishes U.S. Bank was the holder of the note and had standing.

{¶ 33} Further, a chain of recorded assignments shows U.S. Bank was the current assignee of the mortgage when the 2015 complaint was filed. *Matthews*, 8th Dist. Cuyahoga No. 105011, 2017-Ohio-4075, at ¶ 31. The assignment of note and mortgage attached to the 2015 foreclosure complaint indicates that on June 25, 2009, MERS as nominee for Finance America, assigned the mortgage to Bank of America. The mortgage was then assigned to U.S. Bank on September 29, 2015.[6] The assignments demonstrate U.S. Bank was assigned the mortgage and was entitled to enforce the mortgage and foreclosure action. *Walker*, 2017-Ohio-535, 78 N.E.3d 930, at ¶ 28.

{¶ 34} Accordingly, U.S. Bank had standing to file the foreclosure action. We find the O'Malleys' second assignment of error is without merit and is overruled.

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[6] The O'Malleys lack standing to object to the assignment of the mortgages because they were neither a party to, nor a third-party beneficiary of, the contract to assign the rights. *Bank of Am. v. Rogers*, 8th Dist. Cuyahoga No. 107464, 2019-Ohio-1443, ¶ 20.

D. Allonges

{¶ 35} In their third assignment of error, the O'Malleys contend genuine issues of material fact exist as to whether the allonges were affixed to the original note when the 2015 complaint was filed. In their fourth assignment of error, the O'Malleys also argue the allonges differ among the 2010, 2011, and 2015 complaints filed against them by U.S. Bank.

{¶ 36} A promissory note and two allonges were attached to the 2015 complaint and U.S. Bank's motion for summary judgment. The note and allonges attached to the 2015 complaint and motion for summary judgment were identical. While the Syphus affidavit attached to U.S. Bank's motion for summary judgment referenced the note as Exhibit A — and did not mention the allonges — both the note and allonges were included as Exhibit A to the affidavit. Likewise, the promissory note and allonges were attached together as Exhibit A to the 2015 complaint. We can reasonably infer that when Syphus referenced the note he was referring to the note and the two allonges that were provided as one exhibit.

{¶ 37} The first allonge indorsed interest in the O'Malleys' note from Finance America, L.L.C. to Bank of America. The O'Malleys' names are listed on the allonge. Additionally, the second allonge indorsed by Bank of America to U.S. Bank specifically references the O'Malleys by name as well as the date of the O'Malleys' note, the amount of the note, and the address of the mortgaged property securing the payment of the note. Syphus stated in his affidavit that U.S. Bank was in possession of the note at the time the motion for summary judgment was filed.

Syphus was not required to aver that he compared the copies attached to his affidavit with the original documents. *Wells Fargo Bank, N.A. v. Hammond*, 2014-Ohio-5270, 22 N.E.3d 1140, ¶ 37 (8th Dist.).

{¶ 38} Based upon the foregoing evidence, U.S. Bank was not required to state, verbatim, that the allonges were physically attached to the note. *Wilmington Trust Natl. Assn. v. Boydston*, 8th Dist. Cuyahoga No. 105009, 2017-Ohio-5816, ¶ 25. The trial court could reasonably conclude that the allonges filed with the 2015 complaint were properly affixed to the note at the time the instant case was filed. *MorEquity, Inc. v. Gombita*, 2018-Ohio-4860, 125 N.E.3d 300, ¶ 37 (8th Dist.); *see also Matthews*, 8th Dist. Cuyahoga No. 105011, 2017-Ohio-4075, at fn. 3.

{¶ 39} The O'Malleys also complain that in the prior 2010 and 2011 foreclosure cases between the same parties, the note and allonges attached to the complaints had hole punches at the top of the pages. The copies of the note and allonges attached to the 2015 complaint do not contain hole punches. The O'Malleys argue that the presence versus the absence of hole punches raises a genuine issue of material fact as to whether the allonges were affixed to the original note when the 2015 complaint was filed. Yet, the presence of two differing copies of a note "'does not mandate a finding that one of the notes was "unauthentic" or otherwise preclude[ ] summary judgment.'" *Hammond* at ¶ 21, quoting *Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, at ¶ 59, citing *U.S. Bank, N.A. v. Adams*, 6th Dist. Erie No. E-11-070, 2012-Ohio-6253, ¶ 10.

{¶ 40} Further, the O'Malleys incorrectly compare the differences in the allonges — the presence or absence of hole punches — to the facts in *U.S. Bank, N.A. v. Lavelle*, 8th Dist. Cuyahoga No. 101729, 2015-Ohio-1307, where inconsistencies between two notes resulted in genuine issues of material fact that precluded resolution of the case by summary judgment. In *Lavelle*, notes affixed to two separate complaints were both purported to be the original note yet significant, obvious differences existed between them — the notes differed in page length and the indorsements on the notes were signed by different parties. *Id*. at ¶ 18-19. The note and allonge attached to the 2010 and 2011 complaint are identical. The differences in the 2015 complaint are (1) the attachment of the second allonge, and (2) the presence of hole punches. The second allonge demonstrating the indorsement of interest from Bank of America to U.S. Bank was recorded in 2015 and would not have been available when the 2010 and 2011 complaints were filed. Further, the fact that the 2010 and 2011 note and allonge had hole punches while the 2015 complaint's attached note and allonges did not have hole punches is immaterial. The differences between the note and allonge attached to the 2010 and 2011 complaints in comparison to the note and allonges presented with the 2015 complaint do not create genuine issues of material fact.

{¶ 41} The record demonstrates U.S. Bank presented evidence that the allonges were affixed to the promissory note. Once U.S. Bank submitted such evidence, the burden shifted to the O'Malleys to present evidence of conflicting facts demonstrating a genuine issue of material fact as to whether the allonges were

attached to the note. *Wells Fargo Bank v. Sowell*, 2015-Ohio-5134, 53 N.E.3d 969, ¶ 20 (8th Dist.); Civ.R. 56(E). The O'Malleys did not introduce compelling evidence to support these claims.

{¶ 42} The O'Malleys' third assignment of error and the portions of the O'Malleys' fourth assignment of error regarding allonges that were presented and discussed here lack merit and are overruled.

E. Sufficiency of the Affidavit

{¶ 43} The O'Malleys raise numerous issues in their fourth assignment of error that reads:

> Fourth Assignment of Error: The trial court erred by granting appellee's motion for summary judgment when the affidavit of Mark Syphus was not made upon personal knowledge and material issues of fact existed for trial.

For ease of analysis, we will discuss the issues individually.

1. Possession of the Note

{¶ 44} The O'Malleys challenge the sufficiency of Mark Syphus's affidavit that was submitted in support of U.S. Bank's motion for summary judgment and whether it establishes U.S. Bank had possession of the original note.

{¶ 45} Civ.R. 56(E) governs affidavits submitted in support of motions for summary judgment and states, in pertinent part:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. * * *

The O'Malleys argue that there is no business record — such as a computer screen shot or other document — attached to the Syphus affidavit supporting Syphus's statement that U.S. Bank has possession of the note.

{¶ 46} In the absence of contradictory evidence, an affiant's assertion that his business affidavit is made on personal knowledge demonstrates the affiant is competent to testify to the matters contained therein and satisfies Civ.R. 56(E). *Najar*, 8th Dist. Cuyahoga No. 98502, 2013-Ohio-1657, at ¶ 20; *Sowell*, 2015-Ohio-5134, 53 N.E.3d 969, at ¶ 17. An averment that the affiant has personal knowledge of a transaction or fact cannot be disputed without contrary evidence. *Id*. An affiant is not required to explain the basis of his personal knowledge where that knowledge can be reasonably inferred from the affiant's position and other facts contained in the affidavit. *MorEquity*, 2018-Ohio-4860, 125 N.E.3d 300, at ¶ 25. "Similarly, verification of documents attached to an affidavit supporting or opposing a motion for summary judgment is generally satisfied by an appropriate averment in the affidavit itself, for example, that 'such copies are true copies and reproductions.'" *Najar* at ¶ 20, quoting *State ex rel. Corrigan v. Seminatore*, 66 Ohio St.2d 459, 423 N.E.2d 105 (1981), paragraph three of the syllabus.

{¶ 47} Here, Syphus stated in his affidavit that as a Document Control Officer with SPS, the servicer for U.S. Bank, he has access to and is familiar with SPS's business records, including the business records for and relating to the subject loan. The affidavit is made based upon Syphus's own personal knowledge of how the records are kept and maintained and his review of the relevant SPS business

records including the business records relating to the O'Malleys' loan. SPS collects payments from borrowers and maintains up-to-date electronic records in its electronic record-keeping system. The loan records are kept in the ordinary course of SPS's regularly conducted business activities. Any business records created by a prior servicer have been integrated and boarded into SPS's system and those records are now part of SPS's business records. SPS maintains quality control and verification procedures to ensure the accuracy of the boarded records and in its regular course of business, SPS relies on the boarded records. Syphus averred that according to the SPS business records, U.S. Bank, directly or through an agent, has possession of the note and the note has been either made payable to U.S. Bank or has been duly indorsed. The Syphus affidavit stated that a true and correct copy of the note was attached.

{¶ 48} The foregoing statements within the affidavit satisfied Civ.R. 56(E)'s personal knowledge requirement. The O'Malleys offered no evidence contrary to Syphus's statements. It can be reasonably inferred from Syphus's position and other facts contained in the affidavit that Syphus has personal knowledge of the information contained within his affidavit including that U.S. Bank had possession of the note. *Matthews*, 8th Dist. Cuyahoga No. 105011, 2017-Ohio-4075, at ¶ 22. The fact that Syphus is an employee of the mortgage servicer, rather than of U.S. Bank, is immaterial. *Najar* at ¶ 27.

{¶ 49} In addition to Syphus's affidavit, a review of the note and allonges attached to the 2015 complaint and U.S. Bank's motion for summary judgment

demonstrates the documents are identical. The attachment of the note and allonges to both pleadings, along with Syphus's assertions in his affidavit, show U.S. Bank was in possession of the note when the 2015 complaint was filed.

{¶ 50} We do not require summary judgment affidavits that are based upon documents to state the affiant compared the attached copies with the original documents, "'nor do we intend to do so because the Ohio Supreme Court has not made this a requirement of Civ.R. 56(E).'" *Sowell*, 2015-Ohio-5134, 53 N.E.3d 969, at ¶ 16, quoting *Hammond*, 2014-Ohio-5270, 22 N.E.3d 1140, at ¶ 37. Further, the fact that the note attached to the affidavit had a court time-stamped date on the bottom margin did not refute Syphus's statement that the attachment was a true and correct copy of the note.

{¶ 51} The use of the phrase "directly or through an agent" in the Syphus affidavit did not raise a genuine issue of material fact as to whether the affiant was with personal knowledge as to who has possession of the note. *See U.S. Bank Natl. Assn. v. Duvall*, 8th Dist. Cuyahoga No. 102156, 2015-Ohio-2275, ¶ 18-19 (while the language "directly or through an agent" may suggest an affiant lacks personal knowledge of the facts, additional statements that the affiant inspected business records relating to the foreclosure and that her knowledge is based upon that inspection demonstrate the affiant possesses the averred information through her own personal knowledge).

{¶ 52} The O'Malleys' reliance on *Deutsche Bank Natl. Trust Co. v. Dvorak*, 9th Dist. Summit No. 27120, 2014-Ohio-4652, and *Bank of New York Mellon v.*

Villalba, 9th Dist. Summit No. 26709, 2014-Ohio-4351, is misplaced. The *Dvorak* court found the granting of a motion for summary judgment inappropriate because Deutsche Bank failed to demonstrate it was in possession of the note when the complaint was filed. However, the facts set forth in *Dvorak* do not state that the note was attached to the foreclosure complaint. In *Villalba*, there was a discrepancy between the dates of the assignment of the mortgage and the affiant's claimed date of ownership. The *Dvorak* and *Villalba* courts required additional documentation, such as supporting business records, to prove possession of the note when the complaint was filed. Additional documentation was not required here because the complaint and its attached exhibits, coupled with Syphus's affidavit, show that U.S. Bank was in possession of the note on the date the foreclosure complaint was filed.

{¶ 53} Based upon our review, the facts averred in Syphus's affidavit were sufficient to establish that Syphus had personal knowledge of the facts contained within his affidavit and that U.S. Bank had possession of the note.

2. Authentication of the Default

{¶ 54} The O'Malleys argue the Syphus affidavit did not authenticate the default. The O'Malleys challenge that the affidavit was executed on April 27, 2017, yet the affidavit identifies the balance due — or the default — as of a date in the future, May 31, 2017. The O'Malleys also argue that Syphus could not authenticate the default records for any company other than his employer, SLS, or U.S. Bank.

{¶ 55} Unless controverted by evidence, an affidavit stating the loan is in default is sufficient for purposes of Civ.R. 56 to authenticate a default. *Bank One,*

N.A. v. Swartz, 9th Dist. Lorain No. 03CA008308, 2004-Ohio-1986, ¶ 14. There is no requirement that a plaintiff in a foreclosure action provide a complete payment history in order to prevail on summary judgment. *Matthews*, 8th Dist. Cuyahoga No. 105011, 2017-Ohio-4075, at ¶ 33.

{¶ 56} Here, U.S. Bank presented evidence, through Syphus's affidavit and its attachments, establishing that the loan was in default; the default had not been cured; the amount owed on the loan; and the fact that the conditions precedent to foreclosure — as set forth in the mortgage — had been satisfied. This evidence was sufficient to establish the amount due on the note. *Matthews* at ¶ 34. The Syphus Affidavit's reference to a balance due on May 31, 2017 — a future date — does not adversely affect the authentication of the default.

{¶ 57} The O'Malleys cite *Bank of New York Mellon v. Roulston*, 8th Dist. Cuyahoga No. 104908, 2017-Ohio-8400, in support of their position that Syphus could not authenticate the default records because they were generated by an entity other than SLS or U.S. Bank. However, the holding in *Roulston* was narrowed in *Jones*, 2018-Ohio-587, 107 N.E.3d 117; *see also Bank of New York Mellon v. Kohn*, 7th Dist. Mahoning No. 17 MA 0164, 2018-Ohio-3728, ¶ 14-17.

{¶ 58} In *Jones*, the note and mortgage at issue were initially executed, respectively, in favor of First Magnus and MERS, acting as nominee for First Magnus. An undated allonge was attached to the note negotiating the document to Deutsche Bank as Trustee for Residential Accredit Loans, Inc. ("Deutsche Bank Trustee"). The homeowners' last payment was received in May 2012; the mortgage

was assigned to Deutsche Bank Trust in August 2012 and Deutsche Bank in 2016. The loan servicing officer, who provided an affidavit supporting Deutsche Bank's motion for summary judgment, sufficiently demonstrated his personal knowledge of the default:

> He averred that in the regular performance of his job functions, he reviews business records related to the servicing of the mortgage loan at issue, and that these records are maintained in the regular course of business. [He] authenticated the note, mortgage, and assignments, attesting that they are true and accurate. He also authenticated attached payment records detailing all payments and demonstrating that the Joneses' last payment was applied to the May 2012 installment of the mortgage. [He] averred that the Joneses were advised in August 2012 that the loan was in default, accelerating the unpaid balance of $142,475.

Jones at ¶ 20. Although Deutsche Bank held the note and mortgage subsequent to the Joneses' last mortgage payment, the loan servicing officer's affidavit provided sufficient information to authenticate the default.

{¶ 59} Just as the loan servicing officer in *Jones* had sufficient knowledge to authenticate the default, so too did Syphus. Syphus's affidavit demonstrated his personal knowledge of the referenced business records related to the servicing of the O'Malleys' loan. The records reviewed were maintained in the regular course of business. Syphus authenticated the note, mortgage, and assignments, attesting that they were true and accurate. Syphus also authenticated the attached demand letter

and account history and verified the O'Malleys' last payment was made on February 1, 2009, and a balance of $531,350.34 was owing to U.S. Bank.[7]

{¶ 60} If the O'Malleys disputed the amount of the default, they could have raised this argument and submitted evidence — such as cancelled checks, bank statements, or receipts attached to an affidavit — to establish the proposed amounts were incorrect. *Jones*, 2018-Ohio-587, 107 N.E.3d 117, at ¶ 20; *Chase Manhattan Mtge. Corp. v. Locker*, 2d Dist. Montgomery No. 19904, 2003-Ohio-6665, ¶ 30. No such evidence was introduced.

{¶ 61} To successfully oppose a motion for summary judgment, a party must present supporting evidence in accordance with Civ.R. 56(C); the reliance on unsubstantiated allegations does not raise genuine issues of material fact. *Schrader v. Gillette*, 48 Ohio App.3d 181, 183, 549 N.E.2d 218 (11th Dist.1988); *see also Locker* at ¶ 30-32. The O'Malleys did not provide evidence in support of their claim that U.S. Bank failed to authenticate the default.

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[7] Furthermore, the instant matter is distinguishable from *Fannie Mae v. Ford*, 2016-Ohio-919, 61 N.E.3d 524 (8th Dist.). In *Ford*, the plaintiff-creditor's motion for summary judgment was not appropriate because the plaintiff-creditor did not attach a copy of the notice of acceleration or payment history, and therefore, could not substantiate "(1) that the required prerequisites under the note and mortgage were performed in order to accelerate the balance due on the note; (2) the relevant loan history; and (3) the evidence to support the late fees." *Ford* at ¶ 20. Here, all necessary support materials were provided and attached to U.S. Bank's motion for summary judgment including the mortgage, assignment of mortgage, demand letter, and account history.

{¶ 62} Syphus provided sufficient information to authenticate the default records.

3. Successor Relationship

{¶ 63} The O'Malleys argue U.S. Bank "did not properly authenticate a merger" but the evidence does not support their position. The note and allonges attached to the 2015 complaint and summary judgment indicate the note was originally payable to Finance America. Finance America negotiated the note by indorsing it to Bank of America and, in turn, Bank of America negotiated the note to U.S. Bank.

{¶ 64} The first assignment of the mortgage that was filed with the Cuyahoga County's Recorder's Office on May 3, 2010, clearly indicates Finance America's intent to transfer the note, along with the mortgage, to Bank of America. Similarly, the second assignment of the mortgage — filed with the Cuyahoga County's Recorder's Office on October 30, 2015, — demonstrates Bank of America's intent to transfer the mortgage to U.S. Bank.

{¶ 65} The assignments of mortgage were admissible as evidence because they were exempted from the hearsay rule under Evid.R. 803(14) — records of documents affecting an interest in property. *United States Bank Natl. Assn. v. Higgins*, 2d Dist. Montgomery No. 24963, 2012-Ohio-4086, ¶ 16. Both assignments are acknowledged by a notary, and therefore, are self-authenticating. *Id*. at ¶ 17. The assignments also contain stamps noting the date the documents were filed with the Cuyahoga County Recorder's Office. Further, the Syphus affidavit avers that the

attached copies of the assignments are true and correct copies of the originals. Based upon the facts and Evid.R. 803(14), the assignments of mortgage were properly considered with U.S. Bank's motion for summary judgment.

{¶ 66} The note, allonges, and assignments of mortgage demonstrate U.S. Bank was the holder of the note and mortgage.

{¶ 67} Our review of the record demonstrates Syphus's affidavit was sufficient; the O'Malleys' default was properly authenticated; and the successor relationship of the parties was established. Accordingly, we find that the O'Malleys' fourth assignment of error lacks merit and is overruled.

{¶ 68} Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

RAYMOND C. HEADEN, JUDGE

MARY J. BOYLE, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR

[Cite as *Burris v. Zurich*, 2019-Ohio-5255.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

PATRICIA BURRIS, ET AL.,	:	
Plaintiffs-Appellants,	:	Case No. 19CA3676
vs.	:	
ZURICH, ET AL.,	:	DECISION & JUDGMENT ENTRY
Defendants-Appellees.	:	

APPEARANCES:

Peter D. Traska, Cleveland, Ohio, for appellant.

Jonathan W. Philipp, Schaumburg, Illinois, for appellees.

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 12-11-19
ABELE, J.

{¶ 1} This is an appeal from a Ross County Common Pleas Court summary judgment in favor of Herrnstein Chrysler, Inc. and John Brant, III, defendants below and appellees herein. Patricia Burris, plaintiff below and appellant herein, assigns the following errors for review:

> FIRST ASSIGNMENT OF ERROR:
>
> "THE TRIAL COURT SHOULD HAVE FOUND THAT THERE IS AN ISSUE OF FACT AS TO APPELLEE HERRNSTEIN CHRYSLER, INC.'S DIRECT NEGLIGENCE IN THEIR VEHICLE TEST DRIVE PROCEDURES."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT SHOULD HAVE FOUND THAT, AS A MATTER OF OHIO LAW, WHEN A CORPORATE AUTO DEALER'S SALESPERSON IS PRESENT DURING A TEST DRIVE, THE CORPORATE DEALER IS A DIRECT PARTICIPANT OR CO-VENTURER IN THE TEST DRIVE, AND IS THEREFORE LIABLE FOR THE DRIVER'S NEGLIGENCE."

{¶ 2} In November 2015, Hidy Richards and her friend, Tijuana Zerrei, visited the Herrnstein dealership. Zerrei had been interested in purchasing a vehicle. Because Zerrei apparently forgot her driver's license and could not test drive a vehicle, Richards offered to test drive the vehicle for Zerrei. The salesperson, Brant, accompanied Richards and Zerrei on the test drive. During the course of the test drive, Richards collided with the car that appellant and her companion, Jimmy Riddle, had occupied.

{¶ 3} Appellant and Riddle filed a complaint against multiple parties, including Richards, Herrnstein, Brant, and various insurance companies. The parties eventually settled or dismissed all of the claims except the claims appellant filed against appellees. Appellant sought to hold appellees liable for (1) Richards' alleged negligent operation of the vehicle, and (2) Herrnstein's failure to have a test drive policy in place that may have revealed that Richards had worked a graveyard shift the day of the test drive.

{¶ 4} Subsequently, appellees requested summary judgment and argued that they cannot be held vicariously liable for Richards' alleged negligence. They further disputed appellant's claim that the court could impute negligence under a joint enterprise theory of liability.

{¶ 5} To support their respective positions, the parties referred the trial court to the depositions. Richards stated that she worked the night before the accident and finished work at 6:30 a.m. Richards explained that after work, she went home to sleep. Later, she accompanied Zerrei to the dealership and, because Zerrei forgot to bring her driver's license, Richards agreed to test drive the car.

{¶ 6} Brant testified that he had been unaware that Richards worked until 6:30 a.m. the day of the accident. When plaintiffs' counsel asked Brant whether he would have allowed Richards to test drive the vehicle if he had known that she had worked all night, Brant responded:

> The way you've asked that question, it would be subjective. If there was any reason for her–I mean, if she wasn't seemingly able to drive it, then no, I would say something to upper management that there was a problem. If she didn't have any indication that there was any issue and she had a valid driver's license and a seemingly valid insurance card and signed the test drive agreement, then I would have let her drive.

Brant stated that he did not notice anything to lead him to believe that Richards would have a problem driving the car.

{¶ 7} Herrnstein's director of sales operations stated that the dealership's test drive policy is to ask for a driver's license and to obtain a copy of the insurance card, or to otherwise obtain the insurance information by asking the prospective purchaser for the insurance information.

{¶ 8} The trial court subsequently granted appellees' request for summary judgment. This appeal followed. In her two assignments of error, appellant argues that the trial court incorrectly entered summary judgment in appellees' favor. Because the same standard of review applies to both assignments of error, for ease of discussion we consider them together.

A

{¶ 9} Initially, we observe that appellate courts must conduct a de novo review of trial court summary judgment decisions. *E.g., State ex rel. Novak, L.L.P. v. Ambrose*, 156 Ohio St.3d 425, 2019-Ohio-1329, 128 N.E.3d 1329, ¶ 8; *Pelletier v. Campbell*, 153 Ohio St.3d 611, 2018-Ohio-2121, 109 N.E.3d 1210, ¶ 13; *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Accordingly, an appellate court must independently review the record to determine if summary judgment is appropriate and need not defer to the trial court's decision. *Grafton*, 77 Ohio St.3d at 105.

{¶ 10} Civ.R. 56(C) provides, in relevant part, as follows:

> * * * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor.

{¶ 11} Accordingly, pursuant to Civ.R. 56, a trial court may not award summary judgment unless the evidence demonstrates that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) after viewing the evidence most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, and that conclusion is adverse to the nonmoving party. *Pelletier* at ¶ 13; *M.H. v. Cuyahoga Falls*, 134 Ohio St.3d 65, 2012-Ohio-5336, 979 N.E.2d 1261, ¶ 12; *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977).

B

{¶ 12} In her first assignment of error, appellant asserts that genuine issues of fact remain as to whether Herrnstein acted negligently by (1) failing to inquire into Richards' competency to operate a vehicle, and (2) failing to have a policy that may have revealed that Richards had worked until 6:30 a.m. the day of the test drive. Appellant argues that Ohio case law does not exist regarding "a car dealer's direct liability for an accident caused by a driver who was not up to operating a vehicle during the test drive." Appellant thus requests that this court to consider a case from Louisiana, *Barnett v. Globe Indemn. Co.*, 557 So.2d 300,301 (La.App.1990).

{¶ 13} Appellees respond that appellant's negligence claim against appellees is one for negligent entrustment. Appellees contends that appellant cannot establish any genuine issues of material fact to show that Herrnstein negligently entrusted the vehicle to Richards.

{¶ 14} In reply, appellant appears to suggest that because no Ohio case has ever applied a negligent entrustment theory against a car dealership, then this court should follow *Barnett*. Appellant asserts that car dealers have heightened duties when allowing prospective purchasers to test drive vehicles and that car dealers act negligently when they fail to inquire into an individual's competency to drive.

{¶ 15} Despite appellant's attempt to recast her negligence claim as something other than negligent entrustment, we point out that courts across the country have uniformly applied the negligent entrustment theory of liability in actions against car dealerships. In fact, the case that appellant asks us to follow, *Barnett*, considered the car dealership's liability under a negligent entrustment theory and not under some heightened negligence standard applicable to car dealerships only. In *Barnett*, the car dealership permitted an individual to test drive one of its

vehicles. During the test drive, the vehicle struck the plaintiffs' vehicle. The plaintiffs filed a complaint against the car dealership and alleged that the salesperson and car dealership acted negligently by entrusting the vehicle to the individual who test drove the car. The plaintiffs sought to hold the car dealership liable under theories of imputed negligence and negligent entrustment. The trial court later entered summary judgment in the car dealership's favor, and the plaintiffs appealed.

{¶ 16} On appeal, the plaintiffs argued that factual disputes remained regarding its two theories of liability. The plaintiffs claimed that the car dealership and the prospective purchaser were engaged in a joint venture at the time of the accident and that the car dealership thus may be liable for the prospective purchaser's alleged negligence. The plaintiffs further asserted that the car dealership acted negligently by entrusting the vehicle to an alleged incompetent driver.

{¶ 17} The Louisiana court rejected both arguments. The court noted that under Louisiana law, a joint venture exists between "'occupants of a conveyance'" when the occupants share a "'joint interest in the objects and purposes of the enterprise'" and "'an equal right, express or implied, to direct and control the conduct of each other in the operation of the conveyance.'" *Id.*, quoting *Ault & Wiborg Co. Of Canada v. Carson Carbon Co.*, 160 So. 298 (1935). The appellate court determined that the plaintiffs failed to present any evidence to support their theory of liability under a joint venture theory. The court explained:

> The mere fact of [the individual]'s test drive as a prospective purchaser and [the salesperson]'s allowing the test drive in hopes of selling the car do not suggest a mutual intent to combine their property, labor or skill in the conduct of a venture analogous to a partnership.

Id. at 301.

{¶ 18} The court also rejected the plaintiffs' negligent entrustment theory of liability. The court first indicated that "the lender of a vehicle is not responsible for the negligence of the borrower, unless he had or should have had knowledge the borrower was physically or mentally incompetent to drive." *Id.* at 301. The court did not, however, state whether the car dealer knew or should have known of the prospective purchaser's alleged incompetence. Instead, the court recognized that the plaintiffs cited "some cases in which the negligence of the driver of an automobile was imputed to the owner/passenger based on an agency theory or on the owner's theoretical right to control the operation of the vehicle." The court pointed out, however, that the Louisiana Supreme Court rejected the rule that the plaintiffs had proposed: to hold car dealership liable under an imputed negligence theory or under an agency theory. *Id.* at 302. The court also recited the Louisiana Supreme Court's holding in *Gaspard v. LeMaire*, 158 So.2d 149, 154 (La.1963): "'It is unrealistic to hold in the present day uses of motor vehicles that the occupant of a motor vehicle has factually any control or right of control over the operator.'" *Barnett* at 302.

{¶ 19} Thus, the court determined that the plaintiffs had failed to present a genuine issue of material fact and that the trial court properly entered summary judgment in the car dealer's favor. *Barnett* thus did not hold, as appellant seems to suggest, that car dealerships face heightened duties when they permit prospective purchasers to test drive vehicles. Instead, *Barnett* applied the traditional theory of negligent entrustment and the theory that seeks to hold a car dealership liable under a joint venture theory. The court declined to hold car dealerships liable under either theory based upon the mere fact of a prospective purchaser's test drive while a salesperson is also an occupant.

{¶ 20} Cases within and outside Ohio appear to align with *Barnett*. In *Shea v. Brown*, 153 A.2d 419 (1959), the Connecticut Supreme Court determined that a car dealership did not negligently entrust a motor vehicle by allowing an eighteen-year-old prospective purchaser with a suspended license to test drive a vehicle. The court refused to hold the car dealership liable based on the plaintiff's allegation that the car dealership possessed a duty to inquire into the status of the prospective purchaser's driver's license. *Id.* at 420.

{¶ 21} A Nebraska Court of Appeals likewise declined to hold car dealerships liable based on a failure to inquire into the status of a prospective purchaser's driver's license. *Suiter v. Epperson*, 571 N.W.2d 92, 104 (Neb.App.1997). The *Suiter* court recognized that car dealerships could be liable under a negligent entrustment theory if the plaintiff established both of the following: (1) that "the dealer [knew], or in the exercise of reasonable care should [have known], the driver to be incompetent" and (2) "the injuries complained of must be a result of such incompetence." *Id.* The court further noted, however, that "[c]ourts in other states have limited a dealer's liability for negligent entrustment to circumstances where the driver was intoxicated, lacked driving experience, or was unfamiliar with a particular type of car." *Id.*, citing Annotation, *Dealer's Liability for Negligent Operation of Car by Prospective Purchaser or One Acting for Him*, 31 A.L.R.2d 1441 (1953). The *Suiter* court found that the plaintiff failed to present any evidence to show that the car dealership knew, or should have known, that the prospective purchaser was incompetent to drive. In doing so, the court rejected the argument that car dealerships possess a duty to ask for a license. The court agreed that requiring car dealerships to "ensure that they are entrusting a vehicle to a licensed driver for a test drive seems a rather elementary statement of desirable public policy." *Id.* at 105. The court aptly

recognized, however, that it does "not make public policy." *Id.*

{¶ 22} Similarly, a New Mexico court of appeals determined that a car dealership did not negligently entrust a motor vehicle to an unlicensed prospective purchaser. *Spencer v. Gamboa*, 699 P.2d 623 (Ct. App. 1985). In *Spencer*, the plaintiff's husband was killed when the prospective purchaser ran a red light and struck the plaintiff's husband's vehicle. The plaintiff asserted that the car dealership knew, or should have known, that the prospective purchaser lacked a valid driver's license and was an incompetent driver. The appellate court affirmed the summary judgment and concluded that, even though the car dealership's entrustment of the vehicle violated state law, the plaintiff failed to present evidence to show that the car dealership knew, or should have known, that the prospective purchaser was an incompetent driver. *Id.* at 625.

{¶ 23} In *Boutilier v. Chrysler Ins. Co.,* 14 Fla. L. Weekly Fed. D 231, 2001 WL 220159 (M.D.Fla.Jan. 31, 2001), the court rejected the precise argument appellant makes: that a car dealership "is held to a higher standard of care due to the relationship between a dealership and prospective buyer." *Id.* at *4. In reaching its decision, the court observed:

> Courts across the country have established that "at common law, a dealer who holds a motor vehicle for purposes of sale is not liable for injuries or damages from negligence in the operation of the dealer's vehicle by a prospective purchaser, or one acting for a prospective purchaser, who is seeking to determine whether to purchase such vehicle." 8 Am.Jur.2d § 708 (citing *West v. Wall*, 191 Ark. 856, 88 S.W.2d 63 (1935); *Sproll v. Burkett Motor Co.*, 223 Iowa 902, 274 N.W. 63 (1937); *Foley v. John H. Bates, Inc.*, 295 Mass. 557, 4 N.E.2d 349 (1936); *Saums v. Parfet*, 270 Mich. 165, 258 N.W. 235 (1935); *Hill v. Harrill*, 203 Tenn.123, 310 S.W.2d 169 (1957); *Flaherty v. Helfont*, 123 Me. 134, 122 A. 180 (1923); *Roy v. Hammett Motors*, 187 Miss. 362, 192 So. 570 (1940). In *Mathews v. Federated Serv. Ins. Co.*, 857 P.2d 852 (Or.App.1993), the court held that an individual or entity is not negligent in entrusting a vehicle to a licensed driver simply because the driver was young or inexperienced. In *Grimmett v.*

> *Burke*, 906 P.2d 156, 165 (Kan.Ct.App.1996), the court held that entrusting a vehicle to an individual with a suspended driver's license is not negligence, absent actual or imputed knowledge that the driver was incompetent or dangerous.

Id. at *3.

{¶ 24} Based upon the foregoing, the court held that the car dealership had "no duty to investigate or determine [the prospective purchaser]'s competency to operate the automobile." *Id.* at *4.

{¶ 25} Little Ohio case law directly addresses a car dealership's liability to a third party injured during the course of a prospective purchaser's test drive. The Ninth District held that a vehicle lessor and its agent could not be held liable under a negligent entrustment theory when the lessee's operation of the leased vehicle caused injury to a third party. In *Bell*, the plaintiff sought redress for injuries that resulted when the lessee crashed the vehicle. The plaintiff asserted that the lessor and the agent knew that the lessee had difficulty obtaining insurance and that they thus had "a duty to check his driving record." Id. at *2.

{¶ 26} The court noted that the lessor "may be held liable in negligence for an injury received by a third person * * * if it knowingly leases a motor vehicle to an inexperienced or incompetent driver whose negligent operation results in the injury." *Id.* at *1. The court explained that to hold the lessor liable under a negligent entrustment theory, the injured party must show that the lessor "was negligent because it knew or should have known at the time of the lease either that [the operator] had no driver's license, or that he was incompetent or unqualified to operate a motor vehicle." *Id.* at *2. The court concluded that the lessor had no duty to inquire into the lessee's driving record and the lessor and the agent were entitled to judgment as a matter of law regarding the plaintiff's negligent entrustment claim.

{¶ 27} In *Williamson v. Eclipse Motor Lines*, the Ohio Supreme Court held that motor vehicle owners ordinarily are not liable for an entrustee's negligent operation of a motor vehicle. 145 Ohio St. 467, 62 N.E.2d 339 (1945), paragraph one of the syllabus. "Liability may arise, however, where an owner permits the operation of his motor vehicle by one who is so lacking in competency and skill as to convert it into a dangerous instrumentality." *Id.* The court stated that to hold a motor vehicle owner liable for negligently entrusting a vehicle, the injured person must establish "by competent evidence that the owner had knowledge of the driver's incompetence, inexperience or reckless tendency as an operator, or that the owner, in the exercise of ordinary care, should have known thereof from facts and circumstances with which he was acquainted." *Id.* at paragraph three of the syllabus.

{¶ 28} Based upon all of the foregoing, we do not agree with appellant that car dealerships possess some heightened duty when allowing prospective purchasers to test drive vehicles. Instead, the general rules regarding negligent entrustment apply.

{¶ 29} In the case sub judice, appellant has not produced any evidence to suggest appellees knew, or should have known, that Richards was allegedly incompetent to test drive a vehicle. Even if Richards had worked a graveyard shift shortly before the test drive, nothing in the record establishes that Richards appears to be so sleep-deprived that appellees knew, or should have known, that she was incompetent to operate a motor vehicle. Furthermore, the cases referenced above indicate that car dealerships do not have a duty to inquire into a potential purchaser's competency to operate a vehicle during a test drive. Accordingly, based upon the foregoing reasons, we overrule appellant's first assignment of error.

C

{¶ 30} In her second assignment of error, appellant asserts that genuine issues of material fact remain as to whether Richards' negligence may be imputed to appellees. Appellant contends that negligence may be imputed to appellees if they were engaged in a joint venture with Richards, the individual who test drove the vehicle.

{¶ 31} "The doctrine of imputed negligence does not ordinarily apply in Ohio, an exception being when parties are engaged in a joint enterprise." *Bloom v. Leech*, 120 Ohio St. 239, 166 N.E. 137 (1929), syllabus. "A 'joint enterprise' within the law of imputed negligence is the joint prosecution of a common purpose under such circumstances that each member of such enterprise has the authority to act for all in respect to the control of the agencies employed to execute such common purpose." *Id.* "'Parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interests in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control or management.'" *Id.* at 244, quoting *St. Louis & Sante Fé R. Co. v. Bell*, 58 Okl. 84, 159 P. 336, L. R. A. 1917A, 543; *Landry v. Hubert*, 100 Vt. 268, 137 A. 97; *Jessup, Adm'x v. Davis*, 115 Neb. 1, 211 N. W. 190, 56 A. L. R. 1403.

{¶ 32} In *Bloom*, the court determined that a joint enterprise did not exist between an operator of a motor vehicle and a passenger when the evidence failed to establish that the passenger "had any power or control over the vehicle in which they were riding." *Id.* at 245. Instead, the evidence showed, at most, that the passenger advised the driver of the location to which they were traveling and that the driver asked the passenger to help look for any

approaching vehicles. The court noted that the evidence failed to show that the passenger "had any power or control over the vehicle in which they were riding, or that he had any such authority as would show that he had joint control with * * * the owner and driver of the car." *Id.* The court acknowledged that the driver and the passenger may have shared a common purpose when embarking on the drive, but nevertheless determined that simply because the trip "was beneficial to both" did not mean that they had "joint operation or control of the automobile in which they were riding." *Id.* The court explained that to establish a joint undertaking between the driver and a passenger in a motor vehicle, "'it is not sufficient merely that the passenger or occupant of the machine indicate[s] to the driver or chauffeur the route he may wish to travel, or the places to which he wishes to go, even though in this respect there exists between them a common enterprise of riding together." *Id.* at 245-246, quoting *Bryant v. Pac. Elec. Ry. Co.*, 174 Cal. 737, 164 P. 385. Instead, the court explained, "[t]he circumstances must be such as to show that the occupant and the driver together had such control and direction over the automobile as to be practically in the joint or common possession of it.'" *Id.* at 246, quoting *Bryant v. Pac. Elec. Ry. Co.*, 174 Cal. 737, 164 P. 385. The court further stated that "'[t]he negligence of the driver of a vehicle is not imputable to the passenger merely because the passenger suggested a ride, and directed as to the place where the car was to be driven.'" *Id.*, quoting *Cram v. City of Des Moines*, 185 Iowa, 1292, 172 N. W. 23.

{¶ 33} The court thus held:

> "A joint adventure in the use of an automobile, implies a common possession and right of control of the vehicle and a responsibility for its negligent operation equally common to all of its occupants; and therefore the rule or doctrine of joint adventure should be restricted to cases in which these essentials are clearly apparent from the agreement of the parties, or arise as a logical

inference or legal conclusion from the facts found by the trier."

Id., quoting *Bryant v. Pac. Elec. Ry. Co.*, 174 Cal. 737, 164 P. 385.

{¶ 34} In the case sub judice, we do not believe that the record contains any evidence to suggest that appellees and Richards were engaged in a joint enterprise. Even though the dealership owned the car, ownership of a car does not, in itself, also show the necessary right of control over the vehicle. Furthermore, the salesman's decision to accompany Richards and the prospective purchaser on the test drive does not necessarily establish that the salesman had a right to joint control over the vehicle. Moreover, we question whether Richards and appellees shared a community of interests in the objects or purposes of the test drive. The purpose of the test drive from Richards' standpoint is to help Richards' friend decide whether to purchase the car. The purpose of the test drive from appellees' standpoint was to sell the car to Richards' friend. Richards' purpose thus was to help her friend decide whether to buy the car. Appellees' purpose was to sell the car. The parties to the alleged joint enterprise thus did not share the same interest in the object of the test drive. Instead, they held different interests.

{¶ 35} Additionally, as we observed in our discussion of appellant's first assignment of error, the Louisiana case that appellant cited, *Barnett*, declined to hold a car dealership liable under an imputed-negligence, joint-enterprise theory based on the mere fact of a prospective purchaser's test drive during which the salesperson also is an occupant. We likewise do not believe that the joint enterprise theory of imputed negligence applies so as to render a car dealership and its salesperson liable for injuries that result to a third party during the course of a prospective purchaser's test drive.

{¶ 36} We recognize that appellant cites a Colorado case that found a car dealership

liable under a joint venture theory of imputed negligence. *American Family Mut. Ins. Co. v. AN/CF Acquisition Corp.*, 361 P.3d 1098 (Colo.App. 2015). We decline, however, appellant's invitation to adopt the same rule. Instead, we believe that the Ohio Supreme Court should be the court to decide whether to adopt a rule that holds car dealerships liable under a joint venture theory of imputed negligence.[1]

{¶ 37} Accordingly, based upon the foregoing reasons, we overrule appellant's second assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

[1] Although neither party cites the following Ohio case, we note that a 1939 Ohio appellate decision found that a car dealer could be held liable for a prospective purchaser's negligent operation of the car dealer's motor vehicle during a test drive under the doctrine of respondeat superior. *Dahnke v. Meggitt*, 63 Ohio App. 252, 255, 26 N.E.2d 223 (6th Dist.1939). Because neither party has argued the applicability of *Dahnke* to the facts involved in the case sub judice, we do not address it.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellees recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. & Hess, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

[Cite as *PHH Mtge. Corp. v. Barker*, 2019-Ohio-5301.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
VAN WERT COUNTY

PHH MORTGAGE CORPORATION,

PLAINTIFF-APPELLEE, **CASE NO. 15-19-01**

v.

DENISE L. BARKER, ET AL., **O P I N I O N**

DEFENDANTS-APPELLANTS.

Appeal from Van Wert County Common Pleas Court
Trial Court No. CV-15-07-112

Judgment Affirmed

Date of Decision: December 23, 2019

APPEARANCES:

George R. Smith, Jr. **for Appellants**

Rick D. DeBlasis and William P. Leaman **for Appellee**

ZIMMERMAN, P.J.

{¶1} Defendant-appellants, Denise L. Barker and Robert D. Barker, Jr. ("Barkers"), appeal the December 31, 2018 judgment entry of the Van Wert County Court of Common Pleas granting summary judgment in favor of PHH Mortgage Corporation ("PHH") as to the Barkers' counterclaims for breach of contract, declaratory judgment relief, and wrongful foreclosure and the January 29, 2019 judgment entry of the Van Wert County Court of Common Pleas granting foreclosure in favor of the PHH. For the reasons that follow, we affirm.

{¶2} This case stems from PHH's third foreclosure complaint in rem filed against the Barkers.[1] (Doc. No. 3). PHH had previously filed foreclosure complaints against the Barkers in 2007 and 2011. (*Id.*).

{¶3} Relevant to this appeal, PHH filed its third foreclosure complaint against the Barkers on July 30, 2015. (Doc. No. 3). On September 25, 2015, the Barker's filed their answer and counterclaims against PHH for breach of contract, declaratory-judgment relief, tortious infliction of emotional distress, and wrongful foreclosure.[2] (Doc. No. 16). PHH filed an answer to the Barkers' counterclaims on November 23, 2015 and an amended answer on December 11, 2015. (Doc. Nos.

[1] The Barkers' obligation on the promissory note was discharged in bankruptcy. (Doc. No. 3).
[2] This court recited much of the factual and procedural background of this case in previous appeals, and we will not duplicate those efforts here. *See PHH Mtge. Corp. v. Barker*, 3d Dist. Van Wert No. 15-10-01, 2010-Ohio-5061 (the "2007 case"); *PHH Mtge. Corp. v. Denise L. Barker*, et al., Case No. CV15-07-112 (the "2011 case"). (Doc. No. 16).

20, 22). Mediation was ordered on May 5, 2016 and concluded with the parties unable to reach a settlement. (Doc. Nos. 25, 32). Thereafter, the Barkers requested leave to file an amended answer and counterclaim, and leave was granted. (Doc. Nos. 38, 40, 41). PHH then filed an amended answer to the Barkers' amended counterclaim. (Doc. No. 43).

{¶4} On March 31, 2017, PHH filed a motion for summary judgment. (Doc. No. 54). (*See also* Doc. No. 55). The Barkers also filed a motion for summary judgment together with their memorandum in opposition to PHH's motion for summary judgment on April 26, 2017. (Doc. No. 56).

{¶5} Ultimately, on December 31, 2018, the trial court issued judgment in favor of PHH as to a decree in foreclosure (in rem only) and dismissed the Barkers' counterclaims with prejudice. (Doc. No. 73). The trial court issued its judgment entry and decree in foreclosure on January 29, 2019. (JE, Doc. No. 76).

{¶6} The Barkers filed their notice of appeal on February 20, 2019 and raise seven assignments of error for our review. (Doc. No. 79). We will begin by addressing the Barkers' first, second, third, fourth and fifth assignments of error together, followed by their sixth assignment of error, and then their seventh assignment of error.

Assignment of Error No. I

The trial court erred in granting summary judgment to plaintiff [PHH] and in denying defendants' [Barkers'] summary judgment on their claim for breach of duty of good faith and fair dealing and breach of contract by impermissibly weighing the evidence, failing to accord the Barkers the benefit of all reasonable inferences permissibly derived from the pleadings and evidence of record and failing to construe the evidence most strongly in their favor as it was undisputed that plaintiff [PHH] refused to provide a valid reinstatement quote or an address where payments would be *accepted* and thus unlawfully impeded or prevented defendants' [Barkers'] performance of their obligations under contract and violated the court order reinstating the loan.

Assignment of Error No. II

The trial court erred in granting summary judgment to plaintiff [PHH] and in denying defendants' [Barkers'] motion for summary judgment as the notice of default included sums to which plaintiff [PHH] was not legally entitled, failed to comply with a prior order of the court and PHH failed to mail a notice of default prior to filing this action.

Assignment of Error No. III

The trial court erred in granting summary judgment to plaintiff [PHH] as it was undisputed plaintiff [PHH] failed to mitigate damages by refusing to provide an address where payments would be *accepted* or providing a reinstatement quote.

Assignment of Error No. IV

The trial court erred in denying defendants [Barkers] [sic] partial summary judgment on their counterclaim for wrongful foreclosure. Where, as here, a lender files successive foreclosure actions in violation of a court judgment and refuses to provide borrowers an opportunity to perform their obligations under the court judgment and contract in an effort to coerce the borrowers

into paying illegal sums under the constant threat of losing their home, its acts in bad faith and the lender may be held to answer for this tortious conduct in damages.

Assignment of Error No. V

The trial court erred in denying defendants' [Barkers'] summary judgment on their counterclaim for declaratory judgment relief as the bad faith conduct of a lender in performance of its contractual and legal obligations entitles borrowers to a declaration that the note and mortgage are void as a matter of law.

{¶7} In their first-five assignments of error, the Barkers argue that the trial court erred by granting summary judgment in favor of PHH because PHH breached its mortgage contract with them. In their second and third assignments of error, the Barkers assert that the trial court improperly granted summary judgment in favor of PHH because PHH assessed them for late charges and expenses incurred in prior unsuccessful litigation; that PHH failed to provide the Barkers with an accurate reinstatement quote prior to notice of intent to foreclose; and because PHH failed to mitigate its damages. In their fourth and fifth assignments of error, the Barkers assert that the trial court should have granted summary judgment on their wrongful-foreclosure and declaratory-judgment counterclaims. [3]

Standard of Review

[3] The Barkers are not challenging the dismissal of the tortious infliction of emotional distress claim against PHH.

{¶8} Generally, we review a decision to grant summary judgment de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 390 (2000). "De novo review is independent and without deference to the trial court's determination." *ISHA, Inc. v. Risser*, 3d Dist. Allen No. 1-12-47, 2013-Ohio-2149, ¶ 25, citing *Costner Consulting Co. v. U.S. Bancorp*, 195 Ohio App.3d 477, 2011-Ohio-3822, ¶ 10 (10th Dist.). Summary judgment is proper where there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can reach but one conclusion when viewing the evidence in favor of the non-moving party, and the conclusion is adverse to the non-moving party. Civ.R. 56(C); *State ex rel. Cassels v. Dayton City School Dist. Bd. of Edn.*, 69 Ohio St.3d 217, 219 (1994).

{¶9} However, "'"[t]o properly support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials showing: (1) the movant is the holder of the note and mortgage, or is a party entitled to enforce the instrument; (2) if the movant is not the original mortgagee, the chain of assignments and transfers; (3) the mortgagor is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due."'" *U.S. Bank N.A. v. Jones*, 3d Dist. Allen No. 1-16-15, 2016-Ohio-7168, ¶ 17, quoting *HSBC Mtge. Servs., Inc. v. Watson*, 3d Dist. Paulding No. 11-14-03, 2015-Ohio-221, ¶ 24, quoting *Wright-Patt Credit Union, Inc. v. Byington*, 6th Dist. Erie No. E-12-002, 2013-Ohio-3963, ¶ 10.

{¶10} "The party moving for summary judgment has the initial burden of producing some evidence which demonstrates the lack of a genuine issue of material fact." *Carnes v. Siferd*, 3d Dist. Allen No. 1-10-88, 2011-Ohio-4467, ¶ 13, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 292 (1996). "In doing so, the moving party is not required to produce any affirmative evidence, but must identify those portions of the record which affirmatively support his argument." *Id.*, citing *Dresher* at 292. "The nonmoving party must then rebut with specific facts showing the existence of a genuine triable issue; he may not rest on the mere allegations or denials of his pleadings." *Id.*, citing *Dresher* at 292 and Civ.R. 56(E).

Analysis

{¶11} In the Barkers' first, second, and third assignments of error, they argue that the trial court erred when it granted summary judgment in favor of PHH. Specifically, the Barkers argue that summary judgment in favor of PHH was improper because there is no genuine issue of material fact that they were prevented from performing under the terms of the contract (i.e., paying their mortgage payments) through PHH's refusal to provide an accurate reinstatement quote and to provide an address where their mortgage payments were to be sent as a result of PHH's breach. That is, the Barkers contest PHH's standing to initiate the foreclosure action, arguing that PHH is not entitled to summary judgment because PHH failed to demonstrate that they defaulted; that PHH did not meet all conditions

precedent to advance the Barkers' debt; that PHH had not established the accurate principle and interest due; and because PHH failed to mitigate its damages.

Breach of Contract

{¶12} In order to address the Barkers' assignments of error, we need to first look to the contract between the parties. To succeed on a breach-of-a-written-contract claim, a plaintiff must demonstrate proof of the contract's existence, performance by the plaintiff, breach by the defendant, and damage or loss to the plaintiff. *See Reddy v. Singh*, 3d Dist. Marion No. 9-14-29, 2015-Ohio-1180, ¶ 75, citing *Caley v. Glenmoor Country Club, Inc.*, 5th Dist. Stark Nos. 2013 CA 00023 and 2013 CA 00018, 2013-Ohio-4877. ¶ 59. Here, the Barkers contend that PHH breached its contract with them because it failed to provide them with an address to which they could tender payment. (*See* Doc. No. 67, D. Barker Aff. at 2-3). In other words, the Barkers argue that PHH breached the duty of good faith and fair dealing.

{¶13} The duty of good faith and fair dealing by each of the parties in performance and enforcement of the contract are implied covenants dictated by public policy. *Littlejohn v. Parris*, 1st Dist. Hamilton No. C-040720, 2005-Ohio-4850, ¶ 27 (concluding "[g]ood faith and fair dealing [] require[] not only honesty but also reasonableness in the enforcement of the contract"). "'Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed

common purpose and consistency with the justified expectations of the other party.'" *Id.* at ¶ 26, quoting 1 Restatement of the Law 2d, Contracts, Section 205, Comment a (1981). Conversely, bad faith may consist of inaction, or may be the "'abuse of a power to specify terms, [or] interference with or failure to cooperate in the other party's performance.'" *Id.* at ¶ 26, quoting 1 Restatement of the Law 2d, Contracts, Section 205, Comment d (1981).

{¶14} "'[T]he doctrine is based on the long-established principle of law that a party should not be able to take advantage of its own wrongful act.'" *Lucarell v. Nationwide Mut. Ins. Co.*, 152 Ohio St.3d 453, 2018-Ohio-15, ¶ 54, citing 13 Lord, Section 39:6, at 582. There exists no independent cause of action for a breach of the implied covenant of good faith or fair dealing separate and apart from the breach-of-contract claim because those implied covenants are integral to any contract, and thus, they "'cannot stand alone.'" *Krukrubo v. Fifth Third Bank*, 10th Dist. Franklin No. 07AP-270, 2007-Ohio-7007, ¶ 18-19, quoting *Interstate Gas Supply, Inc., v. Calex Corp.*, 10th Dist. Franklin No. 04AP-980, 2006-Ohio-638, ¶ 98.

{¶15} Even assuming that there are discrepancies as to the addresses provided to the Barkers by PHH, there is no genuine issue of material fact that the Barkers failed to tender *any* mortgage payment to PHH at *any* address after February of 2008. (*See* Doc. No. 67, D. Barker Aff. at 2); (Doc. No. 54, Spare Aff. Exs. A, B, C, D, E, F, G, H, I, J, K, L). *Compare Lucarell* at ¶ 54, (concluding that "[t]he

prevention of performance doctrine provides that a party who prevents another from performing its contractual obligations cannot rely on that failure of performance to assert breach of contract"), citing *Suter v. Farmers' Fertilizer Co.*, 100 Ohio St. 403 (1919), paragraph four of the syllabus, *Buckley Towers Condominium, Inc. v. QBE Ins. Corp*., 395 Fed.Appx. 659, 662 (11th Cir.2010), and 13 Lord, Section 39:3, at 569-571. Further, the Barkers failed to present any evidence that PHH prevented them from tendering any mortgage payment to *any* address. Instead, the record reveals that the Barkers had no intent on tendering a reinstatement payment; instead, they sought modification, an accommodation, and mortgage-debt forgiveness. (*See* Doc. No. 67, D. Barker Aff. at 2-3); (Doc. No. 54, Burchfield Aff. Exs. D, E).

{¶16} The record reflects that between August 26, 2009 and January 26, 2011, PHH attempted to engage the Barkers through correspondence indicating they may qualify for the Home Affordable Modification Plan ("HAMP"), which would create a trial-period-payment plan for the Barkers on their mortgage. (*See* Doc. No. 54, Spare Aff. Exs. F, G, H, I). However, this HAMP was denied because the Barkers "did not make all of the Trial Period Plan payments by the end of the trial period as required by the program." Thereafter, the Barkers were denied a second HAMP opportunity because they failed to timely return the necessary documents to PHH. (*See* Doc. No. 54, Spare Aff. Ex. G, I). When subsequent loss-mitigation reviews failed to result in permanent-loan modification, the Barkers then requested

a payment plan beginning on October 1, 2007 "when the Barkers felt that they entered into the accommodation with PHH." (*See* Doc. No. 54, Burchfield Aff. Exs. D, E). Additionally, when their attempts at modification and setting up a payment plan and accommodation were unsuccessful, the Barkers sought mortgage-debt forgiveness on July 15, 2011. Specifically, the Barkers' attorney informed PHH:

> I have been authorized by the Barkers to agree to go forward with their mortgage and reinstate their mortgage as if they had made all their payments that were necessary from October 1, 2007 to today with no back interest assessment and with the principal adjusted as if those payments had been made and then go forward and resume paying the loan under those terms.

(*Id.*). Stated differently, the above correspondence (with PHH) negates any genuine issue of material fact that the Barkers were seeking reinstatement.

{¶17} Moreover, the record reflects that the Barkers did not seek to make a total-reinstatement payment. Thus, there is no genuine issue of material fact that the Barkers were not prevented from performing under the terms of the mortgage contract by PHH's failure to provide an address to remit their payments.

{¶18} Next, we turn to Barkers' claim that they were prevented from performing under the terms of the contract by PHH's failure to provide them an accurate reinstatement quote.

{¶19} Ohio law does not provide a borrower with a right of reinstatement. *See Wilborn v. Bank One Corp.*, 121 Ohio St.3d 546, 2009-Ohio-306, ¶ 18. However, the terms of a mortgage contract may grant a borrower these rights. *Id.*

We therefore must review Paragraphs 19 and 22 of the Barkers' mortgage contract to determine whether they were entitled to reinstatement. Paragraph 22 of the Barkers' mortgage contract provides that the notice of intent to foreclose shall specify the following:

> (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sum secured by this Security Instrument, foreclosure by judicial proceeding and sale of the Property. *The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in foreclosure proceeding the non-existence of default or any other defense of Borrower to acceleration and foreclosure.* If the default is not cured on or before the date specified in the notice, Lender at its option may require immediately [sic] payment in full or all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, costs of title evidence.

(Emphasis added.) (Doc. No. 54, Spare Aff. Ex. E). The notice of intent to foreclose provided to the Barkers by PHH on July 7, 2011 states, in relevant part:

> We recognize that your personal obligations to repay the debt secured by the mortgage held by PHH Mortgage Services, on the above referenced property, has been discharged, dismissed or relief granted through your bankruptcy proceeding.
>
> The mortgage would not be subject be subject to foreclosure at this time if $ 16079.27 (total amount due) is remitted within 30 days from the above date. We are required to notify you before foreclosure proceedings commence.

> Any remittances must be in the form of "CERTIFIED FUNDS"; no personal checks will be accepted.

(Doc. No. 54, Spare Aff. Ex. J). Paragraph 19 of the mortgage provides that the borrower has the right to reinstatement after acceleration if the borrower meets certain conditions, which are listed as follows:

> **19. Borrower's Right to Reinstate after Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) *pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred;* (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including but not limited to reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, shall continue unchanged. *Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender:* (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

(Emphasis added.) (Doc. No. 54, Spare Aff. Ex. E).

{¶20} Here, the notice's reference to the right to reinstate in Paragraph 22 does not confer an absolute right to reinstatement. Rather, it confers a right to

reinstatement subject to the terms of Paragraph 19. Because PHH complied with the terms of mortgage contract by sending the Barkers a notice of intent to foreclose which complied with the terms of Paragraph 22, and because the Barkers failed to subsequently meet the conditions specified in Paragraph 19, we conclude the Barkers' argument (that they were unaware of the amount required for reinstatement) to be without merit.[4]

{¶21} Moreover, there are no terms in the mortgage contract that support the Barkers' argument regarding the preciseness of the reinstatement quote. Instead, and based upon the facts and circumstance of this case—the Barkers' conduct—in failing to remit the reinstatement amount of $16,079.27 by August 15, 2011 is the issue of material fact in question. Therefore, there is no genuine issue of material fact that the Barkers were not prevented from performing under the terms of the mortgage contract by PHH's failure to provide them with an accurate reinstatement quote.

{¶22} Further, the Barkers argue that their July 15, 2011 letter to the PHH (sent in response to the notice of intent to foreclose) constitutes a qualified written request ("QWR") under the Real Estate Settlement Procedures Act of 1974 ("RESPA"). Therefore, according to the Barkers, they were entitled to a response from PHH within the statutory time frame. *See* 12 U.S.C. 2605 (1996) (current

[4] To the extent that the Barkers argue that they were entitled successive notices of intent to foreclose, their argument is specious. The terms of the mortgage contract require no such notices.

version at 12 U.S.C. 2605 (2011)). We disagree. The Barkers waived this argument because such was never raised in their answer, amended answer, or counterclaims against PHH as required under 12 U.S.C. 2605. Furthermore, 12 U.S.C. 2614 creates a three-year statute of limitation for actions brought under 12 U.S.C. 2605. 12 U.S.C. 2614 (1996) (current version at 12 U.S.C. 2614 (2011)). Because the Barkers were precluded from raising their claim under 12 U.S.C. 2605 as a result of the expiration of the statute of limitations (on July 15, 2014) and concurrently failed to demonstrate that the statute of limitation should be equitably tolled, any argument related to the applicability of RESPA fails to create a genuine issue of material fact. *See* 12 U.S.C. 2614. *See Wells Fargo Bank, N.A., v. Sessley*, 10th Dist. Franklin No. 09AP-178, 2010-Ohio-2902, ¶ 24, (concluding that the statute of limitations under 12 U.S.C. 2614 expired and without Sessley's demonstration that the statute of limitations were equitably tolled arguments related to RESPA "were insufficient to create a genuine issue of material fact"). Thus, there is no genuine issue of material fact that the Barkers were not prevented from performing under the terms of the mortgage contract because they were not entitled to a response from PHH under RESPA.

{¶23} Next, the Barkers assert that the accuracy of the notice of intent to foreclose is called into question by PHH's inclusion of late charges and property inspection fees into reinstatement amount. Specifically, they argue that PHH is not

entitled to late charges and property inspection fees as a result of PHH's refusal to communicate with the Barkers or accept payments and because PHH failed to advise the Barkers that it was seeking a lump-sum payment on reinstatement. As we have previously determined, the Barkers failed to establish any genuine issue of material fact that they were entitled to any further form of communication under the terms of the mortgage or RESPA other than the notice of intent to foreclose or that PHH had failed to accept payments after December 7, 2009. (*See* Doc. No. 54, Spare Aff. Ex. N). Thus, any argument suggesting that the Barkers did not know that PHH was seeking a lump-sum payment on reinstatement is without merit. (*See* Doc. No. 54, Spare Aff. Ex. J). Accordingly, we conclude that PHH was entitled to include late fees and property inspection fees in the notice of intent to foreclose under the facts presented in this case.

{¶24} Lastly, the Barkers argue that summary judgment in favor of PHH was improper because PHH had a duty to mitigate their damages. "Under Ohio law, the injured party in a breach-of-contract action has a duty to mitigate damages, meaning that the injured party cannot recover damages 'that it could have prevented by "reasonable affirmative action."'" *First Fin. Bank, N.A. v. Cooper*, 1st Dist. Hamilton No. C-150664, 2016-Ohio-3523, ¶ 23, quoting *Four Seasons Environmental, Inc. v. Westfield Cos.*, 93 Ohio App.3d 157, 159 (1st Dist.1994), quoting *F. Ents. v. Kentucky Fried Chicken Corp.*, 47 Ohio St.2d 154 (1976),

paragraph three of the syllabus. "An injured party need only use 'reasonable, practical care and diligence, not extraordinary measures to avoid excessive damages.'" *Id.*, quoting *Provident Bank v. Barnhart*, 3 Ohio App.3d 316, 320 (1st Dist.1982). The burden of proof for the affirmative defense of failure to mitigate damages lies with the breaching party. *Id.*, citing *Jindal Builders & Restoration Corp. v. Brown & Cris*, 1st Dist. Hamilton Nos. C-970029 and C-970050, 1997 WL 674621, *1 (Oct. 31, 1997). "Whether an injured party used reasonable care to avoid damages presents a question of fact." *Id.*, citing *Pinnacle Mgt. v. Smith*, 12th Dist. Butler No. CA2003-12-327, 2004-Ohio-6928, ¶ 12, citing *Young v. Frank's Nursery Crafts, Inc.*, 58 Ohio St.3d 242, 244 (1991).

{¶25} Even though, PHH could have been more timely in initiating its third foreclosure action (after its dismissal of the 2011 case on July 13, 2014) by filing its foreclosure complaint before July 30, 2015, the mitigation argument ignores the Barkers' inaction throughout the course of the proceedings beginning with the 2007 case. The Barkers argue that PHH failed to take reasonable steps to provide them with an address where payments could be remitted, answer correspondence, and accept payments. However, the Barkers did not establish that PHH failed to use reasonable care to avoid damages, as we previously determined, because PHH provided the Barkers with an address where they could remit a reinstatement payment; because the Barkers never attempted to tender any form of payment to

PHH after February 2008; and because PHH was not legally required to respond to the Barkers' correspondence. *See Cooper* at ¶ 23.

{¶26} Moreover, the Barkers were not prejudiced by *any* failure on the part of PHH to mitigate damages because they were permitted to live *rent-free* in the residence throughout the entirety of the *decade-long* foreclosure actions.

{¶27} Thus, we conclude that there is no genuine issue of material fact that PHH met the conditions precedent in order to advance the debt because there is no genuine issue of material fact that the Barkers failed to perform under the terms of the mortgage contract; that PHH did not breach the mortgage contract; that PHH established accurate principle and interest due; and that PHH did not fail to mitigate its damages.

Wrongful Foreclosure

{¶28} Under the fourth assignment of error, the Barkers argue that the trial court should have granted their summary judgment request as to their wrongful foreclosure counterclaim because PHH prevented them from performing under the terms of mortgage contract. In particular, the Barkers request us to recognize an independent cause of action for wrongful foreclosure. "Ohio courts have not yet recognized an independent cause of action for wrongful foreclosure." *Nationstar Mtge., L.L.C. v. Waisanen*, 9th Dist. Lorain No. 16CA010904, 2017-Ohio-131, ¶ 6, fn. 1. *See also Third Fed. S. & L. Assn. of Cleveland v. Formanik*, 8th Dist.

Cuyahoga No. 103649, 2016-Ohio-7478, ¶ 53-54 (concluding that Ohio law does not recognize wrongful-foreclosure actions). Accordingly, the trial court properly denied summary judgment in favor of the Barkers as to their counterclaim for wrongful foreclosure.

Declaratory Judgment

{¶29} In their fifth assignment of error, the Barkers assert that the trial court erred in denying summary judgment as to their counterclaim for declaratory-judgment relief because PHH acted in bad faith.

{¶30} A complaint seeking relief based on a breach of contract may be treated as a claim for declaratory judgment seeking construction of the contract. *See Blackwell v. Internatl. Union, United Auto Workers*, 9 Ohio App.3d 179 (8th Dist.1983), paragraph one of the syllabus. *See also* R.C. 2721.04 ("a contract may be construed by a declaratory judgment or decree either before or after a breach of the contract"). An appellate court reviews a trial court's determination "concerning the appropriateness of the case for declaratory judgment" under an abuse-of-discretion standard. *See Arnott v. Arnott*, 132 Ohio St.3d 401, 2012-Ohio-3208, ¶ 1. After the trial court determines that a complaint for declaratory judgment presents a justiciable question, an appellate court reviews de novo purely legal issues. *Id.* at ¶ 17.

{¶31} "A declaratory judgment action provides a means by which parties can eliminate uncertainty regarding their legal rights and obligations." *Mid-Am. Fire and Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, ¶ 8, citing *Travelers Indemn. Co. v. Cochrane*, 155 Ohio St. 305, 312 (1951). *See also* R.C. 2721.03. "The purpose of a declaratory judgment action is to dispose of 'uncertain or disputed obligations quickly and conclusively,' and to achieve that end, the declaratory judgment statutes are to be construed 'liberally.'" *Mid-Am.* at ¶ 8, quoting *Ohio Farmers Inemn. Co. v. Chames*, 170 Ohio St.3d 209, 213 (1959). However, "the declaratory judgment statutes are not without limitation," and a declaratory judgment should be used "only to decide 'an actual controversy, the resolution of which will confer certain rights or status upon the litigants.'" *Id.* at ¶ 9, quoting *Corron v. Corron*, 40 Ohio St.3d 75, 79 (1980).

{¶32} Here, the trial court properly denied summary judgment as to the Barkers' declaratory-judgment counterclaim. That is, the trial court did not abuse its discretion in determining that the Barkers were not entitled to declaratory-judgment relief because PHH did not act in bad faith. Indeed, as we previously determined, the record reflects that PHH did not act in bad faith by pursuing foreclosure against the Barkers due to non-payment of their debt.

{¶33} For these reasons, the Barkers' first, second, third, fourth, and fifth assignments of error are overruled.

Assignment of Error No. VI

> **The trial court erred in granting judgment of foreclosure to plaintiff [PHH] as it did not have clean hands and considerations of equity furthermore bar it from the equitable remedy of foreclosure. Where a lender refuses to provide a reinstatement quote or an address where payments would be *accepted* after a court judgment ordering reinstatement of the mortgage loan, it has created the very default giving rise to its claim for relief and equity will not countenance such conduct.**

{¶34} The Barkers argue that the trial court erred in granting a judgment of foreclosure. Specifically, they argue that the trial court erred in granting the judgment of foreclosure because PHH did not have "clean hands."

Standard of Review

As this court has previously held,

> a foreclosure involves a two-step process. Once it has been determined as a matter of law that a default on the obligation secured by the mortgage has occurred, the court must then consider the equities to determine if foreclosure is the appropriate remedy.

PHH Mtge. Corp. v. Barker, 3d Dist. Van Wert No. 15-10-01, 2010-Ohio-5061, ¶ 35, citing *First Knox Natl. Bank v. Peterson*, 5th Dist. Knox No. 08CA28, 2009-Ohio-5096, ¶ 18, citing *Rosselot v. Heimbrock*, 54 Ohio App.3d 103, 105-106 (12th Dist.1988). "Moreover, because foreclosure is equitable relief, 'the simple assertion of the elements of foreclosure does not require, as a matter of law, the remedy of foreclosure.'" *Id.*, quoting *First Natl. Bank of Am. v. Pendergrass*, 6th Dist. Erie No. E-08-048, 2009-Ohio-3208, ¶ 22. "Therefore, as an equitable action, a

foreclosure action should be reviewed for abuse of discretion." *Id.*, citing *Buckeye Retirement Co., L.L.C. v. Walling*, 7th Dist. Mahoning No. 05 MA 119, 2006-Ohio-7059, ¶ 16. An abuse of discretion suggests the trial court's decision is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

Analysis

{¶35} In their sixth assignment of error, the Barkers argue that the trial court abused its discretion by granting a judgment of foreclosure in favor of PHH because PHH violated the doctrine of "clean hands." "The 'clean hands doctrine' of equity requires that whenever a party takes the initiative to set into motion the judicial machinery to obtain some remedy but has violated good faith by [his] prior-related conduct, the court will deny the remedy." *Bank of New York Mellon v. Antes*, 11th Dist. Trumball No. 2014-T-0028, 2014-Ohio-5474, ¶ 32, quoting *Crick v. Starr*, 7ths Dist. Mahoning No. 08 MA 173, 2009-Ohio-6754, ¶ 38, quoting *Bean v. Bean*, 14 Ohio App.3d 358, 363-364 (10th Dist.1983). "'A movant cannot obtain relief on a matter if he is "guilty of reprehensible conduct with respect to the subject matter of the suit."'" *Id.*, quoting *Crick* at ¶ 32, quoting *Marinaro v. Major Indoor Soccer League*, 81 Ohio App.3d 42, 45 (9th Dist.1991). "'However, the movant's conduct "must constitute *reprehensible, grossly inequitable, or unconscionable conduct,* rather than mere negligence, ignorance, or inappropriateness."'" (Emphasis sic.)

Id., quoting *Crick* at ¶ 38, quoting *Wiley v. Wiley*, 3d Dist. Marion No. 9-06-34, 2007-Ohio-6423, ¶ 15.

{¶36} Here, the Barkers contend that PHH violated the "clean-hands doctrine" because it did not provide them with a reinstatement quote or an address to which they were to remit payment. However, as we previously determined, the Barkers breached the terms of the mortgage contract and subsequently benefitted from their breach. Consequently, we cannot say that PHH's conduct constitutes "reprehensible, grossly inequitable, or unconscionable conduct" which would permit the Barkers equitable relief because the Barkers' conduct of non-payment was "reprehensible, grossly inequitable, or unconscionable conduct." Accordingly, we conclude that the trial court did not abuse its discretion by granting the equitable relief of foreclosure to PHH.

{¶37} Accordingly, the Barkers' sixth assignment of error is overruled.

Assignment of Error No. VII

The judgment of foreclosure is unlawful as it renders the prior judgment ordering reinstatement of the loan a nullity and permits collection of sums to which PHH is not entitled.

{¶38} Finally, and in their seventh assignment of error, the Barkers argue that the trial court abused its discretion by granting PHH foreclosure because the trial court's order of foreclosure permits PHH to collect sums that it is not entitled to collect from the confirmation of sale.

Standard of Review

{¶39} Foreclosure actions progress through two, distinct stages which culminate in "final, appealable judgment[s]: the order of foreclosure and the confirmation of sale." *Farmers State Bank v. Sponaugle*, 157 Ohio St.3d 151, 2019-Ohio-2518, ¶ 18, citing *CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, ¶ 39. Through the order of foreclosure, the trial court determines "the extent of each lienholder's interest, sets out the priority of the liens, determines the other rights and responsibilities of each party, and orders the property to be sold by sheriff's sale." *Id.*, citing *Roznowski* at ¶ 39 and R.C. 2323.07. The parties may challenge the trial court's decision to grant the decree of foreclosure on appeal. *Id.*, citing *Roznowski* at ¶ 39.

{¶40} "The confirmation of sale is an ancillary proceeding limited to whether the sheriff's sale conformed to law." *Id.* at ¶ 19 citing *Roznowski* at ¶ 40. After the trial court examines the proceedings and finds that the sheriff's sale conformed with R.C. 2329.01 through 2329.61, then the trial court enters a confirmation of sale order which addresses the dispersal of proceeds. *Id.* citing R.C. 2329.31. "An appeal of the confirmation of sale is limited to challenging the confirmation order itself and to issues related to confirmation proceedings—for example, computation

of the final total amount owed by the mortgagor, accrued interest, and *amounts advanced by the mortgagee for inspections, appraisals, property protection, and maintenance*." (Emphasis added.) *Id.,* citing *Roznowski* at ¶ 40. We review the trial court's decision to confirm a sheriff's sale of property under an abuse-of-discretion standard. *Id.*, citing *Ohio Savs. Bank v. Ambrose*, 56 Ohio St.3d 53, 57 (1990). An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore*, 5 Ohio St.3d at 219.

Analysis

{¶41} Because the confirmation-of-sale proceeding has not yet occurred, we are without jurisdiction to review the Barkers' argument. "'In order to be justiciable, a controversy must be ripe for review.'" *State v. Loving*, 10th Dist. Franklin No. 08AP-278 and 08AP-281, 2009-Ohio-15, ¶ 4, quoting *Keller v. Columbus*, 100 Ohio St.3d 192, 2003-Ohio-5599, ¶ 26. "A claim is not ripe for our consideration if it rests on contingent future events that may not occur as anticipated or may never occur at all." *Id.* at ¶ 4, citing *Texas v. United States*, 523 U.S. 296, 300, 118 S.Ct. 1257 (1998). *See State v. Robinson*, 11th Dist. Lake No. 2009-L-168, 2011-Ohio-4695, ¶ 35. *See also Kalnasy v. Metro Health Med. Ctr.*, 8th Dist. Cuyahoga No. 90211, 2008-Ohio-3035, ¶ 5. Accordingly, we decline to address the Barkers' seventh assignment of error.

{¶42} Having found no error prejudicial to the appellant herein in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

SHAW and WILLAMOWSKI, J.J., concur.

/jlr

[Cite as *Midland Funding, L.L.C. v. Colvin*, 2019-Ohio-5382.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
HANCOCK COUNTY

MIDLAND FUNDING LLC,

PLAINTIFF-APPELLEE, **CASE NO. 5-18-15**

v.

CASSANDRA COLVIN, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Hancock County Common Pleas Court
Trial Court No. 2013-CV-459

Judgment Reversed and Cause Remanded

Date of Decision: December 30, 2019

APPEARANCES:

Ronald I. Frederick and Gregory S. Reichenbach **for Appellant**

H. Toby Schisler **for Appellees, Midland Funding LLC, Midland Credit Management, Inc., and Encore Capital Group, Inc.**

PRESTON, J.

{¶1} Defendant/counterclaim-plaintiff/third-party-plaintiff-appellant. Cassandra Colvin ("Colvin"), appeals the June 12, 2018 judgment of the Hancock County Court of Common Pleas denying her motion for class certification. For the reasons that follow, we reverse.

{¶2} On April 22, 2013, plaintiff/counterclaim-defendant-appellee, Midland Funding LLC ("Midland"), filed a complaint against Colvin in the Hardin County Municipal Court. (Doc. No. 8). Midland alleged that Colvin had defaulted on a Chase Bank credit-card account, that it had purchased Colvin's delinquent account from Chase Bank, and that, despite Midland's informal efforts to collect the amount owing, Colvin failed to pay the balance due. (*Id.*). Midland requested judgment against Colvin in the amount of $950.60 along with other related relief. (*Id.*).

{¶3} On June 5, 2013, Colvin filed a motion to dismiss Midland's complaint. (*Id.*). In her motion, Colvin alleged that she "lives in Hancock County, Ohio, and has never lived in Hardin County, Ohio." (*Id.*). In addition, she noted that Midland "made no allegation that there was any contract signed in Hardin County, or any other connection to Hardin County." (*Id.*). Colvin thus argued that the Hardin County Municipal Court did not have subject-matter jurisdiction over Midland's action because Midland's action did not have a territorial connection to the court.

(*Id.*). On June 14, 2013, Midland filed a memorandum in opposition to Colvin's motion to dismiss. (*Id.*).

{¶4} On June 27, 2013, the Hardin County Municipal Court issued its ruling on Colvin's motion to dismiss. (*Id.*). The court found that Colvin "at all times relevant lived in Hancock County, Ohio" and that "there does not appear to be any nexus to the territory over which [the Hardin County Municipal Court] has jurisdiction." (*Id.*). However, the court did not dismiss Midland's action outright. (*Id.*). Instead, the court transferred Midland's action to the Findlay Municipal Court at Midland's cost. (*Id.*).

{¶5} On September 3, 2013, after the case had been transferred to the Findlay Municipal Court, Colvin filed a combined answer to Midland's complaint, counterclaim against Midland, and third-party complaint adding third-party-defendants-appellees, Midland Credit Management, Inc. ("Midland Credit") and Encore Capital Group, Inc. ("Encore"), as third-party defendants.[1] (*Id.*). In her counterclaim and third-party complaint, Colvin alleged that the Midland parties violated the federal Fair Debt Collection Practices Act ("FDCPA") when Midland filed suit against her in the Hardin County Municipal Court because she did not reside within the territorial jurisdiction of the Hardin County Municipal Court at the time Midland filed its complaint and she did not sign the contract underlying her

[1] Midland, Midland Credit, and Encore will hereafter be referred to collectively as the "Midland parties."

alleged debt to Chase Bank within the territorial jurisdiction of the Hardin County Municipal Court.[2] (*Id.*). *See* 15 U.S.C. 1692i(a). Colvin further maintained that the Midland parties "regularly file[] collection actions against Ohio residents in counties where the defendant does not live and did not sign a contract, including * * * instances where [the Midland parties] used the city or village of defendants' postal address without determining the physical location of the address," in violation of the FDCPA. (Doc. No. 8). Accordingly, Colvin asserted claims on behalf of a class of plaintiffs who were injured by the Midland parties' alleged violations of the FDCPA. (*Id.*). Colvin referred to this class of plaintiffs as the "FDCPA Class."[3] (*Id.*). Colvin requested a declaration that the Midland parties violated the FDCPA when they brought suit against class members in improper venues, actual and statutory damages as provided for by 15 U.S.C. 1692k(a)(1)-(2), and costs of the action and reasonable attorney's fees as provided for by 15 U.S.C. 1692k(a)(3). (*Id.*).

{¶6} The same day that Colvin filed her answer, counterclaim, and third-party complaint, Colvin filed a motion to transfer the case to the Hancock County

[2] Although Midland was the only plaintiff named in the complaint filed against Colvin in the Hardin County Municipal Court, Colvin alleges that Midland, Midland Credit, and Encore "operate as a de facto single business interest, and jointly plan all significant operations and business activities, including but not limited to, debt collection and litigation of collection lawsuits in Ohio * * *." (Doc. No. 8). The Midland parties have vigorously disputed this assertion throughout the proceedings. (*See* Appellees' Brief at 3).

[3] The definition of this class changed between the filing of Colvin's counterclaim and third-party complaint and the filing of her motion for class certification. To avoid confusion, we will introduce only the definition of the class that Colvin included in her motion for class certification.

Court of Common Pleas. (Doc. No. 8). On September 5, 2013, the Findlay Municipal Court granted Colvin's motion to transfer, and the case was subsequently transferred to the Hancock County Court of Common Pleas. (*Id.*).

{¶7} On November 7, 2013, the Midland parties filed their joint answer to Colvin's counterclaim and third-party complaint. (Doc. No. 20). On December 5, 2013, the Midland parties filed their amended joint answer to Colvin's counterclaim and third-party complaint. (Doc. No. 23).

{¶8} In March 2015, Colvin moved to consolidate her case with case number 2015-CV-94, *Caitlin Gilbert v. Midland Funding LLC* ("*Gilbert*"). *See Gilbert v. Midland Funding, L.L.C.*, 3d Dist. Hancock No. 5-19-11, 2019-Ohio-5295, ¶ 5. On May 21, 2015, the trial court ordered that Colvin's case be consolidated with *Gilbert* for purposes of discovery. *Id.*

{¶9} On November 30, 2015, Colvin moved for leave to file an amended counterclaim/third-party complaint. (Doc. No. 68). On December 28, 2015, the Midland parties filed a memorandum in opposition to Colvin's motion for leave to file an amended counterclaim/third-party complaint. (Doc. No. 71). On January 15, 2016, the trial court granted Colvin's motion. (Doc. No. 73). On February 22, 2016, Colvin filed her amended counterclaim/third-party complaint. (Doc. No. 78). On March 4, 2016, the Midland parties filed their answer to Colvin's amended counterclaim/third-party complaint. (Doc. No. 79).

{¶10} On June 1, 2017, Colvin filed a motion for class certification. (Doc. No. 106). Colvin sought to certify one class defined as:

> a. All persons who have been sued in Ohio Courts by [the Midland parties] from April 22, 2012 until the time this class is certified;
>
> b. where the address on the face of the complaint and/or the address at which the Defendant was served are not within the geographical limits of the court where the suit was filed; or
>
> c. where [the Midland parties] filed suit in a court where the contract was not signed; and
>
> d. the debt alleged by [the Midland parties] was incurred for personal, family or household use.[4]

(*Id.*). On June 22, 2017, the Midland parties filed their memorandum in opposition to Colvin's motion for class certification.[5] (Doc. No. 107). On July 14, 2017, Colvin filed a reply in support of her motion for class certification. (Doc. No. 108). On July 20, 2017, the Midland parties filed a reply memorandum in support of their motion to strike Colvin's class claims. (Doc. No. 109).

[4] While Colvin did not denominate it as such in her motion for class certification, the class Colvin attempts to certify shares a number of similarities with the "FDCPA Class" proposed in her complaint. (*See* Doc. No. 8).

[5] The Midland parties had earlier filed a motion to strike Colvin's class claims on May 30, 2017. (Doc. No. 105). In their memorandum in opposition to Colvin's motion for class certification, the Midland parties requested that the trial court treat their motion to strike as part of their response to Colvin's motion for class certification "to the extent the Court does not grant the Motion to Strike." (Doc. No. 107).

{¶11} On June 12, 2018, the trial court denied Colvin's motion for class certification. (Doc. No. 115). The trial court first concluded that the proposed class definition is unambiguous, that the proposed class is sufficiently numerous, and that Colvin is a member of the proposed class. (*Id.*). However, the trial court held that class certification is inappropriate because there are not questions of law or fact common to the class, Colvin's claims and defenses are not typical of the claims and defenses of the proposed class, and Colvin cannot fairly and adequately protect the interests of the proposed class. (*Id.*). *See* Civ.R. 23(A)(2)-(4). Because the trial court concluded that Colvin and the proposed class fail to satisfy Civ.R. 23(A)'s commonality, typicality, and adequacy-of-representation requirements, it did not conduct an analysis to determine whether the proposed class satisfies the requirements of Civ.R. 23(B)(3). (*Id.*).

{¶12} On July 11, 2018, Colvin filed a notice of appeal. (Doc. No. 116). She raises two assignments of error for our review.

Assignment of Error No. I

> **The Trial Court abused its discretion in denying Ms. Colvin's motion for class certification based on the incorrect premise that her claims were not common or typical of the purported class and that she was not an adequate representative, because she has differing damages.**

{¶13} In her first assignment of error, Colvin argues that the trial court abused its discretion by denying her motion for class certification. Colvin contends

that the entire basis of the trial court's conclusion that Civ.R. 23(A)'s commonality, typicality, and adequacy-of-representation requirements are not satisfied was the trial court's belief that, because she is seeking only statutory damages under the FDCPA, she cannot represent class members with claims for both actual damages and statutory damages. (Appellant's Brief at 6). She argues that the trial court was mistaken and that "Civ.R. 23 permits class certification despite differing damages among class members and, in the FDCPA setting, permits a class member claiming only statutory damages to represent members claiming both statutory and actual damages." (*Id.*). Thus, Colvin maintains that the trial court should have found the commonality, typicality, and adequacy-of-representation requirements satisfied with respect to the entire proposed class.

{¶14} "Civ.R. 23 sets forth the requirements for maintaining a class action." *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 125 Ohio St.3d 91, 2010-Ohio-1042, ¶ 6 ("*Stammco I*"). The Supreme Court of Ohio has identified seven requirements that a litigant must satisfy in order to maintain a class action under Civ.R. 23:

> "(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 impracticable; (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 met."

Id., quoting *Hamilton v. Ohio Sav. Bank*, 82 Ohio St.3d 67, 71 (1998), citing Civ.R. 23(A) and (B) and *Warner v. Waste Mgt., Inc.*, 36 Ohio St.3d 91 (1988). The party moving for class certification must prove each of these seven requirements by a preponderance of the evidence. *Gordon v. Erie Islands Resort & Marina*, 6th Dist. Ottawa No. OT-15-035, 2016-Ohio-7107, ¶ 26, citing *Cullen v. State Farm Mut. Auto. Ins. Co.*, 137 Ohio St.3d 373, 2013-Ohio-4733, ¶ 15; *MidFirst Bank v. Biller*, 3d Dist. Seneca No. 13-10-13, 2010-Ohio-6067, ¶ 18, citing *Robinson v. Johnston Coca-Cola Bottling Group, Inc.*, 153 Ohio App.3d 764, 2003-Ohio-4417, ¶ 2 (1st Dist.) and *State ex rel. Ogan v. Teater*, 54 Ohio St.2d 235, 247 (1978). "'The failure to meet any one of these prerequisites will defeat a request for class certification * * *.'" *Stammco, L.L.C. v. United Tel. Co. of Ohio*, 136 Ohio St.3d 231, 2013-Ohio-3019, ¶ 24 ("*Stammco II*"), quoting *Schmidt v. Avco Corp.*, 15 Ohio St.3d 310, 313 (1984).

{¶15} "'A trial judge has broad discretion in determining whether a class action may be maintained and that determination will not be disturbed absent a showing of an abuse of discretion.'" *Id.* at ¶ 25, quoting *Marks v. C.P. Chem. Co.*,

Inc., 31 Ohio St.3d 200, 201 (1987). "[T]he appropriateness of applying the abuse-of-discretion standard in reviewing class action determinations is grounded not in credibility assessment, but in the trial court's special expertise and familiarity with case-management problems and its inherent power to manage its own docket." *Hamilton* at 70. "'Abuse of discretion has been defined as more than an error of law or judgment; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable.'" *Stammco II* at ¶ 25, quoting *Marks* at 201, citing *Ojalvo v. Bd. of Trustees of Ohio State Univ.*, 12 Ohio St.3d 230, 232 (1984). "'A finding of abuse of discretion, particularly if the trial court has refused to certify, should be made cautiously.'" *Id.*, quoting *Marks* at 201.

{¶16} However, the trial court's discretion, while expansive, "'is not unlimited, and indeed is bounded by and must be exercised within the framework of Civ.R. 23. The trial court is required to carefully apply the class action requirements and conduct a rigorous analysis into whether the prerequisites of Civ.R. 23 have been satisfied.'" *State ex rel. Davis v. Pub. Emps. Retirement Bd.*, 111 Ohio St.3d 118, 2006-Ohio-5339, ¶ 20, quoting *Hamilton* at 70.

{¶17} In this action, Colvin maintains that the Midland parties' litigation activities against putative class members violated the FDCPA. "Congress enacted the FDCPA * * * to eliminate abusive debt collection practices, to ensure that debt collectors who abstain from such practices are not competitively disadvantaged, and

to promote consistent state action to protect consumers." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 577, 130 S.Ct. 1605 (2010), citing 15 U.S.C. 1692(e). "Forum abuse," "an unfair practice in which debt collectors seek to obtain default judgments by filing suit in courts so distant or inconvenient that consumers cannot make an appearance," was one such debt collection practice that concerned Congress. *Taylor v. First Resolution Invest. Corp.*, 148 Ohio St.3d 627, 2016-Ohio-3444, ¶ 72, citing *Stratton v. Portfolio Recovery Assocs., L.L.C.*, 770 F.3d 443, 449-450 (6th Cir.2014). As explained by the Seventh Circuit Court of Appeals:

> Consumer debts covered by the [FDCPA] are usually too small to justify a lawsuit unless the suit is promptly defaulted, thereby enabling the debt collector to obtain—without incurring significant litigation cost—a judgment that it can use to garnish the debtor's wages. * * *
>
> [O]ne common tactic for debt collectors is to sue in a court that is not convenient to the debtor, as this makes default more likely; or in a court perceived to be friendly to such claims; or, ideally, in a court having both of these characteristics. In short, debt collectors shop for the most advantageous forum. By imposing an inconvenient forum on a debtor who may be impecunious, unfamiliar with law and legal processes, and in no position to retain a lawyer (and even if he can

> afford one, the lawyer's fee is bound to exceed the debt itself), the debt collector may be able to obtain through default a remedy for a debt that the defendant doesn't actually owe.

Suesz v. Med-1 Solutions, LLC, 757 F.3d 636, 638-639 (7th Cir.2014). Accordingly, Congress included a "fair-venue" provision in the FDCPA to combat abusive forum shopping. *Taylor* at ¶ 72. *See* 15 U.S.C. 1692i. Under the FDCPA's fair-venue provision, unless the "debt"[6] sued on is secured by real estate, a "debt collector"[7] who brings any legal action on a debt against a "consumer"[8] must "bring such action only in the judicial district or similar legal entity—(A) in which such consumer signed the contract sued upon; or (B) in which such consumer resides at the commencement of the action." 15 U.S.C. 1692i(a)(2). If a debt collector fails to comply with the FDCPA's fair-venue provision, the debt collector may be liable to the consumer or consumers for:

> (1) any actual damage sustained by such person [or persons] as a result of such failure;

[6] "Debt" means "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. 1692a(5).

[7] Subject to a number of exclusions, "debt collector" means "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6).

[8] "Consumer" means "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. 1692a(3).

> (2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding $1,000; or
>
> (B) in the case of a class action, (i) such amount for each named plaintiff as could be recovered under subparagraph (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of $500,000 or 1 per centum of the net worth of the debt collector; and
>
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

15 U.S.C. 1692k(a). *See Suesz* at 639.

{¶18} In its judgment denying Colvin's motion for class certification, the trial court concluded that the proposed class is identifiable, unambiguously defined, and sufficiently numerous. (Doc. No. 115). The trial court also concluded that Colvin is a member of the proposed class. (*Id.*). None of these conclusions is before this court for review. Instead, in this appeal, Colvin argues only that the trial court abused its discretion by concluding that the commonality, typicality, and adequacy-of-representation prerequisites to class certification are not satisfied. *See* Civ.R. 23(A)(2)-(4). Accordingly, we focus solely on these three prerequisites to class certification.

{¶19} We begin with commonality. Civ.R. 23(A)(2)'s commonality requirement "involves scrutinizing class claims for a 'common nucleus of operative facts, or a common liability issue.'" *Barrow v. New Miami*, 12th Dist. Butler No. CA2015-03-043, 2016-Ohio-340, ¶ 28, quoting *Hamilton*, 82 Ohio St.3d at 77; *Pivonka v. Sears*, 8th Dist. Cuyahoga No. 106749, 2018-Ohio-4866, ¶ 58, appeal accepted, 155 Ohio St.3d 1412, 2019-Ohio-1205. "The commonality requirement 'does not demand that all the questions of law or fact raised in the dispute be common to all the parties.'" *Pivonka* at ¶ 59, quoting *Marks*, 31 Ohio St.3d at 202. *See Berdysz v. Boyas Excavating, Inc.*, 8th Dist. Cuyahoga No. 104001, 2017-Ohio-530, ¶ 28 ("[T]here need not be a complete identity of claims among all class members * * *."). "'Although there may be differing factual and legal issues, such differences do not enter into the analysis until the court begins to consider the Civ.R. 23(B)(3) requirement of predominance and superiority.'" *Pivonka* at ¶ 59, quoting *Marks* at 202.

{¶20} "'Commonality may be found where the basis for liability is common to the proposed class or where a common factual question exists on issues of negligence, breach of contract, illegal practice, or other applicable causes of action[.]'" *Berdysz* at ¶ 29, quoting *Grant v. Becton Dickinson & Co.*, 10th Dist. Franklin No. 02AP-894, 2003-Ohio-2826, ¶ 36. "'Courts generally have given a

permissive application to the commonality requirement in Civ.R. 23(A)(2).'" *Pivonka* at ¶ 58, quoting *Warner*, 36 Ohio St.3d at 97-98.

{¶21} In determining that the proposed class fails to satisfy the commonality requirement, the trial court observed:

> [T]here are different questions of law and facts between Colvin and the proposed class members. Colvin's suit was transferred to the correct jurisdiction after it was shown that the original suit was improperly filed and is still pending. Colvin has not had judgment rendered against her or been subject to any collection efforts. These facts do not match the majority, if any, of the proposed class members. Despite Colvin's contentions, it is not the difference in possible damages alone that make her different from the rest of the proposed class members. Significant factual differences exist between her situation and the rest of the class.

(Doc. No. 115).

{¶22} We conclude that the trial court erred when it decided that the proposed class fails to satisfy the commonality requirement. First, we note that, at least for purposes of determining whether the proposed class satisfies the commonality requirement, the trial court should not have compared Colvin's individual circumstances to the circumstances of absent members of the proposed

class. "Traditionally, commonality refers to the group characteristics of the class as a whole, while typicality refers to the individual characteristics of the named plaintiff in relation to the class." *Piazza v. Ebsco Indus., Inc.*, 273 F.3d 1341, 1346 (11th Cir.2001), citing *Prado-Steiman v. Bush*, 221 F.3d 1266, 1279 (11th Cir.2000). Thus, the trial court's examination of the differences between Colvin and absent class members should have been reserved for its analysis of the typicality requirement.

{¶23} More importantly, the particular dissimilarities between Colvin and other members of the proposed class identified by the trial court are not meaningful at this stage in the class-certification analysis. While the trial court found that "[s]ignificant factual differences exist between [Colvin's] situation and the rest of the class," it failed to pinpoint any of these differences, other than noting that Midland's action against Colvin was transferred from the allegedly improper venue, that judgment has not been entered against Colvin, and that she has not had her wages or bank account garnished. (Doc. No. 115). The differences the trial court highlighted are relevant only to a determination of the damages to which Colvin may be entitled as compared to the damages to which absent class members may be entitled. For purposes of the fair-venue provision, "'the violation and injury occurs as soon as the debt collector brings the lawsuit in the improper forum, in other words the moment the complaint is filed.'" *Hill v. Freedman Anselmo Lindberg, LLC*,

N.D.Ill. No. 14 C 10004, 2015 WL 2000828, *2 (May 1, 2015), quoting *Komisar v. Blatt, Hasenmiller, Leibsker & Moore LLC*, N.D.Ill. No. 14 C 7948, 2015 WL 427845, *2 (Jan. 29, 2015); *McInerney v. Roosen Varchetti & Olivier PLLC*, E.D.Mich. No. 17-10037, 2017 WL 4778724, *4 (Oct. 23, 2017) ("By its terms, a violation of [1692i] occurs when a lawsuit is initiated in an improper venue."). *Contra Orellana-Sanchez v. Pressler & Pressler, LLP*, D.N.J. No. 12-6309, 2015 WL 532517, *6 (Feb. 6, 2015) ("[A] violation does not arise under § 1692i(a)(2) until the alleged debtor receives notice of the suit and is forced to respond."). Therefore, provided that the Midland parties did in fact file suit against Colvin and the rest of the proposed class in improper venues, Colvin and the rest of the proposed class suffered the exact same, complete injury as soon as suit was filed against them.

{¶24} Although absent members of the proposed class may have incurred litigation expenses that they would not otherwise have incurred had suit been filed against them in the correct venue or paid money to the Midland parties to satisfy judgments entered against them in improper venues, because each member of the proposed class allegedly sustained an identical injury, these potential differences between Colvin and absent class members pertain only to the *severity* of the injuries suffered and, accordingly, to the damages to which absent class members may be entitled for more-severe injuries as compared to the damages to which Colvin may be entitled for her apparently less-severe injury. Ultimately, "'a trial court should

not dispose of a class certification *solely* on the basis of disparate damages'" as the trial court appears to have done in this case. (Emphasis added.) *Hamilton*, 82 Ohio St.3d at 81, quoting *Ojalvo*, 12 Ohio St.3d at 232. In any event, the issue of differing damages is more appropriately addressed in the analysis of Civ.R. 23(B)(3)'s predominance and superiority requirements. *See Marks*, 31 Ohio St.3d at 202.

{¶25} By focusing on the shared attributes of the proposed class, rather than the differences between Colvin and the rest of the class, we have little difficulty concluding that the proposed class satisfies the commonality requirement. As discussed in the previous paragraph, Colvin and the rest of the proposed class allegedly suffered the same injury when the Midland parties filed suit against them in supposedly improper venues. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-350, 131 S.Ct. 2541 (2011) ("Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury * * *.'"), quoting *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157, 102 S.Ct. 2364 (1982). Moreover, the basis for liability, 15 U.S.C. 1692i and 1692k, is common to the entire class.

{¶26} Furthermore, Colvin has sufficiently alleged that the Midland parties have engaged in a pattern of filing suit against class members in jurisdictions where class members did not reside at the time suit was filed and where class members did not sign the contracts underlying their alleged debts. Colvin has also satisfactorily alleged that a common practice is responsible for the Midland parties' alleged

violations of the FDCPA—the Midland parties' use of an alleged debtor's street address to decide where to file suit without determining whether the street address is within the territorial jurisdiction of the court where suit is filed or whether the alleged debtor signed the contract underlying their alleged debt within that court's territory. (*See* Doc. Nos. 78, 106). She further contends that the "system or systems [the Midland parties] use[] to verify addresses regularly cause suits to be filed in the wrong jurisdiction" despite the availability of systems that can determine the exact physical location of a given street address, i.e., the specific political subdivision in which a street address is located, thereby preventing violations of the FDCPA's fair-venue provision. (*See* Doc. Nos. 78, 113).

{¶27} Therefore, the common question of fact is whether the Midland parties actually filed suit against Colvin and the rest of the class in jurisdictions in which Colvin and other class members did not reside at the time suit was filed and in which they did not sign any contract underlying their alleged debts; the common issue of law is whether the Midland parties' pattern of filing suit in such jurisdictions, if proven, resulted in violations of the FDCPA. *See Tedrow v. Cowles*, S.D.Ohio No. 2:06-cv-637, 2007 WL 2688276, *6-7 (Sept. 12, 2007); *Holloway v. Pekay*, N.D.Ill. No. 94 C 3418, 1995 WL 736925, *2 (Dec. 11, 1995). "These questions of law and fact are central to [Colvin's] and to the proposed class'[s] claims, * * * and resolution of them will unquestionably affect a significant number of the proposed

class." *Tedrow* at *7, citing *Sprague v. Gen. Motors. Corp.*, 133 F.3d 388, 397 (6th Cir.1998). Consequently, we are satisfied that the proposed class meets the commonality requirement of Civ.R. 23(A)(2).

{¶28} Having concluded that the trial court erred by determining that the proposed class fails to satisfy the commonality requirement, we now consider whether the trial court erred by holding that Colvin's claims and defenses are not typical of the claims and defenses of the proposed class. Civ.R. 23(A)(3)'s typicality requirement "serves the purpose of protecting absent class members and promoting the economy of class action by ensuring that the interests of the named plaintiffs are substantially aligned with those of the class." *Baughman v. State Farm Mut. Auto. Ins. Co.*, 88 Ohio St.3d 480, 484 (2000). Claims are typical if they "arise[] from the same event or practice or course of conduct that gives rise to the claims of other class members" and if they "are based on the same legal theory." *Id.* at 485. "The requirement for typicality is met where there is no express conflict between the class representatives and the class." *Hamilton*, 82 Ohio St.3d at 77. "'When it is alleged that the same unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of varying fact patterns which underlie individual claims.'" *Baughman* at 485, quoting 1 Newberg, Class Actions, Section 3.13, at 3-74 to 3-77 (3d Ed.1992).

{¶29} With respect to typicality, the trial court concluded:

> As with commonality, Colvin fails to meet [the typicality] prong. Her claim is limited to the actions of Midland filing a complaint against her in the wrong jurisdiction, a problem later rectified. In comparison, other potential class members have had judgments taken against them and been subject to collection activities. Their range of potential damages far exceeds those of Colvin. Colvin argues that her different circumstances are no bar to representation of the class because her claim arises out of the same conduct by [the Midland parties] as all other class members. Despite her arguments and citations to the contrary, it is clear that her injury is different than the rest of the class members, irrespective of the fact that she meets the class definition.

(Doc. No. 115).

{¶30} We conclude that the trial court erred by determining that Colvin cannot satisfy the typicality requirement. In its typicality analysis, the trial court committed an error similar to the one it made in its examination of the commonality requirement—concluding that Colvin's alleged injury is different from the alleged injuries of the rest of the class members. As explained in our analysis of the commonality requirement, the injury suffered by an alleged debtor due to a violation of the FDCPA's fair-venue provision is complete as soon as a complaint is filed

against the alleged debtor in an improper venue. Being sued in an improper venue *is* the injury. Any developments subsequent to the filing of a complaint in an improper venue, such as the action being transferred to a proper venue or the action proceeding to final judgment in the improper venue, do not change the fundamental nature of the injury. Therefore, Colvin's alleged injury is not atypical of the injuries allegedly suffered by the rest of the class just because Midland's action against her was eventually transferred to a proper venue or because she has not had judgment entered against her.

{¶31} However, while the trial court incorrectly determined that Colvin's alleged injury is different from the injuries allegedly sustained by the rest of the class, the trial court correctly observed that the "range of potential damages [for absent class members] far exceeds those of Colvin." (Doc. No. 115). As Colvin concedes, because Midland's action against her was quickly transferred and because she has not had judgment entered against her, she seeks only statutory damages for herself. (Appellant's Brief at 3); (Doc. No. 106). As a result, her individual potential recovery is capped at $1,000—a sum that is considerably less than the potential recoveries of those class members with actual damages. *See* 15 U.S.C. 1692k(a). Nevertheless, the fact that Colvin is personally seeking only statutory damages, rather than actual damages and statutory damages, does not make her claims atypical of the class.

{¶32} "The FDCPA does not require proof of actual damages as a precursor to the recovery of statutory damages." *Keele v. Wexler*, 149 F.3d 589, 593 (7th Cir.1998), citing *Bartlett v. Heibl*, 128 F.3d 497, 499 (7th Cir.1997) and *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 781 (9th Cir.1982); *Miller v. Javitch, Block & Rathbone*, 561 F.3d 588, 592 (6th Cir.2009), quoting *Fed. Home Loan Mtge. Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir.2007), citing 15 U.S.C. 1692k(a). "In other words, the Act is blind when it comes to distinguishing between plaintiffs who have suffered actual damages and those who have not." *Keele* at 593-594. As long as the class representative's and class members' injuries arise out of the same conduct violative of the FDCPA, the class representative can represent a class of plaintiffs with both actual and statutory damages even if the representative can claim only statutory damages. *Id.* at 594. Hence, the fact that Colvin is not seeking actual damages does not itself render her claims atypical of the claims of class members who may be entitled to actual damages. *Irwin v. Mascott*, 96 F.Supp.2d 968, 977 (N.D.Cal.1999); *Herrera v. LCS Fin. Servs. Corp.*, 274 F.R.D. 666, 679 (N.D.Cal.2011); *Mund v. EMCC, Inc.*, 259 F.R.D. 180, 184-185 (D.Minn.2009); *Petrolito v. Arrow Fin. Servs., LLC*, 221 F.R.D. 303, 310 (D.Conn.2004); *Wyatt v. Creditcare, Inc.*, N.D.Cal. No. 04-03681-JF, 2005 WL 2780684, *4 (Oct. 25, 2005), citing *Keele* at 593. Colvin's "interest in establishing that [the Midland parties']

conduct violated the FDCPA * * * is not diminished by the type or amount of damages available for recovery." *Wyatt* at *4.

{¶33} Still, the Midland parties contend that other differences between Colvin and the rest of the proposed class make Colvin atypical of the class. The Midland parties argue that Colvin cannot satisfy the typicality requirement because she is subject to defenses that are different from the defenses of absent members of the proposed class. (Appellees' Brief at 10-11). They maintain that "[t]he impact of the res judicata defense from prior lawsuits between the Midland Parties and the proposed class members would, by itself, create atypical circumstances sufficient to preclude class certification." (*Id.* at 10). The Midland parties also suggest that the FDCPA's bona fide error defense is "in play for Colvin's individual claim" and "may be inapplicable to the circumstances of potential class members."

{¶34} The Midland parties' arguments are without merit. "'The defenses * * * of the class representatives must be typical of the defenses * * * of the class members.'" *Baughman*, 88 Ohio St.3d at 485, quoting *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho*, 52 Ohio St.3d 56, 64 (1990). However, "'*[t]hey need not be identical*.'" (Emphasis sic.) *Id.*, quoting *Project Jericho* at 64. "'[A] unique defense will not destroy typicality * * * unless it is "so central to the litigation that it threatens to preoccupy the class representative to the detriment of the other class members."'" *Id.* at 487, quoting *Hamilton*, 82 Ohio St.3d at 78,

quoting 5 Moore, *Federal Practice*, Section 23.25[4][b][iv], at 23-126, and Section 23.24[6], at 23-98 (3d Ed.1997).

{¶35} Here, the res judicata and bona fide error defenses are unlikely to preoccupy Colvin to the detriment of the rest of the proposed class. Concerning the defense of res judicata, the Midland parties rightly point out that the defense is almost certainly inapplicable to Colvin because the action originally filed in the Hardin County Municipal Court by Midland against Colvin has not yet resulted in a final judgment. (*See* Doc. Nos. 105, 109); (Appellees' Brief at 7, 10). However, while Colvin is probably not subject to the defense of res judicata, she is not atypical of the class because the defense is likely inapplicable to many, if not the majority, of the members of the proposed class.

{¶36} """The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel."""" *Crown Chrysler Jeep, Inc. v. Boulware*, 10th Dist. Franklin No. 15AP-162, 2015-Ohio-5084, ¶ 18, quoting *State ex rel. Schachter v. Ohio Pub. Emps. Retirement Bd.*, 121 Ohio St.3d 526, 2009-Ohio-1704, ¶ 27, quoting *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, ¶ 6. The concept germane to this case, claim preclusion, "'prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action.'"

Id., quoting *Schachter* at ¶ 27. "'The previous action is conclusive for all claims that were or that could have been litigated in the first action.'" *Id.*, quoting *Schachter* at ¶ 27.

{¶37} "[T]he Ohio Supreme Court has identified four elements necessary to bar a claim under the doctrine of res judicata: (1) there is a final, valid decision on the merits by a court of competent jurisdiction; (2) the second action involves the same parties or their privies as the first; (3) the second action raises claims that were or could have been litigated in the first action; and (4) the second action arises out of the transaction or occurrence that was the subject matter of the previous action." *State ex rel. Dept. of Edn. v. Ministerial Day Care*, 8th Dist. Cuyahoga No. 103685, 2016-Ohio-8485, ¶ 14, citing *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954, ¶ 84, quoting *Hapgood v. Warren*, 127 F.3d 490, 493 (6th Cir.1997) (construing *Grava v. Parkman Twp.*, 73 Ohio St.3d 379 (1995)). The Supreme Court of Ohio has defined "transaction" as a "'common nucleus of operative facts.'" *Grava* at 382, quoting 1 Restatement of the Law 2d, Judgments, Section 24, Comment b (1982).

{¶38} Turning to the facts of this case, the doctrine of res judicata is likely inapplicable to a substantial percentage of the members of the proposed class because putative class members' FDCPA fair-venue claims do not arise out of the same "common nucleus of operative facts" as class members' alleged debts. Federal

courts applying Ohio law have concluded that, with respect to some types of FDCPA claims, the doctrine of res judicata does not bar a plaintiff from bringing claims in federal court despite the fact that the plaintiff did not raise the potential FDCPA violations during collection proceedings initiated in Ohio state courts. *E.g.*, *Frazier v. Matrix Acquisitions, LLC*, 873 F.Supp.2d 897, 898-899, 903-904 (N.D.Ohio 2012) (though the plaintiff did not bring an FDCPA fair-venue counterclaim in the original debt collection action filed in the Summit County Court of Common Pleas, res judicata did not bar the plaintiff from litigating the claim in federal court); *Foster v. D.B.S. Collection Agency*, 463 F.Supp.2d 783, 796-798 (S.D.Ohio 2006) (res judicata did not bar claims under 15 U.S.C. 1692e and 1692f from being pursued in federal court). Regarding a plaintiff's claim under the FDCPA's fair-venue provision, the court in *Frazier* explained:

> [The plaintiff] certainly could—and should—have raised improper venue as a defense in the underlying [debt collection] action. But * * * the venue defense would not have gone to the validity or collectability of the debt itself. Rather, its effectiveness would have been limited to forcing a transfer of the underlying action to, or a refiling of the underlying action in, the proper venue. * * * [T]he question of proper venue does not share a "common nucleus of

> operative fact" with the question of the validity of the debt itself * * *.

(Citations omitted.) *Frazier* at 903-904. A number of additional courts, both in Ohio and in other jurisdictions, have reached similar conclusions with respect to other provisions of the FDCPA. *See, e.g.*, *Whitaker v. Ameritech Corp.*, 129 F.3d 952, 955-958 (7th Cir.1997); *Foster* at 797-798; *Egge v. Healthspan Servs. Co.*, 115 F.Supp.2d 1126, 1129-1130 (D.Minn.2000); *Hughes v. Deutsche Bank Natl. Trust Co.*, N.D. Ohio No. 5:19-CV-00011, 2019 WL 4934507, *7, 10 (Oct. 7, 2019); *Keller v. Hosp. of Morristown*, E.D.Tenn. No. 3:15-CV-581, 2016 WL 6956621, *5 (Nov. 28, 2016). *See also Unifund CCR Partners v. Young*, 7th Dist. Mahoning No. 11-MA-113, 2013-Ohio-4322, ¶ 28-29 ("[A]n FDCPA claim concerns the method of collecting the debt, not whether the underlying debt is valid. Thus, a FDCPA claim does not arise out of the transaction creating the debt[,] * * * [and] [the counterclaim-plaintiff's] FDCPA claim is a permissive counterclaim and not a compulsory counterclaim[.]").

{¶39} In this case, the Midland parties' collection actions against Colvin and the rest of the proposed class were based on class members' alleged use of credit cards, resulting in alleged debts to various credit card issuers, and class members' alleged failure to pay these debts, which the Midland parties had purchased from the credit card issuers who originated the debts. In contrast, the instant action

against the Midland parties is based on the Midland parties' filing of collection actions against class members in allegedly improper venues. In this action, Colvin is not challenging whether class members' alleged debts are valid or collectible; instead, she is challenging the practices that the Midland parties employed when they collected or attempted to collect class members' alleged debts. Therefore, class members' FDCPA fair-venue claims do not arise out of the transactions creating their alleged debts. As a result, regardless of whether the Midland parties obtained final judgments against class members in the underlying debt collection actions, the doctrine of res judicata will not bar class members from pursuing FDCPA fair-venue claims against the Midland parties in this action for the sole reason that class members may have failed to bring FDCPA fair-venue claims against the Midland parties in the underlying debt collection actions. Accordingly, because a great many of the members of the proposed class are likely not subject to the defense of res judicata, the fact that Colvin is not subject to the defense does not render her atypical of the proposed class.

{¶40} Next, we consider the extent to which Colvin's susceptibility to the FDCPA's bona fide error defense makes her atypical of the proposed class. The bona fide error defense is set forth in 15 U.S.C. 1692k(c), which provides:

> A debt collector may not be held liable in any action brought under [15 U.S.C. 1692 et seq.] if the debt collector shows by a

> preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

"FDCPA violations forgivable under [15 U.S.C. 1692k(c)] must result from 'clerical or factual mistakes,' not mistakes of law." *Daubert v. NRA Group, LLC*, 861 F.3d 382, 394 (3d Cir.2017), quoting *Jerman*, 559 U.S. at 587.

{¶41} In the instant case, the bona fide error defense does not make Colvin's defenses atypical, at least with respect to a segment of the proposed class. The lead attorney of record who filed the complaint against Colvin in the Hardin County Municipal Court hailed from Midland's in-house legal team. (*See* Doc. No. 8). This same attorney, Kimberly Klemenok ("Klemenok"), filed complaints against at least 50 members of the proposed class. (*See* Nov. 5, 2015 Tr., Colvin's Ex. A). In her deposition, Klemenok described the procedures that Midland's Ohio-based in-house attorneys used to determine where to sue alleged debtors. Klemenok testified that all lawsuits that Midland itself files in the state of Ohio, as opposed to lawsuits filed on behalf of Midland by outside counsel, are filed out of Midland's offices in Cleveland. (Kimberly Klemenok's Feb. 4, 2015 Depo. at 24). There, the process of filing suit against an alleged debtor began with a team of legal specialists that prepared and assembled the documents necessary to file suit. (*Id.* at 39). To determine where to file suit against alleged debtors, the legal specialists

> had a spreadsheet identifying zip codes with different venues. A lot of that stemmed from the American Postal Guide to Courts, but also included exceptions, venue exceptions where you cannot determine venue from just the zip code. And if that were the case, they would have to do further investigation.

(*Id.* at 45, 70). If the legal specialists were uncertain about the proper venue in which to file suit against an alleged debtor, they would check the Melissa or Factfinder databases or contact the court. (*Id.* at 45-47, 86).

{¶42} Once this process was concluded, completed lawsuits were then forwarded by the legal specialists to Klemenok. (*Id.* at 39). Klemenok testified that, before filing the lawsuits, she used Midland's internal database, Q-Law, to "review every fact pertinent to the lawsuit, starting with the consumer's address; making sure it's in the correct court * * *." (*Id.* at 40). According to Klemenok, she

> [l]ook[ed] at the consumer address in the system. Venue[] [had] already been checked at this point by [the] team of legal specialists trained to check venue and trained in the FDCPA. [She] just look[ed] for things that may [have] be[en] incorrect.
>
> [She] ma[de] sure that the address in the system matche[d] the address in the Complaint. [She] ma[de] sure that the address on the Complaint

> [was] complete and that the court line[d] up with the consumer's address.

(*Id.* at 41-42). Klemenok observed that, in making the venue determination, "[a] lot of it [was] just obvious. * * * [I]f you ha[d] one court caption, if [she] file[d] in one county, and [she] kn[ew] that the city is another county, that [was] wrong. [They were] going to reject the suit." (*Id.* at 42). However, she stated that when discrepancies were not obvious, she had to "rely on the people below [her], that the legal specialists follow procedure for checking venue and that [it was] correct." (*Id.*). Finally, though Klemenok was able to describe the procedures used by Midland's internal legal team, she was not able to detail the processes that outside attorneys use to file suit on behalf of Midland. (*See id.* at 56).

{¶43} Throughout the proceedings in this case, Colvin has not contended that the Midland parties intentionally filed suit against putative class members in improper venues. (*See* Doc. Nos. 106, 108). Consequently, the only real issue to be litigated with respect to the Midland parties' possible bona fide error defenses is whether the Midland parties maintain procedures reasonably adapted to avoid filing suit against alleged debtors in improper venues. As suggested by Klemenok's deposition testimony, concerning members of the proposed class who were sued by the Midland parties' in-house legal team, the same process was employed to ascertain the appropriate venue in which to file suit. Therefore, by determining

whether the Midland parties' procedures were reasonably adapted to avoid filing suit against Colvin in an improper venue, the finder of fact will simultaneously determine whether the same procedures were reasonably adapted to avoid improperly filing suit against members of the proposed class who were sued by the Midland parties' internal legal team. Accordingly, Colvin's potential bona fide error defense is not atypical of the bona fide error defenses of class members who were sued by the Midland parties' in-house counsel.

{¶44} However, it is likely that the same cannot be said of the bona fide error defenses that the Midland parties may assert against members of the proposed class who were sued by outside counsel on behalf of the Midland parties. This is because the procedures used to decide where to file lawsuits might differ between the Midland parties' in-house attorneys and the Midland parties' outside counsel. Nevertheless, while the bona fide error defense to which Colvin might be subject may not be typical of the bona fide error defenses to which members of the proposed class who were sued by outside counsel may be subject, this does not necessitate a conclusion that Colvin is completely unable to satisfy the typicality requirement. Rather, under the particular circumstances of this case, it would be appropriate to slightly modify the class definition to include only those alleged debtors sued by the Midland parties' internal legal team working in Cleveland. *See Shaver v. Standard Oil Co.*, 68 Ohio App.3d 783, 796 (6th Dist.1990) (concluding that "the trial court

need not have totally denied certification based upon antagonistic or conflicting interests" in part because it was possible that the class could be redefined to eliminate antagonistic or conflicting interests between the class representative and some members of the class).

{¶45} To summarize, although Colvin is claiming only statutory damages, her claims are not atypical of the claims of class members who may be entitled to both statutory damages and actual damages. Furthermore, the fact that Colvin is not subject to the defense of res judicata does not make her atypical of the class because res judicata is likely inapplicable to many members of the proposed class as well. Similarly, the bona fide error defense that the Midland parties may assert against Colvin is not atypical of the bona fide error defenses that the Midland parties may assert against class members who were sued by the Midland parties' internal legal department. Ultimately, Colvin's FDCPA fair-venue claim arises from the same alleged conduct that gives rise to the fair-venue claims of absent class members, and Colvin's claim is based on the same legal theory. *See Tedrow*, 2007 WL 2688276, at *7; *Holloway*, 1995 WL 736925, at *2. Moreover, at least concerning class members who were sued by the Midland parties' internal legal department, we have been unable to identify any express conflict between Colvin and the class. For these class members at least, Colvin will advance their interests and claims. *Tedrow* at *7 ("The proofs that are required for [the class representatives'] claims to prevail

are those necessary for the putative class to prevail. That is, all interests are advanced by proving that Defendant has a policy and/or practice of bringing civil actions against debtors in violation of federal * * * law."). Accordingly, we conclude that the trial court erred by holding that Colvin completely fails to satisfy Civ.R. 23(A)(3)'s typicality requirement.

{¶46} Finally, we consider whether the trial court erred by concluding that Colvin cannot fairly and adequately protect the interests of the proposed class as required by Civ.R. 23(A)(4). Civ.R. 23(A)(4)'s adequacy-of-representation requirement is "of crucial importance in terms of ensuring due process to members of the proposed class who will not have their individual day in court." *Marks*, 31 Ohio St.3d at 203, citing *Augusta v. Marshall Motor Co.*, 453 F.Supp. 912, 917-919 (N.D.Ohio 1977). "Adequacy refers to the class representative's ability to protect all the members' interests in the action." *Musial Offices, Ltd. v. Cuyahoga Cty.*, 8th Dist. Cuyahoga No. 99781, 2014-Ohio-602, ¶ 27. "The analysis under [the adequacy-of-representation requirement] is divided into a consideration of the adequacy of the representatives and the adequacy of counsel." *Warner*, 36 Ohio St.3d at 98. "A representative is deemed adequate so long as his interest is not antagonistic to that of other class members." *Id.*, citing *Marks* at 203. "The representatives' counsel is adequate if the lawyers are 'qualified, experienced and generally able to conduct the proposed litigation.'" *Musial* at ¶ 28, quoting *Helman*

v. EPL Prolong, Inc., 7th Dist. Columbiana No. 2001 CO 43, 2002-Ohio-5249, ¶ 40. In making these determinations, "courts must consider two questions: '(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members, and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?'" *Id.* at ¶ 27, quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992) and citing *New Albany Park Condo. Assn. v. Lifestyle Communities, Ltd.*, 195 Ohio App.3d 459, 2011-Ohio-2806, ¶ 53 (10th Dist.).

{¶47} Regarding Civ.R. 23(A)(4)'s adequacy-of-representation requirement, the trial court concluded:

> As stated above in considering commonality and typicality, Colvin's circumstances are significantly different than that of the rest of the proposed class members. This Court agrees with Colvin's legal precedent that differences which are not antagonistic may be deemed adequate, but such significant factual disparities create antagonisms in this particular case. Colvin has not had judgment rendered against her and has not faced the same injuries as the rest of the class. This distinction is significant because the remedies to which she may be entitled are significantly different than those who have already had judgment rendered against them.

> Accordingly, Colvin is unable to adequately represent the interests of the class.

(Doc. No. 115).

{¶48} As with the commonality and typicality requirements, we conclude that the trial court erred by determining that Colvin cannot satisfy the adequacy-of-representation requirement. In its analysis of the adequacy-of-representation requirement, the trial court only discussed Colvin's supposed inadequacy as class representative; it did not conduct an analysis to determine whether Colvin's counsel is adequate. Therefore, our analysis of the adequacy-of-representation requirement will focus solely on Colvin's adequacy as class representative.

{¶49} In its analysis of the adequacy-of-representation requirement, the trial court again erred by concluding that Colvin's injury is not the same injury suffered by the rest of the proposed class. As explained earlier, Colvin and the rest of the proposed class allegedly suffered the same injury when the Midland parties filed suit against them in purportedly improper venues. All of the "factual disparities" identified by the trial court pertain only to differing damages between Colvin and the rest of the class, not differing injuries, and there is no indication in the record that Colvin is unable to fairly and adequately protect the interests of class members with claims to both actual damages and statutory damages simply because she is seeking only statutory damages. *See Petrolito*, 221 F.R.D. at 310.

{¶50} Certainly, the type of relief sought by the proposed class representative for her own injuries is relevant to the determination of whether the proposed class representative can adequately represent the entire class. In some cases, antagonisms may exist between a proposed class representative and members of the class because the proposed class representative does not have an incentive to pursue forms of relief that are most beneficial to certain parts of the class. For example, in *Amchem Prods., Inc. v. Windsor*, the Supreme Court of the United States held that the proposed class representatives did not satisfy the adequacy-of-representation requirement because "the interests of those within the single class [were] not aligned." 521 U.S. 591, 626, 117 S.Ct. 2231 (1997). The court found that for class members currently injured by exposure to asbestos, "the critical goal [was] generous immediate payments" and that this goal "tug[ged] against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future." *Id.* The class representatives were inadequate because they "achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Id.* at 627.

{¶51} Likewise, in *Shaver*, the Sixth District Court of Appeals concluded that the proposed class representative, a former gasoline dealer, could not adequately represent a class composed of both current gasoline dealers and former gasoline dealers against a defendant oil company. 68 Ohio App.3d at 795-796. The

court noted that whereas "current dealers are interested in economic viability of a business and in maintaining an amicable relationship with that business," "[f]ormer dealers are essentially interested in the recovery of monetary damages without regard to the possible adverse impact on the present system." *Id.* at 796. Thus, the proposed class representative, as a former dealer who likely possessed a greater interest in obtaining monetary damages, could not adequately represent the interests of current dealers who were likely more interested in equitable relief. *See id.*

{¶52} Antagonisms like those in *Amchem* and *Shaver* are not present in this case because Colvin's interests are entirely aligned with the interests of the rest of the proposed class. Colvin and the rest of the proposed class all seek a declaration that the Midland parties violated the FDCPA when the Midland parties allegedly filed suit against class members in improper venues and request damages for these violations. *See Tedrow*, 2007 WL 2688276, at *8. Unlike *Amchem* and *Shaver*, where the *form* of the relief sought by the class representative created antagonisms, the relief that Colvin seeks for herself is the same type of relief sought by the rest of the class. Moreover, although Colvin is not entitled to actual damages herself, there is nothing in the record suggesting that Colvin is therefore unable or unwilling to vigorously advance the interests of class members with claims to actual damages or to maximize their recoveries. Thus, we conclude that Colvin is an adequate representative of the proposed class. Because the trial court's adequacy-of-

representation determination was based solely on Colvin's adequacy as class representative, we conclude that the trial court erred by determining that Civ.R. 23(A)(4)'s adequacy-of-representation requirement is not satisfied.

{¶53} In sum, we conclude that the trial court erred by holding that Civ.R. 23(A)'s commonality, typicality, and adequacy-of-representation requirements are completely unsatisfied. Therefore, we conclude that it was unreasonable for the trial court to deny Colvin's motion for class certification on these grounds and that the trial court accordingly abused its discretion. That said, we offer no opinion whether the trial court should ultimately certify the proposed class. As noted above, the trial court's conclusions concerning identifiability, numerosity, and Colvin's membership in the proposed class are not properly before this court for review, and thus, we have no occasion to determine whether the trial court properly decided those matters. Furthermore, the trial court did not determine whether the proposed class meets the requirements of Civ.R. 23(B), and we decline to make this determination in the first instance.

{¶54} Colvin's first assignment of error is sustained.

Assignment of Error No. II

Even if Ms. Colvin's claims were not common and typical of class members claiming recovery for actual damages and, therefore, she was not an adequate representative for this subclass, the Trial Court abused its discretion by denying Ms. Colvin's motion for class certification with respect to those class members claiming only statutory damages.

{¶55} In her second assignment of error, Colvin argues that the trial court abused its discretion by concluding that she does not satisfy the commonality, typicality, and adequacy-of-representation requirements with respect to a subclass composed of those claiming only statutory damages. However, because we concluded under Colvin's first assignment of error that Colvin's potential entitlement to only statutory damages, as opposed to both statutory damages and actual damages, does not prevent her from representing the entire proposed class, Colvin's second assignment of error is rendered moot, and we need not address it.

{¶56} Having found error prejudicial to the appellant herein in the particulars assigned and argued, we reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

Judgment Reversed and Cause Remanded

ZIMMERMAN, P.J. and SHAW, J., concur.

/jlr