

IN THE SUPREME COURT OF OHIO

FIRST FEDERAL BANK OF OHIO, )  
 )  
 Plaintiff/Appellant, )  
 )  
 v. )  
 )  
 JOHN ANGELINI, JR., et al., )  
 JEFFREY ANGELINI, and GALION )  
 BUILDING & LOAN BANK, )  
 )  
 Defendants/Appellees. )

CASE NO. 08-0019

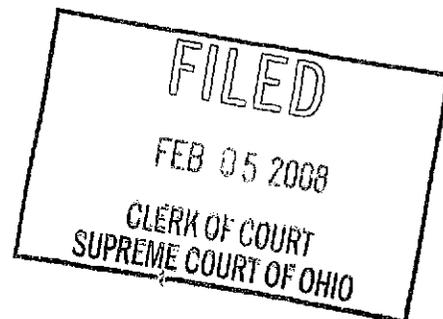
On Appeal from the Crawford  
County Court of Appeals,  
Third Appellate District,  
Case No. 3-07-04,  
2007-Ohio-6153

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REPLY MEMORANDUM OF APPELLEE  
JEFFREY ANGELINI (BY AND THROUGH JOSIAH MASON AS TRUSTEE IN  
BANKRUPTCY FOR THE ESTATE OF JEFFREY J. ANGELINI) TO APPELLANT  
FIRST FEDERAL BANK OF  
OHIO'S MEMORANDUM IN SUPPORT OF JURISDICTION

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## **I. THIS IS NOT A CASE OF PUBLIC AND GREAT GENERAL INTEREST**

Although Appellant has tried its best to frame the issues decided by the Court of Appeals in this litigation as issues of significant interest, this case involves neither a novel legal issue nor a substantial constitutional question nor an issue of public or great general interest. The issue in this case is whether a bank and its officers and lawyers used extortion to coerce the Appellee into executing a guaranty, a security pledge agreement, and several mortgages in favor of the bank, and whether the Appellant appropriately applied the proceeds of a refinanced property in accordance with the terms of a Collateral Pledge Agreement.

The Court of Appeals has now twice said that there are material issues of disputed fact for a jury to decide. This case is so fact-specific that it does not qualify as a case of “public or great general interest.” *Section 2(B)(2)(e), Article IV of the Ohio Constitution*, and is unlikely to provide meaningful guidance to the bench and bar. However, to read Appellant’s statement of facts, one would conclude that what is at the core of this dispute was nothing more than a simple, garden variety financial transaction between the Bank and a lender. Nothing could be further from the truth.

## **II. STATEMENT OF THE CASE**

The 3<sup>rd</sup> District Court of Appeals twice heard this case, and twice held that there were disputed material issues of fact. This case was initially filed in April 2003. In October of 2004, the Crawford County Court of Common Pleas granted summary judgment in favor of First Federal. On May 9, 2005 (Opinion, copy attached as Supplemental Appendix 1), the 3<sup>rd</sup> District reversed holding that there were triable issues of fact. Upon remand, the Trial Court again granted summary judgment in favor of First Federal. On November 18, 2007, the 3<sup>rd</sup> District again reversed and again reminded the Trial Court that there were triable issues of fact that should go to a jury.

### **III. STATEMENT OF FACTS**

The Appellant Josiah Mason is the Trustee in Bankruptcy for the Bankrupt Estate of Jeffrey Angelini pending in the United States Bankruptcy Court for the Northern District of Ohio. The Debtor, Jeffrey Angelini, was forced to file for bankruptcy protection after First Federal commenced a foreclosure action against him on two properties in which Jeffrey had executed security agreements in favor of the bank.

Jeffrey Angelini is 40 years old, a high school graduate, and until 2003, worked in his father's business, a car dealership located in Galion, Ohio. Presently he works as an event planner for a company he owns called Nyteflight Entertainment. In 1987, Jeffrey purchased the property located on St. Rte. 314 for \$139,000; and in 1998, he purchased the property located on 201 Erie Ave. for \$76,000. He financed these acquisitions through mortgage loans from Appellant, First Federal of Ohio.

Jeff sustained 2<sup>nd</sup> & 3<sup>rd</sup> degree burns over 45% of his body in a house fire in 1998. He continues to carry the scars from the fire and he continues to suffer pain in his hands and feet. As a result of this tragedy, the manufacturer of the propane heater that caused the fire paid Jeffrey a substantial settlement, the proceeds of which Jeffrey used to pay off all of his loans with First Federal. As of January 2000, Jeffrey was debt free and owned real estate having a value in excess of \$500,000. Today, he is hundreds of thousands of dollars in debt and First Federal is foreclosing upon what property he has remaining.

Jeffrey has come to this unhappy end because he acted as a guarantor on a secured note that First Federal extorted from him in January of 2001. From January 8<sup>th</sup> through the 12<sup>th</sup> of that month, First Federal held the financial equivalent of a gun to Jeffrey's head and coerced him into signing a note, a pledge agreement, a guaranty, and two mortgages. First Federal threatened Jeff that if he did not cooperate and sign the agreements, the Bank would expose his father, and

would see that his father was prosecuted for check kiting. Faced with that dim choice of alternatives, Jeffrey agreed to guarantee his parent's note and to pledge the St. Rte. 314 and Erie Ave. properties as collateral for the note. Having obtained these secured positions by coercion, duress, and extortion, First Federal subsequently filed this foreclosure action.

On June 26, 1997, John and Joyce borrowed \$850,000 from First Federal, of which \$300,000 was a Floor Plan Line of Credit for their Automobile Dealership. John and Joyce secured the Floor Plan with the titles to 54 automobiles and Open-End Mortgages on nine separate pieces of real estate owned by John and Joyce. From October 1, 1998, John and Joyce also had a separate Floor Plan line of credit with United Bank, N.A.

In January of 2001, United Bank, in rapid succession, decided to pull its Floor Plan of \$300,000.00, and to set off against the Floor Plan deposits John and Joyce had on hand with United, and to dishonor all outstanding checks. At that time, the Angelinis had about \$405,000 on deposit with United Bank. Unfortunately, by the time United Bank elected to pull its line and offset the Angelinis' account, Joyce had written approximately \$840,000 in checks drawn on that account, which she applied to First Federal's Floor Plan. Joyce then wrote 40 checks totaling \$842,579.19 against its First Federal Floor Plan line of credit, which First Federal promptly honored. On January 8th, when First Federal presented Joyce's checks at United Bank for payment, United informed First Federal that it would not honor them. First Federal realized that it had just become an unwilling and unsecured creditor of John and Joyce Angelini in the amount of \$842,579.19.

Upon this discovery, First Federal's President, Tom Moore, and its Vice President, Rod Vose, met with the Bank's counsel, Attorney Richard Hottenroth. The three of them quickly concluded that John and Joyce had intentionally written hundreds of thousands of dollars in bad

checks. Hottenroth, contacted United Bank and confirmed that John Angelini did not have the funds on hand at United to cover the checks United had just dishonored.

That afternoon, Rod Vose contacted John Angelini and asked him to come to the bank to discuss the situation. Mr. Angelini went to the bank where he met with Messrs. Hottenroth, Vose and Moore. At that meeting, John was accused of kiting checks and was threatened by Mr. Hottenroth that if he did not provide sufficient collateral to secure the hundreds of thousands of dollars that the bank had just paid out on his behalf that he was going to inform the FBI and that Mr. Angelini would go jail.<sup>1</sup> As the spokesman for the Bank, Hottenroth told John that the bank would accept additional property, which the bank had already identified as collateral it wanted for the money the bank had paid out on the uncovered checks. Two of the properties identified by First Federal were owned by Jeffrey Angelini; to-wit, the Erie Rd. and State Rte. 314 properties. The bank insisted on these two properties as part of the collateral.<sup>2</sup>

After this meeting with the Bank and its lawyer, John came back to the dealership and told Joyce and Jeff what the bank was claiming, and what the bank wanted, and what the bank was threatening to do to him if they did not agree. Joyce was upset and left the dealership. John further explained the dilemma to Jeff, who agreed that if it took pledging his property to keep his father out of jail, he would do it.

The following morning, January 9, 2001, Hottenroth, Moore, and Vose went to the Angelini dealership to demand a response to their threats. This time the meeting took place in John's tiny office.<sup>3</sup> John and Jeff testified that Hottenroth again threatened both John and Jeff that unless the Bank got the additional security and collateral it wanted, the Bank would inform

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<sup>1</sup> Understandably, Mr. Hottenroth, an attorney, knowing the ethical consequences of such an act, now denies ever making such a threat.

<sup>2</sup> Even though Jeff owned these properties outright, his parents' names also appeared on the deed.

<sup>3</sup> The fact that all three showed up and crowded into John's tiny office added to the desired atmosphere of intimidation they wanted to achieve.

the authorities and John would go to jail. Jeff testified that he was called into the room where his father and the three bank officials were meeting and was told that the Bank wanted him to put up his properties located on Erie Ave. and on State Rte. 314 as collateral for the Note First Federal wanted to cover the bad checks. Hottenroth confirmed to him that unless he did as First Federal wanted, Jeff's father would be going to jail. With that threat so squarely placed before him, Jeff agreed to pledge his properties.

Between January 9<sup>th</sup> and January 12<sup>th</sup>, Hottenroth drafted all of the various documents. In a telephone conversation between Hottenroth and John on January 11<sup>th</sup>, John asked for a delay in the execution of the documents for a few more days, as he still believed things would work out with United Bank. Hottenroth disagreed and insisted that First Federal had no more time and needed to have the papers signed the following day. The following day, January 12<sup>th</sup>, Hottenroth, Vose, and Moore once again went to the Angelini Dealership and met at some length with John and Joyce and briefly with Jeffrey. Joyce testified that Hottenroth repeated the Bank's threats to expose her and her husband, unless they gave the security that the Bank wanted.

Hottenroth presented all of the documents the bank wanted the Angelinis to sign. After the threats had been repeated, and after having been given no alternative but to sign the documents or face exposure and criminal prosecution, John and Joyce and Jeffrey executed no less than 12 separate documents comprised of a collateral pledge agreement, a promissory note, numerous mortgages and a guaranty. Collectively, these documents are referred to as the Charge Back Loan.

There is no dispute as to this next point. No one read the documents before signing them. The intimidation factor was so high, the Angelinis simply signed where they were instructed to sign. Jeff testified that had it not been for First Federal's threats of exposure and jail, he would not have acted as the guarantor, nor would he have pledged his property.

According to the testimony of Joyce, she made it clear on January 12<sup>th</sup> that she did not want to sign. However, after an hour of Hottenroth's threats against her and her husband, she agreed to do so, but only if Jeff's properties were released first. Joyce testified that when Hottenroth agreed to the condition that Jeff's property would be released first, she agreed to sign. Jeff was called into the meeting and was told in front of everyone that his properties would be released first. Hottenroth, Voss and Moore confirmed this point and Jeff agreed to sign.

There is also unimpeachable independent evidence confirming that Hottenroth did indeed threaten criminal exposure and criminal prosecution to get the Angelinis to sign the Charge Back Loan documents. Don Stone and Dave Lauther, the President and Vice-President of United Bank, respectively, both provided affidavits and attached contemporaneously prepared notes that each separately made of a telephone conversation they had with Hottenroth on January 12<sup>th</sup>, during which Hottenroth boasted of the fact that he had threatened the Angelinis with criminal prosecution and jail to get them to sign the Charge Back Loan documents.

The Pledge Agreement With Collateral Security confirms that the Bank was making a deal under which they were agreeing to conceal what they were sure was criminal conduct.<sup>4</sup> It states in pertinent part:

**Whereas**, Debtors, John Angelini, Jr. and Joyce Angelini, husband and wife, dba Angelini Transportation, did improperly draw upon a certain checking account at United Bank, N.A., Bucyrus, Ohio checks totaling \$842,579.19 which checks were thereafter on January 5<sup>th</sup>, January 8<sup>th</sup> and January 9<sup>th</sup>, 2001 presented to First Federal and negotiated at First Federal, and thereafter were refused by United Bank, N.A., upon presentment by First Federal; and

**Whereas**, Angelini, jointly and individually, had knowledge that said checks were not covered by sufficient deposits to their checking account at United Bank, N.A.

Rod Vose testified that the Bank's goal in this transaction was to grab as much security as they could, and to do it as quickly as they could. Compounding the willfulness of the Bank's

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<sup>4</sup> In actuality, First Federal never filed a Suspicious Activity Report with the FBI or the Federal Home Bank Board as it was obligated to do if it believed that criminal conduct had occurred.

extortion and coercion is the evidence that it never intended to perform its part of the bargain that it had forced down Jeff's throat. The Collateral Pledge Agreement, the third recital on Page 2 states, "Angelini . . . has offered certain security in the form of mortgages upon various properties and the conveyance of a property in Florida to First Federal as additional security, **all of which security shall act as a new credit item to satisfy said outstanding returned checks.**" Pursuant to paragraph 3 of this Agreement, First Federal "shall prepare a schedule of release of properties which will be made upon dollar values received by First Federal upon the outstanding debt obligation, including accumulated interest thereon until the entire debt obligation has been retired."

First Federal unilaterally decided not to prepare any such schedule of release of properties. And, the reason they never prepared a schedule of properties to be released was that First Federal never intended to apply the funds from the sale of these assets to the Charge Back Loan. Instead, Rod Vose testified that on January 12<sup>th</sup>, First Federal's intentions were to apply the proceeds from the sale or the refinancing of the properties secured in the Charge Back Loan as it saw fit to any obligation owed to First Federal by John and Joyce, not just to the obligations set forth in the Charge Back Loan.

Even though the Bank demanded that Jeff act as a guarantor on the Charge Back Loan, and even though they had represented to him that when assets were sold that his properties would be the first to be released, at no time either prior to or subsequent to January 12, 2001 did First Federal ever advise Jeff of First Federal's intentions to apply the proceeds from the sale or refinancing of the properties listed in the Charge Back Loan to other obligations owed to First Federal by John and Joyce, as the Bank saw fit. This is critical because at the time that Jeff agreed to guarantee the Charge Back Loan and pledge his two properties as collateral, John and Joyce owned a property in Sanibel Island, Florida worth approximately \$700,000, which they

had up for sale. It was everyone's expectation that the property would be shortly sold or refinanced and the proceeds applied to the Charge Back Loan, thereby releasing Jeff's properties as collateral for any balance owed by John and Joyce. This is also confirmed in the Collateral Pledge Agreement, where it states:

WHEREAS, Angelini has now requested of First Federal its forbearance upon the collection of said checks and has offered certain security in the form of mortgages upon various properties and the conveyance of a property in Florida to First Federal as additional security, all of which security shall act as a new credit item to satisfy said outstanding returned checks;

\*\*\*

Jeffrey J. Angelini shall sign the promissory note as a collateral pledgor for the purpose of pledging as additional collateral that property described in Exhibit B, subject to the agreement by all parties that upon execution of the mortgage documents, promissory note documents, pledge and collateral agreements, that First Federal will prepare a schedule of release of properties which will be made upon dollar values received by First Federal upon the outstanding debt obligation, including accumulated interest thereon until the entire debt obligation has been retired.

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Jeffrey J. Angelini acknowledges that he is responsible and liable to First Federal only to the extent of the value of the additional collateral evidenced by the property described in Exhibit B herewith.

From this inartfully drawn language<sup>5</sup> and the representations that First Federal's officers and lawyer made to him on January 12<sup>th</sup>, Jeff expected that First Federal would create a list of properties to be released. He expected that his parents' property in Florida would be quickly sold or refinanced, and that when the proceeds of that sale or refinancing were paid to First Federal that his properties would be released as collateral. Yet, contrary to what Hottenroth had represented to the Angelinis, Don Vose testified that as of January 12<sup>th</sup>, the very day the documents were signed and the representations were made to Jeff that his properties would be released first, the Bank intended to apply the proceeds they collected wherever they saw fit.

Vose readily admits that First Federal never prepared a schedule of properties to be released as it had promised, obviously because they intended to disregard it. Vose also admits

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<sup>5</sup> All of the documents were drafted by Mr. Hottenroth on behalf of First Federal.

that neither he nor anyone else at First Federal ever informed Jeff that the Bank was changing the terms of the Charge Back Loan or of his guaranty, effectively making him a guarantor on all of his parents' obligations to First Federal, which totaled an additional \$850,000.

On January 19<sup>th</sup>, United Bank transferred \$101,790.11 to First Federal.<sup>6</sup> The Bank did apply this amount, as the Angelinis and as Jeff expected, *i.e.*, to the repayment of the Charge Back Loan. However, in February, 2001, John and Joyce obtained a loan on the Sanibel Property from Huntington National Bank; and on February 23<sup>rd</sup>, Huntington wired \$405,203.53 of the proceeds of its loan on the Sanibel Property to First Federal. Instead of applying the full \$405,000 to the repayment of the Charge Back Loan as it had agreed in the documents, First Federal elected instead to apply \$300,000 of those proceeds to John and Joyce's 1997 Floor Plan.

This conduct is even more remarkable when one recognizes that the Sanibel Island property was not given as collateral for the 1997 Floor Plan or for any obligation that John and Joyce had with First Federal other than the Charge Back Loan. The funds from the refinancing of the Sanibel property were expressly earmarked for the repayment of the Charge Back Loan. However, in direct violation of the Pledge Agreement, First Federal applied the proceeds from the Sanibel Island refinancing to the 1997 Floor Plan Loan that was already secured by automobile titles and several other properties of John and Joyce.

Vose testified that First Federal intended from the very beginning to apply the payments that it received from the sale of the assets it grabbed in the Charge Back Loan to other loans that John and Joyce had with First Federal, where the Bank was least happy with the security it had on those loans. From that point forward, the Bank applied the proceeds it received from the sale of any assets it had secured through the Charge Back Loan to every other obligation that John and Joyce had with First Federal instead of to the Charge Back Loan, the only obligation upon

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<sup>6</sup> This was the balance of the funds John and Joyce had at United after setting of the United Floor Plan.

which Jeff had acted as a guarantor. First Federal never notified Jeff of its intentions to unilaterally change the terms of the Charge Back Loan.

First Federal has received approximately \$755,000 in payments from the sale or refinancing of the collateral it grabbed in the Charge Back Loan, but has applied less than \$210,000 of these proceeds to the Charge Back Loan, the only loan Jeff guaranteed, and for which he pledged his property. All of these payments should have first been applied to the Charge Back Loan, and had First Federal done so, the Charge Back Loan would have been fully paid off, and Jeff's property would have been released. The Bank intended to do this from the very beginning and it concealed this fact from Jeff and changed the risk and terms of his guaranty without notification.

Even though Vose testified that First Federal was sure that John and Joyce had committed criminal activity and that they had knowingly written bad checks, to this date, neither First Federal nor any of its agents have ever filed a suspicious activity report (SAR) with the Office of Thrift Supervision or with any other regulatory body to which the Bank is obligated to report such conduct. This was the only part of the extorted bargain the Bank kept with the Angelinis.

#### **IV. ARGUMENT**

##### **A. Evidence of First Federal's acts of Constructive Fraud**

In this case, First Federal committed constructive fraud by way of extortion when it threatened to expose John Angelini and initiate criminal proceedings against him. The elements of extortion can be found in O.R.C. § 2905.11. The record is replete with evidence that First Federal repeatedly threatened Jeff that if Jeff did not sign the promissory note, pledge agreement and mortgage documents that First Federal would expose his father, and have him criminally prosecuted. Not only was First Federal threatening to expose John and Joyce, they did it for the purpose of obtaining valuable benefits. In the face of those threats, Jeffrey gave a promissory

note, a guaranty, and pledged his property as collateral to First Federal all so that it would not report his father or have him criminally prosecuted. By constructive fraud is meant all surprise, trick, cunning, dissembling, and other unfair ways that are used to cheat another. *Isaac v. American Sur. Co.* (1939), 61 Ohio App. 47, 50.

There is overwhelming evidence in the record that First Federal committed extortion and that the result of that extortion was that they unlawfully obtained a promissory note, a collateral pledge agreement, a guaranty, and two mortgages, upon which they are attempting to foreclose. They exerted dominion over the property interest that Jeff had in his real estate as evidenced by these documents. First Federal interfered with his efforts to sell one of the properties. He could not refinance them. The Bank recorded the mortgage and security interest it took on his properties. And, now they have obtained an order of judicial sale for the properties.

In *Blodgett v. Blodgett* (Ohio 1990), 49 Ohio St. 3d 243, 245-246, the Supreme Court declared that threats may be held to constitute duress “if such threats overcome the will of such person, remove his capacity to act for himself and cause him to perform an act he is not legally bound to perform.” The Court in *Blodgett* also went on to point out that the law of duress as a reason to avoid a contract has evolved to encompass “economic duress” as well as **physical compulsion**. 1 Restatement of the Law 2d, Contracts (1981), Section 176, Comment a. A person who claims to have been a victim of duress must show that he or she was subjected to a wrongful or unlawful act or threat, and that it deprived the victim of his unfettered will. 13 Williston on Contracts (3 Ed. 1970) 704, Section 1617. The Restatement of the Law 2d, Contracts, *supra*, also requires that the one who coerces the victim be the other party to the agreement: “If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.” *Id.* at 475, § 175(1).

There is substantial evidence in the record to establish that Jeff's agreement to sign the Promissory Note, Letter of Guaranty, Collateral Pledge Agreement and Mortgages was procured through criminal threats amounting to extortion. He testified that had it not been for these threats he would not have signed these documents. Had he not signed those documents, First Federal would not be foreclosing on his property today. As a matter of law, the Trustee was entitled to have a jury determine whether the contracts were procured through constructive fraud and were therefore void or voidable.

### **B. Evidence of Actual Fraud**

There is also substantial evidence that First Federal committed actual fraud. Whether a contract was procured through fraud is a question for the trier of fact. *Haller v. Borrer Corp.* (Ohio 1990), 50 Ohio St. 3d 10, 14-15. Fraud is a civil wrong. It is a deception practiced with a view to gain an unlawful or unfair advantage.

Vose's testimony established that First Federal induced Jeffrey into signing as a guarantor knowing that it had no intention of applying the proceeds from the refinance of the Florida property and the other assets they tied up under the Charge Back Loan to the repayment of that Loan. The Bank deceived Jeff when it assured him that First Federal would prepare a schedule of properties to be released and that his properties would be the first released. This was a false statement – it never happened. And, First Federal never intended to release Jeffrey's property first or to apply the proceeds from the Florida property to the Charge Back Loan.

From the state of the evidence in the record, the Court of Appeals found twice that a reasonable jury could easily conclude that First Federal made affirmative false representations of fact to Jeff Angelini, which they knew to be false at the time they made them with the intention of having Jeff rely upon them, and that Jeff did rely upon them to his detriment.

An agreement secured through fraud in the inducement is voidable. *Haller v. Borrer Corp., supra*. Fraud in the inducement occurs when the one party is induced to enter into an agreement upon the wrongful conduct or misrepresentation of the person so benefited.” *Id.*, at 14. The “wrongful conduct may include even coercion or duress.” *Id.* A contract is obtained by fraud in the factum where an intentional act or misrepresentation of one party precludes a meeting of the minds concerning the nature or character of the purported agreement. Thus, when the actions or representations of one party so impair the mind and judgment of the other party that he fails to understand the nature or consequence of his contract, there has been no meeting of the minds. Where device or fraud is used to procure an agreement, there has been no meeting of the minds. In such cases the act or representation of one party against the other constitutes fraud in the factum and renders the agreement obtained void ab initio. *See, Haller, supra*.

There is substantial evidence in the record to demonstrate that First Federal is guilty of fraud in the inducement and fraud in factum. Its acts of extortion and coercion satisfy the criteria for fraud in factum. The evidence of the misrepresentations that First Federal made to Jeff to induce him to sign the promissory note, the collateral pledge agreement, the letter of guaranty, and mortgages was more than sufficient to allow Appellee’s claims of fraud and constructive fraud to go to the trier of the fact. And, so the Court of Appeals found twice.

There is overwhelming evidence in the record that First Federal committed extortion and violations of O.R.C. § 2921.22 to obtain Jeff’s pledge of collateral and guaranty. A jury could reasonably conclude that Jeff, and consequently the Trustee, was substantially injured, damaged, and prejudiced by First Federal’s illegal activities.

**C. First Federal breached the duties it owed to Jeff Angelini as a guarantor.**

The plain meaning of Paragraph 3 of the Collateral Pledge Agreement is that First Federal would apply the proceeds from any sale or refinancing of the Florida property “to satisfy

said outstanding checks.” At the time First Federal coerced Jeffrey Angelini into guaranteeing the Chargeback Loan, First Federal represented that payments made to First Federal by his father from the assets listed in the Charge Back Loan would be applied to the Charge Back Loan and that after the principle was reduced below the amount required for Jeffrey’s pledge then Jeffrey’s collateral would be released. Of course, this did not occur. Instead, when John Angelini made payments to First Federal, First Federal unilaterally chose to apply the bulk of those payments to other less secured obligations that John and Joyce owed to the bank.

First Federal’s misapplication of the proceeds of the Sanibel Island, Florida property to John’s other loans greatly increased the risk to Jeffrey as guarantor in that it effectively made Jeff a guarantor of all of John and Joyce’s loans and tied up Jeff’s property for a considerably longer time, while John’s other assets were being depleted.

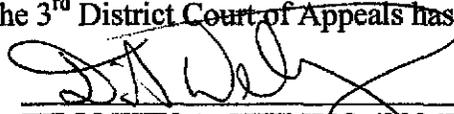
A lender cannot unilaterally modify obligations with a debtor where a guarantor’s risk will be increased. In *Kawasaki Motors Corp. v. Navratil* (3<sup>rd</sup> Dis. 1985), 1985 Ohio App. LEXIS 9104, at 8, the Court held:

“...after careful consideration, we conclude that the rule as stated in the Restatement of Security (1941), section 124(1) is a correct reflection of the current state of the law, and we adopt that rule providing: “Where before the surety has undertaken his obligation the creditor knows facts unknown to the surety that materially increase the risk beyond that which the creditor has reason to believe the surety intends to assume, and the creditor also has reason to believe that these facts are unknown to the surety and has a reasonable opportunity to communicate them to the surety, failure of the creditor to notify the surety of such facts is a defense to the surety.”

There is indisputable evidence in the record to establish that First Federal’s conduct unilaterally and without notice to Jeff, materially increased his risk on the Guaranty by misapplying the proceeds from the sale of the assets the bank grabbed as security in the Charge Back Loan, and by not releasing Jeff’s properties as represented.

## V. CONCLUSION

As the Court can see, though this case may be possessed of some interesting facts, they are of no interest to anyone except the litigants herein. The circumstances of this case are so fact intensive and the principles of law so basic and well settled that no question of public and great general interest is presented for this Court's review. It is merely a case where there are material facts in dispute to be decided by a jury, as the 3<sup>rd</sup> District Court of Appeals has found twice.

  
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Angelini (by and through Josiah Mason as  
Trustee in Bankruptcy for the Estate of  
Jeffrey J. Angelini)*

**VI. CERTIFICATE OF SERVICE**

On this 1<sup>st</sup> day of February, 2008, I certify that a true and accurate copy of the foregoing was served upon the following by ordinary U.S. mail:

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**TIMOTHY A. SHIMKO (0006736)**

**DAVID A. WELLING (0075934)**

*Counsel for the Trustee in Bankruptcy for the Estate  
of Jeffrey J. Angelini*

# APPENDIX 1

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO  
CRAWFORD COUNTY

FIRST FEDERAL BANK OF OHIO

CASE NUMBER 3-04-31

PLAINTIFF-APPELLEE

JOURNAL

v.

ENTRY

JOHN ANGELINI, ET AL.

DEFENDANTS-APPELLANTS

FILED IN THE COURT OF APPEALS

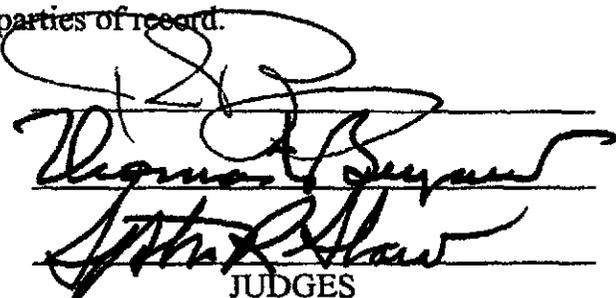
MAY 09 2005

CRAWFORD COUNTY, SUE SEEVERS  
CLERK

For the reasons stated in the opinion of this Court rendered herein,  
it is the judgment and order of this Court that the judgment of the trial court is  
reversed at the costs of the appellee for which judgment is rendered and this cause  
is remanded to that court for further proceedings consistent with the opinion and  
judgment of this Court.

It is further ordered that the Clerk of this Court certify a copy of this  
judgment to that court as the mandate prescribed by Appellate Rule 27 or by any  
other provision of law, and also furnish a copy of any opinion filed concurrently  
herewith directly to the trial judge and parties of record.

DATED: May 9, 2005

  
JUDGES

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
CRAWFORD COUNTY**

FILED IN THE COURT OF APPEALS

**MAY 09 2005**

WRIGHT COUNTY, SUE SEEVERS  
CLERK

**FIRST FEDERAL BANK OF OHIO**

**CASE NUMBER 3-04-31**

**PLAINTIFF-APPELLEE**

**v.**

**OPINION**

**JOHN ANGELINI, ET AL.**

**DEFENDANTS-APPELLANTS**

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**CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court.**

**JUDGMENT: Judgment reversed and cause remanded.**

**DATE OF JUDGMENT ENTRY: May 9, 2005**

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**ATTORNEYS:**

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**Rogers, J.**

{¶1} Defendants-Appellants, John and Joyce Angelini (“Angelinis”), Jeffrey Angelini (“Jeffrey”) and Galion Building & Loan Bank (“Galion Bank;” hereinafter jointly referred to as “Appellants”), appeal a judgment of the Crawford

County Court of Common Pleas, granting Plaintiff-Appellee's, First Federal Bank of Ohio ("First Federal"), motion for summary judgment. On appeal, the Angelinis and Galion Bank jointly assert that the trial court erred in granting First Federal's motion that its requests for admissions be deemed admitted. Furthermore, Appellants assert that the trial court erred in granting First Federal's motion for summary judgment. Additionally, Galion Bank contends First Federal's service of its request for admissions was improper. Finding that the trial court did err in issuing a blanket ruling on First Federal's motion that requests for admissions be deemed admitted, we reverse the judgment of the trial court and remand for proceedings consistent with this opinion.

{¶2} In April of 2003, First Federal filed a fifteen count complaint against Appellants. Counts 1, 3, 5, 7 and 10 of the complaint alleged that the Angelinis were in default on five separate promissory notes for monies they borrowed from First Federal between 1995 and 2001. Counts 2, 4, 6, 8, 9, 11, 14 and 15 sought foreclosure on certain real properties of the Angelinis, in which First Federal had mortgage interests as security for the promissory notes. Counts 12 and 13 sought foreclosure on certain real properties of Jeffrey, in which First Federal had mortgage interests as security for the promissory note contained in count 10.

{¶3} Count 10 involved a note executed on January 12, 2001. In this note, the Angelinis mortgaged three properties and Jeffrey mortgaged two

properties in order to secure a loan for \$849,802.78. Galion Bank held a mortgage interest on each of these properties.

{¶4} On July 13, 2004, First Federal served the Angelinis with a set of requests for admissions pursuant to Civ.R. 36. On August 9, 2004, those requests for admissions were returned to First Federal. The requests that were returned included a copy of the requests served by First Federal with a written answer following each of the individual requests. The requests were also returned with a cover letter signed by the Angelinis' counsel.<sup>1</sup>

{¶5} On August 17, 2004, without consulting the Angelinis' counsel, First Federal filed a motion that the requests be deemed admitted. On August 25, 2004, the Angelinis filed a motion in opposition to First Federal's motion that the requests be deemed admitted. Specifically, the Angelinis argued that First Federal's motion should be denied because they had substantially complied with Civ.R. 36, that they would be willing to execute a separate verification of their answers and, finally, that answers to Request Nos. 3, 9, 15, 21 and 27 had been specifically denied in conformity with Civ.R. 36.

{¶6} On September 1, 2004, the trial court granted First Federal's motion that the requests be deemed admitted, finding that the responses submitted were neither signed nor did they comply with the requirements of Civ.R. 36. Without

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<sup>1</sup> While a copy of the signed cover letter is not in the record before us, First Federal concedes to this fact in its brief.

citing to any of the specific answers given by the Angelinis, the trial court stated that pursuant to Civ.R. 36(A) a party may not give lack of information or knowledge as an answer or objection.

{¶7} Subsequently, First Federal filed a motion for summary judgment and the Angelinis and Jeff filed motions in opposition to summary judgment. In October of 2004, the trial court granted First Federal's motion for summary judgment on all fifteen counts of its complaint. It is from this judgment Appellants appeal, presenting the following assignments of error for our review.

*Angelinis' Assignment of Error No. I*

**THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON COUNTS 10-15 OF THE COMPLAINT BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT REGARDING THE AMOUNT OF DEFENDANTS' LIABILITY ON THESE COUNTS.**

*Angelinis' Assignment of Error No. II*

**THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING PLAINTIFF'S MOTION TO DEEM ADMITTED ITS REQUESTS FOR ADMISSION.**

*Jeffrey's Assignment of Error No. I*

**The Trial Court erred in granting Plaintiff's Motion for Summary Judgment on paragraphs 10-15 of the Complaint because there were genuine issues of material fact regarding the amount of the guarantor's liability on these accounts.**

*Jeffrey's Assignment of Error No. II*

**The Trial Court abused its discretion in granting Plaintiff's Motion for Summary Judgment in granting this Defendant prior to sale and disposal of all of the pieces of real estate owned by Defendants John Angelini and Joyce D. Angelini, as this Defendant was merely a guarantor as to pledge or with no personal liability.**

***Galion Bank's Assignment of Error No. I***

**The trial court committed reversible error, abused its discretion and its decision was against the manifest weight of the evidence which was prejudicial against the Defendant/Appellant (Galion Bank) when the Trial Court granted Plaintiff/Appellee's (First Federal) Motion for Summary Judgment finding John and Joyce Angelini owned First Federal the sum of \$385,544.34 plus interest pursuant to the terms of the Promissory note (App. 7) and Collateral Pledge Agreement (App. 8) while ignoring the evidence First Federal did not credit the \$299,733.20 it received against said loan that would have substantially reduced the balance due and owing and/or satisfied that debt in full.**

***Galion Bank's Assignment of Error No. II***

**The Trial Court committed reversible error and abused its discretion which was prejudicial against the Defendant/Appellant (Galion Bank) when the Trial Court found that Defendant/Appellants' (John and Joyce Angelini's (sic.)) responses to Plaintiff's/Appellee's (First Federal's) Request for Admissions were improper and deemed admitted (App. 3) and denied their Motion to Amend and/or correct response (App. 6).**

***Galion Bank's Assignment of Error No. III***

**The Trial Court committed reversible error and abused its discretion which was prejudicial to Defendant/Appellant (Galion Bank) when the trial Court found the Plaintiff/Appellee's (First Federal's) Request for Admissions against the Defendants John, Joyce, and Jeff Angelini deemed admitted when the Plaintiff/Appellee (First Federal) did not properly served its**

**request on the said Defendant/Appellants (Angelinis) as set forth in Ohio Rules of Civil Procedure 36.**

{¶8} Due to the nature of Appellants' claims, we will be addressing the assignments of error out of order.

*Angelinis' Assignment of Error No. II &  
Galion Bank's Assignment of Error No. II*

{¶9} In their second assignments of error, respectively, the Angelinis and Galion Bank contend that the trial court abused its discretion in granting First Federal's motion to deem admitted its request for admission.

{¶10} Generally, it has been stated that "Civil Rule 36 provides a mechanism by which potentially disputed issues may be expeditiously resolved before trial, thereby expediting proof of these issues at trial." *St. Paul Fire & Marine Ins. Co. v. Battle* (1975), 44 Ohio App.2d 261, 269.

{¶11} Civ.R. 36(A) provides in relevant part as follows:

**A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(B) set forth in the request, that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.**

**\*\*\***

**Each matter of which an admission is requested shall be separately set forth. The party to whom the requests for admissions have been directed shall quote each request for admission immediately preceding the corresponding answer or objection. The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service thereof or within such shorter or longer time as the court**

**may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefore shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his or her answer, or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that he or she has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(C), deny the matter or set forth reasons why the party cannot admit or deny it.**

**\* \* \***

{¶12} As stated above, on July 13, 2004, First Federal served the Angelinis with a set of requests for admissions pursuant to Civ.R. 36. On August 9, 2004, which was within the twenty-eight days provided for under Civ.R. 36, the Angelinis returned those requests to First Federal. Again, the requests that were returned included a copy of the requests served by First Federal with a written answer following each of the individual requests as well as a cover letter signed by the Angelinis' counsel. Subsequently, First Federal filed a motion that the requests be deemed admitted and the Angelinis filed a motion in opposition to First Federal's motion.

{¶13} On appeal, the Angelinis contend that the trial court abused its discretion by granting First Federal's motion that the requests be deemed admitted. Specifically, the Angelinis argue that trial counsel's signed cover letter satisfies the signature requirement of Civ.R. 36, that the trial court erred in issuing a blanket ruling on First Federal's motion, that they provided a proper response to Request No. 27, which is the central admission to the issue on appeal, and, finally, that the trial court erred in not allowing the Angelinis to modify or amend their answers pursuant to Civ.R. 36(B), which they requested in their motion in opposition.

{¶14} Upon review of the answers given by the Angelinis to First Federal's request for admissions, we agree with the Angelinis' argument that the trial court erred in issuing a blanket ruling on all requests for admission. Furthermore, we find that the Request No. 27 was properly denied by the Angelinis under Civ.R. 36(A).

{¶15} First, after reviewing the answers provided by the Angelinis, we find that the trial court did abuse its discretion in issuing a blanket ruling on First Federal's motion that the requests be deemed admitted. Initially, we note that this is not a situation where there has been a failure to respond within the twenty-eight day time limit. Accordingly, this is not a circumstance where a party's failure to respond requires that the requests for admissions be deemed admitted. See, *St.*

*Paul Fire & Marine Ins. Co.*, 44 Ohio App.3d at 271; *T&S Lumber Co. v. Alta Const. Co.* (1984), 19 Ohio App.3d 241, 244.

{¶16} Here, in many of the answers to First Federal's requests, the Angelinis' answers provided that they did not know the answer or that they had insufficient evidence to answer the request. Under Civ.R. 36(A), "\* \* \* an answering party may not give lack of information or knowledge as a reason for failure to admit or deny *unless the party states that he or she has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny.*" (Emphasis added.) Accordingly, the trial court could properly deny those answers.

{¶17} However, not all of the Angelinis' answers stated that they did not have knowledge or information. Therefore, we find that the trial court's blanket ruling that the answers did not conform to the above mentioned portion of Civ.R. 36(A) to be error.

{¶18} Turning to Request No. 27, which deals specifically with the January 12, 2001 note that is being contested on appeal, the request for admission and answer provide the following:

**27. That the Defendants John Angelini, Jr. aka John Angelini and Joyce D. Angelini aka Joyce Angelini and Jeffrey J. Angelini, owe to Plaintiff the sum of \$385,544.34 with interest at the rate of 12% per annum or \$108.9896 per day from and after April 4, 2003, on said note.**

**Answer: Because of the misappropriation of \$300,000.00 paid to First Federal by John and Joyce Angelini this amount is not correct. Had this been done properly Jeff's properties would be released.**

{¶19} We find that the Angelinis' denial of Request No. 27 is sufficient under Civ.R. 36(A). Civ.R. 36(A) requires that "the answer shall specifically deny the matter *or* set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter." (Emphasis added.) The Angelinis' answer to Request No. 27 specifically denies First Federal's request. Accordingly, because they gave a specific denial, they were not required to set forth a specific reason as to why they were unable to admit or deny.

{¶20} In *Banford v. State Farm Insurance Co.* (June 22, 2001), 2d Dist. No. 18464, unreported, the Second District Court of Appeals addressed a similar issue. In *Banford*, the Second District rejected appellee's claim that appellant's response was insufficient under Civ.R. 36(A). *Id.* Specifically, the court declined to interpret Civ.R. 36(A) to shift the burden to the answering party where a request for admission had been served upon them. *Id.* Following the rationale set forth in *Banford*, we are satisfied that the Angelinis answer is a specific denial and that nothing more is required under Civ.R. 36(A).

{¶21} Appellee, however, argues that the Angelinis' failure to sign their answers is sufficient to nullify those answers. Furthermore, Appellee argues that the Angelinis' or their counsel were required to sign each and every answer. First

Federal fails to include any law to support this argument, and we are unable to find any cases that suggest such a rule. While the Angelinis did not sign the answers we are satisfied that the cover letter, including trial counsel's signature is sufficient under Civ.R. 36(A).

{¶22} Moreover, it is "a basic tenet of Ohio jurisprudence that cases should be decided on their merits." *Perotti v. Ferguson* (1983), 7 Ohio St.3d 1, 3. Accordingly, we reject First Federal's argument, so that this case can be reviewed and decided upon its merits.

{¶23} Thus, having found that the trial court erred in issuing a blanket ruling, where the Angelinis filed their answers within time allotted and where not all of the answers they provided were out of rule and that the answer to Request No. 27 was proper under Civ.R. 36(A), the Angelinis' second assignment of error and Galion Bank's second assignment of error are both sustained.

*Angelinis' Assignment of Error No. 1,  
Jeffrey's Assignment of Error No. 1 &  
Galion Bank's Assignment of Error No. 1*

{¶24} In the Angelinis' first assignment of error, Jeffrey's first assignment of error and Galion Bank's first assignment of error, each contends that the trial court erred in granting summary judgment as to counts 10 through 15. We agree.

*Standard of Review*

{¶25} An appellate court reviews a summary judgment order de novo. *Hillyer v. State Farm Mut. Auto. Ins. Co.* (1999), 131 Ohio App.3d 172, 175. Accordingly, a reviewing court will not reverse an otherwise correct judgment merely because the lower court utilized different or erroneous reasons as the basis for its determination. *Diamond Wine & Spirits, Inc. v. Dayton Heidelberg Distr. Co.*, 148 Ohio App.3d 596, 2002-Ohio-3932, at ¶ 25, citing *State ex rel. Cassels v. Dayton City School Dist. Bd. of Ed.* (1994), 69 Ohio St.3d 217, 222. Summary judgment is appropriate when, looking at the evidence as a whole: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) construing the evidence most strongly in favor of the nonmoving party, it appears that reasonable minds could only conclude in favor of the moving party. Civ.R. 56(C); *Horton v. Harwick Chemical Corp.* (1995), 73 Ohio St.3d 679, 686-687. If any doubts exist, the issue must be resolved in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-59.

{¶26} The party moving for the summary judgment has the initial burden of producing some evidence which affirmatively demonstrates the lack of a genuine issue of material fact. *State ex rel. Burnes v. Athens City Clerk of Courts* (1998), 83 Ohio St.3d 523, 524; see, also, *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. The nonmoving party must then rebut with specific facts showing the

existence of a genuine triable issue; they may not rest on the mere allegations or denials of their pleadings. *Id.*

*Counts 10 through 15*

{¶27} Counts 10 through 15 involved the January 12, 2001 promissory note. On appeal, Appellants argue that a genuine issue of fact remains as to how certain monies were apportioned by the bank as to that note. Specifically, Appellants assert that following the re-financing of a Florida property, owned by the Angelinis and specifically referenced in the pledge agreement of the promissory note, proceeds of \$405,203.53 were paid to First Federal. According to Appellants, that entire amount was to be used for payment on the January 12, 2001 promissory note only. However, First Federal appropriated \$299,733.32 to other under-secured debts of the Angelinis. According to Appellants, that appropriation was improper under the terms of the pledge agreement. First Federal, on the other hand, contends that it was perfectly within its right to appropriate those proceeds as it did.

{¶28} In granting summary judgment, a trial court is able to rely on a request for admission that has been deemed admitted as fact, even if it goes to the heart of the case. *Cleveland Trust v. Willis* (1985), 20 Ohio St.3d 66, 67. Additionally, Civ.R. 36(B) states that “[a]ny matter admitted under this rule is conclusively established \* \* \*.” Thus, pursuant to its finding that all requests be

deemed admitted, the trial court was able to rely on the requests for admissions as fact, even where they went to the heart of the case.

{¶29} As noted above, Request No. 27 involved the amount owed on the January 12, 2001 note. Based on the trial court's finding that Request No. 27 was admitted and as a result conclusive, it granted summary judgment on counts 10 through 15. Essentially, with Request No. 27 being admitted, there existed no genuine issue of fact as to the amount owed on that note. However, based on our above finding that the Angelinis' answer to Request No. 27 was proper under Civ.R. 36(A), that answer can no longer be deemed admitted to conclusively establish the issue of the amount owed on the January 12, 2001 note. Accordingly, because a material question of fact exists as to the issue of First Federal's appropriation of the \$299,733.32, summary judgment is not appropriate as to counts 10 through 15.

{¶30} Having found that a material issue of fact exists as to First Federal's appropriation of proceeds collected from the re-finance of the Angelinis' Florida property, the Angelinis' first assignment of error, Jeffrey's first assignment of error and Galion Bank's first assignment of error are all sustained.

*Jeffrey's Assignment of Error No. II &  
Galion Bank's Assignment of Error No. III*

{¶31} In his second assignment of error, Jeffrey asserts that the trial court abused its discretion in granting First Federal's motion for summary judgment

prior to sale and disposal of all properties owned by the Angelinis. In its third assignment of error, Galion Bank asserts that the trial court abused its discretion in granting First Federal's motion that requests for admission be deemed admitted because First Federal did not properly serve its requests upon the Angelinis.

{¶32} Based on the above, these assignments of error are rendered moot. App.R.12(A)(1)(c). Thus, we will forego any discussion in relation thereto.

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

*Judgment reversed  
and remanded.*

**BRYANT and SHAW, JJ., concur.**

**r**