

IN THE SUPREME COURT OF OHIO

Sharon Wilborn, et al.

Plaintiffs-Appellants,

vs.

Case No. 07-0558

Bank One Corporation,

Defendant-Appellees

ON APPEAL FROM THE SEVENTH  
DISTRICT COURT OF APPEALS,  
MAHONING COUNTY  
CASE NO. 04 MA 182

**PLAINTIFFS-APPELLANTS' MOTION TO RECONSIDER**

Now come the Plaintiffs-Appellants, by and through their counsel, and respectfully move this Court to reconsider its decision rendered on February 3, 2009.

Respectfully submitted,

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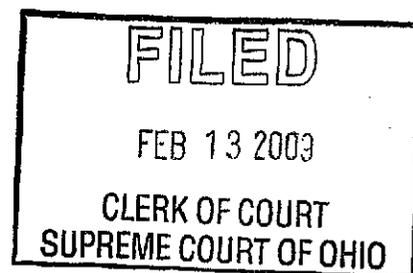
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## MEMORANDUM IN SUPPORT

The standard for reconsideration in this Court has recently been described as “nebulous”:

The standard for reconsideration is nebulous, but we have suggested that we grant such motions when persuaded, “upon reflection,” to deem our prior decision as having been made in error. *See, e.g., State ex rel. Huebner v. W. Jefferson Village Council* (1996), 75 Ohio St.3d 381, 383, 662 N.E.2d 339.

*State ex rel. Gross v. Indus. Comm'n*, 115 Ohio St. 3d 249 (O’Connor, J., dissenting). The standard for reconsideration in the courts of appeal has been described more specifically, and provides that a motion to reconsider is proper where it is claimed that the court made an “obvious error” or failed to consider an argument that is properly before it:

The test generally applied upon the filing of a motion for reconsideration in the court of appeals is whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. (*Matthews v. Matthews* (1981), 5 Ohio App. 3d 140, 5 Ohio B. Rep. 320, 450 N.E.2d 278, followed.)

*Stern v. Stern*, 2002 Ohio 554 (Ct. App. 7<sup>th</sup> Dist.).

In the instant matter, this Court expressly based its decision that the attorney fee provisions in the reinstatement clauses in the various mortgages at issue herein were not “adhesive” because they were the result of bargaining on the national level amongst lenders and consumer groups which lead to the creation of standardized mortgage contracts. While it is true that certain mortgages that are covered by federal law (such as Fannie Mae and Freddie Mac mortgages) are allowed, **by that federal law**, to include such attorney fee provisions, **there has been no showing that the mortgages at issue herein are subject to those federal laws.**

This case was decided upon a Motion to Dismiss, which assumes the truth of the allegations forth complaint, and the neither the original complaint in this matter, nor the amended complaint, makes any allegation that the mortgages are subject to federal law. If the Defendants-Appellees believed that their mortgages were subject to any such federal laws, and that those federal laws not only allowed the attorney fee provisions, but also preempted any law of the State of Ohio invalidating such provisions, then they had to file a motion for summary judgment and adduce evidence showing the mortgages are, in fact, subject to any such federal law.

Instead, the Defendants-Appellees expressly stated, in the Trial Court, that they would raise any arguments that the law of the State of Ohio was preempted by any such federal law **only** if the trial court held that the attorney fee provisions were invalid under law of the State of Ohio (otherwise, there was no need for the trial court to consider the applicability and effect of any federal law allowing any such attorney fee provisions):

MR. NAPOLITANO: Your Honor...we don't need to do this today [*i.e.*, argue that the attorney fee provisions are valid under federal law,], but I wanted to remind you that depending upon your decision on what was argued today, [*i.e.*, if the trial court were to hold the fee provision invalid under State law,]...we would probably then have to come back and argue the [federal] preemption argument....

Transcript of Trial Court Hearing, p. 90 (Docket No. 87).

Accordingly, Plaintiffs-Appellants request this Court to hold, “upon reflection,” that it was error to base its decision that the attorney fee provisions in the mortgages at issue herein are valid, under the law of the State of Ohio, based upon the provisions of federal law when there has been no showing that the mortgages are subject to any such federal law.

The issue whether the mortgages herein are subject to the federal law referred to by this Court is critically important, because, as this Court expressly indicated, those federal laws, in return for allowing the lender to charge attorney fees, also include extensive protections for the borrower: “As result of the testimony of consumer advocates at the public meetings, the revised final uniform mortgage forms contain extensive consumer protection.” *See* para. 32. But, if the mortgages at issue herein are not subject to those federal laws, then the Plaintiffs-Appellants are not protected by the pro-consumer provisions of any such federal law. Thus, this Court’s decision will allow lenders **who have issued mortgages that are not subject to federal law** to nonetheless charge attorney fees even though the borrowers are not protected by the pro-consumer provisions of any such federal law.

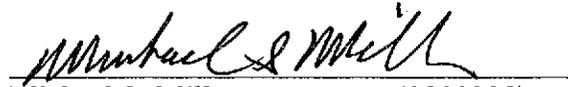
In conclusion, Plaintiffs-Appellants respectfully request this Court to grant their Motion for Reconsideration, and to base its decision upon Ohio law without any reference to any federal law because it has not been shown that any such federal law applies to the mortgages at issue herein. If, upon reconsideration, this Court were to then agree that the attorney fee provisions are unenforceable under the law of the State of Ohio, then it should remand this case to the lower courts to allow the Defendants-Appellees, if they so choose, to argue and prove that the mortgages they issued to the Plaintiffs-Appellants are subject to a federal law that not only allows the attorney fee provisions, but also preempts any law of the State of Ohio that invalidates such attorney fee provisions. This will then allow (1) the parties to brief the issue whether the mortgages are subject to a federal law that not only permits attorney fee provisions, but also preempts any contrary State law and, and (2) the

lower courts to consider those issues before they are presented to and considered by this Court.

In conclusion, Plaintiffs-Appellants respectfully request this Court to grant their Motion for Reconsideration, and to base its decision solely on Ohio law without any reference to any federal laws that may validate the attorney fee provisions, because there has been no showing that the mortgages at issue herein are subject to any such federal law.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that a true copy of the foregoing Plaintiffs-Appellants' Motion To Reconsider was served upon the following Counsel of Record, by regular first class U.S. mail, postage prepaid, on this 13<sup>th</sup> day of February, 2009:

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