

**IN THE SUPREME COURT OF OHIO**

.....

**JPMorgan Chase Bank, as Trustee, on Behalf of  
the holders of the Truman Capital Mortgage  
Loan Trust 2004-2 Asset Backed Certificates,  
Series 2004-2**

**Appellees,**

**vs.**

**Dennis L. Murphy, et al.**

**Appellants.**

**Supreme Court Case No. 2010-2136**

**Court of Appeals Case No. 2008 CV  
08810**

**On Appeal from the Second District  
Court of Appeals, Montgomery  
County**

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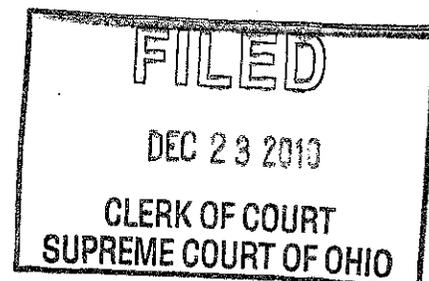
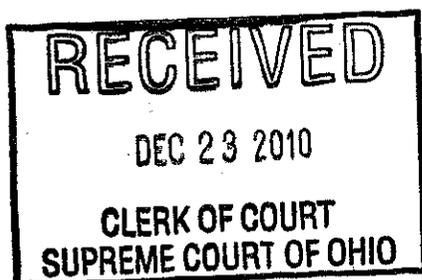
**RESPONSE OF APPELLEE JP MORGAN CHASE BANK, AS TRUSTEE, ON BEHALF OF THE  
HOLDER OF THE TRUMAN CAPITAL MORTGAGE LOAN TRUST 2004-2 ASSET BACKED  
CERTIFICATES, SERIES 2004-2 TO APPELLANTS DENNIS L. AND ROBIN L.  
MURPHY'S MEMORANDUM IN SUPPORT OF JURISDICTION**

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## STATEMENT IN OPPOSITION TO JURISDICTION

The Second District Court of Appeals, Montgomery County, reviewed and answered the question of whether a moving party that presents sufficient evidence to support its claim is entitled to summary judgment when the non-moving party fails to present any evidence. The Court of Appeals also answered the question of whether an affirmative defense is waived when a party fails to assert that defense prior to judgment. In both cases, the Answer is yes. Neither issue concerns an unsettled area of the law. Therefore, neither issue is one of public or great general interest. The Court should decline to exercise jurisdiction.

## STATEMENT OF THE FACTS AND THE CASE

The following background is set forth in the Opinion entered by Court of Appeals on October 9, 2010 (“Opinion”), attached to Appellants’ Memorandum in Support of Jurisdiction.

Appellee filed a complaint in foreclosure on September 25, 2008, alleging default on a promissory note and entitlement to foreclose on a mortgage both of which were executed by Appellants. Opinion, p. 2. Appellants filed an Answer that alleged the loan was “predatory” and requested a stay of the proceedings. *Id.* Appellee moved for summary judgment on October 20, 2008. *Id.* Appellee supported its motion with two affidavits attesting to its right to enforce the Note and Mortgage, and Appellants responded by filing a narrative detailing their efforts to obtain a loan modification and secure legal representation. *Id.* The trial court granted judgment in Appellee’s favor on December 11, 2008. *Id.* at p. 3.

Approximately one year later, Appellants, through counsel, moved to vacate the judgment on grounds that the Court was without subject-matter jurisdiction. *Id.* The factual basis for that motion was that the assignment of mortgage was recorded after Appellee filed its Complaint. *Id.* at p. 4.

The trial court denied that motion, and Appellants appealed to the Second District Court of Appeals, Montgomery County, Ohio.

The Court of Appeals affirmed the trial court's ruling. Id. at pp. 7-8. Appellants failed to attach the decision from which the appeal was taken, failed to assign any errors, and instead requested a declaration that the "Mortgage [was] Paid in Full." Id. at p. 5. However, Appellants' brief did mention summary judgment, which the appellate court reviewed de novo. Id. at p. 5.

The Court held that Appellants' request for a stay of the foreclosure action was insufficient to raise a genuine issue of material fact as against Appellee's "competent summary judgment evidence," and that "the trial court correctly determined that [Appellee] was entitled to summary judgment and foreclosure." Id. at pp. 6-7.

As to Appellants' post-judgment motion to vacate based on the belated recording of a Mortgage assignment, the Second District Court of Appeals stated that Appellants "did not timely challenge the standing of [Appellee] to prosecute the foreclosure action, and [Appellants] accordingly waived this argument." Id. at p. 7. Noting again that it had "been very liberal in applying the Appellate Rules and in interpreting the Appellants' arguments," Judge Froelich authored a concurrence specifically identifying waiver as the legal basis for the court's holding. Id. at p. 6 (Froelich, J., concurring).

### **RESPONSE TO APPELLANTS' MEMORANDUM**

There is no discernable issue of public or great general interest presented by Appellants' Memorandum in Support of Jurisdiction. This Court's role as a court of last resort is "not to serve as an additional court of appeals on review, but rather to clarify rules of law arising in courts of appeals that are matters of public or great general interest." State v. Bartrum, 121 Ohio St.3d 148, 2009-

Ohio- 355, 902 N.E.2d 961 at ¶ 31. Appellants do not designate any proposition of law, provide any legal argument or designate what legal issue is of interest to any party other than Defendants in this case. See Appellant’s Memorandum. Appellants instead allege unspecified “federal crimes” and “fraud,” and seek “punitive and compensatory fines” in the amount of \$36 million dollars from Appellee and other entities not a party to the trial court action. See Notice of Appeal, p. 4. Notwithstanding Appellants’ claims and requests “on behalf of all the People of Ohio,” Appellants have not presented an issue of public or great general interest in light of the appellate court’s opinion.

That opinion identifies two possible grounds for reversal, and upon application of the law and procedure to the facts, reaches the correct conclusions. The appellate court reviewed summary judgment de novo, and found that where a non-moving party fails to place any material before the trial court in response to a properly supported motion for summary judgment, the non-moving party has not raised a genuine issue. Opinion, p. 7. This is hardly a matter of public or great general interest, and is certainly not an unsettled question of law requiring clarification or guidance from this Court. See Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St.2d 64, 65-66, 375 N.E.2d 46. Nor is the other possible ground for reversal.

The appellate court also reached the correct conclusion that where a party fails to assert a non-jurisdictional affirmative defense in a timely fashion, it is waived. Opinion, p. 7. Again, this proposition is not novel. See Sate ex rel. Jones v. Suster (1998), 84 Ohio St.3d 70, 75, 701 N.E.2d 1002 (non-jurisdictional affirmative defense may be waived). Even this Court has agreed that the underlying ancillary issue of when a party becomes the real party in interest based on the execution of an assignment of mortgage is not a matter of public or great general interest. See Wells Fargo Bank, N.A. v. Jordan, 123 Ohio St.3d 1407, 2009-Ohio-5031, 914 N.E.2d 204 (discretionary appeal

denied). Accordingly, this Court should decline to exercise jurisdiction once again.

### CONCLUSION

Neither the summary judgment standard nor the rules for waiver are unclear or of public or great general interest. The Second District Court of Appeals reviewed the proper law, and applying it to the facts, came to the same conclusion as the trial court. Appellants are not satisfied with this result, but fail to articulate any basis for a different outcome. Accordingly, the Court should decline to exercise jurisdiction.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Appellee JP Morgan Chase Bank's Response to Appellant's Memorandum in Support of Jurisdiction was sent to the following by ordinary U.S. Mail, postage prepaid, on the date indicated below:

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December 21, 2010  
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Dated