ORIGINAL

IN THE OHIO SUPREME COURT

MERCHANTS BANK & TRUST COMPANY, Plaintiff-Appellee vs. FIVE STAR FINANCIAL CORPORATION and STEVEN A. WINTER, Defendants-Appellants	:	Case No. 2011-11-1183 Appeal from the Court of Appeals for the First Appellate District of Ohio, Hamilton County, Ohio Court of Appeals Case No. C100037

MEMORANDUM IN SUPPORT OF JURISDICTION BY APPELLANTS FIVE STAR FINANCIAL CORPORATION AND STEVEN A. WINTER

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

The issues raised on the appeal are of public or great general interest, because the First District Court of Appeal is taking a different approach to the issues raised here regarding cognovit judgments from the other districts of the state. This court needs to provide guidance to the lower courts of this state on the proper handling of this issue.

In this economic and political climate, when significant problems with banks and their foreclosure processes are coming to light,[1] the use of cognovit notes to obtain judgments should not be taken lightly by the courts of this state. Thus, when a cognovit note by its own terms refers to extrinsic documents from which the balance due on the note must be determined, the trial courts and magistrates of the state cannot enter a judgment without having that evidence before them.

It is easy for a magistrate or a trial judge to simply enter judgment on a cognovit note, taking at face value the allegations of the amount due, even when that amount cannot be determined without

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[1] *See, e.g.*, Attorney General Mike DeWine, *Finding problems with foreclosures*, October 28, 2010 at http://www.ohioattorneygeneral.gov/SpeakOutOhio/Blog/October-2010/Finding-problems-with-foreclosures; David McLaughlin and Dakin Campbell, *Banks Said to Offer $5 Billion to Resolve State, U.S. Foreclosures Probe,* Bloomberg, May 11, 2011, at http://www.bloomberg.com/news/2011-05-11/u-s-banks-said-to-offer-to-pay-5-billion-to-resolve-state-mortgage-probe.html; David McLaughlin, *Banks Will Be Sued If Foreclosure Practices Talks Collapse, Two States Say,* Bloomberg, June 22, 2011, at http://www.bloomberg.com/news/2011-06-22/banks-will-be-sued-if-foreclosure-talks-collapse-two-states-say.html; *Class action lawsuit filed against Bank of America goes national*, May 26, 2011, at http://www.ktnv.com/story/14722737/b-of-a-class-action-lawsuit-goes-national; Mark DeCambre, *Feds accuse Deutsche Bank of mortgage fraud,* New York Post, May 4, 2011, at http://www.nypost.com/p/news/business/bank_blitzkrieg_anYrPZxQh2jSJiLWv0XjJI; *Maine High Court Overturns Foreclosure, Cites 'Untrustworthy' Paperwork,* Wall Street Journal, May 24, 2011, at http://blogs.wsj.com/developments/2011/05/24/maine-high-court-overturns-foreclosure-cites-untrustworthy-paperwork/.

looking at the books and records of the creditor, simply for the sake of expediency. The reality is that, in the vast majority of case, no appeal will ever be taken of the ruling, because the person affected is the one least able to pursue his or her legal remedies. The trial court is often the only hope they have for redress. Thus, it is important for this Court to send a message to the courts of this state to strictly adhere to the procedural requirements for entering a cognovit judgment.

Accordingly, the issues raised on the appeal are of public or great general interest, and this Court should take jurisdiction of this appeal.

STATEMENT OF THE CASE AND FACTS

On July 25, 2003 Five Star Financial Corporation and Steve Winter entered into a $1,000,000 open ended note and security agreement with Merchants Bank & Trust Company for the purpose of funding mortgage loans. The agreement was executed at 107 N. State St. in West Harrison, Indiana and the terms of the agreement clearly state that it is governed by the laws of Indiana. This was the first such agreement between the parties. This note was modified on two occasions. The first modification added a pledge of additional stocks on June 1, 2004. The second modification dated August 24, 2004 extended the maturity date of the note to October 25, 2004. Neither modification addressed a change of governing law from Indiana to Ohio.

On July 12, 2004 Five Star received a letter from Paul Silva of Merchants that stated "we are anxious to renew this credit" and included a loan application prepared by Merchants with the box checked next to the section marked "Renew/Increase Existing Line of Credit," and a loan amount of $2,000,000. Winter filled in the name of his accountant and initialed and signed the application in the spaces provided. The application was then returned to Merchants.

On October 25, 2004 Winter received a letter from Mark Sams of Merchants that stated "I

am pleased to inform you that we have approved the financing arrangements subject to the following terms and conditions." The terms provided for a $2,000,000 line of credit at a rate of Prime + .75% with a term of 1 year and interest only monthly payments. The collateral outlined in the commitment were the same stocks pledged with the June 1,2004 modification of the 2003 agreement plus a $100,000 certificate of deposit, an assignment of the mortgage for each mortgage financed under the agreement, and a UCC filing on all business assets of Five Star. The commitment also required Five Star to pay all costs associated with the renewal including legal fees. The commitment said nothing about a change of governing law to Ohio or a cognovit provision. On October 28, 2004 Winter executed the commitment and returned it to Merchants. Upon receipt of the executed commitment, Sams called Winter and informed him that Merchants would require Thompson Hine prepare the loan documents.

Winter had no objection as Five Star had been represented by Thompson Hine since Five Star had been formed and Thompson Hine was currently litigating other issues for Five Star and Winter. No further negotiations regarding the renewal of the credit facility took place. Merchants arranged for the preparation of the loan documents with Thompson Hine and a closing was scheduled.

When Winter appeared at the office of Thompson Hine to execute the renewal, Winter was presented with a 33 page loan document dated October 25, 2004 that was far longer and more complicated than the 2003 agreement or any other loan document Winter had ever been presented. Winter did not read the agreement and instead asked the attorney from Thompson Hine that had prepared the agreement what it said as Winter believed that Thompson Hine was representing him in the transaction. Winter was told that the agreement was essentially the same as the 2003 agreement, the loan amount was $2,000,000, the rate was prime + .75%, and the term was 1 year.

Winter was not told anything regarding a change of governing law or its resulting effects. When Winter went to execute the agreement he saw the cognovit warning and again questioned the attorney. He was told by the attorney that a cognovit provision doesn't allow the lender to do anything they couldn't do without it. Winter still refused to execute the agreement and instead called Tom Kirkwood of Thompson Hine. Kirkwood again repeated to him that the cognovit provision did not give Merchants any additional rights and informed Winter that his choices were to execute the agreement as-is or have Merchants declare his loan in default. Winter then executed the agreement on the advice of the attorneys from Thompson Hine that he believed were representing his interests and the interests of Five Star.

The need to renew the agreement arose from time to time and four modifications of the agreement were executed.

- The first modification was a "Modification of Note, Credit and Security Agreement, and Pledge Agreement" and was executed on November 28, 2005. This modification extended the maturity date of the note to February 25, 2006. This modification did not contain the language or warning required by ORC 2323.13 for cognovit provisions.
- The second modification was a modification of "Credit and Security Agreement" executed on March 24, 2006 and extended the maturity date to May 25, 2007. This modification included the language and warning required by ORC 2323.13 for cognovit provisions.
- The third modification was a modification of "Credit and Security Agreement" executed on June 9, 2006 and again extended the maturity date to May 25, 2007. This

modification included the language and warning required by ORC 2323.13 for cognovit provisions.

- The fourth modification was a modification of "Credit and Security Agreement" executed on June 29, 2007 and extended the maturity date to May 25, 2008. This modification did not include the language or warning required by ORC 2323.13 for cognovit provisions. This was also the final modification of the agreement.

All of the modifications were prepared by Thompson Hine with Five Star paying Thompson Hine for their preparation. Winter also consulted with Tom Kirkwood of Thompson Hine prior to the execution of each modification and executed each on the advice of Mr. Kirkwood.

On December 13, 2007 Winter received a letter from Sams of Merchants dated December 10, 2007 declaring a default under Section 7.1 of the 2004 agreement and demanding payment in full of $1,445,753.39 by December 20, 2007, despite the fact that Section 7.1 of the 2004 agreement calls for a 30 day cure period after written notice of default is provided from Merchants.

Winter called Sams of Merchants and instructed him to apply all funds on deposit with Merchants toward the balance claimed in the December 10, 2007 letter. On January 9, 2008 Thompson Hine filed a complaint on the cognovit note on behalf of Merchants against Five Star and Winter. Merchants retained attorney Brian Ewald to waive service and confess judgment in the amount of $1,445,753.39 plus interest on behalf of Five Star and Winter. On January 14, 2008 Winter received a loan statement from Merchants that stated a loan balance of $1,338,878.00 even though no payments had been made by Winter since the judgment had been taken.

On May 19, 2008 Winter filed a motion to vacate the judgment under Civ. R. 60(B) asserting the cognovit provision was barred by Indiana Law, improper venue, and that the appellant failed to

apply payments in its possession prior to confessing judgment and thereby creating a judgment balance in excess of the true amount owed when judgment was confessed.

On June 17, 2008 Winter filed a second motion to vacate that specified (1) the procurement of a document with a cognovit provision while the relationship between the parties was governed by the Laws of Indiana was the invalidating cause of the cognovit provision, (2) fraud in the inducement of the cognovit provision, (3) that the final modification of the agreement did not contain the language required by ORC 2323.13 directly above or below the signature line of the modification making the cognovit provision defective, (4) that the loan agreement was unconscionable. Most importantly, and consistently with his first motion he argued that the balance owed was far less than the judgment amount on the day judgment was taken.

On October 6, 2008 Merchants filed an additional brief in support of their previously filed motions to vacate that challenged Winter to provide evidence to support the claims in his July 3, 2008 brief. On October 9, 2008 Winter filed a brief with evidence attached showing Thompson Hine had represented both Five Star and Winter prior to, concurrent with, and after the execution of 2004 Merchants agreement where Thompson Hine represented Merchants but provided legal advice to Five Star and Winter without providing any conflict of interest disclosure to support the claims of fraud in the inducement. The issue was set for decision on October 14, 2008 but at the request of Merchants, Winter consented to postpone the decision so that settlement negotiations could take place.

On August 21, 2009 counsel for Winter and Five Star requested a hearing on the previously filed motions to vacate as ten months had passed and no settlement proposal from Merchants had been received. On November 16, counsel for Winter and Five Star filed a motion to declare the

judgment held by Merchants void ab initio. On November 19, 2009 Merchants requested a continuance so that it could respond to the void ab initio motion and on November 30, 2009 Merchants filed a reply. On December 11, 2009 Winter and Five Star filed their response and incorporated by reference all of the motions and briefs previously filed by Winter. On December 14, 2009 the appellants filed a supplement to their response and on the same day oral arguments were heard. On December 21, 2009 an order was signed that overruled both motions to vacate and the motion to declare the judgment void ab initio.

ARGUMENT

Proposition of Law No. 1
This matter is of public and great general interest because the First District's decision is at variance with other districts in this state.

The case most directly on point to the case at bar is the published case of *Onda, LaBuhn & Rankin Co., LPA v. Johnson*, 184 Ohio App. 3d 296, 2009-Ohio-4726, 920 N.E.2d 1000 (4th Dist. Ct. App). The *Onda* Appellant argued that the cognovit provisions of the promissory note in question were invalid because the amount owed could not be determined solely by referring to the note, and the note specifically referenced outside documents. The original note in *Onda* stated:

> Appellant promises to pay "... the principal sums advanced hereunder from time to time for the purpose of securing legal fees, not to exceed Fifty Thousand Dollars ($50,000.00), or such principal sum as may be adjusted do~mvardfr om time to time by payments of principal by Payee or as may be adjusted upward from time to time by additional loans made by Payee to the Makers."

Id., 184 Ohio App. 3d at 299, 2009-Ohio-4726 at ¶9, 920 N.E.2d at 1003. The promissory note modification agreement in *Odna*, which raised the note amount to $70,000, read:

> "Debtors promise to pay to the order of Secured Party all amount(s) advanced by Secured Party to Debtors for the purpose of securing legal fees, *as evidenced by the books and records of the Secured party and Debtors,* plus interest, in an amount not to exceed seventy

> thousand and no/100 dollars ($ 70,000.00) (the 'Principal Balance'), payable pursuant to the terms of the note." (Emphasis added.)

Id., 184 Ohio App. 3d at 300, 2009-Ohio-4726 at ¶9, 920 N.E.2d at 1003 (emphasis in original).

In *Onda* , the Appellee argued that the terms of the note and modification agreement showed that the principle amount due on the note was clear, thus, the note was sufficient to support the cognovit judgment. The Fourth Appellate District disagreed and found that because the amount due on the note cannot be determined without reference to additional evidence that was specifically referred to in the note, the cognovit note is invalid.

In the case at bar, the language of the note is similar to that of *Onda*. The note at bar clearly states:

> The unpaid principal balance of and interest accrued on this Note *shall be determined by the ledgers and records of the Bank* as maintained in accordance with the respective ordinary practices to reflect Advances and payments under this Note and the Credit Agreement and shall be conclusive in the absence of manifest error. [emphasis supplied]

The note at bar, like the one in *Onda*, clearly refers to extrinsic documents, without which the court cannot enter a judgment.

The First District Court dismissed the applicability of *Onda,* noting that only the authoring judge subscribed to the opinion of the court, while the other two judges concurred in the judgment only. *Opinion* at 4, n.9. However, what the First District failed to note is that one of the judges who concurred in the judgment also wrote a concurring opinion. Judge Kline wrote:

> I concur in judgment only because I respectfully disagree that the cognovit note is facially insufficient to support the cognovit judgment. Instead, I believe that the cognovit judgment is invalid because the Appellee (hereinafter "Onda LaBuhn") did not submit its books and records along with the cognovit note.

Onda, 184 Ohio App. 3d at 302, 2009-Ohio-4726 at ¶17, 920 N.E.2d at 1005. Nevertheless, whether

one follows the opinion, that the cognovit note is facially insufficient to support the judgment, or the concurring opinion, that the judgment is invalid because the books and records were not produced, both approaches mandate the judgment be vacated in this case.

The decision of the Fourth District Court of Appeals was based on in large part upon the Tenth District cases of *Gunton Corp. v. Banks*, 2002-Ohio-2873 (10th Dist.), and *Simmons Capital Advisors, Ltd. v. Kendall Group, Ltd.*, 2006-Ohio-2272 (10th Dist.).

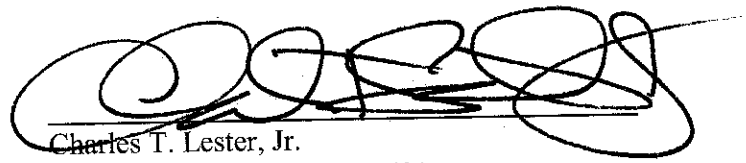
> In *Gunton*, the court held that a cognovit note was invalid because the statuses of the signors, and thus the terms of the note, were not sufficient to facially support the judgment. "If judgment is to be rendered upon a confession of judgment, the notes themselves must be sufficient to support the judgment. It was erroneous for the trial court to take into account anything other than the notes themselves and the confession of judgment, all of which was patently insufficient to support judgment upon confession." *Gunton Corp. v. Banks*, 2002-Ohio-2873 (10th Dist.) at ¶31.
>
> In *Simmons Capital Advisors*, the appellants challenged the judgment amount on the cognovit note. In holding that the trial court abused its discretion in denying the appellants' *Civ.R. 60(B)* motion, the court stated that ". . . we recognize that the note's provision for the parties' to raise and rebut evidence on the schedule of advances precluded the trial court from accepting the confession of judgment and ultimately entering a cognovit judgment when it did. This is so because the note, on its face, did not support the confession of judgment or the cognovit judgment, *and the trial court needed additional evidence to compute the judgment*." (Emphasis added.) *Simmons Capital Advisors, Ltd. v. Kendall Group, Ltd.*, 2006-Ohio-2272 (10th Dist.) at ¶21.

Id., 184 Ohio App. 3d at 299, 2009-Ohio-4726 at ¶¶6, 7, 920 N.E.2d at 1003 (emphasis in original). Both of these arguments also apply to the instant case. The note in the instant case requires the ledgers and records of the Bank to determine the balance owed on the note while manifest error in those ledgers and records gives the appellants a right to raise evidence and rebut the balance due on the note. The ledgers and records of the bank were not submitted when judgment was confessed. Thus, the note in the instant case cannot be a valid cognovit note because it specifically references documents outside of the note which are required to understand the terms.

The First District's holding in this case is at variance with the holdings in te Fourth and Tenth Districts, and thereore this Court should take jurisdiction of this matter to provide the necessary guidance to the lower courts.

CONCLUSION

For the foregoing reasons, the appeal involves matters of public and great general interest, and the appellants respectfully requests that this Court grant jurisdiction for the appeal and allow this case to be heard and reviewed on the merits.



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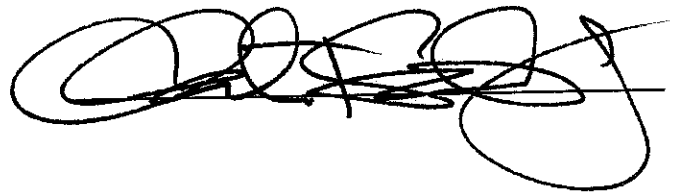
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the persons named below by U.S. Mail on July 8, 2011.



cc:
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APPENDIX

Judgment Entry and Decision of the Hamilton County Court of Appeals (May 25, 2011)

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

MERCHANTS BANK & TRUST COMPANY,	:	APPEAL NO. C-100037 TRIAL NO. A0800266
Plaintiff-Appellee,	:	*JUDGMENT ENTRY.*
vs.	:	
FIVE STAR FINANCIAL CORPORATION	:	
and	:	
STEVEN A. WINTER,	:	
Defendants-Appellants.	:	

ENTERED
MAY 25 2011

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed for the reasons set forth in the Decision filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Decision attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on May 25, 2011 per Order of the Court.

By: _____
Presiding Judge

Appendix

D93188479

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

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HAMILTON COUNTY

MERCHANTS BANK & TRUST COMPANY,	:	APPEAL NO. C-100037 TRIAL NO. A0800266
Plaintiff-Appellee,	:	*DECISION.*
vs.	:	
FIVE STAR FINANCIAL CORPORATION	:	
and	:	
STEVEN A. WINTER,	:	
Defendants-Appellants.	:	

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COURT OF APPEALS

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2011 MAY 25 A 7 [illegible]

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: May 25, 2011

Bryce A. Lenox and *Thompson Hine LLP*, for Plaintiff-Appellee,

Charles T. Lester, Jr., and *Eric C. Deters & Associates, P.S.C.*, for Defendants-Appellants.

Please note: This case has been removed from the accelerated calendar.

FISCHER, JUDGE.

{¶1} Five Star Financial Corporation ("Five Star") and its president, Steven Winter, appeal a decision of the Hamilton County Court of Common Pleas that denied their motions to vacate a cognovit judgment entered in favor of Merchants Bank & Trust Company ("Merchants Bank"). For the following reasons, we affirm.

Factual Background & Procedural Posture

{¶2} On October 25, 2004, Five Star and Merchants Bank entered into a Credit and Security Agreement (the "Credit Agreement"). As part of that agreement, Five Star executed a promissory note in favor of Merchants Bank for a $2,000,000 line of credit (the "Note"). Under the Note, the unpaid principal balance and accrued interest owed by Five Star is determined by the "ledgers and records" of Merchants Bank. In addition, Winter signed a Guaranty Agreement fully backing Five Star's obligations under the Credit Agreement and the Note (the "Guaranty"). Both the Note and the Guaranty contain Ohio choice-of-law and warrant-of-attorney provisions.

{¶3} On January 9, 2008, Merchants Bank filed suit against Five Star and Winter alleging default on the Credit Agreement, the Note, and the Guaranty. Pursuant to the warrant-of-attorney provisions, attorney Brian Ewald appeared on behalf of Five Star and Winter and confessed judgment against them for $1,458,279.95, plus interest, costs, late charges, and attorney fees. The trial court promptly entered a cognovit judgment with the same terms.

{¶4} On May 19, 2008, Five Star and Winter moved to vacate that judgment. Over the next 18 months, Winter separately moved to vacate the judgment, and Five Star and Winter filed an "Amended Motion to Dismiss and

Declare Merchants Judgment Void Ab Initio." On December 21, 2009, the trial court denied these motions, and this appeal followed.

The "Ledgers and Records" of Merchants Bank

{¶5} In their first assignment of error, Five Star and Winter argue that the cognovit judgment is invalid because the "ledgers and records" of Merchants Bank were not submitted before the judgment was entered. We are not persuaded.

{¶6} "The cognovit is the ancient legal device by which the debtor consents in advance to the holder's obtaining a judgment without notice or hearing, and possibly even with the appearance, on the debtor's behalf, of an attorney designated by the holder."[1] "[T]he purpose of a cognovit note is to allow the holder of the note to quickly obtain judgment, without the possibility of trial."[2]

{¶7} In Ohio, R.C. 2323.12 and 2323.13 establish and govern the jurisdiction of the state's trial courts to enter cognovit judgments.[3] The former allows for judgment by confession, and the latter provides for warrants of attorney, which may authorize an attorney to confess judgment against a defendant without prejudgment notice. All of their requirements "must be met in order for a valid judgment to be granted upon a cognovit note or for a court to have subject-matter jurisdiction over the same."[4] And because the statutes empower courts to enter judgments they would otherwise be without authority to enter, warrants of attorney to confess judgment must be "strictly construed, and court proceedings based on such warrants must conform in every essential detail with the statutory law governing the subject."[5]

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[1] *D. H. Overmyer Co. v. Frick Co.* (1972), 405 U.S. 174, 176, 92 S.Ct. 775.
[2] *Sky Bank v. Colley*, 10th Dist. No. 07AP-751, 2008-Ohio-1217, at ¶7.
[3] Id. at ¶9.
[4] Id.
[5] *Lathrem v. Foreman* (1958), 168 Ohio St. 186, 151 N.E.2d 905, paragraph one of the syllabus.

{¶8} Five Star and Winter contend that the Note is "facially insufficient" to support a cognovit judgment because it determines the amount owed by Five Star by referring to extrinsic documents. Specifically, the Note provides that the "unpaid principal balance of and interest accrued on this Note shall be determined by the ledgers and records of [Merchants Bank] as maintained in accordance with the respective ordinary practices to reflect Advances and payments." Thus, at any given time, the amount due on the Note is not evident on its face.

{¶9} To support their proposition, Five Star and Winter cite *Onda, LaBuhn, Rankin & Boggs Co., LPA v. Johnson*.[6] In *Onda*, a debtor signed a cognovit note to secure his payment for legal services. The debtor promised to pay "all amount(s) advanced by [the law firm] to [the debtor] for the purpose of securing legal fees, as evidenced by the books and records of [the law firm] and [the debtor]."[7] The firm later obtained a cognovit judgment against the debtor, but the Fourth Appellate District reversed. In the opinion of the court, the authoring judge wrote that because the note required extrinsic documents to calculate the amount owed, the note was "facially insufficient to support a cognovit judgment."[8] The judgment was held void and vacated.[9]

{¶10} In our analysis, we turn first to the Revised Code. Although we must strictly construe R.C. 2323.12 and 2323.13, we nevertheless have an "obligation to give effect to the intention of the General Assembly."[10] If statutory language "conveys

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[6] *Onda, LaBuhn, Rankin & Boggs Co., LPA v. Johnson*, 184 Ohio App.3d 296, 2009-Ohio-4726, 920 N.E.2d 1000.
[7] Id at ¶9.
[8] Id. at ¶11 (citing *Gunton Corp. v. Thomas G. Banks*, 10th Dist. No. 01AP-988, 2002-Ohio-2873 [holding that "where the notes are facially insufficient to support the confession of judgment, without additional facts being adduced, the cognovit is void"]).
[9] Notably, only the authoring judge subscribed to the opinion of the court. The remaining two judges concurred in judgment only.
[10] *Basic Distrib. Corp. v. Ohio Dept. of Taxation*, 94 Ohio St.3d 287, 291, 2002-Ohio-794, 762 N.E.2d 979.

a meaning that is clear and unequivocal, interpretation is at an end, and the statute must be applied accordingly."[11]

{¶11} Under R.C. 2323.13, "[a]n attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession." Neither statute, however, requires the instrument containing the warrant of attorney to demonstrate by itself the amount owed by the defendant. We, therefore, decline to adopt such a rule.

{¶12} Moreover, to hold otherwise would severely undermine the clear legislative intent to allow warrants of attorney in nonconsumer transactions. Such a holding would leave numerous proper lending arrangements unenforceable in cognovit actions, particularly when the amount owed may change from day to day, such as with open lines of credit and interest-bearing loans. Accordingly, we hold that the Note was not facially insufficient to support a cognovit judgment merely because it determined the amount owed by Five Star by reference to extrinsic documents.

{¶13} Five Star and Winter alternatively argue that, by its own terms, the Note required the submission of the "ledgers and records" of Merchants Bank before the cognovit judgment was entered. We recognize that nothing in R.C. 2323.12 and 2323.13 prevents parties from creating contingent warrants of attorney that courts may enforce. For instance, in *Bank One, N.A. v. DeVillers*, the Tenth Appellate District held that where a warrant of attorney authorized the confession of judgment for an unpaid amount "as evidenced by an affidavit signed by an officer of the Lender

[11] Id.

for the amount then due," the lender was required to submit that affidavit before judgment.[12]

{¶14} But those are not the facts in this record. Here, the Note authorizes "any attorney at law to appear before any Court of Record, state or Federal, in the county or judicial district where this Note was executed or where [Five Star] or [Merchants Bank] reside or may be found, after the unpaid principal balance of this Note becomes due * * * and confess judgment against [Five Star] in favor of [Merchants Bank] or other holder of this Note for the amount then appearing due on this Note * * * ."

{¶15} Similarly, the Guaranty authorizes "any attorney-at-law to appear in any court of record in Hamilton County, Ohio * * * after the indebtedness evidenced hereby becomes due * * * and confess judgment against the undersigned in favor of [Merchants Bank] for the amount then appearing due * * * ."

{¶16} Even under a strict reading of these provisions, we see no requirement for the submission of the "ledgers and records" of Merchants Bank prior to the entry of judgment. Although the Guaranty refers to "indebtedness evidenced," the confession of judgment was adequate to show the amount owed by Five Star and Winter.[13] We, therefore, overrule the first assignment of error.

Personal Jurisdiction

{¶17} In their second assignment of error, Five Star and Winter contend that the trial court lacked personal jurisdiction to enter the cognovit judgment. We disagree.

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[12] *Bank One, N.A. v. DeVillers*, 10th Dist. No. 01AP-1258, 2002-Ohio-5079. See, also, *Onda*, supra, at ¶23 (Kline, P.J., concurring) (reasoning that the cognovit judgment was void because the lender had not submitted the books and records necessary to determine the amount owed).

[13] See *BJ Bldg. Co., LLC v. LBJ Linden Co., LLC*, 2d Dist. No. 21005, 2005-Ohio-6825, at ¶33 (holding that a cognovit note, in conjunction with a confession of judgment, was sufficient to inform the court of the amount of the defendant's indebtedness).

{¶18} Five Star and Winter rely on Section 10.8 of the Credit Agreement, which provides that "[Five Star] agrees that any action or proceeding to enforce or arising out of this Credit Agreement or any of the other Loan Documents [including the Note and Guaranty] may be commenced in the Court of Common Pleas for Montgomery County, Ohio or in the District Court of the United States for the Southern District of Ohio, and [Five Star] waives personal service of process and agrees that a summons and complaint commencing an action or proceeding in any such court shall be properly served and shall confer personal jurisdiction over [Five Star] * * * ."

{¶19} We note, however, that in their initial motion to vacate the cognovit judgment, Five Star and Winter did not challenge the trial court's personal jurisdiction over them. Instead, they pointed to the same forum-selection clause and challenged the court's venue. Personal jurisdiction, which concerns the power of a court to exercise control over parties, is a distinct concept from venue, which primarily concerns the selection of a convenient forum among courts with jurisdiction.[14] Because Five Star and Winter failed to raise the issue at their first appearance in this case, they implicitly consented to the trial court's jurisdiction.[15]

{¶20} Moreover, in the Note and Guaranty, Five Star and Winter expressly waived the issuance and service of process and authorized any attorney to appear on their behalf to confess judgment against them. Winter's waiver applied to the courts of Hamilton County, and Five Star's extended to all Ohio courts. They, therefore,

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[14] See *Fish v. Nottoli*, 7th Dist. No. 02-MO-4, 2003-Ohio-6275, at ¶38; *Lindahl v. Office of Personnel Management* (1985), 470 U.S. 768, 793, 105 S.Ct. 1620, fn. 30.
[15] See *McBride v. Coble Express* (1993), 92 Ohio App.3d 505, 510, 636 N.E.2d 356 ("[A]ny objection to assumption of personal jurisdiction is waived by a party's failure to assert a challenge at its first appearance in the case, and such defendant is considered to have consented to the court's jurisdiction.").

consented to the personal jurisdiction of the Hamilton County Court of Common Pleas to enter judgment against them without prior notice.[16]

{¶21} Five Star and Winter nevertheless contend that, under Indiana law, these waivers were invalid, and that because they never were served with process or entered an appearance, the trial court lacked personal jurisdiction over them. But we see no reason to apply Indiana law here. Although the state's laws had governed an earlier lending arrangement among the parties, the Note and the Guaranty expressly provide that Ohio law shall govern. The second assignment of error is, therefore, without merit.

Civ.R. 60(B) Motion

{¶22} Finally, in their third assignment of error, Five Star and Winter argue that the trial court abused its discretion when it denied their motions to vacate the cognovit judgment under Civ.R. 60(B). Again, we are not persuaded.

{¶23} In reviewing a trial court's decision to grant or deny relief from judgment, we look only for an abuse of discretion.[17] We, therefore, will reverse only if the trial court's decision was unreasonable, arbitrary, or unconscionable.[18]

{¶24} "Generally, a party seeking relief under Civ.R. 60(B) must demonstrate that '(1) the party has a meritorious defense or claim to pursue if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time.' "[19] But

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[16] See *Collins v. Collins*, 165 Ohio App.3d 71, 2006-Ohio-181, 844 N.E.2d 910, at ¶6 ("For a court to acquire personal jurisdiction, there must be a proper service of summons or an entry of appearance, and a judgment entered without proper service or an entry of appearance is null and void.").

[17] *Steinriede v. Cincinnati*, 1st Dist. No. C-100289, 2011-Ohio-1480, at ¶5 (citing *Harris v. Anderson*, 109 Ohio St.3d 101, 2006-Ohio-1934, 846 N.E.2d 43, at ¶7).

[18] Id. (citing *AAAA Enterprises Inc. v. River Place Community Urban Redevelopment Corp.* [1990], 50 Ohio St.3d 157, 161, 553 N.E.2d 597).

[19] *Lykins Oil Co. v. Pritchard*, 169 Ohio App.3d 194, 2006-Ohio-5262, 862 N.E.2d 192, at ¶11 (quoting *GTE Automatic Elec., Inc. v. ARC Industries, Inc.* [1976], 47 Ohio St.2d 146, 150, 351 N.E.2d 113).

when seeking relief from a cognovit judgment, the movant "need only establish that it has a meritorious defense and that the motion is timely raised."[20] Although cognovit notes cut off many defenses for the maker, a "meritorious defense goes to the integrity and validity of the creation of the debt or note, the state of the underlying debt at the time of confession of judgment, or the procedure utilized in the confession of judgment on the note."[21] To allege a meritorious defense, the movant must provide "operative facts in support thereof,"[22] and these facts must be alleged "with enough specificity to allow the court to decide whether it has met that test."[23]

{¶25} Five Star and Winter first claim that they owe less money than was confessed to the trial court. They allege that although the cognovit judgment was for $1,458,279.95, a statement prepared by Merchants Bank on January 14, 2008, shows a balance of $1,338,879. Five Star and Winter, however, do not contest that they in fact owe the amount confessed at the time of judgment. Nor do they contest Merchants Bank's contention that the bank liquidated certificates of deposit with a face value of $100,000 it held as collateral pursuant to the Credit Agreement as partial satisfaction of the judgment. In fact, Winter has even assumed this was the case.[24] We, therefore, cannot say that the trial court abused its discretion in denying relief on this basis.

{¶26} Next, Five Star and Winter allege that the Credit Agreement, the Note, and the Guaranty were unconscionable because the law firm that advised Winter to sign the documents failed to disclose that it was also representing Merchants Bank.

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[20] Id.
[21] Id. at ¶14 (internal quotations omitted).
[22] Id.
[23] *Elyria Twp. Bd. of Trustees v. Kerstetter* (1993), 91 Ohio App.3d 599, 601, 632 N.E.2d 1376.
[24] T.d. 34 at 8.

They maintain that the firm failed to advise Winter of material differences between an earlier lending agreement among the parties that did not contain a cognovit provision, and the Note and the Guaranty, which did. Allegedly relying on this advice, Winter signed the Credit Agreement and the Note on behalf of Five Star, as well as the Guaranty, without reading the documents.

{¶27} Before the trial court, however, Winter argued that he had relied on the representations of "Plaintiff and counsel for the Plaintiff" and that he and Five Star "were not permitted to retain separate counsel to review" the Credit Agreement.[25] This account is inconsistent with their assertion before this court that Five Star and Winter believed the law firm represented them. Five Star and Winter did not satisfy Civ.R. 60(B) in this instance either.

{¶28} Finally, Five Star and Winter contend that the warrant-of-attorney provisions were invalid because they were procured in violation of Indiana law. For the reasons set forth in our response to the second assignment of error, we reject this argument and overrule the third assignment of error. The trial court's judgment is accordingly affirmed.

Judgment affirmed.

DINKELACKER, P.J., and **HILDEBRANDT, J.**, concur.

Please Note:

The court has recorded its own entry this date.

[25] Id. at 4, 5.