

IN THE SUPREME COURT OF OHIO

11-1526

PHH MORTGAGE CORPORATION,

*APPELLANT,*

v.

MICHAEL S. PRATER, ET AL.,

*APPELLEES.*

ON APPEAL FROM THE CLERMONT  
COUNTY COURT OF APPEALS, TWELFTH  
APPELLATE DISTRICT.

COURT OF APPEALS  
CASE No. CA 2010-12-095

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MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT PHH MORTGAGE CORPORATION

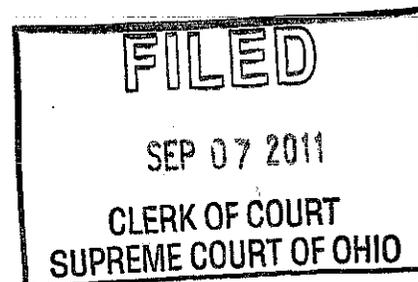
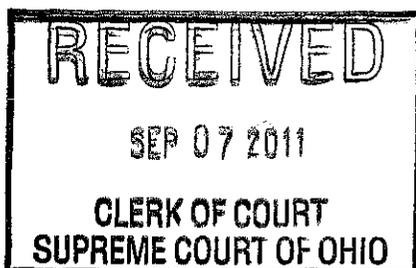
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**I. EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

As a case of first impression, this matter is of great public importance in determining the role of websites as a means of delivering legal notice of the date, time and location a sheriff's sale to interested parties in a foreclosure action. Societal advancements in technology indisputably create new avenues for communicating thoughts and ideas (*i.e.* email, websites, and facebook). However, these new forms of communication do not necessarily comport with the minimum standards of due process or statutory standards governing the delivery of legal notice in foreclosure actions. Presently, the specific legal issue is whether the minimum standards of due process and R.C. 2329.26(A)(1)(a) allow a plaintiff in a foreclosure action, holding an interest in the subject property, to receive constructive notice of the date, time, and location of an impending sheriff's sale via a website when plaintiff's mailing address is readily ascertainable.

In this case, the court of appeals found that sending a written notification directing a plaintiff to access the sheriff's office website in order to ascertain the date, time and location of the impending sheriff's sale is not akin to receiving constructive notice by publication. The court of appeals found that a website is a reliable method of delivering legal notice because it can be viewed from anywhere around the world. The appellate court also found that the information on a website is directly accessible and notifies an interested party much like a letter. Moreover, the court of appeals expanded upon the trial court's rationale—that because technology has changed drastically since the *Central Trust* and *Menonite* cases, notice requirements may also change. As such, the appellate court found that the method of delivering notice employed by the Sheriff's office was not notice by publication but rather equated to delivering actual notice by mail, and was therefore compliant with the demands of due process.

This case is of great public importance because the appellate court's decision effectively overturns this Court's ruling in *Central Trust Co. v. Jensen* (1993), 67 Ohio St.3d 140, 616 N.E.2d 873. Following the *Mennonite Bd. of Missions v. Adams* decision, this Court created a bright line standard in *Jensen* that has been followed by intermediate appellate courts around Ohio. *Mennonite* (1983), 462 U.S. 791, 798-800, 103 S.Ct. 2706, 2711-12. *Jensen* was decided on the principle that notice at least by mail is a constitutional prerequisite to a proceeding that adversely affects a party's property interest when the interest holder's address is known or easily ascertainable. Contrary to this standard, the appellate court's decision approves a method of notice that is akin to notice by publication rather than delivery of a letter to effectuate actual notice. As a result, the appellate court's decision effectively fragments the principle behind *Jensen* and allows an interested party to be constructively notified of an impending sheriff's sale. This has the real potential to render a party's property interest unprotected at a sheriff's sale should they not receive actual notice of the date, time, and location of sale.

This case is also a case of great public importance because the appellate court's decision usurps the Ohio legislature's role in setting standards of legal notice and is contrary to the legislative intent behind R.C. 2329.26 and R.C. 2329.27. Although the legal standards of notice are interpreted by courts, legislative statutes define and control the kind of notice a party is entitled to receive in foreclosure proceedings. In 1999, the Ohio General Assembly amended R.C. 2329.26 and R.C. 2329.27 in response to this Court's decision in *Central Trust Co. v. Jensen*. The intent of the amendment was to require that written notice of the date, time, and place of an execution of sale of real property be given to parties in a foreclosure action. Through this amendment, the legislature recognized that publication notice does not satisfy due process when given to those holding an interest in the property being sold. Here, the appellate court's

decision fundamentally alters the provisions of R.C. 2329.26 and R.C. 2329.27 by allowing an interested party to receive published notice of the date, time, and location of a sheriff's sale. The appellate court was constrained to follow the intent of the legislature and impermissibly deviated from this course by finding that advancements in technology justified changing the provisions of R.C. 2329.26. This Court has historically disfavored legislating from the bench and should correct the appellate court's decision by hearing this appeal.

The appellate court's decision is of great general interest because it effectively creates third class of legal notice in Ohio foreclosure law—constructive notice via a website. The Ohio legislature has approved of two types of notice in foreclosure proceedings: actual notice to interested parties and constructive notice via publication. R.C. 2329.26. Actual notice is information directly sent to a desired recipient at their specific address and is mandated by this Court's holding in *Jensen* when an interested party's address is reasonably ascertainable. Constructive notice is a substitute for actual notice and is only permissible in foreclosure actions to advertise sale of the subject property to the general public. While the method of delivering notice may vary, these two classes remain separate and distinct. Here, however, the appellate court's decision permits county sheriff's across Ohio to ignore statutory foreclosure procedures and constructively notify interested parties in a foreclosure action. Directing an interested party to search a website for sheriff's sale information constitutes constructive notice because the pertinent sale information is not directly transmitted to the desired recipient. In other words, it constitutes a legal fiction equating to notice by publication. Thus, the appellate court erred by impermissibly creating a third class of notice in Ohio foreclosure law.

Employing constructive notice in foreclosure actions presents an enormous risk to the fundamental property rights of parties holding an interest in the subject property. By indirectly

notifying a party as to where they may find sheriff's sale information, interested parties will be placed in jeopardy of not receiving the notice, thus losing the opportunity to protect their interest in the property. Moreover, the appellate court's decision will likely bring about great confusion amongst Ohio courts regarding what constitutes alternative forms of delivering actual notice. If new technologies are to be used in delivering notice to interested parties in foreclosure proceedings, the legislature should be the one to promulgate those standards.

This case further presents a great public interest because the delivery of actual notice of an impending sheriff's sale to other interested parties depends on whether the plaintiff in the lawsuit receives notice. Under R.C. 2329.26(A)(1), the plaintiff in a foreclosure action has the duty of providing actual written notice of an impending sheriff's sale to all other interested parties in the action. In effect, the Ohio Legislature has daisy-chained the notice process for interested parties in matters of foreclosure. Thus, if a plaintiff is never informed of the date, time, and location of the sheriff's sale, notice will not be sent to all other interested parties in compliance with R.C. 2329.26. *Ohio Sav. Bank v. Hawley*, 5th Dist. No. 00-COA-01387, 2001 Ohio App. LEXIS 702 at \*6-8. Employing constructive notice by directing the plaintiff to monitor a website for sale information places all other interested parties at risk of not being notified of an impending sheriff's sale. Moreover, because sheriff's sales are routinely canceled or rescheduled, indirect notice of a sheriff's sale via a website places an undue burden on plaintiffs to constantly monitor a website to guarantee that a sale date has not been changed or canceled. Thus, indirectly notifying an interested party via a website does not comport with the statutory notification requirements in R.C. 2329.26(A)(1).

Apart from the constitutional and separation of powers issues, this case presents this Court with the opportunity to define the legal effect of placing notice upon a website and

whether this method of notice constitutes actual notice or notice by publication. The pervasive use of websites has drastically changed how information and goods are transferred in society. Although employing websites and new technologies can serve as a cost-effective means of effectuating legal notice, such methods cannot be employed without first determining their legal significance and effect. This Court should grant jurisdiction over this case because reasonable minds can differ as to the legal effect of a particular method of notice. For example, the appellate court's majority opinion found that sending a written notification directing a plaintiff to the sheriff's office website for the date, time and location of the impending sale is not akin to receiving notice by publication. Conversely, the dissenting judge concluded that opening a website is more like opening a newspaper; and opening an email is more like opening a letter.

Finally, the substantial constitutional question in this case implicates the 14th Amendment to the U.S. Constitution regarding the minimum standards of due process required in a judicial proceeding involving the deprivation of life, liberty or property. Constitutional due process requires that (at least) notice by mail be sent to an interested party adversely affected by the sale of foreclosed property, because foreclosure sales jeopardize the interest holder's fundamental rights in the subject property. *Jensen*, 67 Ohio St.3d at 142, citing, *Mennonite*, 462 U.S. at 799. Here, the appellate court's decision uproots Ohio's compliance with the legal standard set by the U.S. Supreme court in *Mennonite Bd. of Missions v. Adams*. Its decision further offends constitutional notions of due process by allowing an interested party to be indirectly notified of a judicial sale when the party's address is readily ascertainable. A party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation to deliver actual notice. *Jensen*, 67 Ohio St.3d at 143, citing, *Mennonite*, 462 U.S. at 799. Thus, the appellate court's ruling is contrary to the standard set by this Court in *Jenson*

which says that when a party's name and address are readily ascertainable, actual-written notice must be sent to that address in compliance with the minimum constitutional standards.

In conclusion, this case presents a unique opportunity for this Court to opine on the legal character of new technologies being utilized to deliver notice to interested parties in foreclosure actions. Although technology may change, a state still must comply with the minimum standards of due process when notifying parties holding an interest in property to be sold at a sheriff's sale. Here, instead of adhering to the standard that actual notice be sent to those holding an interest in property being sold at a sheriff's sale, the appellate court's decision now opens the door for county sheriffs across Ohio to indirectly inform interested parties via publication upon a website. This result is contrary to the provisions of R.C. 2329.26(A)(1). Ultimately, the appellate court's decision jeopardizes an interested party's ability to safeguard its interest in the subject property. Accordingly, this Court should grant jurisdiction to hear this case and review the erroneous decision of the Twelfth Appellate District.

## **II. STATEMENT OF FACTS**

Plaintiff, PHH Mortgage Corporation (hereafter PPH Mortgage), filed a foreclosure action on April 14, 2008 against Michael S. Prater. The trial court's Final Judgment in favor of PPH Mortgage was then filed on September 29, 2008. The property was then to be set for sale through the Clermont County Sheriff's Office.

Several sales were scheduled and withdrawn before the property was finally sold. The property was first scheduled to be sold at Sheriff's Sale on January 6, 2009. However, by order of the court one day before the sale was to commence, the first order of sale was withdrawn. The property was rescheduled to be sold on June 9, 2009, but again withdrawn from the Sheriff's

Sale a day before commencement of the sale at the Plaintiff's request. The sale was rescheduled a third time for November 17, 2009; however, on November 13th, Plaintiff requested that the property be withdrawn from sale. In all three prior attempts at scheduling a sale date, the Plaintiff was notified of each date by delivery of actual mail.

The trial court then scheduled a fourth sale for April 6, 2010. However, Plaintiff did not receive written notice of the date, time, and location of said fourth sale. Sometime between the vacancy of the third sale and setting the fourth sale date, the Clermont County Sheriff's Office made a policy change in the way it effectuated notice of sale dates. Prior to this change, the Sheriff's Office notified plaintiffs of each sale date by sending a copy of the publication notice via ordinary mail. The new policy, effective as of January 1, 2010, specified that notice of each sale date would now be published on the Sheriff's Office website and directed plaintiffs to check the website to determine the date of each sale. Thus, due to budget constraints, the Sheriff would no longer be sending actual notice by mail of sale dates. A Sheriff's deputy claims that notice of this policy change was sent to plaintiffs who had foreclosure sales pending within the county. However, the Plaintiff never received notice despite its intent on bidding for the subject property.

Upon scheduling the fourth sale of the subject property, the trial court's judgment entry ordered that Plaintiff be sent actual notice of the sale date. However, at the time the fourth sale was scheduled, it was the Clerk of Court's policy to only send the praecipe and order of sale to the Sheriff's Office, and not the court's judgment entry. Thus, the Sheriff was not placed on notice as to any specific requirements concerning actual notice to Plaintiff-Appellant, and no notice was ever sent. Consequently, having not received notice itself, Plaintiff did not deliver notice to the Clermont County Treasurer in accordance with R.C. 2329.26(A)(1).

As a result of the Sheriff's new policy of publishing notice of sales upon its website, Appellant did not receive notice of the date, time, and location of the fourth sale. As a result, the property sold for an amount substantially less than the debt owed to Appellant and far below the amount Appellant would have bid had it received notice and appeared at the sale.

### **III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

#### **Proposition of Law No. 1: Mixed Questions of Law and Fact are Reviewed De Novo.**

The appellate court erroneously found that the standard of review governing this case is abuse of discretion. Because the issue in this case presents mixed questions of law and fact, the proper standard of review is de novo.

An appellate court is required to accept the factual determinations of a trial court if they are supported by competent and creditable evidence. However, the application of the law to those facts is reviewed de novo. Because this matter originated as a foreclosure proceeding, the appellate court erroneously applied an abuse of discretion standard of review based on this Court's decision in *Ohio Sav. Bank v. Ambrose* (1990), 56 Ohio St. 3d 53, 55, 563 N.E.2d 1388. In *Ambrose*, this Court found that a trial court may confirm a judicial sale of foreclosed property when the sale is made in conformity with R.C. 2329.01 – 2329.61. This Court further found in *Ambrose* that whether a judicial sale should be confirmed or set aside is within the sound discretion of the trial court. At issue here, however, are questions of law pertaining to whether R.C. 2329.26(A)(1)(a) requires a plaintiff be sent actual notice or whether constructive notice via a website is permissible to establish conformity with R.C. 2329.01 *et seq.* In other words, this case presents a question of how the law should be applied and does not directly involve the trial court's factual determinations. Accordingly, the correct standard of review is de novo.

De novo review is the proper standard to govern this appeal because it is the trial court's application of the law that is ultimately in issue. See *Taylor v. Kemp*, 7th Dist. No. 05 BE 13, 2005 Ohio 6787, at \*P27. The pertinent law being applied is *Central Trust Co. v. Jensen* and R.C. 2329.26(A). *Jensen* establishes the baseline rule—that a party (necessarily including a plaintiff) holding an interest in foreclosed property being sold must receive actual notice of an impending sheriff's sale when the party's address is known or reasonably ascertainable. Following *Jensen*, the Ohio legislature amended R.C. 2329.26 to require that plaintiffs send written notice detailing the date, time, and location of a sheriff's sale to interested parties in the action. *Foreclosure of Liens for Delinquent Taxes v. Parcels of Land*, 2d. Dist. No. 2002-CA-99, 2003 Ohio 1760, at \*P8 (citing 1999 S.B. 30, eff. 9-29-1999). The intent of this amendment was to bring Ohio law in compliance with this Court's decision in *Jensen*. *Id.*

Based on this law, Plaintiff-Appellant appealed the trial court's legal determination of whether the sheriff's indirect notification equates to "actual notice" in compliance with *Jensen* and R.C. 2329.26(A)(1). This issue does not implicate the trial court's factual findings, but rather the legal conclusions made by the trial court—which should be subject to de novo review. See *America's Collectibles Network, Inc. v. MIG Bd. Group, Inc.*, 330 Fed. Appx. 81, 85, 2009 U.S. App. LEXIS 11682 (6th Cir. 2009). Thus, the appellate court erred in reviewing this case under an abuse of discretion standard when it should have used a de novo standard of review.

**Proposition of Law No. 2: Under principles of due process, constructive notice by publication to a party with a property interest in a foreclosure proceeding is insufficient when that party's address is known or easily ascertainable.**

Notice by publication is the alternative to delivering actual notice in foreclosure proceedings. Notice by publication is commonly referred to as a "legal fiction" because notice is not actually delivered to the desired person directly. *Jensen*, 67 Ohio St. 3d at 142. Instead, the

communication is typically placed in a newspaper of general circulation with the hopes that the desired person(s) will see the message and take action. Since notice by publication is premised upon the legal fiction that notice reached the desired person, the great weight of legal authority holds that notice by publication is unreliable as compared to delivering actual notice when a party's name and address are known. *Mullane v. Central Hanover Bank & trust Co.* (1950), 339 U.S. 306, 314, 70 S.Ct. 652; *Mennonite*, 462 U.S. at 798-800. Accordingly, courts have consistently held that publishing legal notice is a method of last resort—only to be used when a party's address is unascertainable. *Jensen*, 67 Ohio St. 3d at 144. Similarly, directing an interested party to monitor a website to obtain the date, time, and location of a sheriff's sale constitutes notice by publication or (alternatively) an impermissible form of constructive notice.

In foreclosure actions, the Ohio legislature has set-forth specific rules regarding when notice by publication may be used in connection with the sale of property. Under R.C. 2329.26(A)(2), notice by publication may be used to advertise the sale of the subject property to interested buyers. This advertisement must be placed in a newspaper for three weeks and specify the date, time, and place of the sale. *Id.* While the purpose of publishing notice under R.C. 2329.26(A)(2) is to drum-up interest amongst potential purchasers of the subject property, the notice requirements within R.C. 2329.26(A)(1) are designed to assure that an interested party receives actual notice of the impending sale. To this end, R.C. 2329.26(A)(1) demands that parties holding an interest in the subject property are sent a written notice of the date, time, and place of the sheriff's sale. And because a plaintiff is a party to the foreclosure action, this Court's holding in *Central Trust Co. v. Jensen* mandates that plaintiffs also receive actual written notice of the date, time and location of a sheriff's sale in accordance with principles due process. *See, e.g., Jensen*, 67 Ohio St. 3d at 141.

Although advancements in technology improve the speed and efficiency of communicating information in society, the inherent characteristics of these new methods of communication remain relatively unchanged from the traditional forms of sending legal notice. For example, placing notice upon a website equates to placing notice within a newspaper; both distribute information to the entire community indiscriminately. Conversely, sending notice via email equates to sending a letter to the desired recipient at a specific address. *PHH Mortgage Corp. v. Prater*, 12th Dist. No. CA2010-12-095, 2011 Ohio 3640, at \*P39 (dissent). By holding that directing a party to monitor a website for notice of sale comports with standards of due process, the appellate court's opinion essentially allows a county sheriff to publish notice based on the "legal fiction" of constructive notice.

**Proposition of Law No. 3: Merely providing a written notification directing an interested party to monitor a website for the date, time and location of a sheriff's sale constitutes constructive notice by publication in violation of this Court's holding in *Jensen and R.C. 2329.26(A)(1)*.**

In Ohio, notice at least by mail is a constitutional and statutory prerequisite to a proceeding that adversely affects a property interest where the interest holder's address is known or easily ascertainable. Accordingly, merely sending written notification to the interest holder's address directing them to monitor a website for the date, time, and location of an impending sheriff's sale does not meet the minimum constitutional requirements under the 14th Amendment's due process clause, nor does it comply with R.C. 2329.26(A)(1).

The standard for determining whether notice of a sheriff's sale is adequate has been set by long-standing Ohio and United States Supreme Court precedent. In *Mennonite Bd. of Missions v. Adams*, the U.S. Supreme Court addressed the question of what is adequate notice to a mortgagee of property of its impending tax sale. 462 U.S. at 792. The Court held that when a party's name and address are reasonably ascertainable, notice by mail, or by other means equally

reliable, is a minimum constitutional requirement for a proceeding affecting the party's property interest. *Id.* at 798; *Jensen*, 67 Ohio St. 3d at 142. The fact that this rule depends on the recipient's address being ascertainable indicates that the phrase "other means equally reliable" refers to other forms of actual notice. In analyzing and following the *Mennonite* decision, this Court in *Central Trust Co. v. Jensen* concluded that the requirements of due process depend on striking a reasonable balance between the property interest sought to be protected and the state's interest in efficiency and finality in proceeding affecting the property. 67 Ohio St. 3d at 143. In applying this balancing test, the *Jensen* Court also adopted this baseline rule: when a party's address is known or easily ascertainable and the cost of notice is little more than that of a first-class stamp, the balance will almost always favor notice by mail over publication. *Id.* Moreover, because (in Ohio) notice to parties holding an interest in the subject property depends on plaintiff receiving notice and forwarding the notification, a heightened need to employ actual notice is needed to comport with minimum constitutional requirements.

Following this Court's decision in *Central Trust Co. v. Jensen*, the Ohio legislature amended R.C. § 2329.26 and R.C. § 2329.27 effective September 29, 1999. The intent of this amendment was "to require that a written notice of the date, time, and place of an execution sale of real property be given to certain parties to the underlying action." *See Foreclosure of Liens v. Parcels of Land*, 2d Dist. No. 2002-CA-99, 2003 Ohio 1760 (citing 1999 S.B. 30, eff.9-29-1999). Through this amendment, the legislature recognized that mere publication notice does not satisfy due process when applied to individuals who have an interest in the property to be sold. The amended statute also provides that a sale shall be set-aside when the requisite notice is not given. *See* R.C. 2329.27(B). While advancements in technology would seem to dictate a change in how notices are handled, a change in the language of a statute is beyond the purview of courts.

*Smith v. Ohio DOC*, 10th Dist. No. 00AP-1342, 2001 Ohio App. LEXIS 3660, at \*8. Here, the appellate court's decision is not only contrary to this Court's holding in *Jensen*, it is contrary to the legislative intent behind R.C. 2329.26. Accordingly, the appellate court erred by finding that constructively notifying Plaintiff through a website complied with R.C. 2329.26(A)(1) and this Court's holding in *Central Trust Co. v. Jensen*.

In the case at bar, a serious violation of the standards of due process has occurred. Because Plaintiff's counsel's address was on file with the Clermont County Sheriff's Office, actual written notice by mail was constitutionally required. *Jensen*, 67 Ohio St. 3d at 143. Moreover, the fact that technology allows for "other means" of delivering notice does not alter the minimum constitutional requirement that actual notice be sent. For example, if the legislature had approved of email notification, the demands of due process would be satisfied. Accordingly, the appellate court erred in finding that directing an interested party to monitor a website for the date, time and location of a sheriff's sale was constitutionally permissible.

#### IV. CONCLUSION

For the aforementioned reasons, this case involves matters of great public and general interest and presents a substantial constitutional question concerning the minimum constitutional requirements of due process. Accordingly, the Appellant respectfully requests that this Court accept jurisdiction in this case so that these important issues are reviewed on their merits.

Respectfully Submitted,



FELTY & LEMBRIGHT CO., L.P.A.

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Counsel for Appellant,

PHH Mortgage Corporation

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Brief of Plaintiff-Appellant was sent by regular U.S. Mail on the 6<sup>th</sup> day of September, 2011 to the following parties:

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Counsel for Appellant,

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# **APPENDIX**

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THE COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO

PHH MORTGAGE CORPORATION

Plaintiff

v.

MICHAEL S. PRATER, et al.

Defendants

CASE NO. 2008 CVE 0781

Judge Haddad

DECISION/ENTRY

Richard LaCivita, of Felty & Lembright Co., LPA, Attorney for Plaintiff, 1500 West Third St., Suite 400, Cleveland, OH 44113

John Woliver, Attorney for Intervenor Scott Wolf, 204 North St., Batavia, OH 45103

This matter came before the Court for hearing pursuant to a motion to set aside sheriff's sale, filed by the plaintiff, PHH Mortgage Corporation. Attorney Richard LaCivita represented the plaintiff and Attorney John Woliver represented the intervenor. The matter came on for hearing on August 11, 2010, but due to a power outage, it was continued in progress until August 25, 2010. The Court took the matter under advisement and, having considered the briefs, the oral arguments, and the evidence submitted, now renders the following decision.

FINDINGS OF FACT

The complaint for foreclosure in this action was filed on April 14, 2008. The plaintiffs then filed a motion for default judgment on September 24, 2008 and the final judgment entry granting default judgment was filed by the Court on September 29, 2008. The property was scheduled for Sheriff's Sale on January 6, 2009; however, by court order filed January 5, 2009, the first order of sale was withdrawn by the plaintiff. The property was then rescheduled to be sold on June 9, 2009, but the plaintiff's again

requested and the Court ordered, by entry filed June 8, 2009, that the property be withdrawn from the Sheriff's Sale. The sale was rescheduled yet another time for November 17, 2009. On November 13, 2009, at the plaintiff's request, the Court issued another order withdrawing the property from Sheriff's Sale. The plaintiffs do not dispute that they were notified by the Sheriff's Office of all sales previous to April 6, 2010.

The property finally sold at Sheriff's Sale on April 6, 2010, with the Order of Sale being returned to the Clerk's Office on April 12, 2010. Third party purchaser, Scott A. Wolf Trust, purchased the property for a sum of \$26,666.67. The plaintiff asserts, however, that it never received notice from the Sheriff's Office with the new date for the Sheriff's Sale. It alleges that it fully intended to enter a bid at the sale in the amount up to its total debt, but since it did not receive notice of the sale, it failed to attend and place a bid.<sup>1</sup> Consequently, the property sold for an amount substantially less than the total debt. For this reason, the plaintiff requests that the Court set aside the sale.

#### LEGAL ANALYSIS

Foreclosure executions are governed by R.C. 2329.01 through R.C. 2329.61. The decision whether to set aside a sheriff's sale is left to the sound discretion of the trial court. *Harris Trust & Sav. Bank v. Natl. Republic Bank of Chicago*, Summit App. No. 21668, 2004-Ohio-1602, 2004 WL 625799, ¶ 5, citing *Ohio Sav. Bank v. Ambrose* (1990), 56 Ohio St.3d 53, 55, 563 N.E.2d 1388. See, also, *Atlantic Mtge. & Invest. Corp. v. Sayers* (Mar. 1, 2002), Ashtabula App. No. 2000-A-0081, 2002 WL 331734, at \*2. Once a sale is complete, R.C. 2329.31 requires the court to confirm the

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<sup>1</sup> There is no dispute in this case that the sale price was two-thirds of the appraised value, in compliance with R.C. 2329.20.

sale, provided "that the sale was made, in all respects, in conformity with sections 2329.01 to 2329.61, inclusive, of the Revised Code." *Harris Trust* at ¶5, quoting *Ohio Sav. Bank*, 56 Ohio St.3d at 55, 563 N.E.2d 1388.

In exercising its discretion in a foreclosure action, the court must keep in mind that "the primary purpose and goal of a foreclosure sale [is] to protect the interests of the mortgagor-debtor" and to promote a general policy which provides "judicial sales with a certain degree of finality." *Ohio Sav. Bank*, 56 Ohio St.3d at 56. "The chancellor or judge administering equity will protect the rights of all interested and make the sale most profitable to all, and after a sale has once been made, he will certainly before the confirmation, see that no wrong has been accomplished in and by the manner in which the sale was conducted. Yet the purpose of the law is that the sale shall be final; and to insure reliance upon such sales, and induce biddings, it is essential that no sale be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining party prior thereto. A judicial sale of real estate will not be set aside for inadequacy of price, unless the inadequacy is so great as to shock the conscience, or unless there are additional circumstances against its fairness." *Dairymen's Cooperative Sales Co., Inc. v. Frederick Dairy, Inc.* (1934), 17 Ohio Law Abs. 690, at 4. "If a successful bidder in good faith can have a sale set aside simply because another potential bidder . . . decides he would have bid higher and wants a second chance, then no bid can be awarded with confidence at a sale." *Harris Trust*, at ¶ 6.

In this case, the plaintiff is alleging that the sheriff's sale was not in compliance with R.C. 2329.26, and should be set aside pursuant to R.C. 2329.26(B) and R.C. 2329.27(B)(1). R.C. 2329.26(A) provides that the judgment creditor seeking the sale of the lands and tenements, or its attorney, must (1) cause written notice of the date, time,

and place of the sale to be served upon the judgment debtor and each other party to the action, and (2) at least seven calendar days prior to the date of the sale, file with the clerk of the court a copy of the written notice previously described. See **R.C.**

**2329.26(A)(1)(a)(i) & (ii)**. The written notice, however, is not required to be served upon any party who was in default for failure to appear in the action. **R.C.**

**2329.26(A)(1)(b)**. The plaintiff asserts that it could not provide the requisite written notice since it did not receive notice from the sheriff's office indicating the date, time, and place of the sale. The argument is essentially that, since it was not aware that the sale had been scheduled, it could not have complied with the statute.

The Court first finds that the plaintiff's assertion that it could not comply with the written notice requirements of R.C. 2329.26(A)(1) is without merit. While it is true that the plaintiff failed to comply with the statute, this failure is without consequence since no other party except the plaintiff is complaining. Further, the only interested parties in this action are the plaintiff, the two defendants, and the Clermont County Treasurer. Even if the defendants complained about the notice requirements, they were in default, and therefore, pursuant to R.C. 2329.26(A)(1)(b), were not entitled to notice. Once they are excluded, the only parties remaining are the plaintiff and the Clermont County Treasurer. The Treasurer is not interested in participating in the sale of the property, but was instead made a party for the sole purpose of asserting priority over funds to be set aside for taxes. Accordingly, it is of no significance that the Treasurer did not receive notice of the sale. Since the defendants and the Treasurer are now excluded from the notice requirements of R.C. 2329.26(A)(1), the only interested party remaining is the plaintiff. It would make no sense to set aside the sale due to the plaintiff's failure to notify itself.

Further, while the plaintiff's failure to send notice in this case was unintentional, if the Court set aside the sale as a result of this failure, it would open the door for future plaintiffs in other cases to intentionally withhold the notice required under R.C. 2329.26, assert that they did not know about the sheriff's website, and have a sale set aside if the price obtained at the sale were lower than expected. It would basically allow plaintiffs to take a wait and see approach before determining whether the sale should be confirmed. It also circumvents the purpose of the judicial sale, which is to protect the interest of the mortgagor-debtor and to promote a general policy providing judicial sales with a certain degree of finality. For all of these reasons, the Court will not set aside the sale based upon the plaintiff's assertion that it did not comply with the Ohio Revised Code when notifying the parties of the sale.

The Court would note that it is undisputed that counsel received written notice in the mail of the first three scheduled judicial sales for the property in question. The dispute, however, is whether counsel had notice of the fourth sale, which occurred on April 6, 2010. Alicia Begin, a legal specialist at plaintiff's counsel's firm, testified that she is responsible for overseeing judicial sales in Clermont County. She testified that, prior to the filing of the current motion to set aside, her firm would always receive a copy of the publication notice via mail from the Clermont County Sheriff's Office. However, she asserted that the firm did not receive notice from the Sheriff's Office indicating that its notification policy had changed or that the sale had been rescheduled. It was not until they missed the sale in this case that they realized the policy had changed. She testified that she had been directed by the plaintiff to bid at the sale. Ms. Begin testified, however, that while she is responsible for sales in Clermont County, she does not open all of the mail and could not testify as to whether any other person at the firm had

opened the mail containing the notice from the Sheriff's Office regarding its policy change.

Corporal Christine Schehr from the Clermont County Sheriff's Office, Civil Division, testified that the procedure for notification of sheriff's sales was as follows: until September 30, 2009, the Sheriff's Office notified plaintiffs by sending a copy of the publication notice via certified mail; from October 1, 2009, to December 31, 2009, the Sheriff's Office notified plaintiffs by sending a copy of the publication notice via regular U.S. mail; and from January 1, 2010 until the present, no notice is mailed and plaintiffs must go to the Sheriff's Office website in order to determine the date of sale. Corporal Schehr testified that her department mailed written notification, evidenced by Intervenor's Exhibit 1 ("I-1 letter"), to attorneys advising them that notices would no longer be mailed.<sup>2</sup> She testified that this notification was mailed along with regular mail notice of sales from October 1, 2009 through December 31, 2009. She testified that once the notification was sent to an attorney, a notation would be made in the software program to indicate that the I-1 letter was sent, and also included the date that the I-1 letter was sent. After December 31, 2009, no I-1 letters were mailed, and prior to that date, there was no mass mailing of these letters.<sup>3</sup>

While Ms. Begin testified that she did not personally receive notification from the Sheriff's Office of the policy change, Corporal Schehr testified that the software program used by the Sheriff's Office shows that the I-1 letter was mailed to plaintiff's counsel on

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<sup>2</sup> See Exhibit I-1.

<sup>3</sup> The Court would note that the best practice would have been to have sent a mass mailing to all known foreclosure counsel by certified mail that notified them of the policy change. Corporal Schehr testified that they had a list of counsel frequently involved in these types of cases, including Kriss D. Felty; thus, it would have been more practical to have sent notice to them of the change via certified mail.

October 15, 2009, along with notice of the third scheduled sale.<sup>4</sup> She testified that notice of the fourth sale, on April 6, 2010, was not mailed since it occurred after January 1, 2010. She further testified that the property sold on April 6, 2010, for two-thirds of the appraised value, as required by statute.<sup>5</sup> According to Corporal Schehr, notice of the April 6, 2010 sale would have remained on the website until the property was sold at auction. Corporal Schehr further testified that the plaintiff's counsel, Kriss D. Felty, was also mailed the I-1 letter on December 10, 2009 in association with a different case, which would have been the second time that Mr. Felty was notified of the policy change.<sup>6</sup> Corporal Schehr indicated that the I-1 letter would have been addressed to the attorney of record, which, in this case, was Mr. Felty. Ms. Begin testified that, if the letter was addressed to Mr. Felty, she would not have opened it. Therefore, while the evidence indicates that Ms. Begin did not receive the I-1 letters from the Sheriff's Office, the evidence also indicates that those letters were sent to Mr. Felty. Thus, the testimony of Ms. Begin, without corroboration from Mr. Felty, is insufficient for the Court to find that the firm was not placed on notice of the policy change. While the Court is not sure what happened to the I-1 letter once it left the Sheriff's Office, the evidence before it indicates that the I-1 letter was sent in relation to this case and at least four other cases in which Mr. Felty's firm was involved.

In addition, Antonio Scarlato, an attorney at Mr. Felty's firm, was notified about the policy change in association with three other cases, and in each case, the firm was represented and participated in the bidding.<sup>7</sup> In the Reichardt case, contained within I-7, the sale was held on the same date as the sale in this case and someone was present to

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<sup>4</sup> See Exhibit I-4.

<sup>5</sup> See Exhibit I-5.

<sup>6</sup> See Exhibit I-6.

<sup>7</sup> See Exhibit I-7.

represent Mr. Felty's and Mr. Scarlato's firm.<sup>8</sup> Ms. Begin testified that her firm was represented at the Reichardt sale because it received actual notice in the mail of that sale. While it may be true that actual notice was received, that does not change the fact that the I-1 notice was mailed along with it. Therefore, if the firm was on notice of the sale, it was also on notice of the upcoming policy change in the way that the Sheriff's Office notified counsel of the sale dates. There is no dispute that the Reichardt notice was received prior to April 6, 2010, thus, since the I-1 letter was mailed with the notice, it would have been received prior to that date.

Corporal Schehr further testified that a copy of the Court's judgment entry was contained within her file; however, she could not testify as to how or when it was placed there. She indicated that the Sheriff's Office, despite the fact that it was not aware of the specific requirements contained within the entry, complied with the terms of the judgment entry until the policy changed in January, 2010. Further, she testified that the praecipe for sale, submitted by the plaintiff, did not indicate any special instructions as to notification. While Ms. Begin stated that it is their practice to send the judgment entry along with the order of sale, there is no evidence that she actually complied with that policy in this case. Further, the Clerk of Court's policy prior to this motion was to send only the praecipe and order of sale to the Sheriff's Office, and not the Court's judgment entry; thus, the Sheriff's Office would not receive from the Court the judgment entry ordering the sale. As a result, the Sheriff would not be placed on notice as to any specific requirements contained within the Court's judgment entry. Additionally, while the judgment entry is now in Corporal Schehr's file, there is no evidence that it was in the file prior to the date of sale. It could have since been placed into the file as a result of

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<sup>8</sup> Id.

this action. Therefore, the Court cannot find that the Sheriff's Office was on notice of the specific requirements contained within the judgment entry. The Court would note that, since the filing of this motion, the Clerk of Courts has changed its policy and now sends to the Sheriff's Office the judgment entry in foreclosure cases, along with the praecipe and order of sale.

The plaintiff relies on *Central Trust Co. v. Jensen* (1993), 67 Ohio St.3d 140, for the proposition that publication notice of a sale date is not sufficient to afford interested parties with actual notice that is reasonably calculated to apprise them of the pendency of the sale and to give them an opportunity to protect their interest. The plaintiff in a foreclosure case is an interested party to the foreclosure proceeding, thus it is entitled to notice of the sale date. *Ohio Savings Bank v. Hawley* (Feb. 16, 2001), Ashland App. No. 00-COA-01387, 2001 WL 1782891, unreported, at 3. However, the Court in *Central Trust Co.* states that notice by mail or *by other means equally reliable*, is the minimum constitutional requirement for notification when the name and address of interested parties are reasonably ascertainable. *Central Trust*, at 142, citing *Mennonite Bd. of Missions v. Adams* (1983), 462 U.S. 791, 798-800, 103 S.Ct. 2706.

In the current case, the plaintiff was notified of the first three scheduled sale dates by mail. When the Sheriff's Office became aware that its policy was going to change, the evidence shows that it sent notice to plaintiff's counsel informing him of the third sale, and also included in that same envelope was I-1, which notified him that he would need to check the website for future Clermont County sales. Therefore, when the third sale was cancelled, the firm was on notice that it would need to check the website for any future sale dates. The evidence further shows that, on several different occasions, the law firm involved appeared and participated in sales that occurred after

notice via the website. Thus, the evidence tends to prove that the law firm was aware of the new policy prior to the date of this sale. Additionally, notice through the website is even more reliable than notice by mail since mail can be lost. Therefore, the Sheriff's Office provided actual written notice by mail to the plaintiff's counsel that it was implementing a policy that would provide notice in a manner that was equal to or even more reliable than notice by mail, i.e., notice by website. Since technology has changed drastically since the *Central Trust* and *Mennonite* cases, the Court finds that the notice requirements may also change. The cases specifically state that notice by a means equally reliable to notice by mail is sufficient, and the Court finds that notice by website is, at the very least, equally reliable to notice by mail. Therefore, the Court finds that the Sheriff's Office complied with the mandate of *Central Trust* and *Mennonite* when implementing its new policy.

For all of the foregoing reasons, the Court finds that the new policy of the Sheriff's Office is in compliance with the statutory and common law requirements for notice, and that counsel was on notice of this change in policy prior to the date of sale. Therefore, while the Court is cognizant of the fact that the plaintiff planned to participate in the sale and would have bid up to the full amount of the debt, the Court finds that it would not be equitable to now set the sale aside and punish Mr. Wolf, who participated in the sale and purchased the property for two-thirds of the appraised value, as required by statute. The evidence before the Court proves that the Sheriff's Office notified the plaintiff's counsel of the change in policy and that the plaintiff's counsel was aware of the policy. The fact that this sale was missed by the plaintiff is through no fault of the Sheriff's Office or the third-party purchaser. The fact that I-1 was not given to Ms. Begin is not the Sheriff's Office's fault, nor is it the fault of the third-

party purchaser. The Court finds that setting aside the sale would circumvent the policy of promoting finality of judicial sales and confidence in the judicial processes. Further, in the interest of equity, the Court cannot set aside the sale due to a unilateral mistake on the part of the plaintiff and punish a third-party purchaser who, in good faith, purchased the property in compliance with the statute.

Further, while the Court is mindful of the fact that its judgment entry required notice to the plaintiff's counsel by mail, the Court finds that the purpose of the entry was to provide the plaintiff with notice of the sale date in order for it to comply with the mandates of R.C. 2329.26. The Court would point out that, despite the fact that the Clerk of Courts, at that time, did not send a copy of the judgment entry to the Sheriff's Office, the Sheriff mailed written notice to plaintiff's counsel of the three previously scheduled sales. Further, the Sheriff's Office mailed written notice of the change in its notification policy to the plaintiff's counsel on a couple of different occasions. Therefore, while the Sheriff failed to mail the notice of the final sale, the Court finds that it satisfied the purpose of the judgment entry by notifying plaintiff's counsel that it could obtain the sale date from the Sheriff's website. Although the Court does not know whether the Sheriff had a copy of the judgment entry in its file prior to the sale, the Court finds that the Sheriff satisfied the purpose and goal of the judgment entry, which was to notify the plaintiff of the sale date in order to allow the plaintiff to comply with its statutory notice requirements. While the judgment entry requires notice by mail, the Court finds that the Sheriff substantially complied with the judgment entry by notifying the plaintiff on three prior occasions of the sale date by mail and by mailing the 1-1 letter to notify the plaintiff that it would need to use the website for any future sales, which included the April 6, 2010 sale date for the property at issue.

CONCLUSION

Based upon the foregoing analysis, and the competent, credible evidence before the Court, the Court hereby denies the plaintiff's motion to set aside the sheriff's sale.

Plaintiff's counsel is hereby ordered to submit an entry confirming the sale for the Court's review.

IT IS ORDERED, that this Decision shall serve as the Judgment Entry in this matter.

SO ORDERED.

Date:

11/5/10

  
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Victor M. Haddad, Judge

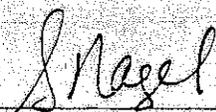
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Decision was served upon the following by e-mail this 5 day of November, 2010.

Richard LaCivita

John Woliver

Corporal Christine Schehr

  
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Sherry Nagel, Administrative Assistant

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IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
CLERMONT COUNTY

COURT OF APPEALS  
FILED  
JUL 25 2011  
BARBARA A. WIEDENBEIN  
CLERK  
CLERMONT COUNTY, OH

PHH MORTGAGE CORPORATION,

Plaintiff-Appellant,

CASE NO. CA2010-12-095

- vs -

JUDGMENT ENTRY

MICHAEL S. PRATER, et al.,

Defendants-Appellees.

The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Clermont County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

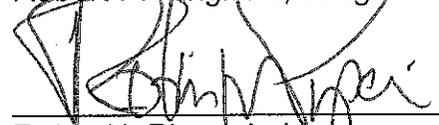
Costs to be taxed in compliance with App.R. 24.

(dissents)

\_\_\_\_\_  
Stephen W. Powell, Presiding Judge

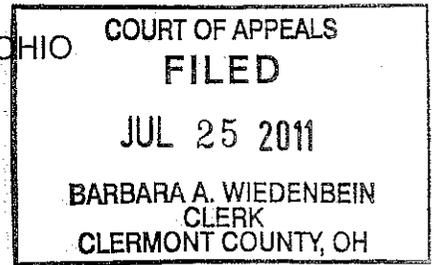


\_\_\_\_\_  
Robert P. Ringland, Judge



\_\_\_\_\_  
Robin N. Piper, Judge

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
CLERMONT COUNTY



PHH MORTGAGE CORPORATION, :

Plaintiff-Appellant, :

CASE NO. CA2010-12-095

- vs -

OPINION  
7/25/2011

MICHAEL S. PRATER, et al., :

Defendants-Appellees. :

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS  
Case No. 2008 CVE 0781

Felty & Lembright Co., L.P.A., Antonio J. Scarlato, David M. Gauntner, 1500 West Third Street, Suite 400, Cleveland, Ohio 44113, for plaintiff-appellant

John D. Woliver, 204 North Street, Batavia, Ohio 45103, for intervenor-appellee

**PIPER, J.**

{¶1} Plaintiff-appellant, PHH Mortgage Corporation, appeals a decision of the Clermont County Court of Common Pleas denying its motion to set aside a sheriff's sale.

{¶2} On April 14, 2008, appellant commenced a foreclosure action against defendant-appellee, Michael S. Prater. Appellant thereafter filed a motion for default judgment on September 24, 2008. The trial court granted default judgment in favor of appellant on September 29, 2008.

{¶3} The property was subsequently set for sale through the Clermont County Sheriff's Office. The property was first scheduled to be sold at a sheriff's sale on January 6, 2009. At the request of appellant, this order of sale was withdrawn by order of the court one day before it was to be sold. The property was rescheduled to be sold on June 9, 2009, but was again withdrawn at appellant's request a day beforehand. The sale was rescheduled a third time for November 17, 2009; however, it was once again withdrawn at the request of appellant. Appellant does not dispute that it was mailed notice of the date, time, and location of each of these three sale dates, each time continued by appellant.

{¶4} The property was then scheduled for sale a fourth time, with a date set for April 6, 2010. Appellant claims that it did not receive written notice of the date, time, and location of this fourth sale. As of January 1, 2010, the sheriff's office had instituted a new policy whereby each sale date would be made available via the sheriff's office website. The sheriff's office claims that notice of this policy change was sent to all attorneys involved with foreclosure sales pending in Clermont County between October 1 and December 31, 2009. The property was sold at the April 6, 2010 sale for significantly less than the total debt owed to appellant. Appellant was not present for the actual sale. The order of sale to a third-party purchaser, Scott A. Wolf Trust, was returned to the clerk's office on April 12, 2010.

{¶5} On April 16, 2010, appellant filed a motion to set aside the sale on the grounds that it did not receive notice of the April 6, 2010 sale date from the sheriff's office. Appellant argues that had it been aware of the date of sale, it would have bid substantially more than the amount for which the property was sold. On November 5, 2010, the trial court issued a decision denying appellant's motion to set aside the sale. Appellant now appeals the decision of the trial court, advancing three assignments of error for our review.

{¶6} We begin by noting that foreclosure executions against property are governed by R.C. 2329.01, et seq. Once a sale is complete, R.C. 2329.31 requires the court of

common pleas to confirm the sale, provided the court finds "that the sale was made, in all respects, in conformity with sections 2329.01 to 2329.61, inclusive, of the Revised Code[.]" "While the statute speaks in mandatory terms, it has long been recognized that the trial court has discretion to grant or deny confirmation[.]" *Ohio Sav. Bank v. Ambrose* (1990), 56 Ohio St.3d 53, 55. "Whether a judicial sale should be confirmed or set aside is within the sound discretion of the trial court." *Id.* at 55, quoting *Michigan Mtge. Corp. v. Oakley* (1980), 68 Ohio App.2d 83, at paragraph two of the syllabus. Therefore, we review for an abuse of discretion, which is typically defined as an attitude that is unreasonable, arbitrary, or unconscionable. *AAAA Enterprises, Inc. v. River Place Comm. Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Id.*

{¶7} Assignment of Error No. 1:

{¶8} "THE TRIAL COURT ERRED, IN VIOLATION OF PLAINTIFF-APPELLANT'S DUE PROCESS RIGHTS, BY DENYING PLAINTIFF'S MOTION TO VACATE SHERIFF'S SALE WHEN THE PLAINTIFF DID NOT RECEIVE ACTUAL NOTICE OF THE IMPENDING SHERIFF'S SALE."

{¶9} In appellant's first assignment of error, it claims that the trial court erred by denying its motion to vacate the sale when appellant did not receive actual notice of the sale from the sheriff's office. Within this assignment of error, appellant raises two issues for our review. First, appellant argues that, "[u]nder the Fourteenth Amendment, an interested party to a foreclosure action has the right to due process in receiving actual notice of the date, time, and location of the impending sheriff's sale." Second, appellant argues that, "[m]erely notifying plaintiff of the sheriff's change in policy regarding how notice of sale is to be made does not satisfy the plaintiff's due process rights of receiving actual written notice of the date, time, and place of the judicial sale."

{¶10} In *Central Trust Co. v. Jensen*, 67 Ohio St.3d 140, at 141-2. 1993-Ohio-232, the Ohio Supreme Court has discussed the degree of notice necessary to satisfy the minimum requirements of due process. The Court noted:

{¶11} "In *Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, the Supreme Court of the United States held that '[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' *Id.* at 314. In *Mullane*, the Central Hanover Bank & Trust Company, under the New York Banking Law, consolidated numerous trust accounts into a common fund. Over a year later, Central Hanover Bank petitioned the Surrogate's Court for settlement of its first account as common trustee. The statute required only publication notice to trust beneficiaries, which was done. The court-appointed special guardian for persons having an interest in the income of the common fund challenged the sufficiency of notice by mere publication. The New York trial and appellate courts overruled his objection. 339 U.S. at 309-311.

{¶12} "The Supreme Court of the United States reversed. In an opinion by Justice Jackson, the court reasoned that the minimum requirement of due process in any judicial deprivation of life, liberty or property is notice and an opportunity to be heard *appropriate to the case*. The court noted that personal service of written notice is always adequate in any proceeding. To determine whether less certain notice is appropriate requires balancing the respective interests of the state and the persons subject to the deprivation. This balancing is case specific and not subject to any formula. Notice that is a 'mere gesture' is insufficient; it must be 'such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.' *Id.* at 313-315.

{¶13} " \* \* \*

{¶14} "In *Mennonite Bd. of Missions v. Adams* (1983), 462 U.S. 791, the court addressed the question of what is adequate notice to a mortgagee of property of its impending tax sale. The court held that notice by mail, or by other means equally reliable, is the minimum constitutional requirement for a proceeding affecting the property interest of a party when that party's name and address are reasonably ascertainable. *Id.* at 798-800." (Emphasis added.)

{¶15} The United States Supreme Court thus shifted from *Mullane* to a more formulaic rule in *Mennonite* which was acknowledged by the Ohio Supreme Court in *Central Trust*. Under this rule, constructive notice alone is not sufficient to satisfy the minimum requirements of due process. Instead, the notice must be, "by mail, or by other means equally reliable \*\*\*." *Id.* (Emphasis added.) By allowing for "other means equally reliable," the rule in *Mennonite* and *Central Trust*, while more formulaic, is not so rigid as to forbid any alternative form of notice beyond mail. The courts have not required *actual notice by mail*, but rather that the procedure be, "*as certain to ensure actual notice \*\*\*.*" (Emphasis added.) *Mennonite*, 462 U.S. at 800. Therefore, the question in the present case is whether, in the context of the proceedings below, the means of notice utilized by the Clermont County Sheriff's Office were equally reliable and as certain to ensure actual notice as notice by mail?

{¶16} As stated above, the U.S. Supreme Court has held that all circumstances must be taken into consideration when determining whether notice has been reasonably calculated, "to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mennonite*, 462 U.S. at 795, quoting *Mullane*, 339 U.S. at 314. If this has been accomplished in a particular case, minimum requirements of due process have been satisfied. *Id.*

{¶17} In the instant case, the established sale date of the property was rescheduled on three separate occasions. In each of those instances, appellant was mailed notice of the

date, time, and location of the sale. The trial court found that along with the mailed notice of the third sale date, the sheriff's office provided written notice to appellant that all future notices of the date, time, and location of a sale would be posted on the sheriff's office website. According to the testimony of an employee of the sheriff's office, a notation was made in their software program to indicate when this notice was sent to attorneys involved in foreclosure actions. An employee of appellant's counsel testified that she did not see the letter giving notice of this policy change. She also stated, however, that she would not have opened a letter that was addressed to a specific attorney of the firm. The attorney of record to whom the letters were addressed, Mr. Felty, never testified that he had not received the sheriff's notice of the change. Assuming mail is reliable for delivering notice, it is therefore uncontroverted that said notice was received. Being in the position best suited to consider all of the evidence before it, the trial court found that Mr. Felty did in fact receive notice of this policy change in relation to the present case as well as another. In addition, the court found that Mr. Felty's firm received this notification in relation to at least four other cases in which it was also involved. There is no evidence that the website malfunctioned, was inaccessible, or otherwise did not contain the notice of the sale date. "When a party is unreasonable in failing to protect its interest despite its ability to do so, due process does not require that the State save the party from its own lack of care." *Id.* at 809 (O'Connor, dissenting).

{¶18} Given that appellant was notified that the upcoming sale dates would be available on the sheriff's website, the task of opening and reading the website is no more burdensome or less reliable than the act of opening and reading a letter containing the same information. As technology advances, so should the means available to satisfy minimum requirements of due process. Past forms of simple communication have evolved with the use of modern technology, and due process also grows with these trends. Due process is not to be regarded as stagnant or inflexible, but rather as a fundamental principle pliant to the

realities of modern society. This does not mean that parties are entitled to less due process than minimum standards require, only that other equally reliable methods should be available to satisfy those requirements.<sup>1</sup> We find that the trial court could have reasonably determined that the procedure in the present case provided sufficient notice to apprise appellant of the opportunity to participate in the continuing foreclosure action. In addition, we find that within the narrow confines of the specific circumstances sub judice, providing written notice to appellant that future dates, times, and locations of the pending sale would be found on the sheriff's office website is equally reliable and as certain to ensure actual notice as notice by mail.

{¶19} We note that the present case is somewhat distinguishable from *Mennonite* and *Central Trust*. In *Mennonite* and *Central Trust*, the appellants were provided nothing more than notice by publication. 462 U.S. at 794; 67 Ohio St.3d at 141. Without being provided notice sufficient to apprise them of the pendency of the foreclosure actions, the parties were placed in a position where they had no opportunity to take part in the related proceedings. The courts therefore held that notice by publication alone did not meet the minimum requirements of due process. In the present case, however, appellant was aware of the pendency of the sale, had participated actively in its proceedings, and was provided written notice by mail directing it to where the date, time, and location of the sale could be quickly found.

{¶20} Appellant argues that the notice given in the case at bar is similar to *Mennonite* and *Central Trust* as it constitutes notice by publication. The notice in the present case, however, is distinguishable from publication notice such as that of a newspaper listing. First,

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1. For example, were the judgment entry to have directed the parties to the sheriff's office website for the date, time, and location of the sale, in conjunction with a local court rule requiring that this information be posted for a reasonable period of time prior to the sale date, this may be deemed equally reliable as notice by mail. Alternatively, emailing notice to the parties, along with a local court rule requiring a return confirmation of its receipt, may also satisfy minimum due process requirements.

in order to obtain a newspaper, a party must either have a subscription to that particular paper or seek out and purchase it, assuming it is available locally. Next, a party would be required to buy this paper daily until it received the notice it was awaiting. Furthermore, the sale listings in a newspaper are buried amongst a mountain of information irrelevant to a party seeking notice of a property sale. The sheriff's office website, on the other hand, provides a dedicated site that is readily available at any home, office, or public computer connected to the internet. It can be viewed from anywhere in the world and around the clock from the day it is posted through the date of sale. Finally, it is accessible directly from the website, without requiring a party to sift through vast amounts of unrelated materials. For the foregoing reasons, we find that a written notification directing appellant to the sheriff's office website for the date, time and location of the sale is not akin to directing it to monitor the newspapers.

{¶21} We also find that this method of notification does not shift the burden to appellant to retrieve the notice himself any more so than requiring appellant to retrieve the mail and open it. Both forms of notice were made available by the sheriff over the course of these sale proceedings. One form is seen by receiving a letter, opening it, and reading it; the other is seen by a few strokes on a keyboard via an electronic link and reading it. Whether an attorney retrieves his notices at a mail box or a keyboard is of little distinction.

{¶22} While even the minimum requirements of due process concerning property rights are to be jealously protected, notice here is not required via personal service or certified mail. Those forms of notice presumably occurred earlier in the litigation. The notice required here involves a duty to apprise interested parties of the opportunity to participate in the proceedings. Such notice occurs within the unique facts of the instant case. We find that the notice provided by the sheriff's office under the totality of these specific circumstances is not notice by publication, but rather it is notice equally reliable and certain to ensure actual

notice as notice by mail, and therefore it is compliant with the demands of minimum due process.

{¶23} Having found no abuse of discretion, appellant's first assignment of error is overruled.

{¶24} Assignment of Error No. 2:

{¶25} "BECAUSE PUBLISHING NOTICE OF A SHERIFF'S SALE VIA A WEBSITE CONSTITUTES NOTICE BY PUBLICATION, THE TRIAL COURT ERRED BY CONCLUDING THAT THE SHERIFF'S OFFICE COMPLIED WITH THE MINIMUM DUE PROCESS REQUIREMENTS MANDATED BY *CENTRAL TRUST CO. AND MENNONITE*."

{¶26} In appellant's second assignment of error, it claims that notice via website is a form of notice by publication and therefore the trial court erred by concluding that the sheriff's office complied with the due process requirements when it utilized this method. Within this assignment of error, appellant raises two issues for our review. First, appellant argues that, "[p]ublishing legal notice via a website violates the specific statutory requirements governing notice by publication under R.C. §§ 7.10 to 7.12." Second, appellant argues that, "[t]he trial court erred, as a matter of law, in finding that posting notice on a website is equally as reliable as delivering notice by mail."

{¶27} R.C. 7.12 sets forth the requirements for newspaper publication of legal notices. The purpose of this statute in relation to foreclosure actions is to ensure that the general public is apprised of impending sales. Appellant argues in its first issue that the website posting did not satisfy the statutory requirements for notice via publication as set forth in R.C. 7.12. In the present case, however, no argument has been made that the new policy instituted by the sheriff's office is intended to satisfy the publication notice requirements of R.C. 7.12. The sheriff's office states that this policy was adopted as a cost-effective means of providing notice to interested parties involved in a foreclosure action. It was not instituted

as a replacement for the publication requirements of the aforementioned statute whose intended purpose is to notify the general public of the impending sale. In fact, the record shows that the sheriff's office did indeed publish the sale three times in a local newspaper in satisfaction of the statutory requirements. Therefore, for purposes of this assignment of error, it is irrelevant whether the posting on the website complies with R.C. 7.12.

{¶28} In its second issue within this assignment of error, appellant argues that the trial court erred when it found that posting notice to a website is as reliable as delivering notice by mail. However, appellant draws too narrowly upon the facts used by the trial court when making its determination. The issue of the reliability of the notice under the present circumstances was discussed in the first assignment of error. Having held that multiple mailed notices and direction to a website is not notice by publication, but rather is as certain to ensure actual notice as notice by mail, we find that this argument is without merit.

{¶29} Having found no abuse of discretion, appellant's second assignment of error is overruled.

{¶30} Assignment of Error No. 3:

{¶31} "THE SHERIFF DID NOT COMPLY WITH THE TRIAL COURT'S SEPTEMBER 29TH JUDGMENT ENTRY, WHICH EXPRESSLY ORDERED THAT PLAINTIFF'S COUNSEL BE SENT ACTUAL NOTICE OF THE SALE."

{¶32} The judgment entry dated September 29, 2008 stated that, "the Sheriff of Clermont County shall provide counsel for [appellant] with notice of the sale date and appraisal in accordance with ORC 2329.26 by mailing a copy of the first advertisement of sale to counsel for [appellant] within seven (7) days of the date of the first publication."

{¶33} The trial court later found that, "the purpose of the entry was to provide [appellant] with notice of the sale date in order for it to comply with the mandates of R.C.

2329.26."<sup>2</sup> It is undisputed that notice was mailed to appellant in compliance with the entry on each of the first three scheduled sale dates. Along with notice of the third sale, the trial court found that the sheriff's office mailed appellant written notice that the website would be used for notification of any future sale dates. As discussed in the first assignment of error, we have found that this notice satisfied the minimum requirements of due process and was equally reliable and as certain to ensure actual notice as notice by mail. Therefore, because appellant was mailed written notice of the change in policy, it had the opportunity to obtain the April 6, 2010 sale date from the website. As such, we cannot find that the trial court abused its discretion in refusing to set aside the sale after concluding that the purpose of the judgment entry was sufficiently satisfied.

{¶34} Accordingly, the third assignment of error is overruled.

{¶35} Judgment affirmed.

RINGLAND, J., concurs.

POWELL, P.J., dissents.

**RINGLAND, J., concurring separately.**

{¶36} I concur with the majority's analysis and resolution of appellant's three assignments of error. I write separately, however, to emphasize that this court's decision is based solely on the facts and circumstances of this particular case. Here, notice was first sent by the customary and constitutionally sound method of ordinary mail. The trial court determined in weighing the credibility of witnesses that this mail notice had been received by

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2. R.C. 2329.26 requires that a judgment creditor seeking the sale of lands or tenements must provide each party to the action with written notice of the date, time, and location of the sale at least seven days prior to the date of the sale. The trial court aptly observed that while appellant failed to comply with its written notice obligations under R.C. 2329.26, "this failure is without consequence since no other party except [appellant] is complaining." Therefore, the court held, "the only interested party remaining is the plaintiff. It would make no sense to set aside the sale due to the plaintiff's failure to notify itself."

appellant. This is not a case involving service of process or jurisdiction, but instead, a case involving posted notice to the "caretaker" after service and jurisdiction were properly obtained. The United States Supreme Court has clearly opined that, while posting notice may be improper in certain situations, posting is still a constitutionally sound method for notice. See *Greene v. Lindsey* (1982), 456 U.S. 444, 452, 102 S.Ct. 1874; see, also, *Miebach v. Colasurdo* (1983), 25 Wash.App. 803. The sheriff's website, combined with the mail notice of the method of all future postings, is "notice reasonably calculated to apprise the parties."

{¶37} Furthermore, I find no constitutional defect in requiring appellant, after being notified of the sheriff's website, to check the site periodically. There is simply no evidence that the posting provided insufficient time to give fair warning of the sale to appellant.

{¶38} Moreover, while I agree with the majority's finding due process principles must be pliant to the realities of modern society, I caution that even with the advent of new and more efficient methods of communication that such fundamental principles of due process may still be subject to abuse. Therefore, if the sheriff's office intends to continue making the dates of all upcoming sales available solely through its website, the enactment of a local rule outlining this notification procedure may be necessary. See, generally, *Martin v. Stan Grueninger Oldsmobile, Inc.* (Oct. 27, 1982), Hamilton App. No. C-820013, 1982 WL 4789, fn. 1; see, also, *Durell v. Spring Valley Twp. Bd. of Zoning Appeals*, Greene App. No. 2009-CA-69, 2010-Ohio-3241, ¶21 ("counsel is presumed to have constructive notice of the local rules of court").

**POWELL, P.J., dissenting.**

{¶39} I respectfully dissent from the decision of the majority. While I agree that the law on this issue is as the majority says, I find the factual assumptions as to modern media

are misplaced. The majority says that opening a website is as easy as and similar to opening a letter. Opening a website is more like opening a newspaper. Opening an e-mail is more like opening a letter. I believe that putting the duty on the attorney of record to seek a website, open it and search for information that might affect his/her client is as inadequate as putting the duty on him/her to find a newspaper open it and find information that might affect the client. If publication in a newspaper is inadequate, then publication on a website is inadequate. The majority says that this is acceptable because the Sheriff, charged with giving the parties notice of sale information, sent all the attorneys of record in all foreclosures notice that all future notices of the date, time, and location would be posted on its website. In essence, the policy change notice was telling attorneys to look on the website, periodically, for the sale information for their cases at some point in time in the future. And that worked in other cases with this same plaintiff's attorney. But it did not work in this case. The court order, pursuant to statute, directed the Sheriff to give the required notice to plaintiff's attorney. The Sheriff says he gave the notice with this new policy. Plaintiff's attorney says he did not receive the notice of this sale. The new policy that the majority approves required this plaintiff's attorney to retrieve the notice himself. I believe it is inadequate to shift the notice burden from the party required to give it to the party who is supposed to receive it.

{¶40} This case involves fundamental property rights. As such, we should take great pains to safeguard those rights. Notice is basic to protecting such due process rights. If we are going to abandon regular mail in favor of new electronic media, then e-mail is the better way. For example, it is not that much more burdensome or costly to require the party charged with giving notice to the parties to send an e-mail than it is to post the same information onto a website. Someone sits at a workstation entering the sale information into the system and then posts it to the website. With a few more key strokes that information can be sent to an e-mail list pre-established for the case. At least with the e-mail, you can

obtain an electronic confirmation of delivery to show that notice was sent. Obviously an e-mail notice policy would require a local and possibly state rule change allowing such notice and require the lawyers practicing before the Clermont County Common Pleas Court to provide a valid e-mail address for receiving notice. But they are already required to provide a valid postal address, phone number and attorney registration number. As I said above, opening an e-mail is more like opening a letter. Opening a website is more like opening a newspaper. Websites are great, but they are not the solution for satisfying this duty. Due process means more than the easiest and cheapest way.

{¶41} Lastly, if posting notice information on a website satisfies due process for future litigation, then Caveat Litigant.

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