

**IN THE SUPREME COURT OF OHIO**

EVERHOME MORTGAGE COMPANY, :  
 :  
 PLAINTIFF/APPELLEE, :  
 :  
 V. :  
 :  
 DOUG A. BAKER, :  
 :  
 DEFENDANT/APPELLANT. :  
 :  
 AND :  
 :  
 MIRANDA G. SMITH, :  
 :  
 INTERVENOR/APPELLEE, :  
 :  
 AND :  
 :  
 LAWRENCE D. BAKER, :  
 :  
 DEFENDANTS/APPELLEES. :

CASE NO.: 11-1398  
  
On Appeal from the Franklin County  
Court of Appeals, Tenth Appellate  
District  
  
Court of Appeals Case No.:  
10AP-534

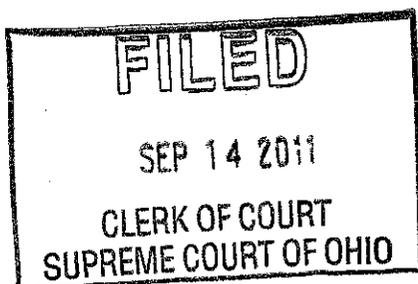
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**INTERVENOR/APPELLEE MIRANDA G. SMITH'S  
MEMORANDUM IN RESPONSE TO APPELLANT'S  
MEMORANDUM IN SUPPORT OF JURISDICTION**

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For Intervenor/Appellee:

Karl H. Schneider (0012881)  
Counsel of Record  
Mark R. Meterko (0080992)  
Maguire and Schneider, LLP  
250 Civic Center Drive, Suite 500  
Columbus, Ohio 43215  
614-224-1222 Telephone  
614-224-1236 Facsimile  
khschneider@ms-lawfirm.com  
mmeterko@ms-lawfirm.com



For Defendant/Appellant:

Rick L. Brunner (0012998)

Patrick M. Quinn (0081692)

Michael E. Carleton (0083352)

BRUNNER QUINN

35 N. Fourth Street, Suite 200

Columbus, Ohio 43215

614-241-5550 Telephone

614-241-5551 Facsimile

[rlb@brunnerlaw.com](mailto:rlb@brunnerlaw.com)

[pmq@brunnerlaw.com](mailto:pmq@brunnerlaw.com)

[mec@brunnerlaw.com](mailto:mec@brunnerlaw.com)

Counsel for Defendant/Appellant Doug Baker

For Plaintiff/Appellee:

Benjamin D. Carnahan (0079737)

Shapiro, Van Ess, Phillips & Barragate, LLP

4805 Montgomery Road

Suite 320

Norwood, Ohio 45212

216-373-3131 Telephone

847-627-8805 Facsimile

[bcarnahan@logs.com](mailto:bcarnahan@logs.com)

Counsel for Plaintiff/Appellee Everhome Mortgage Company

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**THIS CASE IS NOT ONE OF GREAT GENERAL INTEREST**

**A. This Honorable Court should not accept jurisdiction of this case because Appellant has failed to present any issues of great general interest for review**

This case does not present the issues accepted by this Honorable Court for review in *U.S. Bank v. Duvall*, Case No. 2011-0218 and *U.S. Bank v. Perry*, Case No. 2011-0170. In this case, the issue of whether Plaintiff, Everhome Mortgage Company (“Everhome”) had real party in interest standing to foreclose on the mortgage was mooted by the filing of an Amended Complaint. In addition, the issue of whether Everhome had real party in interest standing has been waived by Appellant, Doug A. Baker (“Appellant”). In short, the specific procedural issues of this case do not allow this Court to consider the issues relating to standing it decided to accept for review in *Duvall* and *Perry*.

Appellant argues that because there was no assignment attached to the original complaint, Everhome lacked standing to prosecute the foreclosure. On January 8, 2009, Everhome filed a Complaint alleging to be the holder of a note and mortgage. The same day the Complaint was filed, an assignment of note and mortgage to Everhome was executed. The Assignment was recorded on January 20, 2009. On March 11, 2009, after receiving leave of court, Everhome filed an Amended Complaint, which attached a copy of the Assignment.

It is axiomatic that an amended complaint supersedes the original complaint, which is totally abandoned upon the filing of an amended complaint. *Southern Ohio Risk Management, Inc. v. Michael*, 4<sup>th</sup> Dist. No. 05CA11, 2005-Ohio-5862 at ¶ 8 (citations omitted); *Hack v. Fisher-Bord Worldwide Moving*, 9<sup>th</sup> Dist. No. 20914, 2002-Ohio-3863 at ¶ 45. Since an amended complaint completely supersedes and replaces the original complaint and the Assignment was attached to Everhome’s amended complaint, Appellant’s arguments as to standing were completely mooted by the filing of Everhome’s amended complaint. Accordingly,

this case does not present the issues of standing previously accepted by this Honorable Court for review in *Duvall and Perry*.

Even if the amended complaint did not moot the issue of standing, Appellant has waived the issue of standing. Lack of real party in interest standing is not a defect in subject matter jurisdiction and can be waived. *See State ex rel. Jones v. Suster* (1998), 84 Ohio St.3d 70, 77.<sup>1</sup> “[B]ecause the issue of lack of standing ‘challenges the capacity to bring an action, not the subject matter jurisdiction of the court,’ the issue of standing or ‘real party in interest’ defense is waived if not timely asserted.” *JPMorgan Chase Bank Trustee v. Murphy*, 2<sup>nd</sup> Dist. No. 23927, 2010-Ohio-5285 at ¶ 19. Appellant filed an answer to the amended complaint, but failed to raise the affirmative defense of standing or real party in interest. As such, the affirmative defense of standing was waived. Consequently, this case does not present the issues of standing previously accepted by this Honorable Court for review in *Duvall and Perry*.

Appellant also waived the issue of real party in interest standing by failing to argue that Everhome lacked standing in opposing the motion for summary judgment.<sup>2</sup> Appellate courts

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<sup>1</sup> In *Suster*, the Ohio Supreme Court stated the following:

Although a court may have subject matter jurisdiction over an action, if a claim is asserted by one who is not the real party in interest, then the party lacks standing to prosecute the action. The lack of standing may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter. Civ.R. 17. Unlike lack of subject matter jurisdiction, other affirmative defenses can be waived. *Houser v. Ohio Historical Soc.* (1980), 62 Ohio St. 2d 77, 16 Ohio Op. 3d 67, 403 N.E.2d 965. Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court. *State ex rel. Smith v. Smith* (1996), 75 Ohio St. 3d 418, 420, 662 N.E.2d 366, 369; *State ex rel. LTV Steel Co. v. Gwin* (1992), 64 Ohio St. 3d 245, 251, 594 N.E.2d 616, 621.

<sup>2</sup> In response to the motion for summary judgment, Appellant filed a motion pursuant to Rule 56(F) and a preliminary memorandum contra Plaintiff’s motion for summary judgment.

generally will not consider arguments that were never presented to the trial court whose judgment is sought to be reversed. *See State ex rel. Quarto Mining Co. v. Foreman* (1997), 79 Ohio St. 3d 78, 81. Appellant never raised the issue of standing in opposing Everhome's motion for summary judgment. Accordingly, this Honorable Court should not even consider the issue of standing. As a result, this case does not present the issues of standing previously accepted by this Honorable Court for review in *Duvall* and *Perry*.

Perhaps realizing the procedural hurdles preventing this Court from reviewing the issue of standing, Appellant also urges this Court to accept jurisdiction to determine whether the Tenth District Court of Appeals properly determined that Appellant waived the issue of defective service of the Amended Complaint upon him. This is not an issue of great general interest.

As an initial matter, how Appellant was served and whether he waived the defense of lack of service turns on the specific facts and circumstances of this particular case, and therefore, hardly rises to the level of an issue of great general interest. Because Appellant's assertion that he was not properly served is limited to the factual and procedural history of this case, it neither affects other pending cases nor would it affect future cases throughout Ohio. The fact driven inquiry is inherently limited to the specific circumstances of this case and does not rise to the level of great general interest.

Moreover, the proposition of law that a party to civil case can waive the defense of lack of service is a long standing legal principle that needs no clarification by this Honorable Court. As set forth above, Everhome filed an amended complaint and Appellant filed an answer to the amended complaint. Appellant's answer to the amended complaint did not set forth an affirmative defense of insufficient process, insufficient service of process or lack of service. Under these facts, the Court of Appeals correctly concluded that Appellant waived any defense

of lack of service. Nothing about the Tenth District's application of the long standing legal principle of waiver requires further guidance from this Court.

**B. Even if this Honorable Court accepts jurisdiction, it should make clear, in its order accepting jurisdiction, that pursuant to R.C. 2329.45 Miranda Smith's title shall not be defeated or affected by the outcome of the appeal**

Pursuant to the underlying judgment of foreclosure, the subject property was set for sheriff's sale, and was purchased by Miranda Smith ("Smith"). The Trial Court entered an Order confirming the sale to Smith.

R.C. 2329.45 provides the following:

If a judgment in satisfaction of which lands, or tenements are sold, is reversed, such reversal shall not defeat or affect the title of the purchaser. In such case restitution must be made by the judgment creditor of the money for which such lands or tenements were sold, with interest from the day of sale.

Pursuant to R.C. 2329.45, Smith has taken title as a purchaser in good faith at the sheriff's sale of the Property and her interest is not subject to attack by any subsequent reversal of the underlying judgment. In accordance with the clear directive of R.C. 2329.45, if this Honorable Court accepts jurisdiction of this case it should state, in its Order accepting jurisdiction, that Smith's title in the subject property shall not be defeated or affected by the outcome of the appeal.<sup>3</sup>

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<sup>3</sup> R.C. 2325.03 also protects Smith's title to the subject property. In fact, the Tenth District Court of appeals stated that "pursuant to R.C. 2329.45 and R.C. 2325.03, Smith has taken title as purchaser in good faith at the sheriff's sale of the subject property and her interest is no longer subject to attack by any subsequent modification of the underlying foreclosure judgment..." Opinion, ¶ 15. While Smith believes that R.C. 2329.45 protects her interest in the subject property should the Trial Court's judgment be reversed, she is also protected by the provisions of R.C. 2325.03, which protects a bona fide purchaser at a duly confirmed judicial sale if the final judgment is vacated, modified or set aside.

## STATEMENT OF CASE AND FACTS

On January 8, 2009, Everhome filed a complaint against Appellant and Nancy Baker (the “Bakers”). The Complaint sought recovery under a Note from Appellant and foreclosure of a corresponding Mortgage interest in real property commonly known as 5639 Shannon Heights, Columbus, Ohio 43220 (the “Property”). The same day the Complaint was filed, an assignment of note and mortgage to Everhome was executed. The Assignment was recorded on January 20, 2009. The Complaint did not contain a copy of an assignment of the mortgage to Everhome.

At the time it filed the Complaint, Everhome also filed a commitment for title insurance, which contained a preliminary judicial report (“PJR”). The PJR noted that Doug A. Baker, and Nancy A. Baker, signing to release her dower interest, gave a mortgage to Union Federal Bank of Indianapolis. The PJR went on to note that “[s]aid mortgage was assigned from Union Federal Bank of Indianapolis to Mortgage Electronic Registration Systems, Inc....”

On February 17, 2009, Everhome filed a motion for leave to amend its Complaint, and the motion was granted. On March 11, 2009, Everhome filed an amended complaint. The amended complaint attached an assignment of mortgage demonstrating that Mortgage Electronic Registration Systems, Inc. assigned its interest in the Mortgage to Everhome. Everhome filed a praecipe requesting that the Clerk serve all defendants with the amended complaint by process server. Appellant was served by process server on March 19, 2009. On July 22, 2009, Appellant filed an answer to the amended complaint. Notably absent from the Bakers’ Answers was any affirmative defense alleging insufficient process, insufficient service of process or lack of service.

On September 1, 2009, Everhome filed a motion for summary judgment against the Bakers. On September 17, 2009, the Bakers filed a 56(f) motion for extension to conduct

discovery, and a memorandum contra to the motion for summary judgment. The only argument advanced by the Bakers in their memorandum contra was that the motion for summary judgment should be denied because the Amended Complaint was not properly served upon them.

On October 7, 2009, the trial court entered a Final Judgment Entry granting Everhome's motion for summary judgment against the Bakers. The Property proceeded to sheriff's sale on January 8, 2010, but did not sell. On January 14, 2010, Everhome filed a motion to set minimum bid price at sheriff's sale, and the motion was served upon counsel for Appellant. Appellant never requested that the sheriff's sale be stayed even though there was nearly four months until the April 9, 2010 sheriff's sale.

At the April 9, 2010 sheriff's sale, the Property was purchased by Miranda Smith ("Smith") for \$103,000.00. On May 5, 2010, the trial court issued a Judgment Entry confirming the sale to Smith, and ordering distribution.

The Bakers appealed the October 7, 2009 Final Judgment Entry and the May 5, 2010 confirmation of sale. The Court of Appeals allowed Smith, as the purchaser of the Property, to intervene in the appeal. On June 30, 2011, the Tenth District Court of Appeals issued a decision and Judgment Entry affirming the October 7, 2009 Final Judgment Entry, and holding that the assignment of error relating to the confirmation of sale was moot.

### **RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW**

**Response to Proposition of Law No. 1: The holder of a promissory note has standing to enforce a mortgage which secures its payment, the recording of an assignment of mortgage is not relevant to the analysis and standing need only be proven prior to the entry of judgment**

As has been demonstrated by the briefs filed by the appellant in U.S. *Bank v. Duvall*, Case No. 2011-0218, currently pending before this Honorable Court, a party need not show that

it owned the note and mortgage at the time it filed the complaint in order to have standing as a plaintiff in a mortgage foreclosure action.

Standing to enforce a note is not based upon owning the note, but rather being a person entitled to enforce it as set forth in R.C. 1303.31. Under well established Ohio precedent, a person entitled to enforce the promissory note has standing to foreclose a mortgage securing its payment. *Kernohan v. Manss* (1895), 53 Ohio St. 118; *U.S. Bank N.A. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178. The recording of an assignment of mortgage is not necessary to have standing to sue on the note or to foreclose on the mortgage. Rather, a recording of mortgage assignments is only relevant “to the extent of establishing creditor priority and subsequent notice to a bona fide purchaser of the land. The validity of the mortgage itself remains unaffected by the timing of the assignment’s recordation.” *Wead v. Kutz*, 161 Ohio App.3d 580, 2005-Ohio-2921 at ¶ 16. Finally, in accordance with Rule 17 of Ohio Rules of Civil Procedure, real party in interest standing need only be proven prior to judgment.

**Response to Proposition of Law No. 2: An alleged defect in service of an amended complaint may be waived**

It is well established that “the defense of insufficiency of service of process is waived...if it is not included in a responsive pleading.” See *Glozzo v. University Urologists of Cleveland, Inc.* (2007), 114 Ohio St. 3d 141, 144. Contrary to Appellant’s assertions, this well-established rule of law extends to alleged defects regarding service of an amended complaint. See *Schroeder v. Dailey*, 4<sup>th</sup> Dist. No. 08CA3021, 2008-Ohio-6100 at ¶ 8 (“Despite our determination that counsel, rather than Appellant, should have been served the amended complaint in foreclosure, we conclude that any defect in service was waived...”). Accordingly, an alleged defect in service of an amended complaint may be waived.

**CONCLUSION**

For the reasons set forth above, this case does not present this Honorable Court with any issues of great general interest to review. Accordingly, this Honorable Court should deny Appellant's Memorandum in support of jurisdiction, and decline to accept jurisdiction of this case.

If this Honorable Court decides to accept jurisdiction, it should make clear, in its Order accepting jurisdiction, that Smith's title in the subject property shall not be defeated or affected by the outcome of the appeal.

Respectfully submitted,

**MAGUIRE & SCHNEIDER, L.L.P.,**



Karl H. Schneider (0012881) (Counsel of Record)

Mark R. Meterko (0080992)  
250 Civic Center Drive, Suite 500  
Columbus, Ohio 43215

Telephone: (614) 224-1222

Facsimile: (614) 224-1236

khschneider@ms-lawfirm.com

mmeterko@ms-lawfirm.com

*Attorneys for Miranda Smith*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was mailed via regular U.S. mail on this 14th day of September, 2011 to the following:

Rick L. Brunner, Esq.  
Patrick M. Quinn, Esq.  
Michael Carleton, Esq.  
545 E. Town Street  
Columbus, Ohio 43215

Benjamin Carnahan, Esq.  
Phillip Barragate, Esq.  
Lindsay Niehaus, Esq.  
Shapiro, Van Ess, Phillips & Barragate, LLP  
405 Montgomery Road, Suite 320  
Norwood, Ohio 45212

A handwritten signature in black ink, appearing to read 'Mark R. Meterko', written over a horizontal line.

Mark R. Meterko (0080992)