

ORIGINAL

IN THE SUPREME COURT OF OHIO

U.S. BANK, N.A. as Trustee for CMLTI
2007-WFHE2

Plaintiff-Appellant

-vs-

ANTOINE DUVALL, et al.

Defendants-Appellees.

* Case No. 2011-0218
* On Appeal from the Cuyahoga
* County Court of Appeals, Eighth
* Appellate District
* Court of Appeals Case No.
* CA -10-094714
*

MEMORANDUM CONTRA OF AMICI CURIAE DUANE AND JULIE
SCHWARTZWALD IN OPPOSITION TO MOTION FOR RECONSIDERATION

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Now come Amici Curiae Duane and Julie Schwartzwald and pursuant to SCt. R. XI(3)(B) submit their memorandum in opposition to Appellant's Motion for Reconsideration.

U.S. Bank has asked this Court to reconsider its September 21, 2011 dismissal of this case as being moot. U.S. Bank does not argue that the case is not moot, a fact it conceded in its *Memorandum Regarding Notice Of Suggestion Of Mootness* filed herein on August 12, 2011, but rather that the Court should nonetheless decide the case under the "public interest" exception to the mootness doctrine. In support of its argument, U.S. Bank cites the Court to several cases in which this exception is discussed and applied by the Court. Although that exception has been recognized by the Court, it has rarely been invoked to retain jurisdiction over an otherwise moot case. One case in which the exception was used by the Court was *in Franchise Developers, Inc. v. City of Cincinnati*, (1987) 30 Ohio St.3d 28, 31. In that case, the Court applied the exception only because, even though the case is technically moot with respect to one party because of a transfer of title to the real estate at issue in the case, the issue remained pending as to the new owners of the property. *Id.*; see also, *Smith v. Leis*, 106 Ohio St.3d 309, 2005-Ohio-5125, 835 N.E.2d 5 (applying the exception because of the presence of a properly debatable constitutional issue).

Although frequently raised, the Court has generally declined to follow it. *Wallace v. University Hospitals of Cleveland*, (1961) 171 Ohio St. 487, 489-90 (stating "[a]lthough the temptation may be great to indulge in the theory that a case may be 'moot as to the parties' but not 'moot as to the public,' . . . the majority of this court are of the opinion that in this case we should follow the usual procedure of deciding cases only);

see also, *Danis Clarkco Landfill Co. v. Clark County Solid Waste Management Dist.* (1995), 73 Ohio St.3d 590, 653 N.E.2d 646 (finding that the case was not moot).

The Court's reluctance to invoke the exception is well-founded. The exception, if carelessly invoked, may violate the Court's self-imposed prohibition on issuing advisory opinions:

It is well-settled law that this court will not issue advisory opinions. *State ex rel. White v. Kilbane Koch*, 96 Ohio St.3d 395, 2002-Ohio-4848, 775 N.E.2d 508, ¶ 18, citing *State ex rel Baldzicki v. Cuyahoga Cty. Bd. of Elections* (2000), 90 Ohio St.3d 238, 242, 736 N.E.2d 893; *Egan v. Natl. Distillers & Chem. Corp.* (1986), 25 Ohio St.3d 176, 25 OBR 243, 495 N.E.2d 904, syllabus. " It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect." *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14, 51 O.O.2d 35, 257 N.E.2d 371. Because the court need not reach the issue of whether discrimination on the basis of lactation is prohibited by R.C. 4112.02, it should not do so. See *PDK Laboratories, Inc. v. United States Drug Enforcement Admin.* (C.A.D.C.2004), 362 F.3d 786, 799 (Roberts, J., concurring in part and concurring in the judgment, " if it is not necessary to decide more, it is necessary not to decide more").

In re Popp, (1973), 35 Ohio St.2d 142, 144 (dismissing the case as moot and refusing to invoke the "public interest" exception because of the nature of the remedy sought);

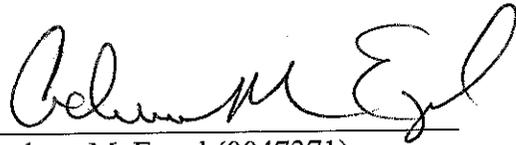
Tschantz v. Ferguson, (1991) 57 Ohio St.3d 131, 133 (stating "[n]o actual controversy exists where a case has been rendered moot by an outside event."); *Miner v. Witt* (1910), 82 Ohio St. 237, syllabus (holding an event occurs which renders it impossible for the court to grant any relief, the Court must dismiss the case as moot.)

If the Court were to consider the issue presented, what relief could it grant U.S. Bank? Could the Court remand the case for further proceedings? No. U.S. Bank has already released the mortgage of record, an act which it concedes rendered the case moot. There is no relief regarding that mortgage which this, or any other, court could grant.

Moreover, as U.S. Bank points out, the legal issue involved in this case is before the Court in other cases which are not moot. *U.S. Bank v. Perry*, Case No. 11-0170 (accepted for review but held pending outcome of this case) and *Federal National Loan Mortgage Corp. v. Schwartzwald*, Case Nos. 11-1201 and 11-1362. In the presence of such other active disputes, there is no need to invoke the "public interest" exception to hear this moot case.

Therefore, Amici Curiae Duane and Julie Schwartzwald request that the Court overrule Appellant's Motion for Reconsideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Andrew M. Engel", written over a horizontal line.

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I certify that a copy of the foregoing was served by ordinary mail this 4th day of October 2011 upon:

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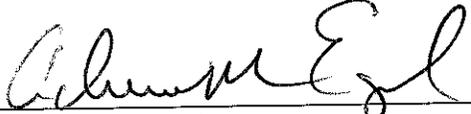
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