

ORIGINAL

IN THE SUPREME COURT OF OHIO

Countrywide Home Loan Servicing, L.P.)

Appellee,)

vs.)

Michael P. Nichpor, *et al.*,)

Appellants.)

Case No. 12-0578

On Certification of Conflict from Wood
County Court of Appeals, Sixth Appellate
District

Court of Appeals Case No. WD-11-047

**REPLY BRIEF OF APPELLANTS
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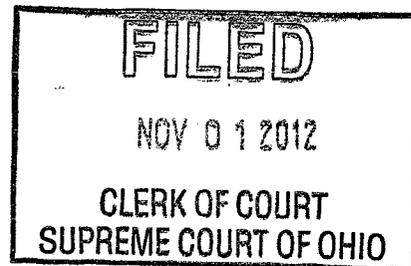
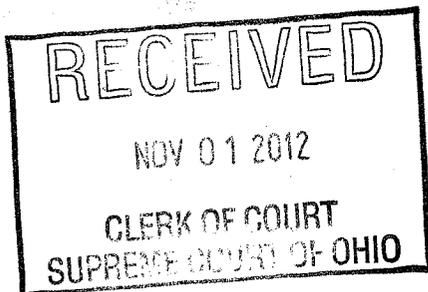


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INTRODUCTION

On June 20, 2012, this Court certified the following conflict question for review:

Whether a foreclosure action, in which judgment of foreclosure has, in fact, been issued, can be dissolved in its entirety prior to confirmation of sale, with the filing of a voluntary dismissal, filed by a party in accordance with Civ.R. 41(A).

On August 8, 2012, Appellants Michael and JoAnn Nichpor (the "Nichpors") filed their Merit Brief. Appellee Countrywide Home Loan Servicing, L.P. ("Countrywide"), filed its Merit Brief on September 27, 2012, to which this Brief is in reply.

STATEMENT OF FACTS; A CONFLICT EXISTS

The necessary facts in the instant action are straight forward and undisputed. Countrywide does, however, dispute both this Court and the Sixth Appellate District's finding that a conflict exists between *Coates v. Navarro*, 2nd Dist. Nos. 86-CA-11 and 86-CA-18, 1987 WL 8490, the appellate decision from which this appeal originates, *Countrywide v. Nichpor*, 6th Dist. No. WD-11-047, 2012-Ohio-1101, and the decision upon which the appellate court below relied, *NOIC v. Yarger*, 6th Dist. No. WD-06-025, 2006-Ohio-4658. (Countrywide, Br. 8).

Countrywide is in error. The same underlying facts necessary for a determination of the narrow procedural question presented are identical: a foreclosure action was initiated by a creditor (Countrywide's Br. at 3, 7); the creditor filed a dispositive motion (*Id.*); the creditor received a favorable judgment entry and decree in foreclosure (*Id.*); and the creditor attempted to vacate the final judgment entry via Civ.R. 41(A)(1)(a). (*Id.*).

The fact that the *Coates* transaction was a land contract is of no consequence, the creditor's ultimate remedy was still foreclosure. (Nichpors' Br. at 20). Both this Court and the Sixth Appellate

District were correct in certifying the conflict between *Coates*, and *Yarger* and the appellate decision below.

REPLY ARGUMENT

Countrywide's Merit Brief asks this Court to answer the certified question in the affirmative for the following proffered reasons: (i) the language of Civ.R. 41(A)(1)(a) does not prevent a plaintiff from voluntarily dismissing a foreclosure action after a judgment (Countrywide's Br., 9); (ii) Civ.R. 60(B) is ill-suited to dissolve a foreclosure judgment in favor of a plaintiff (*Id.*, at 23); (iii) the foreclosure process is not complete until confirmation of a sheriff's sale (*Id.*, at 33); and (iv) allowing a plaintiff to dissolve a foreclosure judgment through Civ.R. 41(A)(1)(a) benefits the homeowners (*Id.*, at 39). As set forth below, Countrywide's contentions are amiss.

I. COUNTRYWIDE'S VOLUNTARY DISMISSAL WAS UNTIMELY

The sole issue in this case is whether a party can voluntarily dismiss an action after a judgment entry and decree in foreclosure. Civ.R. 41(A)(1)(a) allows plaintiffs to voluntarily dismiss all asserted claims, one time without prejudice, before the "commencement of trial." The analysis of this case therefore begins and ends with the statutory construction of "commencement of trial," and the answer hinges on whether a final judgment entry occurs before or after "commencement of trial." As also submitted in their Merit Brief, the Nichpors insist that a judgment entry and decree in foreclosure presupposes the occurrence of a trial, thus precluding use of Civ.R. 41(A)(1)(a).

A. Countrywide's Statutory Construction

In April, for the first time, this Court examined the term "commencement of trial." *Schwering v. TRW Vehicle Safety Sys. Inc.* (2012), 132 Ohio St.3d 129, 970 N.E.2d 865. *Schwering* held that a civil jury trial commences once a jury is empaneled. *Id.* at 132. In dicta not pertinent to the question before the Court, the *Schwering* decision stated that a bench trial commences at opening statement.

Id. Countrywide believes that because “no opening statements were made,” it was not precluded from voluntarily dismissing the foreclosure per Civ.R. 41(A)(1)(a). (Countrywide Br., p. 12, et seq.).

In *Schwering*, this Court did not answer whether a final judgment occurs before or after “commencement of trial” for purposes of Civ.R. 41. “Trial” is defined by R.C. 2311.01 as a “judicial examination of the issues, whether of law or fact, in an action or proceeding.” Countrywide analyzes the statutory definition of “trial” in relation to Civ.R. 59, motion for new trial, where Countrywide introduces nine (9) “indicia of trial” as prescribed by this Court. *First Bank of Marietta v. Mascrete, Inc.*, 79 Ohio St.3d 503, 507, 684 N.E.2d 38 (1997). (Countrywide Br., p. 13).

The *Mascrete* “indicia of trial” include “whether the proceeding was initiated by pleadings,” “whether issues of fact were decided by the judge,” “whether the issues decided were central to the primary dispute,” and “whether a judgment was rendered.” *Id.* at 507. The *Mascrete* Court warned that “[t]he list of factors is not intended to be exhaustive. Other indicia may be considered. The focus of the inquiry *** is whether there is a substantial predominance of indicia of trial such that the proceeding is properly characterized as a trial *for Civ.R. 59 purposes.*” *Id.* (Emphasis added). Even though this case has nothing to do with “Civ.R 59 purposes,” a final judgment was unequivocally rendered. In addition, the judgment entry was initiated by the pleadings (i.e the complaint requesting foreclosure), facts were decided by the judge (i.e. lien priority, deficiency amount, etc.), and the issue examined was the central issue in the case (judgment in foreclosure).

Countrywide concedes these “indicia of trial” when it states that a “decree in foreclosure typically includes a finding (1) the maker of the promissory note has defaulted; (2) a determination related to the validity of the mortgage; (3) the description and amount of all liens; (4) a general determination of the priority of liens ***.” (Countrywide Br., 34). Even if Civ.R. 59 does not apply

to default judgments, as Countrywide suggests, Countrywide cannot escape the plain language of Civ.R. 55(B) that default judgments can only be set aside pursuant to Civ.R. 60(B).

Mascrete simply held that a contempt hearing can constitute a “trial” for *purposes of Civ.R. 59*. The grounds for a new trial under Civ.R. 59 include irregular proceedings, jury misconduct, excessive damages, newly discovered evidence, and so forth. The analysis of “trial” for “Civ.R. 59 purposes” is to determine whether a procedural “do-over” is warranted, but not every proceeding is entitled to Civ.R. 59 consideration. For example, a hearing on a motion to compel production of potentially privileged documents might be an appealable order, but is not subject to Civ.R. 59. That is because a motion to compel is not “initiated by the pleadings” and is not the “central issue” in the case, it is an ancillary non-dispositive hearing. Because *Mascrete* expressly limits its analysis of “trial” for “Civ.R. 59 purposes,” it does not apply for purposes of Civ.R. 41 analysis.

B. Plain Reading of Civ.R. 41(A)(1)(a)

The question of whether a plaintiff’s voluntary dismissal is timely under Civ.R. 41(A)(1)(a) depends upon – and must remain tethered to – a reasonable construction of the statutory term “commencement of trial.” As in any case involving interpretation, the polestar is the drafter’s intent, which is best gleaned from the words used and purpose sought to accomplish. *State v. Hanning*, 89 Ohio St.3d 86, 91, 728 N.E.2d 1059 (2000). Words and phrases in a statute must be read in context of the whole statute in order to give proper force and effect to its construction. *Commerce & Industry Ins. Co. v. City of Toledo*, 45 Ohio St.3d 96, 102, 543 N.E.2d 1188 (1989).

Contrary to Countrywide’s suggestions (*Countrywide Br.*, 16, *passim*), the plain language and structure of the Ohio Rules of Civil Procedure (“Rules”) support the Nichpors’ position that a final judgment occurs after trial. Because a “trial” is “a judicial examination of issues, whether of law or fact, in an action or proceeding,” a “trial” is a necessary predicate to the entry of a final judgment.

R.C. 2311.01. Lest the cart come before the horse, “examination of the issues of law or fact” (a trial) cannot occur after the entry of a final judgment.

Ohio courts regard titles of and within statutes as an indicator of that statute’s purpose. *Commerce & Industry Ins. Co.*, at fn 7, citing *State v. Glass* (1971), 27 Ohio App.2d 214, 273 N.E.2d 214. The Rules begin with a panoptic title on scope and purpose. Title II of the Rules address commencement of an action and service. Pleadings, motions, and their form are found in Title III, while Title IV is comprised of joinder, class actions, intervention, and similar topics regarding proper parties. Title V embodies discovery and all of its prescriptions. Next is “Trials” in Title VI, *followed by* “Judgment” in Title VII.

Civ.R. 41(A) is located in Title VI, devoted to “trials,” and is conspicuously void of language suggesting a plaintiff may dismiss a final judgment. The remainder of Title VI details the mechanics of trial: consolidation and bifurcation (Civ.R. 42); judicial notice (Civ.R. 44.1); subpoenas (Civ.R. 45); jurors and *voire dire* (Civ.R. 47). It is not until Civ.R. 48 that the Rules mention “judgment” when they prescribe the number of votes needed for a jury verdict. Title VI then discusses types of verdicts (Civ.R. 49), jury instructions (Civ.R. 51), and motions for judgment notwithstanding the verdict (Civ.R. 50), which all occur prior to judgment.

Following “Trials” is Title VII - “Judgment”. Within Title VII lie provisions concerning the definition of “judgment” (Civ.R. 54), procedures for default judgments (Civ.R. 55), summary judgments (Civ.R. 56), entry of judgments (Civ.R. 58), and how to obtain relief from a judgment (Civ.R. 60). Civ.R. 60(B) applies to the vacation of all judgments, including cognovits judgments (R.C. 2323.12), default judgments (Civ.R. 55), summary judgments (Civ.R. 56), and judgment procured by trial. *Adomeit v. Baltimore* (1974), 39 Ohio App.2d 97, 101-102, 316 N.E.2d 469.

The numerical order of the Rules' tracks the chronological flow of litigation from start to finish: commencement of action, complaint, service, pre-answer motions, answer, discovery, trial, and *then* judgment. Chronological common sense commands that final judgment occur after trial. The sequential arrangement of the Civil Rules further affirms that judgments occur *after* trial.

Countrywide believes "trial" to be what appears on the nightly re-runs of "Law & Order" - that is, a trial must include opening statement, examination of witnesses, summation, and a verdict. While championing the "liberalness" of Civ.R. 41(A)(1)(a) on one hand, on the other, Countrywide asks this Court to adopt a narrow interpretation of the phrase "commencement of trial." (Countrywide Br., pp. 10, 13). Warning against the "tyranny of literalness," the great Justice Felix Frankfurter correctly observed that "literalness may strangle meaning." *Utah Junk Co. v. Porter*, 328 U.S. 39, 44 (1946). A final judgment connotes the conclusion of trial, not commencement. Countrywide's statutory construction suffocates the plain meaning of Ohio's Civil Rules.

C. A Final Judgment Entry Precludes Civ.R. 41(A)(1)(a)

Countrywide wants to maintain that summary judgment and default judgment proceedings are merely hearings on motions, not trials. (Countrywide Br., pp. 12, 15). What Countrywide refuses to acknowledge is that a duly journalized final judgment was entered in the case at hand. This undisputed fact fully disposed of any "action" and made the utilization of Civ.R. 41(A)(1)(a) improper.

The entry of a judgment occurs "**** upon a decision announced *** [where after] *** the court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it upon the journal. A judgment is effective only when entered by the clerk upon the journal." Civ.R. 58(A). A judgment entry and decree in foreclosure is a "decision announced." For purposes of a judgment entry, there is no distinction between the journalization of a judgment

brought forth through Civ.R 55 (default judgment), Civ.R. 56 (summary judgment), or a judgment brought forth through a jury verdict. See *Nieman v. Bunnel Hill Development Co., Inc.*, 10th Dist. No. CA2002-10-249, 2004-Ohio-89.

It is well-settled that a court speaks through its journal entries. *State ex rel. Geauga Cty. Bd. of Commrs. v. Milligan* (2003), 100 Ohio St.3d 366, 2003-Ohio-6608, at ¶ 20. Dockets and journals are distinct records kept by the clerk of courts. R.C. 2303.12 commands “the clerk of common pleas shall keep at least four books[:] *** the appearance docket, trial docket *** , journal, and execution docket.” *State ex rel. White v. Junkin*, 80 Ohio St.3d 335, 338, 1997-Ohio-340, 686 N.E.2d 267 (“A docket is not the same as a journal.”). The journal occurs *after the trial docket*. Sequentially, a judgment appears on the journal, which occurs after trial docket, yet before the execution docket.

Not only does a court speak through its journal entries, but “*until journalized*, a court’s decision can have no effect on a party’s right to voluntarily dismiss pursuant to Civ.R. 41(A).” *Bank One v. O’Brien*, 8th Dist. No. 91AP-165, 1991 WL 281436 (Dec. 31, 1991), citing *Torres v. Sears, Roebuck & Co.* (1980), 68 Ohio App.2d 87. (Emphasis added). Taking the inverse of the *O’Brien* court’s statement to its logical conclusion – *once journalized*, a court’s decision *does* have an effect on a party’s right to voluntarily dismiss. Especially apt to this case, the *O’Brien* court also stated that Civ.R. 41 does *not* apply to default judgments. *Id.* at *8. (Emphasis added).

The title of Civ.R. 41 provides for the dismissal of “actions,” not “judgments.” A foreclosure judgment, containing “no just cause for delay” language, is “final” because it affects a substantial right that determines an action. R.C. 2505.02(B)(1). Because a final judgment in foreclosure “determines an action,” it is dispositive. Thus, the entry of a final judgment precludes the application of Civ.R 41(A)(1)(a) for there is no longer an “action” to dismiss. A party cannot unilaterally undo a

journalized final judgment without first seeking court approval or a stipulation, and, therefore, Countrywide's voluntary dismissal was untimely.

D. Caselaw Supports the Nichpors' Position

In addition to the caselaw in the Nichpors' Merit Brief, the recently-discovered cases below leave no doubt that the certified conflict question should be answered in the negative.

1. *State ex rel. Engelhart v. Russo*

In addition to *Schwering*, this Court examined Civ.R. 41(A)(1) in *State ex rel. Engelhart v. Russo*, 131 Ohio St.3d 137, 2012-Ohio-47, 961 N.E.2d 1118. In *Russo*, the trial judge signed a proposed journal entry granting summary judgment in favor of appellee on January 12, 2011, which was electronically submitted to the clerk of courts at 2:25 p.m. *Id.* at ¶ 2. That same day, the appellant filed a notice of dismissal pursuant to Civ.R. 41(A)(1) at 3:38 p.m. *Id.* at ¶ 4. Minutes later, at 4:05 p.m., the summary judgment entry was journalized by the clerk. *Id.* at ¶ 5.

The question before this Court in *Russo* was at what point does journalization of a judgment entry occur. The Court answered "that a judgment is effective only when entered by the clerk upon the journal, not when it is filed with the clerk ***." *Id.* at ¶ 20 (Emphasis deleted); Civ.R. 58(A). This Court declared that a notice of voluntary dismissal is effective *if filed before the journalization of a summary judgment entry*. *Id.* at ¶ 18 (citations omitted). (Emphasis added). In congruence with Civ.R. 58(A), *Russo* also held that the notice of voluntary dismissal was proper *because* the judgment entry was not journalized until after the notice of dismissal was filed. *Id.* at ¶ 25 (Emphasis added).

In so holding, this Court affirmed that a journalized final judgment cannot be vacated in accordance with Civ.R. 41(A)(1). "It is true that a notice of voluntary dismissal filed after the trial court enters summary judgment is of no force and effect and is a nullity." *Id.* at ¶ 17 (Citations

omitted); see also *Pearce v. Church Mut. Ins. Co.*, 9th Dist. No. 02CA0101-M, 2003-Ohio-3147, ¶ 15. *Russo* affirms that a voluntary dismissal is of no force and effect after the entry of a final dispositive judgment. *Id.* at ¶ 17, 18, 25. The Court came to this conclusion despite the absence of many of Countrywide's "indicia of trial," including opening statement, witness examination, and summation. Perhaps that is because it is axiomatic that a final dispositive judgment must occur after "trial." *Russo* directly conflicts with Countrywide's contention that "a summary judgment proceeding does not amount to trial." (Countrywide Br., 15).

2. *Kahler v. Capehart*

The *Russo* decision, that a summary judgment entry precludes voluntary dismissal, leaves Countrywide only two opportunities to win this case: (1) the Court accepts their novel "things are different in a foreclosure action" argument (addressed below in Section II(B)), or, (2) that their dismissal was proper because the final judgment and decree in foreclosure was taken in default.

Addressing the latter, Countrywide's position must be that a foreclosure judgment can be dismissed because it is merely a default judgment. Still, a default judgment is a final judgment which occurs after trial for purposes of Civ.R. 41. *Coates v. Navarro, supra* at 1; *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 149-150, (1976); see also Section A, above; Nichpors' Br., 8-10; R.C.2311.01; R.C. 2505.02. Civ.R. 41 does not apply to default judgments as was confirmed by *Kahler v. Capehart*, 3d Dist. No. 13-03-55, 2004-Ohio-2224, at ¶ 8. *Kahler* is detrimental to Countrywide's case.

In *Kahler*, a landlord brought an action against tenants for unpaid rent. *Id.* at ¶ 2. The tenants failed to enter an appearance and a default judgment was granted in favor of landlord. *Id.* The landlord proceeded to initiate a garnishment proceeding against tenants. *Id.* at ¶ 3. After collecting some funds from tenants' bank accounts, a dispute arose regarding satisfaction of the underlying

claim and the trial court ordered the garnished money be deposited with the court until further hearing. *Id.* at ¶ 4. The landlord then attempted to dismiss the entire action pursuant to Civ.R. 41(A)(1)(a). *Id.* at ¶ 5.

The landlord argued that no trial in the underlying case had been commenced and therefore the landlord should have been able to dismiss the case at any time. *Id.* at ¶ 8. The Third District Court of Appeals disagreed, holding the landlord was too late to file a Civ.R. 41(A)(1)(a) dismissal. *Id.* “Once default judgment was entered in the underlying case and the order became final, the ‘trial’ for purposes of Civ.R. 41(A) had commenced and the matter had proceeded to verdict and final judgment.” *Id.*

Kahler is indistinguishable for purposes of the procedural question presented herein. Both cases involve the following: (1) a default judgment favorable to plaintiff; (2) the initiation of enforcement of that favorable default judgment (garnishment, foreclosure of real estate); (3) unhappiness with the way the enforcement proceedings transpired; and, (4) the attempted dismissal of the entire action through Civ.R. 41(A) after the entry of judgment had been journalized.

“[W]hatever *** may be said of a default judgment, it is a judgment. It is as good as any other judgment. *It is a final determination of the rights of the parties.*” *GTE Automatic Elec., Inc.*, at 149-150 (Emphasis added); *Wells Fargo Bank v. Messina*, 8th Dist. No. 2011-G-3041, 2012-Ohio-3019. As a “final determination of the rights of the parties,” a default judgment is also a “trial” per R.C.2311.01. See also Black’s Law Dictionary (6th Ed.Rev.1990). Once a default judgment is entered and the order becomes final, “trial” for the purposes of Civ.R. 41(A) has commenced and the matter has proceeded to verdict and final judgment. *Kahler* at ¶8, citing *Lovins v. Kroger* (2002), 150 Ohio App.3d 656, 782 N.E.2d 1171; 1 Ohio Jurisprudence 3d., Action, Limitation of time on right to dismiss, at § 181 (2012).

3. Foreign Authority is Consistent with the Nichpors' Position

To be sure, Ohio's Civ.R. 41(A)(1) allows voluntary dismissals to be taken at a much later stage than its federal counterpart. (Countrywide's Br., 10). But, similar to Ohio jurisprudence, the federal courts find a default judgment amounts to a "judicial or conclusive admission which may be avoided only by setting aside the default. *** [W]here a court has entered judgment on default, [Federal] Rule [of Civil Procedure] 55 states that a court may set aside that judgment only in accordance with the grounds laid out in [Federal] Rule [of Civil Procedure] 60(b)." (citations omitted). *Rice v. Liberty Surplus Ins. Corp.*, 113 Fed.Appx. 116, 122 (6th Cir.2004).

Ohio is one of only thirteen states that have not adopted the Federal Rules concerning voluntary dismissals. Michael Solimine and Amy Lippert, *Deregulating Voluntary Dismissals*, 36 U. Mich. L. Reform 367, 376-77 (2003). Contrary to Countrywide's assertions (Countrywide Br., 17), many states with rules similar to Ohio's Civ.R. 41(A)(1)(a) have held that a party may not unilaterally dismiss an action after a final judgment has been entered. And though not binding, this Court has recognized that a canvass of foreign jurisdictions is acceptable and often times sensible in determining the best approach for Ohio. *Pietro v. Leonetti* (1972), 30 Ohio St.2d 178, 180, 283 N.E.2d 172.

In a case directly on point, a Wisconsin appellate court refused to allow a bank to voluntarily dismiss its foreclosure action after default judgment was taken against the debtors. *Bank One Wisconsin v. Kahl* (2002), 258 Wis.2d 937, 655 N.W.2d 525. In *Kahl*, the mortgagee-bank filed a foreclosure complaint against debtors. *Id.* at ¶ 4. The debtors failed to file a responsive pleading and a default foreclosure judgment was entered against them. *Id.* After realizing there was equity in the real estate, the mortgagee-bank sought to voluntarily dismiss the default judgment entry and pursue a

deficiency judgment against debtors. *Id.* at ¶ 4, 5. In the alternative, the mortgagee-bank, filed a motion for relief from judgment *Id.* at ¶ 6, 7.

The Wisconsin Court held “[w]hile it is true that the [debtors] never filed a responsive pleading, the entry of judgment against the [debtors] precludes application of the [dismissal] statute. [Wisconsin’s dismissal statute] only applies to dismissals, it does not address vacating judgments. Once judgment is entered, there is no ‘action’ to dismiss.” *Id.* at ¶ 10. The Wisconsin court correctly observed that because judgment was entered, the bank should have moved for relief from judgment. *Id.* at ¶ 13 – 15. Unfortunately for the bank, the *Kahl* court also held that the bank was barred from obtaining relief from judgment because its Civ.R. 60(B) motion was filed more than a year had from the date of judgment. *Id.* at ¶ 16. The Wisconsin Rules of Civil Procedure are identical to Ohio’s.

In *Gogri v. Jack In The Box, Inc.* (2008), 166 Cal.App.4th 255, 82 Cal.Rptr.3d 629, the California Supreme Court, for purposes of voluntary dismissal, construed “commencement of trial” to include “determinations on matters of law *** that effectively dispose of the case, such as demurrers and pretrial motions.” *Id.* at 261-262. The Court came to this conclusion despite California Code’s definition of “trial” as commencing “at the beginning of opening statement.” *Id.*

In *Hudson v. City of Chicago*, 228 Ill.2d 462, 471-482, 889 N.E.2d 210 (2008), the Illinois Supreme Court decided that *res judicata* bars a plaintiff from bringing a second cause of action for claims that were voluntarily dismissed after they were brought to final judgment in the prior action. *Id.* at ¶ 471-482. Similarly, in *Gelinas v. Forest River, Inc.*, 931 So.2d 970, 973 (2006 Florida 4th Dist.), a Florida appellate court held that a voluntary dismissal was a nullity after a dispositive judgment was granted and the judgment was not a partial summary judgment, but, rather, addressed the entire complaint. *Id.* at 973.

II. COUNTRYWIDE'S REMAINING PROPOSITIONS OF LAW

In addition to its faulty statutory interpretation, Countrywide presents three misguided propositions of law: (a) Civ.R 60(B) is ill-suited to vacate a favorable judgment; (b) the foreclosure process is unique in that it has two final orders; and (c) a public policy argument for why a bank should be able to voluntarily dismiss a judgment decree.

As mentioned, the crux of this case is whether a party can voluntarily dismiss an action after a judgment entry and decree in foreclosure. The only analysis needed is the statutory construction of Civ.R. 41(A), anything more is mere surplusage. Still, portions of Countrywide's ancillary arguments require a response. For ease of discussion, Countrywide's final three propositions of law will be addressed in reverse order.

A. Countrywide's Public Policy Contention

The dispositive issue before this Court is the interpretation of Civ.R. 41(A)(1)(a). Public policy contentions should be given no consideration. In their discussion of how the foreclosure process is supposed to work, the Nichpors' admittedly allude to public policy. (Nichpors' Br., 25). The Nichpors, however, present public policy in promotion of statutory interpretation, not to formulate policy *per se*. To arrive at any conclusion in consideration of *either* parties' public policy position would not be in line with the basic function of the judicial branch: interpretation of the law. Such outcome-driven discourse, also known as consequentialism, is a task best left to Ohio's duly-elected legislature.

Nevertheless, Countrywide's public policy position goes something like this: Because loan modification agreements are often reached after foreclosure judgments, mortgagees should be allowed to voluntarily dismiss the action after judgment. (Countrywide Br., 39). Yet in the same paragraph, Countrywide exemplifies the difference; "**** these agreements frequently occur ****

before a sheriff's sale occurs." (*Id.*). "The deadline for accomplishing a loan modification is not judgment, but sale." (*Id.*).

Countrywide's argument does not apply for purposes of the instant action because the sheriff's sale had already occurred. Not only that, but all of Countrywide's proffered cases in support of its public policy position are void of any reference to Civ.R. 41(A)(1)(a) and wholly immaterial. (Countrywide Br., 39). Countrywide's public policy position is inapt.

The prohibition of dissolving judgments through Civ.R. 41(A)(1)(a), Countrywide believes, will lead to "more clouds on title," "fewer loan modification agreements," "more foreclosure sales," and "more dispossessed mortgage loan borrowers in Ohio." (Countrywide Br., 40). This is nothing more than a scare tactic. As Countrywide itself discusses in Section II of its Brief, there are multiple ways to dissolve a judgment, including Civ.R. 60(B). (Countrywide Br., 23-25).

Countrywide opines a Civ.R. 41(A) dismissal is preferable to a Civ.R. 60(B) motion because it is "quick, certain, and self-executing, *** unlike the relatively long, expensive, and uncertain process involved in dissolving a decree in foreclosure under Civ.R. 60(B)." (Countrywide Br., 44). Countrywide exaggerates the longevity, expensiveness and uncertainty of a Civ.R. 60(B) motion in apparent support of its position. It is worth mentioning that Countrywide originally filed a Motion to Vacate the Sheriff's Sale in the First Case, but decided to unilaterally dismiss after meeting resistance from undersigned counsel. (Nichpors' Br., at Appx. 39). Nevertheless, it is well-settled that Civ.R. 60(B) motions do not always require a hearing. *Adomeit* at 103. Even if they did, the tediousness of a task should not dictate the commands of our procedural rules.

More damaging to Countrywide's position of proper procedure is that Civ.R. 41(A)(1)(b) allows a dismissal by *stipulation of all parties*. (Emphasis added). If a loan modification was truly discussed and agreed upon by all parties, it would be in the debtor's interest to enter an appearance

(assuming they were in default) and stipulate to a dismissal. This would be as “quick, certain, and self-executing” as the improperly employed Civ.R. 41(A)(1)(a) dismissal. This is also how Civ.R. 41 is supposed to operate, for Civ.R. 41(A)(1)(b) is not restrained by Civ.R. 41(A)(1)(a)’s “commencement of trial” limitation. If a debtor is not locatable, a creditor can still seek a dismissal of a judgment by court order through Civ.R. 41(A)(2) or Civ.R. 60(B), but they both require a party to move the court. The main point is that a party cannot *unilaterally* dissolve a final judgment without first seeking consent of all parties or court approval. If a party can do such a thing, the statutory definition of “final” judgment is misnamed because it has no permanence whatsoever.

Countrywide’s public policy argument assumes two facts not true in the instant action: (1) a sale had not taken place, and (2) the debtors and creditors always agree on a loan modification. Regarding the latter, Countrywide continuously suggests that it was looking out for the Nichpors’ interests. (Countrywide Br., 42, 43). Countrywide even states that the Nichpors submitted a loan modification application. (Id.). Countrywide makes this statement without any reference to the record and without a scintilla of documentary evidence. This is because the statement is false.

The Nichpors were never solicited by Countrywide to enter into a loan modification agreement. The Nichpors think quite poorly of Countrywide precisely because Countrywide did not work with them on a loan modification and was generally unresponsive to over two years of attempted communication. The Nichpors are very upset with the way Countrywide has handled this entire situation and it is an utter misrepresentation that the Nichpors received “another opportunity to defend against the complaint and accomplish a loan modification.” (Countrywide Br., 43).

Heavy in Countrywide’s discourse is concern that the Nichpors’ “include the nonexistent interests of unconfirmed third-party purchasers in every argument contained in their brief.” (Countrywide Br. 43-44). The Nichpors do reference the interests of third party purchasers, but only

to demonstrate how the foreclosure process is supposed to work and that a final judgment cannot be dissolved by Civ.R. 41(A)(1)(a). At stake is not only “the thousands of lenders who could enter into loan modifications after judgment,” but the integrity of Ohio’s Civil Rules and the parameters by which these “thousands of lenders” proceed in future litigation. (Countrywide Br., pp. 41-42).

It is unclear what Countrywide is implying, but there is no question that the Nichpors’ are the real party in interest in this action. First, Countrywide concedes the Nichpors’ statutory right of redemption has not lapsed. R.C. 2329.33. (Countrywide Br., 36). In addition, the Nichpors believe a meritorious argument exists that, should the certified conflict question be answered in the negative, the appellate court below would decide the doctrine of *res judicata* completely bars the Second Case. This would leave Countrywide with an *unenforceable mortgage*.

There is precedence for unenforceable mortgages. In *U.S. Bank National Association v. Gullotta*, 120 Ohio St.3d 399, 2008-Ohio-6268, 899 N.E.2d 987, this Court held that a third foreclosure action, where the previous two were dismissed per Civ.R. 41(A), was barred by the “two dismissal rule” and the doctrine of *res judicata*. ¶ 2, 18-28. In his dissent, Justice O’Donnell worried that “the voluntary dismissal of [mortgagee]’s second action in effect results in an adjudication that [mortgagor] has no further obligation to make payments toward the mortgage and that the bank will not be able to foreclose.” *Id.* ¶ 58. A majority of this current Court had no qualms with that result. *Id.*

Does this result provide the Nichpors with a “windfall,” as described by Countrywide? (Countrywide Br., 42). It does. But Countrywide is hardly a plaintiff deserving sympathy. First of all, Countrywide could have sought redress from its agent that neglected to attend the sheriff’s sale. In addition, the United States filed a \$1 Billion lawsuit this October against Countrywide alleging “brazen mortgage fraud” for its executives selling mortgages with practically no underwriting, widespread falsification, and concealment of the ballooning defaults, while passing such mortgages

along to Fannie Mae and Freddie Mac. *United States v. Countrywide*, Case No. 12 CV 1422 (U.S.D.C. S.D. N.Y). Countrywide's past practices might not be before this Court today, but before this Court is a simple question of civil procedure. The Nichpors may benefit by a favorable ruling from this Court, but Countrywide has acted in direct contravention of the Civil Rules as promulgated by this Court. Vis-à-vis Countrywide and the Nichpors, at least the Nichpors have played by the rules. This Court should refrain from making bad law to obtain what Countrywide perceives to be a "good result."

B. The "Uniqueness" of the Foreclosure Process

Countrywide's third proposition of law correctly states that a foreclosure judgment is a final, appealable order. (Countrywide Br., 33-35). Countrywide also correctly states that a confirmation of sale is a separate final, appealable order. (*Id.*). The Nichpors do not disagree with any of Countrywide's stated purposes of a confirmation entry. (Countrywide Br., 36-37). The Nichpors would redirect the Court's attention to their description of the foreclosure process, illustrating how the confirmation of sale is simply oversight over the enforcement mechanisms of a final foreclosure judgment, akin to a garnishment proceeding after judgment. (Nichpors' Br., 22-25).

"Confirmation involves *only* a determination of whether a sale has been conducted in accord with law," such as public notice requirements, confirmation has no bearing on the amount of damages, existence of liens, nor the order of sale. *Citimortgage, Inc., v. Roznowski*, 5th Dist. No. 2012-CA-93, 2012-Ohio-4901, ¶ 11. If the sale has been conducted in accordance with R.C. 2329.01, *et seq.*, the court *shall* confirm the sale. R.C. 2329.31; *PNMAC Mtge., LLC, v. Sivula*, 8th Dist. No. 98082, 2012-Ohio-4939, ¶ 10 (Citations omitted). And as discussed above, common pleas clerks are all mandated to maintain four books: an appearance docket, trial docket, journal, and a *separate* execution docket. (*Supra*, section I(B), p.7). There is no difference between a foreclosure action and

any other action in which a prevailing party attempts to collect upon its judgment. Though Countrywide suggests otherwise, the fact that there are separate final orders in a foreclosure proceeding is irrelevant.

Countrywide's cited cases regarding the foreclosure process actually bolster the Nichpors' position. Every case cited by Countrywide permits the dismissal of a judgment that was *interlocutory* (not final), whether because the judgment did not dispose of all claims, all parties, or because counter claims still existed. (Countrywide Br., 37-38). The Nichpors' Merit Brief thoroughly discusses the distinction between interlocutory and final judgments. (Nichpors' Br., 5-8). The judgments in the cited cases were not dispositive. This crucial distinction between a dispositive and a non-dispositive judgment is a determinative factor; if a judgment fully disposes of an action, and is an adjudication on the merits, then there is no "action" to dismiss per Civ.R. 41. (*Supra*, 7-8). Countrywide admits that a judgment entry and decree in foreclosure is dispositive. (Countrywide Br., 2).

Countrywide relies upon the sixth appellate decision below, *Countrywide v. Nichpor* (*supra* p. 1), which relied upon *NOIC v. Yarger* (*supra*, p.1), to expound its theory that creditors can employ Civ.R. 41(A)(1)(a) after the entry of a final judgment because of "the unique nature of a foreclosure action." (Countrywide Br., 4, 38). Besides these two cases, Countrywide provides no other support.

The Nichpors' Merit Brief spends a significant amount of time discussing the cases in conflict, including the assertion that *Coates v. Navarro* should be the preferred precedent rather than *NOIC v. Yarger*. (Nichpors' Br., 17-21). As a reminder, the *Coates* court held that a judgment entry and decree in foreclosure cannot be dismissed pursuant to Civ.R. 41(A), it can only be vacated in accordance with Civ.R. 60(B). *Id.* at *5. Though Countrywide tries to create one, there is no stated exception that a final judgment can be voluntarily dismissed because "things are different in a foreclosure." *Yarger* has been fully discredited. (Nichpors' Br., 17-19). Once *Yarger* is determined

undesirable law, the sixth district's decision becomes untenable and the conflict question must be answered in favor of *Coates v. Navarro*.

C. The Appropriateness of Civ.R. 60(B)

Citing *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 423 N.E.2d 1105 (1981), Countrywide informs the Court that Civ.R. 60(B) is not the sole method to obtain relief from a final judgment. (Countrywide Br., 23). *Pitts* examined whether the Civil Rules allow for "Motions for Reconsideration." Noting the conspicuous absence of such a motion, the Court stated "the Rules of Civil Procedure *specifically limit relief from judgments to motions expressly provided for within the same Rules.* *** the Civil Rules *do* allow for relief from final judgments by means of Civ.R. 50(B), Civ. R. 59, and Civ.R. 60(B)." (Emphasis added). Also conspicuously absent is any mention that final judgments can be dissolved by Civ.R. 41.

Civ.R. 60(B) applies to the vacation of all judgments, including cognovits judgments (R.C. 2323.12), default judgments (Civ.R. 55), summary judgments (Civ.R. 56), and, of course, judgment procured by trial. *Adomeit* at 101-102. The only way to vacate a default judgment is through Civ.R. 60(B). See Civ.R. 55(B).

Civ.R. 60(B) may not be the exclusive method for obtaining relief from judgment in all cases, but it was the exclusive method available to Countrywide in the instant action. Civ.R. 55(B). Countrywide could have tried to obtain a dismissal by stipulation (Civ.R. 41(A)(1)(b)), but the Nichpors would have never agreed. And because a third party purchaser was present, the proper vehicle for relief from judgment had to be Civ.R. 60(B). (See cases discussed in Nichpors' Br., 12-13).

Countrywide thinks Civ.R. 60(B) is ill-suited for accommodating unsuccessful litigants. (Countrywide Br., 25). Countrywide has confused unsuitableness for rarity. It is truly an odd scenario

where the party in whose favor a judgment is entered wishes to vacate that judgment. Hence, caselaw is scarce. The Nichpors do not disagree with the standard laid out by this Court in *GTE Automatic Elec.* at 150-51. The Nichpors do, however, assert the plain language of that standard, in conjunction with the plain language of Civ.R. 55(B) and 60(B), make the rule applicable to successful and unsuccessful litigants alike. (Nichpors' Br., 14-16).

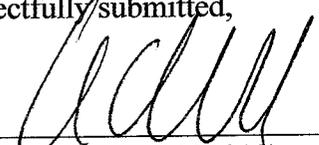
CONCLUSION

The language of Ohio's Rules of Civil Procedure is clear, common sense is clearer. A trial cannot logically occur after the entry of a final dispositive judgment. The judgment entry and decree in foreclosure disposed of any "action" in the First Case, and the execution phase became a mere formality to protect the interests of the *debtor*. (Nichpors' Br., 22-25). When read in totality, the Rules of Civil Procedure do not allow a plaintiff to unilaterally obtain a second bite of the apple simply because execution of their judgment went awry.

The purpose of the Rules of Civil Procedure is "to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice." Civ.R. 1(B). Countrywide's facilitation of Civ.R. 41(A) results in delay, unnecessary expense, hinders efficient administration of justice, encourages abuse, subjects defendants to duplicitous litigation, and violates any sense of fair play. In sum, it directly contradicts the stated purposes of Civ.R. 1(B). More troubling, Countrywide's tactics completely undermine the sanctity of a court's judgment and journal entries.

Based on the foregoing, the certified question should be answered in the negative.

Respectfully submitted,



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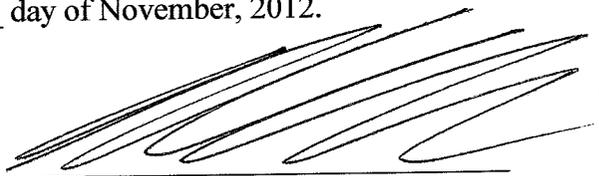
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Merit Brief was served by ordinary U.S. Mail, postage prepaid, upon Matthew J. Richardson, Esq., Counsel for Appellee, at P.O. Box 165028, Columbus, Ohio 43216 this 1st day of November, 2012.



An Attorney for Appellants