

ORIGINAL

IN THE SUPREME COURT OF OHIO

CITIMORTGAGE, INC.,  
successor by merger to  
ABN AMRO Mortgage Group, Inc.,

Appellant,

v.

JAMES A. ROZNOWSKI, et al.,

Appellees.

Case No. 2012-2110

On Appeal from the Stark County  
Court of Appeals, Fifth Appellate District  
Court of Appeals Case No. 2012 CV 00093

MERIT BRIEF OF APPELLANT  
CITIMORTGAGE, INC.

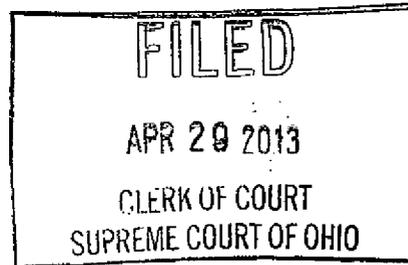
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## **QUESTIONS CERTIFIED BY OHIO SUPREME COURT**

1. Whether a judgment decree in foreclosure is a final appealable order if it includes as part of the recoverable damages amounts advanced by the mortgagee for inspections, appraisals, property protection and maintenance, but does not include specific itemization of those amounts in the judgment.
2. Whether a mortgagor that contests amounts expended by a mortgagee for inspections, appraisals, property protection and maintenance can challenge those amounts as part of the proceedings to confirm the foreclosure sale, and appeal any adverse ruling in an appeal of the order of confirmation.

## INTRODUCTION

The two certified questions before this Court present important issues relating to foreclosure judgments. For at least 50 years, Ohio courts have recognized that judgment decrees in foreclosure that award a money judgment, decide lien priority, and order a sale of the property satisfy all the requirements of R.C. 2505.02(B)(1), and therefore constitute final appealable orders. For the first time, an Ohio court of appeal has held that a judgment decree in foreclosure is not final if it fails to itemize costs for inspections, appraisals, property protection and maintenance, and instead defers those amounts until the court confirms the foreclosure sale. But omitting these ancillary costs for property-related expenses, whose calculation is merely mechanical and ministerial and requires no judicial action, does not disturb the finality of that judgment. In fact, these costs routinely change between the time the judgment decree in foreclosure is entered and the time of the sale, sometimes do not occur at all, and cannot be accurately listed at the time of the foreclosure judgment in any event. Requiring premature itemization of these costs only promotes inaccuracy and efficiency, and unnecessary appeals. The best time to list them, to ensure they are up-to-date and accurate, and to deal with any disputes over them, including appeals, is when the foreclosure sale is confirmed. Nothing in the statute governing foreclosure sales precludes an appeal of these costs at confirmation, and allowing an appeal protects borrowers and mortgagors alike.

This Court should declare that a judgment decree in foreclosure need not itemize these costs, and adopt the sensible approach adopted by the majority of the courts of appeal, which allows for itemization of all costs at confirmation. The Court should further declare that any dispute over the costs can be appealed as part of the order of confirmation. Accordingly, this Court should answer “yes” to both certified questions.

## STATEMENT OF THE CASE AND FACTS

This case arises out of a foreclosure action filed by Appellant CitiMortgage, Inc. ("CitiMortgage"). Appellees James and Steffanie Roznowski ("Appellees") purchased a home in 2003. Appellees borrowed \$135,350.00 from CitiMortgage's predecessor in interest, ABN AMRO Mortgage Group, Inc. ("ABN AMRO") to complete the purchase. (Supp. 39). Appellants agreed to repay the loan in a note they signed on May 6, 2003 ("Note"). (Supp. 19, 39, 42-44). Appellees' repayment obligation under the Note was secured by a mortgage in favor of ABN AMRO, which Appellees also signed on May 6, 2003 ("Mortgage"). (Supp. 19, 39-40, 45-50). ABN AMRO was the holder of the Note and the mortgagee of the Mortgage until its merger with CitiMortgage on or about September 1, 2007. (Supp. 40, 51-55). Since then, CitiMortgage has been the holder of the Note and mortgagee of the Mortgage by operation of law as a result of the merger, as well as by the in-blank endorsement on the Note and the Assignment of Mortgage executed on July 8, 2008, which was recorded in the public record. (Supp. 19, 40, 42-44, 51-58).

Appellees did not make all of the payments required of them under the Note and Mortgage, and are in default. (Supp. 40-41). Appellees' loan is due for the September 1, 2007 payment. (Supp. 40). As a result of Appellants' default, CitiMortgage exercised its rights under paragraph 7 of the Note and paragraph 9 of the Mortgage, and accelerated and called due the entire principal balance due on the Note. (Supp. 40).

CitiMortgage filed a foreclosure action against Appellees on February 19, 2008. (Supp. 1-17). Appellees answered the Foreclosure Complaint and filed a Counterclaim against CitiMortgage and a Third-Party Complaint against ABN AMRO. (Supp. 18-25). After

extensive efforts at mediating a resolution failed, the mediator returned the case to the active docket on December 9, 2010. (Supp. 26).

On January 10, 2011, CitiMortgage and ABN AMRO timely moved for summary judgment on the foreclosure Complaint, and on Appellants' Counterclaim and Third-Party Complaint. (Supp. 27-62).

Appellees filed their opposition on March 25, 2011. (Supp. 63-70). In their response, Appellees did not dispute they were in default on the Note and Mortgage and did not dispute the amounts owed or the evidence used to establish the amounts owed. *Id.*

On April 20, 2011, the trial court entered a judgment granting CitiMortgage and ABN AMRO's Motion for Summary Judgment. (Supp. 71-72; Appx. A-031-032). The Judgment Entry called for Citimortgage to submit a Judgment Entry and Decree in Foreclosure. The Judgment Entry stated that it was a final appealable order and that there was no just cause for delay. *Id.* Appellees appealed the April 20, 2011 Judgment Entry before the trial court entered the contemplated Judgment Entry and Decree in Foreclosure.

The Fifth District Court of Appeals dismissed the appeal, finding the Judgment Entry granting summary judgment was not a final appealable order (Supp. 73-81; Appx. A-034-043). The Fifth District noted that the April 20, 2011 Judgment Entry directed CitiMortgage to submit a judgment entry determining the case, but no judgment entry had been entered by the court. (Supp. 80; Appx. A-042). The Fifth District held the April 20, 2011 Judgment Entry was not a final appealable order, despite the Rule 54(B) language, because "it did not set forth the balance due on the mortgage . . ." or otherwise refer to documents in the record that did. (Supp. 80-81; Appx. A-042-043).

After the Fifth District remanded the case to the trial court, CitiMortgage submitted a Judgment Entry Sustaining Plaintiff's Motion for Summary Judgment and Decree in Foreclosure, which entered judgment on the Note in favor of CitiMortgage, found CitiMortgage's mortgage to be a valid and enforceable first lien, subject only to real estate taxes, and ordered foreclosure of the mortgages and sale of the property. (Supp. 82-83; Appx. A-045-046). The Court journalized the Judgment Entry Sustaining Plaintiff's Motion for Summary Judgment and Decree in Foreclosure on February 1, 2012. *Id.* The February 1, 2012 Judgment Entry awarded judgment in the amount of \$126,849.04, plus interest at the rates and amounts stated,

plus costs of this action, those sums advanced by plaintiff for costs of evidence of title required to bring this action, for payment of taxes, insurance premiums and expenses incurred for property inspections, appraisal, preservation and maintenance for which amount judgment is awarded in favor of plaintiff and against defendant(s) James A. Roznowski and Steffanie M. Roznowski.

*Id.* The Judgment Entry also noted there was no just reason for delay. *Id.*

Appellees again appealed to the Fifth District Court of Appeals. In the second appeal, Appellees argued, among other things, that the Judgment Entry and Decree in Foreclosure was also not a final appealable order because it did not include specific amounts for fees, costs and advances. The Fifth District Court of Appeals again dismissed the second appeal, finding it was not a final appealable order because the expenses incurred by CitiMortgage for inspections, appraisals, preservation and maintenance were not included in the Judgment Decree in Foreclosure and that these amounts could not be determined and challenged at confirmation of the sheriff's sale. (Supp. 86-92; Appx. A-050-057). CitiMortgage moved to certify a conflict with the Seventh District Court of Appeals in *LaSalle Bank National Association v. Smith*, 7th Dist. No. 11 MA 85, 2012-Ohio-4040, which held that a judgment was final and appealable even though the judgment did not itemize the amounts advanced for property protection, and left them

for determination at a later date and that these issues could be addressed at confirmation. (Supp. 108-119). CitiMortgage also moved for reconsideration of the opinion. (Supp. 93-107). The Fifth District Court of Appeals granted the Motion to Certify a Conflict and denied the Motion to Reconsider. (Supp. 120-124). The order granting the Motion to Certify a Conflict certified two questions to this Court. This Court accepted both for consideration.

### ARGUMENT

The Court certified two separate but related questions for review: whether a judgment decree in foreclosure is a final appealable order if it includes as a part of the recoverable damages the amounts advanced for inspections, appraisals, property protection and maintenance, but does not include a specific itemization of those amounts in the judgment; and whether a mortgagor may contest the amounts expended by a mortgagee for inspections, appraisals, property protection and maintenance as part of the proceedings to confirm the foreclosure sale, and appeal any adverse ruling in an appeal of the order of confirmation. The answer to both certified questions is “yes,” based on well-established Ohio law and sound policy.

**I. CitiMortgage, Inc.’s Proposition of Law No. 1 -- A Judgment Decree in Foreclosure is a Final Appealable Order if it Includes as a Part of The Recoverable Damages The Amounts Advanced For Inspections, Appraisals, Property Protection and Maintenance, But Does Not Include a Specific Itemization of Those Amounts in The Judgment.**

The Fifth District’s ruling below held that a judgment decree in foreclosure that granted a money judgment, decided lien priority, and ordered a sale was *not* a final appealable order. The Fifth District decision in this case, *CitiMortgage, Inc. v. Roznowski*, 5th Dist. No. 2012-CA-93, 2012-Ohio-4901, is in direct conflict with several decisions by other courts of appeal in this state, including the decision in *LaSalle Bank N.A. v. Smith*, 7th Dist. No. 11 MA 85, 2012-Ohio-4040. This is not surprising, because the Fifth District’s decision is also contrary to prior

decisions by this Court and 50 years of Ohio jurisprudence. This Court should reverse the Fifth District's ruling that a judgment decree in foreclosure is not final and appealable unless it specifically itemizes the amounts incurred for property inspections, appraisals, protection and maintenance. This Court should clarify that a judgment decree in foreclosure is final and appealable as long as it enters judgment for those amounts generally, whether itemized or not.

**A. The Judgment Entry Met The Requirements of R.C. 2502.02 Because It Awarded a Money Judgment, Decided Lien Priority, and Ordered a Sale of The Property**

Section 2505.02(B) of the Ohio Revised Code defines when an order is a final order subject to review, affirmance, modification, or reversal. An order is a final order if it "affects a substantial right in an action that in effect determines the action and prevents a judgment." R.C. 2505.02(B)(1). This Court confirmed the test for determining whether an order is final and appealable: "Under R.C. 2502.02, an order is final and appealable if it satisfies each of these three criteria: (1) it affects a substantial right; (2) it in effect determines the action; and (3) it prevents a judgment." *City of Cleveland v. Trzebuckowski*, 85 Ohio St. 3d 524, 526, 709 N.E.2d 1148 (1999), quoting *State ex rel. Hughes v. Celeste*, 67 Ohio St. 3d 429, 430, 619 N.E.2d 412, 414 (1993), citing *Bellaire City Schools Bd. of Edn. v. Paxton*, 59 Ohio St. 2d 65, 391 N.E.2d 1021 (1979).

The trial court's February 1, 2012 Judgment Entry Sustaining Plaintiff's Motion for Summary Judgment and Decree in Foreclosure in this case fully satisfied the criteria of a final appealable order. The judgment expressly declared that CitiMortgage was due the unpaid principal sum of \$126,894.04 plus interest, determined that CitiMortgage's mortgage was the first and best lien on the property with the exception of real estate taxes, and ordered a foreclosure sale. The judgment entry further ordered payment of the proceeds as stated in the

Judgment Entry and in any subsequent order of the court. *See* Appx. A-045-046. The Judgment Entry also awarded to CitiMortgage as part of the judgment the costs of the action, plus sums advanced for the costs of title work, payment of taxes, insurance premiums, and expenses incurred for property inspections, appraisal, preservation and maintenance. The Judgment Entry included the standard Rule 54(B) “no just reason for delay” language as well. The Judgment Entry was a final appealable order.

### **1. The Judgment Entry “Affects A Substantial Right”**

The February 1, 2012 Judgment Entry affected a substantial right of the Appellees. A “substantial right” is “a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.” R.C. 2505.02(A)(1); *see also Trzebuckowski*, 85 Ohio St. 3d at 526, 709 N.E.2d at 1150, quoting *Celeste*, 67 Ohio St. 3d 429, 430, 619 N.E.2d 412, 414 (1993), citing *Noble v. Colwell*, 44 Ohio St. 3d 92, 94, 540 N.E.2d 1381, 1383 (1989).

The common law provides a right to contract that lenders and borrowers can protect and enforce. The Judgment Entry granted Citimortgage a money judgment on the Note, which Appellees were obligated to pay. Thus, the judgment decided the contract claims in the Complaint against the Appellees. The Judgment Entry also decided the statutory claims in the Counterclaim against the Appellees. The Judgment Entry also determined that Citimortgage was entitled to foreclosure of its mortgage. The common law provides a right to foreclosure of mortgages to satisfy debts that can also be protected and enforced. This Judgment Entry had the effect of divesting Appellees of their ownership interest in the real property, and of their common law right of redemption, subject to their statutory right of redemption. Thus, the Judgment Entry affected substantial rights possessed by Appellees.

## 2. The Judgment Entry “Prevents A Judgment”

The February 1, 2012 Judgment Entry also prevented a judgment. This Court in *Trzebuckowski* held that an order prevents a judgment when it is journalized, because the act of journalization cuts off a court’s power to unilaterally vacate its own judgment and set the case for trial. *Trzebuckowski*, 85 Ohio St. 3d at 526, 709 N.E.2d 1148. The Judgment Entry in this case was journalized on February 1, 2012. Thus, the Judgment Entry prevented any further judgment at that time.

## 3. The Judgment Entry “Determined The Action”

The February 1, 2012 Judgment Entry also determined the action. Typically, an order determines the action when it resolves all the issues in the case and no issues remain for judicial resolution. “For an order to determine the action and prevent a judgment for the party appealing, it must dispose of the whole merits of the cause or some separate and distinct branch thereof and leave nothing for the determination of the court.” *Nat’l City Commer. Capital Corp. v. AAAA at Your Serv., Inc.*, 114 Ohio St. 3d 82, 2007-Ohio-2942, 868 N.E.2d 663, ¶ 7 (2007), quoting *Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities v. Professionals Guild of Ohio*, 46 Ohio St. 3d 147, 153, 545 N.E.2d 1260 (1989), citing *State ex rel. Downs v. Panioto*, 107 Ohio St. 3d 347, 2006-Ohio-8, 839 N.E.2d 911, ¶ 20. “A judgment that leaves issues unresolved and contemplates that further action must be taken is not a final appealable order.” *State ex rel. Keith v. McMonagle*, 103 Ohio St. 3d 430, 2004-Ohio-5580, 816 N.E.2d 597, ¶ 4, quoting *Bell v. Horton*, 142 Ohio App.3d 694, 696, 2001-Ohio-2593, 756 N.E.2d 1241 (4th Dist. 2001). The key inquiry is whether a court issuing the order or judgment contemplates further action on the issues settled by the judgment or order. *Panioto*, 107 Ohio St. 3d 347, 2006-

Ohio-8, 839 N.E.2d 911, ¶ 23. No further action was contemplated by the trial court in connection with the Judgment Entry in this case.

**a. This Court's Decision in *Queen City and Its Progeny Controls***

This Court, in *Queen City Sav. & Loan Co. v. Foley*, 170 Ohio St. 383, 165 N.E.2d 633 (1960), addressed the issue whether a judgment decree in foreclosure that granted a money judgment, decided lien priority, and ordered a sale to occur later satisfied all the requirements of R.C. 2505.02(B)(1), and thus was a final order subject to appeal. In *Queen City*, the mortgagee, Queen City Savings & Loan, filed a foreclosure action when its borrowers, the Foleys, defaulted on their mortgage loan. Hyde Park Lumber had a mechanics lien on the Foleys' property that preexisted Queen City's mortgage. Hyde Park was named as a defendant in the complaint but failed to timely answer and assert its lien. The trial court subsequently journalized a judgment decree in foreclosure, entering judgment against the Foleys and Hyde Park, declaring that Queen City's mortgage was first and best and ordering a sale. After the trial court journalized the judgment, Hyde Park filed an answer and cross-claim setting up its mechanics lien. A subsequent journalized order allowed Hyde Park leave to file its pleading but maintained the priority of Queen City's mortgage over Hyde Park's mechanics lien. Hyde Park appealed from this subsequent order.

The issue before the Ohio Supreme Court was whether Hyde Park's appeal from the subsequent order was proper. The resolution of this issue depended on whether the earlier judgment was final and appealable. The Court noted that the issue was one of first impression, as no prior decision had addressed "precisely the type of judgment with which we are here concerned." *Id.* at 386. Nevertheless, the Court unequivocally held that "[i]n a mortgage foreclosure action, a journalized order determining that the mortgage constitutes the first and best

lien upon the subject real estate is a judgment or final order from which an appeal may be perfected.” *Id.* at paragraph one of the syllabus. Thus, the Court lacked jurisdiction over Hyde Park’s appeal.

Although not specifically spelled out in the decision, the main issue in *Queen City* was whether the earlier judgment had sufficiently determined the action to make it final and appealable. The issue arose because the earlier judgment contemplated a future sale of the property in aid of execution, and a confirmation proceeding overseen by the trial court, but Hyde Park appealed before either of these events had occurred. The statutory right of redemption has been a mainstay of Ohio foreclosure law since 1853. *See Wells Fargo Bank, N.A. v. Young*, 2d Dist. No. 2009 CA 12, 2011-Ohio-122, ¶¶ 21-26 (discussing historical background of equitable and statutory rights of redemption). Thus, the *Queen City* Court was well aware of the statutory right of redemption and the sale and confirmation process that follows the entry of a foreclosure judgment. Hyde Park raised, and the Court considered, whether these further proceedings (sale and subsequent confirmation) made the judgment nonfinal because the judgment did not determine the action.

The *Queen City* Court held that the foreclosure judgment did determine the action. The Court relied on several prior cases finding orders final and appealable even though further order or action by the trial court was contemplated. The Court cited *State ex rel. K-W Ignition Co. v. Meals*, where the trial court had issued an order that decided the equities of the case in favor of the plaintiff and granted an injunction, but also ordered an accounting and appointed a receiver to determine amounts due. *Queen City*, 170 Ohio St. at 386, 165 N.E.2d 633, quoting *State ex rel. K-W Ignition Co. v. Meals*, 93 Ohio St. 391, 113 N.E. 258 (1916). The *Meals* court held the order was final and appealable, because “while the further order of the court was necessary to

carry into effect the right settled by the order, it was merely auxiliary to or in execution of the order of the court made on the merits of the case....” (Emphasis deleted.) *Meals*, 93 Ohio St. 391, 395, 113 N.E. 258 (1916). Similarly, *Queen City* cited *Shuster v. North American Mortg. Loan Co.*, which involved an action for breach of trust and accounting arising out of the liquidation of a trust company. The court noted that “a decree, finding the general equities in favor of a party and ordering an accounting, is a final order from which an appeal may be perfected, although a further provision is included to carry into effect the rights settled.” *Queen City*, 170 Ohio St. at 387, 165 N.E.2d 633, quoting *Shuster v. North American Mortg. Loan Co.*, 139 Ohio St. 315, 329-30, 40 N.E.2d 130 (1942). *Queen City* also cited a case of “similar philosophy” which held that a self-described “temporary order” of the Probate Court was nonetheless final where it determined liability for and the amount of succession taxes even though actual liability for the taxes was “subject to future contingencies.” *Id.* at 387, citing *In re Estate of Friedman*, 154 Ohio St. 1, 93 N. E.2d 273 (1950).

Based on “the clear authority” of these cases, the *Queen City* Court concluded “without hesitation” that “the judgment of the Court of Common Pleas in this mortgage foreclosure action determining that the mortgage constituted the first and best lien upon the subject real estate was an order from which an appeal could have been perfected.” *Id.* at 387. The Court’s conclusion in *Queen City* that a foreclosure judgment is a final and appealable order necessarily recognized that a sale still had to occur and the trial court still had to confirm it in order to preserve the statutory right of redemption. The fact that additional orders of the trial court might be necessary to carry out the judgment did not affect its finality, as long as the additional orders were auxiliary to or in execution of court’s original order.

*Queen City* remains the seminal decision on the finality and appealability of foreclosure judgments, and has been followed faithfully for over 50 years. Thus, a judgment in a foreclosure action that enters a money judgment against the borrowers, declares the priority of the liens, and orders a foreclosure sale to occur in the future, is a final appealable order. See *Oberlin Sav. Bank Co. v. Fairchild*, 175 Ohio St. 311, 312, 194 N.E.2d 580 (1963) (following *Queen City* and holding the entry “ordering a foreclosure sale and finding the amounts due the various claimants is [a] final order”); *Third Nat’l Bank v. Speakman*, 18 Ohio St. 3d 119, 120, 480 N.E.2d 411 (1985) (same). A recent decision from the Fourth District addressing a judgment of foreclosure summed up Ohio law on this point: “The judgment appealed here clearly contemplated further proceedings, including a sale of the secured premises and distribution of proceeds. Although such actions seem counterintuitive to the notion of finality, Ohio law has always held that a judgment ordering sale of mortgaged land is a final appealable order in a foreclosure case.” *Century Nat’l Bank v. Hines*, 4th Dist. No. 11CA28, 2012-Ohio-4041, ¶¶ 4-5, fn.1, citing *Speakman*, 18 Ohio St.3d 119, 120, 480 N.E.2d 411(1985); *Oberlin*, 175 Ohio St. 311, 312, 194 N.E.2d 580 (1963); *Queen City*, 170 Ohio St. 383, 165 N.E.2d 633 (1960). The judgment entry below was thus final and appealable.

**b. The Majority of the Courts of Appeal Agree That a Judgment Decree In Foreclosure Is Final Without Itemizing Amounts Advanced for Property Inspections, Appraisals, Protection and Maintenance**

Until the Fifth District decision below, every Ohio Court of Appeals that has addressed the issue has held that a judgment decree in foreclosure constitutes a final appealable order, even where amounts advanced for taxes, insurance premiums, property inspections, appraisal, and property preservation and maintenance are not itemized. For example, in *LaSalle Bank N.A. v. Smith*, 7th Dist. No. 11 MA 85, 2012-Ohio-4040, the appellants argued the judgment was not

final because the judgment did not determine all the amounts due and left that determination for a later date. *Id.* at ¶ 17. The only sums omitted from the judgment were costs that were not ascertainable when the judgment was entered, including taxes, insurance and property preservation. The trial court's statement that it would make a finding as to these amounts at confirmation did "not render the judgment nonfinal." *Id.* at ¶ 18. The Seventh District thus held the judgment decree in foreclosure was final and appealable.

In *Wells Fargo Fin. Ohio 1 Mortg. Group v. Lieb*, 2d. Dist. No. 23688, 2011-Ohio-1988, the Second District affirmed as final and appealable a judgment entry that stated the unpaid principal balance of \$331,723.24, along with general "court costs, advances, and other charges as permitted by law." See *Wells Fargo Fin. Ohio 1 Mortg. Group v. Lieb*, Montgomery County C.P. No. 2007CV02175, (09/08/2009) Final Judgment Entry and Foreclosure Decree at 2 (available through the online docket at <http://www.clerk.co.montgomery.oh.us/pro/>). In affirming the judgment entry as a final appealable order, the court cited *Speakman*, *Oberlin*, and *Queen City* for the general rule that "foreclosure orders that find the amounts due to claimants are final, appealable orders." (Quotations and citations omitted.) *Lieb*, 2d. Dist. No. 23688, 2011-Ohio-1988, ¶ 14; see also *GMAC Mortgage, LLC v. Herring*, 189 Ohio App.3d 200, 2010-Ohio-3650, 937 N.E.2d 1077 (2d Dist.) (affirming judgment in the amount of \$111,114.21, plus non-itemized interest, late charges, advances, costs, and expenses).

The Eighth District, in *Huntington Nat'l Bank v. Shanker*, 8th Dist No. 72707, 1998 Ohio App. LEXIS 2287 (May 21, 1998), likewise affirmed as final and appealable a judgment entry that specified the unpaid principal owed, determined the priority of the mortgage, and found that "Huntington could advance funds for the payment of real estate taxes, hazard insurance premiums or for protection of the subject property, the total amount which would be

ascertainable at the time of the sheriff's sale." *Id.* at \*\*1-2. *See also Parkview Fed. Sav. Bank v. Grimm*, 8th Dist. No. 93899, 2010-Ohio-5005, ¶ 60 (judgment was "clearly ascertainable and not vague when it stated the principal amount due, the applicable interest rate, and the exact date from which the interest was to be calculated").

In *BAC Home Loans Servicing, L.P. v. Ferguson*, 10th Dist. No. 12AP-350, 2012-Ohio-5670, ¶ 10, the Tenth District held that a judgment decree in foreclosure was not subject to reconsideration because it constituted a final appealable order. The judgment entry at issue determined the lien priority, identified the unpaid principal balance owed, and awarded "advance sums for taxes, insurance, and property protection. . . . [but] makes no finding as to the amounts of the advances and continues same until the confirmation of the sale." *BAC Home Loans Servicing, L.P. v. Ferguson*, Franklin County C.P. No. 10CV002897, (03/20/2012) Judgment Entry at 3 (available through the online docket at <http://fcdcfjs.co.franklin.oh.us/CaseInformationOnline/>); *see also Whipples v. Ryan*, 10th Dist. Nos. 07AP-231 and 07AP-232, 2008-Ohio-1216, ¶ 19 (affirming a judgment decree in foreclosure as final and appealable because "it resolve[d] all issues involved in the foreclosure, such as the liens that must be marshaled, the priority of those liens, and the amounts due the claimants," even though it also awarded "interest and any sums advanced," which were not itemized. *Id.* at ¶¶ 15, 19.

The Twelfth District, in *First Horizon Home Loans v. Sims*, 12th Dist. No. CA2009-08-117, 2010-Ohio-847, ¶ 25, affirmed as final and appealable a judgment decree in foreclosure that "did not include amounts for the additional allowances for late fees, advances made on appellants' behalf, or costs and expenses incurred for the enforcement of the note and mortgage." *Id.* at ¶ 25; *see also Wash. Mut. Bank, FA v. Wallace*, 194 Ohio App. 3d 549, 2011-Ohio-4174, 957 N.E.2d 92, ¶ 3 (12th Dist.), *rev'd on other grounds, Wash. Mut. Bank, F.A. v. Wallace*, 134

Ohio St. 3d 359, 2012-Ohio-5495; 982 N.E.2d 691 (2012) (affirming as final order judgment entered in the amount of “\$60,114.11, plus interest of 9.5 per cent per annum from March, 2008, ‘together with advances for taxes, insurance, and otherwise expended [sic], plus costs’”); *Third Fed. S&L Ass'n of Cleveland v. Farno*, 12th Dist. No. CA2012-04-028, 2012-Ohio-5245, ¶ 14 (citing *Wallace*, stating judgment not vague, and noting the Defendant “acknowledged that this court had previously found no problems with such judgment entries because those sums advanced are continuously accruing through the date of the sheriff’s sale”).

These decisions are all consistent with *Queen City* and its progeny. They recognize the long and uniform history of Ohio courts holding that judgment decrees in foreclosure are final appealable orders, despite not listing out all costs, fees, and advances that may occur until the court later confirms the sheriff’s sale. This Court should declare that the approach taken by the majority of appellate districts is the law in Ohio.

**B. Requiring Itemization of Advances For Property Inspections, Appraisals, Preservation and Maintenance Is Unwarranted and Unworkable**

**1. The Redemption Amount is Easily Ascertainable And the Right to Redeem Is Not Jeopardized If Certain Property-Related Expenses Are Not Itemized the Judgment Decree**

The Fifth District’s decision appears to be driven in part by a concern about the mortgagor’s statutory right to redeem. The Fifth District held that “[i]n order to exercise their right of redemption, appellants must know the amount of money they must produce,” and that “[n]othing in the record gives appellants or this court notice of the amount.” *CitiMortgage, Inc. v. Roznowski*, 5th Dist. No. 2012-CA-93, 2012-Ohio-4901, ¶ 9; Appx. A-056. But the Fifth District’s approach is a solution in search of a problem, and the price of this unnecessary “protection” is a foreclosure procedure that is unwarranted and unworkable.

First, the Eighth and Twelfth Districts have expressly rejected the proposition that not itemizing amounts advanced in the judgment decree in mortgage foreclosure impairs a borrower's right to redemption. In *Shanker*, the Eighth District rejected the argument that the redemption amount could not be determined, holding that "the entire record demonstrates that the sum as entered in the decree and judgment was valid and clearly ascertainable" because the decision and decree "contained the principal balance due, along with the applicable interest, interest rate, and the exact date from which the interest was to begin. The potential additional allowances given . . . to protect [the mortgagee's] interest in the subject property, are easily discoverable by appellants." *Shanker*, 8th Dist No. 72707, 1998 Ohio App. LEXIS 2287, \*5. The Twelfth District in *Wallace* rejected a similar argument by the borrower that the judgment was "void for vagueness" because the "advances for taxes, insurance, and otherwise" were not itemized and her right of redemption was impaired. *Wallace*, 194 Ohio App. 3d 549, 2011-Ohio-4174; 957 N.E.2d 92, ¶¶ 45, 48-49.

The Fifth District acknowledged that prior Ohio cases have held that judgments do not need to state a definite amount required for redemption as long as the redemption value is "ascertainable through normal diligence." *Roznowski*, 5th Dist. No. 2012-CA-93, 2012-Ohio-4901, ¶ 7; Appx. A-054-055. In addition, the Fifth District acknowledged that other Ohio courts have held that requiring the mortgagee to specify the total amount due for additional charges is impractical because some of those charges continue to accrue through the date of the sheriff's sale. *Id.* Nevertheless, the Fifth District, concluded that the computation of the dollar amount for the expenses of property inspection, appraisal, protection and maintenance are not easily ascertainable.

The redemption amount is ascertainable through normal diligence. The way to ascertain the amount required to redeem, i.e. the amount of the judgment, is simple and straightforward: ask the mortgagee. The redemption amount is constantly changing, due mainly to the accrual of interest. The amount may also change due to the costs of insurance, inspections, appraisals, property protection and maintenance, as these costs are routinely incurred after the judgment decree in foreclosure. Whether they accrue or not, however, the mortgagee knows what the amount is at any given time, and the amount is easily ascertainable by simply asking the mortgagee.

Moreover, the costs incurred for property-related inspections, appraisals, protection and maintenance are akin to court costs. This Court has held that “failing to specify the amount of costs assessed in a sentencing entry does not defeat the finality of the sentencing entry as to costs.” *State v. Threatt*, 108 Ohio St. 3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 21 (2006). In *Threatt*, the Court noted that a trial court’s authority to tax costs to a convicted criminal defendant derived from statute, so “the only issue to be resolved is the calculation of those costs and creation of the bill.” *Id.* Since calculating the bill is merely a ministerial task, no further judicial action is required; the clerk simply supplies the amount of costs that the defendant must pay.

The property inspection, appraisal, protection and maintenance costs are no different. These costs are recoverable by agreement of the parties in the mortgage itself. The only issue is their amount, and they are simply calculated by the mortgagee, based on its records, and added to the distribution amounts at confirmation. This process is precisely like the calculation of taxes, court costs, and insurance premiums, which the Fifth District concedes are ministerial and mechanical, and ascertainable through normal diligence. *Roznowski*, 5th Dist. No. 2012-CA-93,

2012-Ohio-4901, ¶ 9; Appx. A-055-056. The Fifth District fails to articulate a viable distinction between the calculation of taxes (maintained by the appropriate county agency), court costs (maintained by the clerk), and insurance premiums (maintained by the mortgagee), which the Fifth District agrees are mechanical, ministerial, and easily ascertainable, and property inspection, appraisal, protection and maintenance costs (also maintained by the mortgagee), which the Fifth District says are not.

Even if the Fifth District approach is adopted, and the amounts advanced at the time the judgment decree is entered must be included in the actual foreclosure judgment, a borrower would still have to contact the mortgagee to find out whether any additional advances had been made and what the current redemption amount was. As the court in *Sims* noted, these amounts presumably would be stated in an affidavit supporting summary judgment, and would likely be out of date by the time the court entered the judgment. *See Sims*, 12th Dist. No. CA2009-08-117, 2010-Ohio-847, ¶ 25. This in itself demonstrates the unworkable nature of the Fifth District's decision. This Court should hold that a borrower's right to redemption is still preserved even when amounts advanced for inspections, appraisals, property protection and maintenance are not itemized in the judgment decree in mortgage foreclosure.

The cases cited by the Fifth District do not compel a different result. The Fifth District's main authority is a block quote from *CitiMortgage, Inc. v. Arnold*, 9th Dist. No. 25186, 2011-Ohio-1350, ¶ 7. *Arnold* involved a judgment that was not final because it determined only liability, and not damages. In *Arnold*, there were two mortgagees, and the judgment decided the priority of the liens but stated the judgment amount for the lower priority lien only. *Id.* at ¶ 8. The judgment thus did not determine the amounts due to all claimants, and deciding the principal amount due was more than a ministerial task, so the judgment was not final. *Id.* at ¶ 9. Notably,

the *Arnold* court did *not* question the language in the trial court's judgment entry awarding, in addition to the stated amount of unpaid principal, "advances for taxes, insurance, and amounts otherwise expended, plus costs." See *CitiMortgage, Inc. v. Arnold*, Summit County C.P. No. CV-2006-05-2785, (12/14/2009) Judgment Entry at 8 (available through the online docket at <http://www.cpclerk.co.summit.oh.us/SelectDivision.asp>).

*Arnold* in turn cited *Walburn v. Dunlap*, 121 Ohio St. 3d 373, 2009-Ohio-1221, 904 N.E.2d 863 (2009), and *State ex rel. White v. Cuyahoga Metro. Hous. Auth.*, 79 Ohio St. 3d 543, 1997-Ohio-366, 684 N.E.2d 72 545 (1997). But these cases also concerned judgments that only decided liability and omitted damages amounts altogether. In *Walburn*, this Court held that "an order that declares that an insured is entitled to coverage but does not address damages is not a final order as defined in R.C. 2505.02(B)(2)." *Walburn* at ¶ 4. Likewise, in *White*, the judgment held an employer liable for prior service vacation credit to its employees, but "did not specify an amount of damages." *Id.* at 545. This Court further held that more than a "ministerial task" remained to determine the damages, because the judgment entry itself "envision[ed] the possibility of disputes concerning alleged class members' individual claims by providing a dispute resolution procedure and appointing a commissioner," and the court had "not yet considered evidence regarding [the employer's] vacation policies." *White* at 546. The Court was concerned that additional judicial decision making was still required.

No similar judicial determinations are necessary after entry of a foreclosure judgment. In fact, as *White* recognized, and the Fifth District acknowledged, when any remaining tasks are "ministerial" or "mechanical," such as executing a judgment or assessing costs, a judgment that otherwise affects substantial rights is final. In *White*, this Court cited some examples of permissible "ministerial tasks" that do not make an order nonfinal. The Court cited *Pledger v.*

*Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (Ark. 1991), where the court held the calculation of attorney’s fees after judgment did not make the order nonfinal; and *Parks v. Pavkovic*, 753 F.2d 1397 (7th Cir. 1985), where all that remained to be done to compute damages was for the members of the class to submit receipts or other evidence showing what they had paid or still owed to the defendants. *See White*, 79 Ohio St. 3d at 546, 684 N.E.2d 72. The calculation of the amounts advanced for inspections, appraisals, property protection and maintenance are classic “mechanical” and “ministerial” tasks akin to calculating attorney fees or adding up receipts. No judicial fact-finding or exercise of judicial discretion is necessary.

**2. The Fifth District Decision Rests On The Incorrect Factual Assumption That Costs For Inspections, Appraisals, Property Protection and Maintenance Do Not Change**

The approach taken by the Fifth District also rests in part on an incorrect factual assumption: that inspections, appraisals, property protection and maintenance costs “are not accruing continuously until the sheriff’s sale,” so are capable of being specified in the judgment, and may not occur at all. *See Roznowski*, 5th Dist. No. 2012-CA-93, 2012-Ohio-4901, ¶ 10; Appx. A-056. In fact, they are, and other courts recognize this fact.

The Eighth District in *Shanker* explained that “[i]t is impossible to state the exact amount of redemption due to the fact that the amount is constantly evolving and changing over time.” *Shanker*, 8th Dist No. 72707, 1998 Ohio App. LEXIS 2287, \*6. The court pointed out that “[w]ith each passing day the value increases because of the applicable interest rate and other charges that may accrue as the result of the mortgage default.” *Id.*; *see also Parkview Fed. Sav. Bank v. Grimm*, 8th Dist. No. 93899, 2010-Ohio-5005, ¶60 (noting “[t]rial courts are not required to state the exact amount due because that amount is constantly changing as interest accrues”); *First Horizon Home Loans v. Sims*, 12th Dist. No. CA2009-08-117, 2010-Ohio-847, ¶

25 (recognizing “these amounts are continuously accruing through the date of the sheriff’s sale,” and “it would be impractical to require appellee to state with specificity the total amount due”). The Seventh District in *LaSalle Bank N.A.* held “certain fees are not ascertainable at the time of the judgment entry,” including taxes and “advances for taxes, insurance and property protection,” because “the court cannot compute those figures because their final amount is dependent on how quickly the property sells.” *LaSalle Bank N.A.*, 7th Dist. No. 11 MA 85, 2012-Ohio-4040, ¶ 18.

Unlike the Fifth District, these courts recognize that the condition of each property subject to a foreclosure judgment varies and the sale process can differ depending on the county in which each property is located. For example, property inspections often continue after a judgment is entered, because the main purpose of an inspection is to determine whether the property is vacant, and property often becomes vacant after a court enters a decree in foreclosure. Vacancy in turn dictates whether property protection and maintenance is required to address conditions that might affect the value of the property, and to deter vandalism, as do location, time of year, and other factors. The fact that these circumstances may change is precisely why they cannot be determined in a specified amount for inclusion in the judgment. As noted, a myriad of factors affects the need for and amount of these costs, including the location of the property, the condition of the property, the actions of the borrowers, how long it takes for the property to be set for sale and sold (which varies in each county), whether the borrowers remain in the property after the judgment decree is entered, and whether any damage to the property occurred between the judgment decree being entered and the sale.

The present case before this Court is a good example. The case has been pending for five years. The affidavit supporting the summary judgment motion was submitted on January 10, 2011. The trial court did not rule on that motion until more than three months later, on April 20,

2011. The initial judgment entered by the trial court was appealed. On remand, the trial court entered the operative judgment decree in foreclosure on February 1, 2012, which is now on appeal. The property has still not been sold. The circumstances of this case show the type of significant delays that can occur between entry of judgment and confirmation of sale. The precise amounts for property-related advances can change. Any specific amount that had been included in the supporting affidavit, and either of the two foreclosure judgments entered in this case, are long since outdated. Requiring specific itemization of all advances in the judgment decree would only add unnecessary steps, fraught with inaccuracies, since the correct amounts are constantly changing and would need to be continually updated and restated.

### **3. The Fifth District Decision Will Increase Litigation and Not Promote Judicial Economy**

The Fifth District seemed to suggest that concluding that a judgment decree in foreclosure that does not itemize property inspections, appraisals, protection and maintenance costs is a final appealable order might create the opportunity for multiple appeals. The Fifth District noted that a borrower might dispute “the necessity, frequency, and/or reasonableness of the expenses” of the property-related costs, and this might lead to “a second appeal before the sale.” *See Roznowski*, 5th Dist. No. 2012-CA-93, 2012-Ohio-4901, ¶ 10; Appx. A-056. The Fifth District approach exacerbates this potential problem, however, and creates the unintended consequence of judgment decrees in foreclosure that are either never final or continually appealable.

First, declaring the standard judgment decree in foreclosure used across Ohio to be nonfinal creates a self-perpetuating “catch-22” scenario. As the *LaSalle Bank N.A.* court noted, “[t]o find that the judgment entry is non-final because it does not compute future costs would mean that no judgment of foreclosure and sale would ever be final.” *LaSalle Bank N.A.*, 7th Dist.

No. 11 MA 85, 2012-Ohio-4040, ¶21; Appx. A-023. Obviously, this approach flies in the face of the desire to resolve disputes in a timely and efficient matter.

Second, the approach proposed by the Fifth District opens the door to frivolous appeals by borrowers merely seeking to delay the foreclosure process. Borrowers could appeal the initial judgment decree in foreclosure containing the initial calculation of the property-related costs. Upon remand, when the costs are updated, the borrowers could appeal the new judgment decree in foreclosure containing the revised calculation of the property-related costs incurred since the first appeal. The Fifth District contemplated that upon remand, if there was “delay occasioned by further appeal,” the court could award “subsequent damages,” but presumably this damages award would also be appealable. *Roznowski*, 5th Dist. No. 2012-CA-93, 2012-Ohio-4901, ¶ 10; Appx. A-056. A clever borrower could repeatedly appeal the “necessity, frequency, and/or reasonableness” of the calculation of these advances, and any “subsequent damages,” in an effort to remain living in the house, thwart the issuance of final judgment, and indefinitely delay the foreclosure sale. Creating the opportunity for such repeated appeals does not promote judicial economy.

Third, the Fifth District also subjects existing foreclosure judgments using previously standard language to collateral attack under Rule 60(B). This could also increase litigation and costs associated with obtaining foreclosure in cases where courts have already concluded the borrowers are in default under the terms of the Note and Mortgage, and foreclosure is the appropriate remedy.

Trial judges should not be required to predict the future, and to itemize costs in the foreclosure decree that are out of date and incorrect the moment they are journalized. The irony of the approach proposed by the Fifth District is that it adopts a procedure where judgment

decrees in foreclosure can only be considered final orders if they specifically itemize amounts that are indisputably non-final. The overwhelming majority of Ohio appellate courts have rejected this approach. This Court should reaffirm *Queen City* and likewise reject this impractical approach.

**II. CitiMortgage, Inc.'s Proposition of Law No. II -- A Mortgagor May Contest The Amounts Expended by a Mortgagee For Inspections, Appraisals, Property Protection and Maintenance as Part of The Proceedings to Confirm The Foreclosure Sale, and Appeal Any Adverse Ruling in an Appeal of The Order of Confirmation.**

The Fifth District's holding that costs for inspections, appraisals, property protection, and maintenance must be itemized in the judgment decree in foreclosure appears to have also been based in part on the concern that borrowers would be subject to imposition of these costs without being able to challenge them as part of the proceedings to confirm the foreclosure sale or on appeal from the confirmation of sale. This conclusion is not supported by Ohio law, and this Court should not endorse this incorrect view of the confirmation process.

**A. Ohio Law Permits a Borrower to Appeal The Order of Confirmation, and Does not Prohibit This Appeal From Including The Amounts Advanced For Inspections, Appraisals, Property Protection and Maintenance**

Ohio courts have consistently held that there are two final appealable orders in a foreclosure proceeding: "The first is the order of foreclosure and sale. The second is the confirmation of the sale." *LaSalle Bank N.A.*, 7th Dist. No. 11 MA 85, 2012-Ohio-4040 at ¶ 20, citing *Emerson Tool, L.L.C. v. Emerson Family Ltd. P'ship*, 9th Dist. No. 24673, 2009-Ohio-6617, ¶ 13; *Citifinancial, Inc. v. Haller-Lynch*, 9th Dist. No. 06CA008893, 2006-Ohio-6908, ¶ 5-6; *Bankers Trust Co. of California, N.A. v. Tutin*, 9th Dist. No. 24329, 2009-Ohio-1333, ¶ 14; *Triple F. Invests., Inc. v. Pacific Fin. Servs., Inc.*, 11th Dist. No. 2000-P-0090, 2001 Ohio App. LEXIS 2484, 2001 WL 589343 (June 1, 2001). See also *Lieb*, 2d. Dist. No. 23688, 2011-Ohio-

1988, ¶14 (“orders confirming a sale and foreclosure orders that find the amounts due to claimants are final, appealable orders”), citing *Speakman*, 18 Ohio St. 3d 119, 120, 480 N.E.2d 411 (1985); *Queen City*, 170 Ohio St. 383, 165 N.E.2d 633 (1960); *Oberlin*, 175 Ohio St. 311, 312, 194 N.E.2d 580 (1963). Thus, it is well established that the order confirming the foreclosure sale may be appealed.

The procedure for execution against property, including the sale of lands, is governed generally by Chapter 2329 of the Ohio Revised Code. The confirmation of the sale of lands, pursuant to foreclosure sales, is governed by Ohio Revised Code Section 2329.31. Section 2329.31 provides in relevant part that if the court “finds that the sale was made, in all respects, in conformity with sections 2329.01 to 2329.61 of the Revised Code,” the court shall confirm the sale. R.C. 2329.31. The statute provides that the court’s involvement in the confirmation of the sale includes a careful examination of the sale proceedings, including review of the entries on the execution docket of the “amount of the judgment” and “the costs due each person.” R.C. 2329.59. This judicial review would include the itemization of costs advanced for inspections, appraisals, property protection and maintenance.

Moreover, R.C. 2329.31 expressly states: “Nothing in this section prevents the court of common pleas from staying the confirmation of the sale to permit a property owner time to redeem the property or *for any other reason* that it determines is appropriate.” (Emphasis added.) R.C. 2329.31. “Any other reason” would include a dispute over the “the necessity, frequency, and/or reasonableness of the expenses.” This Court has recognized the trial court’s broad discretion to confirm a sale, even before the General Assembly expressly added it to section 2329.31 in 2008, stating, “While the statute speaks in mandatory terms, it has long been recognized that the trial court has discretion to grant or deny confirmation: ‘Whether a judicial

sale should be confirmed or set aside is within the sound discretion of the trial court.” *Ohio Sav. Bank v. Ambrose*, 56 Ohio St. 3d 53, 55, 563 N.E.2d 1388 (1990), quoting *Michigan Mortgage Corp. v. Oakley*, 68 Ohio App. 2d 83, 426 N.E. 2d 1195, at paragraph two of the syllabus (12th Dist. 1980).

Thus, as the Seventh District correctly observed, “if the advances made for taxes, insurance and property protection are determined at the time of the confirmation of the sale, any amount in dispute is subject to an appeal of the confirmation of the sale order.” *LaSalle Bank N.A.*, 7th Dist. No. 11 MA 85, 2012-Ohio-4040 at ¶ 21. There appears to be no Ohio authority that prohibits a borrower from appealing the amounts advanced after the order of confirmation of the sale, and the Fifth District does not provide any.

Instead, the Fifth District relied on cases that are unrelated to whether amounts advanced for inspections, appraisals, property protection and maintenance are subject to appeal at confirmation. *See Roznowski*, 5th Dist. No. 2012-CA-93, 2012-Ohio-4901, ¶ 11; Appx. A-056. In *Federal National Mortgage Association v. Day*, 158 Ohio App. 3d 349, 2004-Ohio-4514, 815 N.E.2d 730 (2d Dist.), the plaintiff, Federal National Mortgage Association (“Fannie Mae”), filed a foreclosure action and named Huntington Mortgage as a defendant who may have an interest in the property. *Id.* at 351. The judgment decree in foreclosure found that Huntington’s lien was junior to Fannie Mae’s. *Id.* at 351-52. After the sale, Huntington objected to Fannie Mae’s proposed entry confirming the sale and distributing the proceeds, claiming for the first time its lien was superior to Fannie Mae’s lien. *Id.* at 352. The trial court sustained Huntington’s objections, finding that Huntington’s lien was superior, and confirmed the sale. *Id.* On appeal, the court found that Huntington could not challenge the determination of its lien priority as part of the sale confirmation proceedings because the issue was decided in the judgment decree in

foreclosure, and the proper remedy was appeal of that order or a motion to vacate the judgment under Rule 60(B). *Id.* at 353. The appellate court explained “the proper time to challenge the existence and extent of mortgage liens is in the foreclosure action.” *Id.* *Day* simply reiterated well-established Ohio law going back to *Queen City* that a court’s determination of lien priority affects substantial rights and must be immediately appealed. *Day* did not address advances by a mortgagee for inspections, appraisals, property protection and maintenance, or other issues typically addressed at confirmation. Thus, nothing in *Day* suggests that these amounts cannot be addressed at confirmation if they are first addressed there.

Similarly, *Ohio Sav. Bank v. Ambrose*, 56 Ohio St.3d 53, 563 N.E.2d 1388 (1990), does not prohibit a borrower from challenging amounts advanced at confirmation, or the right to appeal an adverse ruling in an appeal of the order of confirmation. In *Ambrose*, the issue was whether a third-party purchaser at a sheriff’s sale had standing to appeal a trial court’s order denying confirmation of the sale where the original mortgagor exercised its right of redemption. *Id.* at 54. This Court explained that the primary purpose of confirmation proceedings is the sale, and reiterated the trial court has discretion regarding confirmation of the sale. *Id.* at 55. The case does not hold that the only issues that can be determined at confirmation are whether a sale has been conducted in accordance with law, such as whether the public notice requirements were followed and whether the sale price was at least two-thirds of lands appraised value. Nothing in *Ambrose* limits the scope of the issues a borrower may appeal in an order of confirmation, or otherwise prevents the amounts for inspections, appraisals, property protection and maintenance from being determined and challenged at confirmation, and contested in an appeal from the order.

Borrowers certainly have the right to appeal the order of confirmation of the sale, and nothing prohibits the raising in that appeal of all issues decided in the order for the first time, including the correctness of amounts advanced and ordered distributed by order of the trial court. The Fifth District's contrary conclusion is not supported by Ohio law.

**B. Allowing a Borrower to Challenge The Amounts Advanced During The Confirmation Proceeding and to Contest Any Adverse Ruling in an Appeal of The Confirmation Order Promotes Fairness and Judicial Efficiency.**

Allowing a borrower to challenge the amounts advanced at the time they can be most accurately calculated, and to appeal any adverse ruling, offers a better means to achieve judicial efficiency and fairness than the impractical approach adopted by the Fifth District. If this Court adopts a proposition of law that prohibits a borrower from challenging or appealing the amounts advanced at confirmation, it necessitates the premature itemization of these amounts in the judgment decree in foreclosure. This proposition opens the door for the "catch-22" problem described previously. And adopting an approach that forces the mortgagee and the court to predict and prematurely specify the exact amounts of costs which are subject to change, which are not known, or which may or may not even occur, opens the door to inaccurate judgments and unnecessary appeals. Under the approach proposed by the Fifth District, a borrower would be forced to appeal the inevitably inaccurate itemization of amounts advanced as stated in the judgment decree, yet be potentially barred from challenging the actual amounts advanced when they are accurately known at confirmation.

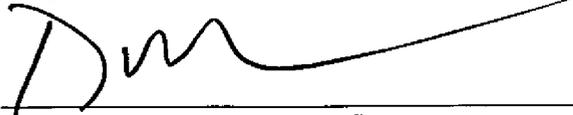
Endorsing a procedure that anticipates the itemization of all advances at confirmation ensures the amounts will be current and accurate, and allows the borrower to appeal the costs listed in the confirmation order. These costs include the amounts advanced for taxes, court costs, and insurance premiums, as well as for inspections, appraisal, and property preservation and

maintenance. A borrower may wish to contest the amount of these costs and court costs assessed as well. Whether the amounts advanced are small or large, or minimal in light of the accelerated unpaid principal balance, the right to challenge them is preserved. Accordingly, this Court should not arbitrarily limit the scope of appeals from orders confirming sheriff's sales. This approach adequately protects mortgagors from inaccurate costs and mortgagees from endless appeals, and promotes judicial economy.

### **CONCLUSION**

For these reasons, this Court should answer "yes" to both certified questions. The Court should reverse the decision of the Fifth District below, and affirm that a judgment decree in foreclosure does not need to itemize amounts advanced for inspections, appraisals, property protection and maintenance to constitute a final appealable order. Further, this Court should hold that amounts advanced for inspections, appraisals, property protection and maintenance may be itemized at confirmation, and a borrower can challenge any disputed amounts as part of the proceedings to confirm the foreclosure sale, and appeal any adverse ruling in an appeal of the order of confirmation.

Respectfully submitted,



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*Attorneys for Appellant*

*CitiMortgage, Inc., successor by merger to ABN*

*AMRO Mortgage Group, Inc.*

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Merit Brief Of Appellant CitiMortgage, Inc. was served by first class, U.S. Mail, postage prepaid, on April 29, 2013, upon:

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7550 Paragon Road  
Dayton, OH 45459

CitiFinancial, Inc.  
4349 Whipple Ave. NW  
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Katie W. Chawla, Esq.  
Stark County Prosecutor's Office  
110 Central Plaza South, Suite 1510  
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Peter D. Traska  
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PO BOX 609306  
Cleveland, Ohio 44109



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One of the Attorneys for Appellant  
CitiMortgage, Inc., successor by merger to ABN  
AMRO Mortgage Group, Inc.

# APPENDIX

1. The first part of the appendix contains a list of the names of the members of the committee who have been appointed to investigate the matter.

# **EXHIBIT A**

ORIGINAL

IN THE SUPREME COURT OF OHIO

CITIMORTGAGE, INC.,  
successor by merger to  
ABN AMRO Mortgage Group, Inc.,

Plaintiff/Appellee,

v.

JAMES A. ROZNOWSKI, et al.,

Defendants/Third-Party  
Plaintiffs/Appellants.

Supreme Court Case No.

12-2110

On Appeal from the Stark County  
Court of Appeals, Fifth Appellate District  
Court of Appeals Case No. 2012 CV 00093

NOTICE OF CERTIFIED CONFLICT

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Attorneys for Defendants/Appellees  
James A. Roznowski and  
Steffanie M. Roznowski

FILED

DEC 18 2012

CLERK OF COURT  
SUPREME COURT OF OHIO

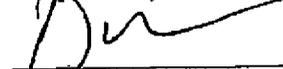
CitiMortgage, Inc. and ABN AMRO Mortgage Group, Inc. respectfully give notice that the Fifth District Court of Appeals issued a Judgment Entry in Case No. 2012 CV 00093 certifying the following questions as a conflict pursuant to Rule 25 of the Ohio Rules of Appellate Procedure:

1. Whether a judgment decree in foreclosure is a final appealable order if it includes as part of the recoverable damages amounts advanced by the mortgagee for inspections, appraisals, property protection and maintenance, but does not include specific itemization of those amounts in the judgment.
2. Whether a mortgagor that contests amounts expended by a mortgagee for inspections, appraisals, property protection and maintenance can challenge those amounts as part of the proceedings to confirm the foreclosure sale, and appeal any adverse ruling in an appeal of the order of confirmation.

Pursuant to Rule 4.1 of the Rules of Practice of the Supreme Court of Ohio, a copy of the Court of Appeals Judgment Entry certifying the conflict is attached as Exhibit A. The Fifth District certified the conflict based on its decision in CitiMortgage, Inc. v. Roznowski, 2012-Ohio-4901, which conflicts with the Seventh District's decision in LaSalle Bank National Association v. Smith, 7th Dist. No. 11 MA 85, 2012-Ohio-4040.

Copies of those decisions are attached as Exhibits B and C, respectively.

Respectfully submitted,



---

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Attorneys for Plaintiff/Appellant  
CitiMortgage, Inc. and Third-Party  
Defendant/ Appellant ABN AMRO  
Mortgage Group, Inc.

**CERTIFICATE OF SERVICE**

I certify that a copy of the Notice of Certified Conflict was served by first class, U.S. Mail, postage prepaid, on December 18, 2012, upon:

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Laurito & Laurito, LLC  
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CitiFinancial, Inc.  
4349 Whipple Ave. NW  
Canton, Ohio 44718

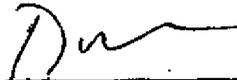
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*Attorneys for Treasurer of Stark County*

*Attorneys for James A. Roznowski and  
Steffanie M. Roznowski*



One of the Attorneys for Plaintiff/Appellant  
CitiMortgage, Inc. and Third-Party Defendant/  
Appellant ABN AMRO Mortgage Group, Inc.

367-654:336967

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

12 NOV 29 PM 6:09

QI MORTGAGE, INC.  
Successor by merger to  
ABN AMRO Mortgage Group, Inc.

Plaintiff-Appellee

-vs-

JUDGMENT ENTRY

JAMES A. ROZNOWSKI, ET AL

Defendant-Appellant

CASE NO. 2012-CA-00993

This cause comes before us on appellees' motion to certify a conflict to the Ohio Supreme Court between our opinion in the within, filed October 22, 2012 and *LaSalle Bank National Association, Trustee v. Smith*, 7th Dist. No. 11 MA 85, 2012-Ohio-4040.

Article IV, Section 3(B)(4) of the Ohio Constitution states:

Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the Supreme Court for review and final determination.

App R. 25 governs Motions to Certify a Conflict:

(A) A motion to certify a conflict under Article IV, Section 3(B)(4) of the Ohio Constitution shall be made in writing before the judgment or order of

5

EXHIBIT A

A-005

the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court's decision, whichever is the later. The filing of a motion to certify a conflict does not extend the time for filing a notice of appeal. A motion under this Rule shall specify the issue proposed for certification and shall cite the judgment or judgments alleged to be in conflict with the judgment of the court in which the motion is filed.

Pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution, a court of appeals shall certify the case to the Supreme Court if it finds its judgment in conflict with a judgment of another court of appeals on the same question. At least three preconditions must be met before a conflict can be certified: "First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be upon the same question." Second, the alleged conflict must be on a rule of law not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals." (Emphasis in original.) *Whitelock v. Gilbane Building Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

Appellees' motion was timely filed. In it they propose two issues which they allege are appropriate for Certification:

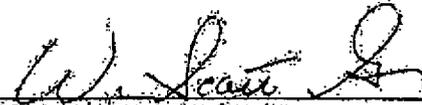
"1. Whether a judgment decree in foreclosure is a final appealable order if it includes as part of the recoverable damages amounts advanced by the mortgagee for

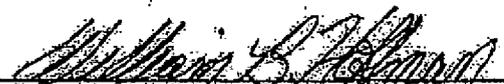
inspections, appraisals, property protection and maintenance, but does not include specific itemization of those amounts in the judgment.

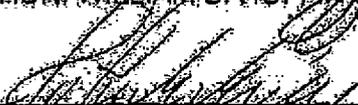
"2. Whether a mortgagor that contests amounts expended by a mortgagee for inspections, appraisals, property protection and maintenance can challenge those amounts as part of the proceedings to confirm the foreclosure sale, and appeal any adverse ruling in an appeal of the order of confirmation."

Upon review, we find our opinion in the within is in direct conflict with *Smith*, supra on the same questions and on rules of law not facts, on both issues proposed by appellees. Accordingly we sustain appellees' motion and certify the record to the Ohio Supreme Court for final resolution.

IT IS SO ORDERED.

  
\_\_\_\_\_  
HON. W. SCOTT GWIN

  
\_\_\_\_\_  
HON. WILLIAM B. HOFFMAN

  
\_\_\_\_\_  
HON. JOHN W. WISE

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

12 OCT 22 PM 2:19  
DEPARTMENT OF REVENUE

DE MORTGAGE, INC.  
Plaintiff-Appellee

JUDGES:  
Hon. W. Scott Gwin, P.J.  
Hon. William B. Hoffman, J.  
Hon. John W. Wise, J.

vs.  
JAMES A. ROZNOWSKI, ET AL  
Defendant-Appellant

Case No. 2012-CA-03

OPINION

CHARACTER OF PROCEEDING:

Civil appeal from the Stark County Court of  
Common Pleas, Case No. 2008CV00894

JUDGMENT:

Dismissed

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By ..... Deputy  
Date .....

DATE OF JUDGMENT ENTRY:

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7  
EXHIBIT B

Gwin, P.J.

{¶1} Defendants-appellants James and Steffanie Roznowski appeal a judgment of the Court of Common Pleas of Stark County, Ohio, entered in favor of plaintiff-appellee CitMortgage, Inc., the successor by merger to ABN AMRO Mortgage Group, Inc. For the reasons that follow, we find we have no jurisdiction over the matter.

{¶2} This case came before us on an earlier appeal, in which we determined there was no final appealable order. *CitMortgage Inc v. Roznowski*, 5th Dist. No. 2011CA00124, 2012-Ohio-74. We found the earlier judgment did not set forth the dollar amount of the balance due on the mortgage and did not reference any documents in the record that did.

{¶3} In response, the trial court entered a judgment on February 1, 2012. The court set forth the principal sum due plus the interest. In addition, it awarded "costs of this action, those sums advanced by plaintiff for costs of evidence of title required to bring this action, for payment of taxes, insurance premiums and expenses incurred for property inspections, appraisal, preservation and maintenance." The court did not enter a dollar amount for any of those damages.

{¶4} Before addressing the merits of any appeal, we must first determine whether we have jurisdiction over the matter. If the parties to the appeal do not raise this jurisdictional issue, we may raise it *sua sponte*. *Chef Italiano Corp. v. Kent State University*, 44 Ohio St.3d 86, 541 N.E.2d 64, (1989), syllabus by the court. With few exceptions, the order under review must be a final appealable order. If an order is not final and appealable, then we have no jurisdiction to review the matter and must dismiss it. See *General Accident Insurance Co. v. Insurance Co. of North America*, 44 Ohio

St.3d 17, 20, 540 N.E.2d 266, (1989). An appellate court has jurisdiction to review and affirm, modify, or reverse judgments or final orders of the trial courts within its district. Ohio Constitution, Article IV, Section 3(B)(2); R.C. § 2505.02.

{15} Ohio law recognizes an absolute right of redemption that is dual in nature, arising both from equity and statute. *Hausman v. Dayton*, 73 Ohio St.3d 671, 678, 1995-Ohio-277, 653 N.E.2d 1190. In *Hausman*, the Ohio Supreme Court explained that the mortgagor's equitable right of redemption is cut off by a decree of foreclosure. Generally, a common pleas court grants the mortgagor a three-day grace period to exercise the 'equity of redemption,' which consists of paying the debt, interest and court costs, to prevent the sale of the property. *Id.* After the decree of foreclosure has been entered, a mortgagor retains a statutory right of redemption under R.C. 2329.33 that may be exercised at any time prior to the confirmation of sale by depositing the "amount of the judgment" with all costs in the common pleas court.

{16} To redeem the property under R.C. 2329.33, "the mortgagor-debtor must deposit the amount of the judgment with all costs specified." *Women's Federal Savings Bank v. Pappadakes* 38 Ohio St.3d 143, 527 N.E.2d 792 (1988), paragraph one of the syllabus. The funds deposited must be available for use and division immediately. *Id.* at 146.

{17} In *Huntington National Bank v. Shanker*, Guyahoga App. No. 72707, 1998 WL 269097, (May 21, 1998), the court stated "it would be beyond reason to hold a trial court or magistrate to a standard that insists they state a definite sum of redemption," and that "[a]s long as the redemption value of a foreclosed property is ascertainable through normal diligence, the value, as stated by a finder of fact, will be upheld."

Likewise, courts have held it could be impractical to require the mortgagee to state with specificity the total amount due for additional charges because some of the damages would be accruing continuously through the date of the sheriff's sale. *First Horizon Home Loans v. Sims*, 12th Dist. No. CA2009-08-117, 2010-Ohio-847 ¶ 25.

(¶18) In *Roznowski I*, we said:

"Generally, an order that determines liability but not damages is not a final, appealable order. *Walburn v. Duntap*, 121 Ohio St.3d 373, 2009-Ohio-1921, 904 N.E.2d 863, at ¶ 31. There is an exception to this general rule, however, "where the computation of damages is mechanical and unlikely to produce a second appeal because only a ministerial task similar to assessing costs remains." *State ex rel. White v. Cuyahoga Metro. Housing Auth.* (1997), 79 Ohio St.3d 549, 546, 684 N.E.2d 72. Thus, if "only a ministerial task similar to executing a judgment or assessing costs remains" and there is a low possibility of disputes concerning the parties' claims, the order can be appealed without waiting for performance of that ministerial task. *Id.*

*Roznowski I* at ¶25, citations sic.

(¶19) The valuation of the damages "for costs of evidence of title required to bring this action, for payment of taxes, insurance premiums" may be mechanical and ministerial, and ascertainable by normal diligence, and thus the court was not required to list them in the judgment entry of foreclosure. However, we find the computation of the dollar amount for "expenses incurred in property inspections, appraisal, preservation and maintenance" are not easily ascertainable. This matter has been pending for nearly

five years, and the accrued expenses appellee claims could represent a substantial sum. In order to exercise their right of redemption, appellants must know the amount of money they must produce. Nothing in the record gives appellants or this court notice of the amount.

{¶10} Appellants may dispute the necessity, frequency, and/or reasonableness of the expenses, and any challenges to these expenses may be likely to produce a second appeal before the sale. Further, these damages are not accruing continuously until the sheriff's sale. The final appraisals will be ordered by the sheriff, and appellee may or may not be required to expend funds for further inspections or maintenance. If there is a delay, occasioned, for example, by another appeal, the court can award subsequent damages.

{¶11} Appellee represented at oral argument all of the above can be challenged at the confirmation hearing. We do not agree. The proper time to challenge the existence and the extent of mortgage liens is in the foreclosure action, not upon confirmation of a judicial sale. *National Mortgage Association v. Day*, 168 Ohio App. 3d 349, 2004-Ohio-4514, 815 N.E. 2d 730. Confirmation involves only a determination of whether a sale has been conducted in accord with law, such as whether the public notice requirements were followed and whether the sale price was at least two-thirds of lands appraised value. *Ohio Savings Bank v. Ambrose*, 56 Ohio St. 3d 53, 55, 563 N.E. 2d 1318 (1990). It is for this reason that only damages whose computation are "mechanical and ministerial" can be addressed at a hearing on confirmation of the sheriff's sale.

(¶12) We find the judgment entry appealed from is not a final appealable order, and the appeal is dismissed for lack of jurisdiction.

By Gwin, P.J.,

Hoffman, J., and

Wise, J., concur

  
\_\_\_\_\_  
HON. W. SCOTT GWIN

  
\_\_\_\_\_  
HON. WILLIAM E. HOFFMAN

  
\_\_\_\_\_  
HON. JOHN W. WISE

WSG:ofw 1010

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

12 OCT 22 PM 2:19  
CLERK OF COURT  
STARK COUNTY, OHIO

CITIMORTGAGE, INC.

Plaintiff-Appellee

-vs-

JAMES A. ROZNOWSKI, ET AL

Defendant-Appellant

JUDGMENT ENTRY

CASE NO. 2012-CA-93

For the reasons stated in our accompanying Memorandum Opinion, the appeal is dismissed for lack of jurisdiction. Costs to appellees.

  
HON. W. SCOTT GWIN

  
HON. WILLIAM B. HOFFMAN

  
HON. JOHN W. WISE



**LaSALLE BANK NATIONAL ASSOCIATION, TRUSTEE,  
PLAINTIFF-APPELLEE VS. RONALD SMITH, et al., DE-  
FENDANTS-APPELLANTS.**

**CASE NO. 11 MA 85**

**COURT OF APPEALS OF OHIO, SEVENTH APPELLATE  
DISTRICT, MAHONING COUNTY**

**2012 Ohio 4040; 2012 Ohio App. LEXIS 3549**

**August 27, 2012, Decided**

**PRIOR HISTORY: [\*\*1]**

**CHARACTER OF PROCEEDINGS:** Civil Appeal from Common Pleas Court, Case No.  
05CV3869.

**DISPOSITION:** Affirmed.

**COUNSEL:** For Plaintiff-Appellee: Attorney Anne Sferra, Attorney Nelson Reid, Attorney Justin  
Ristau, Columbus, Ohio.

For Defendant-Appellant: Attorney Bruce Broyles, Boardman, Ohio.

**JUDGES:** Hon. Joseph J. Vukovich, Hon. Cheryl L. Waite, Hon. Mary DeGenaro. Waite, P.J.,  
concur. DeGenaro, J., concurs.

**OPINION BY:** Joseph J. Vukovich

**OPINION**

**EXHIBIT C**

**A-015**

VUKOVICH, J.

[\*P1] Defendants-appellants Ronald and Nancy Smith appeal the decisions of the Mahoning County Common Pleas Court that denied their motion for reconsideration and their Civ.R. 60(B) motion for relief from judgment. The Smiths contend that the January 12, 2007 judgment ordering foreclosure and sale of the real property and residence located at 1625 Gully Top Lane, Canfield Ohio, in Mahoning County was not a final order, and thus, the trial court could reconsider its order of foreclosure. In the alternative, they contend that even if the January 12, 2007 order was a final appealable order, the trial court erred when it denied their Civ.R. 60(B) motion. They assert that plaintiff-appellee LaSalle Bank National Association, As Trustee for Certificate Holders of Bear Stearns Asset-Backed Securities [\*\*2] LLC Asset Back Certificates, Series 2004-HE5 (LaSalle) committed fraud on the court when it asserted in its complaint that it was a real party in interest, despite the fact that according to the Smiths, LaSalle is not the holder of the mortgage. The Smiths assert that this is a meritorious defense and that the motion was brought within a reasonable amount of time.

[\*P2] For the reasons expressed more fully below, the decision of the trial court is hereby affirmed. The January 12, 2007 order is a final order of foreclosure. As such, the motion for reconsideration is a nullity and the trial court did not abuse its discretion in denying the motion. As to the Civ.R. 60(B) motion, the action was not timely.

#### STATEMENT OF THE CASE

[\*P3] LaSalle filed a complaint and an amended complaint in foreclosure against the Smiths asserting that the Smiths defaulted on their mortgage for the real property and residence located at 1625 Gully Top Lane in Canfield, Ohio, and that LaSalle has the first lien on the property.

10/13/05 and 10/25/05 Complaints. LaSalle asserted that \$525,023.67 plus interest was owed on the note.

[\*P4] From the record it appears that in October 2004, when the Smiths were five payments behind [\*\*3] in their mortgage, they executed a forbearance agreement. The Smiths defaulted on that agreement and in April 2005, when they were seven payments behind, and they executed a second forbearance agreement. They defaulted on this agreement too and in October 2005, they executed their third and final forbearance agreement. They only made one payment under that plan. On May 1, 2006, LaSalle accelerated the loan, called it due and initiated foreclosure proceedings.

[\*P5] After the Smiths answered the complaint, LaSalle moved for summary judgment. 01/27/06 Motion. The Smiths filed motions in opposition to summary judgment approximately six months later. 07/19/06 Motions. LaSalle filed a response to the opposition motions in August 2006. Thereafter, in December 2006, LaSalle filed a detailed account of mortgage.

[\*P6] In January 2007, the trial court granted summary judgment in favor of LaSalle ordering foreclosure and the sale of the property. No appeal was filed from this order.

[\*P7] In July 2007, the property was set for sale. However, in August 2007, the case was stayed due to the Smiths filing bankruptcy. Thus, the order of sale was withdrawn. The bankruptcy stay was lifted in October 2007 after the bankruptcy [\*\*4] case was dismissed.

[\*P8] The property was ordered to sale and a notice of sale was issued in May 2008. However, prior to the sale, the Smiths requested another stay because of an action they had pending in Federal District Court against LaSalle. In that case, the Smiths asserted that LaSalle violated the Truth in Lending Act, The trial court granted the stay request. 06/20/08 J.E.

[\*P9] In October 2009, the stay was lifted after the federal case had been dismissed. 10/19/09 J.E. One week later, the Smiths requested another stay. This request was based on a pending case in the Mahoning County Common Pleas Court that made claims against LaSalle that were similar in nature to the claims that were already asserted and dismissed by the federal court. 10/28/09 Motion. In March 2010, prior to the court ruling on the request, the Smiths asked the trial court to reconsider its October 2009 order lifting the stay. The magistrate stayed the case. 06/23/10 J.E. However, in February 2011 the trial court vacated the magistrate's stay.

[\*P10] On March 16, 2011, approximately 51 months after the initial foreclosure order, the Smiths filed a motion for reconsideration of the trial court's January 12, 2007 order. That [\*\*5] same day they also filed a Civ.R. 60(B) motion for relief from judgment. Both motions asserted that LaSalle is not the real party in interest, committed fraud on the court and violated the Pooling and Servicing Agreement (PSA) that governed how the mortgage was to be placed in the Bear Stearns Trust. LaSalle filed motions in opposition to both of the Smiths' motions. 04/15/11 and 04/26/11 Motions. On May 4, 2011, the trial court overruled the motions. It is from that order that the Smiths appeal.

[\*P11] During the pendency of the appeal, the Smith sought a stay of the January 12, 2007 order. The trial court denied the stay. We granted the stay and ordered a bond in the amount of \$750,000. 06/29/11 J.E. Even though the Smiths did not file the required bond to stay the proceedings, on July 7, 2011, LaSalle moved to withdraw the order of sale. The trial court granted the motion and the order of sale was withdrawn. 07/07/11 J.E.

#### JANUARY 12, 2007 JUDGMENT ENTRY

[\*P12] The arguments presented in the assignments of error are alternatives to each other. The first assignment of error is premised on the position that the January 12, 2007 order is not a

final order since a trial court can only reconsider nonfinal [\*\*6] orders. The second assignment of error is premised on the position that the January 12, 2007 order is a final order since Civ.R. 60(B) only applies to final orders. Thus, before addressing the assignments of error, the initial question this court must decide is whether the January 12, 2007 Judgment Entry that ordered foreclosure and sale of the property was a final appealable order.

[\*P13] Our court has previously looked at the issue of what is needed in a foreclosure judgment to render that judgment final. *Second Nat. Bank of Warren v. Walling*, 7th Dist. No. 01CA62, 2002-Ohio-3852. We have stated that:

[A] judgment entry ordering a foreclosure sale is not final and appealable unless it resolves *all* of the issues involved in the foreclosure, including the following: whether an order of sale is to be issued; what other liens must be marshaled before distribution is ordered; the priority of any such liens; and the amounts that are due the various claimants.

(Emphasis sic.) *Id.* ¶ 18.

[\*P14] Within the past year we have favorably cited our decision in *Walling. PHH Mtge. Corp. v. Albus*, 7th Dist. No. 09MO9, 2011-Ohio-3370, ¶ 18. In *PHH* we found that the judgment was not final even though the judgment entry [\*\*7] did state the exact amount due on the promissory note, it included a demand to marshal liens and it did provide that there was a right to redemption. *Id.* This was because the judgment entry stated that the final decree of foreclosure is "to be submitted" at some point in the future. *Id.* Furthermore, the entry did not include the description and amount of other liens, the priority of the liens, and how the funds should be distributed to the various claimants. *Id.*, citing *Walling*, ¶ 18.

[\*P15] In the case at hand, the January 12, 2007 judgment entry that granted summary judgment in favor of LaSalle acknowledged that defendants McHutchinson LLC and Sky Bank Successor to Citizens Banking Company "disclaimed any right, title claim or interest in the premises described herein." The judgment then stated:

The Court finds that there is due the Treasurer of Mahoning County, taxes, accrued taxes, assessments and penalties on the premises described herein, as shown on the County Treasurer's tax duplicate, the exact amount being unascertainable at the present time, but which amount will be ascertainable at the time of sale; which are a valid and subsisting first lien thereon for that amount so owing on [\*\*8] the day of the timely transfer of deed.

\* \* \*

The Court finds on the evidence adduced that there is due Plaintiff on the promissory note set forth in the First Count of the Complaint, the sum of \$525,023.67, plus interest thereon at the rate of 8.25% per annum from February 1, 2005, plus all late charges due under the Note and Mortgage, all advances made for the payment of real estates taxes and assessments and insurance premiums, and all costs and expenses incurred for the enforcement of the Note and Mortgage, except to the extent the payment of one or more specific such items is prohibited by Ohio law, for which sum judgment is hereby rendered in favor of Plaintiff against the Defendants, Ronald J. Smith.

\* \* \*

The Court finds that Plaintiff has and will from time to time advance sums for taxes, insurance and property protection. Plaintiff has the first and best lien for these

amounts in addition to the amount set forth above. The Court makes no finding as to the amounts of the advances and continues same until the confirmation of sale.

\* \* \*

It is therefore ORDERED, ADJUDGED AND DECREED that unless the sums found due herein, together with the costs of this action be fully paid within [\*\*9] three (3) days from the date of the entry of this decree, the equity of redemption and dower of all defendants in and to said premises shall be foreclosed and that an order of sale may be issued to the Mahoning County Sheriff, directing him to appraise, advertise in a paper of general circulation within the County and sell said premises as upon execution and according to law free and clear of the interest of all parties to this action.

1/12/07 J.E.

[\*P16] The above clearly shows that any other lien holders have disclaimed their rights. Thus, here, we do not have the issue that we had in *Walling* where the number, priority and value of other outstanding liens was not determined. Likewise, the ability to redeem the property is also set forth.

[\*P17] The Smiths' assertion that this judgment is not final is based on the fact that the judgment does not, in their opinion, determine the amounts due and leaves that determination for a later date.

[\*P18] The judgment entry clearly indicates that certain fees are not ascertainable at the time of the judgment entry. For instance, the accrued taxes that will be owing to the Mahoning County Treasurer at the time of the sale is not ascertainable at the order of foreclosure [\*\*10] because it is

unclear how long it will take to sell the property. Likewise, if LaSalle advances sums for taxes, insurance and property protection, that is also not ascertainable at the point that foreclosure is ordered. The court cannot compute those figures because their final amount is dependent on how quickly the property sells. However, what is clear from the judgment is that any money that is expended by LaSalle for those items constitutes a lien on the property. While the trial court did state that it is not making any "finding as to the amount of the advances and continues the same until the confirmation of the sale" that statement should not render the judgment nonfinal.

[\*P19] Our decision in *PHH* that the foreclosure order was not final was partially based on the statement in the trial court's judgment of foreclosure that a final decree of foreclosure is "to be submitted" at some point in the future. *PHH Mtge. Corp. v. Albus*, 7th Dist. No. 09MO9, 2011-Ohio-3370, ¶ 18. The statement that the amount of the advances will be determined in the confirmation of the sale judgment is not the equivalent to the statement that a final decree of foreclosure is "to be submitted" at some point [\*\*11] in the future. Thus, our case is distinguishable from *PHH*.

[\*P20] At this point, it is important to recognize that there are two judgments that are appealable in foreclosure actions. *Emerson Tool, L.L.C. v. Emerson Family Ltd. P'ship*, 9th Dist. No. 24673, 2009-Ohio-6617, ¶ 13, citing *Citifinancial, Inc. v. Haller-Lynch*, 9th Dist. No. 06CA008893, 2006-Ohio-6908, ¶ 5-6. See, also, *Bankers Trust Co. of California, N.A. v. Tutin*, 9th Dist. No. 24329, 2009-Ohio-1333, ¶ 14; *Triple F. Invests., Inc. v. Pacific Fin. Servs., Inc.*, 11th Dist. No. 2000-P-0090, 2001 Ohio App. LEXIS 2484, 2001 WL 589343 (June 1, 2001). The first is the order of foreclosure and sale. The second is the confirmation of the sale.

[\*P21] Thus, if the advances made for taxes, insurance and property protection are determined at the time of the confirmation of the sale, any amount in dispute is subject to an appeal of

the confirmation of the sale order. The order of foreclosure clearly indicates that those advances are the first and best lien for those amounts in addition to the amounts set forth above. This is especially the case when the advances are future costs that have not occurred and potentially may not occur. To find that the judgment entry is nonfinal [\*\*12] because it does not compute future costs would mean that no judgment of foreclosure and sale would ever be final.

[\*P22] Consequently, after considering the entire January 12, 2007 judgment entry we find that it is a final appealable order.

#### FIRST ASSIGNMENT OF ERROR

[\*P23] "THE TRIAL COURT ERRED IN DENYING THE MOTION FOR RECONSIDERATION."

[\*P24] It has been explained multiple times that motions for reconsideration of a final judgment in the trial court are a nullity. *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 379, 423 N.E.2d 1105 (1981). As explained above, the January 12, 2007 order of foreclosure is a final appealable order. Thus, considering *Pitts* and our holding regarding the finality of the January 12, 2007 order, this assignment of error lacks merit.

#### SECOND ASSIGNMENT OF ERROR

[\*P25] "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR RELIEF FROM JUDGMENT."

[\*P26] Civ.R. 60(B) states that "[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding" when certain factors are met. Civ.R. 60(B) only applies to final orders. Therefore, since we have found that the

January 12, 2007 order is a final order, Civ.R. 60(B) [\*\*13] can be used as means to have that order vacated.

[\*P27] The standard of review used to evaluate the trial court's decision to grant or deny a Civ.R. 60(B) motion is an abuse of discretion. *State ex rel. Russo v. Deters*, 80 Ohio St.3d 152, 153, 1997 Ohio 351, 684 N.E.2d 1237 (1997). An abuse of discretion connotes conduct which is unreasonable, arbitrary, or unconscionable. *State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.*, 72 Ohio St.3d 106, 107, 1995 Ohio 251, 647 N.E.2d 799 (1995).

[\*P28] We have continuously explained that Civ.R. 60(B) cannot be used as a substitute for appeal. *John Soliday Fin. Group, L.L.C. v. Moncreace*, 7th Dist. No. 09 JE 11, 2011-Ohio-1471, ¶ 11, quoting *Doe v. Trumbull Cty. Children Servs. Bd.*, 28 Ohio St.3d 128, 28 Ohio B. 225, 502 N.E.2d 605 (1986). The movant's arguments cannot merely reiterate merit arguments that could have been raised on appeal. *Manigault v. Ford Motor Co.*, 134 Ohio App.3d 402, 412, 731 N.E.2d 236 (8th Dist. 1999).

[\*P29] In order to prevail on a motion brought under Civ.R. 60(B), the movant must show that:

[\*P30] "(1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); [\*\*14] and (3) the motion is made within a reasonable time, and, where the grounds of relief are Civ.R. 60(B)(1), (2) or (3), not more than one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec., Inc. v. Arc Industries, Inc.*, 47 Ohio St.2d 146, 351 N.E.2d 113 (1976), paragraph two of the syllabus.

[\*P31] The grounds for relief under the second *GTE* element are:

(1) [M]istake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment.

Civ.R. 60(B).

[\*P32] Our analysis will begin with the second and third *GTE* factors, grounds for relief and timeliness of the Civ.R. 60(B) motion. The Smiths contend that the catchall provision in Civ.R. 60(B)(5) applies, [\*\*15] i.e. any other reason justifying relief from the judgment. Specifically, they contend that when counsel for LaSalle filed the complaint asserting LaSalle was the holder of the note and mortgage, counsel was committing a fraud on the court because counsel knew LaSalle was not the holder of the note. Therefore, according to the Smiths Civ.R. 60(B)(5) is applicable and since the motion for vacation was filed within a reasonable time, it complied with the timeliness requirement.

[\*P33] LaSalle disagrees and asserts that the allegation that LaSalle knew it was not the holder of the note is more akin to (B)(3), "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party." Thus, according to LaSalle, Civ.R. 60(B)'s one year filing requirement is applicable. Since the motion was filed approximately 4 years and 3 months after the foreclosure judgment, it was untimely.

[\*P34] As can be seen by the arguments, the determination of whether the vacation motion is timely is partially dependent upon what ground for relief is being claimed. The comments to Civ.R. 60(B) clearly indicate that fraud upon the court differs from Rule 60(B)(3), fraud or misrepresentation [\*\*16] by an adverse party. Civ.R. 60(B) (staff notes). "Fraud upon the court might include, for example, the bribing of a juror, not by the adverse party, but by some third person." *Id.*

[\*P35] The Ohio Supreme Court has explained that "fraud on the court" occurs when an officer of the court (i.e. an attorney) actively participates in defrauding the court. *Coulson v. Coulson*, 5 Ohio St. 3d 12, 15, 5 Ohio B. 73, 448 N.E.2d 809 (1983). This type of fraud does not fall under Civ.R. 60(B)(3), but rather constitutes a ground for relief under Civ.R. 60(B)(5). *Id.*

[\*P36] That said, our sister district has stated that the mere allegation that the party seeking foreclosure is not the holder of the note is not enough for it to constitute fraud on the court, rather in that case it merely falls under general fraud. *U.S. Bank Natl. Assn. v. Spicer*, 3d Dist. No. 9-11-01, 2011-Ohio-3128, ¶39, 41-42. However, in that case, there was not a clear allegation that counsel for the bank was involved in the fraud. Here, the Smiths take the allegation one step farther than Spicer did; the Smiths contend that the counsel for LaSalle was involved in the fraud and thus, it became fraud on the court.

[\*P37] Here, the Smiths' allegation involves an officer [\*\*17] of the court and thus, by mere definition the ground for relief is fraud on the court. Whether the Smiths can prove such allegation is a whole separate issue. However, it falls under Civ.R. 60(B)(5) and thus, in order to meet the timeliness requirement, the motion was required to be filed within a reasonable time.

[\*P38] Thus, the issue before this court is whether the four year and three month delay was reasonable. It has been explained that the determination for Civ.R. 60(B) as to what is a reasonable

length of time is fact specific. *Frantz v. Martin*, 8th Dist. No. 92211, 2009-Ohio-2377, ¶14 (stating, "from a review of case law regarding timeliness of Civ.R. 60(B) motions, it is clear that each case must be decided upon its own facts as a delay of four years has been held to be reasonable, and a delay of four months has been held to be unreasonable").

[\*P39] Given the facts of this case, we do not find that the length of the delay was reasonable. Admittedly, the Smiths have pursued multiple tactical maneuvers to stop the foreclosure, which included constant litigation that stayed the foreclosure action. However, stays do not prevent a party from filing a motion to vacate. While the trial court [\*\*18] could not rule on the motion during the stays, the motion still could have been filed.

[\*P40] Likewise, it also acknowledged that the Smiths had to obtain the voluminous Pooling and Servicing Agreement (PSA) and its supplement, the Prospectus Supplement, from the Securities and Exchange Commission to determine whether LaSalle complied with those requirements in those documents. The PSA and Prospectus Supplement were obtainable at the time the complaint was filed; the Prospectus Supplement is dated 2004. Thus, the alleged failure to follow the requirements could have been discovered shortly after filing of the 2005 complaint.

[\*P41] The Smiths assert that it was not until the November 2010 Federal Congressional Oversight Panel Report came out that they could fully comprehend the legal consequences of LaSalle's failure to comply with the terms of the PSA. We disagree with the position that the failure to comply with the terms of the PSA could not be discovered until the congressional report was issued. The Federal Committee Report is merely a report, it is not law. Therefore, it does not indicate the legal consequences of the failure to comply with the terms of the PSA. Only through litigation can [\*\*19] the consequences of failing to comply with the terms of the PSA be realized.

The Smiths did not need the committee report to realize legal consequences, but rather needed to pursue the issue through the courts.

[\*P42] Furthermore, the congressional report does not indicate that there is a clear issue in the case at hand. The report indicates that mortgages may not have been properly conveyed to the trust that claims to own the note if the required documentation to transfer the note and mortgage to the trust was incomplete. Thus, the trust may not have the ability to enforce the lien through foreclosure because it may not be the owner of the note and mortgage. The report shows that for securitization of the mortgage there are multiple transfers. It shows the mortgage starting with the originator, who in this case would be Encore, then being transferred to a Securitization Sponsor and then to a Depositor and then to the Securitization Trust, which in this case would be LaSalle. In this case the middlemen were jumped and the mortgage was placed directly into the trust. Encore, the original lender assigned the note and mortgage to "LaSalle Bank National Association, as Trustee for certificateholders [\*\*20] of Bear Stearns Asset Stacked Securities I LLC Asset Backed Certificates, Series 2004-HE5". The report does not suggest whether such an action was right or wrong.

[\*P43] Consequently, considering all the above the motion for relief from judgment was not filed within a reasonable time. Thus, as the third *GTE* requirement was not met, the trial court did not abuse its discretion in denying the Civ.R. 60 motion. *Rose Chevrolet, Inc.*, 36 Ohio St.3d at 20, 520 N.E.2d 564 (1988) (stating that the trial court should overrule a Civ.R. 60(B) motion if the movant fails to meet any one of the foregoing three requirements). Therefore, this assignment of error lacks merit.

CONCLUSION

[\*P44] The trial court's January 12, 2007 order of foreclosure is a final appealable order. The first assignment of error lacks merit because reconsideration of a final trial court order is a nullity. The second assignment of error also lacks merit because the Civ.R. 60(B) motion was not made within a reasonable time. Therefore, the trial court's decisions to deny the motion for reconsideration and Civ.R. 60(B) motion to vacate are hereby affirmed.

Waite, P.J., concurs.

DeGenaro, J., concurs.

APPROVED:

JOSEPH J. VUKOVICH, JUDGE

JUDGMENT [\*\*21] ENTRY

For the reasons stated in the Opinion rendered herein, the assignments of error are without merit and are overruled. It is the final judgment and order of this Court that the judgment of the Common Pleas Court, Mahoning County, Ohio, is affirmed. Costs taxed against appellants.

# EXHIBIT B

IN THE COURT OF COMMON PLEAS  
STARK COUNTY, OHIO

CITIMORTGAGE, INC.,

PLAINTIFF,

V.

JAMES A. ROZNOWSKI, et al.,

DEFENDANTS.

) CASE NO. 2008CV00894

) JUDGE HAAS

) JUDGMENT ENTRY

This matter came on for consideration upon separate Motions for Summary Judgment filed by Plaintiff and Third-Party Defendant Quest Title Agency, Inc. Defendants filed Memorandum in Opposition to both motions. Additionally, Defendants filed a Second Civ. R. 56(F) Motion for Additional Time to Conduct Discovery and for Leave to File a Cross Motion for Summary Judgment.

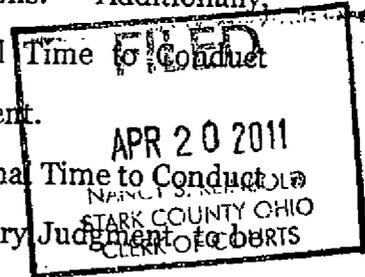
Upon review, the Court finds Defendants' Motion for Additional Time to Conduct Discovery and Motion for Leave to File a Cross Motion for Summary Judgment to be not well-taken and hereby **OVERRULES** the same.

Construing the pleadings of the action, the briefs for the motions, and the supporting documents, most strongly in favor of the non-moving party, the Court finds that there is no genuine issue of fact to be submitted to the trier of fact and concludes that both Plaintiff and Third-Party Defendant are entitled to judgment as a matter of law.

It is hereby

**ORDERED, ADJUDGED and DECREED** that Plaintiff's Motion for Summary Judgment and Third-Party Defendant's Motion for Summary Judgment are **GRANTED**; and it is further

**ORDERED** that Counsel for Plaintiff is to prepare a judgment entry consistent with this Entry, the pleadings and the record within two weeks from the date of this



entry. This is a final appealable order and there is no just cause for delay. **IT IS SO ORDERED.**



**JOHN G. HAAS, JUDGE**

To: Atty. Robert E. Soles, Jr.  
Atty. Peter Traska  
Atty. David Wallace  
Atty. Erin M. Laurito  
Atty. Lee Petersen

# **EXHIBIT C**

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

CITIMORTGAGE INC., et al.,  
Plaintiffs-Appellees

-vs-

JAMES A. ROZNOWSKI, et al.,  
Defendants-Appellants

JUDGMENT ENTRY

CASE NO. 2011CA00124

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NANCY S. BEHROLD  
CLERK OF COURT OF APPEALS  
STARK COUNTY, OHIO

For the reasons stated in our accompanying Memorandum-Opinion on file, the appeal of the Stark County Court of Common Pleas is dismissed. Costs assessed to appellants.

Julie A. Edwards  
William B. Hoffman  
Shelby Farmer

JUDGES

# **EXHIBIT D**

JAN 3 2 2012

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

CITIMORTGAGE INC., et al.,  
Plaintiffs-Appellees

JUDGES:  
William B. Hoffman, P.J.  
Sheila G. Farmer, J.  
Julie A. Edwards, J.

-vs-

Case No. 2011CA00124

JAMES A. ROZNOWSKI, et al.,  
Defendants-Appellants

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from Stark County  
Court of Common Pleas Case No.  
2008CV00894

JUDGMENT:

Dismissed *haw*

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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For Defendants-Appellants

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NANCY S. REINHOLD  
CLERK OF COURT OF APPEALS  
STARK COUNTY, OHIO

*[Handwritten signature]*  
1-9-12

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*Edwards, J.*

{¶1} Defendants-appellants, James and Steffanie Roznowski, appeal from the April 20, 2011, Judgment Entry of the Stark County Court of Common Pleas granting summary judgment in favor of plaintiff-appellees CitiMortgage, Inc. and ABN AMRO Mortgage Group, Inc.

STATEMENT OF THE FACTS AND CASE

{¶2} On February 19, 2008, appellee CitiMortgage, Inc., (hereinafter "CitiMortgage") filed a foreclosure action against appellants James and Steffanie Roznowski. After mediation was unsuccessful, appellants, on July 28, 2008, filed an answer, counterclaim and Third Party Complaint against Quest Title Agency, Inc. and appellee ABN AMRO Mortgage Group, Inc. The counterclaim and Third Party Complaint alleged that appellee CitiMortgage and/or its predecessor, appellee ABN AMRO Mortgage Group, Inc, had violated the Ohio Consumer Sales Practices Act. On August 19, 2008, appellee CitiMortgage filed an answer to the counterclaim and Third Party Complaint and, on August 22, 2008, it filed a Motion for Summary Judgment. As memorialized in a Judgment Entry filed on December 12, 2008, the motion was overruled and the case was referred to the foreclosure mediation program for a second time.

{¶3} On December 19, 2008, appellee ABN AMRO Mortgage Group, Inc filed an answer to the counterclaim and Third Party Complaint.

{¶4} After mediation was unsuccessful, the case was returned to the active docket in December of 2010. A non-jury trial was scheduled for February 10, 2011.

{¶5} On January 10, 2011, Quest Title Agency, Inc. filed a Motion for Summary Judgment. On the same date, appellees Citimortgage and ABN AMRO Mortgage Group, Inc filed a Motion for Summary Judgment on the complaint, on appellants' counterclaim and on the Third Party Complaint. In response, appellants filed a request asking for a pretrial and for a continuance of the trial scheduled for February 10, 2011. Appellants also asked that the summary judgment motions be held in abeyance. The trial court, pursuant to a Judgment Entry filed on January 25, 2011, continued the trial date until February 24, 2011. In a separate Notice filed the same date, the trial court gave appellants until January 31, 2011 to respond to the Motions for Summary Judgment.

{¶6} Appellants, on January 31, 2011, filed a motion, pursuant to Civ.R. 56(F), for additional time within which to conduct discovery. A telephone conference call was held on February 24, 2011. Via a Judgment Entry filed on February 25, 2011, the trial court continued the trial date until May 3, 2011 and gave appellants until March 25, 2011 to file responses to the pending Motions for Summary Judgment.

{¶7} Thereafter, on March 22, 2011, appellant filed a second motion, pursuant to Civ.R. 56(F), for additional time to conduct discovery. Three days later, On March 25, 2011, appellants filed a memorandum in opposition to the pending Motions for Summary Judgment and a cross Motion for Summary Judgment. Appellants had requested leave from the trial court to file their cross Motion for Summary Judgment.

{¶8} On April 19, 2011, appellants filed a Notice of Voluntary Dismissal of Third Party Complaint against Quest Title Agency, Inc. with prejudice.

{¶9} Pursuant to a Judgment Entry filed on April 20, 2011, the trial court denied appellants' motion for additional time within which to conduct discovery and their motion for leave to file a cross Motion for Summary Judgment. The trial court granted appellees' Motion for Summary Judgment. The trial court, in its Judgment Entry, stated, in relevant part, as follows: "Counsel for Plaintiff is to prepare the judgment entry consistent with this Entry, the pleadings and the record within two weeks from the date of this entry. This is a final appealable order and there is no just cause for delay."

{¶10} Appellants now raise the following assignments of error on appeal:

{¶11} "I. THE TRIAL COURT ENTERED FINAL JUDGMENT IN A FORECLOSURE ACTION WITHOUT ANY ENTRY ON THE AMOUNT OWED.

{¶12} "II. THE TRIAL COURT'S ENTRY OF JUDGMENT RESTS ENTIRELY ON HEARSAY.

{¶13} "III. THE TRIAL COURT ERRED BY REFUSING TO ENFORCE THE FACE TO FACE MEETING REQUIREMENT OF 24 CFR 203.604(B).

{¶14} "IV. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT ALLOWING ADEQUATE TIME FOR DISCOVERY."

{¶15} As a preliminary matter, we must first determine whether the order under review is a final appealable order. If an order is not final and appealable, then we have no jurisdiction to review the matter and must dismiss it. See *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.*, 44 Ohio St.3d 17, 20, 540 N.E.2d 266, (1989). In the event that the parties to the appeal do not raise this jurisdictional issue, we may raise it sua sponte. See *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St.3d 86, 541 N.E.2d 64, (1989),

syllabus; *Whitaker–Merrell v. Carl M. Geupel Const. Co.*, 29 Ohio St.2d 184, 186, 280 N.E.2d 922, (1972).

{¶16} An appellate court has jurisdiction to review and affirm, modify, or reverse judgments or final orders of the trial courts within its district. See Section 3(B)(2), Article IV, Ohio Constitution; see also R.C. § 2505.02 and *Fertec, LLC v. BBC & M Engineering, Inc.*, 10<sup>th</sup> Dist. No. 08AP–998, 2009–Ohio–5246. If an order is not final and appealable, then we have no jurisdiction to review the matter and must dismiss it. See *Gen. Acc. Ins. Co.*, *supra* at 20.

{¶17} To be final and appealable, an order must comply with R.C. 2505.02 and Civ.R. 54(B), if applicable. R.C. § 2505.02(B) provides the following in pertinent part:

{¶18} "(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

{¶19} "(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

{¶20} "(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment."

{¶21} Civ.R. 54(B) provides:

{¶22} "When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision,

however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

{¶23} Therefore, to qualify as final and appealable, the trial court's order must satisfy the requirements of R.C. § 2505.02, and if the action involves multiple claims and/or multiple parties and the order does not enter a judgment on all the claims and/or as to all parties; as is the case here, the order must also satisfy Civ .R. 54(B) by including express language that "there is no just reason for delay." *Internatl. Bhd. of Electrical Workers, Local Union No. 8 v. Vaughn Indus., L.L.C.*, 116 Ohio St.3d 335, 2007-Ohio-6439, 879 N.E.2d 187, ¶ 7, citing *State ex rel. Scruggs v. Sadler*, 97 Ohio St.3d 78, 2002-Ohio-5315, 776 N.E.2d 101, ¶ 5-7. We note that "the mere incantation of the required language does not turn an otherwise non-final order into a final appealable order." *Noble v. Colwell*, 44 Ohio St.3d 92, 96, 540 N.E.2d 1381, (1989). To be final and appealable, the judgment entry must also comply with R.C. 2505.02. *Id.*

{¶24} As noted by the court in *CitiMortgage v. Arnold*, 9<sup>th</sup> Dist. No. 25186, 2011-Ohio-1350, ¶7:

{¶25} "Generally, an order that determines liability but not damages is not a final, appealable order. *Walburn v. Dunlap*, 121 Ohio St.3d 373, 2009-Ohio-1221, 904 N.E.2d 863, at ¶ 31. There is an exception to this general rule, however, 'where the computation of damages is mechanical and unlikely to produce a second appeal because only a ministerial task similar to assessing costs remains.' *State ex rel. White*

*v. Cuyahoga Metro. Hous. Auth.* (1997), 79 Ohio St.3d 543, 546, 684 N.E.2d 72. Thus, if 'only a ministerial task similar to executing a judgment or assessing costs remains' and there is a low possibility of disputes concerning the parties' claims, the order can be appealed without waiting for performance of that ministerial task. *Id.*"

{¶26} In the case sub judice, we find that the April 20, 2011 Judgment Entry was not a final appealable order despite inclusion of the Civ.R. 54(B) language. While the order granted summary judgment to appellees, it did not set forth the dollar amount of the balance due on the mortgage, and did not reference any documents in the record that did. See *CitiMortgage v. Arnold*, supra.<sup>1</sup> While the April 20, 2011 Judgment Entry ordered: "Counsel for Plaintiff is to prepare the judgment entry consistent with this Entry, the pleadings and the record within two weeks from the date of this entry..." no such entry has been filed.

---

<sup>1</sup> In such case, the court held that a summary judgment order in a foreclosure case that did not set forth the amount of judgment owed was not final.

{¶27} Because the judgment appealed from is not a final, appealable order, the appeal is dismissed.

By: Edwards, J.  
Hoffman, P.J. and  
Farmer, J. concur

*John G. Edwards*

*William B. Hoffman*

*Phyllis J. Farmer*

JUDGES

JAE/d1107

# **EXHIBIT E**

cc

2012 FEB -1 AM 11:11  
CLERK OF COURTS  
STARK COUNTY, OHIO

IN THE COMMON PLEAS COURT OF STARK COUNTY, OHIO

CITIMORTGAGE, INC.

CASE NO. 2008CV00894  
JUDGE HAAS

Plaintiff,

v.

JUDGMENT ENTRY SUSTAINING  
PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AND  
DECREE FOR FORECLOSURE

JAMES A. ROZNOWSKI, et al.

Defendants.

\*\*\*\*\*

This cause came to be heard upon the Complaint of the Plaintiff to obtain a judgment upon the promissory note set forth in Count One of said Complaint, to foreclose the lien of the mortgage securing the obligations of said promissory note, upon the Motion for Summary Judgment of Plaintiff, upon the Answer of Defendants James A. Roznowski and Steffanic M. Roznowski, upon the Answer and Cross-Claim of Defendant CitiFinancial, Inc., and upon the Answer of Defendant Stark County Treasurer.

The Court further finds that all Defendants are properly before this Court, that Plaintiff's Motion for Summary Judgment is well-taken and hereby sustained and that all of the allegations of the Plaintiff's Complaint are true.

The Court, upon further consideration, finds that there is due Plaintiff on the promissory note set forth in the Complaint, the principal sum of \$126,849.04, plus interest from August 1, 2007 through October 1, 2007 at the rate of 7.00% per annum in the amount of \$1,479.90, interest from October 1, 2007 through October 1, 2008 at a rate of 7.125% in the amount of \$9,038.04, interest from October 1, 2008 through October 1, 2009 at a rate of 6.125% in the amount of \$7,769.52, interest from October 1, 2009 through October 1, 2010 at a rate of 5.125% in the amount of \$6,501.00, together with interest at 4.125% per annum from October 1, 2010, plus costs of this action, those sums advanced by Plaintiff for costs of evidence of title required to bring this action, for payment of taxes, insurance premiums and expenses incurred for

CLERK OF COURTS  
STARK COUNTY, OHIO  
A TRUE COPY TESTED:  
NANCY S. REINHOLD, CLERK  
By \_\_\_\_\_  
Date 4.12.12 A-045

property inspections, appraisal, preservation and maintenance for which amount judgment is awarded in favor of Plaintiff and against Defendant (s) James A. Roznowski and Steffanie M. Roznowski.

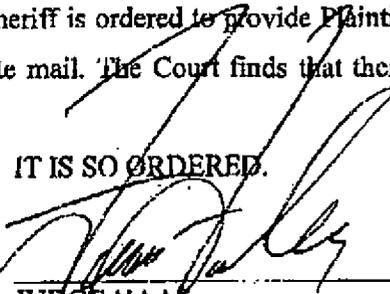
The Court further finds that the mortgage to Plaintiff recorded in Mortgage Record INSTRUMENT No. 200305060042320, is a good and valid lien and the first and best lien on the real estate described in Plaintiff's Complaint, prior to all other liens against same, with the exception of real estate taxes; that there has been a failure to perform and keep the agreements, conditions and covenants recited in said mortgage and that the condition of defeasance in said mortgage has become broken, said mortgage deed has become absolute and Plaintiff is entitled to have said mortgage foreclosed.

The Court further finds that the interest as described in the Answer of Defendant CitiFinancial, Inc. is a good and valid lien upon the premises as described in Plaintiff's Complaint.

The Court further finds that the lien as set forth in the Answer of Defendant Stark County Treasurer is a good and valid lien and the first and best lien upon the premises as described in Plaintiff's Complaint.

**IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** the equity of redemption in said real estate be foreclosed and the Plaintiff shall file with the Clerk of this Court a Praecipe for Order of Sale to be issued to the Sheriff of this County, directing him to appraise, advertise and sell according to law as upon execution, free from any dower interest of any Defendants, said real estate and pay the proceeds of said sale as herein and hereafter ordered by this Court. The Court further Orders that the Sheriff is ordered to provide Plaintiff a copy of the first ad of the sale publication by United State mail. The Court finds that there is no just reason for delay in entering final Judgment.

IT IS SO ORDERED.

  
\_\_\_\_\_  
JUDGE HAAS

LAURITO & LAURITO, L.L.C.

  
\_\_\_\_\_  
Erin M. Laurito (0075531)  
Colette S. Carr (0075097)  
Co-Counsel for Plaintiff  
7550 Paragon Road

FOR:

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(937) 743-4878

submitted  
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Assistant Prosecutor, Civil Division  
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Canton, OH 44702  
Atty for Def. Stark County Treasurer

submitted  
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Landerhaven Corporate Center  
6105 Parkland Blvd.  
Mayfield, Heights, OH 44124  
Attorney for Defendant James A. Roznowski  
And Stefanie M. Roznowski

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing pleading has been served upon all parties or counsel for all parties of interest in this case in accordance with Ohio Rules of Civil Procedures. Executed this 14th day of Jan, 2012.

LAURITO & LAURITO, L.L.C.

Erin M. Laurito (0075531)  
Colette S. Carr (0075097)  
Co-Counsel for Plaintiff

CITIFINANCIAL, INC.  
Attn: Kim Lytton  
605 Munn Road  
Fort Mill, SC 29715  
Defendant

DAVID A WALLACE  
KAREN M. CADIEUX  
280 North High Street, Suite 1300  
Columbus, OH 43215  
Co-Counsel for Plaintiff

KARA DODSON  
Washington Square Office Park  
6545 Market Avenue N., Suite 100 North

Attorney for Third Part Defendant  
Quest Title Agency, Inc.

# **EXHIBIT F**

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

12 OCT 22 PM 2:19  
CLERK OF COURT OF APPEALS  
STARK COUNTY, OHIO

CITIMORTGAGE, INC.

Plaintiff-Appellee

-vs-

JAMES A. ROZNOWSKI, ET AL

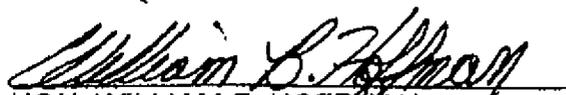
Defendant-Appellant

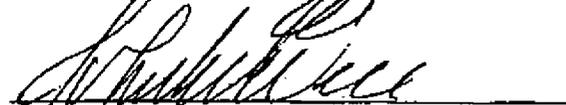
JUDGMENT ENTRY

CASE NO. 2012-CA-93

For the reasons stated in our accompanying Memorandum-Opinion, the appeal is dismissed for lack jurisdiction. Costs to appellees.

  
HON. W. SCOTT GWIN

  
HON. WILLIAM B. HOFFMAN

  
HON. JOHN W. WISE

# EXHIBIT G

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

12 OCT 22 PM 2:19  
CLERK OF COURT  
STARK COUNTY, OHIO

CITIMORTGAGE, INC.  
Plaintiff-Appellee

JUDGES:  
Hon. W. Scott Gwin, P.J.  
Hon. William B. Hoffman, J.  
Hon. John W. Wise, J.

-vs-

JAMES A. ROZNOWSKI, ET AL  
Defendant-Appellant

Case No. 2012-CA-93

OPINION

CHARACTER OF PROCEEDING:

Civil appeal from the Stark County Court of  
Common Pleas, Case No. 2008CV00894

JUDGMENT:

Dismissed

H

DATE OF JUDGMENT ENTRY:

A TRUE COPY TESTE:  
NANCY S. REINBOLD, CLERK  
By ..*[Signature]*.. Deputy  
Date ..*[Signature]*..

APPEARANCES:

For Plaintiff-Appellee  
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For Defendant-Appellant  
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KAREN A. CADIEUX  
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Columbus, OH 43215

RYAN HARRELL  
Chamberlain Law Firm  
2765 Lancashire Road  
Cleveland Heights, OH 44106

7

Gwin, P.J.

{¶1} Defendants-appellants James and Steffanie Roznowski appeal a judgment of the Court of Common Pleas of Stark County, Ohio, entered in favor of plaintiff-appellees CitiMortgage, Inc., the successor by merger to ABN AMRO Mortgage Group, Inc. For the reasons that follow, we find we have no jurisdiction over the matter.

{¶2} This case came before us on an earlier appeal, in which we determined there was no final appealable order. *CitiMortgage Inc v. Roznowski*, 5th Dist. No. 2011CA00124, 2012-Ohio-74. We found the earlier judgment did not set forth the dollar amount of the balance due on the mortgage and did not reference any documents in the record that did.

{¶3} In response, the trial court entered a judgment on February 1, 2012. The court set forth the principal sum due plus the interest. In addition, it awarded "costs of this action, those sums advanced by plaintiff for costs of evidence of title required to bring this action, for payment of taxes, insurance premiums and expenses incurred for property inspections, appraisal, preservation and maintenance." The court did not enter a dollar amount for any of those damages.

{¶4} Before addressing the merits of any appeal, we must first determine whether we have jurisdiction over the matter. If the parties to the appeal do not raise this jurisdictional issue, we may raise it sua sponte. *Chef Italiano Corp. v. Kent State University*, 44 Ohio St.3d 88, 541 N.E.2d 64, (1989), syllabus by the court. With few exceptions, the order under review must be a final appealable order. If an order is not final and appealable, then we have no jurisdiction to review the matter and must dismiss it. See *General Accident Insurance Co. v. Insurance Co. of North America*, 44 Ohio

St.3d 17, 20, 540 N.E.2d 266, (1989). An appellate court has jurisdiction to review and affirm, modify, or reverse judgments or final orders of the trial courts within its district. Ohio Constitution, Article IV, Section 3(B)(2) ; R.C. § 2505.02 .

{15} Ohio law recognizes an absolute right of redemption that is dual in nature, arising both from equity and statute. *Hausman v. Dayton*, 73 Ohio St.3d 671, 676, 1995-Ohio-277, 653 N.E.2d 1190. In *Hausman*, the Ohio Supreme Court explained that the mortgagor's equitable right of redemption is cut off by a decree of foreclosure. Generally, a common pleas court grants the mortgagor a three-day grace period to exercise the 'equity of redemption,' which consists of paying the debt, interest and court costs, to prevent the sale of the property. *Id.* After the decree of foreclosure has been entered, a mortgagor retains a statutory right of redemption under R.C. 2329.33 that may be exercised at any time prior to the confirmation of sale by depositing the "amount of the judgment" with all costs in the common pleas court.

{16} To redeem the property under R.C. 2329.33, "the mortgagor-debtor must deposit the amount of the judgment with all costs specified." *Women's Federal Savings Bank v. Pappadakes* 38 Ohio St.3d 143, 527 N.E.2d 792 (1988), paragraph one of the syllabus. The funds deposited must be available for use and division immediately. *Id.* at 146.

{17} In *Huntington National Bank v. Shanker*, Cuyahoga App. No. 72707, 1998 WL 269091, (May 21, 1998) , the court stated "It would be beyond reason to hold a trial court or magistrate to a standard that insists they state a definite sum of redemption," and that "[a]s long as the redemption value of a foreclosed property is ascertainable through normal diligence, the value, as stated by a finder of fact, will be upheld."

Likewise, courts have held it could be impractical to require the mortgagee to state with specificity the total amount due for additional charges because some of the damages would be accruing continuously through the date of the sheriff's sale. *First Horizon Home Loans v. Sims*, 12th Dist. No. CA2009-08-117, 2010-Ohio-847 ¶ 25.

{¶8}. In *Roznowski I*, we said:

"Generally, an order that determines liability but not damages is not a final, appealable order. *Walburn v. Dunlap*, 121 Ohio St.3d 373, 2009-Ohio-1221, 904 N.E.2d 863, at ¶ 31. There is an exception to this general rule, however, 'where the computation of damages is mechanical and unlikely to produce a second appeal because only a ministerial task similar to assessing costs remains.' *State ex rel. White v. Cuyahoga Metro.Housing Auth.* (1997), 79 Ohio St.3d 543, 546, 684 N.E.2d 72. Thus, if 'only a ministerial task similar to executing a judgment or assessing costs remains' and there is a low possibility of disputes concerning the parties' claims, the order can be appealed without waiting for performance of that ministerial task. *Id.*

*Roznowski I* at ¶25, citations sic.

{¶9} The valuation of the damages "for costs of evidence of title required to bring this action, for payment of taxes, insurance premiums" may be mechanical and ministerial, and ascertainable by normal diligence, and thus the court was not required to list them in the judgment entry of foreclosure. However, we find the computation of the dollar amount for "expenses incurred in property inspections, appraisal, preservation and maintenance" are not easily ascertainable. This matter has been pending for nearly

five years, and the accrued expenses appellee claims could represent a substantial sum. In order to exercise their right of redemption, appellants must know the amount of money they must produce. Nothing in the record gives appellants or this court notice of the amount.

{¶10} Appellants may dispute the necessity, frequency, and/or reasonableness of the expenses, and any challenges to these expenses may be likely to produce a second appeal before the sale. Further, these damages are not accruing continuously until the sheriff's sale. The final appraisals will be ordered by the sheriff, and appellee may or may not be required to expend funds for further inspections or maintenance. If there is a delay, occasioned, for example, by another appeal, the court can award subsequent damages.

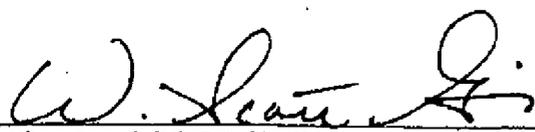
{¶11} Appellee represented at oral argument all of the above can be challenged at the confirmation hearing. We do not agree. The proper time to challenge the existence and the extent of mortgage liens is in the foreclosure action, not upon confirmation of a judicial sale. *National Mortgage Association v. Day*, 158 Ohio App. 3d 349, 2004-Ohio-4514, 815 N.E. 2d 730. Confirmation involves only a determination of whether a sale has been conducted in accord with law, such as whether the public notice requirements were followed and whether the sale price was at least two-thirds of lands appraised value. *Ohio Savings Bank v. Ambrose*, 58 Ohio St. 3d 53, 55, 563 N.E. 2d 1318 (1990). It is for this reason that only damages whose computation are "mechanical and ministerial" can be addressed at a hearing on confirmation of the sheriff's sale.

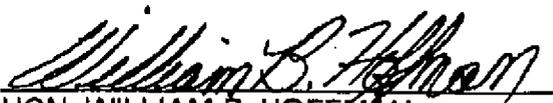
{¶12} We find the judgment entry appealed from is not a final appealable order, and the appeal is dismissed for lack of jurisdiction.

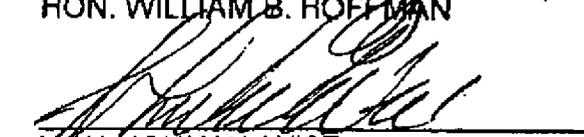
By Gwin, P.J.,

Hoffman, J., and

Wise, J., concur

  
HON. W. SCOTT GWIN

  
HON. WILLIAM B. HOFFMAN

  
HON. JOHN W. WISE

WSG:clw 1010

# EXHIBIT H

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Current through Legislation passed by the 130th Ohio General Assembly  
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\*\*\* Annotations current through November 9, 2012 \*\*\*

TITLE 23. COURTS – COMMON PLEAS  
CHAPTER 2329. EXECUTION AGAINST PROPERTY  
DEED

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2329.31 (2013)*

§ 2329.31. Confirmation and order for deed; stay

(A) Upon the return of any writ of execution for the satisfaction of which lands and tenements have been sold, on careful examination of the proceedings of the officer making the sale, if the court of common pleas finds that the sale was made, in all respects, in conformity with *sections 2329.01 to 2329.61 of the Revised Code*, it shall, within thirty days of the return of the writ, direct the clerk of the court of common pleas to make an entry on the journal that the court is satisfied of the legality of such sale and that the attorney who filed the writ of execution make to the purchaser a deed for the lands and tenements. Nothing in this section prevents the court of common pleas from staying the confirmation of the sale to permit a property owner time to redeem the property or for any other reason that it determines is appropriate. In those instances, the sale shall be confirmed within thirty days after the termination of any stay of confirmation.

(B) The officer making the sale shall require the purchaser, including a lienholder, to pay within thirty days of the confirmation of the sale the balance due on the purchase price of the lands and tenements.

**HISTORY:**

RS § 5398; S&C 1074; 51 v 57, § 437; GC § 11688; Bureau of Code Revision. Eff 10-1-53; 152 v H 138, § 1, eff. 9-11-08.

# **EXHIBIT I**

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\*\*\* Annotations current through November 9, 2012 \*\*\*

TITLE 23. COURTS -- COMMON PLEAS  
CHAPTER 2329. EXECUTION AGAINST PROPERTY  
DOCKET

**Go to the Ohio Code Archive Directory**

*ORC Ann. 2329.59 (2013)*

§ 2329.59. Entries on execution docket

The clerk of the court of common pleas shall enter upon the execution docket the names in full of parties to the cause in which an execution is issued, the number of the cause on the appearance docket, number of the execution, date of its issue, amount of the judgment, the costs due each person or officer, the time when the judgment was rendered, and the date of the return. The return shall be recorded upon the execution docket in full.

**HISTORY:**

RS § 5423; 75 v 690, § 51; GC § 11718; Bureau of Code Revision. Eff 10-1-53.

# **EXHIBIT J**

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\*\*\* Annotations current through November 9, 2012 \*\*\*

TITLE 25. COURTS -- APPELLATE  
CHAPTER 2505. PROCEDURE ON APPEAL

Go to the Ohio Code Archive Directory

*ORC Ann. 2505.02 (2013)*

§ 2505.02. Final order

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to *section 2307.85* or *2307.86 of the Revised Code*, a prima-facie showing pursuant to *section 2307.92 of the Revised Code*, or a finding made pursuant to division (A)(3) of *section 2307.93 of the Revised Code*.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018, and the enactment of *sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code* or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of *sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code*.

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of *section 163.09 of the Revised Code*.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

**HISTORY:**

GC § 12223-2; 116 v 104; 117 v 615; 122 v 754; Bureau of Code Revision, 10-1-53; 141 v H 412 (Eff 3-17-87); 147 v H 394. Eff 7-22-98; 150 v H 342, § 1, eff. 9-1-04; 150 v H 292, § 1, eff. 9-2-04; 150 v S 187, § 1, eff. 9-13-04; 150 v H 516, § 1, eff. 12-30-04; 150 v S 80, § 1, eff. 4-7-05; 152 v S 7, § 1, eff. 10-10-07.