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**IN THE SUPREME COURT OF OHIO**

Case No. 2012-2110

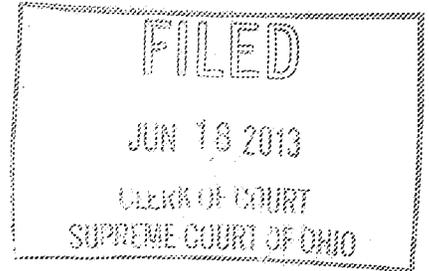
**CITIMORTGAGE INC.**, successor by merger to  
ABN AMRO Mortgage Group, Inc.,

Appellants,

vs.

**JAMES A. ROZNOWSKI AND  
STEFFANIE ROZNOWSKI,**

Appellees.



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

**BRIEF OF THE APPELLEES  
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## STATEMENT OF FACTS AND CASE

This Appeal is the second taken from a judgment entry prepared for the trial court by the Appellant, CitiMortgage. The first appeal was also dismissed for lack of a final appealable order. *CitiMortgage v. Roznowski*, 5th Dist. No. 2011CA 124, 2011-Ohio-74, P27 (January 9, 2012). The first time through the Fifth District Court of Appeals, the Court below gave the Appellant a detailed set of directions of how to complete the judgment entry. Citi elected not to follow them.

CitiMortgage has made several attempts at writing a final entry in this case. After remand of the first case, the Appellant submitted for filing an entry similar, though not identical,<sup>1</sup> to the second of two entries that had been circulated before the first appeal. (Judgment Entry of February 1, 2012.) This entry offers calculations of interest for specified periods, marked by the date the adjustable interest rate changed under the note. However, it also awards, “the 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., pp. 1-2.) No dollar amounts, nor any estimate is stated. No attempt was made to state a formula for calculating any of these amounts.

The Complaint, at paragraph 2, stated:

2. The Plaintiff further states that ... Plaintiff is entitled to Judgment in the amount of \$126,849.04 plus interest from August 1, 2007, to October 1,

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<sup>1</sup> The Judgment Entry of 2/1/12 changed the dollar amount stated formerly as “\$,501.00” to “6,501.00” in the Appellee’s calculation of interest for the period from October 1, 2009 to October 1, 2010.

2007 in the amount of \$1479.90 and interest paid on said principal at the rate of 7.125% per annum from October 1, 2007, until paid, together with court costs, late charges, advances for taxes and insurance and other charges, as set forth in the Promissory Note, Mortgage Deed and existing law.

The prayer for relief in the Complaint states:

WHEREFORE, Plaintiff prays for Judgment against Defendant(s) James A. Roznowski and Steffanie Roznowski in said principal sum of \$ [sic] plus interest from August 1, 2007 to October 1, 2007 in the amount of \$1479.90 and interest on said principal at the rate of 7.125% per annum from October 1, 2007, until paid, plus late charges, taxes, assessments and insurance premiums that may be advanced by Plaintiff and for all costs herein expended; and any and all advancements which have been paid or will be paid for the benefit, preservation and protection of said real property ... and that the proceeds arising from [the foreclosure sale] be applied to the payment of Plaintiff's judgment ... .

The interest calculation in the Complaint does not match the interest calculation stated in the judgment. Four days after return from mediation, the trial court set the case for trial on February 10, 2011. Without asking leave, CitiMortgage/ABN AMRO moved for summary judgment on January 10, 2011. The trial court's ruling on this motion is the one under appeal, as during the first appeal. The evidence CitiMortgage submitted was an Affidavit of a Citi employee, Ms. Wendy Wilson, which was filed on January 18, 2011. Like the Complaint, and like the Entry appealed, the Motion for Summary Judgment stated a prayer for "other costs," without any clarification of what those would be, or how much.

The undersigned appeared formally for the Appellees on January 24, 2011 and sought a continuance of the trial date. That request outlined several issues that required time to develop, in light of the stay that had been imposed during the mediation. Specifically, the Roznowskis raised the issues of what amount CitiMortgage was seeking in damages from them, in light of the Plaintiff's prior inconsistent statements concerning the amounts owed on the note. There were also irregularities in the documents Citi had produced in an effort to prove title to the note and mortgage.

The Appellees specified their factual and legal bases for requesting more time by a Rule 56(F) Motion filed on January 31, 2011. The Roznowskis also needed time to research the legal bases for their claims and defenses. The trial court cancelled the trial set for February 24, and held a pre-trial that date instead. Then, the Roznowskis were allowed only 29 days, or to March 25, 2011, for their opposition to CitiMortgage's Motion for Summary Judgment. Trial was re-set for May 3, 2011.

On March 22, 2011, Defendants filed a second Rule 56(F) Motion. Attached to that Motion were the discovery requests the Roznowskis would rely on to defend against foreclosure. Also attached is an Affidavit by Steffanie Roznowski, detailing incorrect information she had received from CitiMortgage about the amounts due and times of interest adjustment during the life of the loan. The discovery was served on March 18, or twenty-two days after the initial pre-trial in this case. As additional cause, the Defendants specified that legal research was necessary on several areas of the law; that CitiMortgage employees had made several inconsistent statements about the amounts due under the note, both prior to foreclosure and during the proceedings; that the Affidavit supporting Citi's Motion for Summary Judgment was based on hearsay and

lacked foundation; that the “assignment” that supposedly gave title to Citi was signed *only by an employee of CitiMortgage*; and that the Defendants required the opportunity to inquire of Citi and ABN AMRO as to whether their loan was packaged and sold, and what, if anything, Citi and ABN AMRO gained in that process, or stood to gain still. Not relying entirely on the second Rule 56(F) request for leave, the Roznowskis filed an Opposition on March 25 along with a motion for leave to file a cross-motion for summary judgment. The Cross-Motion for summary judgment was based on CitiMortgage not having conducted the face to face meeting required by 24 C.F.R. 203.604(b).

CitiMortgage filed a motion for a protective order on April 15, as to the discovery served on March 18. Judge Haas had made it clear at the final pre-trial on the 14th that he would not order discovery responses to be served. The Roznowskis dismissed Quest Title with prejudice shortly after that pre-trial. At the pre-trial, and in several of the written pleadings detailed above, the Roznowskis stated that it was clear that the CitiMortgage/ABN AMRO Motion for Summary Judgment could not completely dispose of this case because the Motion did not state a total amount of damages Citi sought.

But on April 20, 2011, the trial court issued the judgment entry that was the subject of the first appeal. That entry overruled the Roznowskis' second 56(F) motion, and granted the two pending motions for summary judgment. The Fifth District Court held that the entry was not final and appealable, however, because it did not set forth either the amount of the monetary damages sought, or a method for calculating those damages that left no more than “ministerial” items to add, such as court costs.

Citi's Complaint in this case named a principal sum in the body of the Complaint, but not also in the prayer for relief. It named a particular amount of interest for the time

from August 1, 2007 to October 1, 2007, but then a fixed rate of interest (7.125%) for all time after October 1, 2007. It also claimed late charges, court costs, expenses, and expenditures for taxes and insurance. CitiMortgage still has never filed anything that put a dollar amount on these obligations.

The Roznowskis have contested several of these obligations. Attached to the first 56(F) Motion is Steffanie Roznowski's sworn statement, in which she detailed that she was given incorrect information on at least two occasions as to how the loan was supposed to adjust. (See S. Roznowski Affidavit, filed February 7, 2011, Ps 15-19.) Further, in Defendants' Opposition to Citi's Motion for Summary Judgment, Defendants stated informed the Court that because the damages were not stated in the Motion for Summary Judgment, at worst the motion had to be construed as one for partial summary judgment. Brief in Opp. at 4, filed March 25, 2011.

Even during the mediation the Roznowskis were presented with forbearance plans that showed varying amounts to calculate the "Total Arrears Due" to the time of their default. The Roznowskis attached CitiMortgage's discrepant calculations to the discovery served on March 18, 2011, and asked questions about how these numbers were arrived at. This was put on the record with the Defendants' second Rule 56(F) Motion, as copies of the discovery were attached to that motion. These discrepancies go to (1) the amount of payments some at CitiMortgage had calculated, and (2) the dates on which the payment schedule was supposed to adjust.

With the amounts owing for CitiMortgage's various claims not established, the undersigned and the Roznowskis appeared for trial--believing this would be the issue--

on May 3, 2011. The bailiff of the trial court informed Defendants and the undersigned that the trial was cancelled.

CitiMortgage took two tries at at Entry after the judgment in 2011. Both times, Counsel for the Roznowskis pointed out that there was no dollar amount on either one, nor any certain way to determine the final amounts. The Entry now under appeal fixes other errors that had been in those previous drafts, but still offers no dollar amounts for the costs, fees or expenditures for taxes or insurance claimed by Citi. The Plaintiff opted not to address those issues on remand, but instead submitted a revised entry to the trial court, which the trial court adopted without any indication of having considered the mandate of the first appeal.

The Roznowskis also filed a Motion for Reconsideration and/or Dismissal on May 3, 2011. In that Motion they again raised the issue of Wendy Wilson's affidavit resting on computerized records that were never brought to court, and cited two recent cases reversing summary judgment in foreclosure cases for this reason.

CitiMortgage has not been required to show that title remained with ABN AMRO from the time the loan was made to the time that CitiMortgage acquired ABN AMRO, with no transactions in the middle. Citi has to this day not been required to prove its entitlement to foreclose.

At page 17 of its Brief, CitiMortgage says that ascertaining the redemption amount is easy: "ask the mortgagee." Unfortunately, the Appellees have done so several times, through a prolonged period, and received discrepant information.

## ARGUMENT

Foreclosure plaintiffs are not entitled to special rules as to the finality and particularity of the judgments they seek. This Court has historically held foreclosure plaintiffs to the same standards as other litigants as to how much information is necessary to resolve the issues between the parties. Appellant's statement that the opinion under review is "contrary to decisions by this Court and 50 years of Ohio jurisprudence" is very inaccurate. (Brief of Appellants, pp. 5-6.)

The Appellant's point that the amount of the judgment is "constantly changing" is not the intractable problem the Appellant suggests it to be. Nothing prevents a foreclosing plaintiff from stating the amount due on the judgment in *all* particulars, through the date of the judgment. The reasons the amount will increase through time are not a mystery. Some expenses can be forecast exactly. In Ohio, foreclosure proceedings seek a legal, *monetary* judgment against the homeowner. The Plaintiff's burden is to state the amounts with as much particularity as reasonably possible. For any amount that evades exact calculation at the time of judgment, the plaintiff's obligation is to state how that amount will be arrived at, with reasonable particularity.

In this case, Appellant CitiMortgage simply declined the opportunity to fix its judgment entry so that the Roznowskis could reasonably ascertain (1) what is due presently, and (2) how to calculate what will be owing. This case does not present a close call, or reasonable competing interpretations of how particular an entry must be. Instead, this case is about CitiMortgage insisting that it has *no* obligation to be specific about how much money is owed on a legal judgment, prior to forcing execution on a family's home.

CitiMortgage's propositions of law are contrary to several of this Court's rulings. As an alternative rule for final judgments in foreclosure, Appellees suggest that an order determining foreclosure and ordering sale is specific enough to be final and appealable when:

1. All sums that can be calculated through the date of the entry are stated in the entry; and
2. The plaintiff lists the known expenses that will continue to accrue, and
3. The plaintiff provides information about any formula or schedule known at the time of the judgment entry that puts the defendants, interested parties, potential buyers, and the court on notice of the nature of the damages that will continue to accrue.

Put simply, the judgment is final when it details the amounts of damages that are known, and says as much as *can be* known about the ongoing damages. By contrast, CitiMortgage is arguing that there is no need for the degree of definition and finality that this Court has mandated for every other type of civil judgment, until the Sheriff executes a sale. CitiMortgage is arguing for a broad rule that the requirement that a judgment be definite simply does not apply to foreclosing banks.

CitiMortgage is mistaken on the law. Further though, the facts of this case illustrate the potential peril of the rule of law Citi advances. The Roznowskis have shown that Citi has a track record of getting the amount due wrong in this case. To put it mildly, foreclosure processes have been the subject of national scrutiny as well because of banks' irregularities. The way CitiMortgage would have it, there would be no remedy when a bank makes a mistake as to the very most essential element of a legal judgment--the amount--until after execution on the property. This rule is contrary to established law, and would serve all parties badly, including foreclosing banks.

**First Certified Issue:**

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.

The certified questions advanced by CitiMortgage break some of the undetermined expenses into two categories. But they fail to ask for the all the same damage categories as the judgment entry. The first is the subject of the First Certified Issue, which are for “inspections, appraisals, property protection and maintenance.” The language of Citi’s proposition of law addressing this question assumes incorrectly that there is no issue on this record, or generally, as to the amounts of principal, interest, and late fees. In this case, CitiMortgage’s own attempts to state these numbers were fraught with error. It is a matter of the integrity of the courts’ dockets that a final entry state what is known about the amount of damages, as of the time the entry is made, with as much finality as possible. Any amount that is ascertainable at the time of entry, but incorporated only by reference to other documents, invites error. CitiMortgage’s strategy is to kick examination of any potential source of error as far down the road as possible. Appellees ask this Court to reject CitiMortgage’s division of what damage items may be stated (albeit only by reference to other documents) in the first judgment entry, and which may be punted to the confirmation hearing.

**I. AN ENTRY THAT DOES NOT RENDER A FINAL DETERMINATION OF THE PARTIES’ RIGHTS IS NOT A FINAL JUDGMENT.**

Like every other civil plaintiff, CitiMortgage filed this suit in very large part to ask the Court to determine an amount of money the Roznowkis owe it. So says the prayer for relief. The general rule is well established: an entry that says one party is liable to

another, but does not say the amount, is not final or appealable. "As a general rule, even where the issue of liability has been determined, but a factual adjudication of relief is unresolved, the finding of liability is not a final appealable order even if Rule 54(B) language was employed." *Noble v. Colwell*, 44 Ohio St. 3d 92, 96, 540 N.E.2d 1381 (1989). Footnote 5 of *Noble* lists six Ohio and Sixth Circuit cases on this proposition, and an annotation.

The Ninth District Court of Appeals has issued a reported decision that excellently states why a judgment must be definite to be final:

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. \*\*\*

The courts have similarly described a "judgment": "**A judgment is the final determination of a court of competent jurisdiction upon matters submitted to it.**" *State ex rel. Curran v. Brookes* (1943), 142 Ohio St. 107, 50 N.E.2d 995, paragraph two of the syllabus. "A final judgment is one which determines the merits of the case and makes an end to it." *Id.* at 110.

A final judgment is one which operates to divest some right in such a manner as to put it beyond the power of the court making the order to place the parties in their original condition after the expiration of the term; that is, **it must put the case out of court and must be final in all matters within the pleadings.** [Emphasis added.]

*Harkai v. Scherba Indus.*, 136 Ohio App. 3d 211, 214-215, 736 N.E.2d 101 (9th Dist. 2000), citing *Hamilton Cty. Bd. of Mental Retardation & Developmental Disabilities v. Professionals Guild of Ohio* (1989), 46 Ohio St. 3d 147, 153, 545 N.E.2d 1260. "One fundamental principle in the interpretation of judgments is that, to terminate the matter, the order must contain a statement of the relief that is being afforded the parties." *Harkai*, 136 Ohio App.3d at 215-216.

A party hauled into court deserves, at a minimum, to come out with an answer to the question, "what do I owe you?" The main issue of this appeal is how much information in a foreclosure entry is necessary to answer that question. The *Harkai* court compiled several authorities to well state the general principles:

The content of the judgment must be definite enough to be susceptible to further enforcement and provide sufficient information to enable the parties to understand the outcome of the case. **If the judgment fails to speak to an area which was disputed, uses ambiguous or confusing language, or is otherwise indefinite, the parties and subsequent courts will be unable to determine how the parties' rights and obligations were fixed by the trial court.**

[cite omitted] The characteristics of a judgment were similarly described in as follows:

"It is fundamental that the trial court employ diction which should include \*\*\* operative, action-like and conclusionary verbiage \*\*\* . **Obviously, it is not necessary for such directive to be encyclopedic in character, but it should contain clear language to provide basic notice of rights, duties, and obligations.**" [Emphasis added.]

*Harkai*, 136 Ohio App. 3d at 215, quoting *In re Michael* (1991), 71 Ohio App. 3d 727, 595 N.E.2d 397, and *Lavelle v. Cox*, Trumbull App. No. 90-T-4396, unreported, (1991) (Ford, J., concurring).

This Court's most recent pronouncement on what is generally required of a final order is in accord. "We hold that in a case involving multiple claims, a judgment in a declaratory judgment action is not a final, appealable order when the trial court finds that an insured is entitled to coverage but has not addressed the issue of damages, even though the order includes a Civ.R. 54(B) certification." *Walburn v. Dunlap*, 121 Ohio St. 3d 373, 379-380 (2009). *Walburn* clarifies that a certification of "no just reason for delay" means nothing on an entry that leaves issues to be decided.

CitiMortgage incorrectly points this Court toward *Queen City Sav. & Loan Co. v. Foley*, 170 Ohio St. 383, 165 N.E.2d 633, 11 Ohio Op. 2d 116 (1960). CitiMortgage holds up *Queen City* as controlling. (Brief of Appellant at 9.) If the issue disputed here were the priority of liens, CitiMortgage would be correct:

1. In 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.

\*\*\*

3. A lien holder who is a party to a mortgage foreclosure action and who fails to perfect an appeal from a judgment determining the mortgage to be the first and best lien on the subject premises cannot thereafter in an appeal from a subsequent judgment confirming such priority attack the correctness of such earlier judgment.

Id. at syllabus 1, 3. See *Goodman v. Schneider*, No. 96883, 2012-Ohio-5411, ¶ 10 (8th Dist.)(distinguishing *Queen City*, noting that the validity of the lien was not the issue).

Certainly a party seeking to contest a lien has a definite, final, appealable order in this case. The Entry declares CitiMortgage's priority. But that is not the Roznowskis' issue. The fact that lien priority is stated in the entry does not put anyone on notice of the question of the amount of the legal, monetary damages sought. This issue was not present in *Queen City*. Citi appears to be suggesting that an order that is final as to one or more issue is final as to all. That has never been a correct statement of law.

As a general proposition, a lawsuit is not over until all parties can look at the docket and say what the outcome is. A suit that asks for monetary damage, like CitiMortgage's suit did here, is not final until damages are determined. A civil defendant is entitled to know what the damage is. The question here is whether any special rules apply to foreclosure plaintiffs, to make a final judgment any different in foreclosure cases. The answer is that none do.

## II. OHIO LAW HAS REQUIRED AN AMOUNT DUE IN FORECLOSURE ACTIONS FOR OVER A CENTURY.

Foreclosure actions do not present occasion for exceptions to the general rule:

[\*\*P33] **"The finding of the amount due is a necessary predicate to an order of sale in a foreclosure proceeding, and the finding is a judicial determination of the amount.** The defendant can take issue as to the amount claimed. [Emphasis added.]

*Italiano v. Commer. Fin. Corp.*, 148 Ohio App. 3d 261, 267-268, 772 N.E.2d 1215, 2002-Ohio-3040 (7th Dist.), quoting the "aged by still applicable" *Doyle v. West*, 60 Ohio St. 438, 54 N.E. 469 (1899).

The Eleventh District Court of Appeals recently offered a very detailed analysis of the gaps in a foreclosing bank's claim to a final entry:

{¶149} Regarding the interest and late fees, these matters are set forth in the note. While the better practice would be for the trial court to specify the exact interest rate and late charges in the judgment entry itself, the fact that these terms are unambiguously stated in the note does not render the judgment entry deficient in regard to these items. **This is because it is possible for Villio to ascertain the amount of the interest and late fees by referencing the note and performing her own computations.**

*NovaStar Mtge., Inc. v. Akins*, Case Nos. 2007-T-0111, 2007-T-0117, 2008-Ohio-6055 overruled on other grounds by *Geauga Sav. Bank v. McGinnis*, Case Nos. 2010-T-0052 and 2010-T-0060, 2010-Ohio-6247, ¶118 (11th Dist.)(stating that *NovaStar* should have found the judgment to be voidable, not void).

Here it must be noted that the facts are on the record in this case that demonstrate the inadequacy of incorporating the amounts of the unpaid principal, interest, and late fees just by reference to the note. Appellees asked CitiMortgage for numbers several times, before suit and after, and got varying information. If these sums are obvious from the note, then the plaintiff reducing them to judgment should

just (1) calculate them, and (2) aver that the calculation is consistent with the payment history records. Otherwise one would need a calculator and a leap of faith to determine the most elementary item of the judgment: the amount.

The NovaStar court continued:

{¶50} The judgment entry also provides that Villio pay to NovaStar for its advance on real estate taxes and insurance premiums. The judgment **entry does not provide a cost of these purported advancements. Further, the record does not contain any evidence that NovaStar made any advancements for real estate taxes or insurance premiums.**

{¶51} **We are also troubled by the trial court's assessment of "costs."** \*\*\*

{¶53} There is nothing in the record to demonstrate NovaStar's costs and expenses or whether those costs and expenses were reasonable.

{¶54} In addition, the trial court's judgment entry requires Villio to reimburse NovaStar for funds it advanced for "property protection." \*\*\*

{¶56} Again, there is nothing in the record to indicate what, if any, funds NovaStar expended relating to property protection. Further, if NovaStar did advance such funds, there is nothing in the record to show that those expenditures were "reasonable" and "appropriate."

*{¶57} The trial court's October 22, 2007 judgment entry is vague and uncertain, because it does not permit Villio to determine her obligations as they existed at the time of the decree with reasonable certainty.* \*\*\*

{¶58} **We recognize, as NovaStar contends, there will be costs incurred by the lender that will not be known until the time of confirmation of sale. However, to the extent specific costs of the lender have been incurred and are known at the time of the decree of foreclosure, those specific costs should be included in the decree. Otherwise, the debtor is being asked to review and approve a judgment without knowing the amount. This could result in an improperly-motivated lender submitting exorbitant statements for lawn care, insurance, maintenance, etc. Foreclosure proceedings can be time- and resource-intensive matters. However, at the time the final judgment is entered, the mortgage company has most likely expended the majority of the costs associated with the foreclosure case. Thus, the mortgage company should submit an amount certain that is owed by the borrower for the principal, interest, and fees at the time of the final judgment. If the specific costs are submitted, the borrower has an opportunity to object before it**

becomes a judgment. **Further, this “owed to date” approach permits the trial court to review the charges and make sure that they are accurate and reasonable.** This method would continue to protect the lender’s interests, because the final decree could provide for an allowance of any additional costs incurred between the date of the decree and the date of the confirmation of sale. The confirmation of sale would then reflect reimbursement of those additional costs.

Id. at ¶¶ 50-58.

The Fifth District’s analysis in this case is actually more forgiving of CitiMortgage’s omissions than the 11th District was in *NovaStar*:

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.

[\*P10] 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.

*CitiMortgage, Inc. v. Roznowski*, Stark Ct. App. No. 2012-CA-93, 2012-Ohio-4901, ¶¶ 9-10 (5th Dist.).

There is no basis stated by the Fifth District for differentiating what is “ministerial and mechanical” from what is not. Certainly Citi’s proposed “just ask us” approach cannot satisfy what has always been necessary for a final judgment, that the determination be made in open court. The Roznowski’s experience has been that

CitiMortgage should not be trusted to state correct numbers. Insurance costs are not ascertainable by any means; only CitiMortgage can say who it paid insurance to, and how much. Tax numbers are equally accessible to the parties, but CitiMortgage bears the burden of substantiating its judgment by virtue of being (1) the party seeking summary judgment, and (2) the plaintiff. CitiMortgage provided no numbers for any item. Citi is not saying what it intends to collect under the “costs of this action” clause.

The *NovaStar* approach creates a more even-handed rule: a plaintiff must state what is due at the time of entering judgment, and give as much information as is known that shows how ongoing damages will accumulate.

Ohio has a statute that provides for interest on judgments “until the judgment, decree, or order is satisfied.” R.C. § 1343.03(B). By its terms, the statute prescribes the same problem Citi complains of, that the amount accruing increases continually. This does not mean that a judgment entered under this statute cannot prescribe *how* the damage is going to accrue. Appellees are not demanding that CitiMortgage look into the future. They are demanding only what due process requires, that CitiMortgage say what can be said about the amount of the judgment. That is what makes a judgment a judgment.

This Court’s most recent pronouncement is consistent with only the Appellees’ position. This Court just stated that an entry is final once foreclosure is ordered, so that the bank is not at liberty to file a Rule 41(A)(1)(a) notice of voluntary dismissal:

That this default judgment occurred within a foreclosure proceeding does not make the judgment any less final. All that remained in this case were administrative matters finalizing the result of the sheriff’s sale and giving the mortgagors the opportunity to exercise their equitable right of redemption. These actions can be classified as proceedings to aid in execution of the judgment. In *Triple F Invests. v. Pacific Fin. Servs., Inc.*, 11th Dist. No. 2000-

P-0090, 2001 Ohio App. LEXIS 2484, \*3 (June 2, 2001), the Eleventh District stated: This court has held that a debtor may immediately appeal an order of sale and decree of foreclosure because such are final and appealable orders. [cites omitted] Once an order of sale and decree of foreclosure is filed, a creditor may file a praecipe for an order directing the sheriff to sell the property. This second phase of the proceedings is viewed as a separate and distinct action seeking enforcement of an order of sale and decree of foreclosure. ... **The appraisal of the foreclosed property, the sheriffs sale, and the confirmation of that sale have been described as special proceedings to enforce an order of sale and decree of foreclosure.** [Emphasis added.]

*Countrywide Home Loans Servicing, L.P. v. Nichpor*, \_\_\_ Ohio St.3d \_\_\_, 2013-Ohio-2083, ¶ 6 (May 28, 2013), citing *Citizens Loan & Savings Co. v. Stone*, 1 Ohio App.2d 551, 552, 206 N.E.2d 17 (1965) and *Shumay v. Lake Chateau, Inc.*, Medina App. Nos. 1013 and 1034, 1981 Ohio App. LEXIS 12382, \*6, unreported (1981).

As set forth in greater detail below, CitiMortgage's proposed formula of waiting until the confirmation order is incorrect and unworkable. This Court just clarified that the special proceeding of the Sheriff's sale is narrowly defined by statute. Both equity, and the statutory definition of that proceeding require that the obligation be finalized prior to the sale. It follows that any controversy of the amount of the obligation be determined prior as well.

### **III. THE RIGHT OF REDEMPTION CANNOT BE LEFT TO A FIGURE STATED ONLY BY THE MORTGAGEE WITHOUT JUDICIAL DETERMINATION.**

In addition to being simply too vague to determine this action, the Entry CitiMortgage insists on would be very detrimental to a foreclosed defendant's right of redemption. As CitiMortgage would have it, redemption could not be exercised until after the Sheriff's sale had already occurred. To that time, to exercise the right, the foreclosed defendant would be wholly dependent on "as the mortgagee" for the redemption amount. There would be no judicial scrutiny until the confirmation hearing.

This position is contrary to established law, contrary to the purpose of the redemption statute, and would be very bad public policy if adopted.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"

*In re Adoption of Zschach*, 75 Ohio St. 3d 648, 665 N.E.2d 1070 (1996), quoting *Mathews v. Eldridge* (1976), 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18, 32, quoting *Armstrong v. Manzo* (1965), 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L. Ed. 2d 62, 66. The confirmation hearing is not a meaningful time for judicial the redemption amount.

"The time to bring defenses to a mortgage and any notes associated with the mortgage is when the validity of the mortgage is before the court, i.e., during the initial foreclosure proceedings." *Italiano*, 148 Ohio App. 3d at 267-268, citing *Bank One Dayton, N.A. v. Ellington* (1995), 105 Ohio App. 3d 13, 16, 663 N.E.2d 660, and *Carr v. Home Owners Loan Corp.*, 148 Ohio St. 533, 76 N.E.2d 389.

Ohio's redemption statute provides:

§ 2329.33. Redemption by judgment debtor

In sales of real estate on execution or order of sale, at any time before the confirmation thereof, the debtor may redeem it from sale by depositing in the hands of the clerk of the court of common pleas to which such execution or order is returnable, the amount of the judgment or decree upon which such lands were sold, with all costs, including poundage, and interest at the rate of eight per cent per annum on the purchase money from the day of sale to the time of such deposit, except where the judgment creditor is the purchaser, the interest at such rate on the excess above his claim. The court of common pleas thereupon shall make an order setting aside such sale, and apply the deposit to the payment of such judgment or decree and costs, and award such interest to the purchaser, who shall received from the officer making the sale the purchase money paid by him, and the interest from the clerk. This section does not take away the power of the court to set aside such sale for any reason for which it might have been set aside prior to April 16, 1888.

The statutory structure provides also for excess proceeds from the sale to be payable to the debtor. R.C. § 2329.44.

In the posture of this case, the amount necessary to prevent sale, to redeem the property after sale but before confirmation, or the amount of excess that should be paid if the Roznowski's home is sold are all kept by CitiMortgage alone. Citi has proved itself unreliable on this issue.

Further, as shown below, CitiMortgage's second proposed answer to the second certified question is directly contrary to precedent.

**Second Certified Issue:**

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.

**IV. CITIMORTGAGE'S SECOND PROPOSITION OF LAW IS CONTRARY TO PRECEDENT.**

The second category of unspecified damages CitiMortgage advocates for is "Inspections, Appraisals, Property Protection and Maintenance." Citi makes no mention of the "costs of the action" in either proposition, but did in the judgment entry. As stated above, however, Appellees do not accept CitiMortgage's division as to what damages can be outlined or incorporated by reference in the entry ordering foreclosure, and which can wait for the confirmation order. Appellant's analysis does not account for all items of damages, particularly court costs. In addition to being incomplete, CitiMortgage's division of what damages can be stated when is not supported in Ohio law.

The second certified question does have controlling precedent. *Oberlin Sav. Bank Co. v. Fairchild*, 175 Ohio St. 311, 194 N.E.2d 580, 25 Ohio Op. 2d 181 (1963).

This Court should summarily answer Question 2 in the negative, or find this question improvidently certified:

S.Ct.Prac.R. 8.04. Improvidently Certified Conflicts.

When the Supreme Court finds a conflict pursuant to S.Ct.Prac.R. 8.02, it may later find ... that the same question has been raised and passed upon in a prior appeal. Accordingly, the Supreme Court may sua sponte dismiss the case as having been improvidently certified or summarily reverse or affirm on the basis of precedent.

*Oberlin Sav. Bank Co. v. Fairchild* concerned an un-named party's claim to a life estate in a property that was the subject of a foreclosure suit. Ms. Fairchild did not appear in the action prior to the order of sale. She later appeared after the sale was made, but before confirmation. She took appeal only after the confirmation of sale. *Id.* at 311.

This Court held that "The Court of Appeals was in error in reversing the judgment of the trial court, where no appeal was taken from the final order of that court," citing *Queen City Savings & Loan Co. v. Foley*; see also *Italiano v. Commer. Fin. Corp.*, 148 Ohio App. 3d at 267-268.

CitiMortgage's effort to push issues down the road toward the confirmation hearing would also significantly curtail the availability of review. "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); see also *Laub v. Warren*

*Guarantee Title & Mortg. Co.*, 54 Ohio App. 457, 468-469, 8 N.E.2d 258, 23 Ohio L. Abs. 514, 8 Ohio Op. 220 (11th Dist. 1936)(abuse of discretion standard).

CitiMortgage's push to delay adjudication of damages amounts until the confirmation hearing is also contrary to the policy of finality that has historically attended confirmation proceedings. *Ambrose*, 56 Ohio St. 3d at 55-56. The more delay in judicial determination, the more to review after the confirmation sale.

Notably, once the sale is consummated, reversal of the underlying judgment by which it was ordered does not divest the purchaser of title:

§ 2329.45. Reversal of judgment

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

Reading these statutes together, these are the parties who would be disadvantaged by the rule of law proposed by Appellant CitiMortgage:

- homeowners defending foreclosure, who could only “call the mortgagee” prior to the sale and not challenge any error in the amount due until confirmation;
- prospective purchasers, who could only buy a property that was subject to **subsequent** determination of whether the judgment ordering sale was calculated correctly; and
- the foreclosing banks, who (1) will watch the sale prices drop should this Court announce that the validity of the judgment could only be determined after they sold the property, and (2) who will be on the hook to pay back the sale price under R.C. § 2329.45 in the event of a reversal.

No part of a court's determination of the amount owed should be deferred for any longer than necessary. CitiMortgage's second proposition of law is contrary to decided precedent. It is contrary to statute. Even if it were not, it remains a bad idea.

## CONCLUSION

A judge on a Connecticut appellate court stated very recently:

I will leave it to others to decide whether some banks are too big to fail. It is becoming increasingly evident, however, that some have become unable to efficiently manage their book of loans.

*CitiMortgage, Inc. v. Gaudiano*, 142 Conn. App. 440, 449-450 (Conn. App. Ct. 2013).

In this appeal, CitiMortgage is asking for the very least judicial oversight possible on legal judgments it is assessing on Ohio citizens. No one is too big for due process. As well summarized by the Second District Court of Appeals:

[S]ummary judgment is not properly rendered on the basis of assumptions or statements in briefs. ... **“Financial institutions, noted for insisting on their customers’ compliance with numerous ritualistic formalities, are not sympathetic petitioners in urging relaxation of an elementary business practice.”** [Emphasis added, cite omitted.]

... There can be little doubt that a home is the single largest asset of most homeowners. Banks, therefore, should submit adequate documentation when attempting to foreclose on this important asset.

*Bank of America, NA v. Miller*, 194 Ohio App.3d 307, 2011-Ohio-1403, ¶¶ 32-33. By narrow extension, the Second District's statement applies equally to the content of a judgment entry. Pleadings are only the parties' statements. Entries are the courts.' CitiMortgage has not shown itself to be authoritative on the integrity of judicial foreclosure processes, in this case or others.

For the reasons stated, the Appellees James & Steffanie Roznowski ask that this Court answer Certified Question no. 1 in the negative. Appellees ask further that this

Court declare the second question is either summarily disposed of under *Fairchild*, find it improvidently allowed by this Court's rule, or answer in the negative.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

A copy of the foregoing Brief of the Appellees was sent via First Class mail on this 18th Day of June, 2013, to each of the following:

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