

ORIGINAL

IN THE SUPREME COURT OF OHIO

|                                      |   |                                |
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| <b>FIFTH THIRD MORTGAGE COMPANY,</b> | : | Appeal No. CA20130003          |
|                                      | ) |                                |
| Plaintiff/Appellee,                  | : | Trial No. 13-0893              |
|                                      | ) |                                |
| vs.                                  | : |                                |
|                                      | ) |                                |
| <b>MARCIA C. BELL, et al.,</b>       | : | <b>ON APPEAL FROM THE</b>      |
|                                      | ) | <b>MADISON COUNTY COURT OF</b> |
|                                      | ) | <b>APPEALS, TWELFTH</b>        |
| Defendants/Appellants.               | : | <b>APPELLATE DISTRICT</b>      |

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**BRIEF OF PLAINTIFF/APPELLEE FIFTH THIRD MORTGAGE COMPANY  
IN OPPOSITION TO MEMORANDUM IN SUPPORT OF JURISDICTION**

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**FILED**  
JUL 01 2013  
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**I. EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION**

**A. The Case is Moot.**

Before considering the substance of this appeal, this court should dismiss it because it is moot. The Appellant Greg Bell (“Bell”) did not obtain an entry staying the execution of the foreclosure decree. As a result, the sheriff’s sale proceeded and the property was sold. Once the property subject to the foreclosure is sold at a sheriff’s sale, any appeal of the underlying judgment becomes moot. *Roman Plumbing Co. v. Cherevko*, 2011 WL 1593229, 2011–Ohio–1991, ¶ 34, citing *Dietl v. Sipka*, (11th Dist. 2009), 185 Ohio App.3d 218, 2009–Ohio–6225, ¶ 21. Quoting *Bankers Trust of California, N.A. v. Tutin*, 9th Dist. No. 24329, 2009–Ohio–1333, 2009 WL 763994, at ¶ 16. The *Roman* court noted “[i]n foreclosure cases, as in all other civil actions, after the matter has been extinguished through satisfaction of the judgment, the individual subject matter of the case is no longer under control of the court and the court cannot afford relief to the parties to the action.”

The capable of repetition yet evading review standard does not salvage the appeal for Bell. As the court noted in *State ex rel. Calvary v. Upper Arlington* (2000), 89 Ohio St.3d 229, 231, 729 N.E.2d 1182, a claim is capable of repetition, yet evading review if “(1) the challenged action is too short in its duration to be fully litigated before its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.” The second part of the test dooms Bell’s appeal. It is not reasonable to expect that Bell will once again be a foreclosure defendant subject to a supersedeas bond setting which he deems unreasonably high. If the capable of repetition theory applied as loosely as Bell urges, a sheriff’s sale would never render a foreclosure claim moot.

**B. The Case Presents No Question of Great General Interest or Any Substantial Constitutional Question**

Aside from the fact that the case is moot, this Court should dismiss Bell's memorandum because the issue presented is not one of great general interest. Bell contends that the appellate court erred when it set an unreasonably high bond and that it compounded the error when it denied Bell's request for reconsideration. That is the sum and substance of this appeal. One foreclosure defendant in one unique circumstance contends that the Court of Appeals misapplied R.C. 2505.09. It is an unfortunate circumstance for Bell, but it presents no issue of great general interest.

Recognizing this inconvenient truth, Bell attempts to conjure up an issue that might meet the great general interest standard. But this too is unavailing. Bell argues that R.C. 2505.09 is unconstitutional because it presents an "unreasoned impediment" to his right to appeal. In Bell's view, because the statute does not allow for a court to consider, among other things, the appellant's ability to pay for the bond, it violates the constitution. Bell presents no cases that support this point. He instead relies primarily on the United States Supreme Court decision in *Lindsey v. Normet* (1972), 405 U.S. 56. But that case provides no support for Bell's argument. *Lindsey* merely held that an Oregon statute that required defendants in Forcible Entry and Detainer proceedings to post a bond in the amount of twice their rent before appealing were denied equal protection and due process.

*Lindsey* has no application here. R.C. 2505.09 applies across the judicial spectrum – it does not carve out a class of litigants for unequal treatment. Thus, there is no equal protection argument here. In addition, the double rent provision in *Lindsey* had no relation to the landlord's actual damages. The Ohio statute requires the court to set a bond based on the amount of the judgment and interest. Accordingly, there is a rational basis for the Ohio statute that was lacking in the Oregon

statute. It is unfortunate if the appellate court misapplied the statute, but it does not make the statute unconstitutional. Given that Bell's constitutional argument lacks merit, there is no issue of great general interest presented in this appeal.

## II. STATEMENT OF THE CASE AND FACTS

Appellee Fifth Third Mortgage Company ("Fifth Third") does not contest the facts set forth in Bell's Memorandum. To the extent the statement of facts sets forth legal arguments, however, Fifth Third disputes those arguments for the reasons set forth herein.

## III. ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW

**Proposition of Law #1: R.C. 2505.09 is an unconstitutional burden on an appellant's constitutional right to an appeal where its application deprives the appellant of a meaningful appeal.**

Bell's argument is flawed from the outset by its very premise. He does not have a constitutional right to an appeal. The United States Supreme Court has held that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review. *Lindsey*, 405 U.S. at 77 (citations omitted). Bell does not dispute that he received a full and fair hearing on the foreclosure case, as well as on the stay application – indeed, he received two hearings on that application. He effectively contends that he was deprived a constitutional right that does not exist.

But the *Lindsey* court did hold that "[w]hen an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Id.* Bell contends that R.C. 2505.09 is arbitrary and capricious, in a manner similar to the Oregon statute at issue in *Lindsey*. But a review of the two statutes reveals that the two are not alike and the *Lindsey* holding does not control these proceedings. The Oregon statute in *Lindsey* applied only to defendants in Forcible Entry and Detainer cases. And those defendants were

required to post a bond of twice their rent to appeal the decision at all – not just to stay the execution.

The Supreme Court struck down the Oregon statute because it singled out FED defendants and because it automatically set the bond in an amount that bore no relation to the landlord's actual damage. *Id.* The Court also noted that the justification for the statute – that it screened out frivolous appeals was not persuasive, since it would allow frivolous appeals by those who could afford the bond. *Id.* at 78.

The Court noted that the statute fell disproportionately on the poor, but this was not the deciding factor in the opinion. *Id.* at 79. The statute singled out one class of litigants and imposed a bond in an amount that bore no relation to the landlord's actual damages for no rational reason. These factors doomed it. The Supreme Court made clear the limited scope of the *Lindsey* holding in *Bankers Life and Casualty Company v. Crenshaw*, (1988), 486 U.S. 71, 83.

The Ohio statute – R.C. 2505.09 – bears none of the offending characteristics of the Oregon statute. It does not carve out a class of litigants for disparate treatment. It applies to all civil litigants. The statute expressly ties the amount of the bond to the judgment, meaning that the bond must bear a relationship to the actual damages. The statute imposes no automatic, arbitrary multiplier. It does not in any fashion pose the constitutional infirmities that the Oregon statute posed.

Indeed, R.C. 2505.09 is very similar to Oregon Statute 19.040. That statute – which provides for a posting of sureties in an amount that would cover all “damages, costs and disbursements which may be awarded against [the appellant] on appeal” raised no serious constitutional questions according to the *Lindsey* court. *Id.* at 76 The Ohio statute is virtually identical. It is not unconstitutional.

Bell misinterprets *Lindsey* when he argues that R.C. 2505.09 is unconstitutional because it fails to take into account the borrower's ability to afford the bond. The borrower's ability to pay the bond is not the issue. So long as the bond bears a relationship to the damages, the appellant's ability to pay is not an issue. In *Johnson v. Daley* (7<sup>th</sup> Cir. 2003), 339 F.3d 582, 597-98, the Seventh Circuit noted:

“As for *Lindsey*: the Court held that, consistent with the equal protection clause, a state may distinguish eviction suits from other litigation about property and may require tenants to post bonds for the rent accruing pending decision. Indigent litigants unable to post bonds for accrued rent may lose the litigation summarily, the Court held, as far as the Constitution is concerned.”

Where the statute sets the bond in a manner that relates to the actual damages, the litigant's ability to pay is irrelevant.

Equally irrelevant is the existence of a mortgage. Bell argues that the bond should be altered to reflect the value of the mortgaged property. But the fact that the statute does not include this requirement does not make it unconstitutional. Bell's theory would require the successful litigant to take the risk that the mortgaged property will retain its value pending appeal. The successful litigant would also bear the risk of casualty to the property. It is not irrational nor unconstitutional for the legislature to avoid placing this burden on the successful litigant. The bond is not subject to shifting valuations or casualty. It is not irrational to afford this level of security to a successful litigant.

**Proposition of Law #2: R.C. 2505.09 is an unconstitutional abrogation of a court's authority to regulate procedural matters.**

Bell's second proposition of law is, in a word, unintelligible. But the gist seems to be that because R.C. 2505.09 sets a “mandatory” bond amount, it intrudes on Ohio Civ. R. 62(B) and Ohio App. R. 7, which both appear to give courts discretion in setting the supersedeas bond. But the plain language of R.C. 2505.09 belies Bell's argument. The very first line of the statute says: “Except as provided in section 2505.11 or 2505.12 or another section of the Revised Code **or in applicable**

**rules governing courts**” (emphasis added). Thus, the statute gives way to applicable rules of courts – including Civ. R. 62(B) and App. R. 7. As the cases Bell cites demonstrate, courts can and have exercised discretion in setting supersedeas bonds, consistent with the plain language of R.C. 2505.09. Bell’s second proposition of law is an illusion.

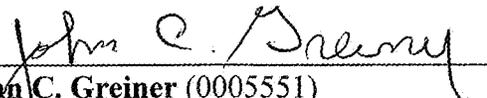
#### **IV. CONCLUSION**

This Court should not exercise its discretionary jurisdiction in this matter. It presents no matter of public or great general interest, and there is no substantial constitutional issue presented. Bell’s legal positions are not supported by legal authority and in fact, are belied by the authorities upon which he relies.

Respectfully submitted,

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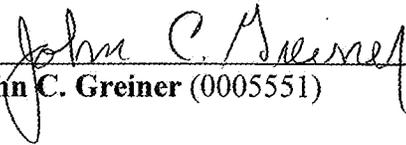
  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing ***Brief of Plaintiff/Appellee Fifth Third Mortgage Company*** was sent by regular U.S. Mail, postage prepaid, on June 28, 2013, upon the following:

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