

IN THE SUPREME COURT OF OHIO

Bank of America, N.A.,

Appellant,

v.

George M. Kuchta, et al.,

Appellees.

: Case No. 2013-0304
:
: On Appeal From the Medina County Court of
: Appeals, Ninth Appellate District
:
: Court of Appeals Case No. 12CA0025-M
:
:
:

BRIEF OF APPELLEES GEORGE M. KUCHTA AND BRIDGET M. KUCHTA

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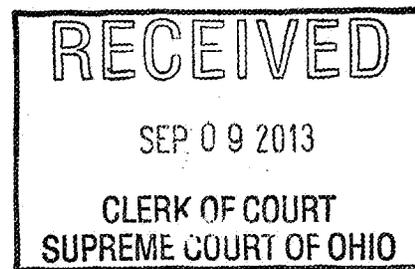
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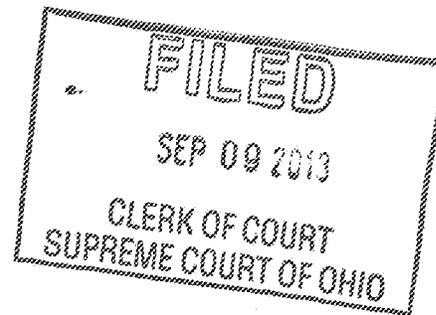
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I. INTRODUCTION

This Court accepted jurisdiction to resolve the following question: “When a defendant fails to appeal from a trial court’s judgment in a foreclosure action, can a lack of standing be raised as part of a motion for relief from judgment?”

Since Article IV of the Ohio Constitution limits the subject matter jurisdiction of the Ohio Courts to “justiciable controversies”, the certified question must be answered in the affirmative.

As this Court recognized in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St. 3d 31, 2012-Ohio-5017, a Plaintiff’s standing is a jurisdictional requirement necessary to invoke the subject matter jurisdiction of the court. If the subject matter jurisdiction of the court is never invoked, any judgment entered is void.

Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time. *United States v. Cotton* (2002), 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860; *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 75, 701 N.E.2d 1002. It is a “condition precedent to the court’s ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void.” *Id.*; *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 518 N.E.2d 941, paragraph three of the syllabus.

Pratts v. Hurley, 102 Ohio St.3d 81, 2004-Ohio-1980 at ¶ 11.

Appellant argues that this court should carve out a public policy exception to the rule that a judgment rendered by a court, whose jurisdiction has not been invoked, is void *ab initio*. In a nutshell, Appellants are asking this court to carve a public policy exception to the Ohio Constitution.

Res judicata does not apply to cases where the subject matter jurisdiction of the Court was not invoked. When there is no justiciable controversy the court’s subject matter jurisdiction is not invoked and any proclamation of the court is void *ab initio*. Res judicata does not attach to

a judgment that is void *ab initio*. *State v. Wilson*, 73 Ohio St.3d 40, 45, 1995 Ohio 217, 652 N.E.2d 196 (1995), fn. 6. A litigant cannot confer subject matter jurisdiction on a court by agreement or by waiver. When there is a lack of subject-matter jurisdiction in any case, any judgment by a court lacking jurisdiction can be challenged post-judgment, even without a direct appeal. *Bank of NY Mellon Trust Co. v. Shaffer*, 2012-Ohio-3638 at ¶ 29; *Cheap Escape Company v. Haddox, L.L.C.*, 120 Ohio St. 3d 493, 2008-Ohio-6323; *Onewest Bank v. Yevtich*, 2012-Ohio-6246; *Wells Fargo Bank, N.A. v. Washington*, 2013-Ohio-773.

II. STATEMENT OF FACTS

A. Facts in *Bank of Am. v. Kuchta*, 9th Dist. No. 12CA0025-M, 2012-Ohio-5562

On June 1, 2010 Appellant Bank of America, N.A., filed a complaint in foreclosure against Appellees George and Bridget Kuchta and falsely alleged that it was the “holder” of the note. *See Complaint at ¶ 1*. The note attached to the complaint was payable to Wells Fargo Home Mortgage, Inc. *See Complaint, Exhibit A*. The mortgage attached to the complaint was granted to Wells Fargo Home Mortgage, Inc. *See Complaint, Exhibit B*. Appellant falsely alleged that the mortgage had been assigned to it. *See Complaint at ¶ 3*. There was no assignment of mortgage attached to the complaint.

On July 2, 2010 Appellees George and Bridget Kuchta filed a pro se answer that stated “[t]here is no proof in the Foreclosure Complaint that the Plaintiff owns or was assigned my mortgage.” *See Answer*. It is undisputed that the Assignment of Mortgage was executed nine (9) days after the Complaint was filed. It was thereafter recorded and submitted, by notice, to the Court. On June 27, 2011, summary judgment was entered against the Kuchtas. On September 23, 2011, the Kuchtas filed a motion to vacate said judgment. On December 5, 2012, the Ninth

District Court of Appeals cited *Schwartzwald* and reversed the decision that denied Appellees' motion to vacate.

B. Facts in *PNC Bank, Nat'l Ass'n v. Botts*, 10th Dist. No. 12AP-256, 2012-Ohio-5383

On January 21, 2011 PNC Bank, National Association (PNC) filed a complaint for foreclosure against Thomas Botts, Jr., and others. The note attached to the complaint was payable to First Franklin Financial Corporation. There was no indorsement on the note and no allonge. See Complaint, *Exhibit A*. The mortgage attached to the complaint was granted to First Franklin Financial Corporation. See Complaint, *Exhibit B*. There was an assignment of Botts's mortgage from First Franklin Financial Corporation to Wells Fargo Bank, N.A. as Trustee for National City Mortgage Loan Trust 2005-1, Mortgage-Backed Certificates, Series 2005-1. See Complaint, *Exhibit C*. The Preliminary Judicial Report attached to the complaint showed no further assignment of mortgage. See Complaint, *Exhibit D*. The Franklin County Court of Common Pleas granted a default judgment and decree of foreclosure. On January 11, 2012, Botts, through counsel, filed a motion to stay the sheriff's sale and a motion to vacate the judgment. In response to the motion to vacate PNC attached a copy of the note that still failed to evidence a proper negotiation of the note to PNC. Nonetheless, the trial court denied the motion to vacate.

Botts appealed the decision and the Tenth District Court of Appeals affirmed the judgment:

Nevertheless, we note that Botts argues under this assignment of error that the trial court erred when it found that PNC's lack of standing could be cured after the complaint was filed. The Supreme Court of Ohio very recently decided *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012 Ohio 5017, 979 N.E.2d 1214, and determined that lack of standing may not be cured after the complaint is filed. Thus, the trial court's statement here, in this respect, was erroneous. Nevertheless, because we have found that lack of standing may not be challenged in a Civ.R. 12(B)(1) motion to dismiss, we need not delve further into

the trial court's findings with respect to this issue. Therefore, we find the trial court did not err when it denied Botts's motion to dismiss, pursuant to Civ.R. 12(B)(1), although we find denial was proper on a different basis than that relied upon by the trial court. For all of these reasons, Botts's third assignment of error is overruled.

Botts at ¶ 23.

It does not appear that the court considered Civ.R. 12(H)(3), which provides “[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”

III. ARGUMENT

The Certified Question

When a defendant fails to appeal from a trial court’s judgment in a foreclosure action, can a lack of standing be raised as part of a motion for relief from judgment?

Appellant’s Propositions of Law in Response to the Certified Question

1. Res judicata bars a defendant who participated in litigation from using a post-judgment motion to contest standing.
2. When a party who participated in litigation could have raised an issue as part of a direct appeal but did not do so, that party cannot extend the time for filing an appeal by using that issue as a basis for a motion for relief from judgment.

A. *Schwartzwald*

The issue currently before this Court is very similar to the issue before this Court in *Schwartzwald*. In *Schwartzwald*, this court reaffirmed its prior interpretation of the Ohio Constitution that the Ohio courts are only vested with the subject matter jurisdiction to consider justiciable controversies. Until such time as the parties have adverse legal interests, there is no justiciable controversy. *Kincaid v. Erie Insurance Co.*, 128 Ohio St. 3d 322, 2010 Ohio 6036 at ¶ 13. This Court further held that invoking the jurisdiction of the court depends upon the state of things at the time of action is brought. *Schwartzwald* at ¶¶ 24-25. The state of things at the time

the action is brought and the state of things as originally alleged are not necessarily synonymous.

Id. Therefore, demonstration that the allegations found in the complaint were false, will defeat jurisdiction. *Id.*

Because standing to sue is required to invoke the jurisdiction of the common pleas court, "standing is to be determined as of the commencement of suit." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-571, 112 S.Ct. 2130, 119 L.Ed.2d 351, fn. 5 (1992); see also *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC)*, 528 U.S. 167, 180, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154-1155 (10th Cir. 2005); *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003); *Perry v. Arlington Hts.*, 186 F.3d 826, 830 (7th Cir. 1999); *Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055, 1061 (5th Cir. 1991).

Further, invoking the jurisdiction of the court "depends on the state of things at the time of the action brought," *Mollan v. Torrance*, 22 U.S. 537, 539, 6 L.Ed. 154 (1824), and the Supreme Court has observed that "[t]he state of things and the originally alleged state of things are not synonymous; demonstration that the original allegations were false will defeat jurisdiction." *Rockwell Internatl. Corp. v. United States*, 549 U.S. 457, 473, 127 S.Ct. 1397, 167 L.Ed.2d 190 (2007).

Id.

The underlying similarity in both *Kuchta* and *Botts* is that the foreclosing party in each case was not the holder of the subject note and mortgage, meaning that there was no justiciable controversy. Because there was no justiciable controversy, the facially false allegations contained within the individual complaints notwithstanding, standing was never demonstrated. Absent a demonstration of standing, the subject matter jurisdiction of the court was not invoked and any proclamation by the court, including a final judgment is void *ab initio*. It is well settled that the Doctrine of Res judicata does not attach to a judgment that is void. *Wilson* at fn. 6.

B. Res judicata bars a defendant who participated in litigation from using a post-judgment motion to contest standing.

Res judicata does not bar Ohio litigants from post-judgment challenges to a lack of jurisdiction because a homeowner cannot consent to subject matter jurisdiction and subject

matter jurisdiction can never be waived. See Civ.R. 12(H)(3). Res judicata does not attach to a judgment that is void *ab initio*. *Wilson* at fn. 6.

Homeowners cannot consent to a lack of subject matter jurisdiction. See *Shaffer* at ¶29 (“it is well settled that “[p]arties may not, by stipulation or agreement, confer subject-matter jurisdiction on a court, where subject-matter jurisdiction is otherwise lacking.”)

The procedural history in *Shaffer* is identical to that in *Botts* as it represents a post-judgment attack upon a default judgment.

The judgments entered in *Kuchta* and *Botts* were void *ab initio* and could be vacated by the court’s inherent power as well as upon motion by the homeowners. After *Schwartzwald* the Eleventh District Court of Appeals reasoned:

[B]ecause standing is jurisdictional, it can never be waived and may be challenged at any time. See *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶11. Finally, the Court in *Schwartzwald* held that when the evidence demonstrates the mortgage lender lacked standing when the foreclosure action was filed, the action must be dismissed without prejudice. *Id.* at ¶40.

Shaffer at ¶24.

None of the cases to which Appellant cites deal with attempts to vacate void judgments. Appellant’s reliance on *State ex rel. DeWine v. Helms*, 2013-Ohio-359, is misplaced because that case states that res judicata will bar successive Civ.R. 60(B) motions, but is inapplicable here Appellants did not file successive Civ.R. 60(B) motions. Regardless, the lack of standing would not be barred by res judicata anyway. See *Waterfall Victoria Master Fund Ltd. v. Yeager*, 2013-Ohio-3206, ¶ 16 (“As the lack of jurisdiction is an issue that cannot be waived and may be raised at any time, res judicata does not bar the arguments before this court.”)

Appellant’s citations to *Nkurunziza v. Nyamusevya*, 10th Dist. No 11AP-222, 2012-Ohio-6133, *Boardman Canfield Ctr., Inc. v. Baer*, 7th Dist. App, No. 06-MA-80, 2007-Ohio-2609, and

Strugill v. Sturgill, 61 Ohio App. 3d 94, 572 N.E.2d 178 (2nd Dist. 1989), are distinguished because, at the time of initiating each of these proceedings, it is undisputed that there were actual controversies between the parties.

As this Court said in *Schwartzwald*, jurisdiction as to whether or not there is a justiciable matter is not waivable. The only type of jurisdiction that cannot be waived is subject-matter jurisdiction. Civ.R. 12(H)(3); see also *Cheap Escape*, *supra*.

In *BAC Home Loans Servicing LP v. Busby*, 2013-Ohio-1919, the Second District Court of Appeals re-analyzed standing after this Court issued its decision in *Schwartzwald*:

If a trial court lacks subject matter jurisdiction to render a judgment, the order is void *ab initio* and may be vacated by the court's inherent power, even without the filing of a Civ.R. 60(B) motion." *State v. Wilfong*, 2d Dist. Clark No. 2000-CA-75, 2001 WL 256326, * 2 (Mar. 16, 2001). See *BJ Bldg. Co., L.L.C. v. LBJ Linden Co., L.L.C.*, 2d Dist. Montgomery No. 21005, 2005-Ohio-6825, ¶ 20.

Busby at, ¶ 19.

Appellant's arguments about *res judicata* do not apply in a case where there is a lack of standing. Both *Kuchta* and *Botts* hold that a lack of standing can serve as a meritorious defense in a Civ.R. 60(B) motion. There is no conflict on that issue.

In *Kuchta*, the Ninth District Court of Appeals analyzed the standing issue as follows:

One of Appellants' arguments is that Bank of America did not have a valid assignment of the mortgage at the time the complaint was filed, and therefore, lacked standing to bring the foreclosure suit. The Ohio Supreme Court has addressed this issue in a recent decision, *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017.

The Ohio Constitution provides in Article IV, Section 4(B): "The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law." (Emphasis sic.) *Schwartzwald* at ¶ 20. Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process,

the question of standing depends on whether the party has alleged * * * a personal stake in the outcome of the controversy. (Internal quotations omitted) Id. at ¶ 21, quoting *Cleveland v. Shaker Hts.*, 30 Ohio St.3d 49, 51 (1987). Standing is a jurisdictional matter and, therefore, must be established at the time the complaint is filed. *Schwartzwald* at ¶ 24.

If, at the commencement of the action, a plaintiff does not have standing to invoke the court's jurisdiction, the plaintiff cannot "cure the lack of standing * * * by [subsequently] obtaining an interest in the subject of the litigation and substituting itself as the real party in interest [pursuant to Civ.R. 17(A)]." Id. at ¶ 39. "The lack of standing at the commencement of a foreclosure action requires dismissal of the complaint; however, that dismissal is not an adjudication on the merits and is therefore without prejudice." Id. at ¶ 40.

In light of the Ohio Supreme Court's recent decision, we conclude Appellants' "Civ.R. 60(B) motion contain[ed] allegations of operative facts which would warrant relief from judgment." See *Seidner*, 76 Ohio St.3d at 151. We reverse and remand the case so that the trial court may apply *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017.

Kuchta at ¶¶ 12-15.

Likewise in *Botts*, the Tenth District Court of Appeals agreed that a lack of standing was a meritorious defense:

The court found there was a meritorious defense that PNC lacked standing to prosecute the underlying foreclosure action because the documents attached to the complaint did not demonstrate that PNC was the holder of the note, and the mortgage attached to the complaint indicated that it was assigned to Wells Fargo Bank, N.A., as Trustee for National City Mortgage Loan Trust 2005-1, Mortgage-Backed Certificates, Series 2005-1.

Botts at ¶ 12.

The Restatement of the Law 2d, Judgments, Section 12, Comment c (1982), cited by the Appellant discusses res judicata when subject matter jurisdiction was actually litigated in the original action and does not apply to *Kuchta* or *Botts* because neither one raised subject matter jurisdiction in their underlying foreclosure case.

Standing is jurisdictional and:

[A] jurisdictional defect cannot be waived. *Painesville v. Lake Cty. Budget Comm.*, 56 Ohio St.2d 282 (1978). This means that the lack of jurisdiction can be raised at any time, even for the first time on appeal. See *In re Byard*, 74 Ohio St.3d 294, 296 (1996). This is because jurisdiction is a condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void. *Patton v. Diemer*, 35 Ohio St.3d 68 (1988).” *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 75 (1998).

Washington at ¶ 9.

Moreover, the Restatement of the Law (2d) Judgments, Section 12, Comment d (1982), is more applicable than the discussion of Comment c and emphasizes the strong public interest in vacating a void judgment if “[a] tribunal’s excess of authority was plain or has seriously disturbed the distribution of governmental powers or has infringed a fundamental constitutional protection [emphasis added].”

Appellant’s citation to *Vitale v. Connor*, 1985 Ohio App. LEXIS 8004 (June 10, 1985), should be disregarded because this unreported case out of the Fifth District was decided prior to that court recognizing that *Suster* did not permit lack of standing to be cured. Post-*Schwartzwald*, the Fifth District Court of Appeals reversed the previous holdings of *Wachovia Bank, N.A. v. Cipriano*, Fifth Dist. App. No. 09CA007, 2009-Ohio-5470, *U.S. Bank Natl. Assn. v. Bayless*, Fifth Dist. App. No. 09 CAE 01 004, 2009-Ohio-6115, and *LaSalle Bank Natl. Assn. v. Street*, Fifth Dist. App.No. 08 CA 60, 2009-Ohio-1855, and found that the real party interest could not be cured after the complaint was filed:

Standing, on the other hand, is a “jurisdictional requirement”. *State ex rel. Dallman v. Franklin Cty.* Court of Common Pleas, 35 Ohio St.2d 176, 179, 298 N.E.2d 515 (1973). Because standing to sue is required to invoke the jurisdiction of the common pleas court, “standing is to be determined as of the commencement of suit.” *Schwartzwald, supra.* (Citations omitted).

BAC Home Loans Servicing, LP. v. Altizer, 2010-Ohio-5328 at ¶¶ 16-20.

Appellant attempts to confuse the very specific issue before this Court of whether or not a party aggrieved by a void judgment, may bring a direct attack on that judgment. Appellant is arguing that a void judgment is somehow morphed into a valid judgment, if not appealed, for public policy reasons. Appellees advocate that the Ohio Constitution can never be disregarded for reasons founded in public policy or judicial expediency. Therefore, the cases cited by Appellant all have limited applicability to collateral attacks on voidable judgments or are cases, prior to *Schwartzwald*, that incorrectly held standing to be a procedural, not jurisdictional, issue.

In short, a judgment that is rendered by a court without subject matter jurisdiction is void and has no legal effect whatsoever.

Should this court answer the certified question in the negative, it will vault the public policy consideration of finality of judgments over the Constitutional consideration of validity of judgments and overrule the well-settled case authority that *res judicata* does not attach to a judgment that is void. *Wilson* at fn. 6.

The procedural history of *Botts* is identical to the procedural history of *Cheap Escape*, and commands the same result. In *Cheap Escape*, the plaintiff filed a complaint before a court that lacked subject matter jurisdiction and judgment was rendered by default. Eleven (11) months after the judgment was rendered and execution proceedings commenced, one of the defendants filed a motion to vacate the judgment, arguing that the court lacked subject-matter jurisdiction to render a valid judgment. The trial court denied the motion to vacate and the matter was appealed to the Tenth District Court of Appeals. The Tenth District Court of Appeals held that the trial court lacked subject-matter jurisdiction, and reversed and remanded the case for dismissal. This Court then accepted the case on discretionary appeal. In *Cheap Escape*, this Court rejected an argument very similar to the argument advanced by Appellant in the instant

matter. That is, this Court rejected the notion that judicial expediency and/or public policy should override the Ohio Constitution¹ and reaffirmed that the statutory territorial limitations placed upon municipal courts in Ohio is a necessary component of subject-matter jurisdiction. This Court affirmed the decision of the Tenth District Court of Appeals, vacating a void judgment by way of a motion to vacate judgment eleven (11) months after the void judgment was rendered.

The leading case of *The Lincoln Tavern, Inc. v. Snader*, 165 Ohio St.3d 61, 1956 Ohio LEXIS 616, also shares a similar procedural history and reinforces that fact that a void judgment is subject to a direct post-judgment attack. A post-judgment attack on the jurisdiction of the court is not within the rule forbidding the collateral impeachment of judgments, but rather is of the nature of a direct attack upon the judgment. *Hayes v. Kentucky Joint Stock Land Bank*, 125 Ohio St. 359 (1932).

The sole question before the trial court at the hearing on defendants' petition was whether the judgment was void due to a lack of proper service. Thus, when the trial court determined that there was a defective service apparent on the face of the record, it found that defendants were never before it and that it never had jurisdiction in the action; and there was only one finding it could make—that such judgment was a nullity and void and that it and any proceedings taken thereunder should be vacated and held for naught. Since the sale of defendants' property was based on the judgment and the judgment is void on the face of the record, the sale made thereunder is also void.

Lincoln Tavern at ¶ 40.

Surely, if a judgment that is void for lack of personal jurisdiction is subject to direct attack post judgment, a judgment that is void for lack of subject matter jurisdiction is equally subject to direct attack. In fact, this Court has explicitly espoused this position in stating:

¹ “Based on *Haddox*, potentially thousands of judgments rendered by municipal courts across the state could be subject to invalidation.” *Cheap Escape*, Merit Brief of Appellant at p. 22

This court has determined that the reasons for disfavoring collateral attacks do not apply in two principal circumstances—when the issuing court lacked jurisdiction or when the order was the product of fraud (or of conduct in the nature of fraud). See *Coe*, 59 Ohio St. at 271, 52 N.E. 640 (strangers to a judgment are permitted to attack the judgment based on "fraud and want of jurisdiction"). See, also, *(1927), 117 Ohio St. 152, 159, 157 N.E. 897 (absent an invalid or void judgment or fraud in the procurement of the judgment, a valid judgment cannot be collaterally attacked).

Ohio Pyro, Inc. v. Ohio Dept. of Commerce, 875 N.E.2d 550, 115 Ohio St.3d 375, 2007-Ohio-5024, at ¶23.

Appellant has offered the pre-*Schwartzwald* decision in *JPMorgan Chase Bank Tr. v. Murphy*, 2d Dist. App. No. 23927, 2010-Ohio-5285, and a series of similar cases for the proposition that a party may not attack a foreclosure judgment, post-judgment, on the grounds that the trial court lacked subject-matter jurisdiction to render a valid judgment.

In *Murphy*, the Second District Court of Appeals stated that "standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court, ***the issue of standing or the 'real-party-in-interest' defense is waived if not timely asserted." *Id.* at ¶ 19. The Second District employed the same reasoning in their handling and interpretation of the *Schwartzwald* matter, *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 194 Ohio App.3d 644, 2011-Ohio-2681, and this reasoning was specifically and explicitly rejected by this court in *Schwartzwald* and subsequently by the Second District Court of Appeals in *Busby*.

Interestingly, *Murphy* cites to *Hunt v. Hunt*, 2d Dist App. No. 93-CA-92, 1994 Ohio App. LEXIS 4831, as authority for the distinction between a collateral attack upon a judgment on procedural grounds and the direct attack of a judgment on jurisdictional grounds.

It is well understood *** that the lack of subject matter jurisdiction may be raised anytime." *Hunt v. Hunt* (Oct. 28, 1994), Greene App. No. 93-CA-92, 1994 Ohio App. LEXIS 4831. While *Murphy* asserted that their motion to dismiss was a "jurisdictional motion," we have previously held, "[b]ecause '[t]he issue of lack of standing "challenges the capacity of a party to bring an action, not the subject

matter jurisdiction of the court," *** the issue of standing or the "real-party-in-interest" defense is waived if not timely asserted." *Countrywide Home Loans v. Swayne*, Greene App. No. 2009 CA 65, 2010 Ohio 3903, P 29. In other words, "standing is not an issue of subject matter jurisdiction." *Portfolio Recovery Assoc., L.L.C. v. Thacker*, Clark App. No. 2008 CA 119, 2009 Ohio 4406, P 14. As noted above, Murphy did not timely challenge the standing of JPMorgan Chase to prosecute the foreclosure action, and Murphy accordingly waived this argument.

Murphy at ¶ 19.

In *Hunt*, the Court dismissed the argument raised by Appellant herein that the issue of subject matter jurisdiction must be raised on the trial level or it is waived.

The appellant in his reply brief, argues that the appellee did not raise this particular issue of subject matter jurisdiction at the trial level and therefore is deemed to have waived it. It is well understood, however, that the lack of subject matter jurisdiction may be raised anytime. Civ.R. 12(H)(3) provides that "whenever it appears...that the court lacks jurisdiction of subject matter, the court shall dismiss the action." (Emphasis added). The issue may be raised for the first time on appeal. *Breidenbach v. Mayfield* (1988), 37 Ohio St.3d 138, 139, 524 N.E.2d 502. *Teramar Corp. v. Rodier Corp.* (1987), 40 Ohio App.3d 39. *State, ex rel. Lawrence Development Co. v. Weir* (1983), 11 Ohio App.3d 96. *Fox v. Eaton Corp.* (1976), 48 Ohio St.2d 236, 257. *Jenkins v. Keller* (1966), 6 Ohio St.2d 122, 216 N.E.2d 379, syllabus five. *Railroad Co. v. Hollenberger* (1907), 76 Ohio St. 177. *Indust. Conn. v. Weigand* (1934), 128 Ohio St. 463, 191 N.E. 696. *Thompson v. Steamboat* (1853), 2 Ohio St. 26, 28.

Id.

In *Busby*, the Second District Court of Appeals admitted it was wrong in its analysis on *Suster* and that a lack of standing did involve a lack of subject matter jurisdiction. Appellant argues unpersuasively that a party may not raise subject matter jurisdiction for the first time on appeal. However, this argument fails due to the *sui generis* nature of subject matter jurisdiction. It has been long established that the issue of subject matter jurisdiction cannot be waived and therefore can be raised at any time, even the first time on appeal, or in a collateral or direct attack upon the judgment. *Wilson* at fn. 6. Orders which are erroneous for lack of subject matter jurisdiction are void and subject to collateral attack. *State ex rel. Beil v. Dota* (1958), 168 Ohio

St. 315, 319, 154 N.E.2d 634; *Polakova v. Polak* (1995), 107 Ohio App. 3d 745, 669 N.E.2d 498; *Slone v. Ohio Bd. of Embalmers & Funeral Directors* (1995), 107 Ohio App.3d 628, 669 N.E.2d 288.

Since jurisdiction is never waived and is not waivable, Appellee may raise this issue and this Court may consider it, even if not raised below. *Jones v. Village of Chagrin Falls*, 195 Ohio App. LEXIS 2156 (May 25, 1995); *Sanford v. Ohio Bureau of Motor Vehicles*, 1994 Ohio App. LEXIS 5784 (Dec. 21, 1984); *Slone* at 630.

Since subject matter jurisdiction cannot be entered into by consent, challenges to the lack of subject matter jurisdiction cannot be barred by res judicata. The Court should answer the certified question in the affirmative.

- C. When a party who participated in litigation could have raised an issue as part of a direct appeal but did not do so, that party cannot extend the time for filing an appeal by using that issue as a basis for a motion for relief from judgment.

It is the job of a judge, at every level, to determine the jurisdiction of their own court. A judgment rendered when the court lacks subject matter jurisdiction, resulting from a lack of standing, should be vacated regardless of whether the defect is brought to the court's attention by motion or whether the court identifies the problem *sua sponte*.

The court is a gatekeeper. Even in the case of an agreed judgment, the court must vacate a judgment when it becomes aware of a lack of subject-matter jurisdiction. *See also, e.g., In re Foreclosures*, N.D. Ohio Nos. 1:07CV2282, 07CV2532, 07CV2560, 07CV2602, 07CV2631, 07CV2638, 07CV2681, 07CV2695, 07CV2920, 07CV2930, 07CV2949, 07CV2950, 07CV3000, 07CV3029, 2007 WL 3232430 (Oct. 31, 2007); *see also, EMC Mtge. Corp. v. Atkinson*, 2013-Ohio-782 at ¶¶ 5-7.

As EMC has not established it had standing to bring this action at the time it filed its complaint in foreclosure, the judgment against Mr. Atkinson cannot stand. *See*

id.; *Kuchta* at ¶ 15.

In light of the foregoing, we can only conclude that Mr. Atkinson is entitled to have the agreed judgment entry of foreclosure vacated. See *Kuchta* at ¶ 15. Further, the matter is remanded so that the trial court can apply *Schwartzwald*.

Atkinson at ¶¶ 5-7.

Appellant has offered several cases for the proposition that a party may not bring a direct attack upon a void judgment that have no applicability whatsoever to the case at bar. Appellant argues that “public policy” considerations should be afforded greater weight by this Court than Article IV of the Ohio Constitution that limits the subject matter jurisdiction of Ohio courts to justiciable controversies.

Surely public policy does not mandate that a void judgment, rendered by a court absolutely lacking the legal authority to render a judgment, somehow becomes valid because no appeal is taken. A judgment that is merely voidable may be vacated under the appropriate circumstances pursuant to Civ.R. 60. Therefore, it is illogical that a voidable judgment is subject to attack, but a void judgment would be afforded finality. Indeed, it is illogical and unconstitutional that a void judgment would be afforded finality under any circumstances whatsoever.

A judgment rendered by a court lacking subject matter jurisdiction is void and a nullity: “Appellee's protestations to the contrary, no one has a vested right or interest in a judgment that was void *ab initio*, no matter how much time elapses before it is challenged.” *Francis David Corp v. Scrapbook Memories & More*, 2010-Ohio-82 at ¶ 18.

Since no one has a vested right or interest in a judgment that is void *ab initio*, there can be no public policy consideration that affords finality to that which does not exist in the first instance. That which is void, does not exist. Therefore, the mere passage of time cannot cause

to exist that which did not exist in the first instance. The vacation of a void judgment is a matter of simple due process. The mere passage of time before a party attacks a void judgment may be inefficient, it may be inconvenient, it may be cumbersome, and it may be slow, in the final analysis since no one has a vested right in a void judgment, no one can claim to be prejudiced by a void judgment being vacated. Due process is fundamental to our system of jurisprudence.

Despite Appellant's argument, *Schwartzwald* was not a subsequent change in the law; it is recognition of what the law has always been. *Schwartzwald* is based on the Ohio Constitution. Article 4 of the Ohio Constitution only grants subject matter jurisdiction to the common pleas court for justiciable matters. If the foreclosing Plaintiff does not have the proper evidence of transfers of the note and mortgage then the matter is not ripe, the plaintiff lacks standing and because there is no justiciable controversy between the Plaintiff and the Defendant homeowner the court lacks subject matter jurisdiction to decide the case. Any judgment without subject matter jurisdiction is void *ab initio*. Subject matter jurisdiction can be raised at any point. *Kuchta* and *Botts* both raised the matter of the trial court's lack of subject matter jurisdiction and both judgments should have been reversed.

Appellant's reliance on *Doe v. Trumbull County Children Services Bd.*, 28 Ohio St.3d 128, 502 N.E.2d 605, is misguided because *Doe* is not about a subject matter jurisdiction issue, it is about whether the defense of sovereign immunity can be used. That is not the same as a jurisdictional challenge. When *Doe* was decided, the court acted correctly according to that law. It is indisputable that Doe had injury and a claim against Trumbull CSB, albeit one that was statutorily limited. In contrast, when *Kuchta* and *Botts* were decided, the trial courts did not act according to law because the Ohio Constitution mandated that before the court could proceed

there had to be a justiciable controversy. Both cases were filed with no evidence that Plaintiffs had the legal right to collect on the note or foreclose on the mortgage.

The plaintiffs have suffered no injury, so the court has no subject matter jurisdiction since there is no justiciable controversy between the parties. There is nothing for the court to decide. Therefore, a judgment entered by a court lacking jurisdiction can be challenged post-judgment, whether or not the litigant defended, because the court cannot issue advisory opinions. If a judgment is entered without jurisdiction then the court has the inherent power and duty to vacate it, however and whenever it comes to their attention.

In *Botts*, the Tenth District Court of Appeals erroneously relied on *Suster* after that case was criticized and rejected by this Court in *Schwartzwald* when it held that lack of standing does not implicate constitutional subject matter jurisdiction. *Botts* at ¶ 23. The Tenth District Court of Appeals mistakenly relied on pre-*Schwartzwald* cases from the Second District Court of Appeals (the same appellate district that decided *Schwartzwald* before it was appealed to the Supreme Court of Ohio). However, post-*Schwartzwald* the Second District Court of Appeals has reversed itself and agrees that lack of standing deprives the court of subject matter jurisdiction. See *Busby* at ¶ 19. “Because standing is a jurisdictional requirement, the complaint must be dismissed if standing is lacking.” *Id.* at ¶ 40.

Relying on *Schwartzwald*, the Sixth District Court of Appeals vacated a judgment in *Yevtich*, because the Supreme Court of Ohio held that a party that failed to establish an interest in the mortgage or the note at the time it filed suit had no standing to invoke the jurisdiction of the court.

Since appellee did not obtain a justiciable interest in this suit until the mortgage was assigned to it in January 2010, it lacked standing to invoke the subject matter jurisdiction of the court when it filed its complaint in September 2009.

Appellants' Civ.R. 12(B)(1) motion should have been granted. Accordingly, appellants' sole assignment of error is well-taken.

Yevtich at ¶ 8.

The policy of finality of judgments cannot possibly compete with the Constitutional requirement of due process of law.

D. That which is void, does not exist.

IV. CONCLUSION

A judgment rendered by a court lacking constitutional subject matter jurisdiction is void *ab initio*. The authority to vacate a void judgment is an inherent power possessed by all Ohio courts. *Patton v. Diemer*, 35 Ohio St.3d 68 (1988). Because subject matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time, even for the first time on appeal or in a collateral attack on the judgment.

Before a plaintiff sues for foreclosure the Plaintiff must demonstrate that it has an interest in the note and mortgage. In *Schwartzwald*, this Court held that:

[St]anding is required to invoke the jurisdiction of the common pleas court, and therefore it is determined as of the filing of the complaint. Thus, receiving an assignment of a promissory note and mortgage from the real party in interest subsequent to the filing of an action but prior to the entry of judgment does not cure a lack of standing to file a foreclosure action.”

Schwartzwald at ¶ 3 (emphasis added).

This Court has long held that standing is jurisdictional. Therefore, lack of standing can be challenged in a post-judgment motion and this Court should answer the certified question in the affirmative.

Respectfully submitted,



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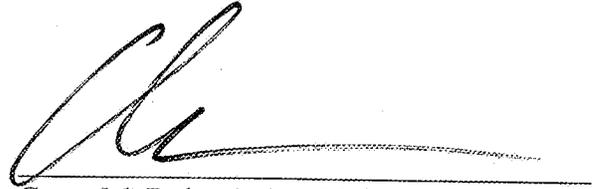
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the following via regular, U.S. Mail, on this 6th day of September, 2013:

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