

ORIGINAL

IN THE SUPREME COURT OF OHIO

BANK OF AMERICA, NATIONAL ASSOCIATION,

Plaintiff-Appellant,

v.

GEORGE M. KUCHTA, et al.,

Defendants-Appellee.

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

**REPLY BRIEF OF APPELLANT
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FILED
SEP 30 2013
CLERK OF COURT
SUPREME COURT OF OHIO

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I. INTRODUCTION.

This Court has accepted certification from the Ninth District Court of Appeals to answer the 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?” After Bank of America filed its initial Brief, three parties responded: Defendants-Appellees George and Bridget Kuchta (the “Kuchtas”), Amici Joseph and Lori LaPierre (the “LaPierres”), and Amici representing all of Ohio’s “civil legal services programs” (“CLSPs”).

Each opposing party argues that standing affects subject matter jurisdiction, that subject matter jurisdiction can be attacked at any time, that if a court did not have subject matter jurisdiction, then the judgment is “void,” and that void judgments can never be subject to res judicata. In addition, the LaPierres suggest that the Court has implicitly decided the question by remanding cases following *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St. 3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, while the Kuchtas suggest that the Court should follow (some of) the appellate district cases decided after *Schwartzwald*. The CLSPs claim that “public policy” would be best served by allowing defendants to collaterally attack standing.

The opposing parties’ contentions that judgments rendered without subject matter jurisdiction are “void” and subject to attack at any time proves too much. If that were the law, then a party could challenge standing, the common pleas court could make an express finding of fact on the issue, and even though the defendant failed to appeal, the defendant could later *again* attempt to litigate the issue on the theory that the judgment in the first trial was “void.” Contrary to the opposing parties, the dispositive issue contained in the certified conflict question is not *if* res judicata attaches to a court’s finding of subject matter jurisdiction in a contested case, but rather *when* res judicata attaches to that determination?

As detailed below, decisions by this Court and the United States Supreme Court, as well as the recommendations from the American Law Institute provide the same answer: defects in standing can be attacked only during the pendency of the proceedings or in a direct appeal from the proceedings. If the defendant appeared in the case and raised a lack of standing during the case or in a direct appeal, the defendant cannot subsequently raise a lack of standing as part of a motion for relief from judgment.

The Court did not decide this issue in *Schwartzwald*, much less decide it *sub silentio* by remanding cases following *Schwartzwald*. Public policy favors the finality of judgments. The Court should answer the certified question in the negative.

II. ARGUMENT.

Certified Conflict 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?”

A. When does res judicata attach to a determination of standing?

None of the opposing parties address whether res judicata can **ever** attach to a determination of an issue affecting subject matter jurisdiction. To the contrary, they each repeat the mantra that “subject matter jurisdiction may be attacked at any time.” Kuchtas’ Brief, 6-7; CLSPs’ Brief, 7; LaPierres’ Brief, 11. Each argues that judgments rendered by courts without subject matter jurisdiction are void. Kuchtas’ Brief, 6; CLSPs’ Brief, 7; LaPierres’ Brief, 9. The opposing parties then conclude that a decision on subject matter jurisdiction can *never* be subject to res judicata. Kuchtas’ Brief, 5-6; CLSPs’ Brief, 8-9; LaPierres’ Brief, 11.

That cannot be the law. Assume that the defendant contends that a plaintiff did not have standing, and the trial court holds an evidentiary hearing where both parties present witness

testimony on the issue. The trial court enters a judgment making an express determination that the plaintiff does have standing, and awards a monetary amount to the plaintiff. The defendant fails to appeal. Nonetheless, two years later the defendant concludes that the court got it “wrong,” and wants to re-litigate the standing issue in a post-judgment motion, even though there was an earlier express adjudication of the issue.

That position is contrary to the recommendations of the American Law Institute. Bank of America Brief, 5-12, citing Restatement of the Law 2d, Judgments, § 12 (1982), cmt. c. (“*Subject matter jurisdiction actually litigated in original action.* When the question of the tribunal’s jurisdiction is raised in the original action, in a modern procedural regime there is no reason why the determination of the issue should not thereafter be conclusive under the usual rules of issue preclusion.”).

It is also contrary to the law in federal courts. *Williams v. North Carolina*, 325 U.S. 226, 230 (1945) (“[Res judicata] applies also to jurisdictional questions. After a contest these cannot be relitigated”). See also, 11 Wright, Miller, & Kane, *Federal Practice and Procedure*, Section 2862 (2012) (“[A] court’s determination that it has jurisdiction of the subject matter is binding on that issue, if the jurisdictional question actually was litigated . . .”). Succinctly, once litigated, an issue affecting subject matter jurisdiction is subject to the normal rules of res judicata.

This leads to the next point: if a determination of an issue of subject matter jurisdiction is subject to res judicata, a trial court’s judgment is not “void” because the trial court potentially erred. “When a court does have jurisdiction over a general category of case, the fact that a court errs in assuming jurisdiction in one individual case is generally not sufficient to make the resulting judgment void for lack of subject-matter jurisdiction.” 12 Moore’s, *Federal Practice*,

Section 60.44(2)(b), at 60-154 (Matthew Bender 3d Ed.). “It has long been established that if the subject-matter jurisdiction of the court is actually litigated by the parties, the matter is conclusively settled, the judgment is not void, and there will be no relief from the judgment (at least not after all appeals have been waived or exhausted) simply because the court’s decision is erroneous.” *Id.*

Accordingly, the first part of the answer to the certified question should be plain: if the defendant appeared in the action and the trial court made an express determination on the issue of standing, the answer should be “no,” the defendant may not again raise standing in a post-judgment motion. The issue has been determined and is subject to res judicata.

As noted in Bank of America’s initial Brief, the American Law Institute applies res judicata not only to those cases where the issue affecting subject matter jurisdiction was actually litigated, but also when it was only impliedly litigated, as long as the defendant appeared and defended the case on other grounds. Restatement of the Law 2d, Judgments, § 12 (1982), cmt. d. This is because res judicata applies both to claims and defenses that were actually litigated, and those that could have been litigated. *Id.*

Again, that is the law in federal courts. *Stoll v. Gottlieb*, 305 U.S. 165, 171-172 (1938) (“[e]very court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter.”). *See, also*, 12 Moore’s, *Federal Practice*, Section 60.44(2)(b), at 60-154 (Matthew Bender 3d Ed.) (“In fact, in most cases, it is tacitly assumed that the court and the parties litigated the issue of the court’s subject-matter jurisdiction.”) and 11 Wright, Miller, & Kane, *Federal Practice and Procedure*, Section 2862 (2012) (“[A] court’s determination that it has jurisdiction of the subject matter is binding on that issue . . . if a party had an opportunity to contest subject-matter jurisdiction and failed to do so.”).

As the United States Supreme Court summed up in *Stoll*:

After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

Stoll, 305 U.S. at 172. If the defendant appears but does not contest an issue relating to subject matter jurisdiction (such as standing) during either the case or on a direct appeal, the defendant is precluded from raising that issue in a post judgment motion. *Id.* As to these types of judgments, the answer to the certified question should also be “no.”

This Court applied these principles in *Incorporated Consultants v. Todd*, 175 Ohio St. 425, 195 N.E.2d 788 (1964). In that case, the plaintiff filed suit claiming it was the “Assignee of Wm. Manlove.” The defendant filed an answer denying that allegation, but lost. *Todd*, 175 Ohio St. at 425. The defendant then filed a motion to vacate the judgment, arguing that there were no allegations of an assignment in the complaint and that this meant the plaintiff lacked standing. The trial court granted the motion. This Court reversed, detailing the wealth of secondary authority and Ohio case law supporting the proposition that a defect in standing is not subject to collateral attack. 175 Ohio St. at 427-428. *See also*, *Smead, Collard & Hughes v. Fay*, 1 Disney, 531, 12 Dec. Rep., 777 (1857) (a judgment cannot be set aside on a showing by the defendant that the plaintiff was not the real party in interest) and *Mantho v. Board of Liquor Control*, 162 Ohio St. 37, 120 N.E.2d 730 (1954) (discussed in Bank of America’s initial Brief at 8-9).

As noted in Bank of America’s initial Brief, there is a limited exception to these rules. The Second Restatement of Judgment permits collateral attacks (and does not apply res judicata) if “[t]he subject matter of the action was so plainly beyond the court’s jurisdiction that its

entertaining the action was a manifest abuse of authority.” Restatement of the Law 2d, Judgments, § 12(1) (1982).

This Court’s jurisprudence reflects this aspect of the rule as well: “In the absence of a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction, and a party contesting that jurisdiction has an adequate remedy by appeal.” *State ex rel. Jean-Baptiste v. Kirsch*, 134 Ohio St. 3d 421, 425, 2012-Ohio-5697, 983 N.E.2d 302, ¶ 16, quoting *State ex rel. Plant v. Cosgrove*, 119 Ohio St. 3d 264, 2008-Ohio-3838, 893 N.E.2d 485, ¶ 5; *State ex rel. Pruitt v. Donnelly*, 129 Ohio St. 3d 498, 2011-Ohio-4203, 954 N.E.2d 117, ¶ 2.

Here, the Kuchtas appeared in the case and raised the issue of standing in their Answer. Judgment was entered against them and they did not appeal. Res judicata precludes the Kuchtas from attacking the issue of standing by claiming that the judgment is “void.” Because the Kuchtas entered an appearance and contested the case, the answer to the certified question is “no.”

B. None of the pre-Schwartzwald cases allowed a collateral attack on the basis of standing.

The opposing parties cite cases which they contend show that subject matter jurisdiction may be attacked at any time. But those cases involved situations in which res judicata does not apply, *i.e.*, cases where the trial court did not have jurisdiction to hear that particular type of dispute, or where the defendant raised the issue during the pendency of the preceding as opposed to a collateral attack.

In *State v. Wilson*, 73 Ohio St. 3d 40, 652 N.E.2d 196 (1995), the defendant pled no contest to criminal charges in the General Division of the Hamilton County Common Pleas Court. Twelve years later, the defendant filed a motion to vacate the conviction, asserting that he

was not eighteen years old at the time, that he could have only been tried in the General Division if the case had been originated and then transferred there by Juvenile Division, and that it had not. Since the General Division never had jurisdiction over the type of dispute at issue, this Court permitted the post-judgment challenge.

In *Cheap Escape Co. v. Haddox, L.L.C.*, 120 Ohio St. 3d 493, 2008-Ohio-6323, 900 N.E.2d 601, the plaintiff filed an action in Franklin County Municipal Court against a Summit County company to recover monies for ads run in Summit County. This Court determined that R.C. 1901.18(A) only provided the Franklin County Municipal Court with jurisdiction over cases involving acts occurring within Franklin County. 2008-Ohio-6323, ¶ 22. Because the Franklin County Municipal Court never had jurisdiction over that type of dispute, the judgment could be collaterally attacked.

As noted in Bank of America's initial Brief, these cases are perfectly consistent with the position of the American Law Institute that subject matter jurisdiction may be collaterally attacked if the trial court never had jurisdiction over that type of dispute in the first instance. Restatement of the Law 2d, Judgments, § 12(1) (1982). Because a common pleas court has jurisdiction over foreclosure matters, that exception does not apply here. *JPMorgan Chase Bank Tr. v. Murphy*, 2d Dist. No 23927, 2010-Ohio-5285, ¶ 23; R.C. 2323.07.

Other cases cited by the opposing parties raised subject matter jurisdiction at trial or during a direct appeal, not in a collateral attack. *State v. Filiaggi*, 86 Ohio St. 3d 230, 714 N.E.2d 867 (1999); *Pratts v. Hurley*, 102 Ohio St. 3d 81, 85, 2004-Ohio-1980, 806 N.E.2d 992; *New Boston Coke Corp. v. Tyler*, 32 Ohio St. 3d 216, 218, 513 N.E.2d 302 (1987); *Hunt v. Hunt*, 2nd Dist. No. 93-CA-92, 1994 Ohio App. LEXIS 4831 (Oct. 28, 1994). These cases are again

consistent with the rule that where a defendant participates in an action, any challenge to subject matter jurisdiction must be raised either during the proceedings or in a direct appeal.

Finally, the opposing parties cite *Lincoln Tavern, Inc. v. Snader*, 165 Ohio St. 61, 133 N.E.2d 606 (1956) and *Hayes v. Kentucky Joint Stock Land Bank*, 125 Ohio St. 359, 181 N.E. 542 (1932). Both involved defective service of process. Where a defendant was never served and never participated in the action, *res judicata* does not apply. Here, the Kuchtas were served with process, participated in the action, and even raised the issue of standing in their answer. When they lost, they did not file a direct appeal, and cannot use a post-judgment motion as an untimely substitute.

For cases in which the defendant appears, the answer to the certified question is “no,” regardless of whether standing is expressly litigated or only impliedly determined. Nothing in any of the cases cited by the opposing parties supports a different conclusion.

C. The arguments based on post-*Schwartzwald* cases lack merit.

The LaPierres take the position that this Court’s decisions remanding cases following *Schwartzwald* must mean that it has implicitly decided the certified question. The Kuchtas take the opposite approach, arguing that this Court should adopt the rationale of the District Courts of Appeal that have rendered decisions in their favor following *Schwartzwald* and ignore the conflicting decisions. Neither has merit.

The LaPierres argue that after it decided *Schwartzwald*, this Court remanded *Wash. Mut. Bank, F.A. v. Wallace*, 134 Ohio St. 3d 359, 2012-Ohio-5495, 982 N.E.2d 691, *Bank of Am., N.A. v. Jimenez*, 134 Ohio St. 3d 360, 2012-Ohio-5499, 982 N.E.2d 692, and *Bank of N.Y. Mellon Trust Co., N.A. v. Shaffer*, 134 Ohio St. 3d 1435, 2013-Ohio-161, 981 N.E.2d 898, that these cases all involved post-judgment motions, and that this *sub silentio* must mean the Court

intended for standing challenges to be permitted in post-judgment motions. There are two problems with this contention.

First, while it is true that this Court remanded cases involving post-judgment motions following *Schwartzwald*, the Court has taken the seemingly opposite approach in other cases. The Court initially accepted jurisdiction over a case involving a post-judgment challenge to standing, *Bank of N.Y. v. Blanton*, 134 Ohio St. 3d 368, 2012-Ohio-5498, 982 N.E.2d 698, and held it for decision in *Schwartzwald*. The Court then dismissed that case as improvidently accepted, leaving in effect the appeals court judgment affirming the denial of the collateral attack on the basis it was barred after judgment. *Id.*

In *LSF6 Mercury Reo Invs. v. Garrabrant*, 5th Dist. No. 11CAE040037, 2012-Ohio-4883, the Fifth District Court of Appeals affirmed the denial of a motion for relief from judgment premised on standing, holding that standing could have only been raised in a direct appeal. After *Schwartzwald* was decided, this Court declined jurisdiction over the appeal of Fifth District's decision. *LSF6 Mercury Reo Invs. v. Garrabrant*, 134 Ohio St. 3d 1468, 2013-Ohio-553, 983 N.E.2d 368.

In any event, this Court has made clear that “[t]he law stated in an opinion of the Supreme Court shall be contained in its text, including its syllabus, if one is provided, and footnotes.” S.Ct.R.Rep.Op. 2.2. Because none of these cases included a written opinion, they are not dispositive of the question here.

Second, the District Courts of Appeal are in active disagreement on this issue, and that is precisely why the Ninth District certified the question to this Court. Not only did the Ninth District conclude that its holding was in conflict with the Tenth District in *PNC Bank, Nat'l Ass'n v. Botts*, 10th Dist. No. 12AP-256, 2012-Ohio-5383, but since this Court accepted

jurisdiction over this case, the Second and Eleventh Districts have sided with the Ninth. *BAC Home Loans Servicing LP v. Busby*, 2d Dist. No. 25510, 2013-Ohio-1919 and *Bank of N.Y. Mellon Trust Co., N.A. v. Shaffer*, 11th Dist. No. 2011-G-3051, 2013-Ohio-3205. Meanwhile, the Fifth District has now sided with the Tenth District. *Wells Fargo Bank, N.A. v. Elliott*, 5th Dist. No 13-CAE-03-0012, 2013-Ohio-3690, citing *Countrywide Home Loan Servicing, L.P. v. Nichpor*, 136 Ohio St. 3d 55, 2013-Ohio-2083, 990 N.E.2d 565. The Eighth District, in a plurality opinion, has also decided that a post-judgment attack on standing is barred by res judicata. *Chem. Bank, N.A. v. Krawczyk*, 8th Dist. No. 98263, 2013-Ohio-3614. The issue has not been resolved and the District Courts are in disagreement, both of which require this Court's clarification.

The Kuchtas do not suggest that this issue has been resolved. Instead, they assert that this Court should adopt the reasoning of the Second District in *Busby* or of the Eleventh District majority in *Shaffer*. Both held that under *Schwartzwald* standing is “jurisdictional.” *Busby* holds that “standing is an issue that cannot be waived and may be raised at any time, even after judgment.” *Id.*, ¶ 19.¹ The majority in *Shaffer*² reasoned that because *Schwartzwald* held standing was required to invoke the jurisdiction of the trial court, standing may be challenged at any time. 2013-Ohio-3205, ¶ 24.

¹ The Second District cited *Byard v. Byler*, 74 Ohio St. 3d 294, 658 N.E.2d 735 (1996), for the proposition that standing can be challenged after judgment. *Byard* does not provide that support – in *Byard*, a party to a Uniform Reciprocal Enforcement of Support Act case certified to an Ohio court an issue regarding child support. The trial court issued a visitation order, which was the subject of a separate Kentucky court case. This Court held that the Ohio court lacked **statutory** jurisdiction to entertain any issue involving visitation, even though it had jurisdiction over the child support issues. *Byard*, 74 Ohio St. 3d at 297.

² Judge Grendell dissented for many of the reasons discussed in Bank of America's Briefs. *Shaffer*, 2013-Ohio-3205, ¶¶ 35-59.

With respect to the Second and Eleventh Districts, neither *Busby* nor the majority opinion in *Shaffer* addressed the issue of res judicata, or the relationship of post-judgment motions to timely appeal. In fact, neither mentioned the words “res judicata,” much less wrestled with its requirements or impact.

Nothing in the post-*Schwartzwald* cases suggests a basis for this Court to deviate from the law followed in federal courts, from the law advanced by the American Law Institute, or from its prior decisions with respect to when res judicata bars post-judgment challenges to jurisdictional issues. The certified conflict question should be answered in the negative.

D. Public policy supports the application of res judicata.

The CLSPs’ claim that public policy is better served by allowing the defendants in foreclosure cases to challenge standing at any time. CLSPs’ Brief, 10-18. That has no merit.

As noted in Bank of America’s initial Brief, the law has a strong interest in the finality of judgments. *Doe v. Trumbull County Children Services Bd.*, 28 Ohio St. 3d 128, 131, 502 N.E.2d 605 (1986) (“There must be an end to litigation someday”). As this Court put it:

In our jurisprudence, there is a firm and longstanding principle that final judgments are meant to be just that—final. Therefore, subject to only rare exceptions, direct attacks, *i.e.*, appeals, by parties to the litigation, are the primary way that a civil judgment is challenged. For these reasons, it necessarily follows that collateral or indirect attacks are disfavored and that they will succeed only in certain very limited situations.

Ohio Pyro, Inc. v. Ohio Dep’t of Commerce, 115 Ohio St. 3d 375, 380, 2007-Ohio-5024, 875 N.E.2d 550, *citing* *Coe v. Erb*, 59 Ohio St. 259, 267-268, 52 N.E. 640 (1898). Put simply, final judgments should not be lightly set aside, and the exceptions to finality must be few and limited.

That is particularly true where the defendant participated in the case and had the opportunity to raise the issue of standing (or in cases like this one, *did* raise the issue). In every foreclosure complaint, the plaintiff asserts that it is entitled to enforce the note and mortgage. If

a defendant wants to contest that the plaintiff should not have invoked the jurisdiction of the common pleas court, the defendant can file an answer and raise the issue prior to judgment. If the defendant is unsatisfied with the trial court's decision, the law provides a remedy—appeal. That is, of course, exactly what the Schwartzwalds did in their case.

That leads to the next point. This Court in *Schwartzwald* expressed a concern that plaintiffs in foreclosure actions were not following proper procedure by prematurely filing actions before they had the right to do so. But the Civil and Appellate Rules apply to *both* parties in a court action, and the law provides defendants with specific rights and procedures to protect their interests. Nothing in any of the opposing briefs explains why defendants in a foreclosure action should be excused from the normal rules that apply to all litigants.

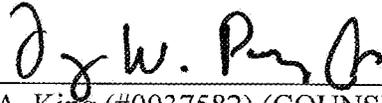
There is a public policy issue here, and that public policy is the one that underlies res judicata. At some point, all things, including litigation, must end. The opposing parties ask this Court to adopt a rule that permits defendants to hold back arguments, saving them for post-judgment motions. They ask for a rule which benefits those who do not timely appeal. They ask to prolong litigation, and to unsettle the finality of judicial decisions. Public policy is at stake, and it requires the certified question be answered in the negative.

III. CONCLUSION.

Bank of America alleged that it was the proper party to enforce the note and mortgage. The Kuchtas raised the issue of standing, and asserted in their Answer that Bank of America was not the proper party. The Kuchtas could have opposed summary judgment, but chose not to do so. The Kuchtas could have filed an appeal, but again chose not to so. There is no reason to relieve them from these “deliberate choices” (*Doe*, 28 Ohio St. 3d at 131), or to eliminate the finality favored in the law by allowing collateral attacks on judgments.

“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?” Where, as here, the defendant participated in the case, the answer to that question should be “no.”

Respectfully submitted,



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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 30th day of September, 2013.

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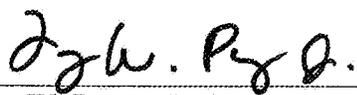
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