

**IN THE SUPREME COURT OF OHIO**

BANK OF AMERICA, N.A., : Supreme Court Case No. 2013-0304  
: :  
Plaintiff-Appellant, : On Appeal from the Medina County  
: Court of Appeals, Ninth Appellate  
v. : District  
: :  
GEORGE M. KUCHTA, *et al.*, : Appeals Case No. 12CA0025-M  
: :  
Defendant-Appellees. : :  
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**MEMORANDUM OF APPELLANT BANK OF AMERICA, N.A.  
IN OPPOSITION TO MOTION FOR RECONSIDERATION**

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## I. INTRODUCTION

In *Bank of Am., N.A. v. Kuchta*, Slip Opinion No. 2014-Ohio-4275 (the “Opinion”), this Court resolved a certified question arising from *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214. In *Schwartzwald*, the Court held that if challenged during an action, a plaintiff had to show standing as of date that the complaint was filed.

In this case, the borrower challenged standing during the action, lost a motion for summary judgment, did not appeal, and then raised standing in a post-judgment motion. Resolving a split between the Ninth and Tenth District Courts of Appeal, this Court held that because a lack of standing was “an issue cognizable on appeal,” it could not be used to collaterally attack the judgment. Opinion, Syllabus, ¶ 2. The Court also held that while standing is required to invoke the jurisdiction of a court “over a particular action, lack of standing does not affect the subject-matter jurisdiction of the court.” *Id.*, Syllabus, ¶ 3.

Defendant-Appellees George and Bridget Kuchta filed a Motion for Reconsideration arguing that a lack of standing deprives a common pleas court of subject-matter jurisdiction, that this means that a lack of standing may be challenged through a collateral attack on a judgment, and that the Opinion is contrary to this Court’s precedent. Amici Joseph and Lori LaPierre filed a memorandum in support of the Motion. None of these arguments have merit.

Under both the Opinion and this Court’s precedent, standing and subject-matter jurisdiction are different concepts. A plaintiff’s lack of standing to invoke a court’s jurisdiction does not mean that the court lacked subject-matter jurisdiction. In any event, determinations that affect subject-matter jurisdiction are subject to res judicata. Accordingly, and as correctly stated

in the Opinion, any error in a plaintiff's standing must be addressed on a direct appeal, and res judicata bars a collateral attack. The Motion should be denied.

## II. DISCUSSION

- A. The Court correctly held that a lack of standing does not deprive a common pleas court of subject-matter jurisdiction over a foreclosure case.

*Schwartzwald* clarified three aspects of standing: (1) standing is a part of what makes a matter justiciable under Article IV, Section 4(B) of the Ohio Constitution; (2) justiciability is a jurisdictional prerequisite; (3) because it is a jurisdictional prerequisite, standing is to be shown as of the time the complaint is filed. *Schwartzwald*, 2012-Ohio-5017, ¶¶ 20-24.

The Movants attempt to stretch *Schwartzwald* beyond its actual holding to stand for two additional propositions: (4) a lack of standing equates to a lack of subject-matter jurisdiction; and consequently, (5) because a lack of subject-matter jurisdiction may be challenged at any time, a defendant may challenge a judgment for lack of standing without filing an appeal from an adverse judgment, even years after the judgment was entered. Their theory has no merit.

*Schwartzwald* never held that a lack of standing deprives a court of subject-matter jurisdiction. Rather, that case reasoned that Article IV, Section 4(B) of the Ohio Constitution provides common pleas courts with jurisdiction over all “justiciable matters” and that a plaintiff without standing cannot properly “invoke the jurisdiction” of a common pleas court.<sup>1</sup> In

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<sup>1</sup> *E.g.*, “standing is required to invoke the jurisdiction of the common pleas court”( ¶ 3); “It is an elementary concept of law that a party without standing to *invoke the jurisdiction* of the court unless he has, in an individual or representative capacity, some real interest in the subject-matter of the action[]” (emphasis in original) (¶ 22, citing *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 179, 298 N.E.2d 515 (1973)); “standing to sue is required to invoke the jurisdiction of the common pleas court” ( ¶ 24); “invoking the jurisdiction of the court ‘depends on the state of things at the time the action is brought’” ( ¶ 25, citing *Mollan v. Torrance*, 22 U.S. 537, 539 (1824)); “Thus, because [Freddie Mac] failed to establish an interest in the note or mortgage at the time that it filed suit, it had no standing to invoke the jurisdiction

*Schwartzwald*, the defendant challenged the plaintiff’s standing both in the trial court and on a **direct appeal** to this Court. *Id.*, ¶¶ 20-22. The Court did not address whether standing could be raised in a *post judgment* motion by a defendant who chose not to file a direct appeal, much less whether a lack of standing deprived a trial court of subject-matter jurisdiction.

The Movants’ contrary arguments misread *Schwartzwald*. Despite repeated references to *Schwartzwald*, the Movants cite no language in which the Court actually stated that a lack of standing is tantamount to a lack of subject-matter jurisdiction. That is because there is no such language or holding in *Schwartzwald*. While *Schwartzwald* reasoned that to “invoke the jurisdiction” of a court the plaintiff must show standing, nothing in that case held that a lack of standing deprived a court of subject-matter jurisdiction.

Movants also cite *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382 for the proposition that a lack of standing equates to a lack of subject-matter jurisdiction. In *ProgressOhio*, three individuals challenged the constitutionality of the JobsOhio Act. *Id.* at 521. The trial court held that the plaintiffs “lacked the personal stake and direct injury necessary for standing.” *Id.* The plaintiffs then filed a **direct** appeal, and this Court affirmed. *Id.* *ProgressOhio* reiterated the “traditional standing principles” that litigants are required to allege “(1) an injury that is (2) fairly traceable to the defendant’s allegedly unlawful conduct, and (3) likely to be redressed by the requested relief.” *Id.*, quoting *Moore v. Middletown*, 133 Ohio St.3d 55, 2012-Ohio-3897, 975 N.E.2d 977, ¶ 22. Nothing in *ProgressOhio* held that a lack of standing deprives a common pleas court of subject-matter jurisdiction.

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of the common pleas court[.]” (¶ 28); “Standing is required to invoke the jurisdiction of the common pleas court[.]” (¶ 38).

And once again, the Movants' contrary arguments with respect to *ProgressOhio* are based on a misreading of the Court's opinion. Movants rest their arguments on the following passage: "If a common pleas court proceeds in an action in which the plaintiff lacks standing, the court violates Article IV of the Ohio Constitution. Article IV requires justiciability, and justiciability requires standing. These constitutional requirements cannot be bent." *ProgressOhio*, 139 Ohio St.3d 520 at ¶ 11. That passage only confirms what the Court held in *Schwartzwald*: if a plaintiff commences an action without standing to invoke a court's jurisdiction, if the defendant contests the lack of standing and if the trial court nonetheless proceeds, the trial court errs and its decision may be reversed on appeal. Those principles do not equate standing to subject-matter jurisdiction.

Movants also suggest that the Opinion changed the law. It did not. This Court has repeatedly held that a lack of standing does not deprive a court of subject-matter jurisdiction. *Groveport Madison Local School Bd. of Edn. v. Franklin County Bd. of Revision*, 137 Ohio St.3d 266, 2013-Ohio-4627, 998 N.E.2d 1132, ¶ 25 ("Lack of standing, on the other hand, challenges a party's capacity to bring an action, not the subject-matter jurisdiction of the tribunal."); *State ex rel. Smith v. Smith*, 75 Ohio St.3d 418, 420, 662 N.E.2d 366 (1996) ("Issues of res judicata and standing do not attack a court's jurisdiction and can be adequately raised by postjudgment appeal."); *State ex rel. LTV Steel Co. v. Gwin*, 64 Ohio St.3d 245, 251, 594 N.E.2d 616 (1992) ("These arguments raise issues of standing and res judicata, which are appealable as error; they do not attack respondents' appellate jurisdiction."); *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 82, 701 N.E.2d 1002 (1998) ("Lack of standing challenges the capacity of a party to bring an action, not the subject-matter jurisdiction of the court"). The Opinion is consistent with *ProgressOhio*, *Schwartzwald*, and this Court's other precedent.

Finally, if the law were as the Movants suggest, it would lead to nonsensical results. As the Court held in *ProgressOhio*, standing requires a redressable “injury.” *ProgressOhio*, 139 Ohio St.3d at 521. What if, in an automobile accident case, a jury determines that a plaintiff has suffered no redressable injury? Or what if, in a collections case, it turned out that the defendant was not in default because the plaintiff had in fact been paid in full, and again there was no “injury”? In both instances, the plaintiff would lose at trial, but does that mean that the trial court never had subject-matter jurisdiction to hold the trial in the first instance? Does a lack of standing equate to a lack of subject-matter jurisdiction? The answer to both questions is the same—the answer is “no.”

Standing and subject-matter jurisdiction are different concepts. Subject-matter jurisdiction refers to a court’s ability to adjudicate a *particular type* of case. Standing refers to the ability of a *particular litigant* to invoke the jurisdiction of a court that may hear that type of dispute. Nothing in *Schwartzwald*, *ProgressOhio*, or any other case equates a lack of standing with a lack of subject-matter jurisdiction.

The initial premise of the Motion is not supported by this Court’s precedent, and is just not the law. “Although standing is required in order to invoke the jurisdiction of the court of common pleas over a particular action, lack of standing does not affect the subject-matter jurisdiction of the court.” Opinion, Syllabus, ¶ 3. The Court’s conclusion was correct. The Motion should be denied.

- B. The Court correctly held that any error concerning a lack of standing is to be raised as part of a direct appeal, not a collateral attack.

Even if, as the Movants would have it, a lack of standing did affect subject-matter jurisdiction, it would do them no good. Factual determinations that affect subject-matter

jurisdiction are subject to res judicata, and the remedy for an erroneous determination is a direct appeal.<sup>2</sup>

Res judicata strikes the balance between the law's interest in ensuring that a court's judgment is correct (the concept of "validity") and the law's interest in ensuring the efficient use of the judicial system and in the conclusion of disputes (the concept of "finality"). Second Restatement of Judgments, § 12, Comment a. Res judicata promotes finality by requiring errors to be raised during the appeal process, not years later. *Id.*

Res judicata applies to factual determinations that affect subject-matter jurisdiction. If a court makes a factual finding that shows that it had subject-matter jurisdiction over the dispute, that determination becomes subject to res judicata. Second Restatement of Judgments, § 12, Comment c. Put another way, once a court expressly adjudicates an issue that impacts subject-matter jurisdiction, that determination must be challenged on appeal, not by collateral attack. *Id.*

Res judicata attaches not only to issues of subject-matter jurisdiction that are raised directly, it also applies if the case has been litigated and the defendant fails to challenge the result on appeal:

Even if the issue of subject-matter jurisdiction has not been raised and determined, the judgment after becoming final should ordinarily be treated as wholly valid if the controversy has been litigated in any other respect. The principle to be applied in this situation is essentially that of claim preclusion, particularly the proposition that a judgment should be treated as resolving not only all issues actually litigated but all issues that might have been litigated.

Second Restatement of Judgments, § 12, Comment d.

The only time that res judicata does not bar subsequent attacks on subject-matter jurisdiction is if the court rendering judgment lacked subject-matter jurisdiction over *that type of*

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<sup>2</sup> The application of res judicata to subject-matter jurisdiction was discussed at pages 11-15 of Bank of America's Merit Brief and pages 5-7 of its Reply Brief.

dispute in the first instance. Second Restatement of Judgments, § 12(1). These principles have been applied in Ohio courts. *State ex rel. Henderson v. Maple Heights Civil Service Com.*, 63 Ohio St.2d 39, 41, 406 N.E.2d 1105 (1980); *Dwyer v. Thompson Township Volunteer Fire Dept.*, 11th App. No. 1397, 1988 Ohio App. LEXIS 3643, \*4-5 (Sept. 9, 1998); *Vitale v. Connor*, Fifth Dist. App. No. CA-671, 1985 Ohio App. LEXIS 8004 (June 10, 1985); *Mantho v. Board of Liquor Control*, 162 Ohio St. 37, 120 N.E.2d 730 (1954).

In this case, as the Court noted, common pleas courts have subject-matter jurisdiction over the type of disputes at issue here—foreclosure actions. Opinion, 2014-Ohio-4275, ¶ 20. If a court holds that a plaintiff in a foreclosure case has “standing” to invoke its jurisdiction, that determination must be challenged on appeal, and may not be collaterally attacked. Second Restatement of Judgments, § 12, Comment c. Even if the court only implicitly determines that the plaintiff has standing, the result is the same—res judicata attaches. Second Restatement of Judgments, § 12, Comment d. The Opinion thus not only mirrors Ohio precedent, it is in line with the position of the American Law Institute, and its holding was correct: “Lack of standing is an issue that is cognizable on appeal, and therefore it cannot be used to collaterally attack a judgment in foreclosure.” Opinion, Syllabus, ¶ 2.

Even though this issue was addressed in both Bank of America’s Briefs and in the Opinion, the Movants do not address this aspect of the Court’s holding. Even if, as the Movants suggest, a plaintiff’s wrongful invocation of jurisdiction in a foreclosure action were deemed to be a “subject-matter jurisdiction” defect, res judicata still attaches to both explicit and implicit findings of standing, and would bar a collateral attack. Here, the Kuchtas challenged standing in the trial court before judgment, lost, and chose not to appeal. Res judicata precludes them from

getting another post judgment bite at the same apple. The Motion for Reconsideration fails for this separate reason. It should be denied.

### **III. CONCLUSION**

A plaintiff's lack of standing to invoke a trial court's jurisdiction in a particular case does not deprive a trial court of subject-matter jurisdiction. Even if a plaintiff's lack of standing were deemed to be an issue which affects subject-matter jurisdiction, it would still be subject to the res judicata bar against collateral attack. The Opinion is in harmony both with this Court's prior precedent and the American Law Institute. The Motion for Reconsideration should be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

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