

IN THE SUPREME COURT OF OHIO

<b>DEUTSCHE BANK NATIONAL TRUST</b>	*	<b>Case No. 2014-0791</b>
<b>COMPANY, AS TRUSTEE FOR</b>	*	
<b>SOUNDVIEW HOME LOAN TRUST 2005-</b>	*	<b>On Appeal from the Summit</b>
<b>4, ASSET-BACKED CERTIFICATES,</b>	*	<b>County Court of Appeals, Ninth</b>
<b>SERIES 2005-4,</b>	*	<b>Appellate District</b>
	*	
<b>Plaintiff-Appellant,</b>	*	<b>Court of Appeals</b>
	*	<b>Case No. CA-26970</b>
<b>v.</b>	*	
	*	
<b>GLENN E. HOLDEN, et al.,</b>	*	
	*	
<b>Defendants-Appellees.</b>	*	

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**MEMORANDUM IN OPPOSITION TO RECONSIDERATION OF PLAINTIFF-  
APPELLANT DEUTSCHE BANK NATIONAL TRUST COMPANY, AS  
TRUSTEE FOR SOUNDVIEW HOME LOAN TRUST  
2005-4, ASSET-BACKED CERTIFICATES, SERIES 2005-4**

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## **I. Introduction**

Plaintiff-Appellant Deutsche Bank National Trust Company, as Trustee for Soundview Home Loan Trust 2005-4, Asset-Backed Certificates, Series 2005-4 (“DBNTC”) received summary judgment in its *in rem* foreclosure action against Defendants-Appellees Glenn and Ann Holden. The Ninth District Court of Appeals reversed. *Deutsche Bank Natl. Trust Co. v. Holden*, 9th Dist. Summit No. 26970, 2014-Ohio-1333 (the “Lower Court Opinion”).

It was undisputed that at the time of filing the Complaint: (1) DBNTC was the recorded mortgagee of the mortgage (“Mortgage”) at issue; (2) Glenn Holden (the only party who had executed the promissory note (“Note”)) had discharged his indebtedness in bankruptcy; (3) the copy of the Note attached to the Complaint was payable to the original payee; and (4) DBNTC was only seeking to foreclose *in rem* and was not seeking a personal judgment against the Holdens. The Holdens filed counterclaims relating to DBNTC’s standing.

DBNTC sought and received summary judgment on all claims. At the time of summary judgment, it demonstrated that it was in possession of the original Note, indorsed in blank, and had possessed the Note prior to filing the Complaint. The Holdens appealed.

In the Lower Court Opinion, the Ninth District found that a genuine issue of material fact existed as to DBNTC’s standing because of a difference in the copy of the Note attached to the Complaint and the original Note presented at summary judgment. On July 1, 2016, this Court reversed. *Deutsche Bank Nat'l Trust Co. v. Holden*, Slip Opinion No. 2016-Ohio-4603 (the “Opinion”).

In the Opinion, the Court clarified the standing requirements announced in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214. It concluded that DBNTC’s allegations of a right to foreclose the Mortgage, which included an

Assignment of the Mortgage to DBNTC, “alleged such a personal stake in the outcome of the controversy that [it is] entitled to have a court hear [its case].” *Id.*, ¶ 33; quoting *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 7. This Court noted that “[to] achieve judgment on its foreclosure claim, [DBNTC] needed to prove that it was the party entitled to enforce the note.” *Id.*

This Court then reviewed the summary judgment evidence, and concluded that “the Holdens failed to present any evidence to show that a genuine issue of material fact existed regarding any of the elements of the bank’s foreclosure action” and affirmed the Trial Court’s decision. *Id.*, ¶ 34. The Court “reverse[d] the judgment of the appellate court and reinstate[d] the judgment of the trial court.” *Id.*, ¶ 36.

The Holdens have filed a Motion for Reconsideration making three arguments. First, they argue that a complaint containing a promissory note payable to a third party renders the plaintiff permanently without standing, and that the mortgage alone is insufficient to demonstrate standing. Second, they contend that paragraphs 26, 27, and 34 of the Opinion are contradictory and should be resolved. Lastly, they contend that the Lower Court Opinion did not address all of their assignments of error, and the reinstatement of the trial court judgment was incorrect.

As for the standing arguments, the Holdens’ reconsideration request merely re-argues the same contentions addressed by this Court, and is procedurally improper. Their contentions are, in any event, unavailing. Lastly, the Holdens’ last argument that the lower court did not address all assignments of error is waived.

The Holdens’ motion should be denied.

## II. Discussion

### A. Standard of Review.

Under S.Ct.Prac.R. 18.02, reconsideration is only appropriate to “correct decisions which, upon reflection, are deemed to have been made in error.” *Dublin City Sch. Bd. of Educ. v. Franklin Cnty. Bd. of Revision*, 139 Ohio St.3d 212, 2014-Ohio-1940, 11 N.E.3d 222, ¶ 9; quoting *State ex rel. Huebner v. W. Jefferson Village Council*, 75 Ohio St.3d 381, 383, 662 N.E.2d 339 (1995). Reconsideration is not appropriate “when a movant seeks merely to reargue the case at hand.” *Dublin City Sch. Bd. of Educ.*, 139 Ohio St.3d 212, ¶ 9; citing S.Ct.Prac.R. 18.02(B).

### B. Standing is different than the right to enforce.

The Holdens contend that standing to enforce the note must exist at the time a complaint is filed in an action to foreclose the mortgage, and must be demonstrated by the promissory note attached to the Complaint. Both arguments are incorrect.

In *Wells Fargo Bank, N.A. v. Horn*, 142 Ohio St.3d 416, 2015-Ohio-1484, 31 N.E.3d 637, this Court plainly rejected the contention that any exhibits to a complaint are determinative of the issue of standing. The Court held: “the import of our holding in *Schwartzwald* is that the plaintiff in a foreclosure action must have standing at the time that it files its complaint. But nowhere in this opinion did the court indicate that the plaintiff must also submit proof of standing at that time . . . Proof of standing may be submitted *subsequent* to filing the complaint.” *Id.*, ¶ 12.

Moreover, in *Groveport Madison Local Schs. Bd. of Educ. v. Franklin County Bd. of Revision*, 137 Ohio St. 3d 266, 2013-Ohio-4627, 998 N.E.2d 1132, ¶ 26, after citing *Schwartzwald* for the proposition that “standing is determined as of the commencement of the

action,” this Court noted that “[i]f the complainant’s standing is challenged, the complainant may prove its standing without being bound by what it asserted on the face of its [] complaint.” Here, it was undisputed that DBNTC possessed the Note, indorsed in blank, prior to the filing of the Complaint. Opinion, ¶ 34.

*Horn and Groveport Madison* alone resolve this aspect of the Holdens’ reconsideration request. In addition, the Opinion is consistent with the Court’s earlier holdings and its reasoning rejects the Holdens’ standing argument. In the Opinion, the Court noted that it has “long recognized that an action for personal judgment on a promissory note and an action to enforce a covenant are ‘separate and distinct remedies.’” *Id.*, ¶ 24; citing *Carr v. Home Owners Loan Corp.*, 148 Ohio St. 533, 540, 76 N.E.2d 389 (1947) and *Giddings v. Barney*, 31 Ohio St. 80, 82 (1876).

The Court noted the available “separate and independent remedies” in a default of a note and mortgage: an action on the note alone, an action in ejectment, and an action to foreclose the mortgage. Opinion, ¶¶ 21-24. The Court recognized that standing to foreclose the mortgage was created by DBNTC’s status as the mortgagee: “because the mortgage grants the mortgagee and its successors and assigns a security interest in property, upon default, the mortgagee has standing to foreclose on the mortgage and obtain a judicial sale of the property to enforce the mortgage lien against that property.” *Id.*, ¶ 27.

Again, it was undisputed that DBNTC was the recorded mortgagee. Opinion, ¶ 12. Here, in an action to foreclose the mortgage, it is appropriate and consistent that the recorded mortgagee possesses standing. Opinion, ¶ 33. The Holdens introduced no contrary evidence – the argument is a technicality belied by the underlying facts.

C. The Opinion is consistent.

The Holdens contend that paragraphs 26, 27, and 34 of the Opinion are inconsistent. However, as discussed above, the Holdens' Motion for Reconsideration confuses the difference between standing and a right to enforce.

In paragraph 26, the Court states "Even in a case in which the personal liability of the debtor has been discharged in bankruptcy, however, the creditor seeking to foreclose on the mortgage must prove that it was the person or entity entitled to enforce the note secured by the mortgage." Similarly, in paragraph 27, the Court states: "[DBNTC] must still show that it is the holder of the note that establishes the debt in order to foreclose" and "[DBNTC] must still demonstrate that it is the party entitled to enforce the note—regardless of whether it can obtain a personal judgment on it against the Holdens."

Consistent with those principles, DBNTC is seeking to recover the amounts due under the Note that were secured by the Mortgage. No party can receive a judgment on the Note, but recovering amounts due under the Note through the foreclosure of the Mortgage requires evidence of the right to enforce the Note.

Nor is there any contradiction regarding paragraph 34 of the Opinion. The Holdens appear to be concerned that the language: "purposes of summary judgment, the bank established that it had received an assignment of the Holdens' mortgage, that its mortgage interest survived the bankruptcy, and that the Holdens had defaulted" is limiting. The Holdens ignore the remaining discussion regarding possession of the Note: "the bank had the note in its possession before it filed the complaint. The Holdens failed to present any evidence to show that a genuine issue of material fact existed regarding any of the elements of the bank's foreclosure action . . . ."

*Id.* The Court is clear: judgment in a foreclosure action requires evidence of a right to enforce the note and mortgage.

D. Remand was not requested.

For their last grounds for reconsideration, the Holdens note that in the Lower Court Opinion, the Ninth District reversed the entry of summary judgment based on their first assignment of error, and consequently, declined to address the remaining three.

The un-addressed assignments of error raised issues regarding: (1) whether the affiant in support of DBNTC's summary judgment motion had personal knowledge; (2) whether the notice of acceleration was properly sent; and (3) whether the Holdens' counterclaims (all premised on a lack of standing) were properly denied. The Trial Court fully addressed these issues in its April 3, 2013 Order Granting DBNTC's MSJ and denying the Holdens' MSJ.

However, these assignments of error were not mentioned in any of the Holdens' previous briefing, and no request for remand in the event of reversal was made. A failure to raise arguments to this Court waives them. *City of E. Liverpool v. Columbiana Cnty. Budget Comm'n*, 116 Ohio St.3d 1201, 2007-Ohio-5505, 876 N.E.2d 575, ¶ 3 (the party "never pressed this argument in its briefs, and under our precedent it is therefore 'deemed to be abandoned.'"); *citing Household Finance Corp. v. Porterfield*, 24 Ohio St.2d 39, 46, 263 N.E.2d 243 (1970); *see also Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997). Reconsideration should be denied.

### **III. Conclusion**

The Holdens' arguments generally stem from a misunderstanding of the Opinion's holding. As the party seeking to foreclose a mortgage, DBNTC possessed standing by being the

recorded mortgagee at the time of filing the Complaint. It also introduced evidence it possessed the Note at the time of filing the Complaint.

Moreover, there is no conflict in the Court's analysis. While standing may be proven by recorded mortgagee status alone, the right to a judgment of foreclosure including the amounts due under a promissory note requires evidence of being the party entitled to enforce the note. The Opinion is consistent – the Holdens are merely dissatisfied with the outcome. Their attempt for a “second bite at the apple” is improper.

Remand to consider unaddressed assignments of error should be denied. The Holdens failed to previously raise the issue.

Reconsideration is inappropriate and should be denied.

Respectfully submitted,

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**Certificate of Service**

I hereby certify that on July 18, 2016, a true copy of the foregoing document was served  
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