NOTICE OF A CERTIFIED CONFLICT

IN THE SUPREME COURT OF OHIO 13-0091

FirstMerit Bank, N.A.,

Appellant,

vs.

Daniel E. Inks, *et al.*,

Appellees.

On Appeal from the Summit County Court of Appeals, Ninth Appellate District,
C.A. Nos. 25980, 26182

APPELLANT FIRSTMERIT BANK, N.A.'S NOTICE OF A CERTIFIED CONFLICT

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NOTICE OF A CERTIFIED CONFLICT

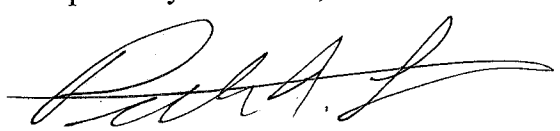
Appellant FirstMerit Bank, N.A. gives notice of a certified conflict to the Ohio Supreme Court from the Ninth District Court of Appeals, Case Nos. 25980, 26182, decided and journalized on November 7, 2012. On December 19, 2012, the Ninth District certified the following question to this Court:

> Whether Section 1335.05 of the Ohio Revised Code prohibits a party from raising as a defense that the parties to a contract involving an interest in land orally agreed to modify the terms of their agreement.

The Ninth District has declared that its decision in *FirstMerit Bank, N.A. v. Daniel E. Inks, et al.* is in conflict with the Tenth District's decision in *Nicolozakes v. Deryk Babrield Tangeman Irrevocable Trust*, 10th Dist. No. 00AP-7, 2000 WL 1877521 (Dec. 26, 2000).

Pursuant to S.Ct.Prac.R. 8.01(B), a copy of the Ninth District's order certifying the conflict and copies of all decisions determined to be in conflict are attached in the accompanying appendix.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on January 15, 2013, a true and accurate copy of the foregoing was served upon the following by regular U.S. mail, postage prepaid:

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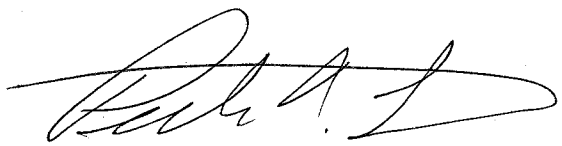

Counsel for Appellant, FirstMerit Bank, N.A.

APPENDIX

Order of the Ninth District Court of Appeals certifying a conflict in *FirstMerit Bank, N.A. v. Daniel E. Inks, et al.*, Case Nos. 25980 and 26182, issued December 19, 2012.

Decision of the Ninth District Court of Appeals in *FirstMerit Bank N.A. v. Inks*, Case Nos. 25980 and 26182, 2012-Ohio-5155.

Decision of the Tenth District Court of Appeals in *Nicolozakes v. Deryk Babrield Tangeman Irrevocable Trust*, 10th Dist. No. 00AP-7, 2000 WL 1877521 (Dec. 26, 2000).

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STATE OF OHIO)
)ss
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

FIRSTMERIT BANK, N.A.

Appellee

v.

DANIEL E. INKS, et al.

Appellants

C.A. No. 25980
26182

JOURNAL ENTRY

FirstMerit Bank N.A. has moved this Court to certify a conflict between its judgment in this case and those of the Fifth District Court of Appeals in *Fifth Third Bank v. Labate*, 5th Dist. No. 2005CA00180, 2006-Ohio-4239, the Eighth District Court of Appeals in *Lemmo v. Petti*, 8th Dist. No. 48343, 1984 WL 6333 (Dec. 6, 1984), the Tenth District Court of Appeals in *Nicolozakes v. Deryk Babrield Tangeman Irrevocable Trust*, 10th Dist. No. 00AP-7, 2000 WL 1877521 (Dec. 26, 2000), and the Twelfth District Court of Appeals in *Winton Savings & Loan Co. v. Eastfork Trace Inc.*, 12th Dist. No. CA2001-07-064, 2002-Ohio-2600. We grant the motion because our judgment in this case conflicts with the judgment of the Tenth District Court of Appeals in *Nicolozakes v. Deryk Babrield Tangeman Irrevocable Trust*, 10th Dist. No. 00AP-7, 2000 WL 1877521 (Dec. 26, 2000), on the same question of law.

Article IV Section 3(B)(4) of the Ohio Constitution provides that, whenever the judges of a court of appeals determine that a judgment upon which they have agreed

conflicts with a judgment of another court of appeals, they shall certify that conflict to the Ohio Supreme Court. In *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St. 3d 594, 596 (1993), the Ohio Supreme Court held that, for certification under Article IV Section 3(B)(4) to be appropriate, three conditions must be satisfied:

> First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict *must* be "upon the same question." Second, the alleged conflict must be on a rule of law–not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals.

Id. (Emphasis in original). The issue that FirstMerit has proposed for certification is: "Does the Statute of Frauds bar a defendant from obtaining relief from a cognovit judgment by asserting, as an alleged defense to judgment, a claim arising out of an alleged oral loan agreement that is within the Statute of Frauds."

In *Fifth Third Bank v. Labate*, 5th Dist. Nos. 2005CA00180, 2006CA00040, 2006-Ohio-4239, Fifth Third Bank obtained a cognovit judgment against Rebecca Labate. Ms. Labate moved for relief from judgment, arguing that the bank committed fraud when it incorrectly told her that the documents she was signing contained the terms they had negotiated. She also argued that the bank "slipped" a security agreement into the stack of loan documents. *Id.* at ¶ 36. She argued that, because of the fraud, the bank should be estopped from asserting that the statute of frauds prevented the court from looking outside the written documents. The Fifth District rejected her argument because it concluded that Section 1335.02 of the Ohio Revised

Code requires loan agreements to be in writing and that the terms of such agreements to be determined solely from the written documents. *Id.* at ¶ 37, 40.

Unlike *Labate*, this case involves an agreement that was allegedly negotiated by the parties to a loan agreement after the agreement had already been breached. We, therefore, conclude that the cases do not present the same question of law.

In *Lemmo v. Petti*, 8th Dist. No. 48343, 1984 WL 6333 (Dec. 6, 1984), Robert Lemmo obtained a default judgment against his tenants. The tenants moved for relief from judgment, asserting that Mr. Lemmo had released them from the lease agreement. They also filed a counterclaim alleging that Mr. Lemmo had orally agreed to renew their lease. The Eighth District Court of Appeals upheld the denial of the tenants' motion, concluding that they had "failed to show any meritorious defense" because "proof of the oral release defense would be barred by the statute of frauds." *Id.* at *3.

In this case, FirstMerit argued that the Slymans and Inkses' oral-forbearance-agreement defense was barred under Sections 1335.02 and 1335.05 of the Ohio Revised Code. In *Lemmo*, the court did not identify which statute it was applying. We note that the General Assembly did not enact Section 1335.02 until eight years after *Lemmo* was decided. Although Section 1335.05 existed in 1984, the Eighth District may have been applying Section 1335.04, which provides that "[n]o lease . . . shall be . . . granted except . . . in writing . . . ." FirstMerit, therefore, has failed to establish that *Lemmo* and this case conflict upon the same question of law.

In *Nicolozakes v. Deryk Babrield Tangeman Irrevocable Trust*, 10th Dist. No. 00AP-7, 2000 WL 1877521 (Dec. 26, 2000), George Nicolozakes bought a house for Rebecca Tangeman to live in. Mr. Nicolozakes later sold the house to the Deryk Babrield Tangeman Irrevocable Trust for $250,000, which he secured with a mortgage. When the trust defaulted, Mr. Nicolozakes foreclosed. Ms. Tangeman alleged that Mr. Nicolozakes' intent had been to give the property to her, but they disguised the transaction as a sale for tax purposes. She also alleged that, even if the transaction was a sale, Mr. Nicolozakes later renounced his interest in the property, gifting it to the trust. The Tenth District upheld an award of summary judgment to Mr. Nicolozakes, noting that Section 1335.04 of the Ohio Revised Code requires all transfers of an interest in real property to be in writing. It also concluded that Ms. Tangeman's argument that Mr. Nicolozakes had later discharged the loan was barred because "a discharge of a mortgage is an interest in land and is required to be in writing under the Statute of Frauds[.]" *Id.* at *4 (citing *Gatts v. GMBH*, 14 Ohio App. 3d 243, 247 (11th Dist. 1983).

In *Nicolozakes*, the Tenth District determined that Section 1335.05 of the Ohio Revised Code barred Ms. Tangeman from defending against a foreclosure action by alleging that Mr. Nicolozakes had orally released her from a note and mortgage. In this case, this Court determined that the Slymans and Inkses could defend against an action to enforce a guaranty by arguing that FirstMerit and Ashland Lakes had orally modified their agreement. We conclude that the two cases conflict on the same question of law, which is whether the language in Section 1335.05 providing that

"[n]o action shall be brought . . . to charge a person . . . upon a contract or sale of lands . . . or interest in or concerning them . . . unless the agreement . . . is in writing . . ." prohibits a defendant from arguing that the parties to a contract involving land orally agreed to modify the terms of the their agreement.

In *Winton Savings & Loan Co. v. Eastfork Trace Inc.*, 12th Dist. No. CA2001-07-064, 2002-Ohio-2600, Eastfork Trace Inc. obtained a loan from Winton Savings & Loan to finance a real estate development. When Winton refused to disburse funds for two improvement projects that Eastfork wanted to perform on the land, Eastfork stopped repaying the loan. After Winton foreclosed, Eastfork filed a counterclaim, alleging that the parties had orally agreed to treat the loan as a line of credit. According to Eastfork, because the loan was a line of credit, any funds that it had repaid to Winton should have been available to it to finance the improvement projects. The trial court entered summary judgment for Winton. The Twelfth District affirmed, holding that, under Section 1335.02, whether the loan was a line of credit had to be determined solely from the parties' written agreement. *Id.* at ¶ 10, 12.

Winton, like *Labate*, only involved the interpretation of a loan agreement at the time it was signed. In this case, the Slymans and Inkses have argued that the parties to a loan agreement orally agreed to modify the agreement years after its execution. We, therefore, conclude that the Twelfth District's decision in *Winton* is factually distinguishable.

Upon review of FirstMerit's motion to certify a conflict, we conclude that our decision conflicts with the decision of the Tenth District Court of Appeals in

Nicolozakes v. Deryk Babrield Tangeman Irrevocable Trust, 10th Dist. No. 00AP-7, 2000 WL 1877521 (Dec. 26, 2000). Accordingly, we certify the following question to the Ohio Supreme Court: "Whether Section 1335.05 of the Ohio Revised Code prohibits a party from raising as a defense that the parties to a contract involving an interest in land orally agreed to modify the terms of their agreement." The motion to certify a conflict is granted.

Clair E. Dickinson, Judge.

Concurs:
Carr, J.

Dissents:
Belfance, J.

[Cite as *FirstMerit Bank N.A. v. Inks*, 2012-Ohio-5155.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

FIRSTMERIT BANK, N.A.

Appellee

v.

DANIEL E. INKS, et al.

Appellants

C.A. No. 25980
26182

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2011-05-2676

DECISION AND JOURNAL ENTRY

Dated: November 7, 2012

DICKINSON, Judge.

INTRODUCTION

{¶1} Daniel Inks, Deborah Inks, David Slyman, and Jacqueline Slyman guaranteed that Ashland Lakes LLC would repay a $3,500,000 loan from FirstMerit Bank N.A. When Ashland Lakes defaulted, FirstMerit sued the Slymans and Inkses to recover the balance of the loan. The trial court awarded judgment to FirstMerit based on confessions of judgment entered by the Slymans and Inkses under warrants of attorney. The Slymans and Inkses have appealed, arguing that the court incorrectly awarded judgment to FirstMerit based on the confessions because the confessing lawyer did not produce the original warrants of attorney, as required under Section 2323.13(A) of the Ohio Revised Code. After filing their appeal, the Slymans and Inkses moved the trial court for relief from judgment, arguing that FirstMerit was not entitled to recover from them because it had entered into an oral forbearance agreement with Ashland Lakes. We remanded the action to the trial court so that it could rule on the motion. Following a hearing,

the court denied the motion, concluding that the Slymans and Inkses' forbearance-agreement argument was barred by the doctrine of issue preclusion and the Statute of Frauds. It also concluded that, even if their argument was not barred, they had not demonstrated that FirstMerit and Ashland Lakes entered into a forbearance agreement. The Slymans and Inkses have appealed from that decision also. We affirm the judgment in case number 25980 because the record does not establish that the original warrants of attorney were not produced at the time the lawyer confessed judgment. We reverse and remand in case number 26182 because the court applied the incorrect standard to determine whether the Slymans and Inkses are barred by res judicata from asserting their forbearance-agreement defense, the statute of frauds does not bar their defense, and the court incorrectly considered the merits of their defense in determining whether to grant relief from judgment.

BACKGROUND

{¶2} FirstMerit loaned $3,500,000 to Ashland Lakes, which it secured with a mortgage of Ashland Lakes' property and by requiring the Slymans and Inkses to guarantee the loan. After Ashland Lakes defaulted on the loan, it entered into a series of written forbearance agreements with FirstMerit. When those agreements expired, FirstMerit foreclosed on the mortgage. It succeeded, and an auction of the property was scheduled for March 9, 2011.

{¶3} Despite the result of the foreclosure action, Ashland Lakes and FirstMerit continued to negotiate another forbearance agreement. According to Mr. Inks, at a meeting on January 7, 2011, the parties discussed an agreement under which Ashland Lakes would pay FirstMerit $1,300,000 at an undetermined time plus an additional $300,000 by October 15 of that year. Following the meeting, Ashland Lakes obtained a commitment letter from Westfield Bank, agreeing to finance part of the $1,300,000. On February 14, Mr. Inks sent the commitment letter

to FirstMerit. FirstMerit determined that the letter was insufficient to move forward with a forbearance agreement, however, because it contained some contingencies that FirstMerit thought could not be satisfied.

{¶4} According to Mr. Inks, on March 3, he followed up with FirstMerit about the forbearance agreement and was told that he would receive a term sheet memorializing the terms of the agreement by the next morning. When he received the term sheet, it contained a $200,000 deposit requirement and a $9000 appraisal fee that the parties had not previously discussed. On March 7, he called FirstMerit and told a representative that he could only raise $150,000 for a deposit, which the representative said was "doable." Shortly after the call, the representative delivered a written copy of the forbearance agreement, which still contained the $200,000 deposit requirement. Mr. Inks called the representative again and was told that, if he could produce $150,000 for the deposit and $9000 for the appraisal by the next day, the bank would postpone the auction. Mr. Inks said that, on the morning of March 8, the representative again told him that, if he could deliver $150,000 to him that day, he would postpone the auction. Mr. Inks told the representative that he would call him later in the day with details on how he would deliver the money. When Mr. Inks attempted to contact the representative later, however, the representative did not answer his phone. The representative finally returned his calls near the end of the day, but told him that it was too late to stop the auction.

{¶5} After the auction, Ashland Lakes moved to set it aside, arguing that FirstMerit had breached the oral forbearance agreement. The common pleas court rejected its argument, concluding that it had failed to establish that such an agreement existed. FirstMerit subsequently filed this action to recover the balance owed by Ashland Lakes from the Slymans and Inkses. The trial court entered judgment against the Slymans and Inkses based on their confessions of

judgment. The Slymans and Inkses moved for relief from judgment, but the court denied their motion. The Slymans and Inkses have appealed the court's judgment and its order denying their motion for relief from judgment.

WARRANTS OF ATTORNEY

{¶6} The Slymans and Inkses' assignment of error in case number 25980 is that the trial court incorrectly entered judgment against them based on confessions of judgment. They have argued that the confessions were invalid because the lawyer who submitted them did not present the court with their original warrants of attorney.

{¶7} Under Section 2323.13(A) of the Ohio Revised Code, "[a]n attorney who confesses judgment in a case, at the time of making such confession, must produce the warrant of attorney for making it to the court before which he makes the confession." "Warrants of attorney to confess judgment are to be strictly construed, and court proceedings based on such warrants must conform in every essential detail with the statutory law governing the subject." *Lathrem v. Foreman*, 168 Ohio St. 186, paragraph one of the syllabus (1958).

{¶8} The Slymans and Inkses have cited *Lathrem* in support of their argument that the lawyer who confessed judgment had to produce their original warrants of attorney. In *Lathrem*, the Ohio Supreme Court explained that, since Section 2323.13 "requires the production of the warrant of attorney to the court at the time of confessing judgment, . . . [if] the original warrant has been lost and can not be produced, the court, . . . lacks the power and authority to . . . enter judgment by confession . . . ." *Lathrem v. Foreman*, 168 Ohio St. 186, paragraph two of the syllabus (1958); *Huntington Nat'l Bank v. 199 S. Fifth St. Co.*, 10th Dist. No. 10AP-1082, 2011-Ohio-3707, ¶ 21 ("[T]he language of [Section] 2323.13(A) . . . requires an attorney confessing

judgment to present the original warrant of attorney to the trial court at the time the attorney makes the confession[.]").

{¶9} The record does not indicate whether the lawyer who confessed judgment presented the trial court with the original warrants of attorney or merely copies of them. The fact that the record contains only copies of the warrants is not determinative because Section 2323.13(A) allows "[t]he original or a copy of the warrant [to] be filed with the clerk." *See Huntington Nat'l Bank v. 199 S. Fifth St. Co.*, 10th Dist. No. 10AP-1082, 2011-Ohio-3707, ¶ 21 (noting that, after producing the original warrant of attorney, "the plaintiff may then choose to file either the original warrant or a copy of it with the clerk for purposes of maintaining the record."). As the Tenth District Court of Appeals explained in *Huntington National Bank*, "[r]equiring the attorney confessing judgment to produce the original warrant of attorney provides a minimal level of assurance that the note is authentic and actually exists, while allowing the plaintiff to file a copy of the warrant with the clerk allows the plaintiff to retain control of the instrument after it is presented to the court if the plaintiff so chooses." *Id.* at ¶ 20.

{¶10} The Slymans and Inkses bear the burden on appeal of establishing that the trial court did not have jurisdiction to enter judgment based on their confessions. *Knapp v. Edwards Labs.*, 61 Ohio St. 2d 197, 199 (1980) ("[A]n appellant bears the burden of showing error by reference to matters in the record."); *Howiler v. Connor*, 9th Dist. No. 10648, 1982 WL 2779, *1 (Oct. 6, 1982) ("In courts of general jurisdiction a legal presumption arises in favor of jurisdiction, want of which must be affirmatively demonstrated on the record."). The record does not indicate that the lawyer who confessed judgment for the Slymans and Inkses failed to produce the original warrants of attorney to the trial court. Accordingly, the Slymans and Inkses have not established that the trial court lacked jurisdiction to enter judgment against them. We

note that this case is distinguishable from *Huntington National Bank* because, in that case, it was undisputed that the bank "[a]t no time . . . provide[d] the trial court with the original note or commercial guaranties." *Huntington Nat'l Bank v. 199 S. Fifth St. Co.*, 10th Dist. No. 10AP-1082, 2011-Ohio-3707, ¶ 4. The Slymans and Inkses' assignment of error in case number 25980 is overruled.

MOTION FOR RELIEF FROM JUDGMENT

{¶11} The Slymans and Inkses' assignment of error in case number 26182 is that the trial court incorrectly denied their motion for relief from judgment under Rule 60(B) of the Ohio Rules of Civil Procedure. Under Civil Rule 60(B), a trial court "may relieve a party . . . from a final judgment . . . for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence . . . ; (3) fraud . . . , misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied . . . ; or (5) any other reason justifying relief from the judgment." "The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment . . . ." Civ. R. 60(B). Interpreting Rule 60(B), the Ohio Supreme Court has held that, "[t]o prevail . . . , the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time . . . ." *GTE Automatic Elec. Inc. v. ARC Indus. Inc.*, 47 Ohio St. 2d 146, paragraph two of the syllabus (1976). This Court has recognized that, "[if] the relief from judgment sought is on a cognovit note, ' . . . relief . . . is warranted by authority of Civ.R. 60(B)(5) [if] the movant (1) establishes a meritorious defense, (2) in a timely application.'" *Brown-Graves Co. v. Caprice Homes Inc.*, 9th Dist. No. 20689,

2002 WL 347322, *3 (Mar. 6, 2002) (quoting *Meyers v. McGuire*, 80 Ohio App. 3d 644, 646 (1992)).

RES JUDICATA

{¶12} The Slymans and Inkses have argued that the trial court incorrectly concluded that the argument that they made in their motion for relief from judgment is barred by the doctrine of res judicata. In their motion, the Slymans and Inkses argued that they have a meritorious defense because FirstMerit entered into a forbearance agreement with Ashland Lakes. The trial court determined that they were barred from raising that defense because the same issue was decided in FirstMerit's action against Ashland Lakes and the Slymans and Inkses are in privity with Ashland Lakes.

{¶13} "Res judicata operates as 'a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them.'" *Brown v. City of Dayton*, 89 Ohio St. 3d 245, 247 (2000) (quoting *Johnson's Island Inc. v. Danbury Twp. Bd. of Trs.*, 69 Ohio St. 2d 241, 243 (1982)). The Slymans and Inkses have conceded that their forbearance-agreement defense is the same defense that Ashland Lakes raised in its motion to set aside the auction in FirstMerit's foreclosure action. They have argued, however, that they are not in privity with Ashland Lakes.

{¶14} According to the Ohio Supreme Court, "[w]hat constitutes privity in the context of res judicata is somewhat amorphous. A contractual or beneficiary relationship is not required: 'In certain situations . . . a broader definition of privity is warranted. As a general matter, privity is merely a word used to say that the relationship between the one who is a party on the record and another is close enough to include that other within the res judicata.'" *Brown v. City of*

Dayton, 89 Ohio St. 3d 245, 248 (2000) (quoting *Thompson v. Wing*, 70 Ohio St. 3d 176, 184 (1994)).

{¶15} The Slymans and Inkses, citing *National City Bank v. The Plechaty Companies*, 104 Ohio App. 3d 109 (8th Dist. 1995), have argued that the guarantor of a loan is never in privity with the debtor. The case that the Eighth District Court of Appeals cited for that proposition was *Woodward v. Moore*, 13 Ohio St. 136 (1862). *Plechaty Cos.*, 104 Ohio App. 3d at 115. In *Woodward*, Ebenezer Woodward sold to Chapman & McKernan his right to collect a judgment that he had against Jonathan Hall. As part of the sale, Mr. Woodward guaranteed that, if Chapman & McKernan could not collect the judgment, he would pay them $400. Chapman & McKernan sued Mr. Hall in Iowa. Mr. Hall defended by claiming that the suit was barred by the statute of limitations and that the judgment had been paid. Following a trial to the bench, the court found in favor of Mr. Hall. *Woodward*, 13 Ohio St. at 137.

{¶16} After Chapman & McKernan's lawsuit failed, they assigned their rights to Sydney Moore. *Woodward v. Moore*, 13 Ohio St. 136, 137-38 (1862). Mr. Moore sued Mr. Woodward on his guaranty, arguing that Mr. Woodward knew that the judgment had already been satisfied at the time he sold it to Chapman & McKernan. At trial, Mr. Moore submitted the record of the Iowa case as his only evidence. Mr. Woodward attempted to testify that the judgment was, in fact, still unpaid, but the trial court sustained an objection to his statement. A jury ruled in favor of Mr. Moore. *Id.* at 140.

{¶17} The Ohio Supreme Court reversed the judgment against Mr. Woodward. It determined that, at the time Mr. Woodward sold the judgment to Chapman & McKernan, the three of them had an understanding that the judgment could be enforced against Mr. Hall. *Woodward v. Moore*, 13 Ohio St. 136, 143 (1862). When Mr. Hall asserted the defense of

payment, therefore, Chapman & McKernan should have notified Mr. Woodward. *Id.* Because Mr. Woodward did not receive notice of the defense, "[t]he most that could be claimed of the effect . . . of the record of the proceedings [against Mr. Hall], would be to make a prima facie case for [Mr. Moore]." *Id.* at 144. "Had notice been given to Woodward of the pendency of the suit [against Mr. Hall] and of the defense set up, it might have been his duty in that action to sustain the validity of the judgment he had assigned. Having received no such notice, he is not precluded from showing in the action against him that the judgment he assigned was a valid and subsisting judgment, and that had proper diligence been used in the conduct of the suit against Hall, his defense to that suit would not have been successful." *Id.* The Supreme Court, therefore, concluded that, under the facts of the case, res judicata did not bar Mr. Woodward from testifying about whether Mr. Hall had satisfied the judgment.

{¶18} Regarding whether a guarantor is bound by a suit against the debtor, the Restatement of the Law of Security provides that, "[if], in an action by a creditor against a principal, judgment is given, other than by default or confession, in favor of the creditor, and the creditor subsequently brings an action against the surety, proof of the judgment in favor of the creditor creates a rebuttable presumption of the principal's liability to the creditor." Restatement of the Law 1st, Security, Section 139 (1941). As explained in the comments to the rule, it "expresses a middle ground between the possible rule that a judgment against the principal is conclusive of the principal's liability, even in an action against the surety, and that such a judgment is evidence only of the fact of its rendition. It is inequitable to bind the surety conclusively by a judgment to which he is not a party. On the other hand, it is not unfair to make a rebuttable presumption of the regularity of the judicial proceedings antecedent to the judgment and of the correctness of the judgment as evidence of the principal's liability. Under [this] rule .

. . , it is open to the surety to prove if he can that judgment should have been rendered for the principal." *Id.* The Restatement specifically identifies two defenses that may rebut the presumption of regularity: fraud and collusion. *Id.* Some courts have also allowed a surety to present defenses that were not "actually adjudicated" in the action against the debtor. *City of Pasco v. Pacific Coast Cas. Co.*, 172 P. 566, 567 (Wash. 1918).

{¶19} Several states have explicitly adopted the Restatement's position or taken a similar view. *Motion Picture Indus. Pension Plan v. Hawaiian Kona Coast Assocs.*, 823 P.2d 752, 758 (Hawaii App. 1991); *South County Sand & Gravel Inc. v. Nat'l Bonding & Accident Ins. Co.*, R.I. App. No. 82-327, 1989 WL 1110278, *3 (May 17, 1989); *Von Eng'g Co. v. R.W. Roberts Constr. Co. Inc.*, 457 So. 2d 1080, 1082 (Fla. App. 1984); *Indiana Univ. v. Indiana Bonding & Sur. Co.*, 416 N.E.2d 1275, 1285 (Ind. App. 1981). We agree with the Restatement approach, which is consistent with *Woodward.* In *Woodward*, the Supreme Court did not declare an inflexible rule regarding privity, but based its decision on the fact that Mr. Woodward did not know that Mr. Hall had asserted the defense of payment and did not have an opportunity to contest Mr. Hall's assertion. Just as the Restatement approach allows a guarantor to contest the regularity of the proceedings against the debtor, the Ohio Supreme Court determined that, under the circumstances of the case, Mr. Woodward should have been allowed to demonstrate that the debt, in fact, had not yet been paid. *Woodward v. Moore*, 13 Ohio St. 136, 144 (1862); *see also Jaynes v. Platt*, 47 Ohio St. 262, 274 (1890) (holding that, in an action on an attachment bond, a judgment against the debtor "is not only the best, but the only, evidence, and, until impeached for fraud, collusion, or manifest mistake, ought to be held conclusive").

{¶20} In this case, the trial court examined whether there was a mutuality of interest between Ashland Lakes and the Slymans and Inkses. Although that is an important part of the

privity determination, the court should also have considered whether the common pleas court in the case against Ashland Lakes gave appropriate consideration to Ashland Lakes' forbearance-agreement defense. *See O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St. 3d 59, 2007-Ohio-1102, ¶ 9 ("'[M]utuality of interest, including an identity of desired result' might also support a finding of privity.") (quoting *Brown v. City of Dayton*, 89 Ohio St. 3d 245, 248 (2000)). The Slymans and Inkses specifically argued in their post-hearing brief in this case that "Ashland Lakes was not provided a full and fair opportunity to litigate the issue of whether an oral settlement agreement was entered into by Ashland Lakes and [FirstMerit]." The trial court, however, failed to analyze that issue in its decision. Because the trial court did not analyze whether the Slymans and Inkses have overcome the rebuttable presumption of regularity in the case between FirstMerit and Ashland Lakes we sustain their assignment of error and remand for the trial court to decide that issue in the first instance.

STATUTE OF FRAUDS

{¶21} Independent of its privity determination, the trial court also determined that the Slymans and Inkses' forbearance-agreement defense was barred by the statute of frauds. Under Section 1335.02(B) of the Ohio Revised Code, "[n]o party to a loan agreement may bring an action on a loan agreement unless the agreement is in writing and is signed by the party against whom the action is brought or by the authorized representative of the party against whom the action is brought." The trial court determined that the alleged forbearance agreement was a "[l]oan agreement" under Section 1335.02(A)(3) and, therefore, had to be in writing to be enforceable.

{¶22} By its plain language, Section 1335.02(B) prohibits a party from "bring[ing] an action on a loan agreement" unless the agreement is in writing. In this case, the Slymans and

Inkses did not attempt to "bring an action" against FirstMerit, they merely raised the oral forbearance agreement as a defense to FirstMerit's action against them. Accordingly, the trial court incorrectly concluded that their defense was barred under the statute of frauds. R.C. 1335.02(B); *see also* R.C. 1335.05 (providing that "[n]o action shall be brought . . . upon a contract or sale of lands . . . unless the agreement upon which such action is brought . . . is in writing . . . .").

MERITORIOUS DEFENSE

{¶23} The trial court further determined that the Slymans and Inkses' argument about the oral forbearance agreement was barred because the parties to the alleged agreement intended that any such agreement be in writing. It is not clear from the court's opinion what part of the Civil Rule 60(B) analysis it was engaging in when it made this statement. The court had already concluded that the Slymans and Inkses "have asserted operative facts that demonstrate that they have a meritorious defense that could justify relief from judgment." Nevertheless, it examined the record and determined that it was "the parties' clear intent that any forbearance be in writing to be enforceable." It also wrote that the "facts conclusively establish that both [the Slymans and Inkses] and FirstMerit manifested an intention not to be bound absent execution of a written agreement."

{¶24} According to the Ohio Supreme Court, "[u]nder [Civil Rule] 60(B), a movant's burden is only to allege a meritorious defense, not to prove that he will prevail on that defense." *Rose Chevrolet Inc. v. Adams*, 36 Ohio St. 3d 17, 20 (1988). We conclude that, by determining that the parties' course of dealings established that the alleged forbearance agreement would have had to be in writing, the trial court exceeded the scope of its authority under Rule 60(B).

The court did not merely examine whether the Slymans and Inkses had alleged a meritorious defense, it improperly evaluated whether they had proved that defense.

CONCLUSION

{¶25} The trial court correctly entered judgment for FirstMerit based on the Slymans and Inkses' confessions of judgment. The court, however, incorrectly analyzed whether the Slymans and Inkses are bound by the judgment against Ashland Lakes, incorrectly applied the statute of frauds, and incorrectly evaluated the merits of their forbearance-agreement defense. The judgment of the Summit County Common Pleas Court in case number 25980 is affirmed. The judgment of the common pleas court in case number 26182 is reversed, and this matter is remanded for proceedings consistent with this decision.

Judgments affirmed in part,
reversed in part,
and causes remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

CLAIR E. DICKINSON
FOR THE COURT

CARR, P. J.
CONCURS.

BELFANCE, J.
CONCURRING IN JUDGMENT ONLY.

{¶26} I concur in the majority's resolution of case of number 25980 and concur in the judgment of its resolution of case number 26182.

{¶27} In case number 26182, the Inkses and Slymans appealed the denial of their Civ.R. 60(B) motion. The trial court incorrectly concluded that res judicata barred the Inkses and Slymans from raising their alleged meritorious defense. Because FirstMerit has not established the elements of the defense, I concur in the majority's judgment.

{¶28} "[B]efore res judicata/collateral estoppel can apply one must have a final judgment." (Internal quotations and citation omitted.) *McDowell v. DeCarlo*, 9th Dist. No. 23376, 2007-Ohio-1262, ¶ 7. Further, the party seeking to use the defense has the burden of establishing that it applies. *See Fraternal Order of Police, Akron Lodge No. 7 v. Akron*, 9th Dist. No. 23332, 2007-Ohio-958, ¶ 12. In the instant matter, FirstMerit has not demonstrated that the order which it believes has a preclusive effect is a final judgment. During the course of the proceedings below, it does not appear that a confirmation of sale decree was ever actually entered. It appears that the trial court in the foreclosure case overruled Ashland Lakes' objection to the confirmation of sale concerning the alleged oral forbearance agreement. However, it

cannot be assumed that a final judgment was rendered by pointing to the trial court's ruling. Throughout the proceedings in the instant matter, FirstMerit indicated that it expected the confirmation decrees "shortly[]" or "any day." Absent a final judgment confirming the sale, FirstMerit cannot meet its burden to demonstrate that principles of res judicata are applicable. *See Emerson Tool, LLC v. Emerson Family Ltd. Partnership*, 9th Dist. No. 24673, 2009-Ohio-6617, ¶ 13-14.

{¶29} Further, even assuming a final judgment existed in the foreclosure case, I cannot conclude that the trial court considered the applicable law concerning the specific relationship between a debtor/principal, a creditor, and a guarantor/surety and the effect that a prior judgment against the debtor/principal has in a suit between the creditor and the guarantor/surety. The Supreme Court of Ohio has stated that "where the sureties have notice of the suit, and may, or do make defense, the judgment against the principal is conclusive against them. Where such notice is not given, the judgment against the principal is prima facie only. It may be impeached for collusion, or for mistake." *State v. Colerick*, 3 Ohio 487, 487-488 (1828); *see also State v. Jennings*, 14 Ohio St. 73, 76 (1862); 52 Ohio Jurisprudence 3d, Guaranty and Suretyship, Section 269 (2012); *see generally Standard Acc. Ins. Co. v. Hattie Fid. & Cas. Co.*, 50 Ohio App. 206 (5th Dist.1935). Consistent among the above authorities is the notion that the guarantor receives notice and an opportunity to defend, prior to the judgment having a preclusive effect. *Colerick* at 487-488; *Standard Acc. Ins. Co.* at 209-210; 52 Ohio Jurisprudence 3d at Section 269. It is clear from the trial court's entry that it did not consider this law and whether FirstMerit has met its burden under the law. Accordingly, I would reverse the trial court's judgment.

APPEARANCES:

SCOTT H. KAHN and GREGORY J. OCHOCKI, Attorneys at Law, for Appellants.

BRETT A. WALL, PATRICK T. LEWIS, and SARA L. WITT, Attorneys at Law, for Appellee.

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

George Nicolozakes,	:	
Plaintiff-Appellee,	:	No. 00AP-7
v.	:	(REGULAR CALENDAR)
The Deryk Gabriel Tangeman Irrevocable Trust, Rebecca Tangeman, Trustee,	:	
Defendant-Appellant.	:	

O P I N I O N

Rendered on December 26, 2000

Jones, Day, Reavis & Pogue, Fordham E. Huffman and *Mary E. Taft*, for appellee.

Tyack, Blackmore & Liston Co., L.P.A., and *Thomas M. Tyack*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

PETREE, J.

In 1989, plaintiff, George Nicolozakes, and Rebecca Tangeman, Trustee of defendant, The Deryk Gabriel Tangeman Irrevocable Trust ("Trust"), began a relationship which proceeded from friendship to intimacy. In 1992, during the course of this relationship, plaintiff purchased residential property located at 7400 Rodebaugh Road, Reynoldsburg, Ohio, as a personal residence for his frequent business trips to

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Columbus, and as a residence for Tangeman and her son, Deryk, the beneficiary of the trust.

Tangeman eventually requested that plaintiff transfer the property into her name. Plaintiff offered to sell the property to Tangeman. Tangeman declined plaintiff's offer, however, because an outstanding federal tax lien against her would immediately attach to the property and would have priority over any mortgage. Plaintiff and Tangeman eventually agreed that plaintiff would sell the property to the Trust. On July 19, 1996, the sale was carried out through the execution of a warranty deed from Georgetown Marine, Inc.[1] to the Trust. Contemporaneous with the transfer, Tangeman executed a promissory note on behalf of the Trust in the amount of $250,000, secured by a mortgage deed on the property.

> The promissory note provides, in pertinent part, as follows:
>
> For value received, The Deryk Gabriel Tangeman Irrevocable Trust promises to pay to George Nicolozakes, solely and personally, the sum of $250,000.00, with no interest, upon demand.
>
> This note is made subject to the following terms and conditions:
>
> 1) This note is non-negotiable and cannot be assigned for the benefit of any other person.
>
> 2) This note shall be cancelled upon the death of George Nicolozakes.
>
> 3) This note shall become due and payable upon the death of Rebecca L. Tangeman, Trustee of Maker.

[1] In February 1996, plaintiff transferred title to the property to Georgetown Marine, Inc., a corporation owned by plaintiff.

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4) This note is secured by a mortgage on real property. Upon default of any payment under this note The Deryk Gabriel Tangeman Irrevocable Trust shall have the following options:

a) It may pay the face amount of this note which payment shall cause the release of the subject mortgage.

b) It may tender a deed in lieu of foreclosure of the subject mortgage which tender shall be in full satisfaction of this note and mortgage.

5) In the event of the death of Rebecca L. Tangeman, Trustee, the Maker may exercise the options set forth in paragraph 4 above.

The relationship between plaintiff and Tangeman eventually deteriorated, and on July 13, 1998, plaintiff made a demand for payment on the note. By letter dated July 31, 1998, Tangeman acknowledged the demand and proposed various payment options. By letter dated August 18, 1998, plaintiff offered to consider the payment proposals, provided Tangeman tendered the deed pursuant to his demand. When Tangeman refused to tender the deed, plaintiff, on October 23, 1998, commenced an action in foreclosure.

Tangeman admits that she is the signatory of the note, but maintains that the original transfer of the property to the Trust was intended as a personal gift to her, disguised as a sale to the Trust in order to frustrate the attachment of the undischarged federal tax lien against her. Tangeman further contends that even if the original transaction was a sale, plaintiff subsequently renounced his interest in the note and mortgage and gifted the property to Tangeman. In support of this defense, the Trust relies exclusively on parol evidence offered in the deposition testimony of Tangeman, Tangeman's friends, Wayne Miller and Debra Gross, and her attorney, David Buda.

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On July 29, 1999, plaintiff filed a motion for summary judgment based on the theory that normal contract law applies to mortgages, and that under contract law parol evidence is not admissible to interpret an unambiguous contract. By decision and entry dated September 21, 1999, the trial court denied plaintiff's motion for summary judgment, finding that certain terms of the note were ambiguous and, thus, parol evidence was admissible to construe those terms.

On October 5, 1999, plaintiff's present counsel appeared in substitution for plaintiff's original counsel. On October 8, 1999, the trial court granted plaintiff leave to file a second motion for summary judgment. Plaintiff filed his second motion for summary judgment on October 25, 1999, contending that he was entitled to judgment as a matter of law because: (1) transfers of an interest in real property, whether through sale, mortgage, or gift, are within the Statute of Frauds and require a writing; (2) parol evidence of prior or contemporaneous oral agreements is inadmissible to contradict or vary the terms of a writing within the Statute of Frauds; and (3) an agreement to renounce or cancel a mortgage must be in writing.

R.C. 1335.04, entitled "Interest in land to be granted in writing," states in pertinent part: "No lease, estate, or interest, either of freehold or term of years, or any uncertain interest of, in, or out of lands, tenements, or hereditaments, shall be assigned or granted except by deed, or note in writing, signed by the party assigning or granting it, or his agent thereunto lawfully authorized, by writing, or by act and operation of law." R.C. 1335.05, entitled "Certain agreements to be in writing," states in pertinent part: "No action shall be brought whereby to charge the defendant, *** to charge a person upon an agreement made *** upon a contract or sale of lands, tenements, or hereditaments, or

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interest in or concerning them *** unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized."

By decision and entry filed December 15, 1999, the trial court granted plaintiff's second motion for summary judgment, finding that because the transaction concerns the transfer of real property, it falls within the Statute of Frauds; that parol evidence is inadmissible to vary the terms of the note; and that plaintiff's alleged discharge of the note and mortgage fails because it was not in writing. The court concluded: "because there is no writing evidencing the transaction as gift, nor is there any writing which evidences Nicolozakes renouncement of the Note and mortgage, both of the Trust's gift arguments are without merit." The Trust has timely appealed the trial court's judgment, and raises a single assignment of error, as follows:

> The trial court erred in granting summary judgment to the plaintiff, as there were disputed issues of fact that make summary judgment improper under the law.

Civ.R. 56(C) provides, in relevant part, as follows:

> *** Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. ***

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Thus, summary judgment is appropriate only where the evidence before the court demonstrates that: (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party that conclusion is adverse to the party against whom the motion for summary judgment is made. *Tokles & Son, Inc. v. Midwestern Indemnity Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 65-66.

In reviewing a trial court's disposition of a summary judgment motion, an appellate court applies the same standard as that applied by the trial court. *Maust v. Bank One Columbus, N.A.* (1992), 83 Ohio App.3d 103, 107. An appellate court reviews a summary judgment disposition independently and without deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 711. Summary judgment is a procedural device to terminate litigation, so it must be awarded cautiously, with any doubts resolved in fav the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 356, 358-359.

By its assignment of error, the Trust argues that the trial court erred in granting summary judgment in favor of plaintiff because: (1) the note is ambiguous, thereby requiring parol evidence to explain its meaning; and (2) parol evidence is admissible to determine whether plaintiff orally modified the terms of the note subsequent to its execution.

As noted previously, the Statute of Frauds requires that all transfers of an interest in real property must be in writing. As this transaction concerns the transfer of

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real property, it falls within the Statute of Frauds. The note clearly states that it is payable on demand. The Trust argues that parol evidence may be considered to determine the "true meaning and purpose" of the note. We find the Trust's argument to be contradicted by the Ohio Supreme Court's decision in *Marion Production Credit Assn. v. Cochran* (1988), 40 Ohio St.3d 265, wherein the court held in the fourth paragraph of the syllabus:

> When a party voluntarily places his signature upon a note or other writing within the statute of frauds, and where that party's sole defense to an action brought upon the writing is that a different set of terms was originally agreed to at that time, such defense shall not be countenanced at law regardless of the theory under which such facts are pled. In such an event, the writing alone shall be the sole repository of the terms of the agreement.

Marion is directly on point and expressly contradicts the position espoused by the Trust. It holds that parol evidence is not admissible to contradict or alter the terms of the note, which, in this case, is the sole repository of the terms of the agreement between plaintiff and the Trust. Accordingly, the Trust's argument that parol evidence is admissible to demonstrate plaintiff's original intention to gift the property to Tangeman fails as a matter of law.

Similarly, the Trust's contention that plaintiff orally agreed, after the note was executed, to release the Trust's obligation on the note and mortgage to effect his "gift" to Tangeman also fails as a matter of law. In *Gatts v. GMBH* (1983), 14 Ohio App.3d 243, 247, the court held that a discharge of a mortgage is an interest in land and is required to be in writing under the Statute of Frauds; if an alleged discharge has not been reduced to writing, it is void. Applying the holding of *Gatts* to the facts of the instant

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case, any discharge of the note and mortgage by plaintiff was required to be in writing. As no such writing exists, the Trust is bound by the terms of the note.

In short, even construing the disputed facts in favor of Tangeman, the nonmoving party, *i.e.*, that the original transfer of the property was intended as a gift from plaintiff to Tangeman, and/or that plaintiff renounced his interest in the note and mortgage after the note was executed a gift of the property to Tangeman, such facts are rendered immaterial by operation of Ohio law governing real estate transfers. Thus, this court finds that the trial court did not err in rendering summary judgment in favor of plaintiff. Accordingly, the assignment of error is overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BOWMAN, P.J., and KENNEDY, J., concur.