

IN THE SUPREME COURT OF OHIO

The Bank of New York Mellon	:	Case No. 2017-0870
	:	
Petitioner	:	On Order of Certification of Questions
	:	of State Law
v.	:	
	:	Bankruptcy Appellate Panel of the Sixth
	:	Circuit Court of Appeals Case No.
	:	16-8042
Susan L. Rhiel, Trustee	:	
	:	
Respondent	:	

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**MERIT BRIEF OF PETITIONER THE BANK OF NEW YORK MELLON**

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	i
INTRODUCTION.....	1
SUMMARY OF ARGUMENT.....	1
STATEMENT OF FACTS.....	2
ARGUMENT.....	4

**Certified Question #1:** Whether an individual who is not identified in the body of a mortgage, but who signs and initials the mortgage, is a mortgagor of his or her interest?

**Proposition of Law No. I:** An individual who is not identified in the body of a mortgage, by name, but who signs and initials the mortgage is a mortgagor of his or her interest.

**Certified Question #2:** Is a mortgage signed and initialed by an individual whose name is not identified in the body of the mortgage but whose signature is properly acknowledged pursuant to Ohio Revised Code § 5301, invalid as a matter of law such that parol evidence is not admissible to determine the intent of the individual signing the mortgage?

**Proposition of Law No. II:** A mortgage that is signed and initialed by an individual whose name is not identified in the body of the mortgage but whose signature is properly acknowledged pursuant to Ohio Revised Code § 5301 is rebuttably presumed to be valid and parol evidence is admissible to determine the intent of the individual signing the mortgage, in the event of an ambiguity in the mortgage.

- A. R.C. § 5301.07 supplies the answer to both certified questions.....4
- B. Intermediate decisions from Ohio Courts of Appeal are dispositive of the first certified question.....6
- C. Other Ohio statutes provide further guidance on the first certified question .....7
- D. A mortgagor signs to grant the interest that she holds so that the mortgagee is secured in the estate held by the mortgagor.....8

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>CitiMortgage, Inc. v. Kermeen</i> , No. 2011 CA 2, 2012-Ohio-1655, 2012 WL 1264488 (2 <sup>nd</sup> Dist. 2012) .....	7
<i>Citizens Nat. Bank in Zanesville v. Denison</i> , 165 Ohio St. 89, 133 N.E. 2d 329.....	9
<i>Dodd v. Bartholomew</i> , 44 Ohio St. 171, 5 N.E. 866 (1886).....	10
<i>Inland Refuse Transfer Co. v. Browning-Ferris Indus. of Ohio, Inc.</i> , 15 Ohio St. 3d 321, 474 N.E. 2d 271 (1984).....	10
<i>Jackson v. Watkins</i> , 128 Ohio St. 407, 191 N.E. 483 (1934).....	9
<i>MidFirst Bank v. Stump</i> , Nos. 16AP-52 and 16AP-189, 2017-Ohio-4312 (10 <sup>th</sup> Dist. 2017).....	7
<i>Mortgage Electronic Registration Systems, Inc. v. Kaehne</i> , No. 2007-P-0033, 2008-Ohio-4051, 2008 WL 3271249 (11 <sup>th</sup> Dist. 2008).....	7
<i>SFJV 2005 v. Ream</i> , 187 Ohio App. 3d 715, 933 N.E. 2d 819 (2 <sup>nd</sup> Dist. 2010).....	6, 7
<i>Smith v. Turpin</i> , 20 Ohio St. 478(1870).....	8
<i>State v. Laws</i> , No. 72AP-398, 1980 WL 353796 (10th Dist. 1980).....	6
<i>Tuttle v. Burgett's Adm'r</i> , 53 Ohio St. 498, 42 N.E. 427 (1895).....	10
<i>Van Fossen v. Babcock &amp; Wilcox, Co.</i> , 36 Ohio St. 3d 100, 522 N.E. 2d 489 (1988).....	6
<u>STATUTES AND RULES</u>	
R.C. § 5301.01.....	7
R.C. § 5301.02.....	1, 7, 8, 9
R.C. § 5301.07.....	4, 10
R.C. § 5301.07(B)(1)(a).....	1
R.C. § 5301.07(B)(1)(b).....	1
R.C. § 5301.07(C)(4) .....	1

## **I. INTRODUCTION**

### **A. Two questions have been certified to this Court**

This Court has been asked to answer two questions certified by the United States Bankruptcy Appellate Panel for the Sixth Circuit Court of Appeals in an appeal from a decision of the United States Bankruptcy Court for the Southern District of Ohio in a case styled *Susan L. Rhiel, Trustee v. The Bank of New York Mellon (In re Vodrick Lee Perry and Marcy L. Perry)*:

Certified Question #1: Whether an individual who is not identified in the body of a mortgage, but who signs and initials the mortgage, is a mortgagor of his or her interest?

Certified Question #2: Is a mortgage signed and initialed by an individual whose name is not identified in the body of the mortgage but whose signature is properly acknowledged pursuant to Ohio Revised Code § 5301, invalid as a matter of law such that parol evidence is not admissible to determine the intent of the individual signing the mortgage?

## **II. SUMMARY OF ARGUMENT**

The following presumptions are found in Ohio law:

- (1) That a mortgagor intends to grant her lawful interest in property to a mortgagee unless otherwise clearly stated in the instrument. R.C. § 5301.02;
- (2) That a mortgage conveys, encumbers or is enforceable against the person who signed the instrument. R.C. § 5301.07(B)(1)(a);
- (3) That a mortgage is valid, enforceable and effective when executed. R.C. § 5301.07(B)(1)(b).

In addition to these presumptions, Ohio law cures any defect in the execution of a mortgage which is of record for more than four years, including where the name of the mortgagor does not appear in the granting clause of the mortgage. R.C. § 5301.07(C)(4). Ohio does not mandate or require that a particular mortgage form be used. R.C. § 5302.12.

Ohio intermediate appellate courts have upheld mortgages executed by a spouse who did not also sign the related Note and whose name did not appear in the body of a mortgage. In those cases, where the mortgage defines the mortgagor as a co-signer/borrower who executes the mortgage in order to mortgage, grant and convey the co-signer's interest to the mortgagee, Ohio courts have held that the signature of the co-signer was sufficient to bind the co-signer.

### **III. STATEMENT OF FACTS**

The Perrys owned real estate located at 8253 Rodebaugh Road, Reynoldsburg, Ohio ("Property"). A General Warranty Deed was filed on April 11, 2005 in Instr. No. 200504110066461 of Franklin County, Ohio records from Trinity Home Builders, Inc. to Vodrick Lee Perry and Marcy L. Perry, "for their joint lives, the remainder to the survivor of them" for the Property.

The Perrys financed their purchase of the Property with a mortgage to Developers Mortgage Company in the amount of \$238,700.00 which was filed in Instr. No. 200504110066504 of Franklin County, Ohio records. Both Perrys executed the Note secured by that mortgage.

In 2007 the Perrys decided to refinance their 2005 mortgage to avoid an interest rate adjustment and to pay off the 2005 mortgage. Vodrick Perry signed a Promissory Note for the refinance.

Mr. Perry applied for the refinance loan through a mortgage broker. The loan application only included Mr. Perry's information and only he signed the application. The loan application disclosed that Mr. Perry was married.

Mr. Perry applied for a mortgage loan for the full value of the Property. The Property was valued at \$314,000 at the time of the 2007 refinance.

On or about February 6, 2007, the Perrys executed and delivered a mortgage to America's Wholesale Lender in the amount of \$244,800 ("2007 Mortgage"). The 2007 Mortgage is filed in Instr. No. 200703050038184 of Franklin County, Ohio records.

Mr. and Mrs. Perry believed that Mrs. Perry signed the 2007 Mortgage for "the dowry rights". Mrs. Perry believed that "dowry rights" means that one spouse cannot purchase property without the other spouses knowledge. Mrs. Perry admitted that she "was on the deed" to the Property which is different than "dowry rights".

Mr. Perry admitted that the 2007 Mortgage does not state that his wife was signing to release dower.

Mr. and Mrs. Perry agreed that the 2007 Mortgage contains a "co-signer" provision:

"Borrower covenants and agrees that borrower's obligations and liabilities shall be joint and several. However, any borrower who cosigns this instrument-- security instrument but does not execute the note, parens, a cosigner, quote, close quote, (a) is cosigning the security instrument only to mortgage, grant and convey the cosigner's interest in the property under the terms of the security instrument; (b) is not personally obligated to pay the sum secured by the security instrument."

Mrs. Perry admitted that this provision means that she was required to sign the 2007 Mortgage.

In addition to signing the 2007 Mortgage, Mr. and Mrs. Perry signed a Truth in Lending Disclosure which included a provision that she was "giving a security interest in the property located at 8253 Rodebaugh Road, Reynoldsburg, Ohio." Mr. and Mrs. Perry also signed a Notice of Right to Cancel which included the statement, "Each borrower/owner in this transaction has the right to cancel. The exercise of this right by one borrower/owner shall be effective to all borrowers/owners." Mrs. Perry admitted that

she was unsure why she would have signed the Right to Cancel if she were not an owner or borrower.

The bankruptcy litigation went to trial on March 18, 2016. A decision was entered in favor of Petitioner The Bank of New York Mellon on September 20, 2016. An appeal was timely filed to the Bankruptcy Appellate Panel for the Sixth Circuit Court of Appeals. The appeal remains pending.

#### **IV. ARGUMENT**

**Certified Question #1:** **Whether an individual who is not identified in the body of a mortgage, but who signs and initials the mortgage, is a mortgagor of his or her interest?**

**Proposition of Law No. I:** **An individual who is not identified in the body of a mortgage, by name, but who signs and initials the mortgage is a mortgagor of his or her interest.**

**Certified Question #2:** **Is a mortgage signed and initialed by an individual whose name is not identified in the body of the mortgage but whose signature is properly acknowledged pursuant to Ohio Revised Code § 5301, invalid as a matter of law such that parol evidence is not admissible to determine the intent of the individual signing the mortgage?**

**Proposition of Law No. II:** **A mortgage that is signed and initialed by an individual whose name is not identified in the body of the mortgage but whose signature is properly acknowledged pursuant to Ohio Revised Code § 5301 is rebuttably presumed to be valid. Parol evidence is admissible to determine the intent of the individual signing the mortgage, in the event of an ambiguity in the mortgage.**

##### **A. R.C. § 5301.07 supplies the answer to both certified questions**

On April 6, 2017, R.C. § 5301.07 took effect. This statute cures defects in a mortgage where a mortgagor's name is not included in the body of the document:

(A) As used in this section, "real property instrument" means a deed, mortgage, and installment contract, lease, memorandum of trust, power of attorney, or any instrument accepted by the county recorder under section 317.08 of the Revised Code.

(B)(1) When a real property instrument is delivered to and accepted by the county recorder of the county in which the real property is situated, and is signed and acknowledged by a person with an interest in the real property that is described in the instrument, the instrument raises both of the following:

(a) A rebuttable presumption that the instrument conveys, encumbers, or is enforceable against the interest of the person who signed the instrument;

(b) A rebuttable presumption that the instrument is valid, enforceable, and effective as if in all respects the instrument was legally made, executed, acknowledged, and recorded.

(2) The presumptions described in division (B)(1) of this section may be rebutted by clear and convincing evidence of fraud, undue influence, duress, forgery, incompetency, or incapacity.

(C) When a real property instrument is of record for more than four years from the date of recording of the instrument, and the record shows that there is a defect in the making, execution, or acknowledgment of the instrument, the instrument and the record thereof shall be cured of the defect and be effective in all respects as if the instrument had been legally made, executed, acknowledged, and recorded. The defects may include but are not limited to the following:

The instrument was not properly witnessed.

(1) The instrument contained no certificate of acknowledgment.

(2) The certificate of acknowledgment is defective in any respect.

(3) The name of the person with an interest in the real property does not appear in the granting clause of the instrument, but the person signed the instrument without limitation.

(D) A real property instrument when delivered to the county recorder of the county in which the real property is situated and filed in the chain of title to the real property provides constructive notice to all third parties of the instrument notwithstanding any defect in the making, execution, or acknowledgment of the real property instrument.

(E) Nothing contained in this section operates to discharge the obligation to comply with all provisions of sections 5301.47 to 5301.56 and section 5301.332 of the Revised Code before the extinguishment, abandonment, or forfeiture of an interest in real estate as may be authorized by those sections.

(F) Except as otherwise provided in division (E) of this section, this section applies to all real property instruments notwithstanding any other provision of the Revised Code. To the extent that a conflict exists between this section and any

other section of the Revised Code, including but not limited to section 1301.401 of the Revised Code, this section controls with respect to any matters addressed in this section.

(G) This section shall be given retroactive effect to the fullest extent permitted under Section 28 of Article II, Ohio Constitution. This section shall not be given retroactive effect if to do so would affect any accrued substantive right or vested rights in any person or in any real property instrument.

This statute supplies the answers to both certified questions. In addition, it applies to resolve the issues in *Perry. Van Fossen v. Babcock & Wilcox, Co.*, 36 Ohio St. 3d 100, 106, 522 N.E. 2d 489 (1988); *State v. Laws*, No. 72AP-398, 1980 WL 353796 § 5 (10th Dist. 1980).

**B. Intermediate decisions from Ohio Courts of Appeal are dispositive of the first certified question**

Ohio appellate courts have answered Certified Question #1 on the basis that a mortgage is a contract which must be interpreted under general principles of contract interpretation. *SFJV 2005 v. Ream*, 187 Ohio App. 3d 715, 721, 933 N.E. 2d 819 (2<sup>nd</sup> Dist. 2010).

Based upon the content of the Ream's mortgage, interpreting the words used by the parties to that instrument, the Court held that when a mortgage was signed by the "mortgagor/borrower" those parties granted their interests in real property to the mortgage lender. *Ream* ¶ 26. In addition, when a "co-signer" signed the mortgage, he mortgaged his interest in the real property. *Ream* ¶ 26-27. This result would hold unless there was evidence in the mortgage that the signing was for some other purpose, such as to waive dower. *Ream* ¶ 31.

In reaching that conclusion, the Court in *Ream* held that the word "mortgagor" is synonymous with "borrower". Thus, "The accompanying mortgage identified Donna Ream as the mortgagor/borrower" and "Although Paul Ream is not listed as a borrower/mortgagor on the first page of the mortgage . . . Paul signed as 'borrower'". *Ream* ¶ 3, 31. The "co-signer"

paragraph in the Ream mortgage also defined “borrower” as a co-signer. *Ream* ¶ 27. A co-signer is someone who signs the mortgage but not the Note secured by the mortgage. *Id.*

Similarly, in *CitiMortgage, Inc. v. Kermeen*, No. 2011 CA 2, 2012-Ohio-1655, 2012 WL 1264488 (2<sup>nd</sup> Dist. 2012) the court relied on the same co-signer provision identified in *Ream* to enforce a mortgage signed by a borrower/co-signer. *Kermeen* at 20. The Court in *MidFirst Bank v. Stump*, Nos. 16AP-52 and 16AP-189, 2017-Ohio-4312 (10<sup>th</sup> Dist. June 15, 2017) also ratified *Ream*.

In *Mortgage Electronic Registration Systems, Inc. v. Kaehne*, No. 2007-P-0033, 2008-Ohio-4051, 2008 WL 3271249 (11<sup>th</sup> Dist. 2008), the Court upheld a mortgage noting, “by signing the mortgage [Kaehne’s girlfriend] pledged her undivided one-half interest in the property as security for Kaehne’s note.” *Kaehne* ¶ 18.

There are no Ohio cases in conflict with *Ream* or *Kaehne*. Accordingly, Certified Question #1 must be answered affirmatively.

#### **C. Other Ohio statutes provide further guidance on the first certified question**

R.C. § 5301.01 states that “A . . . mortgage . . . shall be signed by the . . . mortgagor” and, “The signing shall be acknowledged by the . . . mortgagor . . . before . . . a notary public“. There are no other requirements for the execution of a mortgage in Ohio.

“[E]very grant, conveyance, or mortgage of lands . . . shall convey or mortgage the entire interest which the grantor could lawfully grant, convey, or mortgage, unless it clearly appears by the . . . mortgage . . . that the grantor intended to . . . mortgage a less estate.” (emphasis added).

R.C. § 5301.02.

“In a conveyance of real estate or any interest therein all rights, easements, privileges and appurtenances belonging to the granted estate shall be included in the conveyance unless the

contrary is stated in the deed, and it is unnecessary to enumerate or mention them either generally or specifically.” R.C. § 5302.04.

Ohio does not require that a particular form be used in order to create a valid and enforceable mortgage. R.C. § 5302.12.

Thus, regardless of the form of a mortgage, Ohio law only requires that the mortgage be signed and notarized. From there, we presume that the mortgagor signed the mortgage to grant her interest to the mortgagee. Accordingly, the first certified question, “Whether an individual who is not identified in the body of a mortgage, but who signs and initials the mortgage, is a mortgagor of his or her interest“ must be answered affirmatively.

**D. A mortgagor signs to grant the interest that she holds so that the mortgagee is secured in the estate held by the mortgagor**

When a mortgagor signs a mortgage, she does so in order to mortgage the interest she holds. For instance, the mortgagor could grant an undivided fee simple interest or encumber a leasehold estate. She could also sign to release her dower.

The purposes for which a mortgagor conveys or grants her interest are limited in scope. Based upon the presumption found in R.C. § 5301.02, a mortgagor who holds title alone or as a tenant in common with others would mortgage her undivided interest. She would not simply release inchoate dower. *See Smith v. Turpin*, 20 Ohio St. 478, 493 (1870).

Similarly, if a mortgagor holds title in survivorship, she would not sign to release dower because tenants in survivorship do not have an inchoate dower claim in the interest(s) of the other survivorship tenant(s).

And where the signer only holds an inchoate dower claim, having no title, she would not be signing to grant a fee interest to the lender. She would sign for the purpose of releasing her dower.

Given the limited purposes for which a mortgagor signs a mortgage, applying R.C. § 5301.02 to the first certified question requires the conclusion that the act of executing a mortgage is dispositive of the mortgagors intention to obtain mortgage financing by granting her interest to the lender.

Moreover, this Court has never deviated from the rule that a mortgage is a valid contract between the parties thereto. *Citizens National Bank v. Denison*, 165 Ohio St. 89, 95, 133 N.E. 2d 329 (1956). This Court has also held that a party to a contract is either the individual signer or a principal acting in a representative capacity. *Jackson v. Watkins*, 128 Ohio St. 407, 191 N.E. 483 (1934). If the presumption is that a mortgagor signs to grant her lawful interest to the lender and the mortgage is enforceable as a contract between the lender and mortgagor, then the only conclusion to be reached is that the act of signing a mortgage is all that is required to grant the interest of the mortgagor to the mortgagee.

#### **E. Certified Question #2 must be answered negatively**

The second certified question asks if a mortgage is *per se* invalid if the name of the mortgagor is not contained in the text of the document. This question presumes that there would be no ambiguity in the mortgagors execution of the mortgage.

##### **(1) The presumption of validity defeats the premise of the second certified question**

Certified Question #2 cannot be answered affirmatively. The presumption that a mortgagor grants the interest that she holds in property unless otherwise clearly stated prevents an affirmative answer to this question. Therefore, we would presume that the mortgagor granted her interest, regardless of whether her name specifically appears in the text of the mortgage, unless her interest was unclear. In that case, parol evidence would be available to resolve the ambiguity.

**(2) Parol evidence is always available to interpret a mortgage in the event of ambiguity**

Fundamentally, mortgages are interpreted as contracts. *Tuttle v. Burgett's Adm'r*, 53 Ohio St. 498, 42 N.E. 427 (1895). All of the parts of a mortgage are to be construed together and the meaning is to be obtained from a consideration of every part. *Dodd v. Bartholomew*, 44 Ohio St. 171, 5 N.E. 866 (1886). In the event of ambiguity parol evidence would be available to determine the intent of the parties to the contract. *Inland Refuse Transfer Co. v. Browning-Ferris Indus. of Ohio, Inc.*, 15 Ohio St. 3d 321, 322, 474 N.E. 2d 271 (1984).

We presume the mortgage reflects the intent of the mortgagor unless the mortgage clearly shows otherwise. Therefore, if it is unclear why the mortgagor signed, the conclusion must be that she did so to mortgage her interest or parol evidence must be available to clarify her intention.

Answering the Certified Question # 2 affirmatively would substantially alter Ohio law on the issue of contract interpretation. The question invites this Court to make an exception to the rule of construction that permits the introduction of parol evidence to resolve ambiguities in a mortgage. This Court should decline that invitation.

In addition, with the enactment of R.C. § 5301.07, Certified Question #2 is a nullity. Therefore, the question cannot be answered affirmatively.

**V. CONCLUSION**

Certified Question #1, [w]hether an individual who is not identified in the body of a mortgage, but who signs and initials the mortgage, is a mortgagor of his or her interest must be answered in the affirmative.

Certified Question #2, [i]s a mortgage signed and initialed by an individual whose name is not identified in the body of the mortgage but whose signature is properly acknowledged

pursuant to Ohio Revised Code § 5301, invalid as a matter of law such that parol evidence is not admissible to determine the intent of the individual signing the mortgage? must be answered in the negative.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on October 23, 2017 a copy of the foregoing Merit Brief was served on the following by regular US Mail:

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