IN THE SUPREME COURT OF OHIO

THE FARMERS STATE BANK,	*	**CASE NO. 2017-1377**
	*	
Plaintiff-Appellant,	*	**On Appeal from the Darke County**
	*	**Court of Appeals, Second Appellate**
v.	*	**District**
	*	
STEVEN SPONAUGLE, et al.,	*	**Court of Appeals**
	*	**Case No. 2016-CA-4**
Defendants-Appellees.	*	
	*	

REPLY BRIEF OF PLAINTIFF-APPELLANT THE FARMERS STATE BANK

Terry W. Posey, Jr. (#0078292)
Terry.Posey@thompsonhine.com
THOMPSON HINE LLP
10050 Innovation Drive, Suite 400
Miamisburg, Ohio 45342-4934
Telephone: (937) 443-6857
Facsimile: (937) 443-6635

Attorney for Appellant The Farmers State Bank

H. Grant Stephenson (#0023025)
gstephenson@porterwright.com
L. Bradfield Hughes (#0070997) (Counsel of Record)
bhughes@porterwright.com
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street
Columbus, Ohio 43215
Phone: (614) 227-2053/Fax: (614) 227-2100

Attorneys for Amicus Curiae The Community Bankers Association of Ohio and Independent Community Bankers of America

Andrew M. Engel (#0047371)
aengel@kendodulaney.com
7925 Paragon Road
Dayton, Ohio 45459
Telephone: (937) 221-9819
Facsimile: (937) 433-1510

Attorney for Appellees Steven and Karen Sponaugle

John Marchal, Jr. (#0066432)
jmarchaljr@marchalandmarchal.com
MARCHAL & MARCHAL LTD.
116 West Fourth Street
Greenville, Ohio 45331
Telephone: (937) 548-1125
Facsimile: (937) 548-6409

Attorney for Amicus Curiae Greenville National Bank

Stephen D. Miles (#0003716)
mmiles@mileslaw.com
LAW OFFICES OF STEPHEN D. MILES
18 West Monument Avenue
Dayton, Ohio 45402
Telephone: (937) 461-1900
Facsimile: (937) 461-0444

Attorney for Amicus Curiae
Farmers and Merchants Bank

H. Grant Stephenson (#0023025)
gstephenson@porterwright.com
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street
Columbus, Ohio 43215
Telephone: (614) 227-2053
Facsimile: (614) 227-2100

Attorneys for Amicus Curiae
Osgood State Bank

Tami Hart Kirby (#0078473)
tkirby@porterwright.com
PORTER WRIGHT MORRIS & ARTHUR LLP
One S. Main Street
Suite 1600
Dayton, Ohio 45402
Telephone: (937) 449-6721
Facsimile: (937) 449-6820

Attorney for Amicus Curiae
Twin Valley Bank

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(S)

CASES

STATUTES/OTHER AUTHORITIES

I. INTRODUCTION

In this case, Farmers State[1] obtained a judgment of foreclosure against the Sponaugles. The Sponaugles appealed. Farmers State proceeded to order a sheriff's sale on the mortgaged property. The Sponaugles sought stays of the Sheriff's Sale before the Trial Court and the Court of Appeals, but never raised any issue as to whether the Sheriff's Sale was appropriate. Both Courts offered the Sponaugles a stay conditioned by a bond, which they did not pay.

Consequently, the Property was sold in February 2016. Nearly a month later, the Second District Court of Appeals issued a Show Cause Order (to the Sponaugles only) questioning whether the Decree was a final appealable order. The Sponaugles, unhappy that the Sheriff's Sale had occurred, and believing that Ohio law barred execution on a non-final order, began adopting the Second District's suggestion as their own position.

The Second District eventually dismissed the First Appeal as lacking a final appealable order on the basis that the Treasurer's lien for taxes was not expressly described and that the amount of the junior lienholder's lien was not expressly stated in the Decree. This Dismissal Entry was issued without requesting Farmers State to respond to the Show Cause Order.

In the meantime, the Trial Court confirmed the Sheriff's Sale; and a Sheriff's Deed was issued weeks before the Sponaugles appealed the Confirmation Entry or sought a stay.

More than a year after confirmation and issuance of the Sheriff's Deed (and after the Property had been transferred again to a third party), the Second District ruled in a 2-1 Decision that the Sheriff's Sale be vacated, because applying the law of the case doctrine, the Decree was not a final appealable order.

[1] All capitalized terms have the same meaning as in the initial brief filed May 21, 2018.

This appeal followed. In its initial brief, Farmers State's first proposition of law pointed out that under Ohio law a sheriff's sale after a non-final order can be properly confirmed pursuant to two separate arguments. First, a sheriff's sale may be predicated on a non-final decree when the priority and amounts due a first lienholder are established. Second, if the defendant fails to object prior to sale, any defects with regards to a sheriff's sale are waived.

The Sponaugles now respond by citing generic cases concerning ***garnishments***. Those cases support the proposition that garnishment can only occur from a final appealable order. They do not address, much less distinguish, the on-point cases cited by Farmers State. They also argue, without appropriate citation, that they can raise the issue of whether the Sheriff's Sale was proper after the sale already occurred.

Farmers State's second proposition of law (supported by case law from this Court and the lower appellate districts, as well as secondary authority) is that a foreclosure decree that determines the plaintiff has first priority and the amount due to the plaintiff is a final appealable order. The Second District nonetheless held that the Decree was a non-final order based on a misapplication of the law of the case doctrine. That does not apply to issues that were never appealed to this Court, to issues that were not fully and fairly litigated, and to conclusions that are plainly wrong.

The Sponaugles respond by conflating liens with claims. Again, the case law and secondary authority demonstrate that so long as the priority of the first lienholder and the amount due the first lienholder is established, the amounts due to the remaining lienholders can be adjudicated after sale, if there are any funds remaining.

It is important to remember that the genesis of this case is Farmers State's attempts to recover monies due to it under Notes and Mortgages. The Sponaugles did not file a response to

the Motion for Summary Judgment (which resulted in the Decree). None of their arguments relating to the appropriateness of the sale were raised prior to the sale.

The Second District's Decision has made unclear the requirements for a foreclosure Decree, and disrupted the finality of previously valid sheriff's sales. Based on the better law and policy, the Court should adopt Farmers State's propositions of law and reverse the Decision. Either proposition restores harmony to the foreclosure law (and real estate markets) in Ohio, and results in efficient and lawful post-judgment sale proceedings.

II. DISCUSSION

THE APPEAL IS NOT SUBJECT TO DISMISSAL.

The Sponaugles' initial argument is that this appeal should be dismissed because the Decree did not address the Treasurer's cross-claim and Farmers State did not serve Defendant Midstates Resources Corp. ("Midstates") prior to judgment. The argument is a red herring.

A. The Treasurer's cross-claim is determined by statute.

Even though it was not required to under Ohio law, the Treasurer filed an Answer and Cross-Claim against the Sponaugles on November 15, 2013. Sponaugle Supplement S-6. The Sponaugles filed an Amended Answer to the first Complaint and the Treasurer's Cross-Claim on December 27, 2013, generically denying the allegations.

The Treasurer's Cross-Claim stated that it was for "real estate taxes, special assessments, penalties and interest * * * pursuant to Sections 323.11, 323.47, and 5721.10 of the Ohio Revised Code which has priority over all other liens, without exceptions, and which is required to be discharged out of the proceeds from a judicial sale of such property." Cross-Complaint, ¶ 2.

The Treasurer did not file an Answer to the Amended Complaint.

The Decree (which was signed by the Treasurer) identified the Treasurer as having the "first and best lien" for payment of real estate taxes. This is what is required. R.C. 323.47(B)(1) states:

> (B)(1) Except as provided in division (B)(2) or (3) of this section, if real estate is sold at judicial sale, the court shall order that the total of the following amounts shall be discharged out of the proceeds of the sale but only to the extent of such proceeds:
>
> > (a) Taxes, assessments, interest, and penalties, the lien for which attaches before the date of sale but that are not yet determined, assessed, and levied for the year that includes the date of sale, apportioned pro rata to the part of that year that precedes the date of sale;
> >
> > (b) All other taxes, assessments, penalties, and interest the lien for which attached for a prior tax year but that have not been paid on or before the date of sale.

More simply put, the Treasurer's cross-claim was determined once the Decree was entered.[2] There was nothing any party could do to displace the Treasurer's statutory priority and calculation of the amount due from the proceeds of the Sheriff's Sale.

This Court has held that to constitute a final appealable order: "the judgment entries [must] set forth the rights of all lienholders. Although the [judgment entries] did not specify the actual amounts due, they did state what the mortgagors would be liable for." *CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, ¶ 20

That holding was applied in *JTS Capital 1 LLC v. Lake Cottage Communities Ltd.*, 5th Dist. Perry No. 16-CA-00010, 2017-Ohio-1437, ¶ 24. In *JTS Capital 1*, the foreclosing lienholder argued that the county treasurer's failure to appear or respond to the cross-claims regarding the priority of real estate taxes entitled the foreclosing lienholder to a superior position.

[2] Section (B)(3) applies only to certain foreclosures initiated by the Treasurer that are not tax foreclosures and to county purchasers.

The Fifth District rejected the argument – noting that the statutory scheme places the treasurer in first priority position regardless of any claims. *Id.*

Judgment on the Treasurer's cross-claim was appropriate and final, as it was a foregone conclusion. The Sponaugles cite no authority that the initial amount due (as of the date of the Decree) is required to be included in the Decree, and with good reason, because as noted in *JTS Capital 1*, the amount would change at the time the proceeds were distributed.

B. Midstates' interest was properly adjudicated.

As a secondary argument, and for the first time, the Sponaugles now assert that the Decree was a non-final order because Midstates was not served with any of the complaints. However, the Sponaugles: (1) waived the issue by failing to raise it below; (2) lack standing to argue on behalf of Midstates or the propriety of the judgment eliminating its lien; (3) ignore the relevant statutory determination; and (4) incorrectly describe the consequences of failing to properly obtain jurisdiction over Midstates.

1. *The Sponaugles waived the argument.*

First, the issue of whether the Decree was subject to execution has been litigated at the Trial Court and through the Second District Court of Appeals. This is the first time that the Sponaugles have raised any issue with the Midstates mortgage as it pertains to the Decree. Importantly, the Sponaugles did not file any opposition to the Motion for Summary Judgment.[3]

As a consequence of this failure to raise the argument before the Trial Court or the Court of Appeals, the argument is waived. *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997) ("we have long recognized, in civil as well as criminal cases, that failure to timely

[3] The Sponaugles filed a Motion for Leave to File Response to Motion for Summary Judgment and a Response to the Motion for Summary Judgment on December 28, 2015. The Trial Court had already granted the Motion for Summary Judgment on December 15, 2015, and denied the Motion for Leave on December 30, 2015.

advise a trial court of possible error, by objection or otherwise, results in a waiver of the issue for purposes of appeal."). As discussed below, even if the Sponaugles had standing to raise the issue, or the mortgage was not released by operation of statute, the Sponaugles have waived the issue by failing to raise it below. There is no reason to dismiss the appeal.

2. *The Sponaugles lack standing to raise any issues with Midstates' mortgage.*

Relatedly, the Sponaugles lack standing to raise any issue regarding Midstates' mortgage. It is undisputed that the Trial Court's Decree eliminated the Midstates mortgage which stood as a potential encumbrance to the Property. The Sponaugles therefore lack standing to challenge whether that should have occurred. A party is only entitled to argue for correction of errors of the lower court that injuriously affected them. *Petitioners for Incorporation v. Bd. of Twinsburg*, 4 Ohio App.2d 171, 176, 211 N.E.2d 880 (1st Dist.1965). "[T]he test * * * lies in whether or not one is an 'aggrieved' party — a party who has suffered some loss." *Warren v. Cincinnati*, 113 Ohio App. 254, 257, 173 N.E.2d 180 (1st Dist.1959). The elimination of an encumbrance on their property does not harm the Sponaugles.

Moreover, mortgagors lack standing to assert the rights of other lienholders. *American Savings Bank, FSB v. Wrage*, 2016-Ohio-2879, 63 N.E.3d 793 (4th Dist.). This is because "[t]he standing doctrine encompasses, among other things, a general prohibition against a party asserting the legal rights of another entity." *Id.* at ¶ 16. Even if there were some issue with Midstates' mortgage in the Decree, the Sponaugles are barred as a matter of jurisprudential standing from raising it.

3. *Midstates' mortgage was released by statute.*

Separately, the Midstates mortgage was properly released. Although Midstates was named as a defendant, it was never served. Second Supp. 17. Farmers State's Motion for

Summary Judgment explained that Midstates mortgage indebtedness was due October 15, 1991, and was no longer enforceable pursuant to R.C. 5301.30 because more than 21 years had passed since that due date. Second Supp., 14, 17. Based on this fact, the Trial Court concluded in the Decree that Midstates had "no interest in the property described herein." Supp. 40.

That result was dictated by R.C. 5301.30:

> The record of any mortgage which remains unsatisfied or unreleased of record for more than twenty-one years after the date of the mortgage or twenty-one years after the stated maturity date of the principal sum, if a stated date of maturity is provided in the mortgage, whichever is later, secured as shown in the record of such mortgage, does not give notice to or put on inquiry any person dealing with the land described in such mortgage that such mortgage debt remains unpaid or has been extended or renewed. **As to subsequent bona fide purchasers, mortgagees, and other persons dealing with such land for value, the lien of such mortgage has expired.**

(Emphasis added.)

The Trial Court properly entered a judgment eliminating the lien of Midstates. The Mortgage had expired prior to the time of the filing of the First Complaint. The Sponaugles' argument is simply incorrect.

4. *Even if there were an issue, it did not affect the judgment.*

Lastly, assuming there was some error as to the elimination of the Midstates' mortgage, the Sponaugles incorrectly describe the potential consequences. The Sponaugles contend that the failure to serve Midstates renders the entire Decree void. Opposition Brief, 14, citing *Lincoln Tavern, Inc. v. Snader*, 165 Ohio St. 61, 63, 133 N.E.2d 606 (1956) and *Cincinnati School Dist. Bd. of Edn. v. Hamilton Cty. Bd. of Revision*, 87 Ohio St.3d 363, 365, 721 N.E.2d 40 (2000). The Sponaugles are wrong.

First, neither case is on point, as both were addressing a failure of service on the actual property owner. In *Lincoln Tavern*, the question was whether service by publication on the

landowner/mortgagor must be strictly complied with to effectuate a foreclosure sale to a third party. 165 Ohio St. at 61. The Court held that the service requirements must be satisfied to foreclose and proceed with an effective judicial sale. *Id.*, syllabus ¶ 3.

Cincinnati School Dist. involved a Board of Revision complaint filed by a school board seeking to increase the valuation of a property. The actual property owner was never properly served. This Court held that the failure to give the property owner notice of the hearing rendered any subsequent judgment void. 87 Ohio St.3d at 367.

The holdings of these cited cases are not being contested here, but neither case disposes of the present issues. The Sponaugles are arguing that the failure to serve a potentially senior lienholder renders this judgment void, but they cite no authority for that contention.

The Sponaugles' argument is wrong as a matter of law. If a mortgaged property is sold without notice to a senior lienholder, the remedy is not that the underlying judgment resulting in the sale is void. The outcome is that the property was sold subject to the remaining lien. *Stewart v. Wheeling & Lake Erie Ry. Co.*, 53 Ohio St. 151, 41 N.E. 247 (1895), paragraph 3 of the syllabus; *Pease Co. v. Huntington Natl. Bank*, 24 Ohio App.3d 227, 230, 495 N.E.2d 45 (10th Dist.1985).

The Sponaugles' argument is an overreach. They are arguing that the Decree is void because Farmers State named Midstates in the complaints, but Farmers State realized that the Midstates mortgage was ineffective as a matter of law. The elimination of the Midstates mortgage only benefits the Sponaugles – if the Sponaugles were to have redeemed the property, they would have benefited from not having to clear out a lienholder. Because they are not aggrieved, they lack standing to make these arguments. There are no grounds for dismissal.

PROPOSITION OF LAW NO. 1 A sheriff's sale can be confirmed even if the underlying foreclosure decree was a non-final order.

A. A non-final order of foreclosure is capable of execution.

The clear question before the Court is whether a final order is required for a foreclosure sale to be confirmed. At pages 9-11 of its initial brief, Farmers State pointed out that the cases being cited in the Decision for the holding that a final appealable order is required for execution were cases that all involved garnishments. At page 15 of the Opposition Brief, the Sponaugles cite most of those same cases. The Sponaugles then cite some new cases for the proposition that a sheriff's sale cannot issue from an interlocutory order, but none support their desired position. The new cases will be discussed in turn.

Star Leasing Co. v. G&S Metal Consultants, Inc., 10th Dist. Franklin No. 08AP-713, 2009-Ohio-1269, ¶ 35 actually proves Farmers State's point. *Star Leasing* involved a commercial dispute regarding a trailer lease. The trial court granted summary judgment on two of eight claims: (1) that the trailer lease was enforceable; and (2) that the defendants were obligated to return the trailers to the plaintiff. The defendants refused, and the trial court found them in contempt. The defendants appealed the contempt proceeding (the final appealable order) and the entry of partial summary judgment (rendered appealable through the contempt proceeding). The Tenth District first held: "Star Leasing does not dispute that interlocutory orders are, generally, not subject to execution," but then held that the enforcement procedure was in the vein of a prejudgment attachment. *Id.*, ¶ 35. The Court concluded that the trial court had jurisdiction to order prejudgment return of property (an execution proceeding) even though there was no final appealable order from any of the claims until the contempt order was entered. *Id.* The same result should have occurred here.

Towner v. Wells, 8 Ohio 136, 140 (1837) is simply inapposite. In that case, a judgment lienholder purchased a senior mortgage in an attempt to "tack" his pending judgment amount

with the mortgage for the purpose of avoiding intervening liens. The Court was not addressing whether a sheriff's sale could be confirmed in the absence of a final order.

Likewise, *Tyler Refrig. Equip. Co. v. Stonick*, 3 Ohio App.3d 167, 168, 444 N.E.2d 43 (9th Dist.1981) is not on point. That case dealt with a municipal judgment being certified as a judgment lien, but the parties had agreed for a six month stay of execution. The question before the court was the priority of liens when other liens were perfected during the six month stay. The case did not discuss the requirement of a final order for the purposes of execution at all.

Lastly, *Phoenix Office & Supply Co. v. Little Forest Nursing Ctr*., 7th Dist. Mahoning No. 99 CA 15, 2000 Ohio App. LEXIS 798, at *10 (Feb. 24, 2000) involved an appeal being dismissed for lacking a final appealable order, and in *dicta* commented that execution would be inappropriate because the defendant against whom judgment had been entered had a pending third-party complaint for indemnification. Here, there are no third party claims that remain, nor any claims that could affect Farmers State's priority and judgment amount.

In short, the Sponaugles point the Court to **no cases** or authority for the proposition that where all pending claims have been resolved and the priority of all lienholders has been established that a sheriff's sale cannot proceed.

Farmers State did direct the Court to relevant authority, all of which find that in nearly identical circumstances a sheriff's sale was appropriately authorized. Brief, 11-13; citing *Falls Sav. Bank, F.S.B. v. Cadwell*, 9th Dist. Summit No. 14644, 1991 Ohio App. LEXIS 416, at *8-10 (Jan. 31, 1991); *Mulby v. Poptic*, 8th Dist. Cuyahoga No. 98324, 2012-Ohio-5731, ¶ 15; *JP Morgan Chase Bank v. Dewine*, 3d Dist. Logan No. 8-08-20, 2009-Ohio-87, ¶ 11; and *Third Fed. S. & L. Assn. of Cleveland v. Rains*, 8th Dist. Cuyahoga No. 98592, 2012-Ohio-5708, ¶ 10. The Sponaugles do not acknowledge these cases, much less attempt to distinguish them.

Nor did the Sponaugles wrestle with the secondary authority supporting the proposition that a judicial sale can occur in the absence of a final appealable order when circumstances "justify the making of an order for sale prior to final judgment or decree, leaving the adjustment of the interests and priorities to be determined subsequently, where it appears that a sale is inevitable and that an immediate sale is in the best interest of all parties concerned." 64 Ohio Jurisprudence 3d, Judicial Sales, Section 10 (2017), citing *Sauer v. Cox*, 5 Ohio N.P. 460, 7 Ohio Dec. 507, 1898 WL 1463 (Super. Ct. 1897).

The reason foreclosure is allowed even if there is an issue with the precise amounts due to other lienholders is straightforward – between Farmers State and the Sponaugles, all claims had been conclusively decided. As to all lienholders, the priority had been decided. The Property **was** going to sale. The Decision should be reversed – when the priority of all lienholders has been decided, along with any offsetting counterclaims, execution is appropriate.

B. Any error in executing on a non-final order must be raised prior to sale.

Farmers State's second independent argument in support of the first proposition of law is that even if a final order is required for the purposes of execution, the failure to raise the error prior to the sheriff's sale waives it.[4] In its opening Brief, Farmers State pointed out that any defect in a sheriff's sale proceeding must be raised prior to the sale. Brief, 13-14; citing *U.S. Bank, N.A. v. Sanders*, 8th Dist. Cuyahoga No. 104607, 2017-Ohio-1160, ¶ 24; *Citimortgage, Inc. v. Hoge*, 8th Dist. Cuyahoga No. 98597, 2013-Ohio-698, ¶ 10. This is because when a court has jurisdiction to enter orders (including execution proceedings), the failure to raise a timely

[4] The Sponaugles argue that the issue of waiver or invited error was not argued below. The Second District disagreed: "The bank argues * * * it was unjust to reverse the sheriff's sale, because the Sponaugles invited the error * * * " and later stated "[Farmers State] raised each of the issues they argue here, either in its appellate brief, during oral argument, or both." *Farmers State Bank v. Sponaugle*, 2d Dist. Darke No. 2016-CA-4, 2017-Ohio-7744, 2017 Ohio App. LEXIS 4161, *10.

objection waives the issue. *State ex rel. Hawes-Saunders Broadcast Properties v. Hall*, 2d Dist. Montgomery No. 19552, 2002 Ohio App. LEXIS 5512, *18 (Oct. 10, 2002); *Trotwood v. Wyatt*, 2d Dist. Montgomery No. 13319, 1993 Ohio App. LEXIS 164 (Jan. 21, 1993); *Wissel v. Ohio High School Athletic Assn.*, 78 Ohio App.3d 529, 533, 605 N.E.2d 458 (1st Dist.1992).

Again, the Sponaugles fail to distinguish (or even acknowledge) the precedent in *Sanders* and *Hoge*. Without citation to any applicable precedent, the Sponaugles argue they "brought the lack of a final appealable order to the trial court's attention before the sale was confirmed." Opposition Brief, 22. As stated in *Sanders* and *Hoge*, that is insufficient.

The issue of whether the Sheriff's Sale was improper because the Decree was non-final was waived by the Sponaugles when they failed to object prior to the sale. The first proposition of law should be adopted for this independent reason.

C. There was no plain error in the Confirmation Order.

Farmers State pointed out that the completion of all tasks of confirmation moots all related arguments. Brief, 15; citing *MidFirst Bank v. Samad*, 8th Dist. Cuyahoga No. 101976, 2015-Ohio-2270, ¶¶ 9-10. Given that the Sheriff's Deed issued in the absence of an effective stay, and all required funds were paid and distributed, there was nothing left to adjudicate. The Sponaugles do not address or distinguish this case. For this separate reason, the first proposition of law should be adopted.

D. Any harm to the Sponaugles is the natural consequence of their own actions.

As an initial matter, it is worth noting that this litigation commenced as a result of a default of the Sponaugles on their obligations in the Notes and Mortgages. The Sponaugles claim they will suffer harm by being unable to appeal the Decree even though they failed to recognize the potential of a final appealable order issue until the Second District brought it to their attention

with the Show Cause Order. At that point, they then embraced the concept that the Decree lacked a final appealable order because it might undo the Sheriff's Sale.

Farmers State asserts that the Decree was an appealable order because even if it was interlocutory, it merged into the next final order: the Confirmation Entry. *Grover v. Bartsch*, 170 Ohio App.3d 188, 2006-Ohio-6115, 866 N.E.2d 547, ¶ 9 (2d Dist.) ("[i]nterlocutory orders * * * are merged into the final judgment," with the result that "an appeal from the final judgment includes all interlocutory orders merged with it"). None of the cases or authority cited by the Sponaugles hold to the contrary.

Star Leasing Co. (cited by the Sponaugles) supports this point. In that case, the court affirmed an appeal from a contempt order, arising from an interlocutory order requiring the return of property (under a prejudgment execution proceeding). The court endorsed this procedure even though summary judgment entry was not a final appealable order until the entry of a contempt order. 2009-Ohio-1269, ¶ 39.

The Sponaugles respond by asserting that the Confirmation Entry arose from an ancillary proceeding, and is therefore, not the type of "judgment" that would have any previous orders merge with it. They cite no authority for this contention.

E. <u>The Sponaugles' statutory and Civil Rules arguments have no merit.</u>

The Sponaugles attempt two new arguments in their opposition brief. First, they argue that R.C. 2329.09 only permits a writ of execution for a judicial sale for a "judgment debtor" and consequently a final judgment is required. Second, they contend that Civ.R. 69 (regarding execution) and Civ.R. 62 (regarding stays) are abrogated under the arguments made by Farmers State. Neither argument is meritorious.

1. *R.C. 2329.09 is not the applicable statute.*

The Sponaugles contend that R.C. 2329.09 requires a final judgment for the purposes of execution. By its text, the statute simply applies to the order of operations for a general writ of execution:

> The writ of execution against the property of a judgment debtor issuing from a court of record shall command the officer to whom it is directed to levy on the goods and chattels of the debtor. If no goods or chattels can be found, the officer shall levy on the lands and tenements of the debtor…

R.C. 2329.09. The statute merely provides that "a writ of execution" shall command the sheriff to first sell goods and chattels, and then on lands of the debtor. That is not the writ at issue here.

Rather, R.C. 2323.07 states: "[w]hen a mortgage is foreclosed or a specific lien enforced, a sale of the property * * * shall be ordered by the court having jurisdiction * * *." The procedures for a writ of execution under R.C. 2323.07 and R.C. 2329.09 are separate. *Sheely v. Gindlesberger*, 5th Dist. Holmes No. 16 CA 008, 2017-Ohio-200, ¶ 19. The Sheriff's Sale here occurred on a Praecipe for Sale and Order of Sale – not a writ of execution. Supp. 47, Supp. 50. The execution procedures required by R.C. 2329.09 are simply irrelevant in the face of a decree ordering the Mortgages foreclosed and the Property sold.

2. *The cited Civil Rules are not abrogated by the proposition.*

The Sponaugles contend that Civ.R. 62 and 69 would be abrogated if a sheriff's sale is permitted premised on a non-final foreclosure decree, because each references a judgment. As an initial matter, Civ.R. 69 is inapplicable as it only pertains to a "process to enforce a judgment for the payment of money." As discussed above, a sale resulting from the foreclosure of a mortgage is ordered under R.C. 2323.07, and is not part of a R.C. 2329.09 execution procedure. The rule is simply irrelevant and inapplicable to this case.

Civ.R. 62 provides procedures for stays after judgment or stays after appeal. The Sponaugles make the straw man argument that if the Decree was not a final order, the rule would

not apply because it references "judgments." That was not the procedure used in this case – both the Trial Court and the Second District considered and ruled on the Sponaugles' Motions to Stay without reference to such an option being unavailable.

Farmers State's first proposition of law should be adopted. As an initial matter, when the decree identifies the first lienholder and resolves all claims between the first lienholder and the mortgagor, the property is going to sale. There is no reason that a finality issue as to junior lienholders should stop this process. Second, because the Trial Court had jurisdiction to order the sale, even if there were error in executing on a non-final order, this issue was waived by failing to raise it prior to the sale. Lastly, there was no plain error or harm to the Sponaugles as a result of the Sheriff's Sale, because the Decree was appealable through the Confirmation Entry. The first proposition of law should be adopted and the Decision reversed.

PROPOSITION OF LAW NO. 2 A foreclosure decree which determines liability and the amount due the first mortgagor and leaves the remaining amounts to mechanical calculation is a final order subject to execution.

Farmers State pointed out that the Decision is predicated on another incorrect legal conclusion: that the Decree was not a final appealable order. Decision, ¶ 18. That conclusion is based on the law of the case doctrine. Decision, ¶ 18. Each conclusions were incorrect.

A. The Decree was a final appealable order.

The essential contention regarding the Decree's status as a final appealable order is whether the Decree properly addressed the amounts due the Treasurer and ABC. The Sponaugles summarize their argument: "two lienholders filed answers, but then didn't bother to respond to the summary judgment motion and took no further action to define their claim." Opposition Brief, 26.

As to the Treasurer, there was simply nothing more required. R.C. 323.47(B)(1) controlled the Treasurer's status and amount due – and that is only determined "if real estate is

sold at judicial sale * * * .” As discussed above, R.C. 323.47(B)(1) means there simply is no “claim” for the Treasurer to prosecute, nor any requirement that the exact amount be conclusively stated in a foreclosure decree. The Sponaugles simply cite no law suggesting otherwise.

And this Court did determine that a foreclosure decree was not required to conclusively establish amounts due for taxes in *Roznowski*, 2014-Ohio-1984, ¶ 20; citing *LaSalle Bank N.A. v. Smith*, 7th Dist. Mahoning No. 11 MA 85, 2012-Ohio-4040, ¶ 18. Again, *Roznowski* held that “actual amounts due” are not required, only “what the mortgagors would be liable for.” *Id.*, ¶ 20.

Neither the Second District in the Decision nor the Sponaugles cite any law that a Treasurer is required to establish a claim or the amount due in a foreclosure decree. Under R.C. 323.47(B)(1), **if a property is going to sale**, the property taxes are being paid first. The Decision was wrong that the Decree was not a final appealable order as to the Treasurer’s claim.

The Decision was also wrong as it pertains to ABC’s priority claim. An action to marshal liens only needs to determine the primary lienholder to create a final appealable order: “[i]n a mortgage foreclosure action, a journalized order determining that the mortgage constitutes the first and best lien upon the subject real estate is a judgment or final order from which an appeal may be perfected.” *Queen City S. & L. Co. v. Foley*, 170 Ohio St. 383, 165 N.E.2d 633 (1960), paragraph one of the syllabus. The Sponaugles do not cite this case, much less distinguish it.[5]

The same argument, that the failure to determine the amounts due and priority to junior lienholders rendered the foreclosure decree a non-final order, was raised in *St. Clair Savings Assn. v. Janson*, 40 Ohio App.2d 211, 215, 318 N.E.2d 538 (8th Dist.1974). There, the Court

[5] For more examples of this principle, *see Cleveland Constr., Inc. v. Schneider*, 8th Dist. Cuyahoga Nos. 96911, 97352, 97361, and 97513, 2012-Ohio-5707, ¶ 1, fn.1; *Goodman v. Schneider*, 8th Dist. Cuyahoga No. 96922, 2012-Ohio-5412, ¶ 12*; Bank of Am. NA v. Omega Design/Build Group, LLC*, 1st Dist. Hamilton No. C-100018, 2011-Ohio-1650, ¶ 16-18.

determined that an order which fixed the first lienholder and held the remaining liens for adjudication if any proceeds remained after sale, was a final appealable order.

The Ninth District too has recently considered this issue. In *Bank United v. Klug*, 9th Dist. No. 16CA010923, 2016-Ohio-5769, ¶ 11, a trial court's judgment of foreclosure in favor of a senior lienholder was a final appealable order despite not stating the definite amount of a widow's dower interest: "Although the judgment entry does not specify [the widow's] dower interest in terms of a fixed dollar amount, we determine that the definite formula contained in the entry is sufficient to constitute a final appealable order under R.C. 2505.02(B)(1)."

The Eighth District recently held that the priority of liens is not a claim that affects final appealable order status because "priority of liens is an issue relating to the foreclosure action, but does not involve a separate claim." *Huntington Natl. Bank v. 5777 Grant, L.L.C.*, 2014-Ohio-5154, 24 N.E.3d 609, ¶ 14 (8th Dist.); citing *Mtge. Electronic Registration Sys. v. Aleksin*, 9th Dist. Summit No. 23723, 2007-Ohio-6295, ¶ 9.

This analysis has been adopted by commentators. 1 Robert M. Curry and James Geoffery Durham, *Ohio Real Property Law and Practice*, Section 19.09 (Rev. Ed. 2017) (noting "the trial court may enter a judgment establishing the priority of senior liens but withholding judgment on the priority between junior liens until such time as it becomes clear that the proceeds of the sale of the property will provide an amount in excess of the senior liens."); 2 Kenton L. Kuehnle and Jack S. Levey, *Baldwin's Ohio Practice, Ohio Real Estate Law*, Section 37:27 (3d Ed. 2003) ("[w]hile it is important for the second and third lienholders to determine, amongst themselves, the order of priority for such bidding, the senior lienholder should not be required to delay the proceedings while such junior lienholders argue over priorities. Accordingly, the senior

lienholder, upon proof of his claim, should be entitled to judgment notwithstanding the fact that issues remain to be litigated among junior lienholders.").

When a sale has been ordered – if the amounts due to the first lienholder have been established – any issues with the amounts due junior lienholders should not stop a sale. As noted in the treatises, those issues are to be litigated as part of the distribution during confirmation.

B. The Dismissal Entry did not create the law of the case.

In its initial brief, Farmers State pointed out that the Dismissal Entry should not have been considered the law of the case for the purposes of the Decision. The Sponaugles fail to directly address **any** of Farmers State's arguments: (1) that this Court is not bound by an erroneous decision of a court of appeals that was not appealed to this Court; (2) that the law of the case doctrine does not apply unless a case is "fully litigated" and this one was not; and (3) the law of the case doctrine does not apply when the decision is in error (as discussed above).

Instead, they merely argue that "res judicata bars [Farmers State's] attempted collateral attack." Opposition Brief, ¶ 29; citing *Bank of America, N.A. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶ 14. *Kuchta* does not support the point. In that case, this Court held that a standing challenge (an essential element of judgment) could not be raised for the first time in a post-judgment motion. Farmers State was the prevailing party in both the Decree and the Confirmation Entry, it was not aggrieved in any sense that would have created an obligation to appeal the Dismissal Entry. *Kuchta* is inapposite.

1. *The law of the case doctrine does not affect this Court's review of the finality of the Decree.*

The Sponaugles and the Second District did not note or discuss the longstanding principle that issues which have not been raised to this Court are not subject to the law of the case doctrine. 5 Ohio Jurisprudence 3d, Appellate Review, Section 562 (2017) ("the Ohio Supreme

Court will not be bound by an erroneous decision of the court of appeals on a first review notwithstanding that such decision stood unappealed"); *New York Life Ins. Co. v. Hosbrook*, 130 Ohio St. 101, 196 N.E. 888 (1935). Nor was Farmers State aggrieved from the dismissal of the appeal such that it would be on notice that it needed to take further action. *Warren*, 113 Ohio App. at 257. The law of the case doctrine does not preclude this Court's review.

2. *The law of the case doctrine does not apply unless the issue was fully litigated.*

The Sponaugles did not contest that the law of the case doctrine requires an issue to be fully litigated. *State ex rel. Dannaher v. Crawford*, 78 Ohio St.3d 391, 394, 678 N.E.2d 549 (1997).

Here, it is undisputed that the Show Cause Order required the Sponaugles to respond. The Second District did not request that Farmers State respond. It is unfair to apply the law of the case doctrine when only one party was requested to address the adjudicated issue.

3. *The law of the case doctrine does not apply when the determination is erroneous.*

Lastly, the law of the case doctrine does not apply to erroneous decisions. 5 Ohio Jurisprudence 3d, Appellate Review, Section 561 (2017); *see also Weaver v. Motorists Mut. Ins. Co.*, 68 Ohio App. 3d 547, 589 N.E.2d 101 (2d Dist.1990).

As discussed above, the Decree was a final appealable order, and appropriate for execution. *Roznowski*, 2014-Ohio-1984, ¶ 20. Neither the Treasurer or ABC's lien was required to be fully described, as both were subject to mechanical calculation. *Id.*

C. Public policy is served by adopting this proposition.

The Sponaugles contend that the Farmers State propositions of law would increase litigation expenses by creating multiple appeals. That misses the point and is wrong.

First, not requiring a mortgagor to object to an improper sale prior to the sale causes the foreclosing plaintiff to incur a variety of unrecoverable fees. *See Brief of Amicus Curiae* filed May 21, 2018, p. 4. Considering that this is an action to recover amounts **already not paid** by the Sponaugles, any argument that their litigation expenses increased is unpersuasive.

Second, not requiring junior lienholders to prove their liens until after a sheriff's sale has satisfied the first lienholder promotes litigation efficiencies. Plaintiffs will not litigate issues that may be fruitless if the sheriff's sale returns less than the plaintiff's full judgment amount. Junior lienholders will not be required to incur litigation costs without a guaranteed recovery. The only party that benefits from the Sponaugles' rule is the defaulting mortgagor.

Lastly, to the extent the Sponaugles contend that an additional appeal is created, there are already at least two opportunities to appeal from a foreclosure proceeding – the initial decree and the confirmation entry. In the event a sheriff's sale will satisfy the primary lienholders, a trial court is capable of managing its docket to allow junior lienholders to litigate disputes (and establish amounts due) prior to the distribution order arising from the confirmation entry. There simply is no justifiable concern that either proposition of law requires additional litigation.

IV. CONCLUSION

The Sponaugles argue that Farmers State's propositions of law are incorrect by citing irrelevant case law. The Sponaugles fail to cite, much less distinguish, the direct persuasive precedent and secondary authority supporting both propositions of law.

In this case, the Second District has improperly elevated form over substance. This Court should appropriately clarify the law by adopting one or both propositions of law.

Respectfully submitted,

/s/Terry W. Posey, Jr.

Terry W. Posey, Jr. (#0078292)
Terry.Posey@thompsonhine.com
THOMPSON HINE LLP
10050 Innovation Drive
Suite 400
Miamisburg, Ohio 45342-4934
Telephone: (937) 443-6857
Facsimile: (937) 443-6635

Attorney for Appellant The Farmers State Bank

CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2018, a true copy of the foregoing document was served by ordinary U.S. Mail, postage paid, upon the following:

Andrew M. Engel
7925 Paragon Road
Dayton, Ohio 45459

H. Grant Stephenson
L. Bradfield Hughes
PORTER WRIGHT MORRIS & ARTHUR LLP
41 South High Street
Columbus, Ohio 43215

John Marchal, Jr.
MARCHAL & MARCHAL LTD.
116 West Fourth Street
Greenville, Ohio 45331

Stephen D. Miles
LAW OFFICES OF STEPHEN D. MILES
18 West Monument Avenue
Dayton, Ohio 45402

Tami Hart Kirby
PORTER WRIGHT MORRIS & ARTHUR LLP
One S. Main Street
Suite 1600
Dayton, Ohio 45402

/s/Terry W. Posey, Jr.
Terry W. Posey, Jr.