IN THE SUPREME COURT OF OHIO

Fifth Third Mortgage Company, Plaintiff-Appellee, -vs- **Jeffrey C. Berman, et al.,** Defendants-Appellants.	**Case No. 2019-0649** On Appeal from Franklin County, 10th District Court of Appeals, Case No. 17 AP 563

APPELLEE'S REVISED MEMORANDUM IN RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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THIS IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST

Appellee respectfully opposes the Memorandum in Support of Jurisdiction filed on May 10, 2019, by Appellant, Jeffrey C. Berman ("Appellant"),[1] because this is not a case of public or great general interest. Appellant challenges rulings by the trial court, affirmed by the court of appeals, that concern factual issues entirely specific to this appeal or that were not addressed in the appeal. Appellant failed to provide the appellate court a complete transcript of the bench trial held in the trial court. Therefore, the appellate court had to presume that all the factual findings by the trial court were correct. The trial court and court of appeals ruled properly on each of the issues raised by Appellant. For these reasons, this Court should not accept jurisdiction of the appeal.

Section 2, Article IV of the Ohio Constitution, states in part, "In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;…" Oh. Const. Art. IV, § 2(B)(2)(e). "Whether the question or questions argued are in fact ones of public or great general interest rests within the discretion of the court." *Williamson v. Rubich*, 171 Ohio St. 253, 254, 168 N.E.2d 876 (1960). "According to Section 2, Article IV of the Ohio Constitution, this court sits to settle the law, not to settle cases." *Baughman v. State Farm Mut. Auto. Ins. Co*., 88 Ohio St.3d 480, 492, 2000-Ohio-397, 727 N.E.2d 1265 (Cook, J., concurring).

Appellant seeks review of the decision of the Tenth District Court of Appeals affirming the judgment of the trial court. The trial court found that Appellee's claims for judgment on Appellant's promissory note and foreclosure of Appellant's mortgage are not barred by the

[1] No other parties to the action below took part in the appeal to the court of appeals.

applicable statutes of limitations or the Ohio's savings statute.[2] Appellant's first and second propositions of law ask this Court to find that the filing of a foreclosure complaint against Appellant on September 30, 2009 (the "2009 Case") accelerated the note, and that the subsequent dismissal of that case did not revoke the acceleration. Appellant ignores the factual details that distinguish this case from his broad propositions of law, and he fails to show that the lower courts have issues determining the point of "acceleration." The trial court correctly determined, based on the facts of the case, that Appellee did not accelerate the loan when it filed the 2009 Case.

The trial court held that Appellee's attempt to accelerate in 2009 was deficient because its acceleration notice was sent to an incorrect address, and that acceleration only occurred when Appellee corrected this defect in 2013. Due to the lack of a complete transcript, the appellate court relied on the trial court's factual findings, and both courts correctly determined that Appellee's claims were not barred by the statute of limitations. *See Fifth Third Mtge. Co. v. Berman*, 10th Dist. Franklin No. 17AP-563, 2019-Ohio-1068,¶ 36. This Court should not accept jurisdiction over this factually-specific case.

In his third proposition of law, Appellant asks this Court to rule that Ohio's savings statute cannot be utilized more than once to "save" an action. However, the savings statute had no application to this case once the trial and appellate courts determined that the instant case was filed well within the statute of limitations. *Berman*, 2019-Ohio-1068, ¶ 38. Appellant's proposed interpretation of the savings statute – that a second dismissal without prejudice bars a third filing without regard to the statute of limitations – has no support under Ohio law. The complete lack of merit to Appellant's argument, combined with the fact that the lower courts never reached the issue,

[2] Appellant did not challenge Appellee's standing, the existence of a default, or the amount due on the loan in his appeal to the Tenth District.

should dissuade this Court from accepting this proposition of law.

In his fourth and final proposition of law, Appellant contends, relying on two federal decisions, that when a claim for a judgment on a note is time-barred, a claim for a foreclosure of the mortgage securing the amount due under the terms of the note is also time-barred. However, the appellate court never reached a decision on this issue after it determined that Appellee timely filed its claims for a judgment on the note. Therefore, this proposition of law is not before the Court at this time.

The court of appeals correctly affirmed the trial court's finding that Appellee's claims were not barred by the statutes of limitations. This Court should not accept jurisdiction over this appeal.

APPELLANT's FIRST PROPOSITION OF LAW: Acceleration of a negotiable instrument is an affirmative action at the option of the lender and the filing of the foreclosure is such an affirmative action that constitutes acceleration.

APPELLEE'S RESPONSE TO APPELLANT'S FIRST PROPOSITION OF LAW:
In this case, the trial court determined that Appellee did not properly accelerate the loan until 2013, and that its foreclosure filed in 2016 was well within the six-year limitations period of R.C. 1303.16. Appellant failed to provide a transcript of the proceedings when he challenged this factual finding on appeal. Therefore, the Tenth District Court of Appeals correctly affirmed the trial court's determination that Appellee's claims were timely filed.

APPELLEE'S ARGUMENT

In his first proposition of law, Appellant claims that acceleration of a negotiable instrument requires an affirmative action by the lender, such as the filing of a complaint. *Appellant's Memorandum in Support of Jurisdiction*, pp. 4-9. Appellant ignores the trial court's factual determination that Appellee's acceleration notice preceding the 2009 case was mailed to an incorrect address and therefore ineffective as acceleration. Appellant failed to provide the appellate court a full transcript of the trial when he challenged this factual finding on appeal. The court of appeals correctly affirmed the trial court's determination that Appellee's claim on the note is not

barred by the statute of limitations.[3] The Court should not accept review of Appellant's first proposition of law.

"[A] bedrock principle of appellate practice in Ohio is that an appeals court is limited to the record of the proceedings at trial." *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, ¶ 13. "Upon appeal of an adverse judgment, it is the duty of the appellant to ensure that the record, or whatever portions thereof are necessary for the determination of the appeal, are filed with the court in which he seeks review" *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 19, 520 N.E.2d 564 (1988), citing App.R. 9(B) App.R. 10(A), and Section (1) of Rule IV of the Supreme Court Rules of Practice. "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (1980).

In this case, the appellate court held:

> To the extent appellant challenges the trial court's determination that the note was not accelerated in 2009, we again observe he has not provided this court with a complete transcript of the bench trial proceedings. As indicated above, the trial court found, based on the evidence presented at trial, the 2009 notice of default was not valid as appellee mailed the notice to a post office box rather than to the property address as required under the agreement. In support of that determination, the trial court cited testimony by appellant that he "never reported a change of address" to appellee prior to the first notice. (July 10, 2017 Decision & Entry at 7.) The trial court also noted appellee "conceded at trial that [appellant] did not report a change of address from the Property address to the post office box listed on the First Notice." (July 10, 2017 Decision & Entry at 7.)
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> In light of the record on appeal, we accept the findings of the trial court that appellee's attempt to accelerate the debt in 2009 was ineffective for failure to satisfy a condition precedent, i.e., failure to provide proper notice under the agreement

[3] As discussed in response to Appellant's Fourth Proposition of Law, even if Appellee's claim on the note is time-barred, which it is not, Appellee's claim for foreclosure of a mortgage is not barred by the applicable statute of limitations.

requiring the lender to send notice to the property address. * * *

Berman, 2019-Ohio-1068, ¶¶ 34-35.

Appellee provided the trial court with evidence that it issued to Appellant a notice of default dated April 8, 2013, which informed Appellant that the loan was in default and that failure to pay the past due amount would result in the acceleration of the loan and foreclosure. *Appellant's Memorandum in Support of Jurisdiction, Appendix, "Decision and Entry"* dated 7/20/2017, pp. 7, 11. Thus, there was evidence in the record that the loan had not been accelerated before April 8, 2013. This foreclosure was filed on March 9, 2016, less than three years later, and the trial court's finding that there is no limitations issue is based on credible evidence. The determination that Appellee did not accelerate the loan in 2009 was based on specific facts presented at the trial in this case. This Court should not accept review of Appellant's first proposition of law due to this fact-specific nature of the central question. *See City of Blue Ash v. Kavanagh*, 113 Ohio St.3d 67, 2007-Ohio-1103, 862 N.E.2d 810, ¶ 31 (Pfeifer, J., dissenting) ("As a preliminary matter, this case should be dismissed as having been improvidently accepted. It is so fact-specific, involving a possible stall for time to allow backup to arrive so a drug-sniffing dog could be deployed, that it does not qualify as a case of "public or great general interest." Section 2(B)(2)(e), Article IV of the Ohio Constitution. Because of its fact-specific nature, the majority opinion is unlikely to provide meaningful guidance to the bench and bar.").

Appellant claims that, under the mortgage, the notice is deemed given when mailed by first class mail. *Appellant's Memorandum in Support of Jurisdiction*, p. 5. However, the appellate court affirmed the trial court's determination that the mortgage contains additional requirements before the notice may be deemed given, such as a proper address. Appellant successfully argued in the 2009 Case that the 2009 letter did not provide the proper notice of default and intent to accelerate

the loan because it was not mailed to the proper address. *See Fifth Third Mtge. Co. v. Berman*, 10th Dist. Franklin No. 11AP-637, 2012-Ohio-4411. Now, Appellant seeks the benefit of the exact opposite position; *i.e.*, that the notice properly accelerated the debt simply because it was sent. It was Appellant's burden to prove to the trial court that a 2009 acceleration had occurred, and he failed to do so. Furthermore as noted below, even if the note had been accelerated in 2009, which it had not, Appellant failed to identify any evidence showing that the loan remained accelerated after that date.

Appellant failed to carry his burden of proving that Appellee's claim for a judgment on the note is barred by the statute of limitations. The trial court based its decision on facts specific to this case, and the appellate court affirmed that decision based on the record presented on appeal. Appellant offers this Court no issue of public or great general interest. Therefore, this Court should not accept jurisdiction over this appeal.

APPELLANT'S SECOND PROPOSITION OF LAW: A voluntary dismissal of a foreclosure lawsuit does not on its own revoke a prior acceleration.

APPELLEE'S RESPONSE TO APPELLANT'S SECOND PROPOSITION OF LAW: In this case, the trial court correctly determined that Appellee did not accelerate the loan when it filed the 2009 case. Appellant relied on this argument to prevail in the appeal in that case. Therefore, the trial court and Tenth District Court of Appeals correctly determined that Appellee's claims are not barred by the applicable statutes of limitations.

APPELLEE'S ARGUMENT

In his second proposition of law, Appellant claims that a voluntary dismissal of a foreclosure without prejudice does not on its own "revoke" a prior acceleration of the loan. *Appellant's Memorandum in Support of Jurisdiction*, pp. 9-11. Appellant's broad proposition of law does not relate to the trial court's finding in this case, and again, ignores the facts that distinguish this appeal from future actions in Ohio. The court determined that Appellee did not

accelerate the loan when it sent a 2009 notice of default and filed the 2009 Case. Therefore, Appellee did not "revoke" an acceleration of the loan. This proposition of law should not be accepted for review.

The parties do not dispute that Appellee dismissed the 2009 Case without prejudice. "A trial court must treat a refiled complaint following a voluntary dismissal as if the first complaint had never been filed." *Furney v. Wynn*, 10th Dist. Franklin No. 11AP-110, 2011-Ohio-4000, ¶ 13, citing *Kellie Auto Sales, Inc. v. Rahbars & Ritters Ents., L.L.C.*, 172 Ohio App.3d 675, 2007-Ohio-4312, 876 N.E.2d 1014, ¶ 32 (10th Dist.), citing *Zimmie v. Zimmie*, 11 Ohio St.3d 94, 95, 464 N.E.2d 142 (1984). After dismissal of the 2009 Case without prejudice, the parties returned to the *status quo* as if the case had never been filed. Appellant successfully argued in his appeal of the 2009 Case that Appellee had not provided proper notice of the default. *See Berman*, 2012-Ohio-4411.

The evidence is that Appellee then sent Appellant a notice dated April 8, 2013, notifying him of payment default and the amount needed to cure that default to avoid the acceleration of the loan. *Appellant's Memorandum in Support of Jurisdiction, Appendix, "Decision and Entry"* dated 7/20/2017, pp. 7, 11. The clear implication from that letter was that the note had not been accelerated as of that date. *See Bank of New York Mellon Trust Co., N.A. v. Unger*, 8th Dist. Cuyahoga No. 101598, 2015-Ohio-769, ¶ 10 ("As Mellon's evidentiary submission makes clear, as of April 7, 2007, the Ungers had the option of curing the default, by remitting $12,749.14 for the missed monthly payments, in order to put their account in good standing. Pursuant to the terms of the letter, it was only upon their failure to cure the default that the entire balance owed on the note was accelerated."). Appellant failed to provide the court of appeals with a transcript of the testimony at trial or any of the exhibits introduced there to prove that the loan had been accelerated in 2009, or that subsequent events between the dismissal of the 2009 Case and the filing of a new

complaint in 2016 did not cause the note to become "decelerated."

This case does not hinge on a legal determination of whether a dismissal without prejudice on its own "revokes" acceleration of a note. Based on the specific facts in this case, the appellate court correctly affirmed the trial court's finding that Appellee did not accelerate the note before 2013. This Court should not accept jurisdiction over this proposition.

APPELLANT'S THIRD PROPOSITION OF LAW: Ohio Saving's Statute, R.C. 2305.19, cannot be utilized more than once to 'save' an action after a failure otherwise than on the merits.

APPELLEE'S RESPONSE TO APPELLANT'S THIRD PROPOSITION OF LAW: Appellant's interpretation of the savings statute has not support under Ohio law. Furthermore, in this case, the evidence established that Appellee's claims are not barred by the applicable statutes of limitations. Therefore, Appellee did not need to rely on the savings statute.

APPELLEE'S ARGUMENT

In his third proposition of law, Appellant asks this Court to hold that a party cannot rely on Ohio's savings statute more than once to "save" a case after a failure otherwise than on the merits. *Appellant's Memorandum in Support of Jurisdiction*, pp. 11-12. However, Appellant's attempt to use the savings statute as a sword to bar to Appellee's claims is not supported by the statute or Ohio law. Furthermore, the trial and appellate courts did not rely on the savings statute once it found that Appellee's claims were timely filed. Therefore, this proposition should not be accepted.

In the courts below, Appellant argued that the Ohio savings statute bars Appellee's current foreclosure action. He construed the savings statute as a limitation of rights and not as an expansion of rights where a statute of limitations has expired. Appellant appears to still advance the same argument, as he states, "Here, when Plaintiff voluntarily dismissed its First Lawsuit and refiled within a year of that dismissal, it simultaneously foreclosure further refilings whether before or after the expiration of the original statute of limitations." *Appellant's Memorandum in Support of*

Jurisdiction, p. 12. From this argument, it appears that Appellant still confuses the operation of the savings statute with that of the "double-dismissal rule" of Civ.R. 41. However, that rule does not apply in this case, as Appellee did not voluntarily dismiss the 2013 Case under Civ.R. 41(A)(1)(a). *Id*., p. 3.

"R.C. 2305.19 can have no application unless an action was timely commenced, was dismissed without prejudice, and the applicable statute of limitations had expired by the time of such dismissal." *Reese v. The Ohio State Univ. Hosp*., 6 Ohio St.3d 162, 163, 451 N.E.2d 1196 (1983). Appellant fails to provide any support for his interpretation of the savings statute, or his attempt to use the statute as a sword to bar to Appellee's claims. The cases he cites do not support his mistaken interpretation of the savings statute. For example, Appellant relies upon *Owens College Nursing Students v. Owens State Community College*, 6th Dist. Wood No. WD-14-012, 2014-Ohio-5210. But, Appellant's reliance on *Owens College* is misplaced.

The *Owens College* court stated, "The plain language of R.C. 2305.19(A) directs that the refiling of the 2009 case dismissed otherwise than upon the merits could only be done prior to the later of either one year following the 2009 dismissal or prior to the September 28, 2011 expiration of the original applicable statute of limitations." *Id*., at ¶ 21. Thus, the *Owens College* court found the statute of limitations important in its analysis of the savings statute. In this case, the trial and appellate court determined that Appellee filed this action within the statute of limitations. Therefore, *Owens College* does not support Appellant's proposition, and the savings statute is inapplicable to this case.

Appellant's attempt to use the savings statute as a bar to Appellee's claims is not supported by the statute or Ohio law, and the trial and appellate courts did not need to rely on the savings statute once it found that Appellee's claims were timely filed. Therefore, the Court should not

accept review of Appellant's third proposition of law.

APPELLANT'S FOURTH PROPOSITION OF LAW: The recent rulings in *In Re Fisher* and *Baker v. Nationstar Mortgage LLC* concluded that the statute of limitations for a note and mortgage are the same – six years from the date of acceleration – and therefore if an action on the note is determined to be untimely, then an in rem action on the mortgage would likewise be untimely.

APPELLEE'S RESPONSE TO APPELLANT'S FOURTH PROPOSITION OF LAW: Even if Appellee's claim on the note was time-barred, which it is not, Appellee's claim for a foreclosure of the mortgage was timely under the applicable statute of limitations.

APPELLEE'S ARGUMENT

In his fourth proposition of law, Appellant relies on decisions from a federal bankruptcy court and federal district court (the latter of which has been vacated) to claim that when a claim for a judgment on a note is time-barred, a claim for a foreclosure of the mortgage securing the amount due under the terms of the note is also time-barred. *Appellant's Memorandum in Support of Jurisdiction*, pp. 12-14. However, the appellate court never reached this question after it decided that Appellee's claim on the note is not time-barred. *See Berman*, 2019-Ohio-1068. Moreover, under Ohio law, Appellee's claim for a foreclosure of the mortgage was timely. Appellant's fourth proposition of law should not be accepted by the Court.

"A mortgage is a specialty, and as such, is governed by a different statute of limitations than a negotiable instrument." *Bank of New York Mellon v. Walker*, 2017-Ohio-535, 78 N.E.3d 930, ¶ 19 (8th Dist.), citing *Bradfield v. Hale*, 67 Ohio St. 316, 322, 65 N.E. 1008 (1902). An action to enforce the mortgage is subject to the fifteen-year statute of limitations for written contracts and actions on a specialty found in R.C. 2305.06.[4] *See*, 66 Ohio Jurisprudence 3d, *Limitations and*

[4] The limitations period was changed to eight years in 2012, as part of SB 224. That part of the Senate Bill further states: "For causes of action that are governed by section 2305.06 of the Revised Code and accrued prior to the effective date of this act, the period of limitations shall be eight years from the effective date of this act or the expiration of the period of limitations in effect prior to the effective date of this act, whichever occurs first." Applying the default date

Laches, § 38 ("An action upon a specialty must be brought within 15 years after the cause thereof accrues. An action to foreclose a mortgage and sell the mortgaged premises is not an action for the recovery of real property but is an action on a specialty and is therefore barred under the statute of limitations as to an action on a specialty, 15 years after the condition contained in the mortgage is broken." (internal citations omitted)); *Kerr v. Lydecker*, 51 Ohio St. 240, 253, 37 N.E. 267 (1894).

In *Deutsche Bank Natl. Trust Co. v. Holden*, 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.3d 1243, this Court stated, "We have long recognized that an action for a personal judgment on a promissory note and an action to enforce mortgage covenants are 'separate and distinct' remedies." *Id*. at ¶ 25 (additional citations omitted). "Based on the distinction between these causes of action—i.e., one is an action on a contract, while the other is an action to enforce a property interest created by the mortgage—we have explained that 'the bar of the note or other instrument secured by mortgage does not necessarily bar an action on the mortgage.' *Kerr*, 51 Ohio St. at 253; *accord Bradfield* at 325 (holding that an action for ejectment can be maintained after the statute of limitations on the note has expired)[.]" *Id*. (additional citations omitted).

This Court recognized that "upon a mortgagor's default, the mortgagee may elect among separate and independent remedies to collect the debt secured by a mortgage." *Id*. at ¶ 21, citing *Carr*, 148 Ohio St. at 540 (additional citations omitted). "First, the mortgagee may seek a personal judgment against the mortgagor to recover the amount due on the promissory note, without resort to the mortgaged property." *Id*. at ¶ 22 (citations omitted). "Second, the mortgagee may bring an action to enforce the mortgage, which 'is for the exclusive benefit of the mortgagee and those claiming under him.'" *Id*. at ¶ 23 (citations omitted). "Third, based on the property interest created by the mortgagor's default on the mortgage, the mortgagee may bring a foreclosure action to cut off

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would mean that the action accrued in 2009, prior to the 2012 effective date of the act. Thus, Appellee's action on the breached mortgage, where Revised Code 1303.16 has no application, is timely.

the mortgagor's right of redemption, determine the existence and extent of the mortgage lien, and have the mortgaged property sold for its satisfaction." *Id*. at ¶ 24 (citations omitted).

Based, in part, on this analysis, the Eighth District recently held:

> * * * A mortgage is a specialty, and as such, is governed by a different statute of limitations than a negotiable instrument. *Bradfield* at 322. Former R.C. 2305.06, at the time the instrument was created, stated, "[e]xcept as provided in sections 126.301 and 1302.98 of the Revised Code, an action upon a specialty or an agreement, contract, or promise in writing shall be brought within fifteen years after the cause thereof accrued." Therefore, even if Bank of New York is unable to obtain a judgment on the note, they still have a remedy in ejectment or to obtain a judgment on the mortgage through a foreclosure action under the longer statute of limitations, which has not yet expired.

Walker, 2017-Ohio-535, ¶ 19. *See also U.S. Bank Natl. Assn. v. Robinson*, 8th Dist. Cuyahoga No. 105067, 2017-Ohio-5585, ¶ 11 ("As a matter of law, R.C. 1303.16(A) does not apply to actions to enforce the mortgage lien on the property after the payment on the note becomes unenforceable through the running of the statute of limitations.").

In his Memorandum, Appellant first relies on a decision from the United States Bankruptcy Court for the Northern District of Ohio, where the court held that the bar of an action on a note also barred a foreclosure of the mortgage. *In re Fisher*, 584 B.R. 185, 200 (Bankr. N.D. Ohio 2018). Appellant also relies on *Baker v. Nationstar Mtge. LLC*, S.D.Ohio No. 2:15-cv-2917, 2018 U.S. Dist. LEXIS 121686 (July 20, 2018),[5] where the United States District Court for the Southern District of Ohio applied the same holding in reliance on *In re Fisher*. However, the rulings in *In re Fisher* and *Baker* are both based on a mistaken interpretation of this Court's prior opinion in *Kerr v. Lydecker*, 51 Ohio St. 240, 253, 37 N.E. 267 (1894).

R.C. 1303.16 was enacted in 1994. Prior to that time, the statute of limitations for a claim on a promissory note was also R.C. 2305.06. Therefore, at the time of the Court's decision

[5] The Baker decision was vacated after the parties reached a settlement. *See Baker v. Nationstar Mtge. LLC*, S.D.Ohio No. 2:15-cv-2917, 2018 U.S. Dist. LEXIS 219080 (Sep. 4, 2018).

in Kerr, the same statute of limitations for the mortgage would also apply to the note, as both are contracts in writing. This very point is discussed in *Kerr*:

> But when a note is secured by mortgage, the statute of limitations as to both is the same; and therefore the mortgage will be available as a security to the note in an action for foreclosure and sale until the note shall be either paid or barred by the statute; but in such case an action for foreclosure and sale can not be maintained on the mortgage after an action on the note shall be barred by the statute of limitations.

51 Ohio St. at 254-55.

However, in this section of the *Kerr* decision, the Court rejected the holding in *Riddle v. Howenstein*, 16 Bull. 178 (May 29, 1883), which was that an action to foreclose a mortgage was subject to a twenty-one year statute of limitations, and therefore, could be brought after the recovery on the note was time-barred. The holding of *Kerr*, that the statute of limitations for the foreclosure of a mortgage is fifteen years, led to the conclusion that any action on the note and the mortgage securing that note were barred at the same time. When faced with different statutes of limitations for a mortgage securing an account, the Supreme Court of Ohio held that an action on the mortgage is subject to the fifteen-year statute of limitations. *Id*. at 254 ("A mortgage may be made to secure an account, and an action on account may be barred in six years, while an action on the mortgage would not be barred short of fifteen years.") As noted by this Court in *Kerr*, "the bar of the note, or other instrument secured by mortgage, does not necessarily bar an action on the mortgage." *Kerr*, 51 Ohio St. at 253.

The mortgage is a separate contract in writing between the parties, and the right to enforce the mortgage is a separate independent claim in this foreclosure action. It is subject to the statute of limitations in R.C. 2305.06, which, in 2009, when the cause of action accrued, was fifteen years. As a result, even if Appellee's claim on the note was barred, which it is not, Appellee is still entitled to foreclose the mortgage. Although the appellate court never reached this specific issue, the court

properly held that Appellee's claims are not time-barred. Therefore, the Court should not accept review of Appellant's fourth proposition of law.

CONCLUSION

Based on the specific facts of this case, the trial court correctly determined that Appellee's claims are not barred by the statute of limitations. The appellate court correctly affirmed that decision based on the limited record provided on appeal. Appellant fails to show that this case presents a public or great general interest. Therefore, Appellee respectfully requests that this Court decline jurisdiction of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of June, 2019, this document was electronically filed via the Court's authorized electronic filing system. I further certify that I served this document by regular U.S. mail, on the same day as electronically filed, upon the following:

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