The Supreme Court of Ohio

Cynthia Lundeen	)	Case: 2020-0356
Relator-Appellant	)	On Appeal from:
	)	The Court of Appeals of Ohio
vs.	)	Eighth Appellate District
	)	COA 19-109240
Deborah M. Turner Judge	)	
Sheriff David G Schilling	)	
Respondents-Appellees	)	

MERIT BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF THE CASE AND STATEMENT OF FACTS

This instant case, a right of appeal is on appeal from the Court of Appeals of Ohio, Eighth Appellate District. A related case, a Case of a Substantial Constitutional Question as well as a Case of Public or Great General Interest is now the subject of appeal in this Court, case, 2020-0932, also on appeal from Court of Appeals of Ohio, Eighth Appellate District. Two entirely distinct three judge panels were assigned to the aforementioned cases.

To avoid confusion between the cases, when referring to the Court of Appeals of Ohio, Eighth Appellate District, it will be referred to by the nature of the cases, i.e., the Writ Panel and the Appellate Panel.

Patent and Unambiguous Lack of Personal Jurisdiction Due to Failure of Commencement

Relator-Appellant filed an Emergency Verified Complaint for Writs of Prohibition and Alternative Writs of Prohibition, case number 19-109240, as an original action on November 27, 2019 in the Eighth District Court of Appeals of Ohio to prevent Respondents-Appellees from exercising judicial and quasi-judicial power which was unauthorized by law, for which no other adequate remedy existed, which in itself was immaterial due to a patent and unambiguous lack of personal jurisdiction. *Sua sponte*, the Eighth District Court of Appeals of Ohio (Writ Panel) issued an alternative Writ of Prohibition staying the sale of the real property, parcel no. 685-04-022 which was at that time the subject of a Sheriff's Sale scheduled for December 2, 2019, Cuyahoga Court of Common Pleas Case No. CV-16-856890, on appeal at the Eighth District Court of Appeals (Appellate Panel) case number 18-107184, pending further order of the Writ Panel. Personal jurisdiction writs of prohibition are rare, and it is reasonable to suggest that the Writ Panel carefully considered the matter prior to issuing said writ.

> "Cases granting prohibition for lack of personal jurisdiction are extremely rare and occur only when the lack of personal jurisdiction is premised on a complete failure to comply with constitutional due process." *Clark v. Conner*, 82 Ohio St.3d 309, 1997-Ohio-1240, 695 N.E.2d 751.

Despite the fact that Writs in Prohibition are extraordinary relief, not dependent upon other relief, the Writ Panel *sua sponte* dismissed based upon the affirmation by the Appellate Panel in the related case, the judgment and opinion of which was fraught with errors making it a Case of a Substantial Constitutional Question as well as a Case of Public or Great General Interest such that it is now the subject of appeal in this Court, case, 2020-0932.

The Writ Panel provided no explanation as to how it could *sua sponte* dismiss based upon the flawed judgment and opinion of the Appellate Panel as the Appellate Panel in substantial part based its judgment and opinion on a presumption and left wholly unaddressed authenticated evidence already on record which rebutted the Appellate Panel's presumption and the Writ Panel had already on record sworn, authenticated evidence which rebutted the Appellate Panel's presumption. Presumption is not evidence and most assuredly does not trump properly framed pre-existing sworn evidence already on record. Evid.R. 301.

The Writ Panel provided no explanation or mathematical calculation as to how it could *sua sponte* dismiss based upon the flawed judgment and opinion of the Appellate Panel as *prima facie* evidence proves service was not perfected within one year of filing the complaint, thus the case suffered from failure of commencement for lack of service and lack of acquisition of personal jurisdiction over Relator-Appellant (named Defendant in trial court case).

The Writ Panel provided no explanation as to how it could *sua sponte* dismiss based upon the flawed judgment and opinion of the Appellate Panel as *prima facie* evidence of the trial court docket shows *infra.*, that Relator-Appellant (named Defendant) was never served with the magistrate's Decision of Summary Judgment in the trial court case and the Appellate Panel justified not reviewing the entire record stating that there was not a timely objection to the aforementioned Decision for which the trial court's own docket provides evidence of never having been served on her.

The Writ Panel provided no explanation as to how it could *sua sponte* dismiss based upon the flawed judgment and opinion of the Appellate Panel as to Wells Fargo's lack of standing to bring the trial court case with its resultant lack of personal jurisdiction.

The Writ Panel in its *sua sponte* dismissal based on the flawed judgment and opinion of the Appellate Panel stated Relator could not prevail; if the Appellate Panel had addressed facts and sworn evidence rather than relying on presumptions for which sworn rebuttals and court record evidence already existed in the record, it could have done nothing other than reversed as opposed to affirmed. Had the Writ Panel decided the case on the facts, it could have done nothing other than conclude that the prevailing of Relator-Appellant (Relator) comports with the law applied to the facts.

The inherent power of the Court permits the Court to vacate a void order without resort to Civ.R. 60(B). "Consequently, the authority to vacate a void judgment is not derived from Civ. R. 60(B), but rather constitutes an inherent power possessed by Ohio courts. See Staff Notes to Civ. R. 60(B); *Lincoln Tavern, Inc.* v. *Snader* (1956), 165 Ohio St. 61, 59 O.O. 74, 133 N.E. 2d 606, paragraph one of the syllabus; *Westmoreland* v. *Valley Homes Corp.* (1975), 42 Ohio St. 2d 291, 294, 71 O.O. 2d 262, 264, 328 N.E. 2d 406, 409. It was neither incumbent upon appellee to establish a basis for relief under Civ. R. 60(B) nor was it necessary for the common pleas court to derive its authority therefrom. Rather, the 'judgment' sought to be vacated constituted a nullity." *Patton v. Diemer*, 35 Ohio St. 3d 68, 70, 518 N.E.2d 941 (1988).

Relator-Appellant timely filed her notice of appeal in this instant case and submits this brief to prevent Respondents-Appellees from taking further action in the total absence of personal jurisdiction.

Respondent-Appellee Judge Deborah Turner is the successor to retired Judge Janet Burnside, predecessor Burnside who on Friday April 13, 2018, issued an order of summary judgment of foreclosure against the property of Relator-Appellant, however, both judges *patently* and *unambiguously* lacked personal jurisdiction over Relator-Appellant in her role as named Defendant in a case which failed to commence in the Cuyahoga County Court of Common Pleas, known as 16-856890.

Wells Fargo Bank, N.A., which is not the originator of the promissory note or mortgage of Relator-Appellant filed the alleged action known as 16-856890 on January 8, 2016 and does not

dispute, and in fact admits that it did not obtain service over Relator-Appellant in her role as named Defendant in alleged action 16-856890 within the one year time frame mandated by Civ.R. 3(A), R.C. 2305.17.

As no service was perfected within the one-year time-frame and the praecipe for regular mail service was requested after the expiration of one year i.e., on January 16, 2017 with regular mail service being sent on January 18, 2017, trial court case 16-856890 never came into existence and never took a breath. Not only does the aforementioned mailing not comport with the dictates of Civ. R. 3(A), R.C. 2305.17, Relator-Appellant is on record in many court filings, including in properly framed affidavits of not having been served, in the trial court 16-856890, the court of appeals 18-107184 Appellant Brief, page 1 ¶1 and *passim* Verified Emergency Motion to Stay Execution May 30, 2018 p. 9 ¶4, p. 10 ¶¶1-4 *inter alia,* and in the Complaint for Writs of Prohibition 19-109240. Item # 23 of Affidavit attached to the Verified Emergency Complaint for Writs of Prohibition and Alternative Writs of Prohibition, page 47 of the .pdf, case 19-109240.

The record is clear that Wells Fargo Bank, N.A. never sought to dismiss its alleged case pursuant to Civ.R. 41.

The one-year period for obtaining service under Civ.R. 3(A) cannot be extended. *Fetterolf v. Hoffman-LaRoche, Inc.* (1995), Pewitt *v. Roberts*, 2005 Ohio 4298, 11-12 (Ct. App. 2005).

In order for a court to issue a valid order over a person that court must have general subject matter jurisdiction as well as jurisdiction over the person. Proper service of complaint and summons within one year of filing had it occurred, and it did not, would satisfy personal jurisdiction. When such service does not occur, as it did not here, *supra* and *infra*, then a court must look at other items which could confer upon it jurisdiction over the person. However, if a court is to find that the person waived personal jurisdiction, either explicitly or implicitly, a court *must* find that such waiver occurred prior to the one-year deadline from filing—the Failure of Commencement Date (FCD). Civ.R. 3(A), R.C. 2305.17.

The Writ Panel did not pass on the merits of the Complaint for a Writ, it merely *sua sponte* dismissed based upon the opinion of the Appellate Panel, this being done without the mention of

res judicata or claim preclusion, but apparently same was implied. Apparently, the Writ Panel ruled to dismiss the Complaint for a Writ of Prohibition based on the order of the Appellate Panel which cited a presumption of regular mail service (Civ.R. 4.6(D)) and erroneously cited a filing of a Rule 12(H) motion without preserving either insufficiency of process or insufficiency of service of process. As Relator-Appellant here submitted her Rule 12(H) motion after the presumptive case at the trial level failed to commence, her motion did not waive personal jurisdiction—there was no case over which to have personal jurisdiction on the date that the Rule 12(H) motion was filed.

Res judicata and claim preclusion do not apply to a void order. As a void order does not constitute a final judgment, *res judicata* and claim preclusion have no applicability. Moreover, the presumption made by the Appellate Panel regarding regular mail service Civ.R. 4.6(D) is not evidence. Evid.R. 301. Any Rule 12 motion made by the undersigned was filed after the Failure of Commencement Date and therefore does not constitute waiver of personal jurisdiction.

> "The doctrine of *res judicata* involves both claim preclusion (historically called estoppel by judgment in Ohio) and issue preclusion (traditionally known as collateral estoppel). See *Whitehead v. Gen. Tel. Co.*, (1969), 20 Ohio St.2d 108, 49 O.O.2d 435, 254 N.E.2d 10; *Krahn v. Kinney* (1989), 43 Ohio St.3d 103, 107, 538 N.E.2d 1058, 1062; 46 American Jurisprudence 2d (1994) 780, Judgments, Section 516. This case involves claim preclusion only. With regard to the claim preclusive effect of the doctrine of *res judicata*, this court, in previous years, has stated: "A final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction * * * is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them." *Norwood v. McDonald* (1943), 142 Ohio St. 299, 27 O.O. 240, 52 N.E.2d 67, paragraph one of the syllabus; see, also, *Whitehead v. Gen. Tel. Co., supra*, paragraph one of the syllabus."

Grava v. Parkman Twp., 73 Ohio St. 3d 379, 381, 653 N.E.2d 226, 1995 Ohio 331 (1995).

All of the reasons stated by the Appellate Panel allegedly supporting their specious finding of service, waiver of service and personal jurisdiction were time-barred by the passing of the Failure of Commencement Date as after said cutoff date for commencement, the Rules of Civil Procedure have no applicability without the existence of an action. Civ.R. 3(A).

No action ever arose from the filing of the complaint and summons on January 08, 2016. It is undisputed by Wells Fargo and it in fact concedes on a number of occasions, including in its

Appellee Brief page 7, ¶1 that no service was perfected in the one-year time allotment, although Wells Fargo made the following materially misleading statement apparently to give the misimpression to the Appellate Panel that *Goolsby v. Anderson Concrete Corp.*, 61 Ohio St. 3d 549, 575 N.E.2d 801 (1991) might apply, a new argument raised for the first time on appeal, arguing that *Goolsby* afforded it one additional year to serve the trial court proposed Defendant:

> "Here, Wells Fargo filed the TAC on August 12, 2016, requested service on November 18, 2016, and ultimately achieved service in January 2017."

N.B. "TAC" is the acronym Wells Fargo uses for "Third Amended Complaint." Neither the TAC nor any of its forerunners were served within one year of January 8, 2016, as mandated by Civ.R. 3(A), R.C. 2305.17. In *fact*, the service requested on November 18, 2016 was for *certified mail* service which failed on November 28, 2016, and December 13, 2016, as well as Personal and/or Residential Service via Private Process Server (Flatiron Services, LLC) which failed on December 2, 2016. To be perspicuous, no praecipe for service by *regular mail* service was made until January 16, 2017, eight (8) days after the failure of commencement of the presumptive civil action. Civ.R. 3(A), R.C. 2305.17, Civ.R. 4.6(D).

As is black letter law that a new argument other than *plain error* cannot debut on appeal, *Goolsby* fails. More importantly, however, is that *Goolsby* would not apply even had it been timely raised as it is an application of R.C. 2305.19, the "Savings Statute". The Savings Statute is only applicable when there is an imminent statute of limitations ("SOL") date and when a praecipe is filed with the Clerk to serve the complaint and summons prior to the Failure of Commencement Date. There was never a mention of a SOL date in the trial court. There was no praecipe filed just prior to January 08, 2017, but instead on January 16, 2017, after the Failure of Commencement Date. *Goolsby* has no application here.

The Appellate Panel did not comprehend or overlooked the dates on the documents of the alleged activities which they cited as bases of "the civil rules being followed." Had they comprehended that those dates occurred *subsequent* to the Failure of Commencement Date, they could not have deemed that "the civil rules were followed" and could not have presumed service,

infra. This primary error of the Appellate Panel was overlooked by the Writ Panel in the Writ Panel's decision to *sua sponte* dismiss based upon the flawed judgment and opinion of the Appellate Panel. There were underlying errors as well.

Relator-Appellant (named Defendant) did not waive service or file a written waiver pursuant to Civ.R. 4(D), did not make a personal appearance pursuant to Civ.R. 7(A), and *did not file any motions of any nature until well after the Failure of Commencement Date*.

That participation does not equate with appearance or waiver:

> "The appellants argue that by obtaining the two orders for leave to move or plead, defendant voluntarily waived service of process. However, as noted, *158 the record does not show a voluntary waiver of service in writing as required by Civ. R. 4(D). Additionally, the appellants in essence contend that the defendant had either entered a responsive pleading or, by way of the requests for leave to move or otherwise plead, had submitted motions to the court prior to a responsive pleading, which motions did not set forth the affirmative defense of lack of personal jurisdiction. Thus, appellants argue that the defendant waived such defense pursuant to Civ. R. 12(G) and (H)."
> *Maryhew v. Yova*, 11 Ohio St. 3d 154, 157-158, 464 N.E.2d 538 (1984).

> "We must reject appellants' argument for a number of reasons. First, requests for leave to move or otherwise plead do not constitute a responsive pleading. Civ. R. 7(A) sets forth the types of responsive pleadings which are contemplated by the Civil Rules." *Id*. at 158.

In Ohio, failure of commencement results in lack of personal jurisdiction, no case comes into existence and the appropriate action is for the non-existent case to be struck. *Kossuth v. Bear*, 161 Ohio St. 378, 119 N.E.2d 285 (1954).

After the passage of one year from the date of filing the complaint and after failed attempts at service during that year, on January 16, 2017, Wells Fargo filed a praecipe for service via regular mail and the trial court docket reflects that on January18, 2017, the clerk of courts mailed the Summons and Third Amended Complaint via regular mail, the trial court record being clear that all previous attempts at service had failed and none of the previous versions of the Summons and Complaint were ever served upon Relator-Appellant (Defendant).

It is crucial to understand that in Ohio, commencement of an action is very specifically delineated with service, commencement and personal jurisdiction being inter-related in this Ohio court system and judgments rendered in the absence of personal jurisdiction are a nullity and hence void *ab initio*. An action is commenced only when effective service of process is obtained. *Lash v. Miller*, 50 Ohio St.2d 63, 65, 362 N.E.2d 642 (1977). "It is axiomatic that for a court to acquire jurisdiction there must be a proper service of summons or an entry of appearance, and a judgment rendered without proper service or entry of appearance is a nullity and void." *Tavern, Inc. v. Snader*, 165 Ohio St. 61, 64, 133 N.E.2d 606 (1956).

The Appellate Panel, while fully acknowledging that Wells Fargo filed its Complaint on January 8, 2016 and that the Clerk of Court after many failed attempts of service sent a Summons and Complaint via regular mail on January 18, 2017, the praecipe for said mailing having been requested on January 16, 2017, none-the-less presumed proper service, in its ruling stating as follows:

> "{¶ 17} Finally, we can presume proper service in this case. Proper service is presumed where the civil rules on service are followed. *Deaton v. Brooker*, 8th Dist. Cuyahoga No. 83416, 2004-Ohio-4630, ¶8."

The Appellate Panel provided no explanation or mathematical calculation as to how the civil rules on service could be construed as having been followed within the realm of possibility given the undisputed fact that no service was perfected within one year of filing the Complaint and given the fact that both the praecipe for regular mail service and the mailing of service via regular mail occurred after the one year time limitation from the date of filing the Complaint had expired, which does not comport with the dictates of Civ.R. 3(A), R.C. 2305.17. It is axiomatic that both the date of the praecipe requesting service of January 16, 2017, and the date of regular mailing of January 18, 2017, are both more than one year from the date of filing January 8, 2016. No extension of Civ.R. 3(A) is permitted, and this has been upheld in black letter case law:

> Civ.R. 3(A): provides that: The service of process is governed by Civ.R. 3(A) which states that "[a] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing." "The action would have been timely commenced with the filing of

> this complaint, but only 'if service [was] obtained within one year from such filing upon a named defendant ***.' Civ.R. 3(A.) {¶ 12} The one year period for obtaining service under Civ.R. 3(A) cannot be extended. *Fetterolf v. Hoffman-LaRoche, Inc.* (1995), 104 Ohio App.3d 272, 277. Appellant did not obtain service on appellees within one year from the filing of the complaint in this case, so it is clear that the action was not 'commenced' with the filing of the complaint. *Pewitt v. Roberts*, 2005 Ohio 4298, 11-12 (Ct. App. 2005).

The issue of Civ.R. 4.6(D) arose during the appeal with the Appellate Panel. In its ruling, i.e., journal entry and opinion below, the Appellate Panel stated its presumption, an argument never made by Wells Fargo, that the filing of a motion by Relator-Appellant (proposed Defendant) on February 14, 2017, which is after Failure of Commencement occurred, made it "apparent" to the Appellate Panel that the Defendant had been served; Relator-Appellant (proposed Defendant) respectfully suggests this statement is based upon less than rigorous logic, for of course, the public has access to court records which the court makes available to the public via its website and indeed, Relator-Appellant (proposed Defendant), a member of the public, has made use of said access and in so doing discovered documents with which she had not been served.

On this matter it is instructive to consider the insightful comment of Justice Evelyn Lundberg Stratton in the Oral Argument in *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714:

> Start Time: 18:29: Attorney Nick Papa for plaintiff-appellee Gliozzo: "...what the defendants have claimed is that they never received a copy of the complaint at all. They never received the interrogatories. Then somehow, an answer is filed. The notice that was sent out regarding this failure of service was sent out on January 12th.
>
> Justice Lundberg Stratton: "But if, if they heard through the grapevine that this had been filed and they went and pulled this from the court you aren't alleging that constitutes service are you?
>
> Attorney Nick Papa: "No I am not at all alleging that it constitutes service..."End Time: 19:02 http://www.ohiochannel.org/video/frank-gliozzo-v-university-urologists-of-cleveland-inc-et-al-case-no-2006-1166

The impact of misapplying the R.C. 2305.17, Civ.R. 3(A) and disregarding appropriately applied historical case law precedent is palpable and has the potential to create chaos in the Ohio courts. Carving out exceptions to perfect service and acquiring personal jurisdiction would defeat any attempt to establish a fair legal system upon which the public could rely and in fact would

vastly reduce any public confidence in the legal system. *Goldfuss v. Davidson*, 79 Ohio St. 3d 116, 679 N.E.2d 1099, 1997 Ohio 401 (1997).

The trial court, in the person of Judge Janet Burnside, predecessor of Respondent-Appellant Judge Turner, granted summary judgement of foreclosure providing no explanation or mathematical calculation as to how service, commencement and the acquisition of personal jurisdiction could possibly comport with the civil rules, statute and black letter case law precedent. The Appellate Panel likewise offered no explanation as to how it could affirm the above with the Writ Panel likewise offering no explanation as to how it could dismiss *sua sponte* based upon such flawed judgment and opinion.

RELEVANT TIMELINE

-On January 08, 2016, Plaintiff Wells Fargo, in the trial court alleged action filed an initiating document (Complaint) in the Cuyahoga County Court of Common Pleas, against the undersigned Relator-Appellant (Defendant). (See docket entry of January 08, 2016, self-authenticating public document.)

-On March 05, 2016, Plaintiff Wells Fargo filed an Amended Complaint. Service was not perfected on Defendant (Relator-Appellant) when Plaintiff Wells Fargo filed said Amended Complaint on March 05, 2016.

-Service was not perfected on Defendant (Relator-Appellant) when Plaintiff Wells Fargo filed a Second Amended Complaint on May 18, 2016.

-Service was not perfected on Defendant (Relator-Appellant) when on August 12, 2016, Plaintiff Wells Fargo filed a Third Amended Complaint. Plaintiff Wells Fargo filed said Third Amended complaint without showing good cause why such service was not made within the time period as required by Civ.R. 4(E).

-On October 11, 2016, Plaintiff Wells Fargo moved for a default judgment incorrectly claiming that Defendant (Relator-Appellant) had been served, when in fact she had not.

-On November 18, 2016, the magistrate denied the motion of Plaintiff Wells Fargo for default judgment, issuing a magistrate's order stating: "PLAINTIFF'S MOTION FOR DEFAULT IS DENIED. PLAINTIFF TO PERFECT SERVICE ON ALL NECESSARY PARTIES."

-On November 18, 2016 Wells Fargo filed praecipes for service via certified mail at two addresses, one which was never her address and via process server

-On November 28, 2016 certified mail service failed

-On December 2, 2016 process server service failed

-On December 18, 2016 certified mail service failed

-On January 8, 2017 The case Failed to Commence and the trial court did not acquire personal jurisdiction

-On January 16, 2017 Wells Fargo filed a praecipe for service via regular mail

-On January 18, 2017, the trial court docket reflects a summons and amended complaint being sent via regular mail to Defendant (Relator-Appellant)

-Thus, it is undisputed that service was not perfected on Defendant (Relator-Appellant) within one year of filing. This is important. Civ.R. 3(A), R.C. 2305.17

-On November 27, 2017, the magistrate *sua sponte* ordered Wells Fargo to submit affidavits for summary judgment stating "PLAINTIFF TO FILE ALL NECESSARY DISPOSITIVE MOTIONS, UPDATED TITLE WORK, AFFIDAVITS, AND PROPOSED MAGISTRATE'S DECISIONS WITHIN 30 DAYS OF THIS ORDER. NOTICE ISSUED."

Patent and Unambiguous Lack of Personal Jurisdiction: Relator-Appellant (named Defendant) was Never Served with the Magistrate's Decision of Summary Judgment, which was issued long after the Failure of Commencement Date

Respondent-Appellant (named Defendant) was never served with magistrate's decision of summary judgment; Official Court Record Shows Said Decision was Never Sent to Relator-Appellant (named Defendant): R.E. writ case 11/27/2019 Emergency Verified Complaints for Writs pp.22-23 of the .pdf item# 12. Trial court docket record entries of February 14 and 16, 2018

unequivocally show that defendant was never served with the magistrate's decision of summary judgment of foreclosure which occurred after the failure to commence accrued. This is not simply an *ipse dixit* statement, the official Court docket record is clear that between those two dates seventeen (17) notices of said magistrate's decision were sent, *none* of which was directed to the Relator-Appellant (named Defendant. R.E. 9/12/2018 Appeals case Verified Motion pp. 33 and 34 of the .pdf.

Furthermore, when Relator-Appellant (named Defendant) finally learned of said magistrate's decision and filed an objection containing authenticated court evidence that she had not been served, the trial court struck said objection for the sole reason of being "untimely." Appellate Case J.E. 01/09/2020 ¶9.

While all court documents are important, surely a magistrate's decision of summary judgment is crucial to a foreclosure case; the fact that undisputed evidence in the official record shows that Relator-Appellant (named Defendant) was never served with the magistrate's decision of summary judgment and that the trial court would strike a document containing record evidence from the same court that that the clerk of court did not send service to Relator-Appellant (named Defendant)is beyond disconcerting.

Relator-Appellant (named Defendant) had also brought this serious matter to the attention of both the trial court, R.E. 09/13/2018 Verified Emergency Motion of Defendant Cynthia Lundeen to Stay Execution p11 ¶¶ 1-2, *inter alia,* and the Appellate Panel R.E. May 30, 2018 Verified Emergency Motion of Defendant Cynthia Lundeen to Stay Execution Pending Appeal p37 of the .pdf, (attachment to the affidavit) ¶¶2-3 cont'd to p38 of the .pdf ¶¶1-3, Appellant's Brief R.E. 07/09/2018, brief p6 ¶1*inter alia, with Affidavits* on more than one occasion; this serious issue remains unaddressed by either court as of the date of this writing.

The Appellate Panel in its opinion stated that Relator-Appellant (named Defendant-Appellant) "failed to timely object to the magistrate's decision granting Wells Fargo's motion for summary judgment," and used that statement as its justification to not examine the full record although it

had authenticated evidence, including the trial court docket revealing that service had not been made to Relator-Appellant (named Defendant-Appellant).

Applying the Reasonable Person test, the obvious inequity of a Court basing an Opinion and Judgment on a lack of an objection to a document which reliable and sworn court evidence along with evidence in the court's own docket proves had never been served nor sent in any manner to Defendant by the Clerk of Court would be apparent to all and "if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings." *Goldfuss v. Davidson*, 79 Ohio St. 3d 116, 679 N.E.2d 1099, 1997 Ohio 401 (1997).

It is axiomatic that an Objection due date cannot be determined until service is made.

The Writ Panel left this matter wholly unaddressed and provided no explanation as to how it could dismiss *sua sponte* based upon the flawed judgment and opinion of the Appellate Panel.

Patent and Unambiguous Lack of Personal Jurisdiction Due to Lack of Standing

Read in *Pari Materia*, Civ.R. 56 (C), Civ.R. 56(E), Evid.R. 803(6), Evid.R. 901(B)(10) Do Not Permit the Use of Adopted Business Records As the Basis for Summary Judgment of Foreclosure or To Substitute Summary Judgment For the Inviolate Right Under the Ohio Constitution for a Civil Trial

The evidentiary requirements for summary judgment affidavits in Ohio mandate the use of authenticated or sworn documents to substitute for the inviolate right under the Ohio Constitution for a civil trial and permit a summary judgment in lieu of trial by fact finders. *State Ex Rel. Corrigan, Pros. Atty. v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981).

While Wells Fargo is the successor of the failed Wachovia Bank which in turn was the successor of the failed World Savings Bank, it is not a corollary that all promissory notes and mortgages were inherited by Wells Fargo.

Wells Fargo not being the originator of the promissory note or mortgage as more fully delineated *supra*, cannot authenticate outside documents without a chain of custody and there is no evidence that the business records custodian of Wells Fargo was the business records custodian for the now defunct World Savings Bank or Wachovia Bank.

Wells Fargo stated that the documents accompanying its affidavits were copies. R. 140 Motion For Summary Judgment, page 9 of .PDF. Wells Fargo never offered properly authenticated evidence to prove standing despite receiving an order of summary judgment, and the Appellate Panel but rather cited singularities from a paucity of Ohio court actions none of which included the Eighth District or the Ohio Supreme Court, creating an intra-district conflict. R.E. January 9, 2020 Journal Entry and Opinion ¶22, ¶26.

The precious right to a civil trial with fact finders (jury) is guaranteed as inviolate under the Ohio Constitution. However, since the introduction of the concept of summary judgment, countless persons have been deprived of their Ohio constitutional right to a jury trial by a preempting order of summary judgment. Civ.R. 56. In order to justify such substitution where none is present in the Ohio Constitution, the evidentiary requirements for summary judgment must equal those of evidence required at jury trial.

Unfortunately, many trial and appellate courts in Ohio circumvent this strict evidentiary requirement and permit documents of less than evidentiary quality to determine the outcome of many civil cases. As this practice of permitting inferior quality evidence is manifestly unconstitutional, this Court must rule that such substitution renders any such judgment void *ab initio*. In other words, this Court must rule that *Seminatore* is controlling and evidentiary quality evidence is mandatory to support an affidavit for summary judgment. Anything less than the strict evidentiary requirements as stated clearly in *Seminatore* perverts the system of justice and greatly diminishes the public trust in the Ohio court system.

Ironically, Respondent-Appellee Turner's predecessor Burnside authored an article entitled "Summary Judgment Practice is Losing Integrity" appearing in Litigation News Vol. 18 Issue 2 Spring 2013 Published by the Ohio State Bar Association Litigation Section, lamenting the lax standards of "evidence" relied upon for summary judgment, said predecessor Burnside having ordered Summary Judgment in the trial court case under discussion.

This Action Is Not Moot As The Exigent Situation Is Likely To Recur

This action is not moot as the exigent situation is likely to recur and is more fully set forth in the Proposition Of Law 12, infra, which is incorporated as if fully re-written here.

Based upon the foregoing facts and the following law applied to these facts it is appropriate and proper for this Court to grant the extraordinary relief requested in the Complaint for a Writ of Prohibition.

LAW AND ARGUMENT

PROPOSITION OF LAW 1

There is no mechanism to extend the mandate of Civ.R. 3(A), R.C. 2305.17 that a Complaint and Summons must be served within one year of filing the complaint or it never matures to become an active case

Civ.R. 3(A) controls and defines the commencement of an action filed in the trial court. Civ.R. 3(A): provides that: The service of process is governed by Civ.R. 3(A) which states that [a] civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing. In the absence of filing, the status of the action is presumptive until one year passes without perfection of service which results in termination of the presumptive status and no case results, or the status becomes active if waiver of personal jurisdiction occurs. If the case becomes active by service or waiver during the first year after filing, then the filing date becomes the date on which the action commenced. There is no mechanism to extend the one-year requirement of Civ.R. 3(A).

> "`It is rudimentary that in order to render a valid personal judgment, a court must have personal jurisdiction over the defendant. This may be acquired by * * * service of process upon the defendant * * *.' *Maryhew v. Yova* (1984), 11 Ohio St.3d 154 [11 OBR 471, 464 N.E.2d 538]. "Civ.R. 3(A) governs service of process and provides that `[a] civil action is commenced by filing a complaint with the court, if service is obtained *within one year from such filing.'* "In *Lash v. Miller* (1977), 50 Ohio St.2d 63 [4 O.O.3d 155, 362 N.E.2d 642], the court construed Civ.R. 3(A) and determined that an action is not timely commenced when there has been no effective service within the time limit prescribed by Civ.R. 3(A). *Id.*, citing *Mason v. Waters* (1966), 6 Ohio St.2d 212 [35 O.O.2d 337, 217 N.E.2d 213]. 277*277 "Further, as stated by the court in *Saunders v. Choi* (1984), 12 Ohio St.3d 247, 250 [12 OBR 327, 330, 466 N.E.2d

889, 892], `[u]nder Civ.R. 3(A), an action is not *deemed to be "commenced"* unless service of process is obtained *within one year from the date of filing.'"* (Emphasis added.)

Fetterolf v. Hoffmann-LaRoche, Inc., 104 Ohio App. 3d 272, 276-277, 661 N.E.2d 811 (Ct. App. 1995).

Based on the facts in this instant case set forth above this Court must find that the alleged foreclosure action did not become an active case for failure of commencement. Civ.R. 3(A), R.C. 2305.17. Therefore, no case exists and this Court must follow the dictate of *Kossuth v. Bear, supra,* and order the record of this alleged trial court action be struck.

PROPOSITION OF LAW 2

A Plaintiff's Failure to Serve the Defendant Before the Deadline to Serve a Summons and Complaint, the One-Year Commencement Period Set Forth in R.C. 2305.17 and Civ.R. 3(A), results in failure of commencement, meaning that no case comes into existence and that the Court does not acquire jurisdiction over the person attempted to be served and any orders rendered in the absence of personal jurisdiction are void *ab initio*

In order for a court to issue a valid order over a person that court must have general subject matter jurisdiction as well as jurisdiction over the person. Proper service of complaint and summons within one year of filing satisfies personal jurisdiction. When such service does not occur, as it did not here, *supra* and *infra*, then a court must look at other items which could confer jurisdiction over the person. However, if a court is to find that the person waived personal jurisdiction, either explicitly or implicitly, a court *must* find that such waiver occurred prior to the one-year deadline from filing—the Failure of Commencement Date.

First, it is crucial to understand that in Ohio, commencement of an action is very specifically delineated with service, commencement and personal jurisdiction being inter-related in this state court system. This differs from the federal system and may differ from the systems in some of the other states in this union. However, the Ohio legislature, in enacting statute R.C. 2305.17 upon which Civ.R. 3(A) is modeled, made a conscious decision to keep the system which has been in effect dating back to the first Code of Civil Procedure enacted in 1853 (prior to the adoption of the Ohio Revised code,) which is as follows: In Ohio, a state court acquires personal jurisdiction over a defendant pursuant to Civ.R. 3(A) which states in pertinent part:

> "A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant,"

The word "if" is not to be lightly disregarded, rather it operative as shown in *Pewitt v. Roberts*, quoting *Fetterolf v. Hoffman-Laroche*:

> "The action would have been timely commenced with the filing of this complaint, but only 'if service [was] obtained within one year from such filing upon a named defendant ***.' Civ.R. 3(A). {¶ 12} The one year period for obtaining service under Civ.R. 3(A) cannot be extended. *Fetterolf v. Hoffman-LaRoche, Inc.* (1995), 104 Ohio App.3d 272, 277. Appellant did not obtain service on appellees within one year from the filing of the complaint in this case, so it is clear that the action was not 'commenced' with the filing of the complaint."
>
> *Pewitt v. Roberts*, 2005 Ohio 4298,11-12 (Ct. App. 2005).

A case, therefore, is considered to be commenced or not to be commenced through the Relation Back Doctrine, thus, if service is obtained within one year of filing the complaint, the case is considered to have commenced as of the date of filing, whereas if service of process is not perfected within one year of filing the complaint, the case fails to commence, the case never comes into existence and the appropriate procedure is for the court to strike the potential case from the record as it is axiomatic that a case that has never existed cannot be dismissed. *Kossuth, supra, at p. 384.*

There is a long, unbroken chain of consistent, black letter, precedential case law on the matter of failure of commencement and its corollaries: a court thus not acquiring personal jurisdiction and any order in the face of this scenario being void *ab initio*, including but not limited to:

> "As to the petition which was filed in Lorain county on May 29,1950 (one day before the expiration of two years from the date of the accident), there was no service of summons. Therefore, it cannot be said that an action was ever deemed to be commenced in Lorain county. In other words, notwithstanding the filing of the petition and the issuance of summons, no case ever matured in Lorain county to the point where the court had any jurisdiction over the defendant or had any power to make any order based upon the allegations of the petition *384 so filed. There was no pending case to be "dismissed." Although on the Lorain county court docket there appears the words, "dismissed without prejudice," what that court did was merely to strike the petition from the files. It is common knowledge that after service of summons and even after the filing of an answer a case may be "dismissed" for want of prosecution. Such would be a genuine dismissal because such case would be pending and the court would have jurisdiction over it. It seems axiomatic that a nonexistent case can not be dismissed. In the

present instance, for lack of service, no case came into existence in Lorain county. Therefore, as to the petition filed in Lorain county we hold that the plaintiff did not fail "otherwise than upon the merits." The plaintiff simply never had a pending case in Lorain county." *Kossuth* at pp. 383-384.

Absent proper service of process on a defendant, a trial court lacks jurisdiction to enter a judgment against that defendant, and if the court nevertheless renders a judgment, the judgment is a nullity and is void *ab initio*. *Tavern, Inc. v. Snader,* 165 Ohio St. 61, 133 N.E.2d 606 (1956).

An action is commenced only when effective service of process is obtained. *Lash v. Miller,* 50 Ohio St.2d 63, 65, 362 N.E.2d 642 (1977). Without personal jurisdiction, all orders of the court pertaining to the person are void *ab initio. Tavern v. Snader,* 165 Ohio St. 61, 133 N.E.2d 606 (1956). "Effective service of summons on the defendant is a necessary prerequisite to the commencement of a civil action. Civ. R.3(A)." *Lash* v. *Miller* (1977), 50 Ohio St. 2d 63, 65, 362 N.E. 2d 642, 643. "It is rudimentary that in order to render a valid personal judgment, a court must have personal jurisdiction over the defendant." See *Maryhew* v. *Yova* (1984), 11 Ohio St. 3d 154, 156, 464 N.E. 2d 538, 540."

"The action would have been timely commenced with the filing of this complaint, but only 'if service [was] obtained within one year from such filing upon a named defendant ***.' Civ.R. 3(A). {¶ 12} The one year period for obtaining service under Civ.R. 3(A) cannot be extended. *Fetterolf v. Hoffman-LaRoche, Inc.* (1995), 104 Ohio App.3d 272, 277. Appellant did not obtain service on appellees within one year from the filing of the complaint in this case, so it is clear that the action was not 'commenced' with the filing of the complaint."

Pewitt v. Roberts, 2005 Ohio 4298,11-12 (Ct. App. 2005).

"{¶ 2} 'A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant * * *.' Civ.R. 3(A). If service of process is not obtained within one year from the date of the filing of the action, the action has not 'commenced.' *See Saunders v. Choi,* 12 Ohio St.3d 247, 250, 466 N.E.2d 889 (1984). A failure of commencement means that no case comes into existence. *Id.*; *Kossuth v. Bear,* 161 Ohio St. 378, 384, 119 N.E.2d 285 (1954); *Buckeye Union Ins. Co. v. Sheppard,* 8th Dist. Cuyahoga No. 55782, 1989 WL 18922, at 1 (Mar. 2, 1989).{¶ 3} In the broad sense, 'service of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served.' *Miss. Publishing Corp. v. Murphree,* 326 U.S. 438, 444-445, 66 S.Ct. 242, 90 L.Ed. 185 (1946). "{¶11} …The

court erred by refusing to dismiss the action. *Maryhew v. Yova,* 11 Ohio St.3d 154, 159, 464 N.E.2d 538 (1984)."

Tadross v. Tadross, 86 N.E.3d 827, 828, 830, 2017 Ohio 930 (Ct. App. 2017)

Such is the case here. It is undisputed that no service of process was perfected within one year from filing the complaint, that a new praecipe for service was requested after the expiration of one year, that Relator-Appellant (proposed Defendant) did not make a personal appearance within the one year time frame or at any time, and certainly not within the meaning of Civ.R. 7(A), did not file a written waiver pursuant to Civ.R. 4(D) filed no motions within one year of the filing of the Complaint and did not in any other way submit to the jurisdiction of the court, *supra*.

The trial court tacitly condoned Wells Fargo's out-of-rule filing of a praecipe for service by regular mail service *after* the one-year window permitted by Civ.R. 3(A) or R.C. 2305.17 was *closed*. The Appellate Panel in its ruling of January 09, 2020, stated that it presumed that Relator-Appellant (named Defendant-Appellant) had received proper service by regular mail on January 18, 2017, Civ.R. 4.6(D) with reference to regular mail being an accepting form of service *when the Civil Rules are followed,* however, did not provide any explanation or mathematical calculation as to how the Civil rules on service could be construed as having been followed within the realm of possibility given the undisputed fact that no service was perfected within one year of filing the Complaint filing of January 8, 2016 and given the fact that both the date of praecipe for regular mail service of January 16, 2017 and the stated mailing date of January 18, 2017 of service via regular mail occurred after the one year time limitation from the date of filing the Complaint had expired, which does not comport with the dictates of Civ.R. 3(A), R.C. 2305.17. It is axiomatic that both the date of the praecipe requesting service of January 16, 2017 and the date of regular mailing of January 18, 2017 are both more than one year from the date of filing January 8, 2016. No extension of Civ.R. 3(A) is permitted, *supra*. Not only does the aforementioned mailing not comport with the dictates of Civ. R. 3(A), R.C. 2305.17, Relator-Appellant (named Defendant-Appellant) is on record having rebutted the presumption of regular mail service by uncontested

affidavits and verified by uncontested affidavit court documents including but not limited to: in the trial court 16-856890, R.E. 11/27/2019 Emergency Verified Complaint for Writs of Prohibition and Alternative Writs of Prohibition p. 47 of the .pdf item #23 of Affidavit and p20 of .pdf item #8. Appeals Case R.E. 05/30/2018 Verified Emergency Motion p 9 ¶4, p10 ¶¶1-4, Appeals Case R.E. 07/09/2018 Appellant's Brief p1 ¶1 and in exquisite detail *passim*, *inter alia*, Appellate court R.E. 09/13/2018 Verified Motion for Stay p6 of the .pdf ¶, *inter alia*.

Relator-Appellant (named Defendant-Appellant's) sworn statements were not rebutted by Wells Fargo. This is a good juncture to note that in the era of the General Code, sixty days were allotted to perfect service; now under the Revised Code a full year is allotted to perfect service and is deemed to be an eminently reasonable amount of time for that purpose.

> "The rule [3(A)] puts litigants on notice that a reasonable time will be afforded in order to obtain service of process over defendants. Such a rule goes to the essence of civil procedure and is not, in our view, a mere technicality designed to deny parties their day in court." *Saunders v. Choi, 12 Ohio St. 3d 247, 250, 466 N.E.2d 889 (1984)*

"As in the instant case, a plaintiff is the master of his or her cause of action." *Saunders, supra*

This means that a plaintiff does not need to rely on any other human being to perfect service, and interesting and ironically, it is usually said that the burden is on the plaintiff to serve; but I suggest it is perhaps more fair to say that the plaintiff has the benefit of being able to serve, as it does indeed make a plaintiff is the master of his or her cause of action. Controlling case law states that in cases where the civil rules on service of process have been followed, an uncontradicted sworn rebuttal stating service was not perfected entitles the defendant to have the judgment against her vacated:

> "{¶ 13} Where the civil rules on service of process have been followed, there is a presumption of proper service unless the defendant rebuts this presumption with sufficient evidence of non-service. *Rafalski v. Oates* (1984), 17 Ohio App.3d 65, 66; *Grant v. Ivy* (1980), 69 Ohio App.2d 40. In *Rafalski* this court held: "Where a party seeking a motion to vacate makes an uncontradicted sworn statement that she never received service of a complaint, she is entitled to have the judgment against her vacated even if her opponent complied with Civ.R. 4.6 and had service made at an address where it could reasonably be anticipated that the defendant

would receive it." 17 Ohio App.3d at 66. *Lakhodar v. Madani*, 2008 Ohio 6502 (Ct. App. 2008). "Thus, a trial court errs in summarily overruling a defendant's motion to set aside a judgment for lack of service, when the defendant submits a sworn statement that she did not receive service of process, without affording the defendant a hearing. Id."

Patterson v. Patterson, 2005 Ohio 5352 (Ct. App. 2005) at ¶15.

In this instant case, as set forth above, the civil rules were not followed by Wells Fargo, thus no case came into existence and was a nullity. *Kossuth v. Bear*, 161 Ohio St. 378, 384, 119 N.E.2d 285 (1954). However, even if a court were to misconstrue the civil rules to have been followed, as with the Appellate Panel, the uncontested Affidavits of Relator-Appellant (named Defendant-Appellant) entitles her to have the judgment against her vacated, as in *Patterson*, *supra.*

COURT BASED ORDER/OPINION ON A PRESUMPTION WHICH IS NOT EVIDENCE IN THE FACE OF SWORN UNCONTESTED EVIDENCE

The issue of Civ.R. 4.6(D) arose in the ruling of the Appellate Panel. In its ruling, i.e., journal entry and opinion below, the Appellate Panel stated its presumption, an argument never made by Wells Fargo, that the filing of a motion by Relator-Appellant (named Defendant-Appellant) on February 14, 2017, which is after Failure of Commencement occurred, made it "apparent" to the Appellate Panel that she had been served; Relator-Appellant (named Defendant-Appellant) respectfully suggests this statement is based upon less than rigorous logic, for of course, the public has access to court records which the court makes available to the public via its website and indeed, Relator-Appellant (named Defendant-Appellant), a member of the public, has made use of said access and in so doing discovered documents with which she had not been served.

On this matter it is instructive to consider the insightful comment of Justice Evelyn Lundberg Stratton in the Oral Argument in *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714

> Start Time: 18:29: Attorney Nick Papa for plaintiff-appellee Gliozzo: "...what the defendants have claimed is that they never received a copy of the complaint at all. They never received the interrogatories. Then somehow, an answer is filed. The notice that was sent out regarding this failure of service was sent out on January 12th.

> Justice Lundberg Stratton: "But if, if they heard through the grapevine that this had been filed and they went and pulled this from the court you aren't alleging that constitutes service are you?
>
> Attorney Nick Papa: "No I am not at all alleging that it constitutes service..."End Time: 19:02 http://www.ohiochannel.org/video/frank-gliozzo-v-university-urologists-of-cleveland-inc-et-al-case-no-2006-1166

> "In *Ayers v. Woodard* (1957), 166 Ohio St. 138, 140 N.E.2d 401, this court stated: 'A presumption is a procedural device which is resorted to only in the absence of evidence by the party in whose favor a presumption would otherwise operate; and where a litigant introduces evidence tending to prove a fact, either directly or by inference, which for procedural purposes would be presumed in the absence of such evidence, the presumption never arises and the case must be submitted to the jury without any reference to the presumption in either a special instruction or a general charge.' *Id.* at paragraph three of the syllabus. "Id. *Cotterman* involved the presumption set forth in Ohio Adm. Code 5101:3-50-22(C). This court stated that the presumption 'would *ab initio* be inapplicable' where evidence was presented to rebut the presumption. *Cotterman v. Ohio Dept. of Pub. Welfare*, 28 Ohio St. 3d 256, 258, 503 N.E.2d 757, 759 (1986). The court's sole authority, and without comment, was *Ayers. Id.* "If one party relies on a presumption and his adversary introduces evidence of a substantial nature which counterbalances the presumption, it disappears." *Carson* v. *Metropolitan Life Ins. Co.* (1956), 165 Ohio St. 238, Evid. R. 301, Staff Note. "Evid.R. 301. In short, a presumption is not evidence and does not switch the burden of proof; it affects only the burden of going forward with evidence." *AMENT, Trustee, Appellant and Cross-Appellee, v. Reassure America Life Insurance Company et al., Appellees and Cross-Appellants. 180 Ohio App.3d 440 (2009) 2009-Ohio-36.* "However, a presumption may be rebutted." See Evid.R. 301.

Royster, Appellant v. Toyota Motor Sales, U.S.A., Inc., Appellee. 92 Ohio St.3d 327 (2001).

A Failure Of Commencement Means That No Case Comes Into Existence

Relator-Appellant (Defendant-Appellant) has demonstrated conclusively that no commencement occurred within the meaning of Civ.R. 3(A) or otherwise. *Tadross, supra*. Even if Relator-Appellant (Defendant-Appellant) had received regular mail service, which she did not, both the praecipe and mailing of supposed service was more than one year from the filing of the complaint. There is no mechanism to extend the one-year deadline for commencement. Civ.R. 3(A). It is clear that due to failure of commencement, the trial court never acquired jurisdiction over the person of the defendant and any and all order that it issued are void *ab initio.*

It is clear the Writ Panel erred in dismissing, based upon the flawed ruling of the Appellate Panel. Relator-Appellant (Defendant-Appellant) is and was entitled to immediate relief in the form of Writ of Prohibition prohibiting Respondents-Appellees from taking further action resulting from Wells Fargo's alleged foreclosure action and void order of summary judgment.

PROPOSITION OF LAW 3

The Civil Rules Set Forth that which Constitutes an Appearance

The Appellate Panel in its ruling below acknowledged that there is no Answer on record from Relator-Appellant (named Defendant-Appellant) in the trial court case.

> "{¶15} …never filed an answer to the third amended complaint,"

Maryhew, supra, makes clear that in order to determine appearance we need only look at two things, whether a written waiver was filed pursuant to Civ.R. 4(D) and whether there was an appearance within the meaning of Civ.R. 7(A). *Maryhew* also makes clear that motions and orders for leave to move or plead do not constitute a voluntary waiver of service of process and that participation does not equate with appearance.

> "No action having been commenced, there was no obligation upon this defendant under the Civil Rules to move or otherwise plead within the year and her failure to do so would not have waived her right to the affirmative defense of lack of personal jurisdiction. Inaction upon the part of a defendant who is not served with process, even though he might be aware of the filing of the action, does not dispense with the necessity of service. *Haley* v. *Hanna* (1915), 93 Ohio St. 49. The Civil Rules do not change this common law of Ohio." *Maryhew v. Yova*, at p. 157.

> "In the present case, service was not perfected upon the defendant and there was not a specific written waiver of service pursuant to Civ. R. 4(D).[2] Also, there was not a voluntary entry of appearance on behalf of the defendant by way of an entry of the court, or a responsive pleading to the merits of the case. Therefore, the question presented is whether the two requests by defendant's counsel, as granted by the trial court, for leave to move or otherwise plead in the action, constitute a waiver of the affirmative defense of lack of personal jurisdiction over the defendant. We answer such inquiry in the negative for the reasons set forth below." *Id.* at 156.

> "We must reject appellants' argument for a number of reasons. First, requests for leave to move or otherwise plead do not constitute a responsive pleading. Civ. R. 7(A) sets forth the types of

responsive pleadings which are contemplated by the Civil Rules. The record here shows no responsive pleading was made." *Id.* at 158.

Relator-Appellant (named Defendant-Appellant) in the trial court case never filed a written waiver of service and there is no record of a responsive pleading or Answer. As in *Maryhew*, there was no obligation upon Relator-Appellant (named Defendant-Appellant) under the Civil Rules to move or otherwise plead within the year and her failure to do so would not have waived her right to the affirmative defense of lack of personal jurisdiction. As Relator-Appellant did not implicitly or explicitly waive personal jurisdiction and certainly did not during the one year from filing (January 08, 2016 through January 08, 2017), the presumptive foreclosure action against her property by Wells Fargo, plaintiff in the trial court, never matured into an action and cannot be revived. This Court must find that the Writ Panel erred when it adopted the decision of the Appellate Panel and dismissed the Writ action. The Appellate Panel found that implicit waiver had occurred without noting the timeline of events and the time restrictions of service. Civ.R. 3(A). The Appellate Panel presumed proper service by regular mail, which presumption was known to be false by the court documents in both the Writ Panel and Appellate Panel dockets in sworn statements in properly framed affidavits. A presumption is not evidence. Evid.R. 301.

PROPOSITION OF LAW 4

In the absence of commencement, the Ohio Rules of Civil Procedure do not apply to a presumptive action which failed to commence within one year from filing and where waiver of personal jurisdiction did not occur.

After the one year from filing, there are no parties to such a non-action. Civil Rules are a mechanism that governs the conduct of all parties equally. No action, no parties, no applicability. In this instant case, service was never perfected resulting in the absence of parties and the absence of applicability of the Civil Rules. Stated more perspicuously, the Civil Rules do not apply in the trial court case thus any argument of implicit waiver of personal jurisdiction fails.

{¶ 22} Rather, the issue presented in this case is one of a failure to perfect service, which ultimately affects whether a court has personal jurisdiction over a defendant. The obligation to perfect service of process is placed only on the plaintiff, and the lack of jurisdiction arising from want of, or defects in, process or in the service thereof is ground for reversal. *Gliozzo v.*

Univ. Urologists of Cleveland, Inc., 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, ¶ 16 (discussing the plaintiff's obligation to perfect service); *Ohio Elec. Ry. Co. v. United States Express Co.* (1922), 105 Ohio St. 331, 345-346, 137 N.E. 1 (discussing the effect of the failure to obtain service). Similarly, it is an established principle that actual knowledge of a lawsuit's filing and lack of prejudice resulting from the use of a legally insufficient method of service do not excuse a plaintiff's failure to comply with the Civil Rules. *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 157, 11 OBR 471, 464 N.E.2d 538; *Haley v. Hanna* (1915), 93 Ohio St. 49, 52, 112 N.E. 149.

{¶ 23} In this regard, the Civil Rules are not just a technicality, and we may not ignore the plain language of a rule in order to assist a party who has failed to comply with a rule's specific requirements. *Gliozzo*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, ¶ 16. The Civil Rules are a mechanism that governs the conduct of all parties equally. Id.

***LaNeve v. Atlas Recycling, Inc.*, 119 Ohio St. 3d 324, 329, 2008 Ohio 3921 (2008).**

PROPOSITION OF LAW 5

It is axiomatic that a judicial panel must be attentive to timeline/sequence of events (facts) when the timing of an event is not within the language of the rule or statute when the rule or statute is mandatory. Civ.R. 3(A) is a mandatory statute for commencement of a civil action if service is perfected within one year

In the absence of waiver of personal jurisdiction, either implicitly or explicitly, Civ.R. 3(A), R.C. 2305.17, controls as to whether a presumptive action becomes an action or not following a filing of a complaint. If service of summons and complaint are perfected within one year of filing, then a presumptive action becomes an action, and its creation date is its filing date. If not served within one year, there is no mechanism for extending the one-year deadline and the presumptive action then becomes a non-action without any means of revival. If personal jurisdiction is waived implicitly or explicitly, then the presumptive action becomes an action on such date of waiver.

In the trial court case, the named Defendant (Relator-Appellant) was never served with any version of the complaint and summons. As of January 08, 2017, the one-year mark was reached on which date the presumptive action in foreclosure became a non-action, never to be revived. Activity in the trial court after January 08, 2017, was not controlled by any authority, certainly not the Civil Rules. All activity of the named Defendant in the presumptive action after January 08, 2017, was inapplicable to the Civil Rules. Such activity after January 08, 2017, cannot constitute waiver under the Civil Rules as such rules are inapplicable as no litigants exist in a non-action.

The trial court and the appellate court both chose to ignore the fact that the presumptive action failed to commence and hence was dead. Instead, these courts both chose to determine that certain filings by the previously named Defendant in the presumptive action constitutes implicit waiver of personal jurisdiction although filed after the deadline of January 08, 2017.

This court must agree with the Civil Rules, case law and Ohio Constitution and find that no waiver of personal jurisdiction, implicit or otherwise occurred and that the order issued by the Writ Panel dismissing the complaint is void.

PROPOSITION OF LAW 6

Common Law and Statutory Law Recognize The Defense Of Failure Of Commencement As Being Distinct From Other Affirmative Defenses

Relator-Appellant cites the following case law examples from the Eighth District Court Of Appeals for support of her argument that Common Law and Statutory Law Recognize a distinction between failure of commencement and other affirmative defenses, particularly insufficiency of service. Restated, the following Eighth District Court of Appeals citations manifest that Civ.R. 3(A), as well as Civ.R. 4(E) are recognized in this Appellate District and that litigants *other* than the undersigned prevailed on their arguments of failure to commence when the one year limit has been exceeded.

> "The action would have been timely commenced with the filing of this complaint, but only 'if service [was] obtained within one year from such filing upon a named defendant ***.' Civ.R. 3(A). {¶ 12} The one year period for obtaining service under Civ.R. 3(A) cannot be extended. *Fetterolf v. Hoffman-LaRoche, Inc.* (1995), 104 Ohio App.3d 272, 277. Appellant did not obtain service on appellees within one year from the filing of the complaint in this case, so it is clear that the action was not 'commenced' with the filing of the complaint. *Pewitt v. Roberts*, 2005 Ohio 4298, 11-12 (Ct. App. 2005)

> "{¶ 2} 'A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant * * *.' Civ.R. 3(A). If service of process is not obtained within one year from the date of the filing of the action, the action has not 'commenced.' *See Saunders v. Choi*, 12 Ohio St.3d 247, 250, 466 N.E.2d 889 (1984). A failure of commencement means that no case comes into existence. *Id.*; *Kossuth v. Bear*, 161 Ohio St. 378, 384, 119 N.E.2d 285 (1954); *Buckeye Union Ins. Co. v. Sheppard*, 8th Dist. Cuyahoga No. 55782, 1989 WL 18922, at 1 (Mar. 2, 1989).{¶ 3} In the broad sense, 'service of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served.' *Miss.*

Publishing Corp. v. Murphree, 326 U.S. 438, 444-445, 66 S.Ct. 242, 90 L.Ed. 185 (1946). "{¶11} …The court erred by refusing to dismiss the action. *Maryhew v. Yova,* 11 Ohio St.3d 154, 159, 464 N.E.2d 538 (1984). "*Tadross v. Tadross,* 86 N.E.3d 827, 828, 830 2017 Ohio 930 (Ct. App. 2017)

"Appellants having failed to perfect service on any of the defendants within one year after the complaint was filed, the court never acquired personal jurisdiction over the defendants, and the action was never commenced within the meaning of Civ.R. 3(A). Therefore, the court properly dismissed the complaint." *DeFranco v. Shaker Square of Ohio LLC,* 158 Ohio App. 3d 105, 13, 2004 Ohio 3864 (Ct. App. 2004).

"'Effective service of summons on the defendant is a necessary prerequisite to the commencement of a civil action. Civ. R. 3(A).' *Lash* v. *Miller* (1977), 50 Ohio St. 2d 63, 65, 4 O.O. 3d 155, 156, 362 N.E. 2d 642, 643." *Harrell v. Guest,* 33 Ohio App. 3d 163, 514 N.E.2d 1137 (Ct. App. 1986).

"A court must have obtained personal jurisdiction over a party in order to render a valid personal judgment. See *Maryhew* v. *Yova* (1984), 11 Ohio St. 3d 154, 156, 11 OBR 471, 472, 464 N.E. 2d 538, 540." Id. At 164. "{¶ 33} In *Anderson v. Borg-Warner Corp.,* 8th Dist. Cuyahoga Nos. 80551 and 80926, 2003-Ohio-1500, 2003 WL 1561700, this court held that when a plaintiff duly files its complaint within the statute of limitations, but fails to obtain service within the one-year period required by Civ.R. 3(A), the action is not effectively commenced." *Khatib v. Peters*, 77 N.E.3d 461, 467, 2017 Ohio 95 (Ct. App. 2017).

"Pursuant to Civ.R. 3(A), all that is required for commencement of an action is the filing of a complaint with the court and the acquisition of jurisdiction over the person of the defendant within one year thereafter. *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 157, 11 OBR 471, 473, 464 N.E.2d 538, 541." *Winters v. Hubbard,* 104 Ohio App. 3d 420, 422, 662 N.E.2d 95 (Ct. App. 1995).

The Appellate Panel substituted the argument made by Relator-Appellant that the alleged trial court action *failed to commence* with *insufficiency of service*. It is well established that an appellate panel must pass on each assignment of error. App.R. 12(A)(1)(c). It is not the role of the appellate court to fashion arguments for the appellant. This substitution of affirmative defense from failure of commencement to insufficiency of service had the result of eliminating the need to address the applicability of Civ.R. 3(A), R.C. 2305.17 in the alleged trial court action.

N.B. Filings were made by Defendant in the Trial Court pursuant to the Doctrine of the Duty to Mitigate Damages:

The duty to mitigate damages is the duty, or obligation, on the part of a person who has suffered injury or loss to take action to minimize further damage, injury or loss. A person is not allowed to stand idly by and watch further harm come to his or her property, or to otherwise passively allow additional costs or losses to occur. Everyone must use reasonable care and diligence to minimize damages by preventing additional damage, loss, or costs. In determining what action to take to mitigate damages, the "reasonable person" test is applied, i.e., what the hypothetical reasonable average person would do under similar circumstances.

Of particular significance is the fact that Defendant (Relator-Appellant) was not served nor was any attempt made by the trial court to notify her electronically or by mail or in any other manner of the magistrate's decision dated February 14, 2018 recommending summary judgment.

A reasonable person would certainly be concerned with how the trial court may or may not handle its own errors and omissions and take reasonable steps to mitigate damages, such as filing documents and certain acts of participation which do not equate with appearance; being a reasonable person, this is what Defendant (Relator-Appellant) did. Taking steps to have mitigated damages was particularly appropriate as courts are generally reticent to disturb or undo foreclosure sales which involve a third-party transaction. The trial and appeals court ignored the fact that summary judgment was never served.

This Court must find that such substitution of assignments of error violates App.R. 12(A)(1)(c) and vacate the judgment of the Appellate Panel for failure to adhere to the Law. This is not a harmless error, but one extremely prejudicial in nature and one which deprived Relator-Appellant of the appellate relief to which she is entitled by Law.

PROPOSITION OF LAW 7

A Court errs when it considers the journal entry and opinion based on a stated presumption another Court when uncontested sworn evidence exists in its own case in the form of a properly framed affidavit. Uncontested sworn statements in properly framed affidavits directly on point on a matter trumps a mere presumption; presumption does not rise to level of evidence. Evid.R. 301.

RULE 201. Judicial Notice of Adjudicative Facts

(A) Scope of rule. This rule governs only judicial notice of adjudicative facts; i.e., the facts of the case.

(B) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(C) When discretionary. A court may take judicial notice, whether requested or not.

(D) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(E) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(F) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

> "{¶2} The Supreme Court of Ohio has established that a court may take notice of a docket that is publicly available via the internet. *State ex rel. Everhart v. McIntosh,* 115 Ohio St.3d 195, 2007-Ohio-4798, 874 N.E.2d 516, ¶ 8, citing *Doe v. Golden & Walters, P.L.L.C.,* 173 S.W.3d 260, 265 (Ky.App.2005); *Leatherworks Partnership v. Berk Realty, Inc.,* N.D. Ohio No. 4:04 CV 0784, 2005 U.S. Dist. LEXIS 27887, 2 (Nov. 15, 2005). *See also Cornelison v. Russo,* 8th Dist. Cuyahoga No. 107283, 2018-Ohio-3574; *State v. Chairperson of the Ohio Adult Parole Auth.,* 10th Dist. Franklin No. 17AP-651, 2018-Ohio-1620, ¶ 23."

STATE EX REL. BANKS v. Comstock, 2018 Ohio 4796 (Ct. App. 2018).

The Appellate Panel in its ruling of January 09, 2020 stated that it presumed that Defendant-Appellant had received proper service by regular mail on January 18, 2017, Civ.R. 4.6(D) with reference to regular mail being an accepting form of service *when the Civil Rules are followed,* however, did not provide any explanation or mathematical calculation as to how the Civil rules on service could be construed as having been followed within the realm of possibility given the undisputed fact that no service was perfected within one year of filing the Complaint filing of January 8, 2016 and given the fact that both the date of praecipe for regular mail service of January 16, 2017 and the stated mailing date of January 18, 2017 of service via regular mail occurred after the one year time limitation from the date of filing the Complaint had expired, which does not comport with the dictates of Civ.R. 3(A), R.C. 2305.17. It is axiomatic that both the date of the

praecipe requesting service of January 16, 2017 and the date of regular mailing of January 18, 2017 are both more than one year from the date of filing January 8, 2016. No extension of Civ.R. 3(A) is permitted, *supra*. Defendant-Appellant was on record in properly submitted documents that she had not been served, including properly framed affidavits; Defendant-Appellant's sworn statement was not rebutted by Wells. Controlling case law states that in cases where the civil rules on service of process have been followed, an uncontradicted sworn rebuttal stating service was not perfected entitles the defendant to have the judgment against her vacated:

> "{¶ 13} Where the civil rules on service of process have been followed, there is a presumption of proper service unless the defendant rebuts this presumption with sufficient evidence of non-service. *Rafalski v. Oates* (1984), 17 Ohio App.3d 65, 66; *Grant v. Ivy* (1980), 69 Ohio App.2d 40. In *Rafalski* this court held: "Where a party seeking a motion to vacate makes an uncontradicted sworn statement that she never received service of a complaint, she is entitled to have the judgment against her vacated even if her opponent complied with Civ.R. 4.6 and had service made at an address where it could reasonably be anticipated that the defendant would receive it." 17 Ohio App.3d at 66. *Lakhodar v. Madani*, 2008 Ohio 6502 (Ct. App. 2008). "Thus, a trial court errs in summarily overruling a defendant's motion to set aside a judgment for lack of service, when the defendant submits a sworn statement that she did not receive service of process, without affording the defendant a hearing. Id." *Patterson v. Patterson*, 2005 Ohio 5352 (Ct. App. 2005) at ¶15.

In the alleged trial court case, as set forth above, the civil rules were not followed, thus no case came into existence and was a nullity. *Kossuth v. Bear*, 161 Ohio St. 378, 384, 119 N.E.2d 285 (1954). It is undisputed in the alleged trial court case that Wells Fargo did not perfect service within one year, and there is an uncontradicted sworn rebuttal that Defendant (Relator-Appellant) was not served with the TAC, for which the request to serve and mailing occurred after the time had expired to do so. R.C. 2305.17, Civ.R. 3(A). This is a good juncture to note that in the era of the General Code, sixty days were allotted to perfect service; now under the Revised Code a full year is allotted to perfect service and is deemed to be an eminently reasonable amount of time for that purpose.

COURT BASED ORDER/OPINION ON A PRESUMPTION WHICH IS NOT EVIDENCE IN THE FACE OF SWORN UNCONTESTED EVIDENCE

The issue of Civ.R. 4.6(D) arose during the appeal in the Eighth District Court of Appeals. In its ruling, i.e., journal entry and opinion below, the Eighth District Appellate Panel stated its presumption, an argument never made by Wells Fargo, that the filing of a motion by Relator-Appellant (proposed Defendant) on February 14, 2017, which is after Failure of Commencement occurred, made it "apparent" to the Eighth District that the Defendant had been served; Relator-Appellant (proposed Defendant) respectfully suggests this statement is based upon less than rigorous logic, for of course, the public has access to court records which the court makes available to the public via its website and indeed, Relator-Appellant (proposed Defendant), a member of the public, has made use of said access and in so doing discovered documents with which she had not been served. On this matter it is instructive to consider the insightful comment of Justice Evelyn Lundberg Stratton in the Oral Argument in *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714:

> Start Time: 18:29: Attorney Nick Papa for plaintiff-appellee Gliozzo: "...what the defendants have claimed is that they never received a copy of the complaint at all. They never received the interrogatories. Then somehow, an answer is filed. The notice that was sent out regarding this failure of service was sent out on January 12th.
>
> Justice Lundberg Stratton: "But if, if they heard through the grapevine that this had been filed and they went and pulled this from the court you aren't alleging that constitutes service are you?
>
> Attorney Nick Papa: "No I am not at all alleging that it constitutes service..."End Time: 19:02 http://www.ohiochannel.org/video/frank-gliozzo-v-university-urologists-of-cleveland-inc-et-al-case-no-2006-1166

Relator Not served with Third Amended Complaint; Presumption in Appeals case judgment Rebutted:

Relator rebutted the presumption of regular mail service by uncontested affidavit R.E. 11/27/2019 Emergency Verified Complaint for Writs of Prohibition and Alternative Writs of Prohibition p. 47 of the .pdf item #23 of Affidavit and p20 of .pdf item #8. Appeals Case R.E. 05/30/2018 Verified Emergency Motion p 9 ¶4, p10 ¶¶1-4, Appeals Case R.E. 07/09/2018

Appellant's Brief p1 ¶1 and in exquisite detail *passim*, *inter alia*, lower court R.E. 05/25/2019 Verified Motion for Stay p8 of the .pdf ¶1, *inter alia*. The Appeals Case judgment relied in part on an unsubstantiated presumption: ¶17. "Finally, we can presume proper service in this case." R.E. 01/09/2020 Appeals Case. This rebuttable presumption has been thoroughly rebutted, *supra*.

> "In *Ayers v. Woodard* (1957), 166 Ohio St. 138, 1 O.O.2d 377, 140 N.E.2d 401, this court stated: 'A presumption is a procedural device which is resorted to only in the absence of evidence by the party in whose favor a presumption would otherwise operate; and where a litigant introduces evidence tending to prove a fact, either directly or by inference, which for procedural purposes would be presumed in the absence of such evidence, the presumption never arises and the case must be submitted to the jury without any reference to the presumption in either a special instruction or a general charge.' *Id.* at paragraph three of the syllabus. "Id. *Cotterman* involved the presumption set forth in Ohio Adm. Code 5101:3-50-22(C). This court stated that the presumption 'would *ab initio* be inapplicable' where evidence was presented to rebut the presumption. *Cotterman v. Ohio Dept. of Pub. Welfare*, 28 Ohio St. 3d 256, 258, 503 N.E.2d 757, 759 (1986). The court's sole authority, and without comment, was *Ayers. Id.* "If one party relies on a presumption and his adversary introduces evidence of a substantial nature which counterbalances the presumption, it disappears." *Carson* v. *Metropolitan Life Ins. Co.* (1956), 165 Ohio St. 238, Evid. R. 301, Staff Note. "Evid.R. 301. In short, a presumption is not evidence and does not switch the burden of proof; it affects only the burden of going forward with evidence." *AMENT, Trustee, Appellant and Cross-Appellee, v. Reassure America Life Insurance Company et al., Appellees and Cross-Appellants. 180 Ohio App.3d 440 (2009) 2009-Ohio-36.* "However, a presumption may be rebutted." See Evid.R. 301.

Royster, Appellant v. Toyota Motor Sales, U.S.A., Inc., Appellee. 92 Ohio St.3d 327 (2001).

"Thus, a trial court errs in summarily overruling a defendant's motion to set aside a judgment for lack of service, when the defendant submits a sworn statement that she did not receive service of process, without affording the defendant a hearing. Id." *Patterson v. Patterson*, 2005 Ohio 5352 (Ct. App. 2005) at ¶15.

This Writ Panel erred in sua sponte taking judicial notice of the Journal Entry And Opinion And Judgment of the Appeals Court based on a mere presumption, not evidence, as the Writ Panel had uncontested sworn evidence in the case under its review. Such evidence clearly refuted the presumption. Evid.R. 301.

PROPOSITION OF LAW 8

A Writ of Prohibition May Prohibit Future Unlawful Activity and Vacate Prior Unlawful Activity in the Same Action

In *State ex rel Tubbs Jones vs. Suster,* 84 Ohio St.3d 70, 701 N.E.2d 1002 (1998), the Supreme Court set out the following standards for the granting of a writ of prohibition: In order for a writ of prohibition to issue, the relator must prove that (1) the lower court (or officer) is about to exercise judicial (or quasi-judicial) authority, (2) the exercise of authority is not authorized by law, and (3) the relator possesses no other adequate remedy in the ordinary course of law if the writ of prohibition is denied. *State ex rel. Keenan v. Calabrese*, 69 Ohio St.3d 176, 178, 631 N.E.2d 119, 121 (1994).

The Court in *State ex rel Tubbs Jones vs. Suster*, *supra*, went on to explain: Prohibition will not lie to prevent an anticipated erroneous judgment. *State ex rel. Heimann v. George*, 45 Ohio St.2d 231, 232, 344 N.E.2d 130, 131 (1976). However, we have created a limited exception in cases where there appears to be a total lack of jurisdiction of the lower court to act. Early cases referred to a "total want of jurisdiction" or to the court's being "without jurisdiction whatsoever to act." *State ex rel. Adams v. Gusweiler*, 30 Ohio St.2d 326, 329, 285 N.E.2d 22, 24 (1972) and paragraph two of the syllabus. Later cases defined this exception as a "'patent and unambiguous' lack of jurisdiction to hear a case." *Ohio Dept, of Adm. Serv, Office of Collective Bargaining v. State Emp. Relations Bd.*, 54 Ohio St.3d 48, 51, 562 N.E.2d 125, 129 (1990); *State ex rel. Tollis v. Cuyahoga Cty., Court of Appeals*, 40 Ohio St.3d 145, 148, 532 N.E.2d 727, 729 (1988). Therefore, in order for this Court to grant a writ of prohibition, this Court must find that (1) Respondent is about to exercise jurisdiction; (2) Respondent has a "patent and unambiguous" lack of jurisdiction to hear the case; and, (3) Relator has no adequate remedy at law. *State ex rel Tubbs Jones vs. Suster*, 84 Ohio St.3d 70, 701 N.E.2d 1002 (1998).

> "The final question for us arises from the alternative reason upon which the Court of Appeals based its dismissal of the action, i.e., that the Court of Common Pleas had acted prior to the filing of the complaint for a writ of prohibition. This reasoning is supported by the second sentence of the third paragraph of the syllabus of State, ex rel. Frasch, v. Miller (1933), 126 Ohio St. 287;

the second paragraph of the syllabus of Marsh v. Goldthorpe (1930), 123 Ohio St. 103; and the fifth paragraph of the syllabus of State, ex rel. Birckell, v. Roach (1930), 122 Ohio St. 117. However, in none of those cases was the rule, that prohibition may be invoked only to prevent a future act and not to undo an act already performed, necessary to its disposition. Our present opinion is that a strict adherence to that rule exalts form over substance, particularly where, as here, a total and complete want of jurisdiction by the lower 330*330 court is presented and the issuance of the writ will serve to arrest the authority to act of the arbitrator appointed by that court. See State, ex rel. Northern Ohio Telephone Co., v. Winter, supra (23 Ohio St. 2d 6), in which, after an ultra vires temporary injunction had been issued by the Court of Common Pleas, we granted a writ of prohibition which was effectual not only to prevent further action by that court but to invalidate the order already made. Thus, a court which has jurisdiction to issue the writ of prohibition as well as the writs of procedendo and mandamus has plenary power, not only to prevent excesses of lower tribunals, but to correct the results thereof and to restore the parties to the same position they occupied before the excesses occurred. The judgment below is vacated and the writ prayed for is allowed. Judgment vacated and writ allowed."

Gusweiler at 229-230.

A Writ of Prohibition is warranted in this instant case. Based upon all of the foregoing facts as stated in this document, this Court must issue such a writ and in doing so prevent future unlawful activity as well as undoing the prior unlawful actions of the trial court.

PROPOSITION OF LAW 9

Lack of Standing to Bring a Case Results in a Patent and Unambiguous Lack of Personal Jurisdiction

At oral argument in this instant case, Relator-Appellant (named Defendant-Appellant) was asked by the Appellate Panel for a citation "on which she hung her hat" pertaining to lack of admissibility of outside business records and was provided the citation *Ohio Receivables, LLC v. Williams*, 2013 Ohio 960 (Ct. App. 2013). Despite the Appellate Panel's question and the Relator-Appellant (named Defendant-Appellant's) answer, the Appellate Panel did not address this citation in its ruling of January 09, 2020. Had the Appellate Panel addressed the citation, it would have agreed with Relator-Appellant (named Defendant-Appellant) that the business records of prior lending institutions could not be authenticated by Wells Fargo Bank, N.A. in the absence of certified copies and in the absence of personal knowledge of the business record creation and

maintenance at World Savings Bank and Wachovia Bank — the prior and defunct lending institutions from which Wells Fargo Bank, N.A. obtained outside business records.

Relator will demonstrate below that the materials used by the bank, Wells Fargo Bank, N.A. in submitting materials alleged to be supportive of standing and for material to support its motion for summary judgment were not evidentiary-quality materials but simple copies of unauthenticated records alleged to be outside business records of World Savings Bank and its successor, Wachovia. Wells failed to properly authenticate business records as the statements of the affiant, Shae Smith, an employee of Wells, failed to meet the requirements of R.C. 2317.40, et seq. and of Evid.R. 803(6). "The testifying witness must possess a working knowledge of the specific record-keeping system that produced the document *** [and] 'be able to vouch from personal knowledge of the record-keeping system that such records were kept in the regular course of business." OHIO RECEIVABLES, LLC v. Williams, 2013-0hio-960 (Ct. App. 2013). Shae Smith did not state the mode of making the documents or establish a foundation that they were business records of Wells made in the normal course of business. Moreover, Shae Smith could not, as an employee of Wells alone, authenticate outside business records; that task would have to be completed by records custodians at World Savings Bank and separately at Wachovia and these institutions are no longer extant. Id.

Evid.R. 803(6)

The plaintiff, Wells, filed with its complaint simple copies of a note, mortgage, and merger documents. These simple copies without more are not competent evidence and thus inadmissible evidence to support standing and/or to support a motion for summary judgment. See Exhibits attached to the Complaint filed on January 8, 2016, lower court case CV 16-856890. Wells filed nothing more with its affidavit for summary judgment than the non-evidentiary quality documents that it filed with its complaint. Wells used double hearsay evidence for the dual purposes of proving standing to sue in foreclosure and for moving the court for an order granting summary judgment in foreclosure. The lower court erred in granting Wells summary judgment based on such

inadmissible evidence. Wells did not meet its R.C. 2317.40, et seq. and Evid.R. 803(6) burdens for records possibly created and maintained by Wells. Shae Smith, affiant, did not identify the mode of making the records or whether the records were even made at Wells. Wells did not and cannot via Wells' employee(s) alone authenticate business records created at World Savings Bank (originator of the note and mortgage) or at Wachovia (successor in general to World Savings Bank via acquisition of Golden West Financial Corporation its parent company). The admission of outside business records not authenticated as business records pursuant to Evid.R. 803(6) or R.C. 2317.40, *et seq*., is not permitted. As affidavits must be made on personal knowledge, such authentications must be made by the records custodians of each respective institution. Cf. Ohio Receivables, infra:

> {13} The hearsay exception relevant to this case is the business records exception. Evid.R. 803(6) provides that the following evidence is not excluded by the rule against hearsay: Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. * * *
>
> {14} The business records exception has an authentication requirement which must be met before the rule applies. HSBC Mtge. Servs., Inc. v. Edmon, 6th Dist. Erie No. E-l 1-046, 2012- Ohio-4990, H22; State v. Hirtzinger, 124 Ohio App.3d 40, 49, 705 N.E.2d 395 (2d Dist. 1997). "[T]he testifying witness must possess a working knowledge of the specific record-keeping system that produced the document * * * [and] 'be able to vouch from personal knowledge of the record-keeping system that such records were kept in the regular course of business."1 State v. Davis, 62 Ohio St.3d 326, 343, 581 N.E.2d 1362 (1991), quoting Dell Publishing Co., Inc. v. Whedon, 577 F.Supp. 1459, 1464 (S.D.N.Y.1984), fn. 5. Generally, the business record exception requires that some person testify as to the regularity and reliability of the business activity involved in the creation of the record. Hirtzinger at 49.
>
> {19} It was not necessary that an employee or agent of Ohio Receivables possess personal knowledge of these facts, but it was necessary for Ohio Receivables to prove, by some means, that the documents on which Ohio Receivables sought to

rely as its business records were first business records created and maintained by Chase in the course of its (Chase's) regularly conducted business.

{20} Ohio Receivables's affidavits stating that the documents were received by Chase as part of the series of purchases of the accounts were insufficient to prove this fact. It is beyond dispute that, if Chase had sought to collect against Williams directly, it would have been required to establish the admissibility of records like the ones offered into evidence by demonstrating that they were business records. We see no reason why its assignee should be held to a lesser standard. A contrary rule "would inappropriately provide litigants with a means of avoiding rules governing the admission of evidence such as hearsay." United States v. Irvin, 682 F.3d 1254, 1262 (10th Cir. 2012), citing United States v. Samaniego, 187 F.3d 1222,1224 (10th Cir. 1999).

{21} We recognize that some courts have established a different rule for "adoptive business records," where records created by a third party, such as a predecessor in interest, have been incorporated into the business records of the assignee. See, e.g., Ohio Receivables, L.L.C, v. Dallariva, 10th Dist. Franklin No. 11AP-951, 2012-Ohio-3165, 21 (admitting records prepared by the creditor's predecessors-in-interest and attached to the affidavit of creditor's record custodian under "adoptive business records hearsay exception doctrine"). These cases conclude that Evid.R. 806(3) "permits exhibits to be admitted as business records of an entity even when the entity was not the maker of the records, so long as the other requirements of [Evid.R. 803(6)] are met and circumstances indicate the records are trustworthy," Id. at 20, citing Shawnee Assocs., L.P. v. Shawnee Hills, 5th Dist. No. 09-CAE-05 0051, 2010-Ohio-1183, 50, and that "[r] ecords need not be actually prepared by the business offering them if they are received, maintained, and relied upon in the ordinary course of business" and "incorporated into the business records of the testifying entity." Id. (Some internal citations omitted.) See, also, State Farm Mut. Auto. Ins. Co. v. Anders, 197 Ohio App.3d 22, 2012-Ohio-824, 965 N.E.2d 1056, 17-19 (10th Dist.) ("Numerous federal courts have addressed whether documents may be admitted as business records of an entity other than the maker" and "have permitted admission of documents incorporated into a business's records, although prepared by third parties," rejecting "the 'anachronistic rule' that once required foundational testimony to be given by the preparer of a business record.").

{22} Anders' reference to an "anachronistic rule" cites United States v. Irvin, 656 F.3d 1151 (10th Cir. 2011), which was superseded on rehearing by United States v. Irvin, 682 F.3d 1254 (10th Cir. 2012). This case dealt with boxes of "loan files" which pertained to allegedly fraudulent home sales. Although the government in Irvin sought to admit a summary of the loan files under Evid.R. 1006, we see no meaningful evidentiary distinction between an Evid.R. 1006 summary and the 50-page spreadsheet reflecting the accounts sold by Chase to Global and then to Ohio Receivables and from which Ohio Receivables sought to parse out Williams's account. The documents summarized must themselves be admissible. Id. at 1261-1262. The admission of the summary in Irvin was found to be error.

Ohio Receivables, LLC v. Williams, 2013 Ohio 960 (Ct. App. 2013).

R.C. 2317.40 *et seq.* Records as evidence.

> As used in this section "business" includes every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not. A record of an act, condition, or event, in so far as relevant, is competent evidence if the custodian or the person who made such record or under whose supervision such record was made testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission. This section shall be so interpreted and construed as to effectuate its general purpose to make the law of this state uniform with those states which enact similar legislation. Effective Date: 09-16-1957.

Shae Smith did not adhere to R.C. 2317.40 that requires "A record of an act, condition, or event, in so far as relevant, is competent evidence if the custodian or the person who made such record or under whose supervision such record was made testifies to its identity and the mode of its preparation." Affidavit of Relator TJ10, Affidavit of Shae Smith for summary judgment.

R.C. 2317.41 Photographic copies of records admissible as competent evidence.

> "Photograph" as used in this section includes but is not limited to microphotograph, a roll or strip of film, a roll or strip of microfilm, a photostatic copy, or an optically-imaged copy. To the extent that a record would be competent evidence under section 2317.40 of the Revised Code, a photograph of such record shall be competent evidence if the custodian of the photograph or the person who made such photograph or under whose supervision such photograph was made testifies to the identity of and the mode of making such photograph, and if, in the opinion of the trial court, the record has been destroyed or otherwise disposed of in good faith in the regular course of business, and the mode of making such photograph was such as to justify its admission. If a photograph is admissible under this section, the court may admit the whole or a part thereof. Such photograph shall be admissible only if the party offering it has delivered a copy of it, or so much thereof as relates to the controversy, to the adverse party a reasonable time before trial, unless in the opinion of the court the adverse party has not been unfairly surprised by the failure to deliver such copy. No such photograph need be submitted to the adverse party as prescribed in this section unless the original instrument would be required to be so submitted. Effective Date: 10-04-1996.

Shae Smith did not adhere to R.C. 2317.41 requirements pertaining to identifying who made the photographic copy, under whose supervision the copy was made and by what mode of preparation. Affidavit of Relator 1.9, Affidavit of Shae Smith for summary judgment. Shae Smith did not adhere to R.C. 2317.41 requirements to state that the record has been destroyed or otherwise disposed of in good faith in the regular course of business, to justify admission of a photographic image. As Wells did not and apparently cannot or will not take steps to authenticate the documents allegedly acquired by merger and name change from World Savings Bank and from Wachovia, then Wells cannot prove an unbroken chain of custody of the documents and further cannot prove that they are business records made in the normal courses of business at World Savings Bank and Wachovia. In order to authenticate records from World Savings Bank as its business records pursuant to Evid.R. 803(6), a custodian of the now defunct institution would have to swear to Evid.R. 803(6) requirements in an affidavit. This could not be done with an employee of Wells who has no personal knowledge of the record keeping system and business practices at World Savings Bank. In order to authenticate records from Wachovia as its business records pursuant to Evid.R. 803(6), a custodian of the now defunct institution would have to swear to 803(6) requirements in an affidavit. This could not be done with an employee of Wells who has no personal knowledge of the record keeping system and business practices at Wachovia. Relator's full critique of the Shae Smith affidavit based on Relator's personal knowledge of reviewing the Shae Smith affidavit is present in Relator's affidavit.

LACK OF EVIDENTIARY QUALITY MATERIAL TO PROVE STANDING AND/OR TO OBTAIN AN ORDER OF SUMMARY JUDGMENT

Wells Fargo Bank, N.A. in its affidavits only spoke of "copies" of a note a mortgage and conceded that they did not originate the documents. The affiant, Shae Smith, did not and cannot state on the basis of personal knowledge how or when the documents were created or maintained, as Shae has never been an employee of Wachovia or World, predecessors to Wells. Despite the

lack of personal knowledge of Shae Smith and despite the lack of commencement of the action filed by Wells on January 08, 2016, the lower court granted summary judgment.

PROPOSITION OF LAW 10

It is axiomatic that a response (objection) to a Magistrate's order or decision is not due prior to service of the order or decision on the litigant

Respondent-Appellant (proposed Defendant) was never served with magistrate's decision of summary judgment; Official Court Record Shows Said Decision was Never Sent to Relator-Appellant (proposed Defendant): R.E. appellate case 11/27/2019 Emergency Verified Complaints for Writs pp.22-23 of the .pdf item# 12. The Writ Panel took judicial notice of the journal entry and opinion of the Appellate Panel whose adverse ruling in part included refusing to perform a de novo review of the order of summary judgment alleging that the named Defendant in the trial court failed to respond to the Magistrate's Decision of Foreclosure. Appendix 2 Journal Entry of Appellate Panel ¶¶10-11. In fact, the named Defendant was never mailed or emailed a copy of the Magistrate's Decision upon which the Judge's order of summary judgment was based. Trial court docket record entries of February 14 and 16, 2018 unequivocally show that defendant was never served with the magistrate's decision of summary judgment of foreclosure which occurred after the failure of commencement accrued. This is not simply an *ipse dixit* statement, the official Court docket record is clear that between those two dates seventeen (17) notices of said magistrate's decision were sent, *none* of which was directed to the Relator-Appellant (proposed Defendant. R.E. 9/12/2018 Appeals case Verified Motion pp. 33 and 34 of the .pdf. Furthermore, when Relator-Appellant (proposed Defendant) finally learned of said magistrate's decision and filed an objection containing authenticated court evidence that she had not been served, the trial court struck said objection for the sole reason of being "untimely." Appeals Case J.E. 01/09/2020 ¶9. While all court documents are important, surely a magistrate's decision of summary judgment is crucial to a foreclosure case; the fact that undisputed evidence in the official record shows that Relator-Appellant (proposed Defendant) was never served with the magistrate's decision of

summary judgment and that the lower court would strike a document containing record evidence from the same court that that the clerk of court did not send service to defendant is beyond disconcerting. Relator-Appellant (proposed Defendant) has brought this serious matter to the attention of the trial court, Appellate and Writ panels, R.E. Writ Case 11/27/2019 Verified Emergency Complaint For Writ Of Prohibition pp. 22-23 of the .pdf item #12. R.E. 09/13/2018 Verified Emergency Motion of Defendant Cynthia Lundeen to Stay Execution p11 ¶¶ 1-2, *inter alia,* and the Appeals Court R.E. May 30, 2018 Verified Emergency Motion of Defendant Cynthia Lundeen to Stay Execution Pending Appeal p37 of the .pdf, (attachment to the affidavit) ¶¶2-3 cont'd to p38 of the .pdf ¶¶1-3, Appellant's Brief R.E. 07/09/2018, brief p6 ¶1*inter alia, with Affidavits* on more than one occasion; this serious issue remains unaddressed by either court as of the date of this writing.

Applying the Reasonable Person test, the obvious inequity of a Court basing an Opinion and Judgment on a lack of an objection to a document which reliable and sworn court evidence proves had never been served nor sent in any manner to Defendant by the Clerk of Court would be apparent to all and "if left uncorrected, would have a material adverse effect on the character of, and public confidence in, judicial proceedings." *Goldfuss v. Davidson*, 79 Ohio St. 3d 116, 679 N.E.2d 1099, 1997 Ohio 401 (1997)

This Court must find that the Magistrate's Decision was never served on Relator-Appellant and vacate the order of summary judgment issued by Judge Burnside which flowed from said Magistrate's Decision.

PROPOSITION OF LAW 11

Court errs when it considers the availability or adequacy of a remedy of appeal material, when patent and unambiguous lack of personal jurisdiction makes it immaterial

While Respondents argue that in the Appeals case Relator has an adequate remedy at law, it is well settled law that in the face of a court *patently and unambiguously lacking personal jurisdiction,* such otherwise adequate remedy is immaterial. This is so well established with Ohio

Supreme Court case law that no further discussion is needed, other than to reference several of the prodigious citations:

> "If an inferior court is without jurisdiction whatsoever to act, the availability or adequacy of a remedy of appeal to prevent the resulting injustice is immaterial to the exercise of supervisory jurisdiction by a superior court to prevent usurpation of jurisdiction by the inferior court. See *State, ex rel. Northern Ohio Telephone Co., v. Winter* (1970), 23 Ohio St. 2d 6. See, also, *Hall v. American Brake Shoe Co.* (1968), 13 Ohio St. 2d 11, 13."

State, ex rel. Adams v. Gusweiler, 30 Ohio St. 2d 326, 329, 285 N.E.2d 22 (1972).

> "{¶ 37} .... The only exception is that we will issue a writ of prohibition regardless of the existence of an adequate remedy at law when a court patently and unambiguously lacks jurisdiction. It is a set of rules that we have cited over and over again and that we apply in case after case. *See, e.g., State ex rel. Adams v. Gusweiler,* 30 Ohio St.2d 326, 329, 285 N.E.2d 22 (1972); *State ex rel. Lewis v. Moser,* 72 Ohio St.3d 25, 28, 647 N.E.2d 155 (1995); *State ex rel. Durrani v. Ruehlman,* 147 Ohio St.3d 478, 2016-Ohio-7740, 67 N.E.3d 769, ¶ 13, 17."

State, ex rel. McGirr et al. v. Winkler, 152 Ohio St. 3d 100, 107-108, 2017 Ohio 8046, 93 N.E.3d 928 (2017).

Based upon the facts set forth in this document and the record on appeal, this Court must find that the Writ Panel erred when it found that an appeal of the trial court alleged action is an available and adequate remedy in order to deny issuance of the requested Writ of Prohibition and grant the extraordinary relief requested by Relator-Appellant.

PROPOSITION OF LAW 12

A Complaint for Writ of Prohibition is Not Moot when an exigent situation removed, is likely to recur

Mootness is an issue when an element necessary to maintain an action is no longer present, but the promise of reappearance has made itself clearly manifest. The elements necessary to sustain a complaint for a writ of prohibition include the following elements: 1) the court or officer against whom it is sought is about to exercise judicial or quasi-judicial power; 2) the exercise of such power is unauthorized by law; and 3) it will result in injury for which no other adequate remedy

exists. *State ex rel Tubbs Jones vs. Suster*, 84 Ohio St.3d 70, 701 N.E.2d 1002 (1998). The noted exception is in the patent and unambiguous lack of personal jurisdiction. *See, e.g., State ex rel. Adams v. Gusweiler*, 30 Ohio St.2d 326, 329, 285 N.E.2d 22 (1972); *State ex rel. Lewis v. Moser*, 72 Ohio St.3d 25, 28, 647 N.E.2d 155 (1995); *State ex rel. Durrani v. Ruehlman*, 147 Ohio St.3d 478, 2016-Ohio-7740, 67 N.E.3d 769, ¶ 13, 17."

When Relator-Appellant filed her first complaint for a writ of prohibition, the third Sheriff's sale order was pending. However, the plaintiff Wells Fargo in the trial court in case 16-856890 on November 7, 2018 filed a Motion to Return Order of Sale without Execution providing as its sole reason that Wells Fargo "wishes to refrain from executing on its Judgment, pending the outcome of ongoing litigation." R.E. Writ Case COA 19-109240 December 26, 2019 Response in Opposition Exhibit AA of attached Affidavit, Exhibit A pp. 19-21 of the .pdf. Said motion was granted Exhibit BB, *ibid*., p. 20.

In successfully recalling the third Sheriff sale order, Wells Fargo removed any argument of an exigent situation and Wells Fargo's statement to the trial court that it wished to refrain from executing on its judgment removed any argument for the Relator to seek appeal to this Court as the Wells Fargo's statement taken at face value at that time made the matter moot. Circumstances are different at this time.

After the order granting Wells Fargo's motion to recall the third scheduled Sheriff's sale, Wells Fargo belied its statement to the trial court within less than 24 hours after the Relator's deadline for appeal expired by filing anew for a fourth Sheriff's sale of said property. R.E. Writ case, 11/27/2019, Verified Complaint for Writs of Prohibition, p. 51 of the .pdf displaying R.E. Trial court docket 11/20/2018.

Then, Wells Fargo, proposed Appellee-Intervener in the Writ case 19-109240 from which this appeal is taken, stated in its motion to intervene that a Writ of Prohibition will prevent Wells Fargo from executing on its judgment, taking a contrary position in stark violation of the doctrine of judicial estoppel. Wells Fargo, proposed Appellee-Intervener in the Writ case, provided as a reason to the Writ Panel that it believes a writ of prohibition would impede its ability to execute on the

very judgment which Wells Fargo, Plaintiff advised the trial court it wished to refrain from executing, as described above. R.E. Writ case, 12/16/2019, Motion to Intervene, p. 4 of .pdf.

The Writ Panel in its *sua sponte* dismissal stated:

> "{¶10} Lundeen has not alleged any changes in circumstance between the prior original action and the present action, and the arguments advanced are the same. Therefore, Lundeen obviously cannot prevail in the present action. The respondent judge still has general subject-matter jurisdiction over foreclosure actions,.."

The circumstances are changed due to the stated likelihood of recurrence of an exigent situation, but also, and very importantly, in the prior original action referred to by the Writ Panel, the matter of lack of personal jurisdiction went wholly unaddressed, with only an obvious conclusion that the Court of Common Pleas has general subject matter jurisdiction over foreclosure actions.

N.B. In cases of lack of standing, while a court may have general subject matter jurisdiction over foreclosure actions, it does not have specific subject matter jurisdiction over cases where there is lack of standing to bring the case. J. Patrick Browne, Being And Nothingness: Commencement And The Application Of Ohio Civil Rules 3(A) and 4(E), 33 Clev. St. L. Rev. 245 (1984-1985) p. 290.

Therefore, the Complaint for a Writ of Prohibition against Respondent-Appellee Judge Turner and Respondent-Appellee Sheriff Shilling is not moot as Wells Fargo, by reversal of its position, has made clearly that an exigent situation is likely to recur. Clearly, the principle of judicial estoppel must prevail and the matter of the likelihood of a recurrence of an exigent situation is not moot and has made itself manifest as described, *supra*. A Writ of Prohibition should issue or this Court may find the entire matter void for lack of commencement and strike from the court dockets at all levels.

PROPOSITION OF LAW 13

The inherent power of the Court permits the Court to vacate a void order without resort to Civ.R. 60(B)

The complaint and summons, as well as the three successive amended complaints in the trial court never resulted in a valid or viable action. Any presumptive case attempted by the trial court Plaintiff Wells Fargo never materialized for want of personal jurisdiction of the trial court over the named Defendant (Relator-Appellant). The Plaintiff in the trial court failed to ever perfect service on the named Defendant in the trial court. Civ.R. 3(A), Civ.R. 4.6(D), R.C. 2305.17, *inter alia.* The named Defendant never made an appearance, signed any waiver of service, took any action or failed to take a necessary action which implicitly waived personal service. Civ.R. 4(D), Civ.R. 12(G), Civ.R. 12(H), Civ.R. 4.6(D), *inter alia.*

For complete and total want of personal jurisdiction, all orders and judgments rendered to date are void *ab initio. Tavern v. Snader*, 165 Ohio St. 61, 64, 133 N.E.2d 606 (1956).

> "It is axiomatic that for a court to acquire jurisdiction there must be a proper service of summons or an entry of appearance, and a judgment rendered without proper service or entry of appearance is a nullity and void." *Westmoreland v. Valley Homes Mutual Housing Corp.*, 42 Ohio St. 2d 291, 294, 328 N.E.2d 406 (1975).

> "{¶ 36} Ohio appellate courts have uniformly recognized that void judgments do not constitute final, appealable orders. See generally *Brown v. Brown*, 183 Ohio App.3d 384, 2009-Ohio-3589, 917 N.E.2d 301, ¶ 21; *State v. Gilmer*, 160 Ohio App.3d 75, 2005-Ohio-1387, 825 N.E.2d 1180, ¶ 6; *State v. Whitehouse*, Lorain App. No. 09CA009581, 2009-Ohio-6504, 2009 WL 4758812, ¶ 8; *Pauer v. Langaa*, Cuyahoga App. No. 83232, 2004-Ohio-2019, 2004 WL 859174, ¶ 12; *Reed v. Montgomery Cty. Bd. of Mental Retardation & Dev. Disabilities* (Apr. 27, 1995), Franklin App. No. 94APE10-1490, 1995 WL 250810, *4." *State ex rel. Carnail v. McCormick*, 126 Ohio St. 3d 124, 131, 2010 Ohio 2671, 931 N.E.2d 110 (2010).

Ohio law permits appellate review of final appealable orders.

> "Appeals as a matter of right may be taken to the Supreme Court in cases originating in courts of appeals, including actions involving extraordinary writs. Section 2(B)(2)(a)(i), Article IV, Ohio Constitution. R.C. 2505.03 limits the appellate jurisdiction of any court, including the Supreme Court, to the review of final orders, judgments, or decrees. *Wright*, 75 Ohio St.3d at 84, 661 N.E.2d at 545*545 731. R.C. 2505.02 defines a 'final order that may be reviewed, affirmed, modified, or reversed, with or without retrial' as '[a]n order that affects a substantial right in an action which in effect determines the action and prevents a judgment, an order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order that vacates or sets

> aside a judgment or grants a new trial * * *.'The two categories of final orders that might apply to the court of appeals' order are (1) orders that affect a substantial right in an action which in effect determine the action and prevent a judgment, and (2) orders that affect a substantial right made in a special proceeding. R.C. 2505.02. Both of these categories require that the order affect a substantial right in order to be final and appealable. A 'substantial right' for purposes of R.C. 2505.02 is a legal right enforced and protected by law. *State ex rel. Hughes v. Celeste* (1993), 67 Ohio St.3d 429, 430, 619 N.E.2d 412, 414; *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94, 540 N.E.2d 1381, 1383. Here, the court of appeals' order granting extraordinary relief in mandamus affects substantial rights of the parties."

State ex rel. White v. Cuyahoga Metro. Hous. Auth., 79 Ohio St. 3d 543, 544-545, 684 N.E.2d 72, 1997 Ohio 366 (1997).

The inherent power of the Court permits the Court to vacate a void order without resort to Civ.R. 60(B).

> "Consequently, the authority to vacate a void judgment is not derived from Civ. R. 60(B), but rather constitutes an inherent power possessed by Ohio courts. See Staff Notes to Civ. R. 60(B); *Lincoln Tavern, Inc.* v. *Snader* (1956), 165 Ohio St. 61, 59 O.O. 74, 133 N.E. 2d 606, paragraph one of the syllabus; *Westmoreland* v. *Valley Homes Corp.* (1975), 42 Ohio St. 2d 291, 294, 71 O.O. 2d 262, 264, 328 N.E. 2d 406, 409. It was neither incumbent upon appellee to establish a basis for relief under Civ. R. 60(B) nor was it necessary for the common pleas court to derive its authority therefrom. Rather, the 'judgment' sought to be vacated constituted a nullity."

Patton v. Diemer, 35 Ohio St. 3d 68, 70, 518 N.E.2d 941 (1988)

On the basis that the order of the lower court which dismissed this complaint for a writ of prohibition is void for recognizing personal jurisdiction of the trial court found by the Appellate Panel by mere presumption, not by any evidence, this Court should either vacate said order of the Writ Panel and remand for issuance of requested extraordinary relief or rule directly that the trial court never attained personal jurisdiction over the named Defendant to issue any order impacting her substantive rights and strike the presumptive action from the dockets of the trial court and appellate court and take no further action.

PROPOSITION OF LAW 14

If court refuses to abide by the Civil Rules governing jurisdiction then the resulting order is a nullity and void

"It is axiomatic that for a court to acquire jurisdiction there must be a proper service of summons or an entry of appearance, and a judgment rendered without proper service or entry of appearance is a nullity and void." *Tavern v. Snader, supra,* at 64, directs that the void order is a nullity and void.

In the trial court no service was ever perfected on the named Defendant (Relator-Appellant). This appears in sworn statements in affidavits in the two cases in this Court. No entry of appearance nor waiver of any type occurred at any time. The presumptive case failed to commence and never took a breath. The trial court and the Appellate Panel insist that waiver in one form or another occurred when the record is clear—no waiver occurred, and no service was perfected. The Writ Panel erred by accepting the journal entry and opinion of the Appellate Panel when it had sworn evidence to the contrary already contained in the case under its review.

Subject matter jurisdiction of the trial court is general. Jurisdiction over the person is also required to issue valid, non-void orders. Jurisdiction over the person, the named Defendant, never was realized by the trial court. The orders of the trial court are nullities and void. All appellate orders which affirm the trial court's decision and orders are nullities and void as well.

This Court must find that personal jurisdiction was never realized, implicitly or explicitly, pertaining to the named Defendant (Relator-Appellant). Then, this Court must reverse the Writ Panel having found that the Writ Panel erred when it took judicial notice of the ruling of the Appellate Panel who erred in finding that waiver occurred when it did not. This Court must issue the requested extraordinary relief.

Respectfully submitted,

/s/ *Cynthia Lundeen*
Cynthia Lundeen, *pro se*
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th Day of August, 2020, I electronically filed the foregoing document, Merit Brief, with the Clerk of Courts using the e-filing system, and have sent notification of such filing to the attorneys of record listed below via e-mail and regular U.S. mail, postage prepaid:

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APPENDIX

January 24, 2019 Journal Entry Writ Case Eighth District

January 09, 2019 Journal Entry Appellate Case Eighth District

April 13, 2018 Journal Entry Summary Judgment CCCCP

App.R. 12(A)(1)(c)

Civ.R. 3

Civ.R. 4

Civ.R. 4.6

Civ.R. 7

Civ.R. 12

Civ.R. 41

Civ.R. 56

Evid.R. 201

Evid.R. 301

Evid.R. 803(6)

Evid.R. 901(B)(10)

R.C. 2305.17

R.C. 2305.19

R.C. 2317.40

R.C. 2317.41

R.C. 2505.02

R.C. 2505.03

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

CYNTHIA LUNDEEN, :

Relator, :

No. 109240

v. :

JUDGE DEBORAH TURNER ET AL., :

Respondent. :

JOURNAL ENTRY AND OPINION

JUDGMENT: COMPLAINT DISMISSED
DATED: January 24, 2020

Writ of Prohibition
Motion No. 534529
Order No. 534540

Appearances:

Cynthia Lundeen, *pro se.*

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Michael J. Stewart, Assistant Prosecuting Attorney, *for respondent.*

MARY EILEEN KILBANE, P.J.:

{¶ 1} Relator, Cynthia Lundeen, seeks a writ of prohibition against respondents, Judge Deborah M. Turner and Sheriff David G. Schilling, Jr. Lundeen argues that respondent judge lacks jurisdiction over a foreclosure action pending

before her in *Wells Fargo Bank v. Lundeen*, Cuyahoga C.P. No. CV-16-856890 (the "Foreclosure Case"). Therefore, Lundeen argues, orders entered in that case must be vacated—including the order directing the real property involved in the Foreclosure Case be sold at sheriff's sale by the respondent sheriff. This action is moot in light of this court's decision in *Wells Fargo Bank v. Lundeen*, 8th Dist. Cuyahoga No. 107184, 2020-Ohio-28 (the "Lundeen Appeal"). There, Lundeen raised the same arguments she now asserts here, and those arguments were rejected by this court. As a result, the motion to intervene filed by putative intervenor, Wells Fargo Bank, N.A., ("Wells Fargo") is denied as moot. Respondents' motion to dismiss is also denied as moot.

Factual and Procedural History

{¶ 2} On November 27, 2019, Lundeen filed a complaint for writ of prohibition along with an emergency motion for alternative writ to stay the pending sale of her home by the respondent sheriff, scheduled for December 2, 2019. This court issued an alternative writ staying the sheriff's sale during the pendency of this action. Wells Fargo filed a motion to intervene with attached motion to dismiss on December 16, 2019. Respondents also filed a motion to dismiss on December 19, 2019, which was opposed by Lundeen.

{¶ 3} Lundeen's claims in her complaint stem from a foreclosure action filed by Wells Fargo. Her complaint in the present action asserts that Wells Fargo failed to properly initiate the Foreclosure Case by obtaining service on her within one year. She claims that as a result, all orders entered by respondent judge in the

Foreclosure Case are void, and the respondent judge does not have jurisdiction over the action. She also claims that the evidence offered by Wells Fargo in support of its claims in that action constitutes inadmissible evidence under Evid.R. 803(6) and R.C. 2317.40.

{¶ 4} The Foreclosure Case resulted in a judgment in favor of Wells Fargo. Lundeen appealed that decision to this court in the Lundeen Appeal. In that appeal she presented the same arguments she now relies on in this original action to claim that respondent judge lacks jurisdiction.[1] On January 9, 2020, this court issued an opinion rejecting Lundeen's arguments raised in the Lundeen Appeal and affirmed the trial court's grant of summary judgment. *Lundeen,* 8th Dist. Cuyahoga No. 107184, 2020-Ohio-28, at ¶ 13, 21, and 29.

Law and Analysis

Motion to Intervene

{¶ 5} We will first address a motion to intervene filed by the putative intervenor, Wells Fargo, on December 16, 2019. Pursuant to Civ.R. 24, a party with an interest in litigation may move to intervene by filing a motion to intervene with an attached pleading specified in Civ.R. 7(A). Civ.R. 24(C). However, Wells Fargo's present motion is moot based on the sua sponte dismissal of this action.

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[1] The Ohio Supreme Court has held that a court may take judicial notice of a docket that is publicly available via the internet. *State ex rel. Everhart v. McIntosh,* 115 Ohio St.3d 195, 2007-Ohio-4798, 874 N.E.2d 516; *State v. Chairperson of the Ohio Adult Parole Auth.,* 2018-Ohio-1620, 96 N.E.3d 303 (10th Dist).

Writ of Prohibition

{¶ 6} A "writ of prohibition has been defined in general terms as an extraordinary judicial writ issuing out of a court of superior jurisdiction and directed to an inferior tribunal commanding it to cease abusing or usurping judicial functions." *State ex rel. Burtzlaff v. Vickery*, 121 Ohio St. 49, 50, 166 N.E. 894 (1929). In order to be entitled to a writ of prohibition, a relator is required to show by clear and convincing evidence that "(1) the lower court is about to exercise judicial authority, (2) the exercise of authority is not authorized by law, and (3) the relator possesses no other adequate remedy in the ordinary course of law if the writ of prohibition is denied." *State ex rel. Keenan v. Calabrese*, 69 Ohio St.3d 176, 178, 631 N.E.2d 119 (1994). Such a writ is only appropriate where a lower court has exceeded its jurisdiction. Generally, a challenge to a court's jurisdiction in prohibition is a challenge that relates only to a court's subject-matter jurisdiction. *State ex rel. Eaton Corp. v. Lancaster*, 40 Ohio St.3d 404, 409, 534 N.E.2d 46 (1988).

{¶ 7} Lundeen's claim that respondent judge lacks jurisdiction based on the failure of Wells Fargo to properly perfect service on her in the Foreclosure Case has been rejected by this court in the Lundeen Appeal.[2] *Lundeen*, 8th Dist. Cuyahoga No. 107184, 2020-Ohio-28, at ¶ 20. Therefore, this question is moot. A "moot question" is defined as, among other things:

---

[2] Further, this argument does not relate to a court's subject-matter jurisdiction, but the jurisdiction a court has over the parties.

> A question which does not rest upon existing facts or rights; a question as to which in reality there is no actual controversy existing; a question which involves no right actually asserted and contested. * * * A question which has lost significance because of a change in the condition of affairs between the parties, whether before or after the commencement of the action.

(Citations omitted.) *Ballentine's Law Dictionary* (3d Ed.2010). "An event that causes a case to become moot may be proved by extrinsic evidence." *State ex rel. Hawkins v. Haas*, 141 Ohio St.3d 98, 2014-Ohio-5196, 21 N.E.3d 1060, ¶ 4, fn. 1, citing *State ex rel. Brown v. Ohio Dept. of Rehab. & Corr.*, 139 Ohio St.3d 433, 2014-Ohio-2348, 12 N.E.3d 1187, ¶ 2, fn. 1, citing *Pewitt v. Lorain Corr. Inst.*, 64 Ohio St.3d 470, 472, 597 N.E.2d 92 (1992). Lundeen's claims are moot because they have been resolved by this court in the Lundeen Appeal, and not in her favor.

{¶ 8} Even if the case were not moot as a result of the holdings in the Lundeen Appeal and there were something left to decide, Lundeen obviously cannot prevail in the present action. This constitutes grounds for this court to sua sponte dismiss this original action. A court may do so when "after presuming the truth of all material factual allegations of [relators'] petition and making all reasonable inferences in their favor, it appear[s] beyond doubt that they could prove no set of facts entitling them to the requested extraordinary relief in prohibition." *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923, ¶ 14, citing *State ex rel. Brady v. Pianka*, 106 Ohio St.3d 147, 2005-Ohio-4105, 832 N.E.2d 1202, ¶ 6. "Sua sponte dismissal without notice is warranted when a complaint is frivolous or the claimant obviously cannot prevail on the facts alleged

in the complaint." *Id.*, citing *State ex rel. Duran v. Kelsey*, 106 Ohio St.3d 58, 2005-Ohio-3674, 831 N.E.2d 430, ¶ 7.

{¶ 9} Lundeen's claims raised in the instant complaint are the same as those raised in an earlier original action she filed in this court in *State ex rel. Lundeen v. Burnside*, 8th Dist. Cuyahoga No. 107657, 2018-Ohio-4122. In the previous original action, Lundeen sought a writ of prohibition against the judge presiding over the Foreclosure Action at that time. *Id.* at ¶ 1. This court dismissed the complaint, finding that the respondent judge had general subject matter jurisdiction over foreclosure actions, and Lundeen had an adequate remedy at law evident in her then pending appeal. *Id.* at ¶ 2-4.

{¶ 10} Lundeen has not alleged any changes in circumstance between the prior original action and the present action, and the arguments advanced are the same. Therefore, Lundeen obviously cannot prevail in the present action. The respondent judge still has general subject-matter jurisdiction over foreclosure actions, and Lundeen still possesses an adequate remedy at law in the form of the Lundeen Appeal. *Burnside* at ¶ 2-3.

{¶ 11} For all these reasons, Lundeen's complaint for writ of prohibition is dismissed. Respondents' motion to dismiss is denied as moot. The alternative writ, issued on November 27, 2019, is vacated as moot. Costs to Lundeen. The court directs the clerk of courts to serve all parties with notice of this judgment and the date of entry upon the journal as required by Civ.R. 58(B).

{¶ 12} Complaint dismissed.

FILED AND JOURNALIZED
PER APP.R. 22(C)

JAN 24 2020

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By _____ Deputy

MARY EILEEN KILBANE, PRESIDING JUDGE

LARRY A. JONES, SR., J., and
SEAN C. GALLAGHER, J., CONCUR

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

WELLS FARGO BANK, N.A., :

Plaintiff-Appellee, :

No. 107184

v. :

CYNTHIA LUNDEEN, ET AL., :

Defendants-Appellants. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: January 9, 2020

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-16-856890

Appearances:

Thompson Hine, L.L.P., Scott A. King, Richard A. Freshwater, Terry W. Posey, Jr., Todd Seaman, and Caitlin R. Thomas, *for appellee.*

Cynthia Lundeen, *pro se.*

KATHLEEN ANN KEOUGH, J.:

{¶ 1} In this foreclosure action, defendant-appellant, Cynthia Lundeen ("Lundeen"), appeals from the trial court's judgment that adopted a magistrate's decision and granted plaintiff-appellee, Wells Fargo Bank, N.A. ("Wells Fargo"), a

judgment on a note and a decree of foreclosure. Finding no merit to the appeal, we affirm.

I. Procedural Background

{¶ 2} On January 8, 2016, Wells Fargo filed a foreclosure complaint against Lundeen, seeking the balance due on a promissory note and to foreclose on a mortgage. On August 12, 2016, Wells Fargo filed a third amended complaint. Count 1 of the third amended complaint alleged that Wells Fargo was due the principal amount of $364,579.25 under the note, plus interest, late charges, and other costs and expenses, and Count 2 asserted that Wells Fargo was entitled to foreclose on the mortgage in light of Lundeen's default on the note.

{¶ 3} Copies of the note and mortgage were attached as Exhibits A and B to the third amended complaint. The note, which was executed by Lundeen and payable to World Savings Bank, FSB, bore an endorsement stating that the note was payable to Wells Fargo as the successor by merger to Wachovia Mortgage FSB, which was formerly known as World Savings Bank. The mortgage was also executed by Lundeen in favor of World Savings Bank. Attached to the third amended complaint were copies of the merger documents between World Savings Bank, Wachovia, and Wells Fargo.

{¶ 4} On November 22, 2016, the clerk of courts sent a summons and the third amended complaint to Lundeen by certified mail. The summons and third amended complaint were returned to the court unclaimed. On January 18, 2017,

the clerk sent a summons and the third amended complaint to Lundeen by regular mail; the clerk endorsed the summons with an answer date of February 15, 2017.

{¶ 5} On February 14, 2017, Lundeen filed a motion for an extension of time to respond to the third amended complaint, and the trial court granted the motion. On March 10, 2017, Lundeen requested additional time to respond to the third amended complaint; the court granted Lundeen until May 1, 2017, to answer. On that day, however, the case was referred to the court's mediation program, and all motion practice was stayed pending the mediation. The case did not settle and was returned to the trial court for further proceedings on September 26, 2017.

{¶ 6} Lundeen never filed an answer to the third amended complaint. However, on November 27, 2017, she filed a Civ.R. 12(B)(6) motion to dismiss the case. In her motion, Lundeen argued that Wells Fargo did not have standing to bring the foreclosure action because she had signed the note and mortgage with World Savings Bank, and Wells Fargo had not alleged in the third amended complaint that it was a successor to the note and mortgage by merger or a name change. Lundeen made no argument regarding insufficiency of service. The trial court denied the motion on January 8, 2018.

{¶ 7} In the meantime, on December 27, 2017, Wells Fargo filed a motion for summary judgment. Lundeen filed a brief in opposition to the motion on January 26, 2018. Although Lundeen argued that Wells Fargo was not entitled to summary judgment for various reasons, she made no argument that she was never served with the third amended complaint.

{¶ 8} On February 14, 2018, the magistrate issued a decision granting summary judgment in favor of Wells Fargo. On February 22, 2018, Lundeen filed a motion for findings of fact and conclusions of law with respect to the magistrate's decision, but she never filed any objections to the decision. On April 8, 2018, the court denied Lundeen's request for findings of fact and conclusions of law, ruling that the magistrate's decision contained fully elaborated findings of fact and conclusions of law and therefore, no further relief was appropriate or necessary. On April 13, 2018, the trial court issued its judgment entry adopting the magistrate's decision.

{¶ 9} On April 18, 2018, after the trial court had adopted the magistrate's decision, Lundeen filed an objection to the magistrate's decision. The trial court ordered the objection stricken, ruling that any objections were to be filed on or before February 28, 2018, as required by Civ.R. 53(D)(3)(b)(1). This appeal followed.

II. Law and Analysis

A. Standard of Review

{¶ 10} Normally, we review a trial court's decision granting summary judgment de novo, applying the same standard as the trial court applies under Civ.R. 56(C). *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). We accord no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Ruf v. Belfance*, 9th Dist. Summit No. 26297, 2013-Ohio-160, ¶ 8.

{¶ 11} In this case, however, because Lundeen failed to timely object to the magistrate's decision granting Wells Fargo's motion for summary judgment, she has waived all but plain error. In matters referred to a magistrate, Civ.R. 53(D)(3)(b) imposes an affirmative duty on parties to submit timely, specific, written objections to the trial court, identifying any error of fact or law in the magistrate's decision. *Hameed v. Rhoades*, 8th Dist. Cuyahoga No. 94267, 2010-Ohio-4894, ¶ 14; *Huntington Natl. Bank v. Blount*, 8th Dist. Cuyahoga No. 98514, 2013-Ohio-3128, ¶ 11. Civ.R. 53(D)(3)(b)(iv) provides that "[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion * * * unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." Simply put, "one cannot object to an error on appeal that was not raised to the trial court who adopted a magistrate's decision." *Naple v. Bednarik*, 7th Dist. Mahoning No. 11 MA 121, 2012-Ohio-5881, ¶ 34. *See also Third Fed. S. & L. v. McCulloch*, 8th Dist. Cuyahoga No. 97525, 2012-Ohio-1956, ¶ 13 (where mortgagors did not file objections to magistrate's decision granting summary judgment in favor of mortgagee bank, mortgagees "waived any error by failing to timely object" when trial court thereafter adopted the magistrate's decision).

{¶ 12} "Plain errors are errors in the judicial process that are clearly apparent on the face of the record and are prejudicial to the appellant." *Macintosh Farms Community Assn., Inc. v. Baker*, 8th Dist. Cuyahoga No. 102820, 2015-Ohio-5263, ¶ 8, citing *Reichert v. Ingersoll*, 18 Ohio St.3d 220, 223, 480 N.E.2d

802 (1985). When applying the plain error doctrine in the civil context, reviewing courts "must proceed with the utmost caution." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997). The doctrine is limited to those "extremely rare cases" in which "exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a materially adverse effect on the character of, and public confidence in, judicial proceedings." *Id.* This is not that case. We find no error, plain or otherwise, in the trial court's entry of summary judgment in this case.

B. Sufficiency of Service

{¶ 13} Lundeen's first three assignments of error all relate to sufficiency of service of the third amended complaint. In her first assignment of error, Lundeen asserts that the trial court erred in granting summary judgment to Wells Fargo because she was never served with the third amended complaint and, therefore, the action was not commenced within one year of filing, as required by Civ.R. 3(A). In her second assignment of error, Lundeen contends that the trial court erred in granting summary judgment because she was never served with the third amended complaint and, therefore, the trial court should have dismissed the action on its own initiative pursuant to Civ.R. 4(E). In her third assignment of error, Lundeen contends that the trial court erred in granting summary judgment to Wells Fargo because she was never served with the third amended complaint and, therefore, the trial court should have sua sponte stricken the third amended complaint pursuant to Civ.R. 3(A).

{¶ 14} Lundeen did not raise any of these arguments in the trial court. It is well settled that a party cannot raise new arguments and legal issues for the first time on appeal, and that failure to raise an issue before the trial court waives that issue for appellate purposes. *Miller v. Cardinal Care Mgmt.*, 8th Dist. Cuyahoga No. 107730, 2019-Ohio-2826, ¶ 23, citing *Cleveland Town Ctr., L.L.C. v. Fin. Exchange Co. of Ohio, Inc.*, 2017-Ohio-384, 83 N.E.2d 383 (8th Dist.) (appellate courts "will not consider a question not presented, considered, or decided by a lower court"). Thus, we will not consider these arguments for the first time on appeal.

{¶ 15} Even if we were to consider Lundeen's arguments, we would find they have no merit because Lundeen waived any issue with service as a matter of law. Civ.R. 12(H) states that "[a] defense of * * * insufficiency of process, or insufficiency of service of process is waived if * * * it is neither made by motion under this rule nor included in a responsive pleading." Lundeen never filed an answer to the third amended complaint, but she filed a motion to dismiss pursuant to Civ.R. 12(B)(6) on November 7, 2017. Lundeen's motion made no mention whatsoever regarding insufficiency of service of process and, therefore, pursuant to Civ.R. 12(H), she waived that defense.

{¶ 16} Additionally, the record reflects that Lundeen filed numerous other motions during the two-year pendency of the case and participated in the proceedings, all without ever raising the issue of insufficiency of service of process. Consequently, she voluntarily submitted to the court's jurisdiction and waived the

defense of insufficiency of service of process. *See Derykka R.R. v. Eric R.*, 8th Dist. Cuyahoga No. 94363, 2010-Ohio-2361, ¶ 24, citing *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, ¶ 13 (holding that party that filed motions, appeared at hearings, participated in the proceedings, never raising the defense of insufficiency of service of process, waived the defense by voluntarily submitting to the court's jurisdiction).

{¶ 17} Finally, we can presume proper service in this case. Proper service is presumed where the civil rules on service are followed. *Deaton v. Brooker*, 8th Dist. Cuyahoga No. 83416, 2004-Ohio-4630, ¶ 8. Civ.R. 4.6(D) provides that when service by certified mail is returned unclaimed, then service may be made by ordinary mail. Pursuant to the rule,

> [t]he mailing shall be evidenced by a certificate of mailing which shall be completed and filed by the clerk. Answer day shall be twenty-eight days after the date of mailing as evidenced by the certificate of mailing. The clerk shall endorse this answer date upon the summons which is sent by ordinary mail. Service shall be deemed complete when the fact of mailing is entered of record, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery.

{¶ 18} In this case, the record reflects that service to Lundeen by certified mail was returned unclaimed, and ordinary mail service was requested. The record contains the clerk's certificate of mailing, with an answer date endorsed on the summons. The record does not contain any evidence that the ordinary mail envelope was returned for failure of delivery.

{¶ 19} Moreover, even if we do not presume proper service under Civ.R. 4.6(D), it is apparent that Lundeen was served with the third amended complaint. Lundeen filed her motion for an extension of time to respond to the third amended complaint on February 14, 2017, one day before the answer date of February 15, 2017, as endorsed by the clerk on the summons that accompanied the regular mail service of the third amended complaint. The timing of Lundeen's motion leaves no doubt that despite her protestations of insufficient service, she was indeed served with the third amended complaint.

{¶ 20} The first, second, and third assignments of error are therefore overruled.

C. Sufficiency of the Affidavit

{¶ 21} In her fourth assignment of error, Lundeen asserts that the trial court erred in granting summary judgment because the affidavit of Shae Smith, which was attached to Wells Fargo's summary judgment motion in support of its motion, failed to authenticate the note and mortgage. In her fifth assignment of error, Lundeen contends there was no evidence upon which the trial court could grant summary judgment because the Smith affidavit did not authenticate the note and mortgage. We consider these errors under a plain error standard because, as discussed above, Lundeen did not timely object to the magistrate's decision granting summary judgment to Wells Fargo.

{¶ 22} Under Civ.R. 56(E), "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in

evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." The rule further provides that "sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit." In other words, "attached documents must be verified." *Fifth Third Mtge. Co. v. Campbell*, 2d Dist. Montgomery No. 25458, 2013-Ohio-3032, ¶ 7.

{¶ 23} In her affidavit, Smith averred that she was a vice president of loan documentation with Wells Fargo; was familiar with the business records maintained by Wells Fargo for servicing mortgage loans; had examined those records with respect to the note and mortgage signed by Lundeen; and pursuant to her personal knowledge regarding the terms of the note, Lundeen was in default. Smith further averred that Wells Fargo had been in possession of the note since the filing of the complaint, and was entitled to enforce the note and foreclose the mortgage by operation of merger. Smith averred that "copies" of the note with any applicable endorsements, the mortgage, the notice of default sent by Wells Fargo to Lundeen, and the merger documents were attached as exhibits to the affidavit.

{¶ 24} Lundeen asserts that Smith's averment that the attached documents were "copies," rather than "true and accurate copies," was insufficient to properly authenticate the documents. She further contends that Smith never asserted that she personally saw or viewed the original note and mortgage. Consequently, she contends, the documents were not verified and, thus, Wells Fargo failed to demonstrate it had standing to bring the action. We disagree.

{¶ 25} Evid.R. 901(A) states that the requirement of authentication is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Evid.R. 901(B)(1) provides an example of verification that conforms with the authentication requirement, specifying that the testimony of a witness with knowledge that a matter is what it is claimed to be is sufficient. Smith's affidavit authenticated the documents attached to her affidavit in accordance with these rules. She averred that she was a bank officer, had reviewed the bank's business records, and had personal knowledge of their contents. She also averred that the documents attached to her affidavit were copies of the note, mortgage, notice of default, and merger documents. These averments sufficiently established that the documents were what Smith claimed them to be.

{¶ 26} They further satisfied Civ.R. 56(E)'s requirement of "sworn" copies. Contrary to Lundeen's assertion otherwise, there is no requirement that an affiant must describe as "true and accurate" the copies of named documents attached as exhibits. *U.S. Bank N.A. v. Aguilar-Crow*, 7th Dist. Mahoning No. 15 MA 0113, 2016-Ohio-5391, ¶ 25. By stating in a sworn affidavit that the exhibits attached are "copies" of the listed documents, an affiant adequately verifies that the documents are what he or she claims them to be. *Id.* at ¶ 28. *See also Wells Fargo Fin. Ohio 1 v. Robinson*, 2d Dist. Champaign No. 2016-CA-23, 2017-Ohio-2888, ¶ 16 (by averring the exhibits were copies of the documents she examined, the affiant adequately implied the documents were accurate copies of the originals); *Am. Sav.*

Bank v. Wrage, 4th Dist. Scioto No. 13CA3566, 2014-Ohio-2168, ¶ 20 (finding the affiant's statement that the note was a copy properly authenticated the exhibit).

{¶ 27} Additionally, an affiant need not explain that the attached copy was compared to the original note in order to ensure the bank actually had possession of the note. *Aguilar-Crow* at ¶ 31, citing *Wells Fargo Bank, N.A. v. Hammond*, 8th Dist. Cuyahoga No. 100141, 2014-Ohio-5270, ¶ 37 (no requirement that affiant compare copies of documents attached to affidavit with originals).

{¶ 28} In short, we find no plain error in Smith's affidavit or in the trial court's grant of summary judgment to Wells Fargo. The evidence established that Lundeen had signed the note and was in default, and that Wells Fargo, as the corporate successor to the original creditor, was entitled to enforce the note and foreclose on the mortgage. It thus had standing to bring the action. The fourth and fifth assignments of error are overruled.

{¶ 29} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, JUDGE

EILEEN T. GALLAGHER, A.J., and
MARY J. BOYLE, J., CONCUR

FILED AND JOURNALIZED
PER APP.R. 22(C)

JAN 09 2020

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By Greg Heccik Deputy

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

WELLS FARGO BANK, N.A.
Plaintiff

CYNTHIA LUNDEEN, ET AL.
Defendant

Case No: CV-16-856890

Judge: JANET R BURNSIDE

JOURNAL ENTRY

96 DISP.OTHER - FINAL

ORDER ADOPTING THE MAGISTRATE'S DECISION. O.S.J.
PURSUANT TO CIV.R. 58(B), THE CLERK OF COURTS IS DIRECTED TO SERVE THIS JUDGMENT IN A MANNER PRESCRIBED BY CIV.R. 5(B). THE CLERK MUST INDICATE ON THE DOCKET THE NAMES AND ADDRESSES OF ALL PARTIES, THE METHOD OF SERVICE, AND THE COSTS ASSOCIATED WITH THIS SERVICE.

Judge Signature Date
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CUYAHOGA COUNTY

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04/10/2018

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Wells Fargo Bank, N.A	**Case No. CV-16-856890**
Plaintiff,	**Judge Janet R. Burnside**
vs.	**Magistrate Amy R. Jackson**
Cynthia Lundeen, et al.	**JUDGMENT ENTRY ADOPTING MAGISTRATE'S DECISION**
Defendants.	

This cause is before the Court on the decision of the magistrate, the evidence admitted at the hearing, and the motions and pleadings in the Court file.

Summary judgment granted in favor of Plaintiff against the following Defendants:

- Cynthia Lundeen

The Court adopts the Magistrate's Decision dated February 14, 2018, granting Plaintiff a decree of foreclosure on the following premises.

(SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF)
PREMISES COMMONLY KNOWN AS 2380 OVERLOOK ROAD, CLEVELAND HEIGHTS OH
PERMANENT PARCEL NO.: 685-04-022

The parties who have asserted an interest in the premises and defendant State of Ohio, Department of Taxation will be paid according to their priority. The claims of all parties who have asserted an interest in premises and whose claims are not paid in the order of distribution herein are transferred to the proceeds of sale and will be determined at a later date.

Judgment is rendered in favor of Plaintiff against Cynthia Lundeen in the sum of $364,579.25, plus interest thereon at the rate of 3.913% per annum from December 16, 2013.

The Court finds that Defendant, United States of America, shall retain its extended right of redemption as provided in 28 U.S.C. § 2410(c).

The Court finds that Plaintiff has standing to bring this case.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED, that unless the sums hereinabove found due, together with the costs of this action, be fully paid within three days of the date of the Court's adoption of the Magistrate's Decision, the equity of redemption and dower of all the defendants in and to said premises will be foreclosed, and said premises sold; and, that an order of sale shall issue to the Sheriff of Cuyahoga County directing him to appraise, advertise in a newspaper of general circulation within the County and sell said premises as upon execution and according to law, free and clear of the interest of all parties to this action. If the court authorizes a private selling officer to sell the real estate, then the sale must proceed in accordance with R.C. § 2329.152.

If this is a residential property and the property remains unsold after the first auction, then a second auction shall be held and the property shall be sold to the highest bidder without regard to the minimum bid requirement in §2329.20 of the Revised Code. This auction shall be held no earlier than seven days and not later than thirty days after the first auction.

If there is a bidder at the second or subsequent sales, the judgment creditor and the first lien holder have the right to redeem the property within fourteen days of the sale, by paying the purchase price to the Clerk of Court. Upon timely payment, the court will proceed as described in R.C. § 2329.31 with the redeeming party considered the successful purchaser at sale. .

However, Defendant, United States of America, shall retain its extended right of redemption as provided in 28 U.S.C. § 2410(c).

In the event an order of sale is returned by the selling officer unexecuted, subsequent orders of sale shall issue in accord with appraisal instructions contained in the Praecipe for those sales.

And coming now to distribute the proceeds of said sale, it is ordered that the Sheriff or private selling officer, out of the funds in his hands, pay:

FIRST:	To the Clerk of Courts the costs of this action, including the sum of $1,635.00 payable to Plaintiff's attorney Manley Deas Kochalski LLC for the judicial reports filed herein, which is hereby taxed as costs;
SECOND:	To the Cuyahoga County Treasurer, taxes, accrued taxes, assessments, 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, and all other taxes, assessments, penalties, and interest which attached for a prior tax year but have not been paid on or before the date of sale;
THIRD:	To Plaintiff the sum of $364,579.25, plus interest thereon at the rate of 3.913% per annum from December 16, 2013, subject to adjustment;
FOURTH:	To Plaintiff sums advanced for real estate taxes, hazard insurance and property protection in an amount to be determined by further order of the Court;
FIFTH:	The balance, if any, to be held by the Clerk of Courts pending further order.

In the event Plaintiff is the successful bidder at the sale, the amount of the deposits made herein by Plaintiff and the cost of the preliminary judicial report in the sum of $1,635.00, will be deducted from the total amount of Court costs otherwise payable herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there may be due Plaintiff, additional sums advanced by it under the terms of the note and mortgage to pay real estate taxes, hazard insurance premiums, and property protection, which sums are to be determined by further Order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, upon the confirmation of the sale made herein, a minute of these proceedings be entered upon the Cuyahoga County Records involved in this action to reflect that they are released as liens against the subject premises.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that after said sale has been completed, a deed will be conveyed to the purchaser and a Writ of Possession of said property be issued.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, if a successful sale occurs, the parties are ordered to file any motions for reimbursement of advances pursuant to R.C. §5301.233 within 21 days from the sale. A party may move the court to extend this deadline for good cause shown. No party will be granted reimbursement for advances if such a motion is not filed before this deadline. Within 7 days from the filing of a motion for reimbursement, a party may file a brief in opposition. The court will then make a careful examination of the sale pursuant to the applicable statutes. If, however, this case does not involve advances or no mortgagee intends to seek advances, a party may file a notice to this effect within seven days of the sale. Where such notice is filed, no party filing such notice will be granted reimbursement for advances and the court will make a careful examination of the sale pursuant to the applicable statutes upon the return of the order of sale. A party may redeem before confirmation of the sale.

Nothing in this order prevents the court from staying the confirmation of sale to permit a property owner additional time to redeem.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to Civ.R. 54(B), there is no just reason for delay.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, pursuant to Civ.R. 58(B), the Clerk of Courts must serve, in a manner prescribed by Civ.R. 5(B), all parties not in default for failure to appear notice of this judgment and its date of entry upon the journal and must note the service on the appearance docket.

IT IS SO ORDERED.

Janet R Burnside

Judge Janet R. Burnside

EXHIBIT A

LEGAL DESCRIPTION OF PROPERTY

Situated in the City of Cleveland Heights, County of Cuyahoga and State of Ohio:

And known as being part of Sublot No. 39 in the Euclid Heights Allotment of part of Original one Hundred acre Lots Nos. 398, 404, 405 and 406, and part of original Euclid Township Lots Nos. 7 and 8, as shown by the recorded Plat in Volume 36 of maps, page 2 of Cuyahoga County Records, and bounded and described as follows:

Beginning on the Northerly Line of Edgehill Road, at the Southwesterly corner of land conveyed to Alice C. Brayton by deed dated March 2, 1955, and recorded in Volume 8264, Page 137 of Cuyahoga County records; Thence Westerly along the Northerly line of Edgehill Road, 204.62 feet to the Southerly end of the curved turnout between said northerly line and the southeasterly line of Overlook road; Thence Northwesterly, along said turnout, 61.88 feet to the Southeasterly line of Overlook Road; Thence Northeasterly, along the Southeasterly line of Overlook Road, 205.50 feet to the most Northeasterly corner of Sublot No. 39, 151.05 feet to the Northwesterly corner of land conveyed, to Alice C. Brayton as aforesaid; Thence Southerly along the Westerly line of Land so conveyed, 140.11 feet to the place of beginning, as appears by said plat, be the same more or less, but subject to all legal highways.

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

Wells Fargo Bank, N.A	**Case No. CV-16-856890**
Plaintiff,	**Judge Janet R. Burnside**
vs.	**Magistrate Amy R. Jackson**
Cynthia Lundeen, et al.	**MAGISTRATE'S DECISION**
Defendants.	

This cause was submitted to the Magistrate and heard upon the Amended Complaint, Motion for Summary Judgment of Plaintiff, Wells Fargo Bank, N.A ("Plaintiff"), the Answer of Defendant Cynthia Lundeen, the Brief in Opposition to the Plaintiff's Motion for Summary Judgment, the Reply Brief filed in support of the Motion for Summary Judgment, the Answer of Defendant The United States of America, Office of the Department of the Treasury and the evidence.

All necessary parties have been served with summons according to law and are properly before the Court.

Construing the evidence most favorably to the non-moving parties, reasonable minds

could only conclude that there is no genuine issue of material fact and that Plaintiff is entitled to judgment and a decree of foreclosure. Accordingly, Plaintiff's motion for summary judgment is granted.

The magistrate finds that the arguments made by Defendant Cynthia Lundeen in her brief in opposition to the Plaintiff's Motion for Summary Judgment are contrary to law and the facts in this case. Plaintiff has sufficiently demonstrated that it is the holder of the note and the assignee of the mortgage and was the holder of the note and mortgage at the time that the Complaint was filed. Accordingly, the Magistrate finds that Plaintiff had standing when it filed this action. Additionally, Plaintiff has demonstrated, through proper Civ. R. 56 evidence, the amount due on the note. The affidavit submitted in support of the Motion for Summary Judgment is not inadmissible hearsay. See Evid. R. 803(14), (15), and (6) and Wilmington Trust N.A. v. Boydston, 8th Dist. No. 105009, 2017-Ohio-5816. Additionally, there is "no requirement that a plaintiff in a foreclosure action provide a payment history in order to establish its entitlement to summary judgment." Boydston, 8th Dist. No. 105009, 2017-Ohio-5816, citing Deutsche Bank National Trust Co. v. Najar, 8th Dist. No 98502, 2013-Ohio-1657. Furthermore, Defendant Cynthia Lundeen's assertions about "unclean hands" concerning her former spouse are not proper and are also irrelevant. Plaintiff affirmatively demonstrated its entitlement to Summary Judgment and Defendant Cynthia Lundeen did not meet her reciprocal burden outlined in Civil Rule 56.

The Magistrate finds that defendant James E. Lundeen was dismissed from this action.

There is due the Cuyahoga County Treasurer, taxes, accrued taxes, assessments, and penalties on the premises described herein including: (1) 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, and (2) all other taxes, assessments, penalties, and interest which attached for a prior tax year but have not been paid on or before the date of the judicial sale. The exact amount of said taxes, accrued taxes, assessments, and penalties are unascertainable at this time, but will be determined at the time of the sale of said premises for which amount the Cuyahoga County Treasurer has a good and valid lien.

The Magistrate finds that Plaintiff was the real party in interest when it filed its complaint and has maintained the requisite standing at all times material to this action.

There is due on the promissory note set forth in the complaint executed by Cynthia Lundeen the sum of $364,579.25, plus interest thereon at the rate of 3.913% per annum from December 16, 2013, for which sum judgment is hereby rendered in favor of Plaintiff and against Defendant Cynthia Lundeen.

In order to secure payment of said promissory note aforesaid, defendants Cynthia Lundeen and James E. Lundeen, husband and wife at the time the mortgage was signed, executed and delivered a certain mortgage deed set forth in the Second Count of said Complaint, thereby conveying to World Savings Bank, F.S.B. the following described premises:

> SEE LEGAL DESCRIPTION ATTACHED HERETO AS EXHIBIT "A" AND INCORPORATED HEREIN.
> Said premises also known as 2380 Overlook Road, Cleveland Heights OH
> P.P.N. 685-04-022

This mortgage was duly filed with the Recorder of Cuyahoga County Ohio, recorded on October 26, 2006 as Instrument Number 200610260790, Cuyahoga County, Ohio records of the Mortgage Records of said county and thereby became and is a valid first mortgage lien upon said premises subject only to the lien of the Treasurer for taxes. This mortgage deed was

assigned to the Plaintiff. The conditions in the mortgage deed have been broken and the same has become absolute. As a consequence, Plaintiff is entitled to have the equity of redemption and dower of all the defendants in and to said premises foreclosed. However, the Magistrate finds that Defendant, United States of America, shall retain its extended right of redemption as provided in 28 U.S.C. § 2410(c).

Defendant State of Ohio, Department of Taxation has a lien or liens on the Property as set forth in the title reports filed herein. The liens of State of Ohio, Department of Taxation are inferior and subsequent to the lien of the Plaintiff. No further finding is made at this time as to the liens of State of Ohio, Department of Taxation except to note that such lien or liens are hereby ordered transferred to the proceeds derived from the sale of said premises; after the payment of the costs of the within action, taxes due and payable, and the amount found due the Plaintiff, and the same is hereby ordered continued until further order.

Plaintiff may have advanced or may advance during the pendency of this action sums for the payment of taxes, hazard insurance premiums, and protection of the property described herein, the total amount of which is undetermined at the present time, but which amount will be ascertainable at the time of the judicial sale, which amount may be added to the first mortgage lien of the Plaintiff. The Magistrate reserves for further order a determination of the exact, if any, amount due Plaintiff for said advances.

Defendant The United States of America, Office of the Department of the Treasury claims some right, title, interest, or lien upon the premises described herein, and has set forth its claims in its pleadings filed herein, but that any right, title, interest, or lien said defendant may have is inferior and subsequent to the lien of the Plaintiff.

No finding is made at this time as to the right, title, interest, or lien of said defendant as

set forth in its pleadings filed herein, except to note that, by agreement of the parties, such right, title, interest or lien of the above named defendant is hereby ordered transferred to the proceeds derived from the sale of said premises, after the payment of the costs of the within action, taxes due and payable and the amount found due to the Plaintiff, and the same are hereby ordered continued until further order.

Plaintiff has an additional interest by virtue of a second mortgage in the amount of $75,000.00, filed for record on April 25, 2006, and recorded at as Instrument Number 200604250047, as re-recorded on October 26, 2006 as Instrument Number 200610260791, Cuyahoga County, Ohio records Recorder's Office, Cuyahoga County, OH. This mortgage shall be released after the confirmation of sale.

Pursuant to Civ. R. 54(B), there is no just reason for delay in entering judgment for Plaintiff.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that unless the sums hereinabove found due, together with the costs of this action, including the sum of $1,635.00 for the Preliminary Judicial Report filed herein for which Plaintiff is entitled to reimbursement, be fully paid within three (3) days from the date of the Court's adoption of this Magistrate's Decision, the equity of redemption and the dower of all defendants in the premises described above will be foreclosed and that upon issuance of a Praecipe for Order of Sale by Plaintiff's attorney, the Clerk of Court shall issue an Order of Sale to the Sheriff commanding him to appraise, advertise in a paper of general circulation within the County, and sell the premises as upon execution and according to law, free and clear of the interest of all parties to this action. If the court authorizes a private selling officer to sell the real estate, then the sale must proceed in accordance with R.C. §2329.152.

If this is a residential property and the property remains unsold after the first auction, then a second auction shall be held and the property shall be sold to the highest bidder without regard to the minimum bid requirement in §2329.20 of the Revised Code. This auction shall be held no earlier than seven days and not later than thirty days after the first auction.

If there is a bidder at the second or subsequent sales, the judgment creditor and the first lien holder have the right to redeem the property within fourteen days of the sale, by paying the purchase price to the Clerk of Court. Upon timely payment, the court will proceed as described in R.C. §2329.31 with the redeeming party considered the successful purchaser at sale.

In the event an order of sale is returned by the selling officer unexecuted, subsequent orders of sale shall issue in accord with appraisal instructions contained in the Praecipes for those sales.

Coming now to distribute the proceeds of said sale, it is ordered that the Sheriff or private selling officer, out of the funds in his hands, pay:

FIRST:	To the Clerk of Courts the costs herein, including the sum of $1,635.00 payable to Plaintiff's attorney Manley Deas Kochalski LLC for the judicial reports filed herein, which is hereby taxed as costs;
SECOND:	To the Cuyahoga County Treasurer, 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, and all other taxes, assessments, penalties, and interest which attached for a prior tax year but have not been paid on or before the date of sale;
THIRD:	To Plaintiff the sum of $364,579.25, plus interest thereon at the rate of 3.913% per annum from December 16, 2013, subject to adjustment.
FOURTH:	To Plaintiff sums advanced for real estate taxes, hazard insurance and property protection in an amount to be determined by further order upon Motion of the Plaintiff;

FIFTH: The balance, if any, to be held by the Clerk of Courts pending further order.

In the event Plaintiff is the successful bidder at the sale, the amount of the deposits made herein by Plaintiff and the cost of the judicial report in the sum of $1,635.00 shall be deducted from the total amount of Court costs otherwise payable herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there may be due Plaintiff, additional sums advanced by it under the terms of the note and mortgage to pay real estate taxes, hazard insurance premiums, and property protection, which sums are to be determined by further Order.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, upon the confirmation of sale made herein, a minute of these proceedings be entered upon the Cuyahoga County Records involved in this action to reflect that they are released as liens against the subject premises.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that after said sale has been completed, a deed will be conveyed to the purchaser and a Writ of Possession of said property be issued.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, if a successful sale occurs, the parties are ordered to file any motions for reimbursement of advances pursuant to R.C. §5301.233 within 21 days from the sale. A party may move the court to extend this deadline for good cause shown. No party will be granted reimbursement for advances if such a motion is not filed before this deadline. Within 7 days from the filing of a motion for reimbursement, a party may file a brief in opposition. The court will then make a careful examination of the sale pursuant to the applicable statutes. If, however, this case does not involve advances or no

mortgagee intends to seek advances, a party may file a notice to this effect within seven days of the sale. Where such notice is filed, no party filing such notice will be granted reimbursement for advances and the court will make a careful examination of the sale pursuant to the applicable statutes upon the return of the order of sale. A party may redeem before confirmation of the sale. Nothing in this order prevents the court from staying the confirmation of sale to permit a property owner additional time to redeem.

Magistrate Amy R. Jackson

A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ. R. 53(D)(3)(b).

EXHIBIT A
LEGAL DESCRIPTION OF PROPERTY

Situated in the City of Cleveland Heights, County of Cuyahoga and State of Ohio:

And known as being part of Sublot No. 39 in the Euclid Heights Allotment of part of Original one Hundred acre Lots Nos. 398, 404, 405 and 406, and part of original Euclid Township Lots Nos. 7 and 8, as shown by the recorded Plat in Volume 36 of maps, page 2 of Cuyahoga County Records, and bounded and described as follows:

Beginning on the Northerly Line of Edgehill Road, at the Southwesterly corner of land conveyed to Alice C. Brayton by deed dated March 2, 1955, and recorded in Volume 8264, Page 137 of Cuyahoga County records; Thence Westerly along the Northerly line of Edgehill Road, 204.62 feet to the Southerly end of the curved turnout between said northerly line and the southeasterly line of Overlook road; Thence Northwesterly, along said turnout, 61.88 feet to the Southeasterly line of Overlook Road; Thence Northeasterly, along the Southeasterly line of Overlook Road, 205.50 feet to the most Northeasterly corner of Sublot No. 39, 151.05 feet to the Northwesterly corner of land conveyed, to Alice C. Brayton as aforesaid; Thence Southerly along the Westerly line of Land so conveyed, 140.11 feet to the place of beginning, as appears by said plat, be the same more or less, but subject to all legal highways.

CERTIFICATE OF SERVICE

Copies of the foregoing have been sent via ordinary U.S. Mail by the Clerk of Courts to the following:

Copies to:

Cynthia Lundeen, 2380 Overlook Road, Cleveland, OH 44106

State of Ohio, Department of Taxation, c/o Ohio Attorney General, 150 East Gay Street, 21st Floor, Columbus, OH 43215

Michelle J. Sheehan, Reminger Co., LPA, Co-Counsel for Plaintiff, 101 West Prospect Ave, Suite 1400, Cleveland, OH 44115-1093

Scott A. King and Caitlin Thomas, Co-counsel for Plaintiff, Thompson Hine LLP, 127 Public Square, 3900 Key Center, Cleveland, OH 44117

Marlon A. Primes, Attorney for The United States of America, Office of the Department of the Treasury, 400 United States Court House, 801 W. Superior Avenue, Cleveland, OH 44113-1852

John E. Codrea, Manley Deas Kochalski LLC, Attorney for Plaintiff, P.O. Box 165028, Columbus OH 43216-5028

Copies mailed by Clerk: H. Walker Date: 2·15·18

15-018424_MLB

RULE 12. Determination and Judgment on Appeal

(A) Determination.

(1) On an undismissed appeal from a trial court, a court of appeals shall do all of the following:

(a) Review and affirm, modify, or reverse the judgment or final order appealed;

(b) Determine the appeal on its merits on the assignments of error set forth in the briefs under App. R. 16, the record on appeal under App. R. 9, and, unless waived, the oral argument under App. R. 21;

(c) Unless an assignment of error is made moot by a ruling on another assignment of error, decide each assignment of error and give reasons in writing for its decision.

(2) The court may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief, as required under App. R. 16(A).

(B) Judgment as a matter of law. When the court of appeals determines that the trial court committed no error prejudicial to the appellant in any of the particulars assigned and argued in appellant's brief and that the appellee is entitled to have the judgment or final order of the trial court affirmed as a matter of law, the court of appeals shall enter judgment accordingly. When the court of appeals determines that the trial court committed error prejudicial to the appellant and that the appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and render the judgment or final order that the trial court should have rendered, or remand the cause to the court with instructions to render such judgment or final order. In all other cases where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment accordingly.

(C) Judgment in civil action or proceeding when sole prejudicial error found is that judgment of trial court is against the manifest weight of the evidence

(1) In any civil action or proceeding that was tried to the trial court without the intervention of a jury, and when upon appeal a majority of the judges hearing the appeal find that the judgment or final order rendered by the trial court is against the manifest weight of the evidence and have not found any other prejudicial error of the trial court in any of the particulars assigned and argued in the appellant's brief, and have not found that the appellee is entitled to judgment or final order as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and either weigh the evidence in the record and render the judgment or final order that the trial court should have rendered on that evidence or remand the case to the trial court for further proceedings.

(2) In any civil action or proceeding that was tried to a jury, and when upon appeal all three judges hearing the appeal find that the judgment or final order rendered by the trial court on the jury's verdict is against the manifest weight of the evidence and have not found any other prejudicial error of the trial court in any of the particulars assigned and argued in the appellant's brief, and have not found that the appellee is entitled to judgment or final order as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and remand the case to the trial court for further proceedings.

(D) All other cases. In all other cases where the court of appeals finds error prejudicial to the appellant, the judgment or final order of the trial court shall be reversed and the cause shall be remanded to the trial court for further proceedings.

Staff Note (July 1, 2015 amendment)

App.R. 12(C) is amended to avoid the implication of the former rule that a reversal on the manifest weight of the evidence was not available in civil cases tried to a jury. *See Eastley v. Volkman*, 4th Dist. Scioto Nos. 09CA3308, 09CA3309, 2010-Ohio-4771, ¶ 58 (Kline, J., dissenting), citing Painter & Pollis, Ohio Appellate Practice, Section 7:19 (2009-2010 Ed.), *rev'd*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517. The amendment clarifies that a manifest-weight reversal is available in civil cases tried to a jury, but there are distinctions. In a civil case tried to a court without a jury, a majority of the appellate court may reverse, and it may either remand the case for a new trial or enter judgment for the appellee. By contrast, in a case tried to a jury, a reversal on the manifest weight of the evidence must be unanimous, *see* Ohio Constitution, Article IV, Section 3(B)(3), and the trial court is permitted to reverse and remand, not to enter judgment for the appellee. *See Hanna v. Wagner*, 39 Ohio St.2d 64, 313 N.E.2d 842 (1974). In addition, the amendments remove the restriction in the current rule allowing an appellate court to reverse a judgment based on the manifest weight of the evidence only once in either instance.

[Effective: July 1, 1971; amended effective July 1, 1973; July 1, 1992; July 1, 2015.]

ARTICLE II. JUDICIAL NOTICE

RULE 201. Judicial Notice of Adjudicative Facts

(A) Scope of rule. This rule governs only judicial notice of adjudicative facts; i.e., the facts of the case.

(B) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(C) When discretionary. A court may take judicial notice, whether requested or not.

(D) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(E) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(F) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(G) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

[Effective: July 1, 1980.]

ARTICLE III. PRESUMPTIONS

RULE 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by statute enacted by the General Assembly or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

[Effective: July 1, 1980.]

RULE 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then existing, mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown by the testimony of the witness to have been made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in record kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a

memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirement of law

(10) Absence of public record. Testimony—or a certification under Evid.R. 901(B)(10)—that a diligent search failed to disclose a public record or statement if:

(a) the testimony or certification is admitted to prove that

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(b) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned Treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of the declarant's family by blood, adoption, or marriage or among the declarant's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of the declarant's personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among the person's associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of no contest or the equivalent plea from another jurisdiction), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment,

judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

[Effective: July 1, 1980; amended effective July 1, 2006; July 1, 2007; July 1, 2016.]

Staff Note (July 1, 2006 Amendment)

The 2006 amendment adds a new hearsay exception for statements in reliable learned treatises that are relied on by expert witnesses on direct examination or are called to the attention of expert witnesses on cross-examination. The 2006 amendment also renumbers five existing hearsay exceptions to reflect the insertion of Evid. R. 803(18).

Evid. R. 706, adopted in 1998, is repealed in view of the adoption of Evid. R. 803(18).

Rule 803(18) Learned Treatises

Evid. R. 803(18) is modeled on Federal Rule of Evidence 803(18), which has been described as a "carefully drafted rule [that] appears to work well in practice." Robert F. Magill, Jr., *Issues Under Federal Rule of Evidence 803(18): The "Learned Treatise" Exception to the Hearsay Rule,* 9 St. John's J. Legal Comment. 49 (1993). Although a departure from the common law and Ohio practice, substantive use of learned treatises is now accepted by the majority of states, Clifford Fishman, Jones on Evidence 316 (7th ed., 2003).

There are a number of reasons for creating a hearsay exception for statements in learned treatises under the circumstances in the proposed rule. Every expert brings a certain amount of "background hearsay" to his or her opinion, in the form of the out-of-court statements of textbook authors, colleagues, and others, that forms much of the basis of the expert's training and education. Paul Gianelli, Understanding Evidence 347 (2003). Ohio law now allows experts to rely on that knowledge in establishing their qualifications and in forming opinions. *Worthington City Schools v. ABCO Insulation*, 84 Ohio App. 3d 144, 152 (1992); *State v. Echols*, 128 Ohio App. 3d 677, 698 (Ham.1998). The rule makes explicit the sources of the expert's opinion, and in doing so both avoids disputes about the level of detail in their testimony and assists the trier of fact in evaluating that testimony. *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787. Similarly, while former law permitted the use of learned treatises for impeachment on cross-examination, Ohio Rule of Evidence 706, and on redirect examination after impeachment, *Hinkle v. Cleveland Clinic Foundation*, 159 Ohio App. 3d. 351, 365 (Cuy. 2004), it is often difficult for a jury to understand or maintain the distinction between impeachment or rehabilitation, on the one hand, and substantive use on the other.

Importantly, commentators agree that statements in learned treatises come within the two major justifications for most hearsay exceptions: reliability and necessity. David H. Kaye, *et. al.*, The New Wigmore: A Treatise on Evidence: Expert Evidence 132 (2004). Authors of scholarly works usually have no connection to the litigation and no motive to misrepresent. Their scholarly reputations are at stake when peers review their work for accuracy, enhancing reliability. With respect to necessity, there is often no other way to get the opinions of the most highly qualified researchers and scholars before the court.

Evid. R. 803(18) contains a number of safeguards against unreliability and misuse. Misunderstanding is guarded against by the fact that the statements in learned treatises come to the trier of fact only through the testimony of qualified experts who are on the stand to explain and apply the material in the treatise. The rule provides that the treatise may be read into evidence but not received as an exhibit to prevent the

trier from giving it excessive weight or attempting to interpret the treatise by itself. The rule applies only to a learned treatise found by the judge to be a “reliable authority” under Evid. R. 104(A).

Staff Note (July 1, 2016 Amendment)

The amendment adopts the 2011 federal stylistic changes made to the introductory language of Fed.R.Evid. 803 and to Fed.R.Evid. 803(10).

The amendment also adds Evid.R. 803(10)(b) which is modeled on a similar amendment made to Fed.R.Evid. 803(10) in 2013 in response to the United States Supreme Court ruling in *Melendez-Diaz v. Massachusetts*, 557. U.S. 305 (2009). As explained in the Federal Advisory Committee notes to the 2013 amendment, the *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The language of Fed.R.Evid. 803(10)(B) and Ohio Evid.R. 803(10)(b) incorporates, with minor variations, a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

RULE 901. Requirement of Authentication or Identification

(A) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(B) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witness with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (a) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (b) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (a) is in such condition as to create no suspicion concerning its authenticity, (b) was in a place where it, if authentic, would likely be, and (c) has been in existence twenty years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods provided by statute or rule. Any method of authentication or identification provided by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio or by other rules prescribed by the Supreme Court.

[Effective: July 1, 1980.]

2305.17 Commencement of action.

An action is commenced within the meaning of sections 2305.03 to 2305.22 and sections 1302.98 and 1304.35 of the Revised Code by filing a petition in the office of the clerk of the proper court together with a praecipe demanding that summons issue or an affidavit for service by publication, if service is obtained within one year.

Effective Date: 08-19-1994 .

2305.19 Saving in case of reversal.

(A) In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff or, if the plaintiff dies and the cause of action survives, the plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later. This division applies to any claim asserted in any pleading by a defendant.

(B) If the defendant in an action described in division (A) of this section is a foreign or domestic corporation, and whether its charter prescribes the manner or place of service of process on the defendant, and if it passes into the hands of a receiver before the expiration of the one year period or the period of the original applicable statute of limitations, whichever is applicable, as described in that division, then service to be made within one year following the original service or attempt to begin the action may be made upon that receiver or the receiver's cashier, treasurer, secretary, clerk, or managing agent, or if none of these officers can be found, by a copy left at the office or the usual place of business of any of those agents or officers of the receiver with the person having charge of the office or place of business. If that corporation is a railroad company, summons may be served on any regular ticket or freight agent of the receiver, and if there is no regular ticket or freight agent of the receiver, then upon any conductor of the receiver, in any county in the state in which the railroad is located. The summons shall be returned as if served on that defendant corporation.

(C) This section does not apply to an action or proceeding arising under section 2106.22, 2107.76, 2109.35,2115.16, 5806.04, or 5810.05 of the Revised Code.

Amended by 128th General AssemblyFile No.13, SB 106, §1, eff. 3/23/2010.

Effective Date: 03-02-2004 .

2317.40 Records as evidence.

As used in this section "business" includes every kind of business, profession, occupation, calling, or operation of institutions, whether carried on for profit or not.

A record of an act, condition, or event, in so far as relevant, is competent evidence if the custodian or the person who made such record or under whose supervision such record was made testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission.

This section shall be so interpreted and construed as to effectuate its general purpose to make the law of this state uniform with those states which enact similar legislation.

Effective Date: 09-16-1957 .

2317.41 Photographic copies of records admissible as competent evidence.

"Photograph" as used in this section includes but is not limited to microphotograph, a roll or strip of film, a roll or strip of microfilm, a photostatic copy, or an optically-imaged copy.

To the extent that a record would be competent evidence under section 2317.40 of the Revised Code, a photograph of such record shall be competent evidence if the custodian of the photograph or the person who made such photograph or under whose supervision such photograph was made testifies to the identity of and the mode of making such photograph, and if, in the opinion of the trial court, the record has been destroyed or otherwise disposed of in good faith in the regular course of business, and the mode of making such photograph was such as to justify its admission. If a photograph is admissible under this section, the court may admit the whole or a part thereof.

Such photograph shall be admissible only if the party offering it has delivered a copy of it, or so much thereof as relates to the controversy, to the adverse party a reasonable time before trial, unless in the opinion of the court the adverse party has not been unfairly surprised by the failure to deliver such copy. No such photograph need be submitted to the adverse party as prescribed in this section unless the original instrument would be required to be so submitted.

Effective Date: 10-04-1996 .

2505.02 Final orders.

(A) As used in this section:

(1) "Substantial right" means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.

(2) "Special proceeding" means an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.

(3) "Provisional remedy" means a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, suppression of evidence, a prima-facie showing pursuant to section 2307.85 or 2307.86 of the Revised Code, a prima-facie showing pursuant to section 2307.92 of the Revised Code, or a finding made pursuant to division (A)(3) of section 2307.93 of the Revised Code.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

(1) An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;

(2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment;

(3) An order that vacates or sets aside a judgment or grants a new trial;

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.

(b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action.

(5) An order that determines that an action may or may not be maintained as a class action;

(6) An order determining the constitutionality of any changes to the Revised Code made by Am. Sub. S.B. 281 of the 124th general assembly, including the amendment of sections 1751.67, 2117.06, 2305.11, 2305.15, 2305.234, 2317.02, 2317.54, 2323.56, 2711.21, 2711.22, 2711.23, 2711.24, 2743.02, 2743.43, 2919.16, 3923.63, 3923.64, 4705.15, and 5111.018 (renumbered as 5164.07 by H.B. 59 of the 130th general assembly), and the enactment of sections 2305.113, 2323.41, 2323.43, and 2323.55 of the Revised Code or any changes made by Sub. S.B. 80 of the 125th general assembly, including the amendment of sections 2125.02, 2305.10, 2305.131, 2315.18, 2315.19, and 2315.21 of the Revised Code;

(7) An order in an appropriation proceeding that may be appealed pursuant to division (B)(3) of section 163.09 of the Revised Code.

(C) When a court issues an order that vacates or sets aside a judgment or grants a new trial, the court, upon the request of either party, shall state in the order the grounds upon which the new trial is granted or the judgment vacated or set aside.

(D) This section applies to and governs any action, including an appeal, that is pending in any court on July 22, 1998, and all claims filed or actions commenced on or after July 22, 1998, notwithstanding any provision of any prior statute or rule of law of this state.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 9/29/2013.

Effective Date: 07-22-1998; 09-01-2004; 09-02-2004; 09-13-2004; 12-30-2004; 04-07-2005; 2007 SB7 10-10-2007

2505.03 Appeal of final order, judgment, or decree.

(A) Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.

(B) Unless, in the case of an administrative-related appeal, Chapter 119. or other sections of the Revised Code apply, such an appeal is governed by this chapter and, to the extent this chapter does not contain a relevant provision, the Rules of Appellate Procedure. When an administrative-related appeal is so governed, if it is necessary in applying the Rules of Appellate Procedure to such an appeal, the administrative officer, agency, board, department, tribunal, commission, or other instrumentality shall be treated as if it were a trial court whose final order, judgment, or decree is the subject of an appeal to a court of appeals or as if it were a clerk of such a trial court.

(C) An appeal of a final order, judgment, or decree of a court shall be governed by the Rules of Appellate Procedure or by the Rules of Practice of the Supreme Court, whichever are applicable, and, to the extent not in conflict with those rules, this chapter.

Effective Date: 03-17-1987 .

TITLE II. COMMENCEMENT OF ACTION AND VENUE; SERVICE OF PROCESS; SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS SUBSEQUENT TO THE ORIGINAL COMPLAINT; TIME

RULE 3. Commencement of Action; Venue

(A) Commencement. A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Civ.R. 15(C), or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D).

(B) Limited Appearance by Attorney. An attorney's role may be limited in scope, as authorized by Prof.Cond.R. 1.2(c), if that scope is specifically described in a "Notice of Limited Appearance" stating that the limited appearance has been authorized by the party for whom the appearance is made, and filed and served in accordance with Civ.R. 5 prior to or at the time of any such appearance. The attorney's limited appearance terminates without the necessity of leave of court, upon the attorney filing a "Notice of Completion of Limited Appearance" filed and served upon all parties, including the party for whom the appearance was made, in accordance with Civ.R. 5. If there is no objection within ten days of service of this notice, then no entry by the court is necessary for the termination of the limited appearance to take effect.

(C) Venue: where proper. Any action may be venued, commenced, and decided in any court in any county. When applied to county and municipal courts, "county," as used in this rule, shall be construed, where appropriate, as the territorial limits of those courts. Proper venue lies in any one or more of the following counties:

(1) The county in which the defendant resides;

(2) The county in which the defendant has his or her principal place of business;

(3) A county in which the defendant conducted activity that gave rise to the claim for relief;

(4) A county in which a public officer maintains his or her principal office if suit is brought against the officer in the officer's official capacity;

(5) A county in which the property, or any part of the property, is situated if the subject of the action is real property or tangible personal property;

(6) The county in which all or part of the claim for relief arose; or, if the claim for relief arose upon a river, other watercourse, or a road, that is the boundary of the state, or of two or more counties, in any county bordering on the river, watercourse, or road, and opposite to the place where the claim for relief arose;

(7) In actions described in Civ.R. 4.3, in the county where plaintiff resides;

(8) In an action against an executor, administrator, guardian, or trustee, in the county in which the executor, administrator, guardian, or trustee was appointed;

(9) In actions for divorce, annulment, or legal separation, in the county in which the plaintiff is and has been a resident for at least ninety days immediately preceding the filing of the complaint;

(10) In actions for a civil protection order, in the county in which the petitioner currently or temporarily resides;

(11) In tort actions involving asbestos claims, silicosis claims, or mixed dust disease claims, only in the county in which all of the exposed plaintiffs reside, a county where all of the exposed plaintiffs were exposed to asbestos, silica, or mixed dust, or the county in which the defendant has his or her principal place of business.

(12) If there is no available forum in divisions (C)(1) to (C)(10) of this rule, in the county in which plaintiff resides, has his or her principal place of business, or regularly and systematically conducts business activity;

(13) If there is no available forum in divisions (C)(1) to (C)(11) of this rule:

(a) In a county in which defendant has property or debts owing to the defendant subject to attachment or garnishment;

(b) In a county in which defendant has appointed an agent to receive service of process or in which an agent has been appointed by operation of law.

(D) Change of venue.

(1) When an action has been commenced in a county other than stated to be proper in division (C) of this rule, upon timely assertion of the defense of improper venue as provided in Civ.R. 12, the court shall transfer the action to a county stated to be proper in division (C) of this rule.

(2) When an action is transferred to a county which is proper, the court may assess costs, including reasonable attorney fees, to the time of transfer against the party who commenced the action in a county other than stated to be proper in division (C) of this rule.

(3) Before entering a default judgment in an action in which the defendant has not appeared, the court, if it finds that the action has been commenced in a county other than stated to be proper in division (C) of this rule, may transfer the action to a county that is proper. The clerk of the court to which the action is transferred shall notify the defendant of the transfer, stating in

the notice that the defendant shall have twenty-eight days from the receipt of the notice to answer in the transferred action.

(4) Upon motion of any party or upon its own motion the court may transfer any action to an adjoining county within this state when it appears that a fair and impartial trial cannot be had in the county in which the suit is pending.

(E) Venue: no proper forum in Ohio. When a court, upon motion of any party or upon its own motion, determines: (1) that the county in which the action is brought is not a proper forum; (2) that there is no other proper forum for trial within this state; and (3) that there exists a proper forum for trial in another jurisdiction outside this state, the court shall stay the action upon condition that all defendants consent to the jurisdiction, waive venue, and agree that the date of commencement of the action in Ohio shall be the date of commencement for the application of the statute of limitations to the action in that forum in another jurisdiction which the court deems to be the proper forum. If all defendants agree to the conditions, the court shall not dismiss the action, but the action shall be stayed until the court receives notice by affidavit that plaintiff has recommenced the action in the out-of-state forum within sixty days after the effective date of the order staying the original action. If the plaintiff fails to recommence the action in the out-of-state forum within the sixty day period, the court shall dismiss the action without prejudice. If all defendants do not agree to or comply with the conditions, the court shall hear the action.

If the court determines that a proper forum does not exist in another jurisdiction, it shall hear the action.

(F) Venue: multiple defendants and multiple claims for relief. In any action, brought by one or more plaintiffs against one or more defendants involving one or more claims for relief, the forum shall be deemed a proper forum, and venue in the forum shall be proper, if the venue is proper as to any one party other than a nominal party, or as to any one claim for relief.

Neither the dismissal of any claim nor of any party except an indispensable party shall affect the jurisdiction of the court over the remaining parties.

(G) Venue: notice of pending litigation; transfer of judgments.

(1) When an action affecting the title to or possession of real property or tangible personal property is commenced in a county other than the county in which all of the real property or tangible personal property is situated, the plaintiff shall cause a certified copy of the complaint to be filed with the clerk of the court of common pleas in each county or additional county in which the real property or tangible personal property affected by the action is situated. If the plaintiff fails to file a certified copy of the complaint, third persons will not be charged with notice of the pendency of the action.

To the extent authorized by the laws of the United States, division (G)(1) of this rule also applies to actions, other than proceedings in bankruptcy, affecting title to or possession of real property in this state commenced in a United States District Court whenever the real property is situated wholly or partly in a county other than the county in which the permanent records of the court are kept.

(2) After final judgment, or upon dismissal of the action, the clerk of the court that issued the judgment shall transmit a certified copy of the judgment or dismissal to the clerk of the court of common pleas in each county or additional county in which real or tangible personal property affected by the action is situated.

(3) When the clerk has transmitted a certified copy of the judgment to another county in accordance with division (G)(2) of this rule, and the judgment is later appealed, vacated, or modified, the appellant or the party at whose instance the judgment was vacated or modified must cause a certified copy of the notice of appeal or order of vacation or modification to be filed with the clerk of the court of common pleas of each county or additional county in which the real property or tangible personal property is situated. Unless a certified copy of the notice of appeal or order of vacation or modification is so filed, third persons will not be charged with notice of the appeal, vacation, or modification.

(4) The clerk of the court receiving a certified copy filed or transmitted in accordance with the provisions of division (G) of this rule shall number, index, docket, and file it in the records of the receiving court. The clerk shall index the first certified copy received in connection with a particular action in the indices to the records of actions commenced in the clerk's own court, but may number, docket, and file it in either the regular records of the court or in a separate set of records. When the clerk subsequently receives a certified copy in connection with that same action, the clerk need not index it, but shall docket and file it in the same set of records under the same case number previously assigned to the action.

(5) When an action affecting title to registered land is commenced in a county other than the county in which all of such land is situated, any certified copy required or permitted by this division (G) of this rule shall be filed with or transmitted to the county recorder, rather than the clerk of the court of common pleas, of each county or additional county in which the land is situated.

(H) Venue: collateral attack; appeal. The provisions of this rule relate to venue and are not jurisdictional. No order, judgment, or decree shall be void or subject to collateral attack solely on the ground that there was improper venue; however, nothing here shall affect the right to appeal an error of court concerning venue.

(I) Definitions. As used in division (C)(11) of this rule:

(1) "Asbestos claim" has the same meaning as in section 2307.91 of the Revised Code;

(2) "Silicosis claim" and "mixed dust disease claim" have the same meaning as in section 2307.84 of the Revised Code;

(3) In reference to an asbestos claim, "tort action" has the same meaning as in section 2307.91 of the Revised Code;

(4) In reference to a silicosis claim or a mixed dust disease claim, "tort action" has the same meaning as in section 2307.84 of the Revised Code.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1986; July 1, 1991; July 1, 1998; July 1, 2005; July 1, 2018.]

Staff Note (July 1, 2018 Amendment)

New Division (B): Limited Appearance by Attorney.

This and other July 1, 2018 amendments to the Ohio Rules of Civil Procedure encourage attorneys to assist pro se parties on a limited basis without undertaking the full representation of the client on all issues related to the legal matter for which the attorney is engaged. By these amendments, the Supreme Court seeks to enlarge access to justice in Ohio's courts as recommended by a 2006 Report of the Court's Task Force on Pro Se & Indigent Litigants and by a 2015 Report of the Court's Task Force on Access to Justice.

New division (B) permits attorneys to enter a limited appearance on behalf of an otherwise unrepresented litigant. The effect of the limited appearance is to permit an attorney to represent a client on one or more matters in a lawsuit but not on all matters. While normally leave of court is required if an attorney seeks to withdraw from representation, under this provision, leave of court is not required for withdrawal from the case at the conclusion of a properly noticed limited appearance, provided the attorney files and serves the proper Notice of Completion of Limited Appearance in accordance with Civ.R. 5.

The benefits of division (B) are obtained only by filing a notice of limited appearance identified as such. The notice of limited appearance must clearly describe the scope of the limited representation and state that the limitation of appearance has been authorized by the party for whom the appearance is made. It is intended that any doubt about the scope of the limited representation be resolved in a manner that promotes the interests of justice and those of the client and opposing party.

Staff Note (July 1, 2005 Amendment)

Civ. R. 3 is amended in response to requests from the General Assembly contained in Section 3 of Am. Sub. H.B. 342 of the 125th General Assembly, effective September 1, 2004, and Section 4 of Am. Sub. H.B. 292 of the 125th General Assembly, effective September 2, 2004. These acts contain provisions governing tort claims that allege exposure and injury by persons exposed to asbestos, silica, or mixed dust. Each act includes a request that the Supreme Court amend the Rules of Civil Procedure "to specify procedures for venue and consolidation" of asbestosis, silicosis, and mixed dust disease claims.

Rule 3(B) Venue: where proper

Civ. R. 3(B) is amended to include an exclusive venue provision that applies to the filing of actions involving asbestos, silicosis, or mixed dust disease claims. Division (B)(11) states that a civil action alleging one or more of these claims may be filed only in either the county in which all exposed plaintiffs reside, a

county where all exposed plaintiffs were exposed to asbestos, silica, or mixed dust occurred, or the county in which the defendant has his or her principal place of business.

Existing divisions (B)(11) and (12) have been renumbered to reflect the addition of new division (B)(11).

Rule 3(H) Definitions

Division (H) is added to reference the statutory definitions of "asbestos claim," "silicosis claim," "mixed dust disease claim," and "tort action" for purposes of Civ. R. 3(B)(11).

Staff Note (July 1, 1998 Amendment)

Rule 3(A) Commencement.

The style used for rule references was changed. There was no substantive amendment to this division.

Rule 3(B) Venue: where proper.

The 1998 amendment added a new division (10), and renumbered existing divisions (10) and (11) to (11) and (12), respectively. New division (10) clarifies the appropriate venue for an action seeking the entry of a civil protection order in domestic or family violence cases. The Supreme Court's Domestic Violence Task Force recommended this change in order to clarify Ohio law on this matter. Report of the Supreme Court of Ohio Domestic Violence Task Force: Increasing Safety for Victims, Increasing Accountability of Offenders 16 (October 18, 1996). The amendment uses criteria similar to other venue provisions. For example, the concept of residence is used in other divisions of Civ.R. 3(B), and the concept of a current or temporary residence is similar to the reference to plaintiff's residence in Civ.R. 3(B)(11) (renumbered from Civ. R. 3(B)(10)). See, e.g., *State, ex rel. Saunders v. Court of Common Pleas of Allen Cty*. (1987), 34 Ohio St. 3d 15, 17, 516 N.E. 2d 232 ("the term, 'resides,' as used in [prior] Civ.R. 3(B)(10) ought to be 'liberally construed and not confused with [the] requirements for domicile.'"(quoting McCormac, Ohio Civil Rules Practice). The respondent remains free to challenge venue under Civ.R. 3(D).

Nonsubstantive grammatical revisions were also made to this division.

Rule 3(C) Change of venue.

The style used for rule references was changed. There was no substantive amendment to this division.

Rule 3(F) Venue: notice of pending litigation; transfer of judgments

The style used for rule references was changed and the division was made gender-neutral. There was no substantive amendment to this division.

RULE 4.6 Process: Limits; Amendment; Service Refused; Service Unclaimed

(A) Limits of effective service. All process may be served anywhere in this state and, when authorized by law or these rules, may be served outside this state.

(B) Amendment. The court within its discretion and upon such terms as are just, may at any time allow the amendment of any process or proof of service thereof, unless the amendment would cause material prejudice to the substantial rights of the party against whom the process was issued.

(C) Service refused. If attempted service of process by United States certified or express mail or by commercial carrier service within or outside the state is refused, and the certified or express mail envelope or return of the commercial carrier shows such refusal, or the return of the person serving process by personal service within or outside the state or by residence service within the state specifies that service of process has been refused, the clerk shall forthwith notify the attorney of record or, if there is no attorney of record, the party at whose instance process was issued and enter the fact and method of notification on the appearance docket. If the attorney, or serving party, after notification by the clerk, files with the clerk a written request for ordinary mail service, the clerk shall send by United States ordinary mail a copy of the summons and complaint or other document to be served to the defendant at the address set forth in the caption, or at the address set forth in written instructions furnished to the clerk. The mailing shall be evidenced by a certificate of mailing which shall be completed and filed by the clerk. Answer day shall be twenty-eight days after the date of mailing as evidenced by the certificate of mailing. The clerk shall endorse this answer date upon the summons which is sent by ordinary mail. Service shall be deemed complete when the fact of mailing is entered of record. Failure to claim United States certified or express mail or commercial carrier service is not refusal of service within the meaning of this division. This division shall not apply if any reason for failure of delivery other than "Refused" is also shown on the United States certified or express mail envelope.

(D) United States certified or express mail service unclaimed. If a United States certified or express mail envelope attempting service within or outside the state is returned with an endorsement stating that the envelope was unclaimed, the clerk shall forthwith notify the attorney of record or, if there is no attorney of record, the party at whose instance process was issued and enter the fact and method of notification on the appearance docket. If the attorney, or serving party, after notification by the clerk, files with the clerk a written request for ordinary mail service, the clerk shall send by United States ordinary mail a copy of the summons and complaint or other document to be served to the defendant at the address set forth in the caption, or at the address set forth in written instructions furnished to the clerk. The mailing shall be evidenced by a certificate of mailing which shall be completed and filed by the clerk. Answer day shall be twenty-eight days after the date of mailing as evidenced by the certificate of mailing. The clerk shall endorse this answer date upon the summons which is sent by ordinary mail. Service shall be deemed complete when the fact of mailing is entered of record, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing

failure of delivery. If the ordinary mail envelope is returned undelivered, the clerk shall forthwith notify the attorney, or serving party.

(E) Duty of attorney of record or serving party. The attorney of record or the serving party shall be responsible for determining if service has been made and shall timely file written instructions with the clerk regarding completion of service notwithstanding the provisions in Civ. R. 4.1 through 4.6 which instruct a clerk to notify the attorney of record or the serving party of failure of service of process.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1978; July 1, 1997; July 1, 2012.]

Staff Note (July 1, 2012 Amendment)

Divisions (C) and (D) are amended (1) to specify that their provisions for service by United States ordinary mail apply to service by commercial carrier that is returned showing "Refused" but do not apply to service by commercial carrier that is returned showing "Unclaimed" and (2) to make clear that these divisions are applicable to U.S. mail service attempted both within and outside the state.

Division (C) relating to service "Refused" is also amended to specify that its provisions do not apply to ambiguous returns of U.S. certified or express mail stating other reasons for failure of delivery that suggest lack of actual notice to the defendant, such as "unable to forward". Division (D) relating to service "Unclaimed" is not similarly amended with respect to returns stating both "Unclaimed" and other reasons for failure of delivery; however, division (D) continues to apply only to U.S. Postal Service returns showing that the addressee was notified of, and failed to claim, the certified or express mail envelope.

Staff Note (July 1, 1997 Amendment)

Rule 4.6 Process: Limits; amendment; service refused; service unclaimed

Prior to the 1997 amendment, service of process under this rule was permitted only by certified mail. It appears that service of process by express mail, i.e. as that sort of mail is delivered by the United States Postal Service, can always be obtained return receipt requested, and thus could accomplish the purpose of notification equally well as certified mail. Therefore, the amendment provides for this additional option for service.

Other amendments to this rule are nonsubstantive grammatical or stylistic changes.

RULE 4. Process: Summons

(A) Summons: issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons for service upon each defendant listed in the caption. Upon request of the plaintiff separate or additional summons shall issue at any time against any defendant.

(B) Summons: form; copy of complaint. The summons shall be signed by the clerk, contain the name and address of the court and the names and addresses of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the times within which these rules or any statutory provision require the defendant to appear and defend, and shall notify the defendant that in case of failure to do so, judgment by default will be rendered against the defendant for the relief demanded in the complaint. Where there are multiple plaintiffs or multiple defendants, or both, the summons may contain, in lieu of the names and addresses of all parties, the name of the first party on each side and the name and address of the party to be served.

A copy of the complaint shall be attached to each summons. The plaintiff shall furnish the clerk with sufficient copies.

(C) Summons: plaintiff and defendant defined. For the purpose of issuance and service of summons "plaintiff" shall include any party seeking the issuance and service of summons, and "defendant" shall include any party upon whom service of summons is sought.

(D) Waiver of service of summons. Service of summons may be waived in writing by any person entitled thereto under Rule 4.2 who is at least eighteen years of age and not under disability. For any civil action filed in a Court of Common Pleas, the plaintiff may request that the defendant waive service of a summons pursuant to the provisions of Civ.R. 4.7.

(E) Summons: time limit for service. If a service of the summons and complaint is not made upon a defendant within six months after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This division shall not apply to out-of-state service pursuant to Rule 4.3 or to service in a foreign country pursuant to Rule 4.5.

(F) Summons: revivor of dormant judgment. Upon the filing of a motion to revive a dormant judgment the clerk shall forthwith issue a summons for service upon each judgment debtor. The summons, with a copy of the motion attached, shall be in the same form and served in the same manner as provided in these rules for service of summons with complaint attached, shall command the judgment debtor to serve and file a response to the motion within the same time as provided by these rules for service and filing of an answer to a complaint, and shall notify the judgment debtor that in case of failure to respond the judgment will be revived.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1973; July 1, 1975; July 1, 1984; July 1, 2008; July 1, 2020.]

Staff Note (July 1, 2008 Amendment)

The adoption of the Ohio Rules of Civil Procedure in 1970 left unclear the procedure and manner of service for a motion to revive a dormant judgment, formerly governed by R.C. 2325.15 and R.C. 2325.16 which referred to statutes superseded by the Rules. Division (F) of Rule 4 has been adopted to make clear that R.C. 2325.15 and R.C. 2325.16 are superseded by this new Rule. It requires, consistent with the practice under the prior statutes, that a motion to revive a dormant judgment be served upon the judgment debtor in the same manner as service of summons with complaint attached, affording the debtor an opportunity to show cause against the revivor.

Staff Note (July 1, 2020 Amendment)

Civ.R. 4(D) is amended to include a reference to the specific provisions for waiver of service of summons provided for in Civ.R. 4.7.

TITLE III. PLEADINGS AND MOTIONS

RULE 7. Pleadings and Motions

(A) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Civ.R. 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

(B) Motions.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or a trial, shall be made in writing. A motion, whether written or oral, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. A written motion, and any supporting affidavits, shall be served in accordance with Civ.R. 5 unless the motion may be heard ex parte.

(2) To expedite its business, the court may make provision by rule or order not inconsistent with these rules for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

(3) The rules applicable to captions, signing, and other matters of form of pleading apply to all motions and other papers provided for by these rules.

(4) All motions shall be signed in accordance with Civ.R. 11.

[Effective: July 1, 1970; amended effective July 1, 1984; July 1, 2014; July 1, 2015; July 1, 2019.]

Staff Note (July 1, 2019 Amendment)

Division (B)(2)

Division (B)(2) of the rule is amended to ensure that any local rule or order of the court relating to the submission and determination of motions is not inconsistent with the provisions of any other Rule of Civil Procedure (e.g., Civ.R. 6).

Staff Note (July 1, 2015 Amendment)

Rule 7(B) is amended by eliminating the reference to a "notice of hearing" which is no longer required by Civ.R. 6(B).

Staff Note (July 1, 2014 Amendments)

Rule 7(C) abolishing demurrers is deleted, corresponding to the 2007 deletion of former Federal Rule 7(c). Demurrers are unknown in Ohio modern practice, having been replaced in 1970 by Civ.R. 12(B)(6) with the adoption of the Ohio Rules of Civil Procedure. As the 2007 Federal Advisory Committee Note stated: “Former Rule 7(c) is deleted because it has done its work.”

RULE 12. Defenses and Objections--When and How Presented--by Pleading or Motion--Motion for Judgment on the Pleadings

(A) When answer presented.

(1) Generally. The defendant shall serve his answer within twenty-eight days after service of the summons and complaint upon him; if service of notice has been made by publication, he shall serve his answer within twenty-eight days after the completion of service by publication.

(2) Other responses and motions. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty-eight days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty-eight days after service of the answer or, if a reply is ordered by the court, within twenty-eight days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (a) if the court denies the motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after notice of the court's action; (b) if the court grants a motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after service of the pleading which complies with the court's order.

(B) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

(C) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

(D) Preliminary hearings. The defenses specifically enumerated (1) to (7) in subdivision (B) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (C) of this rule shall be heard and determined before trial on application of any party.

(E) Motion for definite statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within fourteen days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(F) Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent, or scandalous matter.

(G) Consolidation of defenses and objections. A party who makes a motion under this rule must join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter assert by motion or responsive pleading, any of the defenses or objections so omitted, except as provided in subdivision (H) of this rule.

(H) Waiver of defenses and objections.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (a) if omitted from a motion in the circumstances described in subdivision (G), or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(A) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(A), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction on the subject matter, the court shall dismiss the action.

[Effective: July 1, 1970; amended effective July 1, 1983.]

RULE 41. Dismissal of Actions

(A) Voluntary dismissal: effect thereof.

(1) By plaintiff; by stipulation. Subject to the provisions of Civ. R. 23(E), Civ. R. 23.1, and Civ. R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:

(a) filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant;

(b) filing a stipulation of dismissal signed by all parties who have appeared in the action.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court.

(2) By order of court. Except as provided in division (A)(1) of this rule, a claim shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon that defendant of the plaintiff's motion to dismiss, a claim shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under division (A)(2) of this rule is without prejudice.

(B) Involuntary dismissal: effect thereof.

(1) Failure to prosecute. Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim.

(2) Dismissal; non-jury action. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff’s evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Civ. R. 52 if requested to do so by any party.

(3) Adjudication on the merits; exception. A dismissal under division (B) of this rule and any dismissal not provided for in this rule, except as provided in division (B)(4) of this rule, operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies.

(4) Failure other than on the merits. A dismissal for either of the following reasons shall operate as a failure otherwise than on the merits:

(a) lack of jurisdiction over the person or the subject matter;

(b) failure to join a party under Civ. R. 19 or Civ. R. 19.1.

(C) Dismissal of counterclaim, cross-claim, or third-party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to division (A)(1) of this rule shall be made before the commencement of trial.

(D) Costs of previously dismissed action. If a plaintiff who has once dismissed a claim in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the claim previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1972; July 1, 2001.]

Staff Note (July 1, 2001 Amendment)

Civil Rule 41 Dismissal of Actions

This rule was amended (1) to reflect more precisely its interpretation by the Supreme Court in *Denham v. City of New Carlisle*, 86 Ohio St. 3d 594 (1999); (2) to conform Civ. R. 41(D) with Civ. R. 41(A) as amended; and (3) to reflect that Civ. R. 23.1 provides that a shareholder derivative action "shall not be dismissed or compromised without the approval of the court."

In divisions (B) and (C), masculine references were changed to gender-neutral language, the style used for rule references was changed, and other grammatical changes were made. No substantive amendment to divisions (B) and (C) was intended.