

IN THE SUPREME COURT OF OHIO

**WILMINGTON SAVINGS FUND  
SOCIETY, FSB, AS TRUSTEE FOR  
UPLAND MORTGAGE LOAN TRUST A,**

Plaintiff-Appellee,

-vs-

**DEMETRIUS SMITH, *et al.*,**

Defendants-Appellants.

**Supreme Court Case No. 2021-1337**

**On Appeal From The Hamilton  
County Court of Appeals, First  
Appellate District**

**First District Court of Appeals  
Case No. C-190357**

---

**MEMORANDUM OF APPELLEE WILMINGTON SAVINGS FUND SOCIETY, FSB, AS  
TRUSTEE FOR UPLAND MORTGAGE LOAN TRUST A'S IN RESPONSE TO  
DEFENDANTS-APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION**

---

Kara A. Czanik (0075165)  
Dinsmore & Shohl LLP  
255 East Fifth Street, Suite 1900  
Cincinnati, Ohio 45202  
Tel: (513) 832-5490  
Fax: (513) 977-8141  
Email: kara.czanik@dinsmore.com

Demetrious Yadirfa Smith  
Amy Kathleen Smith  
4703 Wionona Terrace  
Cincinnati, Ohio 45227

*Defendants-Appellants*

*Counsel for Plaintiff-Appellee Wilmington  
Savings Fund Society, FSB, as Trustee for  
Upland Mortgage Loan Trust A*

## **TABLE OF CONTENTS**

	<u>Page</u>
THIS CASE DOES NOT INVOLVE ISSUES OF PUBLIC OR GREAT GENERAL INTEREST OR A SUBSTANTIAL CONSTITUTIONAL QUESTION .....	1
STATEMENT OF THE CASE.....	2
PROCEDURAL POSTURE.....	2
STATEMENT OF PERTINENT FACTS .....	3
ARGUMENTS IN OPPOSITION TO THE SMITHS PROPOSITIONS OF LAW.....	7
CONCLUSION .....	11

## **TABLE OF AUTHORITIES**

	<u>Page</u>
<b><u>Cases</u></b>	
1. <i>Bank of Am. v. Kuchta</i> , 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶20 .....	9
2. <i>Bank of America, NA. v. Smith</i> , 1 <sup>st</sup> Dist. Hamilton No. C-170654, 2018-Ohio-3638.....	2
3. <i>Deutsch Bank Nat'l Trust Co. v. Holden</i> , 147 Ohio St.3d 85, 93, 2016-Ohio-4603, ¶ 21 (2016).....	10
4. <i>Fed. Home Loan Mtg. Corp. v. Schwartwald</i> , 134 Ohio St.3d 13, 2012-Ohio- 5017, 979 N.E.2d 1214, ¶41 (2012).....	10
5. <i>Fifth Third Mtg. Co. v. Wizzard</i> , 12 <sup>th</sup> Dist. Butler No. CA 2013-03-046, 2014- Ohio-73, ¶ 8 (Jan. 13, 2014) .....	8
6. <i>State v. Ramage</i> , 138 Ohio St.3d 390, 2014-Ohio-783, ¶7 (2013) .....	8
7. <i>U.S. Bank N.A. v. Alex</i> , Eighth Dist. Cuyahoga No. 101276, 2015-Ohio-871, ¶ 7 (Mar. 12, 2015) .....	7
8. <i>Williamson v. Rubich</i> , 171 Ohio St. 253, 254, 168 N.E.2d 876 (1960) .....	1
<b><u>Statutes</u></b>	
1. Oh Const. Art IV, §2(B)(2)(e) .....	1
2. Oh. R. Civ. R. 56(C) .....	8
3. Oh. R. Civ. P. 56(E) .....	8, 9
4. Oh. R. Civ. P. 25(C) .....	11

**I. THIS CASE DOES NOT INVOLVE ISSUES OF PUBLIC OR GREAT GENERAL INTEREST OR A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This case raises neither a question of public and great general interest, nor a substantial Constitutional question. Instead, this foreclosure action concerns factual and evidentiary issues specific to this case. And, the appellate court’s decision involved the application of clear and well-established law. The First Appellate District applied on-point precedent and ruled properly. Because this case involves routine application of existing law to specific facts, it falls well below the standard for a substantive review by this Court.

Section 2, Article 4 of the Ohio Constitution, states in part, in cases of great general or public interest, the Supreme Court may direct any court of appeals to certify its record to the Supreme Court, and may review and affirm, modify or reverse the judgment of the court of appeals; . . .” Oh Const. Art IV, §2(B)(2)(e). “Whether the question or questions argued are in fact ones of public or great general interest rests with the discretion of the court.” *Williamson v. Rubich*, 171 Ohio St. 253, 254, 168 N.E.2d 876 (1960).

Appellants Demetrious and Amy Smith (the “Smiths”) hurl diatribes and conspiracy theories about the mortgage industry, Ohio’s court system, its judges, and Appellee Wilmington Savings Fund Society, FSB, as Trustee for Upland Mortgage Loan Trust A (“Wilmington”) and its counsel. They do not connect any of those allegations to the decision from the First Appellate District below, which upheld a decision granting summary judgment to Wilmington.

The Smiths have also failed to raise a Constitutional issue. The Smiths argue that “the servicer attorneys have eloquently quoted all kinds of statutes, and case law, in support of the banks, however, they derive from man-made laws, repugnant to the Constitution, and are invalid against natural persons. All codes, rules and regulations are unconstitutional, and are invalid against natural persons. All codes, rules, and regulations are unconstitutional when they lack due

process of the law. \* \* \*” The Smiths further argue that “[a]ll codes, rules, and regulations are applicable to the government authorities only, not human/Creators in accordance with God’s Laws.” The Smiths further state that federal law governs where there is a conflict with state law. Again, the Smiths fail to connect the issues they raise to the decision they purport to appeal. They also fail to explain how any specific law is unconstitutional or how there is a conflict of law.

Because this is not a case with great general or public interest, the Court should decline jurisdiction.

## **II. STATEMENT OF THE CASE**

### **A. Procedural Posture.**

On September 29, 2016, Bank of America, N.A. (“BOA”) filed a complaint for foreclosure of the Smiths’ residence. (See September 17, 2021 Judgment Entry in the First District Court of Appeals (“First District Decision”) at 2; T.d.) The Smiths filed a motion to dismiss and attempted to remove the case to federal court. BOA filed a motion for default. The trial court granted the motion for default and denied the Smiths’ motion to dismiss. The Smiths appealed, and Ohio First District Court of Appeals reversed the portion of the trial court’s judgment granting default judgment to BOA. (See *Bank of America, N.A. v. Smith, 1<sup>st</sup> Dist. Hamilton No. C-170654, 2018-Ohio-3638 (“Decision in First Appeal”)*)

On remand, BOA filed a motion to substitute Wilmington as the Plaintiff. The order was granted and Wilmington moved for summary judgment. The trial court adopted a magistrate decision granting summary judgment to Wilmington, which led to the second appeal to the First District Court of Appeals in Case No. C-190357. On September 17, 2021 the First District entered the First District Decision, affirming the trial court order granting summary judgment to

Wilmington. The Smiths filed a notice of appeal on October 29, 2021 seeking to challenge the First District Decision.

**B. Statement of Pertinent Facts.<sup>1</sup>**

**1. Proceedings before the First Appeal.**

The Smiths executed a promissory note made payable to ABN AMRO Mortgage Group, Inc. (“ABN AMRO”) in the principal amount of \$100,000.00 and both Demetrious Smith and Amy Smith executed a mortgage against their residence to secure the amounts due under the promissory note. (*Id.*; T.d. 1, Complaint) The loan was ultimately assigned to BOA. The Smiths defaulted on their obligations under the note and mortgage. (*Id.*)

As a result of the default, BOA filed a complaint and attached a copy of the relevant promissory note originally payable to ABN AMRO, with an indorsement from ABN AMRO to LaSalle Bank, N.A. (“LaSalle”) and an indorsement in blank form BOA as successor by merger to LaSalle. (*Id.*) BOA also attached an assignment of mortgage from ABN AMRO, the original mortgagee, to LaSalle dated March 4, 2008. (*Id.*, Assignment attached thereto as Exhibit C) BOA also included a certificate from the Comptroller of the Currency, under which LaSalle merged into BOA as of December 23, 2008. (*Id.*, Certificate attached as Exhibit D thereto) Finally, BOA attached an assignment of mortgage from itself, as successor by merger to LaSalle, to itself alone. (*Id.*, Assignment attached as Exhibit E thereto)

The Smiths filed a motion to dismiss the complaint. (*Id.*) They also removed the case to the United States District Court for the Southern District of Ohio. (*Id.*) The district court remanded the case back to the Hamilton County Court of Common Pleas and sanctioned the Smiths for the

---

<sup>1</sup> The Smiths’ Statement of Facts lacks any reference to the trial court record or the First District Decision. The Smiths’ Statement of Facts also includes inapplicable legal arguments and conclusions.

improper removal. (*Id.*) BOA subsequently filed a motion for default judgment against the Smiths based on their failure to file an answer to the complaint. (*Id.* at 3) The trial court overruled the Smiths' motion to dismiss and granted BOA's motion for a default judgment. (*Id.*) The Smiths appealed, and Ohio First District Court of Appeals reversed the portion of the trial court's judgment granting default judgment to BOA. (*See Decision in First Appeal*) The court of appeals held that even though the Smiths had not filed an answer to the complaint, they had appeared and otherwise defended against the allegations in the Complaint. (*Id.* at ¶ 20.) The court rejected the Smiths' arguments that BOA lacked standing to file suit, finding that BOA correctly alleged standing and attached proper documentation me.

## **2. Proceedings after the Smiths' First Appeal.**

On remand, the Smiths filed an answer and a counterclaim. (*Id.*) The Smiths continued their unfounded and ultimately unsuccessful campaign to disqualify the trial judge from hearing the case. On January 10, 2019, BOA moved to substitute Wilmington as the plaintiff in the action because Wilmington had purchased the note and mortgage that were subject of the foreclosure action. (*Id.*) The trial court issued an order substituting Wilmington as the plaintiff in the action. (*Id.*)

On February 15, 2019, Wilmington moved for summary judgment. (*Id.*) Wilmington supported the motion with a proper affidavit, with the affiant testifying on the basis of personal knowledge and a review of business records. Specifically, the affiant testified that that Wilmington had possession of the original note and that the Smiths were due for their January 2009 mortgage payment, and authenticated the note, mortgage, assignments of mortgage, demand letter, and payment history. (*Id.*, Aff. and exhibits) The Smiths opposed the motion for summary judgment and removed the case to the United States District Court for the Southern District of New York.

(*Id.*) The district court remanded the case back to the trial court and threatened sanctions against the Smiths if they attempted to file another improper notice of removal. (*Id.*) A Magistrate with the court of common pleas granted Wilmington’s motion for summary judgment. (*Id.*) The Smiths filed objections to the magistrate’s decision. The trial court overruled the objections and adopted the magistrate’s decision. (*Id.*).

In its entry, the trial court found that Demetrious Smith and Amy Smith executed the promissory note and the mortgage, that the payments required by the note had not been made, that the payments due under the note were properly accelerated, and that the Smiths were in default of their obligations under the note and mortgage. The court further found that Wilmington was entitled to enforce the note and mortgage and have the mortgage reformed to clarify that both Demetrious Smith and Amy Smith executed it as borrowers. The court ordered that the Smiths’ property be foreclosed and sold, with the proceeds of the sale distributed as set forth in the court’s entry. (*Id.* at 4)

### **3. The Second Appeal and Bankruptcy.**

On June 13, 2019, the Smiths filed the appeal in case no. C-190357, their second appeal to the First District Court of Appeals (“Second Appeal”). Wilmington sought to execute on its judgment to sell the mortgaged property (T.d., Notice of Sale). The Smiths filed a motion to avoid the sale, but without posting a supersedeas bond. (T.d., August 15, 2019 motion to avoid sale). Wilmington opposed the motion.

On August 30, 2019, the Smiths filed a petition for bankruptcy in the Bankruptcy Court for the Southern District of Ohio, Case No. Case No. 19-13209 and filed a Notice of Emergency Bankruptcy Petition and Wilmington removed the property from sale. (T.d.) The Smiths voluntarily dismissed their bankruptcy on May 4, 2021. On May 27, 2021, Wilmington moved to

proceed with the sale (T.d., Notice of Sale). On July 15, 2021, the Smiths filed a Motion for Removal of Case to the Federal District Court. (T.d., Motion for Removal). On that same day, in the court of appeals, the Smiths filed a Motion for Removal of Case to the Federal District Court, Preliminary Injunction and Declaratory Relief, Motion for Stay on Appeal Pending the Removal of the Case in the court of appeals. (*See* Second Appeal Docket) Wilmington opposed the motions filed in both the trial court and in the Second Appeal.

#### **4. The Sale, the First District Decision in the Second Appeal, and Confirmation of the Sale.**

On July 21, 2021, the Property was sold. (T.d. Order of Sale Returned) On August 4, 2021, the Smiths filed a motion to set aside Sheriff's sale in the Second Appeal. (Second Appeal Docket) On August 6, 2021, the court of appeals denied that motion. On August 16, 2021, Wilmington filed a Motion for Entry of Confirmation of sale and Distribution of Proceeds. (T.d., Motion for Entry of Confirmation of Sale) That same day, the Smiths filed a Motion for EnBlanc Reconsideration for Writ of Stay the Execution of the Sheriff's Sale Motion to Declare Certified Conflict. (Second Appeal Docket) On August 19, 2021, they filed a Motion to Set Aside Sheriff's sale in the trial court. (T.d., Motion to Set Aside Sheriff Sale)

On September 17, 2021, the court in the Second Appeal entered the First District Decision, affirming the trial court's decision granting summary judgment. On October 6, 2021, the Smiths filed a Motion to Vacate Sale in the trial court. The trial court confirmed the sale and distributed proceeds on November 3, 2021. (T.d., Confirmation Entry Of Sale And Distribution Of Proceeds.)

The Smiths filed their Notice of Appeal to this Court on October 29, 2021 challenging the First District Decision.

### **III. ARGUMENTS IN OPPOSITION TO THE SMITHS PROPOSITIONS OF LAW.**

It is nearly impossible to decipher what portion of the First District Decision the Smiths are actually trying to challenge. Specifically, the Smiths do not include any support with their specific Propositions of Law. They simply list the Propositions of law at the end of their Memorandum. Nevertheless, Wilmington will below respond to the Propositions of Law as it understands them as well as the related arguments raised inappropriately in their fact section. In short, there are absolutely no grounds for this Court to review this matter.

#### **A. Response to Proposition of Law No. 1.**

**APPELLANTS' PROPOSITION OF LAW NO. 1: Are Certain Codes Prejudicial to the Administration of Justice for Ohio Homeowners Fighting Unlawful Foreclosures? These codes are O.R.C. 2737.03, Motion and Affidavit for Order of Possession of Property, O.R.C. 2715.045, Issuing Order of Attachment Without Notice or Hearing, O.R.C. 2737.11 Recov. Of Prop by filing bond or cash deposit.**

#### **APPELLEE'S RESPONSE: The Smiths Fail to Raise Issues of Constitutionality.**

The Smiths seem to be challenging the Constitutionality of the above Statutes. However, they fail to explain how those statutes are unconstitutional. Further, and importantly, none of those provisions were referred to in the First District Decision – the actual decision the Smiths are attempting to appeal. The Smiths seem to allege that the trial court erred by referencing a supersedeas bond, and applying admiralty law to that determination. As an initial matter, the Smiths did not appeal a final judgment relating to Wilmington's execution of the judgment. They appealed only the First District Decision, which upheld the decision granting Wilmington summary judgment. At the time of the appeal, any ruling regarding a supersedeas bond was not a final appealable order. *See, U.S. Bank N.A. v. Alex*, Eighth Dist. Cuyahoga No. 101276, 2015-Ohio-871, ¶ 7 (Mar. 12, 2015).

Further, the Smiths are deeply confused about what a supersedeas bond actually is, linking it to admiralty law, despite that the Ohio Revised Code and related case law set forth exactly what

a supersedeas bond is, its purpose, and when it applies in foreclosure actions. *Fifth Third Mtg. Co. v. Wizzard*, 12<sup>th</sup> Dist. Butler No. CA 2013-03-046, 2014-Ohio-73, ¶ 8 (Jan. 13, 2014).

Under Ohio law statutes are given a strong presumption of constitutionality, and the party challenging the constitutionality of a statute bears the burden of establishing unconstitutionality. *State v. Ramage*, 138 Ohio St.3d 390, 2014-Ohio-783, ¶7 (2013). And, the Smiths do not set forth any basis to overcome that presumption.

The Smiths' attempt to have the Court review a decision based on the purported unconstitutionality of laws that were not part of the appealed decision is frivolous, and does not warrant this Court's review.

#### **B. Response to Proposition of Law No. 2.**

**APPELLANTS' PROPOSITION OF LAW NO. 2: Is the State of Ohio Giving Servicers the Advantage, When They Don't Have to Prove Anything, Just File an Affidavit, when that Denies Due Process?**

**APPELLEE'S RESPONSE: Wilmington Submitted Proper Rule 56 Evidence and the First District Decision is in line with Well-Established Precedent.**

The Smiths seem to challenge a court's ability to grant summary judgment even when an affidavit is properly submitted in support. This argument is unfounded. The Ohio Rules of Civil Procedure provide for the use of summary judgment and Oh. R. Civ. P. 56(C) specifically identifies the evidence that may be used to support summary judgment:

Summary Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Oh. R. Civ. P. 56(E).

The First District properly affirmed the grant of summary judgment because Wilmington properly supported its motion with an Affidavit and properly-authenticated evidence and the

Smiths failed to oppose the motion with evidence sufficient to raise a genuine issue of material fact in accordance with Oh. R. Civ. P. 56(E).

While not alleged in connection with their Propositions of Law directly, the Smiths seem to argue that the trial court lacked subject matter jurisdiction. The Smiths misunderstand the concept of subject matter jurisdiction. Nevertheless, the principal of subject matter jurisdiction in a foreclosure matter is not novel and the First District Decision is consistent with well-accepted principals:

In their third assignment of error, the Smiths argue that the trial court was without subject-matter jurisdiction because Wilmington was not the real party in interest who filed the complaint. This argument is meritless, because “actions in foreclosure are within the subject-matter of a court of common pleas.” *Bank of Am. v. Kuchta*, 141 Ohio St.3d 75, 2014-Ohio-4275, 21 N.E.3d 1040, ¶20.

As such, the issue of subject matter jurisdiction does not warrant review from this Court.

#### **C. Response to Proposition of Law No. 3.**

**Appellants’ Proposition of Law No. 3: Are the Courts in Hamilton County, Ohio Setting up Homeowners to Lose Their Homes, When There is No Enforcement of H.B. 489?**

**APPELLEE’S RESPONSE: This Issue is Inapplicable and Not Compelling.**

Because the Smiths provide no explanation as to this proposition of law and how it is connected to the First District Decision, it does not warrant this Court’s review.

#### **D. Response to Proposition of Law No. 4.**

**Proposition of Law No. 4: Are Ohio Homeowners Being Denied a Fair Trial When There is No Swearing in for Testimony of Servicer Attorneys, and the Servicer Attorneys Have Brought In No Injured Party?**

**APPELLEE’S RESPONSE: The Smiths are Deeply Confused about the Rules of Procedure and Counsel’s Role.**

The Smiths seem to argue that Wilmington’s counsel should have been sworn in. The Smiths do not understand that Wilmington’s counsel was not a witness, and there was no trial. The Smiths’ misunderstanding does not support this Court’s review.

Further, to the extent the Smiths attempt to challenge standing, Ohio law is clear with respect to standing. In *Fed. Home Loan Mtg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶41 (2012), this Court held that “a party commencing litigation must have standing to sue in order to present a justiciable controversy and invoke the jurisdiction of the common pleas court.” In *Deutsch Bank Nat’l Trust Co. v. Holden*, 147 Ohio St.3d 85, 93, 2016-Ohio-4603, ¶ 21 (2016), clarified that “[w]hat Schwartzwald made clear was that the fundamental requirement of standing is that the party bringing the action must have a personal stake in the outcome of the controversy, i.e., that it must be the injured party.”

Here, BOA attached to the complaint a copy of the relevant promissory note, the original payee of which was ABN AMRO. The note contained an indorsement from ABN AMRO to LaSalle and an indorsement in blank from BOA as successor by merger to LaSalle.

Additionally, the original mortgagee was ABN AMRO. BOA attached an assignment of mortgage from ABN AMRO to LaSalle, dated March 4, 2008. In this respect, BOA attached a certificate from the Comptroller of the Currency under which LaSalle had merged into BOA as of December 23, 2008. Finally, BOA attached a second assignment of mortgage from itself, as successor by merger to LaSalle, to itself alone.

Moreover, and importantly, the First District already addressed BOA’s standing during the First Appeal and disagreed with the Smiths that BOA lacked standing to file suit, finding that BOA had made the correct allegations to support its standing and attached the correct documents to the complaint to demonstrate its standing. And, the Smiths are not entitled to challenge this ruling.

Nothing that occurred subsequent to the filing of the complaint denies the conclusion that standing was appropriate. On January 10, 2019, BOA moved the trial court to substitute Wilmington in its place as a party plaintiff on the basis of an assignment of mortgage from BOA to Wilmington, dated May 24, 2018. Wilmington was properly substituted as a party plaintiff under Oh. R. Civ. P. 25(C). Subsequently, Wilmington produced sufficient evidence of its ability to enforce the Note and Mortgage in connection with its motion for summary judgment. And, the Smiths produced no summary judgment evidence to establish a triable issue of fact.

The First District's Decision is in harmony with well-established jurisprudence.

**E. Response to Proposition of Law No. 5.**

**Appellants' Proposition of Law No. 5: Has the State of Ohio Forgotten Its Commitment to Fair Housing in Ohio?**

**APPELLEE'S RESPONSE: The Smiths' Theoretical Question is Unsupported.**

Other than some very general allegations that are not based on record evidence, the Smiths fail completely to explain how the First District Decision and the Court's review of that decision impact the issue of Ohio's Commitment to Fair Housing. As such, it does not appropriately support this Court's review.

**IV. CONCLUSION**

For the foregoing reasons, Appellee respectfully request this Court deny Appellants' request for this Court to accept jurisdiction.

Respectfully submitted,

/s/ Kara A. Czanik

---

Kara A. Czanik (0075165)

Dinsmore & Shohl LLP

255 East Fifth Street, Suite 1900

Cincinnati, Ohio 45202

Tel: (513) 832-5490

Fax: (513) 977-8141

Email: [kara.czanik@dinsmore.com](mailto:kara.czanik@dinsmore.com)

*Counsel for Plaintiff-Appellee Wilmington  
Savings Fund Society, FSB, as Trustee for  
Upland Mortgage Loan Trust A*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **Wilmington Savings Fund Society, FSB, As Trustee For Upland Mortgage Loan Trust A'S Memorandum in Opposition to Appellants' Memorandum in Support of Jurisdiction** was served via email on November 23, 2021, upon the following:

*/s/ Kara A. Czanik*  
\_\_\_\_\_  
Kara A. Czanik (0075165)