IN THE SUPREME COURT OF OHIO

WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR SOUNDVIEW HOME LOAN TRUST 2007-OPT4, Plaintiff-Appellee, v. GRACE M. DOBERDRUK, et al., Defendant-Appellant.	Supreme Court Case Nos. 2024-1669 and 2025-0071 On Appeal from the Cuyahoga County Court of Appeals, 8th Appellate District Court of Appeals Case No. CA 24 113637

MERIT BRIEF OF PLAINTIFF-APPELLEE WELLS FARGO BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR SOUNDVIEW HOME LOAN TRUST 2007-OPT4

Andrew M. Engel (0047371)
Marc E. Dann (0039425)
DANNLAW
15000 Madison Avenue
Lakewood, OH 44107
Telephone: (216) 373-0539
Facsimile: (216)373-0536
notices@dannlaw.com

Grace M. Doberdruk (0085547)
Law Office of Grace M. Doberdruk
5950 Mayfield Road
Cleveland, Ohio 44124
Telephone: (440) 221-5437
Facsimile: (440) 848-1616
Grace.doberdruk@gmail.com
Attorneys for Appellant Grace Doberdruk

Stefanie L. Deka (0089248)
McGlinchey Stafford
3401 Tuttle Road, Suite 200
Cleveland, Ohio 44122
Telephone: (216) 378-9914
Facsimile: (216) 274-9201
sdeka@mcglinchey.com
Attorney for Appellee Wells Fargo Bank, National Association as Trustee for Soundview Home Loan Trust 2007-OPT4

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I. INTRODUCTION

This case is about an unremarkable foreclosure action where a mortgagor attempted to appeal a final judgment of foreclosure and requested a stay of a lower court judgment. However, the mortgagor voluntarily failed to post the requisite bond to effectuate the stay, rendering her appeal moot. Indeed, Defendant-Appellant Grace Doberdruk ("Ms. Doberdruk") could have posted the bond or requested the trial court order a lower one. Instead, she did neither, which ultimately resulted in the sale of the property subject to this action and the distribution of the sale proceeds. The appeal is moot.

Because of Ms. Doberdruk's choices, there was nothing left for the appellate court to decide and it could grant no relief to Ms. Doberdruk. Ms. Doberdruk tries to liken the appellate court's dismissal to a deprivation of her rights and invokes alleged due process violations. But requiring an appellant to post a bond to stay execution of a judgment and avoid the dismissal of an appeal, is not a novel theory nor is it limited to foreclosure actions. Rather courts routinely require litigants to post bonds in other contexts to preserve their rights on appeal, or else forfeit those rights and have an appeal dismissed as moot. Public policy reasons further support this custom and practice. Courts do not need to fill their dockets with cases for which no relief can be granted and, moreover, litigants need finality. In order to try and make her propositions work, Ms. Doberdruk must find an exception to the mootness doctrine. As such, she relies on R.C. § 2329.45, but nothing in R.C. § 2329.45 permits the remedy of restitution post-distribution. Allowing such a carve out to the mootness doctrine, which is only applicable in foreclosure actions, is contrary to the Ohio Revised Code, is predicated on an unsupportable expansive reading of R.C. § 2329.45 not intended by the legislature. The appellate court's decision should be affirmed.

II. STATEMENT OF THE CASE AND FACTS

Appellee Wells Fargo Bank, National Association as Trustee for Soundview Home Loan Trust 2007-OPT4 ("Wells Fargo") filed its Complaint for Foreclosure against Ms. Doberdruk alleging a default on a promissory note in the principal amount of $449,905.31 plus interest on the outstanding principal amount at the rate of 2% per annum from June 1, 2022 plus late charges, advances, and all costs and expenses as well as foreclosure of the mortgage on the real property located at 5650 Ashley Circle, Highland Heights Ohio 44143 (the "Property"). (T.d. 1). Ms. Doberdruk filed an answer and asserted counterclaims against Wells Fargo. (T.d. 50). The parties filed cross-motions for summary judgment. (T.d. 63, 66). On January 11, 2024, the trial court issued an Order granting Wells Fargo's Motion for Summary Judgment and denying Ms. Doberdruk's Motion for Summary Judgment. (T.d. 78). On February 12, 2024, Ms. Doberdruk appealed the trial court's judgment (the "Appeal") (T.d. 82). While the Appeal was pending, an order of sale was issued for the Property on March 22, 2024. (T.d. 87).

On May 6, 2024, the Property sold to a third party bidder. (T.d. 93). On May 9, 2024, Ms. Doberdruk sought to stay confirmation of the sale. (T.d. 94). In her motion, filed before the trial court set a bond, she asked the trial court to require that she post a bond in the amount of zero dollars, or, in the alternative $3,360. (Id.) Ms. Doberdruk did not present any information to the trial court concerning her financial situation or identify whether a bond may or may not be affordable to her. (Id.) Thereafter, the trial court granted Ms. Doberdruk a stay of distribution of proceeds on the condition that she post a bond in the amount of $472,905 and temporarily stayed the case for 21 days to give her time to post the bond. (T.d. 94, 96). Unfortunately, Ms. Doberdruk did not post the bond and the sale was confirmed on July 2, 2024. (T.d. 98, 102).

On August 2, 2024, Ms. Doberdruk filed an Emergency Motion to Stay Distribution in the trial court ("Motion to Stay") (T.d. 105). In the Motion to Stay, Ms. Doberdruk alleged that she

uncovered new evidence that Wells Fargo allegedly did not have standing when it filed the foreclosure complaint. (Id.) Ms. Doberdruk argued that the trial court should stay distribution and a set a bond in the amount of zero dollars solely because of the "newly discovered evidence of Wells Fargo's lack of standing and the misconduct of the adverse party." (Id). Ms. Doberdruk did not seek to reduce the bond amount on the basis of unaffordability.

On September 19, 2024, Ms. Doberdruk filed an Emergency Motion to Stay ("Appellate Motion to Stay") with the appellate court and requested that it stay distribution and reduce the bond amount because she alleged Wells Fargo did not have standing when it filed the foreclosure. (A.d. 20). As with the Motion to Stay, the Appellate Motion to Stay, did not allege that the bond amount should be reduced because Ms. Doberdruk could not afford it. (A.d. 20). On September 27, 2024, the trial court issued its Distribution of Sale Proceeds Report which distributed the sale proceeds and removed the sale proceeds from the control of the trial court. Title to the Property transferred to the third party purchaser on August 9, 2024 and the transfer was recorded September 17, 2024. On October 17, 2024, the appellate court dismissed the Appeal as moot and held R.C. § 2329.45 did not apply because Ms. Doberdruk "sought but failed to obtain a stay because she did not post the required bond." (A.d. 28).

Ms. Doberdruk moved to certify a conflict regarding whether an appeal of a foreclosure judgment is moot after the distribution of sale proceeds when an appellant filed a motion requesting a stay, but could not post the bond or if the appeal is not moot because R.C. § 2329.45 provides appellant the remedy of restitution. (A.d. 29). The appellate court certified the conflict. (A.d. 33). Ms. Doberdruk also filed a jurisdictional appeal. (A.d. 32). This Court determined the certified conflict existed, accepted the jurisdictional appeal, and consolidated the cases.

III. ARGUMENT

In reliance on *HSBC Bank, USA, Natl. Assn. v. Surrarrer,* 2019-Ohio-1539 (8th Dist.), the appellate court dismissed the Appeal as moot holding "an appeal from a decree of foreclosure is moot in instances where the debtors fail to obtain a stay from the distribution of proceeds or the confirmation of sale by posting the required bond." *Wells Fargo Bank, Natl. Assn. v. Doberdruk,* 2024-Ohio-5007, ¶ 10 (8th Dist.), citing *Surrarrer*, 2019-Ohio-1539, at ¶ 9. Ms. Doberdruk argued that the Appeal was not moot because, even though she did not pay the required bond, R.C. § 2329.45 allows for the remedy of restitution from the mortgagee. *Doberdruk*, at ¶¶ 11-12. The appellate court concluded that "if R.C. § 2329.45 applied to appeals from a foreclosure order, this court has held that it only applies when the appealing party sought *and obtained* a stay of the distribution of the proceeds." (Emphasis added.) *Id*. at¶ 13. As Ms. Doberdruk moved for, and was granted a stay, she met the first prong, but because she failed to post the required bond and the sale proceeds were distributed, she no longer had a right to restitution under R.C. § 2329.45.

As to the propositions of law before this Court, Wells Fargo will first discuss the availability of the remedy of restitution, an appellant's ability to seek restitution after a judicial sale and after the proceeds are distributed, how the unavailability of restitution moots an appeal, and the statutory interpretation of R.C. § 2329.45. Second, Wells Fargo will address this Court's decision in *Blodgett v. Blodgett,* 49 Ohio St.3d 243 (1990), its interplay with Civ. R. 62 and R.C. § 2505.29, as well as the constitutionality of R.C. § 2505.09. Lastly, Wells Fargo will answer the certified question.

PROPOSITION OF LAW NO. 1: AN APPEAL FROM THE JUDGMENT OF FORECLOSURE IS NOT MOOT WHEN THE PROCEEDS OF SALE HAVE BEEN DISTRIBUTED BECAUSE R.C. § 2329.45 PROVIDES THE REMEDY OF RESTITUTION.

A. The remedy of restitution is not available if a party fails to obtain a bond to stay the sale of real property on appeal.

Restitution, as outlined in R.C. § 2329.45, is not guaranteed. And even in situations where restitution may be available, a party must still take action to preserve the remedy. Therefore, if a party fails to preserve that remedy through his or her own inactions, it renders an appeal moot and dismissal is warranted.

1. Restitution is not always available to a litigant.

Contrary to Ms. Doberdruk and her *amici's* arguments, the right to restitution is not absolute and the failure of an appellant to preserve the remedy renders an appeal moot.

There are three other well-established instances where restitution under R.C. § 2329.45 is not an available remedy. First, when the debt owed to the judgment creditor is more than the sale price of the real property. *See U.S. Bank Trust Natl. Assn. v. Janossy,* 2018-Ohio-2228, ¶ 17 (8th Dist.) Second, when the debt owed is greater than the appraised value of the property as restitution would merely offset the debt. *See MSCI 2007-IQ16 Granville Retail, LLC v. UHA Corp., LLC*, 660 F.App'x 459, 462 (6th Cir. 2016). Third, when the purchaser of real property at a foreclosure sale is not a third party purchaser. *Ins. Co. v. Sampson,* 38 Ohio St. 672, 676 (1883) (noting that "this statutory rule, which applies only to purchases by strangers, when the judgment is reversed, does not apply to a mortgagee who is a party, nor where the order of sale or confirmation is reversed.")

This Court's precedent is consistent with how the foreclosure process works under Ohio law. When a property is sold at foreclosure sale and purchased by the judgment creditor, the judgment creditor can credit bid using its judgment to bid on the property. *See Navy Portfolio, L.L.C. v. Avery Place, L.L.C.,* 2014-Ohio-3401, ¶ 6 (10th Dist.)(a credit bid is "a sale in which the purchaser would pay certain costs, like all real estate taxes, but the remainder of the purchase price would be paid as a credit against the existing mortgage debt.") As a practical matter, a judgment

creditor is de-incentivized to bid an amount over its judgment, as it will need to pay that amount out of pocket, and has no mechanism to recoup that cost from a borrower. Even in situations where the appraised value exceeds the judgment amount, a judgment creditor is very unlikely to bid allowing a third party to purchase the property and receiving the amount due on its judgment through that mechanism. When the sale is confirmed, the judgment creditor tenders no funds to the court because its "payment" is the judgment. In contrast, when a third party purchaser buys the property, it must tender the purchase price and thereafter, sale proceeds are in the control of the court. *See* R.C. § 2329.31(B). Only when the property is purchased by a third party does the court ever obtain the proceeds. As such, when the property is purchased by a third party, restitution is available upon appellant both seeking and obtaining a stay of the distribution of proceeds as the proceeds are under the control of the court having been paid by the third party purchaser to complete the sale.

2. An appeal is moot when the sale proceeds are distributed and a stay is not obtained.

Neither R.C. § 2329.08 or R.C. § 2329.44 provide an exception to the well-settled principle that an appeal is moot if a party fails to post the requisite bond to obtain a stay of execution.

"A case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome." *State ex rel. Gaylor, Inc. v. Goodenow*, 2010-Ohio-1844, ¶ 10-11, quoting *Powell v. McCormack*, 395 U.S. 486, 496, (1969). "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Miner v. Witt*, 82 Ohio St. 237, 238 (1910). "Actions or opinions are described as 'moot' when they are or have become fictitious, colorable, hypothetical, academic or dead." *Culver v. City of Warren*, 84

Ohio App. 373, 393 (7th Dist. 1948). "The distinguishing characteristic of such issues is that they involve no actual genuine, live controversy, the decision of which can definitely affect existing legal relations. *Id*. This Court has only recognized two exceptions to the mootness doctrine: when a case (1) concerns issues that "are capable of repetition, yet evading review"; or (2) "involves a matter of public or great general interest." *In re Appeal of Suspension of Huffer from Circleville High School*, 47 Ohio St.3d 12, 14, (1989). Neither mootness exception applies to the Appeal.

Additionally, the statutory mechanisms to collect surplus funds or a deficiency judgment do not create an exception to the mootness doctrine and further, these issues need not be considered by this Court. As an initial matter, this issue was not raised by the parties in the lower courts and cannot be raised here for the first time. *See State ex rel. Citizen Action v. Hamilton Cty. Bd. of Elections,* 2007-Ohio-5379, ¶ 26 *("[a]mici curiae* are not parties to an action and may not, therefore, interject issues and claims not raised by parties.") Even if they had been raised, the argument still fails as surplus funds under R.C. § 2329.44 were not available because the property sold for less than the full judgment (T.d. 101) and Ms. Doberdruk did not sign the note which prevented Wells Fargo from collecting a deficiency judgment under R.C. § 2329.08 from her. (T.d. 1). *See CitiMortgage, Inc. v. Wiley,* 2016-Ohio-5902, ¶ 24 (10th Dist.) (judgment can only be sought against a person obligated on the note).

Even if either remedy was available to Ms. Doberdruk, an appeal is still moot upon sale proceeds being distributed. "The term "deficiency judgment" embraces a personal judgment rendered against a mortgagor and represents the mortgage debt remaining unsatisfied out of the proceeds of the sale of the mortgaged property; and that a "deficiency judgment" is the balance of personal indebtedness above the amount realized on the sale of the mortgaged property securing such indebtedness." *Carr v. Home Owners Loan Corp.,* 148 Ohio St. 533, 539-540, (1947).

Importantly, if a deficiency judgment is sought, consistent with R.C. § 2329.08, the foreclosure judgment is certified and a new lawsuit, separate and apart from the foreclosure, is filed to collect on the amount due. *See Summit Ridge Condominium Assn. v. Ewing*, 2021-Ohio-1839, ¶ 4 (2nd Dist.). In litigating the deficiency judgment, a defendant is prevented from contesting the validity of the foreclosure judgment because res judicata precludes such a collateral attack. *See Rak-Ree Ents. v. Timmons,* 2011-Ohio-1090, ¶ 16 (10th Dist.) citing *Grava v. Parkman Twp*., 73 Ohio St.3d 379, 381, quoting *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67, (1943) paragraph one of the syllabus ("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.") As such, the ability of a lienholder to subsequently bring a deficiency action does not function to revive issues mooted by the confirmation of sale or prevent mootness of those issues in the first place because the court has no authority to grant any relief in the foreclosure action.

Moreover, the mere fact that surplus funds may exist under R.C. § 2329.44 does not support the conclusion that the remedy of restitution remains post-distribution as well. By its very terms, R.C. § 2329.44(A) requires the sheriff to deliver the remaining balance to the clerk of court. A controversy still exists because the clerk of courts has possession of the surplus funds, and the court must determine if the borrower is entitled to the funds. The same is not true for sale proceeds because unlike surplus funds, the sale proceeds were previously distributed, and therefore are no longer being held by the court. As such, even if this issue was considered by this Court, neither R.C. § 2329.44 nor R.C. § 2329.08 allow for an exception to the mootness doctrine in a foreclosure action.

3. Ms. Doberdruk would not be entitled to restitution because set off would moot the Appeal.

If this Court were to accept Ms. Doberdruk's arguments and allow for the restitution after the sale proceeds were distributed, Ms. Doberdruk would still not be entitled to any restitution and the Appeal would again be moot because the restitution amount would be offset by the judgment.

It is undisputed that the property sold for less than Wells Fargo's judgment. (T.d. 102). Thus, if restitution was an available remedy, the amount would be offset by the debt owed to Wells Fargo. In other words, there would not and could not be an award of restitution at all in this case. *See U.S. Bank Trust Natl. Assn. v. Janossy,* 2018-Ohio-2228, ¶ 17 (8th Dist.), citing *MSCI 2007-IQ16 Granville Retail, LLC v. UHA Corp., LLC*, 660 Fed. Appx. 459, 462 (6th Cir. 2016), citing *Vegas Diamond Props., L.L.C. v. Fed. Deposit Ins. Corp.*, 669 F.3d 933, 936-937 (9th Cir .2012); *Christopher Village, Ltd. Partnership v. Retsinas*, 190 F.3d 310, 314-315 (5th Cir. 1999); *Fed. Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1263-1264 (7th Cir. 1986). Indeed, a set-off results in the cancellation of each parties' mutual debts. *Citizens Bank of Maryland v. Strumpf,* 516 U.S. 16, 18 (1995). This would render any appeal moot as there is no live controversy for the court to consider. *See State ex rel. Gaylor, Inc. v. Goodenow*, 2010-Ohio-1844, ¶ 10-11. Because the judgment creditor is no longer owed the debt, having been paid from the sale, and restitution cannot be awarded to a borrower due to set-off, the appellate court does not have any issues to decide nor can it afford relief to any party. As such, after concluding restitution was unavailable, the Appeal would again be moot as the court could not fashion any further remedy.

4. Ohio Revised Code Section § 2329.45 does not provide an absolute right to restitution.

Contrary to Ms. Doberdruk and her *amici's* assertions, R.C. § 2329.45, as interpreted in *Bankers Tr. Co. of California v. Tutin*, 2009-Ohio-1333, (9th Dist.) as well as the 2016 amendments to R.C. § 2329.45 do not confer an absolute right to the remedy of restitution.

The court's first step when considering the meaning of a statute "is always to determine whether the statute is "plain and unambiguous." *Jacobson v. Kaforey*, 2016-Ohio-8434, ¶ 8 citing *State v. Hurd*, 89 Ohio St.3d 616, 618, (2000). "If "the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation," because "an unambiguous statute is to be applied, not interpreted."" *Jacobson*, ¶ 8 citing *Sears v. Weimer*, 143 Ohio St. 312, (1944), paragraph five of the syllabus. "Ambiguity, in the sense used in our opinions on statutory interpretation, means that a statutory provision is "capable of bearing more than one meaning."" *Jacobson*, ¶ 8 citing *Dunbar v. State*, 2013-Ohio-2163, ¶ 16. "Without "an initial finding" of ambiguity, "inquiry into legislative intent, legislative history, public policy, the consequences of an interpretation, or any other factors identified in R.C. § 1.49 is inappropriate."" *Dunbar*, ¶ 16 citing *Jacobson,* ¶ 8.

If a statute is ambiguous, the factors outlined in R.C. § 1.49 become applicable. R.C. § 1.49 allows for the court to consider; (1) the object sought to be attained; (2) the circumstances under which the statute was enacted; (3) the legislative history; (4) the common law or former statutory provisions; (5) the consequences of a particulate construction; and (6) the administrative nature of the statute. *See* R.C. § 1.49(A)-(F). Toward that end, "it is a basic rule of statutory construction that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage."" R.C. § 1.42. Moreover, the court cannot ignore the plain language of the statute, nor can it insert operative provisions that are not there. *Akron v. Rowland*, 67 Ohio St.3d 374, 380 (1993). In construing statutory language, courts must presume that a just and reasonable

result was intended by the enactment of the statute. *See* R.C. § 1.47. It is also "a well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law." *State v. Moaning*, 76 Ohio St.3d 126, 128 (1996).

In *Tutin*, the appellate court considered the pre-2016 version of R.C. § 2329.45 which states:

> If a judgment in satisfaction of which lands, or tenements are sold, is reversed, such reversal shall not defeat or affect the title of the purchaser. In such case restitution must be made by the judgment creditor of the money for which such lands or tenements were sold, with interest from the day of sale.

In *Tutin*, appellant sought and obtained a stay of the trial court's judgment. *Id.* at ¶¶ 2-3, 7. However, after the second appeal, the stay expired, the property was sold to a third party purchaser and the sheriff distributed the sale proceeds. *Id*., ¶ 7. Wells Fargo moved to dismiss the appeal as moot. *Id*. The appellate court agreed and, in interpreting R.C. § 2329.45 in reliance on the rules of statutory construction, held R.C. § 2329.45 applies only where the appealing party sought and obtained a stay because even though the sale is confirmed, the sale proceeds remain with the trial court and an appealing party does not have a remedy after distribution of the sale proceeds. *Id.,*¶¶ 12, 15.

Tutin's interpretation of R.C. § 2329.45 was correct. One of the factors under R.C. § 1.49, when determining legislative intent, is the consequence of the court's construction of a statute. Here, while R.C. § 2329.45 does not mention the distribution of the sale proceeds, the appellate court's interpretation tracks the foreclosure process in Ohio. Critically, the trial court has thirty days from the return of the writ to confirm the sale. R.C. § 2329.31(A). Therefore, the only way for the sale proceeds to remain with the trial court, post-confirmation, is if a stay of distribution of proceeds is obtained and only then may restitution be available. "If the trial court no longer holds the proceeds, the judgment is satisfied and there is nothing further for the court to decide" and

"once a judgment is satisfied, "the rights and obligations of the parties [are] extinguished."" *Saxon Mtge. Servs., Inc. v. Whitely*, 2013-Ohio-3221, ¶ 5 (9th Dist.) citing *Tutin*, ¶¶ 6, 8.

Despite the 2016 amendments to R.C. § 2329.45, in *Doberdruk*, the appellate court relied on *Tutin* and held that "even if R.C. § 2329.45 applied to appeals from a foreclosure order, this court has held that it "only applies when the appealing party sought *and obtained* a stay of the distribution of the proceeds."" *Wells Fargo Bank, Natl. Assn. v. Doberdruk*, 2024-Ohio-5007, ¶ 13 (8th Dist.) citing *Provident Funding Assocs., L.P. v. Turner,* 2014-Ohio-2529, ¶ 6 (8th Dist.); *Tutin*, ¶ 11. The appellate court's reliance on *Tutin* is not inconsistent with the 2016 amendments to R.C. § 2329.45 and further allows for the conclusion that even if the 2016 amendments are ambiguous, and they are not, the legislative intent of R.C. § 2329.45 reflects that restitution is not available when execution of the judgment is not stayed and the sale proceeds are distributed.

The 2016 amendments to R.C. § 2329.45 are as follows:

> If a judgment in satisfaction of which lands or tenements are sold is reversed ***on appeal,*** such reversal shall not defeat or affect the title of the purchaser. In such case restitution in an amount equal to the money for which such lands or tenements were sold, with interest from the day of sale, must be made by the judgment creditor. ***In ordering restitution, the court shall take into consideration all persons who lost an interest in the property by reason of the judgment and sale and the order of the priority of those interests***.

Only one court has weighed in regarding the effect of the 2016 amendments and its holding was mere dicta. In *Green Tree Servicing LLC v. Asterino-Starcher,* 2018-Ohio-977 (10th Dist.), the court noted that "recent amendments to R.C. § 2329.45 seem to obviate any split in authority [with regard to mootness of an appeal] because those changes make even more clear that a mortgagor or junior lienholder retains a remedy in restitution even after disbursement of the proceeds from a judicial sale." *Id.,* ¶ 17 (10th Dist.) Not only does *Asterino-Starcher* ignore the plain language of the statute, but its reasoning is inconsistent with statutory construction. The amendments to R.C. § 2329.45 do not change the plain and unambiguous language in the statute

which apply only if restitution is awarded. Indeed, the language does not establish a right to restitution but merely advises what happens *if* restitution is an available remedy and which parties can exercise the available remedy, if any.

Even if R.C. § 2329.45 was ambiguous, it must be read with R.C. § 2505.09 and in doing so, the limits on its application are even more clear. R.C. § 2329.45 contemplated a situation where an appellant appealed the creditor's judgment and while the appeal was pending, the judgment creditor executed on its judgment through the sale of the real property securing the judgment. The judgment creditor did so because it was permitted to as the appellant did not seek a stay of execution of the judgment by posting a bond. *See* R.C. § 2505.09. Interpreting R.C. § 2329.45 with R.C. § 2505.09 allows for the conclusion that there is no absolute right to restitution under R.C. § 2329.45 because in situations where a bond is not posted and the appeal proceeds, the appeal is moot and there is nothing further for the court to consider. Further, accepting *amici's* interpretation that an available remedy exists after the sale proceeds are distributed would render R.C. § 2505.09 meaningless because an appellant would never post a bond. An appellant would not be required to because appellant's failure to post a bond would have zero effect appellant's ability to proceed with its appeal, *i.e*. the appeal would never be moot post-distribution of proceeds. This is hardly the just and reasonable result intended by the enactment of the R.C. § 2329.45. *See* R.C. § 1.47. As such, Wells Fargo respectfully requests this Court determine R.C. § 2329.45 is not ambiguous and apply its plain terms to limit the remedy of restitution to those situations where the bond required by R.C. § 2505.09 is posted.

5. Other provisions of the Ohio Revised Code support an appeal being moot when no bond is posted.

Outside of the foreclosure context, failure to post a bond consistently moots an appeal and there is no reason to deviate from this well-established principle here.

For instance, the Revised Code requires a bond to be posted in administrative appeals:

> Except as provided in section 2505.12 of the Revised Code, no administrative-related appeal shall be effective as an appeal upon questions of law and fact until the final order appealed is superseded by a bond in the amount and with the conditions provided in sections 2505.09 and 2505.14 of the Revised Code, and unless such bond is filed at the time the notice of appeal is required to be filed.

R.C. § 2505.06.

In *Walouke v. Mentor Bd. of Bldg. & Zoning Appeals*, 1984 Ohio App. LEXIS 12133, (11th Dist. Dec. 28, 1984), the trial court granted a permit variance to a homeowner to build a garage. *Id*., * 1. The appellant objected to the variance at the public meeting held on the permit application and thereafter, filed an appeal to the common pleas court. *Id*. However, appellant did not seek a stay during the pendency of the appeal and the homeowner constructed the garage, in accordance with the variance, during the appeal. *Id*., * 2. The appellate court dismissed the appeal as moot because the garage was already complete and there was no further relief that could be granted. *Id*., * 3.

In addition, R.C. § 1923.14(A) also requires the posting of a bond to stay execution of an eviction judgment pending an appeal. *See Wise v. Webb*, 2015-Ohio-4298, ¶ 14 (2nd Dist.) ("the statute provides a means by which the defendant may maintain, or even recover, possession of the disputed premises during the course of his appeal ***by filing a timely notice of appeal, seeking a stay of execution, and posting a supersedeas bond***. If the defendant fails to avail himself of this remedy, all issues relating to the action are rendered moot by his eviction from the premises.") (Emphasis added). Indeed, "when a tenant has vacated the premises and the landlord has again taken possession of the property, the merits of an eviction action are generally rendered moot." *David M.A.N.S.O. Holding L.L.C. v. Marquette,* 2024-Ohio-1188, ¶ 14 (2nd Dist.) citing *Wise,* ¶ 11. "If immediate possession is no longer at issue because the defendant vacates the premises and

possession is restored to the plaintiff, then continuation of the forcible entry and detainer action or an appeal of such an action is unnecessary, as there is no further relief that may be granted." *Rithy Properties, Inc. v. Cheeseman*, 2016-Ohio-1602, ¶ 15 (10th Dist.)

Accordingly, numerous other provisions of the Ohio Revised Code require the posting of a bond to effectuate a stay pending an appeal, and the failure to do so in those contexts moots and appeal. The same holds true here and creating an exception to the remedy of restitution under R.C. § 2329.45 as a means to prevent an appeal from being moot, is inconsistent with the language of R.C. § 2329.45 and not supported by other provisions of the Ohio Revised Code that moot an appeal when a bond is not posted.

PROPOSITION OF LAW NO. 2: IF A HOMEOWNER FILES A MOTION TO STAY THE DISTRIBUTION OF PROCEEDS THEN THERE IS NO VOLUNTARY SATISFACTION OF THE JUDGMENT AND THE APPEAL IS NOT MOOT.

B. When a payment satisfies the judgment and there is no economic duress, the payment is voluntary.

Ms. Doberdruk's second proposition of law raises a question that this Court has already answered: whether payment of a judgment from proceeds of a judicial sale constitutes a voluntary or involuntary satisfaction of the judgment. In *Blodgett v. Blodgett,* 49 Ohio St.3d 243, 246 (1990), this Court limited the application of its holdings in *Knox Cty. Bank v. Doty,* 9 Ohio St. 505 (1859) and *Lynch v. Board of Education of City School District of City of Lakewood,* 116 Ohio St. 361 (1927).

1. Blodgett defines what constitutes an involuntary payment of a judgment.

Blodgett changed how courts determine whether a payment that satisfies a judgment is involuntary or voluntary. In so doing, *Blodgett* partially overruled prior Ohio Supreme Court precedent to the contrary.

Blodgett stands for two basic propositions: (1) when determining if satisfaction of a judgment is involuntary, a court cannot consider economic considerations, such as the appellant's financial circumstances, unless the non-appealing party undertook wrongful actions or threats that constitute coercion resulting in the economic distress; and (2) a finding of economic duress, by means of enforcement of a legal right, such as executing upon a judgment, does not mean that the payment was involuntary. *Blodgett,* at 246-247. Importantly, by identifying when a payment is not voluntary, *Blodgett* partially overruled *Lynch* and *Doty* insofar as the holding that payment of a judgment, after execution, is voluntary. *Blodgett* did so by requiring courts to conduct an analysis of involuntariness under each of its two basic propositions. *Blodgett* necessitates a finding of duress afflicted on the appealing party by the non-appealing party which duress constituted coercion sufficient to rise to the level provided. What *Blodgett* did not change in *Lynch* and *Doty* was the well-established principal that a voluntary payment of a judgment will render an appeal from that judgment moot. *Id.,* 245. Further, while the appellant in *Blodgett* took action that resulted in mooting her appeal, the holding applies equally here. Ms. Doberdruk decided to take no action to prevent execution of the judgment. Taking no action is a voluntary choice - a choice not to do something. See *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 262 (1990) (analyzing the common law right to informed consent, applicable to a competent person, which right implies that an individual can voluntarily chose to take no action to sustain life).

As such, while Ms. Doberdruk did not tender payment to moot the appeal like in *Blodgett*, her inaction in posting the required bond was a choice nonetheless, as was her choice not to request a lower bond amount on the basis of unaffordability. *Blodgett* is not distinguishable because Nancy

Blodgett and Ms. Doberdruk each undertook a voluntary act that resulted in their respective appeals being moot.

Moreover, the appellate court's interpretation of *Blodgett* is consistent with *Blodgett's* holding and lower courts are not crafting their own interpretation of *Blodgett* out of whole cloth. The common nucleus for *Blodgett*, *Doty*, and *Lynch* is the ***satisfaction*** of the judgment, whether the judgment is satisfied through acceptance of payment or execution of the judgment, the result remains the same, *i.e*. the appeal is moot. By explicitly requiring a party to meet the economic duress test to avoid satisfaction of the judgments mooting effect on an appeal, *Blodgett* overruled *Lynch* and *Doty's* holding that an execution of a judgment is not voluntary by limiting when a judgment is involuntarily paid.

2. Blodgett's holding is consistent with R.C. § 2505.09 and Civ. R. 62.

This Court's holding in *Blodgett* can be read in concert with R.C. § 2505.09 and Civ. R. 62 and therefore, requires an appellant to take actions to prevent an appeal from becoming moot.

Ms. Doberdruk seeks review of *Blodgett* in isolation and in doing so advances her theory that appellate courts impermissibly expanded the scope of *Blodgett* in terms of defining when payment constitutes a voluntary act. Critically, *Blodgett* did not disrupt the application of Civ. R. 62, App. R. 7, and R.C. § 2505.09 to satisfaction of a judgment and an appellant's right to prevent a voluntary payment. Civ.R. 62(B) sets forth how an appellant obtains a stay of judgment pending appeal from the trial court by giving an adequate supersedeas bond. "App.R. 7 contains similar language regarding a stay requested from a court of appeals, although the rule specifies that the stay must ordinarily first be sought from the trial court." *State ex rel. Hunter v. Goldberg*, 2024-Ohio-4970, ¶ 11. R.C. § 2505.09, which has been relied on by courts well before *Blodgett*, provides that "an appeal does not operate as a stay of execution until a stay of execution has been

obtained pursuant to the Rules of Appellate Procedure or in another applicable manner, and a supersedeas bond is executed by the appellant to the appellee…" R.C. § 2505.09. Pre-*Blodgett*, this Court decided *State ex rel. Ocasek v. Riley*, 54 Ohio St.2d 488, 490 (1978) and in reliance on Civ. R. 62, held that when an appeal is taken, appellants are entitled to a stay of judgment as a matter of right and can obtain a stay of execution of judgment by paying an adequate supersedeas bond. *Id*., * 490.

As such, R.C. § 2505.09 and Civ. R. 62 make the appealing party take two affirmative steps to prevent a judgment from being voluntarily satisfied; move to stay execution of judgment and post a bond. In line with *Blodgett*, the availability of this remedy warrants against a finding that a payment is involuntary simply because it was made through execution of a judgment or by failing to post a bond. If an appellant fails to avail herself of the options under R.C. § 2505.09 or Civ. R. 62 she has allowed the payment to become voluntary unless she can meet the economic duress test in *Blodgett*. An appellant's inability to afford to pay a bond is not an involuntary payment under *Blodgett* because appellant cannot establish economic duress solely due to unaffordability. *Blodgett*, 246. Indeed, "merely taking advantage of another's financial difficulty is not duress. Rather, the person alleging financial difficulty must allege that it was contributed to or caused by the one accused of coercion." (Internal citations omitted.) *Id*. Economic duress requires a finding of a wrongful or unlawful act or threat that deprived victim of his unfettered will." *Blodgett*, at 246, citing 13 Williston on Contracts (3 Ed.1970) 704, Section 1617. As such, *Blodgett* is not inconsistent with R.C. § 2505.09 or Civ. R. 62; instead, each work in concert with each other.

Additionally, appellate courts apply this analysis consistently and not just in the context of foreclosure judgments. *See O'Donnell v. Northeast Ohio Neighborhood Health Services, Inc.,*

2020-Ohio-1609, ¶ 42 (8th Dist.), citing *Francis David Corp. v. Mac Auto Mart, Inc.,* 2010-Ohio-1215, ¶ 12 (8th Dist.) ("Because defendants failed to avail themselves of a "viable legal remedy," we find that they voluntarily satisfied the underlying judgment, rendering their appeal moot.") "Until and unless a supersedeas bond is posted the trial court retains jurisdiction over its judgments as well as proceedings in aid of the same." *State ex rel. Klein v. Chorpening*, 6 Ohio St.3d 3, 4, (1983), citing *McMillen* v. *Watts*, 67 Ohio Law Abs. 33, (1950) *appeal dismissed* 154 Ohio St. 502 (1951) Thus, absent a stay and posing of a bond, the prevailing party has a right to execute on its judgment during the pendency of the appeal. *In re Kurtzhalz,* 141 Ohio St. 432, 435 (1943). And as a practical matter, a judgment creditor has many reasons to take such actions; to recoup the money owed in an effort to take the debt off its books, avoid further financial obligations owed to a real property such as payment of taxes and insurance; prevent destruction of the real property, and remove appellant from the real property during the pendency of the appeal to further mitigate the above noted risks.

Ms. Doberdruk could have avoided satisfaction of the judgment by posting a bond, but she failed to do so. In reliance on precedent from the Eighth Appellate District, the trial court required Ms. Doberdruk to both move for a stay of execution of the sale and post the bond in the amount ordered by the trial court. *See Provident Funding Assocs., L.P. v. Turner*, 2014-Ohio-2529, ¶ 6 (8th Dist.), citing *Bankers Trust Co. of California, N.A. v. Tutin*, 2009-Ohio-1333, ¶ 11 (9th Dist.); *Blisswood*, ¶ 17; *U.S. Bank Trust Natl. Assn. v. Janossy*, 2018-Ohio-2228, ¶ 7, (8th Dist.); *Third Fed. Sav. & Loans Ass'n of Cleveland v. Rains*, 2012-Ohio-5708, ¶ 13 (8th Dist.). The appellate court's reasoning is consistent with *Blodgett*, R.C. 2505.09, and Civ. R. 62 and Ms. Doberdruk's second proposition of law should be answered in the negative as a result.

C. The requirement to post a bond does not raise due process or equal process concerns.

Ms. Doberdruk's right to an appeal was not abolished through the application of R.C. §2505.09 and the dismissal of the Appeal as moot does not raise any due process or equal protection violations as alleged.

1. Constitutional challenges to statutes are rarely considered.

This Court is not required to consider the constitutionality of R.C. § 2505.09 because it is unnecessary for it to do so to decide the Appeal.

"Ohio law abounds with precedent to the effect that constitutional issues should not be decided unless absolutely necessary." *Ohioans for Fair Representation, Inc. v. Taft*, 67 Ohio St.3d 180, 183 (1993), quoting *Hall China Co. v. Public Utilities Com.*, 50 Ohio St. 2d 206 (1977). *See also*, *Interstate Motor Freight Sys. v. Bowers*, 164 Ohio St. 122, (1955) paragraph two of the syllabus ("[w]here a case can be determined upon any other theory than that of the constitutionality of a challenged statute, no consideration will be given to the constitutional question.") Indeed, "legislative enactments are to be afforded a strong presumption of constitutionality." Here, neither due process or equal protection concerns are implicated by R.C. § 2505.09 because the trial court has discretion in setting a bond, an unaffordability analysis is inconsistent with Civ. R. 62 and case law, and the amount of the bond is rationally related to the judgment.

2. R.C. § 2505.09 is not unconstitutional.

Because R.C. § 2505.09 affords the trial court discretion in setting a bond amount, and because the amount of the bond is rationally related to the judgment, it does not function to bar access to courts and the statute is therefore constitutional.

Importantly, parties are not entitled to an appeal. "The Ohio Constitution does not specifically provide for a " 'right to appeal'"; however, 'Section 3(B)(1)(f), Article IV of the Constitution provides 'for the establishment of an appellate court system with jurisdiction [i]n any cause on review as may be necessary to its complete determination.'" *Atkinson v. Grumman Ohio*

Corp., 37 Ohio St.3d 80, 84, (1988) "As to the due process clause of the Fourteenth Amendment, it is sufficient to say that, as frequently determined by this Court, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance." *Ohio ex rel. Bryant v. Akron Metro. Park Dist.,* 281 U.S. 74, 80, (1930), citing *McKane v. Durston*, 153 U.S. 684, 687 (1894).

(a) The trial court can utilize its discretion in setting a bond amount.

R.C. § 2505.09 and Civ. R. 62 both allow for an appellant to avoid an appeal becoming moot. Courts interpreting R.C. § 2505.09 hold determination of the bond amount is based on the facts and circumstances of each case. As such, a blanket assertion that R.C. § 2505.09 is unconstitutional ignores the court's discretion in setting a bond amount. "The fixing of the amount of such supersedeas bond is within the discretion of the court setting it." *Rice v. Wheeling Dollar Sav. & Tr. Co.,* 163 Ohio St. 606, 615 (1955). Similarly, Civ. R. 62(B) requires the posting of an adequate supersedeas bond to obtain a stay from execution of judgment. Indeed, courts utilize their discretion to calculate the appropriate bond amount in different ways. *See Huntington Natl. Bank v. Cade*, 2015 Ohio Misc. LEXIS 22724, *8-9 (C.P. 2015) (despite the lender's judgment amount of $356,341.46, the bond required was $24,053.94 calculated as 1.5 times one year's worth of interest.) *See also Wells Fargo Bank, N.A. v. Collins,* 2021-Ohio-508, ¶ 14 (8th Dist.) (requiring a bond in the amount of $23,984 representing the amount of the judgment, plus interest, minus the amount of the appraised value of the property at $150,000). While the trial court has discretion to set the bond amount, Ms. Doberdruk never filed a motion to reduce the bond amount with the trial court or appellate court on the basis of unaffordability. She sought to reduce the bond amount to zero in the Appellate Motion to Stay and Motion to Stay solely on the basis of Wells Fargo's

alleged lack of standing. If an appellant claims the bond is unaffordable, the burden should be on appellant to ask the trial court to reduce the bond amount and establish unaffordability.

Further, the requirement of a bond does not just apply to foreclosure judgments, but ***all*** judgments subject to an appeal. Consequently, a court can set a bond in an amount that is affordable to appellant because the appellant can use collateral completely unaffected by the litigation specifically, when the judgment obtained is not against appellant's residential real property. Even if the judgment obtained is against residential real property, the foreclosed property can be used as a bond pursuant to R.C. § 2505.11 "a court may issue an order allowing the deed to the property in question to be held in lieu of a supersedeas bond, effectively staying the execution of judgment during the pendency of the appeal." *Winton S. & L. Co. v. Eastfork Trace*, 119 Ohio Misc.2d 83, 85 (C.P. 2001). The trial court's discretion to set the bond amount obviates the concern of unaffordability. Therefore, the bond requirement affords appellants an opportunity to contest the judgment through the appeal and applies to all appellants equally.

(b) The trial court is not required to consider whether the bond amount is affordable to an appellant before setting it.

Both Civ. R. 62 and R.C. § 2505.09 require a bond to stay execution of a judgment and the affordability of the bond is not required to be considered when setting a bond amount nor does it raise due process or equal protection concerns as Ms. Doberdruk's *amici* claim.

The fact that a bond is not affordable is not a sufficient reason for courts to ignore Civ. R. 62 and allow for restitution when the appeal has become moot. Only one appellate district has considered an appellant's financial standing when determining whether an appellant's failure to post a bond should not moot the appeal. *See LaSalle Bank Natl. Assn. v. Murray*, 2008-Ohio-6097, ¶ 26 (7th Dist.). Appellate district courts in all other cases advanced by Ohio Legal Aid did not consider the affordability of a bond ; instead, each court simply concluded that the appellant failed

to post the bond and no reason was given for that failure. *Ameriquest Mtge. Co. v. Wilson,* 2007-Ohio-2576, ¶ 8 (11th Dist.), *MIF Realty L.P. v. K.E.J. Corp.,* 1995 Ohio App. LEXIS 2082, *4 (6th Dist. May 19, 1995), *Green Tree Servicing LLC v. Asterino-Starcher,* 2018-Ohio-977, ¶ 13 (10th Dist.); and *Chase Manhattan Mtge. Corp. v. Locker,* 2003-Ohio-6665, ¶ 35 (2nd Dist.). In fact, in *Ameriquest Mtge. Co.,* neither the bond or its amount were considerations as the appellate court held that the "case should be decided on its merits since there was so much confusion as to what constituted the final decree of foreclosure and that restitution may be awarded to appellant if justice so requires." *Id*., ¶ 22. The same holds true for *Governors Place Condominium Owners Assn.* which held "we already determined that the trial court erred in distributing funds to U.S. Bank. Therefore, in the interest of justice, we find that satisfaction of the judgment was involuntary, despite the fact that no stay was obtained. The appeal is not moot, as a viable remedy is available in the form of restitution." *Id.*, at ¶ 31.

Not only have lower courts refused to consider an appellant's inability to afford the bond amount as a factor in determining whether an appeal is moot, this Court should not do so either because neither Civ. R. 62 or R.C. § 2505.09 provide for an affordability analysis. A bond is necessary "to protect non-appealing parties from damages that result from the appeal being taken." *Richard L. Bowen & Assocs. v. 1200 W. Ninth St. Ltd. Pshp.,* 107 Ohio App.3d 750, 753 (8th Dist. 1995). "The purpose of an appeal bond is to secure the appellee's right to collect on the judgment during the pendency of the appeal." *State ex rel. Geauga Cty. Bd. of Commrs. v. Milligan,* 2003-Ohio-6608, ¶ 21, citing *Mahoney v. Berea,* 33 Ohio App.3d 94, 96 (1986). Should the appeal fail, the party should be able to execute on the bond and be in no worse situation than if the appeal had taken place. If the bond amount is determined by whether it is affordable to an appellant, it does not protect the judgment creditor as it does not secure the judgment, rendering R.C. § 2505.09

obsolete and worsening the judgment creditor's position. Such a finding would render the plain language of R.C. § 2505.09 meaningless and flout the will of the Legislature in enacting the statute in the first instance. *See New Riegel Local School Dist. Bd. of Education v. Buehrer Group Architecture & Eng., Inc.,* 2019-Ohio-285, ¶ 29 (holding "we avoid construing a statute in a way that would render a portion of the statute meaningless or inoperative.")

Finally, an unaffordable bond amount does not burden the right to appeal, discriminate against lower income appellants, or violate the equal protection clause because the amount is rationally related to the judgment. In *Lindsey v. Normet,* 405 U.S. 56 (1972), the United States Supreme Court analyzed an Oregon statute, only applicable to forcible entry and detainer judgment appeals, that required a surety for "the payment of twice the rental value of the premises from the commencement of the action in which the judgment was rendered until final judgment in the action." *Id.* at 76, citing ORS § 105.160. If the judgment was affirmed, "the landlord is automatically entitled to twice the rents accruing during the appeal without proof of actual damage in that amount." *Id.* The double bond requirement in *Normet* was held to be unconstitutional because the bond required payment based on twice the value of the property as well as twice the rent owed upon an successful appeal and those amounts were not rationally related to preserving the property during the appeal and recoupment of the rental amounts owed to the landlord. *Id*., ¶ 77. Here, however, the amount of the bond required by R.C. § 2505.09 is expressly linked to the total for all claims covered by the final judgment (T.d. 96) and as such, unlike *Normet,* the bond amount is related to the judgment amount. Consequently, *Normet* does not support a finding that the bond requirement is unconstitutional simply because it is unaffordable to an appellant.

CERTIFIED CONFLICT QUESTION: IS AN APPEAL OF THE JUDGMENT OF FORECLOSURE MOOT AFTER THE DISTRIBUTION OF SALE PROCEEDS WHEN AN APPELLANT FILED A MOTION REQUESTING A STAY BUT COULD NOT POST THE BOND OR IS THE APPEAL NOT MOOT BECAUSE

R.C. § 2329.45 PROVIDES THE APPELLANT WITH THE REMEDY OF RESTITUTION?

D. Answering the certified conflict question.

Based on its analysis, Wells Fargo suggests that these are two separate questions. The response to the first question is "Yes;" an appeal of the judgment of a foreclosure is moot after the distribution of sale proceeds when an appellant filed a motion requesting a stay but did not post the required bond. The response to the second question, upon re-phrasing to remove the double negative, is "No;" an appeal is moot because R.C. § 2329.45 does not provide the appellant with the remedy of restitution.

IV. CONCLUSION

For the foregoing reasons, Appellee Wells Fargo Bank, National Association as Trustee for Soundview Home Loan Trust 2007-Opt4 respectfully asks this Court to affirm the decision of the court of appeals.

Respectfully submitted,

/s/ *Stefanie L. Deka*
Stefanie L. Deka (0089248)
McGlinchey Stafford
3401 Tuttle Rd, Ste 200
Cleveland, OH 44122
Telephone: (216) 378-9914
Facsimile: (216) 274-9201
sdeka@mcglinchey.com
Counsel for Appellee Wells Fargo Bank, National Association as Trustee for Soundview Home Loan Trust 2007-Opt4

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Appellee's Merit Brief* was served upon the following via electronic mail this 19th day of August, 2025.

Andrew M. Engel
Marc E. Dann
notices@dannlaw.com

Grace M. Doberdruk
grace.doberdruk@gmail.com
Counsel for Appellant

/s/ Stefanie L. Deka
Stefanie L. Deka (0089248)

Ohio Revised Code

Section 2505.09 Stay of execution - supersedeas bond.

Effective: June 28, 2002
Legislation: Senate Bill 161 - 124th General Assembly

Except as provided in section 2505.11 or 2505.12 or another section of the Revised Code or in applicable rules governing courts, an appeal does not operate as a stay of execution until a stay of execution has been obtained pursuant to the Rules of Appellate Procedure or in another applicable manner, and a supersedeas bond is executed by the appellant to the appellee, with sufficient sureties and in a sum that is not less than, if applicable, the cumulative total for all claims covered by the final order, judgment, or decree and interest involved, except that the bond shall not exceed fifty million dollars excluding interest and costs, as directed by the court that rendered the final order, judgment, or decree that is sought to be superseded or by the court to which the appeal is taken. That bond shall be conditioned as provided in section 2505.14 of the Revised Code.

APPENDIX 1