SUPREME COURT OF FLORIDA

DYCK-O'NEAL, INC.,

Petitioner,

v.

HEATHER LANHAM,

Respondent.
_____/

Supreme Court Case No.: SC17-975

DCA Case No.: 1D16-1624

Circuit Court (Trial Court) Case No.: 2014-CA-000438

RESPONDENT'S ANSWER BRIEF ON THE MERTIS

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PRELIMINARY STATEMENT

In this Answer Brief, the Petitioner, DYCK-O'NEAL, INC., is referred to as "Dyck." The Respondent, HEATHER LANHAM, is referred to as "Lanham." The record on appeal is referred to as "R.," followed by the page(s) cited.

STATEMENT OF THE ISSUE

The issue is whether a foreclosure plaintiff who includes in its pleadings a prayer for relief requesting that the foreclosure court grant it a deficiency, and who obtains a judgment from the foreclosure court reserving jurisdiction to grant or deny that deficiency claim, is free to then ignore the foreclosure court's jurisdiction, seek a different forum, and pursue the deficiency judgment in a new tribunal of the plaintiff's choosing through a separate action at law. At issue is the meaning of a trial court's reservation of jurisdiction, and whether its reservation of jurisdiction must be respected, or whether Section 702.06 of the Florida Statutes permits a plaintiff to forum shop.

STATEMENT OF THE CASE AND THE FACTS

The following facts are set forth herein to show that Dyck is not, as it appears to claim, an innocuous party that was mistreated by the First DCA. *See* Initial Brief at 9-15. On May 27, 2014, Dyck filed the Complaint commencing this case. The Complaint (which was filed in a county where Lanham did not reside at the time) seeks a deficiency arising from a mortgage foreclosure action, in which the

foreclosure judgment ("Foreclosure Judgment") had been entered approximately four years prior. (R. 5, 6).[1] Dyck then inexplicably waited until September 28, 2015—more than a year—to serve the Complaint on Lanham. (R. 64). Lanham's counsel appeared on October 19, 2015, by filing Defendant's Notice to Plaintiff of Need to File Cost Bond, giving timely notice to Dyck of counsel's appearance. (R. 40).[2]

Notwithstanding counsel's appearance in the case and the Notice served pursuant to § 57.011, Dyck proceeded to file a Motion for Default against Lanham. (R. 41-43). And instead of serving its Motion for Default on Lanham's counsel of record in the manner required by Rule 2.516(b), Florida Rules of Judicial Administration, Dyck served its motion on Lanham personally via U.S. Mail. (R. 42). As a result of this intentional choice by Dyck not to serve counsel, Lanham's counsel did not receive notice of the Motion for Default. (R. 51-52). Dyck was then able to lead the Clerk of the Court into error and obtain a Default against Lanham, despite Dyck's noncompliance with Rule 1.500(a), Florida Rules of Civil Procedure

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[1] The Foreclosure Judgment is attached to the Complaint as Exhibit B, and in relevant part it provides, "This Court reserves jurisdiction of this cause for the purpose of making any and all further orders as may be necessary and proper, including, without limitation, writs of possession and deficiency judgment." (R. 17).

[2] *See* Rule 2.505(e)(1), Florida Rules of Judicial Administration (providing that an attorney may appear in a proceeding "[b]y serving and filing, on behalf of a party, the party's first pleading or paper in the proceeding").

and Rule 2.516(b), Florida Rules of Judicial Administration (collectively, the "Rules"). (R. 43).

On November 10, 2015, counsel for Lanham brought Dyck's improper actions to the Trial Court's attention by filing a Notice of Plaintiff's Noncompliance with Service. (R. 51-53). Apparently unconcerned by its noncompliance with the Rules, Dyck did not voluntarily take action to set aside the Default, requiring counsel for Lanham to file a Motion to Set Aside Default, which was granted on November 20, 2015. (R. 56-58).

This type of misbehavior and noncompliance with the Rules has been common practice for Dyck as a litigant. Dyck failed to respond to Defendant's First Request for Admissions to Plaintiff, which consisted of only one request. (R. 54-55). Dyck waited until after Lanham had filed her Motion for Summary Judgment and Memorandum of Law on January 4, 2016, (R. 59-65, "Motion for Summary Judgment"), to acquire the cost bond raised in Lanham's initial appearance and subsequent Motion to Dismiss. (R. 47-50, 66-71). Dyck also waited until shortly before the hearing on Lanham's Motion for Summary Judgment to seek relief from its failure to respond to Lanham's solitary Request for Admission. (R. 72-74).

Indeed, Dyck failed to file any response to Lanham's Motion for Summary Judgment prior to the summary judgment hearing. Dyck never submitted any evidence controverting the facts asserted to be undisputed in the Motion for

Summary Judgment and Lanham's supporting Affidavit, as required by Rule 1.510. Nor did Dyck submit any timely written legal argument in opposition to the Motion for Summary Judgment. On January 29, 2016, the Trial Court held a hearing on the Motion for Summary Judgment,[3] at which counsel for Lanham and Dyck appeared. Based on the argument and evidence presented, the Court entered a Final Summary Judgment in favor on Lanham on February 5, 2016. (R. 99-100).

It was only after Dyck lost the summary judgment hearing that Dyck filed a written response to the arguments in Lanham's Motion for Summary Judgment, raising all of its arguments for the first time on February 2, 2016, in Plaintiff's Motion for Rehearing on Defendant's Motion for Summary Judgment with Imbedded Memorandum of Law in Support. (R. 75-97, 107-129, "Motion for Rehearing"; R. 98). On March 23, 2016, after hearing and consideration of Dyck's post-judgment motions, the Trial Court entered an Order Denying Dyck's Motion for Rehearing. (R. 141-42). Dyck filed a Notice of Appeal, which itself required a subsequent Amended Notice of Appeal (R. 149-69).[4]

[3] R. 98 (letter dated February 2, 2016, from Lanham's counsel to the Trial Court, submitting proposed judgment after the January 29, 2016, hearing on the Motion for Summary Judgment).

[4] The issue on which Lanham prevailed in the trial court on summary judgment is not the same issue that is before this Court. *See* Final Summary Judgment (R. 101-02); Order Denying Motion for Rehearing (R. 141-42).

Dyck's cavalier attitude and noncompliance with the Rules continued on appeal when it failed to disclose adverse controlling precedent to the First DCA, even though Dyck had to have been aware of that precedent, since Dyck was a party to it. *See Higgins v. Dyck-O'Neal, Inc.*, 201 So. 3d 157 (Fla. 1st DCA 2016).[5] After Lanham raised this jurisdictional issue in her answer brief in the First DCA, Dyck failed to make any argument, file a reply brief, or otherwise respond to or address the substantive legal issue that is now before this Court.

Based on Dyck's conduct in this and presumably other cases,[6] it should come as no surprise that the First DCA was reluctant to grant Dyck's request to certify conflict in the *Higgins* proceeding and reward Dyck for its misbehavior and noncompliance with the Rules. *See* Initial Brief at 11-15 (seeming to complain that Dyck was not treated fairly by the First DCA). Dyck's complaints are ironic, given Dyck's conduct in this and apparently other proceedings.

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[5] *See also* Rule 4-3.3(a)(3), Rules Regulating that Florida Bar.

[6] *See* Judith Fox, *The Foreclosure Echo: How Abandoned Foreclosures Are Re-Entering the Market through Debt Buyers*, 26 Loy. Consumer L. Rev. 25, 65-66, 68-70 n.234, 235, 260 (2013) (discussing the problems with Dyck's conduct in proceedings in Florida and around the country, resulting in a Consent Order being entered against Dyck in the Commonwealth of Massachusetts (available at: https://www.mass.gov/consent-order/dyck-oneal-inc), and a Cease and Desist Order being entered against Dyck by the Department of Banking and Finance in Georgia (available at: https://dbf.georgia.gov/press-releases/2009-06-30/departments-order-cease-desist-against-dyck-oneal-inc-becomes-final (including a link to a .pdf copy of the Cease and Desist Order)), sanctioning Dyck's noncompliance with various rules, regulations, and debt collection laws).

SUMMARY OF ARGUMENT

The question presented in this case is not whether Dyck has a right to a deficiency; rather, the question is where jurisdiction of that deficiency action shall lie when (i) the plaintiff requests the foreclosure court to grant a deficiency, and (ii) the foreclosure court expressly reserves jurisdiction to grant or deny the claim for a deficiency judgment.

Section 702.06 of the Florida Statutes says nothing about jurisdiction. In the absence of a clear statement from the Legislature evincing its intent to abrogate this Court's long-standing precedent on firmly-established jurisdictional principles, this Court's precedent should continue to apply. According to this Court's well-established precedent, when a plaintiff requests that the foreclosure court grant it a deficiency, and the foreclosure court reserves jurisdiction to do so, the plaintiff is bound by that choice. There is nothing in the text or legislative history of § 702.06 that indicates any intent on the part of the Legislature to revoke these basic, foundational jurisdictional principles. Dyck's approach would enable and encourage forum shopping, while undermining the trial courts' ability to control their cases, manage their dockets, and conserve their judicial resources, in contravention of the main purposes of the 2013 amendments to § 702.06. This Court should not upend its own rulings and decisions on such basic and foundational jurisdictional principles

when such a result is not compelled by the language of the statute, and there is no good reason to do so.

ARGUMENT

I. Section 702.06 Does Not Answer the Jurisdictional Question Presented or Abrogate This Court's Well-Established Precedent

In relevant part, § 702.06 provides that, in all foreclosure actions, the decision whether to enter a deficiency shall be within the sound discretion of the foreclosure court, and "[t]he complainant shall also have the right to sue at common law to recover such deficiency, unless the court in the foreclosure action has granted or denied a claim for a deficiency judgment" (emphasis added). Section 702.06 does not address the situation here, where the court in the foreclosure action has reserved jurisdiction to grant or deny the claim for a deficiency judgment. In fact, the word "jurisdiction" is notably absent from § 702.06 altogether.

Section 702.06 reads in its entirety as follows:

> **Deficiency decree; common-law suit to recover deficiency.**—In all suits for the foreclosure of mortgages heretofore or hereafter executed the entry of a deficiency decree for any portion of a deficiency, should one exist, shall be within the sound discretion of the court; however, in the case of an owner-occupied residential property, the amount of the deficiency may not exceed the difference between the judgment amount, or in the case of a short sale, the outstanding debt, and the fair market value of the property on the date of sale. For purposes of this section, there is a rebuttable presumption that a residential property for which a homestead exemption for taxation was granted according to the certified rolls of the latest assessment by the county property appraiser, before the filing of the foreclosure action, is an owner-occupied residential property. The complainant shall also have the right to sue at common law to

recover such deficiency, unless the court in the foreclosure action has granted or denied a claim for a deficiency judgment.

Fla. Stat. § 702.06 (emphasis added).

Importantly, the first sentence of § 702.06 provides that the foreclosure court has "discretion" to enter the deficiency judgment. That discretion necessarily includes the ability to reserve jurisdiction over the deficiency claim and defer ruling on it. *Cf. Herman v. Herman*, 889 So. 2d 128, 129 (Fla. 1st DCA 2004) (explaining that, in the context of a divorce proceeding, a trial court's reservation of jurisdiction is reviewed for abuse of discretion); *Wood v. Wood*, 359 So. 2d 23 (3d DCA 1978) (same).

Notably, in the 2013 amendments, the Legislature did not change the "discretion" language of the first sentence of § 702.06, which indicates an intent on the part of the Legislature to adopt this Court's prior rulings regarding the foreclosure court's discretion and the reservation of jurisdiction over a deficiency claim. The last sentence of § 702.06, on which Dyck relies,[7] does not address the situation here, where the foreclosure court has reserved jurisdiction to grant or deny the deficiency claim, a judicial act that the first sentence of § 702.06 indicates is well

[7] Dyck cites *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006) and other cases for the unremarkable proposition that a court should not resort to legislative history when a statute is clear and unambiguous. (Initial Brief at 4, 19). Here, the statute is neither clear nor unambiguous when the foreclosure reserves jurisdiction to adjudicate the deficiency claim, but is instead silent on jurisdiction altogether.

within the foreclosure court's "discretion." In other words, the first sentence of § 702.06 gives the foreclosure court "discretion" to enter a deficiency, and in this case the foreclosure court exercised that discretion and reserved jurisdiction to grant or deny the deficiency, while Dyck filed a separate action at law and asserts that the last sentence of § 702.06 gives it the right to do so, since the deficiency has not been "granted or denied." Under these circumstances, the application of § 702.06 is neither clear nor unambiguous.[8]

"It is well settled that legislative intent is the polestar that guides a court's statutory construction analysis." *Knowles v. Beverly Enterprises-Florida, Inc.*, 898 So. 2d 1, 5-7 (Fla. 2005). Here, the application of the statute in these circumstances is ambiguous and unclear, making it helpful to review the legislative history to discern legislative intent. *See Hardee County v. FNR II, Inc.*, 221 So. 3d 1162, 1165

[8] Other courts have held that a seemingly facially unambiguous statute can be unclear when applied to a particular set of facts, in which case it is helpful to look to legislative history, canons of construction, the purpose of the statute, and other extrinsic aids to discern legislative intent. *See People v. Leiva*, 56 Cal.4th 498, 510, 297 P.3d 870, 877 (Cal. 2013) (explaining that, when a statute that is "unambiguous on its face" has been shown to have a "latent ambiguity," the court may look to legislative history, public policy, and other extrinsic aids) (internal quotation and citation omitted); *Conway v. Town of Wilton*, 238 Conn. 653, 665, 680 A.2d 242, 249 (Conn. 1996) (explaining that, "[w]hen the application of the statute to a particular situation reveals a latent ambiguity in seemingly unambiguous language . . . we turn for guidance to the purpose of the statute and its legislative history to resolve that ambiguity"); *West v. Kerr-McGee Corp.*, 765 F.2d 526, 530 (5th Cir. 1985) (explaining that, "[w]hen, as here, a statute contains 'latent ambiguities' despite its superficial clarity, we turn to the statute's legislative history for guidance") (citation omitted).

(Fla. 2017) (explaining that, "[l]egislative history can be helpful in construing a statute when its plain meaning is unclear"). The legislative history states that the 2013 amendments were intended "to simplify the language of the current law without providing a substantive change in the law." House of Representatives Final Bill Analysis, Bill No. CS/CS/HB 87, Summary Analysis, at 6 (dated June 13, 2013) (the "Legislative History") (emphasis added).

By way of background, the Legislative History explains that the 2013 amendments to Chapter 702 of the Florida Statutes were enacted because "[t]he foreclosure crisis has impacted Florida's economy and negatively affected the judicial branch in terms of both funding and caseload." *Id.* at 1 (emphasis added). The amendments were intended to accomplish a number of objectives aimed at improving the judicial foreclosure process. In relevant part, the Legislature advised that the amended version of § 702.06 "eliminates the common law recovery of a deficiency when the foreclosure court grants or denies a claim for a deficiency judgment[,] . . . [which] appears to simplify the language of the current law without providing a substantive change in the law." *Id.* at 6 (emphasis added) (citing *Cragin v. Ocean & Lake Realty Co.*, 135 So. 795 (Fla. 1931)).

Based on the Legislative History and the structure of the statute, § 702.06 was intended to confirm a foreclosure plaintiff's right to a deficiency without altering pre-existing law as to jurisdiction or venue. The last sentence of § 702.06 was

merely intended to codify this Court's jurisprudence (set forth and explained below), well-established in numerous cases, and based on principles of res judicata, holding that a foreclosure plaintiff does not lose its right to a deficiency if the foreclosure court overlooks or refuses to consider the deficiency, since, in that case, the foreclosure court would not have "granted or denied a claim for a deficiency judgment." Fla. Stat. § 702.06; *see Wells Fargo Bank, N.A. v. Jones*, Civil Action No. 13-822-JJB-SCR, 2014 WL 1784062, at *2 (M.D. La. May 5, 2014) (concluding that § 702.06 was never meant to apply to the situation where a plaintiff prays for a deficiency judgment and the foreclosure court reserves jurisdiction to enter the deficiency judgment, but instead § 702.06 was meant to apply to situations where a Florida court, in its sound discretion, refused or failed to consider a deficiency decree) (citing *Provost v. Swinson*, 146 So. 641 (Fla. 1933)); *see also Cragin*, 135 So. at 797-98; *Reid v. Miami Studio Properties*, 190 So. 505, 505 (1939); *McLarty v. Foremost Dairies*, 57 So. 2d 434, 435 (Fla. 1952); and the other cases cited below. In other words, the last sentence of § 702.06 was merely intended to preserve the plaintiff's right to a deficiency when the foreclosure court overlooks or refuses to consider the claim for a deficiency judgment.

It is important to recognize that, in a situation like this case, where a foreclosure court has expressly reserved jurisdiction to grant or deny the claim for a

deficiency judgment, the foreclosure has not overlooked or failed to consider the deficiency, as this Court's precedent makes abundantly clear:

> In *Reid* it was decided that if a deficiency decree is not requested or if requested and overlooked or not considered, the right of the complainant to sue at law is not affected. In the instant case the request was made in the complaint and apparently was not immediately considered but was deferred as the court retained jurisdiction to settle any motion for deficiency. So it may be said that the request for deficiency was neither considered nor overlooked. Here again on the salient facts the plaintiff was not at this point free to seek an adjudication elsewhere, hence a conflict was not developed.

First Fed. Sav. and Loan Ass'n of Broward County v. Consol. Dev. Corp., 195 So. 2d 856, 858 (Fla. 1967) (emphasis added).

Dyck attempts to obscure this point of law. *See* Initial Brief at 5, 36-37 (arguing that the First DCA's approach is unsound because it is not possible to tell whether a claim for deficiency has been "ignored" and insinuating that the burden is on the foreclosure court, rather than the parties, to bring up and rule on the deficiency *sua sponte*). Dyck argues that the First DCA's approach in *Higgins* "twists the statute into an undefined and unworkable standard," so that Dyck is unable to tell whether and when a deficiency claim has been "ignored." (Initial Brief at 5, 36-37). Dyck asks, "at what point and under what circumstances may litigants and lower courts reliably know that a foreclosure court has ignored such a claim?" Initial Brief at 36. The answer is simple: when the foreclosure court renders a final judgment in

the foreclosure action without adjudicating the deficiency claim and without reserving jurisdiction to enter a deficiency judgment.

In this case, it is clear that the foreclosure court did not "ignore" the claim for a deficiency judgment. We know the foreclosure court did not ignore or overlook the plaintiff's request for a deficiency in this case because the foreclosure court expressly reserved jurisdiction to grant or deny the deficiency claim. It was Dyck that overlooked the foreclosure court's reservation of jurisdiction in the Foreclosure Judgment, despite the fact that Dyck attached the Foreclosure Judgment to its Complaint in this case.

Dyck's arguments attempt to obfuscate this Court's precedent (set forth below) on this issue. Far from adding "uncertainty" to foreclosure practice in Florida (Initial Brief at 34-35), the foreclosure court's reservation of jurisdiction provides clarity and certainty by giving notice and making clear that it is exercising jurisdiction over the deficiency claim. The approach in *Higgins* provides far more certainty than *Garcia v. Dyck-O'Neal, Inc.*, 178 So. 3d 433 (Fla. 3d DCA 2015), because the reservation of jurisdiction tells the parties which court will be adjudicating the deficiency, something that is clear if one simply looks at the foreclosure judgment.

Nothing in § 702.06 prohibits the foreclosure court from reserving jurisdiction over the deficiency. In fact, § 702.06 explicitly gives the original foreclosure court

"discretion" to address claims for a deficiency by providing that, "[i]n all suits for the foreclosure of mortgages heretofore or hereafter executed the entry of a deficiency decree for any portion of a deficiency, should one exist, shall be within the sound discretion of the court." Such discretion, statutorily granted to the foreclosure court, necessarily includes the discretion to reserve jurisdiction on the deficiency claim and defer ruling on it. The question, then, is what effect such a reservation of jurisdiction has. Section 702.06 simply does not speak to this issue at all.

At the same time, the Legislature "is presumed to know the judicial constructions of a law when enacting a new version of that law[,]" and the Legislature "is presumed to have adopted prior judicial constructions of a law unless a contrary intention is expressed in the new version." *Essex Ins. Co. v. Zota*, 985 So. 2d 1036, 1043 (Fla. 2008) (internal quotation and citation omitted); *see also Hardee County*, 221 So. 3d at 1165 (stating that "[s]tatutes that alter the common law are narrowly construed"). The Legislature should also be presumed to be aware of the Florida Rules of Civil Procedure, including the Forms, and particularly the Form 1.996(A) and (B) Foreclosure Judgments, which specifically provide for a reservation of jurisdiction over the deficiency.[9] Such a reservation of jurisdiction is

[9] It is worth noting that it is the Florida Supreme Court (not the Legislature) that has the exclusive power to regulate practice and procedure in Florida's courts. *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991).

wise, since it results in a conservation of judicial resources (as explained more fully below).

There is nothing in the amended version of § 702.06 that indicates any intention on the part of the Legislature to override this Court's well-established precedent, or the practice and procedure that has developed therefrom, regarding jurisdiction over deficiency judgments. Indeed, the Legislative History makes clear that the 2013 amendments were not intended to substantively alter this Court's jurisprudence at all. *See* Legislative History, *supra*, at 6 (stating that "[t]his provision appears to simplify the language of the current law without providing a substantive change in the law").[10] This is further demonstrated by the Legislative History's citation to *Cragin*. Legislative History, *supra*, at 6, n.39. Importantly, *Cragin* held that a plaintiff filing a foreclosure action has "two remedies as to any deficiency that might exist after applying the proceeds of the foreclosure; they could apply to the equity court to adjudicate and grant them a deficiency decree, or they could have refrained from invoking the jurisdiction of equity in this regard and have

[10] Dyck argues that the Legislature intended the 2013 amendments to be a sweeping change to foreclosure practice in Florida. (*See* Initial Brief at 15-18, 34-35). That may be true with respect to the statute of limitations, the requirements regarding possession of the original note, and other aspects of foreclosure practice, but the Legislature did not change the language of the first sentence of § 702.06, giving the foreclosure court "discretion" to enter a deficiency, so that Dyck overstates how sweeping the Legislature intended the changes to be, at least with respect to a court's jurisdiction to adjudicate deficiency claims.

sued at law for any balance due on the notes after applying the proceeds of the foreclosure." *Cragin*, 101 So. at 797-98 (emphasis added).

Accordingly, § 702.06 must be read in light of this Court's long-standing, well-established precedent and jurisdictional principles (explained more fully below) that a trial court has continuing and exclusive jurisdiction of a matter that it retains jurisdiction to decide. This concept is both basic and fundamental to the operation of the jurisdiction of Florida courts. Section 702.06 has no indication that the Legislature intended to overturn such a basic, fundamental jurisdictional concept.

Section 702.06 was merely intended to codify well-established and long-standing jurisprudence, based on the doctrine of res judicata, that a plaintiff cannot get a second bite at the apple if the foreclosure court has already ruled on the deficiency claim; but if the foreclosure court does not rule on the deficiency claim, then the plaintiff can file a separate action at law. Dyck is trying to shoehorn the codification of res judicata principles found in § 702.06 into determining the effect of the foreclosure court's reservation of jurisdiction over the deficiency. The preclusive effect of the foreclosure court's resolution of the deficiency claim is a different issue from the foreclosure court's reservation of jurisdiction to adjudicate said deficiency claim. Section 702.06 simply does not address the reservation of jurisdiction issue at all, and therefore the jurisdictional principles set forth in this Court's jurisprudence continue to apply. As such, § 702.06 does not serve to divest

the foreclosure court of jurisdiction when it has expressly reserved jurisdiction to adjudicate the deficiency claim.

II. This Court's Well-Established Precedent Holds that a Foreclosure Plaintiff Who Prays for a Deficiency in the Foreclosure Court, and Who Obtains a Judgment from the Foreclosure Court Reserving Jurisdiction to Grant or Deny the Deficiency Claim, Is Bound by that Choice

Over the last century, this Court has developed a well-established body of law defining the jurisdiction of Florida courts with respect to mortgage deficiency claims. In relevant part, that jurisprudence can be distilled down to the rule that, when a plaintiff requests a deficiency judgment from the foreclosure court, and then obtains a judgment from the foreclosure court reserving jurisdiction to grant or deny that deficiency claim, the plaintiff cannot then unilaterally switch off the foreclosure court's jurisdiction, shop for a new forum, and file a separate action for the exact same deficiency that the foreclosure court had reserved jurisdiction to decide. *See First Federal*, 195 So. 2d at 858; *McLarty*, 57 So. 2d at 434; *Luke v. Phillips*, 3 So. 2d 799, 799 (Fla. 1941); *Crawford v. Woodward*, 191 So. 311, 311 (Fla. 1939); *Reid*, 190 So. at 505; *Coffrin v. Sayles*, 175 So. 236 (Fla. 1937); *Belle Mead Dev. Corp. v. Reed*, 153 So. 843, 844 (Fla. 1934); *Coe-Mortimer Co. v. Dusendschon*, 152 So. 729 (Fla. 1934); *Provost*, 146 So. at 643; *Cragin*, 135 So. at 795;[11]

[11] *Cragin* was cited on page 6 of the Legislative History as an example of what the Legislature did not intend to overrule.

Younghusband v. Ft. Pierce Bank & Trust Co., 130 So. 725, 727 (Fla. 1930); *see also Lovett v. Lovett*, 112 So. 768, 775-76 (Fla. 1927).

In *Higgins*, 201 So. 3d at 160-67, the First DCA engaged in a thorough, comprehensive survey of this Court's precedent (cited above) on the jurisdictional question presented in this case. The Brief of Amicus Curiae, Shaikh & Shaikh, P.A., filed November 13, 2017, also provides a detailed, well-researched survey of this Court's precedent on the jurisdictional question presented. As both the First DCA and the Amicus concluded, this Court's precedent can be summarized to hold that, "[w]hen the court in the foreclosure action has been requested to grant a deficiency judgment and has reserved jurisdiction to do so, the plaintiff is bound by that court's ultimate exercise of jurisdiction to rule on the matter." *Higgins*, 201 So. 3d at 166. Neither Dyck nor any of the other DCAs have ever asserted that *Higgins* misread this Court's precedent.

In contrast to *Higgins*, *Garcia* concluded that it could disregard this Court's precedent based on the 2013 amendments to § 702.06. *Garcia*, 178 So. 3d at 435-36.[12] *Garcia* engaged in a perfunctory, superficial, and overly simplistic reading of § 702.06 that lacks historical, jurisdictional, or precedential context. After quoting the text of § 702.06 (without any analysis), the Third DCA summarily concluded

[12] In *Garcia*, like this case, the foreclosure court reserved jurisdiction to adjudicate any claim seeking a deficiency judgment.

that the language was "clear and unambiguous," so that a plaintiff is free to pursue deficiency relief in a separate action, regardless of the foreclosure court's reservation of jurisdiction over that deficiency claim. *Garcia*, 178 So. 3d at 436. *Garcia* reached this conclusion even though § 702.06 is silent as to jurisdiction and the effect of the foreclosure court's express reservation of jurisdiction to grant or deny the claim for a deficiency judgment.

Garcia fails to recognize that § 702.06 does not address jurisdiction in any manner whatsoever, or even contain the word "jurisdiction," and does not state that a plaintiff has an unfettered right to a "separate" or "independent" action at law in derogation of this Court's well-established precedent on jurisdiction over deficiency claims. *Garcia* also failed to consider the import of the first sentence of § 702.06, which gives the foreclosure court discretion to enter a deficiency, and it failed to address the foreclosure court's statutorily given discretion to reserve jurisdiction over the deficiency. Although *Garcia* does acknowledge that there are numerous Florida Supreme Court cases which survey this Court's jurisprudence on the jurisdictional question presented, it then eschews the teachings of those cases and announces that it can ignore them by characterizing them as "inconsistent jurisprudence" and mere "dicta." *Id.* at 435.

There are at least four problems with the rationale in *Garcia*. First, this Court's jurisprudence is not inconsistent. As explained in *Higgins* and by this Court,

these supposedly inconsistent decisions turned on factual differences, such as whether the plaintiff had prayed for a deficiency in its complaint, whether the foreclosure had actually adjudicated the deficiency claim, and whether the foreclosure court had reserved jurisdiction to enter the deficiency. These factual differences matter and explain the different results reached in this Court's cases considering the different factual scenarios regarding the issue of jurisdiction to enter a deficiency judgment. Contrary to Dyck's arguments and the Third DCA's decision in *Garcia*, this Court's precedent on the issue of jurisdiction to determine a mortgage deficiency is not "inconsistent jurisprudence." *See Luke*, 3 So. 2d at 799 (explaining that *Reid* is not inconsistent with *Belle Mead* because those two cases had different facts); *McLarty*, 57 So. 2d at 434-35 (referring to the "confusion" on this question being the result of "some supposed" conflict).

When read and understood correctly, these cases are consistent and form a well-established body of law. That long-standing body of law is clear that, when a plaintiff requests a deficiency in a foreclosure complaint, and obtains a judgment from the foreclosure court reserving jurisdiction over the deficiency, the plaintiff is bound by its choice.

Second, *Garcia* fails to appreciate the binding nature of this Court's precedent. This Court's statements on jurisdiction in its foreclosure deficiency jurisprudence are not mere dicta. In *First Federal*, the holding was as follows:

> In the instant case the request was made in the complaint and apparently was not immediately considered but was deferred as the court retained jurisdiction to settle any motion for deficiency. So it may be said that the request for deficiency was neither considered nor overlooked. Here again on the salient facts the plaintiff was not at this point free to seek an adjudication elsewhere, hence a conflict was not developed.

First Federal Savings, 195 So. 2d at 858 (emphasis added).

That was the holding of the case, notwithstanding that the Court concluded that certiorari had been unadvisedly granted; it is not dicta. But even if this Court's statements of the law in *First Federal* were dicta, that does not mean that a lower court is free to disregard completely and totally ignore this Court's articulation of well-established law, especially under the guise of a statute that does not answer the question presented.

Third, *Garcia* fails to appreciate the continuing and exclusive nature of the trial court's jurisdiction. "A court, having obtained jurisdiction, retains it until final disposition of the cause . . . ." *Davidson v. Stringer*, 147 So. 228, 229 (Fla. 1933); *see also PLCA Condo. Ass'n v. AmTrust-NP SFR Venture, LLC*, 182 So. 3d 668, 669-70 (Fla. 4th DCA 2015); *Ross v. Damas*, 31 So. 3d 201, 203 (Fla. 3d DCA 2010). The court "retains jurisdiction to the extent such is specifically reserved in the final judgment or to the extent provided by statute or rule of procedure." *Central Park A MetroWest Condo. Ass'n, Inc. v. AmTrust REO I, LLC*, 169 So. 3d 1223, 1225-26 (Fla 5th DCA 2015). "The law of mortgage foreclosure in Florida contemplates that a deficiency judgment may be appropriate in a foreclosure suit,

and as such, a deficiency proceeding is a continuation of the original foreclosure suit." *TD Bank, N.A. v. Graubard*, 172 So. 3d 550, 553 (Fla. 5th DCA 2015).

Similarly, *Garcia* fails to acknowledge the "principle of priority," which provides that, when two courts of the same state have concurrent jurisdiction over a matter, the first court to exercise jurisdiction has exclusive jurisdiction over that matter. "In general, where courts within one sovereignty have concurrent jurisdiction, the court which first exercises its jurisdiction acquires exclusive jurisdiction to proceed with that case." *Siegel v. Siegel*, 575 So. 2d 1267, 1272 (Fla. 1991) (emphasis added) (internal quotation and citation omitted); *see also Nascimiento v. Martin C. Boire, P.A.*, 149 So. 3d 690 (3d DCA 2014) (quoting *Siegel*, among others). "It is the well-established law of Florida that where two courts have concurrent jurisdiction of a cause of action, the first court to exercise jurisdiction has the exclusive right to hear all issues or questions arising in the case." *Hirsch v. DiGaetano*, 732 So. 1177, 1177-78 (Fla. 5th DCA 1999) (emphasis added) (adding that, "[a]bsent extraordinary circumstances which do not exist in this case, a trial court abuses its discretion when it fails to respect the principle of priority"); *Perelman v. Estate of Perelman*, 124 So. 3d 983, 986 (Fla. 4th DCA 2013); *Merrill Lynch, Pierce, Fenner, and Smith, Inc. v. Ainsworth*, 630 So. 2d 1145, 1147 (Fla. 2d DCA 1993) (explaining that "[t]he principle[of priority,] which technically applies only to matters among courts within the same sovereignty, provides that the court

first exercising jurisdiction acquires exclusive jurisdiction to proceed") (emphasis added).[13]

In light of these principles, the foreclosure court's reservation of jurisdiction in this case was substantively significant and not merely a matter of form. When the plaintiff invokes the jurisdiction of the foreclosure court to grant or deny a deficiency and obtains a judgment from the foreclosure court reserving jurisdiction over the deficiency, the foreclosure court's jurisdiction over the deficiency claim continues until resolution of that claim, and that jurisdiction is exclusive.

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[13] Dyck cites *State ex rel. Hendricks v. Hunt*, 70 So. 2d 301 (Fla. 1954) for the proposition that "[a]ll circuit courts within a particular county have equal and concurrent jurisdiction to rule on the matters before them." Initial Brief at 33. *Hendricks* is distinguishable based on numerous factual differences. *Hendricks* involved a successful action in the Juvenile and Domestic Relations Court for Polk County ("Juvenile Court") to remove underage children from the custody of their mother based neglect. *Id.* at 302-03. The mother collaterally attacked the order removing the children from her custody on the ground that the Circuit Court for Polk County ("Divorce Court") had previously retained jurisdiction over the custody of the children. The Court rejected this argument, since it appears that the Divorce Court relinquished and transferred jurisdiction to the Juvenile Court. *See id.* at 302, 303-04 (observing that the Divorce Court entered an order stating that "the welfare of the minor children involved has come to the attention of the Polk County Juvenile and Domestic Relations Court, and . . . the Clerk of the Circuit Court in and for Polk County, Florida, is hereby directed to release these sealed records to the Juvenile and Domestic Relations Court for official use only, after which they are to be returned to the Clerk of the Circuit Court and again sealed as previously ordered"). It also appears that *Hendricks* involved different parties from the original divorce action. *Hendricks* affirmed the general rule that a tribunal first exercising jurisdiction over a cause will ordinarily retain it exclusively for the purpose of deciding every issue or question properly arising in the case, but it held that the circumstances of *Hendricks* were such that the general rule did not apply. *See id.* at 305.

Fourth, *Garcia* does not merely apply the plain language of § 702.06, as Dyck repeatedly argues. Rather, *Garcia* and the decisions of the Second through Fifth DCAs vastly expand the application and scope of the statute and apply it to a situation where the foreclosure court reserves jurisdiction to enter a deficiency—a situation that the plain language of § 702.06 does not address.[14] The plain language of § 702.06 does not contain the word "jurisdiction."

In sum, *Garcia* relied on nonexistent language in a statute that does not contain the word "jurisdiction" to answer the jurisdictional question presented in this case, while disregarding this Court's well-established jurisdictional jurisprudence by labelling it "inconsistent" and "dicta" and ignoring the foreclosure court's continuing jurisdiction and the principle of priority.

The Second DCA, Fourth DCA, and Fifth DCA all simply followed *Garcia* without any meaningful analysis. *See Gdovin v. Dyck-O'Neal*, 198 So. 3d 986 (Fla. 2d DCA 2016); *Cheng v. Dyck-O'Neal*, 199 So. 3d 932 (Fla. 4th DCA 2016); *Dyck-*

[14] To the extent that Dyck argues that the use of the word "shall" gives it an absolute right to an independent action at law, such argument is inconsistent with this Court's precedent that "[t]he use of the word 'shall' is generally mandatory, although it may be merely directory under appropriate circumstances." *Shands Teaching Hosp. & Clinics v. Sidky*, 936 So. 2d 715, 721-22 (Fla. 2006).

O'Neal, Inc. v. Hendrick, 200 So. 3d 181 (Fla. 5th DCA 2016).[15] For this reason, the conflict among the district courts of appeal is not nearly so stark as Dyck suggests. (*See* Initial Brief at 5-15). Dyck was able to convince these courts simply to agree with *Garcia*'s myopic reading of § 702.06, without engaging in any real analysis, or considering this Court's precedent, or the jurisdictional principles set forth above. The Second DCA, Fourth DCA, and Fifth DCA are all incorrect for the same reasons that the Third DCA is incorrect.[16]

Of the five District Courts of Appeal, the First DCA is the only one that has recognized that the text of § 702.06 gives the foreclosure court the discretion to enter a deficiency, and it was the only one to acknowledge that § 702.06 does not address the situation where the foreclosure court has exercised its discretion and reserves

[15] Dyck argues that these and other cases are persuasive because an appellate court has a duty to examine, *sua sponte*, subject matter jurisdiction. (Initial Brief at 12, 13 n.3). However, it goes without saying that it is exceedingly dubious to rely on a decision for what it does not say.

[16] For an example of just how far wrong this flawed reasoning can go, *see generally Aluia v. Dyck-O'Neal, Inc.*, 205 So. 3d 768 (Fla. 2d DCA 2016) (reaching the amazing conclusions a mortgage deficiency on a person's home is not a debt for household purpose, and that Dyck is not a debt collector).

jurisdiction to grant or deny the claim for a deficiency judgment.[17] The First DCA was the only one to engage in a thoughtful, thorough, and well-reasoned analysis that pays due respect to this Court's precedent. The other four DCAs ruled on a jurisdictional issue based on a statute that does not even contain the word "jurisdiction," while disregarding this Court's well-established jurisprudence on jurisdiction. Four DCA wrongs don't make a right.

III. Dyck's Approach Would Encourage Forum Shopping While Undermining the Conservation of Judicial Resources

Not only is Dyck's approach statutorily and jurisdictionally unsound for the reasons argued above, it would have perverse and deleterious effects on the administration of justice and the dignity of the trial courts in Florida. Dyck's approach would enable and encourage forum shopping, while undermining efforts to conserve judicial resources, and could create the possibility of a double recovery.

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[17] *See Higgins*, 201 So. 3d at 165 (explaining that the text of § 702.06 cannot be read "to effect a monumental change in the law, which would allow a mortgagee to sue to foreclose on the mortgaged property, successfully request the court to reserve jurisdiction to enter a deficiency in the event of a shortfall after the sale of the property, and then after the court reserves jurisdiction at the request of the mortgagor (or successor), then permit the mortgagor to seek a deficiency judgment at common law. The statute expressly prohibits such a result if the original suit in foreclosure results in an order granting or denying the deficiency judgment. In our view, when the original court in foreclosure reserves jurisdiction to grant or deny the deficiency judgment, the statute cannot be logically or fairly read to permit the plaintiff in the original action to disregard the court's reservation of jurisdiction, and file another action at law. When the court in the foreclosure action has been requested to grant a deficiency judgment and has reserved jurisdiction to do so, the plaintiff is bound by that court's ultimate exercise of jurisdiction to rule on the matter").

In effect, Dyck's interpretation of § 702.06 would create an unfettered right to a separate action at law to adjudicate the deficiency, in a forum of the plaintiff's choosing, notwithstanding the foreclosure court's retention of jurisdiction over that deficiency claim. Such an approach creates not only the opportunity but the right to forum shop. *See Jones*, 2014 WL 1784062, at *2 (stating that, after a plaintiff who had prayed for a deficiency in the foreclosure court had obtained a judgment reserving jurisdiction on the deficiency, "[a]t that point, the plaintiff decided to refrain from putting the deficiency process—which he originally prayed for—'in motion,' and instead, began to shop for a different forum to render the deficiency decree") (emphasis added). There is no indication that the Legislature intended to create the opportunity to forum shop when it amended § 702.06 in 2013.

Moreover, Dyck's approach gives no consideration to the ability of trial courts to manage their cases, control their dockets, or conserve their judicial resources. In fact, Dyck's approach would do the opposite and result in a waste of judicial resources whenever a plaintiff decides it wants to seek the deficiency in a different forum. The reservation of jurisdiction is a key way courts are able to manage, control, and conserve their limited judicial resources. A foreclosure plaintiff should not be able to unilaterally override these considerations, especially when it was the plaintiff who asked the foreclosure court for a deficiency in the first place, and then

obtained a judgment from the foreclosure court reserving jurisdiction over the deficiency.[18]

Judicial economy is no insignificant matter in this context. Importantly, the Legislature made a specific finding as part of the Legislative History that "[t]he foreclosure crisis has . . . negatively affected the judicial branch in terms of both funding and caseload." Legislative History at 1. This shows that judicial economy was a primary motivating factor behind the 2013 amendments. Principles of judicial economy make it appropriate for the foreclosure court to reserve jurisdiction, so that additional judicial labor is not unnecessarily wasted hearing the same evidence that had already been presented in the foreclosure action. For that reason, it makes perfect sense and is wise for the form foreclosure judgment in the Florida Rules of Civil Procedure to contain a reservation of jurisdiction over the deficiency. *See* Fla. R. Civ. P. Form 1.996(a) and (b).

Dyck seems to argue that, because the language in the Foreclosure Judgment reserving jurisdiction comes from a form in the Florida Rules of Civil Procedure,[19]

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[18] Contrary to Dyck's arguments (Initial Brief at 27-29), the merger of the courts of law and equity actually supports Lanham's position, not Dyck's. The merger of the courts of law and equity, as well as the 2013 amendments to § 702.06, were intended to simplify practice and avoid the necessity of a multiplicity of suits. Dyck's approach would have the opposite effect by encouraging a multiplicity of suits, thereby frustrating efforts to conserve judicial resources.

[19] *See* Fla. R. Civ. P. Form 1.996(A) and (B).

that somehow makes the language insignificant and renders the foreclosure court's express reservation of jurisdiction without meaning. *See* Initial Brief at 5-6, 8-9, and 35. But the fact that the reservation of jurisdiction language is contained in a suggested form contained in the Florida Rules of Civil Procedure does not change the fact that jurisdiction over the deficiency was actually reserved in this case.

Although Dyck suggests that the Florida Supreme Court somehow erred by not changing the form foreclosure judgments in the Florida Rules of Civil Procedure after the 2013 amendments to § 702.06, (Initial Brief at 35), it seems this Court knew exactly what it was doing. It is wise and makes eminent sense for the form foreclosure judgments in the Rules to contain a reservation of jurisdiction, since in the course of adjudicating a foreclosure cause of action, the foreclosure court is likely to hear evidence and find facts that will be relevant to the determination of the deficiency. Reserving jurisdiction therefore has the important purpose of conserving judicial resources and furthers the efficient administration of justice, and it involves the practice and procedure of the Florida courts.[20] Sound principles of judicial economy weigh heavily in favor of such a reservation of jurisdiction.

Furthermore, Dyck's approach could create a danger that the foreclosure plaintiff could obtain inconsistent results or even a double recovery. If the

[20] As noted above, the Florida Supreme Court (not the Legislature) has the exclusive power to regulate practice and procedure in Florida's courts. *Haven Federal Savings & Loan*, 579 So. 2d at 732.

foreclosure court retains jurisdiction to enter a deficiency, but the plaintiff then initiates a separate action at law and obtains the deficiency through that separate action, as Dyck has attempted to do in this case, then the plaintiff could conceivably return to the foreclosure court, having reserved jurisdiction, and obtain two different judgments for the same deficiency.[21] The danger of inconsistent result or even a double recovery seems to be one of the concerns underlying this Court's prior rulings that a plaintiff is bound by its choice of forum. *See Cragin*, 135 So. at 797-98; and *Provost*, 146 So. at 643 (referring to principles of res judicata).

Finally, Dyck ignores the fact that the foreclosure court in a particular case may well decide that the specific circumstances of that case warrant a reservation of jurisdiction.[22] There may be issues with the property, or the conduct of the parties, or their counsel, which may make a reservation of jurisdiction by the foreclosure court necessary to prevent fraud, to maintain the dignity of the court, or to protect the court's inherent authority. Such issues run rampant in the secondary market, where entities like Dyck purchase deficiency judgments for cents on the dollar. *See* Fox, *The Foreclosure Echo*, *supra* note 5, at 62-67 (explaining the prevalence of

[21] Dyck's conduct in the trial court demonstrates that such a scenario is not beyond the realm of possibility.

[22] Dyck's argument regarding the "routine judicial rotation practices in Florida's circuit courts" (Initial Brief at 33-34) does not address this concern. Just because judicial assignments periodically rotate does not mean that a plaintiff should be allowed to ignore a trial court's reservation of jurisdiction.

"zombie foreclosures" and the abusive and harmful practices of lenders and distressed debt purchasers, including Dyck, and discussing Dyck by name in connection with deficiency judgments).

There are strong policy reasons why trial courts should have broad discretion and be given wide berth to have the basic ability to reserve jurisdiction over the parties and issues that are brought before them. Trial courts and trial judges should be given the respect they deserve when they expressly reserve jurisdiction. A plaintiff like Dyck, who has already been sanctioned for its failure to comply with rules, regulations, and debt collection laws in other states,[23] and who has engaged in questionable conduct in the instant case, should not be allowed to disregard a foreclosure court's express reservation of jurisdiction and shop for a new forum, in a manner that wastes judicial resources.

If a plaintiff is free to ignore a trial court's duly entered reservation of jurisdiction, the dignity of the trial courts will be greatly diminished, to the detriment of the efficient operation of the courts and the administration of justice. This Court should not interpret § 702.06 in such a manner that minimizes and diminishes the authority of the trial courts, especially when there is no indication that the Legislature intended such a result. The trial courts deserve more respect than that.

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[23] Fox, *The Foreclosure Echo, supra* note 5, at 65-66, n. 234.

CONCLUSION

Section 702.06 of the Florida Statutes does not address the jurisdictional question presented in this case, nor does it abrogate this Court's precedent establishing a well-reasoned jurisprudence regarding jurisdiction of deficiency actions. According to this Court's well-established precedent, when a plaintiff requests the foreclosure court to grant it a deficiency, and the foreclosure court reserves jurisdiction to grant or deny the deficiency, the plaintiff is bound by its own choice and cannot thereafter shop for a different forum to obtain its deficiency. For the foregoing reasons, the First DCA's decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Answer Brief complies with the requirements set forth in Rule 9.210, Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of January, 2018, a true and correct copy of the foregoing has been provided electronically to the following: David M. Snyder, Esq. (dmsnyder@dms-law.com, davey5720@gmail.com, lorinelson0520@gmail.com); Susan B. Morrison, Esq. (smorrisonlaw@tampabay.rr.com, smorrison@gmail.com); Joshua D. Moore, Esq. (joshua.moore@consuegralaw.com, lawsuitnotices@consuegralaw.com); and Natasha Shaikh, Esq. (legal@gpmsusa.com, natashaikh89@gmail.com).

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