SUPREME COURT OF FLORIDA

DYCK-O'NEAL, INC.,

Petitioner,

v.

HEATHER LANHAM,

Respondent.

Case No.: SC17-975
DCA Case No.: 1D16-1624
L.T. Case No. 2014-CA-000438

PETITIONER'S BRIEF ON THE MERITS

David M. Snyder
Florida Bar No. 366528
DAVID M. SNYDER
Professional Association
4230 S MacDill Ave E229
Tampa, Florida 33611-1901
Tel: 813-258-4501
Email: dmsnyder@dms-law.com
davey5720@gmail.com
lorinelson0520@gmail.com

Susan B. Morrison
Florida Bar No. 394424
LAW OFFICES OF SUSAN B. MORRISON, P.A.
1200 W Platt St Ste 100
Tampa, FL 33606-2136
Tel: 813-902-9293
Email: smorrisonlaw@tampabay.rr.com
smorrisonlaw@gmail.com

Joshua D. Moore, Esq.
LAW OFFICES OF DANIEL C. CONSUEGRA
9210 King Palm Dr Ste 110
Tampa, FL 33619-1385
Joshua.moore@consuegralaw.com
lawsuitnotices@consuegralaw.com

Attorneys for Petitioner/Appellant
Dyck-O'Neal, Inc.

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PRELIMINARY STATEMENT

Pursuant to the Florida Constitution, this Court has accepted discretionary jurisdiction to review the certified conflict between a First District Court of Appeal decision, *Higgins v. Dyck-O'Neal, Inc.*, 201 So. 3d 157 (Fla. 1st DCA 2016), and those of all other Florida district courts. *See,* Art. V, § 3(b)(3) & (4), Fla. Const; Fla. R. App. P. 9.030(a)(2)(A)(iv) and (vi). In the instant case, the First District applied *Higgins*, quashed a circuit court order, and certified the conflict to be resolved here. *See Dyck-O'Neal, Inc. v. Lanham*, 214 So. 3d 802 (Fla. 1st DCA 2017) (per curiam) [*see* Appendix A]. Petitioner Dyck-O'Neal, Inc. ("DONI") respectfully submits that the majority decision in *Higgins* is in error and should be disapproved and overruled with directions to reinstate this appeal and all pending actions dismissed and judgments vacated in reliance on it.

References to the record on appeal will be cited as "R.__." The Appendix A will be cited as "A.__;" Appendix B will be cited as "B.__."

STATEMENT OF THE CASE AND FACTS

Defendant/Respondent Heather Lanham ("Lanham") defaulted on a note and a mortgage securing the note on property described in the instrument as 56 Mason Court, Havana, FL 32333. R.6, 9. In February 2010, the circuit court entered a Final Summary Judgment of Foreclosure in the amount of $345,213.14 in favor of the mortgagee. R.11-17. The judgment scheduled a foreclosure sale and further

provided: "This Court retains 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. The property sold for $100.00 in a March 2010 foreclosure sale. R.6.

The note and foreclosure judgment were assigned to DONI, R.38-39, which on May 2014 commenced an independent action at law to recover a $80,213.14 deficiency between the foreclosure judgment amount and the value of the property on the date of the foreclosure sale. R.5-39. In February 2016, the trial court granted summary judgment in favor of Lanham on grounds irrelevant to this review. R.101-102. DONI moved for rehearing, R.107-113, which was denied. R.154-161. DONI timely appealed in April 2016. R.145-148; R.154-161.

On April 24, 2017, the First District Court of Appeal quashed the trial court decision. Applying *Higgins*, the First District held the circuit court's order was void for lack of subject matter jurisdiction to consider DONI's common law suit for a deficiency judgment. *Lanham*, 214 So. 3d at 802; A.1. The First District also certified conflict between its decision in *Higgins* and *Garcia v. Dyck–O'Neal, Inc*., 178 So. 3d 433 (Fla. 3d DCA 2015); *Dyck-O'Neal, Inc. v. Hendrick*, 200 So. 3d 181 (Fla. 5th DCA 2016); *Gdovin v. Dyck-O'Neal, Inc.*, 198 So. 3d 986 (Fla. 2d DCA 2016); *Dyck–O'Neal, Inc. v. McKenna*, 198 So. 3d 1038 (Fla. 4th DCA 2016). *Lanham*, 214 So. 3d at 802; A.2.

SUMMARY OF ARGUMENT

Consistent with the Florida Constitution, the Legislature has determined that circuit courts of this state have jurisdiction of actions at law and that complainants have the right to sue at common law to recover a deficiency following a foreclosure sale, unless the court in the foreclosure action granted or denied a claim for a deficiency judgment.

An outlier, the *Higgins* majority's decision that circuit courts lack such jurisdiction directly violates legislative ukase given effect by all other district courts and disregards this Court's binding precedent. *Higgins* is further based on unsound policy assessments, and twists a statute into an undefined and unworkable standard. The First District's imposition of its erroneous holding here and in more than a dozen other recent decisions also violates Art. V, § 5, Fla. Const. which requires that "[j]urisdiction of the circuit court shall be uniform throughout the state."

Unlike the majority holding in *Higgins*, decisions of the Second through Fifth Districts applied the plain language of Section 702.06, Fla. Stat. (2013) (which remains unchanged since 2013). Their decisions in *Garcia*, *Hendrick*, *Gdovin*, and *McKenna*, *inter alia,* properly hold that a foreclosure judgment holder has the right to a separate suit at common law to recover a deficiency following a

foreclosure sale, unless the court in the preceding foreclosure action granted or denied a claim for a deficiency judgment.

DONI does not offer this Court a fallacious *argumentum ad populum* on the mere fact that four of five district courts have found subject matter jurisdiction. Rather, a careful, critical examination based on this Court's precedent, the reasoning of the district courts, and arguments herein, reveals flawed analysis and assumptions in the *Higgins* majority's view of the Legislature's intent and the difficulties in practical application of its interpretation.

This Court need look no farther than its binding precedent in, *inter alia, Borden v. E.-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006) to rule that the plain language of § 702.06 Fla. Stat. (2013) must be given full effect and approve *Garcia*, *Hendrick*, *Gdovin*, and *McKenna* and overrule *Higgins.*

Further, as demonstrated below, the *Higgins*' majority failed to apply this Court's decisions confirming that a foreclosure judgment holder has the right to sue at common law to recover a deficiency following a foreclosure sale when the foreclosure court has not decided a claim for a deficiency judgment.

Lastly, the *Higgins'* majority misperceived and misapplied the policy underpinnings it relied on to deny a complainant's statutory right to sue at common law to recover a deficiency. The *Higgins* majority's spin on § 702.06—that the statute authorizes a lender to seek relief at common law only "if the original

foreclosure court ignores a claim for a deficiency judgment or one is not sought there—" *Higgins*, 201 So. 3d at 166, is unworkable given the practicalities of circuit court practice.

DONI respectfully asks this Court to approve the decisions of the Second through Fifth District Courts of Appeal, disapprove and overrule *Higgins*, remand this cause for determination on its merits, and direct the First District to reinstate all pending actions that were dismissed or judgments that were vacated by application of *Higgins*. *See* Appendix B for a list of pending appeals.

ARGUMENT

I. THE CONFLICT: ALL DISTRICT COURTS OF APPEAL, SAVE FOR THE FIRST, HAVE HELD § 702.06 FLA. STAT. (2013) PERMITS A SEPARATE ACTION FOR DEFICIENCY IF THE FORECLOSURE COURT HAS NOT GRANTED OR DENIED A DEFICIENCY CLAIM

The Third District was first to rule on whether § 702.06, Fla. Stat. (2013) granted a complainant the right to sue at common law to recover a deficiency when a foreclosure court was asked to and retained jurisdiction to, but did not decide a claim for a deficiency judgment.

In *Garcia v. Dyck-O'Neal, Inc.*, BAC Home Loans Servicing ("BAC") sued Garcia and others in Miami-Dade County circuit court to foreclose a mortgage securing a note. As recommended in Fla. R. Civ. P. Form 1.944(a), BAC requested a deficiency judgment. Tracking the recommended language in Fla. R. Civ. P.

Form 1.996(a), the court retained jurisdiction to consider a deficiency in its final judgment of foreclosure. *Garcia,* 178 So. 3d at 434.

DONI acquired the judgment and note by assignment. It sued Garcia for the deficiency at common law in the same circuit court. Garcia did not respond to the complaint. A clerk's default was entered, but before judgment, Garcia moved to dismiss for lack of subject matter jurisdiction because the foreclosure court had been asked to and had reserved jurisdiction to consider a deficiency. The court rejected Garcia's argument and entered a deficiency judgment for DONI. *Id.*

On appeal, Garcia urged the Third District to disregard the plain and unambiguous language of § 702.06 Fla. Stat. (2013).[1] Instead, he argued the court should rely on pre-law/equity merger decisions such as *Belle Mead Development Corp. v. Reed*, 114 Fla. 300, 153 So. 843 (1934) and *First Federal Savings and Loan Ass'n of Broward County v. Consolidated Development Corp.*, 195 So. 2d 856 (Fla. 1967) and the First District's historical review of them in *Reid v. Compass Bank*, 164 So. 3d 49 (Fla. 1st DCA 2015). *Garcia*, 178 So. 3d 435-436.

DONI relied on the plain and unambiguous language of § 702.06 and the line of this Court's decisions—*Reid v. Miami Studio Properties, Inc.*, 139 Fla. 246,

[1] "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." § 702.06, Fla. Stat. (2013).

190 So. 505 (1939), *Luke v. Phillips*, 148 Fla. 160, 3 So. 2d 799 (1941) and *McLarty v. Foremost Dairies, Inc.,* 57 So. 2d 434 (Fla. 1952)—which support the view that § 702.06 and its predecessors were intended only to prevent a deficiency seeker from pursuing duplicate relief. This Court did not bar a separate deficiency action unless the foreclosure court had acted on claim for a deficiency judgment. *Garcia*, 178 So. 3d 435-436.

The Third District found that neither *First Federal* nor *Compass Bank* established precedent that could empower it to disregard the Legislature's dictate in § 702.06, Fla. Stat. In *First Federal* this Court found no conflict with the Fourth District's determination that the lower court erred in terminating its jurisdiction in a foreclosure action when a claimant filed a common law action for a deficiency in a different venue. *First Federal*, 195 So. 2d at 857. The *Garcia* court determined that the *First Federal* decision's "glancing reference to the rule for recovering a deficiency judgment does not constitute the holding of the case." *Id.* 178 So. 3d at 436. *Compass Bank* involved consolidation of a foreclosure action with a separate common law action for the same deficiency. The *Garcia* court refused to follow *Compass Bank's* five-page historical survey of deficiency judgment law (which later re-surfaced in *Higgins*) because it was *dicta* that relied on *dicta* in *First Federal*. *Garcia*, 178 So. 3d at 436. The actual holding in *Compass Bank* was that

"due to . . . consolidation, the foreclosure court retained jurisdiction to enter a deficiency judgment." *Compass Bank*, 164 So. 3d at 57.

Ultimately, finding that the First District "allows its gaze to drift beyond the plain wording of the statute" in *dicta* regarding the statute's application, the *Garcia* court reasoned that "[t]he remedial nature of the 2013 amendment to section 702.06 militates against our further interpreting an inconsistent body of case law." *Garcia*, 178 So. 3d at 436. The Third District affirmed the circuit court judgment and held:

> [T]he Legislature drafted a clear statute that resolved the courts' struggle with the issue in this case. According to the statute, unless the foreclosure court has granted or has declined to grant a deficiency judgment, a plaintiff may pursue deficiency relief in a separate action. In the instant case, the foreclosure court did not grant or decline to grant the deficiency judgment claim; therefore, the trial court below had jurisdiction to consider [DONI's] deficiency claim.

Id.; *accord Dyck-O'Neal, Inc. v. Weinberg,* 190 So. 3d 137 (Fla. 3d DCA 2016).

The Third District's conclusion flows naturally from the statutory language. This Court's Florida Rules of Civil Procedure forms recommend a plea for a deficiency in a foreclosure complaint and reservation of jurisdiction to resolve same in the final foreclosure judgment. *See* Fla. R. Civ. P. Form 1.944(a) & (b) and Fla. R. Civ. P. Form 1.996(a) & (b). In any event, to obtain a deficiency judgment, the deficiency must first be pled in the foreclosure action and retention of jurisdiction there would follow as a matter of course. Without a foreclosure case,

no deficiency could arise, so the statutory language— "unless the court in the foreclosure action has granted or denied a claim for a deficiency judgment" — plainly presumes that a deficiency was sought and jurisdiction for same was retained in the foreclosure action.

After the *Garcia* and *Weinberg* decisions, the Fourth District Court of Appeal addressed the identical issue in *Cheng v. Dyck-O'Neal, Inc.*, 199 So. 3d 932 (Fla. 4th DCA 2016). The *Cheng* court found "no evidence that the foreclosure court had granted or denied any claim for a deficiency judgment" and affirmed the circuit court's denial of Cheng's motion for relief from a deficiency judgment. Agreeing with the Third District that "section 702.06, Florida Statutes, is unambiguous[,]" the unanimous panel held: "[t]he foreclosure judgment's reservation of jurisdiction does not preclude a separate suit to recover the deficiency where the foreclosure court has not granted or denied a claim for a deficiency judgment." *Cheng*, 199 So. 3d at 932.

The First District was next to consider the issue. It disagreed with the Third and Fourth districts. In *Higgins*, Freedom Mortgage Corporation filed a foreclosure suit in Duval County circuit court. The complaint, true to Fla. R. Civ. P. Form 1.944(a), requested a deficiency judgment. Just like Fla. R. Civ. P. Form 1.996(a), the circuit court's foreclosure judgment stated it retained jurisdiction, *inter alia*, to address deficiency claims. *Higgins*, 201 So. 3d at 159. After the foreclosure sale,

the judgment and note were assigned to DONI, which filed a new complaint for a deficiency judgment in the same circuit court. The defendants failed to appear. The court entered a final default judgment against them. *Id.* Eleven months later, the defendants sought relief from judgment pursuant to Fla. R. Civ. P. 1.540(b), asserting that because of the plea to the foreclosure court for deficiency relief and reservation of jurisdiction for same, the common law deficiency judgment was void for want of subject matter jurisdiction. The circuit court denied their motion for relief and the defendants appealed.

Reversing the circuit court, the *Higgins* majority panel did not find § 702.06 Fla. Stat. to be "clear and unambiguous" as held in *Garcia, Weinberg,* and *Cheng.* Relying what the Third District found to be *dicta* in *First Federal* and *Compass Bank,* the majority stated:

> 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.

Id. at 165-166. The *Higgins* majority concluded:

> We now hold that while the statutory language may "support" such an argument, it does not persuade us that the legislature intended to actually overrule Florida Supreme Court decisions that address the issue more specifically and hold to the contrary. Thus, . . . we hold that a party is not entitled to pursue an action

> at law on a promissory note where that party includes a prayer for a deficiency judgment in its foreclosure complaint and the trial court reserves jurisdiction to enter a deficiency judgment.

In dissent, Judge Makar called the majority's reliance on *Compass Bank* and that opinion's surmise of the *First Federal* case, "dicta" that was "immaterial, and misplaced" to the case at hand. "Immaterial," he noted, because § 702.06 Fla. Stat. "trumps whatever perceived inconsistency the panel in [*Compass Bank*] may have imagined with prior precedents." "Misplaced," he observed, because:

> [T]he caselaw recited by the majority cannot be said to be inconsistent with the 2013 revision. Rather, though the older caselaw is not entirely consistent, it appears that a complainant had the right to pursue an action at law for a deficiency judgment if a deficiency is not sought or entered in the foreclosure proceeding.

Higgins, 203 So. 3d at 167-168 (Makar, J., dissenting).

The majority in *Higgins* denied DONI's motions for rehearing, rehearing *en banc* and certification of conflict with *Garcia, Weinberg* and *Cheng. Higgins*, 203 So. 3d at 168. Judge Makar again dissented, calling certification "a small ask because the majority explicitly rejects the Third District's decision in *Garcia*, which began the unbroken string of district courts (save for ours) that have upheld the clear language of section 702.06, Florida Statutes. The drum beat has gone on." at 168 (Makar, J., dissenting). His dissent to denial of further review or certification also cited *Dyck-O'Neal, Inc. v. Huthsing*, 181 So. 3d 555 (Fla. 1st DCA 2015), wherein the First District (Swanson, Makar, and Bilbrey, JJ.) held the

Duval County circuit court had *in personam* jurisdiction over Huthsing in a separate deficiency action and remanded the case for merits determination. *Higgins*, 203 So. 3d at 168, (Makar, J., dissenting). The record in the *Huthsing* appeal contained the foreclosure court's reservation of jurisdiction to enter a deficiency. Given the district court's duty to examine, *sua sponte,* and rule upon a lack of subject matter jurisdiction if present in the record, the *Huthsing* court implicitly acknowledged subject matter jurisdiction over a separate deficiency claim by remanding the case to proceed.[2] Thus *Higgins* was not, as its majority asserts, an application of *stare decisis*. *Higgins* announced a new rule that this Court should reject as contrary to its binding precedent concerning statutory interpretation and in favor of the better-reasoned, precedent-compliant Second through Fifth district court holdings.

Before and after the *Higgins* decision, each of the other four district courts of appeal examined precedent and determined that § 702.06 Fla. Stat. permits a separate action at law to recover a deficiency even when a plea has been made and jurisdiction reserved in foreclosure court to consider a deficiency as long as the

[2] Post-*Higgins,* the circuit court dismissed DONI's complaint in *Huthsing* based on lack of subject matter jurisdiction. Notwithstanding this Court's acceptance of jurisdiction to review the extant conflict, the First District affirmed, per curiam, *see, Dyck-O'Neal, Inc. v. Huthsing*, No. 1D16-4352 (Fla. 1st DCA Oct. 16, 2017) and denied DONI's Motion to Stay Issuance of Mandate in that case pending this review. *See* Order Denying Motion for Stay, *Dyck-O'Neal, Inc. v. Huthsing*, No. 1D16-4352 (Fla. 1st DCA Oct. 27, 2017).

foreclosure court has neither granted nor denied it. The *Higgins* majority examined and disagreed with only the Third District opinion in *Garcia.* The *Higgins* dissent cited *Weinberg* and *Cheng.* Both decisions agreed with *Garcia* "that section 702.06, Florida Statutes is unambiguous," that "[t]he foreclosure judgment's reservation of jurisdiction does not preclude a separate suit to recover the deficiency where the foreclosure court has not granted or denied a claim for a deficiency judgment." *Cheng,* 199 So. 3d at 932.

Before the *Higgins* court's September 28, 2016 *per curiam* denial of DONI's motions for rehearing, rehearing en banc, and certification, the Second and Fifth districts had issued decisions following the Third and Fourth, rejecting *Higgins* and allowing separate actions for a deficiency judgment. *See Dyck-O'Neal, Inc. v. Rojas*, 197 So. 3d 1200 (Fla. 5th DCA 2016) ("[w]e attribute no significance to Appellant pursuing the deficiency judgment in a separate action, as opposed to reopening the original foreclosure proceeding because, under the facts of the case, the plain language of section 702.06 permitted it to do so.");[3] *Hendrick*, 200 So. 3d at 182 (certifying conflict with *Higgins*); *Dyck-O'Neal, Inc. v. Beckett*, 200 So. 3d

[3] While the issue on appeal in *Rojas* may have been *in personam* jurisdiction, an appellate court has duty to examine *sua sponte* subject matter jurisdiction. *See Ruffin v. Kingswood E. Condominium Ass'n, Inc.*, 719 So. 2d 951, 952 (1998).

179, 180-81 (Fla. 5th DCA 2016) (certifying conflict with *Higgins*) and *Gdovin*, 198 So. 3d at 986 (citing Judge Makar's dissent; certifying conflict with *Higgins*).

The Second District, in *Aluia v. Dyck-O'Neal, Inc.*, 205 So. 3d 768, 772 (Fla. 2d DCA 2016), further acknowledged in *dicta* that a separate deficiency action was proper, when a defendant challenged venue for a deficiency case in the same circuit court where foreclosure the judgment had been entered. The *Aluia* court stated:

> It would defy logic to say that—solely because DONI elected to file the statutorily permitted independent action to pursue the deficiency—venue no longer lies in Florida but that if DONI had been substituted party plaintiff in the foreclosure action and filed its motion for deficiency therein venue in Florida would be indisputable. Venue cannot simply be "lost" because DONI brought a new action to recover the deficiency rather than proceeding within the foreclosure suit.

Id. (footnote omitted).

Rejecting DONI's rehearing/certifications motions, the *Higgins* majority also declined to acknowledge *McKenna*, 198 So. 3d 1038 (Fla. 4th DCA 2016) (rejecting *Higgins*, following *Cheng* to permit separate action on deficiency when deficiency had been pled and jurisdiction retained for same in foreclosure action; certifying conflict with *Higgins*) and *Dyck-O'Neal, Inc. v. Stavola*, 198 So. 3d 1131 (Fla. 4th DCA 2016) (following *McKenna,* certifying conflict with *Higgins*). Thereafter, Judge Makar again disagreed with *Higgins*. *Joseph v. Dyck-O'Neal, Inc.*, 197 So. 3d 1291 (2016) per curiam (Makar, J., dissenting) and Judge Winsor

concurred with a per curiam affirmance noting that he was bound by *stare decisis* to apply *Higgins*. *Dyck-O'Neal, Inc. v. Hogan*, 201 So. 3d 835 (Fla. 1st DCA 2016) (Winsor, J., concurring).

In the ensuing six months, the Second District again disagreed with the *Higgins* majority opinion. *Dyck–O'Neal, Inc. v. Konstantinos*, --- So. 3d ----, 41 Fla. L. Weekly D2728, 2016 WL 7174170 (Fla. 2d DCA Dec. 9, 2016) (certifying conflict with *Higgins*), *see also Dyck-O'Neal, Inc. v. Meikle,* 215 So.3d 604 (Fla. 4th DCA 2017) (§ 702.06 neither vague nor violation of due process).

Finally, in this case, a First District panel that included Judge Makar, certified *Higgins'* conflict with the other district courts. *Lanham*, 214 So. 3d at 802; A.2.

II. FLORIDA LAW CONFERS ON CIRCUIT COURTS JURISDICTION TO ADJUDICATE COMMON LAW DEFICIENCY CLAIMS WHEN A FORECLOSURE COURT NEITHER GRANTS NOR DENIES A DEFICIENCY

Here, as in the certified conflict cases, the court in the preceding foreclosure action did not grant or deny a deficiency judgment. Absent grant or denial of a deficiency by the foreclosure court, DONI followed the plain and unambiguous language of § 702.06, Fla. Stat. (2013) and filed a separate common law action for a deficiency judgment. DONI paid a new filing fee. The new action at law also required acquisition of personal jurisdiction over, and service of process upon the

debtor, thereby ensuring due process.[4] By commencing a new suit, DONI avoided filing a motion to re-open a long-dormant and administratively-closed 2010 foreclosure case and moving to substitute itself for the original plaintiff as the new real party in interest.

Fla. Stat. § 702.06 (2013) states in pertinent part:

> 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; . . . 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.

§ 702.06 Fla. Stat. (2013) (emphasis added).

The above version of the statute did not create a new right to pursue a deficiency in a separate common law action. Every legislative enactment relating to deficiency decrees since 1927 has authorized that alternative.

The 1927 version of the statute provides:

> 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

[4] By contrast, a creditor need not have personal jurisdiction over a debtor to obtain a deficiency judgment within a foreclosure case. See *NCNB Nat. Bank of Florida v. Pyramid Corp.*, 497 So.2d 1353, 1355 (Fla. 4th DCA 1986), per curiam, (plaintiff obtained in rem jurisdiction and foreclosed; personal jurisdiction held unnecessary for deficiency judgment); *accord*, *Timmers v. Harbor Federal Sav. and Loan Ass'n*, 548 So.2d 282, 283 (Fla. 1st DCA 1989). A creditor must merely give notice of a deficiency motion, and need not obtain personal service of process. *Pyramid Corp.*, 497 So.2d at 1355.

> sound judicial discretion of the court, but the complainant shall also have the right to sue at common law to recover such deficiency.

Ch. 11993, § 5751 Laws of Fla. (1927) (emphasis added).

The 1929 version of the statute provides:

> 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 judicial discretion of the court, but the complainant shall also have the right to sue at common law to recover such deficiency, provided no suit at law to recover such deficiency shall be maintained against the original mortgagor in cases where the mortgage is for the purchase price of the of the property involved and where the original mortgagee becomes the purchaser at foreclosure sale and also is granted a deficiency decree against the original mortgagor.

Ch. 13625, Laws of Fla. (1929) (emphasis added).

The 1929 amendment preserved the language of the 1927 statute and added an exclusion prohibiting a separate suit at law when an original mortgagee who purchases the property at sale has already been granted a deficiency. This merely prevents a second bite at the same apple. The same prohibition is carried through and broadened to all creditors in the 2013 version, which authorizes a separate common law action unless the foreclosure court has granted or denied a deficiency decree.

The 2013 amendment is part of Ch. 2013-137, Laws of Fla. (2013). In that enactment, the Legislature overhauled a wide range of mortgage

foreclosure and deficiency processes. That overhaul came in the wake of numerous bank failures and mergers, an ever-changing array of loan servicers authorized to pursue foreclosures and deficiencies, and—highly pertinent to this case—increasing sales and assignments of foreclosure judgments and notes to third parties in arms-length transactions.

The Legislature made clear it did not seek to create additional substantive rights for debtors or creditors, but to remedy and clarify processes. Ch. 2013-137, § 8, Laws of Fla. (2013) provides:

> The Legislature finds that this act is remedial in nature and applies to all mortgages encumbering real property and all promissory notes secured by a mortgage, whether executed before, on, or after the effective date of this act. In addition, the Legislature finds that s. 702.015, Florida Statutes, as created by this act, applies to cases filed on or after July 1, 2013; however, the amendments to s. 702.10, Florida Statutes, and the creation of s. 702.11, Florida Statutes, by this act, apply to causes of action pending on the effective date of this act [June 7, 2013].

Id. (emphasis added). Further, it added:

> The Supreme Court is requested to amend the Florida Rules of Civil Procedures to provide expedited foreclosure proceedings in conformity with this act and is requested to develop and publish forms for use in such expedited proceedings.

Ch. 2013-137, § 9, Laws of Fla. (2013) (emphasis added); *see also In re Amendments to the Florida Rules of Civil Procedure*, 153 So. 3d 258 (2014); *In re*

Amendments to the Florida Rules of Civil Procedure, 190 So. 3d 999 (2016).

A. This Court's Precedent Requires Strict Construction and Application of the Plain and Unambiguous Language of § 702.06, Fla. Stat. (2013) Authorizing a Separate Common Law Action for a Deficiency Judgment.

This Court requires strict construction of the plain, clear, and unambiguous language of § 702.06, Fla. Stat.

> It is a fundamental principle of statutory interpretation that legislative intent is the "polestar" that guides this Court's interpretation. We endeavor to construe statutes to effectuate the intent of the Legislature. To discern legislative intent, we look "primarily" to the actual language used in the statute. Further, "[w]hen the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent."

Borden v. E.-European Ins. Co., 921 So. 2d 587, 595 (Fla. 2006) (quoting *Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005); citations omitted); *accord, City of Miami Beach v. Galbut,* 626 So. 2d 192, 193 (Fla. 1993) ("It is well settled that where a statute is clear and unambiguous, as it is here, a court will not look behind the statute's plain language for legislative intent. . .. A statute's plain and ordinary meaning must be given effect unless to do so would lead to an unreasonable or ridiculous result.").

Thus, strictly applying the plain language of § 702.06, Fla. Stat. (2013), the circuit courts of this state have subject matter jurisdiction of a separate

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

This alone provides more than sufficient grounds for this Court to determine the trial court here had subject matter jurisdiction, to disapprove and overrule *Higgins* and approve the rulings of the Second through Fifth District Courts wherein each applied the plain, unambiguous language of § 702.06, Fla. Stat.

B. This Court's Precedents in *Reid, Luke,* and *McLarty* Hold that Subject Matter Jurisdiction Lies for a Suit at Common Law to Recover a Deficiency if the Foreclosure Court has not Ruled on Same

As noted, the Legislature conferred on a deficiency creditor the right to file a separate common law deficiency action in cases under consideration here. This Court has agreed although there has been some confusing and inconsistent application of the 1927 and 1929 versions of the statute. *See, e.g., Garcia*, 178 So. 3d at 435 (finding "inconsistent jurisprudence on the issue of a foreclosure plaintiff's ability to sue at common law to recover a deficiency judgment. . .."). Perhaps the confusion stemmed from the Court's discussion in early cases of a prayer for deficiency amounting to an election of the foreclosure court as an exclusive forum for a deficiency claim. For example, in *Belle Mead*, a key precedential touchstone for the *Higgins* majority, this Court stated:

> In the case at bar there was a special prayer for affirmative relief in that particular [sic]. The complainant thereby elected that forum in which to have its rights adjudicated and became bound by that choice.
>
> After specifically praying for a deficiency, the complainant may waive the relief prayed for in that regard, but it does not avoid the choice of the forum by not applying for the deficiency decree.

Belle Mead, 114 Fla. at 304, 153 So. at 843; *see also Provost v. Swinson,* 146 So. 641 (Fla. 1933).

However, this Court in *Reid v. Miami Studio Properties, Inc.*, 139 Fla. 246, 190 So. 505 (1939) dispelled and overruled any trend to preclude a separate action where the foreclosure complaint contained a deficiency prayer. The Court stated the question in *Reid* as follows:

> The sole question presented is whether or not under the facts stated, the plaintiff Reid can now maintain an action at law to recover the amount of the deficiency judgment which he prayed for in the foreclosure but which prayer was not considered.

Reid, 139 Fla. at 248, 190 So. at 504. This Court held:

> In fine, we understand [the 1927 version of §702.06], to mean that if a deficiency decree is asked for in a foreclosure and granted, that settles the question of what forum may be sought for relief but if not asked for or if asked for and overlooked or not considered, the right of the claimant is not affected. He may sue at law and recover such portion as he may prove himself entitled to.

Id. (emphasis added).

In *Luke v. Phillips*, 148 Fla. 160, 3 So. 2d 799 (1941), this Court re-affirmed the validity of its decision in *Reid,* stating:

> . . .[T]he instant case is ruled by *Reid v. Miami Studio Properties, Inc.*, wherein we pointed out that the facts of that case were distinct from those in the *Belle Mead Development Corp.* case and that line of cases which were not inferentially or otherwise overruled.

Luke, 148 Fla. at 161, 3 So. 2d at 799.

In *McLarty v. Foremost Dairies, Inc.,* 57 So. 2d 434 (Fla. 1952) this Court again held that a separate claim for a deficiency judgment is permitted. The petitioner contended that the respondent, having prayed for a deficiency without obtaining one, could not sue to recover the balance due upon the mortgage note. This Court held the 1929 version of § 702.06, Fla. Stat. authorized a separate at law action notwithstanding an unresolved plea for a deficiency in a chattel mortgage foreclosure. It rejected the argument that there was confusion between the Court's precedent, including *Belle Mead, Crawford v. Woodward*, 140 Fla. 38, 191 So. 311 (1939) and *Reid. McLarty* 57 So. 2d at 435. Thus, in the 1952 *McLarty* opinion this Court re-affirmed its 1941 decision in *Luke* and its 1939 decision in *Reid.* And in so doing, this Court clearly sought to set the matter at rest by stating:

> If the opinion in *Reid v. Miami Studio Properties, Inc.*, supra, as affirmed in *Luke v. Phillips*, supra, is in conflict with <u>any other</u>

> holdings with reference to the subject matter, such holdings, or opinions, are over-ruled to the extent of such conflict.

McLarty, 57 So. 2d at 435 (emphasis added).

Dicta in this Court's 1967 decision *First Federal*, while not binding, does not compel different result. This Court stated:

> There has been no disturbance of the rule that if a deficiency is sought and the relief is overlooked or not considered, the one entitled to the recovery of the balance of the debt left over after the proceeds of the mortgage sale have been credited may sue for the remainder at law.

First Federal, 195 So. 2d 859. While the *Higgins* majority found this statement at odds with the plain meaning of § 702.06, Fla. Stat. (2016), Judge Makar, dissenting in *Higgins*, did not. He observed that "though the older caselaw is not entirely consistent," an action at law is permitted "if a deficiency is not sought or entered in the foreclosure proceeding." *Higgins*, 203 So. 3d at 167-168, (Makar, J., dissenting).

Thus, strict construction and application of § 702.06, Fla. Stat. (2013) and this Court's binding precedent of *McLarty* require disapproval of *Higgins*, remand of this cause for determination on its merits, and direction to the First District to reinstate all pending actions that were dismissed or judgments that were vacated by application of *Higgins*.

III. CONSTRUING § 702.06 FLA. STAT. TO PERMIT A SEPARATE DEFICIENCY ACTION DOES NOT LICENSE OUTCOMES DIFFERENT THAN THOSE AVAILABLE IN A FORECLOSURE ACTION

In *Higgins*, the majority found that the plain language of § 702.06 Fla. Stat. (2013) "supports" a separate deficiency action. Applying this Court's dictate to adhere to the plain language of a statute, the issue should have been concluded in DONI's favor. Instead, the First District stepped over the line and opined that to allow a separate deficiency claim "would support forum shopping and contravene the Florida Supreme Court case law to the contrary, which the statute does not specifically abrogate." *Higgins*, 201 So. 3d at 166, quoting *Compass Bank*, 164 So. 3d at 54.

Further, the *Higgins* majority asserted:

> the statute cannot be reasonably read to allow a lender to seek a deficiency judgment in the original foreclosure action, where the court is granted the discretion to deny such relief, and retains jurisdiction to do so, and then grant the lender the right to forum shop and file yet another action based on contract principles where the subsequent court is not authorized to deny relief in common law, absent unusual circumstances.

Higgins, 201 So. 3d at 166. With utmost respect, DONI suggests the above policy justifications for rejecting the Legislature's "plain language" in § 706.02 do not exist.

The *Higgins* majority opined that the Legislature would not endorse different outcomes in a foreclosure court, "where the court is granted the discretion

to deny" a deficiency judgment versus a contract action "where the subsequent court is not authorized to deny relief in common law, absent unusual circumstances." *Higgins*, 203 So. 3d at 166. Yet, as examined below in light of modern civil procedure, this Court's precedent, and the 2013 Amendments to § 702.06, Fla. Stat., the *Higgins* majority's justification for believing the Legislature did not intend to allow a separate deficiency action hinges on a distinction without a difference. Put another way, the differences, if any, in relief and defenses available in a foreclosure action versus a separate action on a deficiency are insufficient to warrant disregard for the Legislature's "plain language" in § 702.06, Fla. Stat. that has been acknowledged and given effect by all of Florida's other district courts of appeal.

Traditionally, for a deficiency claim, "the exact amount of the discrepancy may be computed by the simple process of subtracting the net proceeds of the sale from the amount of the final decree." *Life & Cas. Ins. Co. of Tennessee v. Tumlin*, 138 Fla. 447, 451, 189 So. 406, 407 (1939). And while a foreclosure court has discretion to deny a deficiency judgment, that discretion is far from unlimited. As the First District held in *Lloyd v. Cannon,* 399 So. 2d 1095 (Fla. 1st DCA 1981):

> While the grant or denial of a deficiency decree is a matter within the sound judicial discretion of the trial court, such discretion is not absolute and unbridled, and where the exercise of such discretion results in denial of a deficiency decree, it must be supported by disclosed equitable considerations which constitute sound and sufficient reasons for such action. Absent such

> equitable considerations, the granting of a deficiency judgment is the rule rather than the exception.

Lloyd, 339 So. 2d at 1096. (internal citations omitted). In *Lloyd*, the trial court in the foreclosure action denied a deficiency judgment after finding the value of the property had not changed while owned by the mortgagor and the mortgagee had recovered his basis in the property. On appeal, however, the First District found a $7,790.00 gap between the foreclosure sale price and the balance due on the note. It therefore held neither "the trial court's findings recited above nor the record show equitable considerations constituting sound and sufficient reasons for denying appellant's motion for deficiency and depriving her of the benefit of her contract" and reversed the foreclosure court's denial of a deficiency judgment. *Id.*; *see also, Nathanson v. Weston,* 163 So. 2d 41, 42 (Fla. 3d DCA 1964) (reversing denial of deficiency judgment; no equitable considerations appear on the record sufficient to deny deficiency).

The *Higgins* majority's concern for a court's discretion in a separate action for a deficiency based on contract, is also misplaced given changes in judicial procedure wrought by the 1967 adoption of the current Rule 1.040 of the Florida Rules of Civil Procedure. These changes took effect **after** *Belle Mead* and *First Federal*, the asserted precedential touchstones in both *Compass Bank* and *Higgins,* and they dramatically altered the landscape of Florida civil practice by merging law and equity in a single forum:

> Rule 1.040 is new to state practice, and perhaps is the most fundamental rule of all. It abolishes the forms of actions as well as eliminating the distinctions between law and equity, in the identical language of Federal Rule 2. Thus, the litigant now may present his claim in an orderly manner to a court empowered to give him whatever relief is appropriate and just.

Author's Comment – 1967, Fla. R. Civ. P. 1.040, West's Fla. Stat. Ann. (emphasis added). As one court explained, "a cause [is] before the circuit court for all purposes," those that "may sound both in law and in equity." *Emery v. International Glass & Mfg., Inc.*, 249 So. 2d 496, 498 (Fla. 2d DCA 1971) (construing the effect of law/equity merger in statutory mechanics' lien action). "[T]he court ought to clean up the whole ball of wax in the straightest line possible," it continued, "utilizing just so much of the existing rules as may be necessary to get to the heart of the matter." *Id.*

After adoption of Fla. R. Civ. P. 1.040, this Court made clear the trial court's discretion in a separate action for a deficiency judgment is equal that of the court in a foreclosure action. *See R. K. Cooper Const. Co. v. Fulton*, 216 So. 2d 11, 13 (Fla. 1968). In *Fulton*, a mortgagee filed a separate suit to recover a deficiency after a foreclosure sale at which it had purchased the property. "[R]espondent defended on the ground that the property had considerable value" and [mortgagee's nominal winning bid at foreclosure sale] was not the fair market value." *Id*. The trial court awarded a deficiency to the mortgagee and the defendant appealed. Reversing, the Third District Court of Appeal certified a question to the Florida Supreme Court as

to whether the foreclosure sale price "is the conclusive test of the value of the property in a subsequent action at law for the balance of the amount due on the note." *Id.* at 12. This Court answered "No," holding that while the bid price was sufficient under Ch. 702, Fla. Stat. to conclusively vest title in the purchaser, the foreclosure sale price "cannot bind the trial court when **a suit at law** is filed to enforce collection of the remaining amount due on the note." The trial court still had the option to consider equitable defenses, such as a "shockingly inadequate" foreclosure sale price. *Id.* (emphasis added). Thus, albeit without explicit reference to the merger of law and equity effected by Fla. R. Civ. P. 1.040 the year before, this Court held that equitable defenses, left to the discretion of the trial court, are as applicable in an "action on contract principles," as in continuation within a foreclosure action to secure a deficiency judgment.

Therefore, DONI respectfully submits, the *Higgins* majority's refusal to give effect to the "plain language" of § 702.06 based on perceived disparity between foreclosure and contract remedies and defenses was both unnecessary and misplaced.

The absence of disparity is further borne out by the legislative context in which the "plain language" authorizes a separate action "unless the court in the foreclosure action has granted or denied a claim for a deficiency judgment," §

702.06, Fla. Stat. (2013). That context also demonstrates that the *Higgins* majority did not need to disregard the statute's "plain language" to avoid a bad policy result.

No doubt motivated by the boom in foreclosure litigation triggered by the implosion of the mortgage derivatives market and subsequent collapse in residential real property values, Chapter 2013–137, Laws of Florida (wherein the language at issue in *Higgins* first appears) wrought substantial change to the law of foreclosure and deficiency litigation. New provisions added to Chapter 702 Florida Statutes spelled out the required elements of a foreclosure complaint, *id.,* § 3, finality of foreclosure judgments and challenges to same, *id.* § 4, as well as orders to show cause, entry of final judgments of foreclosure and payment during foreclosure, *id.* § 6.

Section 2 of Chapter 2013-137 dramatically shortened the statute of limitations for an action to enforce a claim of a deficiency related to a note secured by a mortgage against a residential property that is a one-family to four-family dwelling unit from five years (the limitation on actions based on a written instrument, § 95.011(2)(b), Fla. Stat. (2012)) to one year, commencing "on the day after the certificate is issued by the clerk of court or the day after the mortgagee accepts a deed in lieu of foreclosure." Ch. 2013-137 Laws of Fla. § 2.

Most importantly for this appeal, Section 5 of Chapter 2013-137 forecloses (pun intended) any doubt that the Legislature places litigants on equal footing without regard to foreclosure or an action on contract:

> **702.06. 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. . . .~~shall be within the sound judicial discretion of the court, but~~ 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 ~~provided no suit at law to recover such deficiency shall be maintained against the original mortgagor in cases where the mortgage is for the purchase price of the property involved and where the original mortgagee becomes the purchaser thereof at foreclosure sale and also is granted a deficiency decree against the original mortgagor~~.

Ch. 2013-137 Laws of Fla. § 5. (additions underlined, ~~deletions struck-through~~, **emphasis added**).

Read together with *R. K. Cooper Const. Co. v. Fulton,* the 2013 amendment to § 702.06 goes beyond affirming the application of judicial discretion to deficiencies between foreclosure sale amount and outstanding debt. The amendment prohibits deficiency arising from an action on owner-occupied

residential property that exceeds the difference between the judgment amount and the fair market value of the property at the time of the foreclosure sale. This rule reflects the same discretionary, equitable considerations shown in *Barnard v. First Nat. Bank of Okaloosa County*, 482 So. 2d 534 (Fla. 1st DCA 1986) (citing *R. K. Cooper Const. Co. v. Fulton*) wherein the fair market value of foreclosed lots at the time of foreclosure sale was greater than the debt owed. The First District held that the trial court abused its discretion in entering a deficiency judgment when the foreclosure sale purchase price (bid by the mortgagee) was less than the amount of the debt. *Barnard*, 482 So. 2d at 536.

For all the above reasons, then, no disparity exists in how parties may be treated when a deficiency is sought in a foreclosure action versus the same effort in a contract case separate from the foreclosure. A suit at law based on contract, as in *R. K. Cooper Const. Co. v. Fulton*, is reviewable by the same standard articulated in *Barnard,* a foreclosure suit:

> The trial court has the duty and discretion to inquire into the fair market value of the property, the adequacy or inadequacy of the sale price, and the relationship, if any, between the foreclosing mortgagee and the purchaser at the foreclosure sale.

Fulton, 216 So. 2d at 13 (citing *Barnard*, 482 So. 2d at 536).

Absent disparate treatment in a foreclosure case or separate suit for deficiency, the *Higgins* majority's principal rationale for rejecting the "plain language" of § 702.06 Fla. Stat. disappears.

Strict construction and application of § 702.06, Fla. Stat. (2013) and this Court's binding precedent require disapproval and reversal of *Higgins*, remand of this cause for determination on its merits, and direction to the First District to reinstate all pending actions that were dismissed or judgments that were vacated by application of *Higgins*.

IV. NEITHER *HIGGINS* NOR THE CASE AT HAND PRESENT "FORUM SHOPPING" THAT COULD JUSTIFY DISREGARD FOR THE LEGISLATURE'S "PLAIN LANGUAGE"

The other policy basis offered by the *Higgins* majority for rejecting the "plain language" of § 702.06 Fla. Stat. was that the Legislature would not intend to encourage the "forum shopping," that it perceived in *Wells Fargo Bank, Nat. Ass'n v. Jones*, 2014 WL 1784062 (U.S.D.C. M.D. La. 2014). *Higgins*, 203 So. 3d at 166.

Jones arose from the foreclosure suit and sale in Okaloosa County, Florida. *Jones*, 2014 WL 1784062 at * 1. The mortgagee had pled for a deficiency decree in Florida and the Florida court had reserved jurisdiction to consider same. After the foreclosure sale, the holder of the note evidently followed the defendant and brought a diversity action against the mortgagor/obligor in the U.S. District Court for the Middle District of Louisiana to obtain a deficiency judgment upon the contract represented by the note. Declining like the majority in *Higgins* to follow the "plain language" of § 702.06, Fla. Stat. the *Jones* court entered a stay pending

further action in the Florida foreclosure suit. *Id.* at 3. Notably, the U.S. District Court did not dismiss the independent deficiency claim or rule that it lacked jurisdiction to consider it.

Here and in *Higgins*, where separate actions were filed in the same circuit as successful foreclosures, it is counterintuitive to suggest a plaintiff would gain a "forum shopping" advantage by filing a new case when the first judge already had granted a foreclosure judgment in plaintiff's favor. All circuit courts within a particular county have equal and concurrent jurisdiction to rule on the matters before them. *See Mauggeri v. Lourde*, 396 So. 2d 1215, 1217 (Fla. 3d DCA 1981) ("We think it appropriate to comment that every judge of the circuit court possesses the full jurisdiction of that court in his of (sic) her circuit and that the various divisions of that court operate in multi-judge circuits for the convenience of the litigants and for the efficiency of the administration of the circuits' judicial business."); *see also State ex rel Hendricks v. Hunt*, 70 So. 2d 301, 305 (Fla. 1954) ("while, in general, 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, there is nothing to prevent a court of concurrent jurisdiction from acting on the same subject matter at the same time.")

Moreover, given routine judicial rotation practices in Florida's circuit courts, filing a separate action to enforce a deficiency by no means guarantees that a

different jurist than the one who ruled in foreclosure case will decide the separate action. Similarly, a litigant has no guarantee that the same judge who entered a foreclosure judgment and reserved jurisdiction to consider a deficiency will still be assigned if a deficiency is sought in the foreclosure case. *See*, Florida Office of Program Policy Analysis & Governmental Accountability, Report No. 09-06, Circuits often modify judicial assignments and rotation to serve local needs 4 (2009) *available at* http://www.oppaga.state.fl.us/reports/pdf/0906rpt.pdf

Considering the foregoing, "forum shopping" concerns in these cases are chimerical.

Respectfully, the stated policy considerations underpinning the majority decision in *Higgins* do not justify that decision's refusal to give effect to the "plain language" of § 702.06 Fla. Stat. found and given effect by Florida four other district courts of appeal.

V. APPROVAL OF *HIGGINS* WOULD NEGATE THE REMEDIAL INTENT OF § 702.06 FLA. STAT. AND ADD UNCERTAINTY TO FORECLOSURE PRACTICE THROUGHOUT THE STATE

When it passed the amendments to foreclosure and deficiency processes that included the current version of § 702.06, Fla. Stat. the Legislature stated:

> The Supreme Court is requested to amend the Florida Rules of Civil Procedures to provide expedited foreclosure proceedings in conformity with this act and is requested to develop and publish forms for use in such expedited proceedings.

Ch. 2013-137, § 9, Laws of Fla. (emphasis added). This Court did so in 2014 and again in 2016. *See In re Amendments to the Florida Rules of Civil Procedure*, 153 So. 3d 258 (2104) and *In re Amendments to the Florida Rules of Civil Procedure,* 190 So. 3d 999 (2016). Despite the opportunity to amend in response to the new statute, this Court made no changes to approved forms wherein it recommends that mortgage foreclosure plaintiffs seek a deficiency judgment in a foreclosure complaint, Fla. R. Civ. P. Form 1.944(a) and (b), and that judges reserve jurisdiction to enter same. Fla. R. Civ. P. Form 1.996(a) and (b).

If the *Higgins* majority is approved, litigants and courts using the forms provided by this Court may never bring an independent action at law to obtain a deficiency judgment. *Higgins* thus not merely interprets, but negates § 702.06, Fla. Stat. (2013), which plainly states a complainant has the right to a common law suit for a deficiency when the foreclosure court has not ruled on same.

The remaining four district courts of appeal hold that the Florida Legislature, in its 2013 amendments to § 702.06, Fla. Stat., confirmed that an independent deficiency action may proceed "unless the court in the foreclosure action has granted or denied a claim for a deficiency judgment." These holdings are consistent with the statute and with this Court's procedural forms. They should be approved.

Finally, the decisions of the Second through Fifth districts give effect to the clear procedure on when a common law deficiency suit is proper, *i.e.* "unless the court in the foreclosure action has granted or denied a claim for a deficiency judgment." On the other hand, the *Higgins* majority's spin on when a separate claim may be brought under the statute—"if the original foreclosure court ignores a claim for a deficiency judgment, or one is not sought there"—is fraught with confusion.

In practice, of course, circuit courts routinely "ignore" matters on which they reserve jurisdiction, awaiting application from litigants before doing anything (except perhaps to give notice of an absence of record activity and dismiss moribund cases for failure to prosecution under Fla. R. Civ. P. 1.420(e)).

What, then, did the First District mean by stating a separate claim is permitted "if the original foreclosure court ignores a claim for a deficiency judgment?" And at what point and under what circumstances may litigants and lower courts reliably know that a foreclosure court has ignored such a claim? In the case at hand, the foreclosure sale giving rise to a claim for deficiency occurred on March 24, 2010. R.6. While the circuit court had retained jurisdiction in the foreclosure case to enter a deficiency, it had done nothing as of May 2014 when, facing an impending time bar, DONI filed its common law suit for a deficiency judgment. *See* § 95.11(5)(h), Fla. Stat.; Ch. 2013-137, §2, Laws of Fla. If the

Higgins majority's interpretation of § 702.06 Fla. Stat. (2013) is to be given effect, should it not be held here that "the original foreclosure court ignore[d] a claim for a deficiency judgment," thereby enabling DONI to bring a separate suit?

The *Higgins* decision itself neither explains nor offers reference to authority from which litigants and lower courts may reliably determine just when a foreclosure court is deemed to have ignored a pending deficiency claim. Indeed, the foreclosure sale in *Higgins* occurred in 2009 and the foreclosure court was still ignoring a pending deficiency claim nearly five years later when DONI filed its deficiency suit. *Higgins*, 201 So. 3d at 158. Thus, the *Higgins* majority's interpretation that § 702.06, Fla. Stat. that permits a separate suit at law "if the original foreclosure court ignores a claim for a deficiency judgment," appears to be meaningless.

To be true to the Legislature's intent in Ch. 2013-137, § 9, Laws of Fla. to expedite foreclosures and this Court's mandate to seek "just, speedy, and inexpensive determination of every action," Fla. R. Civ. P. 1.010, this Court must reject the *Higgins* majority's tortured interpretation of precedent and refusal to give effect to legislative intent. The plain language of § 702.06 Fla. Stat. (2013) must be given full effect. This Court must approve *Garcia*, *Hendrick*, *Gdovin*, and *McKenna* and overrule *Higgins.*

CONCLUSION

The conflict in interpreting and applying § 702.06, Fla. Stat. has been certified by four district courts of appeal. The conflict is express, direct, and significant to litigants. Resolution is essential to the consistency and uniformity of administration of justice in Florida and to restore compliance with the constitutional requirement that "[j]urisdiction of the circuit court shall be uniform throughout the state." Art. V, § 5. Fla. Const. This Honorable Court should exercise its discretionary jurisdiction and resolve the conflict.

For the reasons stated herein above, this Court should:

- approve the decisions of the Second through Fifth District Courts,[5]
- disapprove and expressly overrule *Higgins v. Dyck-O'Neal, Inc.*, 201 So. 3d 157 (Fla. 1st DCA 2016),
- remand this cause for determination on its merits, and
- direct the First District to reinstate all pending actions (*see* Appendix B) that were dismissed or judgments that were vacated by application of *Higgins*.

Dated: November 3, 2017

Respectfully submitted,

/s/ David M. Snyder

[5] *Garcia v. Dyck–O'Neal, Inc.*, 178 So. 3d 433 (Fla. 3d DCA 2015); *Dyck-O'Neal, Inc. v. Hendrick*, 200 So. 3d 181 (Fla. 5th DCA 2016); *Gdovin v. Dyck-O'Neal, Inc.*, 198 So. 3d 986 (Fla. 2d DCA 2016); *Dyck–O'Neal, Inc. v. McKenna*, 198 So. 3d 1038 (Fla. 4th DCA 2016).

David M. Snyder
Florida Bar No. 366528
DAVID M. SNYDER
Professional Association
4230 S MacDill Ave E229
Tampa, Florida 33611-1901
Tel: 813-258-4501
Fax: 813-315-6206
Email: dmsnyder@dms-law.com
davey5720@gmail.com
lorinelson0520@gmail.com

Susan B. Morrison
Florida Bar No. 394424
LAW OFFICES OF SUSAN B. MORRISON, P.A.
1200 W Platt St Ste 100
Tampa, FL 33606-2136
Tel: 813-902-9293
Email: smorrisonlaw@tampabay.rr.com
smorrisonlaw@gmail.com

Joshua D. Moore, Esq.
Florida Bar No. 96062
LAW OFFICES OF DANIEL C. CONSUEGRA
9210 King Palm Dr Ste 110
Tampa, FL 33619-1385
Joshua.moore@consuegralaw.com
lawsuitnotices@consuegralaw.com

Attorneys for Appellant Dyck-O'Neal, Inc.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that this Brief has been prepared in Times Roman fourteen (14) font as required by Fla. R. App. P. 9.210(a)(2).

/s/ David M. Snyder
David M. Snyder

Florida Bar No. 366528

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished on this 3d day of November 2017 via email to:

RICK A. SAVAGE
Florida Bar No. 0026965
SAVAGE LAW OFFICE, PLLC
111 N. Calhoun St., Suite 8
Tallahassee, Florida 32301
Telephone: (850) 222-6167
Facsimile: (850) 391-6167
rick@savagelawoffice.com

Attorney for Respondent/Appellee

/s/ David M. Snyder
Attorney