

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

CapitalSource Bank FBO	)	
Aeon Financial, LLC	)	Case No. 11-754405
	)	
Plaintiff	)	Judge Peter J. Corrigan
	)	
vs.	)	<b><u>OPINION AND ORDER</u></b>
	)	
Paul Jenkins, et al.	)	
	)	
Defendants	)	

**Peter J. Corrigan, J.:**

**Introduction**

Plaintiff CapitalSource Bank FBO Aeon Financial, LLC (“Aeon”) filed this action to foreclose on tax certificates. The Magistrate dismissed Aeon’s case without prejudice because Aeon failed to file its complaint within 120 days after filing its notice of intent to foreclose in violation of R.C. 5721.37(C). Aeon filed objections to the Magistrate’s decision. This Court has conducted an independent review of the record, the law, the Magistrate’s decision, and the objections as required by Civ.R. 53. For the reasons that follow, the Court overrules the objections and adopts the Magistrate’s Decision dismissing the case.

**Procedural History**

On May 23, 2008, Aeon’s predecessor purchased Base Tax Certificate B2008-1-2596 for \$3855.21 at public auction pursuant to R.C. 5721.32. On October 31, 2008, the predecessor purchased First Subsequent Certificate S2008-2-474 for \$3612.30 pursuant to R.C. 5721.42. These tax certificates constitute a first lien against real property appraised at \$147,900.00,<sup>1</sup> located at 3732 Maplecrest Avenue, Woodmere, Ohio (PPN: 891-02-001), and owned by defendant, Paul Jenkins. The bid and thus terms of

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<sup>1</sup> Cuyahoga County Auditor website.

sale requires interest would accrue on the certificates at the maximum allowable rate of 18% from the date of sale as provided in R.C. 5721.30(G).<sup>2</sup>

On May 24, 2009, Aeon's predecessor filed a Notice of Intent to Foreclose with the Cuyahoga County Treasurer in accordance with R.C. 5721.37. On the same day, the Treasurer certified that the liens had not been redeemed. Thereafter, on September 22, 2009, the predecessor filed a complaint seeking foreclosure and asserting \$3855.21 as the prayer amount.<sup>3</sup> On October 8, 2009, the certificates were transferred to Aeon. On January 13, 2011, the case was involuntarily dismissed without prejudice by the Court for failure to perfect service.

On May 3, 2011, Aeon re-filed the foreclosure complaint, again seeking \$3855.21 as the prayer amount, and attached the original notice of intent and the treasurer's certificate, both dated May 24, 2009. On July 16, 2012, the Magistrate issued her decision dismissing the case because Aeon's complaint was filed more than 120 days after the notice of intent was filed, citing R.C. 5721.37(C)(2). On July 30, 2012, Aeon filed its objections to the Magistrate's decision.

### **Tax Certificate Law**

Before considering Aeon's objections, it is necessary first to briefly review the tax certificate law that governs this action.

On February 25, 1998, H.B. 371, the tax certificate bill (codified in R.C. 5721.30 through R.C. 5721.41) became law. The purpose of the law was to spare county governments with limited resources from having to track and recover unpaid property taxes. Rittenhouse, *Comment: The True Costs of Not Paying Your Property Taxes in Ohio*, 36 Dayton L.Rev. 221 (2011).<sup>4</sup> This bill enabled county treasurers of the twelve counties having populations of at least two hundred thousand to collect delinquent real property

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<sup>2</sup> R.C. 5721.32(C) provides that bidding shall begin at 18% per year simple interest however, the county treasurer or the treasurer designee shall accept lower bids in even increments of one-fourth of one per cent to the rate of zero percent. The tax certificate shall be awarded to the person bidding the lowest percent.

<sup>3</sup> Although the prayer amount requested only the principal amount due for the first tax lien, Aeon is also seeking \$3612.30 for the subsequently purchased tax lien.

<sup>4</sup> For a critical view of the tax certificate law see the Rittenhouse Comment.

taxes by selling tax certificates to private investors. County treasurers can negotiate the sale of the tax certificates and the tax certificates can be sold to private investors at tax certificate sales. The tax certificate purchase price includes the delinquent taxes, assessments, penalties, and interest owing on the property. The certificates entitle the tax certificate holder to the first lien on the property and the tax certificate holder can initiate foreclosure no sooner than one year after the purchase of the tax certificates. R.C. 5721.37(A)(1).

Property owners have the opportunity to redeem the certificates, and thereby remove the lien, by paying the certificate holder the purchase price plus interest, penalties, and costs. R.C. 5721.38. After purchasing a tax certificate, the tax certificate holder must wait one month before contacting the property owner to demand payment. R.C. 5721.381. If a redemption payment plan is entered into the time period for filing a notice of intent to foreclose is extended by the length of time the payment plan is in effect and not in default. *Id.*

A tax certificate can have a three-year or six-year period for accruing interest. Interest accrues from the date the certificate is sold at a public auction conducted pursuant to R.C. 5721.32 until the date the titleholder redeems the parcel or the date the certificate holder files the notice of intent and makes payment to the treasurer required to initiate foreclosure proceedings. The deadline to foreclose (except as extended by bankruptcy stay) is six years from the date the certificate is sold. After six years, the tax certificate and its certificate lien are automatically canceled as provided in R.C. 5721.37(E)(1)(a) and they become worthless.

R.C. 5721.37 provides the procedure to foreclose on a tax certificate. Foreclosure proceedings begin when the certificate holder's attorney files a foreclosure complaint in the name of the certificate holder to enforce the lien. R.C. 5721.37(C) contains two filing requirements. The attorney must attach to the foreclosure complaint (1) a copy of the notice of intent to foreclose and (2) a certificate by the county

treasurer that the tax certificate has not been redeemed. Prior to September 22, 2008, the certificate holder had until the expiration of the certificate to file a foreclosure action. Former R.C. 5721.37(C)(2) provided:

[I]f \*\*\* a notice of intent to foreclose has been filed, the county treasurer shall provide certification to the private attorney that the parcel has not been redeemed \*\*\*. After receipt of that certification the private attorney **may** commence a foreclosure proceeding in the name of the certificate holder in the manner provided under division (F) of this section to foreclose the lien vested in the certificate holder by the certificate \*\*\*. (Emphasis added.)

Effective September 22, 2008, R.C. 5721.37 was amended (along with other sections throughout the entire tax certificate code) to establish a deadline by which the complaint must be filed by the attorney. Amended R.C. 5721.37(C)(2) provides:

[I]f \*\*\* a notice of intent to foreclose has been filed, and the payment required under division (B) of this section has been made, the county treasurer shall certify notice to that effect to the private attorney \*\*\*. After receipt of the treasurer's certificate and **not later than one hundred twenty days** after the filing of the intent to foreclose \*\*\*the private attorney **shall** commence a foreclosure proceeding in the name of the certificate holder in the manner provided under division (F) of this section to enforce the lien vested in the certificate holder by the certificate \*\*\*. (Emphasis added.)

Therefore, according to amended R.C. 5721.37(C)(2), a complaint must be filed within 120 days after filing the notice of intent to foreclose.

### **Arguments**

Aeon challenges the Magistrate's decision on two separate grounds. First, Aeon argues that the Magistrate erred in retroactively applying a change in the statute to tax certificates that were purchased prior to the statute change. Second, Aeon contends that the Magistrate erred in failing to apply the Ohio Savings Statute to its re-filed complaint. For the following reasons, neither argument has merit.

### **Retroactive Application Argument**

As stated above, the tax certificate foreclosure statute was amended effective September 22, 2008 to add the requirement that the tax certificate holder must file a complaint for foreclosure within 120 days from the filing of the notice of intent to foreclose. Pursuant to R.C. 5721.30(C), a certificate holder has

always had until the expiration of the term of the tax certificate to file its notice of intent to foreclose. What changed in the amended statute was that once the notice of intent to foreclose was filed, the plaintiff must file its complaint within 120 days. R.C. 5721.37(C)(2). Aeon argues that applying this requirement to the tax certificates it purchased before the effective date of the amended statute was an unconstitutional retroactive application of the law to its certificates.<sup>5</sup> According to Aeon, its cause of action accrued on May 23, 2008 when it purchased its first certificate and its right to the property vested. This argument has no merit.

Section 28, Article II of the Ohio Constitution provides as follows:

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

Not every retroactive application of a statute is unconstitutional. Evaluating whether a law is unlawfully retroactive in violation of Section 28, Article II requires a two-part inquiry. See *Pratte v. Stewart*, 125 Ohio St.3d 473, 2010-Ohio-1860, 929 N.E.2d 415, ¶¶ 29-30. First, the court must determine whether the law is expressly made retroactive, for as previously stated, statutes are presumed to be prospective in operation unless expressly made retrospective. See R.C. 1.48. If the law's retroactive application is not clearly expressed, the constitutional analysis ends and the law is to be applied only prospectively. See *Pratte v. Stewart* at ¶ 30.

If the law is clearly made retroactive, the court must then determine whether it is remedial such that it may be applied retroactively or substantive such that it may not be applied retroactively. See *Bd. of Education of Cincinnati School Dist. v. Hamilton Cty. Bd. of Revision*, 91 Ohio St.3d 308, 316, 2001-Ohio-46, 744 N.E.2d 751. Remedial laws affect only the remedy provided and include laws that merely

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<sup>5</sup> Only one of Aeon's certificates was purchased before the effective date of the amendment. When Aeon filed its first complaint, it sought recovery for both certificates.

substitute a new or more appropriate remedy for the enforcement of an existing right. See *Pratte v. Stewart* at ¶ 37. Generally, laws that relate to procedures are ordinarily remedial in nature. *State v. Cook*, 83 Ohio St.3d 404, 411, 1998-Ohio-291, 721 N.E.2d 570. Substantive laws impair or take away vested rights, affect an accrued substantive right, impose new or additional burdens, duties, obligations, or liability as to a past transaction or create a new right. *Id.*

Thus, the first inquiry is whether the law expressly states that it is to be applied retroactively. Here, the law does not expressly state that it is to be applied retroactively. Therefore, according to R.C. 1.48, the law is to be applied prospectively. And, indeed, this is what occurred here.

It is well established that a cause of action accrues when the claim or right on which it is founded has matured so that an action can be brought upon it. *Kerns v. Schoonmaker*, 4 Ohio 331 (1831). See also *Kraly v. Vannewkirk*, 69 Ohio St.3d 627, 634, 635 N.E.2d 323 (1994)(operative date for determining whether a cause of action accrues is determined when all the conditions precedent to an insured's right to underinsured coverage have been satisfied, including settlement with the tortfeasor, it is at that point when an insured becomes entitled to pursue underinsured motorist coverage); *Beagle v. Walden*, 78 Ohio St.3d 59, 676 N.E.2d 506 (1997)(law in effect when the insured's right to the underinsured motorist coverage controls, not the law in effect when the insurance contract was entered); *Houser v. Ohio Historical Society*, 62 Ohio St.2d 77, 403 N.E.2d 965 (1980) ("where a bailment agreement specifies a period of 'one year, or more' for the return of loaned chattels, and states that the chattels may be retrieved by the bailor 'upon presentation of this receipt,' a cause of action for the return of the bailed property does not accrue until the receipt has been presented"); *R.E. Schweitzer Construction Co. v. University of Cincinnati*, 10<sup>th</sup> Dist. No. 10AP-954, 2011-Ohio-3703 (although money became due and owing when the work was substantially performed under the contract, the cause of action accrued when the contractor's administrative remedies were deemed exhausted 120 days after the contractor filed its claim); *Keithler v. Foster*, 22 Ohio St. 27

(1871)(a cause of action against a sheriff, for not paying money collected by him on execution, does not accrue until demand is made on him for payment).

According to R.C. 5721.37(A)(1):

At any time after one year from the date shown on the tax certificate as the date the tax certificate was sold, and not later than six years after that date \*\*\* a private attorney on behalf of the certificate holder may file with the county treasurer a notice of intent to foreclose, on a form prescribed by the tax commissioner, provided the certificate parcel has not been redeemed under division (A) or (C) of [section 5721.38 of the Revised Code](#) and at least one certificate respecting the certificate parcel, held by the certificate holder filing the request for foreclosure or notice of intent to foreclose and eligible to be enforced through a foreclosure proceeding, has not been voided under [section 5721.381 of the Revised Code](#). \*\*\*

Therefore, pursuant to R.C. 5721.37(A)(1), Aeon's cause of action accrued no sooner than one year from the date the tax certificate was sold. Because the first tax certificate was sold on May 23, 2008, Aeon's cause of action accrued on May 23, 2009. It was on this date that Aeon's certificate matured and gave Aeon the right to foreclose on the property. Aeon filed its first complaint on September 22, 2009. On this date, the amended statute had been in effect for one year and this is the law to be applied. Indeed, Aeon complied with the amended statutory requirements by filing its foreclosure complaint within 120 days from the filing of the notice of intent to foreclose, which was dated May 24, 2009,<sup>6</sup> tacitly acknowledging its application. It would appear inconsistent for Aeon to claim now the statute does not apply to this later action, which was filed on May 3, 2011.

In any case, retroactive application is only unconstitutional if it affects a substantial right. The law in question does not affect a substantive right. Instead, it is procedural in nature. It does not affect the right to sue, it only affects the remedy. It is a fundamental principle of law that a party may not acquire a vested right in a remedy or any part of it. *State, ex rel. Michaels v. Morse*, 165 Ohio St.599, 605-606, 138 N.E.2d 660. By requiring that a foreclosure complaint be filed within 120 days from the date the notice of intent to

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<sup>6</sup> Aeon complied with the other provisions of the amended statute as well such as R.C. 5721.37(B)(2) that required payment of all taxes owed. Prior law required only the payment of delinquent taxes.

foreclose was filed, the statute merely builds statutory due process into the law. The basic right of action is unimpaired.

The purpose for requiring the notice of intent and treasurer's certificates are to provide notice to those who could be affected by the property foreclosure. Clearly, the property owner's rights will be extinguished by a foreclosure;<sup>7</sup> or new certificate holders who purchased certificates after the case was dismissed could be affected; or possibly, the property owner may have redeemed the liens after the lawsuit was dismissed so that the right to foreclose no longer exists. Also, in addition to the notice of intent verifying that the certificate has not been redeemed, it also allows the treasurer to be paid for tax accrual since the certificate date of sale, so the treasurer's right to collect additional taxes may be affected.

Thus, even assuming *arguendo* that the statute was applied retroactively, Aeon cannot show it was unconstitutional.

### **Savings Statute Argument**

In the alternative, Aeon argues the Magistrate erred by failing to apply Ohio's savings statute found in R.C. 2305.19. The Magistrate determined that the 120 day time frame set forth in R.C. 5721.37(C)(2) is a jurisdictional prerequisite for bringing a tax certificate foreclosure action. The Magistrate found that because the time frame is not a statute of limitations the savings statute of R.C. 2305.19 does not apply. Inasmuch as Aeon filed its second complaint over 700 days after filing its notice of intent to foreclose, the magistrate dismissed the complaint.

Here, there is no doubt that Aeon's original foreclosure filing conformed with the law's requirement by attaching to the complaint the notice of intent to foreclose and the treasurer's certificate that the liens had not been redeemed. Further, it is undisputed that Aeon filed its first foreclosure complaint within 120

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<sup>7</sup> According to *The Other Foreclosure Crisis Property Tax Lien Sales*, National Consumer Law Center Report (July 2012), homeowners most at risk are those who have fallen into default because they are incapable of handling their financial affairs, such as individuals suffering from Alzheimer's, dementia, or other cognitive disorders. Also, those with subprime loans face additional challenges to remain current on their property taxes as the vast majority of subprime mortgage loans made prior to 2008 did not include an escrow account.

days from the date of the notice of intent to foreclose and the treasurer's certification. The question becomes, did Aeon need to file a new notice of intent to foreclose along with a new certificate from the treasurer when it re-filed its foreclosure complaint or was the original filing, in compliance with the procedure required to invoke the jurisdiction of the Court, preserved by the savings statute. To answer this question, it is important to determine whether the 120 day filing requirement is a statute of limitations or a condition precedent.

Before the tax certificate bill (R.C.5721.30 through R.C. 5721.41) became law in 1998, as previously stated, the right to execute on a tax certificate lien did not exist. Therefore, it is a liability created by statute. Consequently, the statute of limitations for a tax certificate is found in R.C. 2305.07: "an action \*\*\* upon a liability created by statute other than a forfeiture or penalty shall be brought within six years after the cause thereof accrued." As previously stated, the cause of action accrues on a tax certificate one year from the date of purchase. R.C. 5721.37(A)(1),(2) "At any time after one year from the date shown on the tax certificate as the date the tax certificate was sold \*\*\* the certificate holder may file" a foreclosure action.

Here, Aeon does not claim that the statute of limitations had run. Yet, Aeon argues that R.C. 2305.19, generally known as the savings statute, applies. R.C. 2305.19 provides:

(A) In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff \*\*\* may commence a new action within one year after \*\*\*the plaintiff's failure otherwise than upon the merits or within the period of the applicable statute of limitations, whichever occurs later. \*\*\*

Savings statutes have been created to afford a plaintiff an opportunity to bring a new action after the running of the limitations period when an effort to bring the original action in a timely manner fails otherwise than on the merits. *Motorists Mut. Ins. Co. v. Huron Road Hosp.*, 73 Ohio St.3d 391, 396, 1995-Ohio-119, 653 N.E.2d 235. R.C. 2305.19 has no application unless an action is timely commenced and is then dismissed without prejudice after the applicable statute of limitations has run. *Allen v. McBride*, 105

Ohio St.3d 21, 2004-Ohio-7112, 821 N.E.2d 1001. Thus, by its very terms, it saves a properly commenced cause of action that was dismissed otherwise than on the merits, which new filing, would have failed because the statute of limitations had expired. The savings statute just preserves the right to re-file. The re-filing must still comply with all applicable legal requirements to bring the action. Here, Aeon does not claim the statute of limitations has expired. Therefore, the statute has no application to this case.

Instead, this Court agrees with the Magistrate that R.C. 5721.37 (C)(2) requirements (notice of intent to foreclose, treasurer's certificate and complaint filed within 120 days of suit) are all conditions precedent contained in the statute that establishes the adequacy of the complaint.

Unlike an affirmative defense, such as a statute of limitations, which bars recovery even where the plaintiff has established a prima facie case, a condition precedent is directly tied to the merits of the cause of action. *National City Mortgage Co. v. Richards*, 182 Ohio App.3d 534, 2009-Ohio-2556, 913 N.E.2d 1007 (6<sup>th</sup> Dist.). Analogous to this case is the Civ.R.10(D) requirement that all medical malpractice complaints must attach an affidavit of merit. Failure to do so permits a dismissal of the complaint because the complaint is insufficient. *Fletcher v. Univ. Hosps. of Cleveland*, 120 Ohio St.3d 167, 2008-Ohio-5379, 897 N.E.2d 147.

Also analogous, are wrongful death cases. These cases must be brought in the name of a person appointed by a court to be an administrator, executor, or personal representative of the decedent's estate. *Ramsey v. Neiman*, 69 Ohio St.3d 508, 1994-Ohio-359, 634 N.E.2d 211. In *Ramsey*, the Supreme Court of Ohio found that the appointment is a condition precedent to the maintenance of a wrongful death action. Although Ramsey claimed that he was the personal representative of the estate, the Court found he had never been appointed by the probate court. Therefore, the Court affirmed the lower court's decision dismissing the lawsuit.

The Supreme Court of Ohio's very recent case of *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017, is also analogous to the extent that it determined a plaintiff must meet

certain conditions to invoke the jurisdiction of the court, i.e., that to foreclose on a note and mortgage the plaintiff must have an interest in the note and mortgage at the time it filed suit.

While it is true that Aeon attached a notice of intent to foreclose and the treasurer's certificate, Aeon did not comply with the requirement that the complaint was filed within 120 days from the dates recorded on this document. Therefore, this Court agrees with the Magistrate that when Aeon filed its complaint over 700 days after filing the notice of intent, plaintiff failed to satisfy the condition precedent to its foreclosure action. The action was never properly commenced.

The Court recognizes that other common pleas courts within this jurisdiction have held otherwise. The lead case is *Capitalsource Bank FBO Aeon Financial, LLC v. Young*, Cuyahoga C.P. No. CV-10-736549 (Feb. 24, 2012), which held that Aeon's claims were preserved under the savings statute.<sup>8</sup>

*Young* found the savings statute applied to save Aeon's complaint. However, in reaching the savings statute, it appears that *Young* assumes that the 120 filing requirement embodied within R.C. 5721.37(C)(2) is a statute of limitations. However, for reasons stated above, this Court finds the filing requirement is not a statute of limitations that cuts off the right to assert the lawsuit but rather is a condition precedent to filing the lawsuit.

Although ostensibly following the *Young* decision, *CapitalSource Bank FBO Aeon Financial, LLC v. Oldwine*, Cuyahoga C.P. No. CV-10-736525 (Sept. 5, 2012) recognized that the 120 day time limit is not a statute of limitations and that the savings statute does not independently apply to the time frame for filing a notice of intent. Yet, *Oldwine* found that the foreclosure action was properly commenced when the first complaint was filed and that all jurisdictional pre-requisites were satisfied so that under the savings statute,

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<sup>8</sup>Aeon's notices of supplemental authority cite several decisions from other judges on this bench that adopt *Young*. See *Capitalsource Bank v. Drake*, Cuyahoga C.P. No. CV-11-754434 (Aug. 17, 2012), *Capitalsource Bank FBO Aeon Financial, LLC v. Lumpkin*, Cuyahoga C.P. No. CV-10-736546 (Aug. 28, 2012), *Capitalsource Bank FBO Aeon Financial, LLC v. Jackson*, Cuyahoga C.P. No. CV-10-736424, *Capitalsource Bank FBO Aeon Financial, LLC v. Trademark Real Asset Network, LLC*, Cuyahoga C.P. No. CV-11-754425 (Sept. 28, 2012), *Capitalsource Bank FBO Aeon Financial, LLC v. Havlina*, Cuyahoga C.P. No. CV-11-754379 (Oct. 2, 2012), *Capitalsource Bank FBO Aeon Financial, LLC v. Daniels*, Cuyahoga C.P. No. CV-11-754416 (Sept. 11, 2012), *Famicos Foundation v. Garrett*, Cuyahoga C.P. No. CV-11765775 (Oct. 3, 2012).

the action retains that status upon re-filing. *Oldwine* reasoned that to require a plaintiff, who has previously met all the procedural pre-requisites for filing a tax certificate foreclosure action, to again satisfy the same prerequisites upon re-filing of the same action would be adding additional burdens to such re-filing based on procedural fiat. This Court believes this analysis does not give sufficient consideration to the property owner threatened with foreclosure and the statutory scheme enacted by the legislature. The Court is not to decide who is burdened unfairly. This is a concern of the General Assembly whose job it is to balance competing interests and it presumably did so by enacting a comprehensive law. It does not place undue burdens on the certificate holder to follow the law.

Moreover, a tax certificate is a creature of statute; it did not exist at common law. As a liability created by statute, the law governing it must be strictly construed. *Wall v. City of Cincinnati*, 150 Ohio St. 411, 416, 83 N.E.2d 389 (1948) (“the duties and obligations \*\*\* are in derogation of the common law and must therefore be strictly construed \*\*\*.”) The importance of strictly construing the statutory language becomes clear when considering the potential harm to a homeowner when the value of the tax lien is significantly lower than the value of the home. As the facts of this case show, Aeon’s liens totaled just under \$8000.00 on a house appraised at \$147,900.00.

This Court has carefully considered the *Young* and *Oldwine* opinions as well as the cases that follow the *Young* decision. However, because rulings from other trial courts, even from the same jurisdiction, are not *stare decisis* on this Court, this Court, having conducted its own analysis of the law, reaches a contrary holding.

The Magistrate’s opinion is upheld in all respects. The case is dismissed.

IT IS SO ORDERED.

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PETER J. CORRIGAN, JUDGE

DATE: November \_\_\_\_\_, 2012

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