

ORIGINAL

IN THE SUPREME COURT OF OHIO

PNH, INC., et al.,)	APPEAL NO.: 10-1430
)	
Appellants,)	Seventh Appellate District
)	Case No.: 50 2009 MA 00041
-vs-)	
)	
ALFA LAVAL FLOW, INC.,)	
)	
Appellee.)	

**APPELLEE'S MEMORANDUM
IN OPPOSITION TO JURISDICTION**

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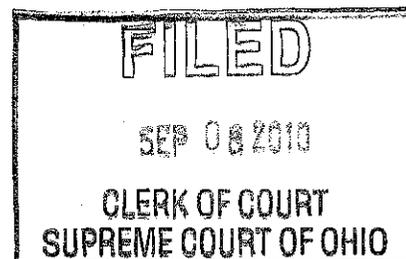
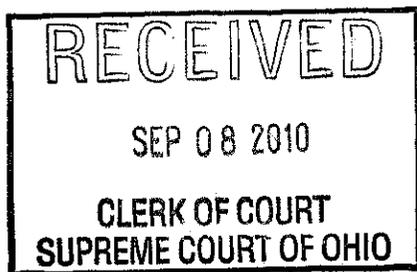


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I. WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL ISSUE

A. *This Case Does Not Involve an Issue of Public or Great General Interest*

Article IV of the Ohio Constitution provides that judgments of the courts of appeal shall serve as the ultimate and final adjudication of all cases, except those involving substantial constitutional questions, conflict cases, felony cases, cases in which the court of appeals has original jurisdiction, and cases of public or great general interest. Except in these special circumstances, a party to a lawsuit has a right to but one appellate review of his cause:

If a party believes his cause to be one of public or great general interest, he may seek leave of this court to hear his cause by filing with the clerk a motion to certify the record. It follows, of course, that the sole issue for determination at the hearing upon such motion is whether the cause presents a question or questions of public or great general interest as distinguished *from* questions of interest primarily to the parties. Whether the question or questions argued are in fact ones of public or great general interest rests within the discretion of the court.

Williamson v. Rubich (1960), 171 Ohio St. 253, 253-254 (applying a former version of Article IV, Section 6; analogous provisions now found within Article IV, Sections 1 and 2).

Cases of “public interest” refer to those that involve a governmental entity as a party. *See*, Hon. Paul M. Herbert, *Cases of Public or Great General Interest*, Ohio State Bar Assoc. Rep. 981 (Sept. 12, 1966). The members of the Fourth Constitutional Convention of Ohio, which promulgated these standards in 1912, intended “public” to refer to those cases involving some governmental entity. *Id.* at 985. Because a governmental entity is not a party to this action, the “public interest” criterion cannot be satisfied.

Other cases are appealable only if they are of “great general interest,” which are those cases “affecting a good many people and that have aroused general interest.” *Id.* The Fourth Constitutional Convention concluded that “one trial, one review” is sufficient to satisfy the ordinary demands of justice. *Id.* at 986. It is only the truly exceptional case that is entitled to further review in this Court.

Appellants’ attempt to label this matter as a case of “great general interest” through a citation of bankruptcy statistics is misleading and inconsequential. The underlying involuntary bankruptcy of Girton, Oakes & Burger (“GOB”) was a complicated commercial matter. It involved unique issues that arose out of the purchase of secured debt, and included allegations of fraud and other misconduct arising out of the bankruptcy process. These issues are wholly dissimilar from the issues raised in the rash of personal bankruptcies caused by today’s unfortunate economic climate.

Five separate judges (one common pleas judge, three appellate judges and the federal bankruptcy judge) have considered the issue and unanimously concluded that subject matter jurisdiction does not exist.¹ This Court should refuse to extend its extraordinary jurisdiction to accept this case, which does not involve questions of public interest or great general interest. While PNH and Creatore are predictably dissatisfied with the decision of the courts below, this case present no question of public or great general interest.

B. There is no Substantial Constitutional Issue

Nowhere in Appellant’s Brief can any explanation of why a substantial constitutional question is involved be found. Pursuant to Sup. Ct. R. III, Section I(B)(2), “a thorough

¹ The bankruptcy court expressed its opinion during a hearing concerning Appellant’s “Motion to Lift Stay,” which was filed as part of Rule 60(B) O.R.C.P. proceedings after the trial court granted Alfa Laval’s Motion to Dismiss.

explanation of why a substantial constitutional question is involved” is indispensable to an attempted appeal.

In point of fact, the issue was addressed in the lower courts primarily in terms of subject matter jurisdiction, not as an issue of “constitutional” dimension. To the extent that a constitutional question is in fact involved, it is the Supremacy Clause of the United States Constitution. Federal courts—not state courts—are not the ultimate arbiters of federal statutory and constitutional law.

The leading authority on the issue is the United States Court of Appeals for the Ninth Circuit. See *MSR Exploration, Ltd. v. Meridian Oil, Inc.* (9th Cir. 1995), 74 F.3d 910 and *Miles v. Okun* (9th Cir. 2005), 430 F.3d 1083. The Ninth Circuit’s decisions finding pre-emption by bankruptcy law and procedure have not been disputed by any other United States Circuit Court of Appeals.

In fact, the Ninth Circuit’s decision in *MSR Exploration* was adopted by the Sixth Circuit Court of Appeals in *Pertuso v. Ford Motor Co.* (6th Cir. 2000), 233 F.3d 417. In *Pertuso*, the court of appeals agreed with the Ninth Circuit that it was “very unlikely” that Congress intended to permit state remedies to be imposed on activities related to the management of the bankruptcy process. 233 F. 3d at 425. The Sixth Circuit held that federal bankruptcy law preempts all such state law tort claims, regardless of whether they are “consistent” or “inconsistent” with the Bankruptcy Code. *Id.* at 426.

On matters of federal law (including federal constitutional law), the decisions of United States Supreme Court and the Sixth Circuit are often said to be “controlling.” *Clay v. Clay* (7th Dist.), 2007-Ohio-4638 at ¶27. Indeed, one court of appeals judge has expressed the view that the Supremacy Clause prevents this Court from “overruling” the Sixth Circuit on its interpretation

of federal constitutional law. As stated in *State v. Barlow* (6th Dist.), 1984 Ohio App. LEXIS

9240:

Of course, state courts are free to interpret the provisions of the federal Constitution, but, in our federal system, they are *not* the final arbiters of what such provisions mean - only the federal courts are.

* * *

Thus, when the United States Court of Appeals for the Sixth Circuit decided the McCarty case, *supra*, it interpreted a federal question (i.e., the issue of applying Miranda warnings to misdemeanors and, therefore, an issue arising under the Fifth and Fourteenth Amendments), and it rendered a holding on a federal issue of law that state courts are bound to follow when the same (federal) issue is raised in their courts.

* * *

The Supremacy Clause of Article VI of the federal Constitution makes state law (whether statutory or common law) subordinate to federal law, and to the Constitution itself. Were it otherwise, federal Constitutional guarantees (such as the Fifth Amendment's privilege against compelled self-incrimination, and the decisional vehicle for implementing that guarantee, *Miranda v. Arizona*) would be meaningless. Accordingly, when a decision of the highest state court (e.g., *State v. Pyle*) conflicts with a decision by the highest federal court to have considered the federal question in issue (e.g., *McCarty v. Herdman*), the Supremacy Clause resolves that conflict by directing state judges to follow the federal interpretation of federal law, *not* their own (state law) interpretation. Consequently, we are constitutionally obligated to follow the Sixth Circuit's recent ruling in *McCarty v. Herdman*, *not* *State v. Pyle*, however much we may disagree with the Sixth Circuit's reasoning or with the result.

Id. at *20-*22 (Handwork, dissenting; footnotes omitted). Indeed, "since Ohio is subsumed within the geographic jurisdiction of the Sixth Circuit..., that court is, for all practical purposes, our (federal) Supreme Court as to all federal questions of law until and unless the United States Supreme Court rules differently." *Id.* at *21, n. 3.

But even if this Sixth Circuit precedent is not “controlling” in the strictest sense of the word, it must be given the highest level of deference, and should be disturbed only for the most pressing of reasons. This is especially true in the case of bankruptcy issues, which are matters of exclusively federal jurisdiction. Indeed, Article I, Section 8 [4] authorizes and directs Congress to “establish... uniform Laws on the subject of Bankruptcies throughout the United States...” The goal of uniformity of bankruptcy laws is not well-served by having state courts second-guess federal circuits courts of appeal on the subject of bankruptcy preemption. That is particularly the case where, as here, the federal circuit court whose jurisdiction encompasses this state has already explicitly addressed this issue.

In its well-reasoned and well written opinion, the court of appeals below correctly applied the interpretation of federal (not Ohio) law that has been explicitly adopted by the Sixth Circuit. As a matter of federal constitutional law, this applicable Sixth Circuit precedent clearly holds that federal bankruptcy law precludes state law tort remedies as it pertains to alleged abuse of bankruptcy law and procedure.

In sum, no substantial constitutional issue exists in the case *sub judice* for this Court to decide.

II. STATEMENT OF THE CASE

A. *Statement of the Case*

The Complaint filed by PNH, Inc. and Ronald Creatore asserted claims sounding in defamation, tortious interference and abuse of process. Alfa Laval, Inc., (incorrectly named in the complaint as Alfa Laval Flow, Inc.; hereinafter Alfa Laval) filed a motion for summary judgment. The trial court granted Alfa Laval’s summary judgment motion on the defamation

claim, but overruled the motion as it pertained to the claims for tortious interference and abuse of process.

Alfa Laval next filed a Rule 12 O.R.C.P. motion to dismiss the remaining claims on the grounds that the court lacked subject matter jurisdiction. Alfa Laval believed—and the trial court agreed—that those claims were preempted by federal bankruptcy law. The trial court granted Alfa Laval's motion to dismiss because it lacked subject matter jurisdiction. PNH and Creatore appealed to the Seventh District Court of Appeals.

In June, the Mahoning County Court of Appeals unanimously affirmed the trial court's dismissal of the case based on lack of subject matter jurisdiction. PNH and Creatore now ask this Court to accept jurisdiction of their attempted appeal.

B. Statement of Facts

Alfa Laval's business includes the manufacture and sale of components and parts to the food and beverage sanitary processing industry. GOB was a distributor for Alfa Laval in the Ohio, New York and Western Pennsylvania area. A Trust established by Creatore—The Ronald M. Creatore Living Trust—acquired GOB in 2001 with two other partners, David Barnitt and William Sayavich. By April 2003, GOB owed Alfa Laval in excess of One Million and 00/100 Dollars (\$1,000,000.00).

In April 2003, Alfa Laval and two other creditors filed an involuntary bankruptcy petition against GOB. During the bankruptcy proceedings, Alfa Laval and GOB's interim Bankruptcy Trustee, Mark Beatrice, filed an adversary action against Creatore, PNH, and several other Creatore-owned entities known as Diversified Process Components, Hevun Diversified Corporation, U.S. Sanitary Corporation and Wolverine Holding Company, LLC. PNH—one of

the parties to this appeal—was an entity incorporated by Creatore to acquire the secured debt of GOB. It never conducted any other type of business.

The adversary action was settled by the trustee and defendants soon after it was filed. The settlement was approved by the bankruptcy court. Notwithstanding the settlement, the gravamen of Appellants' claim has always been Alfa Laval's filing of both the involuntary bankruptcy and the adversary action. Specifically, Appellants have claimed that "the instant litigation centers on Alfa Laval's [alleged] unlawful attempts to pervert the bankruptcy process to prevent the Plaintiffs from competing with Alfa Laval in its field of business." In that same vein, Appellants allege that "Alfa Laval, through its attorneys, hounded and bullied a malleable trustee, who [a]t the command of Alfa Laval's attorneys, . . . committed violations of bankruptcy laws meant to prevent such abuses of process and allowed Alfa Laval's attorneys to hijack his authority and name for Alfa Laval's 'competitive benefit' and against [Appellants'] competitive interest."

Creatore and PNH retained an "expert witness" prior to the trial court's dismissal of the complaint. The nature of the "expert's" anticipated testimony pertained exclusively to Alfa Laval's alleged alleged improprieties during the bankruptcy court proceedings. The allegations of the complaint and the evidence adduced in discovery by PNH and Creatore amply established that the crux of the matter was Alfa Laval's alleged "abuse" of the bankruptcy process and procedures. Stated differently, all of Appellants' claims presuppose violations of bankruptcy code and procedure.

III. PROPOSITION OF LAW

A Common Pleas Courts Lack Subject Matter Jurisdiction to Determine Whether There has Been a Violation of Federal Bankruptcy Law and Procedure.

As noted in Section I above, the leading case on the dispositive jurisdictional issues is the Ninth Circuit decision in *MSR Exploration, Ltd. v. Meridian Oil, Inc.* (9th Cir. 1995), 74 F.3d 910. In *MSR Exploration*, the Ninth Circuit thoroughly explained why federal bankruptcy law pre-empted state tort claims arising from and related to bankruptcy matters.

First, Congress has expressed its intent that bankruptcy matters be handled in a federal forum by placing bankruptcy jurisdiction exclusively in the district courts as initial matters. 28 U.S.C. 1334(a). The mere fact that exclusive jurisdiction over a particular action is in the district courts would not necessary mean that a later malicious prosecution action must be brought there. However, it does militate in that direction.

* * *

Second, in a related vein, a mere browse through the complex, detailed, and comprehensive provisions of the lengthy bankruptcy code, 11 U.S.C. 101 et. seq., demonstrates Congress's intent to create a whole system under federal control which is designed to bring together and adjust all of the rights and duties of the creditors and embarrassed debtors alike. . . . *It is very unlikely that Congress intended to permit the superimposition of state remedies on the many activities that might be undertaken in the management of the bankruptcy process.*

Debtor's petitions, creditor's claims, disputes over reorganization plans, disputes over discharge, and innumerable other proceedings, would all lend themselves to claims of malicious prosecution. Those possibilities might gravely affect the already complicated process of the bankruptcy court. . . .

* * *

In short, the highly complex laws needed to constitute the bankruptcy courts and regulate the rights of debtors and creditors also underscored the need to jealously guard the

bankruptcy process from even slight incursions and disruptions brought by state malicious prosecution actions.

Id. at 913-914 (citations omitted and emphasis added).

The Ninth Circuit in *Miles v. Okun* further held that the scope of federal pre-emption was such that state law claims of non-debtors, similar to Appellants, were likewise precluded.

Because Congress intended the Bankruptcy Code to create a whole scheme under Federal control that would adjust all of the rights and duties of the creditors and debtors alike, *see, MSR Exploration*, 74 F.3d at 914, we can infer from Congress's clear intent to provide damage awards only to the debtor in Federal proceedings predicated upon the bad faith filing of an involuntary petition that **Congress did not intend third parties to be able to circumvent this rule by pursuing those very claims in state court.** (Emphasis added).

If individuals, such as Appellants are not satisfied with the remedies available under the Bankruptcy Code, they should look to Congress, not to state courts to supplement the available remedies. . . .

As in *MSR Exploration*, **Appellants' complaints are "self-consciously and entirely ones which seek damages for claims filed and pursued in the Bankruptcy Court" . . .** The complaints state on their faces that appellants seek damages for the filing and prosecution of the involuntary bankruptcy petition against their relatives. Appellants go so far as to specifically allege that "these various bankruptcy filings and/or prosecution of them caused great emotional, physical and psychological suffering and distress, embarrassment, anxiety, fear, worry and humiliation to [Appellants] and other members of the family." . . . (Emphasis added).

Id. at 1091-1093. *See also, Stone Crushed Partnership, et al. v. Kassab Archibold Jackson O'Brien, et al.* (S.C. Pa. 2006), 589 Pa. 296, 908 A.2d 875.

In *Pertuso v. Ford Motor Company* (6th Cir. 2000), 233 F.3d 417, the United States Court of Appeals for the Sixth Circuit adopted the Ninth Circuit's holding on the scope of bankruptcy preemption. The Sixth Circuit agreed that bankruptcy laws preempt all state law tort claims that arise out of or are associated with conduct that occurred before a bankruptcy court.

In *Pertuso*, the plaintiffs voluntarily filed for bankruptcy and Ford sent a reaffirmation agreement concerning a loan for a vehicle. Although the Pertusos executed the agreement and returned it to Ford, Ford never filed the agreement with the court. Included as part of the claims against Ford were state law claims for accounting and unjust enrichment. The trial court dismissed those claims on the grounds that they were completely preempted by federal bankruptcy law.

On appeal, the Sixth Circuit affirmed. It held that, on its face, federal bankruptcy law is both "pervasive" and "exclusive." The Sixth Circuit cited and followed the Ninth Circuit decision in *MSR Exploration*, and quoted with approval that portion of the Ninth Circuit's decision stating that "It is very unlikely that Congress intended to permit the superimposition of state remedies on the many activities that might be undertaken in the management of the bankruptcy process." 233 F.3d at 425.

Consequently, the Sixth Circuit held that federal bankruptcy law preempts state law tort claims, even if those claims are not "inconsistent" with the Bankruptcy Code:

Several factors highlight the exclusively federal nature of bankruptcy proceedings. The Constitution grants Congress the authority to establish "uniform Laws on the subject of Bankruptcies." [Citation omitted]. Congress has wielded this power by creating comprehensive regulations on the subject and by vesting exclusive jurisdiction over bankruptcy matters in the federal district courts. [Citation omitted]. The pervasive nature of Congress' bankruptcy regulation can be seen just by glancing at the Code...

* * *

The Pertusos argue that their state law unjust enrichment claim and their claim for an accounting are not inconsistent with the Bankruptcy Code and thus should not be deemed to have been preempted. None of the cases on which they rely, however, involved unjust enrichment claims. Where such claims have been presented, courts have typically held them to be preempted. [Citations omitted].

As Ford correctly points out, the Pertusos' state law claims presuppose a violation of the Bankruptcy Code. Permitting assertion of a host of state law causes of action to redress wrongs under the Bankruptcy Code would undermine the uniformity the Code endeavors to preserve and would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Bibbo*, 151 F.3d at 562-63. Accordingly, and because Congress has preempted the field, the Pertusos may not assert these claims under state law.

Id. at 426 (citations omitted).

Both courts below properly followed the pertinent Sixth Circuit precedent on the dispositive legal issue. Appellants' claims against Alfa Laval were solely based on the alleged abuse of bankruptcy law and procedure and, therefore, subject matter jurisdiction was lacking in the court of common pleas.

Appellants contend that the remedies available to them pursuant to bankruptcy law are not "adequate." It is illogical at best to argue that the remedies available under the law supposedly broken are inadequate. Nevertheless, this argument too has been considered and rejected by the Ninth Circuit. In *MSR Exploration, Ltd.* the Court stated:

Of course, Congress did provide a number of remedies designed to preclude the misuse of bankruptcy process. *See, e.g.*, Fed. Bankr. R. 9011 (frivolous and harrasing filings); 11 U.S.C. (105(a) authority to prevent abuse of process); 11 U.S.C. 303(i)(2) (bad faith filing of involuntary petitions); 11 U.S.C. 362(h) (willful violation of stays); 11 U.S.C. 707(b) (dismissal for substantial abuse); 11 U.S.C. 930 (dismissal under Chapter 9); 11 U.S.C. 1112 (dismissal under Chapter 11). That, too, suggests that congress has

considered the need to deter misuse of the process and has not merely overlooked the creation of additional deterrents.

74 F.3d at 915.

In arriving at this conclusion, the Ninth Circuit cited and discussed its earlier decision in *Gonzalez v. Parks* (9th Cir. 1987), 830 F.2d 1033, wherein the court wrote that:

Congress' authorization of certain sanctions for the filing of frivolous bankruptcy petitions should be read as an implicit rejection of other penalties, including the kinds of substantial damages that might be available in state court suits. Even the mere possibility of being sued in tort in state court could in some instances deter persons from exercising their rights in bankruptcy. In any event, it is for congress and the federal courts, not the state courts, to decide what incentives and penalties are appropriate for use in connection with the bankruptcy process and when those incentives or penalties should be utilized.

Id. at 1036. *See also, Koffman v. Osteoimplant Technology, Inc.* (D.Md. 1995), 182 B.R. 115 for a discussion regarding available remedies in bankruptcy court.

And, as indicated, in *Miles*, any question of the adequacy of bankruptcy law remedies should be address to Congress. Given the express constitutional direction requiring *uniform* federal bankruptcy laws, state courts should not second guess well-established federal law concerning the scope of bankruptcy preemption, especially where (as here) the federal circuit court whose jurisdiction includes this state has spoken on the issue.

CONCLUSION

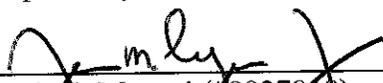
Appellants have not satisfied the necessary criteria for this Court to exercise its discretionary jurisdiction. Neither an issue of "public interest" nor "great general interest" has been raised by Appellants' allegations that Alfa Laval "abused" and "perverted" federal bankruptcy law. Appellants further failed to meet their burden to establish that a substantial constitutional question exists.

This Court is the ultimate arbitor of issues involving Ohio law. But the federal courts are the ultimate arbitors of issues involving federal law, including federal constitutional law. State court judges—including state supreme courts—are bound to follow controlling precedent issued by the federal courts, including the United States Supreme Court and the Sixth Circuit Court of Appeals.

The Sixth Circuit has already passed on the precise “constitutional issue” that PNH and Creatore attempt to raise in this case. If this Court accepts the appeal, it would be duty bound to follow the Sixth Circuit decision. Thus, there is no unique “substantial constitutional issue” presented by this appeal, since the dispositive issue has already been conclusively addressed by the Sixth Circuit.

The attempted appeal should be denied.

Respectfully submitted,



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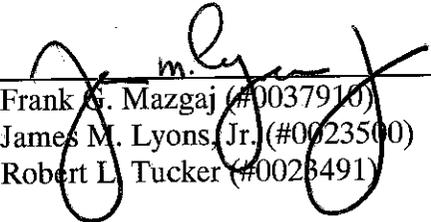
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by regular U.S. mail postage prepaid, this 7 day of September 2010, upon:

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