

ORIGINAL

IN THE
SUPREME COURT OF OHIO

State of Ohio ex. rel. GREGORY D. AND
JO ELLEN ADKINS

CASE NO. 2012-508

Relator-Appellants

vs.

HONORABLE MEGAN SHANAHAN,
JUDGE, HAMILTON COUNTY
MUNICIPAL COURT

On Appeal of Right from the
Hamilton County Court of Appeals,
First Appellate District of Ohio

Court of Appeals Case No. C-1200087
Case Originated in the Court of Appeals

Respondent-Appellee

MERIT BRIEF OF RESPONDENT-APPELLEE
HONORABLE MEGAN SHANAHAN, JUDGE
HAMILTON COUNTY MUNICIPAL COURT

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**IN THE
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vs.

**HONORABLE MEGAN SHANAHAN
JUDGE, HAMILTON COUNTY
MUNICIPAL COURT**

Respondent-Appellee

: CASE NO. 2012-508
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: On Appeal of Right from the
: Hamilton County Court of Appeals,
: First Appellate District of Ohio
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: Court of Appeals Case No. C-1200087
: Case Originated in the Court of Appeals
:
: MERIT BRIEF OF RESPONDENT-
: APPELLEE

STATEMENT OF FACTS

Relator Adkins' filed a Petition for a Writ of Prohibition in the Court of Appeals alleging that a prior discharge in bankruptcy discharged barred the jurisdiction of the Hamilton County Municipal Court. (T.d. 1). That petition was, at best, inconsistent about what was going on between the parties to the municipal court litigation.

The attachments to the Petition indicate that Relator Adkins' testimony at a deposition is as follows:

Q. So no written document at all.

A. No. No. But it is evidence of a loan repayment of the \$2,000 loan that he lent us in 2007. (T.d. 1, Exhibit B-2).

Relator alleges that he filed a bankruptcy in 2001 and received a "no-asset, no-time-bar, discharge" from the Bankruptcy Court in 2001. (T. d. 1, Petition ¶14). There is a substantial issue of fact as to whether the loan occurred in 2007 as Relator testified or before the 2001 bankruptcy.

Next, Relator Adkins' claims that the trial is over a mobile home that no one involved with the case ever owned. (T.d. 1, Petition ¶ 7). Again, if no party to the case ever owned the subject of the suit, how does the bankruptcy in 2001 affect the non-owned asset?

In another attachment to the Petition, Respondent Shanahan recited that she thought that the two parties had reached an agreement and that she was going to set the matter for the motions that both sides had filed and continuation of the trial that had begun. (T.d. 1, Exhibit J-4).

Finally, the alleged discharge in bankruptcy was not raised in the Answer as an affirmative defense. Instead, Relator, if he is now to be believed, wasted a year and a half of the Hamilton County Municipal Court time involving some 103 entries on the docket before the bankruptcy discharge was mentioned to the court. (Exhibit H-9 through H-11).

In short, the facts before Respondent Judge Shanahan, based upon the Petition and various attachments, are exceedingly jumbled. Here are some factual issues that need to be resolved:

1. Did anyone own the mobile home?
2. Was there a loan concerning the asset that nobody owned in 2007, six years after the bankruptcy?
3. While the parties could not agree upon an entry reciting their settlement agreement, will one of the parties to the municipal court case seek to enforce the settlement agreement?
4. Why after the bankruptcy was disclosed, did the parties had apparently reached a settlement?

The Court of Appeals granted Judge Shanahan's motion to dismiss Relator Adkins' petition for a Writ of Prohibition. (T.d. 6). The Court of Appeals Amended the Entry of

Dismissal and denied an Application for Reconsideration. (T.d. 9). The Amended Entry clarified the reason for dismissal was as follows:

While relators have established the existence of a no-asset discharge in bankruptcy as a bar to recovery on the loan guarantee, the petition also confirms ongoing activity between the relators and the creditor after the discharge in bankruptcy. If all of the alleged indebtedness occurred before the relator's sought relief in bankruptcy court, there would have been no purpose in the parties engaging in settlement discussions after the discharge in bankruptcy had been disclosed.

On these facts this Court must determine whether the Court of Appeals correctly found that jurisdiction was not patently and unambiguously lacking.

ARGUMENT

FIRST PROPOSITION OF LAW

In order for a writ of prohibition to be issued, the relator must prove that (1) the lower court is about to exercise judicial authority, (2) the exercise of authority is not authorized by law, and (3) the relator either possesses no other adequate remedy in the ordinary course of law if the writ of prohibition is denied or the lack of jurisdiction of the lower court is patent and unambiguous.

In *State ex rel. Tubbs Jones, Pros. Atty. v. Suster, Judge, et al.*, (1998), 84 Ohio St.3d 70, 701 N.E.2d 1002, the Supreme Court set out the following standards for the granting of a writ of prohibition:

In order for a writ of prohibition to be issued, the relator must prove that (1) the lower court is about to exercise judicial authority, (2) the exercise of authority is not authorized by law, and (3) the relator possesses no other adequate remedy in the ordinary course of law if the writ of prohibition is denied. *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St.3d 176, 178, 631, N.E.2d 119, 121.

The Court in *State ex rel Tubbs Jones v. Suster*, supra, went on to explain:

Prohibition will not lie to prevent an anticipated erroneous judgment. *State ex rel. Heimann v. George* (1976), 45 Ohio St.2d 231, 232, 74, O.O.2d 376, 344 N.E.2d 130, 131. However, we have created a limited exception in cases where there appears to be a total lack of jurisdiction of the lower court to act. Early cases referred to a "total want of jurisdiction" or to the court's being "without jurisdiction whatsoever to act." *State ex rel.*

Adams v. Gusweiler (1972), 30 Ohio St.2d 326, 329, 59 Ohio Op.2d 387, 388, 285 N.E.2d 22, 24, and paragraph two of the syllabus. Later cases defined this exception as a “patent and unambiguous’ lack of jurisdiction to hear a case.” *Ohio Dept. of Adm. Serv., Office of Collective Bargaining v. State Emp. Relations Bd.* (1990), 54 Ohio St.3d 48, 51, 562 N.E.2d 125, 129; *State ex rel. Tollis v. Cuyahoga Cty. Court of Appeals* (1988), 40 Ohio St.3d 145, 148, 532 N.E.2d 727, 729.

Therefore, in order for this Court to grant a writ of prohibition, this Court must find that (1) respondent is about to exercise jurisdiction; (2) the exercise of authority is not authorized by law; and, (3) relators have no adequate remedy at law or the Respondent’s lack of jurisdiction is “patent and unambiguous,” and these elements must be shown by relator “beyond doubt.”

Neither this Court nor the court of appeals is required to address the merits of the Adkins’ jurisdictional claim because its jurisdiction in the writ case was “limited to determining whether jurisdiction is patently and unambiguously lacking.” *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, 881 N.E.2d 224, ¶ 12. Absent a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction, and a party challenging that jurisdiction has an adequate remedy by appeal. *State ex rel. Powell v. Markus*, 115 Ohio St.3d 219, 2007-Ohio-4793, 874 N.E.2d 775, ¶ 8, quoting *State ex rel. Shimko v. McMonagle* (2001), 92 Ohio St.3d 426, 428–429, 751 N.E.2d 472.

SECOND PROPOSITION OF LAW

Where the attachments to a Petition for a Writ of Prohibition demonstrate that the parties to a suit in municipal court had an ongoing business relationship in the decade following a 2001 discharge in bankruptcy, the municipal court does not patently and unambiguously lack jurisdiction in an action regarding a business dispute between the parties.

The attachments to a petition for a writ of prohibition may be considered in determining a motion to dismiss the petition. *State ex rel. Edwards v. Toledo City School Dist. Bd. of Edn.*

(1995), 72 Ohio St.3d 106, 109, 647 N.E.2d 799, 802: *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565, 569, 664 N.E.2d 931, 935, fn. 1.

In this case there is no certainty about the facts surrounding the claims of the parties. Bankruptcies do not immunize an individual for future claims concerning business relationships that occur after the bankruptcy. The discharge in bankruptcy in this case reads: “Most, but not all, types of debts are discharged if the debt existed on the date the bankruptcy case was filed.” (T.d. 1, Exhibit C-2). Obviously if there are ongoing business relationships after the date of discharge, the bankruptcy order has no effect upon disputes concerning the subsequent business relationships. What occurred, and when it occurred is a fact intensive determination.

Post Bankruptcy Business Arrangements and Ownerless Assets

The Ohio courts of appeal have found that the failure to raise the bankruptcy as an affirmative defense in an answer, waives that defense. *Jungkunz v. Fifth Third Bank*, (1st. Dist. 1994) 99 Ohio App.3d 148 650 N.E.2d 134. More recently, the Second District decided *Fountain Skin Care v. Hernandez*, (2nd Dist. 2008) 175 Ohio App.3d 93 885 N.E.2d 286 explaining:

{¶ 20} It is undisputed that Fountain Skin Care has not been paid for the medical treatment it provided to Miguel. According to Carter, he is legally excused from paying the debt owed to Fountain Skin Care because the bankruptcy court granted him a Chapter 7 discharge from his debts in 2006. The trial court rejected this argument, finding that “[a]lthough [Carter] presented evidence of a discharge from the bankruptcy court, he did not provide any evidence that the debt in question was in [sic] included in the petition.” We agree.

{¶ 21} We note that Carter failed to raise discharge in bankruptcy as an affirmative defense in his answer, as required by Civ.R. 8(C), which waives his right to raise this defense.

In the case being considered by Judge Shanahan, notice of the 2001 bankruptcy was not provided until a deposition occurring seven months after the suit was filed. (T.d. 1, Petition ¶4).

The facts set out by Relator Adkins in the attachments to the petition demonstrate why Civil

Rule 8 designated a discharge in bankruptcy as an affirmative defense. The bankruptcy occurred more than a decade ago. In his deposition testimony, Relator Adkins speaks of a 2007 loan. (T.d. 1, Exhibit B-2). The 2001 bankruptcy has no effect on the 2007 loan. The suit, according to the Petition, involves an asset that neither party owned. (T.d. 1, Petition ¶ 7). If neither party to the litigation owned the mobile home involved in the litigation, the 2001 bankruptcy would not have an effect upon that asset. These factually issues need to be resolved before the relevance and materiality of the 2001 bankruptcy can be addressed.

In this case the bankruptcy was not was raised as an affirmative defense in Relator Adkins' answer. The fact that an affirmative defense may exist does not deprive the Court of jurisdiction. This is especially true in the type of case pending before Judge Shanahan. Factual issues need to be resolved concerning the time and nature of the bankruptcy discharge and the time and nature of the business dispute.

Breached Settlement Agreement

Relator attached his which alleges that the parties to the municipal court case reached a settlement. (Exhibit H-1). The plaintiff in the Municipal Court case presented a "Proposed Agreed Judgment Entry" (Exhibits J -2 and J-3). Correctly, Respondent Judge Shanahan stated that she was not just going to choose between competing entries. (Exhibit J-4).

It is axiomatic that settlements are favored in the law and that courts have authority to enforce agreements. See, *Spercel v. Sterling Industries, Inc.* (1972), 31 Ohio St.2d 36, 38, 285 N.D.2d 325. Settlement agreements are as binding, conclusive, and final as if they had been incorporated into a judgment. *RE/MAX Int'l., Inc. v. Realty One, Inc.* (6th Cir 2001), 271 F.3d 633, 466. It is appropriate for courts to summarily enforce settlement agreements when there is no dispute as to the terms. *Id.* Courts are not required to conduct an evidentiary hearing

concerning the terms of a settlement agreement in the absence of allegations of fraud, duress, undue influence, or factual dispute concerning its existence or terms of the agreement. *Mack v. Polson Rubber Co.* (1984), 14 Ohio St.3d 34, 37 N.E.2d 902, 904.

Settlement agreements are contracts designed to terminate a claim by preventing or ending litigation and they are valid and enforceable by any party to the agreement. *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.* (1996), 74 Ohio St.3d 501, 502, 660 N.E.2d 431. Such agreements may be written or oral. *Spercel, supra* at 40, *RE/MAX, supra* at 646. In contract, acceptance of an offer may be made by “word, sign, writing, or act . . . even silence and inaction, under the proper circumstances can constitute acceptance.” *Nilavar v. Osborn* (1998), 127 Ohio App.3d 1, 12, 711 N.E.2d 726, 733.

Attorneys for parties to a lawsuit may confess judgment on their behalf or vacate a judgment previously entered. *Garrett v. Hanshue* (1895) 53 Ohio St. 482, 494, 42 N.E. 256, 259. An attorney’s authorization to “negotiate and settle a client’s claim need not be express, but may be ascertained from the surrounding circumstances.” *Elliott v. General Motors Corp.* (3d. Dist, 1991), 72 Ohio App.3d 486, 488, 595 N.E.2d 463, 464. A settlement entered into by an attorney authorized to negotiate and settle a claim is enforceable regardless of whether the terms of the settlement were approved by, or acceptable to the client. See, *Argo Plastic Products Co. v. City of Cleveland* (1984) 15 Ohio St.3d 389, 393, 474 N.E.2d 328, 331 (holding settlement enforceable against the city for damages in the amount of \$500,000 agreed to by an attorney when actual authority was only \$2,500). Even unauthorized settlements entered into by an attorney may be ratified by a client. *Morr v. Crouch* (1969), 19 Ohio St.2d 24, 249 N.E.2d 780. “Ratification may be implied . . . from the client’s negligence, inaction, or apparent acquiescence in the settlement.” *Id.* at 29, 249 N.E.2d at 783-784.

The settlement agreement in this case is a post-2001 bankruptcy contract. It is clear that both parties believed that there was a settlement of the case before Respondent, Judge Shanahan. Respondent has the authority to enforce the terms of the settlement agreement. Typically, the trial could hold a hearing or request that affidavits be filed setting the terms of the settlement agreement. Once there is evidence presented as to what the actual settlement agreement was, the trial court has jurisdiction to enter an order adopting it.

This Court need not determine Jurisdiction

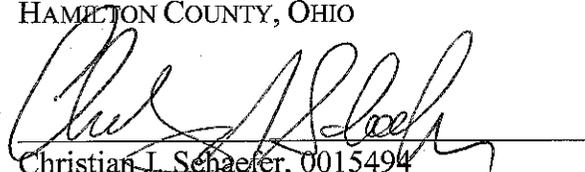
Again, neither this Court nor the Court of Appeals is required to sort out exactly what happened between the parties and whether Judge Shanahan actually had jurisdiction to hear the dispute between the parties. *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, 881 N.E.2d 224, ¶ 12. The only issue is whether jurisdiction is patently and unambiguously absent because of the 2001 bankruptcy. Based upon the petition and attachments thereto, nothing is clear and unambiguous about the case pending before Judge Shanahan. It must be sorted out by a trier of facts and reviewed on direct appeal.

CONCLUSION

For the foregoing reasons, the Judgment of the Court of Appeals denying the Writ of Prohibition should be affirmed.

Respectfully submitted,

JOSEPH T. DETERS
PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO



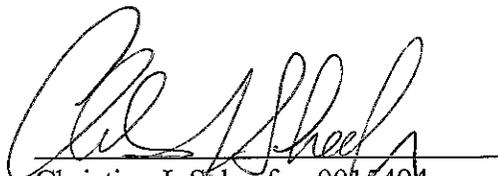
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ATTORNEYS FOR RESPONDENT- APPELLEE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief of Respondent Appellee was served by regular U.S. Mail this 22nd day of May, 2012 on:

Charles E. McFarland
Attorney at Law
338 Jackson Road
New Castle, KY 40050



Christian J. Schaefer, 0015494
Assistant Prosecuting Attorney

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO EX REL.
GREGORY D. ADKINS,

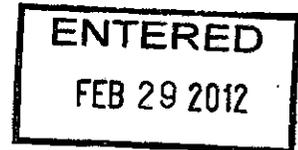
APPEAL NO. C-120087

Petitioner,

vs

ENTRY DISMISSING PETITION
FOR WRIT OF PROHIBITION

HON. MEGAN SHANAHAN, JUDGE,
HAMILTON COUNTY MUNICIPAL COURT



Respondent.

This cause came on to be considered upon the petition for writ of prohibiton, the respondent's motion to dismiss, the petitioner's memorandum in opposition, and the respondent's reply.

The Court finds that the motion to dismiss is well taken and is granted.

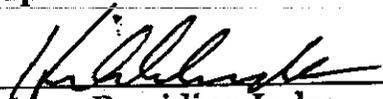
The petition for writ of procedendo is dismissed.



D96594642

To The Clerk:

Enter upon the Journal of the Court on FEB 29 2012 per order of the Court.

By: 
Presiding Judge

(Copies sent to all counsel)

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO EX REL.
GREGORY D. ADKINS AND
JO ELLEN ADKINS,

APPEAL NO. C-120087



Petitioners,

vs



D96960766

AMENDED ENTRY DISMISSING
PETITION FOR WRIT OF
PROHIBITION AND OVERRULING
APPLICATION FOR
RECONSIDERATION

HON. MEGAN SHANAHAN, JUDGE,
HAMILTON COUNTY MUNICIPAL COURT

Respondent.

This cause came on to be considered upon the application of the relators for reconsideration and the memorandum in opposition.

The Court amends the entry of dismissal dated February 29, 2012 and states that the Court considered the petition for writ of prohibition, the respondent's motion to dismiss, and the relators' reply memorandum in opposition. The petition for writ of prohibition is dismissed.

The Court finds that the remainder of the application for reconsideration is not well taken and is overruled.

It is axiomatic that in order for a writ of prohibition to issue, the relator must prove that (1) the lower court is about to exercise judicial authority, (2) the exercise of authority is not authorized by law, and (3) the relator possesses no other adequate remedy in the ordinary course of law if the writ of prohibition is denied. *State ex rel. Keenan v. Calabrese* (1994), 69 Ohio St.3d 176, 178, 631 N.E.2d 119, 121.

The second and third prongs of this test have not been satisfied. While relators have established the existence of a no-asset discharge in bankruptcy as a bar to recovery on the loan guaranty, the petition also confirms ongoing activity between the relators and the creditor after the discharge in bankruptcy. If all of the alleged indebtedness occurred before the relators sought relief in bankruptcy court, there

would have been no purpose in the parties engaging in settlement discussions after their discharge in bankruptcy had been disclosed.

Under the circumstances, it is an appropriate exercise of jurisdiction for the trial court to consider the creditor's claims, if any, on the merits.

To the clerk:

Enter upon the journal of the court on MAR 28 2012 per order of the court.

By:  (Copies sent to all counsel)
Presiding Judge

ENTERED
MAR 28 2012

RULE 8. General Rules of Pleading

(A) Claims for relief. A pleading that sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled. If the party seeks more than twenty-five thousand dollars, the party shall so state in the pleading but shall not specify in the demand for judgment the amount of recovery sought, unless the claim is based upon an instrument required to be attached pursuant to Civ. R. 10. At any time after the pleading is filed and served, any party from whom monetary recovery is sought may request in writing that the party seeking recovery provide the requesting party a written statement of the amount of recovery sought. Upon motion, the court shall require the party to respond to the request. Relief in the alternative or of several different types may be demanded.

(B) Defenses; Form of denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make the denials as specific denials or designated averments or paragraphs, or the pleader may generally deny all the averments except the designated averments or paragraphs as the pleader expressly admits; but, when the pleader does intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Civ. R. 11.

(C) Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, want of consideration for a negotiable instrument, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation.

(D) Effect of failure to deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(E) Pleading to be concise and direct; consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds. All statements shall be made subject to the obligations set forth in Rule 11.

(F) Construction of pleadings. All pleadings shall be so construed as to do substantial justice.

(G) Pleadings shall not be read or submitted. Pleadings shall not be read or submitted to the jury, except insofar as a pleading or portion thereof is used in evidence.

(H) Disclosure of minority or incompetency. Every pleading or motion made by or on behalf of a minor or an incompetent shall set forth such fact unless the fact of minority or incompetency has been disclosed in a prior pleading or motion in the same action or proceeding.

[Effective: July 1, 1970; amended effective July 1, 1994.]