

ORIGINAL

IN THE OHIO SUPREME COURT

State ex rel Joseph McGrath,  
Relator-Appellant,  
-VS-  
Judge: Robert McClelland,  
Respondents-Appellees, et al.

) Supreme Court Case No., 12-0737  
)  
) Eighth Judicial District Court of  
) Appeal's Case No., C.A. 097209  
)  
) Cuyahoga County Court of Common Pleas  
) Case No., CR-388833

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APPELLANT, JOSEPH MCGRATH'S REPLY BRIEF

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REPLY BRIEF

Joseph McGrath says for starters in this reply brief, what is wrong with the 7-25-2002 "nunc pro tunc" sentencing journal entry?

DUE TO CLERICAL ERROR THE SENTENCE OF THE COURT IS CORRECTED. DEFENDANT IS SENTENCED TO A PRISON TERM AT LORAIN CORRECTIONAL OF 2 YEARS AS TO COUNT 1 AND 6 MONTHS AS TO COUNT 3 AND 4; AND TO A JAIL TERM AT COUNTY JAIL OF 6 MONTHS AS TO COUNTS 2, 6, AND 7. SENTENCES IN COUNTS 2, 6 AND 7 ARE TO RUN CONCURRENT TO THE TERMS IMPOSED IN COUNTS 1, 3, AND 4; SENTENCES IMPOSED IN COUNTS 1, 3, AND 4 ARE TO RUN CONSECUTIVE TO ONE ANOTHER. DEFENDANT TO RECEIVE 222 DAYS JAIL TIME CREDIT AS OF JULY 16, 2002.

To the contrary of what the respondents counsel is attempting to project to this court, the 7-25-2002 "nunc pro tunc" sentencing journal entry is not in compliance with the law and an extraordinary writ of mandamus is the appropriate remedy at law given the facts of this case.

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**Proposition of Law One:**

**When an Ohio Supreme Court Instructs the Lower Courts to Correct Sentencing Entries That are Not in Compliance With Crim. R. 32 (C), That's Exactly What the Lower Courts are Required to Do and When a Lower Court Fails to Issue a Corrected Entry an Extraordinary Writ Will Issue and the Doctrine of Res Judicata and/or Law of the Case has No Application:**

On October 13th, 2011, the Ohio Supreme Court released the decision of State v. Lester, 2011-Ohio-5204 (Ohio) and in that decision this Court stated the law for what constitutes a final appealable order at (¶14), R.C. § 2505.02, Crim. R. 32 (C)..

In Lester at (¶14) this Court held, "We hold that a judgment of conviction is a final order subject to appeal under R.C. § 2505.02 when the judgment entry sets forth (1) the fact of conviction, (2) the sentence, (3) the judges signature, and (4) the time stamp indicating the entry upon the journal by the clerk."

In the opinion this Court held at (¶15) "a defendant is entitled to an order that conforms to Crim. R. 32 (C)."

The 7-25-2002 "nunc pro tunc" sentencing entry is not in compliance with

the law of Ohio, the syllabus of an Ohio Supreme Court opinion, and Crim. R. 32 (C).

Despite the passage of time and appellate review, a defendant is still entitled to a sentencing entry that complies with Crim. R. 32 (C). State ex rel Viceroy v. Saffold, 2010 Ohio 5563, 2010 Ohio App. LEXIS 4681 (8th Dist.) (writ granted) (HN 2), Lester, supra.

And again, contrary to what the respondents are claiming in State v. Baker, 119 Ohio St.3d 197, 893 N.E.2d 163, 2008 Ohio LEXIS 1774 (HN 10) "Only one document can constitute a final appealable order." Crim. R. 32 (C).

Accord State v. Casteel, 2012-Ohio-2295, 2012 Ohio App. LEXIS 2039 (5th Dist.) at (¶15)(same) State v. Riggs, 2009-Ohio-6821, 2009 Ohio LEXIS 5731 (5th Dist.)(HN 5)(same) State v. Stults, 195 Ohio App.3d 488, 960 N.E.2d 1015, 2011 Ohio App. LEXIS 3600 (3rd Dist.) (HN 4).

In Stults, (HN 4) the court held that allowing multiple documents to constitute a final appealable order is an erroneous interpretation of Crim. R. 32 (C). Only one document can constitute a final appealable order. This holding is known as Baker's, supra, "One Document" Rule which requires that Crim. R. 32 (C)'s four elements be recorded in one document to constitute a final appealable order, under R.C. § 2505.02.

For arguendo, Lester's holdings never modified this portion of the Baker decision and the "one document rule is still Ohio law."

A. A nunc pro tunc sentencing entry is a replacement for the entire journal entry:

Again, the respondents have misinterpreted Ohio law when a court issues a nunc pro tunc judgment entry, that entry is issued as a correction and "replacement" for the entire original judgment entry. State v. Kramer, 2011 Ohio-3504, 2011 Ohio App. LEXIS 2975 (2nd Dist.) (HN 25).

To hold otherwise would be an erroneous interpretation of Crim. R. 32

(C), Stults, supra (HN 4).

And, this would be a direct violation of the one document rule!

A sentencing journal entry that is not in compliance with Crim. R. 32 (C), R.C. § 2505.02 is not a final appealable order and is **void!**

If the trial court refuses upon request to issue a revised sentencing entry, a party can compel the court to act through an action for a writ of mandamus or a writ of procedendo. Dunn v. Smith, 119 Ohio St.3d 364, 894 N.E.2d 312 (2008) at (¶9)(citations therein omitted), Saffold, supra.

Res judicata does not apply to the collateral attack of a void judgment. State v. Simpkins, 117 Ohio St.3d 420, 884 N.E.2d 568 at (¶25), State v. Fischer, 128 Ohio St.3d 93, 942 N.E.2d 332, at \*1.

Therefore, the respondents arguments has no merit and it must be overuled. entirely.

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**Proposition of Law Two:**

**When There Are No Provisions in Commitment, Sentencing Journal Entry For the Payment of Court Costs By Any Party Any Attempt in Garnishment By the Clerk of Court for the Collections thereof is Void and an Extraordinary Writ Will Issue Against the Clerk Prohibiting Such:**

In response to the misleading argument by the respondents, the trial Court "never" imposed any court costs, they were in fact waived.

Therefore, there was never any reason to appeal that issue in the direct appeal of State v. McGrath, C.A. 77896 (8th Dist.).

The trial court made a clerical error and on 7-25-2002 the court issued a "nunc pro tunc" sentencing entry to reflect what the court actually did at an earlier time, however, the court never mentioned court costs in the nunc pro tunc entry and the clerk of Court and/or the trial Court never served a copy of that entry upon the appellant.

Regardless, the Clerk of Court is not authorized to garnish a persons assets

"9 years latter" when there has been no order by the trial court to do so and/or an order imposing any costs. State ex rel Bitter v. Missig, 1994 Ohio App. LEXIS 3597 (6th Dist.)(mandamus granted), R.C. § 2303.26.

The cases cited in the respondents brief are all distinguishable from this case, as the trial courts imposed court costs on those parties, wherein this case the trial court did not impose any in the journal entry. They were in fact waived!

Joseph McGrath was not required to object and raise any assignment of error in his direct appeal to be sentenced more harshly and to have court cost imposed upon him that were in fact waived.

Moreover, the doctrine of res judicata is a rule of fundamental and substantial justice that is to be applied in particular situations as fairness and justice require, and that is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice. State v. Simpkins, 117 Ohio St.3d 420, 884 N.E.2d 568 at (¶25).

It would be an injustice to authorize the respondent Clerk of Court's to continue the unlawful garnishment of Joseph McGrath's assets for non existant Court costs in Case CR-388833. See (7-25-2002, nunc pro tunc sentencing entry).

Moreover, if the 7-25-2002 nunc pro tunc sentencing entry is not in compliance with Crim. R. 32 (C), R.C. § 2505.02 it is not a final appealable order and is in fact void, coupled with the fact there is no mention of court cost imposed on any party defeats any res judicata argument.

The Clerk is not authorized to enforce void judgments, let alone decide they are going to garnish for non existant costs, "9 years latter."

Therefore, the respondents arguments has no merit and it must be overuled entirely.

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Proposition of Law Three:

When a Sentencing Journal Entry Fails to Impose Any Post Release Control and/or Appropriate Term of Post Release Control, That Offending Portion of the Sentence is Void and Open to Collateral Attack At Any Time By Any Person and the Term Collateral Attack Includes Mandamus, Procedendo, Habeas Corpus, Post Conviction Relief, Delayed Appeal, Appeal, Oral and/or Written Motion to the Court to Compel Compliance and the Doctrine of Res Judicata and/or Law of the Case Do Not Apply:

For starters, the Post Release Control issue with respect to the 7-25-2002 "nunc pro tunc" sentencing journal entry has never been decided. See (Appx., 1, Merit Brief).

Post Release Control was not part of the sentence in Case CR-388833, State v. McGrath, C.A. 77896 at fn 8, (8th Dist.). See (Appx., 1, Merit Brief).

When post release control is not properly imposed in a sentence, that portion of the sentence is void. State v. Fischer, 128 Ohio St.3d 92, 942 N.E.2d 332 (2012), syllabus 16.

Moreover, the doctrine of res judicata does not apply to the collateral attack of a void judgment. Fischer, at syllabus.

Remedies:

To date, the Cuyahoga County Court of Common Pleas will not under any circumstances grant a motion to vacate the void post release control portion of Case CR-388833 sentence!

Moreover, the Court of Appeal's will not permit any appeal of the trial court's decisions denying the post release control claims, nor will the courts recognize this claim!

Remedy for this case:

Mandamus is the proper method by which to attack a void judgment. In re Sensitive Care Inc., 28 S.W.3d 35, 2000 Tex App. LEXIS 3764 (2nd Dist.) at (HN 5), attached.

Moreover, as the Ohio Supreme Court holds in State ex rel Liberty Mills Inc., v. Locker, 22 Ohio St.3d 102, 488 N.E.2d 883 (writ allowed), attached,

[\*\*886] for a remedy at law to be adequate, the remedy should be complete in its nature, beneficial and speedy. The question is whether the remedy is adequate under the circumstances. We find here that the remedy at law of appeal would not be adequate. In addition, the mere existence of the remedy of appeal does not necessarily bar the issuance of a writ of mandamus. (citations omitted).

Accord In re Keeling, 227 S.W.3d 391, 2007 Tex. App. LEXIS 4435 (10th Cir.) (HN4), attached. (technical available legal remedy will not defeat a petitioner's entitlement to mandamus relief when the remedy is so uncertain, tedious, burdensome, slow, inconvenient, inappropriate or ineffective as to be deemed inadequate.).

In In re Sensitive Care Inc., supra, at (HN8) citing In re Masonite Corp., 997 S.W.2d 194, 197 (Tex. 1999)(orig. proceeding), the court held that "mandamus relief is appropriate where trial court's actions show such disregard for guiding principles of law that resulting harm is irreparable."

Since 2009.....Joseph McGrath has made every attempt to compel the trial court to vacate the post release control portion of his sentence in Case CR-388833 to no avail.

To date, neither the trial court and/or any other court will recognize this claim, as the courts either dismiss the proceedings for some procedural ground or they just simply ignore the issue.

Therefore, Joseph McGrath is subject to the collateral disabilities in connection with the void post release control portion of Case CR-388833, that the State of Ohio is purporting to be valid.

Joseph McGrath has done all he can do to compel the lower courts to comply with the syllabus of the Ohio Supreme Court on this post release control issue to no avail.

The Fischer, case supra holds res judicata and law of the case do not

apply and that the issue may be reviewed at any time, on direct appeal or....  
by collateral attack....."

In a distinguishable case Turner v. Bagley, 401 F.3d 718, 2005 U.S. App. LEXIS 4549 (6th Cir.)(HN 2) the court held...."An application for a writ of habeas corpus by a state prisoner shall not be granted unless the petitioner has exhausted available state court remedies, there is an absence of available state court corrective process, or circumstances exist that render such process ineffective to protect the petitioner's rights. 28 U.S.C. § 2254 (b) and (c). This court has also held that a habeas court should excuse exhaustion where further action in state court..."would be an exercise in futility...", citing Lucas v. People of the State of Michigan, 420 F.2d 259, 262 (6th Cir.)(holding that..."such a judicial runaround is not mandated..." by the exhaustion requirement).

The post release control portion of the sentence in Case CR-388833 was not imposed and that portion of the judgment is **void**. See (Appx., 1, Merit Brief).

Fischer's syllabus holds this issue can be collaterally attacked at any time.

In re Sensitive Care Inc., supra (HN 5), attached holds a mandamus is the proper method by which to attack a void judgment.

In another case of Thomas v. Miller, 906 S.W.2d 260, 1995 Tex. App. LEXIS 2183 (6th Dist.)(HN 6), the court held a failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion and may result in appellate reversal through mandamus. **Attached.**

Joseph McGrath has done all he can lawfully do to compel the lower courts **to** follow the law and to date no court will vacate the post release control portion of the sentence of Case CR-388833 that the State of Ohio has purported to be valid.

Therefore, the respondents arguments have no merit and it must be overuled entirely.

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**Proposition of Law Four:**

**The Eighth District Court of Appeal's was Without Jurisdiction to Declare the Relator a Vexatious Litigator, pursuant to Local R. 23 (B), As the Local Rule is in Conflict with R.C. § 2323.52 (B), the Ohio and United States Constitutions and Invalid:**

Once again the respondents argument has no merit. R.C. § 2323.52 (B) is in conflict with Eighth District Local R. 23 (B) and that division of the Local Rule is a nullity. Cassidy v. Glossip, (1967), 12 Ohio St.2d 17, 231 N.E.2d 64 at syllabus 3.

Just recently the respondents supplemented thier brief with the authority of State ex rel Lisboa v. Fuerst, Slip Opinion 2012-3913.

Joseph McGrath says that situation and argument presented in that case was distinguishable from the argument raised herein.

Local R. 23 (B) allows the Eighth District Court of Appeal's to sua sponte inject claims we have before the court in the case at bar.

The Local Rule does not afford the same substantial and procedural protections as the statute and it allows the court to sua sponte impose this lable upon a person and restriction without affording the party Due Process of Law.

The Eighth District sua sponte decided every case in their system under the name Joseph McGrath was the same person. Moreover, most of the cases the Eighth District relyed upon are past the one year statute of limitations set forth in R.C. § 2323.52 (B) to bring the action and they involve parties other than the State in some. Standing to sue for those is lacking by the respondents!

Furthermore, other than the claim that the Local Rule is in conflict with the statute, that the appellant Joseph McGrath properly raised in his motion in the Appellate Court for relief from judgment, Ohio Civ. R. 60 (B); State

ex rel Hilltop Basic Res v. City of Cincinnati , 118 Ohio St.3d 131, 886 N.E.2d 839 (2008) at (¶18)(relief from judgment created a sufficient record for the courts resolution it the claim).

The claims raised in the respondents brief have been bootstrapped into their brief in violation of Belvedere Condominium Unit Owners Ass'n v. R.E. Roark Cos, 67 Ohio St.3d 274, 617 N.E.2d 1075, (reversed and remanded), 1993 Ohio LEXIS 1981 (HN 1)(As a general rule, the court will not consider arguments that were not raised in the courts below).

As afforsaid, the respondents only asked the Eighth District Court of Appeal's to make a vexatious litigation finding with respect to Case CR-388833 and nothing more. See (respondents motion for summary judgment 9-20-2011).

However, the Eighth District utilized every case under the name Joseph McGrath they could find and in doing so they sua sponte expanded the claims of the respondents for cases and issues that were never briefed, plead or authenticated as a material fact. Ohio Civ. R. 8, Ohio Civ. R. 56.

What were any of the cases listed in the Eighth District Court of Appeal's opinion about?

Who filed any of those cases?

Why were any of those cases decided the way they were?

Does the respondents have standing to sue in relation to any of those cases?

Were any of those cases listed in the Eighth District Court of Appeal's opinion pending or dismissed with "one year" as R.C. §2323.52 (B) mandates?

There are a lot of unanswered questions with respect to the cases the Eighth District Court of Appeal's listed in thier opinion and in any event the court's actions amounts to advocacy for the State, rather than being a disinterested party.

In the case of McClure v. Fischer Attached Homes, 145 Ohio Misc.2d 38,

882 N.E.2d 61, at ¶133), the court held, that the court finds that declaring the plaintiffs vexatious litigants is an extreme measure which should only be granted when there is no nexus between the filings made by the plaintiffs and their intended claims. Likewise, the court cannot declare the plaintiffs vexatious litigators solely because they filed lawsuits that the defendants might consider frivolous.

Accord Buoscio v. Macejko, 2003 WL 346117, 2003-Ohio-689 (7th Dist.) at syllabus 5 (existence of 15 previous baseless actions by plaintiff could not be considered in reviewing evidentiary materials for purposes of summary judgment in plaintiff's current action to enforce a promissory note).

Moreover, the Macejko court at syllabus 6 (¶134) held our review of appellee's motion before the trial court readily shows that she did not submit any evidentiary materials to support her assertion concerning the alleged prior actions. In considering similar situations in which a person has been found to be a vexatious litigator, the courts of this state have held that summary judgment cannot be granted on a claim under R.C. § 2323.52 when the moving party has failed to submit any proper documentation concerning the alleged prior actions between the parties. See e.g., Catalano v. Pisani, (1999), 134 Ohio App.3d 549, 555, 731 N.E.2d 738.

Furthermore, since the alleged prior actions between appellant and appellee would have constituted distinct proceedings from the instant case, the trial court did not have the authority to take judicial notice of the prior actions citing Diversified Mortgage Investors, Inc., v. Athens Cty. Bd., of Revision, (1982), 7 Ohio App.3d 157, 454 N.E.2d 1330.

None of these arguments, accept the argument that the Local Rule is in conflict with R.C. § 2323.52 (B), were ever argued in the lower court and it is improper to allow the respondents to now all of the sudden "bootstrap" these claims in this court.

There was no testimony and/or proper authentication that the actions listed in the Eighth District Court of Appeal's opinion are the same Joseph McGrath and the respondents never raised any such claims in the lower court.

There was a claim by Joseph McGrath that the Local Rule 23 (B) is in conflict with a State Statute R.C. § 2323.52 (B). It is well settled that a Local Rule is invalid if it conflicts with a State Statute. GLS Capital Cuyahoga Inc., v. Abuzahrlich, 2006-Ohio-298, (8th Dist.) at (¶9-10); Guzinas v. Constantino, (1988) 43 Ohio App.3d 52, 53, 539 N.E.2d 173; Cassidy v. Glossip, (1967), 12 Ohio St.2d 17, 231 N.E.2d 64 at paragraph 3 of the syllabus.

Allowing a court to sua sponte make a finding that a person is a vexatious litigator without any testimony, proper evidence, notice and prior opportunity to be heard of what the claims are is a violation of Due Process and the Ohio and United States Constitutions.

Eighth District Local Rule 23 (B) allows what the Statute forbids R.C. § 2323.52 (B). When the Ohio Legislature enacted R.C. § 2323.52 (B) they properly included the procedural and substantial rights a party was entitled to when litigating this sort of claim. In part those protections are (1) prior notice and an opportunity to be heard, (2) statute of limitations clause of one year, (3) authorizes only persons with standing to sue to bring the action, (4) and in section (C) of the statute specifies that "A civil action to have a person declared a vexatious litigator shall proceed as any other civil action, and the Ohio Rules of Civil Procedure apply to the action."

Just for arguendo, division (A) of R.C. § 2323.52 specifies what constitutes vexatious conduct.

Joseph McGrath was unable to find any provision in R.C. § 2323.52 et seq that authorizes a court to "sua sponte" make a finding a person is a vexatious litigator, whereas Eighth District Local R. 23 (B) does in violation of the State Statute, rendering that portion of the Local Rule in conflict and a nullity.

Therefore, the respondents arguments that they have improperly "bootstrapped" into their brief have no merit and it must be overuled entirely.

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CONCLUSION

Wherefore, the respondents arguments are misguided characterizations of the law and those views must be overuled forthwith. In this case we have a "nunc pro tunc" correction to a sentencing journal entry and that "replaced" the original sentencing entry it corrected. Within the "nunc pro tunc" sentencing entry, the court failed to comply with Crim. R. 32 (C) and mention the fact of conviction and as a result the "nunc pro tunc" replacement sentencing entry is not a final appealable order R.C. § 2505.02, the Ohio and United States Constitutions. In fact, the "nunc pro tunc" sentencing entry is void under Ohio law.

Moreover, the "nunc pro tunc" sentencing entry fails to mention court costs and/or that they were waived and/or imposed on any party. Therefore, the Clerk of Court's is not authorized to garnish for the collection of non existant costs. R.C. § 2303.26.

Even further, the trial court never imposed any post release control when imposing the sentence in Case CR-388833, nor did the court ever journalize such and in accordance with the law today, that portion of the judgment is void and open to collateral attack at any time by any party and the doctrine of res judicata and/or law of the case do not apply.

Last, but not least we have lower courts who will not follow the syllabus of an Ohio Supreme Court Opinion and an appellate court who just sua sponte made an outrageous finding that Joseph McGrath is now all of the sudden a vexatious litigator and in doing so they utilized every civil case they could find in the system under the name Joseph McGrath and they did so via use of a Local Rule that is in direct conflict of a State Statute and a nullity.

The United States Supreme Court in the case of Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564 (1928) at 485, Mr. Justice Brandeis, dissenting wrote, decency, security and liberty alike demand that Government officials shall be subjected to the same rules of conduct that are commands to the citizens.

In a Government of laws, existence of the Government will be imperilled if it fails to observe the laws scrupulously. Our Government is the potent, the omnipresent teacher.

For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

To declare that in the administration of the criminal law the ends justify the means---, to declare that the Government may commit crimes in order to secure the conviction of a private criminal---, would bring terrible retribution.

Against that pernicious doctrine this court should resolutely set its face.

In another United States Supreme Court decision Marbury v. Madison, 5 U.S. 137, 1803 U.S. LEXIS 352, 1 Cranch 137 (1803)(HN 8) the court held the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of Government is to afford that protection.

Where there is a legal right, there is also a legal remedy by suite, or action at law, waenever that right is invaded. (HN9).

The Government of the United States has been emphatically termed a Government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested right. [\*\*48].

Joseph McGrath is entitled to have a final appealable order in compliance with Crim. R. 32 (C), R.C. § 2505.02, the Ohio and United States Constitutions.

Joseph McGrath has an absolute right to not be garnished for non existant

and non journalized court costs by a Clerk of Courts R.C. § 2303.26, "9 years latter."

Joseph McGrath has an absolute right to have the post release control portion of his sentence vacated as it was never imposed at the time of sentencing and the State must no longer be able to bound me to the purported post release control and/or any violations thereof.

Joseph McGrath may not be barred by the doctrines of res judicata and/or law of the case for the collateral attack of the void judgment for case CR-388833 in accordance with the syllabus of the Ohio Supreme Court, Fischer, supra.

Mandamus is an appropriate remedy to compel a lower court to vacate an improper post release control and/or to issue a final appealable order when the court denies a motion to do so, Locker, supra, Keeling, supra, Sensitive Care Inc., supra, Miller, supra.

Eighth District Local R. 23 (B) is in conflict with the State Statute R.C. § 2323.52 (B)(C) and is a nullity, Glossip, supra.

Joseph McGrath is entitled to the issuance of a writ of mandamus as he has no other adequate remedy in the ordinary course of the law, the respondents are all under a clear legal duty to perform and/or cease and desist the acts and Joseph McGrath is ongoing a serious collateral disability and other damages as a result of the respondents unlawful acts, all in violation of the Ohio and United States Constitutions.

Respectfully submitted,

9-9-2012

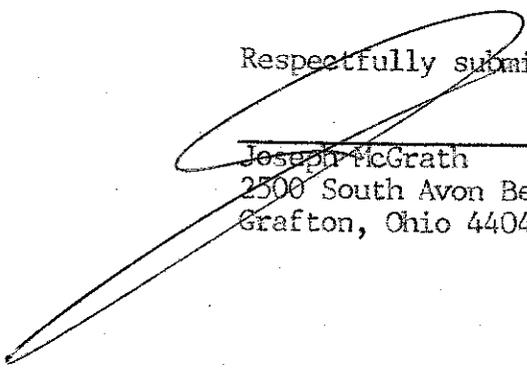
Joseph McGrath  
2500 South Avon Belden Road  
Grafton, Ohio 44044

SERVICE

A true copy of the foregoing was sent out today 9-9-2012 by regular U.S. mail to the Cuyahoga County Prosecutors Office, Assistant Prosecuting Attorney, James E. Moss, Esq., at 1200 Ontario Street, Cleveland, Ohio 44113.

Respectfully submitted,

9-9-2012

  
\_\_\_\_\_  
Joseph McGrath  
2500 South Avon Belden Road  
Grafton, Ohio 44044

IN RE ROGER L. KEELING

No. 10-07-00019-CR

COURT OF APPEALS OF TEXAS, TENTH DISTRICT,  
WACO

227 S.W.3d 391; 2007 Tex. App. LEXIS 4435

June 6, 2007, Filed

NOTICE: PUBLISH

DISPOSITION: [\*\*1] Petition granted and writ  
conditionally issued.**CASE SUMMARY**

**PROCEDURAL POSTURE:** Relator inmate filed a petition for a writ of mandamus challenging a Texas trial court's order regarding a bill of cost for a conviction.

**OVERVIEW:** The inmate spent 5 years in prison for a 1992 conviction. He was released on parole in 1996. He was subsequently sent back to prison. In 2006, he received notice that a bill of costs had been entered for the 1992 conviction. The inmate's motion to rescind the order was not ruled upon. Thereafter, he filed a petition for mandamus relief. In conditionally granting such, the appellate court determined that payments out of the trust account were permitted under Tex. Gov't Code Ann. § 501.014(e) (2004). The inmate had a property interest in his trust account; therefore, he should have been afforded the protections of procedural due process under the Texas and United States Constitutions. Moreover, the fact that the inmate technically had some other remedy at law did not preclude mandamus relief if the remedy was so uncertain, tedious, burdensome, slow, inconvenient, inappropriate or ineffective as to be deemed inadequate. Because the inmate was not afforded procedural due process before entry of the order relating to his account, that order was void, and any funds removed from his account had to be returned.

**OUTCOME:** The petition was conditionally granted.

**CORE TERMS:** inmate's, void, garnishment, mandamus, mandamus relief, trust account, criminal proceeding, legal remedy, civil case, direct appeal, prison, process of law, trust fund, civil proceeding, deprivation, turnover, deprive, notice, fines, mandamus proceeding, criminal case, procedural posture, garnishment proceeding, subject matter, remedies available, contempt order, reimbursement, notification, designation, convicting

[Criminal Law & Procedure](#) > [Postconviction Proceedings](#) > [Imprisonment](#)

**HN1** See Tex. Gov't Code Ann. § 501.014(e) (2004).

[Constitutional Law](#) > [Bill of Rights](#) > [Fundamental Rights](#) > [Procedural Due Process](#) > [Scope of Protection](#)

[Criminal Law & Procedure](#) > [Postconviction Proceedings](#) > [Imprisonment](#)

**HN2** A prison inmate has a property interest in his inmate trust account. A deprivation of personal property without due process violates the United States and Texas Constitutions. [More Like This Headnote](#)

[Constitutional Law](#) > [Bill of Rights](#) > [Fundamental Rights](#) > [Procedural Due Process](#) > [Scope of Protection](#)

**HN3** The Fourteenth Amendment to the United States Constitution protects against deprivation of life, liberty, or property by the State without due process of law. These words require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. The opportunity to be heard is the fundamental requirement of due process; it is an opportunity which must be granted at a meaningful time and in a meaningful manner. Requiring the government to follow appropriate procedures when its agents decide to deprive any person of life, liberty, or property, the Due Process Clause promotes fairness in such decisions. A helpful test in examining the question of whether due process was afforded employs a two-step inquiry: (1) Did the individual possess a protected interest to which due process protection was applicable? (2) Was the individual afforded an appropriate level of process? [More Like This Headnote](#)

[Civil Procedure](#) > [Remedies](#) > [Writs](#) > [Common Law Writs](#) > [Mandamus](#)

Constitutional Law Bill of Rights Fundamental Rights Procedural Due Process Scope of Protection

**HN4** An order entered without due process is void. Mandamus relief may be afforded where the trial court's order is void. If the subject order is void, the relator need not show he did not have an adequate appellate remedy, and mandamus relief is appropriate. And even if the subject order is not void but voidable or erroneous and the relator theoretically has some other remedy at law, a technically available legal remedy will not defeat a petitioner's entitlement to mandamus relief when the remedy is so uncertain, tedious, burdensome, slow, inconvenient, inappropriate or ineffective as to be deemed inadequate. More Like This Headnote

**COUNSEL:** For APPELLANT/RELATOR: Roger L. Keeling, Huntsville, TX.

For APPELLE/RESPONDENT: John C. Paschall, COUNTY & DISTRICT ATTORNEY FOR ROBERTSON COUNTY, Franklin, TX.

**JUDGES:** Before Chief Justice Gray, Justice Vance, and Justice Reyna. (Chief Justice Gray dissenting).

OPINION BY: BILL VANCE

**OPINION**

Original Proceeding

[\*392] Relator Roger L. Keeling seeks mandamus relief regarding the trial court's June 14, 2006 Order and Supplemental Order and an attached Bill of Cost for Conviction. Keeling's application (petition) for writ of mandamus alleges that on January 27, 1992, he pled guilty in cause number 91-12-14,899-CR in the 82nd District Court and, under a plea bargain, was sentenced to five years in prison. He alleges that on December 1, 1996, he was discharged from his sentence and was released from prison on parole.

Although the petition does not discuss any details, Keeling has since been re-imprisoned. He alleges that in late June 2006, he received notice that the convicting court for his 1992 conviction had entered a June 14 Supplemental Order and Bill of Costs. The Supplemental Order provides:

IT IS SO ORDERED that the Clerk of the Court assess court costs, fees, and/or fines against the Offender, for court costs, fees,

and/or fines pursuant to Section 501.014 of the TEXAS GOVERNMENT CODE. Furthermore, the Clerk is to forward a certified **[\*\*2]** copy of this Supplemental Order and Bill of Cost to the Texas Department of Criminal Justice Inmate Trust Fund and the offender.

The Bill of Cost assesses court costs of \$ 123.50 for cause number 91-12-14,899-CR. The primary order is directed to "Inmate Trust Account, Texas Department of Criminal Justice" (with a copy to Keeling) **[\*393]** and orders that payment be made out of Keeling's inmate trust account as follows: an initial amount equal to the lesser of 20% of the preceding six month's deposits in the inmate's account or the total amount of costs; and in each following month, an amount equal to 10% of that month's deposits to the inmate's account or the total amount of unpaid costs.

Keeling alleges that thereafter, he learned that his trust account had been closed and he received a monthly balance slip showing that his account had been "attached" and that he was being charged for the above costs. After exhausting prison grievance proceedings, on August 28, Keeling filed with the convicting trial court a motion requesting that it rescind or reconsider the Supplemental Order. Keeling alleges that, despite several requests by him for the trial court to rule, the trial court has never ruled **[\*\*3]** on Keeling's motion. Nor has the trial court responded to our request for a response to Keeling's petition for writ of mandamus.

Our analysis of the Supplemental Order begins with the statute that it relies on. Government Code section 501.014(e) provides:

**HN1(e)** On notification by a court, the department shall withdraw from an inmate's account any amount the inmate is ordered to pay by order of the court under this subsection. The department shall make a payment under this subsection as ordered by the court to either the court or the party specified in the court order. The department is not liable for withdrawing or failing to withdraw money or making payments or failing to make payments under this subsection. The department shall make withdrawals and payments from an inmate's account under this subsection according to the following schedule of priorities:

(1) as payment in full for all orders for child support;

- (2) as payment in full for all orders for restitution;
- (3) as payment in full for all orders for reimbursement of the Texas Department of Human Services for financial assistance provided for the child's health needs under Chapter 31, Human Resources Code, to a child of the inmate;
- (4) [\*\*4] as payment in full for all orders for court fees and costs;
- (5) as payment in full for all orders for fines; and
- (6) as payment in full for any other court order, judgment, or writ.

TEX. GOV'T CODE ANN. § 501.014(e) (Vernon 2004).

The Department received the Supplemental Order and acted on it under section 501.014(e). Our focus, however, is on the entry of the Supplemental Order, which ordered the removal of money from Keeling's trust account

HN2A prison inmate has a property interest in his inmate trust account. Covarrubias v. Tex. Dep't of Crim. Justice, 52 S.W.3d 318, 324 (Tex. App.--Corpus Christi 2001, no pet.); Brewer v. Collins, 857 S.W.2d 819, 823 (Tex. App.--Houston [1st Dist.] 1993, no pet.); *see also* Op. Tex. Att'y Gen. No. GA-0534 (2007) (county has right to reimbursement from inmate but must comply with applicable due-process requirements). "A deprivation of personal property without due process violates the United States and Texas Constitutions." Texas Workers' Comp. Comm'n v. Patient Advocates of Tex., 136 S.W.3d 643, 658 (Tex. 2004).

The Texarkana court recently examined this same issue in [\*\*394] Abdullah v. State, 211 S.W.3d 938 (Tex. App.--Texarkana 2007, no pet.). That opinion focuses-correctly-on [\*\*5] the procedural due process aspect of such orders, analogizing them to turnover orders and garnishments. *See id.* at 940-41.

The issue as raised by Abdullah, in simple terms, is whether he was accorded due process of law and given proper notice before the State took his money. In simple terms, the answer is: No.

It is apparent from the extremely skimpy nature of these proceedings that no attempt was made to follow garnishment procedure, turnover procedure, or any other type of procedure before the trial court entered its order. There are no pleadings, no proper writ of garnishment, no notifications, no warnings, and no opportunity to respond. Although a judgment of conviction typically reflects the amount of costs incurred, this one does not. When a judgment does contain that information, it would often be clear what amount of costs existed, and the Legislature has provided a means to garnish the funds available to inmates through their trust accounts so as to satisfy the state's expenses. Neither that means, nor any other procedure, was utilized in this case.

Id. at 941 (footnote omitted). *Abdullah* notes that another statute (Civil Practice and Remedies Code § 63.007) 1 applies to [\*\*6] garnishment of inmate accounts, but Texas garnishment rules (Tex. R. Civ. P. 657-679) plainly had not been followed. Id. at 941-43. The court thus concluded that the inmate was not afforded procedural due process in the entry of the section 501.014(e) order and reversed it. 2 Id. at 942.

#### FOOTNOTES

1 "A writ of garnishment may be issued against an inmate trust fund held under the authority of the Texas Department of Criminal Justice under Section 501.014, Government Code, to encumber money that is held for the benefit of an inmate in the fund." Tex. Civ. Prac. & Rem. Code Ann. § 63.007(a) (Vernon Supp. 2006).

2 *Abdullah* summarizes the due process analysis:

HN3The Fourteenth Amendment to the United States Constitution protects against deprivation of life, liberty, or property by the State "without due process of law." Daniels v. Williams, 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). These words "require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Logan v. Zimmerman Brush Co.,

455 U.S. 422, 428, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982);  
Thoyakulathu v. Brennan, 192 S.W.3d 849 (Tex. App.--Texarkana 2006, no pet.). **[\*\*7]** The opportunity to be heard is the fundamental requirement of due process; it is an opportunity which must be granted at a meaningful time and in a meaningful manner. Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965);  
Brewer v. Collins, 857 S.W.2d 819, 822 (Tex. App.--Houston [1st Dist.] 1993, no writ). Requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property," the Due Process Clause promotes fairness in such decisions. Daniels, 474 U.S. at 331, 106 S. Ct. 662.

...

A helpful test in examining the question of whether due process was afforded employs a two-step inquiry: (1) Did the individual possess a protected interest to which due process protection was applicable? (2) Was the individual afforded an appropriate level of process? Copelin-Brown v. N.M. State Personnel Office, 399 F.3d 1248, 1254 (10th Cir. 2005).

Abdullah, 211 S.W.3d at 941-42 & n. 7.

We agree with the Texarkana court's analysis, and we hold that Keeling was not afforded procedural due process in the trial court's entry of the Supplemental Order. Abdullah, however, was in a different procedural posture; it was treated **[\*\*8]** as a civil appeal and the trial court's order was reversed. *See id.* at 939-40 & n.1. **[\*395]** Keeling seeks mandamus relief. He is entitled to it.

HN4 An order entered without due process is void. *Cf. In re Taylor, 130 S.W.3d 448, 449 (Tex. App.--Texarkana 2001, orig. proceeding); cf. also Abdullah, 211 S.W.3d at 943 (order removing funds from inmate's account did not afford procedural due process for inmate's property interest). Mandamus relief may be afforded where the trial court's order is void. In*

re Acceptance Ins. Co., 33 S.W.3d 443, 454 (Tex. App.--Fort Worth 2000, orig. proceeding); see also Dikeman v. Snell, 490 S.W.2d 183, 186 (Tex. 1973) (providing mandamus relief for void nunc pro tunc judgment entered after original judgment had become final). If the subject order is void, the relator need not show he did not have an adequate appellate remedy, and mandamus relief is appropriate. In re Southwestern Bell Tel. Co., 35 S.W.3d 602, 605 (Tex. 2000). And even if the subject order is not void but voidable or erroneous and Keeling theoretically has some other remedy at law, a "technically available legal remedy will not defeat a petitioner's entitlement to mandamus relief when the remedy is **[\*\*9]** 'so uncertain, tedious, burdensome, slow, inconvenient, inappropriate or ineffective as to be deemed inadequate.'" In re Davis, 990 S.W.2d 455, 457 (Tex. App.--Waco 1999, orig. proceeding) (citing State ex rel Holmes v. Court of Appeals, 885 S.W.2d 389, 394 (Tex. Crim. App. 1994) (quoting Smith v. Flack, 728 S.W.2d 784, 792 (Tex. Crim. App. 1987)); and Kozacki v. Knize, 883 S.W.2d 760, 762 (Tex. App.--Waco 1994, orig. proceeding)). Given the subject matter and the circumstances—the 2006 garnishment of funds without due process from an inmate's trust fund account to recover court costs from a 1992 conviction from which the inmate had been paroled in 1996—other theoretical remedies are inadequate and mandamus relief is appropriate. *Cf. id.*

Because Keeling was not afforded procedural due process before entry of the Supplemental Order, that order is void, and any funds removed from Keeling's inmate account must be returned to his account. Accordingly, we conditionally grant mandamus relief, and the writ will issue only if the trial court fails to vacate its June 14, 2006 Order and Supplemental Order and fails to order the return of any removed funds within fourteen days after the date **[\*\*10]** of this opinion.

BILL VANCE

Justice

DISSENT BY: GRAY

**DISSENT**

Original Proceeding

This mandamus proceeding raises a complaint about the garnishment by the State of money in an inmate trust account.

The majority has docketed this proceeding as a criminal

proceeding. It is not. See Crawford v. State, No. 10-06-00269-CV, 226 S.W.3d 688, 2007 Tex. App. LEXIS 3614 (Tex. App.--Waco May 9, 2007, no pet. h.) (Gray, C.J., dissenting). The process for garnishing an inmate's trust account is a civil proceeding. Tex. Civ. Prac. Rem. Code Ann. Ch. 63 (Vernon 1997 & Supp. 2006); Tex. R. Civ. P. 657-679. See Abdullah v. State, 211 S.W.3d 938 (Tex. App.--Texarkana 2007, no pet.) (Docket Number 06-06-00064-CV). 1 The fact that this particular garnishment proceeding relates to the garnishment for the assessment of court costs and fees as part of the judgment in a criminal proceeding is, at this juncture, irrelevant. Tex. Civ. Prac. Rem. Code Ann. § 63.007 (Vernon Supp. 2006).

#### FOOTNOTES

1 The Rules of Appellate Procedure provide that the designation "CV" is assigned to a civil case while the designation "CR" is assigned to a criminal case. Tex. R. App. P. 12.2(a)(4).

[\*396] The error in classifying this as a criminal proceeding then contributes to the determination that \*\*11 mandamus to this Court is an available means of review of the garnishment order. 2

#### FOOTNOTES

2 Interestingly, although they distinguish the procedural posture of *Abdullah* because it was characterized as a civil appeal, the majority uses civil case law, rather than criminal case law, to determine that Keeling is entitled to mandamus relief. And because the majority relies on civil case law and because it should be set up as a civil proceeding, I, too, will rely on civil case law. But if it is a criminal proceeding, as they have docketed it, the Court of Criminal Appeals' authority would absolutely prohibit the result they wish to reach. See discussion *infra*.

First, in order to give Keeling relief by mandamus, the majority must decide that the garnishment order is void. The majority relies on a case from Texarkana to hold that an order entered without due process is void. In re Taylor, 130 S.W.3d 448 (Tex. App.--Texarkana 2001, orig. proceeding). However, *Taylor* was a habeas proceeding where the relator's liberty was being restrained due to a contempt order. And, more importantly, what the Texarkana Court said, relying on a Texas Supreme Court case, was, "An order is void if it is beyond the power \*\*12 of the court to enter it, or if it deprives the relator of liberty without due process of

law." Id. at 449. (Emphasis added.). The majority leaves out the emphasized portion of the quote which is the portion of the statement upon which Texarkana was relying. The garnishment order did *not* deprive Keeling of his liberty. Keeling's criminal behavior did that. The Texarkana Court did not address the "beyond the power of the court" prong because a contempt order is not beyond the power of a district court.

Likewise, I do not believe the garnishment order was void as being "beyond the power of the court to enter it." The order directed to TDCJ regarding the judgment against Keeling may not have been "authorized" or "valid" under the applicable law, see *Abdullah*, but it is not void. The distinction is one the Texas Supreme Court has addressed in *Dubai* and its progeny. 3 See Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 74-75 (Tex. 2000). As long as the court entering a judgment has jurisdiction of the parties and the subject matter and does not act outside its capacity as a court, the judgment is not void. Reiss v. Reiss, 118 S.W.3d 439, 443 (Tex. 2003). See Tesco Am., Inc. v. Strong Indus., No. 04-0269, 221 S.W.3d 550, 49 Tex. Sup. J. 448, 2006 Tex. LEXIS 208, \*15-16 (Tex. 2006) \*\*13 (publication status pending).

#### FOOTNOTES

3 The Court of Criminal Appeals also has an excellent discussion of the distinction in Ex parte Seidel, 39 S.W.3d 221, 224-225 (Tex. Crim. App. 2001). And as will be discussed below, if this is a criminal proceeding, the Court of Criminal Appeals has not decided to allow a void order to be attacked by mandamus without a showing that there is no adequate legal remedy.

Second, because the majority wrongly held the garnishment order was void, it avoided any discussion of whether Keeling had or has an adequate legal remedy. 4 \*\*397 See In re Southwestern Bell Tel. Co., 35 S.W.3d 602, 605 (Tex. 2000). And if the order is not void, as I contend, to prevail by mandamus, Keeling must still show he has no adequate legal remedy.

#### FOOTNOTES

4 While I recognize the Supreme Court held mandamus could be used to attack a void order, I wonder if that alone is the basis of their holding. When other routine remedies are so clearly available and effective, as discussed below, it seems that adding the mandamus remedy too is simply piling-on. On the other hand, the majority has previously determined that this type

proceeding is a criminal proceeding. Unlike the Texas Supreme Court, the Court [\*\*14] of Criminal Appeals requires a showing that there is no adequate legal remedy before a litigant may utilize a mandamus proceeding to attack an order, even a void order. See State v. Patrick, 86 S.W.3d 592, 594 (Tex. Crim. App. 2002). In making this observation, I note the Supreme Court has also recently relaxed the no-adequate-legal-remedy requirement to avoid an unnecessary trial and the attendant cost and delay. In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004) and In re AIU Ins. Co., 148 S.W.3d 109 (Tex. 2004). The legal remedies available to Keeling would not be long delayed or incur unnecessary cost. In fact, he could have and should have pursued a direct appeal even before he brought this mandamus proceeding.

There appear to have been at least three adequate legal remedies available to Keeling: 1) direct appeal; 5 2) restricted appeal; and 3) bill of review. If Keeling was deprived of due process, a bill-of-review should be a simple procedure. See Ross v. Nat'l Ctr. for the Empl. of the Disabled, 197 S.W.3d 795, 797-798 (Tex. 2006). Keeling also had an adequate legal remedy by direct appeal, 6 Varner v. Koons, 888 S.W.2d 511, 513 (Tex. App.-El Paso 1994, orig. proceeding); [\*\*15] see also Roberts v. Stoneham, 31 S.W.2d 856, 857 (Tex. Civ. App.--Austin 1930, no writ), and it also appears that a restricted appeal may have been available to him. See Tex. R. App. P. 30. Mandamus is not available if another remedy, though it would have been adequate, was not timely exercised. In re Tex. Dep't of Family & Protective Servs., 210 S.W.3d 609, 614 (Tex. 2006); In re Johnson, No. 07-04-00416-CV, 2004 Tex. App. LEXIS 7580 (Tex. App.--Amarillo Aug. 23, 2004, orig. proceeding). See Liberty Mut. Ins. Co. v. Brown, 380 F.3d 793, 799 (5th Cir. 2004). See also Ex Parte Townsend, 137 S.W.3d 79, 81-82 (Tex. Crim. App. 2004) (applying the same rule to relief by petitions for writ of habeas corpus) (another form of extraordinary relief).

#### FOOTNOTES

5 The availability of direct appeal may hinge upon the proper characterization of this proceeding as criminal or civil. A majority of this Court has previously determined it to be a criminal proceeding over which we had no jurisdiction. See Crawford v. State, No. 10-06-00269-CR, 226 S.W.3d 688, 2007 Tex. App. LEXIS 3614 (Tex. App.--Waco May 9, 2007, no

pet. h.) (Gray, C.J., dissenting) (setting out withdrawn opinion of majority). The Texarkana Court, however, has [\*\*16] characterized this as a civil proceeding. See Abdullah v. State, 211 S.W.3d 938 (Tex. App.--Texarkana 2007, no pet.) (Docket Number 06-06-00064-CV).

6 If it is determined that this is actually a turnover order rather than a garnishment proceeding, the order is nevertheless a final appealable order. Burns v. Miller, 909 S.W.2d 505, 506 (Tex. 1995).

Based on the foregoing, I respectfully dissent.

TOM GRAY

Chief Justice

Dissenting opinion delivered and filed June 6, 2007

Publish

IN RE SENSITIVE CARE INC. D/B/A H.E.B. NURSING  
CENTER AND CREDIT GENERAL INDEMNITY  
COMPANY D/B/A CREDIT GENERAL INSURANCE  
COMPANY OF TEXAS

NO. 2-00-039-CV

COURT OF APPEALS OF TEXAS, SECOND DISTRICT,  
FORT WORTH

28 S.W.3d 35; 2000 Tex. App. LEXIS 3764

June 8, 2000, Delivered

**SUBSEQUENT HISTORY:** [\*\*1] Relator's Petition for  
Writ of Mandamus Conditionally Granted June 8, 2000.

**PRIOR HISTORY:** TRIAL COURT: 141st District Court.  
COUNTY: Tarrant. TRIAL COURT JUDGE: HON. Paul W.  
Enlow.

**DISPOSITION:** Order Vacated.

#### CASE SUMMARY

**PROCEDURAL POSTURE:** Relators sought a writ of  
mandamus to vacate a judgment of respondent trial court  
(Texas) entered against relator nursing center while relator  
nursing center was in involuntary bankruptcy, and to vacate  
a turnover order against relators.

**OVERVIEW:** Relator nursing center was sued for  
wrongful death and entered a high-low settlement  
agreement before trial. During the state court proceedings,  
relator nursing center entered involuntary bankruptcy.  
Respondent trial court, which did not have knowledge of  
the automatic stay, rendered a judgment that exceeded the  
high-low agreement. The bankruptcy court modified the  
automatic stay to allow the wrongful death plaintiff to  
proceed against relator nursing center's insurance policies  
and allowed relator insurer to defend. Respondent then  
entered a turnover order against relators. On relators'  
request for writ of mandamus, the court found that the  
judgment and turnover order should be vacated. The  
bankruptcy court did not validate the judgment when it  
modified the stay. Respondent did not have the authority to  
validate the judgment, which was therefore void, and the  
turnover order was improper because it was based on a void  
judgment.

**OUTCOME:** The court found that relators were entitled to  
a writ of mandamus directing respondent trial court to  
vacate the judgment and turnover order, and held that the  
writ would issue if respondent refused to vacate the  
judgment and order, which were void for violation of the  
automatic stay.

**CORE TERMS:** void, automatic stay, validate, turnover,  
voidable, vacate, orig. modify, modifying, annul, void  
judgment, mandamus relief, validated, mandamus, high-  
low, modified, punitive damages, writ of mandamus, agreed  
order, invalidity, cap, original proceeding, deems,  
bankruptcy petition, bankruptcy code, involuntary  
bankruptcy, civil practices, writ denied, voidable judgment,  
final judgment

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Demurrers & Objections > Waiver &  
Preservation](#)

**HN1** Waiver and estoppel do not apply when a trial  
court renders a judgment it has no power to  
render. [More Like This Headnote](#)

[Bankruptcy Law > Case Administration >  
Administrative Powers > Stays > Remedies >  
Invalidity of Improper Actions](#)

[Bankruptcy Law > Practice & Proceedings >  
Appeals > General Overview](#)

[Civil Procedure > Judgments > Entry of  
Judgments > Stays of Proceedings > Automatic  
Stays](#)

**HN2** When a bankruptcy petition is filed, it triggers  
the automatic stay under the bankruptcy code.  
[11 U.S.C.S. § 362\(a\)\(1\)](#). The automatic  
stay deprives state courts of jurisdiction over  
proceedings against the debtor, and any action  
taken against the debtor while the stay is in  
place is void and without legal effect. This is  
true regardless of whether a party or court  
learns of the stay before taking action against  
the debtor. [More Like This Headnote](#) |  
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Administrative Powers > Stays > Relief From  
Stays > General Overview](#)

[Bankruptcy Law > Case Administration >](#)

[Administrative Powers > Stays > Remedies > Invalidation of Improper Actions](#)

[Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview](#)

**HN3** A bankruptcy court may annul a stay to validate actions taken while the stay was in effect or take some other action to recognize the invalidity of the stay. But the mere termination or modification of the automatic stay does not validate actions taken in violation of it. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Bankruptcy Law > Case Administration > Administrative Powers > Stays > Remedies > Invalidation of Improper Actions](#)

[Governments > Courts > Authority to Adjudicate](#)

**HN4** State court actions taken in violation of the automatic stay must be validated by the bankruptcy court or they are void. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Civil Procedure > Judgments > Relief From Judgment > Void Judgments](#)

[Civil Procedure > Remedies > Writs > Common Law Writs > Mandamus](#)

**HN5** *Mandamus is the proper method by which to attack a void judgment.* [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Civil Procedure > Appeals > Reviewability > Time Limitations](#)

**HN6** When a judgment is void, the appellate timetable and the deadlines for filing post-judgment motions under [Tex. R. Civ. P. 329b](#) do not apply. [More Like This Headnote](#)

[Civil Procedure > Appeals > Appellate](#)

[Jurisdiction > Final Judgment Rule](#)

**HN7** As a general rule turnover orders are final, appealable orders. [More Like This Headnote](#)

[Civil Procedure > Remedies > Writs > General Overview](#)

**HN8** Mandamus relief is usually not available if the order complained of is appealable, because an appeal is almost always an adequate remedy at law. *But on rare occasions an appellate remedy, generally adequate, may become inadequate because the circumstances are exceptional.* [More Like This Headnote](#)

**COUNSEL:** FOR RELATORS: McCue & Lee, P.C. and David C. McCue of Dallas, TX.

FOR REAL PARTY IN INTEREST: Noteboom & Gray and Charles M. Noteboom of Hurst, Texas and Goins, Underkofler, Crawford & Langdon, L.L.P. and John C. Tollefson of Dallas, TX.

**JUDGES:** DAVID L. RICHARDS, JUSTICE. PANEL A: DAY, RICHARDS, and GARDNER, JJ.

**OPINION BY:** DAVID L. RICHARDS

**OPINION**

[\*37] ORIGINAL PROCEEDING

**Introduction**

This original proceeding involves a state court judgment rendered after the automatic stay of the bankruptcy code was in effect. We must determine whether the bankruptcy court validated the judgment or whether the judgment is void. We hold the bankruptcy court did not validate the judgment. Therefore, the judgment is void, and we conditionally grant mandamus relief.

**Background Facts and Procedural History**

The underlying case is a wrongful death suit. Real party in interest Carol Rhodes sued relator Sensitive Care Inc., d/b/a H.E.B. Nursing Center, alleging that Sensitive Care's negligence caused the death of Woodrow Bryan Sellers, Rhodes's brother. Rhodes sued in her individual capacity and as administratrix of Sellers's estate. Trial began on October 5, 1998.

During trial, Sensitive Care and Rhodes entered into a

high-low settlement agreement, which was dictated into the record. The low was \$ 250,000, and the high was \$ 750,000. On October 15, 1998, the jury returned a verdict in favor of Rhodes for \$ 30,000 in compensatory [\*\*2] damages and [\*\*38] \$ 250 million in punitive damages. Several months passed before Rhodes moved for judgment on the verdict. Meanwhile, in February 1999, Sensitive Care was placed in involuntary bankruptcy. On March 15, 1999 -- apparently without knowledge of the bankruptcy proceeding -- the trial court rendered judgment for Rhodes. The judgment was for the entire amount of the jury's verdict and did not include a damages cap. 1

## FOOTNOTES

1 The civil practices and remedies code caps punitive damages at between \$ 200,000 and \$ 750,000 except where the defendant engaged in certain types of criminal activity or intentional and knowing misconduct. See TEX. CIV. PRAC. & REM. CODE ANN. § 41.008 (Vernon 1997).

The bankruptcy is ongoing. In September 1999, the bankruptcy court modified the automatic stay for the limited purpose of allowing Rhodes to proceed against Sensitive Care's insurance policies -- but no other assets - in the underlying case. The bankruptcy court also allowed relator Credit [\*\*3] General Indemnity Company, d/b/a Credit General Insurance Company of Texas to defend Sensitive Care against any action based on the insurance policies. The bankruptcy court required Credit General to file with the state district clerk a \$ 1 million bond guaranteeing performance of any state court judgment.

Once the stay was modified, relators asked the state court 2 to modify or disregard the March 1999 judgment because it is void. Relators also asked the court to enforce the high-low agreement. In response, Rhodes moved for a turnover order and argued that relators waived their right to enforce the high-low agreement by not complying with its terms in a timely manner. Rhodes contended relators were therefore liable for the full amount of the March 1999 judgment (in excess of \$ 250 million). Rhodes asked the state court to order relators to immediately pay her \$ 750,000 plus \$ 245,500 in attorneys' fees and to appoint a receiver to take all necessary steps in the bankruptcy court to effect the turnover of Sensitive Care's assets to satisfy the remainder of the March 1999 judgment. The state court denied relators' motion, granted Rhodes's motion, and issued the requested turnover [\*\*4] order on January 20, 2000. On January 25, 2000, we stayed the turnover order pending the disposition of this original proceeding.

## FOOTNOTES

2 We sometimes refer to respondent -- the state trial court-- as the state court where necessary to distinguish between it and the bankruptcy court. Otherwise, we refer to respondent as the trial court.

## Waiver

Rhodes contends that relators waived their right to complain of the March 1999 judgment --either on appeal or by mandamus -- by entering into the high- low agreement and by not bringing Sensitive Care's involuntary bankruptcy to the trial court's attention. 3  
HN1 Waiver and estoppel do not apply, however, when a trial court renders a judgment it has no power to render. See Gem Vending, Inc. v. Walker, 918 S.W.2d 656, 658 (Tex. App.--Fort Worth 1996, orig. proceeding); see also Insurance Corp. v. Compagnie des Bauxites, 456 U.S. 694, 702, 102 S. Ct. 2099, 2104, 72 L. Ed. 2d 492 (1982) (holding consent is irrelevant and estoppel and waiver [\*\*5] do not apply when subject matter jurisdiction is in question); Shirley v. Maxicare Tex., Inc., 921 F.2d 565, 568 (5th Cir. 1991) (same).

## FOOTNOTES

3 Rhodes moved for judgment on the verdict on February 26, 1999, two days after the involuntary bankruptcy proceeding was filed, and the trial court held a hearing the same day. Sensitive Care was served with the involuntary bankruptcy petition on March 1, 1999 -- after the hearing but two weeks before the trial court rendered judgment.

## Validity of March 1999 Judgment

The March 1999 judgment is void as a matter of law.  
HN2 When a bankruptcy petition is filed, it triggers the automatic stay under the bankruptcy code. See 11 U.S.C.A. § 362(a)(1) (West 1993 & Supp. 2000); Paine v. Sealey, 956 S.W.2d 803, 805 [\*\*39] (Tex. App.--Houston [14th Dist.] 1997, no writ). The automatic stay deprives state courts of jurisdiction over proceedings against the debtor, and any action taken against the debtor while the stay is in place [\*\*6] is void and without legal effect. See Kalb v. Feuerstein, 308 U.S. 433, 439, 60 S. Ct. 343, 346, 84 L. Ed. 370 (1940); Howell v. Thompson, 839 S.W.2d 92, 92 (Tex. 1992); Paine, 956 S.W.2d at 807; Thomas v. Miller, 906 S.W.2d 260, 261 (Tex. App.--Texarkana 1995, orig. proceeding). 4 This is true regardless of whether a party or court learns of the stay before taking

action against the debtor. <sup>5</sup> See Marroquin v. D & N Funding, Inc., 943 S.W.2d 112, 115 (Tex. App.--Corpus Christi 1997, no writ).

#### FOOTNOTES

<sup>4</sup> Most intermediate appellate courts in Texas also adhere to this position. See, e.g., In re Southwestern Bell Tel. Co., 6 S.W.3d 753, 754 (Tex. App.--Corpus Christi 1999, orig. proceeding); Paine, 956 S.W.2d at 805; Baytown State Bank v. Nimmons, 904 S.W.2d 902, 905 (Tex. App.--Houston [1st Dist.] 1995, writ denied); Burrhus v. M & S Mach. & Supply Co., 897 S.W.2d 871, 873 (Tex. App.--San Antonio 1995, no writ); Tracy v. Annie's Attic, Inc., 840 S.W.2d 527, 542 (Tex. App.--Tyler 1992, writ denied). Two Texas courts have adopted the Fifth Circuit's reasoning in Sikes v. Global Marine, Inc., 881 F.2d 176, 178 (5th Cir. 1989), holding that some actions taken in violation of the automatic stay are voidable rather than void. See Walker's Country Place, Inc. v. Central Appraisal Dist., 867 S.W.2d 111, 112 (Tex. App.--Eastland 1993, no writ); Audio Data Corp. v. Monus, 789 S.W.2d 281, 284-85 (Tex. App.--Dallas 1990, no writ). This minority position is contrary to the Texas Supreme Court's position in Howell, 839 S.W.2d at 92, which was decided after Sikes. Although the Fifth Circuit's decisions are persuasive, we are bound only by decisions of the U.S. Supreme Court and the Texas Supreme Court. See Penrod Drilling Corp. v. Williams, 868 S.W.2d 294, 296 (Tex. 1993). Accordingly, we will follow Kalb and Howell and hold that state court actions taken in violation of the automatic stay are void. [\*\*7]

<sup>5</sup> Rhodes contends Credit General cannot benefit from the stay because Credit General is not a debtor in bankruptcy. But the March 1999 judgment was rendered against the debtor, Sensitive Care, and, as we discuss herein, is void. Credit General cannot be required to satisfy a void judgment.

Rhodes contends the March 1999 judgment is valid, not void, because the bankruptcy court retroactively lifted the stay to validate it. In the alternative, Rhodes contends the judgment is at least voidable and subject to appeal rather than mandamus.

#### ***The Bankruptcy Court Did Not Validate the March 1999 Judgment***

The Texas Supreme Court has held that HN3a bankruptcy court may annul a stay to validate actions

taken while the stay was in effect or take some other action to recognize the invalidity of the stay. See Goswami v. Metropolitan Sav. & Loan Ass'n, 751 S.W.2d 487, 489 (Tex. 1988); see also Lawson v. Gibbs, 591 S.W.2d 292, 295 (Tex. Civ. App.--Houston [14th Dist.] 1979, writ ref'd n.r.e.) (holding that bankruptcy court order approving distribution of foreclosure [\*\*8] sale proceeds invalidated stay order as to sale so that sale was not void). But the mere termination or modification of the automatic stay does not validate actions taken in violation of it. See Nautical Landings Marina, Inc v. First Nat'l Bank, 791 S.W.2d 293, 296 & n.1 (Tex. App.--Corpus Christi 1990, writ denied) (holding that order modifying stay "to permit the parties to continue the appeal of (this cause) including the rights of all parties to pursue whatever rights they might otherwise have in the appellate process" did not validate post-petition actions); Claude Regis Vargo Enters. v. Bacarisse, 578 S.W.2d 524, 527-28 (Tex. Civ. App.--Houston [14th Dist.] 1979, writ ref'd n.r.e.) (distinguishing between annulling stay, which means "to abolish or invalidate" or "to make legally void," and terminating stay); see also Sikes, 881 F.2d at 178-79 (holding that annulment of stay operates retroactively but termination only operates prospectively).

The bankruptcy court in this case modified the automatic stay but did not annul it or take any other action to recognize its [\*\*40] invalidity. Indeed, instead of acting to validate the March [\*\*9] 1999 judgment, the trial court expressly refused to rule on the matter. The record from the bankruptcy hearing shows:

THE COURT: I'm going to modify the stay. I'm not going to lift the stay. I'm going to modify it so I can keep control. If I lift it, it's gone. I'm going to modify the stay to allow . . . all three parties [Rhodes and relators], to go to the state court and get a judgment in accordance with whatever their Rule 11 agreements are, whatever. I'm going to let the state court judge render and enter the final judgment, because that is going to be a starting point, the claim against the debtor.

....

And whatever jumbled up mess there is, the state court judge is the person to straighten that out . . . .

....

. . . I'm not modifying anything in the District Court of Tarrant County.

....

. . . I'll say it again. I'm not making any orders that tamper with the record of the state court, period. I'm not an

appeals court of the state court.

[CREDIT GENERAL'S COUNSEL]: I wanted to make sure that words weren't put into your mouth. With respect to the judgment that was signed by the state court during the gap period, you're not holding that that's a valid judgment?

[\*\*10] THE COURT: I'm not holding anything. I'm modifying the stay to let everybody go back and let that judge do with his case what he deems necessary. And then the parties and this court will deal with, as I said, whatever we have.

....

[RHODES'S COUNSEL]: There is nothing before this Honor today to deal with declaring void or invalid, anything about that judgment. And I think it's improper on this record for this court to enter into that. I think you've lifted the stay. The parties can go back to the state court. And I think that's the right thing to do.

Likewise, the bankruptcy court's order simply modified the stay "to allow the parties to return to the State Court for the Court to take such action, as the State Court deems appropriate under the circumstances." 6

#### FOOTNOTES

6 The cases on which Rhodes relies are distinguishable from this situation because the orders in those cases were clearly intended to validate otherwise invalid state court actions or they were blanket orders governing multiple parties without reference to who had acted in violation of the automatic stay. See In re Chunn, 106 F.3d 1239, 1242 (5th Cir. 1997) (holding that bankruptcy court's order lifting stay to permit state court to enter and enforce temporary orders for spousal support in divorce proceeding, including contempt orders, cured any defect in post-petition temporary orders); Picco v. Global Marine Drilling Co., 900 F.2d 846, 848, 850 (5th Cir. 1990) (holding that blanket order lifting automatic stay so numerous parties could pursue actions against debtor in state court operated to annul rather than terminate automatic stay as to those parties); Sikes, 881 F.2d at 178-79 (same).

#### [\*\*11] *The March 1999 Judgment is Not Voidable Under Texas Law*

Although the bankruptcy court recognized that actions taken in violation of the automatic stay are voidable under Fifth Circuit case law, the court did not rule that the March 1999 judgment was voidable under Texas law. Once the matter was returned to state court, the trial court

did not have the option of deciding whether the judgment was voidable and did not have the authority to validate or reaffirm the judgment. See Audio Data Corp., 789 S.W.2d at 287 (holding that only bankruptcy court can validate a voidable judgment, and state court has no authority to do so). The Texas Supreme Court has ruled that HN4 state court actions taken in violation of the automatic stay must be validated *by the bankruptcy court* or they are void. See Howell, 839 S.W.2d at 92; [\*41] Goswami, 751 S.W.2d at 489. Consequently, the March 1999 judgment is void under Texas law, and the trial court had no choice but to vacate it. See Thomas, 906 S.W.2d at 262 (holding that trial court has not only power but duty to vacate a void judgment). 7

#### FOOTNOTES

7 Rhodes contends the provision in the bankruptcy court's order giving the state court authority to "take such action, as the State Court deems appropriate under the circumstances" gave the state court the option of not going through the "empty exercise" of vacating the March 1999 judgment if it chose not to. There is nothing in the bankruptcy court's order authorizing the trial court to contravene Texas law, and we view adherence to the Texas Supreme Court precedent as mandatory and "appropriate under the circumstances" rather than an empty exercise.

#### [\*\*12] *Res Judicata*

Rhodes contends the bankruptcy court's agreed order modifying the stay dismissed with prejudice Credit General's claims on behalf of Sensitive Care against Rhodes, including a claim for declaratory relief that the March 1999 judgment is void. Thus, Rhodes asserts relators are barred by the doctrine of res judicata from relitigating this issue in state court. Rhodes also asserts she never would have agreed to leave the bankruptcy court, which would have followed Fifth Circuit law and ruled that the judgment was merely voidable, without the benefit of the dismissal order. The record shows, however, that Rhodes had no choice in the matter. At the bankruptcy hearing, the bankruptcy court -- not Rhodes -- stated it was going to modify the stay and return the parties to state court so the state court could "render . . . [a] final judgment." The specific intent of the bankruptcy court -- as expressed both at the hearing and in the agreed order -- was simply to modify the automatic stay, not to annul it or take any other action to recognize its invalidity, or to validate the March 1999 judgment. Therefore, we will not construe the agreed order as having a preclusive [\*13] effect on the issue of whether the March 1999 judgment is void. Moreover, even if dismissal of Credit General's claim for declaratory relief were given preclusive effect, only the bankruptcy court

could have validated the March 1999 judgment. *See* Audio Data Corp., 789 S.W.2d at 287 (holding that only bankruptcy court can validate a voidable judgment); *see also* Sikes, 881 F.2d at 178-79 & n.2 (holding that bankruptcy court's power to annul automatic stay authorizes court to validate actions taken in violation of automatic stay); Paine, 956 S.W.2d at 806 (noting that Fifth Circuit's determination that actions taken in violation of automatic stay are "voidable" does not mean a disputed action is valid unless invalidated, but void unless validated by bankruptcy court). As we have discussed, the bankruptcy court did not validate the March 1999 judgment, and the state court had no authority to do so.

### Propriety of Mandamus Relief

#### From Judgment and Turnover Order

HN5 *Mandamus is the proper method by which to attack a void judgment.* 8 *See* Gem Vending, 918 S.W.2d at 658; *see also* Buttery v. Betts, 422 S.W.2d 149, 151 (Tex. 1967) [\*\*14] (orig. proceeding); J.A. Bitter & Assocs. v. Haberman, 834 S.W.2d 383, 384 (Tex. App.--San Antonio 1992, orig. proceeding). Consequently, relators are entitled to a writ of mandamus directing the trial court to vacate the March 1999 judgment.

#### FOOTNOTES

8 Rhodes asserts relators' sole remedy is a bill of review because the deadline for modifying or appealing from the March 1999 judgment is past. This assertion requires an incorrect assumption -- that the appellate timetable and the deadlines for filing post-judgment motions under TEX. R. CIV. P. 329b were triggered by rendition of the March 1999 judgment. HN6 Because the judgment is void, these rules do not apply.

The January 2000 turnover order is also improper because it is based on a void judgment. HN7 As a general rule turnover [\*42] orders are final, appealable orders. *See* Burns v. Miller, Hiersche, Martens & Hayward, P.C., 909 S.W.2d 505, 506 (Tex. 1995).

HN8 Mandamus relief is usually not available if the order complained of is appealable, because [\*\*15] an appeal is almost always an adequate remedy at law. *See* Republican Party v. Dietz, 940 S.W.2d 86, 88 (Tex. 1997) (orig. proceeding). "*But on rare occasions an appellate remedy, generally adequate, may become inadequate because the circumstances are exceptional.*" *In re Masonite Corp.*, 997 S.W.2d 194, 197

(Tex. 1999) (orig. proceeding) (*holding that mandamus relief is appropriate where trial court's actions show such disregard for guiding principles of law that resulting harm is irreparable*). We believe the exceptional circumstances of this case warrant mandamus relief from the turnover order despite the availability of an appeal.

#### Relators' Remaining Issues

Relators also complain that the trial court did not apply the punitive damages cap of chapter 41 of the Texas Civil Practice and Remedies Code in the March 1999 judgment and failed to enforce the parties' high-low settlement agreement. These complaints are premature and should not be addressed until after the trial court has an opportunity to vacate the March 1999 judgment and render a new one. Accordingly, we deny relators' petition for a writ of mandamus as to these issues.

#### Conclusion

[\*\*16] We vacate our January 25, 2000 order staying the trial court's turnover order. Relators are entitled to a writ of mandamus directing the trial court to vacate the March 1999 judgment and the January 2000 turnover order. We are confident that the trial court will vacate its judgment and order, and our writ will issue only if the trial court refuses to do so.

DAVID L. RICHARDS

JUSTICE

PANEL A: DAY, RICHARDS, and GARDNER, JJ.

DELIVERED JUNE 8, 2000

22 Ohio St. 3d 102, \*, 488 N.E.2d 883, \*\*,  
1986 Ohio LEXIS 562, \*\*\*, 22 Ohio B. Rep. 136

**THE STATE, EX REL. LIBERTY MILLS, INC., v.  
LOCKER, DIRECTOR**

No. 85-1542

Supreme Court of Ohio

22 Ohio St. 3d 102; 488 N.E.2d 883; 1986 Ohio LEXIS  
562; 22 Ohio B. Rep. 136

February 12, 1986, Decided

PRIOR HISTORY: [\*\*\*1] IN MANDAMUS.

Relator, Liberty Mills, Inc., is engaged in the business of handling agricultural commodities. Respondent, Dale L. Locker, is the Director of Agriculture.

In September 1985, relator filed two applications with respondent requesting the issuance of agricultural commodities handler's licenses. The applications were accompanied by the appropriate fees, a current financial statement and certificates of insurance insuring agricultural commodities to be handled by relator. Respondent denied the applications on the basis that an officer of relator was also an officer of another agricultural commodities handler that had been placed in receivership. In addition to requesting a hearing pursuant to R.C. Chapter 119, relator filed this action in mandamus requesting that respondent be compelled to issue the licenses sought by relator. Relator claims that respondent denied the applications on grounds that are legally insufficient. In subsequent exchanges of correspondence, respondent notified relator that an additional ground for denial of the licenses was that relator's financial statement did not fulfill the requirements of R.C. 926.06(C). Respondent required relator [\*\*\*2] to submit to a full audit and relator complied.

Based upon the foregoing facts, relator contends that it has fully complied with the statutory requirements to have the licenses issue. Therefore, relator argues, respondent has a legal duty to issue the licenses and relator is entitled to a writ of mandamus compelling such action by respondent.

DISPOSITION: *Writ allowed.*

**CASE SUMMARY**

**PROCEDURAL POSTURE:** Relator corporation filed a petition for a writ of mandamus to require respondent director of agriculture to issue agricultural commodities handler's licenses to the corporation.

**OVERVIEW:** The corporation was in the business of handling agricultural commodities. The corporation filed two applications with the director for agricultural

commodities handler's licenses, and the director denied the applications. The corporation filed a petition for a writ of mandamus, and the court granted the writ. The court held that the director improperly denied the applications because the corporations complied with all of the requirements of Ohio Rev. Code Ann. ch. 926. Therefore, the director was required to issue the licenses. Also, the corporation had a remedy at law in the form of an appeal, but the availability of that remedy did not preclude mandamus. The delay in following administrative and appellate procedures would have caused irreparable harm to the corporation.

**OUTCOME:** The court granted the writ of mandamus to the corporation.

**CORE TERMS:** license, agriculture, handler's, agricultural, commodity, writ of mandamus, issuance, mandamus, harvest, adequate remedy, clear legal right, complied, season, speedy, gone, ordinary course, financial, responsibility, financial statement, statutory requirements, irreparable harm, final decision, discretionary, receivership, ministerial, prescribed, promulgate, attendant, handled

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**HN1** Mandamus is an extraordinary writ that must be granted with caution. Ohio Rev. Code Ann. § 2731.01 provides that mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station. Section 2731.05 provides that the writ of mandamus must not be issued when there is plain and adequate remedy in the ordinary course of the law. In order for a writ of mandamus to issue, a relator must show that (1) he has a clear legal right to the relief prayed for, (2) respondent is under a clear legal duty to perform the requested act, and (3) relator has no plain and adequate remedy in the ordinary course of the law. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Governments](#) [Agriculture & Food](#) [Product](#)

Promotion

Governments State & Territorial Governments  
Licenses

**HN2** Ohio Rev. Code Ann. § 926.04(A) provides that no person shall handle agricultural commodities without first obtaining a handler's license issued by the director of agriculture. To obtain a license, one must submit an application with the prescribed fee, § 926.05(A) and (B); meet the financial requirements of § 926.06(B); and submit a current financial statement, not more than six months old, prepared by a qualified person setting forth the information required by § 926.06(C). In addition, an applicant, pursuant to § 926.07(A), must file a certificate of insurance with the director, issued by an authorized insurer, insuring in the name of the applicant all agricultural commodities handled or which may be handled by the applicant. More Like This Headnote

Governments Agriculture & Food Processing  
Storage & Distribution

Governments State & Territorial Governments  
Licenses

**HN3** Where an applicant for an agricultural commodity handler's license is in full compliance with the requirements set forth in Ohio Rev. Code Ann. ch. 926, the director of agriculture is required to issue such license. More Like This Headnote

Civil Procedure Remedies Writs Common  
Law Writs Mandamus

**HN4** The mere existence of the remedy of appeal does not necessarily bar the issuance of a writ of mandamus. More Like This Headnote | Shepardize: Restrict By Headnote

Civil Procedure Remedies Writs Common  
Law Writs Mandamus

Governments Agriculture & Food Product  
Promotion

Governments State & Territorial Governments  
Licenses

**HN5** Where the director of agriculture denies an application for an agricultural commodity handler's license from an applicant who has fully complied with the requirements set forth in Ohio Rev. Code Ann. ch. 926, mandamus is a proper action to obtain the issuance of the license. More Like This Headnote

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HEADNOTES

*Agriculture -- Administrative law -- Denial of agricultural commodity handler's license -- R.C. Chapter 926 -- Writ allowed, when.*

SYLLABUS

1. Where an applicant for an agricultural commodity handler's license is in full compliance with the requirements set forth in R.C. Chapter 926, the Director of Agriculture is required to issue such license.

2. Where the Director of Agriculture denies an application for an agricultural commodity handler's license from an applicant who has fully complied with the requirements set forth in R.C. Chapter 926, mandamus is a proper action to obtain the issuance of the license.

COUNSEL: *Gamble & Hartshorn* and *Kenneth A. Gamble*, for relator.

*Anthony J. Celebrezze, Jr.*, attorney general, *John K. Maguire* and *B. Douglas Anderson*, for respondent.

JUDGES: DOUGLAS, J. [\*\*\*3] CELEBREZZE, C.J., SWEENEY, HOLMES and C. BROWN, JJ., concur. LOCHER and WRIGHT, JJ., dissent.

OPINION BY: DOUGLAS

OPINION

[\*103] [\*\*885] **HN1** Mandamus is an extraordinary writ that must be granted with caution. R.C. 2731.01 provides that mandamus is " \* \* \* a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station." R.C. 2731.05 provides that "[t]he writ of mandamus must not be issued when there is plain and adequate remedy in the ordinary course of the law." In order for a writ of mandamus to issue, a relator must show that (1) he has a clear legal right to the relief prayed for, (2) respondent is under a clear legal duty to perform the

requested act, and (3) relator has no plain and adequate remedy in the ordinary course of the law. State, ex rel. Cody, v., Toner (1983), 8 Ohio St. 3d 22.

R.C. 926.04(A) HN2 provides that no person shall handle agricultural commodities without first obtaining a handler's license issued by the Director of Agriculture. To obtain a license, one must submit an application with the [\*\*\*4] prescribed fee, R.C. 926.05(A) and (B); meet the financial requirements of R.C. 926.06(B); and submit a current financial statement, not more than six months old, prepared by a qualified person setting forth the information required by R.C. 926.06(C). In addition, an applicant, pursuant to R.C. 926.07(A), must file a certificate of insurance with the director, issued by an authorized insurer, insuring in the name of the applicant all agricultural commodities handled or which may be handled by the applicant.

Relator contends that it has complied with all of the statutory requirements and we determine this assertion to be accurate. We find HN3 where [\*104] an applicant for an agricultural commodity handler's license is in full compliance with the requirements set forth in R.C. Chapter 926, the Director of Agriculture is required to issue such license.

Respondent contends, however, that pursuant to R.C. 926.06(A), it is discretionary with him, as director, whether or not to issue a license, the statute reading, "[t]he director of agriculture *may* issue a handler's license \* \* \* [emphasis added.]" Respondent argues that since an officer of relator was previously an officer [\*\*\*5] and stockholder in Sharrock Elevator, Inc., another grain handling company which failed and was placed in receivership, that the director was exercising his discretionary authority and, on this basis, had the authority to deny the licenses sought by relator. We do not agree with the director.

On November 20, 1985, there was filed with this court a copy of an order issued by the respondent in response to relator's administrative appeal. In that order, dated November 16, 1985, respondent affirmed the denial of relator's applications for licenses "because of the close connection between Liberty Mills, Inc. and Sharrock Elevator, Inc." The findings upon which the order was based were the same as those relied upon in the original denial, to wit: that relator was using the same facilities as the now defunct Sharrock Elevator, and that the wife of the president of Sharrock Elevator, an agent of Sharrock Elevator, was also an officer of relator. There was no finding that any of the statutory requirements had not been met.

Based upon the foregoing, we find that relator has shown that it has a clear legal right to have the licenses issue and that respondent has a clear legal duty to perform [\*\*\*6] the

issuing act. We also find that relator has no plain and adequate remedy at law. A substantial portion of relator's business as an agricultural commodity handler is done during the harvest season. Following normal administrative and appellate procedures would cause additional irreparable harm to relator as the harvest season and activities attendant thereto would have come and gone long before any final decision would be forthcoming in relator's case. For a remedy at law to be [\*\*\*886] adequate, the remedy should be complete in its nature, beneficial and speedy. State, ex rel. Merydith Constr. Co., v. Dean (1916), 95 Ohio St. 108, 123. The question is whether the remedy is adequate under the circumstances. State, ex rel. Butler, v. Demis (1981), 66 Ohio St. 2d 123, 124 [20 O.O.3d 121]. We find here that the remedy at law of appeal would not be adequate. In addition, HN4 the mere existence of the remedy of appeal does not necessarily bar the issuance of a writ of mandamus. State, ex rel. Emmich, v. Indus. Comm. (1947), 148 Ohio St. 658 [36 O.O. 265]; State, ex rel. Cody, v. Toner, supra, at 23. Thus, HN5 where the Director of Agriculture [\*\*\*7] denies an application for an agricultural commodity handler's license from an applicant who has fully complied with the requirements set forth in R.C. Chapter 926, mandamus is a proper action to obtain the issuance of the license.

[\*105] Accordingly, we find that the respondent should have issued the licenses in question and we order him to do so forthwith. The writ of mandamus is hereby allowed.

*Writ allowed.*

DISSENT BY: LOCHER

**DISSENT**

LOCHER, J., dissenting.

R.C. 926.06(A) states in full that "[t]he director of agriculture *may* issue a handler's license, or renewal thereof, upon the payment of the prescribed fee, *if the director is satisfied* that the applicant meets the standards of financial responsibility required under this section and has complied with this chapter and the rules adopted under it." (Emphasis added.) The language "may issue" does not stand alone -- it is specifically predicated upon the satisfaction of the director with the financial responsibility of the applicant. In my view relator's relationship with another grain-handling company that failed and was placed in receivership more than suffices to create questions as to the ability of relator [\*\*\*8] to properly undertake its responsibilities. These questions can not be resolved within the purview of this court but rather should be within the discretion of respondent. Similarly, the broad range of financial information available to the director in consideration of the

issuance of a license specified under R.C. 926.06(B) and (C), including extensive financial statements and a certified public accountant's opinion of an applicant's financial status, is in derogation of the majority's implicit assumption that issuance of a license is a purely ministerial function that must be accomplished after perfunctory compliance with the statute. Thus, I perceive no clear legal right to issuance of the license. Similarly, we cannot use the extraordinary writ of mandamus to control official discretion. State, ex rel. Breno, v. Indus. Comm. (1973), 34 Ohio St. 2d 227, 230 [63 O.O.2d 378].

Additionally, the majority states that "normal administrative and appellate procedures would cause additional irreparable harm to relator as the harvest season and activities attendant thereto would have come and gone long before any final decision." Unfortunately for relator the harvest has [\*\*\*9] already come and gone and this assertion is moot. Moreover, the majority's concern over a "speedy" remedy is misplaced since "speedy" is not a determinative consideration; otherwise, under this criterion, every civil action would have to be resolved by mandamus.

With today's decision I would urge the Director of Agriculture to promulgate rules, pursuant to R.C. 926.02(F), to take into account the circumstances giving rise to the original refusal to grant the license. The existence of such rules would have rendered this action unnecessary [\*106] although, in my view, the ability of the director to promulgate such rules belies any suggestion that the director's activities are ministerial. Accordingly, I dissent.

WRIGHT, J., concurs in the foregoing dissenting opinion.

906 S.W.2d 260, \*; 1995 Tex. App. LEXIS 2183, \*\*

JAMES H. THOMAS, JR., Relator v. THE HONORABLE  
JOHN F. MILLER, JR., JUDGE, 102ND JUDICIAL  
DISTRICT COURT, BOWIE COUNTY, TEXAS,  
Respondent

No. 06-95-00074-CV

COURT OF APPEALS OF TEXAS, SIXTH DISTRICT,  
TEXARKANA

906 S.W.2d 260; 1995 Tex. App. LEXIS 2183

September 7, 1995, Decided  
September 7, 1995, FILED

**DISPOSITION:** [\*\*1] Relator's Petition for Writ of  
Mandamus was GRANTED

#### **CASE SUMMARY**

**PROCEDURAL POSTURE:** Relator sought a writ of  
mandamus to compel respondent district court judge to  
vacate a summary judgment entered while relator was in  
bankruptcy.

**OVERVIEW:** After respondent, a state district court judge,  
refused to vacate a summary judgment entered while relator  
was in bankruptcy, relator sought a writ of mandamus to  
compel respondent to take appropriate action. Respondent  
asserted that statutory changes to the bankruptcy code had  
the effect that the automatic stay was no longer an absolute  
bar to state court judgments. However, the court held that it  
was only obligated to follow precedents set by higher Texas  
courts and the United States Supreme Court. The court held  
that it would follow the precedent of the Texas Supreme  
Court holding that all such pleadings were void while the  
automatic stay was operative. In addition, the court held that  
mandamus was a proper remedy because the trial court had  
the duty to vacate the entry of a void judgment at any time it  
was brought to the court's attention. The court held that  
respondent abused his discretion in refusing to vacate the  
judgment and that relator had no other adequate remedy at  
law. The court therefore conditionally granted the writ of  
mandamus and directed the trial court to vacate the  
summary judgment during the pendency of the bankruptcy  
action.

**OUTCOME:** The court conditionally granted the writ of  
mandamus because it found that respondent had abused his  
discretion in refusing to vacate a summary judgment  
granted while relator was in bankruptcy. The court directed  
the trial court to vacate the summary judgment during the  
pendency of the bankruptcy action.

**CORE TERMS:** void, mandamus, voidable, summary  
judgment, automatic stay, abuse of discretion, adequate  
remedy, void judgment, pendency, vacate, writ denied, writ

of mandamus, invalid, underlying case

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**HN1** Any order or judgment entered during the  
pendency of a proceeding in bankruptcy is  
void, being entered in contravention of the  
automatic stay provided by the Bankruptcy  
Code. [11 U.S.C.S. § 362](#). The automatic  
stay deprives state courts of jurisdiction until  
the stay is lifted or modified. [More Like  
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**HN2** The Texas court of appeals is obligated to  
follow only higher Texas courts and the United  
States Supreme Court. [More Like This  
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**HN3** Mandamus is an extraordinary remedy that will  
issue only to correct a clear abuse of discretion  
or, in the absence of another adequate remedy,  
when the trial court fails to observe a  
mandatory statutory provision conferring a  
right or forbidding a particular action. [More  
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**HN4** The trial court has not only the power but the duty to vacate the inadvertent entry of a void judgment at any time, either during the term or after the term, with or without a motion therefor. The trial court has no discretion to refuse to set aside a void judgment, but has the duty to do so at any time that such matter is brought to its attention. Furthermore, an attack may be made in any proceeding having as its general objective a finding that such judgment was void when entered. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Governments](#) > [Courts](#) > [Authority to Adjudicate](#)

**HN5** An order is void when a court has no power or jurisdiction to render it. The writ of mandamus will not lie to correct a merely erroneous or voidable order of the trial court, but will lie to correct one which the trial judge had no power to render. Mandamus is a proper mode of attack upon a void judgment. Mandamus issues only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no adequate remedy by appeal. A remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ. [More Like This Headnote](#)

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**HN6** The appellate court's review of a trial court's determination of legal principles controlling its ruling applies a much less deferential standard than its determination of factually based questions, since a trial court has no discretion in determining what the law is or applying the law to those facts. *Thus, a failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion and may result in appellate reversal through mandamus.* [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

**COUNSEL:** For Relator: Hon. David Paul, Hon. Gary D. Grimes, Franks & Grimes, Texarkana, TX.

For Real Party in Interest Medical Arts Hospital: Hon. Blair G. Francis, Hon. James M. Orr, Francis & Orr, Dallas, TX.

**JUDGES:** Before Cornelius, C.J., Bleil and Grant, JJ.

**OPINION BY:** Ben Z. Grant

**OPINION**

[\*261] Original Mandamus Proceeding

OPINION

Relator, James Thomas, Jr., M.D., filed a petition for writ of mandamus to compel the Honorable John Miller, Jr. to vacate a summary judgment entered in the underlying case while the relator was in bankruptcy. In the underlying suit, the Medical Arts Hospital sued James Thomas, Jr., claiming that he breached his contract with them. The following dates are critical to our examination of this motion.

(1) Judge Miller rendered summary judgment on the underlying case on August 8, 1994.

(2) Thomas had filed for bankruptcy three days earlier, on August 5, 1994.

(3) The bankruptcy case was terminated by an order of dismissal on May 1, 1995.

(4) On April 28, 1995, a motion to set aside summary judgment was filed by Thomas.

(5) A hearing was held and, on June 1, 1995, Judge Miller issued an order denying the motion.

[\*\*2] **Valid, Void, or Voidable**

This Court and many others have repeatedly held that **HN1** any order or judgment entered during the pendency of a proceeding in bankruptcy is void, being entered in contravention of the automatic stay provided by the Bankruptcy Code. 11 U.S.C.A. § 362 (West 1993 & Supp. 1995); Lawrenson v. Global Marine, 869 S.W.2d 519, 523 (Tex. App.-Texarkana 1993, writ denied), and the citations contained therein. The automatic stay deprives state courts of jurisdiction until the stay is lifted or modified. Howell v. Thompson, 839 S.W.2d 92 (Tex. 1992); Owen Electric Supply v. Brite Day Construction, 821 S.W.2d 283 (Tex. App.-Houston [1st Dist.] 1991, writ denied).

Counsel contends federal law has changed since Kalb v. Feuerstein, 308 U.S. 433, 60 S. Ct. 343, 84 L. Ed.

370 (1940). In *Kalb*, the Court held that an action by a county court made in violation of the version of the automatic stay provided by the Bankruptcy Code at that time was void, not voidable. Counsel urges that this Court adopt the reasoning of *Sikes v. Global Marine*, 881 F.2d 176 (5th Cir. 1989), as a better analysis of the current state of the law. In *Sikes*, the Fifth [\*\*3] Circuit noted that additions have been made to the Bankruptcy Code after 1940 that give the trustee the power to ratify certain transactions made in violation of the stay (11 U.S.C. § 549) and also give the bankruptcy court the power to annul the stay, i.e., to grant relief from the stay with retroactive effect (11 U.S.C. 362(d)). In the prior version of the Code, the trustee had the power only to modify or terminate the stay, and no exceptions to the stay existed. In the present version of the Code, this bright-line rule has been diluted by statutory exceptions. Thus, the Fifth Circuit concluded that Section 362 no longer acts as an absolute bar and categorized the actions taken in violation of the stay as *voidable* rather than as *void*.

[\*262] Since *Sikes*, a number of other circuit courts have addressed this question. The First, Second, Third, Seventh, Ninth, Tenth, and Eleventh Circuits have all held that such violations are void *ab initio*. The Federal Circuit has adopted the Fifth Circuit's position, but the Sixth Circuit has created its own variation of analysis--holding such actions to be "invalid" and thus *not* incurable. [\*4] *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581 (9th Cir. 1993); *Ellis v. Consolidated Diesel Elec. Corp.*, 894 F.2d 371 (10th Cir. 1990); *In re Ward*, 837 F.2d 124 (3d Cir. 1988); *In re 48th Street Steakhouse*, 835 F.2d 427 (2d Cir. 1987); *Matthews v. Rosene*, 739 F.2d 249, 251 (7th Cir. 1984); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306 (11th Cir. 1982); *In re Smith Corset Shops*, 696 F.2d 971, 976 (1st Cir. 1982); *but see Bronson v. United States*, 46 F.3d 1573, 1577 (Fed. Cir. 1995); *Easley v. Pettibone Michigan Corp.*, 990 F.2d 905, 909 (6th Cir. 1993) (holding that "actions taken in violation of the stay are invalid and voidable and shall be voided absent limited equitable circumstances").

Even if the circuit courts agreed on a proper interpretation of the stay provision of the Bankruptcy Code, the *opinions* of those federal courts are *persuasive*--not binding.

HN2 We are "obligated to follow only higher Texas courts and the United States Supreme Court." *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993).

This Court reviewed the federal authorities in *Lawrenson*,

869 S.W.2d at 523. We noted that in *Sikes*, the bankruptcy court made the determination [\*\*5] that pleadings filed during the course of the bankruptcy were voidable and that it had retroactively given effect to those pleadings. We then held that

although the bankruptcy court may take such action, we are reluctant to hold that any other court may take similar action. Accordingly, this court is bound to follow the precedent of the Texas Supreme Court holding that all such pleadings are void.

*Lawrenson*, 869 S.W.2d at 523. This result is mandated by *Continental Casing Corp. v. Samedan Oil Corp.*, 751 S.W.2d 499, 501 (Tex. 1988). In *Howell v. Thompson*, 839 S.W.2d 92 (Tex. 1992), the Texas Supreme Court has also held an opinion and judgment of an appellate court to be void that were (unknowingly) issued after the petitioner filed bankruptcy proceedings and during the pendency of the automatic stay.

*Howell* was issued well after the *Sikes* opinion. Had the Texas Supreme Court wished to reconsider its position, the opportunity was before it to do so. Thus, we must conclude that under the decisional authority of this state, Section 362(a) means precisely what it says. While the statutory change in the Bankruptcy Code has granted new powers to the bankruptcy [\*\*6] courts concerning stays, those changes do not apply to actions taken by other courts. We conclude that, under the Bankruptcy Code, the trial court's summary judgment is void.

#### The Appropriateness of Mandamus

HN3 Mandamus is an extraordinary remedy that will issue only to correct a clear abuse of discretion or, in the absence of another adequate remedy, when the trial court fails to observe a mandatory statutory provision conferring a right or forbidding a particular action. *Abor v. Black*, 695 S.W.2d 564, 567 (Tex. 1985).

The first question is thus whether mandamus is the proper mode by which to attack the judgment. HN4 The trial court has "not only the power but the duty to vacate the inadvertent entry of a void judgment at any time, either during the term or after the term, with or without a motion therefor." *Bridgman v. Moore*, 143 Tex. 250, 183 S.W.2d 705, 707 (1944); *Neugent v. Neugent*, 270 S.W.2d 223, 225 (Tex. Civ. App.-Beaumont 1954, no writ). These cases have been cited for the proposition that the trial court has *no discretion* to refuse to set aside a void judgment, but has the duty to do so at any time that such matter is brought to its attention. Furthermore, [\*\*7] an attack may be made in any proceeding having as its general objective a finding that such judgment was void when

entered. Qwest Microwave v. Bedard, 756 S.W.2d 426 (Tex. App.-Dallas 1988)(orig. proceeding); Stock v. Stock, 702 S.W.2d 713, 715 (Tex. App.-San Antonio 1985, no writ). In Urbish v. 127th [\*263] Judicial Dist. Court, 708 S.W.2d 429, 431 (Tex. 1986), the Court held that

HN5an order is void when a court has no power or jurisdiction to render it. The writ of mandamus will not lie to correct a merely erroneous or voidable order of the trial court, but will lie to correct one which the trial judge had no power to render.

Mandamus is a proper mode of attack upon a void judgment.

However, this does not complete our inquiry. Mandamus issues only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no adequate *remedy by appeal*. Cantu v. Longoria, 878 S.W.2d 131 (Tex. 1994); Walker v. Packer, 827 S.W.2d 833, 839-40 (Tex. 1992). We must determine whether the relator has another adequate remedy at law, such as a normal appeal. Walker, 827 S.W.2d at 840. Such a remedy is not inadequate merely because it **[\*\*8]** may involve more expense or delay than obtaining an extraordinary writ. Id. at 842.

In Cantu (in which the relator asked the trial court to determine the date that she discovered the existence of a judgment, the Court held that the relator did not have an adequate remedy by appeal because she was precluded from pursuing any appeal without the finding. Similarly, in this case, there is no judgment from which an appeal may be taken because the order issued by the trial court is void. Rather than require the relator to collaterally attack the judgment in multiple proceedings every time the real parties in interest attempt to execute upon it, we now move to an examination of the merits.

HN6Our review of a trial court's determination of legal principles controlling its ruling applies a much less deferential standard than its determination of factually based questions, since a trial court has no discretion in determining what the law is or applying the law to those facts. Thus, a failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion and may result in appellate reversal through mandamus. Walker, 827 S.W.2d at 840. Conclusion

The **[\*\*9]** trial court had the duty to withdraw that judgment upon request. The court's failure to do so constitutes an abuse of discretion. We therefore grant the requested relief and direct the trial court to vacate the

summary judgment issued during the pendency of the bankruptcy action. We presume that the trial judge will act in accordance with this opinion, and we will not issue a formal writ unless he fails to do so.

Ben Z. Grant

Justice

September 7, 1995