

IN THE OHIO SUPREME COURT

BANK OF AMERICA, N.A.

Plaintiff/Appellant

-vs-

GEORGE M. KUCHTA, et al.

Defendant/Appellees.

* **CASE NO. 2013-0304**
* **On Appeal from the Medina**
* **County Court of Appeals, Ninth**
* **Appellate District**
* **Court of Appeals Case No.**
* **12CA0025-M**

MERIT BRIEF OF AMICI CURIAE JOSEPH AND LORI LAPIERRE IN SUPPORT OF APPELLEES

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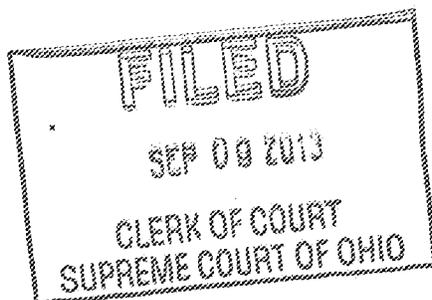


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I. INTRODUCTION

TO QUESTION ALL THINGS: never to turn away from any difficulty; to accept no doctrine either from ourselves or from other people without a rigid scrutiny by negative criticism; letting no fallacy, or incoherence, or confusion of thought, step by unperceived; above all, to insist on having the meaning of a word clearly understood before using it, and the meaning of a proposition before assenting to it;—these are the lessons we learn from the ancient dialecticians.

- John Stuart Mill¹

The above quote is not an attempt to engage the Court on the worth of the Socratic method. It is merely a reminder that legal principles often subsume others, that general propositions of law usually have exceptions, and that we sometimes use terms of art without keeping in mind the exact meaning of those terms, and the propositions framed by them.

II. STATEMENT OF THE INTEREST OF AMICUS CURIAE

Amici Curiae Joseph and Lori LaPierre are like thousands of Ohioans – embroiled in a foreclosure. They are currently appellants in a case pending in the Tenth District Court of Appeals in which the primary issue is the same as that now presented to this Court. The LaPierres believe that their perspective on the issues presented in the case will assist the Court in understanding not only the precise issue presented in this appeal, but also how the resolution of that issue will impact other areas of law.

III. STATEMENT OF FACTS

Amici Curiae accepts the facts as presented by the parties.

IV. ARGUMENT

The issue presented to the Court relates to the extent which the doctrine of res judicata, or more specifically, collateral estoppel, applies to judicial determinations of subject matter jurisdiction. At first

¹ (John Stuart Mill, *Inaugural Address Delivered to the University of St. Andrews, Feb. 1st 1867* [London: Longmans, Green, Reader, and Dyer, 1867], 17) (available at <http://www.scribd.com/doc/55699265/John-Stuart-Mill-Inaugural-Address-at-St-Andrews>).

blush, it might appear that the estoppel may bar a party from all collateral attacks on a trial court's subject matter jurisdiction if the issue was not timely raised. We know from experience, however, that a court's subject matter jurisdiction is different from most other issues presented to a court. Because of the nature of subject matter jurisdiction, it cannot be treated lightly, and special rules have developed regarding how it is handled.

This Court accepted the following certified question from the Ninth District Court of Appeals:

When a defendant fails to appeal from a trial court's judgment in a foreclosure action, can a lack of standing be raised as part of a motion for relief from judgment?

The question is broad, and appears to include all manner of judgments – default judgments, summary judgments, even judgments entered after trial.

The question is vague, however, in that it is limited to motions for relief from judgment. Such motions are filed under Civ.R. 60(B). Indeed, that was the procedural vehicle that the Kuchtas used in this case. It is unclear, therefore, whether the Court of Appeals meant to include in its question common law motions to vacate for lack of jurisdiction.

In response to the certified question, Bank of America advances two propositions of law:

Res judicata bars a defendant who participated in litigation from using a post-judgment motion to contest standing.

When a party who participated in litigation could have raised an issue as part of a direct appeal but did not do so, that party cannot extend the time for filing an appeal by using that issue as a basis for a motion for relief from judgment.

Although Amici will concentrate their efforts on responding to the certified question, they do have some observations about how Bank of America has framed the issues.

It is obvious that these propositions of law do not follow the question certified by the Court of Appeals. The certified question is not limited to motions for relief from judgment filed by someone who participated in the litigation. Perhaps Bank of America is conceding that this Court has already determined that default judgments can be attacked for lack of standing. *See, Washington Mutual Bank,*

F.A. v. Wallace, 982 N.E.2d 691, 134 Ohio St.3d 359, 2012-Ohio-5495 (2012); *Bank of America, National Assn. v. Jimenez*, 982 N.E.2d 692, 134 Ohio St.3d 360, 2012-Ohio-5499 (2012). In both of those cases, the defendant sought to vacate default judgments. This Court reversed and remanded both cases for application of *Federal Home Loan Mtg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 979 N.E.2d 1214, 2012-Ohio-501.

Instead, Bank of America limits its propositions of law to those cases in which a defendant "participated in litigation." It does not acknowledge, however, that this Court has recently addressed this issue scenario, as well. In *Bank of New York Mellon Trust Co., N.A. v. Shaffer*, 981 N.E.2d 898, 134 Ohio St.3d 1435, 2013-Ohio-161 (2013), this Court summarily reversed a denial of a motion for relief from judgment and remanded the case for application of *Schwartzwald*. In *Shaffer*, the defendant certainly participated in the litigation, several motions, including a motion for summary judgment and motions to dismiss. *Bank of New York Mellon Trust Co., N.A. v. Shaffer*, 2012-Ohio-3638, ¶9-24 (11th Dist. No. 2011-G-3051). The defendant even raised the issue of standing in her filings. *Id.* ¶ 16. She did not, however, appeal the entry of judgment against her. Instead, long after the time for appeal had passed, she sought relief from the judgment. *Id.* ¶ 25. Despite all of Shaffer's participation in the litigation, this Court reversed the denial of relief from judgment. On remand, the Court of Appeals dismissed the bank's action for lack of standing. *Bank of NY Mellon Trust Co. v. Shaffer*, 2013-Ohio-3205 (11th Dist. No. 2011-G-3051).

Thus, it seems that this Court has already decided that a plaintiff's lack of standing can be collaterally attacked by a defendant, even if that defendant "participated" in the litigation.

Nonetheless, the certified question and Bank of America's attempt to answer it pose some subtle issues for the Court to consider. But when the dust settles, the answer to the question before this Court is "yes."

A. The General Principle - Res Judicata Presumes Jurisdiction.

Bank of America casts the issue as one relating to res judicata, that is, the preclusive effect of a prior judgment on claims presented in the case. Amici curiae submit that the issue is really one of collateral estoppel - issue preclusion - rather than claim preclusion, but they acknowledge that the two principles are closely related.

The concept of res judicata has two components. First, claims actually litigated in the first proceeding cannot be relitigated in a subsequent case. The second component relates to those matters that *could have been* litigated in the first proceeding, but weren't. This part of the principle might be considered the "one-bite-at-the-apple" part of the rule. And it is this second component of res judicata that Bank of America emphasizes. But before that is addressed, a careful review of the general principle of res judicata is required.

The principle of res judicata provides that:

A final judgment or decree rendered upon the merits, without fraud or collusion, *by a court of competent jurisdiction*, is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action upon the same cause of action between the parties or those in privity with them. The prior judgment is *res judicata* as between the parties or their privies.

Norwood v. McDonald, 142 Ohio St. 299, syll. ¶1(1943) (emphasis added). This Court later restated the principle as follows: "A *valid*, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Twp.*, 653 N.E.2d 226, 73 Ohio St.3d 379, 1995-Ohio-331, syll. (1995) (emphasis added);² *see also*, *Whitehead v. General Tel. Co.*, 254 N.E.2d 10, 20 Ohio St.2d 108, syll. 1 (1969); *Thompson v. Wing*, 637 N.E.2d 917, 70 Ohio St.3d 176, 183, 1994-Ohio-358 (1994).

Thus, for a judgment to have preclusive effect, it must first be, in fact, a judgment. A judgment entered by a court without jurisdiction is void and a nullity. *Patton v. Diemer*, 518 N.E.2d 941, 35 Ohio

² *Grava* did overrule syllabus paragraph 2 of *Norwood*. It did not, however, disturb syllabus ¶ 1.

St.3d 68, syll. ¶3 (1988). It has no effect, and does not operate to determine any rights.

"Jurisdiction" means "the courts' statutory or constitutional power to adjudicate the case." The term encompasses jurisdiction over the subject matter and over the person. *State v. Parker*, 95 Ohio St.3d 524, 2002, ¶ 22 (Cook, J., dissenting). Because subject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case, it can never be waived and may be challenged at any time. *United States v. Cotton* (2002), 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860; *State ex rel. Tubbs Jones v. Suster* (1998), 84 Ohio St.3d 70, 75, 701 N.E.2d 1002. It is a "condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void." *Id.*; *Patton v. Diemer* (1988), 35 Ohio St.3d 68, 518 N.E.2d 941, paragraph three of the syllabus.

Pratts v. Hurley, 806 N.E.2d 992, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶11. (Ohio 2004).

In *Schwartzwald*, this Court carefully examined a common pleas court's jurisdiction and the role that a plaintiff's standing plays in that jurisdiction. It held that standing is an essential part of a common pleas court's jurisdiction and must exist at the time suit is filed. *Id.* ¶24. It concluded that a lawsuit filed by a plaintiff without standing is a nullity and must be dismissed. *Id.* ¶¶28, 38, 40.

The requirement that standing is a prerequisite to a court's jurisdiction is firmly ingrained in Ohio jurisprudence. This Court recently reiterated: "It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue." *Clifton v. Village of Blanchester*, 964 N.E.2d 414, 131 Ohio St.3d 287, 2012-Ohio-780 (Ohio 2012) (quoting *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 469, 715 N.E.2d 1062). This is why "[s]tanding is a preliminary inquiry that must be made before a court may consider the merits of a legal claim." *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, ¶ 9.

The issue, then, becomes whether a court that lacks jurisdiction can somehow gain jurisdiction through the actions, or inaction, of a litigant. Bank of America focuses on this issue in its brief and asks the Court to find that a party's failure to raise subject matter jurisdiction during a case waives the issue and bars a collateral attack on the judgment. But that result cannot be.

B. The Subsumed Principle – Res Judicata Includes the Concept of Waiver.

Bank of America's position is that a party who has participated in litigation, but has failed to raise the issue of subject matter jurisdiction cannot later attack the resulting judgment for lack of subject matter jurisdiction. In essence, it argues that the party who failed to raise the issue has waived the jurisdictional defect. The Court must determine, then, whether subject matter jurisdiction can ever be waived.

This Court has held that “[w]aiver is a voluntary relinquishment of a known right.” *State ex rel. Athens Cty. Bd. of Commrs. v. Gallia, Jackson, Meigs, Vinton Joint Solid Waste Mgt. Dist. Bd. of Directors*, 665 N.E.2d 202, 75 Ohio St.3d 611, 616, 1996-Ohio-68 (1996) (citing *State ex rel. Ryan v. State Teachers Retirement Sys.* (1994), 71 Ohio St.3d 362, 368, 643 N.E.2d 1122, 1128). However, the doctrine of waiver has its limitations:

'As a general rule, the doctrine of waiver is applicable to all personal rights and privileges, whether secured by contract, conferred by statute, or guaranteed by the Constitution, *provided that the waiver does not violate public policy.*'

Id. (emphasis added) (citing *Sanitary Commercial Serv., Inc. v. Shank* (1991), 57 Ohio St.3d 178, 180, 566 N.E.2d 1215, 1218); *see also*, *State ex rel. Hess v. City of Akron*, 7 N.E.2d 411, 132 Ohio St. 305, 307 (Ohio 1937).

Thus, waiver cannot apply to subject matter jurisdiction for two reasons. First, subject matter jurisdiction does not involve an individual right. Indeed, it is not a right at all, but rather the power of a court to decide a particular class of matters. It does not depend on the individual litigants, but is derived from our Constitution. An individual has no right to grant to a court power denied to that court by the citizens of this state.

Similarly, public policy does not permit litigants to waive subject matter jurisdiction. It is not something an individual can waive. It was conferred by the people through the democratic process that is the foundation of our society. It is not a bauble to be cast aside for the convenience of the parties or

the court. It is an integral part of our system of governance and the division of power among the branches of government by the people.

This is why subject matter jurisdiction cannot be waived and can be challenged at any time. *Pratts v. Hurley*, 806 N.E.2d 992, 102 Ohio St.3d 81, 2004-Ohio-1980 (Ohio 2004); *State ex rel. Bond v. Velotta Co.*, 746 N.E.2d 1071, 91 Ohio St.3d 418, 419 2001-Ohio-91 (2001). Indeed, this is why jurisdictional standing cannot be waived. *New Boston Coke Corp. v. Tyler*, 32 Ohio St.3d 216, 218, 513 N.E.2d 302 (1987) ("the issue of standing, inasmuch as it is jurisdictional in nature, may be raised at any time"). In contrast, a court's lack of personal jurisdiction can be waived for it is a personal right.

A challenge to a court's subject matter jurisdiction may even be made for the first time on appeal. *Time Warner AxS v. Pub. Util. Comm.*, 661 N.E.2d 1097, 75 Ohio St.3d 229, 233, 1996-Ohio-224 (1996). And it can be raised sua sponte by the court. *Springfield Local School Dist. Bd. of Edn. v. Lucas Cty. Budget Comm.*, 642 N.E.2d 362, 71 Ohio St.3d 120, 121, 1994-Ohio-453 (1994). Neither can jurisdiction be vested in a court through agreement of the parties. *Cheap Escape Co., Inc. v. Haddox, LLC*, 900 N.E.2d 601, 120 Ohio St.3d 493, 2008-Ohio-6323, fn.1; *Beatrice Foods Co. v. Porterfield*, 282 N.E.2d 355, 30 Ohio St.2d 50, 54 (Ohio 1972).

To expand a trial court's subject matter jurisdiction through agreement or waiver is contrary to the long-standing jurisprudence. It would sacrifice our democratic process on the altar of judicial expedience.

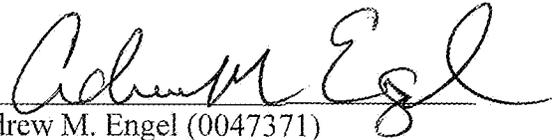
CONCLUSION

The Court should answer the certified questions in the affirmative. Judgments entered without jurisdiction can have no preclusive effect, for they have no effect at all. To be rightly called a judgment, the issuing court must have had subject matter jurisdiction. It is the jurisdiction of the court that gives a judgment life. Until it has the spark of life, a piece of paper entitled "judgment" is inanimate. It is like a snowman in that it bears but a cold semblance to the real thing. Bank of America asks this Court to provide Ohio's common pleas courts with some magic to transform the snowman into a human. But

Frosty's old silk hat works only for Frosty.

For these reasons, Amici Curiae Joseph and Lori LaPierre ask that the Court affirm the Ninth District Court of Appeals's decision.

Respectfully submitted,



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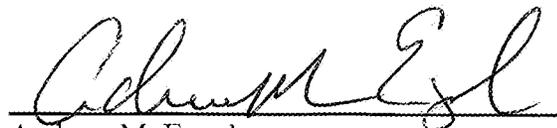
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