

ORIGINAL

IN THE SUPREME COURT OF OHIO

BERNARD NIEDERST)	Case No. 2014-1119
)	
Relator,)	
)	
vs.)	
)	
RICHARD J. MCMONAGLE)	
)	
Respondent.)	

BRIEF IN OPPOSITION TO MOTION TO DISMISS

Relator Bernard Niederst ("Relator" or "Niederst"), by and through his undersigned counsel, respectfully requests this Court deny the Respondent's Motion to Dismiss.

I. INTRODUCTION AND FACTS

The Defendants in the underlying case signed a settlement agreement and cognovit note. The cognovit note required an installment payment of \$250,000.00 "along with all accrued interest" to be paid on January 5, 2013. The settlement provided that "time is of the essence as to this Agreement and any and all payments." The note further provides that if "Payors shall have failed to pay **in full** any amount they are required to pay under this Note", that it is an event of default authorizing Relator to take an immediate judgment. Upon the occurrence of any event of default, the entire unpaid, principal balance and all accrued and accruing interest thereon becomes immediately due and payable without notice or demand. In the event of a default, the Note shall bear interest at the rate of 15% per annum from April 15, 2011. **Defendants admitted failing to timely pay all amounts due and owing.**

RECEIVED
AUG 08 2014
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
AUG 08 2014
CLERK OF COURT
SUPREME COURT OF OHIO

Additionally, it is a default under the parties note and settlement if Defendants fail to hold Relator harmless and indemnify him from third party claims. It is also a default if any of the properties goes into receivership or if the Defendants are unable to pay their debts. Relator and the Defendants were sued for more than \$15 million relating to guaranties for a separate loan on unpaid debts caused by Defendants bad acts and defaults (Cuy. Cty. Case No. 796353). Defendant's property in East Cleveland went into foreclosure and receivership (Cuy. Cty. Case No.7898290). These are all additional defaults, which make the Relator insecure in his position and allow him to take an immediate judgment under the note and settlement. As a result of numerous defaults by the Defendants, Relator obtained a cognovit judgment on October 2, 2013 signed by the Presiding Administrative Judge Nancy Fuerst (the "Judgment"). Shortly thereafter, Judge McMonagle ("Respondent") unilaterally vacated the Judgment of a separate Common Pleas Court Judge (Judge Fuerst) without a motion, hearing or any evidence.

Relator appealed to the Eighth District Court of Appeals. The Court of Appeals immediately reversed, **but did not remand** the decision to the trial court. See Exhibit "1." The Court of Appeals was disturbed by the admitted ex parte conduct by the Defendants' counsel and the trial court. **The Court of Appeals reversed, reinstating the judgment, but did not remand to the trial court.** The Court of Appeals issued a mandate that the trial court "carry this judgment into execution." Thus, the Court of Appeal's decision was final and controlling over the trial court.

After reversal, on June 24, 2014, Respondent stayed the superior Court of Appeal's judgment without a hearing, bond, or allowing Relator to file a Brief in Opposition. Pursuant to Local Rule 11 of the Cuyahoga County Court of Common Pleas, Relator had seven (7) days after service in which to file a brief in opposition to any motion. Accordingly, Relator had until at least June 25, 2014, in which to file a brief in opposition to the Motion to Stay. The trial court

issued the stay on June 24, 2014 without allowing Relator to respond¹. The trial court had no authority or jurisdiction to stay the decision of a superior court. The case was reversed, not remanded, and the trial court had no jurisdiction. The trial court's improper ultra vires actions have impaired and injured Relator and caused the filing of the instant action. Despite winning at trial and winning yet again on appeal, Relator is prohibited from collecting on his judgment and has no way to protect his rights.

During the pendency of this action, the Defendants (realizing that the case was concluded and the appeal was final) sought reconsideration and clarification from the 8th District Court of Appeals. See Motion attached hereto as Exhibit "2." The Defendants specifically requested that the Court of Appeals add remand language to its decision such that the trial court would have jurisdiction. The Court of Appeals refused to add remand language and denied Defendants' motion. See Exhibit "3." Clearly, the Court of Appeals intended to simply reverse and divest the trial court of any further jurisdiction due to the improper actions of the trial court.

As a result of the trial court's ex parte and illegal acts, Relator filed the present action seeking a writ of prohibition and procedendo. Relator has no adequate remedy at law and nowhere to turn, but through the filing of this action. As will be shown herein, the Supreme Court should grant the writ and deny Respondent's Motion to Dismiss.

II. LAW AND ARGUMENT

A. Court of Appeals Reversed, but did not Remand

The Court of Appeals reversed the decision of the trial court and entered judgment in favor of Relator and did not remand the case to the trial court. It is a well-established principle

¹ Relator filed a timely Brief in Opposition, but unbeknownst to Relator the trial court had already granted a stay.

that a court speaks only through its journal entries. State ex rel. Indus. Comm. v. Day, Judge, 136 Ohio St. 477 (1940); State ex rel. Curran v. Brookes, 142 Ohio St. 107 (1943). The language of the judgment in this case was clear and unequivocal, the judgment was reversed, but not remanded. As this Court knows, a case that is reversed on appeal, but not remanded, cannot be disturbed by the trial court. The trial court is divested of jurisdiction and has no ability to address the judgment. The Eighth District Court of Appeals has directly addressed this issue recently. In Edwards v. Lopez, 2013 -Ohio- 571, ¶ 13 (8th Dist.) the Court of Appeals held that:

...this court did not “remand” the matter for further proceedings, so jurisdiction was not returned to the trial court. Accordingly, the trial court was without jurisdiction to “remand” the matter to itself, and was without jurisdiction to “reconsider” the motion[.]

Absent an explicit remand, a trial court has no jurisdiction and “jurisdiction [is] not returned to the trial court.” Id.; see also Baldwin's Ohio Handbook Series, Ohio Appellate Practice, November 2013, Judge Mark P. Painter, Chapter 7 Consideration and Decision (emphasis added). The Ohio Supreme Court held that **“an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.”** Nolan v. Nolan, 11 Ohio St.3d 1, 5 (1984) (emphasis added). The Ohio Supreme Court has long held that once a matter is appealed the trial court cannot consider a 60(B) motion for relief from judgment. Howard v. Catholic Social Serv. of Cuyahoga Cty., 70 Ohio St.3d 141 (1994). A trial court is bound by the decision of the Court of Appeals and has no ability to impair that judgment. State ex rel. Potain v. Mathews, 59 Ohio St.2d 29 (1979); Enyart v. Columbus Metro. Area Comm. Action Org., 1996 WL 660918 (Ohio App. 10th Dist.). The trial court is acting in contravention of the law by staying a superior court’s judgment, issuing a stay with no bond, ignoring the superior court’s mandate, and allowing Defendants to improperly seek relief from judgment a year later.

Despite the fact that the case was reversed, but not remanded to the trial court, Respondent has continued to exercise jurisdiction over the matter and the Court of Appeal's judgment. Such conduct constitutes a usurpation of jurisdiction by Respondent. State of Ohio ex rel. Liquor Control Commission v. Barbuto, 1976 WL 188846 (Ohio App. 9th Dist.). The Respondent is acting ultra vires ignoring the mandate of the Court of Appeals. "[A] court of superior jurisdiction may grant a writ of prohibition to prevent the attempted exercise of ultra vires jurisdiction by a court of inferior jurisdiction. Where the proceedings are void ab initio, ultra vires jurisdiction is invoked and the writ will lie." Wisner v. Probate Court of Columbiana Cty., 145 Ohio St. 419, 422 (1945). As this Court is well aware, an inferior court has no authority to stay execution of a judgment from the Court of Appeals or any superior court. State ex rel. Potain v. Mathews, 59 Ohio St.2d 29 (1979); Enyart, 1996 WL 660918. **A stay of execution by a trial court of a superior court's decision is void as a matter of law.** See 2 Baldwin's Oh. Prac. Civ. Prac. Sec 62.2. The Constitution does not grant a court of common pleas jurisdiction to review a prior mandate of a court of appeals. The actions taken by Respondent are legally unauthorized. This action is legally unauthorized because in addition to lacking discretion to depart from a superior court's mandate, an inferior court also lacks jurisdiction to do so. State ex rel. TRW, Inc. v. Jaffe, 78 Ohio App.3d 411 (8th Dist. 1992).

Despite the clear precedent from this Supreme Court and the Eighth District Court of Appeals, the trial court has ignored the law and mandate from its superior court and stayed a judgment without a hearing or bond. The trial court is acting without authority or jurisdiction. Nolan, 11 Ohio St.3d at 5; Edwards, 2013 -Ohio- 571. When the Court of Appeals simply reverses, like the case at bar, the decision of the Court of Appeals is absolutely final. The trial court does not have jurisdiction and is bound by the decision of its superior court. This Court

held that “**an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case.**” Nolan, 11 Ohio St.3d at 5 (emphasis added). The trial court had no jurisdiction to stay the judgment of a superior court, stay the judgment without a bond, seek to vacate the judgment of a different common pleas court judge, or vacate the judgment in this case at all. The trial court’s actions have been void ab initio, as it has acted ultra vires and thus a writ of prohibition should immediately lie. Wisner, 145 Ohio St. at 422. Respondent’s continuing efforts to exercise *ultra vires* jurisdiction over the case mandates that a writ of prohibition and procedendo issue. State of Ohio ex rel. Kelley v. Junkin, 2009 -Ohio-2723 (8th Dist.).

B. Court of Appeals Refused to Add Remand Language when Requested by Defendants

It is readily apparent from his Motion to Dismiss that Respondent is unaware that the Defendants requested that the Eighth District Court of Appeals clarify the language in its judgment. After the Court of Appeals reversed, Defendants filed a motion requesting that the Court of Appeals add remand language. **The Court of Appeals refused ad stood by its out-right reversal.** See Exhibit “3.” Respondent seeks to parse the words of the original Court of Appeals’ decision and interpret intent that is not present in the actual words to create the appearance of jurisdiction for the trial court. In its brief, Respondent points to the language that the trial court shall take further actions “consistent² with this opinion.” **However, when the Defendants moved for the Court of Appeals to clarify its decision and state that it actually intended to remand, the Court of Appeals said no.** The Court of Appeals has now clearly stated – again – that it did not remand.

Respondent’s attempt to add non-existent words or intent into the judgment fails as a matter of law because the Defendants moved the Court of Appeals to add remand language and clarify its

² Additionally, how would it be consistent with the Court of Appeals’ judgment to again stay the judgment? The only consistent actions by the trial court would be allowing execution and collection – not prohibiting it.

language, but the Court of Appeals absolutely refused. Clearly, if the Court of Appeals had intended to remand the case to the trial court, the Court of Appeals would have done so when Defendants sought clarification. Similarly, if the Court of Appeals believed that there was a typo in its decision or vague wording in its decision, it would have clarified it as soon as Defendants raised this issue. The Court of Appeals refused to do so because it did not want to remand to the trial court due to the issues of ex parte communications by the trial court and the unusual behavior by the trial court in vacating another judge's judgment without evidence, testimony, a hearing, or even a written motion. The Court of Appeals stated during arguments that something "smells" about the conduct of the trial court, implying something underhanded had occurred. The Court of Appeals was disturbed and shocked that the trial court had vacated another Judge's order without a hearing, written motion or any evidence whatsoever. The Court of Appeals clearly intended to fix these illegal proceedings by reversing out-right, with no remand. This was the only way the Court of Appeals could insure that nothing else improper would occur. The trial court's improper actions sullied the matter and brought into question the integrity of the justice system. The Court of Appeals fixed the case once and for all by reversing outright. Notwithstanding the Court of Appeal's judgment, the trial court violated and ignored the judgment from its superior court calling into question the integrity of the Respondent's actions yet again.

The Respondent's reference to App. R. 12 and O'Neill v. Mayberry, 2009 -Ohio-1123 (6th Dist.), actually support Relator - not Respondent. The Court of Appeals reversed, it did not remand. There is no language in the decision that remands under App.R. 12(D). Similarly, in O'Neill, the court of appeals reversed in part and affirmed in part. Clearly, in that case, the Sixth District intended to remand and it made a simple, technical mistake. Otherwise the partial reversal and affirmance language made no sense. That is not the case here because there was no partial

affirmance or partial reversal, just an outright reversal. When Defendants requested that the Eighth District clarify its judgment and add remand language the Court of Appeals refused. Thus, this case is quite distinct and inapposite from O'Neill. Relator is clearly entitled to a writ of prohibition in his favor protecting him from the illegal conduct by Respondent.

Respondent claims that if the Court of Appeals truly believed Niederst was entitled to have judgment rendered in his favor, the Court of Appeals could have reversed the trial court and rendered judgment that the trial court should have rendered (which is authorized by App. R.12(B)). See Motion, p. 7. But that is exactly what the Eighth District did when it reversed Respondent's decision granting the 60(B) motion. By doing so, Niederst's judgment was reinstated. There was nothing more for the Eighth District to do.

Not only did the Court of Appeals refuse to remand to the trial court and refuse to add remand language, the Court of Appeals issued a mandate that the trial court "carry the judgment into execution" See Exhibit "1." **This Court has long held that following a superior court's mandate on appeal that the trial court "carry the judgment into execution," the trial court lacks authority to exercise any continued jurisdiction in and cannot consider a motion for a conference to address a party's compliance with court orders, where the Supreme Court did not remand the cause for further proceedings.** State ex rel. State v. Lewis, 99 Ohio St.3d 97 (2003); R.C. § 2505.39. These are the exact facts and procedural history as the case at bar. The Court of Appeals reversed, but did not remand and ordered the trial court to "carry this judgment into execution." The trial court has no authority or jurisdiction to ignore the mandate from the Court of Appeals and hear any motion by Defendants. Relator requests that this Court issue an immediate writ to protect Relator from further interference by Respondent.

C. No Bond

To add insult to injury, the trial court granted a stay (impairing Relator's judgment) without a bond. R.C. 2505.09; App. R. 7. R.C. 2505.09 states that an appeal does not operate as a stay of execution until a supersedeas bond has been posted. The Ohio Supreme Court and appellate courts have ruled that an appeal from the order of a trial court cannot function as a stay of proceedings absent a bond. It is well-established that unless a stay has been obtained, a trial court retains jurisdiction to enforce a final judgment and to initiate any proceedings in support of that judgment. Strah v. Lake Cty. Humane Soc., 90 Ohio App.3d 822, 836, 631 N.E.2d 165 (11th Dist. 1993), citing State ex rel. Klein v. Chorpening, 6 Ohio St.3d 3, 450 N.E.2d 1161 (1983). **To seek a stay of a judgment, a bond must be posted.** Civ. R. 62; R.C. 2505.09; App. R. 7, Sup. Ct R. 4. **The bond is mandatory.** R.C. 2505.09 states that an appeal does not operate as a stay of execution until a supersedeas bond has been posted. **The Ohio Supreme Court and appellate courts have ruled that an appeal from the order of a trial court cannot function as a stay of proceedings absent a bond.** Therefore, there is no stay without a bond as matter of law. Civ. R. 62; App. R. 7, Sup. Ct. R. 4. Here, the trial court not only ignored the mandate of the Court of Appeals, but it illegally stayed a superior court's judgment without a bond.

Bernard Niederst's ability to collect on his judgment is in jeopardy due to the repeated delays and actions by the Respondent. The Defendants and their properties have been subjected to a series of receiverships and foreclosures. Additionally, a \$15 million lawsuit was filed against Relator and some of the Defendants for bad boy violations of a guaranty agreement caused by Defendants' conduct. All these actions occurred after the settlement and note were signed and constituted defaults entitling Relator to judgment. With each passing day, it becomes apparent that it is merely a matter of time before the Defendants' house of cards collapses

making Relator's judgment worthless. Relator fears a series of further lawsuits against Defendants and their bankruptcy. Time is of the essence for Relator and he has no adequate remedy at law. Where can Relator go to correct this matter? What recourse does he have? What is he to do, appeal again and win only to have the trial court ignore the decision again? He has already won at trial, but the Respondent ignored the judgment. He already won on appeal, but the Respondent ignored the judgment of its superior court. Without a writ from this Supreme Court, Relator will be forever stuck in procedural limbo (having won a meaningless victory, but being unable to recover on his judgment). Relator's judgment becomes meaningless, ineffective and nothing more than a piece of paper. Notwithstanding the judgment in his favor, the Relator is being prejudiced and injured by the trial court's illegal conduct. The trial court has no jurisdiction in this matter. The trial court has no authority to stay, impair or modify a superior court's judgment. This matter is over and the trial court's actions are making it such that Relator had no adequate remedy at law. Relator requests the issuance of a writ in his favor.

D. Wrong Judge

In addition to the fact that the court of common pleas has no jurisdiction in this case, Judge McMonagle was also the incorrect judge to hear the matter and had no jurisdiction over the original underlying judgment. Judge McMonagle did not enter the judgment at issue - the presiding administrative judge, Judge Nancy Fuerst, entered the judgment. Judge McMonagle had no authority or ability to stay a judgment from another judge at the same level. Respondent is not the Court of Appeals or the Supreme Court and he has no ability to modify or stay the judgment from another judge at his same court level. One judge from the court of common pleas has no ability or authority to stay another judge's judgment.

E. Contrary to Respondent's Arguments, the Relator is Entitled to a Writ

A writ of prohibition is appropriate to require lower courts to comply with the mandate of a superior court. State ex rel. Dannaher v. Crawford, 78 Ohio St.3d 391, 394 (1997). In this matter, the Respondent has blatantly ignored and disobeyed the mandate of its superior court. Moreover, a writ of prohibition is appropriate under these circumstances because the Ohio Constitution does not confer jurisdiction on Respondent to even review a mandate of a superior court. State ex rel. Crandall, Pheils & Wisniewski v. DeCessna, 73 Ohio St.3d 180, 182 (1995). By staying the judgment of the Court of Appeals, Respondent is doing just that. Similarly, a writ of procedendo is also appropriate "when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment." State ex rel. Weiss v. Hoover, 84 Ohio St.3d 530, 532, 705 N.E.2d 1227 (1999). Procedendo is a proper remedy in any case in which a court has jurisdiction, but refuses to exercise it. State ex rel. Timson v. Latshutka, 1997 WL 65536 (Ohio App. 10th Dist.). A writ of procedendo will issue requiring a judge to proceed to final judgment if the judge erroneously stayed the proceeding. See Crandall, Pheils & Wisniewski, 73 Ohio St.3d at 184. A court of superior jurisdiction may compel the inferior tribunal to proceed to judgment. State ex rel. Sawicki v. Zmuda, 2008 -Ohio- 2479, ¶ 3 (6th Dist.), citing State ex rel. Utley v. Abruzzo, 17 Ohio St.3d 203, 204 (1985).

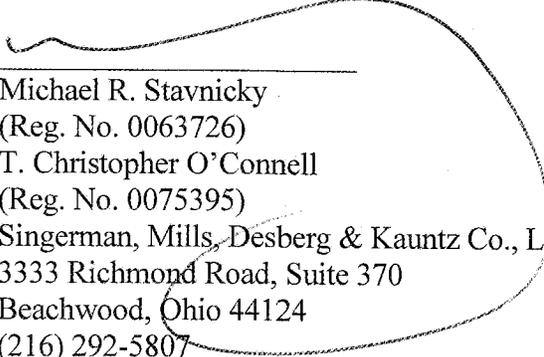
In this matter, the Respondent has delayed the judgment in favor of Relator. Respondent's conduct is preventing Relator from recovering on his judgment in violation of the law. Niederst has no adequate remedy at law based on the fact that Respondent continues to exercise jurisdiction in direct conflict with the law of Ohio and in direct conflict with the mandate of the Eighth District Court of Appeals. Niederst has no adequate remedy because notwithstanding appealing and prevailing in the Court of Appeals, Respondent will not obey the

superior court's ruling. Niederst has already appealed and won, but he still cannot protect his rights due to the unauthorized acts of the Respondent. Relator is entitled to a writ of prohibition preventing Respondent from interfering with his judgment and a writ of procedendo compelling the trial court carry the judgment to execution without delay.

III. CONCLUSION

As set forth herein above, Bernard Niederst requests that this Court deny Respondent's Motion to Dismiss and grant the writs in favor Relator and against Respondent.

Respectfully submitted,

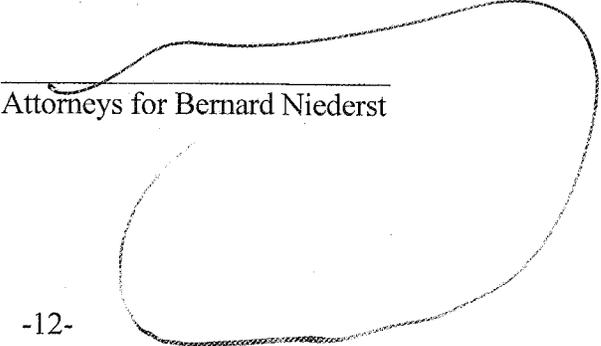


Michael R. Stavnicky
(Reg. No. 0063726)
T. Christopher O'Connell
(Reg. No. 0075395)
Singerman, Mills, Desberg & Kauntz Co., L.P.A.
3333 Richmond Road, Suite 370
Beachwood, Ohio 44124
(216) 292-5807
mstavnicky@smdklaw.com
coconnell@smdklaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served this 4 day of August 2014, via U.S. regular mail upon the following parties:

Timothy McGinty
Justice Center Bld, Floor 8th and 9th
1200 Ontario Street
Cleveland, Ohio 44113



Attorneys for Bernard Niederst

JUN X 5 2014

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100616

BERNARD NIEDERST

PLAINTIFF-APPELLANT

vs.

DAVID B. NIEDERST, ET AL.

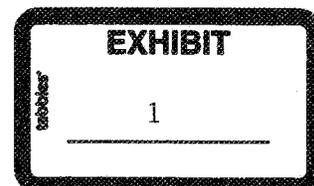
DEFENDANTS-APPELLEES

**JUDGMENT:
REVERSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-814870

BEFORE: Stewart, J., Celebrezze, P.J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: June 5, 2014



ATTORNEYS FOR APPELLANT

Michael R. Stavnicky
T. Christopher O'Connell
Singerman, Mills, Desberg, & Kauntz Co., L.P.A.
3333 Richmond Road, Suite 370
Beachwood, OH 44122

ATTORNEY FOR APPELLEES

Jon J. Pinney
Kohrman Jackson & Krantz P.L.L.
One Cleveland Center
1375 East Ninth Street, 20th Floor
Cleveland, OH 44114

FILED AND JOURNALIZED
PER APP.R. 22(C)

JUN X 5 2014

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By M. Jacobs Deputy

COPIES MAILED TO COUNSEL FOR
ALL PARTIES.-COSTS TAXED

MELODY J. STEWART, J.:

{¶1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1. Plaintiff-appellant Bernard Niederst obtained a cognovit judgment in the amount of \$750,000 against his brother and business partner, defendant David Niederst and various companies apparently associated with him. Seven days later, the court issued a journal entry indicating that it held a “hearing” and, as a result of the hearing, vacated Bernard’s judgment. Bernard appeals, claiming that the court acted improperly by, among other things, vacating the cognovit judgment because there was no motion for relief from judgment before the court.

{¶2} It is a “bedrock principle of appellate practice in Ohio * * * that an appeals court is limited to the record of the proceedings at trial.” *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, ¶ 13. The record in this appeal is sparse, to say the least. As relevant to this appeal, it consists only of the cognovit complaint, the cognovit judgment, and a journal entry stating:

On 10/02/2013, Plaintiff filed a cognovit complaint and judgment was rendered in favor of Plaintiff by confession in the amount of \$750,000. A hearing was held on 10/09/2013. As a result of the hearing, the 10/02/2013 judgment in favor of Plaintiff is hereby vacated. A hearing is scheduled for 10/18/2013, at 2:30 p.m. on plaintiff’s oral motion to reconsider. Notice issued.

{¶3} The record does not contain a motion to vacate the cognovit judgment and David does not deny that he did not file a motion for relief from judgment. He argues, without citation to legal precedent, that the court could act on its own initiative to vacate the cognovit judgment. In fact, we have consistently held that “[a] trial court has no authority to sua sponte vacate its own final orders” because “Civ.R. 60(B) provides the exclusive means for a trial court to vacate a final judgment.” *CAC Home Loans Servicing, LP v. Henderson*, 8th Dist. Cuyahoga No. 98745, 2013-Ohio-275, ¶ 10 (citations omitted). With no motion for relief from judgment filed in conformity with Civ.R. 60(B), the court had no authority to act sua sponte to vacate the cognovit judgment. *See also Schmahl v. Powers*, 8th Dist. Cuyahoga No. 99115, 2013-Ohio-3241, ¶ 13. Our disposition of this appeal is thus dictated by the sparse record on appeal.

{¶4} David appears to suggest that the court considered an oral motion for relief from judgment by asserting that the parties met in chambers with the trial judge and engaged in a “vigorous debate” on the merits of the cognovit judgment. *See Appellee’s Brief*, fn. 1. The Ohio Supreme Court has suggested in dicta that “[n]o procedure is provided in the Civil Rules for the securing of relief from a judgment under Civ.R. 60(B) by means of an oral motion.” *Lamar v. Marbury*, 69 Ohio St.2d 274, 276, 431 N.E.2d 102 (1982), fn. 4. Even if dicta, the Supreme Court’s observations are well-founded. Civ.R. 60(B) states that an application for relief from judgment shall be made by motion as prescribed by the Rules of

Civil Procedure. Civ.R. 7(B)(1) requires motions not made during a hearing or trial to be submitted "in writing." We therefore agree with *Lamar* that it is "self-evident" that a trial court cannot grant relief from a final judgment on an oral motion. *Lamar, supra*. While the record indicates that the court held a "hearing," we do not know what transpired at that "hearing." With the absence of any written motion for relief from judgment or any indication by the court that David actually submitted a motion for relief from judgment, we have no choice but to sustain the first assignment of error. The remaining three assignments of error are moot.

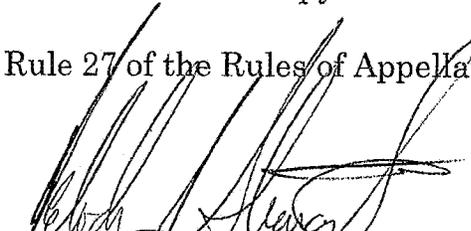
{¶5} This cause is reversed to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellees his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



MELODY J. STEWART, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and
SEAN C. GALLAGHER, J., CONCUR

The State of Ohio, }
Cuyahoga County. } ss.

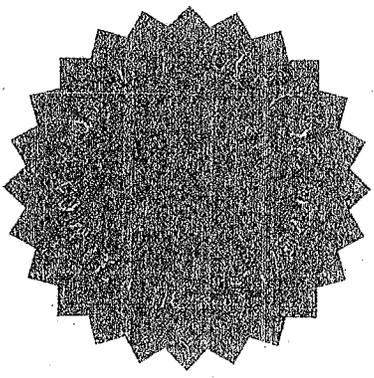
I, ANDREA F. ROCCO, Clerk of the Court of

Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing is taken and copied from the Journal entry dated on 6/5/14 CA 100616 of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal entry dated on 6/5/14 CA 100616 and that the same is correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 6 day of June A.D. 20 14

ANDREA F. ROCCO, Clerk of Courts

By [Signature] Deputy Clerk



IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO
CUYAHOGA COUNTY, OHIO

CASE NO.: CA-13-100616

Appeal from the Cuyahoga County Court of Common Pleas
Case No. 814870

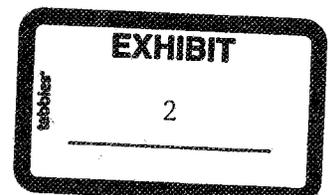
BERNARD NIEDERST
Appellant/Plaintiff,

vs.

DAVID B. NIEDERST, et al.
Appellees/Defendants.

APPELLEES' MOTION FOR CLARIFICATION

Jon J. Pinney (0072761)
Jon T. Hyman (0068812)
Justine Lara Konicki (0086277)
Kohrman Jackson & Krantz PLL
One Cleveland Center, 20th Floor
1375 East Ninth Street
Cleveland, OH 44114
Phone: 216-696-8700
Fax: 216-621-6536
jjp@kjk.com
jth@kjk.com
jlk@kjk.com
Attorneys for Appellees/Defendants
David B. Niederst, et al.



Appellees/Defendants David B. Niederst, Michael D. Niederst, Niederst Management, Ltd., Niederst Management Group, Ltd., Niederst Management Group II, Ltd., Niederst Management Group III, Ltd., Niederst Management Group IV, Ltd., Henninger Apartments, LLC, Niederst Older River Yacht Club, LLC, Niederst Wyoga Lake, LLC, Niederst Richmond Park, LLC, Niederst Blossom Village, LLC, Frv-Elyria, LLC, Evergreen Residential Partners, LLC, Niederst Parma Woods Apartments, LLC, Sunset Townhouses, LLC, Niederst Bent Tree, LLC, Niederst Indian Hills, LLC, Niederst Erie Shore, LLC, 12834-12836 State Rd, LLC, Niederst Lake Park Towers, LLC, Niederst Richmond Hills, LLC, Niederst Forest Ridge, LLC, Westbury Holdings, LLC, and 9800 Tower, LLC (individually, a “*Niederst Defendant*” and collectively, the “*Niederst Defendants*”), by and through counsel, hereby move this Court for an order clarifying its June 5, 2014 decision in the above-captioned matter.

The Niederst Defendants respectfully request that this Court clarify that its opinion in *Niederst v. Niederst*, 8th Dist. No. 100616, 2014-Ohio-2406, operated as a reversal and remand of the action. The Niederst Defendants request this relief out of abundance of caution and in order to conserve judicial resources because the Court’s opinion has created confusion among the parties. Specifically relying on this confusion, Plaintiff Bernard Niederst (“*Plaintiff*”) has filed a Writ of Prohibition and Procedendo with the Ohio Supreme Court.

I. Procedural History

On October 2, 2013, Plaintiff filed his Complaint in the trial court seeking a cognovit judgment and judgment was subsequently entered against the Niederst Defendants. The following week, on October 9, 2013, after hearing the Niederst

Defendants' oral motion for relief from judgment, the trial court granted relief from the cognovit judgment, vacating it in its entirety. Plaintiff appealed the trial court's order to this Court.

On June 5, 2014, this Court issued its decision in the above-captioned matter styled *Niederst v. Niederst*, 8th Dist. No. 100616, 2014-Ohio-2406. In its opinion, the Court found error with the trial court having vacated judgment without a written Civ.R. 60(B) Motion and held that "with the absence of any written motion for relief from judgment" it had "no choice but to sustain the first assignment of error." *Id.* at ¶4. In Paragraph 5 of its opinion, this Court specifically stated:

This cause is reversed to the trial court for further proceedings consistent with this opinion.

Niederst v. Niederst at ¶ 5 (emphasis added).

As a result of this Court's opinion, the Niederst Defendants filed a written Motion for Relief from Judgment with the trial court on June 11, 2014 and a Motion to Stay Judgment pursuant to Civ.R. 60(B) on June 18, 2014. On June 24, 2014, the trial court granted the Niederst Defendants' Motion to Stay Judgment and subsequently set a hearing on the Civ.R. 60(B) Motion for Monday July 7, 2014.

On or about July 3, 2014, and without providing notice to the undersigned, Plaintiff filed a Complaint for a Writ of Prohibition and Procedendo with the Ohio Supreme Court (the "*Writ*"). Plaintiff filed the Writ seeking "a writ of prohibition preventing the Honorable Judge Richard McMonagle, Judge of the Cuyahoga County Court of Common Pleas, from impairing the judgment of a superior court and continuing to exercise jurisdiction in a manner which contradicts the mandate of the Eighth District Court of Appeals." In essence, Plaintiff argues that because this Court's

opinion in *Niederst v. Niederst* did not contain the express word “remand” in Paragraph 5, the case was not reversed and remanded to the trial court, despite the inclusion of the language “for further proceedings consistent with [the this Court’s] opinion.” See *Niederst* at ¶ 5. On July 11, 2014, and due to the controversy over this Court’s opinion, the Niederst Defendants filed a Notice of Appeal and Motion to Stay Judgment with the Ohio Supreme Court.

In an effort to save judicial resources and obviate the need for the Niederst Defendants’ direct appeal and Plaintiff’s Writ, the Niederst Defendants respectfully request that this Court issue an order clarifying its opinion and expressly state that this action was reversed ***and remanded*** to the trial court for further proceedings, which is consistent with the plain text in its original opinion and the narrow procedural issue upon which the Court ruled.

II. LAW & ARGUMENT

The Niederst Defendants request that the Court clarify the fifth paragraph of its opinion, which provides “[t]his cause is reversed to the trial court for further proceedings consistent with this opinion” and request that the Court amend its opinion to particularly provide that this action was and is remanded to the trial court for further proceedings. The Niederst Defendants request this relief only out of abundance of caution and to conserve judicial resources. Indeed, a review of decisions from the Court make clear that the language employed in paragraph five of the *Niederst v. Niederst* decision already operated as a reverse and remand. However, clarification from the Court will prevent the need for the Writ and for the direct appeal, as the trial court will then be free to preside over the case. Specifically, two recent opinions from

the Court used identical language to that in *Niederst*: (1) *State v. Cornick*, 8th Dist. No. 99609, 2014-Ohio-2049; and (2) *In re D.S.*, 8th Dist. No. 99600, 2013-Ohio-5740.

In re D.S., 2013-Ohio-5740, is especially instructive. In *In re D.S.*, a juvenile defendant was charged with carrying a concealed weapon and discharging a firearm into a habitation. The defendant argued the police lacked probable cause to stop and frisk him and filed a motion to suppress the evidence of the rifle, which the trial court granted. The Court reversed the trial court's ruling that granted the defendant's motion to suppress evidence. In reversing and remanding the case to the trial court, the Court used language identical to that in *Niederst*—" [t]his cause is reversed to the trial court for further proceedings consistent with this opinion." *Id.* at ¶ 18. If the Court's opinion in *In Re D.S.* did not operate as a reverse *and remand* to the trial court then the case would be in limbo—the trial court's ruling on the motion to suppress, and the state's appeal, occurred prior to trial and there was no final judgment.

Here, like in *D.S.*, the Court's order that "[t]his cause is reversed to the trial court for further proceedings consistent with this opinion," operated to remand the case to the trial court. However, clarification from the Court that it employed such language to remand the case will allow the Supreme Court to easily rule on the Writ and obviate the need for the *Niederst* Defendants' direct appeal.

III. CONCLUSION

In an effort to conserve judicial resources, and avoid a situation where the Ohio Supreme Court must attempt to discern the true intent of this Court, the *Niederst* Defendants respectfully request that this Court issue an Order that clarifies the Court's

opinion and that provides that this cause was reversed and remanded to the trial court for further proceedings consistent with its original opinion.

Respectfully Submitted,

KOHRMAN JACKSON & KRANTZ PLL

/s/ Jon J. Pinney

JON J. PINNEY (0072761)
JON T. HYMAN (0068812)
JUSTINE LARA KONICKI (0086277)
One Cleveland Center, 20th Floor
1375 East Ninth Street
Cleveland, Ohio 44114-1793
Telephone: (216) 696-8700
Facsimile: (216) 621-6536
Email: jjp@kjk.com; jth@kjk.com; jlk@kjk.com

Counsel for Niederst Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served via this Court's
electronic docketing system this 14th day of July, 2014 to the following:

Michael Stavnicky
T. Christopher O'Connell
Singerman, Mills, Desberg & Kauntz Co., L.P.A.
3333 Richmond Road, Suite 370
Beachwood, Ohio 44122
mstavnicky@smdklaw.com
coconnell@smdklaw.com

/s/ Jon J. Pinney
Jon J. Pinney

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

BERNARD NIEDERST

Appellant

COA NO.
100616

LOWER COURT NO.
CV-13-814870

COMMON PLEAS COURT

-vs-

DAVID B. NIEDERST, ET AL.

Appellee

MOTION NO. 476723

Date 07/23/14

Journal Entry

Motion by appellee for clarification is denied.

RECEIVED FOR FILING

JUL 23 2014

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By *[Signature]* Deputy



Presiding Judge FRANK D. CELEBREZZE, JR.,
Concurs

Judge SEAN C. GALLAGHER, Concurs

[Signature]
MELODY J. STEWART
Judge

EXHIBIT

3

tabbica