

[Cite as *Jacobs v. Acacia Chattanooga Vehicle Auction, Inc.*, 2011-Ohio-3706.]

THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

Alexis Ann Jacobs,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 10AP-1071
v.	:	(C.P.C. No. 10CVH-10-14740)
	:	
Acacia Chattanooga Vehicle Auction, Inc.	:	(REGULAR CALENDAR)
et al.,	:	
	:	
Defendants-Appellants.	:	
	:	

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D E C I S I O N

Rendered on July 28, 2011

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*Schottenstein Zox & Dunn Co., LPA, Alan G. Starkoff and Katherine G. Manghillis, for appellee.*

*Thompson Hine LLP, John B. Kofp and Scott A. Campbell; Robin M. Wilson, for appellants.*

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APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendants-appellants, Acacia Chattanooga Vehicle Auction, Inc., Acacia Automotive, Inc., and Steven L. Sample, appeal from a judgment of the Franklin County Court of Common Pleas ("trial court") entering cognovit judgment in favor of plaintiff-appellee, Alexis Ann Jacobs. Defendants assign a single error:

The Court of Common Pleas erred in entering judgment against Defendant-Appellant Acacia Chattanooga Vehicle Auction, Inc. because the case had been removed to federal

court and the Court of Common Pleas was divested of jurisdiction.

Because the trial court lacked jurisdiction to enter cognovit judgment after defendants properly removed the action to federal court, we vacate the trial court's judgment.

### **I. Facts and Procedural History**

{¶2} On October 7, 2010, plaintiff filed with the trial court a complaint against defendants premised on a cognovit note and cognovit guaranty. Plaintiff attached to the complaint the note evidencing the loan between plaintiff and Acacia Chattanooga, as well as the guaranty agreements Acacia Automotive and Sample executed. The same day, an attorney appeared to answer and confess judgment against defendants.

{¶3} A series of events occurred on October 12, 2010, the exact timing of which is material to this case. At 10:24 a.m., defendants filed a notice of removal in the United States District Court for the Southern District of Ohio, Eastern Division, based on the parties' diversity of citizenship. At 10:54 a.m., defendants filed in the trial court a notice that they filed a notice of removal to the federal court. Lastly, at 11:07 a.m., the trial court journalized what purports to be a final judgment entry against only Acacia Chattanooga in the amount of \$725,451.81, plus interest and court costs. Next to the judge's signature in handwriting is the date "10/8/10."

{¶4} Defendants timely appealed on November 12, 2010, seeking that we vacate the trial court's judgment entered after the case was removed to federal court. Plaintiff responded with a December 2, 2010 motion to dismiss, arguing that because the trial court matter was removed to the federal court, this court lacks subject matter jurisdiction to address defendants' appeal.

{¶5} While the motion and appeal were pending, the federal court issued an opinion and order on February 23, 2011, denying plaintiff's motion to remand and granting plaintiff judgment on the cognovit note in the amount of \$831,489.66, plus interest and costs. At the same time, the federal court allowed defendants the opportunity to file a Civ.R. 60(B) motion seeking to vacate the federal court's cognovit judgment for plaintiff. Pertinent to the issue raised in defendants' appeal, the federal court opinion and order also determined the trial court no longer had subject matter jurisdiction over the case at the time it docketed its judgment, so its "purported October 12, 2010 judgment entry against Acacia Chattanooga is null and void." (Opinion and Order, 11.) The federal court did not expressly vacate the trial court's October 12, 2010 Judgment Entry.

## **II. Assignment of Error and Motion to Dismiss - Jurisdiction**

{¶6} Plaintiff's motion to dismiss and defendants' assignment of error are interrelated. Central to the disposition of both matters is the question of jurisdiction. Defendants' assignment of error asks us to consider the trial court's jurisdiction to enter a judgment after the case was removed to federal court, while plaintiff's motion to dismiss focuses on this court's jurisdiction to review the trial court proceedings after defendants removed the case to federal court.

{¶7} "A basic removal principle is that once the provisions of Section 1446(d), Title 28, U.S. Code have been met, the state court is divested of jurisdiction to proceed further until there has been a remand by the federal court." *Borkowski v. Abood*, 117 Ohio St.3d 347, 2008-Ohio-857, ¶12, citing *Yarnevic v. Brink's, Inc.* (C.A.4, 1996), 102 F.3d 753, 754; *Maseda v. Honda Motor Co., Ltd.* (C.A.11, 1988), 861 F.2d 1248, 1254. "As a result, any subsequent state court proceedings are without effect even if the federal court

later determines that removal was not proper." *Id.*, citing *S. Carolina v. Moore* (C.A.S.C. 1971), 447 F.2d 1067, 1073. A properly filed notice of removal in the state court thus "immediately strips the state court of its jurisdiction." *Nyamusevya v. Medical Mut. of Ohio*, 10th Dist. No. 02AP-769, 2003-Ohio-3335, ¶24, quoting *In re Diet Drugs* (C.A.3, 2002), 282 F.3d 220, 232, fn.6, quoting *Yarnevic* at 754.

{¶8} Acknowledging those principles of law, plaintiff presents alternate arguments. Plaintiff initially contends this court lacks jurisdiction to review the trial court proceedings following removal to federal court, as plaintiff interprets 28 U.S.C. 1446(d) to mean both the state trial and appellate courts are divested of jurisdiction to proceed further. Alternatively, plaintiff suggests the trial court's October 12, 2010 judgment entry is a valid final judgment because the judge signed the entry prior to removal to federal court. We address plaintiff's arguments in reverse order.

*A. Trial Court's October 12, 2010 Judgment Entry Is Not Valid*

{¶9} Plaintiff suggests defendants improperly attempted to remove the case to federal court after the trial court rendered a final judgment. Plaintiff's argument lacks merit.

{¶10} 28 U.S.C. 1446(d) provides that "[p]romptly after the filing of such notice of removal of a civil action" in the federal court, "the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded." Both federal courts and Ohio courts interpreting federal law consistently conclude the state court lacks jurisdiction to proceed any further from the moment the notice of removal is filed in the state court, provided the

removing party complies with the other requirements of the removal statute. See *Borkowski v. Borkowski*, 6th Dist. No. F-04-020, 2005-Ohio-2212, ¶14, citing *Moore* at 1073; *Howes v. Childers* (D.C.Ky. 1977), 426 F.Supp. 358; *Shunk v. Shunk Mfg. Co.* (1945), 75 Ohio App. 253, 256.

{¶11} Here, defendants filed with the trial court on October 12, 2010 at 10:54 a.m. their notice advising that they filed a notice of removal to the federal court. The trial court did not enter its judgment until 11:07 a.m. that day. Application of 28 U.S.C. 1446(d) suggests the trial court at that time lacked jurisdiction to journalize a judgment. Plaintiff, however, contends that because the trial court signed the judgment entry on October 8, 2010 before defendants filed the notice of removal, 28 U.S.C. 1446(d) does not deprive the trial court of jurisdiction to journalize the entry of judgment, a task plaintiff asserts is purely ministerial. See *Pebble Creek Homes, LLC v. Upstream Images, LLC* (D.Utah, 2007), 547 F.Supp.2d 1214, 1218 (concluding a state court order was valid even though it was journalized after removal pursuant to 28 U.S.C. 1446(d) because the entry of the order upon the court's journal "was simply a ministerial act that did not involve further proceedings within the meaning of the federal removal statute").

{¶12} Defendants respond by citing Civ.R. 58(A) which requires a "judgment to be prepared" following a decision, since a judgment is effective only when the clerk enters it upon the journal. *Englert v. Nutritional Sciences, L.L.C.*, 10th Dist. No. 07AP-305, 2007-Ohio-5159, ¶6. Noting "[i]t is axiomatic that a court speaks only through its journal," defendants assert that even if the trial court signed the judgment entry on October 8, 2010, its failure to enter the judgment on the journal before defendants filed their notice of

removal deprived the trial court of jurisdiction to make that decision a valid, journalized judgment. *Id.*, citing *Torres v. Sears, Roebuck & Co.* (1980), 68 Ohio App.2d 87, 89.

{¶13} Plaintiff's reliance on *Pebble Creek Homes* is misplaced, as the Utah District Court decided the case on the basis that the trial judge's entry, following a hearing where the judge ruled from the bench on the record two weeks prior to removal, was a ministerial act. *Pebble Creek Homes* at 1218. Contrary to *Pebble Creek Homes*, this court has rejected an argument that "journalization of the court's entry [is] a mere formality." *State ex rel. Gen. Motors Corp. v. Indus. Comm.*, 159 Ohio App.3d 644, 2005-Ohio-356, ¶8 (concluding a trial court judge's decision and entry signed before the judge left office but docketed after the judge left office was void).

{¶14} When we apply the well-established general rule that a court speaks only through its journal, plaintiff's argument fails. See *id.* at ¶8, citing *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085. See also *San Filippo v. San Filippo* (1991), 81 Ohio App.3d 111. Because the trial court did not journalize its judgment entry until after defendants filed the notice of removal in federal court and their notice of such in the trial court, the trial court lacked jurisdiction to enter judgment for plaintiff on the cognovit note. Accordingly, the trial court's October 12, 2010 judgment entry is void, the same conclusion the federal court reached in its February 23, 2011 order.

#### B. Standing

{¶15} Plaintiff further argues in her motion to dismiss that only Acacia Chattanooga, as the debtor defendant, has standing to appeal from the trial court's October 12, 2010 judgment entry since the trial court only rendered judgment against Acacia Chattanooga. Acacia Automotive and Sample, the guarantor defendants, assert

they also have standing to appeal because the trial court's October 12, 2010 judgment entry is prejudicial to their rights as guarantors of Acacia Chattanooga's debt.

{¶16} Generally, a party does not have standing to argue issues affecting another person. Even so, "an appellant may 'complain of an error committed' " against another party " 'when the error is prejudicial to the rights of the appellant.' " *Benjamin v. Ernst & Young, L.L.P.*, 167 Ohio App.3d 350, 2006-Ohio-2739, ¶4, quoting *In re Smith* (1991), 77 Ohio App.3d 1, 13. In *Benjamin*, this court determined that Ernst & Young had standing to bring the appeal where, even though the trial court's decision did not determine the claims against Ernst & Young, the trial court's decision would have "potential res judicata effect on [Ernst & Young's] contentions." Id. Defendants' appeal is analogous, especially where Acacia Automotive and Sample guaranteed the debt of Acacia Chattanooga: any judgment adverse to Acacia Chattanooga would adversely affect the interests of the guarantor defendants. All defendants have standing to bring this appeal. See *State ex rel. Gabriel v. Youngstown*, 75 Ohio St.3d 618, 620, 1996-Ohio-445.

### C. Direct Appeal

{¶17} Lastly, plaintiff asserts in her motion to dismiss that defendants cannot challenge a cognovit judgment in a direct appeal but must pursue relief under Civ.R. 60(B).

{¶18} While Civ.R. 60(B) relief is "often particularly appropriate in matters concerning cognovit judgments due to the limited nature of the record of proceedings ordinarily associated with cognovit judgments," a direct appeal can still be the proper method to challenge a cognovit judgment where the substance of the appeal is not dependent on a record of proceedings. *Heartland Bank v. 4060 Sullivant, Ltd.*, 10th Dist.

No. 08AP-226, 2008-Ohio-5495, ¶5. See also *Classic Funding, LLC v. Louis Burgos, LLC*, 8th Dist. No. 80844, 2002-Ohio-6047, ¶8-9 (concluding an appellate court can overturn a cognovit judgment on direct appeal where "the judgment is void for lack of subject matter jurisdiction" even though the defendant did not pursue relief under Civ.R. 60(B) in attempting to establish the note was unconscionable). Because defendants' sole assignment of error concerns the trial court's subject matter jurisdiction to render a judgment, direct appeal was an appropriate avenue of relief.

*D. Appellate Jurisdiction to Review Improper Exercise of Trial Court Jurisdiction*

{¶19} Having determined the trial court's October 12, 2010 judgment entry purporting to grant cognovit judgment in favor of plaintiff is void, the issue reduces to how this court should proceed to dispose of the case. Plaintiff asks us to dismiss the appeal, asserting that if removal to federal court operates to divest the trial court of jurisdiction, it also operates to divest this court of jurisdiction. Defendants, on the other hand, contend nothing in 28 U.S.C. 1446 operates to deprive this court of the jurisdiction necessary to review the trial court's improper exercise of jurisdiction.

{¶20} Plaintiff relies on *Ledet v. Guilliot* (La.App. 1989), 548 So.2d 43, for the proposition that a state appellate court must dismiss an appeal from a case properly removed to federal court. Plaintiff further asserts the trial court's October 12, 2010 judgment entry remains binding until the federal court formally sets aside the judgment. See *Chaz Constr., LLC v. Codell* (C.A.6, 2005), 137 Fed.Appx. 735, 743 (holding that because the federal court, in removal cases, "take[s] up the case where the State court left it off," any orders issued by the state court prior to removal "remain binding on the parties until formally set aside by the district court").

{¶21} Although plaintiff relies on a case from Louisiana that does not substantially analyze the interplay of 28 U.S.C. 1446 and state appellate court jurisdiction, we ordinarily would agree with the general proposition that this court should dismiss an appeal from a case properly removed to federal court. We, however, are not being asked to review the merits of the trial court's underlying decision. Instead, the appeal presents a jurisdictional matter. The Supreme Court of Ohio determined an appellate court acts properly in reversing a state trial court's judgment where the trial court rendered judgment after the defendant filed his notice of removal with the state trial court pursuant to 28 U.S.C. 1446(d). *Abood* at ¶13 (concluding that, after proper filing of notice of removal, the trial judge "was required to cease [the] eviction proceedings until the action was remanded by the federal court," so "the appellate court properly reversed [the trial judge's] order" rendered after the defendant filed his notice of removal).

{¶22} Pursuant to *Abood*, an appellate court retains jurisdiction in this specific situation to reverse and vacate an entry of the trial court where the trial court purported to act following a properly effected removal to federal court, a conclusion consistent with the federal court's determination that the trial court's judgment was null and void. See also *Master Equip., Inc. v. Home Ins. Co.* (D.C.Pa. 1972), 342 F.Supp. 549 (concluding that where state court purported to enter default judgment but case had been properly removed to federal court before state court entered judgment, 28 U.S.C. 1446 does not prevent the state court from "act[ing] to correct its own records, i.e. strike the default judgment" because "[t]he State court is best able to correct these [void] entries wherever they may have been made").

{¶23} Accordingly, we deny plaintiff's motion to dismiss and sustain defendants' sole assignment of error.

### III. Disposition

{¶24} Because this court retains jurisdiction to vacate the trial court's exercise of jurisdiction following removal, we deny plaintiff's motion to dismiss. Having determined the trial court's October 12, 2010 judgment entry is void ab initio, we sustain defendants' single assignment of error. Accordingly, we vacate the October 12, 2010 judgment of the Franklin County Court of Common Pleas.

*Motion to dismiss denied;  
judgment vacated.*

KLATT and CONNOR, JJ., concur.

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