

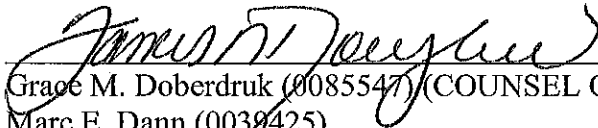
IN THE SUPREME COURT OF OHIO

Bank of America, N.A., : Case No. 2013-0304
: :
Appellant, : On Appeal From the Medina County
: Court of Appeals, Ninth Appellate District
v. : :
: Court of Appeals Case No. 12CA0025-M
George M. Kuchta, et al., : :
: :
Appellees. : :

MOTION FOR RECONSIDERATION OF APPELLEES GEORGE M. KUCHTA AND
BRIDGET M. KUCHTA

NOW COME Appellees George M. Kuchta and Bridget M. Kuchta (“Appellees”), by and through counsel, and, pursuant to Supreme Court Rule of Practice 18.02, respectfully move this Court to reconsider its Opinion issued on October 8, 2014, in *Bank of Am. v. Kuchta*, Slip Opinion No. 2014-Ohio-4275. Appellees’ memorandum in support is attached hereto and hereby incorporated in its entirety as if fully rewritten herein.

Respectfully submitted,




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I hereby certify that a copy of the foregoing has been served upon the following via regular, U.S. Mail, on this 17 day of October, 2014:

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**MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF
APPELLEES GEORGE M. KUCHTA AND BRIDGET M. KUCHTA**

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

I. INTRODUCTION1

II. LAW AND ARGUMENT2

III. CONCLUSION.....9

CERTIFICATE OF SERVICE11

TABLE OF AUTHORITIES

CASES:

Bank of Am., N.A. v. Kuchta, Slip Opinion No. 2014-Ohio-4275 1, 7, 8-9

Cheap Escape Company v. Haddox, L.L.C., 120 Ohio St. 3d 493, 2008-Ohio-63232, 3, 4

Fed. Home Loan Mtge. Corp. v. Schwartzwald, 134 Ohio St. 3d 31, 2012-Ohio-5017 1, 4-5, 9

ProgressOhio.org v. JobsOhio (2014) 139 Ohio St.3d 520, 2014-Ohio-2382.....1, 4, 6

State ex rel. Tubbs Jones v. Suster (1998), 84 Ohio St.3d 709

Steel Co. v. Citizens for a Better Environment (1998) 523 U.S. 8390.....3

STATUTES/OTHER AUTHORITIES:

Civ.R. 12(H)(3).....2

Civ.R. 60(B).....2

Ohio Constitution, Article IV1, 2, 4

I. INTRODUCTION

On October 31, 2012, this Court entered a slip opinion in *Federal Home Loan Mortgage Corporation v. Schwartzwald*, Slip Opinion No. 2012-Ohio-5017. On November 13, 2012, Federal Home Loan Mortgage Corporation filed a Motion for Reconsideration, that was denied and this Court, in *Federal Home Loan Mortgage Corporation v. Schwartzwald* (2012) 134 Ohio St. 3d 13, specifically held at ¶3 that "standing is required to invoke the jurisdiction of the common pleas court, and therefore it is determined as of the filing of the complaint."

This court, on June 10, 2014 reemphasized the standing requirement found in Article IV, Section 4(B) on June 10, 2014, and in *ProgressOhio.org v. JobsOhio* (2014) 134 Ohio St.3d 520, 2014-Ohio-2382 held specifically as follows:

The Ohio Constitution expressly requires standing for cases filed in common pleas courts. Article IV, Section 4(B) provides that the courts of common pleas "shall have such original jurisdiction over all *justiciable matters*." (Emphasis added.) A matter is justiciable only if the complaining party has standing to sue. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 41 ("It is fundamental that a party commencing litigation must have standing to sue in order to present a justiciable controversy"). Indeed, for a cause to be justiciable, it must present issues that have a "direct and immediate" impact on the plaintiffs. *Burger Brewing Co. v. Liquor Control Comm., Dept. of Liquor Control*, 34 Ohio St. 2d 93, 97-98, 296 N.E.2d 261 (1973). Thus, if a common pleas court proceeds in an action in which the plaintiff lacks standing, the court violates Article IV of the Ohio Constitution. Article IV requires justiciability, and justiciability requires standing.

Id. at ¶ 11.

Most recently, this Court answered a certified conflict question and held a "[b]ut a particular party's standing, or lack thereof, does not affect the subject-matter jurisdiction of the court in which the party is attempting to obtain relief." *Bank of Am., N.A. v. Kuchta*, Slip

Opinion No. 2014-Ohio-4275 at ¶ 23.

Justice O'Neill, in his dissenting opinion, recognized the apparent dichotomy between this Court's prior decisions and correctly recognized the confusion that could well be caused by disparate interpretations of decisions in *ProgressOhio.org*, *Schwartzwald*, and the slightly older decision in *Cheap Escape v. Haddox* (2008) 120 Ohio St. 3d 493. While the Kuchtas may not have met the burden of proof on Civ. R. 60(B)(3), they did meet the burden of demonstrating that Bank of America, N.A., failed to invoke the jurisdiction of the court and the trial court should have dismissed the matter pursuant to Civ. R. 12(H)(3), as it is clear from the record that the jurisdiction of the trial court was never invoked.

II. LAW AND ARGUMENT

There are two (2) central elements that must be met before the jurisdiction of a court in Ohio may be invoked. The first component is generally referred to as Subject Matter Jurisdiction and revolves around the issue of whether or not a Court has either the constitutional authority to proceed and in the case of a court of limited jurisdiction, whether or not it has the statutory authority to proceed. The second component is generally referred to as Article 4, Section 4(B) authority to proceed. That authority requires that there be an actual dispute between the parties, a claim that is justiciable, and a claim that is ripened into a present controversy. In short, the court must have both general authority over the subject matter, and the dispute must actually exist between the parties.

While a particular party's standing does not affect the subject-matter jurisdiction of a court, it does impact the court's ability to hear a case based on the justiciability requirements of Article IV, Section 4(B) of the Ohio Constitution.

The narrow holding in *Kuchta* on the certified question relating to Civ. R. 60(B)(3) will

give rise to confusion in the future and could create the mistaken impression that justiciability is no longer a requirement necessary to empower an Ohio Court to proceed.

The rule of law that may have been created by *Kuchta* is now that a judgment, void for want of standing, is no longer void as it somehow transforms into a valid and enforceable judgment upon the mere passage of time. This Court's decision in *Kuchta* and the body of case law that appears to have developed since *Schwartzwald*, calls to mind the oft cited United States Supreme Court decision of *Steel Co. v. Citizens for a Better Environment* (1998) 523 U.S. 8390 that serves as a constant reminder that "jurisdiction is a vague term, a word of many too many meanings".

This case requires us to examine the limits of municipal court jurisdiction. Unfortunately, jurisdiction is a vague term, "a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Environment* (1998), 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210, quoting *United States v. Vanness* (C.A.D.C.1996), 318 U.S. App. D.C. 95; 85 F.3d 661, 663, fn. 2. Several distinct concepts, including territorial jurisdiction, monetary jurisdiction, personal jurisdiction, and subject-matter jurisdiction, must be demonstrated for a municipal court to be able to hear a specific case.

While the parties agree that the Franklin County Municipal Court had territorial jurisdiction, monetary jurisdiction, and personal jurisdiction in this case, they disagree sharply on the issue of [***604] municipal court subject-matter [*495] jurisdiction. "Subject-matter jurisdiction of a court connotes the power to hear and decide a case upon its merits" and "defines the competency of a court to render a valid judgment in a particular action." *Morrison v. Steiner* (1972), 32 Ohio St.2d 86, 87, 61 Ohio Op. 2d 335, 290 N.E.2d 841.

Cheap Escape Co. at ¶¶ 5 and 6.

Most troubling is that this Court, despite protestations to the contrary, appears to be carving out an exception to the constitutional requirements necessary to invoke the jurisdiction of the courts of original jurisdiction in foreclosure proceedings as opposed to other civil

proceedings. If there is to be a separate constitutional standard necessary to invoke the original jurisdiction of Ohio Courts in foreclosure proceedings from other types of civil proceedings, that exception should be created by amendment to Article IV of the Ohio Constitution and not by judicial fiat.

Granted, an inherent dichotomy exists between jurisdiction and justiciability. Nevertheless, in order to invoke the jurisdiction of a court of original general jurisdiction, a plaintiff, must, at a bare minimum be able to demonstrate *both* that the court has the jurisdiction over the subject matter and that it has a ripe and justiciable controversy to present for adjudication. General subject matter jurisdiction without standing is insufficient to invoke the jurisdiction of the courts of original jurisdiction (*Schwartzwald*). Whereas standing, absent a grant of jurisdictional authority is insufficient to invoke the jurisdiction of a court of original jurisdiction (*Cheap Escape*). Absent both subject matter jurisdiction and a justiciable controversy ripe for adjudication, Article IV, Section 4(B) of the Ohio Constitution, has not been invoked and if the court proceeds it does so in violation of the Ohio Constitution. *ProgressOhio.org* at ¶ 13.

Without both subject matter jurisdiction and a justiciable controversy, the court lacks the constitutional authority to proceed and any all proceedings are *void ab initio*. In *Schwartzwald*, the Ohio Supreme Court made it clear that “standing” must exist when suit is filed and later determined that standing is an absolute constitutional requisite to a court of original jurisdiction's exercise of jurisdiction over a particular matter. *ProgressOhio.org* at ¶13.

The Ohio Constitution provides in Article IV, Section 4(B): "The courts of common pleas and divisions thereof shall have such original jurisdiction *over all justiciable matters* and such powers of review of proceedings of administrative officers and agencies as may be provided by law." (Emphasis added.)

In *Cleveland v. Shaker Hts.*, 30 Ohio St.3d 49, 51, 30 Ohio B. 156, 507 N.E.2d 323 (1987), we stated: "Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends on [***1219] whether the party has alleged * * * a "personal stake in the outcome of the controversy.'" *Id.*, quoting *Middletown v. Ferguson*, 25 Ohio St.3d 71, 75, 25 Ohio B. 125, 495 N.E.2d 380 (1986), quoting *Sierra Club v. Morton*, 405 U.S. 727, 731-732, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1972). Similarly, the United States Supreme Court observed in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), that "[s]tanding to sue is part of the common understanding of what it takes to make a justiciable case."

We recognized that standing is a "jurisdictional requirement" in *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 179, 298 N.E.2d 515 (1973), and we stated: "It is an elementary concept of law that a party lacks standing *to invoke the jurisdiction* of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action." (Emphasis added.) See also *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 during the pendency of the proceedings"); Steinglass & Scarselli, *The Ohio State Constitution: A Reference Guide* 180 (2004) (noting that the jurisdiction of the common pleas court is limited to justiciable matters).

And recently, in *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010 Ohio 6036, 944 N.E.2d 207, we affirmed the dismissal of a complaint for lack of standing when it had been filed before the claimant had suffered any injury. There, Kincaid asserted claims that his insurer had breached the insurance contract by failing to pay expenses covered by the policy; however, he had never presented a claim for reimbursement to the insurer. We concluded that Kincaid lacked standing to assert the cause of action, explaining, "Until Erie refuses to pay a claim for a loss, Kincaid has suffered no actual damages for breach of contract, the parties do not have adverse legal interests, and there is no justiciable controversy." *Id.* at ¶ 13.

Schwartzwald at ¶¶ 20-23.

As this Court made clear in *Schwartzwald*, before a party may invoke the original or general jurisdiction of an Ohio court, that party must meet the constitutional requirement of demonstrating the existence of an actual dispute between the parties that is subject to judicial redress. This concept is known simply as justiciability and embraces the time honored notion that Ohio courts may not offer advisory opinions. It is axiomatic that all proceedings before a court are *void ab initio* if the jurisdiction of the court has not been properly invoked.

Indeed, once again, as this Court just announced on June 10, 2014, in *ProgressOhio.org*:

The Ohio Constitution expressly requires standing for cases filed in common pleas courts. Article IV, Section 4(B) provides that the courts of common pleas "shall have such original jurisdiction over all *justiciable matters*." (Emphasis added.) A matter is justiciable only if the complaining party has standing to sue. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 41 ("It is fundamental that a party commencing litigation must have standing to sue in order to present a justiciable controversy"). Indeed, for a cause to be justiciable, it must present issues that have a "direct and immediate" impact on the plaintiffs. *Burger Brewing Co. v. Liquor Control Comm., Dept. of Liquor Control*, 34 Ohio St. 2d 93, 97-98, 296 N.E.2d 261 (1973). Thus, if a common pleas court proceeds in an action in which the plaintiff lacks standing, the court violates Article IV of the Ohio Constitution. Article IV requires justiciability, and justiciability requires standing. These constitution requirements cannot be bent to accommodate *Sheward*.

Id. at ¶ 11.

Surely, this this court did not intend to contradict its two very recent decisions in *ProgressOhio.org* and *Schwartzwald* and now hold that standing in no longer a constitutional requirement necessary to invoke the constitutional grant of authority to courts of general jurisdiction in Ohio. Surely, it was not the intent of this court to radically depart from the well

settled law that courts may not render advisory opinions.¹ In the instant case, it is undisputed that Bank of American d not have standing to bring a cause of against the Kuchtas on the day it filed the Complaint.

Subject-matter jurisdiction is the power of the court to entertain and adjudicate a particular class of cases. *Morrison v. Steiner*, 32 Ohio St.2d 86, 87, 290 N.E.2d 841 (1972). A court's subject-matter jurisdiction is determined without regard to the rights of the individual parties involved in a particular case. *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 75, 1998 Ohio 275, 701 N.E.2d 1002 (1998); *Handy v. Ins. Co.*, 37 Ohio St. 366, 370 (1881). A court's jurisdiction over a particular case refers to the court's authority to proceed or rule on a case that is within the court's subject-matter jurisdiction. *Pratts* at ¶ 12. This latter jurisdictional category involves consideration of the rights of the parties. If a court possesses subject-matter [**11] jurisdiction, any error in the invocation or exercise of jurisdiction over a particular case causes a judgment to be voidable rather than void. *Id.* at ¶ 12.

Kuchta at ¶ 19.

It has long been recognized and is beyond dispute that Ohio courts of general jurisdiction may entertain foreclosure proceedings:

This court has long held that the court of common pleas is a court of general jurisdiction, with subject-matter jurisdiction that extends to "all matters at law and in equity that are not denied to it." *Saxton v. Seiberling*, 48 Ohio St. 554, 558-559, 29 N.E. 179 (1891). We have also long held that actions in foreclosure are within the subject-matter jurisdiction of a court of common pleas. *Robinson v. Williams*, 62 Ohio St. 401, 408, 57 N.E. 55 (1900); *see generally Winemiller v. Laughlin*, 51 Ohio St. 421, 38 N.E. 111 (1894). The Medina County Court of Common Pleas therefore has subject-matter jurisdiction over actions in foreclosure.

Id. at ¶ 20.

The fundamental issue before this court in *Schwartzwald*, *ProgressOhio.org*, and

¹ Colorado, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, and South Dakota have constitutional provisions permitting, or requiring, each of their respective Supreme Courts to render advisory opinions to the governor or legislature; Alabama and Delaware each provide for Supreme Court advisory opinions by statute.

presumably *Kuchta*, has been who may invoke that original jurisdiction over any particular case. The issue, by definition has now been crystallized to to whether not standing and ripeness remain jurisdictional requirements, or does a court of general jurisdiction now have the constitutional mandate to offer advisory opinions? This court stated in *Kuchta*:

Standing is certainly a jurisdictional requirement; a party's lack of standing vitiates the party's ability to invoke the jurisdiction of a court—even a court of competent subject-matter jurisdiction—over the party's attempted action. *Schwartzwald* at ¶ 22; *Tubbs Jones*, 84 Ohio St.3d at 77, 701 N.E.2d 1002; *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 178, 298 N.E.2d 515 (1973). But an inquiry into a party's ability to *invoke* a court's jurisdiction speaks to jurisdiction over a particular case, not subject-matter jurisdiction.

Id. at ¶ 22.

As is hereinabove set forth, this court had previously determined that *both* subject matter jurisdiction and standing are required to invoke the jurisdiction over the particular case. The rule had been that both general and specific jurisdiction must be present before a court may proceed to constitutionally adjudicate a matter brought before it. If the parties have an actual dispute between them, but the court lacks original jurisdiction, it may not proceed. Additionally, if the court had original jurisdiction over the dispute, but the parties were unable to articulate a dispute between them, before this Court's holding in *Kuchta* that court of original jurisdiction had lacked the constitutional authority to proceed. The rule of law announced in *Kuchta* would seem to empower a witness to an auto accident to bring a claim against the negligent party in his own name and then uphold the judgment if there was no appeal.

Indeed, the foregoing was the message emphasized in *Schwartzwald* that appears to now have been rejected by this court in *Kuchta*.

A determination of standing necessarily looks to the rights of the individual parties to bring the action, as they must assert a *personal*

stake in the outcome of the action in order to establish standing. *Ohio Pyro, Inc. v. Ohio Dep't. of Commerce*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27. Lack of standing is certainly a fundamental flaw that would require a court to dismiss the action, *Schwartzwald* at ¶ 40, and any judgment on the merits would be subject [**13] to reversal on appeal. But a particular party's standing, or lack thereof, does not affect the subject-matter jurisdiction of the court in which the party is attempting to obtain relief. *Tubbs Jones* at 77. Accordingly, Bank of America's alleged lack of standing to initiate a foreclosure action against the Kuchtas would have no effect on the subject-matter jurisdiction of the Medina County Court of Common Pleas over the foreclosure action.

Id. at ¶ 23.

An examination of *State ex rel. Tubbs Jones v. Suster* (1998) 84 Ohio St. 3d 70, is most revealing and calls into question why it would have been selected for citation in *Kuchta* in light of the treatment this court afforded the decision in *Schwartzwald*.

The court of appeals and Federal Home Loan relied on the plurality opinion in *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 77, 1998 Ohio 275, 701 N.E.2d 1002 (1998), which suggested that "[t]he lack of standing may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter. Civ.R. 17." However, four justices declined to join that portion of the opinion, and therefore it is not a holding of this court. *See* Ohio Constitution, Article IV, Section 2(A) [***1221] ("A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment").

Schwartzwald at ¶ 29.

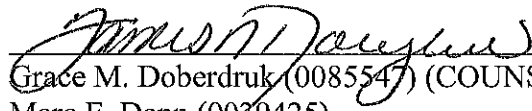
Tubbs-Jones was not binding authority in *Schwartzwald* because it did to refer to a plurality decision. Nothing in the mean time has occurred to change that basic rule and *Tubbs-Jones* is as unprecedential today as the day it was written.

III. CONCLUSION

This Court over the past several years has created a bright line of jurisprudence around the requirement of justiciability found Article IV, Section 4(B) of the Ohio Constitution. In its

decision the Court attempts to solve a genuine matter of concern, but reconsideration is necessary and appropriate to avoid the unintended destruction of the Court's well-reasoned defense of the constitution prohibition on advisory opinions or the use of Ohio's Courts to adjudicate matters where no actual controversy exists between the parties.

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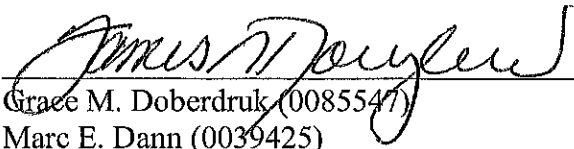
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