



Todd J. Flagel (0066976)  
Counsel of Record  
James Papakirk (0063862)  
Flagel & Papakirk LLC  
10300 Alliance Road, Suite 520  
Cincinnati, Ohio 45242  
(513) 984-8111 telephone  
(513) 984-8118 facsimile  
tflagel@fp-legal.com  
*Attorney for Plaintiff-Appellee*

Susan M. Argo (0067281)  
Graydon Head & Ritchey LLP  
511 Walnut Street, Suite 1900  
Cincinnati, Ohio 452023157  
*Attorney for Receiver, Pete M. Lahni*

Cattani, Inc.  
c/o statutory agent Carlos G. Cattani  
48 Heatherwood Ct.  
Monroe, OH 45050  
*Defendant*

Ohio Logos, Inc.  
c/o statutory agent Capital Corporate  
Services, Inc.  
4568 Mayfield Rd., Suite 213  
Cleveland, OH 44121  
*Defendant*

Dasco, Inc.  
6551 Franklin-Lebanon Road  
Franklin, Ohio 45005  
*Third-Party Defendant*

Carlos G. Cattani  
48 Heatherwood Court  
Monroe, Ohio 45050  
*Third-Party Defendant*

Paul T. Saba (0063723)  
Finnery, Stagnaro, Saba, Patterson Co., L.P.A.  
2623 Erie Avenue  
Cincinnati, Ohio 45208  
*Attorney for Defendant-Appellant Lykins Oil  
Company*

Christopher Watkins (0000966)  
500 Justice Dr.  
Lebanon, OH 45036  
*Attorney for Defendant Warren County, Ohio  
Treasurer*

Bruce S. Schoenberger (0019765)  
Gressley Kaplin & Parker, LLP  
One SeaGate, Suite 1645  
Toledo, Ohio 43604-1584  
*Attorney for Defendant Wendmiddle, LLC*

Nicholas J. Pantel (0021329)  
Assistant U.S. Attorney  
221 East Fourth Street, Suite 400  
Cincinnati, Ohio 45202  
*Attorney for Defendant United States of America*

Majorie A. Cattani  
48 Heatherwood Court  
Monroe, Ohio 45050  
*Third-Party Defendant*

Amy Kaufman (0073837)  
30 W. Broad Street  
Columbus, Ohio 43215  
*Attorney for Defendants Ohio Department of  
Taxation, and Bureau of Workers' Compensation*

**TABLE OF CONTENTS**

EXPLANATION OF WHY THIS CASE DOES NOT WARRANT FURTHER REVIEW..... 5

ARGUMENT OPPOSING PROPOSITIONS OF LAW..... 6

Appellant’s Proposition of Law No. I: A court may not do indirectly, through a receiver, that which it may not do directly with respect to real property subject to its jurisdiction..... 6

Appellant’s Proposition of Law No. II: A receiver may not be authorized to convey property free of a lien interest at a private sale over the objection of the holder of that lien interest..... 9

CONCLUSION..... 11

CERTIFICATE OF SERVICE..... 13

**TABLE OF AUTHORITIES**

<i>The Park National Bank v. Cattani</i> , 12th App. No. CA2009-09-128, 2010 Ohio 1291.....	5
<i>State ex rel. Celebrezze v. Gibbs</i> (1991), 60 Ohio St.3d 69, 74, 573 N.E.2d 62.....	5
R.C. §2735.04.....	6
<i>Ohio v. Bartrum</i> , 121 Ohio St.3d 148, 2009-Ohio-355, 902 N.E.2d 961.....	9
<i>Au v. Au Rustproofing Center</i> (July 3, 1984), 5th Dist. No. CA-2227.....	9
<i>Ohio Director of Transp. v. Eastlake Land Dev. Co.</i> , 894 N.E.2d 1255, 2008-Ohio-3013.....	10
<i>Frye v. MacWilson</i> (1931), 39 Ohio App. 158, 177 N.E. 232.....	10
<i>Quill v. Troutman Enterprises, Inc.</i> , 2nd Dist. No. 20536, 2005-Ohio-2020.....	11

## EXPLANATION OF WHY THIS CASE DOES NOT WARRANT FURTHER REVIEW

The opinion of the Twelfth District Court of Appeals, affirming the trial court's decision to authorize a court-appointed receiver to sell property free and clear of all liens, did not, as Lykins' alleges, "destroy, confiscate or transfer property," contrary to law. And, despite Lykins' claim, the public's confidence in our court system has not been shaken by the trial court's application of R.C. §2735.04, as interpreted by this Court, to the specific facts of this case, which include findings that:

- Urgent exigent circumstances exist that deem it necessary for the Receiver to sell the property as soon as practicable;<sup>1</sup>
- The Property at issue contains an operating Wendy's by virtue of a Ground Lease that makes the Property different and/or unique;<sup>2</sup>
- The sale of the Property at sheriff's sale will result in the Wendy's Ground Lease being terminated that will significantly reduce the value of the Property and result in a loss of a number of jobs;<sup>3</sup> and
- The sale of the Property at sheriff's sale auction will not generate a price greater than the current Contract sought to be approved.<sup>4</sup>

Eliminating all the rabble-rousing contained in Lykins' brief, this case is about statutory interpretation and a court's discretion under R.C. §2735.04. And, this Court has already determined that R.C. §2735.04 enables a trial court to "exercise its sound judicial discretion to limit or expand a receiver's powers as it deems appropriate."<sup>5</sup> Thus, there is no issue of great import, no conflict between appellate districts, and no

---

<sup>1</sup> *The Park National Bank v. Cattani*, 12th App. No. CA2009-09-128, 2010 Ohio 1291, at ¶17.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at ¶18.

<sup>5</sup> *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 74, 573 N.E.2d 62.

novel legal issue for this Court to address, and this Court should decline jurisdiction to hear this case.

**ARGUMENT OPPOSING PROPOSITIONS OF LAW**

**APPELLANT PROPOSITION OF LAW NO. I**

**A court may not do indirectly, through a receiver, that which it may not do directly with respect to real property subject to its jurisdiction.**

Lykins' first proposition of law ignores the procedural posture of this case and the plain language R.C. §2735.04. The foreclosure process Lykins seeks to invoke became inapplicable after the trial court appointed a receiver with the specific power to sell the property under Chapter 2735 of the Revised Code.

On May 29, 2009, the trial court, after conducting a hearing, appointed a receiver. Within that order, the trial court granted the receiver the authority to "sell the Property at one or more public or private sales on notice to the parties to this action and such other notice as the Receiver deems appropriate."<sup>6</sup> Lykins never opposed the motion seeking to appoint a receiver, and did not appeal the trial court's order authorizing the receiver to sell the property.<sup>7</sup> Nevertheless, Lykins now cries foul and incorrectly argues a trial court can only transfer property pursuant to the foreclosure process outlined in R.C. §2329.02 et seq.

Section 2735.04 of the Revised Code details the powers of a receiver and provides:

---

<sup>6</sup> *Cattani* at ¶4.

<sup>7</sup> *Cattani* at ¶5.

Under the control of the court which appointed him, as provided in section 2735.01 of the Revised Code, a receiver may bring and defend actions in his own name as receiver, take and keep possession of property, receive rents, collect, compound for, and compromise demands, make transfers, and generally do such acts respecting the property as the court authorizes.<sup>8</sup>

This Court has interpreted this statute “as enabling the trial court to exercise its sound judicial discretion to limit or expand a receiver’s powers as it deems appropriate.”<sup>9</sup> Thus, once the receiver was appointed, the statutory foreclosure process no longer controlled. And, per the General Assembly, the receiver, under the control of the trial court, could “make transfers, and generally do such acts respecting the property as the court authorizes.”<sup>10</sup>

In its argument supporting jurisdiction, Lykins inaccurately argues that the statutory foreclosure process must be followed to assure the government’s power is not abused. Specifically, Lykins argues that the appraisal process, public sale, and minimum bidding requirements, as set forth in 2329.02 to 2329.61, provide the necessary protective guardrails. Yet, interestingly, nowhere does Lykins argue (nor can it) that Lykins or any other party to this action was not afforded adequate protections. Indeed, Lykins and all other interested parties were afforded greater rights and protections than contemplated by the foreclosure statute.

- Lykins received notice of the motion to appoint a receiver with the power to sell the property, and failed to oppose the motion;

---

<sup>8</sup> R.C. 2735.04.

<sup>9</sup> *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 73, 573 N.E.2d 62.

<sup>10</sup> R.C.2735.04.

- Lykins received notice of the motion seeking authorization for the receiver to sell the property and participated at a full evidentiary hearing;
- Lykins had the opportunity to present evidence concerning the value of the property at the hearing, but failed to do so;
- Lykins cross examined the receiver at length concerning his background, the status of the property, the efforts to sell the property, other offers to purchase the property, and the value of the property.

At the conclusion of the hearing, the trial court specifically found that all parties had been properly served, and that “urgent exigent circumstances exist that deem it necessary for the Receiver to sell the Property as soon as practicable.”<sup>11</sup> In addition, the trial court found the pending sales contract “represents the highest and best use offer for the property,” and that conducting a sheriff’s sale would “not generate a price greater” than the pending sales contract.<sup>12</sup>

Further, Lykins’ brief completely ignores the fact that the General Assembly has afforded courts the authority to exercise their discretion and power to determine property rights, including transfers, in Chapter 2735 and elsewhere, without following the processes set forth in R.C. §§2329.02 to 2329.61. For instance, a court can order partition under Chapter 5307; the sale of a decedent’s or ward’s property under Chapter 2127; the sale of entailed and other estates, and property given for a religious use, under Chapter 5303. There is nothing unique or of great importance about a court controlling and supervising the transfer of property whether through a receivership, a commissioner, an executor, administrator, or guardian, a suitable person, or a sheriff or

---

<sup>11</sup> *Gibbs* at ¶17.

<sup>12</sup> *Id.* at ¶17-18.



master commissioner. The Court should decline to exercise jurisdiction to consider this appeal.

## APPELLANT PROPOSITION OF LAW NO. II

**A receiver may not be authorized to convey property free of a lien interest at a private sale over the objection of the holder of that lien interest.**

Lykins' second proposition of law is simply wrong. The Twelfth District properly analyzed and applied existing law to conclude a receiver may, under certain circumstances, sell property free and clear of all liens. While Lykins may disagree with this conclusion, the decision is not a matter of great interest warranting this Court's jurisdiction. And, Lykins' arguments to the contrary and *alleged* legal authority are nothing more than an attempt to get this Court to serve as an additional court of appeals.<sup>13</sup>

Lykins' reliance on *Au v. Au Rustproofing Center* is misplaced. The brief, 1984 decision was based on the terms of the proposed receiver's sale which included a 5 year payout.<sup>14</sup> Chapter 2735 is not mentioned in the decision.

According to the Fifth District Court of Appeals, the 5-year payment term "prejudiced the objecting creditor because it "converts the immediate right to payment

---

<sup>13</sup> See *Ohio v. Bartrum*, 121 Ohio St.3d 148, 2009-Ohio-355, 902 N.E.2d 961, ¶31 (O'Donnell, J., dissenting) ("[O]ur role as a court of last resort is not to serve as an additional court of appeals on review, but rather to clarify rules of law arising in courts of appeals that are matters of public or great general interest").

<sup>14</sup> *Au v. Au Rustproofing Center* (July 3, 1984), 5th Dist. No. CA-2227.

to appellant into a five-year obligation.”<sup>15</sup> Such is not the case here. Lykins made no objection to the terms of the proposed sale – only the manner.

Similarly, Lykins misconstrues *Ohio Director of Transp. v. Eastlake Land Dev. Co.*, which focused on a creditor’s due process rights, not the receiver’s authority under Chapter 2735.<sup>16</sup> In *Eastlake*, a creditor who did not receive notice of the proposed sale appealed the trial court’s decision authorizing the sale.<sup>17</sup> The Eighth District Court of Appeals found that “[t]he trial court did not have the authority to authorize the receiver to convey the property free and clear of [the objecting creditor’s] contractual lien rights in the property without [the objecting creditor’s] consent or notice to [the objecting creditor] that the property would be sold free of its liens.”<sup>18</sup>

Here, Lykins does not (and cannot) argue its due process rights were violated. Lykins received notice of the proposed sale and participated at the evidentiary hearing held by the trial court. It simply doesn’t like the outcome for reasons wholly unrelated to the law.

Lykins attempt to discount the Twelfth District Court of Appeals’ reliance on *Quill v. Troutman Enterprises, Inc.*, and case law from other jurisdictions is likewise

---

<sup>15</sup> *Id.* at ¶2.

<sup>16</sup> *Ohio Director of Transp. v. Eastlake Land Dev. Co.*, 894 N.E.2d 1255, 2008-Ohio-3013.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* (Emphasis added). The *Eastlake* decision is consistent with an earlier decision rendered by the Eighth District concerning a receiver’s sale. In *Frye v. MacWilson*, the Eighth District held that a first mortgage holder (on personalty) was required to assert its lien interest against sale proceeds derived from a receiver’s sale, rather than proceed with a replevin action.

misplaced. The decision in *Quill* is directly on point. Although the foreclosure action in *Quill* was initiated under §5721.18, the court's analysis focused on Chapter 2735.<sup>19</sup>

In *Quill*, the county treasurer objected to a court order authorizing a receiver to sell property free and clear of liens, including delinquent taxes.<sup>20</sup> Upholding the sale, the Second District Court of Appeals concluded, "R.C. Chap. 2735 does not contain any restrictions on what the court may authorize when it issues orders regarding receivership property."<sup>21</sup>

As long as due process is followed and a court does not abuse its discretion, Chapter 2735 permits a receiver, under the control and supervision of a court, "to make transfers, and generally do such acts respecting the property as the court authorizes." This authority includes the ability to order lien interests to attach to sale proceeds in order of priority. Indeed, if the law were interpreted any other way, a junior lienholder, like Lykins, could hold other superior lien-holders hostage, regardless of "urgent exigent circumstances," and the fact that conducting sheriff's sale would "not generate a price greater" than the pending sales contract. Under such a scenario, Lykins, not a court, has the unilateral authority and discretion to control property to the detriment of other creditors.

### CONCLUSION

The Twelfth District Court of Appeals' decision, following this Court's interpretation of Chapter 2735, analyzed and applied the specific facts of this case to

---

<sup>19</sup> See *Quill v. Troutman Enterprises, Inc.*, 2nd Dist. No. 20536, 2005-Ohio-2020.

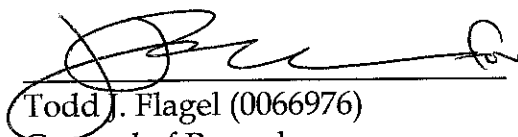
<sup>20</sup> *Id.* at ¶ 23.

<sup>21</sup> *Id.* at ¶ 34.

conclude a receiver's sale is warranted. Lykins' unhappiness that it will not receive a pay-out from the sale of this property does not create a matter of public or great general interest. Accordingly, this Court should decline jurisdiction.

Respectfully submitted,

FLAGEL & PAPANIKOS, LLC



Todd J. Fligel (0066976)

Counsel of Record

James Papanikos (0063862)

10300 Alliance Road, Suite 520

Cincinnati, Ohio 45242

Phone: (513) 984-8111

Fax: (513) 984-8118

tflagel@fp-legal.com

*Attorneys for Appellee, The Park National Bank*

CERTIFICATE OF SERVICE

I hereby certify that a complete copy of the foregoing Memorandum was served by ordinary mail service upon the following parties on this 10<sup>th</sup> day of June, 2010:

Carlos G. Cattani  
48 Heatherwood Court  
Monroe, Ohio 45050

Paul T. Saba (0063723)  
Finnery, Stagnaro, Saba, Patterson Co., L.P.A  
2623 Erie Avenue  
Cincinnati, Ohio 45208

Susan M. Argo (0067281)  
Graydon Head & Ritchey LLP  
511 Walnut Street, Suite 1900  
Cincinnati, Ohio 452023157

Christopher Watkins (0000966)  
500 Justice Dr.  
Lebanon, OH 45036

Cattani, Inc.  
c/o statutory agent Carlos G. Cattani  
48 Heatherwood Ct.  
Monroe, OH 45050

Bruce S. Schoenberger (0019765)  
Gressley Kaplin & Parker, LLP  
One SeaGate, Suite 1645  
Toledo, Ohio 43604-1584

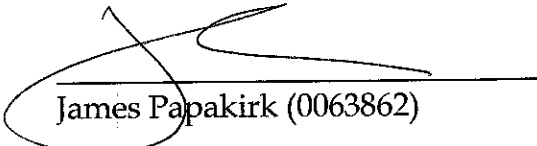
Ohio Logos, Inc.  
c/o statutory agent Capital Corporate  
Services, Inc.  
4568 Mayfield Rd., Suite 213  
*Defendant*

Nicholas J. Pantel (0021329)  
Assistant U.S. Attorney  
221 East Fourth Street, Suite 400  
Cincinnati, Ohio 45202

Dasco, Inc.  
6551 Franklin-Lebanon Road  
Franklin, Ohio 45005

Majorie A. Cattani  
48 Heatherwood Court  
Monroe, Ohio 45050

Amy Kaufman (0073837)  
30 W. Broad Street  
Columbus, Ohio 43215

  
James Papakirk (0063862)