IN THE SUPREME COURT OF OHIO

Lima Memorial Hospital, Plaintiff-Appellee, v. Scott Watamura, M.D. Defendant-Appellant.	))))))	Ohio Supreme Court Case No. 2022-0339 Third Appellate District Case No. 01-21-024 Allen County Common Pleas Case No. CV-2019-0423

RESPONSE OF LIMA MEMORIAL HOSPITAL TO MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT SCOTT WATAMURA, M.D.

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LIMA MEMORIAL HOSPITAL'S POSITION AS TO WHY THIS IS NOT A CASE OF PUBLIC INTEREST OR GREAT GENERAL INTEREST

This is not a case of public interest or great general interest because no clarification of the law governing cognovit judgments is required by the Ohio Supreme Court. Despite the claim of Dr. Scott Watamura ("Appellant"), there is no conflict between Ohio appellate districts concerning a trial court's ability to consider information outside of the four corners of a cognovit note when rendering a cognovit judgment. Instead, the case law unequivocally demonstrates that courts across the State of Ohio sensibly recognize that it is not only appropriate, but also necessary, to consider information outside of the four corners of a cognovit note when a plaintiff requests a cognovit judgment.

STATEMENT OF THE FACTS

In March 2018, Lima Memorial Hospital ("LMH") entered into an Employment Agreement and Physician Recruitment Agreement with Appellant. Pursuant to the Physician Recruitment Agreement, Appellant received sign-on bonus ($40,000) and student loan assistance ($125,000) payments in the amount of $165,000.

As required by applicable federal law governing physician-hospital transactions, the terms of the Physician Recruitment Agreement provided that if Appellant's employment terminated for any reason during the first three years from the date of hire, Appellant would have a repayment obligation. The dollar amount of the repayment obligation is based upon a sliding scale depending on whether the physician's employment terminated in the first, second or third year of employment. The terms of the Physician Recruitment Agreement required that Appellant

execute a Cognovit Note prior to receiving the funds. Appellant executed the Cognovit Note which incorporated the Physician Recruitment Agreement and received the $165,000.

On June 11, 2019, seven months after Appellant's commencement of employment, Appellant's employment was terminated. Appellant was reminded of his obligation to repay the sign-on bonus and student loan assistance, but Appellant refused.

As of July 11, 2019, Appellant was in default of the repayment obligation pursuant to the Cognovit Note.

As a non-profit hospital, LMH must comply with the Federal Anti-kickback Statute and Stark law which provides strict rules regarding recruitment payments by hospitals to physicians and a hospital's legal obligation to pursue collection efforts to recoup such payments. *See* 42 U.S.C. 1320a-7b and 42 U.S.C. 1395nn.

Therefore, LMH filed an action for judgment on the Cognovit Note on October 16, 2019. On that same day, the Allen County Common Pleas Court entered a Cognovit Judgment against Appellant.

On December 30, 2020, fourteen months after the Cognovit Judgment was obtained, Appellant filed a Rule 60(B) motion to set aside the judgment. Appellant's Rule 60(B) motion was granted because the Common Pleas Court determined that the Physician Recruitment Agreement should have been attached to LMH's Complaint for judgment on the Cognovit Note.

With leave of the Common Pleas Court, LMH filed an Amended Complaint that included the Cognovit Note, the incorporated Physician Recruitment Agreement, and an Affidavit. On June 15, 2021, the Allen County Common Pleas Court entered a Cognovit Judgment in favor of LMH.

Appellant appealed the judgment to the Third District Court of Appeals asserting four assignments of error, specifically "[t]he Trial Court Erred in Entering Cognovit Judgment in Favor of Appellee and Against Appellant Because the Underlying Cognovit Note is Facially Insufficient to Support the Cognovit Judgment." *Lima Memorial Hospital v. Scott Watamura, M.D.*, 3rd Dist. Allen No. 1-21-24, 2022-Ohio-417.

The Court of Appeals rejected the four assignments of error and affirmed the Cognovit Judgment. The court opined,

> [s]ince we have concluded that LMH complied with the statutory scheme by submitting a *facially valid* CPN together with the extrinsic instruments and documents necessary for the trial court to interpret the material terms of the cognovit note…, we conclude that the trial court did not err by denying Dr. Watamura's motion for judgment on the pleadings.

Id. at ¶33.

During the course of the underlying proceedings and the appeals, Appellant did not dispute that he entered into the Cognovit Note, Physician Recruitment Agreement or Employment Agreement. Appellant did not dispute any of the terms of the Employment Agreement, Physician Recruitment Agreement or the Cognovit Note. Appellant did not dispute the calculations of the principal and interest owed pursuant to the Cognovit Note and included in the Judgment Entry. Appellant did not challenge that the Cognovit Note satisfies the elements set forth in R.C. 2323.13[1]. Nor did Appellant dispute that pursuant to the Cognovit Note, he owes the amount set forth in the Judgment Entry.

For over three years, Appellant has refused to make any payments pursuant to the Cognovit Note Judgment.

[1] The Court of Appeals concluded that "the requirements of R.C. 2323.13 were met by LMH."

LAW AND ARGUMENT

I. Appellant's case citations do not support Appellant's argument that a cognovit note, by itself, must contain all information necessary for the trial court to grant a cognovit judgment.

With respect to a cognovit note, Appellant asserts that the term "facially sufficient" stands for the proposition that documents attached to a complaint may never be considered when rendering a judgment. That it "is erroneous for a trial court to take into account anything other than the cognovit note itself." *Memorandum of Appellant*, p. 7. Appellant contends that "Ohio law is far from uniform on this point." *Id*.

Appellant mistakenly conflates the requirement that a cognovit note be "facially sufficient" to comply with the requirements of R.C. 2323.12 and 2323.13, with the right, and in some instances requirement, to attach documents to a cognovit note complaint.

It is a true statement that R.C. 2323.13 must be strictly adhered to in order to obtain a cognovit judgment. Nevertheless, while cognovit notes are strictly construed, "[t]he cognovit has long been recognized [in Ohio] by both statute and court decision." *1st Natl. Fin. Serv. v. Ashley*, 10th Dist. Franklin No. 18AP-803, 2019-Ohio-5321, ¶11. This Court recently upheld a cognovit judgment opining that traditional rules of contract interpretation apply to interpreting a cognovit note. *See Sutton Bank v Progressive Polymers, L.L.C.*, 161 Ohio St. 3d 387, 2020-Ohio-5101, N.E.3d 546. Statutorily mandated language in a cognovit note, such as a waiver of a right to trial, specific names and type size, are required to find a cognovit note compliant with the statute and "facially sufficient." Failure to strictly adhere to these statutory requirements may result in a finding that the cognovit note is facially insufficient and void as a matter of law.

The requirement that a cognovit note comply with every statutory requirement to be deemed "facially sufficient" is far different than attaching documents to a cognovit note

complaint "necessary to determine the materials terms of the cognovit note". *See Buehler v. Mallo*, 10th Dist. Franklin No. 10AP-84, 2010-Ohio-6349. A cognovit note may not have included the mandatory R.C. 2323.13 requirements, and therefore be facially insufficient, although all documents necessary to determine the material terms of the note are attached to the complaint. Likewise, a cognovit note may be facially sufficient, while also relying upon extrinsic documents to determine the material terms of the cognovit note.

For example, a cognovit note that by its terms may trigger a repayment obligation at a later date due to a breach, necessarily requires an affidavit attached to the complaint evidencing the date of the breach, date of default, and amount of principal and interest due. These triggering events are determined in the future after a cognovit note is executed, and a trial court cannot ascertain these material terms of default and principal and interest without reference to documents other than the cognovit note itself. Not surprisingly, Ohio courts have regularly utilized affidavits to determine the material terms of a cognovit note and enter a cognovit judgment.[2]

Appellant contends that even future events such as a termination, impossible to determine at the time of the execution of a note, must be on the face of the note to be "facially sufficient."[3] The Appellant's proposition makes no sense when the very nature of a cognovit note is a promise to pay an amount to be determined at a later date based upon failure to comply with the note's terms at some point in the future.

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[2] *Onda, LaBuhn, Rankin, & Boggs Co., L.P.A. v. Johnson*, 4th Dist. Pickaway No. 08CA16, 2009-Ohio-4726, ¶18 *(*Kline, P.J. concurring in judgment only) "Numerous Ohio Courts have upheld cognovit judgment for amounts that cannot be determined solely by referring to the notes in questions."

[3] *Memorandum of Appellant*, p.4, "In addition, the date of Dr. Watamura's termination [determined 7 months after the note was executed], which was the sole factor in determining the amount he had to repay, cannot be determined from the face of the documents."

Most important, the cases cited by Appellant do not stand for the proposition that a cognovit note is facially insufficient if documents other than the cognovit note itself are utilized to determine the material terms.

Appellant cites three cases *Gunton Corp. v. Banks*, 10th Dist. Franklin No. 01AP-988, 2002-Ohio-2873, *Onda, LaBuhn, Rankin & Boggs, Co., LPA v.* Johnson, 184 Ohio App.3d 296, 2009-Ohio-4726, 980 N.E.2d 1000 (4th Dist.), and *Simmons Capital Advisors, Ltd. v. The Kendall Group, Ltd.*, 10th Dist. Franklin No. 05AP-1087, 2006-Ohio-2272, claiming the rulings support his proposition that "it is erroneous for a trial court to take into account anything other than the cognovit note itself." *Memorandum of Appellant, p*.7. The holdings of these cases do not support such a proposition.

In *Gunton*, the court found the cognovit notes facially insufficient because, "The party actually enforcing the note has a somewhat different name than the party to whom the note was given". *Gunton* at ¶29. The court did not opine that it was improper to attach documents to the Complaint in order to determine the material terms of a cognovit note.

Similarly, the *Onda* court opined that the cognovit judgment was void because the judgment relied on "books and records of the Secured Party and the Debtors" which were not attached to the complaint and outside the purview of the Court. *Onda* at ¶11. The holding does not stand for the proposition that a Court cannot consider extrinsic documents when determining a cognovit complaint. In fact, Judge Kline's concurring in judgment opinion in *Onda* specifically recognized that numerous Ohio courts have upheld cognovit judgments based upon documents other than the cognovit note itself.[4]

[4] *Onda* at ¶18 *(*Kline, P.J. concurring in judgment only) ("Numerous Ohio Courts have upheld cognovit judgment for amounts that cannot be determined solely by referring to the notes in question.")

Finally, the *Simmons* court held the note facially insufficient because the "note's provision for the parties to raise and rebut evidence on the schedule of advances precluded the trial court from accepting the confession of judgment", not that extrinsic documents were attached to the complaint. *Simmons* at ¶21. The provision in the note specifically permitted the defendant in the matter to rebut the amount owed by the defendant. This right to rebut is what precluded the court from entering the cognovit judgment.

Not only do these cases not stand for the proposition that consideration of extrinsic documents is prohibited in determining the material terms of a cognovit note and entering a cognovit judgment, but there are more recent cases from the Fourth and Tenth Appellate Districts—the Appellate Districts relied upon by Appellant to support his argument that a conflict exits in the courts in Ohio—that unequivocally refute Appellant's argument.

II. There is no conflict among Ohio Appellate Districts concerning the right to consider extrinsic documents in cognovit proceedings. Appellant relies upon cases in the Fourth and Tenth Appellate Districts that are not an accurate reflection of the current case holdings in those Appellate Districts. More recent cases recognize the right, and necessity, to consider documents beyond the four corners of the cognovit note itself to determine the material terms of a cognovit note and enter a cognovit judgment.

Appellant asserts there is an Appellate District split concerning a trial court's ability to consider any documents other than the face of the cognovit note itself. Appellant claims a conflict in the case law exists between the Fourth and Tenth Appellate Districts and the Third, Fourth, Eighth, and Tenth Appellate Districts. These alleged conflicts in the law do not exist, and a review of the most recent case holdings on cognovit judgments demonstrate that the holdings in the Fourth and Tenth Appellate Districts advanced by the Appellant are consistent with the other Appellate Districts in Ohio permitting the use of extrinsic documents to determine the material terms of a cognovit note.

In an effort to create a conflict in the Appellate Districts where, in reality, none exists, Appellant relies upon *Gunton*, a 2002 Tenth District holding, *Onda*, a 2009 Fourth District holding and *Simmons*, a 2006 Tenth District holding. Appellate fails to cite subsequent case holdings in those Appellate Districts that clearly delineate that reference to documents other than the cognovit note itself are permissible in determining the material terms of a cognovit note and entering a cognovit judgment.

The Fourth Appellate District followed its 2009 opinion in *Onda* with a 2012 opinion in *Century National Bank v. Gwinn*, 4th Dist. Athens No. 11CA20, 2012-Ohio-768. In *Gwinn*, the Fourth Appellate District considered a mortgage and affidavit in a cognovit proceeding and expressly opined that extrinsic documents are permissible to determine a cognovit judgment. Furthermore, as set forth in Section I above, in addition to *Gwinn*, the concurring opinion by Judge Kline in *Onda* cites cases in the Fifth, Seventh, Eighth, Tenth, and Eleventh Appellate Districts where the Court of Appeals upheld cognovit judgments even though the amount could not be determined solely by referring to the cognovit notes in question.

In the Tenth District, both the cases of *Gunton*, a 2002 case, and *Simmons*, a 2006 case, preceded the Tenth District case of *Beuhler*. In *Beuhler*, a note, stock pledge, and affidavit were admitted as extrinsic evidence that supported the cognovit judgment.

While the holdings in *Gwinn* and *Beuhler* did not overrule the *Gunton*, *Onda*, and *Simmons* decisions, it was not necessary to overrule those previous decisions because *Gunton*, *Onda*, and *Simmons* did not address the ability to consider documents beyond the four corners of a cognovit note in order to determine the material terms of a cognovit note and render a cognovit judgment. Conversely, *Gwinn* and *Beuhler* specifically relied upon extrinsic documents for the cognovit judgment. In any event, the most recent holdings and the current law of the Fourth and

Tenth Appellate Districts refute Appellant's proposition of law and support the Third Appellate District's holding in this case that it is permissible for a trial court to consider documents attached to a cognovit complaint to support a cognovit judgment.

III. Ohio courts have consistently and properly held that documents may be attached to a cognovit complaint and reviewed by a court when granting judgment on a cognovit note. A change of this practice would upend Ohio law and eviscerate the essential purpose of cognovit notes.

Ohio courts are uniformly in agreement that extrinsic documents may be attached to a cognovit complaint requesting judgment on a cognovit note and that such documents are properly considered by the trial court when rendering judgment on a cognovit note.

The First, Third, Fourth, Eighth, and Tenth Appellate Districts unequivocally support the use of extrinsic documents in the understanding of the material terms of a cognovit note. *See Merchants Bank & Trust Co. v. Five Star Fin. Corp.*, 2011-Ohio 2476, 958 N.E.2d 964 (1st Dist.); *Lima Mem. Hosp. v. Watamura*, 3rd Dist. Allen No. 1-21-24, 2022-Ohio-417; *Century Natl. Bank v. Gwinn*, 4th Dist. Athens No. 11CA20, 2012-Ohio-768, *Richfield Purchasing, Inc. v. Highpoint Truck Terminals, Inc.*, 8th District. Cuyahoga No. 86056, 005-Ohio-6348; *Bank One, N.A. v. DeVillers*, 10th Dist. Franklin No. 01AP-1258, 2002-Ohio-5079.

The purpose for allowing for review of extrinsic documents is simple. If the courts of Ohio were to adopt a rule requiring all elements required to obtain a judgment to be included in a single document as Appellant requests, cognovit notes would become obsolete because it would be impossible to grant a cognovit judgment based upon the cognovit note itself.

In *Merchant's Bank*, the First District clearly and completely addressed this issue,

> [n]either statute [Ohio Revised Code Section 2323.12 or 2323.13], however, requires the instrument containing the warrant of attorney to demonstrate by itself the amount owed by the defendant. We therefore decline to adopt such a rule. Moreover, to hold otherwise would severely undermine the clear legislative intent to allow

> warrants of attorney in nonconsumer transactions. ***Such a holding would leave numerous proper lending agreements unenforceable in cognovit actions, particularly when the amount owed may change from day to day, such as with open lines of credit and interest-bearing loans***. Accordingly, ***we hold that the note was not facially insufficient to support a cognovit judgment merely because it determined the amount owned by Five Star by reference to extrinsic documents***.

Merchant's Bank at ¶¶ 11, 12 (emphasis added).

Appellant cites no case in any Appellate District that stands for his proposition that a trial court may not consider extrinsic documents when rendering a cognovit judgment. For this reason, Appellant's request for a discretionary appeal should be denied.

CONCLUSION

Appellant's request for relief is not only illogical, but such relief would make the obtaining of a cognovit judgment nearly impossible. The purpose of the cognovit provision is to allow a creditor to quickly and inexpensively obtain a judgment when the debtor fails to pay in accordance with the agreement. It is not intended to contain, nor is it possible for it to contain, every detail and future scenario.

Without the ability to set forth additional information, for instance, in attached affidavits, no trial court could ascertain a breach, default date, principal and interest calculation or the balance due on a cognovit note. There is a practical reason the trial courts of Ohio have always considered extrinsic documents when necessary to determine the material terms of a cognovit note obligation, and those reasons are self-evident—without those documents, no judgment could ever be rendered again on a cognovit note.

The Appellate districts in Ohio have consistently upheld a trial court's right to rely upon properly submitted documents attached to a cognovit complaint when rendering a cognovit

judgment. Accordingly, the Court should continue the practice used by Ohio courts and decline Appellant's request for a discretionary appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent via regular U.S. mail, postage prepaid, this 29th day of April, 2021 to:

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