

**IN THE SUPREME COURT OF OHIO**

RSS WFCM2019-C50-OH WG2, LLC,  
by and through its special servicer Rialto  
Capital Advisors, LLC

Plaintiff-Appellee,

v.

WELCOME GROUP 2, LLC, et al.

Defendant-Appellant.

Case No.

On Appeal from the Montgomery County  
Court of Appeals,  
Second Appellate District

C.A. Case No. 29655

**APPEAL**

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANTS WELCOME GROUP 2, LLC; HILLIARD HOTELS, LLC;  
ELITE HOSPITALITY, LLC; DAYTON HOTELS, LLC;  
AND DAYTON HOTELS 2, LLC**

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**EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL  
CONSTITUTIONAL QUESTION AND IS OF PUBLIC OR GREAT GENERAL  
INTEREST**

This case presents important issues of great public interest as the underlying appellate decision significantly limits the Constitutional and statutory property rights of Appellants while greatly expanding the ability of trial courts to conduct their own investigations in contravention to Ohio Code of Judicial Conduct Rule 2.9(C).

Appellant appealed to the Second District Court of Appeals a trial court decision appointing a receiver. Appellant took the appeal because the trial court made this ruling after hearing *only* Appellee's evidence, without Appellant being afforded the right to be heard. At the conclusion of Appellee's presentation regarding a receiver's appointment, the trial court continued the hearing for several months while at the same time ordering appointment of a receiver. The trial court did this in part to gather information *for the court*.

This case directly implicates Appellants' rights under the Due Process Clause of the Fourteenth Amendment and Article I, Section 16 of the Ohio Constitution and under the Equal Protection Clauses of the Fourteenth Amendment and Article I, Section 2 of the Ohio Constitution. Ohio courts cannot hear only the movant's argument before ordering the relief sought – it must give both sides an opportunity to be heard.

Further, by determining that a receiver was necessary in part to gather information for the court, the court further undermines Appellants' Constitutional rights as well as those afforded to all litigants under Ohio Code of Judicial Conduct Rule 2.9(C).

This case is of even greater importance because the Second District Court of Appeals dismissed Appellants' underlying appeal raising these important Constitutional issues rather than hear it. The Court of Appeals determined that the trial court's order was not final nor appealable

under Ohio R.C. § 2505.02, despite the breadth of the trial court’s order and the clear Constitutional issues it created. The Court of Appeals instead determined it was appropriate for the trial court to appoint a receiver “to write a report for the trial court’s benefit....” (Appx. A-1 at pp. 4-5.) Again, the trial court took this step *before Appellants were given the opportunity to be heard*.

The decision of the Second District Court of Appeals allows trial courts to make decisions after hearing from only the movant, appoint receivers with investigatory powers, gather their own research, and conduct and present evidence for their own consideration before the parties are permitted to heard. Such an appointment is not in line with the Constitutional concepts of our democracy, nor are they in line with the traditional role of a receiver, which is to preserve and manage property during litigation.

This is a significant issue with a broad impact on the Constitutional rights of the public and one that the Court should accept for consideration.

### **STATEMENT OF THE CASE AND THE FACTS**

Defendants-Appellants Welcome Group 2, LLC; Hilliard Hotels, LLC; Elite Hospitality, LLC; Dayton Hotels, LLC; and Dayton Hotels 2, LLC. (“Appellants”) are limited liability companies operating five hotels in southern Ohio. The underlying lawsuit in the Montgomery Court of Common Pleas, Case No. 2021 CV 05237, involves a commercial foreclosure action against Appellants, filed by Plaintiff-Appellee RSS WFCM2019-C50-OH WG2 (“Appellee”). The merits of the action are still in dispute and pending, and Appellants’ hotels are still in operation.

Appellee initiated the foreclosure action on December 28, 2021 by filing a complaint (RSS WFCM2019-C50-OH W2G, LLC v. Welcome Group 2, LLC, et al. CA No. 29655 Doc. R. 1 (2d Dist.)) and a motion for appointment of a receiver for Appellants’ hotels. (*id* at R. 7.) On March 10, 2022, Appellants filed an answer. (*id* at R. 53.) On June 4, 2022, Appellee filed a “renewed

motion” for appointment of a receiver. (*id* at R. 61.) On August 2, 2022, Appellants filed an amended answer and counterclaims. (*id* at R. 71.)

On October 17, 2022, the trial court began a hearing on Appellee’s renewed motion for appointment of a receiver. A transcript of that hearing is in the record. The court heard Appellee’s evidence and did not hear Appellants’ evidence. The trial court permitted only Appellee to present evidence on that day, and expressly continued the hearing to January 20, 2023 so that Appellants could present their case at that time. (*id* at Tr. 4:7-21, 114:9-11, 120:8-10.)

The trial court, despite denying Appellants an opportunity to present their case until January 20, 2023, asked Plaintiff-Appellee to prepare a proposed order appointing a “limited receiver” immediately. (*id* at Tr. 114:12-23, 120:9-10.) Appellants objected to a receiver being appointed before they had an opportunity to present their evidence. (*id* at Tr. 115:22–116:15,<sup>1</sup> 120:5-7.) Nonetheless, on November 10, 2022, the court adopted Appellee’s proposed order. The November 10th order:

- appoints a “Limited Receiver” over Appellants’ five hotels, “to review and analyze all financial and operational information at the Hotels in order to present a report to this Court at the Hearing” (*id* at R. 104, p. 2, ¶ 2);
- orders Appellants to pay the receiver a fixed sum of \$4,500 per month per property (\$22,500 monthly) indefinitely, and irrespective of the amount of work the receiver performs (*id.* at 2, ¶ 3);
- orders Appellants and others to produce documents covering four years (*id.* at 2-3); and
- grants the receiver “the right to full access at the Hotels” with 24 hours advance notice (*id.* at 3, ¶ 2).

In neither the November 10th order nor any other order did the court evaluate Appellee’s

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<sup>1</sup> The transcript erroneously attributes the speech at page 116, lines 10-15 to the trial court. As is manifest from the context, those words were spoken by Appellants’ attorney Mr. Doucet.

claims or Appellants' counterclaims. Day 2 of the hearing never happened. On January 4, 2023, the trial court vacated the January 20th hearing date.

On November 29, 2022, Appellants filed their notice of appeal of the November 10, 2022, Order Appointing a Limited Receiver. (RSS Doc. R. 114.) In Appellants' Brief, the two issues they presented for review were those under the Due Process Clause of the Fourteenth Amendment and Article I, Section 16 of the Ohio Constitution and under the Equal Protection Clauses of the Fourteenth Amendment and Article I, Section 2 of the Ohio Constitution. (March 3, 2023, Principal Brief of Appellants, Second Appellate District, Montgomery County, Case No. CA 029655 [2d Dist. CA029655].)

On February 13, 2023, Appellees filed a motion to dismiss the appeal, arguing the November 10, 2022, Order Appointing a Limited Receiver was not a final appealable order. (February 13, 2023, Plaintiff-Appellee's Motion to Dismiss Appeal, 2d Dist. CA029655.) On February 23, 2023, Appellants filed a memorandum opposing Appellee's motion to dismiss. (February 23, 2023, Appellants' Memorandum Opposing Appellee's Motion to Dismiss, 2d Dist. CA029655.) Appellees filed a reply in support of their motion to dismiss on March 7, 2023. (March 7, 2023 Plaintiff-Appellee's Reply in Support of Motion to Dismiss 2d Dist. CA029655.) Six days later, on March 13, 2023, the appellate court issued its decision and Final Judgement Entry granting Appellee's motion to dismiss.

In its decision, and despite the considerable impact and costs placed on Appellants (including a monthly \$22,500 payment to a receiver to gather information), the appellate court found the November 10, 2022, Order was a provisional remedy, merely maintaining the status quo, and that it does not alter the status quo in a meaningful way such that it would be appealable. (Appx. A-1, p. 6.)



## ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law No. 1: The appointment of a limited receiver with investigative powers constitutes an appealable order under R.C. 2505.02(B)(2) because such an appointment affects a substantial right.**

A judgment entry qualifies as an appealable order if “order that affects a substantial right made in a special proceeding” R.C. 2505.02(B)(2). A substantial right is defined as “a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.” R.C. 2505.02(A)(1). “An order affecting a substantial right is one that, if not immediately appealable, would foreclose appropriate relief in the future.” *State v. Zimpfer*, 2<sup>nd</sup> Dist. Montgomery No. 27705, 2018-Ohio-2430.

Here, the November 10, 2022, Order: (1) was made in a special proceeding, (2) affects a substantial right, and (3) Appellants and others similarly affected will not be able to effectively protect their rights without immediate review.

Receivership proceedings are special proceedings. *PNC Bank, N.A. v. Creative Cabinet Sys., Inc.*, 2<sup>nd</sup> Dist. Darke App. Nos.2013–CA–14, 2013–CA–15, 2014–Ohio–3264, ¶ 9; *Community First Bank & Trust v. Dafoe*, 108 Ohio St.3d 472, 476, 2006–Ohio–1503, 844 N.E.2d 825, ¶ 26 (“We agree that the appointment of a receiver \* \* \* [is] tied to a main action, acting in furtherance of the main action, but with [its own life].”) The November 10, 2022, Order also undoubtedly concerns numerous substantial rights. The Fourteenth Amendment provides: “No State shall... deprive any person of life, liberty, or property, without due process of law[.]” Article I, Section 16 of the Ohio Constitution further provides: “[E]very person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.” “The right to enforcement and performance of a contract involves a substantial right.” *PNC Bank*, ¶ 10. The right to petition the government (here,

the judiciary), is also a “fundamental right[.]” *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, ¶ 10.

The trial court’s decision also clearly affects a substantial right of the Appellants. The decision removes Appellants’ rights to be heard, stripping them of their rights under the Due Process Clause of the Fourteenth Amendment and Article I, Section 16 of the Ohio Constitution and under the Equal Protection Clauses of the Fourteenth Amendment and Article I, Section 2 of the Ohio Constitution.

The trial court’s decision to allow the receiver to investigate and present facts that affects all/each of these substantial rights forecloses Appellants’ appropriate relief in the future. For example, in this matter, the limited receiver’s independent findings and report to the trial court may significantly influence the court’s decision on whether to appoint a full receiver. The limited receiver will also have an indirect impact on the day-to-day operations of Appellants’ hotels. The limited receiver’s access to the hotels and the requirement for Appellants to provide financial information disrupts normal business operations and causes financial harm (including a \$22,500 monthly payment to the receiver) and reputational damage. This potential harm would be difficult, if not impossible, to remedy, affecting Appellants’ substantial rights.

Further, the inherent nature of a receivership, even if limited, naturally represents a loss of control and autonomy for the affected party. By allowing a limited receiver to access financial information, inspect the hotels with little notice, and receive \$22,500 per month, the trial court has granted an external entity some level of control over Appellants’ business prior to a decision on the merits of the motion and prior to Appellants’ Constitutional right to be heard. This loss of control impacts the substantial rights of Appellants, making the November 10, 2022, Order appealable.

If the November 10, 2022, Order is not appealable, Appellants must wait months or years from now to invoke jurisdiction. Appellants have no other avenues available if they want relief from the limited receiver showing up at their hotels, knocking on doors of their guests, sifting through paperwork and digital files, and ultimately creating a report for the court to rely upon in its future rulings. Therefore, even if future relief is not foreclosed *entirely*, the value of Appellants' hotels, and the overall worth of underlying claims, would be diminished.

R.C. 2505.02 (B)(2) anticipates appeals coming before final disposition of the entire case due to the substantial nature of the rights at issue and the importance of an immediate appeal to preserve those rights. This case is a perfect example of one where an immediate appeal is proper and necessary to protect the Constitutional rights of the Appellants.

**Proposition of Law No. 2: The appointment of a limited receiver with investigative powers constitutes an appealable order under R.C. 2505.02(B)(4) because such an order changes the status quo and alters the status of the underlying claims.**

An order is considered a final order when it “grants or denies a provisional remedy and to which both of the following apply: (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy, and (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action. ” R.C. 2505.02(B)(4). The November 10, 2022, Order appointing a limited receiver satisfies all of these requirements.

A “provisional remedy” means a proceeding ancillary to an action...” R.C. 2505.02(A)(3). The appointment of a receiver is a provisional remedy. *Community First Bank & Trust v. Dafoe*, 108 Ohio St.3d 472, 2006-Ohio-1503, 844 N.E.2d 825, ¶ 26. The November 10, 2022, Order also “prevents a judgment in the action in favor of” Appellants because the order contained no provision

permitting Appellants to contest the receivership. *See State v. Muncie*, 91 Ohio St.3d 440, 449 (2001). The appointment of the receiver functionally denied a provisional remedy available to Appellants and precludes Appellants from obtaining meaningful relief if appellate review is deferred until all the proceedings are concluded, or until a “full” receiver is appointed.

“A receivership can drastically curtail existing property rights, foreclosing independent action and decision in irreparable ways.” 16 Wright, Miller & Cooper, *Federal Practice and Procedure* (1996) 217, Section 3925. “The appointment of a receiver is the exercise of an extraordinary, drastic, and sometimes harsh power which equity possesses and is only to be exercised where the failure to do so would place the petitioning party in danger of suffering irreparable loss or injury.” *Helms v. Thomas*, 2nd Dist. No. 27744, 2018-Ohio-1534, ¶ 24 (quotation marks and citation omitted). Here, it is Appellants who suffer the irreparable injuries – not Appellees.

This is a situation where R.C. 2505.02(B)(4) comes into full effect. The statute allows for occasions that may arise in which a party seeking to appeal from an interlocutory order would have no adequate remedy from the effects of that order on appeal from final judgment. In some instances, “[t]he proverbial bell cannot be unrung and an appeal after final judgment on the merits will not rectify the damage” suffered by the appealing party. *Gemmell v. Anthony*, 2015-Ohio-2550, ¶ 16. This is one of those instances. Appellants’ interest is substantial:

- a cost of \$22,500 per month, indefinitely;
- “full access” intrusion onto and into their real property at any time; and
- ongoing production of “all financial and operational information” of Appellants’ businesses.
- Its right to be heard on the motion before a decision is rendered.

Because of the rights affected by the receivership’s actions, the November 10, 2022, Order is detrimental to Appellants. The appellate court states that an “order granting a provisional

remedy that ‘merely maintains the status quo’ is not final.” (Appx. A-1, p. 6.) Yet, Appellants’ status quo is greatly altered as a result of the limited receiver. The nature of the proceedings involves the management and financial well-being of Appellants’ hotels. Any delay in resolving the issue of whether a full receivership is warranted could result in ongoing harm to the business, such as lost revenue or damaged relationships with vendors and customers.

Further, the receiver will be making factual findings and legal conclusions and to presenting them to the Court for further evaluation (even though the underlying loan documents are still in dispute, Appellants’ counterclaims are still pending, and there have been no judgments entered as to the merits of the case.)

This Court should accept jurisdiction and hold that orders appointing a receiver with duties that may alter the status quo are final, appealable orders pursuant to R.C. 2505.02(B)(4). By allowing an immediate appeal of the November 10, 2022, Order, the Ohio Supreme Court can provide a timely resolution to this important matter, thus protecting the interests of all parties involved.

**Proposition of Law No. 3: The appointment of a limited receiver with investigative powers threatens the integrity and impartiality of the judicial process.**

The rules governing discovery allow for the parties to conduct discovery. The discovery rules do not provide for any independent investigations by the court. In fact, a trial court is prohibited from conducting its own discovery on behalf of the parties. *State ex rel. Corn v. Russo*, 133 Ohio App. 3d 57, 63, 726 N.E.2d 1052, 1056 (8<sup>th</sup> Dist. 1999).

Judicial impartiality requires that judges not conduct their own research or gather evidence outside the record presented by the parties. This principle is also recognized in the Ohio Code of Judicial Conduct Rule 2.9(C), which states that a judge shall not investigate facts in a matter

independently and shall consider only the evidence presented and any facts that may properly be judicially noticed.

Here, the Appellate Court acknowledged “[t]he powers of the limited receivership are to collect and analyze financial information and inspect the condition of the hotels. The purpose of the receivership is to write a report for the trial court’s benefit...” (Appx. A-1, pp. 4-5.) The November 10, 2022, Order appointing a limited receiver is an order by the court to conduct its own independent investigation.

This prejudicially affects Appellants’ Constitutional rights. The outcome of a future full receivership hearing, as well as the underlying foreclosure action, will be different due to the court’s outside investigation and consideration of the receiver’s report. *See Am. Builders & Contrs. Supply Co., Inc. v. Frank's Roofing, Inc.* 2012-Ohio-4661 979 N.E.2d 15, (3<sup>rd</sup> Dist.) (trial court's independent discovery constituted plain error in supplier's action to collect debt; the independent discovery of the petition seriously affected the basic fairness, integrity, and reputation of the judicial process. “[H]ad the trial court not conducted independent discovery, it is very likely that the outcome of the trial would have been different.”)

This court should accept jurisdiction to protect litigants’ rights under the Due Process Clause of the Fourteenth Amendment and Article I, Section 16 of the Ohio Constitution and under the Equal Protection Clauses of the Fourteenth Amendment and Article I, Section 2 of the Ohio Constitution.

### **CONCLUSION**

For the reasons stated above, the Appellants respectfully request the Ohio Supreme Court accept jurisdiction over this appeal and reverse the decisions below.

Respectfully submitted,

/s/ Troy J. Doucet

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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served upon the following parties via electronic mail (email) on this 25th day of April, 2023, pursuant to Civ.R. 5(B)(2)(f):

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/s/ Troy J. Doucet

Troy J. Doucet (0086350)

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**MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS WELCOME  
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**A-1** Decision and Final Judgment Entry, Second Appellate District (March 13, 2023)

**A-2** Order Appointing a Limited Receiver Over All Properties, Montgomery County Court of  
Common Pleas (November 10, 2022)