

IN THE SUPREME COURT OF OHIO

A.J. BORKOWSKI, JR.,
Appellee,
v.
CHARLES D. ABOOD, JUDGE,
Appellant.

: On Appeal from the Lucas County
: Court of Appeals, Sixth Appellate
: District
:
: Court of Appeals Case No. L-05-1425
:
: Supreme Court of Ohio Case No.
: 06-1913
:
:

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT THE HONORABLE
JUDGE CHARLES D. ABOOD

A.J. Borkowski Jr.
PO Box 703
Fayette, Ohio 43521
Tel: 419-237-7017

Pro Se Appellee

George D. Jonson (0027124)
Linda L. Woeber (0039112)
Kimberly Vanover Riley
(0068187)(Counsel of Record)
MONTGOMERY, RENNIE & JONSON
36 East Seventh Street, Suite 2100
Cincinnati, Ohio 45202
Tel: 513-241-4722
Fax: 513-241-8775
E-mail: gjonson@mrj.cc, lwoeber@mrj.cc,
kriley@mrj.cc

*Counsel for Appellant
Judge Charles D. Abood*

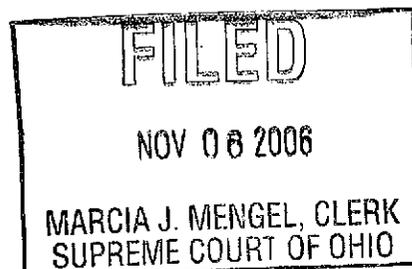


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EXPLANATION OF WHY THIS CASE IS OF PUBLIC INTEREST

This case presents a critical issue for the future of Ohio's absolute judicial immunity doctrine: whether a judge, who otherwise had proper subject matter, personal, and territorial jurisdiction over a case, loses absolute judicial immunity for engaging in a judicial act later held to be a procedural error.

In this case, the Court of Appeals decided an issue of first impression in Ohio, finding that a judge lost his absolute judicial immunity when he continued to preside over a case during the 12 day window after a patently untimely and ultimately unsuccessful Petition for Removal was filed in the federal District Court. This decision is contrary to every published case deciding this identical issue in other jurisdictions. It is also contrary to binding United States Supreme Court and Ohio precedent.

The Court of Appeals' decision threatens the age-old doctrine of absolute judicial immunity, greatly expanding one of the only two exceptions under which a judge may ever be sued in the State of Ohio. The first exception – inapplicable here – permits litigants to sue judges for their non-judicial or administrative acts. The parties do not dispute that Judge Abood was presiding over Mr. Borkowski's case at all times relevant to this action and, therefore, was acting in an adjudicative role. The exception at issue here permits litigants to sue a judge for a judicial act if and only if he performs the judicial act in the "complete absence of all jurisdiction." Binding case law carefully distinguishes between when a judge acts in the "complete absence of all jurisdiction" (which lacks immunity protection) and when a judge acts "in excess of jurisdiction," which is protected by absolute judicial immunity, even if it involves "grave procedural errors," malice, or corruption. If the decision below is allowed to stand, disgruntled litigants may bring lawsuits against Ohio judges for actions they took while presiding

over cases if they merely err in issuing rulings after a notice of appeal, judgment, removal petition, or any other event occurring within litigation that technically ends or stays their ability to rule, despite their otherwise proper jurisdiction over the subject matter of the case.

Those cases in which a judge was found to have erroneously ruled during the time a Petition for Removal was pending analogize this judicial act to ruling during a *stay*, as opposed to ruling while the court is divested of all jurisdiction. (The removal statute does not use the word "divest.") Moreover, cases from other jurisdictions that have addressed this precise issue have unanimously found the judge acted with adequate jurisdiction for immunity purposes.

Ohio judges are plagued with *pro se* suits which purport to attack the way they ruled in an underlying case. These cases fail because the law is clear the judges are immune from suit because their alleged actions – despite claims of gross negligence, malice, collusion, corruption, ethical violations, or even criminal conduct – were judicial in nature and occurred with at least *some* jurisdiction, for immunity purposes. The Court of Appeals' decision undermines this well-settled body of law and, if allowed to stand, will make it possible for litigants to obtain money judgments against judges who err in their adjudicative role by failing to surrender jurisdiction in the face of an obviously inappropriate Petition for Removal. By extension, judges who exercise jurisdiction during a stay or after a notice of appeal has been filed will also face trial and judgment for these errors. These suits will be permissible regardless of whether the judge's ruling was intentionally or inadvertently made after such an event and regardless of whether the judge had any knowledge of such an event. For example, when a judge's ruling and a party's pleading cross in the mail, and the judge is unaware a party has noticed an appeal or removed a matter until after he or she already entered a judgment, the judge may be exposed to litigation if the Court of Appeals' ruling is not reversed.

This decision cannot stand. To restore one of the oldest and most fundamental tenets of Ohio jurisprudence, and to prevent a pox on Ohio's judiciary, this Court must grant jurisdiction to hear this case and review the erroneous and publicly harmful decision of the Court of Appeals.

STATEMENT OF THE CASE AND FACTS

The Underlying Matter: *Borkowski v. Borkowski*

This action arises out of an underlying eviction action, *Jennifer Borkowski v. A.J. Borkowski*, 6th Dist. No. F-04-020, 2005-Ohio-2212, attached to Complaint as Ex. 1.¹) in which Appellee A.J. Borkowski ("Mr. Borkowski") was the defendant and Appellant the Honorable Judge Charles D. Abood was the presiding judge.

In that case, Mr. Borkowski and his daughter, Ms. Borkowski, had previously engaged in extensive litigation since 2002 in the Fulton County Court of Common Pleas, Case No. 02-CV-0274, to determine the ownership of a piece of real property located in Fayette, Ohio. Ms. Borkowski prevailed in that matter and subsequently executed a lease with Mr. Borkowski which gave him possession of the property in exchange for the payment of \$600 rent per month. Mr. Borkowski stopped paying rent in August 2003, and Ms. Borkowski filed an eviction action against him on January 26, 2004. Mr. Borkowski filed an answer on March 23, 2004. On April 29, 2004, Mr. Borkowski was declared a vexatious litigator in the Fulton County Court of Common Pleas where this case was ongoing. The Honorable Judge Charles D. Abood, formerly of the Sixth District Court of Appeals, was assigned as a Visiting Judge over the matter.

¹ If this Court accepts review, it will examine the propriety of the trial Court's dismissal under Ohio R. Civ. P. 12(b)(6). That Court was permitted to rely upon the attachments to the Complaint in determining a dismissal for failure to state a claim, including Exhibit 1 - the pleadings from Mr. Borkowski's underlying action before Judge Abood, as it was an Exhibit to the Complaint and was therefore part of it "for all purposes." (*State ex rel. Crabtree v. Franklin County Bd. of Health* (1997), 77 Ohio St. 3d 247, 249, 1997-Ohio-274, 673 N.E.2d 1281; Ohio R. Civ. P. 10(c).)

Pursuant to 28 U.S.C. § 1446(b), if this state eviction action concerned a federal question (it clearly did not) or if the parties had a diversity of citizenship and the amount in controversy exceeded the federal jurisdictional minimum (which they did not), Mr. Borkowski had up to 30 days from his receipt of the Complaint or summons to file a Petition for Removal in federal court. He did not do so.

This eviction case was set for an evidentiary hearing on May 13, 2004, (51 days after Borkowski filed his answer). On either May 12, 2004 or May 13, 2004 - the day before or the day of his trial² - Mr. Borkowski filed a patently untimely Petition for Removal with the Northern District of Ohio. When the parties appeared for the eviction action on the 13th, Judge Abood held the Petition for Removal did not remove the jurisdiction of the case from his Court. He therefore proceeded with the eviction hearing, permitting both of the Borkowskis to speak.

At the hearing, Ms. Borkowski testified as to the terms of the lease and Mr. Borkowski's failure to pay rent. When it was his turn to speak, in *lieu* of providing testimony, Mr. Borkowski - acting *pro se* - argued that the trial court was divested of jurisdiction to consider the eviction complaint when he had just filed a Petition for Removal.

Judge Abood disagreed, finding that the "mere filing of that document does not remove jurisdiction of this case from this court. And that matter is now closed." At the close of evidence, Judge Abood held Ms. Borkowski had legal possession of the property; that Mr. Borkowski been in default under the terms of the lease since September 2003; that he was served a lawful three-day notice to vacate the premises on January 8, 2004; that he had previously and

² The Complaint identifies the Notice of Removal as having been filed on May 13, 2004; however, the Sixth District Court of Appeals' opinion in *Borkowski v. Borkowski*, also attached to the Complaint, identifies it as having been filed on May 12, 2004. (Complaint, ¶ 6; Complaint Ex. 1, ¶¶ 5, 7.) Whether it was filed the day of trial - as Borkowski alleges - or the day before the trial - as the Court of Appeals' opinion noted - is unclear and unimportant.

continued to unlawfully detain possession of the premises from Ms. Borkowski; and that he was subject to eviction proceedings. Judge Abood's Entry was journalized on May 17, 2004, and a writ of execution of the judgment was filed on May 21, 2004.

On May 24, 2004, the Northern District of Ohio rejected Mr. Borkowski's petition for removal and remanded the proceedings back to Judge Abood's Court. On June 4, 2004, Mr. Borkowski filed an unsuccessful 60(B) Motion, asking the Court to vacate its May 17 and May 21, 2004, Judgments. The Court of Appeals reversed, finding:

Ohio courts . . . have found the mere filing of a proper³ removal petition in state court divests the court of jurisdiction and vests jurisdiction in the federal court.

Borkowski v. Borkowski, 6th Dist. No. F-04-020, 2005-Ohio-2212, ¶14 (emphasis added and citations omitted.) It further found that because Mr. Borkowski's ultimately unsuccessful removal petition divested Judge Abood's Court of jurisdiction from the time it was filed until the case was remanded back 11 or 12 days later, Judge Abood's Judgment Entries were void. Therefore, on May 6, 2005, the Court reversed Judge Abood's decision and remanded the case to the trial court for further proceedings.

The Current Matter: *Borkowski v. Abood*

On August 23, 2005, Mr. Borkowski brought this negligence action against Judge Abood, alleging the judge violated his Constitutional rights, the Ohio Revised Code and Ohio Constitution as he presided over the eviction case. Contemporaneously, he filed a "Notice of *Lis Pendens*," claiming his entitlement to two pieces of real estate owned by Judge and Mrs. Abood. In these actions, Mr. Borkowski claimed, due to the judge's alleged "negligence, acting in bad

³ See section III, *infra*.

faith, and acting in clear absence of jurisdiction,” he should be awarded \$1,000,000.00; an order prohibiting Judge Abood’s disposition of assets; and any other appropriate relief.

Judge Abood filed a motion to dismiss, arguing that – even taking all of Mr. Borkowski’s allegations as true – the Complaint failed to state a claim upon which relief could be granted because Judge Abood was absolutely immune. Ohio law has been well-settled for over 100 years that judges are absolutely immune for their judicial acts as long as they are taken with *some* jurisdiction. See, e.g., *Bradley v. Fisher* (1871), 80 U.S. 335, 352, 20 L.Ed. 646. In both his opening and reply memoranda, Judge Abood explained the distinction between a judge acting in “the complete absence of all jurisdiction” (which carries no immunity) and acting merely “in excess of jurisdiction” or with “*some* jurisdiction, for immunity purposes” (which carries absolute immunity). Judge Abood likewise opposed the *Lis Pendens*. The trial court dismissed the Complaint with prejudice and denied the Notice of *Lis Pendens* on December 1, 2005. Mr. Borkowski filed an unsuccessful motion to set aside the judgments.

Mr. Borkowski then appealed the trial court decision to the Sixth District Court of Appeals (the same court that decided the appeal in *Borkowski v. Borkowski*.) On September 22, 2006, the Court of Appeals reversed and remanded, finding that Judge Abood’s judicial actions between the filing and the rejection of the Petition for Removal were not protected by judicial immunity because 28 U.S.C. § 1446 – the removal statute – instructed State Courts to “proceed no further unless and until the case [was] remanded.” It found:

Here, there was no evidence or allegation that [Mr. Borkowski] had failed to comply with the federal rule. Thus, at the time [Mr. Borkowski] filed his removal petition, the applicable law expressly deprived [Judge Abood] of jurisdiction over the eviction action. In light of this conclusion, we are constrained to find that [Judge Abood] acted in the clear absence of jurisdiction, rather than in excess of his jurisdiction, and, therefore, lost judicial immunity in this case.

(*Borkowski v. Abood*, 6th Dist. No. L-05-1425, 2006-Ohio-4913, ¶ 18.)

This decision was clearly in error and contravenes over 100 years of state and federal jurisprudence defining the parameters of absolute judicial immunity. Likewise, while this precise factual scenario was one of first impression in Ohio, the Court of Appeals' finding is controverted by every decision Appellant has been able to locate on this exact factual point in other jurisdictions. Finally, the public policy reasons for reversing this decision are great – in addition to being plainly wrong, the ruling creates harmful precedent for future disgruntled litigants wishing to bring lawsuits against Ohio judges for the way they rule in cases over which they preside. If the decision of this Court of Appeals is allowed to stand, then all a litigant need do to stop a trial is to file an untimely Petition for Removal, and when the case is remanded because the notice is improper, refile the petition again – and again – and again. Unless this decision is overturned, the trial judge would be rendered powerless to stop this delay tactic by the threat of personal liability.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. I: Ohio judges who act within their judicial capacity have absolute immunity for procedural errors, including ruling during the time between the filing of a patently untimely Petition for Removal and the federal District Court's remand.

I. Ohio law clearly defines Judge Abood's actions as protected by absolute immunity, as they were – at most - merely in excess of jurisdiction.

Federal law has long held judges absolutely immune from claims for money damages if they took (1) “judicial acts” that (2) were not taken in the “clear absence of all jurisdiction,” and Ohio courts are expressly in accord. *Stump v. Sparkman* (1978), 435 U.S. 349, 362, 98 S. Ct. 1099, 55 L. Ed. 2d 331; *Wilson v. Neu* (1984), 12 Ohio St. 3d 102, 103, 465 N.E.2d. 854.

There is no dispute that Judge Abood's allegedly negligent acts below were judicial; the only issue before this Court is whether his acts were taken in “the clear absence of all jurisdiction” and therefore without absolute immunity. In *Stump*, 435 U.S. at 356 (emphasis

added), the Court emphasized that “the necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the **subject matter** before him.” The “absence of jurisdiction” inquiry focuses only on jurisdiction over subject matter, rather than over the person⁴ or geography: where a court has even *some* subject matter jurisdiction, there is sufficient jurisdiction for immunity purposes. *Barnes v. Winchell* (6th Cir. 1997), 105 F.3d 1111, 1122. Therefore, even when a court with subject matter jurisdiction acts where personal jurisdiction is lacking, absolute judicial immunity remains intact. *Stern v. Mascio* (6th Cir. 2001), 262 F.3d 600, 607. *Stump* held because “of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction . . . the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge.” *Stump*, 435 U.S. at 356.⁵

Bradley described the proper analysis as drawing a distinction “between excess of jurisdiction and the clear absence of all jurisdiction over the subject matter.” 80 U.S. at 351. Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority, and no immunity exists. *Id.* The Supreme Court gave the following examples: If a probate judge, with jurisdiction over only wills and estates, tried a criminal case, he would be acting in the clear absence of jurisdiction – this being necessarily known to the judge - and he would not be immune from liability for his action; on the other hand, if a judge of a criminal

⁴ See, e.g., *Ashelman v. Pope* (9th Cir. 1986) 879 F.2d 1072 (*en banc*); *John v. Barron* (7th Cir. 1990), 897 F.2d 1387, 1392; *Crabtree v. Muchmore* (10th Cir. 1990), 904 F.2d 1475.

⁵ For example, in *Stump*, 435 U.S. at 356, the U.S. Supreme Court concluded that the judge of an Indiana state court of general jurisdiction was immune from damages in a federal court action arising from the judge's approval of a mother's petition to have her minor daughter sterilized, even though the judge's action was not specifically authorized by statute, and the exercise of the judge's authority was flawed by serious procedural errors. The mother's petition was not given a docket number, was not filed in the clerk's office, and was approved in an *ex parte* proceeding without notice to the minor, without a hearing, and without a guardian *ad litem*'s appointment.

court convicted a defendant of a nonexistent crime, or with a sentence not permitted by law, he would merely be acting in excess of his jurisdiction, not in the complete absence of all jurisdiction, and would therefore be immune because he still had general jurisdiction over the subject matter. *Id.* at 351-52.

The Court of Appeals' focus on the removal statute's language regarding state courts discontinuing proceedings was manifestly misplaced. The only question, with regard to jurisdiction under *Stump* and *Bradley*, is whether Judge Abood – in presiding over an eviction action in the Fulton County Court of Common Pleas – had *any* subject matter jurisdiction over eviction proceedings. Clearly, he did. Under R.C. 5321.03(A)(1), a landlord may bring a R.C. 1923 action for possession of the premises if the tenant is in default in the payment of rent; under R.C. 1923.02(A)(9), landlords have a forcible entry and detainer action under 1923.01 against tenants who breach a rental agreement; and under R.C. 1923.01(A), Courts of Common Pleas – such as the Fulton Court of Common Pleas in which Judge Abood was presiding – have proper jurisdiction over forcible entry and detainer actions occurring within the territorial jurisdiction of their Court. Judge Abood, while presiding over the underlying eviction matter, therefore had proper subject matter jurisdiction to act. While his judicial rulings during the time the removal was pending were questioned under 28 U.S.C. § 1446, these actions must be characterized as – at most - in *excess* of jurisdiction, not in the clear absence of it. *See Wilson*, 12 Ohio St.3d at 104.

In *Stahl v. Currey* (1939), 135 Ohio St. 253, 259, 20 N.E.2d 529, 14 Ohio Op. 112, this Court put it another way:

It may be stated as a general rule, however, that where a judge or other officer acting in a judicial capacity, having jurisdiction of the person and the subject matter, goes beyond or exceeds his authority, he is not liable, his act in such a case being only reversible error. . . . If on the facts before him a judge has no competence to deal with the matter at all and nevertheless does so, he acts without jurisdiction; if, having authority to deal with it on one footing he deals with it on

another, he acts in excess of jurisdiction. An excess of jurisdiction is simply an absence of jurisdiction as to part of the proceedings.

(Emphasis added.) Like a criminal judge convicting a defendant of a non-existent crime, Judge Abood acted – at most - in excess of his jurisdiction by proceeding in the case during the 12-day window in which the removal petition was pending. However, as he otherwise had proper subject matter jurisdiction over the eviction proceeding, his actions, even to the extent they were improper, were “simply an absence of jurisdiction as to part of the proceedings,” for which he has absolute immunity. *Id.*

II. Courts in other jurisdictions facing this identical issue have all ruled contrarily to the Sixth District Court of Appeals.

While this issue has not been addressed in Ohio, a handful of courts in other jurisdictions have reviewed this precise factual scenario, and every one found absolute judicial immunity:

In *Antelman v. Lewis* (D.C. Mass. 1979), 480 F.Supp. 180, 182, the plaintiff properly filed and noticed a Petition for Removal on November 24, and the judge entered an attachment against him for \$75,000 regardless of the Petition. On page 184 of the Court’s decision, it affirmed the judge’s 12(b)(6) dismissal, holding:

[A]ny action taken by a state court judge in the interval between removal and remand is more in the nature of an act taken in ‘excess of jurisdiction’ than an act taken in the ‘clear absence of all jurisdiction’.

In *Hoppins v. McDermott* (D.C. S.D. Alabama 1991), Case No. 90-0782-AH-S, 1991 U.S. Dist. LEXIS 16141, the Court held that the state court judge – who entered a judgment of conviction, sentence, and commitment after the plaintiff *properly* removed his case from state to federal court – was protected by absolute judicial immunity because the situation was “similar to the latter example noted by the *Stump* court, and that Judge McDermott was not acting in the clear absence of all subject matter jurisdiction.” *Id.* at *12. The Court made a special point of

noting that, although Judge McDermott was technically without jurisdiction over the case, because he had proper subject matter jurisdiction to preside over the plaintiff's criminal case before it was removed, he had adequate jurisdiction, for immunity purposes. *Id.*

In *Classic Distrib., Inc. v. Zimmerman* (M.D. Pa. 1974), 387 F.Supp. 829, 833, at a hearing regarding Pennsylvania's obscenity statute, a plaintiff in an underlying matter informed the underlying defendant that it had just filed a Petition for Removal so the state court could proceed no further. The judge ruled that "unless and until I have a restraining order from the Federal District Bench, we shall continue." *Id.* at 834. The plaintiff's subsequent suit against Judge Wickersham was dismissed pursuant to the judge's absolute immunity. The Court held:

As Judge Wickersham was at all times at issue here acting in the context of a case over which he was given express jurisdiction by [the Pennsylvania obscenity statute], it is clear that he was at all such times acting within his judicial jurisdiction. Even his retention of jurisdiction after the case had been removed, in apparent contravention of 28 U.S.C. § 1446(e), was at worst an act in excess of his jurisdiction; the removal did not alter the fact that the subject matter of the case was initially within the jurisdiction of the state court. Accordingly, plaintiff's claim for damages against Judge Wickersham must be dismissed.

Id. at 835.

In situations other than removal, courts have also found a judge's act after losing jurisdiction over the case – because he once had proper subject matter jurisdiction over the matter – did not diminish the judge's absolute immunity: In *Stern*, 262 F.3d at 604, Judge Mascio continued ruling in a matter after *Stern* filed an Affidavit of Disqualification with this Court pursuant to R.C. 2701.03(D)(1), which automatically deprived the judge of the authority to further preside. The Sixth Circuit held this was merely an act in excess of jurisdiction – despite this Court's opinion in the underlying jurisdictional dispute that Judge Mascio continued ruling in the complete absence of all jurisdiction – because the Court previously had proper subject matter jurisdiction. *Id.* at 607-08.

In *Mullis v. United States Bankruptcy Court* (9th Cir. 1987), 828 F.2d 1385, 1386-1387, Mullis sued judges presiding over his bankruptcy estate, alleging that – after he filed a notice of appeal divesting the court of jurisdiction – they continued to administer the estate; conduct creditor meetings and debtor examinations; and enter orders. Because the Notice of Appeal removed the judges’ jurisdiction, Mullis argued they had no absolute immunity. The Court disagreed, finding, under *Stump* and *Bradley*, “A clear absence of all jurisdiction means a clear lack of all subject matter jurisdiction. . . . What Mullis alleges are, at most, errors or acts in excess of jurisdiction, not acts in the clear absence of all jurisdiction.” *Id.* at 1389,

III. The policies behind the absolute immunity doctrine would be substantially negated by permitting the Court of Appeals’ decision to stand.

The purpose of the judicial immunity doctrine is not to protect the judges, but to “preserve the integrity and independence of the judiciary and to ensure that judges will act upon their convictions free from the apprehensions of possible consequences” and because “independence in decision-making is essential to preserving the integrity of the judicial process.”

Wilson, 12 Ohio St. 3d at 103; *Willitzer v. McCloud* (1983), 6 Ohio St. 3d 447, 449, 453 N.E.2d.

693, citing *Bradley*, 80 U.S. at 335. The U.S. Supreme Court has held that:

if judges were personally liable for erroneous decisions, the resulting avalanche of suits, most of them frivolous but vexatious would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits. The resulting timidity would be hard to detect or control, and it would manifestly detract from independent and impartial adjudication. . . . Most judicial mistakes or wrongs are open to correction through ordinary mechanisms of review, which are largely free of the harmful side effects inevitably associated with exposing judges to personal liability.

Forrester v. White, (1988), 484 U.S. 219, 226-27, 108 S. Ct. 538; 98 L. Ed. 2d 555.

“Ohio law recognizes that “[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction....” *Newdick v. Sharp* (1967), 13 Ohio App. 2d 200, 201, 235 N.E.2d

529. This is because “if judicial immunity means anything, it means that a judge ‘will not be deprived of immunity because the action he took was in error . . . or was in excess of his authority.’” *Mireles v. Waco* (1991), 502 U.S. 9, 12-13, 112 S. Ct. 286, 116 L. Ed. 2d 9 (citing *Stump*, 435 U.S. at 536).

According to persuasive precedent, contrary to the Court of Appeals’ decision in *Borkowski v. Borkowski*, 2005 Ohio 2212, ¶ 15, Judge Abood truly maintained *proper* jurisdiction over the matter during the baseless removal: When a defendant *strictly complies* with removal requirements, the state court faces a stay⁶ until the matter is remanded; however, a Petition for Removal, filed after the expiration of the time provided for filing such a petition “is a nullity and does not divest the state court of jurisdiction to proceed to a determination of the action.” *State ex rel. Ervin v. Gilligan* (1973), 35 Ohio App. 2d 84, Syll 3, 300 N.E.2d 225; *see also Ramsey v. A.I.U. Ins. Co.* (June 18, 1985), 10th Dist. Ct. App. No. 84AP-317, 1985 Ohio App. LEXIS 8157, 13-14.

In *Borkowski v. Borkowski* – where Judge Abood was not a party and had no opportunity to object – the Court of Appeals incorrectly held his Court was divested of jurisdiction to proceed after Mr. Borkowski filed a patently untimely Petition for Removal, merely because Borkowski otherwise complied with the technical provisions, such as providing notice. *Borkowski*, 2006-Ohio-4913, ¶ 17; *see also Borkowski*, 2005-Ohio-2212, ¶15, where the Court

⁶ *See Antelman, supra*, finding the period a trial court faces during an ultimately unsuccessful removal is more akin to a stay than a complete divesting of all jurisdiction and, consequently, affords the judge immunity. In this same vein, the U.S. Supreme Court has held removal actions provide that the removal “acts as a **stay** of the state-court proceedings.” *Vendo v. Lektro-Vend Corp.* (1977), 433 U.S. 623, 640, 97 S. Ct. 2881, 53 L. Ed. 2d 1009 (emphasis added); *see also Greenwood v. Peacock* (1966), 384 U.S. 808, 846-847, 86 S. Ct. 1800; 16 L. Ed. 2d 944. Notably, the word “divest” appears nowhere in 28 U.S.C. § 1446(d).

explicitly noted the fruitlessness of the Petition and, regardless, found the trial court was divested of jurisdiction (“The trial court undoubtedly recognized the ultimate futility of such a maneuver, and chose to resolve the parties’ dispute on May 13, 2004, rather than wait for the federal court to remand the case”). However, the fact of the removal’s timing alone, in addition to the fact it was remanded, should have led the Court of Appeals to hold otherwise. The incorrect analysis of the Court of Appeals in the first *Borkowski* case further complicates the Court of Appeals’ analysis in this matter and makes it difficult for Judge Abood to argue that his rulings during the time the removal was pending – in addition to having adequate jurisdiction for immunity purposes – actually had proper jurisdiction as a matter of law. However, the fact the removal petition was filed nearly five months after the Complaint and immediately before the trial – as evidenced in the Complaint and its attachments in *this* matter – illustrates this under *Gilligan* and *Ramsey*.

The logical extension of the Court of Appeals’ two decisions in these matters is that Ohio judges not only lose immunity for all rulings they make after a patently defective Petition for Removal, but they are also rendered powerless to halt abuse of the federal removal procedure when a litigant frivolously uses that mechanism to delay a trial. Under these two cases, the only scenario in which the trial court would retain proper jurisdiction would be if a plaintiff failed the technical and procedural requirements of a removal petition, such as failing to provide notice: Neither the “ultimate futility” of the Petition, nor its patent defectiveness would be material. While Ohio case law has held a judge’s *erroneous* rulings after a *proper* Petition for Removal were void, the policy rationales behind *Gilligan* and *Ramsey, supra* are the only logical response: an untimely Petition for Removal must be treated as a nullity that does not divest the state court of jurisdiction to proceed. To find otherwise would enable unprepared litigants to bring specious notices of removal on the morning of trial and obtain an automatic continuance.

Finally, the public policy behind absolute immunity is absolutely contravened by the Court of Appeals' decision, which affords immunity to those trial court decisions made after an improperly noticed but otherwise valid removal petition, but denies immunity when the judge rules after a properly noticed but untimely and frivolous petition. In every instance, a judge would have undue trepidation in ruling, knowing that making the right decision would afford immunity and making the wrong one would not. This dynamic is the precise reason judicial immunity exists. The Court of Appeals' decision must be reversed to correct this problem.

CONCLUSION

For the foregoing reasons, this case involves an important matter of public interest. Appellant the Honorable Judge Charles D. Abood therefore respectfully requests that this Court accept jurisdiction in this case to review this important case on the merits.

Respectfully submitted,



George D. Jonson (0027124)

Linda L. Woeber (0039112)

Kimberly Vanover Riley (0068187)(Counsel of Record)

MONTGOMERY, RENNIE & JONSON

36 East Seventh Street, Suite 2100

Cincinnati, Ohio 45202

Tel: 513-241-4722

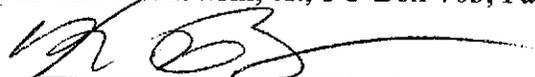
Fax: 513-241-8775

E-mail: gjonson@mrj.cc, lwoeber@mrj.cc, kriley@mrj.cc

Counsel for Defendant-Appellant Judge Charles D. Abood

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2006, a copy of the Memorandum in Support of Jurisdiction was served, via regular U.S. Mail, upon A.J. Borkowski, Jr., PO Box 703, Fayette, Ohio 43521, *Pro Se Appellee*.



KIMBERLY VANOVER RILEY

FILED
COURT OF APPEALS
2006 SEP 22 A 7:59
COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

A. J. Borkowski, Jr.
Appellant

Court of Appeals No. L-05-1425
Trial Court No. CI 0200504894

v.

Charles D. Abood
Appellee

DECISION AND JUDGMENT ENTRY
Decided: SEP 22 2006

A.J. Borkowski, Jr., pro se.

Linda L. Woeber, Kimberley Vanover Riley and Matthew E. Stubbs, for appellee.

SKOW, J.

{¶ 1} Appellant, pro se, A.J. Borkowski, appeals a judgment by the Lucas County Court of Common Pleas, granting dismissal of his claims against appellee, Judge Charles D. Abood. For the reasons that follow, the judgment of the trial court is reversed.

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MANDATED

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{¶ 2} Appellant filed a complaint against appellee, a judge in the Fulton County Court of Common Pleas, for alleged violations of the Ohio Revised Code and the Ohio Constitution, including "negligence, acting in bad faith, and acting in a clear absence of all jurisdiction." Together with the complaint, appellant filed a "Notice of *Lis Pendens*," stating that the instant action involves real property owned by appellee.

{¶ 3} The complaint arose out of an eviction proceeding in which appellant was a defendant and over which appellee presided. An evidentiary hearing was held in the matter on May 13, 2004. Just before the start of the hearing, the trial court allowed appellant to file a notice of removal to federal court. (The notice had already been file-stamped by the United States District Court, Northern District of Ohio.)

{¶ 4} At the hearing, the plaintiff testified that she was the owner of the property in question. She also provided testimony as to the terms of the lease between herself and appellant and appellant's failure to pay rent. Appellant, for his part, offered no evidence. Instead, acting pro se, he argued that the trial court was divested of jurisdiction to consider the eviction complaint when the notice of removal was filed. The court found that the filing of the notice of the removal did not remove the court's jurisdiction, then proceeded to hear evidence in the case. At the close of the evidence, the trial court found that appellant had defaulted under the terms of the lease and, therefore, was subject to eviction proceedings. The trial court's judgment entry was journalized on May 17, 2004, and a writ of execution of the judgment was filed on May 21, 2004.

{¶ 5} On May 24, 2004, the federal court dismissed appellant's petition for removal and remanded the matter back to the trial court. On June 4, 2004, appellant filed a Civ.R. 60(B) motion requesting the trial court to vacate its May 17 and May 21, 2004 judgments. The motion was summarily denied that same day. Appellant appealed the judgment of eviction and the denial of the motion to vacate.

{¶ 6} On appeal, this court found that appellant's removal petition divested the trial court of jurisdiction from the time the notice of removal was filed, on May 13, 2004, until May 24, 2004, when the case was remanded back to the trial court. This court further found that the trial court's entries issued during that time period were void.

{¶ 7} In the instant matter, appellee filed a motion to dismiss appellant's claims, and a motion to declare appellant's "Notice of *Lis Pendens*" void. The trial court, finding that appellee was entitled to absolute judicial immunity, granted both of appellee's motions in a journal entry filed on December 1, 2005. In the same journal entry, the trial court overruled several motions that had been filed by appellant -- specifically, a motion for summary judgment, and a "Motion to Enforce Law Against Defendant and Request for Sanctions." On December 6, 2005, appellant filed a motion entitled "Ohio Civil Rule 60(B)(1)-(5) Motion to Vacate the Court's Judgment of 11/30/2005 and to Reinstate Plaintiff's Valid Complaint, Lis-Pendens and all of his Pleadings with Affidavit." No ruling was made on this motion. Appellant timely appealed the judgments set forth in the December 1, 2005 journal entry, raising the following assignments of error:

{¶ 8} I. "THE LOWER COURT ERRED TO THE PREJUDICE OF APPELLANT IN THAT GRANTING APPELLEE'S MOTION TO DISMISS, MOTION TO REMOVE "NOTICE OF LIS PENDENS," AND OVERRULING APPELLANT'S MOTION FOR SUMMARY JUDGMENT, MOTION TO ENFORCE LAW AND REQUEST FOR SANCTIONS WAS AN ABUSE OF DISCRETION."

{¶ 9} II. "UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE THE LOWER COURT ERRED TO THE PREJUDICE OF APPELLANT IN DENYING APPELLANT HEARING ON THE ISSUES RAISED IN HIS MOTION FOR RELIEF FROM JUDGMENT."

{¶ 10} In his first assignment of error, appellant essentially argues that the court erred in dismissing the case (and otherwise ruling against him) because, contrary to the trial court's finding, appellee was not entitled to judicial immunity. The law is well-settled that where a judge has jurisdiction over a controversy, he is not civilly liable for actions taken in his judicial capacity. *State ex rel. Fisher v. Burkhardt*, 66 Ohio St.3d 189, 192.¹ This is true, even if those actions were in error, in excess of authority, or malicious. *Kelly v. Whiting* (1985), 17 Ohio St.3d 91, 93. A judge will be subject to liability only if: 1) the judge's actions were not judicial in nature; or 2) the judge acted in a "clear absence of jurisdiction". *Reasoner v. City of Columbus*, 10th Dist. No. 02AP-831, 2003-Ohio-670, at ¶ 15.

¹We note, however, that the doctrine of judicial immunity does not preclude injunctive relief against a judicial officer acting in a judicial capacity. *Pulliam v. Allen* (1984), 466 U.S. 522, 541-42. Nor does it preclude a statutory award of attorney's fees generated in obtaining that injunctive relief. *Id.*, at 544.

{¶ 11} Here, the parties do not dispute that appellee's actions were judicial in nature. Nor is there any dispute that appellee had jurisdiction over the eviction action at the inception of the underlying case. At issue is whether appellee acted in a "clear absence of jurisdiction" or merely "in excess of jurisdiction" after the removal petition was filed, when appellee continued to preside over the eviction proceedings. An act is in excess of jurisdiction, if "the act, although within the power of the judge, is not authorized by law and is therefore voidable." *Wilson v. Neu* (1984), 12 Ohio St.3d 102, 104.

{¶ 12} Because "some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction', [*Bradley v. Fisher* (1872), 13 Wall. 335, 352] * * * the scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge." *Stump v. Speakman* (1978), 435 U.S. 349, 356. But where a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes or caselaw expressly depriving him of jurisdiction, he acts in a clear absence of jurisdiction and, as a result, judicial immunity is lost. See *Rankin v. Howard* (C.A.9, 1980), 633 F.2d 844, 849.

{¶ 13} The procedure for filing a removal petition, set forth at 28 U.S.C. §1446, relevantly provides:

{¶ 14} "(a) A defendant or defendants desiring to remove a civil action * * * from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal * * * containing a short and

plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

{¶ 15} "* * *

{¶ 16} "(d) Promptly after the filing of such notice of removal of a civil action 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 removal and the State court shall proceed no further unless and until the case is remanded."

{¶ 17} At the time appellant's removal petition was filed, there existed in addition to the federal statute, longstanding and consistent federal and Ohio caselaw which provided that as long as a defendant strictly complied with the federal procedural rule, including providing proper notice, the state court was immediately divested of jurisdiction. See, e.g., *Fox v. Stames* (Dec. 8, 1989), 11th Dist. No. 88-L-13-192; *Ramsey v. A.I.U. Ins. Co.* (June 18, 1985), 10th Dist. No. 84AP-317; *Shunk v. Shunk Mfg. Co.* (1945), 75 Ohio App. 253, 256 (interpreting former 28 U.S.C.S. §72); *Anderson v. United Realty Co.* (1908), 79 Ohio St. 23, 43; *Howes v. Childers* (E.D.Ky. 1977), 426 F.Supp. 358; *South Carolina v. Moore* (C.A.4, 1970), 447 F.2d 1067, 1073.

{¶ 18} Here, there was no evidence or allegation that appellant failed to comply with the federal rule. Thus, at the time appellant filed his removal petition, the applicable law expressly deprived appellee of jurisdiction over the eviction action. In light of this conclusion, we are constrained to find that appellee acted in the clear absence of

jurisdiction, rather than in excess of his jurisdiction, and, therefore, lost judicial immunity in this case. See *Rankin*, supra.

{¶ 19} Next, we look to the statutory immunity that is conferred upon officers and employees. Such immunity is provided for at R.C. 9.86, wherein it is relevantly provided:

{¶ 20} "Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner."²

{¶ 21} Under this statute, appellee would appear to be protected, even if he acted without jurisdiction, so long as he did not act with malicious purpose, in bad faith, or in a wanton or reckless manner. Unfortunately for appellee, appellant has, in fact, alleged that appellee acted with bad faith in the underlying case. Inasmuch as the trial court made no determination with respect to this allegation, we must reverse the trial court's judgment and remand this matter for further proceedings consistent with this decision. Accordingly, appellant's first assignment of error is found well-taken.

²We note that R.C. 9.86 does not supersede the more specific judicial immunity that was discussed above. By its own terms, R.C. 9.86 "does not eliminate, limit, or reduce any immunity from civil liability that is conferred upon an officer or employee by any other provision of the Revised Code or by case law."

{¶ 22} As a result of our determination regarding the first assignment of error, appellant's second assignment of error, dealing with the trial court's denial of a hearing in connection with the issues raised in his motion for relief from judgment, is clearly moot.

{¶ 23} The judgment of the Lucas County Court of Common Pleas is hereby reversed. The case is remanded to the trial court for further proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

William J. Skow, J.

Dennis M. Parish, J.

CONCUR.



JUDGE



JUDGE



JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.