

IN THE SUPREME COURT OF OHIO

A.J. BORKOWSKI, JR.,

Appellant,

v.

CHARLES D. ABOOD, JUDGE,

Appellee.

: On Appeal from the Lucas County Court of  
: Appeals, Sixth Appellate District  
:  
: Court of Appeals Case No. L-05-1425  
:  
: Supreme Court Case No.: 06-1913  
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APPELLANT THE HONORABLE JUDGE CHARLES D. ABOOD'S MEMORANDUM IN  
OPPOSITION TO MOTION TO STRIKE THE APPELLANT'S APPEAL

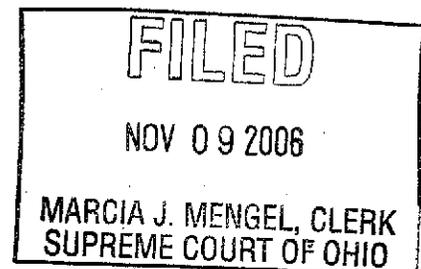
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Judge Charles D. Abood*



## Memorandum

After previously bringing a Motion to Dismiss this appeal, *pro se* Appellee Borkowski brings a Motion to Strike, attacking the legal merits of Judge Abood's appeal before Judge Abood was required to submit a memorandum in support of jurisdiction under Ohio S. Ct. Prac. R. II, Section 1(3). He raises two arguments: First, he claims that Judge Abood's attempt to appeal is barred by the doctrine of *res judicata*, and, second, he argues Judge Abood is not absolutely immune. Beyond being arguments more appropriately suited for the merit brief, these fail as a matter of law.

### Res Judicata

First, the matter of Judge Abood's judicial immunity is not barred by the doctrine of *res judicata*. As explained more fully on pages 13-14 of Judge Abood's Memorandum in Support of Jurisdiction, the Court of Appeals in *Borkowski v. Borkowski*, 6<sup>th</sup> Dist. No. F-04-020, 2005-Ohio-2212, attached to Complaint as Ex. 1, evaluated whether Judge Abood erred in continuing to rule after Borkowski filed his unsuccessful Petition for Removal.<sup>1</sup> It did *not* evaluate whether he acted with adequate jurisdiction *for purposes of absolute immunity*.

The law is clear these analyses are distinctly separate: The term "jurisdiction" is to be broadly construed to effectuate the purposes of judicial immunity. *Stump v. Sparkman* (1978), 435 U.S. 349, 356, 98 S. Ct. 1099, 55 L. Ed. 2d 331. While judicial acts performed "in excess of jurisdiction," as compared to "in the clear absence of jurisdiction" are treated the same for purposes of determining judicial error in a case like *Borkowski v. Borkowski*, they are treated very differently in determining absolute immunity. Judicial acts performed "in the clear absence

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<sup>1</sup> Incidentally, as explained in Judge Abood's memorandum in support of jurisdiction, the Court of Appeals came to the incorrect conclusion in *Borkowski v. Borkowski*; however, that is immaterial for purposes of determining whether Judge Abood has absolute judicial immunity.

of all jurisdiction” carry no immunity, whereas judicial acts performed merely “in excess of jurisdiction” have immunity protection. *Barnes v. Winchell* (6<sup>th</sup> Cir. 1997), 105 F.3d 1111, 1122. In a case like this one – where immunity, not whether Judge Abood erred, is at issue – the question at hand is markedly different than the one answered by the Court of Appeals in *Borkowski v. Borkowski*.

In any event, in order to invoke the doctrine of *res judicata*, the parties to the subsequent action must be identical to or in privity with those in the former action. *Johnson's Island, Inc. v. Danbury Twp. Bd. of Trustees* (1982), 69 Ohio St.2d 241, 243, 23 O.O.3d 243, 431 N.E.2d 672. Judge Abood was not a party in *Borkowski v. Borkowski*, nor is there any privity – or Article XI case or controversy - between a judge and the litigants before him or her. *See, e.g., In Re Justices of the Supreme Court of Puerto Rico* (1<sup>st</sup> Cir. 1982), 695 F.2d 17, 21 (1st Cir. 1982). Consequently, Borkowski’s claims to *res judicata* preclusion fail.

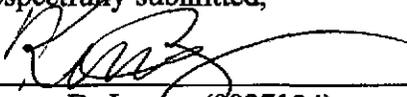
### **Judicial Immunity**

For all the reasons articulated in Judge Abood’s Memorandum in Support of Jurisdiction, he *was* absolutely immune from Borkowski’s claims for money damages and the Court of Appeals erred in finding otherwise. First, contrary to the Court of Appeals’ ruling in *Borkowski v. Borkowski, supra*, Judge Abood actually acted with proper jurisdiction, not simply “adequate” jurisdiction for immunity purposes (Memorandum in Support of Jurisdiction, pp. 13-14). However, even to the extent this Court finds Judge Abood erred, because it is undisputed he had proper subject matter jurisdiction over the proceedings, he only acted at most in *excess* of jurisdiction and therefore remained absolutely immune for any alleged procedural error. (*See* Memorandum in Support of Jurisdiction, pp. 7-12.)

**Conclusion**

For the foregoing reasons, Appellant Judge Abood respectfully requests this Court deny Appellee's Motion.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on November 8, 2006, a copy of the Memorandum in Opposition to Motion to Strike the Appellant's Appeal was served, via regular U.S. Mail, upon the following:

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