

IN THE SUPREME COURT OF OHIO

ANDREA BARNES, EXEC.,

*Plaintiff/Appellee/Cross-Appellant,*

-vs-

UNIVERSITY HOSPITALS  
OF CLEVELAND, et al.

*Defendants/Appellants/Cross-Appellees.*

CASE NO. 2007-0140

On Appeal from the Cuyahoga County Court  
of Appeals, Eighth Appellate District

Court of Appeals Case No. 87247,  
Consolidated with Case Nos. 87285, 87710,  
87903, and 87946

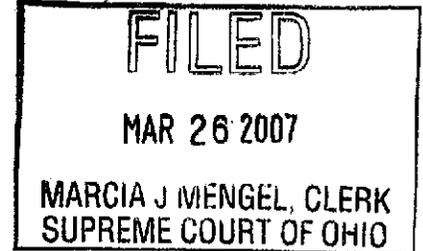
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MEMORANDUM OPPOSING JURISDICTION OF CROSS APPEAL BY APPELLANTS  
MEDLINK OF OHIO AND THE MEDLINK GROUP, INC.

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

STATEMENT OF WHY JURISDICTION SHOULD NOT BE GRANTED FOR THE  
CROSS-APPEAL..... 1

STATEMENT OF FACTS..... 2

ARGUMENT ..... 5

    I.    JURISDICTIONAL REQUEST OF PLAINTIFF/APPELLEE/CROSS-  
          APPELLANT ..... 5

        PROPOSITION OF LAW:  The Amendments to R.C. § 1343.03(C) that were adopted by  
        2004 H.B. 212 do not apply to causes of action that accrued prior to the enactment's  
        effective date of June 2, 2004..... 5

CONCLUSION..... 7

PROOF OF SERVICE ..... 8

**TABLE OF AUTHORITIES**

**Cases**

*Davis v. Wolfe* (2001), 92 Ohio St. 3d 549, 552.....2

*Fox v. Eaton Corp.* (1976), 48 Ohio St.2d 236, 238, 358 N.E.2d 536, 537 .....2

*In re J.J.*, 111 Ohio St. 3d 205, 2006-Ohio-5484, 855 N.E.2d 851.....2

*Jeppe v. Blue Cross* (1980), 67 Ohio App.2d 87, 21 O.O.3d 406, 425 N.E.2d 947.....7

*Kline v. Carroll* (2002), 96 Ohio St. 3d 404, 409-10 .....2

*N. Olmsted v. Eliza Jennings, Inc.* (Ohio App. 8 Dist., 1995) 101 Ohio App.3d 652, 656 N.E.2d 389, appeal denied 73 Ohio St.3d 1410, 651 N.E.2d 1308 .....6

*Pratts v. Hurley*, 102 Ohio St. 3d 81, 2004-Ohio-1980, 806 N.E.2d 992 .....2

*Shear v. W. Am. Ins. Co.* (1984), 11 Ohio St.3d 162, 11 OBR 478, 464 N.E.2d 545 .....7

*State ex rel. Peffer v. Russo*, 110 Ohio St. 3d 175, 2006-Ohio-4092, 852 N.E.2d 170.....4

*State ex rel. Russo v. McDonnell*, 110 Ohio St. 3d 144, 2006-Ohio-3459.....1

*State ex rel. Stacy v. Batavia Local School Dist. Bd. of Ed.* (2002), 97 Ohio St.3d 269, 273.....3

*State ex rel. Sugardale Foods, Inc. v. Indus. Comm.* (2000), 90 Ohio St.3d 383.....3

**Ohio Constitutional Provisions**

Ohio Const. Art. IV, § 6 .....1

**Ohio Rules and Statutory Provisions**

2004 H.B. 212.....1, 5

Gov.Jud.R.VI(1)(C)(2) .....1

R.C. 1343.03(C).....1, 5

R.C. 1343.....1, 5, 6, 7

R.C. 1343.03(C)(1)(C)(II) .....1, 6

R.C. 2701.10.....1

**STATEMENT OF WHY JURISDICTION SHOULD NOT BE GRANTED FOR THE  
CROSS-APPEAL**

The award of prejudgment interest, from which Plaintiff herein cross-appeals, was rendered by an unqualified judge. The award of prejudgment interest, just like the underlying proceedings, is void. This Court should not accept Plaintiff's cross-appeal, as it asks this Court to analyze a post-judgment decision of an unqualified judge subsequent to a void judgment. Further, the award of prejudgment interest in this case did not involve a retroactive application of R.C. 1343.03(C)(1)(c)(ii) because there was no money judgment awarded until after 2004 H.B. 212 went into effect. Plaintiff's Proposition Of Law simply does not raise a question of great or general interest.

As was detailed in the *Memorandum In Support Of Jurisdiction Of Appellants Medlink of Ohio and the Medlink Group, Inc.*, the underlying proceedings are void because (1) a jury trial was held contrary to the statutory requirements of R.C. 2701.10<sup>1</sup>, and (2) the individual assigned to oversee the case pursuant to R.C. 2701.10 was not qualified. Ohio's Private Judge Statute, R.C. 2701.10, clearly provides that only previously elected judges can serve as private judges, and that elected judges must voluntarily retire in order to serve.<sup>2</sup> As Medlink Defendants briefed in their Jurisdictional Memorandum, Robert T. Glickman was not qualified to serve as the private judge in this case because he had never been elected to the Bench.

It is telling that *Plaintiffs' Memorandum Opposing Jurisdiction and in Support of Cross-Appeal* does not even challenge that the statutory requirements of R.C. 2701.10 were not met in this case. Moreover, Plaintiff also does not challenge that Robert T. Glickman was unqualified to serve as a Private Judge.

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<sup>1</sup> *State ex rel. Russo v. McDonnell*, 110 Ohio St. 3d 144, 2006-Ohio-3459, syllabus 1.

<sup>2</sup> See, R.C. 2701.10(A), Gov.Jud.R.VI(1)(C)(2), and Ohio Const. Art. IV, § 6, Editor's Comment.

The fact that the proceedings in this case were held contrary to the statutory requirements of Ohio's Private Judge Statute renders the proceedings void, not voidable. As this Court held in *Kline v. Carroll* (2002), 96 Ohio St. 3d 404, 409-10 (citing *Davis v. Wolfe* (2001), 92 Ohio St. 3d 549, 552), a failure to meet statutory requirements in the transfer of a case confers no subject matter jurisdiction. [emphasis added]. This case is distinguishable from *In re J.J.*, 111 Ohio St. 3d 205, 2006-Ohio-5484, 855 N.E.2d 851, where this Court considered a procedural irregularity in the transfer of a case to a visiting judge, as opposed to a statutory violation, as was the case in the proceedings below. This Court held in *In re J.J.* that "procedural irregularities in the transfer of a case to a visiting judge" will render proceedings voidable. *Id.*, paragraph one of syllabus. However, as this Court explained in the same case, when the trial court lacks subject matter jurisdiction, the judgment is void. (*Id.* at ¶ 10, citing *Pratts v. Hurley*, 102 Ohio St. 3d 81, 2004-Ohio-1980, 806 N.E.2d 992).<sup>3</sup>

Because the proceedings and post-judgment decisions in this case are void, this Court should not examine the legal framework upon which those void decisions were made. The appropriate remedy under these circumstances is to vacate all proceedings that were held before Robert T. Glickman, and to return the *Barnes* matter to the trial court for further proceedings.

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

Defendants adopt by reference their Statement of the Case and Statement of the Facts as provided in their *Memorandum In Support Of Jurisdiction Of Appellants Medlink of Ohio and the Medlink Group, Inc.* However, Defendants will briefly address some of the inaccuracies

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<sup>3</sup> Even if this Court finds that the judgment in this case is voidable, and not void, Medlink Defendants properly raised this issue on appeal. *Fox v. Eaton Corp.* (1976), 48 Ohio St.2d 236, 238, 358 N.E.2d 536, 537 (holding that subject matter jurisdiction cannot be waived and may be raised at any time, including for the first time on appeal.)

provided in the *Memorandum Opposing Jurisdiction and in Support of Cross-Appeal of Plaintiff-Appellee/Cross-Appellant, Andrea Barnes, Executrix*.

As an initial matter, Defendants did not and have not waived their right to challenge Robert T. Glickman's lack of authority to oversee the underlying proceedings or the lack of subject matter over the same. This is true for two reasons. First, a party cannot waive subject matter jurisdiction. *State ex rel. Sugardale Foods, Inc. v. Indus. Comm.* (2000), 90 Ohio St.3d 383, 386. Second, Defendants did not make a knowing waiver. *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Ed.* (2002), 97 Ohio St.3d 269, 273.

The evidence establishes that Defendants had absolutely no knowledge of Glickman's lack of qualifications. Defendants relied on Glickman's representation that he was qualified to act as a private judge and the fact that Glickman held himself out to the public and to this Court that he was qualified to act as a private judge.<sup>4</sup> In fact, Glickman's name was listed on this very Court's "Registration of Private Judges" at the time of the proceedings and it was not until March 14, 2006 that this Court put Glickman on notice that he was not qualified to serve as a private judge because he had never been elected to a judgeship. (Correspondence dated March 14, 2006 from the Supreme Court of Ohio Director of Judicial Services to Robert T. Glickman).

This issue first came to Defendants' attention during a January 30, 2006 hearing on prejudgment interest at which time counsel for Lexington Insurance Company (Medlink's insurer), attempted to intervene, and an effort was made by Glickman and counsel for Plaintiff to obtain Lexington's agreement to waive on the record any appeal regarding the use of Robert T. Glickman as a Private Judge. (Transcript of January 30, 2006 prejudgment interest hearing at

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<sup>4</sup> Glickman continues to hold himself out as qualified to serve as a private judge, as his biography on his law firm's website still indicates that, "[P]ursuant to Ohio statute, former Judge Glickman is also active as a private judge hired by the litigants to preside over jury trials."

page 41, lines 4-9; page 42, lines 15-23.) After that hearing, Defendants researched the issue and discovered Glickman's lack of qualifications. It further became obvious as to why Plaintiff was making attempts to have Lexington waive any appeal regarding the use of Glickman as a private judge. Plaintiff's counsel was intimately familiar with these issues, as they had been raised in *State ex rel. Peffer v. Russo*, 110 Ohio St. 3d 175, 2006-Ohio-4092, 852 N.E.2d 170, in which case Plaintiff's counsel herein (Michael F. Becker) was counsel for the Peffers. Judge Russo's merit brief had been served in the *Peffer* case two weeks before the prejudgment interest hearing in this case. (See Docket, Case No. 2005-2223).

Second, Plaintiff's statement that Defendants' argument has twice been unsuccessful in original actions in this Court is misleading. After discovering the above, Medlink did file a Writ of Prohibition with this Court on March 7, 2006, asking that Glickman be prohibited from deciding the issue of prejudgment interest, which was currently pending in the trial court. (See Case No. 2006-0478). Glickman was served with the Writ of Prohibition on March 8, 2006, which quite obviously put him on notice that his qualifications to serve as a private judge were being challenged. (See *Id.*) Just two days later, Glickman quickly awarded prejudgment interest to Plaintiff to attempt to avoid a ruling on his qualifications. (See Exhibit B to *Plaintiffs' Memorandum Opposing Jurisdiction and in Support of Cross-Appeal*). The Journal Entry filed by Glickman on that date was incomplete and did not even reference an amount of prejudgment interest awarded. Then, on March 14, 2006, an Amended Journal Entry was filed awarding \$896,381.99 in prejudgment interest to Plaintiff and stating that, due to a secretarial error, the initial Journal Entry had been incomplete. (See *Id.*) Once prejudgment interest was awarded, Glickman had ruled upon the last pending issue in the trial court. Therefore, Defendants filed an Application for Dismissal since there was nothing left to prohibit.

Defendants later filed a Writ of Mandamus with this Court on May 11, 2006. (Case No. 2006-0932). That mandamus action was filed by Medlink against Administrative Judge Nancy McDonnell asking that she be ordered to vacate the proceedings in the trial court below, as they are void *ab initio*. Judge McDonnell filed a Motion to Dismiss, arguing that there was no jurisdiction for a mandamus action because the true object sought was declaratory judgment and prohibitory injunction. (*Respondent's Motion to Dismiss*, at p. 4.) Judge McDonnell accepted Medlink's factual assertions regarding Glickman's lack of authority as true for purposes of her Motion. (*Id.*) The Writ of Mandamus was dismissed by this Court on August 2, 2006 without a written opinion.

## ARGUMENT

### **I. JURISDICTIONAL REQUEST OF PLAINTIFF/APPELLEE/CROSS-APPELLANT**

**PROPOSITION OF LAW: The Amendments to R.C. § 1343.03(C) that were adopted by 2004 H.B. 212 do not apply to causes of action that accrued prior to the enactment's effective date of June 2, 2004.**

Although it is Defendants' position that the proceedings are void and a new trial should be granted, the proper statute was applied in calculating the award of prejudgment interest below. R.C. 1343.03(C)(1)(c)(ii) requires that any prejudgment interest awarded is to be imposed from the date of filing of the Complaint. This is the statute that was in effect on the date that an award of prejudgment interest was entered in favor of Plaintiff. Applying the current version of R.C. 1343 on the date of the award of prejudgment interest was not a retroactive application of the statute, because Plaintiff did not have a right to prejudgment interest until March 14, 2006, the date that prejudgment interest was awarded and at which time the current statute was in effect.

Interest is statutorily required only upon rendering of a money judgment that is definite in amount. *N. Olmsted v. Eliza Jennings, Inc.* (Ohio App. 8 Dist., 1995) 101 Ohio App.3d 652, 656

N.E.2d 389, appeal denied 73 Ohio St.3d 1410, 651 N.E.2d 1308. Plaintiff was not awarded prejudgment interest until March 14, 2006. (See Exhibit B to *Plaintiffs' Memorandum Opposing Jurisdiction and in Support of Cross-Appeal*). R.C. 1343.03(C)(1)(c)(ii) was the statute in place on March 14, 2006 and it applies to determine the date upon which prejudgment interest accrues here. The statute states:

If, upon motion of any party to a civil action that is based on tortious conduct... and in which the court has rendered a judgment, decree, or order for the payment of money, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment, decree, or order shall be computed as follows:

(ii) From the date on which the party to whom the money is to be paid filed the pleading on which the judgment, decree, or order was based to the date on which the judgment, decree, or order was rendered.

R.C. 1343.03(C)(1)(c)(ii). The appeals court below affirmed the application of the current version of this statute and stated in its decision:

The language of the statute clearly supports the trial court's decision to calculate prejudgment interest from the date the action was filed. Although this statute was enacted after the suit was originally filed, it was in place before the prejudgment interest determination hearing was conducted, thus, it is applicable. The trial court's actions did not constitute a retroactive application because the current version of the statute was firmly in place before prejudgment interest was evaluated.

(Opinion, p. 25). By operation of law, Defendants did not owe any interest to Plaintiff until a money judgment, with a definite amount, was rendered pursuant to R.C. 1343. *N. Olmsted v. Eliza Jennings, Inc.* (Ohio App. 8 Dist., 1995) 101 Ohio App.3d 652, 656 N.E.2d 389, appeal denied 73 Ohio St.3d 1410, 651 N.E.2d 1308, citing *Shear v. W. Am. Ins. Co.* (1984), 11 Ohio St.3d 162, 11 OBR 478, 464 N.E.2d 545, citing *Jeppe v. Blue Cross* (1980), 67 Ohio App.2d 87, 21 O.O.3d 406, 425 N.E.2d 947.

Because a money judgment was not awarded to Plaintiff until March 14, 2006, providing for prejudgment interest, the operative version of the statute was R.C. 1343.03(C)(1)(c)(ii). Applying that statute to determine when interest began was, therefore, not a retroactive application of the statute and Plaintiff's Proposition of Law need not be considered by this Court.

**CONCLUSION**

For all of the foregoing reasons, this Court should decline to exercise jurisdiction over the Cross-Appellant's Proposition of Law.

Respectfully submitted,



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The undersigned hereby certifies that a copy of the foregoing was served by ordinary U.S. Mail, postage prepaid, on this 26 day of March, 2007, upon the following:

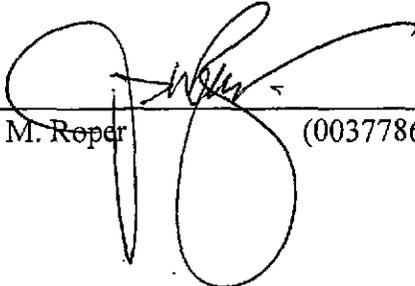
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