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STATEMENT OF FACTS

This matter involves a case within a case: *Pro se* Appellee A.J. Borkowski brought this action against Appellant Judge Charles D. Abood due to Judge Abood's conduct in an underlying eviction action in which Mr. Borkowski was the defendant and Judge Abood was the presiding judge (*Borkowski v. Borkowski*). Understanding this case requires first becoming acquainted with the underlying one.

The Underlying Matter: *Borkowski v. Borkowski*

In *Borkowski v. Borkowski*, Fulton County Ct. Comm. Pls. No. 04-CV-000018, Jennifer Borkowski ("Ms. Borkowski") sued her father, Appellee A.J. Borkowski ("Mr. Borkowski") to evict him from property she owned in Fayette, Ohio. (Supp. 7, ¶ 4.1) Appellant the Honorable Judge Charles D. Abood was the judge, presiding by Assignment as Visiting Judge. (Supp. 12-14.)

In the years before Ms. Borkowski filed the eviction action, she and Mr. Borkowski had been in protracted litigation in another Fulton County Court of Common Pleas case (Case No. 02CV-0274) over the ownership of the Fayette, Ohio property. (Supp. 7, ¶ 4 and n.1.) Ultimately, Ms. Borkowski prevailed and thereafter executed a lease, renting the property to Mr. Borkowski for \$600 per month. (Supp. 7, ¶ 4.) However, in August of 2003, Mr. Borkowski stopped paying rent; therefore, Ms. Borkowski filed an eviction action against him on January 26, 2004. (*Id.*) Mr. Borkowski responded with an Answer on March 23, 2004. (*Id.*)

¹ Both the trial and appellate courts were permitted to note the underlying facts and procedural history outlined by the Sixth District Court of Appeals in *Borkowski v. Borkowski*, 6th Dist. No. F-04-020, 2005-Ohio-2212 because Mr. Borkowski attached it as Exhibit 1 to his Complaint in this matter. This information became part of the pleadings for all purposes, including determining a Civ.R. 12(B)(6) motion to dismiss. See, e.g., Civ.R. 10(C); *State ex rel. Crabtree v. Franklin County Bd. Of Health* (1997), 77 Ohio St.3d 247, 249 n.1, 673 N.E.2d 1281.

The eviction case was set for an evidentiary hearing on May 13, 2004—51 days after Mr. Borkowski filed his answer. (Supp. 7, ¶¶ 4, 5.) Before the evidentiary hearing started, on either May 12, 2004 or May 13, 2004², Mr. Borkowski filed a patently untimely Petition for Removal with the Northern District of Ohio and the trial court. (Supp. 2, ¶ 6; Supp. 7-8, ¶¶ 5, 7; *see also* 28 U.S.C. § 1446(b), limiting civil removal petitions to the first 30 days after receipt of the complaint or summons.)

When the parties appeared for the eviction action on the 13th, Judge Abood held Mr. Borkowski's untimely Petition for Removal did not remove the case from the jurisdiction of his court. (Supp. 8, ¶ 7.) He therefore heard the eviction matter, giving both parties an opportunity to speak. (Supp. 2, ¶ 6; Supp. 7-8, ¶ 6.) Ms. Borkowski used her time to present evidence related to the eviction—specifically, that she owned the property and that her father had failed to pay rent. (Supp. 7, ¶ 6.) When it was his turn to speak, rather than present any evidence, Mr. Borkowski argued the trial court was divested of jurisdiction to consider the action because he had just filed a Petition for Removal. (Supp. 7-8, ¶ 6.)

Judge Abood disagreed with Mr. Borkowski, finding “the mere filing of that document does not remove jurisdiction of this case from this court. And that matter is now closed.” (Supp. 8, ¶ 7.) Judge Abood entered a Judgment in favor of Ms. Borkowski, determining that Mr. Borkowski had been in default under the terms of the lease since September of 2003; that he had “unlawfully detained . . . possession of the

² The Complaint identifies the Notice of Removal as having been filed on May 13, 2004; however, the Sixth District Court of Appeals' opinion, also attached to the Complaint as Exhibit 1, identifies it as having been filed on May 12, 2004. (Supp. 2, ¶ 6; Supp. 7-8, ¶¶ 5, 7.) Whether it was filed the day of trial or the day before trial is unclear and unimportant.

premises” from Ms. Borkowski; that he continued to do so; and that he was subject to eviction proceedings. (Supp. 8, ¶ 8; Supp. 12-13.) The court journalized the Entry on May 17, 2004, and it filed a writ of execution of the Judgment on May 21, 2004. (*Id.*)

On May 24, 2004, the Northern District of Ohio rejected Mr. Borkowski’s Petition for Removal and it remanded the proceedings back to Judge Abood’s court. (Supp. 2, ¶ 6; Supp. 8, ¶ 9.) On June 4, 2004, Mr. Borkowski filed a Motion under Civ.R. 60(B), asking Judge Abood to vacate his judgments of May 17 and May 21, 2004; Judge Abood denied this Motion. (Supp. 8, ¶ 9.) Mr. Borkowski appealed to the Sixth District Court of Appeals, arguing Judge Abood was temporarily divested of jurisdiction during the time his untimely Removal Petition was pending; the court agreed, holding:

Ohio courts...have found the mere filing of a **proper**³ removal petition in state courts divests the court of jurisdiction and vests jurisdiction in the federal court.

(Supp. 9, ¶ 14, emphasis added and citations omitted; *also available as Borkowski v. Borkowski*, 6th Dist. No. F-04-020, 2005-Ohio-2212.) The appellate court further held that the Removal Petition divested the trial court of jurisdiction from the time Mr. Borkowski filed it until approximately twelve days later when the Northern District of Ohio rejected it. (Supp. 10, ¶ 15.) On May 6, 2005, the appellate court remanded the matter to the trial court for further eviction proceedings. (Supp. 2, ¶ 6; Supp. 10, ¶ 17.)

The Current Matter:
Borkowski v. Abood—Allegations and Procedural History

On August 23, 2005, Mr. Borkowski brought this negligence action in the Lucas County Court of Common Pleas against Judge Abood, alleging Judge Abood violated his

³ See section II. B, *infra*.

Constitutional rights, the Ohio Revised Code and the Ohio Constitution as he presided over the eviction case of *Borkowski v. Borkowski*. (Supp. 1; Supp. 2, ¶ 5.) Contemporaneously, he filed a “Notice of *Lis Pendens*,” claiming his entitlement to two pieces of real estate owned by Judge and Mrs. Abood. (Supp. 19-20.) In these actions, Mr. Borkowski claimed, due to Judge Abood’s alleged “negligence, acting in bad faith, and acting in clear absence of all jurisdiction,” he should be awarded \$1,000,000; the court should order Judge Abood to refrain from disposing of his assets; and the court should grant any other appropriate relief. (Supp. 3, Wherefore Clause, ¶¶ a-d.)

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 from liability for these judicial acts, which were effected within his jurisdiction for immunity purposes. (Supp. 21-27; *see also* Supp. 25 n.1.) Ohio law has been well-settled for over a century 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” (both of which carry absolute immunity). (Supp. 24-25, 52-53.)

On December 1, 2005, the trial court denied the Notice of *Lis Pendens* and dismissed the Complaint with prejudice, holding:

Essentially and briefly, the Defendant is cloaked with judicial immunity. He did proceed with the eviction after the request for removal was filed. That decision was reversed by the Sixth District Court of Appeals [in *Borkowski v. Borkowski*], agreeing with the Plaintiff that the Court entered a void judgment. However, the question remains and the

Plaintiff's Complaint asks—did the Defendant's actions give rise to a cause of action against him? This Court and the law recited below says no.

(Supp. 62-63; Appx. 12-13.) The court determined that, while Judge Abood was not authorized by law to act while the Removal Petition was pending⁴, “making any such action must be characterized as an act in excess of jurisdiction, not in the clear absence of it.” (*Id.*, citing *Wilson v. Neu* (1984), 12 Ohio St.3d 102, 104, 12 OBR 147, 465 N.E.2d 854.)

Mr. Borkowski appealed the trial court's decision to the Sixth District Court of Appeals—the same court that decided the appeal of the underlying case, *Borkowski v. Borkowski*. (Supp. 64-67.) On September 22, 2006, the court of appeals reversed the trial court's dismissal. (Appx. 9-11, ¶ 18-23; *Borkowski v. Abood*, 6th Dist. No. L-05-1425, 2006-Ohio-4913, ¶ 18, 23.) It held Judge Abood's challenged judicial actions—which occurred after Mr. Borkowski filed his Petition for Removal, but before it was ultimately rejected—were not protected by judicial immunity because Judge Abood lacked proper jurisdiction. *Id.* The court relied upon the fact that the removal statute, 28 U.S.C. § 1446, provides that a State court is not to proceed after a Petition for Removal, “unless and until the case [is] remanded.” (Appx. 9, ¶ 16-17; *Borkowski* at ¶ 16-17.) It found:

Here, there was no evidence⁵ 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

⁴ See part II.B for an explanation of how the trial court's result was correct, even though its analysis—which was controlled by the court of appeals' earlier and incorrect ruling in *Borkowski v. Borkowski*—was not.

⁵ It is unclear why the court of appeals commented upon the absence of evidence, as it was considering Judge Abood's Motion to Dismiss under Civ.R. 12(B)(6).

[Judge Abood] acted in the clear absence of jurisdiction, rather than in excess of his jurisdiction, and, therefore, lost judicial immunity in this case.

(Appx. 9-10, ¶ 18; *Borkowski* at ¶ 18.) Judge Abood subsequently appealed the decision to this Court. (Appx. 1-3.)

ARGUMENT

Proposition of Law No. 1:

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.

The Sixth District Court of Appeals' decision contravenes over a century of state and federal jurisprudence defining the broad parameters of absolute judicial immunity. While this precise factual scenario was one of first impression in Ohio, the logic and rationale of Ohio decisions preceding this case abundantly support Judge Abood's absolute immunity. In addition, the court of appeals' opinion was contrary to every decision Judge Abood has been able to locate on this exact factual point in other jurisdictions.

Moreover, in addition to being plainly wrong, the court of appeals' decision creates harmful precedent that public policy requires be reversed: If Ohio judges are to be held personally liable for simple procedural errors they make in cases where they have proper subject matter jurisdiction, such liability would irreparably and undeniably harm the independence of the judiciary. Judges who fear personal liability in rendering their decisions may sacrifice their ability to do what is right in deference to what is safe. If the court of appeals' decision is permitted to stand, the very utility of judicial immunity would be drastically compromised.

In this case, the trial court correctly granted Judge Abood's Motion to Dismiss based upon his absolute judicial immunity; the Sixth District Court of Appeals' reversal of that decision was improper and should now be reversed. This Court reviews the lower courts' decisions on Judge Abood's Motion to Dismiss *de novo*. *Perrysburg Twp. v. City of Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4365, 814 N.E.2d 44, at ¶ 5.

I. Absolute judicial immunity protects a judge from actions taken in excess of his court's jurisdiction.

A. Ohio courts have supported judges' broad absolute immunity for over a century.

Federal law has long held judges are 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." *Stump v. Sparkman* (1978), 435 U.S. 349, 362, 98 S.Ct. 1099, 55 L.Ed. 2d 331. As early as 1872, the U.S. Supreme Court recognized that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his⁶ own convictions, without apprehension of personal consequences to himself." *Id.* at 355, citing *Bradley v. Fisher* (1871), 80 U.S. (13 Wall.) 335, 347, 20 L.Ed. 646.

Ohio courts are in express accord with the federal judicial immunity doctrine, holding judges are absolutely immune from individual liability for every judicial act except those they take in the complete absence of all jurisdiction. See *Wilson*, 12 Ohio St.3d at 103 and n.1; *State ex. rel. Fischer v. Burkhardt* (1993), 66 Ohio St.3d 189, 191, 1993 Ohio 187, 610 N.E.2d 999; *Kelly v. Whiting* (1985), 17 Ohio St.3d 91, 93, 17 OBR

⁶ Because Judge Abood is male, all generic references to judges in this analysis will adopt the masculine form.

213, 477 N.E.2d 1123; *Voll v. Steele* (1943), 141 Ohio St. 293, 301-02, 25 O.O. 424, 47 N.E.2d 991.

The U.S. Supreme Court and Ohio courts recognize 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” *Pierson v. Ray* (1967), 386 U.S. 547, 553-554, 87 S.Ct. 1213, 18 L.Ed.2d 288; *see also Newdick v. Sharp* (1967), 13 Ohio App.2d 200, 201, 42 Ohio Ops.2d 344, 235 N.E.2d 529. The purpose of the judicial immunity doctrine “is to preserve the integrity and independence of the judiciary and to ensure that judges will act upon their convictions free from apprehensions of possible consequences.” *Wilson*, 12 Ohio St.3d at 103. Courts afford this immunity because independence in decision-making is “essential to preserving the integrity of the judicial process.” *Willizter v. McCloud* (1983), 6 Ohio St.3d 447, 449, 6 Ohio B.Rep. 489, 453 N.E.2d 693.

In this case, the allegations of Mr. Borkowski’s Complaint make clear he is challenging Judge Abood’s judicial actions in presiding over *Borkowski v. Borkowski*; therefore, the “judicial acts” prong of the immunity test is not disputed. The only question before this Court is whether Judge Abood acted in the “clear absence of all jurisdiction” when he engaged in these judicial acts. The answer is an unqualified “no.” Judge Abood was not acting in the clear absence of all jurisdiction, and he therefore had absolute immunity.

B. Ohio law distinguishes between a judicial act taken in the clear absence of all jurisdiction and an act taken in excess of jurisdiction. Only the former lacks immunity protection.

It is a well-settled rule in Ohio that a judge is not civilly liable for actions taken in his judicial capacity, as long as he possesses *some* jurisdiction over the controversy.

State ex rel. Fischer, 66 Ohio St.3d at 191; *Kelly*, 17 Ohio St.3d at 93; *Wilson*, 12 Ohio St.3d 102, 104. The Court distinguishes between judges acting in excess of jurisdiction and in the clear absence of all jurisdiction over the subject-matter—the former has immunity protection and the latter does not.

In *Stump*, the U.S. Supreme Court held the issue in determining whether a defendant judge is immune from suit is whether “he had jurisdiction over the subject matter before him.” 435 U.S. at 356. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the “clear absence of all jurisdiction.” *Id.* at 356-357. That is, judicial immunity applies “however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff.” *Cleavinger v. Saxner* (1985), 474 U.S. 193, 199-200, 106 S.Ct. 496, 88 L.Ed.2d 507. This Court has explained an excess of jurisdiction, as opposed to an absence of jurisdiction, means that the act, although within the power of the judge, is not authorized by law. *Wilson*, 12 Ohio St.3d at 104.

The jurisdiction inquiry focuses only on jurisdiction over the subject matter, rather than over the person⁷ or geography: where a court has even *some* subject matter jurisdiction, there is sufficient jurisdiction for immunity purposes. *See, e.g., Stump*, 435 U.S. at 356-57 (focusing only on whether the judge had some subject matter, not personal, jurisdiction to find absolute immunity); *State ex rel. Fischer*, 66 Ohio St.3d at 191 (requiring only jurisdiction over the controversy); *Kelly*, 17 Ohio St.3d at 93

⁷ *See, e.g., Ashelman v. Pope* (C.A.9, 1986) 793 F.2d 1072, 1076 (*en banc*); *John v. Barron* (C.A.7, 1990), 897 F.2d 1387, 1392; *Crabtree v. Muchmore* (C.A.10, 1990), 904 F.2d 1475, 1477.

(focusing only on the trial court's subject matter jurisdiction to issue a *capias*); see also *Stern v. Mascio* (C.A.6, 2001), 262 F.3d 600, 607-608 ("When, however, a court with subject matter jurisdiction acts where ...personal jurisdiction is lacking, judicial and prosecutorial absolute immunity remain intact.")(citing *Holloway v. Brush* (C.A.6, 2000), 220 F.3d 767, 773 (*en banc*); *Barnes v. Winchell* (C.A.6, 1997), 105 F.3d 1111, 1122.⁸

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.* *Bradley* 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. *Id.* On the other hand, if a judge of a criminal 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 he would therefore be immune because he still had general jurisdiction over the subject matter. *Id.* at 351-52. Both the United States Supreme Court and this Court have held that because "the most difficult and embarrassing questions which a judicial officer is called

⁸ As Judge Abood's challenged acts in no way implicate personal jurisdiction, this distinction is unimportant. See, e.g., *Wabash Western R. Co. v. Brow* (C.A.6, 1895), 65 F. 941, 949-50 (overruled on other grounds at 164 U.S. 271, 280)(holding a petition for removal does not suggest the State court lacked jurisdiction at all—otherwise, the case could not be removed in any event. However, if it must be *likened* to either an objection to personal or subject matter jurisdiction, it is most analogous to an objection to subject matter jurisdiction).

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 356⁹; *Kelly*, 17 Ohio St.3d at 93.

In other words, a judge will not lose his immunity because of an error in judgment, even if the resultant act is in excess of the court's jurisdiction. *Wilson*, 12 Ohio St.3d at 103-104. Acting in excess of jurisdiction—as opposed to acting in the absence of jurisdiction—means that the act, although within the theoretical power of the judge, is not authorized by law. *See id.*; *see also Wade v. Bethesda Hospital* (S.D. Ohio 1971), 337 F.Supp. 671, 673.

II. The trial court correctly held Judge Abood was acting, at most, in excess of his jurisdiction and he therefore retains absolute judicial immunity.

There is no dispute in this case that the parties in *Borkowski v. Borkowski* were properly appearing in the Fulton County Court of Common Pleas to dispute an eviction in Fayette, Ohio; that Judge Abood's challenged actions in *Borkowski* were judicial; and that Judge Abood had proper authority under R.C. 2305.01 to preside over the eviction action. Notably, Mr. Borkowski only challenges Judge Abood's jurisdiction during the 12-day window in which his frivolous Petition for Removal was pending. The only issue is whether Judge Abood can face negligence liability for ruling Mr. Borkowski should be evicted while an unfounded Petition for Removal was pending: This issue amounts to

⁹ 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 requesting sterilization was not given a docket number, was not placed on file in the clerk's office, and was approved in an *ex parte* proceeding without notice to the minor, without a hearing, and without the appointment of a guardian *ad litem*.

whether Judge Abood acted in the **complete** absence of jurisdiction or whether he was just in **excess** of his jurisdiction (or, as Judge Abood submits in part II.B., *infra*, that his actions were not improper at all).

Under both federal and Ohio law, the answer must be that, at most, Judge Abood acted merely in excess of his jurisdiction. Because Judge Abood had adequate subject matter jurisdiction over the eviction action and—at most—he was only temporarily deprived of procedural jurisdiction at the time he ruled, this Court must find he had absolute immunity from liability. *Stump*, 435 U.S. at 356.

A. Judge Abood’s acts—taken during the pendency of the Removal Petition—were, at most, in excess of jurisdiction.

As a visiting judge in the Fulton County Court of Common Pleas, Judge Abood had proper jurisdiction over the eviction proceedings in *Borkowski v. Borkowski*. The Sixth District Court of Appeals’ focus on the effects of removal on State court proceedings was manifestly misplaced. The only question, with regard to jurisdiction under *Stump* and *Bradley*, is whether Judge Abood had *any* subject matter jurisdiction over eviction proceedings. Clearly, he did:

Under R.C. 5321.03(A)(1), a landlord may bring an action under Chapter 1923 of the Revised Code 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 have breached an obligation in their 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.

Therefore, Judge Abood had proper jurisdiction to act in presiding over the underlying eviction matter. Mr. Borkowski's untimely Removal Petition, which he filed just before his eviction trial was to begin, does not change the fact that the Fulton County Court of Common Pleas had subject matter jurisdiction over the proceeding; it also does not change the fact the court had general jurisdiction to hear eviction cases. Even assuming Judge Abood went beyond his jurisdiction, or acted in excess of his jurisdiction, he was not acting in the complete absence of all jurisdiction because the Fulton County Court of Common Pleas had proper jurisdiction over the proceedings.

Even assuming Judge Abood's rulings during the time the Removal was pending were in error under 28 U.S.C. § 1446(d), these actions must be characterized, at most, as an act in *excess* of jurisdiction. This means the act, although within the power of the judge, was not authorized by law. See *Wilson*, 12 Ohio St.3d at 104, citing *Wade*, 337 F.Supp. 671. This fails to pierce the protections of absolute immunity.

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. Because he otherwise had proper subject matter jurisdiction over the eviction proceeding, his

actions—even to the extent a reviewing court found them to be improper—were “simply an absence of jurisdiction as to part of the proceedings,” for which he had absolute immunity. *Id.*

B. Judge Abood retained proper jurisdiction over the eviction matter because a frivolously filed, patently untimely Removal Petition failed to divest his court of jurisdiction. The appellate holding of *Borkowski v. Borkowski* was incorrect.

As the presiding trial judge in *Borkowski v. Borkowski*, Judge Abood had no opportunity to appeal or otherwise object to the Sixth District Court of Appeals’ opinion that vacated the judicial acts he took during the time Mr. Borkowski’s Removal Petition was pending. While he does not seek to overturn that court of appeals’ decision in *Borkowski v. Borkowski*, understanding the critical flaws in the logic of the appellate decision in that case provides additional support for the proposition that Judge Abood was not acting in the clear absence of all jurisdiction. Indeed, he not only acted with sufficient jurisdiction for immunity purposes—he acted with proper jurisdiction in continuing to rule in the underlying eviction action after Mr. Borkowski filed a frivolous Petition for Removal.

In *Borkowski v. Borkowski*, at ¶ 15, the Sixth District Court of Appeals erred in finding Judge Abood was completely divested of jurisdiction during the time Mr. Borkowski’s Removal Petition was pending. Other Ohio and federal courts have previously provided opinions contrary to *Borkowski* on two fronts:

- 1. Even a properly filed Petition for Removal serves only to stay State court proceedings—not to divest it of all jurisdiction.**

First, the United States Supreme Court has held a defendant’s Petition for Removal only effects a *stay* of State court proceedings until the matter is remanded—not

a complete divestiture of jurisdiction. *Vendo v. Lektro-Vend Corp.* (1977), 433 U.S. 623, 640, 97 S.Ct. 2881, 53 L.Ed. 2d 1009; *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 the federal Removal statute, 28 U.S.C. § 1446(d).

2. When a Petition for Removal is patently frivolous—as it was in *Borkowski v. Borkowski*—the State court retains jurisdiction over the proceedings. Its decisions rendered after the Petition’s filing, and before its inevitable denial, may stand.

Second, and more importantly, the U.S. Supreme Court and other Ohio appellate courts have held that a Petition for Removal only affects the State court’s proceedings when a defendant *strictly complies* with removal requirements. On the other hand, when—as here—a Petition for Removal is filed after the expiration of the time provided for filing, this 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; *Lakelynd Constr. v. Lucky Sand & Gravel Co.* (August 4, 1993), 9th Dist No. C.A. No. 15946, 1993 Ohio App. LEXIS 3821, *9 (citing *Metropolitan Casualty Ins. Co. v. Stevens* (1941), 312 U.S. 563, 566, 61 S.Ct. 715, 85 L.Ed. 1044); *Ramsey v. A.I.U. Ins. Co.* (June 18, 1985), 10th Dist. No. 84AP-317, 1985 Ohio App. LEXIS 8157, * 13-14. *Ramsey* noted similar findings from other jurisdictions. *Ramsey, supra*; see, e.g., *Crown Constr. Co. v. Newfoundland American Ins. Co.* (1968), 429 P.A. 119, 124-25, 239 A.2d 452 (citing *Kovell v. Pennsylvania Railroad Co.*, (N.D. Ohio 1954), 129 F.Supp. 906; *Hamilton v. Hayes Freight Lines* (E.D. Ky. 1952), 102 F.Supp. 594); *Wilson v. Sandstrom* (1975), 317 So.2d 732, 740, 1975 Fla. LEXIS 3352 (citing *F & L Drug Co. v. American Central Ins. Co.* (Dist. Ct. Conn. 1961), 200

F.Supp. 718); *Hopson v. North American Ins. Co.* (1951), 71 Idaho 461, 465-66, 233 P.2d 799, 802.

In *Stevens*, 312 U.S. at 566, the U.S. Supreme Court noted, in interpreting an earlier but substantively similar version of the removal statute, “While the opinion does not expressly consider the effect of a petition for removal on subsequent proceedings in the state court, the clear import of the decision is that **the [state court] proceedings are valid if the case was not in fact removable...The rule that proceedings in the state court subsequent to the petition for removal are valid if the suit was not in fact removable is the logical corollary of the proposition that such proceedings are void if the cause was removable.**” (Emphasis added.)

In *Borkowski v. Borkowski*, the Sixth District Court of Appeals incorrectly held Judge Abood’s court was divested of jurisdiction to proceed after Mr. Borkowski filed a patently untimely Petition for Removal, merely because Mr. Borkowski otherwise complied with the technical provisions of removal, such as providing notice. *Borkowski v. Borkowski* at ¶15 (explicitly noting the fruitlessness of the Petition and, regardless, finding 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”); see also *Borkowski v. Abood*, Appx. 9, ¶ 17.

However, the fact of the Removal’s timing alone, not to mention the lack of diversity or federal question jurisdiction and the fact the Northern District of Ohio ultimately remanded the Petition, should have led the Sixth Appellate District to hold differently in both *Borkowski v. Borkowski* and *Borkowski v. Abood*.

Under the U.S. Supreme Court's decision in *Stevens*, as well as other Ohio appellate court decisions like *Lakelynd*, *Gilligan* and *Ramsey*, a Removal Petition filed 108 days after the Complaint and 51 days after the Answer (not to mention one lacking any indicia of federal question jurisdiction or diversity) was a nullity that a State court could appropriately disregard. Essentially, judges are not bound to honor frivolous Petitions for Removal that would otherwise keep a previously-scheduled trial from proceeding—otherwise, every unprepared litigant could obtain a makeshift trial continuance, even absent any entitlement to a proper Removal. Consequently, Judge Abood's judicial acts effected after this defective Removal Petition did nothing to interfere with his proper jurisdiction over Mr. Borkowski's case.

3. The Sixth District Court of Appeals' two *Borkowski* decisions are contrary to this wealth of caselaw and they contravene clear public policy.

The Sixth District Court of Appeals decisions in both *Borkowski v. Borkowski* and *Borkowski v. Abood* suggest that, in the face of persuasive precedent, 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.

Following these decisions would prohibit trial courts from disregarding facially noncompliant Removal Petitions *only* when the movant failed the technical and procedural requirements of the Petition, such as failing to provide notice. Neither the "ultimate futility" of the Petition, nor its patent defectiveness would be material. The policy rationales behind *Stevens*, *Lakelynd*, *Gilligan*, and *Ramsey* are the only logical response to such a scenario. To find otherwise would enable unprepared litigants to bring specious notices of removal on the morning of trial and obtain an automatic

continuance. It would dangerously shift the power over a courtroom's control from judge to litigant.

C. Other jurisdictions, faced with factual scenarios similar to those in this case, have determined judicial immunity applies.

1. Judges in other jurisdictions have been held immune for actions they took during a pending Petition for Removal.

Although this is a case of first impression in Ohio, Judge Abood has found three cases from other jurisdictions examining this exact factual situation; each one has held a judge who engaged in judicial acts during a pending Petition for Removal was absolutely immune from civil liability.

a. *Antelman v. Lewis*

In *Antelman v. Lewis* (D.C.Mass. 1979), 480 F.Supp. 180, 182, the plaintiff properly filed and noticed a Petition for Removal, but the State court judge subsequently entered an attachment against him for \$75,000, thereby ignoring the Petition. The plaintiff then sued the judge; the defendant judge successfully moved to dismiss the complaint, arguing he was immune from liability for taking actions in his judicial capacity. *Id.* at 182. Like Mr. Borkowski, the plaintiff argued the State court lost jurisdiction after he filed the Removal Petition and, therefore, the State court judge acted "in the clear absence of all jurisdiction," thereby losing immunity. *Id.*

The *Antelman* court disagreed: It held the judge of a superior court (like a judge of an Ohio court of common pleas) has general jurisdiction and, therefore, he obviously had subject matter jurisdiction over a tort claim and any related attachments. *Id.* at 184. The court further explained:

Whatever the meaning of "jurisdiction" may be as used in judicial opinions concerning the effectiveness of orders entered by a state court after a petition for removal has been filed and before remand, that meaning does

not determine the **clearly distinguishable** question whether the state court has such “jurisdiction over the subject-matter” as will support absolute immunity of the judge from an action for damages based on the state judge’s orders. . . .

Accordingly, any 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 "clear absence of all jurisdiction."

Id (emphasis added).

b. *Hoppins v. McDermott*

Similarly, in *Hoppins v. McDermott* (D.C, S.D. Alabama 1991), Case No. 90-0782-AH-S, 1991 U.S. Dist. LEXIS 16141, *12, the court held a State court judge—who entered a judgment of conviction, sentence, and commitment after a party properly removed his case to federal court—was protected by absolute judicial immunity. It reasoned 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*. The court made a special point of noting that, although Judge McDermott was technically without jurisdiction over the case, he had adequate jurisdiction for immunity purposes because he had proper subject matter jurisdiction to preside over the litigant’s criminal case before the litigant removed it. *Id*.

Like the court in *Antelman*, the *Hoppins* court differentiated between the effects of the judge’s improper ruling on the underlying case and its effect on the judge’s immunity: While the judge was technically without jurisdiction to make valid rulings while the Petition was pending and his decisions were reversible on appeal, he maintained adequate subject matter jurisdiction for immunity purposes because he was a criminal court judge acting in a fashion typical of a criminal court judge. *Id*.

c. *Classic Distrib., Inc. v. Zimmerman*

In *Classic Distrib., Inc. v. Zimmerman* (M.D.Pa. 1947), 387 F.Supp. 829, 833, a state court judge ruled during the interval between the filing of a Petition for Removal and the subsequent remand. At a hearing regarding Pennsylvania's obscenity statute, one of the parties informed the court that it had just filed a Petition for Removal. *Id.* at 833. The judge responded that "unless and until I have a restraining order from the Federal District Bench, we shall continue." *Id.* at 834. This party subsequently sued Judge Wickersham; the court dismissed the case, citing the judge's absolute immunity:

The exception [to the general rule of absolute judicial immunity] refers to cases over which it would be inherently impossible for a court to take jurisdiction, as for example a probate court with authority over wills and settlements of estates purporting to take jurisdiction of a criminal case. [Citing *Bradley*, 80 U.S. (13 Wall.) at 351-352.] 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.

Id. at 835. In sum, the court determined that the Removal Petition "did not alter the fact that the subject matter of the case was *initially* within the [judge's] jurisdiction," and that therefore meant that—at most—the judge had acted in excess of jurisdiction, not in the complete absence of it. *Id.* (emphasis added).

2. Courts have also held that a judge maintains his judicial immunity in other similar circumstances where he otherwise loses jurisdiction to proceed over a case.

In situations other than removal, courts have also found that a judge who engages in judicial acts after losing jurisdiction to proceed continues to have immunity because the judge, at one point in time, held proper subject matter jurisdiction over the case.

In *Stern*, 262 F.3d at 604, defendant Judge Mascio continued ruling in a matter after the plaintiff filed an Affidavit of Disqualification with this Court pursuant to R.C.

2701.03(D)(1). While Ohio law notes such an affidavit *automatically* deprives a judge of the authority to further preside, Judge Mascio nonetheless continued to preside over a contempt hearing (ultimately finding Stern in contempt) after learning Stern had filed the affidavit. *Id.* at 605-606. Stern brought an original action in this Court for a writ of prohibition and successfully reversed the contempt order on appeal. *Id.* at 605. The clarity of the problem was significant enough that this Court granted Stern's writ before affording Judge Mascio an opportunity to respond, holding the judge "patently and unambiguously lacked jurisdiction" to hold the parties in contempt. *Id.* at 605-606. However, this holding solely applied to the validity of Judge Mascio's decisions after Stern filed the affidavit of disqualification – before that time, Judge Mascio had jurisdiction to preside over the case. *Id.*

When Stern later sued Judge Mascio for personal, civil liability, the Southern District of Ohio granted the judge's motion to dismiss based on judicial immunity. The Sixth Circuit Court of Appeals affirmed, holding:

The civil action...undoubtedly fell within the subject-matter jurisdiction of the Jefferson County Court of Common Pleas...Since [Judge Mascio] had subject-matter jurisdiction over the case, he did not act "in the complete absence of all jurisdiction" for purposes of the judicial immunity determination.

Id. at 608. Furthermore, the court distinguished the Ohio Supreme Court's holding that Judge Mascio "patently and unambiguously lacked jurisdiction" from an action taken "in the complete absence of jurisdiction," stating Judge Mascio—who had undeniably continued to rule after he lost all authority to do so—was still entitled to immunity. *Id.* at 609.

A similar analogy can be drawn from the Ninth Circuit Court of Appeals' treatment of judicial immunity in a case where a judge ruled after the plaintiff filed a

notice of appeal. In *Mullis v. United States Bankruptcy Court* (C.A.9, 1987), 828 F.2d 1385, 1386-87, the plaintiff sued a number of judges who presided 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 debtors' examinations, and enter orders. *Id.* at 1388. He argued that the Notice of Appeal divested the bankruptcy court of jurisdiction over his petition, and that the judges therefore lost absolute immunity. *Id.* at 1389. The court disagreed, holding under *Stump and Bradley*, "A clear absence of jurisdiction means a clear lack of all subject matter jurisdiction...what [plaintiff] alleges are, at most, errors or acts in excess of jurisdiction, not acts in the clear absence of all jurisdiction." *Id.* at 1388-1389.

Immunity—Conclusion

This case presents the Court with precisely the same scenario as existed in *Stevens, Lakelynd, Gilligan, and Ramsey*—a party filed a patently frivolous Removal Petition that failed to affect the State judge's ability to continue ruling; therefore, the judge retained *proper* jurisdiction and cannot face liability.

Even if this Court finds otherwise, Judge Abood's actions were on all fours with *Antelman, Hoppins, Zimmerman, Stern, and Mullis*. In the three removal cases (*Antelman, Hoppins, and Zimmerman*), the court had to decide if a judge's actions, taken in the interval between the filing of a Petition of Removal and the federal district court's remand, were acts in excess of jurisdiction or in the complete absence of jurisdiction. All three courts correctly determined that the judges' actions were merely in excess of jurisdiction, therefore entitling them to absolute judicial immunity. In each, the reviewing court focused on whether the judge had subject matter jurisdiction over the proceedings when they *began*, prior to the filing of the Removal Petition. Similarly,

in *Stern* and *Mullis*, the courts focused only on whether the judge *ever* had proper jurisdiction over a matter in determining the applicability of judicial immunity.

Here, Judge Abood had proper subject matter jurisdiction over the **entire** *Borkowski* eviction case, both when it began (*see* part II.A., *supra*) and at all other times throughout (*see* part II.B., *supra*). However, all that matters for purposes of the immunity analysis is that the court had *some* jurisdiction at *any* point in the litigation. Mr. Borkowski concedes Judge Abood had proper jurisdiction at all times except the 12-day window when the district court reviewed his Removal Petition. Therefore, this Court must follow the same analysis as the above courts, and, even if it finds Judge Abood's decisions in *Borkowski v. Borkowski* were improper, it must find he retains judicial immunity for actions that were, at most, in excess of his jurisdiction.

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

The U.S. Supreme Court has stated, "it is in the public's interest that judges be allowed to perform their functions in an independent manner without fear of harassment, intimidation, and or suit." *Butz v. Economou* (1977), 438 U.S. 478, 512, 98 S.Ct. 2894, 2913, 57 L.Ed.2d 895. It subsequently elaborated on this point:

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, 226-227, 98 L.Ed.2d 555, 108 S.Ct. 538.

This State has never failed to support the judicial immunity doctrine. 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.

If the Sixth District Court of Appeals’ decision is allowed to stand, Ohio judges will be open to attack for any judicial actions they took with questionable jurisdiction. As a result, they will be forced to check, double-check, and triple-check their jurisdiction before making any decision, fearing an error would place them in jeopardy of personal liability. Being confronted with a new threat of civil liability will lead judges to hesitate and debate their authority to make decisions—a fearful situation that this country and State have prevented for centuries with an expansive judicial immunity doctrine.

Not only will Ohio judges have to be concerned about how to respond to frivolous Removal Petitions, but they will also have to consider the long list of other scenarios that could raise similar challenges. For example, judges will be forced to agonize over whether they have jurisdiction after a party files an appeal or requests a stay—this would be the case, regardless of whether those appeals or stays were valid (*e.g.*, premature notices to appeal interlocutory orders).

Furthermore, judges will be left powerless to react when unscrupulous parties file a frivolous Removal Petition, Notice of Appeal, or other take other action that could arguably affect the court’s jurisdiction. Judicial time and court resources will be wasted following these baseless efforts, but the delay will be necessary because—otherwise—judges’ rulings could subject them to personal liability.

Because there is no requirement of intent to abrogate judicial immunity, even the most careful and error-free judges could be held liable for issuing decisions after parties file Petitions for Removal or Notices of Appeal that cross in the mail or otherwise fail to come to the judge's attention before ruling. This is far from an ideal environment for judges to administer justice.

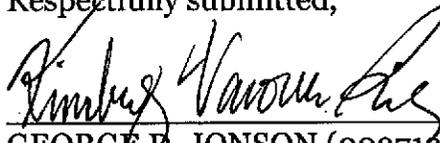
The purpose behind the judicial immunity doctrine will be destroyed if judges are put in a position where they must be timid, cautious, and susceptible to the persistent influence of potential liability. This Court cannot allow the existence of such an environment. This Court must clear up any mistake or confusion created by the appellate court; the law in Ohio must clearly provide for judicial immunity when a judge is performing a judicial act and has ever had some subject matter jurisdiction over the controversy.

CONCLUSION

The decision below is fundamentally wrong in its reasoning and dangerous in its implications. If the decision below is allowed to stand, judicial immunity in this State will be constantly challenged and the courts will be open to harassment and threats. Reversing the appellate court's decision will protect a doctrine that this State and the entire country have uniformly supported for over a century.

For the foregoing reasons, Appellant the Honorable Judge Charles D. Abood respectfully requests this Court reverse the decision of the Sixth District Court of Appeals and reinstate the dismissal under Civ.R. 12(B)(6) entered by the trial court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2007, a copy of this Merit Brief was served, via regular U.S. Mail, upon A.J. Borkowski, Jr., PO Box 703, Fayette, Ohio 43521, *Pro Se Appellee*.



KIMBERLY VANOVER RILEY

IN THE SUPREME COURT OF OHIO

06-1913

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

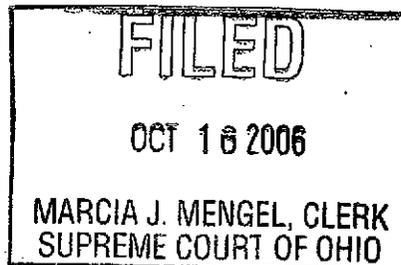
NOTICE OF APPEAL OF APPELLEE THE HONORABLE JUDGE CHARLES D. ABOOD

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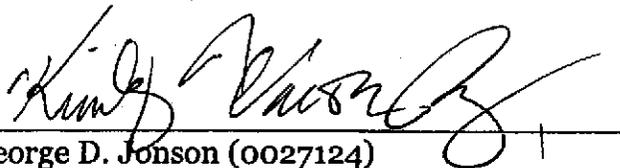


Notice of Appeal of Appellee the Honorable Judge Charles D. Abood

Appellee the Honorable Judge Charles D. Abood hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Lucas County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. L-05-1425 on September 22, 2006.

Pursuant to R. Prac. Ohio Sup. Ct., Rule II, Section 2(A)(3)(a) and 2(B)(1)(d)(v), Petitioner the Honorable Judge Charles D. Abood files this notice of discretionary appeal because this case raises a question of public or great general interest. The Sixth District Court of Appeals' September 22, 2006, Opinion and Judgment Entry and Judge Abood's Motion to Stay that Judgment Entry are filed with this Notice.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2006, a copy of the Notice of Appeal was served, via regular U.S. Mail, upon the following:

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Pro Se Plaintiff



KIMBERLY VANOVER RILEY

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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.

Court of Appeals No. L-05-1425

Appellant

Trial Court No. CI 0200504894

v.

Charles D. Abood

DECISION AND JUDGMENT ENTRY

Appellee

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.

JOURNALIZED

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.

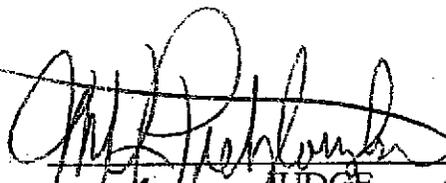
JUDGMENT REVERSED.

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.

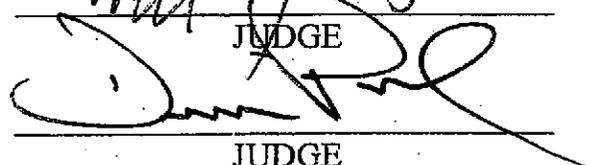
Dennis M. Parish, J.
CONCUR.



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>.

FILED
LUCAS COUNTY
2005 DEC -1 A 9:12
**THIS IS A FINAL
APPEALABLE ORDER**

2005 DEC -1 A 9:12

IN THE COMMON PLEAS COURT OF LUCAS COUNTY, OHIO

A. J. Borkowski, Jr.
COMMON PLEAS COURT
BENJAMIN D. WILSON
CLERK OF COURTS

Plaintiff

-vs-

Charles D. Abood (Judge)

Defendant

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Case # CI 0200504894

Michael P. Kelbley, Judge
By Assignment

JOURNAL ENTRY GRANTING DISMISSAL OF CLAIMS

There are several Motions pending with the Court. Plaintiff filed his Complaint on August 23, 2005. On September 12, 2005, Defendant filed his Motion to Dismiss under Civil Rule 12(B)(6) (within twenty-eight days of being served the Complaint).

The Court reviewed the file in this case, including all ninety two (92) pages of transcript, filed November 7, 2005. Ultimately, this Court must Grant the Defendant's Motion which effectively denies the Plaintiff's request for Lis Pendens, Mandamus and Summary Judgment. Essentially and briefly, the Defendant is cloaked with judicial immunity. He did proceed with the eviction after the request for removal was filed. That decision was reversed by the Sixth District Court of Appeals, agreeing with the Plaintiff that the Court entered a void judgment. However, the question remains and the Plaintiff's Complaint asks – did the Defendant's actions give rise to a cause of action against him? This Court and the law recited below says no.

This Court believes the Fulton County Court of Common Pleas had jurisdiction over the eviction proceedings. See R. C. 2305.01. Defendant, while presiding over the underlying eviction matter, was not authorized by law to act pending the federal court's decision on the removal petition, making any such action must be characterized as an

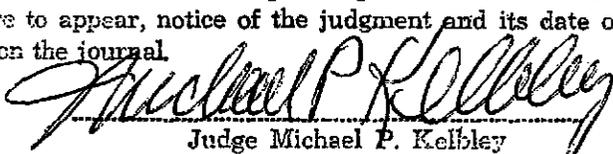
act in excess of jurisdiction, not in the clear absence of it. See *Wilson v Neu*, 12 Ohio St. 3d 102, 104.

In *Bradley v Fisher* (1871), 80 U. S. 335, 352, the United States Supreme Court illustrated the distinction between lack of jurisdiction and excess of jurisdiction, using 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 and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a Defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune. Like a criminal judge convicting a Defendant of a non-existent crime, Defendant acted in excess of jurisdiction by proceeding in this case after the removal petition had been filed, an act unauthorized by law. Thus, Defendant acted, at best, in excess of jurisdiction, and the Judge is entitled to absolute judicial immunity from Plaintiff's claims.

As a result, Defendant's Motion to Dismiss is **GRANTED**. Plaintiff's Motion for Summary Judgment is **OVERRULED**. Plaintiff's Motion to Enforce Law Against Defendant and Request for Sanctions is **OVERRULED**. Defendant's Motion to Remove "Notice of Lis Pendens" is **GRANTED** and the Lucas County Recorder is **ORDERED** to remove such notice from his/her records.

TO THE CLERK: Court costs to Plaintiff.

You are directed to serve upon all parties not in default or failure to appear, notice of the judgment and its date of entry upon the journal.


Judge Michael P. Kelbley


Judge Michael P. Kelbley

TO THE CLERK: Please furnish a copy of the foregoing to the parties by regular U.S. Mail.