

IN THE SUPREME COURT OF OHIO

CASE NO. 07-0140

ROBERT BARNES, ADMINISTRATOR

Plaintiff-Appellee

-vs-

UNIVERSITY HOSPITALS OF CLEVELAND, *et al.*
Defendant -Appellants

ON APPEAL FROM THE CUYAHOGA COUNTY
COURT OF APPEALS
CASE NO. 87247, 87285, 87710, 87903, and 87946

PLAINTIFF-APPELLEE'S MEMORANDUM IN OPPOSITION TO
DEFENDANT-APPELLANTS' MOTION TO SUPPLEMENT THE RECORD

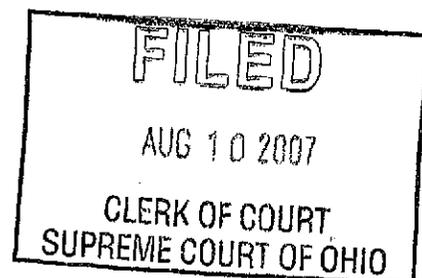
W. Craig Bashein, Esq. (#0034591)
BASHEIN & BASHEIN CO., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216
(216) 771-3239
FAX: (216) 771-5876

Paul W. Flowers, Esq. (#0046625)
[COUNSEL OF RECORD]
PAUL W. FLOWERS CO. L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
(216) 344-9393
FAX: (216) 344-9395

Michael F. Becker, Esq. (#0008298)
Lawrence F. Peskin, Esq. (#0059391)
BECKER & MISHKIND CO., L.P.A.
134 Middle Ave.
Elyria, Ohio 44035
(440) 323-7070
FAX: (440) 323-1879
Attorneys for Plaintiff-Appellee

J. Stephen Teetor, Esq.
James M. Roper, Esq.
Jessica K. Philemond, Esq.
Isaac, Brant, Ledman & Teetor LLP
250 East Broad Street, Suite 900
Columbus, Ohio 43215

Richard P. Goddard, Esq.
Calfee, Halter & Griswold LLP
800 Superior Avenue, Suite 1400
Cleveland, Ohio 44114-2688
Attorneys for Defendant-Appellants



MEMORANDUM

Plaintiff-Appellee, Robert Barnes, Administrator of the Estate of Natalie Barnes, Deceased, hereby submits his Memorandum in Opposition to the Motion to Supplement the Record by Defendant-Appellants MedLink of Ohio and the MedLink Group, Inc. that was filed on August 1, 2007 (hereinafter "MedLink's Motion"). For the reasons which follow, this application should be denied in its entirety.

I. STANDARDS.

Defendant-Appellants, MedLink of Ohio and the MedLink Group, Inc. (hereinafter collectively "MedLink"), have requested that this Court permit them to add new exhibits to the record which they could have, but did not, submit to the trial judge in the proceedings below. The Eighth Judicial District Court of Appeals had rejected a similar request on November 9, 2006. No further review of this determination was sought in this Court.

The Eighth District's ruling comported with the longstanding principle that appellate review is limited to the record as it existed at the time the final judgment was rendered in the trial court. *Brunswick v. Brunswick Hills Twp. Bd. of Trustees* (9th Dist. 1992), 81 Ohio App.3d 252, 258, 610 N.E.2d 1054, 1058, fn. 4. The appellate record cannot be reconstructed after the fact. *Gray v. Baughman Twp. Trustees* (Apr. 8, 1996), 5th Dist. No. 1995CA00173, 1996 W.L. 243788. Likewise, new arguments are not permitted for the first time on appeal. *State ex rel. Gutierrez v. Trumbull Cty. Bd. of Elec.* (1992), 65 Ohio St.3d 175, 177, 602 N.E.2d 622, 624; *Scott v. City of East Cleveland* (8th Dist. 1984), 16 Ohio App.3d 429, 431, 476 N.E.2d 710, 713-714. MedLink's decision not to challenge the Eighth District's order of November 9, 2006 in any of the Propositions of Law that were fashioned for this Court was thus sound.

MedLink now contends that new exhibits may be added to the record at this late stage of the proceedings "pursuant to Supreme Court Rule of Practice V, Section 6". *MedLink's*

Motion, p. 1. No authorities have been cited in support of this proposition. That provision merely states that:

If any part of the record is not transmitted to the Supreme Court but is necessary to the Supreme Court's consideration of the questions presented on appeal, the Supreme Court, on its own initiative or upon stipulation of the parties or motion of a party, may direct that a supplemental record be certified and transmitted to the Clerk of the Supreme Court. [emphasis added]

As the text of the rule plainly reflects, its purpose is not to allow the inclusion of new items to the record that were never submitted to the trial court. The 1994 Staff Notes instruct that:

Section 6 provides that the Court may require transmittal of items in the record that were not transmitted pursuant to Section 5. ***

Rule V(6) thus pertains only to materials already "in the record" which, for whatever reason, were not transferred to the Supreme Court by the appellate court clerk in accordance with Section 5.

II. MEDLINK'S NEW EXHIBITS.

MedLink has made no attempt to obfuscate the fact that the materials that are attached to its Motion were never introduced in the proceedings in the Cuyahoga County Court of Common Pleas. They were first offered as exhibits in a Motion to Modify the Record Pursuant to App.R. 9(E) that was filed in the Eighth District on October 16, 2006 after briefing had been completed and oral argument was set to be held. The latest Motion is a thinly-veiled attempt to circumvent both the appellate court's ruling and the venerable prohibition against new exhibits being submitted for the first time on appeal.

The limited scope of Sup.Ct.Prac.R. V(6) was recognized in *State ex rel. Brantley v. Ghee*, 80 Ohio St.3d 287, 1997-Ohio-116, 685 N.E.2d 1243. An inmate had appealed the denial of his request for a writ of *habeas corpus*. In the proceedings before this Court, he sought to "supplement the record on appeal with documents he has filed in the Court of Appeals for Franklin County." *Id.*, 80 Ohio St.3d at 287. The unanimous *per curiam* opinion

cited Sup.Ct.Prac.R. V(6) and noted that the new exhibits were not necessary for the appeal. *Id.* at 287. More importantly, it was held that:

In addition, “[a] reviewing court cannot add matter to the record before it, which was not part of the trial court’s proceedings, and then decide the appeal on the basis of the new matter.” *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 162, 656 N.E.2d 1288, 1293, quoting *State v. Ishmail* (1978), 54 Ohio St.2d 402, 8 O.O.3d 405, 377 N.E.2d 500, paragraph one of the syllabus. Accordingly, we deny Brantley’s motion to supplement the record.

Id. at 288. The same sound result is warranted in this instance.

III. MEDLINK’S OPPORTUNITY TO DEVELOP THE RECORD.

In its effort to squeeze into Sup.Ct.Prac.R. V(6), MedLink has attempted to create the impression that there was simply no realistic opportunity for the new exhibits to be presented to the trial judge for his consideration. *MedLink’s Motion*, pp. 3-6. As the Eighth District tacitly concluded, nothing could be further from the truth. MedLink and its small army of attorneys had nearly a year to object to Private Judge Robert T. Glickman’s authority over the proceedings, but declined to do so, notwithstanding the considerable controversy swirling around Ohio’s Private Judge Act.

MedLink contends that the new exhibits are necessary to properly argue Proposition of Law No. 3, which states:

One who has never been elected to a judgeship in Ohio may not serve as a private judge under R.C. 2701.10.

MedLink’s Motion, p. 4. It has been proclaimed that: “It is MedLink’s position that Robert T. Glickman, who presided over the jury trial in this case as a private judge and purportedly pursuant to R.C. 2701.10, was not eligible to serve as a private judge under the requirements of R.C. 2701.10 because he was never elected to the Bench.” *Id.*, p. 4 (*emphasis added*).

Rather obviously, the fact that Private Judge Glickman had unsuccessfully campaigned in the general elections of November 5, 2002 to retain the seat he had obtained by

Gubernatorial appointment was not only a matter of "public record", but also common knowledge within the Cuyahoga County legal community. At any time between the originally assigned judge's journalization of the parties' agreement to refer their dispute to Private Judge Glickman on April 18, 2005 and the conclusion of the trial court proceedings on March 14, 2006, MedLink could have (and should have) objected to his authority and developed whatever evidentiary record was felt to be necessary. Even after the jury returned a verdict for compensatory and punitive damages of \$6,100,000.00 on May 4, 2005, no suggestion was made in the ensuing months that there had been any noncompliance with the Private Judge Act.

Instead, the team of defense attorneys that had been assembled hailing from Cleveland, Columbus, and Chicago peppered Private Judge Glickman with one post-trial motion after another imploring him to undo, or at least reduce, the damages that were owed. On September 21, 2005, Judge Nancy Margaret Russo attempted to vacate a referral under R.C. §2701.10 in a separate lawsuit that eventually produced *State ex rel. Peffer v. Russo*, Sup.Ct. Case No. 05-2223, and *State ex rel. Russo v. McDonnell*, Sup.Ct. Case No. 05-2130. The Eighth District determined in another proceeding soon thereafter that originally assigned judges cannot be forced through mandamus to accept referrals. *State ex rel. MetroHealth Med. Cntr. v. Sutula* (Nov. 23, 2005), 8th Dist. No. 87184, 2005-Ohio-6243, 2005 W.L. 3120209. Notwithstanding all this litigation over the Private Judge Act, MedLink still made no effort to raise the issue of compliance with the statute during the seemingly endless post-trial proceedings.

By their own acknowledgement, MedLink's counsel finally "discovered" that Judge Glickman was "unqualified" (in their view) when yet another attorney, Andrew J. Dorman, Esq., joined the defense team for purposes of the pre-judgment interest hearing on January 30, 2006.¹ *MedLink's Motion*, p. 2. The trial court proceedings did not conclude, however, until

¹ Attorney Dorman attempted to enter the fray as counsel for MedLink's insurance carrier, Lexington Insurance Company. What is established in the record is that during the pre-

March 14, 2006. If MedLink's numerous lawyers truly had not known before that moment that Judge Glickman had never won an election, he was thus "unqualified," and he had actually "duped" them into making the referral, they could have easily filed affidavits and supporting evidence to this effect during this six (6) week period. They did not do so.

To be sure, MedLink has completely mischaracterized the pre-judgment interest hearing of January 30, 2006. It has been suggested that defense counsel first appreciated that there was something amiss with the Private Judge's qualifications when "Glickman and counsel for Plaintiff told [MedLink's insurance carrier] that they would not agree to [the insurer] intervening unless [the insurer] would 'waive on the record any appeal regarding the validity of the private judge statute.'" *MedLink's Motion*, p. 2. Actually, Plaintiff's counsel (not Private Judge Glickman) had offered to withdraw his opposition to the insurer's attempts to intervene in the pre-judgment interest proceedings if the carrier would join the waiver of appeal rights with regard to compliance with the Private Judge Act. *Pre-Judgment Interest Transcript of January 30, 2006*, pp. 40-42. Before the jury trial had commenced, both Plaintiff and MedLink had entered an identical stipulation on the record before Private Judge Glickman would accept the referral and proceed with opening statements. *Vol. I*, pp. 146-147. Both parties fully appreciated the uncertainty surrounding the Private Judge Act but nevertheless decided to submit their dispute to Private Judge Glickman for purposes of conducting the jury trial. *Id.* At the outset of the pre-judgment interest hearing, Plaintiff was merely asking that the intervening insurer do the same.

judgment interest hearing Attorney Dorman expressed his appreciation of the cases that had been pending in the Supreme Court which were expected to resolve whether the Private Judge Act, R.C. §2701.10, extended to jury trials. *Transcript of Pre-Judgment Interest Hearing of January 30, 2006*, pp. 38-39. He did not, however, object to Judge Glickman's continued handling of the proceeding. Numerous attorneys representing MedLink were also present in the courtroom that day, but they also did not express any concern that the Private Judge Act had not been followed. *Id.*

The insurer's "consent" to a waiver of appeal rights was purely an academic matter, since MedLink's counsel had already done so in open court at the outset of the jury trial. *Vol. I, pp. 146-147*. Nor is it true that the insurer "refused" to accept the waiver. *MedLink's Motion, p. 2*. After its counsel, Attorney Dorman, was unable to reach a suitable representative to secure such permission, he specifically advised the Court that:

I can't get an answer to those two questions. That doesn't mean yes or no. It's going to take time. The person I need to speak to is not available now. [emphasis added].

Pre-Judgment Interest Transcript of January 30, 2006, p. 45. Quite clearly, the carrier's counsel was agreeable to accepting Judge Glickman's authority and was simply unable to secure specific consent from his client. Not once was it ever suggested during the pre-judgment interest hearing, or in the six (6) week period that followed, that Private Judge Glickman's failure to win a general election over three (3) years earlier precluded him from presiding over the proceedings.

IV. PREJUDICE TO PLAINTIFF.

More significantly, Plaintiff-Appellee's rights will be seriously impaired if MedLink is now permitted to submit new exhibits in support of its Propositions of Law. No opportunity remains for witness testimony to be presented by Plaintiff disputing MedLink's factual assertions. Had this issue been raised at the trial court level, Plaintiff could have elicited a formal response from Judge Glickman addressing MedLink's reckless and unsubstantiated assertions that he was unsuited to sit as a private judge and had misled the defense attorneys in this regard. Depositions of MedLink's trial attorneys from Reminger & Reminger (who have since withdrawn from these appeals) also undoubtedly would have confirmed that they not only knew that Private Judge Glickman had been unsuccessful in his efforts to retain his appointed seat in 2002, but had also been the first to propose referring jury trials to him in this and several other medical malpractice actions they were defending. Questioning of these Cleveland

LAW OFFICES

ASHEIN & BASHEIN
CO., L.P.A.

TERMINAL TOWER

35TH FLOOR

50 PUBLIC SQUARE

LEVELAND, OHIO 44113

(216) 771-3239

attorneys also would have verified that they were extremely familiar with Private Judge Glickman's qualifications and credentials and fully appreciated the disagreements that had arisen over the proper scope of the Private Judge Act. They had nevertheless decided that their clients' best interests would still be served by referring the proceedings to Judge Glickman and waiving their appeal rights. By failing to raise the fact-intensive issues in a timely fashion before the trial court proceedings were concluded, MedLink has successfully precluded Plaintiff from refuting their untrue representations with admissible evidence.

If MedLink is going to be granted leave to introduce new evidence to the record at the eleventh-hour, then Plaintiff must be allowed to do so as well. His counsel will need to depose MedLink's trial attorneys to confirm that they were fully aware of Private Judge Glickman's background and credentials, as well as his failure to win a general election, at the time they agreed to refer the medical malpractice case to him and waive all appeal rights. A sworn statement will also have to be produced from Private Judge Glickman explaining that he never once concealed any information from MedLink and had actually warned the parties that the proper interpretation of the Private Judge Act was still unsettled. MedLink must not be allowed to distort the record with documents supporting only one-side of the Private Judge Act compliance arguments their attorneys have raised for the first time on appeal.

CONCLUSION

For the foregoing reasons, this Court should deny the Motion to Supplement the Record by Appellants MedLink of Ohio and the MedLink Group, Inc.

Respectfully submitted,



W. Craig Bashein, Esq. (#0034591)
BASHEIN & BASHEIN CO., L.P.A.



Paul W. Flowers, Esq. (#0046625)
PAUL W. FLOWERS CO., L.P.A.

Attorneys for Plaintiff-Appellee

Michael F. Becker (per authority)

Michael F. Becker, Esq. (#0008298)
Lawrence F. Peskin, Esq. (#0059391)
BECKER & MISHKIND CO., L.P.A.

CERTIFICATE OF SERVICE

I hereby certify that the forgoing **Memorandum** was served via regular U.S. Mail on this 9th day of August, 2007 upon:

James M. Roper, Esq.
Jessica K. Walls, Esq.
Isaac, Brant, Ledman & Teetor LLP
250 East Broad Street, Suite 900
Columbus, Ohio 43215

*Attorneys for Defendant-Appellants,
MedLink of Ohio, Inc., et al.*

Richard P. Goddard, Esq.
Calfee, Halter & Griswold LLP
800 Superior Avenue, Suite 1400
Cleveland, Ohio 44114-2688



W. Craig Bashein, Esq. (#0034591)
BASHEIN & BASHEIN CO., L.P.A.
Attorney for Plaintiff-Appellee