

IN THE SUPREME COURT OF OHIO

CHARLES D. ABOOD, JUDGE, : **Case No. 2006-1913**
Appellant, : **On Appeal from the Lucas County**
-vs- : **Court of Appeals, Sixth Appellate**
 : **District**
A.J. BORKOWSKI, JR., :
Appellee. :

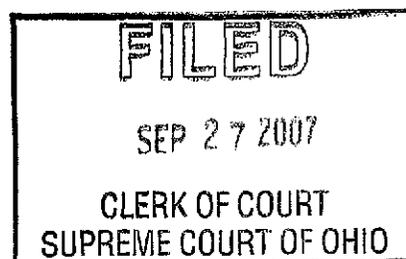
MOTION TO DISMISS THE APPELLEE A.J. BORKOWSKI, JR.

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

A.J. Borkowski, Jr.
P.O. Box 703
Fayette, Ohio 43521
Telephone: (419) 237-7017
aborkowskijr@yahoo.com e-mail

Pro-se Plaintiff, Appellee-Relator

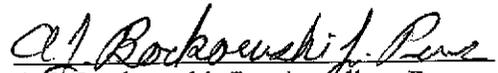
Counsel for Defendant, Appellant-Respondent
the Honorable Judge Charles D. Abood



MOTION TO DISMISS

Now comes Appellee A.J. Borkowski, Jr., and move this Court to dismiss the appeal against him pursuant to Ohio's Fourteenth Amendment due process of law and equal protection of the law and S. Ct. Prac. R. XIV, Section 4. A memorandum in support is attached and incorporated by reference.

Respectfully submitted,


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

MEMORANDUM IN SUPPORT

I. STATEMENT OF FACTS

On October 16, 2006, Appellant Judge Abood filed this notice of appeal against Appellee A.J. Borkowski, Jr. It appears that Appellant is seeking reversal of the appellate court's appropriate and warranted decision of September 22, 2006. This Court denied the Appellant's motion for stay on October 20, 2006. The instant case has been briefed by the parties in this action. Oral argument in this case has been set for Tuesday, October 9, 2007. Without waiving his right to appear for oral argument Appellee believes that oral argument is unnecessary because the appeal is frivolous; that the dispositive issue or issues have been authoritatively decided and that the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. For the reasons outlined below, Appellant's appeal should be dismissed as frivolous, with prejudice as to Appellee A.J. Borkowski, Jr., for acting in clear absence of all jurisdiction and acting in bad faith.

II. LAW AND ARGUMENT

Appellee filed a civil rights complaint against Appellant Abood and asserted *inter alia* claims in the lawsuit of a right to money from the Appellant. See, O.R.C. 2921.45. Appellee sued Appellant Judge Abood in his individual capacity for damages, and in his individual and official capacity for injunctive relief. Judge Abood is not entitled to absolute immunity and is subject to liability because he acted in clear absence of jurisdiction in the eviction action. *Reasoner v. City of Columbus*, 10th Dist. No. 02AP-831, 2003-Ohio-670, at ¶ 15. In fact, 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 fees generated in obtaining that injunctive relief. *Id.*, at 544. The appellate court holding in *Borkowski v. Abood* that Appellant Abood acted in the clear absence of jurisdiction, and, therefore, lost judicial immunity in the case was correct and must be affirmed.

The complaint as filed stated a claim of *inter alia* of bad faith for relief upon which relief could be granted. See, Ohio Civil Rule 8(A). The appellate court was correct in its holding that the trial court made no determination with respect to Appellee assertion that Appellant acted with bad faith in the underlying case and was correct in reversing the trial court's judgment and remanding the matter for further proceedings with its holdings in *Borkowski v. Abood*. Therefore, this Court must affirm that decision. Accordingly, the Appellee is therefore, legally entitled to summary judgment on the issue of bad faith as a matter of law as there is no genuine issue of material fact that the trial court failed to adjudicate the Appellee's claim of bad faith against the Appellant herein. See, Ohio Civ. R. 56; *Leaman v. Johnson*, 794 F. 2d 1148; 1986 U.S. App. LEXIS 26969, (6th Cir. 1986) and *Shaw v. MRO Software, Inc.*, 2006 U.S. District LEXIS 78456 (Ed. Mich. Oct.. 27, 2006).

Appellee urges this Court that Jennifer Borkowski (Haas) gave up her right to ownership in the underlying case on March 14, 2007. (Exhibit 1). The Honorable Judge Abood improperly evicted Appellee Borkowski from the property that he retained through his Grandmother's Last Will and Testament see page 3 (Exhibit 2). The Appellant Honorable Judge Abood was the judge presiding by Assignment as Visiting Judge. (Supp. 12-14). The retired judge (Appellant) who presided over the eviction action patently and unambiguously lacked jurisdiction or acted in the clear absence of all jurisdiction over the eviction matter because the Appellee properly filed a removal petition which divested his court of jurisdiction within the definition of 28 U.S.C. §1446(b) and no person or party timely opposed of it pursuant to 28 U.S.C. §1447(c). The District Court had original jurisdiction over the civil action commenced in the State court by Plaintiff Haas that was removed by this Defendant-Appellee to the U.S. District Court pursuant to 28 U.S.C. §1331(a) and 28 U.S.C. §1443. See, *100 East Broad Corporation v. J.P. Morgan Case & Co.*, Southern District of Ohio docket No. 2:04-cv-1215 (Plaintiff therein stipulated to dismissal on March 12, 2007). The appellate court's holding of *Borkowski v. Borkowski* was correct and this Court must affirm that decision.

Furthermore, the Appellant never opposed of the Appellate court's holdings in either *Borkowski v. Borkowski* or in *Borkowski v. Abood* and cannot now complain for his failure to do so. For this reason alone the Appellate Court's decision must be affirmed.

The U.S. District Court Northern District of Ohio holding in *Humbert v. Borkowski* was incorrect because the Appellee sought to remove the eviction action of which was removable from State court because the federal court had original jurisdiction of the matter and this is what this Defendant exactly in the action sought removal of the eviction action. See, 28 U.S.C. §1331(a), 28 U.S.C. §1446(b), and 28 U.S.C. §1443. Accordingly, the matter was improperly

remanded to the Fulton County Court of Common Pleas (Appellee's Merit Brief at Appendix pages 45-46).

Finally, Appellee urges this Court that he would be prejudiced by this Court's reversal of the Appellate Court's decision and reinstatement of the dismissal under Civ. R. 12(b)(6) entered by the trial court because it will require additional discovery since he stated a claim of bad faith upon which relief could be granted and would deny due process of law or equal protection on his claim of bad faith made against Judge Abood under O.R.C. 9.86 and the Fourteenth Amendment of the U.S. Constitution. Accordingly, this Court must dismiss Judge Abood appeal as frivolous and with prejudice. See, O.R.C. 2921.44 and S. Ct. Prac. R. XIV, Section 5(A)(B).

III. CONCLUSION

For the reasons set forth herein, Appellee respectfully requests that this Court dismiss Appellant's Judge Abood appeal as frivolous and with prejudice because justice so requires it and for any other relief deemed necessary and just by this Court.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

This is to certify that on September 26th, 2007 a true copy of the foregoing was served, by via U.S. Mail, upon George D. Jonson, Esq., Linda L. Woeber, Esq., Kimberly Vanover Riley, Esq., (Counsel of Record), MONTGOMERY, RENNIE & JONSON, 36 East Seventh Street, Suite 2100, Cincinnati, Ohio 45202, Counsel for Appellant Judge Charles D. Abood.

A.J. Borkowski, Jr. Appellee Pro-se
A.J. Borkowski, Jr., Appellee, Pro-se
P.O. Box 703
Fayette, Ohio 43521

FILED
FULTON COUNTY
COMMON PLEAS COURT

07 MAR 14 AM 9:48

COURT OF COMMON PLEAS
FULTON COUNTY, OHIO

MARY GYPE
CLERK

Jennifer Borkowski (Haas))
)
Plaintiff)
)
v.)
)
A.J. Borkowski, Jr.)
)
Defendant)
)
)

Case No. 04-CV-000018

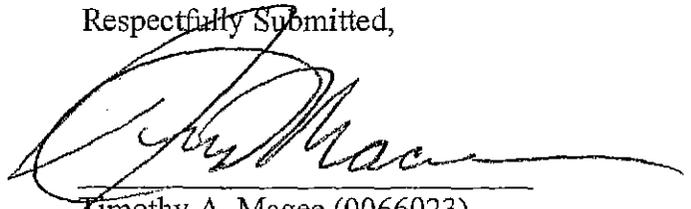
Judge Richard Markus

DISCLAIMER OF INTEREST

Timothy A. Magee (0066023)
347 N. Main St., Ste. 3
Bowling Green, OH 43402

Now comes Jennifer Borkowski (Haas) by and through the undersigned Counsel, who hereby disclaims any interest in the real property known by the street address of 13613 State Route 66, Fayette, Ohio 43521. If in fact it is decided that Jennifer Borkowski (Haas) has any interest in said property, Jennifer Borkowski (Haas) hereby assigns any such interest to the ^{Fulton} Henry County Court of Common Pleas, to be disposed as the Court sees fit.

Respectfully Submitted,



Timothy A. Magee (0066023)
347 N. Main St., Ste. 3
Bowling Green, OH 43402
Phone: (419) 353-1856
Fax: (419) 353-1858
magee_law@cros.net

Ex. 1

CERTIFICATE OF SERVICE

A copy of the foregoing was served by ordinary mail to:

A.J. Borkowski, Jr., Defendant
P.O. Box 703
Fayette, Ohio 43521

Courtesy Copies to:

Matthew Gladwell
Reisenfeld & Associates, LPA, LLC
2035 Reading Road
Cincinnati, OH 45202

Kyle A. Silvers, Esq.
3030 W. Sylvania Ave., Suite 106
Toledo, OH 43613

Honorable Richard M. Markus
3903 North Valley Drive
Fairview Park, OH 44126

A handwritten signature in black ink, appearing to read 'Timothy A. Magee', written over a horizontal line.

Timothy A. Magee, Esq.

FILED
FULTON COUNTY
COMMON PLEAS COURT

07 MAR 14 AM 9:48

COURT OF COMMON PLEAS
FULTON COUNTY, OHIO

MARY GYPE
CLERK

US Bank National)
)
 Plaintiff)
)
 v.)
)
 Jennifer Borkowski et al.)
)
 Defendant)
)
)

Case No. 2003CV00330

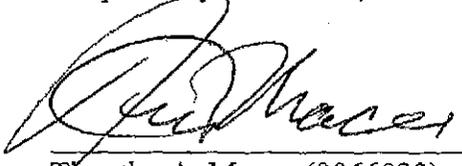
Judge Richard Markus

DISCLAIMER OF INTEREST

Timothy A. Magee (0066023)
347 N. Main St., Ste. 3
Bowling Green, OH 43402

Now comes Jennifer Borkowski (Haas) by and through the undersigned Counsel, who hereby disclaims any interest in the real property known by the street address of 13613 State Route 66, Fayette, Ohio 43521. If in fact it is decided that Jennifer Borkowski (Haas) has any interest in said property, Jennifer Borkowski (Haas) hereby assigns any such interest to the ^{Fulton} Henry County Court of Common Pleas, to be disposed as the Court sees fit.

Respectfully Submitted,



Timothy A. Magee (0066023)
347 N. Main St., Ste. 3
Bowling Green, OH 43402
Phone: (419) 353-1856
Fax: (419) 353-1858
magee_law@cros.net

CERTIFICATE OF SERVICE

A copy of the foregoing was served by ordinary mail to:

A.J. Borkowski, Jr., Defendant
P.O. Box 703
Fayette, Ohio 43521

Courtesy Copies to:

Matthew Gladwell
Reisenfeld & Associates, LPA, LLC
2035 Reading Road
Cincinnati, OH 45202

Kyle A. Silvers, Esq.
3030 W. Sylvania Ave., Suite 106
Toledo, OH 43613

Honorable Richard M. Markus
3903 North Valley Drive
Fairview Park, OH 44126

A handwritten signature in black ink, appearing to read "Timothy A. Magee", written over a horizontal line.

Timothy A. Magee, Esq.

FILED
FULTON COUNTY
COMMON PLEAS COURT

07 MAR 14 AM 9:47

COURT OF COMMON PLEAS
FULTON COUNTY, OHIO

MARY GYPE
CLERK

William K. Humbert, et al.)
)
Plaintiff)
)
v.)
)
Jennifer Borkowski, et al.)
)
Defendant)
)
)
)

Case No. 01 CV 000274

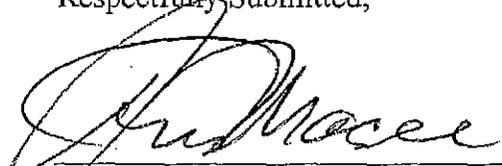
Judge Richard Markus

DISCLAIMER OF INTEREST

Timothy A. Magee (0066023)
347 N. Main St., Ste. 3
Bowling Green, OH 43402

Now comes Jennifer Borkowski (Haas) by and through the undersigned Counsel, who hereby disclaims any interest in the real property known by the street address of 13613 State Route 66, Fayette, Ohio 43521. If in fact it is decided that Jennifer Borkowski (Haas) has any interest in said property, Jennifer Borkowski (Haas) hereby assigns any such interest to the ^{Henry} County Court of Common Pleas, to be disposed as the Court sees fit.

Respectfully Submitted,



Timothy A. Magee (0066023)
347 N. Main St., Ste. 3
Bowling Green, OH 43402
Phone: (419) 353-1856
Fax: (419) 353-1858
magee_law@cros.net

CERTIFICATE OF SERVICE

A copy of the foregoing was served by ordinary mail to:

A.J. Borkowski, Jr., Defendant
P.O. Box 703
Fayette, Ohio 43521

Courtesy Copies to:

Matthew Gladwell
Reisenfeld & Associates, LPA, LLC
2035 Reading Road
Cincinnati, OH 45202

Kyle A. Silvers, Esq.
3030 W. Sylvania Ave., Suite 106
Toledo, OH 43613

Honorable Richard M. Markus
3903 North Valley Drive
Fairview Park, OH 44126

A handwritten signature in black ink, appearing to read 'Timothy A. Magee', written over a horizontal line.

Timothy A. Magee, Esq.

NOV-1 00

Last Will and Testament
of
MICHAEL J. BUMB
JUDGE

BERTHA BORKOWSKI STEWART

I, BERTHA BORKOWSKI STEWART, of the Village of Fayette, County of Fulton and State of Ohio, being of full age, of sound and disposing mind and memory and not under any unlawful restraint, do make, publish and declare this to be my Last Will and Testament, hereby revoking all wills and codicils by me heretofore made.

ITEM I.

I direct that all my enforceable legal debts, funeral expenses and costs of administration of my estate be paid as soon as practical after my decease.

ITEM II.

I direct that all estate, inheritance, succession and other taxes levied or assessed against my estate or any succession thereto, be paid as debts of my estate, without reimbursement therefor being required or requested from any beneficiary hereunder.

ITEM III.

I give and bequeath to Our Lady of Mercy Catholic Church, Fayette, Ohio, the sum of \$2,000.00, for the saying of masses for the repose of my soul and the souls of my departed husbands, John Borkowski and Wayne C. Stewart.

ITEM IV.

I give and bequeath the sum of \$1,000.00 to my friend, Rita Pattison.

Ex. B

NOV -1 00

MICHAEL J. BUMB
JUDGE

ITEM V.

I give and bequeath the sum of \$1,000.00 to my friend, Chalmer Landis.

ITEM VI.

I give, devise and bequeath to my grandson, A. J. Borkowski, Jr., the 27.284 acre farm in Richland Township, Defiance County, Ohio (which description is hereinafter set forth), subject to the right of my son, A. J. Borkowski, Sr., to reside in my mobile home on the current building site which is approximately one acre, including the joint use of the pond. At the death of my son, A. J. Borkowski, Sr., or at such time as he fails to occupy the aforesaid premises for six consecutive months, then his life interest shall terminate and the entire farm set forth in this item shall belong absolutely to my grandson, A. J. Borkowski, Jr.

Tract 1:

Situated in the TOWNSHIP of RICHLAND, COUNTY of DEFIANCE, and STATE of OHIO, and known as:

A part of the northeast $\frac{1}{4}$ of the northeast $\frac{1}{4}$, Section 3, Town 4 North, Range 5 East and more particularly described as follows: Beginning at a stone at the southeast corner of the northeast quarter of the northeast quarter of said Section 3, Richland Township; thence north 0 degrees 41 minutes east along the east line of the northeast quarter of said Section 3 a distance of 1,059.51 feet to an iron pin on the southerly limited access right of way line of U.S. Route 24; thence south 61 degrees 28 minutes west along the southerly limited access right of way line of U.S. Route 24 a distance of 1,500.83 feet to an iron pin on the west line of the northeast quarter of the northeast quarter of said Section 3; thence south 0 degrees 41 minutes west along the west line of the northeast quarter of the northeast quarter of said Section 3, a distance of 298.81 feet to an iron pin; thence continuing south 0 degrees 41 minutes west along the west line of the northeast quarter of the northeast quarter of said Section 3 a distance of 27.00 feet to a point on the south line of the northeast quarter of the northeast quarter of said Section 3; thence south 89 degrees 16 minutes east along the south line

NOV - 1 00
MICHAEL J. BUMB
JUDGE

of the northeast quarter of the northeast quarter of said Section 3 a distance of 1,309.90 feet to the place of beginning of the parcel described herein, containing 20.829 acres of land, more or less, subject to all easements of record.

Tract 2:

Situated in the TOWNSHIP of RICHLAND, COUNTY of DEFIANCE, and STATE of OHIO, and known as:

A part of the west part of the northwest $\frac{1}{4}$ of the northwest $\frac{1}{4}$, Section 2, Town 4 north, Range 5 east and more particularly described as follows: Beginning at a stone at the southwest corner of the northwest quarter of the northwest quarter of Section 2; thence north 0 degrees 41 minutes east along the west line of the northwest quarter of Section 2 a distance of 1,059.51 feet to an iron pin on the southerly limited access right of way line of U.S. Route 24; thence north 61 degrees 28 minutes east along the southerly limited access right of way line of said U.S. Route 24 a distance of 284.34 feet to an iron pin; thence south 0 degrees 39 minutes west a distance of 567.55 feet to an iron pin; thence continuing south 0 degrees 39 minutes west a distance of 635.60 feet to an iron pin on the south line of the northwest quarter of the northwest quarter of Section 2; thence north 88 degrees 12 minutes 30 seconds West along the south line of the northwest quarter of the northwest quarter of said Section 2 a distance of 249.12 feet to the place of beginning of the parcel herein described; containing 6.455 acres of land, more or less, subject to all easements and legal highways.

ITEM VII.

I give, devise and bequeath to my grandson, A. J. Borkowski, Jr., my 40 acre farm located in the Northeast quarter of Section 30, Gorham Township, Fulton County, Ohio.

ITEM VIII.

All the rest, residue and remainder of the property, real, personal or mixed, of every kind and description, wheresoever situate, which I may own or have the right to dispose of at the time of my decease, after the payment of debts, expenses, costs and taxes mentioned in Items I and II hereof, and the bequests mentioned in Items III, IV, V, VI, and VII hereof,

FILED
IN HIGH COUNTY
COMMITTEES PROB. DIV.

NOV - 1 00

MICHAEL J. BUMB
JUDGE

I give, devise and bequeath as follows:

(A.) One-fourth (1/4) thereof, to my great-granddaughter, Jennifer M. Borkowski;

(B.) One-fourth (1/4) thereof, to my great-granddaughter, Amber L. Borkowski;

(C.) One-fourth (1/4) thereof, to my great-grandson, Nathan Bishop;
and

(D.) One-fourth (1/4) thereof, to my great-grandson, Bruce Bishop.

ITEM IX.

I hereby declare that it was my intention not to make provisions in this, my Last Will and Testament, for any relative, next of kin or other person except as otherwise provided herein; and the absence of such provision was not due to oversight on my part.

ITEM X.

I nominate and appoint my grandson, A. J. Borkowski, Jr., and my attorney Jack D. Gooding, co-executors of this my Last Will and Testament, and require that no bond be given by them, hereby granting to them as such co-executors, full power and authority to sell and convey all or any part of my property, real, personal or mixed, at private or public sale, upon such terms and at such prices as they may deem proper, and without obtaining any order of Court therefor. No purchaser from my co-executors need see to the application of the purchase money to or for the purposes of the trust, but the receipt of my co-executors shall be a complete discharge and acquittance therefor. I also grant to them full power and authority in the settlement of my estate to compromise, compound, adjust and settle all

NOV -1 00

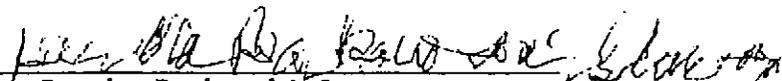
MICHAEL J. BUMB
JUDGE

claims and demands in favor of or against my estate, for such sums and upon such terms and conditions and in such manner as my co-executors shall deem best.

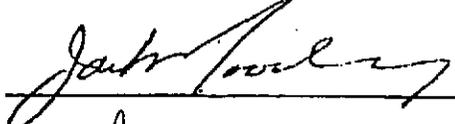
In the event my grandson, A. J. Borkowski, Jr., shall for any reason fail to qualify, or having qualified, fails to complete the administration of my estate, I request that no successor be appointed. It is my desire that the remaining co-executor act as the sole executor of my estate to serve without bond and in such capacity to possess and exercise all powers and authority herein conferred on the executors jointly.

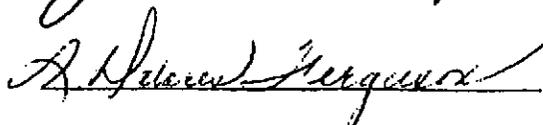
In the event my attorney, Jack D. Gooding, shall for any reason fail to qualify, or having qualified, fails to complete the administration of my estate, I nominate and appoint Brent L. Winzeler co-executor in his stead, giving to him all rights, duties, powers and immunities set forth in this Item and without bond.

IN WITNESS WHEREOF, I have hereunto set my hand at Archbold, Ohio, this 16th day of March, A. D. 1993.


Bertha Borkowski Stewart

Signed by the said Bertha Borkowski Stewart, and by her acknowledged to be her Last Will and Testament, before us and in our presence, and by us subscribed as attesting witnesses in her presence and at her request and in the presence of each other this 16th day of March, A. D. 1993.

 , residing at Archbold, Ohio.

 , residing at Fayette , Ohio.