

IN THE SUPREME COURT OF OHIO

ANDREA BARNES, EXEC.,

Plaintiff-Appellee,

-vs-

UNIVERSITY HOSPITALS
OF CLEVELAND, et al.

Defendants-Appellants.

CASE NO. 2007-0140

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

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

REPLY BRIEF OF APPELLANTS MEDLINK OF OHIO
AND THE MEDLINK GROUP, INC.

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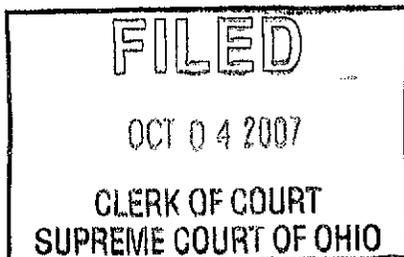


TABLE OF CONTENTS

TABLE OF AUTHORITIESii

INTRODUCTION 1

I. THE LEGAL ERRORS WHICH REQUIRE A NEW TRIAL ARE FOUR-FOLD.....3

II. THE PARTIES COULD NOT CIRCUMVENT R.C. 2701.10 BY AGREEMENT5

III. PRIVATE JUDGES MUST BE ELECTED.7

IV. THE RESULT OF A TRIAL HELD CONTRARY TO R.C. 2701.10 IS A VOID
PROCEEDING.....9

 A. The Contract is Void And Unenforceable.....9

 B. No Subject Matter Jurisdiction Was Conferred.....11

V. A STATE STANDARD OF PUNITIVE DAMAGES REVIEW.14

 A. Private Judge Glickman’s Lack Of Review.15

 B. The Eighth District’s Lack of Review.....17

 C. The Appropriate Remedy18

VI. THE ONLY REMEDY IS A NEW TRIAL18

CONCLUSION19

PROOF OF SERVICE.....21

TABLE OF AUTHORITIES

CASES

<i>Bell v. Northern Ohio Telephone Co.</i> (1948), 149 Ohio St. 157, 78 N.E.2d 42.....	9
<i>BMW of North America, Inc. v. Gore</i> (1996), 517 U.S. 559, 116 S.Ct. 1589	<i>passim</i>
<i>Buchanan Bridge Co. v. Campbell</i> (1899), 60 Ohio St. 406, 54 N.E. 372.....	6
<i>Cangemi v. Cangemi</i> , 8 th Dist. No. 84678, 2005-Ohio-772, 2005 WL 433529	10, 11
<i>Cooper Industries, Inc. v. Leatherman Tool Group, Inc.</i> (2001), 532 U.S. 424, 121 S. Ct. 1678 ...	19
<i>Dardinger v. Anthem Blue Cross & Blue Shield</i> , 98 Ohio St. 3d 77, 2002-Ohio-7113, 781 N.E.2d 121	15
<i>Davis v. Wolfe</i> (2001), 92 Ohio St. 3d 549, 751 N.E.2d 1051	11
<i>In Re J.J.</i> , 111 Ohio St. 3d 205, 2006-Ohio-5484, 855 N.E.2d 851	12, 13
<i>Martin v. Midwestern Group Insurance Co.</i> (1994), 70 Ohio St.3d 478, 639 N.E.2d 438	6
<i>Massilon Savings & Loan Co. v. Imperial Finance Co.</i> (1926), 114 Ohio St. 523, 151 N.E. 645 ..	10
<i>Motorists Insurance Cos. v. BFI Waste Management</i> (April 23, 1999), 2d Dist. No. 17495, 133 Ohio App. 3d 368, 728 N.E.2d 31	9
<i>Office of Disciplinary Counsel v. Coleman</i> (2000), 88 Ohio St. 3d 155, 724 N.E.2d 402.....	6, 9
<i>Philip Morris USA v. Williams</i> , 127 S.Ct. 1057 (2007)	18
<i>Powell v. Markus</i> , ___ Ohio St. 3d ___, ___ N.E.2d ___, 2007-Ohio-4793.....	8
<i>Pratts v. Hurley</i> , 102 Ohio St. 3d 81, 2004-Ohio-1980, 806 N.E.2d 992	1, 5, 6, 12, 13
<i>State ex rel Mason v. Griffin</i> , 104 Ohio St.3d 279, 2004-Ohio-6384, 819 N.E.2d 644	14
<i>State ex rel. Huffman v. Cox</i> , Franklin App. No. 02AP-803, 2003-Ohio-3642, 2003 WL 21545128.....	11
<i>State ex rel. Kline v. Carroll</i> (2002), 96 Ohio St.3d 404, 775 N.E.2d 517	11, 12
<i>State ex rel. Russo v. McDonnell</i> , 110 Ohio St. 3d 144, 2006-Ohio-3459, 852 N.E.2d 145.. <i>passim</i>	
<i>State ex rel. Stern v. Mascio</i> (1996), 75 Ohio St.3d 422, 662 N.E.2d 370.....	14

State Farm Mutual Automobile Insurance Co. v. Campbell (2003), 538 U.S. 408, 123 S. Ct. 1513
..... *passim*

Ohio Rules, Constitutional Provisions, And Statutory Provisions

Gov. Jud. R. VI.....8
Gov. Jud. R. VI(1)(C)(2)8
Ohio Const. Art. IV, § 4(B).....11
Ohio Const. Art. IV, § 57
Ohio Const. Art. IV, § 67, 8
Ohio Const. Art. IV, § 6(A)(3)8
Ohio Const. Art. IV, § 6(C)8
R.C. 2701.10 *passim*

INTRODUCTION

This Court has asked the parties to focus on two issues of law in this case. The Court will decide whether the private judge in this case was among the class of “certain judges” empowered to resolve the parties’ dispute by jury trial under R.C. 2701.10; and whether Medlink was afforded proper Constitutional review of the hotly contested facts surrounding the challenged jury award of punitive damages. Medlink seeks a new trial.

The logical starting point for judicial review of the issues before this Court is April 18, 2005, when the parties contracted with private judge Glickman to oversee a jury trial in this case pursuant to R.C. 2701.10. Although Judge Glickman was a registered private judge with this Court at that time, we now know that he was not qualified to act as a private judge pursuant to R.C. 2701.10 and this Court’s Rules for the Government of the Judiciary.¹ Additionally, we also know that private judge Glickman was not empowered to empanel a jury pursuant to this Court’s decision in *State ex rel. Russo v. McDonnell*, 110 Ohio St. 3d 144, 2006-Ohio-3459, 852 N.E.2d 145.

The significance of the above is that the underlying contract was unlawful. It violated the law established by this Court in *Russo* and violated the Ohio Revised Code. It is axiomatic in Ohio that contracts which violate the law are illegal and are void *ab initio*. Statutes require strict compliance. A failure to strictly comply with a statute is error in the exercise of jurisdiction which may not be voluntarily waived, and is always reversible error on direct appeal. *Pratts v. Hurley*, 102 Ohio St. 3d 81, 2004-Ohio-1980, 806 N.E.2d 992.

¹ Glickman is no longer on this Court’s Registration of Private Judges.

This appeal is not a challenge to Robert Glickman's competence as an attorney in private practice; it is a challenge to Glickman's qualifications to sit as a private judge and preside over a jury trial, pursuant to R.C. 2701.10.

Not only is it apparent that Glickman was not qualified to sit as a private judge or preside over a jury trial, it is equally apparent that the trial court did not conduct an analysis of the punitive damages award under *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 116 S.Ct. 1589 and as required by *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003), 538 U.S. 408, 123 S. Ct. 1513. Even a cursory review of the trial court's decision regarding punitive damages shows there was no analysis using the criteria set forth by the United States Supreme Court.

Medlink asks this Court to focus on the law of Ohio and to reject Appellee Barnes' ("Barnes") attempt to obscure the legal issues with a 19-page recitation of a biased version of the disputed facts. (*See*, Appellee Merit Brief, at pp. 1-19). By its mere length, Barnes revisionist view of the "facts" supports Medlink's argument that a constitutionally-mandated review of the punitive damages award was required by the trial court, but did not take place. If the trial court had indeed done its own constitutional analysis of the trial evidence, then Barnes could simply reference the portions of the opinions below in which the trial court detailed its findings concerning the extent to which the jury's punitive damage award did or did not comport with the reprehensibility, ratio and comparison guideposts required for determining whether the jury's award is unconstitutionally excessive. Instead, the opinions of the lower courts are devoid of findings of fact concerning the guideposts, yet replete with conclusory statements that the punitive damages award somehow was constitutionally validated.

The propositions of law accepted on appeal are:

Proposition of Law No. 1: In reviewing an award of punitive damages, the trial court must independently analyze the three guideposts set forth by the United States Supreme Court in *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559.

Proposition of Law No. 3: One who has never been elected to a judgeship in Ohio may not serve as a private judge under R.C. 2701.10.

I. THE LEGAL ERRORS WHICH REQUIRE A NEW TRIAL ARE FOUR-FOLD.

The propositions of law above incorporate four critically flawed errors of law which cannot hold up to this Court's review under controlling statutes, controlling case law, or the Rules of this Court and require that a new trial be issued.

The errors are the following:

- (1) The *Barnes* case was transferred to Glickman, who was not registered with the Cuyahoga County Clerk of Court, a requirement under R.C. 2701.10(A);
- (2) Glickman presided over the *Barnes* litigation pursuant to R.C. 2701.10, but was not qualified to serve as a Private Judge because he had never been elected to the Bench;
- (3) Glickman presided over a jury trial, which is not permitted by R.C. 2701.10;²
- (4) A post-verdict review of the punitive damages award did not consider the three guideposts articulated by *BMW v. Gore*, supra, and required to be considered by *State Farm*, supra.

Any one of the four legal errors outlined above requires a reversal of the proceedings, but when considered together, the error is unprecedented. Patchwork will not repair the damage that has been done. The only appropriate remedy is a new jury trial, held before a qualified judge.

² See, *State ex rel. Russo v. McDonnell*, 110 Ohio St.3d 144, 2006-Ohio-3459, 852 N.E.2d 145.

If the referral agreement pursuant to R.C. 2701.10 and the proceedings thereafter are ratified by this Court, or even just permitted to stand, then this Court's decision in *Russo* means nothing, this Court's Rules for the Government of the Judiciary mean nothing, the legislative requirements for Private Judges under R.C. 2701.10 mean nothing, and litigants in Ohio will be provided with a roadmap for how they may circumvent all of these rules in the future with impunity. If all it takes to circumvent these rules and statutes is the parties' agreement and an alleged waiver, then parties can simply agree to have individuals who have never been elected to the Bench sit as a trial judge in a public courtroom where they have the power to subpoena witnesses, hold them in contempt, empanel jurors, decide what jurors actually hear a case, direct the staff of elected officials, issue warrants, award sanctions, create common law and establish legal precedent. The result is even broader, because the legal precedent, if undisturbed, is binding on other litigants in other cases that result from a private contract made by others. Also, if the parties choose, the decisions of the private judges are also subject to mandatory review by Ohio courts of appeal and ultimately this high Court. Additionally, affirming the proceedings below will result in the Court's ratification of an illegal contract, a policy which should never be created.

For the reasons outlined below and in Medlink's Merit Brief, it is without cavil that Glickman was not qualified to sit as a Private Judge, that he did not disclose to the parties his lack of qualifications, and that he unlawfully empaneled a jury. These errors were timely raised on direct appeal. Further, it is equally clear that Private Judge Glickman did not conduct a *BMW* analysis as required by the United States Supreme Court.

II. THE PARTIES COULD NOT CIRCUMVENT R.C. 2701.10 BY AGREEMENT.

Barnes asserts that Medlink waived its right to appeal concerning the Private Judge Act. No such waiver could have been effective for two reasons: 1) the requirements of the statute cannot be abrogated by contracting parties, and 2) any waiver could not have been knowing and effective because there was no disclosure to Medlink of the fact that Judge Glickman lacks the qualifications statutorily required to serve as a private judge, nor was there disclosure to Medlink that the extent to which a Private Judge could preside over a jury trial had been challenged in another case. In any event, had Medlink examined this Court's listing of Registered Private Judges, it would have found that Glickman was on the list.

The proceedings on or after April 18, 2005 must be voided because they were founded upon an unlawful contract to allow a jury trial conducted by a private attorney who failed to comply with the statutory requirements of R.C. 2701.10. Statutes require strict compliance. *Pratts v. Hurley*, 102 Ohio St. 3d 81, 2004-Ohio-1980, 806 N.E.2d 992. Any failure to strictly comply is error in the exercise of jurisdiction. *Id.* Strict compliance may not be voluntarily waived³ and is always reversible error on direct appeal. *Id.*

³ Barnes represents that the "on the record" waiver was allegedly due to the "uncertainty surrounding the Private Judge Act, R.C. 2701.10." (Merit Brief of Appellee, p. 2). There was no "uncertainty" at the time of these proceedings, at least not any which was known publicly or to Medlink. In fact, Judge Nancy Russo did not file her original action in prohibition with this Court (challenging the right to jury trials under R.C. 2701.10) until November 14, 2005, nearly six months after *Barnes* was improperly tried to a jury. (*Russo*, Case No. 2005-2130). Private Judge Glickman and Barnes' attorneys certainly did not disclose to Medlink's attorneys at the trial below that they were aware of, or concerned with, any "uncertainty" regarding the Private Judge statute or Glickman's lack of qualifications. (Tx. pp. 146-148).

What was later discovered, though, was that Plaintiff's counsel was intimately familiar with these issues during the pendency of the underlying proceedings, as they had been raised in *State ex rel. Peffer v. Russo*, 110 Ohio St. 3d 175, 2006-Ohio-4092, 852 N.E.2d 170, in which case Plaintiff's counsel herein (Michael F. Becker) was counsel for the Peffers. Judge Russo's merit brief had been served in the *Peffer* case two weeks before the prejudgment interest hearing in this case. (See Docket, Case No. 2005-2223).

Medlink timely appealed both Glickman's lack of qualifications and his improper oversight of a jury trial under R.C. 2701.10 on direct appeal to the Eighth Appellate District. Since at least 1899, the law of this Court has been that a contract which violates the law is void and unenforceable as a matter of law. *Coleman*, 88 Ohio St. 3d at 158; *Martin v. Midwestern Group Insurance Co.* (1994), 70 Ohio St.3d 478, 480, 639 N.E.2d 438; *Buchanan Bridge Co. v. Campbell* (1899), 60 Ohio St. 406, 425, 54 N.E. 372. The only appropriate remedy is for a reversal of the proceedings and a new trial.

Appellee also suggests that a reversal of the underlying proceedings and an order for a new trial will subject Ohio courts to an influx of litigation arising from parties wishing to "undo" proceedings held contrary to R.C. 2701.10. If such a thing were going to occur, it would have started over one year ago when this Court held in *State ex rel. Russo* that it was improper to hold jury trials under R.C. 2701.10. Medlink is not aware of a single party (other than Medlink) who has sought to "undo" a civil jury verdict in a case involving a Private Judge. Furthermore, any error occurring due to the failure to strictly comply with a statute must be raised on direct appeal or it is waived and cannot be remedied through collateral attack. *Pratts v. Hurley*, *supra*.

We now know that Barnes apparently knew of Glickman's lack of qualifications. (Merit Brief of Appellee, p. 35). Further, it is hard to imagine that Glickman did not realize his own lack of qualifications. Still, neither Glickman nor Barnes' counsel ever disclosed concerns over Glickman's lack of qualifications to Medlink. Barnes suggests that if Medlink had looked, Medlink too would have known of Glickman's lack of qualifications. Not true. Cuyahoga County's Clerk of Court did not maintain a listing of private judges as it was required to by statute, and the list of Registered Private Judges maintained by the Ohio Supreme Court at the time of the *Barnes* trial mistakenly included Glickman. In other words, if Medlink had looked, it would have found that Glickman was a registered Private Judge with this Court. (Obviously, Glickman is no longer registered with this Court).

III. PRIVATE JUDGES MUST BE ELECTED.

Barnes agrees that Glickman was never elected to the Bench, but argues instead that R.C. 2701.10 somehow does not require Private Judges to have ever been elected.

Although never argued on appeal or even in its Memorandum In Opposition to Jurisdiction, Appellee now raises a novel argument for the first time in his Merit Brief, *i.e.*, that the answer to whether Private Judges serving pursuant to R.C. 2701.10 must be elected should be determined under this Court's "Guidelines for the Assignment of Judges." Appellee's Merit Brief does not mention, though, that those Guidelines state on their face that they have not been adopted as rules pursuant to Article IV, Section 5 of the Ohio Constitution, apply only to assignments by the Chief Justice (which was not what occurred here), and apply subject to constitutional, statutory, and rule limitations. (Merit Brief of Appellee, Appendix B). The constitutional, statutory, and rule limitations are quite obvious – Private Judges serving pursuant to R.C. 2701.10 must be elected.

The following is a review of the constitutional requirements, statutory requirements, and rules which apply to private judging under R.C. 2701.10.

R.C. 2701.10, titled "Registration of retired judges; referral of civil action or submission of issue or question," states:

"[a]ny voluntarily retired judge, or any judge who is retired under Section 6 of Article IV, Ohio Constitution, may register with the clerk of any court of common pleas...for the purpose of receiving referrals for adjudication of civil actions or proceedings, and submissions for determination of specific issues or questions of fact or law in any civil action or proceeding, pending in the court."

(R.C. 2701.10 (A), Appx. p. 90). The statute provides eligibility for two kinds of retired judges to adjudicate a proceeding under the statute: (1) voluntarily retired judges and (2) judges who are retired under Article IV, § 6 of the Ohio Constitution.

The definition of a “voluntarily retired judge” is defined under Rule VI(C)(2) of the Ohio Supreme Court Rules for the Government of the Judiciary. (Appx. p. 92). Barnes with effrontery asks that this Court to ignore these rules, calling them “inconsequential.” (Merit Brief of Appellee, p. 37). Gov.Jud.R.VI, titled “Reference of civil action pursuant to section 2701.10 of the Revised Code,” defines a “voluntarily retired judge” as “any person who was elected to and served on an Ohio court without being defeated in an election for new or continued service on that court.” Gov.Jud.R.VI(1)(C)(2). (Appx. p. 92). [emphasis added]. Barnes stubbornly refuses to concede, but does not dispute that Glickman was never elected to the Bench.

Article IV, Section 6 of the Ohio Constitution provides guidelines for the compensation of elected judges and provides the only other mechanism under which a person may be qualified to serve as a private judge under R.C. 2701.10. (See, R.C. 2701.10(A) and Constitutional Provision, at Appx. p. 100). This provision of the Ohio Constitution also requires that judges be elected. (Appx. p. 100, Const. Art. IV, § 6(A)(3)). The Editor’s Comment to this section of the Ohio Constitution states that “judges are to be elected rather than appointed....” Ohio Const. Art. IV, § 6, Editor’s Comment. (Appx. p. 101). This section of the Ohio Constitution defines the circumstances under which a judge must “involuntarily” retire. Specifically, a judge is prohibited from assuming the office of judge if he would reach the age of seventy on or before the day when he would assume the office. (Ohio Const. Art. IV, § 6(C)).

R.C. 2701.10 refers to “judges who are retired under Article IV, § 6 of the Ohio Constitution” and the above explanation of judges who have reached the age of seventy is the only retirement requirement under Article IV, § 6 of the Ohio Constitution. See, *Powell v. Markus*, ___ Ohio St. 3d ___, ___ N.E.2d ___, 2007-Ohio-4793 (“This provision [Section 6(C), Article IV, Ohio Constitution], authorizes the assignment of a retired judge who is over 70 years

old.”) Barnes argues that Glickman somehow meets the requirement of a “retired judge” under this section of the Constitution, but Barnes fails to name any other retirement mechanism provided in this section. There is none. Glickman has not reached the age of seventy and he does not fall under this category of individuals permitted to serve as a Private Judge under R.C. 2701.10.⁴

IV. THE RESULT OF A TRIAL HELD CONTRARY TO R.C. 2701.10 IS A VOID PROCEEDING.

A. The Contract is Void And Unenforceable.

The parties to these proceedings signed a contract to allow Glickman to oversee the unlawful jury trial of this case. (See, Agreement dated April 18, 2005, at Supp. p. 1). That contract was unlawful, and so the contract and all proceedings subsequent to it are void. *Because this case involves a contract (and not just an assignment of a judge or a transfer of a case) this case is distinguishable from every case cited by Appellee claiming that the proceedings are “merely voidable,” and not void.* The law from this Court and in Ohio is overwhelmingly clear on this.

In Ohio, “[p]arties are free to enter into any contract the subject of which is not prohibited by law.” *Motorists Insurance Cos. v. BFI Waste Management* (April 23, 1999), 2d Dist. No. 17495, 133 Ohio App. 3d 368, 377, 728 N.E.2d 31. A private contract cannot be used to circumvent actions prohibited by statute. See *Office of Disciplinary Counsel v. Coleman* (2000), 88 Ohio St. 3d 155, 158, 724 N.E.2d 402. A contract that violates a statute is unlawful and void (*Bell v. Northern Ohio Telephone Co.* (1948), 149 Ohio St. 157, 158, 78 N.E.2d 42)

⁴ Barnes has argued in earlier briefs that there is no “proof” that Glickman has not reached the age of seventy. Barnes has wisely abandoned that argument in his Merit Brief herein.

and, therefore, unenforceable (*Massilon Savings & Loan Co. v. Imperial Finance Co.* (1926), 114 Ohio St. 523, 527, 151 N.E. 645).

In the only other known case where a challenge was made to the authority of an individual to serve as a Private Judge under R.C. 2701.10, the result was a holding by the appeals court that the proceeding was void where the appointed private judge did not meet the requirements of R.C. 2701.10. See, *Cangemi v. Cangemi*, 8th Dist. No. 84678, 2005-Ohio-772, 2005 WL 433529.⁵

In *Cangemi*, the parties agreed to an individual to serve as an arbitrator under R.C. 2701.10 whom they knew had never been elected to the Bench or served as a judge in any capacity. The appeals court voided the entire proceedings:

“We are unable to reach the merits of appellant’s assignments of error because of a plain error in the proceedings before the trial court. The parties’ attempt to tailor the proceedings – to choose their decision-maker and define the process by which his decision would be reviewed – is not authorized by the Ohio Revised Code or court rules.” Id. at ¶ 17.

* * *

“Finally, the dispute resolution process to which the parties agreed here did not comply with R.C. 2701.10. Most important, Mr. Heutsche [the appointed arbitrator] is not a retired judge registered with the clerk of courts for the purpose of receiving referrals of cases for adjudication...” Id. at ¶ 23.

* * *

“Here...the appointment of Mr. Heutsche was made without color of authority, and was therefore void...We find Mr. Heutsche had no jurisdiction to hear and decide the parties’ case...The parties’ agreement to this procedure did not eliminate the court’s ethical obligation to exercise its independent judgment.

⁵ *Cangemi*, an Eighth District case, would appear to be the exact opposite result as that reached by the same court of appeals herein. However, in *Cangemi*, the individual assigned under R.C. 2701.10 had never served on the Bench (elected or appointed) whereas here, Glickman had been previously appointed to the Bench. The Eight District, of course, has held that judges need not be elected to serve as Private Judges under R.C. 2701.10. (Opinion p. 21, Appx. p. 27)

Accordingly, we vacate the court's decision and remand for further proceedings." Id. at ¶¶ 25, 26.

Thus, Medlink must be placed in the same position they were in at the time the contract was executed on April 18, 2005, at which time all other proceedings were void.

B. No Subject Matter Jurisdiction Was Conferred.

This Court has recently stated that "R.C. 2701.10, in accordance with Section 4(B), Article IV of the Ohio Constitution, confers subject-matter jurisdiction on certain retired judges to decide civil actions pending in common pleas and other courts." See, *State ex rel. Russo v. McDonnell*, 110 Ohio St. 3d 144, 2006-Ohio-3459, 852 N.E.2d 145, at ¶ 23 (citing *State ex rel. Huffman v. Cox*, Franklin App. No. 02AP-803, 2003-Ohio-3642, 2003 WL 21545128, ¶ 32.) [emphasis added].

As Glickman was ineligible to adjudicate the *Barnes* case under R.C. 2701.10, no subject matter jurisdiction was ever conferred and the proceedings which occurred subsequent to the parties' referral to Glickman are void. See *Cangemi v. Cangemi*, 8th Dist. No. 84678, 2005-Ohio-772, 2005 WL 433529.

This Court has also confirmed that "challenging improper assignment and transfer of a case is an attack on the subject-matter jurisdiction of the transferee court." *State ex rel. Kline v. Carroll* (2002), 96 Ohio St.3d 404, 409-10, 775 N.E.2d 517 (citing *Davis v. Wolfe* (2001), 92 Ohio St. 3d 549, 552, 751 N.E.2d 1051.) [emphasis added].

In *Kline*, this Court affirmed the Eighth Appellate District's issuance of a writ of prohibition finding that no subject matter jurisdiction was conferred because of a failure to meet statutory requirements in the transfer of the case, just like in the *Barnes* litigation. The decision which was affirmed held that when the assignment of a judge is made without the necessary statutory authority, "then the assigned trial court lacks jurisdiction to hear the matter, and the

judgment of that court is void.” *State ex rel. Kline v. Carroll* (Jan. 4, 2002), 8th Dist. No. 79737, 2002 WL 42962 [emphasis added].

Barnes argues that the Court’s decision in *In re J.J.*, 111 Ohio St. 3d 205, 2006-Ohio-5484, 855 N.E.2d 851, requires that the proceedings below may be merely voidable, and not void. Barnes also claims that Medlink has never distinguished *In re J.J.* in these proceedings. Not true. (See *Memorandum Opposing Jurisdiction of Cross Appeal by Appellants Medlink of Ohio and The Medlink Group, Inc.*, at p. 2). The fact is, though, that *In re J.J.* is very different than the proceedings in *Barnes*. There was not an issue of an unlawful contract or even of an unqualified judge in *In re J.J.*, as the sole complaint by the litigants therein was that a magistrate judge, not the administrative judge, assigned the case to the docket of a duly qualified visiting judge. See, *In re J.J.*, at ¶ 9. As this Court stated both *In re J.J.* and in *Russo*, when the trial court lacks subject matter jurisdiction, the judgment is void. (Id. at ¶ 10, citing *Pratts v. Hurley*, 102 Ohio St. 3d 81, 2004-Ohio-1980, 806 N.E.2d 992).⁶ Because it is the statute, R.C. 2701.10, that confers subject matter jurisdiction and the proceedings below were held contrary to R.C. 2701.10, no subject matter jurisdiction was conferred and the proceedings are void.

As his last argument, Barnes urges affirmance of the underlying proceedings because of a supposed fear that a reversal would be “revolutionary,” that “countless verdicts would have to be set aside,” and the result would be “catastrophic.”⁷ This Court undoubtedly considered these issues when it ruled in *Russo* that private judges could not preside over a jury trial pursuant to R.C. 2701.10. Statutes, such as R.C. 2701.10 require strict compliance. A failure to strictly comply with a statute is error in the exercise of jurisdiction which may not be voluntarily waived

⁶ Even if this Court finds that the judgment in this case is voidable, and not void, Medlink Defendants properly raised this issue on appeal.

⁷ Merit Brief of Appellee, p. 46.

and is always reversible error on direct appeal. After a direct appeal, any error is waived and cannot be remedied through collateral attack. *Pratts v. Hurley*, supra. Medlink raised this error on direct appeal, and the floodgates will not open as to the other “countless” verdicts, because they presumably have not raised this error on direct appeal. Moreover, if “the floodgates” were opened, and an influx of litigation was going to begin, this would have happened after this Court’s decision in *Russo*, supra, wherein it was held that trials held pursuant to R.C. 2701.10 may only be bench trials, not jury trials. Again, Medlink is not aware of a single case where a litigant from a jury trial overseen by a Private Judge has sought to set aside the decision based on *Russo*.

Finally, Appellee’s suggestion that Glickman was a de facto judge has no application to this case. Appellee argues that Medlink did not raise objection to Glickman’s authority during the time Glickman was presiding over the underlying litigation. Absolutely untrue. Medlink put the parties and Glickman on notice of Medlink’s objection on March 7, 2006 when it filed a complaint for a writ of prohibition in this Court. (Case No. 2006-0478). Glickman was hand-delivered a copy of the complaint on that same day and was served by this Court on March 10, 2006. (See, Docket for Case No. 2006-0478). In the face of Medlink’s notice that Glickman was not qualified to serve as a Private Judge, Glickman did not await this Court’s decision, but instead ruled on the last post-trial motion pending. In the context of a visiting judge, this Court stated in *In re J.J.* that a party may timely object to the authority of a judge. *In re J.J.*, 111 Ohio St. 3d at 209. Medlink did. Furthermore, the foundation of a finding of a de facto judge is that the position itself was lawful. See, *In re J.J.*, at ¶ 14. Here, a jury trial was held contrary to that allowed in R.C. 2701.10, based on an unlawful contract.

Even if this Court were inclined to hold that Glickman was somehow a de facto judge, the policy against such a decision is overwhelming. Such a decision would provide litigants in Ohio with a mechanism to totally disregard the rules that govern the judiciary, the Ohio Legislature's word, and the word of this Court with impunity. The fact remains, though, that the Court need not reach such a decision because the parties herein executed an unlawful contract which was void *ab initio*. Further, Private Judge Glickman empaneled a jury which he is not permitted to do under *Russo*, supra.

Although Glickman held himself out to Medlink as qualified to preside over the *Barnes* case, he had no statutory authority to act under R.C. 2701.10. See *State ex rel Mason v. Griffin*, 104 Ohio St.3d 279, 282, 2004-Ohio-6384, 819 N.E.2d 644; see also *State ex rel. Stern v. Mascio* (1996), 75 Ohio St.3d 422, 425, 662 N.E.2d 370 (holding that "where a lower court is without jurisdiction whatsoever to act, the availability or adequacy of an appellate remedy is immaterial.") In this case, the April 18, 2005 Referral Agreement that allegedly authorized the transfer of this case to Glickman for a jury trial under R.C. 2701.10 was invalid and all subsequent *ultra vires* proceedings by Glickman are void. Absent statutory authority, all proceedings on or after April 18, 2005 must be rendered void as a matter of law.

V. A STATE STANDARD OF PUNITIVE DAMAGES REVIEW.

The guideposts set forth in *BMW* are simple, specific, and must be considered by all reviewing courts. They are:

- (1) The reprehensibility guidepost. (whether the punishable conduct has a nexus to the specific harm which resulted and whether that conduct is sufficiently egregious to warrant the amount of punishment imposed by the jury's punitive damage award.)
- (2) The ratio guidepost. (whether the ratio between punitive and compensatory damages is constitutionally acceptable.)

- (3) The comparison guidepost. (requires a comparison between the punitive damages award and comparable statutory penalties.)

BMW of North America, Inc. v. Gore (1996), 517 U.S. 559, 116 S. Ct. 1589; *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003), 538 U.S. 408, 418.

This Court has already shown the lower courts how to conduct a *BMW* analysis in its decision in *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St. 3d 77, 2002-Ohio-7113, 781 N.E.2d 121. Nevertheless, the lower courts require this Court's mandate that such an analysis must always be performed in conducting a punitive damages review and, just as important, that the lower courts must "show their work" so that reviewing courts have some way to also review such an award.

Appellee's tenuous position that the trial court and the appeals court somehow "plainly performed"⁸ a proper analysis of the punitive damages award is further evidence of the need for this Court's mandate that all courts in Ohio strictly follow the law of *State Farm* and *BMW* and detail the analysis so that reviewing courts have something to review.

A. Private Judge Glickman's Lack Of Review.

While the trial court did not need to use the words "*BMW v. Gore*" in a punitive damages review, it certainly was required to consider *BMW's* three guideposts.⁹ This was not done, and Glickman's explanation, in affirming the punitive damages award and denying Medlink a due process hearing, need only be quoted verbatim to know this:

The jury, and the Court, heard all of the evidence in this matter. Unlike the facts of *State Farm*, all of the evidence presented by the plaintiff in this matter in

⁸ Appellee Merit Brief, p. 27.

⁹ Barnes' sarcastic contention, at page 20 of his Merit Brief, that Medlink takes issue with Glickman referring to "*State Farm*" instead of "*Gore*" misses the point. Medlink was relentless in its reminding of Glickman that he was required to conduct a Constitutional review of the punitive damages award, including an analysis of the three *BMW* guideposts, which was not done.

support of an award of punitive damages was based on the incident that led to the death of Natalie Barnes. The plaintiff did not introduce evidence of MedLink conduct that did not directly relate to the tragic death of Ms. Barnes.

The jury determined that an appropriate compensatory award was \$3,100,000.00. They then determined that a similar amount, \$3,000,000.00, was appropriate as punitive damages. The Court has considered whether the amount awarded was warranted by the Defendants' conduct, whether the amount was disparate from the actual damages caused by the conduct, and whether such an award is consistent with comparable cases. The Court does not require any further material to determine whether the jury's award of punitive damages was appropriate in this matter.

(Exhibit "A" to Appellee Merit Brief, pp. 1-2). Glickman then went on to affirm the punitive damages award, using a "shocks the conscience" standard. (Exhibit "A" to Appellee Merit Brief, p. 2, finding that "The \$3,000,000.00 award of punitive damages against MedLink does not shock the conscience."). There is no evidence that Glickman considered (1) whether the conduct alleged against Medlink had a nexus to the specific harm which resulted (the reprehensibility guidepost), (2) whether the ratio between punitive and compensatory damages was acceptable (the ratio guidepost), or (3) what a comparison between the punitive damages award and comparable statutory penalties would show (the comparison guidepost). Instead, Glickman apparently found that Medlink's conduct "warranted" a punitive damages award, that the award of punitive damages was similar to "comparable cases" (none of which were articulated in Glickman's decision) and that the overall award did not "shock his conscience." This type of indecipherable decision is exactly the reason why *BMW* and *State Farm* require a detailed analysis and why this Court should hold that reviewing courts must follow the *BMW* guideposts in reviewing an award of punitive damages and articulate their analysis of each guidepost.

B. The Eighth District's Lack of Review.

The reviewing appellate court also refused to perform an analysis of the punitive damages award under the *BMW* guideposts. (See Appeals Opinion, Appendix to Merit Brief of Appellants, Appx. p. 0016-0020).

In its decision, the appeals court indicated that its review of the punitive damages award was based upon whether the court found that Plaintiff presented evidence of “actual malice” against Medlink. (Appeals Opinion, Appx. p. 0017). The appeals court concluded that:

The record clearly indicates that plaintiff's counsel established a strong nexus between MedLink's hiring of Hill and Natalie's injuries and subsequent death, establishing actual malice.

* * *

MedLink acted with actual malice when it hired Hill. Accordingly, the trial court did not commit plain error when it instructed the jury regarding punitive damages, and these assignments of error are overruled.

(Appeals Opinion, Appx. pp. 18-19). At most, an assumption could be made that the appeals court considered the first *BMW* guidepost – whether the conduct alleged against Medlink had a “nexus” to the specific harm which resulted and whether the injury-causing conduct was sufficiently reprehensible to warrant punishment in the amount assessed by the jury (the reprehensibility guidepost). However, no mention was made of the 30-to-1 ratio of compensatory damages to the punitive award (the ratio guidepost) or of the comparison between the punitive award and comparable statutory penalties (the comparison guidepost).

The trial court's conclusion that the punitive damages award did not “shock his conscience” and the appeals court's conclusion that the punitive damages award was merely supported by proof of “actual malice” does not give Medlink the due process review to which it is entitled.

This Court should hold that all reviewing courts are required to review an award of punitive damages under the guideposts set forth in *BMW v. Gore* and that all reviewing courts are required to include in their ultimate decision a detailed analysis of those guideposts.

C. The Appropriate Remedy.

A *BMW* analysis cannot be done now on a cold record. Medlink asked for the opportunity to hold a hearing at the trial court level, which was ignored. There were arguments Medlink wanted to make but was never given the opportunity. *Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1063 (2007) (“For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with ‘an opportunity to present every available defense.’”) If the lower courts had “tacitly concluded that the three guideposts described in *Gore* were satisfied,”¹⁰ Barnes would not have needed to devote five pages of his brief in outlining his own analysis, and not in citing the courts below.¹¹ The law requires that Medlink be given a constitutional analysis which considers the three guideposts set forth in *BMW*. There is no trial judge to whom this case may be returned for an analysis, and this Court ought not to do the analysis on the cold record before it. The only appropriate remedy is for all of the errors in this case to be corrected, and a new trial to be had before a qualified judge.

VI. THE ONLY REMEDY IS A NEW TRIAL

The proceedings in this case are void from the date of the parties’ unlawful contract to appoint Private Judge Glickman, dated April 18, 2005. Therefore, the entire jury trial, held contrary to R.C. 2701.10 and held before an unqualified private judge, and the verdict made pursuant to that trial, is void.

¹⁰ Appellee Merit Brief, p. 22.

¹¹ Appellee Merit Brief, pp. 22-26.

Remanding this case for a review of the punitive damages award, or even a review by this Court, is, respectfully, not the appropriate remedy. As noted by the Supreme Court of the United States, trial courts have “a somewhat superior vantage over courts of appeals” in evaluating the constitutionality of a jury’s punitive damage award “primarily with respect to issues turning on witness credibility and demeanor.” *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001), 532 U.S. 424, 440, 121 S. Ct. 1678, 1687-88 (footnote omitted). The trial court is in the best position to conduct the constitutional review, given the need to evaluate the admissible evidence and credibility of witnesses presented during the jury trial.

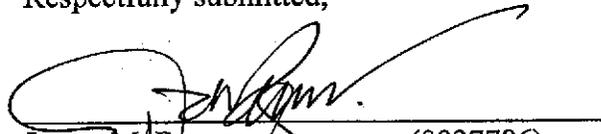
The *Barnes* trial lasted two weeks, with multiple objections to improper evidence, dozens of witnesses, and improper exhibits shown to the jury during opening statement that were never even offered into evidence, so no reviewing court may now appreciate or observe the error. In order for a reviewing court to conduct a due process analysis of the punitive damage award here, the reviewing court is required to consider the evidence presented at trial and evaluate the case as presented. Because Glickman is not qualified to serve as a Private Judge, the parties are left without any trial court to conduct a punitive damages review. Moreover, the jury was exhorted to act on its anger through the passion and prejudice that was incited at trial. This, coupled with the fact that the trial itself was unlawful and void, render the entire proceeding tainted. A reviewing court should not be required to consider the constitutionality of a punitive damages award that is based upon a void verdict. Justice requires that a new trial be granted to Medlink.

VII. CONCLUSION

Accordingly, Medlink respectfully requests that this Court return this case to the Cuyahoga County Court of Common Pleas for a jury trial held in conformity with the laws of this State, before a judge qualified to empanel a jury and preside over a jury trial.

In the event that a punitive damage award is made, Medlink asks that this Court order any reviewing court to conduct a review of the constitutionally-mandated factors, articulated by the United States Supreme Court.

Respectfully submitted,



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The undersigned hereby certifies that a copy of the foregoing was served by ordinary U.S. Mail, postage prepaid, on this 4th day of October, 2007, upon the following:

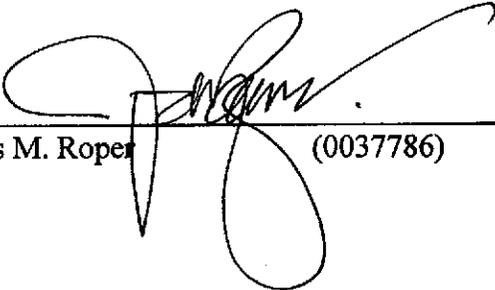
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