

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**
A.J. BORKOWSKI, JR., : **District**
Appellee. :

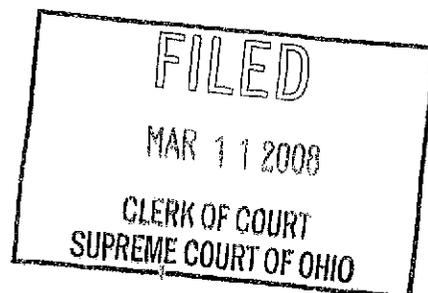
**APPELLEE A.J. BORKOWSKI, JR. MOTION FOR RECONSIDERATION
FILED PURSUANT TO S. CT. PRAC. R. XI**

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

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

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



**MEMORANDUM IN SUPPORT OF RECONSIDERATION OF THE COURT'S
ENTRY OF MARCH 6, 2008**

COMBINED STATEMENT OF THE CASE AND FACTS

On February 6, 2008, this Court filed a judgment entry in which reversed the court of appeals judgment. For the reasons set forth below, this Court must alter or amend its judgment to correct the manifest errors of fact or law.

This action began when A.J. Borkowski, Jr., filed a complaint against Judge Charles D. Abood alleging “negligence, acting in a clear absence of all jurisdiction and bad faith.” Appellee’s Brief at Appendix pages 64-67. Among other things, Borkowski requests \$1,000,000 in damages. *Id.* at Appendix page 66. Borkowski complaint arises from an underlying eviction proceeding in which Borkowski was a Defendant and which was presided over by Judge Abood. *Id.* at Appendix page 66.

In the eviction proceeding and just prior to an evidentiary hearing on May 13, 2004, Borkowski filed with the trial court his notice to remove the action to federal court. Judge Abood proceeded with the hearing despite Borkowski’s assertion that the notice of removal divested the trial court of jurisdiction. Judge Abood determined Borkowski could be evicted and entered judgment accordingly. Thereafter, the federal court remanded the matter to the trial court. Borkowski appealed his eviction. The appellate court found that the notice of removal divested the trial was filed with the trial court of jurisdiction from the time the notice was filed with the trial court until the federal court subsequently remanded the action. As a result, the appellate court held that the trial court’s judgment of eviction was void.

Borkowski then filed his complaint against Judge Abood. Judge Abood responded to Borkowski's valid complaint with a bad faith motion to dismiss. In granting Judge Abood's bad faith motion, the trial court determined that, although Judge Abood's decision to proceed with the eviction hearing was in error and was reversed on appeal, his action were only "in excess of jurisdiction." Judge Abood was, therefore, entitled to judicial immunity. Borkowski appealed his dismissal of his case. The appeals court reversed, concluding that once Borkowski had filed his notice of removal, Judge Abood's continuation of the hearing was in "the clear absence of jurisdiction" and Judge Abood was subject to civil liability. The appeals court further reversed, concluding that Borkowski "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."

Judge Abood appealed the order, and this Court accepted jurisdiction. *Borkowski v. Abood*, 112 Ohio St. 3d 1489, 2007-Ohio-724, 862 N. E. 2d 116. This Court reversed the court of appeals decision, concluding that "even though his [Judge Abood] decision was erroneous, he acted in his official judicial capacity and his immunity remained intact. *Borkowski v. Abood*, Slip Opinion No. 2008-Ohio-857. Inasmuch as the trial court made no determination with respect to the allegation that Judge Abood acted with bad faith in the underlying case, this Court does not make a determination with respect to the allegation that Judge Abood acted with bad faith in the underlying case. As a result, Judge Abood continuation of the hearing was in bad faith, his determination Borkowski

could be evicted and his judgment accordingly was clearly “erroneous or void” thus, Judge Abood “acted with bad faith,” pursuant to R.C. 9.86 and Judge Abood is subject to civil liability “for damage or injury caused in the performance of his duties” in his judicial capacity. Borkowski seeks reconsideration of this Court’s entry. *Borkowski v. Abood*, Slip Opinion No. 2008-Ohio-857.

LAW AND ARGUMENT

- A. THE OHIO SUPREME COURT, JUDGE ABOOD, THE TRIAL COURT CAN BE SUED CIVILLY FOR BAD FAITH PURSUANT TO R.C. 9.86, WHEN THAY MADE NO DETERMINATION/RESPONSE WITH RESPECT TO THE ALLEGATION OF BAD FAITH AND WHEN THEIR BAD FAITH CONDUCT WILL NOT ABROGATE THEIR IMMUNITY FROM CIVIL LIABILITY PURSUANT TO R.C. 9.86 AND CAN BE SUED CRIMINALLY PURSUANT TO R.C. 2921.45 FOR CIVIL RIGHTS VIOLATIONS; THE OHIO SUPREME COURT AND THE TRIAL COURT CAN BE SUED IN THE UNITED STATES DISTRICT COURT FOR CIVIL RIGHTS VIOLATIONS, PURSUANT TO 42 U.S.C. §1983; THE UNITED STATES SUPREME COURT CAN OVERTURN THE STATE COURT JUDGMENT WHEN THAT DECISION WAS FOUND TO BE WRONG AND RESTORE BORKOWSKI TO THE POSITION AND STATUS THAT HE OCCUPIED BEFORE JUDGE ABOOD, TRIAL COURT COMMITTED THE WRONG PURSUANT TO 28 U.S.C. §1257; BORKOWSKI IS ENTITLED TO JUDGMENT ACCORDINGLY PURSUANT TO R.C. 9.86 AND R.C. 2921.45, ETC.

Rule XI, §2 of the Rules of Practice of the Supreme Court of Ohio provides in pertinent part:

- (A) Except in expedited election cases under S. Ct. Prac. R. X, Section 9, a motion for reconsideration may be filed within 10 days after the Supreme Court’s judgment or order is filed with the Clerk... a motion for reconsideration shall be confined strictly to the grounds urged for reconsideration, shall not constitute a reargument of the case...

In the case at Bar, this motion for reconsideration is filed less than 10 days after the entry of judgment and is thus, timely. Further this motion for reconsideration does not constitute a reargument of this case because it is confined strictly to the grounds that

the trial court made no determination with respect to the allegation that Judge Abood acted with bad faith in the underlying case, and that this Court did not make any determination with respect to the allegation that Judge Abood acted with bad faith in the underlying case either. Because the statute provides a remedy for a party who has suffered from bad faith conduct at the hands of a state official is addressed in R.C. 9.86 and permits such review, Borkowski's only recourse would appear to be a determination by this Court that Judge Abood continuation of the hearing was in bad faith, his determination Borkowski could be evicted and his judgment accordingly was clearly "erroneous or void" thus, Judge Abood "acted with bad faith," pursuant to R.C. 9.86 and Judge Abood is subject to civil liability "for damage or injury caused in the performance of his duties" in his judicial capacity.

R.C. 9.86 provides in pertinent part: "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.**"

Under the statute, Judge Abood is not protected, because he acted with a malicious purpose, in bad faith, or in a wanton or reckless manner. There is no doubt that Judge Abood forfeited his civil immunity when he acted with malicious purpose, in bad faith, or in a wanton or reckless manner in the underlying case. See R.C. 9.86. The appeals court reversed, concluding that once Borkowski had filed his notice of removal,

Judge Abood's continuation of the hearing was in "the clear absence of jurisdiction" and Judge Abood was subject to civil liability. The appeals court further reversed, concluding that Borkowski "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." Accordingly, this Court must affirm the Court of Appeals judgment concluding that Borkowski "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." Hence, this court must remand this matter to the trial court for further proceedings consistent with the Court of Appeals decision since this court acted in bad faith by not making any determination with respect to the allegation that Judge Abood acted with bad faith in the underlying case either.

Moreover, this Court should order based on R.C. 9.86 and valid case laws, an order is granted to compel Judge Abood to pay to Borkowski, Borkowski's requested \$1,000,000 in damages for acting in bade faith in the underlying case. 2008-Ohio-565 (Feb. 20, 2008).

The Court can choose, in the interests of judicial economy, to rely on its earlier decision as the definitive resolution of the issues decided therein, it is also true that because of the filing of a timely motion for reconsideration suspends the finality of the judgment for purposes of appeal and thereby renders the decision interlocutory in nature,

the court can, if it deems appropriate, revisit any legal determination *de novo* and alter, amend, or even reverse the prior decision if justice so requires. *Binkley Co., v Eastern Tank, Inc.*, 831 F. 2d 333, 336 n.4 (1st Cir. 1987); cf *Huff v. Metropolitan Life Ins. Co.* 675 F. 2d 119, 122 n.5 (6th Cir. 1982).

A.J. Borkowski asserts that the bases for this motion for reconsideration includes but not limited to: First, A.J. Borkowski asserts that he suffered prejudice due to this Court's failure to resolve the issue of bad faith as requested in and evidenced by his complaint filed against Judge Abood. Remedy for a party who has suffered from a state official for violation of rights secured under the United States Constitution is addressed in 42 U.S.C. §1983, which, in material part, provides:

“remedy for plaintiffs against any person who, under color of state law, deprive them of any rights, privileges, or immunities secured to them by the constitution or federal states.”

Accordingly, A.J. Borkowski, Jr. asserts a due process claim and an equal protection claim against the trial court and this Court in their individual capacities under 42 U.S.C. §1983 for their utter failure to resolve the issue of bad faith as requested in and evidenced by his complaint filed in the trial court against Judge Abood. Appellee's Brief at Appendix pages 64-67. Moreover, this assertion is meritorious because as articulated in Section 1983 permits suit to be filed against a state official for violation of rights secured under the United States Constitution. See Fourteenth Amendment of the United States Constitution. Hence, Borkowski claims that the trial court and this Court violated his Due Process and Equal Protection rights which are secured to him under the Fourteenth Amendment of the United States Constitution by failing to adjudicate his

meritorious bad faith action against Judge Abood. . Appellee's Brief at Appendix pages 64-67.

Second, the failure of the entry of judgment to dispose of A.J. Borkowski, Jr., complaint of bad faith constitutes abuse of discretion because in reversing the judgment of the court of appeals this Court failed to resort to the procedure adopted for preliminary review under *Pulliam v. Allen* (1984), 466 U.S. 522, 541-544 and as set forth in Ohio Revised Code 9.86. Judge Abood appealed the order, and this Court accepted jurisdiction. *Borkowski v. Abood*, 112 Ohio St. 3d 1489, 2007-Ohio-724, 862 N. E. 2d 116. A.J. Borkowski, Jr.'s complaint filed against Judge Abood alleged *inter alia* that Judge Abood acted in bad faith. . Appellee's Brief at Appendix pages 64-67. Because Borkowski complaint stated a claim against Judge Abood under O.R.C. 9.86 upon which relief can be granted, this Court abused its discretion by reversing the judgment of the court of appeals without resorting to the procedure adopted for preliminary review under *Pulliam v. Allen* (1984), 466 U.S. 522, 541-544 and as set forth in Ohio Revised Code 9.86 in violation of Ohio Revised Code 2921.45, 42 U.S.C. §1983 and Fourteenth Amendment of the United States Constitution.

Remedy for a party who has suffered from acts of bad faith conduct at the hands of a state official is addressed in R.C. 9.86 which, in material part, provides: "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.**”

In the case at Bar, civil liability attaches if a judge acts with a malicious purpose, in bad faith, or in a wanton or reckless manner or otherwise violates the rights of a party to the lawsuit. Borkowski asserts Judge Abood acted in bad faith when the judge proceeded with the eviction proceeding notwithstanding Borkowski filing of the notice of removal. Because Judge Abood was divested of jurisdiction in the interval between the filing of the notice of removal and the federal court’s remand of the proceedings, Judge Abood acted in bad faith by continuation of the eviction proceeding and by erroneously determining Borkowski could be evicted and entering judgment accordingly during that period. Actions taken by a judge in this interval are in bad faith and civil liability attaches pursuant to R.C. 9.86 and criminal liability attaches pursuant to R.C. 2921.45.

Judge Abood’s bad faith conduct was in error of 28 U.S.C. §1446(d), longstanding and consistent federal and Ohio case law 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. Further it was such an error that he is liable for damage or injury caused in the performance of his judicial duties, pursuant to R.C. 9.86. To the extent, it should be ordered by this Court based on R.C. 9.86, R.C. 2921.45, an order is granted to compel Judge Abood to pay to Borkowski, Borkowski’s requested \$1,000,000 in damages for his action in bad faith, or violation of Borkowski’s Fourteenth Amendment Constitutional rights in the underlying case.

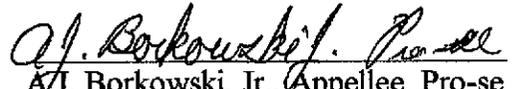
Finally, Borkowski asserts that this Court has not reviewed his original complaint regarding bad faith. Appellee's Brief at Appendix pages 64-67. Ohio Civil Rule 8(a) provides that "A pleading which sets forth a claim for relief ... a demand for judgment for relief the pleader seeks." The court's review under these criteria amply demonstrates that Borkowski's complaint for bad faith against Judge Abood was properly pleaded and was legally sufficient under R.C. 9.86 to withstand any motion to dismiss. Further the Court's review under these criteria amply demonstrates that each of this Court's entries were filed in bad faith and that Judge Abood's entry which determined that Borkowski could be evicted of which he presided over before the action was remanded by the federal court was filed in bad faith in violation of R.C. 9.86. As a result, Borkowski asserts that he suffered undue prejudice due to this Court's bad faith entries and Judge Abood's bad faith entry which violates R.C. 9.86. *Robinson v. Michigan Consol. Gas Co.*, 918 F. 2d 579, 591 (6th Cir. 1990).

In the alternative, Borkowski requests that his Motion for Summary Judgment filed in the trial court on the issue of bad faith be granted. If this Court is not apt grant judgment on the issue of bad faith, then Borkowski will ask the United States Supreme Court to overturn this Court's ruling and restore Borkowski to the position and status that he occupied before Judge Abood committed the wrong. The United States Supreme Court can reverse a state court judgment. See, *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 483 n.16 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923). Under 28 U.S.C. §1257, only the United States Supreme Court has jurisdiction to review, on an appellate basis, decisions of the State courts which are allegedly in conflict with the Constitution or laws of the United States. See *Marbury v.*

Madison, 5 U.S. 137 (1803). As a result, the United States Supreme Court has subject matter jurisdiction to restore Borkowski to the position and status he occupied prior to the state-court judgment. *Borkowski v. Abood*, 2008-Ohio-565 (Feb. 20, 2008).

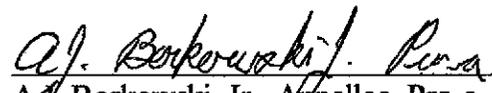
Based on the foregoing, A.J. Borkowski, Jr., respectfully requests that this Court reconsider its prior decision *de novo* and reverse the same because justice so requires it as well as all other relief this Court shall deem proper and just.

Respectfully submitted,


A.J. Borkowski, Jr., Appellee, Pro-se
P.O. Box 703
Fayette, Ohio 43521
Tel: 419.237.7017

CERTIFICATE OF SERVICE

This is to certify that on March 11th, 2008 a true copy of this Motion for Reconsideration 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-Respondent the Honorable Judge Charles D. Abood, also upon John S. Shaffer, Esq., 117 West Maple, Bryan, Ohio 43506, Respondent and Governor Ted Strickland, 77 High Street, 30th Floor, Columbus, Ohio 43215-6117, Fax #(614) 466-9354


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

Local judge can't be sued for mistake, Supreme Court says

BRUCE COLIMBUS/BUREAU

Appeals ruling that resuscitated consequences

a \$1 million lawsuit against

Judge Apood, a former judge

on the Toledo Municipal Lucas

County Common Pleas and 6th

Pleas Court when defendant

Borkowski is properly filed

paperwork to move his case to

federal court.

Although Judge Apood's con-

ference was not such

an error that will abrogate Judge

Apood's immunity from civil

liability, wrote Justice Robert

Copp, writing civil immunity

was designed to allow judges

to rule without fear of personal

Mr. Borkowski's daughter.

non from property owned by

hearing and approved the evic-

ceeded with the scheduled

Judge Apood, however, pro-

to act.

Judge Apood backed jurisdiction

least during that short period

the eviction, under that an

appellate court later overturned

the Toledo-based 6th District

and sent it back to Fulton, but

reversed jurisdiction in the case

Days later the federal court

was dismissed at the lower

Judge Apood in 2007. The suit

non claim personally against

Mr. Borkowski filed a \$1 mil-

lost jurisdiction in the case and

lost jurisdiction temporarily

Justice Copp said there was

no doubt Judge Apood initially

had jurisdiction in the case and

As a result, he said, the judge

did not act entirely outside ju-

isdiction but rather in excess of

it. The difference preserved his

civil immunity.

reversed a 6th District Court of

states high court unanimously

acting outside its authority. The

a judge could be sued civilly for

In a rare question of whether

wrong

that decision was found to be

tion made in 2004, even when

be personally sued for a deci-

Judge Charles D. Apood cannot

unanimously held that visiting

Supreme Court yesterday

COLUMBUS — The Ohio

a \$1 million lawsuit against

Appeals ruling that resuscitated

consequences

Judge Apood, a former judge

on the Toledo Municipal Lucas

County Common Pleas and 6th

Pleas Court when defendant

Borkowski is properly filed

paperwork to move his case to

federal court.

Although Judge Apood's con-

ference was not such

an error that will abrogate Judge

Apood's immunity from civil

liability, wrote Justice Robert

Copp, writing civil immunity

was designed to allow judges

to rule without fear of personal

Appx. 1