

IN THE SUPREME COURT OF OHIO

A.J. BORKOWSKI, JR.,
Appellant,
v.
CHARLES D. ABOOD, JUDGE,
Appellee.

: On Appeal from the Lucas County
: Court of Appeals, Sixth Appellate
: District
:
: Court of Appeals Case No. L-05-1425
:
: Supreme Court Case No.: 06-1913
:
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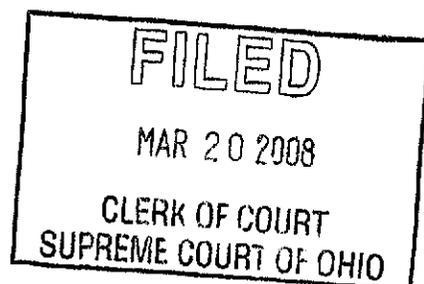
**APPELLANT THE HONORABLE JUDGE CHARLES D. ABOOD'S MEMORANDUM IN
OPPOSITION TO APPELLEE'S MOTION FOR RECONSIDERATION**

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Memorandum

On March 6, 2008, this Court entered judgment in favor of the Appellant the Honorable Judge Charles D. Abood, reversing the decision of the Sixth District Court of Appeals. Appellee A.J. Borkowski has submitted this timely motion for reconsideration, presumably pursuant to Ohio Sup. Ct. Prac. R. XI, Section 2(B)(4), claiming the trial court and this Court failed to “make a determination with respect to the allegation that Judge Abood acted with bad faith in the underlying case.”¹ (Motion for Reconsideration, p. 5.) For the following reasons, Mr. Borkowski’s motion must be denied.

Standard for obtaining a reversal on reconsideration

Pursuant to Ohio Sup. Ct. Prac. R. XI, Section 2(B), a motion for reconsideration shall be confined strictly to the grounds urged for reconsideration, and it shall not constitute a reargument of the case. *See also State ex rel. Shemo v. City of Mayfield Heights*, 96 Ohio St. 3d 379; 2002-Ohio-4905; 775 N.E.2d 493, at ¶ 9.

Analysis

Mr. Borkowski asks this Court to reconsider whether Judge Abood acted with bad faith in the underlying *Borkowski v. Borkowski* matter over which he presided. In support of this request, Mr. Borkowski argues that, pursuant to Ohio R.C. 9.86, public officers and employees are immune from suit “unless the officer or employee acted with

¹ Mr. Borkowski also threatens to bring due process and equal protection claims against the trial court and this Court under 42 U.S.C. § 1983 for their respective failure to resolve the issue of bad faith. (Motion for Reconsideration, pp. 4, 7.) The courts themselves are not entities capable of being sued. *See, e.g., Malone v. Court of Common Pleas of Cuyahoga County* (1976), 45 Ohio St. 2d 245, 248, 344 N.E.2d 126. If Mr. Borkowski intends to sue the trial court judge and this Court’s Justices, they would clearly be immune from any such litigation for all the reasons noted in this Court earlier opinion.

malicious purpose, in bad faith, or in a wanton or reckless manner.” Mr. Borkowski argues he asserted claims of bad faith; therefore, the trial court and this Court should have addressed whether Judge Abood is liable under R.C. 9.86. However, the trial court and this Court did not need to consider this point, nor do they need to now, because Judge Abood’s absolute immunity supersedes this section of the Revised Code.

I. The Trial Court and this Court Did Not Need to Address Mr. Borkowski’s Bad Faith Allegations Under R.C. 9.86 Because Absolute Immunity Protects A Judge Who Faces Allegations of Malice or Bad Faith.

Even if this Court, or the trial court, considered Mr. Borkowski’s contention that Judge Abood acted in bad faith, the courts’ judicial immunity analyses would not be different. As the United States Supreme Court has repeatedly stated, “[j]udicial immunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial.” *Mireles v. Waco* (1991), 502 U.S. 9, 11-12, 112 S. Ct. 286, 116 L. Ed. 2d 9; *Pierson v. Ray* (1967), 386 U.S. 547, 554, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (“Immunity applies even when the judge is accused of acting maliciously and corruptly”) (reversed on other grounds); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), 815-819, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (allegations of malice are insufficient to overcome qualified immunity). Rather, absolute judicial immunity is only overcome if a judge is performing a non-judicial act, or the judge is acting in the complete absence of all jurisdiction. *Wilson v. Neu* (1984), 12 Ohio St. 3d 102, 103 and n.1, 12 O.B.R. 147, 465 N.E.2d 854; *State ex. rel. Fischer v. Burkhardt* (1993), 66 Ohio St.3d 189, 191, 1993-Ohio-187, 610 N.E.2d 999; *Kelly v. Whiting* (1985), 17 Ohio St.3d 91, 93, 17 OBR 213, 477 N.E.2d 1123; *Voll v. Steele* (1943), 141 Ohio St. 293, 301-02, 25 O.O. 424, 47 N.E.2d 991.

The trial court and this Court looked at the only two criteria relevant to providing a judge absolute immunity. They both properly determined that Judge Abood was performing a judicial act and that he was acting adequate jurisdiction for immunity purposes. Once the courts reached this conclusion, their analysis was complete. There was no need for either court to address whether Mr. Borkowski accused Judge Abood of acting in bad faith because this would not affect his absolute judicial immunity. *Mireles*, 502 U.S. at 11-12.

II. Revised Code 9.86 Does Not Eliminate, Limit, or Reduce a Judge's Absolute Immunity.

In addition to case law affording judges absolute immunity, even when plaintiffs raise allegations of bad faith, the statute Mr. Borkowski relies upon provides the same.

Mr. Borkowski asserts that Judge Abood is not protected from liability because R.C. 9.86 permits public officers and employees to be held civilly liable for damages caused in the performance of the officer's duties, if the officer "acted with malicious purpose, in bad faith, or in a wanton or reckless manner." (Motion for Reconsideration, p. 5, citing R.C. 9.86.) However, Mr. Borkowski does not reference the entirety of this statute; the statute further provides:

This section does not eliminate, limit, or reduce any immunity from civil liability that is conferred upon an officer by any other provision of the Revised Code **or by case law.**

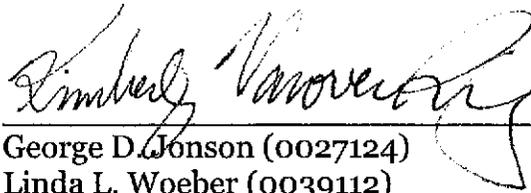
R.C. 9.86. (Emphasis added.) Accordingly, R.C. 9.86 does not provide Mr. Borkowski with a new avenue to seek relief against Judge Abood. The Judge's absolute immunity, established by a common law doctrine that is over a century old, is not abrogated by the Revised Code. The trial court and this Court therefore correctly analyzed Judge Abood's

immunity under the doctrine of judicial immunity, rather than his liability under this statute.

Conclusion

For the foregoing reasons, Appellant the Honorable Judge Charles D. Abood respectfully requests this Court deny Appellee's Motion for Reconsideration.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2008, a copy of the Memorandum in Opposition was served, via regular U.S. Mail, upon the following:

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