

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

APPELLANTS' MOTION FOR RECONSIDERATION

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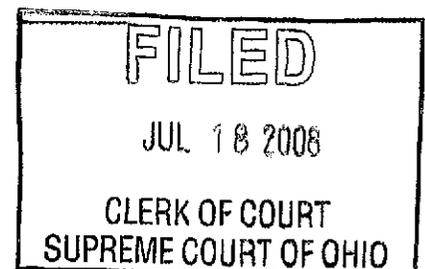
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Appellants Medlink of Ohio and The Medlink Group, Inc. (“Medlink”) hereby move this Court, pursuant to Supreme Court Rule of Practice XI, Section 2(B)(4), to reconsider its decision on Judge Glickman’s jurisdiction to preside over the jury trial and subsequent proceedings in *Barnes v. Univ. Hosps. of Cleveland*, Slip Opinion No. 2008-Ohio-3344, because the holding rests on material factual inaccuracies¹, is contrary 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, and violates Medlink’s constitutional rights.

Contrary to ¶11 of this Court’s decision, which states that Medlink “abandoned its action for prohibition before this court could rule,” Judge Glickman’s conduct—the very conduct that Medlink had petitioned to prohibit—mooted Medlink’s petition for writ of prohibition before this Court could rule. Medlink sought to prohibit Judge Glickman from deciding the only matter left unresolved at the trial court level—Plaintiff’s motion for Prejudgment Interest. Rather than awaiting this Court’s ruling, Judge Glickman took the very action that Medlink sought to prohibit, awarded prejudgment interest against Medlink, and divested the trial court of jurisdiction.

At that juncture, this Court no longer could prohibit Judge Glickman from taking the action that he already had taken. Medlink was left with a petition seeking to prohibit conduct that already had taken place. Since the conduct that the petition sought to prohibit already had taken place, the petition for writ of prohibition was moot. The trial court no longer had

¹ In compliance with Rule XI (2)(B) which requires that a motion for reconsideration “shall be confined strictly to the grounds urged for reconsideration”, in this Motion for Reconsideration Medlink limits its challenges to factual inaccuracies and legal issues material to the grounds urged for reconsideration. Medlink reserves the right to challenge all factual inaccuracies and legal issues contained in the Court’s decision in any other pleadings that may be filed in connection with this case.

jurisdiction of the case, and thus Medlink was left with no meaningful means of seeking relief other than proceeding as it did on appeal. The fact that Medlink pursued relief in the appellate court after Judge Glickman divested the trial court of jurisdiction by doing precisely that which the petition for writ of prohibition sought to preclude, should not result in waiver by Medlink of its right to review by this Court. Such a result would be fundamentally unfair in violation of Medlink's due process rights.

Additionally, ¶26 inaccurately states that prior to trial the parties to the litigation "signed a court-approved agreement with respect to the presiding judge's authority to hear the case." Notably, the form provided to the parties by Judge Glickman was not the court-approved form of agreement. Instead, the court-approved form that did not permit a private judge to hear a jury trial, had been altered to permit Judge Glickman to hear a jury trial in this case. This alteration was contrary to R.C.2701.10, which does not authorize private judges to preside over jury trials. Furthermore, Judge Glickman held himself out as meeting the qualifications for serving as a R.C. 2701.10 private judge, even though Judge Glickman subsequently was removed from this Court's list of individuals eligible to serve as private judges.

Furthermore, contrary to the situation presented in *In re J.J.* on which this Court's holding relies, the parties and the trial court in this case had actual knowledge while the case remained in the trial court that Medlink challenged Judge Glickman's jurisdiction to preside over the case. By petitioning this court for a writ of prohibition while this case was pending in the trial court, Medlink clearly objected to Judge Glickman's jurisdiction to preside. Thus, while the case remained at the trial court level, all parties to the proceeding as well as Judge Glickman received notice of Medlink's challenge to Judge Glickman's authority to preside. In this context, it is fundamentally unfair to characterize Medlink's conduct as abandoning its efforts to obtain

relief such that Medlink is deemed to have failed to preserve the error for appeal. Thus, this

Court's holding in ¶27 that:

. . . Medlink had a duty to object in the trial court to the presiding judge's authority to preserve the alleged error for appeal. Since MedLink did not object, the error, if any, has been waived

is flawed, should be reconsidered, and this Court should hold that Medlink did not waive its right to appellate review. Holding that Medlink's conduct was insufficient to preserve this issue for appellate review and prevent waiver is fundamentally unfair in violation of Medlink's due process rights: *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 430-31 (1994); citations omitted ("Because the procedural protections of the common law have been regarded as so fundamental, very few cases have arisen in which a party has complained of their denial. In fact, most of our due process decisions involve arguments that traditional procedures provide too little protection and that additional safeguards are necessary to ensure compliance with the Constitution. . . . Nevertheless, there are a handful of cases in which a party has been deprived of liberty or property without the safeguards of common-law procedure. . . .When the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process.") . Fairness of procedures is particularly important in cases in which punitive damages are assessed. ". . . the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" *Philip Morris USA v. Williams*, 127 S.Ct. 1057, 1063 (2007).

Medlink has a right to fundamentally fair judicial proceedings in which it is treated in the same way as all other similarly situated litigants, and is permitted to defend itself from an arbitrary or unfair deprivation of its property. *See generally, Village of Willowbrook v. Olech*,

528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000)(*per curium*). Basic notions of justice and fundamental fairness require that the laws and controlling precedent apply equally to all. *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000)(*per curium*)(equal protection precludes disparate treatment of similarly situated individuals or entities). Yet in this case, this Court has permitted a private judge to preside over a jury trial contrary to its decision in *State ex rel. Russo v. McDonnell*, 110 Ohio St.3d 144, 2006-Ohio-3459, 852 N.E.2d 145. As recognized at ¶29 in the decision in this case, “. . . in *Russo*, we held that R.C. 2701.10 and Gov.Jud.R. VI authorize only bench trials”, yet this protection accorded to the parties in *Russo* has not been accorded to Medlink violating Medlink’s constitutional equal protection rights. In this context, this Court should reconsider its decision and rule that R.C. 2701.10 prohibited the presiding judge from hearing the jury trial in this case as he was sitting as a R.C. 2701.10 private judge.

Finally, if the Court’s decision in this case is not reconsidered, the holding effectively would permit contracting parties to ignore this Court’s decision in *Russo* and retain a private judge to preside over a jury trial, so long as the parties entered into a contract stating that they would not challenge the private judge’s authority to preside. Such a result clearly would be contrary to R.C. 2701.10, which precludes jury trials by private judges.

Accordingly, Medlink respectfully requests this Court to:

- 1) reconsider its holding that Medlink failed to preserve its challenge to Judge Glickman’s authority to preside over the jury trial and subsequent proceedings in this case;
- 2) hold that the presiding judge lacked proper jurisdiction to preside over the jury trial and subsequent proceedings in this case; and

3) vacate all decisions in this case from the assignment to Judge Glickman onward, and remand to the trial court for assignment to a sitting judge for retrial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

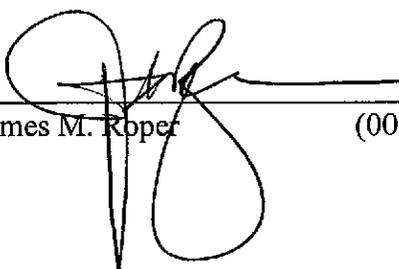
The undersigned hereby certifies that a true copy of the foregoing was sent by ordinary U.S. Mail, postage prepaid this 18th day of July, 2008 upon the following:

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