

MEMORANDUM

The Motion for Reconsideration which was submitted by Defendant-Appellants, MedLink of Ohio and the MedLink Group, Inc., on July 18, 2008 (hereinafter "Defendants' Motion"), offers nothing new to this two-and-a-half (2½) year old appeal.¹ All of the arguments contained therein were previously asserted – over and over – in the two (2) prior original actions and the instant proceedings before this Court. Each of them has undoubtedly received careful consideration and the sensible opinion which was issued on July 9, 2008 should be left intact.

Defendants' Motion begins by taking this Court to task for having the temerity to suggest that the first original action (Case No. 06-0478) had been "abandoned" when the Application for Dismissal Without Prejudice was hastily filed on April 28, 2006. *Defendants' Motion*, p. 2. At that time, two (2) motions to dismiss were pending which were never opposed. Defendants' sensitivity over the majority opinion's innocuous description of the disposition of the first original action is difficult to comprehend, given that a second original action (Case No. 06-0932) was immediately filed and promptly dismissed by the Court on the pleadings. This Court still afforded all of Defendants' jurisdictional arguments full and fair consideration in the instant direct appeal, and concluded that they were meritless. *Barnes v. University Hosps. of Cleveland*, ___ Ohio St.3d ___, 2008-Ohio-3344, ___ N.E.2d ___ ¶ 15-28. Defendants' nit-picking over the use of the term "abandoned" is hardly a compelling justification for reconsideration.

¹ Defendants' first Notice of Appeal was filed in Eighth District Case No. 87247 on November 4, 2005.

Next, Defendants have taken issue with this Court's remark that the parties had "signed a court-approved agreement with respect to the presiding judge's authority to hear the case." *Defendants' Motion*, p. 3. Interestingly, they have expressed no concerns with the opinion's immediately following finding, to wit:

*** On the day of trial, all parties stated on the record before opening arguments that they consented to the presiding judge's authority and waived any rights to contest that issue on appeal. Only after an adverse decision did [Defendants] seek to disqualify the judge.

Barnes, 2008-Ohio-3344 ¶ 26. This verbal on-the-record waiver by the extremely capable team of attorneys representing Defendants was sufficient, by itself, to preclude any further challenges to the trial judge's authority. *Speeth v. Fields* (8th Dist. 1946), 47 Ohio Law Abs. 47, 71 N.E.2d 149; *Brown v. Brown* (9th Dist. 1930), 35 Ohio App. 182, 172 N.E.2d 416.

This is not the first time in the proceedings that Defendants have pressed the near-delusional theory that Private Judge Glickman surreptitiously altered the true "court-approved form" in a diabolical attempt to usurp the medical malpractice/wrongful death trial. As their latest Motion silently attests, they still cannot point to anything in the record to support these far-fetched accusations. *Defendant's Motion*, p. 3. What is undisputed is that attorneys hailing from both Cleveland and Columbus had been retained for purposes of defending the lawsuit and they were afforded an unfettered opportunity to scrutinize the four (4) paragraph Agreement for Referral for Submission to Retired Judge Pursuant to R.C. 2701.10 which had

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been prepared.² Defense counsel knowingly and voluntarily executed the consent form on April 18, 2005, which was promptly incorporated into the trial court record.

Defendants have continued to proclaim that “the parties in the trial court in this case had actual knowledge while the case remained in the trial court that [Defendants] challenged Judge Glickman’s jurisdiction to preside over the case.” *Defendants’ Motion*, p. 3. Their fixation with the issue of whether jurisdiction was timely challenged is puzzling, given that a majority of this Court concluded that Private Judge Glickman did indeed meet the requirements of R.C. §2701.10. *Barnes*, 2008-Ohio-3344 ¶ 25. Noticeably absent from the Motion for Reconsideration is any intelligible argument that some sort of mistake was committed in this regard.

Defendants are still neglecting to mention that their supposed “objection” to jurisdiction was never raised until the first original action was filed in this Court on March 7, 2006. *Case No. 06-0478*. The jury trial had concluded over nine (9) months earlier. Even when they discovered, by their own acknowledgement, during the pre-judgment interest hearing of January 30, 2006 that Judge Glickman may be “unqualified”, they continued to acquiesce to his authority for the next six (6) weeks.³

² Defendants had initially been represented by the law firm of Reminger & Reminger, which is based in Cleveland. Those experienced trial attorneys were extremely familiar with Private Judge Glickman and had actually been the first to propose that he preside over the Jury Trial. As was disclosed during the pre-judgment interest hearing, James Roper, Esq. of Isaac, Brant, Ledman & Teetor, L.L.P. of Columbus had been retained for the purpose of monitoring the trial and look for issues to exploit on appeal. *Hearing transcript of January 30, 2006 p. 144*. Not one of these attorneys expressed any concerns with Private Judge Glickman’s authority on the record during the entire course of the Common Pleas Court proceedings.

³ Because the transcript of the pre-judgment interest hearing leaves them little choice, Defendants have conceded that by that date they knew there were reasons to believe that Judge

This Court confirmed in *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, 855 N.E.2d 851, paragraph one of the syllabus, that “procedural irregularities in the transfer of a case to a visiting judge” renders a judgment merely voidable, not void, and timely objections are absolutely required before any judge’s authority may be challenged. This ruling cited *In re J.L.* (Nov. 17, 2005), 8th Dist. No. 85668, 2005-Ohio-6125, 2005 W.L. 3081535, with approval. *In re J.J.*, 111 Ohio St.3d at 209. In the opinion authored by Judge Diane Karpinski, it was observed that “it has long been the rule that any challenge to a judge’s authority must be raised at the time the judge is hearing the case.” *In re J.L.*, 2005-Ohio-6125, p. *9, citing *Huffman v. Shaffer* (8th Dist. 1984), 13 Ohio App.3d 291, 292, 469 N.E.2d 566. Even a defectively appointed judge “is deemed a de facto judge with all the power and authority of a proper de jure judge” when his/her role in the action has not been properly challenged. *In re J.L.*, p. *10. This high court remarked after discussing *In re J.L.* that:

That holding, unlike the one in the instant case, comports with our precedent because it recognizes that the magistrate’s order, though improper, granted the visiting judge authority as a de facto officer to preside over the case. A party may timely object to the authority of a visiting judge on the basis of an improper case transfer or assignment, but failure to timely enter such an objection waives the procedural error. [emphasis added].

In re J.J., 111 Ohio St.3d at 209. The majority’s determination in the case *sub judice* that Defendants would be held to their attorneys’ on-the-record acceptance of Judge Glickman’s authority was thus sound. *Barnes*, 2008-Ohio-3344 ¶ 26-28.

Defendants have also chastised the majority of this Court for allowing “contracting parties to ignore this Court’s decision in *Russo*”. *Defendants’ Motion*, p. 5. The opinion had

Glickman could not satisfy their interpretation of the Private Judge Act. *Motion to Supplement the Record by Defendant-Appellants MedLink of Ohio and The MedLink Group, Inc. dated August 1, 2007*, p. 2.

actually addressed *State ex rel. Russo v. McDonnell*, 110 Ohio St.3d 144, 2006-Ohio-3459, 852 N.E.2d 145, and concluded that a minor error had been set forth therein. *Barnes*, 2008-Ohio-3344 ¶ 29. The fact remains that *Russo* involved a timely objection to the private judge's authority – which was raised by the original assigned judge herself – and can offer no solace to parties who complain only after all has been lost.

The remainder of Defendants' demand for reconsideration revolves around their theory that their "due process rights" will be violated if they are held to the terms of their written and verbal consents to the private judge's authority. *Defendants' Motion*, pp. 4-6. At no time did the defunct home health care agency attempt to assert its Constitutional rights in this manner in the trial court proceedings.⁴ Likewise, no meaningful attempt was made to assert due process rights in this regard in ensuing direct appeal. *8th Dist. Case No. 87247/87285*. Even after the Defendants were reminded of their written and verbal consent to the private judges' authority, no discernable attempt was made in the Reply Brief they served on June 29, 2006 to demonstrate that enforcement of these agreements would implicate due process interests.⁵

Like this Court, the Eighth District concluded that the jurisdictional issue had been waived. *Barnes v. University Hosps. of Cleveland*, 8th Dist. No. 87247, 2006-Ohio-6266, 2006 W.L. 3446244 ¶60. In the Memorandum in Support of Jurisdiction which Defendants filed in

⁴ Defendant's "due process" arguments all centered upon the issue of whether the punitive damages were excessive. See *MedLink of Ohio Motion for Due Process Hearing & Review of Punitive Damages Award filed August 18, 2005*.

⁵ Defendants had not been shy about invoking "due process" in the appellate court proceedings, but their Constitutional arguments in this respect were limited to discovery which had been conducted and the award of punitive damages. *Brief of Appellant*, 8th Dist. Case No. 87247/87285 pp. 14, 16, 20, 22, 29; *MedLink Appellants' Reply Brief*, 8th Dist. Case No. 87247/87285, pp. 9-10.

this Court on January 25, 2007, they still did not maintain that their "due process rights" had been violated by the private judge's involvement in the proceeding. The senseless argument finally appeared for the first time in the Merit Brief which was filed in this Court on August 15, 2007. At the risk of overstating the obvious, not even constitutional rights may be asserted for the first time on appeal. *Butler v. Jordan*, 92 Ohio St.3d 354, 358, 2001-Ohio-204, 750 N.E.2d 554, 558. No valid grounds therefore exist for disturbing the opinion of this Court.

CONCLUSION

For the foregoing reasons, this Court should deny Appellants' Motion for Reconsideration in its entirety.

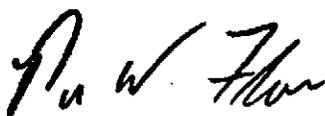
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Memorandum** was served via regular U.S.

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