

ORIGINAL

IN THE SUPREME COURT OF OHIO

11-1117

ERNEST CORNELL)
)
 Appellant,)
)
 v.)
)
 CLERAC, et al,)
)
 Appellees.)

S.Ct. No. _____

On Appeal from Cuyahoga
County Court of Appeals
Eighth Appellate District
CASE NO.: CA-11-096517

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT ERNEST CORNELL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL
QUESTION 1

STATEMENT OF THE CASE AND FACTS 6

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW8

Proposition of Law No. I: Local Rule 29 is unconstitutional as it gives the trial court
Judge the power to bind unwilling parties to arbitration without an agreement, deny a
party’s demand and right to a jury trial, allow an arbitrator to proceed to judgment
without subject matter jurisdiction, and deny the right to appeal in violation of Section 5,
Article 1 of the Ohio Constitution..... 8

Proposition of Law No. II: Local Rule 29 denies injured Ohioans open access to the
courts and the right to remedy for their injuries in violation of Section 16, Article I of the
Ohio Constitution..... 9

Proposition of Law No. III: Local 29 denies injured Ohioans due process of law contrary
to the mandate of Section 16, Article I of the Ohio Constitution. Section 16, Article I of
the Ohio Constitution provides, in pertinent part: All courts shall be open, and every
person, for injury done him in his land, goods, person, or reputation, shall have remedy
by due course of law, and shall have justice administered without denial or delay. Ohio
Constitution Section 19, Article I..... 11

CONCLUSION 13

CERTIFICATION 14

APPENDIX

Journal Entry of the Cuyahoga County Court of Appeals, Eighth District (May 16, 2011)

TABLE OF AUTHORITIES

Cases:

B. & O. Rd. Co. v. Stankard, 56 Ohio St. 224.....	5
Blodgett v. Blodgett (1990), 49 Ohio St.3d 243.....	1,2,7,8
Brennaman v. R.M.I. Company, (1994) 70 Ohio St. 3d 460.....	9
<i>Capital Traction Co. v. Hof</i> , 174 U.S. 1, 19 S.Ct. 580.....	4
City of Norwood v. Homey, (2006) 110 Ohio St. 3d 353.....	12
Commissioners v. Gates, (1910) 83 Ohio St. 19.....	11
<i>Dorchy v. State of Kansas</i> , 264 U.S. 286.....	4
Holeton v. Crouse Cartage Co., (2001) 92 Ohio St. 3d 115.....	11
Marra Constructors, Inc. v. Cleveland Metroparks Sys.,(1993) 82 Ohio App.3d 557...8	
Modzelewski v. Yellow Freight Systems, Inc., (2004) 102 Ohio St. 3d 192.....	11
Railway Co. v. Garrett, 50 Ohio St. 415.....	4
<i>Regis Assoc. v. Rank Hotels, Ltd.</i> (C.A.6, 1990), 894 F.2d 193.....	4
Schaefer v. Allstate Ins. Co. (1992), 63 Ohio St.3d 708, 712.....	2
<i>State ex rel. Wilson-Simmons v. Lake Cty. Sheriff's Dept.</i> (1998), 82 Ohio St.3d 37....	4
Ohio Office of Collective Bargaining v. Ohio Civil Service Employees Assn., Local 11, AFSCME AFL-CIO(1991), 59 Ohio St.3d 177.....	8
<i>Wolff Packing Co. v. Court of Industrial Relations of State of Kansas</i> , 262 U.S. 522...4	

Constitution, Rules, Statutes:

Local Rule 29.0.....	1, 2, 3, 5
Ohio Revised Code §2711.10.....	3, 8
Ohio Revised Code §2711.11.....	2

Ohio Revised Code §2711.14.....2, 4
Section 5, Article 1 of the Ohio Constitution.....5, 8
Section 16, Article I of the Ohio Constitution.....1, 5, 9, 10
Section 19, Article IV, of the Constitution..... 11, 13

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

On May 16, 2011, the Eighth District Court of Appeals decided that Appellant forfeited his right to appeal from the denial of a motion to modify and or to vacate an arbitration award. *Blodgett v. Blodgett* (1990), 49 Ohio St.3d 243, 245.

Accordingly, a court ordered arbitration under Local Rule 29.0, and the grant of an award operates as a waiver of appeal and denial of entitlement to a jury trial. In an unanimous decision, the Court of Appeals in one sentence shot down the opportunity to send a message to corporate America of an ordinary citizen's right to address injuries caused by negligent rental car agencies and the auto makers that supply these agencies with defective motor vehicles depriving citizens of effective laws to protect them from injury or death as a consequence from driving General Motor Cars rented through Enterprise Car Rentals.

As a result of this decision in the Eighth District Court of Appeals, in Ohio powerful Corporations are no longer concerned about the threat of complaints for civil liability and jury trial awards amounting in excess of \$50,000.00 as a result of knowingly committing tortuous conduct against unsuspecting citizens, albeit subtle.

Thus, hundreds of ordinary citizens that consume the products and or use the products or services of corporations every day are not adequately protected from an increased risk of tortuous conduct resulting in injury and loss of life. The citizens of Cuyahoga County, Ohio, in particular, are unprotected as their rights to an appeal and a jury trial are stripped away. Local Rule 29 denies injured Ohioans open access to the courts and the right to remedy for their injuries in violation of Section 16, Article I of the Ohio Constitution.

Judges in Cuyahoga County Court of Common Pleas, Ohio have the power to order arbitration under Local Rule 29.0 without an agreement or contract by the parties. Accordingly, the issues presented in this case that makes it one of a great public interest in protecting the right to trial under the Ohio Constitution, and a general interest of public safety. Within the above stated issues herein another fundamental precept arises in the exercise of judicial economy. In misapplying Blodgett, supra, the Court below improperly substituted its judgment over that of the state legislature. R. C. 2711.14.¹

Due to Cuyahoga County's former leadership, it has long had a problem with corruption including with County Judges², which seems to have impacted the judicial economy more than in other counties. In particular, among the 88 counties in Ohio only Cuyahoga, Hamilton, and Stark Counties have adopted Local Rules compelling court administered arbitration.

In these counties court ordered "arbitration is favored because it provides the parties thereto with a relatively expeditious and economical means of resolving a dispute * * * [and] "* * * has the additional advantage of unburdening crowded court dockets." ' ' Kelm I, 68 Ohio St.3d at 29, quoting Schaefer v. Allstate Ins. Co. (1992), 63 Ohio St.3d 708, 712.

Unfortunately several County Judges are under federal investigation with one Judge having been found guilty of criminal offenses while in office. The integrity of the Cuyahoga County Court of

¹ the trial court in denying appellant Cornell's motion to modify or vacate arbitration award held: "RC 2711.11 has no application to this action. these statutes govern contractually required arbitrations; therefore 2711.14 requires motion such as Plt's to include the agreement under which the arb. is held, the award etc. this motion contained no such agreement and as such does not qualify for the court's consideration under these statutes."

²Judge Terry was convicted of fixing cases and making rulings in several cases including a foreclosure case at the request of former Cuyahoga County Auditor Frank Russo.

Common Pleas has been severely compromised. Local Rule 29 gives County Judges unbridled, unchecked power, and it must be struck down, because it gives Judges the power to appraise civil judgment amounts and order arbitration and forfeit the parties' right to jury trial without an agreement and signature.

Local Rule 29.0 Arbitration, in pertinent part reads:

PART I: CASES FOR SUBMISSION

(A) A case shall be placed upon the Arbitration List if so ordered by a Judge after a case management conference, pretrial or settlement conference and the Court has

determined that all parties to the case have made an appearance by filing a responsive pleading or otherwise.

(B) Judges should ensure that the case is appropriate for Arbitration.

(C) The amount actually in controversy, exclusive of interest and costs, is fifty thousand dollars (\$50,000.00) or less per plaintiff and/or cross-claimant. Cases involving title to real estate or actions in equity are usually not suitable for Arbitration unless the determination of a sum of money is a matter at issue, and it will substantially dispose of an action. In such cases, the Court may in its usual referral order refer such an issue for determination by a panel, reserving other issues for the Court. Arbitration shall be ordered in cases where the monetary amount in controversy exceeds the sum specified in the Arbitration rule where all the parties to the action agree to Arbitration.

Local Rule 29 is unconstitutional as it works to effectively waive the individual right to a trial by jury, and a subsequent appeal. The Rule, provides for an elaborate system of compulsory Arbitration. By its provisions it was made lawful for parties in a civil action with a jury demand for under \$50,000.00 without agreement to be compelled to forfeit the right to a requested jury trial and have the matter decided by a panel of three arbitrators. Consequently, no motion pursuant to Ohio Revised Code 2711.10 may be taken to challenge the reviewing arbitration panel's or reviewing court's jurisdiction.

Local Rule 29.0 violates “the right of trial by jury shall be inviolate” under Section 5, Article 1 of the Ohio Constitution. Here, the provision of the Constitution would be violated by a local rule the effect of which was to compel parties to submit to arbitration against their will or without their assent. *Railway Co. v. Garrett*, 50 Ohio St. 415.

Furthermore, compulsory arbitration conflicts also with the 14th Amendment of the Federal Constitution in that it works a deprivation of property and liberty of contract without due process of law. *Chas. Wolff Packing Co. v. Court of Industrial Relations of State of Kansas*, 262 U.S. 522, 43 S.Ct. 630; *Dorchy v. State of Kansas*, 264 U.S. 286, 44 S.Ct. 323.

This specifically applies here where the statute R.C. 2711.14 closes the courts to litigants and makes the decision of the arbitrators the final determination of the rights of the parties; therefore there is a denial of the right of trial by jury where the statute fails to preserve the right to each of the parties by the allowance of an appeal from the decision of the arbitrators or other tribunal. *Capital Traction Co. v. Hof*, 174 U.S. 1, 19 S.Ct. 580.

The provision of the Local Rule 29 operates to bind and order parties to arbitration without notice, consent or agreement by the parties. Once decided the arbitrators’ award is not challengeable under the statutory provision R.C.2711.10 or R.C. 2711.11, not even on jurisdictional grounds, which according to law can be raised at any time, including after final judgment has been entered in a case. *Regis Assoc. v. Rank Hotels, Ltd.* (C.A.6, 1990), 894 F.2d 193, 195, “subject-matter jurisdiction cannot be waived and, therefore, can be raised at any time ...” *State ex rel. Wilson-Simmons v. Lake Cty. Sheriff’s Dept.* (1998), 82 Ohio St.3d 37, 40.

It is a right which is justly dear to the American people, and one which is expressly guaranteed by the Federal Constitution and by the Constitutions of the several states. In Magna Charta, the basic principle of the right to jury trial is more than once insisted on as the great bulwark of English liberties, especially by the provision that ' no freeman shall be hurt, in either his person or property * * * unless by lawful judgment of his peers or equals, or by the law of the land' -a privilege which, according to Blackstone, is ' couched in almost the same words with that of the Emperor Conrad, two hundred years before.' This ancient right of trial by jury was introduced into this country by the English colonists and is regarded as one of the most important basic and fundamental features of American Jurisprudence-a right which must be carefully guarded against infringement; 50 C.J.S., Juries, § 9 et seq., Page 722.

Statutes which compel parties to submit to arbitration against their will or without their assent, in other words which impose compulsory arbitration, violate the Constitution. The Ohio Constitution is far from upholding compulsory arbitration. Section 19, Article IV, of the Constitution authorizes the general assembly to establish courts of conciliation and prescribes their powers and duties, but expressly provides that submission of matters in dispute must be purely voluntary and based upon their agreement to abide such judgment. B. & O. Rd. Co. v. Stankard, 56 Ohio St. 224.

Local Rule 29 is in conflict with Sections 5 and 16 of Article I of the Constitution of the State of Ohio. Section 5 of Article I provides that: "The right of trial by jury shall be inviolate." Section 16 provides that: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law; and justice administered without denial or delay." If this objection were sustained it would by no means invalidate the whole statute, but, in so far as this defendant in error is concerned, there is in this provision no violation of its constitutional rights.

Accordingly, this matter comes to this Court with several significant issues of public or great general interest and involves substantial constitutional questions.

STATEMENT OF THE CASE & FACTS

This case has a long borne out history, its origins began April, 2007, Appellant Ernest Cornell and his co-plaintiff rented a car from Enterprise rentals also known as Clerac, Inc. Appellee herein. Plaintiffs rented a 2005 Chevrolet Malibu from Defendant Clerac, Inc. (doing business as Enterprise Rent-A-car) which caught fire and burned to a crisp while they were driving on the highway. Despite escaping with his life, Appellant sustained various bodily injuries, post traumatic and financial losses.

As a result, Plaintiff brought an action against the manufacturer of the vehicle for product liability, against General Motors, Enterprise Car Rental company for their acts and omissions including negligence, and against All Star Muffler & Brake the service company that performed maintenance on the vehicle shortly before the car caught fire. However, All Star Muffler & Brake was dismissed from the case.

Plaintiff was using the car to travel to a funeral in Detroit. Prior to leaving for his trip to Detroit, Cornell noticed the "check engine" light had illuminated on the dashboard. Cornell returned with the vehicle to the Clerac, Inc. Rental location where he notified and showed Clerac's agent this illuminated warning light.

Clerac and its agents assured Cornell that everything was fine, and know further investigation of the warning light was needed, and an exchange of vehicle was not necessary. Clerac assured Cornell that the vehicle would have no trouble making it to Detroit and back to Shaker Heights, Ohio. Later that day as the vehicle r,lrao beig driyen on the Ohio Tumpike; smoke started seeping out from under the

hood. Plaintiff pulled the vehicle to the side of the road, opened the hood and noticed the fire that eventually engulfed the vehicle.

Although Cornell brought suit against General Motors Corporation and Enterprise Renal Cars, the court would not allow him to proceed to trial. Instead, the Cuyahoga County Court of Common Pleas erroneously assessed the damages under \$50,000.00 and ordered Cornell to submit to arbitration pursuant to Local Rule 29. At no time was an agreement made between all parties to arbitrate the complaint. Cornell and Clerac were present at the arbitration while General Motors, Inc. was a no show.

The arbitration issued an award to Cornell in the amount of \$24,000 against Clerac, and found in favor of General Motors. Cornell within 90 days of the award decision moved to modify and or vacate the award on several grounds, including the arbitration panel and the court's lack of jurisdiction. Cornell Appealed the trial court's decision and an order was issued dismissing the appeal as Moot. The Moot dismissal was based on Cornell's attorney's acceptance of the \$24,000 award amount. The Court of Appeals cited *Blodgett v. Blodgett* (1990), 49 Ohio St.3d 243. In sum, the Court of Appeals ruled that Cornell forfeited his appeal rights pursuant to *Blodgett, supra*.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1:

Local Rule 29 is unconstitutional as it gives the trial court Judge the power to bind unwilling parties to arbitration without an agreement, deny a party's demand and right to a jury trial, allow an arbitrator to proceed to judgment without subject matter jurisdiction, and deny the right to appeal in violation of Section 5, Article 1 of the Ohio Constitution.

The appeals court in its decision cites a case requiring the parties to have an agreement to proceed to arbitration. *Blodgett v. Blodgett* (1990), 49 Ohio St.3d 243. In the present case, there was no such agreement, thus, the appeals court reliance on *Blodgett* is misplaced. This Court in *Marra Constructors, Inc.* held "... once a reviewing court determines that the arbitrator's award draws its essence from *the parties' contract* and is not unlawful, arbitrary or capricious, the reviewing court has no authority to vacate the award pursuant to R.C. 2711.10(D)." . *Marra Constructors, Inc. v. Cleveland Metroparks Sys.* (1993) 82 Ohio App.3d 557; *Ohio Office of Collective Bargaining v. Ohio Civil Service Employees Assn., Local 11, AFSCME AFL-CIO* (1991), 59 Ohio St.3d 177, 179.

The Eighth District Court of Appeals in the present case determined a satisfaction of judgment renders an appeal moot. In *Blodgett*, this court's decision was based on the question of whether a court has subject matter jurisdiction, holding, "Where the court rendering judgment has subject-matter jurisdiction takes away the right to appeal." *Blodgett, supra.*

In the present case, not only was the right to appeal taken away, but Appellant was impacted by Local Rule 29 where also his right to a jury trial was taken away. Appellant was compelled to submit to arbitration against his will and without his written or oral assent. As such, his right to a jury trial under Section 5, Article 1 of the Ohio Constitution was violated and this proposition of law must be accepted for further review on the merits and reversed accordingly.

Proposition of Law No. II

Local Rule 29 denies injured Ohioans open access to the courts and the right to remedy for their injuries in violation of Section 16, Article I of the Ohio Constitution.

Section 16, Article I of the Ohio Constitution requires open access to the courts and guarantees that all persons injured in person or property shall be afforded the right to seek remedy for such injuries. Section 16, Article I of the Ohio Constitution provides, in pertinent part: All courts shall be open, and every person, for injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Ohio Constitution Section 16, Article I.

The critical point common to all is the insistence of this is a court rule which effectively slams the courthouse door in the face of a citizen seeking redress for harm to his person; property or reputation cannot be reconciled with the requirements of Section 16, Article I of the Ohio Constitution. Moreover, subsequent decisions of this Court have made it clear beyond any reasonable dispute that this constitutional mandate applies to claims and causes of action of injury, including the present case. *Brennaman v. R.M.I. Company*, (1994) 70 Ohio St. 3d 460.

The Court in *Brennaman* held that "[a]t a minimum, Section 16, Article I requires that the plaintiffs have a reasonable period of time to enter the courthouse to seek compensation after the accident ... [the statute of repose] effectively closes the courthouse ...in contravention of the express language of Section 16, Article I, thereby violating constitutionally protected rights." *Brennaman*, at 466. (internal quotations and citations omitted).

This Court has stated succinctly and with complete clarity that the language of Section 16, Article I "is clear and leaves little room for maneuvering. Our courts are to be open to those seeking remedy for injury to person, property or reputation." *Hardy*, at 46.

Because the express purpose and effect of Local Rule 29 is to deny access to the courts and foreclose all opportunity to seek a remedy, Local Rule 29 must be found unconstitutional. The rule in the instant matter terminates the right to sue for products liability after the trial court has submitted the issue for compulsory arbitration. Local Rule 29 suffers from a grave constitutional defect and must be struck down in that it denies legal remedy to one who has suffered bodily injury, a claim of the magnitude as suffered and pleaded by Cornell should not assessed as involving a dispute less than \$50,000.

This Court has consistently held that under the Ohio Constitution the legislature may not deny legal remedy to one who has suffered bodily injury. The language under Rule 29 regarding the requirements that must be met in order to proceed to trial fail, because it is burdensome and elevates form over substance. The fact is, Local Rule 29 denies legal remedy to one who has suffered bodily injury. Therefore, it is in violation of the open courts and right to remedy provisions of Article 16, Section I of the Ohio Constitution.

Proposition of Law No. III

Local 29 denies injured Ohioans due process of law contrary to the mandate of Section 16, Article I of the Ohio Constitution. Section 16, Article I of the Ohio Constitution provides, in pertinent part: All courts shall be open, and every person, for injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Ohio Constitution Section 19, Article I.

A person who has sustained bodily injury caused by the fault of another has a property interest in his claim for relief. The property right protected by Article I, Section 19 is not limited to real property. In both *Holeton v. Crouse Cartage Co.*, (2001) 92 Ohio St. 3d 115 and *Modzelewski v. Yellow Freight Systems, Inc.*, (2004) 102 Ohio St. 3d 192 this Court found that the prior workers' compensation subrogation statutes violated Article I, Section 19 by improperly taking the tort award received by an injured worker. The Holeton Court held that whether "expressed in terms of the right to private property, remedy, or due process, the claimant-plaintiff has a constitutionally protected interest in his or her tort recovery" Holeton, 92 Ohio St. 3d at 122.

Any actual and material interference with a property interest is a taking of property within the meaning of Section 19, Article I of the Ohio Constitution. It has long been understood that "any actual and material interference with private property rights is a taking of property within the meaning of the constitution." *Commissioners v. Gates*, (1910) 83 Ohio St. 19, 24.

In the case at bar, an accrued right to bring suit was terminated by the court. Such a material interference with the right to sue (a property right) offends Article I, Section 19 of the Ohio constitution. Here, the taking is affected by means of an actual and material interference with a private property right much like the interference seen in Holeton and Modzelewski.

Thus, for reasons similar to those found to make the workers compensation subrogation statutes unconstitutional in Holeton and Modzelewski the rule to compel arbitration found at Local Rule 29 is an unconstitutional taking of private property.

In the instant matter the Plaintiff Cornell was injured by a product manufactured by Defendant General Motors Corp. The court of appeals held that Cornell forfeited his right to appeal, the arbitration panel's finding in favor of GM. The court erred, in granting Defendant-Appellee Clerac's Motion to Dismiss under *Blodgett, supra*. Even if the court found that Plaintiff's acceptance of an arbitration award from Clerac forfeits his right to appeal, such has nothing to do with Defendant GM.

General Motors at no time participated in any of the arbitration proceedings compelled by the trial court. However, mysteriously the arbitration found in favor of GM on Plaintiff's product liability claim against GM. The arbitrator panel decision is illogical and unsupported by law.

Local Rule 29 constitutes an actual and material interference with Petitioner's property interest in his claim for relief for bodily injury caused by the car engine manufactured by Defendant GM and therefore violates Section 19, Article I of the Ohio Constitution. "There is no doubt that the bundle of venerable rights associated with property is strongly protected in the Ohio Constitution and must be trod upon lightly, no matter how great the weight of other forces." *City of Norwood v. Homey*, (2006) 110 Ohio St. 3d 353, 363. This is because "Ohio has always considered the right of property to be a fundamental right." *City of Norwood*, 110 Ohio St. 3d at 363. Therefore, Local Rule 29 must come under strict scrutiny as a result of the fact it is impinging upon a recognized fundamental right.

Local Rule 29 will not withstand strict scrutiny. In the case at bar, Rule 29 is actually protecting an out-of-state manufacturer while divesting Appellant of vested property rights. Defendant-Appellant's property right to his cause of action has been taken by the state by means of compulsory arbitration. In addition, GM's right to seek a cross claim and recovery of its damage and compensation award paid to Plaintiff from the car rental agent (Clerac/dba Enterprise) whose negligence in reusing to replace the car caused Cornell's injury has likewise been taken by means of Local Rule 29. Under the Ohio

Constitution, the making of a home court rule simply cannot capriciously divest parties of vested rights in property regardless of whether it is for the benefit of the public, private party or judicial economy.

Ostensibly, the intent of Rule 29 is to clear up clogged up court dockets, cut the costs of expensive litigation, create a more effective and efficient judicial process, and advance the public interest alternative dispute resolution. Laudable as that goal may be, the trial court is not at liberty to advance it by depriving an arbitrarily selected individual of his constitutionally protected property interests in causes of action for bodily injury based on product liability. The individuals divested of their property are not compensated in any fashion whatever for that which the rule (29) in question takes from him.

Moreover, it is by no means apparent that the taking affected by Local Rule 29 ultimately inures to the benefit of the public at large, or that it in fact benefits anyone except the defendants shielded from potential liability. If viewed as a taking for the public good, Rule 29 violates Section 19, Article I because it fails to afford just compensation for the private property taken by its operation. If viewed as a taking which benefits one private citizen at the expense of another, it is manifestly beyond the scope of an arbitration panel's authority.

CONCLUSION

The initial application of Local Rule 29 must be struck down where there is no contractual agreement by the parties. Here, in this case the arbitration and the court was without jurisdiction to proceed to a judgment and award without holding a trial. Last, the application of *Blodgett vs. Blodgett* is misplaced, and cannot be applied to this case where again; "there was no agreement by the parties to arbitrate", furthermore Enterprise Rental Cars (Clerac) cannot enter General Motors a non signatory into

any purported agreement to arbitrate, subject matter jurisdiction is lacking and multiple violations of the Ohio and the United States Constitution has occurred within the court proceedings below.

In sum, this Honorable Court must protect the rights of Appellant herein and the integrity of the proceedings below and grant Appellant the leave to brief an argument based on the merits herein.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction has been filed and forwarded to Appellees counsel of record on this 28th day of June, 2011 via U.S. mail to:

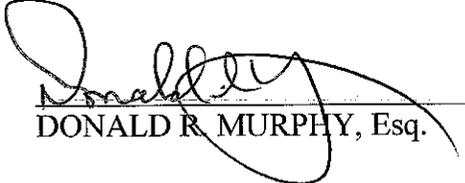
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APPENDIX

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Gerald E. Fuerst, Clerk of Courts

ERNEST CORNELL, ET AL.

Appellant

COA NO.
96517

LOWER COURT NO.
CP CV-689360

COMMON PLEAS COURT

-vs-

CLERAC, INC. ET AL.

Appellee

MOTION NO. 443478

Date 05/16/11

Journal Entry

MOTION BY APPELLEE TO DISMISS APPEAL AS MOOT IS GRANTED PER BLODGETT V.

BLODGETT (1990), 49 OHIO ST.3D 243.

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