



Court of Common Pleas and the Honorable Charles A. Schneider, to carry out the mandate of this court in *Jelinek v. Abbott Laboratories*, 164 Ohio App.3d 607, 2005-Ohio-5696 ("*Jelinek II*") by conducting a new trial on relator's R.C. 4112.02(A) and 4112.99 age discrimination claim that includes relator's constructive discharge theory. Abbott Laboratories, Gregory A. Lindberg, and Karl V. Insani (collectively "Abbott") have intervened as respondents in this action.

{¶2} Pursuant to Civ.R. 53 and Loc.R. 12(M) of the Tenth District Court of Appeals, this matter was referred to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that this court's mandate in *Jelinek II* did not order the trial court to re-try relator's constructive discharge theory. Essentially, the magistrate determined that because relator did not challenge the validity of the trial court's judgment on relator's constructive discharge theory in *Jelinek II*, this court's mandate in *Jelinek II* did not address that aspect of the trial court's judgment. Therefore, this court's mandate did not order the re-trial of that theory. Because relator failed to show that the trial court acted in a manner contrary to this court's mandate in *Jelinek II*, the magistrate has recommended that we deny relator relief in mandamus, procedendo, and prohibition.

{¶3} Relator has filed objections to the magistrate's decision. Although relator has asserted five separate objections, the objections are closely interrelated and, in part, redundant. Therefore, we will address them together.

{¶4} The heart of the issue presented here is the scope of this court's mandate in *Jelinek II*. Relator argues that constructive discharge is not an independent claim, but rather, an adverse employment action that satisfies one of the elements of his R.C.

4112.02(A) age discrimination claim. Therefore, relator argues that when *Jelinek II* ordered a new trial on relator's age discrimination claim, this court's mandate required the trial court to permit relator to prove age discrimination pursuant to a constructive discharge theory. Because the trial court refused to allow relator to prove age discrimination and damages based upon this theory, relator contends that the trial court acted contrary to this court's mandate in *Jelinek II*. According to relator, the trial court's disregard of the mandate in *Jelinek II* entitles relator to relief in mandamus, prohibition, and procedendo. We disagree.

{¶5} The trial court judgment at issue in *Jelinek II* states in relevant part:

It is further ORDERED, ADJUDGED and DECREED that judgment be and hereby is entered in favor of defendants Abbott Laboratories, Inc., Karl V. Insani and Gregory A. Lindberg (collectively "defendants") and against plaintiff David A. Jelinek on his constructive discharge claim.

It is further ORDERED, ADJUDGED and DECREED that judgment notwithstanding the verdict ("JNOV") be, and hereby is, entered in favor of defendants and against plaintiff David A. Jelinek on plaintiff's age discrimination claim.

{¶6} It is clear from these separate paragraphs in the judgment entry that the trial court treated relator's constructive discharge theory as a distinct claim, separate from his age discrimination claim. This separate treatment arose from the way the parties presented the case to the jury.

{¶7} Relator presented two distinct damage theories in connection with his age discrimination claim. These two theories are reflected in separate jury interrogatories. First, the jury was asked whether relator proved by a preponderance of the evidence that Abbott intentionally discriminated against relator because of his age when it transferred

relator to Lake County, Indiana. The jury answered "yes" in response to this interrogatory. (Jury interrogatory II(A)(4)).

{¶8} Then the jury was asked the following question:

If you found for Plaintiff on his claim of age discrimination with respect to his transfer to Lake County, Indiana, did Plaintiff prove by a preponderance of the evidence that the transfer resulted in working conditions that were so intolerable that a reasonable person would have been compelled to resign from his employment with Abbott?

{¶9} The jury answered this interrogatory in the negative. (Jury Interrogatory II(C)(1)). Therefore, the jury expressly rejected relator's constructive discharge theory and refused to award any damages based upon this theory.

{¶10} Thereafter, the jury was also asked the following question:

If you find that Plaintiff suffered damages as a result of age discrimination, and was not compelled to resign as of March 31, 1998, how much do you find that plaintiff is entitled to recover for[.]

{¶11} The jury answered this interrogatory by awarding relator \$700,000 for "emotional distress." (Jury Interrogatory II(C)(2)). The jury's response to this interrogatory indicates that the jury rejected relator's constructive discharge theory but accepted relator's emotional distress theory. Because the jury expressly rejected relator's constructive discharge theory, but still found Abbott liable for age discrimination and awarded damages based on emotional distress, the trial court entered judgment on constructive discharge and age discrimination as if they were separate claims.

{¶12} Notably, in his appeal of the trial court's judgment, relator did not challenge the trial court's treatment of his constructive discharge theory as a separate claim. In fact,

in his fourth assignment of error in *Jelinek II*, relator referred to his constructive discharge theory as a separate and distinct claim:

IV. The trial court erred in excluding certain evidence related to Plaintiff's constructive discharge claim which resulted in an adverse jury verdict on Plaintiff's constructive discharge claim.

{¶13} Therefore, relator's assertion here that constructive discharge is not a distinct claim contradicts his own characterization of that theory of recovery. Moreover, even if relator is technically correct that constructive discharge is not a distinct claim, relator did not challenge the trial court's treatment of his constructive discharge theory as a distinct claim. In fact, relator encouraged this court in *Jelinek II* to treat his constructive discharge theory as a separate claim.

{¶14} We also note that relator's fourth assignment of error is the only assignment of error that expressly addressed his constructive discharge theory. This court overruled that assignment of error in *Jelinek II*. Although *Jelinek II* reversed the trial court's judgment on relator's age discrimination claim, it rejected relator's only challenge to the trial court's resolution of his constructive discharge theory. Therefore, we agree with the magistrate's determination that the mandate in *Jelinek II* did not order the retrial of relator's constructive discharge theory.

{¶15} We reach this conclusion regardless of whether constructive discharge is technically a distinct claim or only one of two alternative theories that relator asserted in attempting to recover damages for age discrimination. In either event, the way these issues were presented and argued on appeal indicates that the mandate in *Jelinek II* did not order the retrial of relator's constructive discharge theory.

{¶16} Given the scope of the mandate in *Jelinek II*, relator is not entitled to the relief he seeks. As noted by Abbott, relator is not entitled to a writ of procedendo because Judge Schneider has not refused to render judgment in the underlying proceeding nor has Judge Schneider delayed in proceeding to judgment. *State ex rel. CNG Fin. Corp. v. Nadel*, 111 Ohio St.3d 149, 2006-Ohio-5344, ¶20. Rather, relator seeks to prevent Judge Schneider from proceeding in a manner relator believes is contrary to this court's mandate in *Jelinek II*. Therefore, there is no basis for a writ of procedendo.

{¶17} Second, relator is not entitled to a writ of prohibition because Judge Schneider has not acted in a manner inconsistent with this court's mandate in *Jelinek II*. A writ of prohibition is an extraordinary writ granted to "restrain inferior courts and tribunals from exceeding their jurisdiction." *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70, 73, 1998-Ohio-275. Judge Schneider did not exceed his jurisdiction or act in a manner contrary to this court's mandate in *Jelinek II*.

{¶18} Lastly, relator is not entitled to mandamus relief because Judge Schneider is not under a clear legal duty to re-try relator's constructive discharge theory given the scope of this court's mandate in *Jelinek II*.

{¶19} For these reasons, we overrule relator's five objections.

{¶20} Respondents have also filed objections to the magistrate's decision. Respondents argue that relator is not entitled to relief in mandamus, prohibition, and procedendo for the additional reason that relator has an adequate remedy at law—the right to appeal Judge Schneider's interpretation of this court's mandate in *Jelinek II* following the re-trial of relator's age discrimination claim. Because we agree with the

magistrate's determination that relator is not entitled to relief in mandamus, prohibition, and procedendo for the reasons noted above, respondents' objections are moot.

{¶21} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny relator's request for a writ of mandamus, prohibition, and procedendo.

*Relator's objections overruled;  
writs of mandamus, prohibition, and procedendo denied;  
and respondents' objections moot.*

FRENCH and CONNOR, JJ., concur.

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**APPENDIX**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. David A. Jelinek, :

Relator, :

v. : No. 08AP-957

Charles A. Schneider, Judge, Franklin : (REGULAR CALENDAR)  
 County Common Pleas Court and  
 Franklin County Common Pleas Court, :

Respondents. :

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MAGISTRATE'S DECISION

Rendered on September 25, 2009

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*Law Offices of Russell A. Kelm, Russell A. Kelm and Joanne W. Detrick, for relator.*

*Ron O'Brien, Prosecuting Attorney, and Patrick Piccininni, for respondents.*

*Winston & Strawn LLP, James F. Hurst, Derek J. Sarafa and Samantha L. Maxfield; Vorys, Sater, Seymour and Pease, LLP, Michael G. Long and Lisa Pierce Reisz, for intervening respondents Abbott Laboratories, Karl V. Insani, and Gregory A. Lindberg.*

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IN PROCEDENDO, PROHIBITION AND MANDAMUS

{¶22} In this original action, relator, David A. Jelinek, requests the issuance of writs ordering respondents Franklin County Court of Common Pleas ("common pleas court") and the Honorable Charles A. Schneider ("Judge Schneider"), a judge of the

common pleas court, to carry out the alleged mandate of this court in *Jelinek v. Abbott Laboratories*, 164 Ohio App.3d 607, 2005-Ohio-5696 ("*Jelinek II*") by conducting a new trial on the issue or claim of constructive discharge as well as relator's age discrimination claim brought pursuant to R.C. 4112.02(A) and 4112.99.

Findings of Fact:

{¶23} 1. On September 10, 1999, relator refiled a complaint in the common pleas court against intervening respondents Abbott Laboratories, Karl V. Insani and Gregory A. Lindberg, who are among the named defendants in that action.

{¶24} 2. In his common pleas court complaint, relator, as plaintiff, brought five counts against defendants. Count one alleged promissory estoppel. Count three alleged retaliation in violation of R.C. 4112.02(I). Count four alleged violation of Ohio public policy. Count five alleged spoliation of evidence.

{¶25} 3. Count two of the common pleas court complaint presented an age discrimination claim alleged as follows:

The actions of defendants in demoting and constructively terminating plaintiff and not hiring him to existing sales positions constitute age discrimination in violation of R.C. 4112.02(A) and 4112.99. \* \* \*

{¶26} 4. Following the trial court's dismissal of the promissory estoppel claim and striking of the spoliation of evidence claim, defendants moved for summary judgment.

{¶27} 5. In a judgment entry journalized on February 12, 2001, the common pleas court granted summary judgment on all remaining claims.

{¶28} 6. Relator appealed to this court. In his assignments of error, relator challenged the trial court's grant of summary judgment as to "plaintiff's claim of age

discrimination," "plaintiff's claim of promissory estoppel" and "plaintiff's claim of constructive discharge."

{¶29} 7. On September 13, 2001, this court, in *Jelinek v. Abbott Laboratories* (Sept. 13, 2001), 10th Dist. No. 01AP-217 ("*Jelinek I*") affirmed in part and reversed in part the judgment of the trial court, and remanded the cause for further proceedings. This court's journal entry was journalized on September 13, 2001. In this court's opinion in *Jelinek I*, this court held that summary judgment was appropriate on relator's claim for retaliation and for violation of public policy. However, this court also held that summary judgment was not appropriate on the "age discrimination claim," the "constructive discharge claim" and the "promissory estoppel claim."

{¶30} 8. In April 2002, relator's action was tried to a jury in the common pleas court. On April 29, 2002, the jury rendered a verdict in favor of plaintiff for age discrimination, finding plaintiff entitled to recover compensatory damages from defendants in the amount of \$700,000, and punitive damages in the amount of 25 million dollars. The jury also rendered a verdict in favor of defendants on the promissory estoppel claim.

{¶31} 9. In a series of interrogatories, the jury held that individual defendants Insani and Lindberg participated in intentional discrimination against plaintiff by transferring him to Lake County, Indiana because of his age.

{¶32} 10. The jury responded "NO" to the following interrogatory:

## II. AGE DISCRIMINATION

### C. Damages On Plaintiff's Age Discrimination Claim.

1. If you found for Plaintiff on his claim of age discrimination with respect to his transfer to Lake County, Indiana, did Plaintiff prove by a preponderance of the evidence that the transfer resulted in working conditions that were so

intolerable that a reasonable person would have been compelled to resign from his employment with Abbott?

(Emphases omitted.)

{¶33} 11. Thereafter, in June 2002, defendants moved for judgment notwithstanding the verdict ("JNOV") or, in the alternative, for a new trial. They also moved, in the alternative, for remittitur.

{¶34} 12. On May 20, 2003, the Honorable John P. Bessey, the common pleas judge presiding over relator's action, issued a 29-page written decision.

{¶35} 13. In his May 20, 2003 written decision, Judge Bessey determined that the court shall grant JNOV and, alternatively, a new trial. Judge Bessey conditionally granted remittitur as to compensatory and punitive damages.

{¶36} 14. On June 23, 2003, Judge Bessey filed a judgment entry, stating in part:

[I]t is hereby

ORDERED, ADJUDGED AND DECREED that judgment be and hereby is entered in favor of defendant Abbott Laboratories and against plaintiff David A. Jelinek on his promissory estoppel claim.

It is further ORDERED, ADJUDGED AND DECREED that judgment be and hereby is entered in favor of defendants Abbott Laboratories, Karl V. Insani and Gregory A. Lindberg (collectively "defendants") and against plaintiff David A. Jelinek on his constructive discharge claim.

It is further ORDERED, ADJUDGED AND DECREED that judgment notwithstanding the verdict ("JNOV") be, and hereby is, entered in favor of defendants and against plaintiff David A. Jelinek on plaintiff's age discrimination claim.

IN THE ALTERNATIVE, it is hereby ORDERED, ADJUDGED AND DECREED that defendants' motion for new trial on plaintiff's claim of age discrimination is hereby conditionally granted should the JNOV in favor of Abbott

Laboratories, Karl V. Insani or Gregory A. Lindberg be vacated or reversed on appeal.

\* \* \*

The judgment entered herein constitutes a final judgment, the Court finding that there is no just reason for delay.

(Emphases sic.)

{¶37} 15. Relator appealed to this court the judgment of the common pleas court.

{¶38} 16. On October 27, 2005, this court issued its 27-page opinion in *Jelinek II*.

As noted in this court's opinion, relator asserted eight assignments of error. Assignments of error one through four provide:

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFF'S CLAIM OF AGE DISCRIMINATION BASED UPON THE "LAW OF THE CASE" DOCTRINE.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON PLAINTIFF'S CLAIM OF AGE DISCRIMINATION.

III. THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR REMITTITUR.

IV. THE TRIAL COURT ERRED IN EXCLUDING CERTAIN EVIDENCE RELATED TO PLAINTIFF'S CONSTRUCTIVE DISCHARGE CLAIM WHICH RESULTED IN AN ADVERSE JURY VERDICT ON PLAINTIFF'S CONSTRUCTIVE DISCHARGE CLAIM.

{¶39} 17. In its opinion in *Jelinek II*, this court stated, in part:

At trial, plaintiff retained the ultimate burden of demonstrating that he was the victim of unlawful discrimination. See *U.S. Postal Serv. Bd. of Governors v. Aikens* (1983), 460 U.S. 711, 103 S.Ct. 1478. In this case, the jury determined that defendants intentionally

discriminated against him because of his age based on his transfer to Lake County, Indiana.

\* \* \*

Based on this court's review of the record, we conclude that the trial court conditionally granted a new trial as to plaintiff's age discrimination claim on the basis that the verdict was not supported by the weight of the evidence. Essentially, the trial court found that the evidence at trial was not legally sufficient to support plaintiff's age discrimination claim, and even if it was legally sufficient to support the claim, it was not supported by the weight of the evidence.

\* \* \*

As revealed in the interrogatories, the jury found that defendants demonstrated that plaintiff was transferred to Lake County, Indiana, for reasons other than his age. However, the jury determined that plaintiff demonstrated that the reason(s) were false, and that plaintiff proved by a preponderance of the evidence that defendants intentionally discriminated against him because of his age based on his transfer to Lake County, Indiana.

As determined above, the evidence at trial was legally sufficient to support an age discrimination claim. However, after thoroughly reviewing the extensive record in this case, and considering the sound discretion provided to the trial court in determining whether to grant a motion for a new trial, we conclude that the trial court did not abuse its discretion in conditionally granting a new trial on plaintiff's age discrimination claim.

Considering the foregoing, we sustain plaintiff's first and second assignments of error on the basis that the trial court erred in granting the motion for JNOV. We need not, and do not, reach the issue that is raised by plaintiff's first assignment of error of whether the trial court erred in granting the JNOV based upon the "law of the case" doctrine. However, the trial court did not abuse its discretion in conditionally granting a new trial as to plaintiff's age discrimination claim. Therefore, to the extent defendant argues under his second assignment of error that the trial court erred in conditionally granting a new trial on the issue of age discrimination, it is overruled.

\* \* \*

Under his fourth assignment of error, plaintiff contends that the trial court erred in excluding certain evidence relating to his claim of constructive discharge. Specifically, plaintiff argues that the trial court erroneously excluded from evidence a 1998 article from a newspaper which declared Gary, Indiana, as the most dangerous city in the United States for crime. Plaintiff also argues that the trial court erred in not permitting plaintiff's counsel to question witnesses regarding the desirability of working in Gary, Indiana, and by excluding from evidence photographs that plaintiff took of Gary, Indiana.

\* \* \*

In this case, the jury held that plaintiff failed to prove that his transfer to Lake County, Indiana, resulted in working conditions that were so intolerable that a reasonable person would have been compelled to resign from his employment with Abbott. Thus, the jury found that plaintiff had failed to prove that he had been constructively discharged.

Id. at ¶40-54.

{¶40} 18. On October 28, 2005, this court issued its judgment entry in *Jelinek II*.

The judgment entry states in its entirety:

For the reasons stated in the opinion of this court rendered herein on October 27, 2005, plaintiff's first and second assignments of error are sustained on the basis that the trial court erred in granting defendants' motion for judgment notwithstanding the verdict as to plaintiff's age discrimination claim, but his second assignment of error is overruled to the extent plaintiff argues that the trial court erred in conditionally granting defendants' motion for a new trial on the issue of plaintiff's age discrimination claim. Our determination that the trial court did not abuse its discretion in conditionally granting defendants' motion for a new trial as to plaintiff's age discrimination claim moots defendants' first, second, and third cross-assignments of error, as well as plaintiff's third, seventh, and eighth assignments of error. Plaintiff's fourth, fifth, and sixth assignments of error are overruled. It is the judgment and order of this court that the judgment of the

Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this cause is remanded to that court for further proceedings in accordance with law and consistent with this opinion. Costs are assessed against defendants.

{¶41} 19. The parties agree that pursuant to this court's October 28, 2005 judgment entry remanding this case to the trial court, Judge Bessey began a new trial that ended in a mistrial. Judge Bessey then reset the new trial for February 2008 and that trial also ended in a mistrial. After Judge Bessey recused himself, the case was reassigned to Judge Schneider.

{¶42} 20. On September 19, 2008, Judge Schneider filed a five-page decision dated September 16, 2008 and captioned "Decision on the Scope of the New Trial." In his decision, Judge Schneider quotes at length from this court's opinion in *Jelinek II*, including those portions of this court's *Jelinek II* opinion quoted above in paragraph 17 of this magistrate's decision.

In his decision, Judge Schneider wrote:

The Court of Appeals distinguished between the age-discrimination claim and the constructive-discharge claim and discussed those separately. As such, in its discussion, the appellate court distinguished between the jury's finding that plaintiff was discriminated against because of his age and the jury's finding that plaintiff did not show that working conditions were so intolerable so as to constitute constructive discharge. See id. at 623 & 625.

In discussing these two, separate matters, the Court of Appeals held "that the trial court did not abuse its discretion in conditionally granting a new trial on plaintiff's age discrimination claim." Id. at 623. Conversely, the Court of Appeals did not mention a new trial on the constructive-discharge claim or any "intertwining."

Contrary to plaintiff's argument, a discrimination claim is distinct from a constructive-discharge claim. See, e.g.,

Valentine v. Harris (Hamilton App., May 11, 1994), No. C-920977, 1994 Ohio App. LEXIS 1976, at \*9-10 ("Even if Valentine failed to present evidence demonstrating that she was constructively discharged from her employment with Kroger, she was still entitled to an award of damages on her discrimination claim, if she proved at trial that she was the subject of wrongful harassment and that the defendants intentionally discriminated against her."); Yates v. Avco Corp. (C.A. 6, 1987), 819 F.2d 630, 637 ("proof of discrimination alone is not a sufficient predicate for a finding of constructive discharge; there must be other 'aggravating factors' ").

As the appellate court held, the trial court's conditional granting of defendants' motion for a new trial was proper, and this conclusion does not require overturning the jury's finding that constructive discharge did not occur. As one court has held,

[w]hen the jury has clearly decided an issue in favor [of] the party opposing the motion, and the issue is unaffected by the particular defect the court finds with respect to a wholly separate issue, a retrial of all issues is not reasonably warranted. The issue or issues to be retried should be limited to those which were affected by the defect according to the court's findings.

Drehmer v. Fylak (Montgomery 2005), 163 Ohio App. 3d 248, 258[.]

Therefore, the scope of the new trial is confined to the age-discrimination claim and excludes a retrial of the constructive-discharge claim, including facts or allegations that relate to that claim. \* \* \*

{¶43} 21. On October 17, 2008, Judge Schneider filed an entry stating in its entirety:

For the reasons set forth in this Court's Decision On The Scope of the New Trial filed herein on September 16, 2008, the scope of the new trial in this matter, scheduled to begin November 10, 2008, will be confined to Plaintiff's age-discrimination claim and will exclude a retrial of the constructive-discharge claim, including facts or allegations that relate to that claim.

IT IS SO ORDERED.

(Emphasis sic.)

{¶44} 22. On October 29, 2008, relator, David A. Jelinek, filed this original action.

Conclusions of Law:

{¶45} It is the magistrate's decision that this court deny relator's requests for writs of procedendo, prohibition and mandamus, as more fully explained below.

{¶46} Under the doctrine of the law of the case, "[a]bsent extraordinary circumstances, such as an intervening decision by the Supreme Court, an inferior court has no discretion to disregard the mandate of a superior court in a prior appeal in the same case." *State ex rel. Crandall, Pheils & Wisniewski v. DeCessna* (1995), 73 Ohio St.3d 180, 182, quoting *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, syllabus. The Ohio Constitution does not give a common pleas court jurisdiction to review a prior mandate of a court of appeals. *Id.*, citing *State ex rel. Potain, S.A. v. Mathews* (1979), 59 Ohio St.2d 29, 32. Accordingly, a writ of prohibition can issue to prevent a lower court from proceeding contrary to the mandate of a superior court. *Id.* Also, a writ of mandamus can issue to prevent a lower court from proceeding contrary to the mandate of a superior court. *Id.* A writ of procedendo can be appropriate when an inferior court has erroneously stayed the proceeding on a remand from a superior court. *Crandall*, at 184.

{¶47} As earlier noted, Judge Schneider's October 17, 2008 entry announces that "the new trial in this matter \* \* \* will be confined to Plaintiff's age-discrimination claim and will exclude a retrial of the constructive-discharge claim." Relator contends here that Judge Schneider's entry, in effect, announces that he will not proceed in accordance with this court's mandate in *Jelinek II*. The magistrate disagrees with relator's contention.

{¶48} It should be noted at the outset that this court's October 28, 2005 judgment entry setting forth this court's mandate in *Jelinek II* holds that "the trial court did not abuse its discretion in conditionally granting defendants' motion for a new trial as to plaintiff's age discrimination claim." This court remanded the cause to the trial court for "further proceedings in accordance with law and consistent with this opinion." This court's October 28, 2005 judgment entry does not directly address the question of whether the new trial as to the age discrimination claim shall include a retrial of the constructive discharge issue or claim.

{¶49} However, this court, in *Jelinek II*, was never asked to determine whether the new trial as to the age discrimination claim shall include a retrial of the constructive discharge issue or claim. That determination, however, can be easily made by a review of Judge Bessey's June 23, 2003 judgment entry and the assignments of error that relator asserted in his appeal to this court in *Jelinek II*.

{¶50} Again, Judge Bessey's June 23, 2003 judgment entry states in part:

It is further ORDERED, ADJUDGED AND DECREED that judgment be and hereby is entered in favor of defendants Abbott Laboratories, Karl V. Insani and Gregory A. Lindberg (collectively "defendants") and against plaintiff David A. Jelinek on his constructive discharge claim.

{¶51} This court's October 28, 2005 judgment entry leaves undisturbed that portion of Judge Bessey's June 23, 2003 judgment entry, quoted above, that enters judgment in favor of defendants on relator's "constructive discharge claim" even though this court's October 28, 2005 judgment does not directly so state.

{¶52} Given that Judge Bessey's entry of judgment in favor of defendants on the constructive discharge claim remains undisturbed by this court's judgment in *Jelinek II*,

Judge Schneider cannot be in violation of this court's mandate in *Jelinek II* and, thus, relator's action here must fail.

{¶53} Accordingly, for all the above reasons, it is the magistrate's decision that this court deny relator's request for writs of procedendo, prohibition and mandamus.

/s/ Kenneth W. Macke  
KENNETH W. MACKE  
MAGISTRATE

### **NOTICE TO THE PARTIES**

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).