

IN THE SUPREME COURT OF OHIO

09-0557

ESTATE OF VERLIN J. PLACE, et al.

\*

Trial Court

Clark Co. Case No. 06CV0462

Appellants,

v.

\*

Court of Appeals

CASE NO. 08CA0073

Appeal from Decision Entered on  
February 9, 2009

MARY ADKINS, et al.

Appellees.

\*

MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANTS, ESTATE OF VERLIN J. PLACE, et al.

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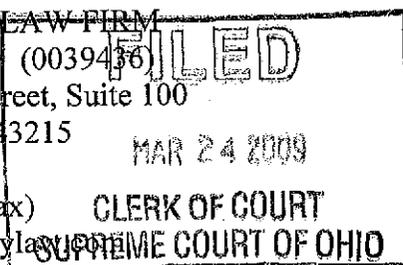
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## I. EXPLANATION OF WHY THIS CASE IS OF GREAT PUBLIC AND GREAT GENERAL INTEREST

This is an important case in which an Ohio Appellate Court has misapplied binding precedent of this Court regarding representations made by attorneys on behalf of their clients. This particular case is of great public interest and great general interest due to the effect the Appellate Court's decision could have on settlement negotiations between litigants. It is essential that litigants be able to rely on the representations made by their adversary's attorney in order to proceed with settlement negotiations that may lead to a mutually acceptable resolution to civil litigation. Settlement is a very important part of civil litigation in this State. Settlement eases the burden placed on trial courts to timely resolve the civil cases that come before them.

When parties engage in settlement negotiation, it is essential that they be able to rely on the representations made by their adversary's attorney. Parties hire attorneys for a specific reason and settlement negotiation strategy and decisions are made on the basis of what the other side has represented through their attorney. The Appellate Court's decision is in conflict with this Court's previous rulings and with its own previous rulings.

This Court has addressed the issue in *Argo Plastic Products Co. v. City of Cleveland* (1984), 15 Ohio St.3d 389. *Argo* and its holding have also been interpreted and supported in *Kraras v. Safeskin Corp., et al.* (Aug. 26, 2004), U.S.D.C., S.D. Ohio Eastern Div. No. 2:98-cv-0169, 2004 WL 2375525 (unreported in F.Supp.2d).

The principles of those two decisions are clear, holding that where an attorney is given authority to negotiate a settlement but ultimately settles the client's claims on terms unacceptable to the client, the settlement is nevertheless enforceable and the client is bound by the acts of his attorney.

The impact of the Appellate Court's decision will greatly affect settlement negotiations in civil cases. Parties who should be able to rely on representations made by their adversary's attorney would now fear that the attorney lacked authority to settle. There would be good cause to worry that settlement was uncertain without going directly to the adverse party in order to verify authorization of the settlement offer or acceptance.

Accordingly, this matter presents a case of great public interest because settlement negotiation is essential to bring about out-of-court resolution to civil litigation. The Estate of Verlin J. Place, et al. respectfully asks this Court to accept jurisdiction and resolve the issues identified in the Proposition of Law, addressed below.

## **II. STATEMENT OF THE CASE AND OF THE FACTS**

The initial Complaint filed by Appellees Mary Adkins and Tim Adkins (hereinafter collectively referred to as "Adkinses") was filed on March 30, 2006. See Transcript of appellate docket (hereinafter "Td"). *Td 1*. The claim arose from an automobile accident which occurred May 22, 2004. The Adkinses filed an Amended Complaint on March 16, 2007. *Td 4*. In response to the Amended Complaint, Defendant American Family Insurance Group filed a motion to dismiss. *Td 6*. Defendant-Appellant Estate of Verlin J. Place (hereinafter "Place") filed an Answer to the Amended Complaint. *Td 7*. The trial court sustained the motion of American Family Insurance Group to dismiss the Adkinses' claim against that party. *Td 8*.

On April 29, 2008, the court ordered that State Farm Mutual Automobile Insurance Company and Auto-Owners Insurance Company be joined in the action. *Td 14*. On June 3, 2008, the Complaint of Intervening Plaintiff State Farm Mutual Automobile Insurance Company was filed. *Td 16*. On June 5, 2008, an Answer on behalf of the Appellant Place was filed. *Td 18*.

On June 20, 2008, the Adkinses' attorney accepted an offer of settlement from Appellant Place in the amount of \$20,000.00. Adkinses then filed a motion to reinstate the case on the trial docket, filing said motion on July 7, 2008. *Td 19*. Appellant Place opposed the motion and filed its own cross-motion to enforce settlement on July 16, 2008. *Td 20*.

On August 1, 2008, the trial court denied the motion of the Adkinses to reinstate the case on the trial docket and the court granted the cross-motion of the Appellant Place to enforce the settlement. The Adkinses were ordered to comply with all terms of the agreed upon settlement in the amount of \$20,000.00. *Td 24*.

On August 8, 2008, Auto-Owners Insurance Company filed its Complaint for subrogation. *Td 25*. Appellant Place filed an Answer to the Complaint of Auto-Owners on September 16, 2008. *Td 32*.

On August 13, 2008, the Adkinses filed a motion for clarification of the court's prior order enforcing settlement. *Td 27*. That motion was opposed by the Appellant Place on August 25, 2008. *Td 29*.

The underlying claim in this case arises from a motor vehicle accident which occurred on May 22, 2004. However, the sole assignment of error as raised in this memorandum in support of jurisdiction pertains only to the settlement negotiation and acceptance of settlement offer which occurred on June 20, 2008. The facts pertinent to the settlement are recited below.

On June 20, 2008, counsel for the Appellant Place directly conveyed an offer of \$20,000.00 to the Adkinses' attorney, T. Jeffrey Beausay. *Td 20*, *Estate of Verlin J. Place's Opposition to Plaintiffs' Motion and Cross-Motion of Place to Enforce Settlement*, and the *Affidavit of Christopher W. Carrigg, Esq., hereinafter "Carrigg Affidavit" at ¶ 2*. The offer

conveyed was on behalf of Appellant Place and contemplated full and final settlement of the matter. *Td 20, Carrigg Affidavit at ¶ 2.*

Later in the day on June 20, 2008, Attorney Beausay contacted Attorney Carrigg and advised that his clients accepted the \$20,000.00 offer in full and final settlement of the claim and the attorneys further spoke that day and confirmed the settlement agreement. *Td 20, Carrigg Affidavit at ¶ 3; and see Adkinses' Appellate Brief, pp. 4-5.* At the request of Adkinses' counsel, the settlement check was not to be sent until he had negotiated the two subrogation liens owned by State Farm and Auto-Owners. *Td 20, Carrigg Affidavit at ¶ 3; and see Adkinses' Appellate Brief, p. 5.*

Relying on the communication of settlement, the court was contacted and informed that settlement had been reached. *Td 20, Carrigg Affidavit at ¶ 4.* One full week later on June 27, 2008, Attorney Beausay contacted Attorney Carrigg indicating there had been a misunderstanding between himself and his clients and that when his clients instructed him to "go ahead and take it," the reference was to a deposition as opposed to the settlement offer. However, there is no question that on June 20, 2008, Attorney Beausay communicated that his clients agreed to accept the \$20,000.00 settlement in complete and final settlement of their claims against the Defendant Estate of Verlin J. Place. *Td 20, Carrigg Affidavit at ¶¶ 5-6.*

There is also no question that Attorney Beausay had the authority to settle and negotiate settlement on behalf of his clients. *See Adkinses' Appellate Brief, p. 4.*

- *"We continued in our efforts to settle the case."*
- *"I immediately called the Adkinses, and relayed this offer. The Adkinses wanted to talk it over and call me back, but the deposition of Doctor Smith was starting in about one hour, so I left for the deposition."*

- “I thought the Adkinses wanted to accept the offer, so I immediately called Mr. Carrigg’s office to see if the offer was still on the table; if so, we would accept the offer.”
- “I then spoke with Mr. Carrigg directly, confirming that the Adkinses would accept the \$20,000.00 if it was still offered.”

See Adkinses’ Appellate Brief, p. 5.

As part of the settlement that was reached, it was agreed that upon payment of the \$20,000.00 to the Adkinses, both Mary and Tim Adkins would review, sign and complete the Full and Final Release With Affidavit, including indemnity and hold harmless provisions and Adkinses would permit their attorney to sign a Dismissal Entry With Prejudice for filing with the Court, and it was understood that Adkinses would be responsible for paying back any subrogation liens including any owned by State Farm and Auto-Owners out of the proceeds of the \$20,000.00 settlement. *Td 29, Defendant Estate of Verlin J. Place’s Opposition to Plaintiffs’ Motion for Clarification of Order, and the Affidavit of Christopher Carrigg, Esq., ¶¶ 5-6.*

The Adkinses appealed the trial court’s decision to the Ohio Second Appellate District. The Appellate District rendered an opinion on February 6, 2009, which was journalized, entered and filed by the Clark County Clerk of Courts on February 9, 2009. The Appellate Court’s decision reversed the trial court and remanded the case.

### III. PROPOSITION OF LAW #1

#### 1. A Client is Bound by the Acts of His Attorney Where the Attorney is Retained and has the Authority to Negotiate a Settlement on His Client’s Behalf.

This is a case of great public interest because the decision of the Appellate Court cannot be harmonized with *Argo Plastic Products Co. v. City of Cleveland*, and action by this Court is required to ensure that similar cases are consistently adjudicated across Ohio. This Court’s binding decision in *Argo* held, “The conduct of counsel is imputed to his client;” “That it would

be manifestly unjust to appellants herein to vacate the judgment entered below pursuant to the settlement on the amount of damages.” *Id. at 393.*

This Court, in the *Argo* decision, held a \$500,000 settlement enforceable against a municipal defendant where the city’s attorney had authority to negotiate the claim, even though the city’s attorney only had authority to negotiate up to a \$2,500 settlement.

In the present action, the Appellate District addressed this Court’s holding in *Argo*. The Appellate District held that the principles set forth by this Court in *Argo* only pertain to a Civil Rule 60(B) motion. This Appellant respectfully disagrees.

While *Argo* did involve a 60(B) motion, the Court’s decision, holdings, and principles were directed to the issue of settlement and the issue of a client being bound by the acts of its attorney. This Court held that the municipal defendant was not entitled to relief from the judgment in the amount of settlement over \$500,000 after its attorney, who apparently had actual authority to settle the claim for only \$2,500 or less, agreed to the settlement of the drastically higher amount. The Court further held that the city’s remedy in that case, if any, “lay in action against counsel.” Addressing the settlement agreement, this Court held: “The city may indeed have been factually surprised, perhaps even shocked, that counsel, who supposedly had authority to settle a case for \$2,500, settled the instant lawsuit for over \$500,000.” *See Id.* The Court was not unsympathetic to the city’s situation in *Argo*, but felt, “that it would be manifestly unjust to appellants herein to vacate the judgment entered below pursuant to the settlement on the amount of damages.” *See Id.*

The holding of this Court in *Argo* was clarified and adopted in the United States District Court for the Southern District of Ohio, Eastern Division, in the case of *Kraras v. Safeskin Corp., et al., supra*. In *Kraras*, the U. S. District Court adopts and interprets the holding of *Argo*.

*Kraras* does not involve a 60(B) motion. There was no dispute in *Kraras* that the attorneys who accepted the settlement on behalf of the plaintiff did, in fact, represent the plaintiff. Further, there was no dispute that those attorneys communicated to the defense attorney that the case had reached a settlement. The U. S. District Court held:

The authority to negotiate and settle a client's claim "need not be express, but may be ascertained from the surrounding circumstances." *Elliott v. General Motors Corp.* (1991), 72 Ohio App.3d 486-488, 595 N.E.2d 463 (Marion County). In fact, "[B]ut for this rule, prudent litigants could not rely on opposing counsel's representation of authorization to settle. Fear of a later claim that counsel lacked authority to settle would require litigants to go behind counsel to the opposing party in order to verify authorization for every settlement offer." *Capital Dredge and Dock Corp. v. City of Detroit* (1986), 800 F.2d 525 531 (6<sup>th</sup> Circuit).

Relying on Ohio case law and specifically the holdings of the Ohio Supreme Court, the Federal court held that where an attorney settles a client's claims without even having the authority to negotiate the settlement, then the settlement is not enforceable; citing *Morr v. Crouch* (1969), 19 Ohio St.2d 24; conversely where an attorney is given the authority to negotiate a settlement but ends up settling the claim on unacceptable terms to his client, such a settlement is enforceable nevertheless; referencing *Argo Plastic Products*, 15 Ohio St.3d at 392.

In this action, it is undisputed that the Adkinses' attorney had authority to negotiate a settlement. In the brief to the Second District Appellate Court, the Adkinses acknowledged, "We continued in our efforts to settle the case." See *Adkinses' Appellate Brief*, p. 4.

The Appellate Court relied on the fact that *Argo* involved a 60(B) request for relief, to conclude that the principles illustrated by this Court in *Argo* do not apply to the instant action and any other action where a 60(B) request was not involved. Appellant Place respectfully disagrees with the Appellate Court's decision and finds support in its interpretation of *Argo* by the Federal Court's holding in *Kraras* which did not involve a 60(B) request for relief.

Further, the Appellate Court based its decision, on the *Moor* case. As Appellant Place illustrated to the Court in its Appellate Brief, *Morr* is clearly distinguishable from the facts of the instant action. The attorney in *Morr* who agreed to a settlement on a real estate transaction, did so without any authority to even negotiate on behalf of his client. In *Morr*, the attorney relied on representations made by the husband of his client. The problem was the husband was not a party to the action and was not an owner of the parcel of land, and therefore had absolutely no authority himself to make any representations regarding settlement authority. This Court held in *Morr* that, "An attorney who is without specific authorization has no implied power by virtue of his general retainer to compromise and settle his client's claim or cause of action." See *Morr*, 19 Ohio St.2d at 27. In the instant action, the power of the Adkinses' attorney goes beyond a general retainer to represent them in the case. As stated above, there is no question that the Adkinses' attorney had authority from his clients to engage in settlement negotiations with the Appellant Place. As that factual scenario exists in this case, the proper rule to apply would be the *Argo* holding which would support enforcement of the settlement agreement. The Appellate Court also diverted from its own holding in *Garrison v. Daytonian Hotel* (June 28, 1995), 105 Ohio App.3d 322 where the Second District held that a defense attorney's assent to a proposal by the plaintiffs gave the plaintiffs authority to bind the defendant to that offer, despite the fact that the defendant hotel asserted that its attorney did not have authority to settle at that amount.

On the above facts, the precedent of the *Argo* case and its progeny should govern the outcome of the underlying litigation and thus, the settlement between the Adkinses and the Appellant Place should be enforced.

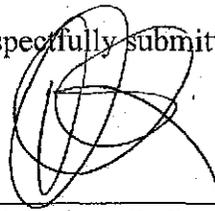
Further, the Appellate Court's refusal to properly apply the *Argo* case in this circumstance creates the risk that future settlement negotiations between litigants in civil cases in

Further, the Appellate Court's refusal to properly apply the *Argo* case in this circumstance creates the risk that future settlement negotiations between litigants in civil cases in the State of Ohio will be hindered by the fear of parties that representations of an adversary attorney are not good enough. This would create a burden and certainly difficult practice of attorneys trying to contact adversary parties directly to ratify settlement agreements.

#### IV. CONCLUSION

For the foregoing reasons, this case involves matters of public and great general concern. Appellant Place therefore requests that this Court take discretionary jurisdiction in this appeal so that these matters could be reviewed on their merits.

Respectfully submitted,



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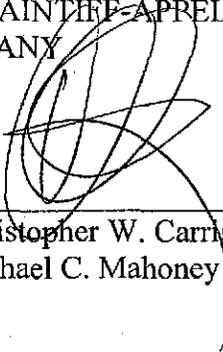
**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing was served this 24 day of March, 2009, via regular U.S. mail, postage prepaid upon the following:

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## APPENDIX A

IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
CLARK COUNTY

MARY ADKINS, et al.

Plaintiff-Appellants

v.

ESTATE OF VERLIN J. PLACE, et al.

Defendant-Appellees

Appellate Case No. 08-CA-73

Trial Court Case No. 06-CV-0462

(Civil Appeal from  
Common Pleas Court)

.....  
OPINION

Rendered on the 6<sup>th</sup> day of February, 2009.  
.....

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FAIN, J.

Plaintiffs-appellants Mary and Tim A. Adkins appeal from a judgment entered by the trial court to enforce a purported settlement agreement between them and defendant-appellee Franco Orefice, Administrator of the Estate of Verlin J. Place, deceased, whereby the Adkinses would receive \$20,000 from the Estate. The Adkinses contend that the trial court erred by entering the judgment without a hearing, because there is a genuine dispute whether they ever entered into the settlement agreement. Orefice contends that the Adkinses' attorney, T. Jeffrey Beausay, who agreed to the \$20,000 settlement, had apparent authority to enter into the settlement agreement on behalf of the Adkinses.

One might think that an attorney retained to represent a client in connection with a matter in litigation would have apparent authority to settle that matter on behalf of the client, but the rule in Ohio is clearly otherwise. There may be an issue of fact whether the Adkinses' attorney had actual authority to enter into the settlement agreement. Accordingly, the judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

I

Mary Adkins was injured when a car in which she was a passenger was struck by a car being driven by Place, who allegedly ran a red light. The Adkinses brought this action against Place for injuries and lost wages Mary Adkins sustained as a result of the collision and for Tim Adkins's loss of services and consortium. When the Adkinses discovered that Place was deceased, Orefice, as administrator of Place's estate, was substituted as defendant.

The events giving rise to the present controversy are set forth in an affidavit filed in the trial court by Beausay, the Adkinses' attorney, the text of which is as follows:

"1. I am trial counsel for plaintiffs in the above case. This case arises from a motor vehicle accident that occurred on May 22, 2004. I just recently took over the case from attorney David Kiger. Also, two insurance companies with subrogation liens recently were ordered added as parties.

"2. Settlement discussions were ongoing right up until the deposition of Dr. Eric Smith on June 20. A new offer was made by defendant right before said deposition, and the offer was relayed by telephone to our clients.

"3. During Dr. Smith's deposition, Mr. Adkins left a message on my cell phone, and stated that he and his wife 'would like to go ahead with it,' or 'we would like you to go ahead with it,' or words to that effect. I interpreted the message to mean that they wanted to go ahead with the settlement; they actually meant that they wanted to go ahead with the deposition and trial.

"4. I called Mr. Carrig [who represented the defendant] and stated that the case was settled. Mr. Carrig said he would call the court and notify the court that the case was settled.

"5. On June 27 at approximately 2:00 p.m., Mr. Adkins called me, and stated that he was expecting to go to trial on Monday, June 30. I explained to him that the case was settled at his direction. He was extremely surprised by this, and explained that, in his voice mail message, he meant for the deposition and trial to go forward, not the settlement.

"6. I immediately contacted Mr. Carrig and the court. \* \* \* ." (Emphasis in original.)

On July 7, 2008, the Adkinses moved to reinstate the case on the trial docket. Orefice opposed this motion and moved, instead, to enforce the settlement. Without a hearing, the trial court overruled the Adkinses' motion, and sustained Orefice's motion to enforce the settlement agreement. The trial court entered the following judgment:

"This Court, having fully considered Plaintiffs' Motion to Reinstate Case to Trial Docket and Defendant Estate of Verlin J. Place's Cross-Motion to Enforce the Settlement, hereby finds that Plaintiffs' motion is not well-taken and thus is denied in its entirety. The Court further finds that Defendant's cross-motion is well-taken, and is hereby granted in its entirety.

**"ORDERED, Plaintiffs' motion is DENIED, and Defendant Estate of Verlin J. Place's cross-motion is GRANTED; thus, Plaintiffs are ordered to comply with all terms of the agreed-upon settlement in the amount of \$20,000.00."** (Bold-face in original.)

Subsequently, the trial court entered a modification of its judgment, as follows:

"This matter was before the Court on plaintiff's motion for clarification of the Court's August 4, 2008 Entry ordering plaintiffs to comply with all terms of the agreed upon settlement in the amount of \$20,000.

"The Court most certainly understands that there are four claimants in this case: (1) Mary Adkins, (2) Tim Adkins, (3) State Farm, and (4) Auto-Owners.

"The Court will not, and cannot, order American Family to do anything since any and all claims against that entity were dismissed by way of Entry dated May 18, 2007.

"The terms of the settlement are as follows: The Estate of Verlin Place is to pay plaintiffs \$20,000 forthwith. State Farm and Auto-Owners, as subrogated entities, are to be reimbursed from that \$20,000 for benefits they paid to or on behalf of the plaintiffs. In

accordance with documents filed in the case, \$6,191.12 is due and owing State Farm, leaving a balance of \$13,808.88. From this balance, plaintiffs are to reimburse Auto-Owners for benefits it paid to or on behalf of the plaintiffs. All remaining funds, less agreed upon attorney fees, are to be distributed directly to plaintiffs.

"IT IS SO ORDERED."

From the judgment of the trial court, the Adkinses appeal.

II

The Adkinses' sole assignment of error is as follows:

"THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO ENFORCE SETTLEMENT."

The basis, both in the trial court and on appeal, for Orefice's argument that the \$20,000 settlement should be enforced, is that Beausay, the Adkinses' attorney, had apparent authority to enter into a settlement agreement on behalf of his clients, regardless of whether his clients ever gave him actual authority to do so.

"Under an apparent-authority analysis, the acts of the principal, rather than the agent, must be examined. *Master Consol. Corp. v. Banc Ohio National Bank* (1991), 61 Ohio St.3d 570, 576-577, 575 N.E.2d 817. For the principal to be liable, the principal's acts must be found to have clothed the agent with apparent authority. *Id.*" *Groob v. Key Bank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170.

"The apparent power of an agent is to be determined by the act of the principal and not by the acts of the agent; a principal is responsible for the acts of the agent within his apparent authority only where the principal himself by his acts or conduct has clothed the

agent with the appearance of the authority and not where the agent's own conduct has created the apparent authority." *Logsdon v. Main-Nottingham Inv. Co.* (Montgomery County, 1956), 103 Ohio App. 233, 242, 3 Ohio Op.2d 289, 74 Ohio L. Abs. 467, 141 N.E.2d 216. See, also, 3 O. Jur.3d 96, Agency and Independent Contractors, §73.

In the case before us, the only act that the Adkinses took that arguably clothed Beausay with apparent authority to enter into a settlement agreement on their behalf was to retain him as their attorney to represent them in this litigation. We are sympathetic to Orefice's argument that the mere act of retaining an attorney to represent a client with respect to matters in litigation, without more, ought to be enough for an adverse party, or a third party, to believe reasonably that the attorney has authority to enter into a settlement of the matters in litigation. But that does not seem to be the law in Ohio.

In *Morr v. Crouch* (1969), 19 Ohio St.2d 24, Ruth Crouch owned land that was the subject of an appropriation action. Her attorney, her husband (who was not an owner of the land), and the assistant attorney general representing the State met in chambers and agreed to settle the appropriation action for \$14,200. The attorney representing Crouch mistakenly believed that he had her authority to settle the action. Crouch moved to vacate the judgment, then died, and her husband was substituted as the executor of her estate. The Supreme Court of Ohio held that "an attorney who is without specific authorization has no implied power by virtue of his general retainer to compromise and settle his client's claim or cause of action." *Id.*, at 27.

We have followed *Morr v. Crouch*, *supra*, in *Brotherton v. Bules* (January 30, 1981), Clark App. No. 1440. See, also, *Saylor v. Wilde*, Portage App. No. 2006-P-0114, 2007-Ohio-4631.

Of the cases cited by Orefice, the most troublesome is *Argo Plastic Products v. Cleveland* (1984), 15 Ohio St.3d 389. In that case, a default judgment was rendered against the City of Cleveland as to liability. While a damages hearing was pending, the city attorney settled with the plaintiff for \$553,673.74, and judgment was entered against the city in that amount. Three months later, the city moved for relief from the judgment, under Civ. R. 60(B), contending, among other things, that the city attorney only had authority to settle the action up to \$2,500. The Supreme Court of Ohio held that the city was not entitled to relief under Civ. R. 60(B), opining as follows:

"The city may indeed have been factually surprised, perhaps even shocked, that its counsel, who supposedly only had authority to settle a case for \$2,500, settled the instant lawsuit for over \$500,000. Nevertheless, we hold that the city is not entitled to relief from judgment under Civ. R. 60(B) pursuant to *GTE [Automatic Electric v. ARC Industries* (1976), 47 Ohio St.2d 146], *supra*.

" \* \* \*

"In our view, the principle expressed in *GTE, supra*, with respect to excusable neglect under Civ. R. 60(B)(1), applies equally to a claim of surprise under the same provision. For purposes of Civ. R. 60(B)(1), then, the conduct of counsel is imputed to his client. It follows that the city may not now obtain relief from judgment under Civ. R. 60(B)(1) solely upon ground of misconduct by *its own attorney*. Thus, under our holding in *GTE, supra*, any 'mistake, inadvertence, surprise or excusable neglect,' as set forth in Civ. R. 60(B)(1), by counsel for a party does not entitle that party to relief from judgment under the rule.

"In the case *sub judice*, the city occupies the same position as did ARC Industries in *GTE, supra*. As we did in *GTE*, we therefore impute [the city attorney's] actions to the city in considering whether the city may obtain relief from judgment under Civ. R. 60(B)(1). That being the case, the city's contention that Civ. R. 60(B) relief is warranted where its attorney exceeds his settlement authority is without merit. The city's remedy, if any, lies elsewhere.

"While we have sympathy for the city's situation, we feel that it would be manifestly unjust to appellants herein to vacate the judgment entered below pursuant to the settlement on the amount of damages. Using the language employed in *GTE, supra*, we would be 'visiting the sins of \* \* \* [the city's] lawyer upon the \* \* \* [appellants].' *Id.* at 152. Such would run afoul of the established purpose of Civ. R. 60(B) which is to afford 'relief in the interests of justice.' *Svoboda v. Brunswick* [(1983), 6 Ohio St.3d 348], at 351. See, also, *Blasco v. Mislik* (1982), 69 Ohio St.2d 684, 687-688 \* \* \* ." (Emphasis in original.)

Can the holding in *Argo Plastic Products v. Cleveland, supra*, be reconciled with the holding in *Morr v. Crouch, supra*, to which it does not refer? We believe that it can. In the *Argo Plastic Products* opinion, the Supreme Court of Ohio was at pains to note, repeatedly, that the issue under review arose in the context of a motion for relief from judgment. The judgment on the settlement in that case had already become final, so that the extraordinary circumstances set forth in Civ. R. 60(B) were required to relieve the aggrieved litigant from its effects. The Supreme Court employed the familiar principle that bad lawyering is not a justification for relief, under Civ. R. 60(B), from a judgment that has become final.

By contrast, the judgment on the settlement in the case before us, like the judgment in *Morr v. Crouch, supra*, has not become final, a timely appeal having been taken from

that judgment. We conclude that these two cases – *Morr v. Crouch* and *Argo Plastic Products v. Cleveland* – are distinguishable upon the ground that the former involved a judgment that had not yet become final, while the latter involved a judgment that had become final, and that we therefore need not conclude that in deciding *Argo Plastic Products*, the Ohio Supreme Court implicitly overruled *Morr v. Crouch*.

The other cases cited by Orefice are easier to distinguish. In *Elliott v. General Motors Corp.* (1991), 72 Ohio App.3d 486, in holding that an attorney's authority to settle litigation need not be express, the court merely held that where, as in that case, there is a factual dispute whether the litigant gave his attorney *actual* authority to settle the case, an evidentiary hearing is required to resolve that issue of fact. Similarly, in *Thirion v. Newmann*, Ashtabula App. No. 2003-A-0006, 2003-Ohio-6419, it was held that a factual dispute whether an attorney had actual authority to settle a case required an evidentiary hearing; and, after that hearing was held, in a subsequent appeal the same court held that there were facts in the record to support the trial court's finding that the client had, in fact, authorized his attorney to settle the case. *Thirion v. Newmann*, Ashtabula App. No. 2004-A-0032, 2005-Ohio-4486. Finally, in *Garrison v. Daytonian Hotel* (1995), 105 Ohio App.3d 322, a decision of this court, the issue was whether the actual authority the client had given the attorney to settle the case for \$20,000 had expired as a result of an intervening counter-offer. We held that the intervening counter-offer did not extinguish the authority that the client had previously given the attorney, which the client had not revoked.

One theme running throughout Orefice's brief is the suggestion that an attorney's authority to negotiate on behalf of his client necessarily implies the authority to enter into a settlement agreement on behalf of his client. In our view, these authorities are not the

same. This is illustrated by a plausible, at least, if not familiar, scenario in which the attorney for the injured plaintiff rejects the insurance company's offer of \$50,000 to settle the case by saying to the insurance company's attorney: "See if your client can come up with \$100,000; if it will offer that amount, I will recommend to my client that she take it." In this scenario, it is clear that both attorneys are negotiating on behalf of their clients; it is equally clear that neither attorney yet has authority from the client to enter into a settlement agreement. Thus, the authority to negotiate is not the same as the authority to enter into a settlement agreement.

Finally, in *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374, and in several of the cases cited above, it has been held that where there is a factual dispute concerning the existence of a settlement agreement, an evidentiary hearing is necessary. For this reason, we conclude that it is premature to determine that Orefice is not entitled to enforce the alleged settlement agreement. There is a potential dispute in this case whether the Adkinses gave their attorney actual authority to settle this litigation. The trial court has not held an evidentiary hearing on that factual issue. Although we have concluded that Beausay was without apparent authority to enter into the settlement agreement, it would be appropriate for the trial court to hold an evidentiary hearing, unless the parties stipulate the relevant facts, to determine whether Beausay had actual authority from his clients to enter into the settlement agreement on their behalf.

The Adkinses' sole assignment of error is sustained.

III

The Adkinses' sole assignment of error having been sustained, the judgment of the

trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

.....

DONOVAN, P.J., and BROGAN, J., concur.

Copies mailed to:

- T. Jeffrey Beausay
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- Michael C. Mahoney
- Mark J. Sheriff
- Alicia E. Zambelli
- Steven J. Zeehandelar
- Hon. Douglas M. Rastatter

## APPENDIX B

IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
CLARK COUNTY

MARY ADKINS, et al.

Plaintiff-Appellants

v.

ESTATE OF VERLIN J. PLACE, et al.

Defendant-Appellees

:  
:  
: Appellate Case No. 08-CA-73  
:  
: Trial Court Case No. 06-CV-0462  
:  
: (Civil Appeal from  
: Common Pleas Court)  
:  
: **FINAL ENTRY**

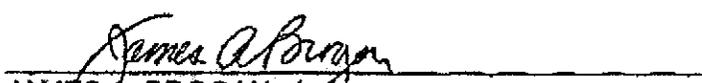
.....

Pursuant to the opinion of this court rendered on the 6th day  
of February, 2009, the judgment of the trial court is **Reversed**, and this cause is  
**Remanded** for further proceedings consistent with the opinion.

Costs to be paid as stated in App.R. 24.

CLARK COUNTY  
COURT OF APPEALS  
  
FEB 9 2009  
  
FILED  
RONALD E. VINCENT, CLERK

  
\_\_\_\_\_  
MARY E. DONOVAN, Presiding Judge

  
\_\_\_\_\_  
JAMES A. BROGAN, Judge

  
\_\_\_\_\_  
MIKE FAIN, Judge

FEB 9 2009

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