

**IN THE SUPREME COURT OF OHIO**

**ORIGINAL**

Mary L. Adkins, et al.

Appellees

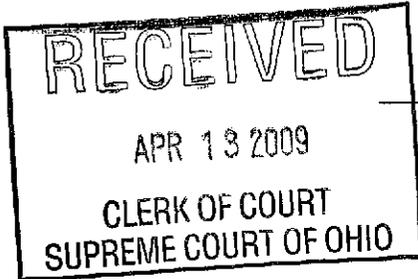
vs.

Estate of Verlin J. Place

Appellant

Case No. 2009-0557

On Appeal from the Clark County Court of Appeals, Second Appellate District



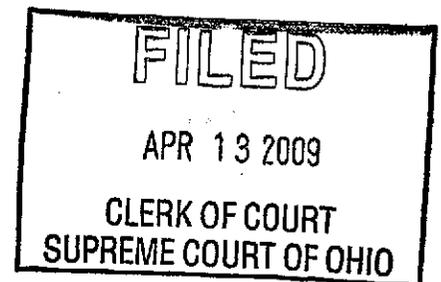
**MEMORANDUM IN RESPONSE**

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## **I. "Public or great general interest"**

While this case presents interesting legal issues, this court has already addressed these issues in *Morr v. Crouch* (1969), 19 Ohio St.2d 242 and *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374. No other cases need to be read.

The trial court made an obvious mistake, the court of appeals corrected it, and the matter should now be determined on its merits in the trial court.

### **A. Facts**

On May 22, 2004, plaintiff Mary Adkins was a passenger in a car driven by her sister when an elderly gentleman, Verlin Place (now deceased), ran a red light, causing a collision with the Adkins vehicle. Ms. Adkins sustained injuries in this accident, and was treated immediately after the accident at Community Hospital in Springfield. Mr. Place was insured by American Family Insurance.

At the time of the accident, Ms. Adkins was undergoing chemotherapy and radiation for breast cancer. She was already in a weakened state, and the injuries sustained in this accident just made matters more difficult for her. Her medical expenses were \$16,191.12.

Mary and her husband, Tim Adkins, made claims against American Family for Mary's injuries and Tim's losses associated with her injuries. Pre-suit, American Family offered \$18,000 to settle the case. This was not acceptable to plaintiffs, so suit was filed on March 30, 2006.

### **B. Procedural History**

The undersigned counsel became involved in this case in June 2008. At that time, the case was set to begin trial on June 30, 2008. We scheduled the trial deposition of Eric Smith,

DC, a treating chiropractor, for June 20, 2008. On June 20, immediately before the Smith deposition, attorney Beusay phoned attorney Carrigg (who had also just recently become involved in the case), to see if American Family would increase their offer before the Smith deposition. Mr. Carrigg called American Family, then called attorney Beusay and increased the offer from \$18,000 to \$20,000. I immediately called the Adkinses, and relayed this offer. The Adkinses wanted to talk it over and call me back, but the deposition of Dr. Smith was starting in about one hour, so I left for the deposition in Springfield. I did have my cell phone with me, and gave my cell number to the Adkinses.

The Adkinses discussed the offer, decided to reject it and proceed to trial. Meanwhile, the deposition of Dr. Smith went forward as scheduled (I did not hear from the Adkinses prior to starting the deposition of Dr. Smith). During the deposition, Mr. Adkins left a voice message on my cell phone (which I had turned off during the deposition), and said, "we want you to go ahead and take it," "we want to go ahead with it," or "we want you to go ahead with it," or words to that effect. I thought the Adkinses wanted to accept the offer, so I called Mr. Carrigg's office to see if the offer was still on the table; if so, we would accept the offer. I first spoke with a staff member at Mr. Carrigg's firm, and then spoke directly with Mr. Carrigg via cell phone, confirming that the Adkinses would accept the \$20,000. I asked Mr. Carrigg to hold off on issuing the settlement check pending my negotiations with the subrogated insurance carriers. He agreed, and said he would call the court and advise that the case was settled.

On Thursday, June 26 or Friday, June 27, Mr. Adkins called me, asking if we were going to trial on Monday, June 30. I said the case was settled as he requested. Mr. Adkins was shocked and said they did not intend to accept the offer. When he said "go ahead and take it," he meant for me to take the deposition of Dr. Smith, and "go ahead" with the trial on Monday. This

of course was a shock to me too, so I immediately phoned Mr. Carrigg and advised him of this misunderstanding.

We immediately called the court to advise of this misunderstanding. The trial court would not re-assign the case to the trial docket at our informal request (indeed, the trial court would not conduct a conference call or status conference at our request, the boorish court bailiff hanging up on the undersigned), so we filed a motion to re-establish the case on the court's trial docket. Instead of supporting our position on an obvious misunderstanding, attorney Carrigg took the position that a settlement was reached, and filed a motion to enforce the settlement. Along with his motion, he attached an order granting his motion for the judge to sign, which the judge did. There was no hearing date set, no discussion of the merits of the motion, no indication as to what exactly the terms of the alleged settlement were, no indication as to whether the settlement included State Farm and Auto-Owners, who had separate counsel at that time, and if the settlement did not include State Farm and Auto-Owners, whether the court intended the order to be final by finding that there is no just reason for delay. Instead, the trial judge just signed the order that was submitted by American Family's lawyer with the motion to enforce settlement. This was the catalyst for this entire fiasco.

Surprised by the trial court's remarkably cavalier conduct, we filed a motion for clarification of the order, since the order did not answer any of the questions raised above, and indeed created additional questions. In ruling on the motion for clarification, the trial court incorporated terms and conditions of this phantom settlement that the parties never discussed! For example, according to the trial judge, the subrogation liens were to be paid 100%, even though we had negotiated reductions for both liens! So the settlement was \$20,000, \$16,191.12 of which would go to the subrogated insurance companies, leaving \$3,808.88. The attorney fee

of 33.3% of the gross settlement would be \$6,666.67, plus expenses. Which means Mrs. Adkins gets \$0, and in fact would be indebted under the attorney fee agreement to her counsel. This would be funny if it weren't so unfortunate for Mr. and Mrs. Adkins, whose case under normal circumstances should have been resolved a few months after this accident in May 2004. Our suspicion is that the trial judge does think this is funny.

## II. Argument

On appeal to the Second Appellate District, there were essentially two issues, one procedural, and one substantive. The first issue on appeal was procedural: Whether a trial court must conduct an evidentiary hearing prior to entering judgment where the terms or existence of a settlement agreement are disputed. In *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374, this court held:

Where the meaning of terms of a settlement agreement is disputed, or where there is a dispute that contests the existence of a settlement agreement, a trial court must conduct an evidentiary hearing prior to entering judgment.

That resolves this appeal. The trial court did not hold an evidentiary hearing, which is why the Court of Appeals remanded the case. The court, if it likes, can stop reading here and deny appellant's request for jurisdiction.

The second issue in this case is a substantive issue: Whether an attorney has implied or apparent authority, solely by virtue of his/her retention, to settle a case if the client does not authorize the settlement. In *Morr v. Crouch* (1969), 19 Ohio St.2d 242, this court held:

"An attorney who is without special authorization has no implied or apparent authority, solely by virtue of his general retainer, to compromise and settle his client's claim or cause of action." Syl. ¶ 2.

For this reason, settlements generally are not final until the parties sign a written settlement agreement, which usually contains boilerplate terms and conditions that are not usually discussed

by the attorneys in settlement discussions. This is why we have our clients sign written settlement agreements (i.e. releases), and we file notices or entries of dismissal before a case is finalized.

Although the syllabus in *Rulli* addresses only the procedural issue of the requirement of a hearing in cases of disputed settlements, Justice Moyer made several observations about the enforceability of settlements in general:

[I]t is not within the province of the trial judge to enforce a purported settlement agreement when the substance or the existence of that agreement is legitimately disputed.

Though we encourage the resolution of disputes through means other than litigation, parties are bound **when a settlement is reduced to final judgment**. Since a settlement upon which final judgment has been entered eliminates the right to adjudication by trial, judges should make certain the terms of the agreement are clear, and that **the parties agree on the meaning of those terms**. *Id* at 376....

Where parties dispute the meaning or existence of a settlement agreement, a **court may not force an agreement upon the parties**. To do so would be to deny the parties' right to control the litigation, and to implicitly adopt (or explicitly, as the trial court did here) the interpretation of one party, rather than enter judgment based upon a mutual agreement. *Id* at 377.

Consequently, the trial court in this case clearly erred in forcing an agreement on the parties where the plaintiffs never authorized a settlement in the first place.

Appellant's main argument is based on *Argo Plastic Products Co. v. Cleveland* (1984), 15 Ohio St.3d 389. First, *Argo* (decided in 1984) would be trumped by *Rulli* (decided in 1997). Second, *Argo* involved undoing a Judgment via Civil Rule 60(B); *Rulli* involved the issue in this appeal, i.e. a trial court cannot enforce a disputed settlement without an evidentiary hearing.

In *Argo*, the attorney for the city of Cleveland committed egregious and repeated legal malpractice (fraudulent inducement in initial settlement, failure to respond to motion to vacate default, failure to answer complaint, failure to oppose motion for summary judgment, failure to

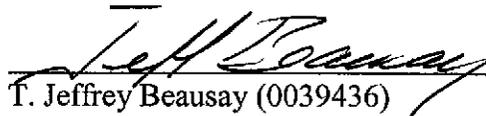
appeal decision on summary judgment, and entering into an **agreed judgment entry** in the amount of \$553,673.74 without authorization). Three months later, the city of Cleveland filed a motion for relief from judgment under Civ. R. 60(B). The city claimed that the attorney was only authorized to settle the case up to \$2,500. Compare those facts with those in this case!

The holding in *Argo* is that a client may not obtain relief from judgment under Civ. R. 60(B)(1) solely on the ground of misconduct by his/her own attorney. In the case at bar, there was no "judgment" entered from which to obtain relief (a proper appeal being perfected from the trial court's granting of defendant's motion to enforce settlement), and no attorney misconduct leading to a judgment. There was nothing more than a simple misunderstanding between Mr. Adkins and his attorney as to the Adkinses' wishes regarding American Family's settlement offer. The mess before the court was created by American Family Insurance Company, their lawyers, and a complicit trial judge.

Appellant also relies on the decision of a magistrate in an unreported federal district court case, *Kraras v. Safeskin Corp.* (2004), 2004 WL 2375525. That *Kraras* does not mention *Rulli* says something about the quality of this decision. Nevertheless, the magistrate in *Kraras* found, **after an evidentiary hearing**, that "Ms. Kraras did authorize [her attorney] to accept Safeskin's offer." Id. p. 7. In the case at bar, the Adkinses did not authorize their attorney to accept American Family's offer. The only reason counsel would rely on such a case is that it (like American Family's lawyers in this case) uses careless language in the application of *Morr*, and the magistrate (like American Family's lawyers in this case) apparently didn't even read *Rulli*.

For all of the foregoing reasons, we suggest that the court decline jurisdiction in this ludicrous appeal.

Respectfully submitted,

  
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**CERTIFICATE OF SERVICE**

A copy of the foregoing was served via regular U.S. mail upon the following on April 10,

2009:

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