

ORIGINAL

IN THE SUPREME COURT OF OHIO

ROBERT BERRY, et al.)	Case No. 2009-1507
)	
Appellees)	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
)	
vs.)	
)	Court of Appeals
JAVITCH, BLOCK & RATHBONE, LLP)	Case No. CA 08 091723
)	
Appellant)	

MEMORANDUM IN OPPOSITION TO JURISDICTION

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I. INTRODUCTION

Appellant Javitch, Block & Rathbone, L.L.P. (“Javitch”), seeks this appeal in an effort to upset precedent and over-turn three long-held decisions of this Honorable Court: *Frederickson v. Nye* (1924), 110 Ohio St. 459; *Shallenberger v. Motorists Mutual Ins. Co.* (1958), 167 Ohio St. 494; and *Haller v. Borrer Corp.* (1990), 50 Ohio St.3d 10. Since the principle of *stare decisis* is “the bedrock of the American judicial system,” which is “designed to provide continuity and predictability in our legal system,” *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, 217, 226, Javitch’s attempt to destroy or re-write the holdings of this Court should be dismissed and jurisdiction declined.

Not only does firmly established precedent support the decision of the Eighth District Court of Appeals from which Javitch now appeals, the facts of *Berry v. Javitch* are so unique and idiosyncratic that they do not warrant the attention of this Court. Indeed, the court of appeal’s decision extensively reviewed the disputed facts through seven pages. The appellate court further determined that the facts of the case are in dispute and that summary judgment should not have been granted by the trial court. Even Javitch’s Memorandum in Support of Jurisdiction includes—by necessity—a lengthy statement of the disputed facts. This appeal is not a case of great public concern or general interest: It is a case of concern only to the Berrys and to Javitch. Thus, judicial economy does not warrant any further consideration.

II. THERE ARE NO PROPER GROUNDS FOR JURISDICTION

A. Grounds for Discretionary Appeals

This Court hears discretionary appeals where there are constitutional questions or where “the case is one of public or great general interest.” S. Ct. Prac. R. III. There is no constitutional question in this case. Therefore, proper grounds for jurisdiction, if any, only exist if Javitch can demonstrate

that its case is one of public or great general interest. *Williamson v. Rubich* (1960), 171 Ohio St. 253, 254.

B. This Is Not a Case of Public or Great General Interest

The framers of the Ohio Constitution determined that “public interest” refers to cases in which some “state, county or city, some public body” are involved. *Proceedings and Debates of the Constitutional Convention of 1912*, C.B. Galbreath, Secretary, Clarence E. Walker, Reporter, F.J. Heer Printing Co., Columbus, OH (1912), Vol. I, p. 1030. There is no public entity involved in this case.

Cases of “great general interest” are those “which involve questions affecting a good many people and that have aroused general interest.” *Id.* This Court has since interpreted the phrase to include:

- (1) “Novel questions of law or procedure,” *Noble v. Colwell* (1989), 44 Ohio St.3d 92, 94;
- (2) The application or extension of constitutional rights or principles, *State v. Bolan* (1971), 27 Ohio St.2d 15, 17;
- (3) “The duty and authority of public officials in a situation likely to recur,” *In re Popp* (1973), 35 Ohio St.2d 142, 144;
- (4) The duty and authority of private institutions, *Wallace v. Univ. Hospitals of Cleveland* (1961), 171 Ohio St. 487, 489 (patient’s right to her medical records); and
- (5) The resolution of a conflict between the courts of appeals, *Flury v. The Central Publishing House of Reformed Church in the U.S.* (1928), 118 Ohio St. 154, 159 (whether such conflict has been certified or not).

This case does not present any novel questions of law or procedure. There are no questions regarding the extension of constitutional rights or principles. There are no questions regarding the

duty and authority of either a public official or a private institution. And as will be demonstrated below, there are no conflicts among the courts of appeals.

There is nothing special about this case which makes it a matter of public or great general interest. Javitch's Memorandum in Support of Jurisdiction argues that because this case involved a settlement agreement and a large number of cases in civil litigation are settled, somehow *this* case is a matter of great general interest. To the contrary, the facts of *Berry v. Javitch* are so unusual that it is quite likely that they have not been seen before in the state of Ohio, and perhaps may never be seen again.

III. STATEMENT OF THE CASE AND FACTS

Appellees Robert and Diane Berry sued Javitch for legal malpractice in June 2000. That case was settled in what Javitch admits was "a unique settlement" agreement: Javitch consented to a judgment of \$195,000, but only had to initially pay \$65,000. The Berrys could later attempt to collect the balance of the judgment from Javitch's insurance carrier, Legion, which had earlier denied coverage.

The Berrys now allege—in a separate lawsuit—that they were fraudulently induced into this strange settlement arrangement by Javitch's misrepresentation. In an answer to an Interrogatory propounded during the malpractice case, Javitch only disclosed the Legion policy. However, a second insurance policy may have covered the malpractice. In fact, the same day Javitch supplemented its Interrogatory responses, its attorney made a demand for insurance coverage on a second insurance company, Clarendon. But Javitch never disclosed the existence of this Clarendon policy, although it simultaneously demanded coverage from the insurer.

The Berrys agreed to the unusual settlement agreement in the malpractice case because it appeared there was limited insurance coverage and Legion was denying coverage. Had the Berrys known that a second insurance policy may have been available to fund a settlement or verdict, the Berrys would not have entered into the settlement agreement.

The Berrys sued Javitch for fraud in the inducement related to the settlement agreement. The Cuyahoga County Court of Common Pleas granted summary judgment to Javitch without a written opinion, simply stating that no material issues of fact remained. The Eighth District Court of Appeals reversed the trial court's decision, holding:

There is ample evidence to support that the Berrys justifiably relied on the representations from Javitch that Legion was the only coverage. While the Berrys realized Legion may not pay the claim when they settled with Javitch, they were unaware that there was another insurance company they could pursue. If the Berrys had known about Clarendon, they may have declined to enter the settlement agreement.

Accordingly, we find a material issue of fact still remains as to whether Javitch purposefully withheld the existence of the Clarendon policy; therefore, we sustain the Berrys' sole assignment of error.

Berry v. Javitch, Block & Rathbone, CA 08 091723, pp. 10-11.

Javitch does not seek to reverse the Court of Appeals in substance. Instead, Javitch argues that the Berrys must pay Javitch back the \$65,000 paid in the malpractice settlement *before* pursuing their separate action for fraud. This argument is contrary to well heeled precedent and was never raised below before the court of appeals.

IV. ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW

Javitch's Proposition of Law No. 1:

Where a tort claim is released by execution of a settlement agreement and a consent judgment entry and the releasor desires to recover more than anyone has paid or agreed to pay for the release, the releasor of the tort claim may not pursue a separate action for fraud in the inducement of the release, but must seek relief from the consent judgment and rescind the settlement agreement.

A party who has been fraudulently induced into an agreement may elect one of three remedies: **(1) affirm the contract and sue for damages;** (2) rescind the contract and sue to recover monies paid; or (3) seek equitable rescission of the contract and incidental relief. *Frederickson*, 110 Ohio St. at 468-469. The Berrys elected option one: affirm the malpractice settlement agreement and sue for damages. Javitch wants to upset the settlement and force the Berrys to pay back the \$65,000 settlement before they can sue for damages. This is not supported by Ohio law and is contradicted by the very cases cited by Javitch.

As the Ninth District Court of Appeals succinctly explained:

Summa's third assignment of error states that in order to prevail on her fraud claim, Nancy was required to tender the \$20,000 settlement amount. Summa cites cases where the party releasing a tort claim later desires to pursue the claim despite the release. In such cases, courts have held that the party must at minimum return the consideration paid in exchange for the release. *See, e.g., Shallenberger*, 167 Ohio St. 494, paragraph two of the syllabus. However, Summa's reliance on such cases is misplaced. Nancy is not seeking to vacate the release so she can sue Summa for malpractice. Rather, she has sued for fraud.

Summa Health Sys. v. Vinnigre (2000), 140 Ohio App.3d 780, 789 (underlining added). The releasor is only required to tender back to the releasee the consideration for the release if he is seeking "to overcome the operation of the release," i.e., to rescind it and sue on the underlying case. *Maust v.*

Bank One Columbus (1992), 83 Ohio App. 3d 103, 110 (10th Dist.); see also *Pizzino v. Lightning Rod Mut. Ins. Co.* (1994), 93 Ohio App.3d 246, 251-252 (8th Dist.).

As the Eighth, Ninth, and Tenth District Courts of Appeals' decisions demonstrate, *Shallenberger* is distinguishable; that case involved a personal injury plaintiff attempting to set aside a release which she claimed she had been induced to sign by means of fraudulent misrepresentation. The court held that the plaintiff first had to set aside the release before proceeding to litigate her claims on their merits. In this case, the Berrys are not seeking to somehow upset the release and resurrect their legal malpractice claim. To the contrary, they are following the dictates of the *Frederickson* line of cases and suing separately for fraud. The Berrys are merely seeking to enforce the settlement agreement terms and the judgment amount of \$195,000, less the \$65,000 already paid, as damages.

V. CONCLUSION

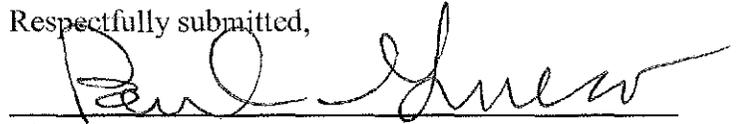
This is not a case of public or great general concern. While the contract in this case is a settlement agreement, and it is true that many civil cases in Ohio are settled, the relationship between this case and the vast majority of those other cases—past and future—ends there. *Berry v. Javitch* has so peculiar a fact pattern (a law firm failing to disclose its other malpractice insurer in response to an Interrogatory, simultaneously making a demand on that second insurance company for coverage, and then entering a consent judgment with a damage limitation), that its impact on other cases in this state is a nil.

Furthermore, the proposition of law submitted by Javitch is contrary to Ohio Supreme Court precedent and *stare decisis*. Furthermore, recent courts of appeals have dealt with the very issue Javitch now raises: all have agreed a releasor need only tender back consideration received when

fraudulently induced into a settlement agreement **IF** he seeks to sue on the underlying claim; if the releasor seeks to enforce the contract and sue for fraud, no tendering back is necessary.

The facts and procedure of this case are unique and unusual. The law of this case is decided and three Ohio courts of appeals have addressed the very proposition of law now raised by Javitch. This case is not one of public or great general concern: It is a case of concern to Javitch alone, who is simply dissatisfied with the ruling of the appellate court.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Paul Grieco", written over a horizontal line.

Christopher M. DeVito
Alexander J. Kipp
Paul Grieco

Counsel for Appellees

CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Opposition to Jurisdiction was sent by ordinary U.S. mail to counsel for Appellants, Roger M. Synenberg, Dominic Coletta, and Clare Christie of Synenberg & Associates, 55 Public Square, Suite 1200, Cleveland, Ohio 44113, on Tuesday, September 15, 2009.

A handwritten signature in black ink, appearing to read "Paul Grieco", written over a horizontal line.

Christopher M. DeVito
Alexander J. Kipp
Paul Grieco

Counsel for Appellees