

IN THE SUPREME COURT OF OHIO

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

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MERIT BRIEF OF APPELLEES ROBERT AND DIANE BERRY

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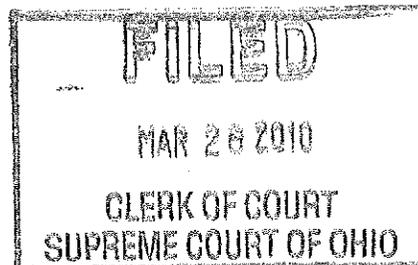


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## STATEMENT OF THE CASE

Plaintiff-Appellees Robert and Diane Berry (the “Berrys”) allege that the law firm Defendant-Appellant Javitch, Block & Rathbone, L.L.P. (“Javitch”) fraudulently induced them to enter a contract. This Honorable Court set forth the remedies available to the Berrys in the seminal case of *Frederickson v. Nye* (1924), 110 Ohio St. 459. Where one has been fraudulently induced to enter a contract, he has three independent remedies:

**First, he may affirm the contract into which he had been induced to enter and sue for his damages for the fraud perpetrated upon him.** Second, he may rescind the contract itself and bring action to recover back the moneys which he has paid. Third, he may bring an action . . . in a court of equity to obtain a rescission of the contract into which he had been induced to enter, with incidental relief.

*Id.* at 468 (emphasis added). The Berrys have elected the first remedy: affirm the contract and sue Javitch for the fraud perpetrated upon them.

In the action for damages for fraudulent representation which induced him to enter into the contract, **he affirms the contract and brings his action to recover damages by reason of such false representations.**

*Id.* at 469 (emphasis added).

The court of appeals’ decision reviewed in detail the many complex facts supporting the Berrys’ claims for fraudulent misrepresentation and concealment. *See Berry v. Javitch, Block & Rathbone, L.L.P.*, 2009-Ohio-3067 (8th Dist.). In summary, the Berrys sued Javitch in June 2000 for legal malpractice. *Id.* at ¶ 2. In response to an interrogatory requesting “each and every” insurance policy which “may” have covered the malpractice, Javitch only

disclosed its policy with Legion Insurance Company (“Legion”), which did not cover the time period when the Berrys’ claim occurred. *Id.* at ¶¶ 2, 15. The Berrys and Javitch entered a consent judgment of \$195,000. *Id.* at ¶ 3. The parties also entered a settlement agreement, which provided that Javitch would only be responsible for \$65,000 of the judgment. *Id.* The settlement agreement again set forth Javitch’s representation that Legion was its legal malpractice insurer. *Id.* However, the Berrys did not release any claims. *Id.* at ¶¶ 3, 12.

Four years after the consent judgment, the Berrys discovered that Javitch had an insurance policy with Clarendon Insurance Company (“Clarendon”) at the time of the alleged malpractice. *Id.* at ¶ 2. After uncovering this second, undisclosed policy, the Berrys brought this case against Javitch for fraudulent concealment and misrepresentation.

The trial court dismissed the case on summary judgment, without an opinion. The court of appeals reversed and remanded, after analyzing the facts and applying Ohio law:

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 into the settlement agreement.**

*Id.* at ¶ 26 (emphasis added) (finding genuine issues of material fact remain for trial).

Javitch's appeal to this Honorable Court does not address the question of fraud. Instead, it seeks to re-write nearly a century of law on the election of remedies in Ohio, while ignoring critical and undisputed facts in this case.

**Settlement Agreements.** A settlement agreement is a contract. *State ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 2004-Ohio-7102 at ¶ 23. If one is fraudulently induced to enter a contract, he may elect from those three remedies set forth in *Frederickson v. Nye*. The Berrys are seeking to affirm the settlement agreement and sue for fraud damages: the \$130,000 **difference** between the \$195,000 consent judgment and the \$65,000 Javitch agreed to pay, plus interest, costs, attorneys fees, and punitive damages (i.e., fraud-type damages). This Honorable Court should affirm the court of appeals' decision to give the Berrys their day in court on this recognized claim.

**Consent Judgments.** A consent judgment is essentially a contractual agreement. *Save the Lake v. City of Hillsboro*, 2004-Ohio-4522 at ¶ 12 (4th Dist.). Javitch erroneously argues that the Berrys must seek relief from that judgment under Ohio Rule of Civil Procedure 60(b)(3).<sup>1</sup> But the Berrys are not seeking to over-turn the consent judgment or

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<sup>1</sup> Despite Javitch's request that this Honorable Court take up this appeal in order to "uphold the well settled policy of favoring prevention of litigation by compromise and settlement of controversies, and the finality of judgments long defended by Ohio courts," (Memo. in Support of Jurisdiction, p. 2; Merit Brief pp. 5-6, 12-13, 16), Javitch's incongruous Proposition of Law would force the Berrys to set aside the consent judgment and re-litigate the underlying legal malpractice case the parties settled years ago. This perverse outcome is not supported by the law or public policy in Ohio, nor the facts of this case.

In truth, Javitch's strategy is simple: If this Court holds that the Berrys' only remedy for Javitch's alleged fraud is by way of Rule 60(B)(3), Javitch will escape liability altogether. A motion under Rule 60 must be made within one year after the judgment. Since the

to re-open the malpractice litigation. Instead, they are affirming the consent judgment and seeking to recover the unpaid balance of that judgment in a separate and independent suit for fraud. *Frederickson v. Nye, supra*. (“option one”).

**Releases.** A release is different in character from a settlement agreement or a consent judgment. *Picklesimer v. v. B&O Rd. Co.* (1949), 151 Ohio St. 1. Sometimes, the remedies available to a plaintiff fraudulently induced to enter a release are more limited than those available to a plaintiff who entered a contract. *Id.* at 4-5. The releasor must tender back any consideration he received, in exchange for the release, and then he may sue on the underlying claim. *Id.* at 7. The *Picklesimer* requirement to tender back **ONLY** applies if the releasor is seeking to litigate the underlying original claim and seek the amount of damages sustained from the original injury. *Id.*

Why Javitch would put all its eggs in the *Picklesimer* basket is inexplicable because **there was no release in this case**. *Berry* at ¶ 12. In fact, the settlement agreement explicitly stated that “Plaintiff will not release Javitch Block with respect to the amount of the consent judgment . . .” *Id.* at ¶ 11 (emphasis added). The *Picklesimer* line of cases, which limits the *Frederickson v. Nye* election of remedies only in cases involving releases, is not applicable to this matter. The Berrys did not release any claims, nor are they seeking to pursue the underlying malpractice claim to determine malpractice-type damages. The Berrys are seeking to affirm the contract (i.e., enforce the judgment rendered in the malpractice case)

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Berrys did not discover the alleged fraud until four years after the judgment, their claims would be time-barred.

and recover separately for fraud-type damages (i.e., the difference between the agreed settlement value and the collected amount).

The court of appeals rejected Javitch's arguments regarding Rule 60 and *Picklesimer*: "We agree with [the Berrys] that Civ.R. 60(B)(3) does not apply in this case because the[y] were not looking to rescind the settlement agreement, but rather were suing for damages caused by Javitch's alleged fraud." *Id.* at ¶ 10. The Eighth District quoted and reaffirmed this Honorable Court's long-standing decision in *Frederickson v. Nye* explaining the three alternative remedies available to a plaintiff fraudulently induced to enter into an agreement. That Eight District's sound legal analysis should be affirmed. There exists a valid cause of action for fraud and genuine issues of material fact remain for trial.<sup>2</sup>

### STATEMENT OF THE FACTS

*The Construction Litigation.* In the 1990s, the Berrys had construction work done on their home. After a dispute arose between the Berrys and some contractors, the Berrys retained Javitch to litigate the matter. Westfield Insurance Company ("Westfield") insured some of the defendants in that case and provided them a defense. Shortly before the trial of that matter, Westfield invited the Javitch law firm to handle the company's subrogation

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<sup>2</sup> The Berrys presented numerous facts as well as an expert opinion — which are **not** the subject of this appeal — to overcome Javitch's motion for summary judgment.

work in northeast Ohio. Javitch wanted Westfield's business more than it wanted to continue to represent the Berrys, so it improperly withdrew from representing them.

*The Malpractice Suit.* The Berrys retained new counsel to complete the construction litigation. Their new counsel also advised them that they had a prima facie case of legal malpractice against Javitch for its improper conduct during the construction litigation and put Javitch on notice of the claim with a letter:

[We] have advised the Berrys that they could prosecute a claim against your firm . . . . We respectfully suggest that you put your firm's malpractice insurance carrier on notice.

*Berry* at ¶ 17 (quoting August 26, 1999, letter from Berrys' counsel to Javitch).

The Berrys sued Javitch for legal malpractice. During discovery, the Berrys issued a standard interrogatory to Javitch regarding its insurance coverage:

State the name of insurer, type of policy/policies, policy number/numbers, and the limits of coverage of **each and every** insurance policy that **may** cover your alleged liability in this action, including umbrella coverage.

*Id.* at ¶ 1 (quoting Interrogatory No. 4). Javitch only disclosed the Legion policy. *Id.* In fact, in a supplemental answer, Javitch again stated that Legion was its only insurer. (See Appendix, p. 1, Supplemental Answer of Defendants to Plaintiffs' Interrogatories.) Although Legion initially provided a defense, it later denied coverage and withdrew its defense. *Id.* at ¶ 3.

*The Consent Judgment & Settlement Agreement.* Javitch and the Berrys negotiated a unique settlement arrangement due to the apparent unavailability of insurance coverage:

**WHEREAS, Javitch Block has legal malpractice insurance coverage which the parties both agree applies to the allegations made by the Berrys, and Javitch Block's insurer, Legion Insurance company, has denied coverage and refused to defend Javitch Block in this matter . . .**

(Javitch Supplement, p. 90) (emphasis added). There were four parts to this settlement arrangement: First, the parties entered a consent judgment for \$195,000. (*Id.* at 94). Second, the parties agreed that Javitch would only be responsible for \$65,000 of the judgment. (*Id.* at 91). Third, the parties would work to obtain the remaining \$130,000 of the judgment from Legion. (*Id.* at 91-92). Fourth, the Berrys would execute a release in the future when the judgment had been satisfied. (*Id.* at 92). The judgment was never satisfied, thus the Berrys did not release Javitch of future claims. *Berry* at ¶¶ 11-12.

*The Truth is Revealed.* Legion continued to deny coverage and prevailed in the coverage dispute. Since Javitch was apparently uninsured, the Berrys sought compensation from the Ohio Guaranty Fund. The Fund replied that the Berrys had not exhausted all of Javitch's insurance coverage: Javitch had insurance with Clarendon at the time of the alleged malpractice.

Javitch had never disclosed the Clarendon policy to the Berrys, not even in response to Interrogatory No. 4, which requested "each and every" policy that "may" provide coverage – a standard request in Ohio. (*See* Appendix, p. 4, Affidavit of W. Craig Bashein.) Nor was the Clarendon policy disclosed in the supplemental answer to the interrogatory.

(See Appendix, p. 1). Javitch's duplicity was exposed in the Eighth District's opinion review of the facts:

Interestingly, on the same day the interrogatory was supplemented, Javitch, through its attorney, sent a letter to Clarendon stating, "**We are hereby putting you on notice of a claim which may be covered by your policy** because of events occurring during your policy period which allegedly constituted a claim."

*Berry* at ¶ 21 (emphasis added).

During the litigation (i.e., interrogatories) and settlement (i.e., agreement) of the malpractice case, Javitch **mised** the Berrys into believing Legion was the only insurance coverage available to satisfy the judgment. Javitch fraudulently concealed – in two sworn interrogatory responses – the Clarendon policy. Javitch continued its fraud upon the Berrys through additional representations and statements in the settlement agreement: "Javitch Block has legal malpractice coverage . . . and Javitch Block's insurer, Legion Insurance Company, has denied coverage. . . ." (Javitch Supplement, p. 90.)

*This Action for Fraud.* It took four years for Javitch's fraud to be uncovered. Once the Berrys discovered the fraud, they filed a new case, separate and distinct from the malpractice action, alleging fraudulent and negligent misrepresentation and concealment. Javitch moved for summary judgment, arguing there were no issues for trial and that it was entitled to judgment as a matter of law because the one-year limitation imposed by Rule 60 had expired. Apparently, Javitch's theory of the case was that the Berrys had to first set aside the consent judgment in the underlying malpractice case before seeking *any* relief.

The Eighth District rejected Javitch's arguments, held that Rule 60 does not apply to this case, and recognized that the Berrys had chosen to pursue the first remedy afforded by this Honorable Court in *Frederickson v. Nye*. The court of appeals understood that the Berrys were not seeking to upset the consent judgment, nor were they seeking malpractice-type damages. The Berrys are affirming the agreement and seeking, as fraud-type damages, the unpaid balance of the consent judgment. The Berrys are not seeking to re-litigate claims and have a jury determine the underlying damages for legal malpractice.

*This Appeal.* Javitch has set forth a peculiar proposition of law dealing with "releasers" which is drawn from *Picklesimer*. But Javitch does not – and cannot – point to a release in this case, which would make the Berrys "releasers" subject to *Picklesimer's* limitation on the *Frederickson v. Nye* rule on the election of remedies. At best, Javitch's Proposition of Law asks this Court to overrule *Frederickson v. Nye* and hold that settlement agreements are not contracts which can be affirmed before suing for fraudulent inducement. This proposed holding has no basis in Ohio law or public policy.

The decision of the court of appeals to give the Berrys their day in court, on a case of fraud, is firmly grounded in this Honorable Court's unquestioned precedent of *Frederickson v. Nye* and the law on the election of remedies applicable to all contracts in this state. The Eighth District's holding should be affirmed.

## ARGUMENT

Near the end of this brief, the Berrys submit their own Propositions of Law, which will re-affirm and clarify *Frederickson v. Nye*. First, however, Javitch's Proposition of Law must be rejected. It asks this Honorable Court to depart dramatically from precedent and write a new law on the election of remedies.

### Javitch's Proposition of Law:

**Where a tort claim is released by execution of a settlement agreement and consent judgment entry and the releasor desires to recover more than anyone has paid or agreed to pay for the release, the releasor of that 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.**

This proposed holding suffers from three fatal flaws: (1) a serious *misapplication* of the law on the election of remedies; (2) a grievous *mistake* alleging the facts of the Berrys' case; and (3) a fundamental *misunderstanding* of the nature of the Berrys' claims for fraud and the contract damages sought in this case. Accepting Javitch's proposed holding would result in an absurd and unjust outcome: the consent judgment would be over-turned; the Berrys forced to pay Javitch \$65,000; the parties compelled to go to trial on the *malpractice* case; and Javitch would escape all consequences for its alleged fraud, including its admission that the underlying malpractice case should settle for \$195,000.

## I. The Law of Election of Remedies

A party who has been fraudulently induced to enter a contract he would not have entered absent the fraud can elect from three remedies prior to trial. *Frederickson* at 468. First, he can affirm the contract and sue for fraud-type damages. Second, he may rescind the contract and try to recover on the underlying matter. Third, he may bring an action in equity to obtain rescission and recover incidental relief. *Id.* These three remedies have been available to plaintiffs, like the Berrys, for nearly a century.

For example, in *Colvenbach v. McLaughlin*, 1982 Ohio App. LEXIS 13569 (11th Dist.), the plaintiffs purchased a building from the defendant, who represented its value was \$50,000. In reliance upon this representation, the plaintiffs agreed to a contract to purchase the building for that amount. *Id.* at \*1. After paying \$37,500, the plaintiffs learned the property was only worth \$35,000, so they ceased making payments and filed an action for fraud, seeking the alternative remedies of contract compensatory damages or rescission and litigation of the underlying matter. *Id.* “Before the start of trial, plaintiff made an election of remedies to maintain the contract and seek compensatory damages.” *Id.* at \*1-2. The court of appeals properly followed *Frederickson* and recognized that this was an appropriate election of the first alternative remedy. *Id.* at \*3-4.

The Berrys’ case is no different. They were led to believe there was potential to recover the balance of the consent judgment from Legion, who it was thought was unjustifiably denying coverage. The Berrys relied on Javitch’s representations about

Legion when they agreed to accept less than the full amount of the consent judgment. Had the Berrys known that Clarendon provided coverage at the time of the malpractice, the Berrys would not have agreed to accept anything less than the full amount of the consent judgment. The Berrys now are electing the first alternative remedy set forth in *Frederickson v. Nye*: affirm the contract to settle the case for the contract amount set forth in the consent judgment, and sue for fraud-type damages (i.e., the **difference** between the consent judgment and the agreement to accept less from Javitch). The Eighth District below followed *Frederickson* and *Colvenbach* and approved of the Berrys' election of remedies. That decision should be affirmed.

Javitch argues that because this was a settlement and judgment of a tort claim, somehow the election of remedies afforded to victims of fraud by Ohio law is limited to Rule 60(B)(3) alone. However, every case cited for Javitch in support of its Proposition of Law involves two things not present in this case: (1) a release and (2) a plaintiff seeking to litigate and determine tort damages on the underlying claim. The Berrys and Javitch did not enter into a release, nor are the Berrys seeking to litigate and determine damages on the underlying malpractice claim. The Berrys have properly elected to affirm the contract and sue "for damages counsed by Javitch's alleged fraud." *Berry* at ¶ 10.

A recent case out of the Ninth District held that even if a release does exist, a plaintiff who is not seeking damages on the released claim can affirm the release and sue separately for fraud damages under *Frederickson v. Nye*. (See *Summa Health System v. Viningre* (2000),

140 Ohio App.3d 780.) Since the Berrys – who did not even give Javitch a release – are not seeking to litigate and determine malpractice damages, they can pursue a fraud action without disrupting the consent judgment, rescinding the settlement agreement, or tendering back the \$65,000.

In *Summa*, the plaintiff was a young woman named Nancy who had a Pap test performed at one of Summa's clinics. Nancy was told the results of the test were normal, but Summa later realized the test actually showed unusual cells that required careful monitoring. *Id.* at 785. Ultimately, Nancy required a total hysterectomy. Summa's risk manager offered to settle Nancy's potential malpractice claim for \$20,000 and the payment of her medical bills, in exchange for a release. *Id.* at 785-786.

Summa later sued Nancy for \$13,000 in unpaid medical bills. Nancy counterclaimed for fraud regarding the settlement (i.e., that Nancy should not be responsible for any medical bills). *Id.* At trial, the jury returned a verdict in Nancy's favor for "\$10,000 in compensatory damages, \$30,000 in punitive damages, and attorneys fees as damages on the fraud claim." *Id.* These damages were **not** malpractice-type damages – they did not relate to the underlying claim; these were contract and fraud-type damages. Nancy was affirming the contract (i.e., settlement agreement) and suing for fraud damages on the contract.

Summa filed for JNOV and appealed the trial court's denial of that motion, arguing Nancy had failed to tender the \$20,000 consideration for the release back before pursuing

her counterclaim for fraud. *Id.* **This is precisely the argument Javitch has made in this appeal.** The Ninth District Court of Appeals affirmed the trial court:

Summa cites [the same cases Javitch does here] where the party releasing her tort claim later desires to pursue the claim despite the release. In such cases, courts have held that the party must at a minimum return the consideration paid in exchange for the release. *See, e.g., Shallenberger v. Motorists Mut. Ins. Co.* (1958), 167 Ohio St. 494. 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 separately for fraud. . . .**

Nancy was **not obligated to return the consideration because she did not seek to void the release.** Rather, she sues for damages that resulted from Summa's failure to honor the settlement.

*Id.* at 789 (recognizing the cost of legal counsel was a damage resulting from the fraud) (emphasis added).

Both *Summa* and the appellate court in this case properly applied the law on the election of remedies established by this Honorable Court in *Frederickson v. Nye*. Both courts understood that *Picklesimer* and *Shallenberger* establish an extremely limited exception to the remedies available to the victims of fraudulent inducement: only when the plaintiff is (1) seeking to **void** a release and (2) sue on the **underlying** action, then tendering back is necessary. Neither Nancy nor the Berrys (who, again, did not even enter a release) are seeking to set aside a release, settlement agreement, or judgment. Both Nancy and the Berrys settled their malpractice cases. The issue in both cases is the good faith of the other party to the settlement agreement. Where the other party (even a releasee) has

fraudulently induced the settlement, the plaintiff may seek to affirm the agreement and sue for contract and fraud-type damages. *Id.*, accord *Frederickson* at 648 (“option one”).

The court of appeals below confirmed that “option one” was available to the Berrys as alleged victims of fraudulent inducement. This was a proper application of the hundred year-old law of election of remedies in Ohio and should be affirmed.

## II. Javitch’s Cases Are Not On-Point

The case law cited in Javitch’s merit brief are dissimilar in three critical respects from the *Frederickson*, *Colvenbach*, *Summa*, and *Berry v. Javitch* decisions. First, in Javitch’s cases, the written agreement the plaintiffs were fraudulently induced to enter was a *release of claims*. Conversely, there is no release in this case; only a consent judgment and a settlement agreement, which are ordinary contracts. Second, in Javitch’s cases, the plaintiff sought to re-open a *released claim*. The Berrys are not seeking to open their malpractice claim; they are affirming the contract and suing separately for fraud. Third, in Javitch’s cases, the plaintiff was seeking to litigate and have a jury determine the damages recoverable on the *released claim*. The Berrys are not seeking malpractice-type damages (i.e., damages incurred as a result of Javitch’s conduct during the construction litigation); they are seeking fraud-type damages (i.e., damages incurred as a result of Javitch’s conduct related to the settlement agreement and consent judgment).

In *Picklesimer*, this Honorable Court set forth a very limited exception to *Frederickson v. Nye*’s law on the election of remedies: “[I]f a person executes a release and afterward

**seeks to avoid its effect** . . . he must first restore the *status quo* by restoring, tendering, or offering to restore what he has received in return for the release.” 151 Ohio St. at 6. There is **no release** at issue in the Berrys’ case and they are **not** seeking to avoid the effect of the consent judgment. Furthermore, the *Picklesimer* exception only applies if the new action seeks to litigate the underlying tort claim: “[A] study of his amended petition disclosed specification of negligence and allegations as to personal injuries, pain, suffering, and loss of wages resulting therefrom. Therefore, although the plaintiff has injected the matter of fraud, the original basic elements of his case . . . remain unchanged.” *Id.* at 9-10. The Berrys new complaint does not include specifications of malpractice or allegations as to malpractice-type damages. The Berrys have not merely “injected” fraud into their original claim. The Berrys have resolved the original legal malpractice claim and brought a separate and independent action under *Frederickson v. Nye* to affirm the contract and sue for fraud damages perpetrated upon them.

In *Shallenberger*, it was also “apparent that the damages sought for the defendant’s fraud would necessarily represent in substance the damages for personal injuries” on the underlying claim. 167 Ohio St. at 496. Therefore, this Court applied the *Picklesimer* exception. But the Berrys’ \$130,000 in fraud damages do not represent their alleged malpractice damages, which are unliquidated and would require a jury to assess them (and perhaps the construction litigation upon which the malpractice case was based). The

Berrys fraud damages are determinable from their agreement, with reference only to the consent judgment, and from the agreed value of the legal malpractice claim by the parties.

The *Picklesimer* exception is extremely limited, as there are even some cases involving releases which do not fall under it. *See, e.g., Summa*. Indeed, a separate action for fraud is allowed where “there has been some fraudulent representation as to the value of the consideration paid for the release **or the value of what the releasor was to receive.**” *Shallenberger* at 500 (emphasis added). Setting aside for the moment the difference between releasors and non-releasors, the Berrys were defrauded as to the value of what they were agreeing to accept in lieu of the entire consent judgment. They believed there was a reasonable basis of recovery through Legion, since Javitch represented that Legion was the appropriate carrier in interrogatory responses and in the settlement agreement. If the Berrys had known the truth – that the Clarendon policy applied at the time of the alleged malpractice – they would not have agreed to accept only \$65,000 of the \$195,000 judgment.

The damages sought in this fraud case, therefore, represent “the difference between the actual value of what the plaintiff received and the value which the amount received would have had if the amount received had been as represented.” *Id.* at 500-501. In coming to this conclusion, this Court cited *Galveston, Harrisburg & San Antonio Ry. Co. v. Walker* (1920), 110 Tex. 286, which is more similar to the case *sub judice* than anything cited by Javitch. In *Galveston*, a releasor who had been induced to accept notes in settlement of a tort claim, based on a representation that the maker of the notes was solvent, was allowed

to recover in an action for deceit for the difference between the face amount of the notes and their value, when it was discovered the maker was insolvent.

Finally, in *Haller v. Borrer Corp.* (1990), 50 Ohio St.3d 10, this Court confirmed that actions to set aside a release are barred unless fraud is shown and any consideration received for the release is tendered back. This holding has **no bearing** upon the present controversy. The Berrys' case does not involve a release and they are not seeking to set anything aside to re-open the underlying legal malpractice case.

All of the other cases cited by Javitch involve (a) a release, (b) a plaintiff who is attempting to re-litigate a settled matter, and (c) a plaintiff seeking the types of damages associated with the underlying matter: *Stone v. City of Rocky River*, 1985 WL 8539 at \*1 (8th Dist.); *Maust v. Bank One Columbus* (1992), 83 Ohio App.3d 103, 105-107 (10th Dist.); *Pizzino v. Lightning Rod Mut. Ins. Co.* (1994), 93 Ohio App.3d 246, 247-249 (8th Dist.); *Weisman v. Blaushild*, 2008 Ohio 219 (8th Dist.). As *Weisman* makes clear, this line of cases only related to "the law in Ohio governing releases" and not circumstances such as the Berrys' fraud claims. *Id.* at ¶ 37.

(see chart on next page)

Case	Release	Underlying Claim	Damages Sought
<i>Picklesimer</i>	Yes	Negligence	Negligence damages
<i>Shallenberger</i>	Yes	Negligence	Negligence damages
<i>Haller</i>	Yes	Employment	Employment damages
<i>Stone</i>	Yes	§ 1983	§ 1983 damages
<i>Maust</i>	Yes	Employment	Employment damages
<i>Pizzino</i>	Yes	Negligence	Negligence damages
<i>Weisman</i>	Yes	Employment	Employment damages
<i>Summa</i>	Yes	Medical Malpractice	Fraud damages
<i>Colvenbach</i>	No	Real Estate	Fraud damages
<i>Berry v. Javitch</i>	No	Legal Malpractice	Fraud damages

*Sister Courts Agree: The Berrys May Affirm and Sue for Fraud.* As the Iowa Supreme Court explained, “Although we have never [before] considered whether the traditional election of remedies doctrine of contracts applies to settlement agreements, we observe most jurisdictions who have considered the issue permit a defrauded party to elect their remedy between rescission and *an independent action for damages.*” *Phipps v. Winneshiek County* (1999), 593 N.W.2d 143, 146 (emphasis added) (citing *Matsuura v. Alston & Bird* (1999), 166 F.3d 1006 (9th Cir.); *Sade v. Northern Natural Gas Co.* (1973), 483 F.2d 230, 234 (10th Cir.); *Automobile Underwriters, Inc. v. Rich* (1944), 222 Ind. 384; *Ware v. State Farm Mut. Auto. Ins. Co.* (1957), 181 Kan. 291; *Bilotti v. Accurate Forming Cop.* (1963), 39 N.J. 184; *Ponce v. Putts* (1986), 104 N.M. 280); *Rochester Bridge Co. v. McNeill* (1919), 188 Ind. 432 (“It is a well-established rule that where a release of a cause of action is procured by fraud the

defrauded party may choose any one of three [*Frederickson v. Nye*] remedies . . . **he may waive his right to rescind and sue to recover any damages suffered by reason of the fraud perpetrated upon him**"); *see also* The Requirement of Restoration in the Avoidance of Releases of Tort Claims (1956), 31 Notre Dame Lawyer, 629, 673-680; 5 Williston on Contracts (Rev. Ed.), 4266, § 1524.<sup>3</sup>

The New York Court of Appeals explained that, in such cases, the entry of judgment is merely an incident of the fraud which was perpetrated outside the action. *Ross v. Preston* (1944), 292 NY 433. *See also* 37 Am.Jur.2, Fraud and Deceit, § 488, p. 676: "It has been held that a judgment or decree entered in accordance with the settlement of a claim **does not bar an action for damages resulting from fraud** where the wrongdoer fraudulently conceals his wrong from the injured person." *See also Id.* at § 32: A party who has executed a release or settlement based upon fraud has several potential remedies: [one among them] **affirm the agreement and bring an action to recover damages for fraud.**

The case of *Exotics Hawaii-Kona, Inc. v. E.I. du Pont de Nemours & Co.* (2007), 116 Haw. 277, contains an excellent analysis of the law of election of remedies in the context of settlement agreements, with great reference to the majority trends in the United States:

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<sup>3</sup> The election of remedies set forth by this Court in *Frederickson v. Nye* has been almost universally adopted by every jurisdiction in the country. In addition to those referenced here, *see also, e.g., E.I. du Pont DeNemours & Co. v. Florida Evergreen Foliage* (2000), 744 A.2d 457 (Del.); *Allstate Ins. Co. v. Walker* (1991), 583 So.2d 356 (Fla.Dist.Ct.App.); *Roth v. La Societe Anonyme Turbomeca France* (2003), 120 S.W.3d 764 (Mo.); *Slotkin v. Citizens Cas. Co.* (1979), 614 F.2d 312 (2d Cir.); *Minazek v. Libera* (1991), 86 N.W. 100 (Minn.).

- Settlement agreements are simply a species of contract and thus are governed by principles of contract law. *Id.* at 288.
- Basic contract principles provide an election of remedies when one has been fraudulently induced to enter a contract, including affirming the contract and suing for expectation damages. *Id.*
- A tiny minority of courts have limited a defrauded plaintiff to the remedy of rescission when he is seeking the speculative damages of his underlying claim. *Id.*
- The vast majority of courts have more properly reasoned that defrauded tort plaintiffs may affirm a settlement agreement, retaining the benefits, and seeking damages. *Id.* at 291 (citing with great favor *DiSabatino v. U.S. Fidelity & Guaranty Co.* (1986), 635 F.Supp. 350 (D.Del)).

Finally, the case of *Siegel v. Williams* (2004), 818 N.E.2d 510 (Ind.App.), is directly on-point. Marjorie Williams hired attorney Siegel to represent her in a medical malpractice action. Siegel failed to file a 180-day notice of claim as required by Indiana law as a prerequisite to a civil action, so Marjorie settled her claim with the hospital for a nominal sum. She then sued Siegel for malpractice and the case went to trial. During trial, Siegel offered Marjorie \$25,000, stating that it was all he had because his wife had taken all his money in his divorce, and if the jury's verdict was any more than that, he would simply declare bankruptcy. This induced Marjorie to settle her claim and judgment was entered.

Years later, Siegel admitted that he could have paid \$300-, \$400-, or \$500,000 to settle the malpractice case, but had “pulled one over” on Marjorie and gotten away with paying much less. After learning of this fraud, Marjorie sued Siegel. He moved to dismiss under the Indiana equivalent of Rule 60—the same defense Javitch would raise in this case—mischaracterizing Marjorie’s new claim as an attack on the settlement and judgment. Marjorie argued that she was not attacking the judgment but instead instituting a separate and independent action for fraudulent inducement.

The court held that Marjorie had an election of remedies, including standing upon the contract and seeking damages. *Id.* at 514. A plaintiff “can keep what he has received and file suit against the ones perpetrating the fraud **and recover such amounts as will make the settlement an honest one.**” *Id.* (emphasis added) (quoting *Automobile Underwriters, Inc. v. Rich* (1944), 222 Ind. 384).

In sum, the law of election of remedies across this country is well harmonized: a party fraudulently induced into a contract has the option of affirming the contract and suing for fraud. The vast majority of courts have held that this option remains available to a plaintiff even if the contract entered into was a settlement and consent judgment. And courts that have specifically addressed cases with similar factual circumstances (and defenses) have agreed with the Berrys: they may affirm and sue for fraud.

### III. Javitch's Proposition of Law Must Be Rejected

Javitch's proposed holding does not take into account the fundamental factual differences between the Berrys' case and those of the plaintiffs in the *Picklesimer* line: (1) The Berrys did not execute a release; (2) they are not seeking to rescind a release; and (3) they are not seeking to litigate and recover damages on the legal malpractice case.

The appellate courts in *Summa* and *Colvenbach* understood these critical differences and agreed that a plaintiff who is fraudulently induced to enter into an agreement can elect to affirm that agreement and sue separately for fraud-type damages under *Frederickson v. Nye* ("option one"). The court of appeals in this case understood this as well. Therefore, the Eighth District's decision should be affirmed, as follows:

#### **The Berrys' Proposition of Law No. 1:**

**One who alleges he was fraudulently induced to enter a consent judgment and settlement agreement may elect from those remedies set forth in *Frederickson v. Nye* (1924), 110 Ohio St. 459.**

#### **The Berry's Proposition of Law No. 2:**

**One who elects to affirm an agreement or judgment and sue for fraud damages under *Frederickson v. Nye* (1924), 100 Ohio St. 459, does not have to tender back any consideration he received for the agreement or judgment before bringing a suit for fraudulent inducement. See *Summa Health Sys. v. Viningre* (2000), 140 Ohio App.3d 780, 785 (9th Dist.), and *Colvenbach v. McLaughlin*, 1982 Ohio App. LEXIS 13569 (11th Dist.).**

These proposed holdings re-affirm long-standing precedent on the election of remedies available to victims of fraudulent inducement. They also take into account the pivotal factual differences between *Berry v. Javitch* – a case akin to *Frederickson*, *Summa*, and

*Colwenbach* – and the cases cited by Javitch, which all deal with the *Picklesimer* exception for releases and attempts to re-open and litigate the underlying original claims. This case does not involve a release; it does not involve an attempt to set aside a release; and it does not involve a request to litigate damages on the underlying case or have a jury determine those damages. This case involves a consent judgment which is unquestioned. Indeed, the Berrys are seeking to enforce (i.e., affirm) the consent judgment, thus no relief need be sought under Rule 60(B)(3).

If the measured and germane holdings proposed by the Berrys are rejected in favor of Javitch's mistaken and mis-matched Proposition of Law, the Berrys' only recourse – and Javitch's only consequence – for the fraudulent misrepresentations regarding insurance coverage would be to over-turn the consent judgment, rescind the settlement agreement, and the Berrys would have to sue on the legal malpractice case, which was settled years ago. How this outcome would advance the interests of settlement, compromise, and finality of judgment is beyond logic and reasonableness.

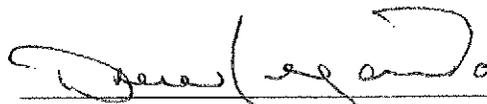
### **CONCLUSION**

This Court should adopt the Berrys' proposed holdings, which will result in a just outcome supported by long standing Ohio Supreme Court precedent: the Berrys will have an election of remedies for Javitch's alleged fraud; the settlement of the legal malpractice case will be respected; the finality of the consent judgment enforced; and the Berrys will proceed to trial against Javitch on the limited claim of fraudulent misrepresentation and

fraud damages. If the Berrys prevail, they will seek \$130,000 in “damages for the fraud perpetrated” upon them, *Frederickson v. Nye, supra.*, as well as punitive damages and fees as a consequence for Javitch’s fraud.

The court of appeals’ decision below achieves this just and lawful result. The Eighth District’s decision should be affirmed.

Respectfully submitted,



---

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COUNSEL FOR APPELLEES  
ROBERT AND DIANE BERRY

CERTIFICATE OF MAILING

A copy of the foregoing was sent by ordinary U.S. Mail to the following counsel of records this 25<sup>th</sup> day of March, 2010:

Roger M. Synenberg (0032517)  
Counsel of Record  
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JAVITCH, BLOCK & RATHBONE, LLP

  
\_\_\_\_\_  
Drew Legando (0084209)

# APPENDIX

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

ROBERT BERRY, et al.

Plaintiffs

v.

JAVITCH, BLOCK, EISEN &  
RATHBONE, P.L.L., et al.

Defendants

CASE NO: 409418

JUDGE JOHN SUTULA

ANSWER OF  
DEFENDANTS JAVITCH, BLOCK,  
EISEN & RATHBONE, MICHAEL  
LINN AND VICTOR JAVITCH TO  
PLAINTIFFS' INTERROGATORIES

Defendants Javitch, Block, Eisen & Rathbone, Michael Linn and Victor Javitch provide the following supplemental answer to one of plaintiffs' interrogatories.

4. State the name of insurer, type of policy/policies, policy number/numbers, and limits of coverage of each and every insurance policy that may cover your alleged liability in this action, including umbrella coverage.

AMENDED ANSWER:

Since providing our original answer to this interrogatory, we have been advised by representatives of Legion Insurance Company that there is no coverage for plaintiffs' claim.



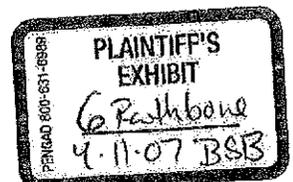
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Attorneys for Defendants  
Javitch, Block, Eisen & Rathbone, P.L.L.,  
Victor Javitch and Michael D. Linn

OF COUNSEL:

GALLAGHER, SHARP,  
FULTON & NORMAN

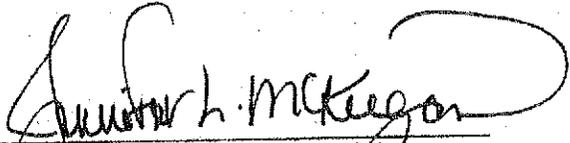


SERVICE

A copy of the foregoing has been mailed this 27th day of October, 2001, to the following:

Paul Grieco  
The Landskroner Law Firm, Ltd.  
55 Public Square, Suite 1040  
Cleveland, Ohio 44113-1904  
Attorney for Plaintiffs

Christopher DeVito  
Morganstern, MacAdams &  
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Attorney for Plaintiffs

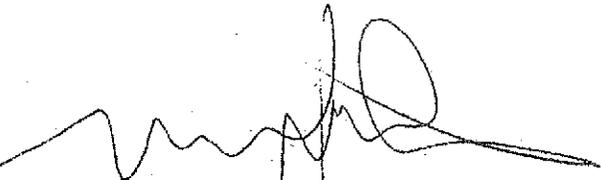
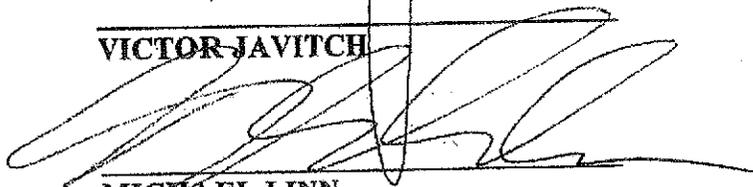
  
ALAN M. PETROV (0020283)  
JENNIFER L. McKEEGAN (0068490)  
Attorneys for Defendants  
Javitch, Block, Eisen & Rathbone, P.L.L., Victor  
Javitch and Michael D. Linn

STATE OF OHIO

COUNTY OF CUYAHOGA

)  
) SS. VERIFICATION  
)

Victor Javitch and Michael Linn, individually and on behalf of Javitch, Block, Eisen & Rathbone, being first duly sworn, depose and say that they have read the foregoing answer to interrogatory and it is true as they verily believe.

  
\_\_\_\_\_  
VICTOR JAVITCH  
  
\_\_\_\_\_  
MICHAEL LINN

SWORN TO BEFORE ME and subscribed in my presence this 24 day of October, 2001.

  
\_\_\_\_\_  
NOTARY PUBLIC  
Attorney At Law  
NO EXPIRATION DATE

STATE OF OHIO

COUNTY OF CUYAHOGA

)  
)  
)

ss:

AFFIDAVIT

Now comes affiant, **W. CRAIG BASHEIN**, who having been duly sworn, states and avers as follows:

1. I am an attorney admitted to practice law in all courts of the State of Ohio. I have been a member of the Bar of Ohio since 1986 and have at all times been in good standing.

2. I am also admitted to practice in the United States District Court, Northern District of Ohio (1986); the United States Court of Appeals for the sixth Circuit (1998); and the United States Supreme Court in (1999).

3. I am the Managing Partner of Bashein & Bashein, located at Terminal Tower, 50 Public Square, Cleveland, Ohio 44113. My practice areas and areas of expertise include class action litigation, intentional tort, medical negligence, personal injury, commercial litigation, products liability, employment, bad faith litigation, insurance law, and appellate practice.

4. I graduated from The Ohio State University, College of Law in 1986 as a member of the Order of the Coif, and a recipient of the American Jurisprudence Award for Excellence in the Study of Law.

5. I was recognized as one of Ohio's top 10 attorneys in 2001 by Ohio Lawyers Weekly, a statewide publication.

6. I am board certified in civil trial advocacy by the National Board of Trial Advocacy. I am a member of the Cleveland and Ohio State Bar Associations, the Ohio Association for Justice, the American Association for Justice, and the Cleveland Academy

of Trial Lawyers. I serve on the Board of Trustees for the Cleveland Academy of Trial Attorneys and the Ohio Association for Justice. I have tried more than 150 jury trials, including cases involving catastrophic injuries and death.

7. I have personal knowledge of the facts and issues concerning the matter of *Robert Berry, et al., v. Javitch, Block & Rathbone* from my review of the facts, documents, pleadings, sworn deposition testimony and exhibits, and my experience and expertise in similar matters.

8. Based upon such personal knowledge, I have rendered certain opinions with regard to relevant issues in the Berry case.

9. My expert opinions and basis for such opinions are further set forth in my report attached hereto and incorporated herein.

FURTHER AFFIANT SAYETH NAUGHT.

  
\_\_\_\_\_  
W. CRAIG BASHEIN

SWORN TO before me and subscribed in my presence this 22 day of June 2007.

  
\_\_\_\_\_  
NOTARY PUBLIC  
Ravalli County  
expire: 1/6/2008



2 of 2 DOCUMENTS

**JAMES W. COLVENBACH, et al., Plaintiff-Appellants, -vs- ROBERT A. McLAUGHLIN, et al., Defendant-Appellees**

**NO. 1082**

**COURT OF APPEALS, ELEVENTH APPELLATE DISTRICT, ASHTABULA COUNTY, OHIO**

*1982 Ohio App. LEXIS 13569*

**June 18, 1982**

**COUNSEL:** [\*1] Robert S. Wynn, 6 Lawyers Row, Jefferson, Ohio 44047, ATTORNEY FOR PLAINTIFFS-APPELLANTS

Gary Leo Yost, Two Lawyers How, Jefforson, Ohio 44047

John G. Cardinal, 4203 Main Avenue, Ashtabula, Ohio 4404, ATTORNEYS FOR DEPENDANTS-APPELLEES

**JUDGES:** COOK, J., DAHLING, J., concur

**OPINION BY:** ROFSTETTER, P. J.

**OPINION**

**OPINION**

Plaintiff-appellants purchased a building in Rock Creck, Ashtabula County, from defendant-appellees. Defendants represented the market value of the building to be \$50,000, which was also their asking price, and allegedly represented that the building had been appraised. Plaintiffs, in reliance on defendants' representations and without getting their own appraisal, signed the contract to purchase the building for \$50,000.

Plaintiffs later determined that the property was worth \$35,000. After paying \$37,500 of the purchase price, plaintiffs ceased making payments and filed this action, alleging fraudulent misrepresentation and seeking alternative remedies of rescission or compensatory damages. Defendants counterclaimed for foreclosure.

Before the start of trial, plaintiff made an election of remedies, electing to maintain the contract and seek compensatory [\*2] damages. Following trial, the jury returned the verdict for the defendant "due to lack of clear and convincing evidence," according to the verdict form. The Court entered judgment on the verdict for the defendants on April 27, 1981. Pn June 29, 1981, the Court entered judgment for defendants on the counterclaim.

On May 27, 1981, plaintiffs appealed the judgment on the verdict entered April 27, but the appeal was dismissed for lack of a final, appealable order because of the pending counterclaim. Plaintiffs again appealed on July 29, 1981, after judgment was entered on the counterclaim.

Plaintiff-appellants present two assignments of error:

1. THE COURT ERRED AS A MATTER OF LAW IN INSTRUCTING THE JURY THAT THE BURDEN OF PROOF APPLICABLE TO APPELLANTS' CLAIM WAS CLEAR AND CONVINCING EVIDENCE.

2. THE COURT ERRED IN EXCLUDING THE EXPERT TESTIMONY OF DANIEL XAPUDJIJA AND RAY MAJKA.

The first assignment of error is well taken.

The Court instructed the jury that the claim of fraud must be proven by clear and convincing evidence. The plaintiffs objected to this aspect of the charge. This instruction would have been correct only if plaintiff had elected the equitable remedy [\*3] of rescission. The syllabus in *Household Finance Corp. v. Allenberg* (1966), 5 Ohio St. 2d 190, says:

In an action for equitable relief based on fraud, such as to set aside or reform a written document, clear and convincing evidence of the fraud is required, but in an ordinary action at law for money only based on fraud, a preponderance of the evidence is sufficient to prove such fraud.

The principle is explained in *Frederickson v. Nye* (1924), 110 Ohio St. 459, at 468-469, quoting from *Clark v. Kirby*, 204 App. Div., 447, 451, 198 N. Y. Supp., 172, 175:

The law is elementary that where one has suffered by reason of the misrepresentation of another, and has been led to part with his money in reliance upon said false and fraudulent misrepresentation, he has three independent remedies: First, he may affirm the contract into which he had been induced to enter and sue for his damages for the fraud perpetrated upon him. Second, he may rescind the contract itself and bring action to recover back the moneys which he has paid. Third, he may bring an action in the nature of the action at bar in a court of equity to obtain a rescission of the contract into which he had been induced [\*4] to enter, with incidental relief. An action for rescission is entirely independent and inconsistent with an action for damages by reason of the false and fraudulent representations. In the first [third] action the contract is treated as a nullity and the plaintiff asks the

intervention of a court of equity to obtain a nullification of said contract. In the action for damages for fraudulent representations which induced him to enter into the contract, he affirms the contract and brings his action to recover damages by reason of such false representations. In the one action he treats the contract as nonexistent, and in the other action he affirms the contract. Each remedy is inconsistent with the other.

In the instant case, plaintiffs elected to affirm the contract and seek recovery of damages for the alleged misrepresentations. Since they did not elect to set aside the contract, they were required to prove the fraud only by a preponderance and not by clear and convincing evidence.

The second assignment of error is without merit.

Plaintiffs attempted to call as rebuttal witnesses two appraisers whose names had not been provided to the Court and to the defendants before [\*5] trial as required by a pre-trial order. The Court would not permit the witnesses to testify. Plaintiffs now argue that the pre-trial order was invalid because it was not made pursuant to an adopted rule of the Court.

*Civ. R. 16* provides that a court may adopt local rules on pre-trial procedures. The rule is wholly permissive in nature and does not abrogate the Court's inherent power to do all things necessary for the administration of justice within its jurisdiction. See *In re Obstruction of Summit County Driveway* (1959), 108 Ohio App. 338, syllabus 1.

In addition, the testimony as proffered would have shown only the appraiser's opinion at the time of trial as to the values of the property at the time of the sale. This evidence would not have been relevant to the issue of misrepresentation at the time of the sale.

Based on the first assignment of error, the judgment of the trial court is reversed and the cause is remanded for a new trial.

Westlaw

Page 1

Not Reported in N.E.2d, 1985 WL 8539 (Ohio App. 8 Dist.)  
 (Cite as: 1985 WL 8539 (Ohio App. 8 Dist.))

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Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR  
 REPORTING OF OPINIONS AND WEIGHT OF  
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,  
 Cuyahoga County.

ROBERT JEFFREY STONE, Plaintiff-Appellant  
 v.  
 CITY OF ROCKY RIVER, ET AL., Defendants-Appellees  
 NO. 49434.

49434

October 31, 1985.

Civil appeal from Common Pleas Court Case No.  
 074,010.  
 AFFIRMED.

For Plaintiff-Appellant: David B. Gallup, Zidar and  
 Gallup, 75 Public Square, Suite 813, Cleveland,  
 Ohio 44113.

For Defendants-Appellees, City of Avon, Patrol-  
 men R.C. Petersen and John R. Vilagi: Thomas J.  
 Smith, McCray, Muzilla & Smith Co., LPA, 940  
 Lorain Boulevard, P. O. Box 119, Elyria, Ohio  
 44036.

For Defendants-Appellees, City of Rocky River and  
 Patrolman Robert Ryan: Russell A. Olsen, 21012  
 Hilliard Boulevard, Rocky River, Ohio 44116.

JOURNAL ENTRY AND OPINION

BROWN, J.

\*1 This is an appeal from entry granting summary  
 judgment under Civil Rule 56 to appellees City of  
 Avon and patrolmen R.C. Petersen and John R. Vil-  
 agi of the City of Avon. Appellant Robert Jeffrey

Stone asserts on appeal that he should have been  
 granted summary judgment rather than appellee.  
 Failing that, he argues that contested material fact  
 issues exist such as to render summary judgment  
 for appellee improper. We affirm.

Construing the documentary evidence produced be-  
 low in a light most favorable to appellant, the fol-  
 lowing facts appear on the record:

Appellant was picked up and taken into custody by  
 officers of the Avon Police Department on April  
 24, 1983, on suspicion of having committed certain  
 acts of vandalism. He was interrogated in a manner  
 which appellees admit "crossed the line of proper  
 questioning." After such questioning, appellant was  
 handcuffed to a chair and left alone in a room with  
 a pocketknife, which had knowingly been left in his  
 possession by the police. Appellant managed to use  
 the pocketknife to open up the veins in his arm.

On November 14, 1983, appellant, in consideration  
 of \$2,000, executed a release of claims, pursuant to  
 advice of counsel, releasing appellees from any and  
 all liability connected with the incident. Appellant's  
 counsel and appellant believed at the time of the re-  
 lease's execution that the police officer primarily  
 responsible for improperly interrogating appellant  
 was a Rocky River officer rather than an employee  
 of the City of Avon Lake. This belief was commu-  
 nicated to appellees' insurance adjustor, and, al-  
 though he knew it to be erroneous, the adjustor did  
 not inform appellant or his counsel of such prior to  
 execution of the release.

It was understood by the parties when the release  
 was executed that appellant had substantially re-  
 covered from the injuries suffered from the April,  
 1983 incident. After the release was executed, it  
 was discovered that because of the incident appel-  
 lant had sustained hidden psychological damage-  
 posttraumatic stress disorder-not suspected earlier  
 because of appellant's active denial of psychologic-  
 al difficulty. This heretofore unrecognized damage

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will require therapy costing between \$7,000 and \$10,000 to treat.

Appellant filed a "Complaint for Money Only" against appellees and others on April 24, 1984, alleging intentional, willful, wanton and malicious acts leading to physical and emotional injury, as well as a claim under 42 U.S.C. § 1983. Appellees' answer pleaded, *inter alia*, that the November 14, 1983 release precluded the action. They subsequently sought and were granted summary judgment, apparently on that basis.

Appellant's two assignments of error may be decided together. They are:

1. THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN GRANTING THE MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS-APPELLEES, CITY OF AVON, PETERSEN AND VILAGI.

2. THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN FAILURE TO GRANT SUMMARY JUDGMENT IN HIS FAVOR UPON THE MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS-APPELLEES, CITY OF AVON, PETERSEN AND VILAGI.

\*2 Appellant essentially makes two arguments to support his assertion that summary judgment should have been granted in his favor rather than appellees, or that, at the very least, the evidence demonstrates there was a material factual dispute rendering summary judgment for appellees inappropriate.

#### I.

Appellant's first argument proposes that if it were accepted as true that appellees' agent knew of appellant's and his counsel's misapprehension concerning which officer was primarily responsible for the improper interrogation, and did not tell appellant, then appellees would be guilty of fraud by omission concerning the release. Such fraud, appel-

lant contends, makes the release of appellees voidable at his option.

Even if appellant's theory of fraud by omission as applied to the facts of this case were accepted, something we need not here decide, it is firmly established in Ohio law that a party to a release may not obtain a judgment against the other party to that release concerning its subject matter without first returning or tendering back the consideration he received in return for forfeiting his claims. For example, in *Manhattan Life Insurance Co. v. Burke* (1903), 69 Ohio St. 294, it was held that:

... [W]here a party to a compromise desires to set aside or avoid the same and be remitted to his original rights, he must place the other party in status quo by returning or tendering the return of whatever has been received by him under such compromise, if of any value, and so far as possible, any right lost by the other party in consequence thereof. In an action to rescind, the petition should allege the fact of such return or tender, prior to, or at least contemporaneous with, the commencement of the suit. Further, as a general proposition, the rule obtains even though the contract of settlement was induced by the fraud or false representations of the other party; the ground being that by electing to retain the property, the party must be conclusively held to be bound by the settlement.

*Id.* at 302-303.

See also, *Shallenberger v. Motorists Mutual Insurance Co.* (1958), 167 Ohio St. 494; *Ficklesimer v. H. & O. Railroad* (1949), 151 Ohio St. 1; *Kercher v. Brown* (1947), 49 Ohio Law Abs. 25.

In the instant case, there is no indication that appellant has ever taken legal action to rescind the release between him and appellees. However, even if his Complaint for Money Only were construed as implicitly seeking rescission, the record is completely devoid of even an allegation that he has returned or tendered back to appellees the consideration he received for executing the release. Since the

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above authorities clearly require such return or tender before an action concerning the subject matter of the release may lie, appellant's first argument in support of his assignments fails.

## II.

Appellant's second argument in support of his assertion that he was entitled to summary judgment, or that in any event appellees were not, is that the parties labored under a mutual mistake concerning the extent of appellant's injuries when the release was executed.

\*3 Appellant relies principally for this argument on *Sloan v. Standard Oil Company* (1964), 177 Ohio St. 149. In that case, the Ohio Supreme Court held that a release may be avoided where the releaser demonstrates mutual mistake regarding a fact material to the nature, extent or gravity of injury, unless the parties intended that claims for all injuries, known or unknown at the time the release was executed, be relinquished. *Sloan, supra* at 152.

The *Sloan* court cited certain factors to consider in determining the intent of the parties:

"\* \* \* Stated favorably to the party seeking rescission or cancellation, these factors are: The absence of bargaining and negotiating leading to settlement; the releasee is clearly liable; absence of discussion concerning personal injuries; the contention that the injuries were in fact unknown at the time the release was executed is reasonable; an inadequate amount of consideration received compared with the risk of the existence of unknown injuries (see *Caay v. Proctor, supra* [(1963), 59 Cal. 2d 97, 378 P.2d 579], and authorities cited therein); haste by the releasee in securing the release (annotation, 71 A.L.R. [2d], 82, 169 [1960]); and the terms of the release exclude the injuries alleged (annotation, 71 A.L.R. [2d], 82, 156 [1960])." *Sloan, supra*, at 153.

We observe at the outset that appellant's second argument must fail for the reasons already stated in rejecting his first argument—namely that, assuming

the release to be voidable, there is nothing in the record to indicate he has affirmatively sought legal rescission of the release, and that he has certainly not demonstrated any effort to return the consideration he received for it. We shall nonetheless address the issue of mutual mistake as though appellant's failure to seek rescission and to tender the proceeds of the release were not a barrier to his cause of action.

In applying the factors cited in *Sloan, supra*, it should be noted that appellant was represented by counsel in negotiating the settlement and comprehensive release. The release was not executed until almost seven months after the incident. Although the behavior of the police in this case may well have been reprehensible, the record shows that appellant was already suffering psychological difficulty prior to the incident. Moreover, unlike the situation in *Sloan, supra*, and the other case cited by appellant, *Woyma v. Ciolek* (1983), 11 Ohio App. 3d 288, where the releasees received only nominal sums (\$20 and \$25, respectively), appellant here received \$2,000. Finally, the reasonableness of appellant's ignorance of his injuries is highly questionable, considering the fact that he and his counsel had almost seven months in which to determine the damage he had suffered for the purpose of arriving at a reasonable settlement figure. While the evidence may show that appellant's injury was hidden, there is no evidence that it was unpredictable or unascertainable during the negotiation period.

\*4 Thus applying the factors set out in *Sloan, supra*, we find the record supports the conclusion that the parties intended the release to preclude appellees' liability for the injury appellant now asserts he suffers from the incident which was the subject of the release. Accordingly, appellant's second argument in support of his assignments fails.

Judgment affirmed.

It is ordered that appellees recover of appellant their costs herein taxed.

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The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

STILLMAN, E.J., and  
(Retired, of the Eighth Appellate District, Sitting by Assignment)

DAHLING, L. CONCUR.  
(Of the 11th Appellate District, Sitting by Assignment)

WILLIAM B. BROWN (Retired, of the Supreme Court of Ohio, Sitting by Assignment)

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

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