

ORIGINAL

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, L.L.P.,	)	Court of Appeals, Eighth Appellate District
	)	
Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT JAVITCH, BLOCK & RATHBONE, L.L.P.

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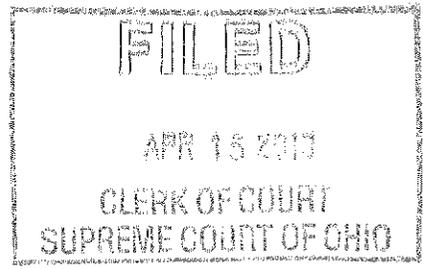
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## INTRODUCTION

Despite twenty-five pages of repetition, the Berrys' merit brief presents only two arguments: (1) that the Berrys did not release JBR, and (2) that they have elected to pursue an independent cause of action for fraud rather than tender back the consideration given by JBR and reinstate their underlying malpractice claims.

First, the Berrys *did* knowingly and voluntarily release JBR. The Berrys knowingly entered into the Settlement Agreement (1) after opposing JBR's attempts to obtain a declaration concerning coverage before settling or proceeding with the malpractice lawsuit (Supp. 62, 64), (2) after receiving a copy of the correspondence from Legion outlining the basis for the coverage denial (Supp. 64), and (3) because, with the apparent approval and advisements of competent counsel, they believed it to be in their best interest (Supp. 87). The Berrys acknowledged Legion's denial of coverage and refusal to defend JBR in the malpractice action in the black letter of the Settlement Agreement. (Supp. 90.) In consideration for the Settlement Agreement and release, the Berrys received: (1) a consent judgment entry in the amount of \$195,000.00 (Supp. 91); (2) payment toward the consented judgment by JBR in the amount of \$65,000.00 (*Id.*); and (3) the right to pursue a supplemental petition against Legion to attempt collection of the balance of the consent judgment amount (*Id.*).

Yet, contrary to the Berrys' repetition, the record demonstrates that the Settlement Agreement contained release language stating unequivocally that JBR would be released at "such time as [the consent judgment] is satisfied by Legion Insurance Company *or the claim against Legion Insurance Company for that judgment is otherwise resolved.*" (Supp. 92.) (emphasis added). Moreover, by signing the Settlement Agreement, the Berrys acknowledged and agreed that they "expressly understood that under no circumstances [would] Javitch, Block pay...more

than a total of \$65,000.00.” *Id.* Both parties pursued actions against Legion. JBR’s claims against were dismissed upon summary judgment – a finding that was upheld on appeal. *Javitch, Block Eisen & Rathbone, P.L.L. v. Target Capital Partners, Inc.* (June 29, 2006), 2006-WL-1781095, unreported, 2006 WL 1781095. The Berrys similarly were unsuccessful in their supplemental petition and ultimately dismissed their claims against both Legion and Clarendon.

Second, Berrys have alleged that JBR fraudulently induced them to settle their underlying malpractice lawsuit. “This fact is apparent from the Berrys’ briefing below, and was acknowledged by the court of appeals. *See Berry v. Javitch, Block & Rathbone, L.L.P.* (Ohio App. 8 Dist. 2009), 182 Ohio App.3d 795, 796 (“Berrys alleged that Javitch committed fraud when it failed to disclose the fact that it was insured for legal malpractice by Clarendon National Insurance Company.”). Indeed, the Berrys’ merit brief leaves no room for doubt: “[The Berrys] allege that the law firm [JBR] fraudulently induced them to enter a contract.” *Berry Merit Br. 1.* Thus, regardless of how they attempt to spin their attempted claims – whether it be as an election to pursue an independent action for fraud or an attempt to seek fraud damages in lieu of damages for malpractice – their claims fall squarely within the longstanding jurisprudence of this Court governing releasors of tort claims.

As the Berrys released their tort claims against JBR in the Settlement Agreement given in exchange for consideration, and their claims below allege fraud in the inducement of that Settlement Agreement and release, the Berrys have no right to elect to pursue an independent action for fraud and the decision of the court of appeals must be reversed.

## ARGUMENT

### **I. The Berrys Released JBR as Part of the Parties' Comprehensive Agreements Bringing the Underlying Tort Litigation to an End.**

The parties' agreements resolving the Berrys' malpractice litigation against JBR included clear language releasing the claims against JBR. A release is a contract that is favored by the law to encourage the private resolution of disputes. *Lewis v. Mathes* (Ohio App. 4 Dist. 2005), 161 Ohio App.3d 1 (citing *Continental W. Condominium Unit Owners Assn. v. Howard E. Ferguson, Inc.* (1996), 74 Ohio App.3d 501, 502, 660 N.E.2d 431 ("It is axiomatic that a settlement agreement is a contract designed to terminate a claim by preventing or ending litigation and that such agreements are valid and enforceable by either party.")). No particular operative words are necessary for a release, and releases are strictly construed against the releasor. 15 Ohio Jur. 3d Compromise, Accord and Release § 42; 66 Am. Jur. 2d Release § 29.

As a contract, a release is subject to basic principles of contract. "A release, or compromise agreement, is a particular kind of contract, and, like other contracts, requires a definite offer and an acceptance thereof." *Noroski v. Fallet* (1982), 2 Ohio St.3d 77, 79, 442 N.E.2d 1302, 1304. Similarly, "It is axiomatic that courts, as a general rule, will not inquire into the adequacy of consideration once consideration is said to exist." *Rogers v. Runfolia & Associates, Inc.* (1991), 57 Ohio St.3d 5, 6, 565 N.E. 2d 540 (citing *Judy v. Louderman* (1891), 48 Ohio St. 562, 29 N.E. 181).

Here, both the court of appeals, and the Berrys in their merit brief, selectively read portions of the Settlement Agreement to conclude that JBR was not released from the Berrys' claims. In support of this position, both the Berrys and the court of appeals state that "[i]t is clear that the parties contemplated executing a release in the future when the [consent judgment]

had been satisfied.” Berry Merit Br. 7; *Berry v. Javitch, Block & Rathbone, L.L.P.* (Ohio App. 8 Dist. 2009), 182 Ohio App.3d at 799. But this interpretation is premised upon a gross misreading of the operative Settlement Agreement provision. The provision, in its entirety, states:

The parties will enter into a mutual settlement and release of any and all claims, except that Plaintiffs will not release Javitch Block with respect to the amount of the consent judgment, *until such time as that judgment is satisfied by Legion Insurance Company or the claim against Legion Insurance Company for that judgment is otherwise resolved.*

(Supp. 92). The provision does not contemplate a release “when the judgment had been satisfied,” but rather, at such time as the judgment is satisfied *by Legion Insurance Company or the claim against Legion Insurance Company for that judgment is otherwise resolved.* Moreover, the Settlement Agreement unequivocally limits JBR’s liability to \$65,000.00: “*It is expressly understood that under no circumstances will Javitch, Block pay Plaintiffs under this agreement or under any judgment on the subject claim more than a total of \$65,000*”. *Id.* It is undisputed that (1) the Berrys received Legion’s correspondence outlining the basis for the coverage denial, (2) the Berrys opposed JBR’s attempts to resolve the coverage issues *before* negotiating the terms of the Settlement Agreement, (3) the Berrys voluntarily opted to accept assignment of a lawsuit against a carrier denying coverage with the apparent approval and advisements of competent counsel for the sake of expediency, (4) JBR paid the \$65,000.00 as required by the Settlement Agreement, and (5) JBR and the Berrys pursued supplemental actions against Legion. Although Legion ultimately did not satisfy the remainder of the consent judgment, the *claim against Legion Insurance Company for that judgment has been otherwise resolved.* As such, the court of appeals erred in determining that the Berrys did not release JBR,

the Berrys argument is meritless, and the court of appeals decision must be reversed and the trial court's grant of summary judgment reinstated.

## **II. By Virtue of the Release, the Berrys Cannot Elect to Pursue an Independent Cause of Action for Fraud.**

One century worth of this Court's jurisprudence establishes that the Berrys, and tort releasors like them, have no election to pursue an independent cause of action for fraud in the inducement of the release. In *Lewis v. Mathes*, (Ohio App. 4 Dist. 2005), 161 Ohio App.3d 1, the Ohio Fourth District Court of Appeals succinctly outlined the law of this State regarding releases alleged to have been induced by fraud:

A release of a cause of action ordinarily acts as an absolute bar to any later action on any claim encompassed within the release. *Haller v. Borrer Corp.* (1990), 50 Ohio St.3d 10, 13, 552 N.E.2d 207, citing *Perry v. M. O'Neil & Co.* (1908), 78 Ohio St. 200, 85 N.E. 41. A releasor may avoid that bar by alleging that the release was obtained by fraud. *Id.* Whether the releasor must pay back the consideration that he received for the release depends on whether the fraud alleged renders the release void or merely voidable.

A release obtained by fraud in factum is void ab initio. *Id.* Fraud in factum occurs when a device, trick, or want of capacity causes the releasor to fail to understand the nature and consequence of the release. *Id.*, citing *Picklesimer v. Baltimore & Ohio R.R. Co.* (1949), 151 Ohio St. 1, 5, 38 O.O. 477, 84 N.E.2d 214. In such cases, the release is void ab initio because there has been no meeting of the minds. *Id.* When the fraud alleged would render the release void, the releasor is not required to give back the consideration that he received for the release in order to avoid the bar and pursue a cause of action purportedly encompassed by the release.

In contrast, fraud in the inducement encompasses those instances in which the releasor understands the nature of the release and intends to be bound by it at the time of execution. *Haller*, 50 Ohio St.3d at 14, 552, N.E.2d 207. Later, the releasor seeks to avoid the release on the ground that the party that benefitted by the release had induced him to grant the release by wrongful conduct, misrepresentation, coercion, or duress. *Id.* *When a release is obtained through fraud in the inducement, it is merely voidable. Id. Therefore, the releasor may contest it only after he returns the consideration that he received in exchange for the release. Id.*

(emphasis added). Indeed, in *Picklesimer v. Baltimore & Ohio R. Co.*, (1949), 151 Ohio St. 1, 84 N.E.2d 214, this Court addressed whether an action for fraud in the inducement of a release may lie absent rescission of the release and tender of the consideration paid. The Court distinguished between a release that is void and one that is voidable, noting that an agreement is void when a party has been fraudulently prevented from knowing that he or she has signed a release or its contents, and is merely voidable when the party alleges fraud or misrepresentation as to the facts inducing the party to settle. *Id.* at 5. Yet nowhere below or in their merit brief before this Court have the Berrys ever argued that they were prevented from knowing that they signed the Settlement Agreement or from knowing the contents of the Settlement Agreement. To the contrary, the Berrys have at all times argued only that JBR fraudulently misrepresented facts to induce the Berrys to settle.

Because the Berrys allege only fraud in the inducement of the Settlement Agreement and release, they are prohibited from the election of remedies available to parties alleging fraud in the inducement of a simple contract and instead are required to rescind the Settlement Agreement and release. Indeed:

In [the settlement of a tort claim for damages arising from personal injuries] a release obtained by fraud in the inducement is voidable, and a subsequent action may not be maintained by the claimant without returning or tendering the consideration he received.

*Id.* at paragraph 2 of syllabus. Moreover:

*To allow the releasor to recover more than anyone agreed to give for his tort claim, because the releasor was induced by fraud...is to permit the releasor in effect to enforce part of the tort claim that he agreed for a consideration not to enforce...If he desires to do that, he must set aside, not affirm, his agreement not to sue...*

*Shallenberger v. Motorists Mutual Ins. Co.*, (1958), 167 Ohio St. 494, 501, 150 N.E.2d 295 (emphasis added). Finally:

*A release of liability procured through fraud in the inducement is voidable only, and can be contested only after a return or tender of consideration. Cases of fraud in the inducement “are those in which the plaintiff, while admitting that he released his claim for damages and received a consideration therefore, asserts that he was induced to do so by the defendant’s fraud or misrepresentation. The fraud relates not to the nature or purport of the release, but to the facts inducing its execution...*

*Haller*, 50 Ohio St.3d 10, 14, 552 N.E.2d 207 (internal citations omitted). Thus, the longstanding law as espoused by this Court does not vest the Berrys with the right to elect to affirm their Settlement Agreement and Release while pursuing an independent cause of action for fraud. The court of appeals has allowed the Berrys to do exactly what *Shallenberger* prohibits – enforce part of their underlying tort claim they agreed for consideration not to enforce by pursuing a claim for fraud in the inducement.

The cases cited by the Berrys do not offer any reprieve from the strictures of this longstanding rule. They cite only three Ohio cases in support of their argument that they are entitled to elect their remedy: *Colvenbach v. McLaughlin*, (June 18, 1982), Ashtabula App. No. 1082, unreported, 1982 WL 5784, *Frederickson v. Nye*, (1924), 110 Ohio St. 459; and *Summa Health System v. Vinigre* (Ohio App. 9 Dist. 2000), 140 Ohio App.3d 780. Both *Colvenbach* and *Frederickson* are distinguishable in that they deal specifically with fraudulently induced contracts for the sale and purchase of real estate, a tangible good. Neither case touches upon the issue here – remedies available following execution of a settlement agreement and consent judgment of a tort claim alleged to have been fraudulently induced. *Summa*, although at first blush would appear to be a departure from the longstanding rule of this Court, in fact arises from a different series of circumstances. Although the *Summa* plaintiff alleged claims for fraud, the *Summa* court analyzed the matter as one for failure by Summa to honor the underlying settlement. *Id.* at 789. As there is no allegation that JBR failed to honor the agreement, *Summa*

is inapposite to this analysis. Finally, the remaining cases cited by the Berrys are from foreign jurisdictions that have adopted an alternative approach, none of which are binding authority upon this Court, and all of which directly contradict the longstanding rule of this Court.

The appellate finding is also subject to reversal as it violates the longstanding preference of prevention of litigation by the compromise and settlement of controversies. *Haller*, 50 Ohio St.3d at 14 (citing *White v. Brokaw* (1863), 14 Ohio St. 339, 346); *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 69, 567 N.E.2d 1291 (citing *State ex rel. Wright v. Weyandt* (1977), 50 Ohio St.2d 194, 363 N.E.2d 1387, syllabus); *Board of Commrs. of Columbiana Cty. v. Samuelson* (1986), 24 Ohio St.3d 62, 63, 493 N.E.2d 245. Relief from a final judgment should not be granted unless the party seeking such relief makes at least a prima facie showing that the ends of justice will be better served by setting the judgment aside. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 21, 520 N.E.2d 564. As the purpose of a consent judgment is to resolve a dispute without further litigation, this principle applies equally to judgments entered by consent of the parties:

[A]s a general rule, a consent judgment operates as *res judicata* with the same force given to a judgment entered on the merits in a fully adversarial proceeding...Implicit in the rule is the recognition that a judgment entered by consent, although predicated upon an agreement between the parties, is an adjudication as effective as if the merits had been litigated and remains, therefore, just as enforceable as any other validly entered judgment.

*Gilbraith v. Hixson* (1987), 32 Ohio St.3d 127, 129, 512 N.E.2d 956 (citing *Sponseller v. Sponseller* (1924), 110 Ohio St. 395, 399, 144 N.E. 48). Simply put, a consent judgment is no different from any other judgment. *Southern Ohio Coal Co. v. Kidney* (1995), 100 Ohio App.3d 661, 668; *See Vulcan, Inc. v. Fordees Corp.* (6th Cir. 1981), 658 F.2d 1106 (finding strong public interest in achieving finality in litigation is advanced by giving *res judicata* effect to consent decrees).

Seeking relief from judgment pursuant to Ohio Civ. R. 60(B) is the only method available for avoiding a voidable settlement agreement and consent judgment entry allegedly induced by fraud. *See Haller*, 50 Ohio St.3d at 14; Ohio Civ. R. 60(B), Staff Notes at ¶ 2. Indeed, this Court has expressly held that a party must file a motion to set aside a binding settlement agreement entered into in the presence of the court. In *Spercel v. Sterling Industries*, (1972), 31 Ohio St.2d 36, 285 N.E.2d 324, this Court stated:

In order to effect a rescission of a binding settlement agreement entered into in the presence of the court, a party must file a motion to set the agreement aside; and, in the absence of such motion, a trial court may properly sign a journal entry reflecting the settlement agreement.

*Id.* at paragraph 2 of syllabus. Indeed:

Once the settlement agreement was achieved through the efforts of the trial judge, plaintiff had a duty, if he wished to disavow that agreement, to file a motion to set it aside. To permit a party to unilaterally repudiate a settlement agreement would render the entire settlement proceedings a nullity, even though, as we have already determined, the agreement is of binding force.

*Id.* at 40.

Contrary to the finding of the court of appeals and the Berrys' argument, there is nothing perverse or inequitable about these requirements. Rather, they exist to prevent unnecessary litigation in circumstances such as this where a party has knowingly and voluntarily released a tort claim in exchange for valuable consideration. The decision of the court of appeals must therefore be reversed, and the trial court decision granting summary judgment reinstated.

#### CONCLUSION

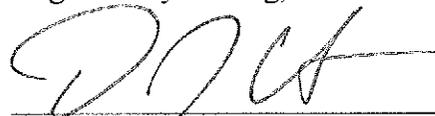
The decision below is fundamentally flawed in its reasoning and dangerous in its implications. The decision of the court of appeals threatens the well-settled policy of law favoring the prevention of litigation by the compromise and settlement of controversies. Moreover, that decision disregards the principle of finality in litigation, establishing a rule that a

party may ignore a validly entered consent judgment of a tort claim and pursue a new, separate cause of action for fraud. Such a rule sabotages the fundamental basis of the policy favoring settlement and compromise of controversies: it creates litigation, exponentially increases litigation costs, and will flood already overcrowded court dockets with new lawsuits stemming from litigation through to have been resolved.

The decision below must be reversed.

Respectfully Submitted,

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Certificate of Service

I certify that a true and accurate copy of this Merit Brief was sent by ordinary U.S. mail to counsel for appellees, Christopher M. DeVito, Esq. and Alexander J. Kipp, Esq., Morganstern, MacAdams & DeVito Co., L.P.A., 623 West Saint Clair Avenue, Cleveland, Ohio 44113, and Paul Grieco, Esq., Landskroner, Grieco, Madden Ltd., 1360 West 9<sup>th</sup> Street, Suite 200, Cleveland, Ohio 44113, on April 15, 2010.



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