

IN THE SUPREME COURT OF OHIO

INFINITE SECURITY SOLUTIONS,
LLC, *et al.*,

Appellant,

vs.

KARAM PROPERTIES I, LTD, *et al.*,

Appellees.

Case Nos. 2013-1671 and 2013-1795

Discretionary Appeal and Certified
Conflict from the Lucas County Court of
Appeals, Sixth Appellate District

Court of Appeals Case No. L-12-1313

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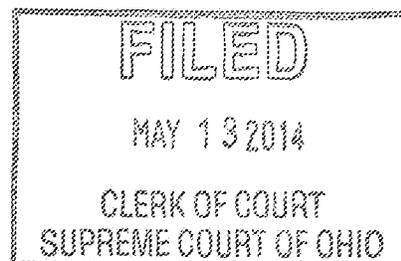


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STATEMENT OF FACTS AND CASE

Karam and Travelers' dispute boils down to a whether the Lucas County Court of Common Pleas ("Trial Court") had jurisdiction to decide whether the subrogation clause found in Travelers' commercial property insurance policy meets the two-pronged test set forth in *Northern Buckeye Edn. Council Group Health Benefits Plan v. Lawson*, 103 Ohio St.3d 188, 2004-Ohio-4886, 814 N.E.2d 1210.¹

Travelers claims that the Trial Court retained jurisdiction despite its prior dismissal of the case because: (1) Karam agreed to submit the issue of priority to the Trial Court for resolution as a negotiated term of Karam and Travelers' settlement with Infinite; and (2) the Trial Court retained jurisdiction to enforce the settlement because the dismissal was conditioned on the settlement.

Conversely, Karam claims that the Trial Court could not resurrect the case after this dismissal because: (1) neither Karam nor Travelers raised the issue of priority in the Trial Court by way of cross-claims; (2) Karam did not agree to submit the issue to the Trial Court for resolution as part of the Infinite settlement, nor was resolution of this issue essential to the settlement's enforcement; and, (3) even if Karam had agreed to submit the issue of priority to the Trial Court, the Trial Court failed to retain jurisdiction to enforce Karam's agreement because the dismissal entry was unconditional.

On October 12, 2012, the Trial Court concluded that it retained jurisdiction to enforce the settlement without evaluating whether the issue of priority was properly before it by way of the pleadings or terms of the settlement, and concluded that Travelers was entitled to all of the Infinite settlement proceeds pursuant to *Northern Buckeye*. [R.192, Op. and J. Entry].

¹ Karam adopts the defined terms and follows the record citation forms used by Travelers in its Merit Brief.

On appeal, the Sixth District reversed, finding that the Trial Court's dismissal was unconditional and its October 12, 2012 Judgment Entry void because the dismissal entry failed to embody the terms of the settlement agreement or expressly reserve jurisdiction to enforce the settlement. [R.23 (Appeal), Dec. and J.].² In its decision, the Sixth District disagreed with the Trial Court's assessment of the dismissal as being nothing more than a "placeholder" entry preserving the case in stasis until reactivated, observing that a dismissal without prejudice:

Mean[s] that the plaintiff's claim is not to be unfavorably affected thereby; all rights are to remain as they then stand, leaving him or her free to institute a similar suit. The parties are put back in their original positions, and the plaintiff may institute a second action upon the same subject matter. In a typical civil action, a claim that is dismissed "without prejudice" may be refiled at a later date.

Dismissal without prejudice relieves the trial court of all jurisdiction over the matter, and the action is treated as though it had never been commenced.

[R.23 (Appeal), Dec. and J., p. 12, *citing* 1 Ohio Jurisprudence. 3d, Actions, Section 170 (2013), *emphasis* in original]. Thus, any inference that the Trial Court retained jurisdiction to enforce the settlement was antithetical to the concept of a dismissal without prejudice because the dismissal would not return the parties to their original positions, but instead, would prevent further litigation of the case and bind the parties to new, contractual obligations.

The Sixth District concluded that its decision was in conflict with the Eighth District's decision in *Estate of Berger v. Riddle*, 8th Dist. Cuyahoga Nos. 66195, 66200, 1994 WL 449397

² The Sixth District did not reach Karam's second and third assignments of error because its ruling that the Trial Court failed to retain jurisdiction to enforce the settlement rendered them moot. [R.23 (Appeal), Dec. and J., p. 12]. Thus, even if Travelers prevails in this appeal, the case must be remanded to the Sixth District to decide the remaining assignments. *Winslow v. Ohio Bus Line Co.*, 148 Ohio St. 101, 73 N.E.2d 504 (1947), disapproved of on other grounds by, *Oberlin v. Friedman*, 5 Ohio St. 2d 1, 213 N.E.2d 168 (1965).

(Aug. 18, 1994) and Eleventh District's decision in *Hines v. Zofko*, 11th Dist. Trumbull No. 93-T-4928, 1994 WL 117110 (Mar. 22, 1994), and thus, certified the following question for review:

Whether a dismissal entry that does not either embody the terms of the settlement agreement or expressly reserve jurisdiction to the trial court to enforce the terms of a settlement agreement is an unconditional dismissal?

[R.23 (Appeal), Dec. and J., p. 13].³ In addition, Travelers asked the Court to accept jurisdiction to consider the following proposition of law:

Proposition of Law: A trial court's entry of dismissal that (1) states the parties have resolved their differences or have arrived at a settlement agreement, (2) states that the dismissal is without prejudice, (3) permits the submission by the parties of a final entry of dismissal, and that (4) provides a time-frame for the filing of any final entry of dismissal, is a conditional dismissal that does not divest the trial court of jurisdiction to consider and enforce the terms of the settlement agreement.

[Memo. in Supp. Juris.]. While Travelers portrays this proposition as merely an attempt to refine the certified question to address the specific facts of this case, it does much more than this by endorsing the practice of using dismissals without prejudice as "placeholder" entries.

In justifying its actions, the Trial Court claimed its dismissal did not terminate the case, but instead, served as a "placeholder" entry that took the case off the docket while the parties continued negotiating. [R.220, Tr. of Proc.; Suppl., p.33]. If negotiations produced a settlement within the allotted time, the parties could simply replace the Trial Court's entry with their own entry dismissing the case with prejudice. [R.220, Tr. of Proc.; Suppl., p. 33]. If the parties were

³ In its Brief in Opposition to Jurisdiction, Karam challenged this certification based on conflict between the Eighth District's decision in *Estate of Berger* and its more recent decision in *Elec. Enlightenment, Inc. v. Lallemand*, 8th Dist. Cuyahoga No. 87551, 2006-Ohio-5731 which suggested the issue had not been clearly settled in that district. See *In re C.F.*, 113 Ohio St.3d 73, 2007-Ohio-1104, 862 N.E.2d 73, ¶ 40 (appellate courts should resolve internal conflicts through en banc proceedings before initiating a procedure to certify a conflict between districts). Additionally, as the Sixth Circuit's decision was based in part on the Trial Court's dismissal without prejudice, Karam pointed out that the two certified decisions, *Estate of Berger* and *Hines*, were distinguishable because they involved dismissals with prejudice.

unable to come to terms, the Trial Court believed that by virtue of its dismissal without prejudice and mention of the settlement it could simply reactivate the case. [R.220, Tr. of Proc.; Suppl., p. 33]. In essence, then, the entry was not a dismissal at all, but rather a stay of proceedings posing as a dismissal. *See Page v. Riley*, 85 Ohio St.3d 621, 623-24, 1999-Ohio-290, 710 N.E.2d 690.

“Placeholder” entries are not authorized by the Civil Rules. However, their use is now widespread as evidenced by the following decisions: *Toca v. Advanced Therapeutic Servs., Inc.*, 2nd Dist. Montgomery No. 25419, 2013-Ohio-4247, ¶ 8; *Morell v. O'Donnell*, 8th Dist. Cuyahoga No. 99824, 2013-Ohio-3921, ¶ 3; *Fifth Third Bank v. Dayton Lodge Ltd. Liab. Co.*, 2nd Dist. Montgomery No. 24843, 2012-Ohio-3387, ¶ 9; *L.N.V. Corp. v. Edgar*, 12th Dist. Butler No. CA-2011-10-0190, 2012-Ohio-1899, ¶ 4; *Figueroa v. Showtime Builders, Inc.*, 8th Dist. Cuyahoga No. 95246, 2011-Ohio-2912, ¶ 3; *Artisan Mech., Inc. v. Beiser*, 12th Dist. Butler No. CA2010-02-039, 2010-Ohio-5427, ¶¶ 14, 30; *Lorain Natl. Bank v. AC DC Leasing, Inc.*, 8th Dist. Cuyahoga No. 93398, 2010-Ohio-163, ¶ 4; *McKay v. Promex Midwest Corp.*, 2nd Dist. Montgomery No. 20112, 2004-Ohio-3576, ¶ 14; *Tabbaa v. Kogelman*, 149 Ohio App.3d 373, 2002-Ohio-5328, 777 N.E.2d 338, ¶ 30; *Gore v. First Nat. Supermarkets*, 8th Dist. Cuyahoga No. 77026, 2000 WL 1231474 (Aug. 31, 2000); *Shah v. Thoma*, 5th Dist. Stark No. 1995CA00154, 1995 WL 768523 (Oct. 30, 1995); *Lieberman v. Crawford*, 2nd Dist. Montgomery No. 13163, 1992 WL 120622 (June 5, 1992); *G.M.S. Mgmt. Co., Inc. v. Park*, 11th Dist. Lake No. 89-L-14-140, 1990 WL 94847 (June 29, 1990); *Smith v. Carpenter*, 6th Dist. Wood No. WD-79-44, 1980 WL 351212 (Mar. 28, 1980) (collectively hereinafter, the “Placeholder Cases”).

Not coincidentally, the advent of these “placeholder” entries roughly corresponds with the Court’s efforts to develop the civil case time recommendations and statistical reporting

requirements set forth in the Ohio Rules of Superintendence. Indeed, while the Trial Court failed to give any reason for its sua sponte dismissal of the case, just a week earlier, it had denied Travelers' motion to amend its complaint on the basis that the action was filed twenty-five months earlier and was "now overage pursuant to the Ohio Rules of Superintendence." [R. 152, May 20, 2011 Order, p. 1]. This suggests that the Trial Court's "placeholder" entry was not an attempt at judicial efficiency, but instead, avoidance of the Court's statistical reporting requirements. The Placeholder Cases, which include numerous examples of trial courts prematurely dismissing cases before a settlement is finalized, provides additional support for this conclusion. See, e.g., *Ohio Cas. Ins. Co. v. Valaitis*, 11th Dist. Lake No. 2011-L-062, 2012-Ohio-2561, ¶ 25; *Lieberman v. Crawford*, 2nd Dist. No. 13163, 1992 WL 120622 (Ohio Ct. App. June 5, 1992).

Karam respectfully submits that adoption of Travelers' proposition of law and the minority view set forth in *Estate of Berger* and *Hines* would institutionalize the use of "placeholder" entries in place of stays and undermine the Court's efforts to collect accurate statistical information regarding court efficiency and caseloads. Additionally, adoption of Travelers' proposition of law and the minority view would also undermine the concept that dismissals terminate litigation because any antecedent event mentioned in the dismissal could be construed as a condition, the failure of which would allow the case's resurrection.

Karam further submits that requiring a dismissal entry to embody the terms of the settlement or expressly reserve jurisdiction would not impose any undue burden on the trial courts, most of which already follow the majority rule. Instead, adoption of the majority view would avoid confusion by promoting clear, unequivocal dismissal entries, and encourage

cooperation between the courts and parties in preparing dismissal entries rather than the rush to judgment evidence by the use of “placeholder” entries.

Accordingly, Karam respectfully requests that the Court adopt the majority view and affirm the Sixth District’s decision.

LAW AND ARGUMENT

A. A dismissal ordinarily terminates an action and divests a trial court of jurisdiction to act, but as an exception to this rule, the dismissal may be conditioned on an event like a settlement as to allow reopening of the case on failure of the condition.

A dismissal terminates an action and brings it to a close. *State ex rel. Fifth Third Mtge. Co. v. Russo*, 129 Ohio St.3d 250, 2011–Ohio–3177, 951 N.E.2d 414, ¶ 17. Thus, a trial court ordinarily lacks jurisdiction to take further action following a dismissal. *See Hinsdale v. Farmers Nat. Bank & Trust Co.*, 823 F.2d 993, 995 (6th Cir. 1987); *State ex rel Fogle v. Steiner*, 74 Ohio St. 3d 158, 161, 1995-Ohio-278, 656 N.E.2d 1288 *citing State ex rel. Hunt v. Thompson* (1992), 63 Ohio St.3d 182, 183, 586 N.E.2d 107, *State ex rel. Rice v. McGrath*, 62 Ohio St.3d 70, 577 N.E.2d 1100 (1991). Any act attempted after dismissal is subject to a writ of prohibition, and a trial court’s post-dismissal orders are void *ab initio*. *McDougal v. Ditmore*, 5th Dist. Stark No. 2008 CA 00043, 2009-Ohio-2019, ¶ 16; *Nova Info Sys., Inc. v. Current Directions, Inc.*, 11th Dist. Lake No. 2006-L-214, 2007-Ohio-4373, ¶ 16; *State ex rel. Northpoint Properties, Inc. v. Markus*, 8th Dist. Cuyahoga No. 82848, 2003-Ohio-5252, ¶ 19; *Cambodian Buddhist Soc., Inc. v. Ke*, 10th Dist. Franklin Nos. 01AP-731, 01AP-732, 2002-Ohio-2766, ¶¶ 30-33.

As an exception to this general rule, a trial court may condition the dismissal on an event such as settlement voluntarily entered into by the parties to a lawsuit. *Mack v. Polson Rubber Co.* 14 Ohio St. 3d 34, 36, 470 N.E.2d 902, 903-04 (1984), *citing Spercel v. Sterling Industries*, 31 Ohio St.2d 36, 40, 285 N.E.2d 324 (1972). However, a trial court’s authority to condition dismissals is not unlimited. In criminal cases, conditional dismissals are prohibited because their

use would allow a prosecutor to keep a defendant perpetually indicted, without any idea concerning, or control over, when the matter would be resolved. *State ex rel. Flynt v. Dinkelacker*, 156 Ohio App. 3d 595, 2004-Ohio-1695, 807 N.E.2d 967, ¶ 15.

Although conditional dismissals are permitted in civil cases, they raise similar concerns regarding the scope and duration of trial court's continuing jurisdiction. As the statute of limitations for a breach of a written settlement agreement is eight years, a party to the agreement may be called into court to answer for an alleged breach years after the case's dismissal. To reduce these concerns, and insure the parties are aware of the conditions and court's continuing jurisdiction, courts generally require that dismissal entries clearly state all of their conditions on their face. *Id.*, ¶ 13. Viewed in this context, the majority view simply extends these principles to dismissal conditioned on settlements.

B. The Sixth District follows the majority of Ohio's appellate districts and the United States Court of Appeals for the Sixth Circuit in requiring that a dismissal entry embody a settlement or expressly reserve jurisdiction to enforce the settlement to be conditioned on the settlement and enforceable post dismissal.

The Sixth District follows the majority of Ohio's appellate districts, including the First, Second, Third, Seventh, Ninth and Tenth Districts, in requiring that a dismissal entry embody a settlement or expressly reserve jurisdiction to enforce the settlement to be conditioned on the settlement and enforceable post-dismissal. *See Said v. Admr., Bur. of Workers' Comp.*, 1st Dist. Hamilton Nos. C-130355, C-130360, 2014-Ohio-841, ¶ 10 (dismissal entry stating "Case settled and dismissed with prejudice by agreement of the parties" unconditional); *Grace v. Howell*, 2nd Dist. Montgomery No. 20283, 2004-Ohio-4120, ¶¶ 4, 8-13 (dismissal entry noting that case had "been settled and compromised to the satisfaction of all parties as shown by the endorsement of counsel below" unconditional); *Showcase Homes, Inc. v. Ravenna Savings Bank*, 126 Ohio App.3d at 329, 331, 710 N.E.2d 347 (3rd Dist. 1998) (dismissal entry stating "The parties ***

advised the Court that the within cause has been settled” unconditional); *Bugeja v. Luzik*, 7th Dist. Mahoning No. 06 MA 50, 2007-Ohio-733, ¶ 8 (dismissal entry stating “case settled and dismissed with prejudice at defendant's cost” unconditional); *Smith v. Nagel*, 9th Dist. Summit No. 22664, 2005-Ohio-6222, ¶ 6 (dismissal entry stating case “settled and dismissed” unconditional); *David v. Jackson*, 159 Ohio App.3d 346, 2004-Ohio- 6735, 823 N.E.2d 941, ¶ 15 (9th Dist.); *Kleinholz v. Bodnar*, 9th Dist. Summit Nos. 19240, 19574, 2000 WL 631976 (May 17, 2000); *Reitter Stucco, Inc. v. Ducharme*, 10th Dist. Franklin No. 11AP-488, 2011-Ohio-6831 (dismissal entry stating “The Court, having been advised by counsel that Defendant . . . has entered an agreement for the repayment of certain sums which are the subject of this case, hereby orders the case dismissed without prejudice” unconditional); *Baybutt v. Tice*, 10th Dist. Franklin Nos. 95APE06-829 and 95APE08-1106, 1995 WL 723688 (Dec. 5, 1995); *Hart v. Smolak*, 10th Dist. Franklin No. 94APE12-1808, 1995 WL 518849 (Sept. 5, 1995). By contrast, the Eleventh District adheres to the minority view, while the remaining districts have not addressed the issue (Fourth and Twelfth Districts) or issued conflicting decision. (Fifth and Eighth Districts).

The Sixth District’s decision and majority view mirror the Federal courts’ position that, to retain jurisdiction to enforce a settlement, a court must incorporate the settlement in its dismissal entry or expressly retain jurisdiction to enforce it. *See, e.g. Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994). In *Caudil v. N. Am. Media Corp.*, 2000 F.3d 913, 917 (6th Cir. 2000), the United States Court of Appeals for the Sixth Circuit held that “[t]he phrase ‘pursuant to the terms of the [s]ettlement’ fails to incorporate the terms of the [s]ettlement agreement into the order because ‘[a] dismissal order’s mere reference to the fact of settlement does not incorporate the settlement agreement in the

dismissal order.” *Accord, McAlpin v. Lexington 76 Auto Truck Stop, Inc.*, 229 F.3d 491 (6th Cir. 2000).

Thus, if the Court adopts the minority view, it will overturn established case law in most of Ohio’s appellate districts, and place Ohio at odds with the federal courts in this state.

C. Requiring a court to embody the terms of the settlement within the dismissal entry or expressly retain jurisdiction to enforce a settlement will insure the parties are on notice of the court’s continuing jurisdiction.

Karam respectfully submits that, because conditional dismissals are an exception to the general rule that dismissals terminate an action, the condition on which the dismissal is based should be stated clearly on its face. Adoption of the majority view would establish a clear standard for these conditional dismissals, assist the trial courts and parties in drafting them to their needs, and insure that everyone is on notice of the court’s continuing jurisdiction.

By contrast, adoption of the minority view will foster uncertainty because a dismissal entry need only mention an antecedent event to retain jurisdiction. Thus, if a dismissal entry mentions a settlement or some other event, it will be impossible to determine from the dismissal’s face if it the event was a condition or merely the case’s procedural history. Instead, a party would have to apply the formula set forth Travelers’ proposition of law or rely on extrinsic evidence to determine the court’s intent.

D. Requiring a court to embody the terms of the settlement within the dismissal entry or expressly retain jurisdiction to enforce a settlement will encourage the court and parties to consider the dismissal entry carefully rather than rush to file.

The procedural histories of this case and the Placeholder Cases illustrates the danger of dismissing cases without considering the terms of the settlement, whether the settlement resolves all of the issues before the court, the possibility of the court’s continued involvement after settlement, and the likelihood of subsequent disputes over the settlement’s terms. The minority

view encourages a “rush to judgment” with little regard for these issues. By contrast, requiring the court and parties to actively participate in the process of drafting the dismissal entry will bring any issues with the settlement to the forefront sooner.

Indeed, had the Trial Court consulted with parties in this case prior to dismissing the case sua sponte, it would have learned that Travelers believed the settlement was incomplete and opposed the dismissal. In turn, the trial court would have addressed the procedural issues prior to dismissal, leaving only the merits in dispute and shortening appellate review by years.

E. Requiring a court to embody the terms of the settlement within the dismissal or expressly retain jurisdiction to enforce a settlement will discourage the misuse of “placeholder” entries when a case has not been settled, but is still in negotiations.

Karam submits that adoption of the minority view will increase the misuse of “placeholder” entries as appellate districts that previously followed the majority view allow trial courts in their districts to retain jurisdiction to enforce a settlement if the court’s dismissal entry mentioned the settlement. By contrast, requiring courts to reserve the right to enforce a settlement is likely to discourage dismissal based on settlements that do not exist.

F. Contrary to Travelers’ assertions, requiring a court to embody the terms of the settlement within the dismissal or expressly retain jurisdiction to enforce a settlement will not impose an undue burden on the courts or parties.

Traveler’s suggests that adoption of the majority view will result in impose significant burdens on the trial courts and parties. As most of Ohio’s appellate districts have been following the majority view for decades, Karam fails to see how extension of this rule to the four remaining appellate districts would result in any significant difficulties.

Moreover, Travelers focuses on the problems flowing from embodiment of the settlement agreement into the dismissal entry, but this is only one of two ways in which a court can retain jurisdiction to enforce a settlement. A trial court can obtain the same results by stating “the court

hereby retains jurisdiction to enforce the settlement agreement reached between the parties after dismissal of this case.” It is evident from the cases cited by Karam and Travelers that similar language is frequently included in dismissal entries with little or no burden on the courts or parties. Accordingly, the benefits of adopting the majority view far outweigh any potential issues raised by Travelers

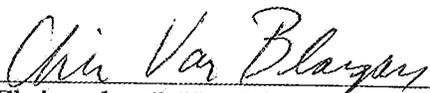
CONCLUSION

For the foregoing reasons, Karam respectfully requests that the Court affirm the Sixth District’s decision, and adopt the majority view requiring courts seeking to retain jurisdiction to enforce a settlement agreement to embody the terms of the settlement within the dismissal or expressly retain jurisdiction to enforce the settlement.

Alternatively, should the Court adopt the minority view, and reverse the Sixth District’s decision, Karam requests that the Court remand this appeal to the Sixth District with instructions to decide Karam’s remaining assignments of error.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent by regular United States Mail this 13th day of May, 2014 upon:

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