ORIGINAL

IN THE SUPREME COURT OF OHIO

INFINITE SECURITY SOLUTIONS, LLC, et al.	)	Cases Nos. 2013-1671 and 2013-1795
Appellee	)	
vs.	)	On Appeal from the Lucas County Court of Appeals, Sixth Appellate District
KARAM PROPERTIES I, LTD., et al.	)	
Appellant	)	Court of Appeals Case No. L-12-1313

REPLY BRIEF OF APPELLANT
THE TRAVELERS INDEMNITY COMPANY

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ARGUMENT

Introduction

Appellant Travelers is asking this Court to sanction a practice followed by the trial courts in four appellate districts which is more logical, less prone to inadvertent mistake and less costly to litigants than the position advocated by Appellees. It is more logical because when a trial court, given its knowledge of a case, is aware of a settlement, it is in the best position to enforce it. Appellant's position is less prone to inadvertent mistake because an omission of talismanic and unnecessary language in a dismissal entry will not be fatal to a court's continuing jurisdiction to enforce a settlement agreement. It is less costly because parties to a settlement agreement would not be forced to file new lawsuits to enforce the agreement, thereby avoiding delayed resolution of the dispute and attendant higher litigation costs. The arguments advanced by Appellees have not overcome, or even directly addressed, these self-evident truths. The certified conflict question should be answered in the negative and Appellant's Proposition of Law should be adopted.

The certified conflict question is much broader in scope than the Proposition of Law. The certified conflict question seeks an answer to the question of whether a dismissal entry that does not either (1) expressly reserve jurisdiction to the trial court to enforce a settlement agreement or (2) embody the terms of a settlement agreement can ever be a conditional dismissal. The Proposition of Law addresses the narrower question presented by the facts of this case, which is whether, assuming that a dismissal entry does not have to expressly reserve jurisdiction or embody the terms of a settlement agreement to be conditional, the instant settlement entry exemplifies a conditional dismissal. Because a negative answer to the certified conflict question is necessary for consideration of the Proposition of Law, the certified conflict question will be addressed first in this Reply Brief.

Certified Conflict Issue:

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

Appellees' Brief does not separately address the certified conflict appeal and the jurisdictional appeal,[1] so it is difficult to divine which of Appellees' arguments are directed towards the certified conflict question and which are directed towards the Proposition of Law. It appears that Appellees urge this Court to answer the certified conflict question in the affirmative primarily based upon their contention that this is the rule in the majority of Ohio's appellate districts. In light of the actual division on this issue in the districts, Appellees' contention is not persuasive.

Ohio's appellate districts are divided on the question of what language must be included in an entry of dismissal in order for the dismissal to be considered conditional. The ***Fifth, Eighth, Eleventh*** and ***Twelfth*** Appellate Districts have held that a dismissal entry need not be highly detailed or precise, but rather need merely elude or make reference to a settlement in order for the dismissal to be conditional. *See, e.g.*, *State ex rel. Spies v. Lent*, 5th Dist. No. 2008 AP 05 0033, 2009-Ohio-3844, ¶47 ("The language reserving limited jurisdiction need not be highly detailed or precise... Rather, the entry of dismissal need merely allude to the existence of a settlement upon which the

[1]S.Ct.Prac.R. 8.03(C) states: "In cases where a certified-conflict case has been consolidated with an appeal under S.Ct.Prac.R. 7.07(C), the brief shall identify the issues that have been found by the Supreme Court to be in conflict and shall distinguish those issues from any other issues being briefed in the consolidated appeal."

dismissal is premised.");[2] *Estate of Berger v. Riddle*, 8th Dist. Nos. 66195, 66220, 1994 WL 44397 (August 18, 1994)(dismissal entry stating "[a]ll claims and counterclaims in the above numbered cases settled and dismissed with prejudice at defendants' costs" was conditional dismissal that did not divest trial court of jurisdiction to hear motion to enforce settlement);[3] *Nova Information Sys., Inc. v. Current Directions, Inc.*, 11th Dist. No. 2006-L-214, 2007-Ohio-4373, ¶15 ("Where a court wishes to reserve limited jurisdiction, the language of the reservation need not be highly detailed or precise. Rather, the entry of dismissal need merely allude to the existence of a settlement upon which the dismissal is premised."); *Henneke v. Glisson*, 12th Dist. No. CA2008-03-034, 2008-Ohio-6759, ¶18 (dismissal entry stating "[b]y agreement, case dismissed" evidenced court's intention to condition dismissal upon settlement and retain jurisdiction).[4]

The ***First, Second, Third, Seventh, Ninth and Tenth*** Appellate Districts have held that in order for a dismissal entry to be conditional, it must either expressly embody the terms of the settlement or explicitly reserve to the trial court continuing jurisdiction over disputes arising out of the settlement. *See, e.g., Said v. Admr., Bur. of Workers' Comp.*, 1st Dist. Nos. C–130355, C–

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[2]Appellees contend the Fifth District has issued conflicting decisions on this issue, but they fail to identify the conflicting decisions. Presumably, Appellees refer to *Spies, supra*, and *McDougal v. Ditmore*, 5th Dist. No. 2008 CA 00043, 2009-Ohio-2019. As indicated, *Spies* states that "[t]he language reserving limited jurisdiction need not be highly detailed or precise[,]" and that "the entry of dismissal need merely allude to the existence of a settlement upon which the dismissal is premised." *McDougal* did not hold to the contrary. *McDougal* merely held that a dismissal entry that stated "[u]pon agreement of Counsel for Plaintiffs and Counsel for Defendant, this matter is dismissed with prejudice to refiling" and that did not reference a settlement, did not indicate the court retained jurisdiction to enforce the terms of a settlement agreement. *Id.* at ¶16.

[3]Appellees contend an internal conflict exists in the Eighth Appellate District between the decisions in *Estate of Berger, supra*, and *Elec. Enlightment, Inc. v. Lallemand*, 8th Dist. No. 87551, 2006-Ohio-5731. That is not so. *Lallemand* did not disavow *Estate of Berger*. Moreover, the Eighth District has repeatedly followed *Estate of Berger*, and it did so as recently as nine months ago in *Morell v. O'Donnell*, 8th Dist. No. 99824, 2003-Ohio-3921, ¶10.

[4]Appellees incorrectly claimed that the Twelfth District has not addressed the issue, but *Henneke, supra*, clearly demonstrates that it answers the certified conflict question in the negative.

130360, 2014-Ohio-841, ¶10; *Grace v. Howell*, 2nd Dist. No. 20283, 2004-Ohio-4120, ¶13; *Showcase Homes, Inc. v. Ravenna Savs. Bank*, 126 Ohio App.3d 328, 331, 710 N.E.2d 347 (3rd Dist. 1998); *Bugeja v. Luzik*, 7th Dist. No. 06 MA 50, 2007- Ohio-733, ¶8; *Smith v. Nagel*, 9th Dist. No. 22664, 2005-Ohio-6222, ¶6; *Baybutt v. Tice*, 10th Dist. Nos. 95APE06-829, 95APE08-1106, 1995 WL 723688, *2 (December 5, 1995). The Court of Appeals below adopted this position.

To the best of Appellant's knowledge, the ***Fourth*** Appellate District has not decided the issue.

Appellees refer to the ruling adopted by the Court of Appeals below as the "majority view," but the split in the districts is paper-thin. With the exception of the ruling of the Court of Appeals below, ***four*** appellate districts would answer the certified question in the negative; ***six*** appellate districts would answer in the affirmative; and ***one*** appellate district has yet to comment. Appellees' contention that requiring a dismissal entry to embody the terms of the settlement or expressly reserve jurisdiction will not impose any undue burden on trial courts because "most...already follow the majority rule" (Appellees' Brief at p. 5) is not true. Excepting the ruling of the Court of Appeals below, Ohio's twelve appellate districts are divided in a six to four split. There is no majority rule, so "most" courts are ***not*** already following ***either*** rule.

Claiming their position is supported by ***federal*** law, Appellees' cite *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 114 S. Ct. 1673, 128 L. Ed. 391 (1994), and the Sixth Circuit's decision in *Caudill v. North Am. Media Corp.*, 200 F.3d 914 (6th Cir.2000) (interpreting *Kokkonen*), for the proposition 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." But the reasoning that supports application of the rule in the federal system is inapplicable in the state system. Unlike Ohio's state courts, which are courts of general jurisdiction and which are presumed to have

jurisdiction over a controversy unless a contrary showing is made[5], "[f]ederal courts are courts of limited jurisdiction[.]" *Kokkonen*, 511 U.S. at 377. It is the concept of ***limited*** jurisdiction that prevents a federal court from retaining jurisdiction to enforce a settlement agreement without an express reservation of such jurisdiction in a dismissal entry. Ohio's courts are courts of general, not limited, jurisdiction. Thus, the *Kokkonen* holding has no precedential or persuasive value. Appellees' contention that answering the certified question in the negative will "place Ohio at odds with the federal courts in this state" ignores this fundamental difference between the two systems.

Appellees contend 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." (Appellees' Brief at p. 9). Travelers does not disagree that, to be conditional, a dismissal must include language stating that the parties have resolved their differences or have arrived at a settlement. Indeed, such language is included in Travelers' Proposition of Law. Travelers does adamantly oppose a rule that would require a dismissal entry to actually ***embody*** the terms of a settlement because that would discourage settlements and run counter to public policy favoring settlements. Parties to settlement agreements frequently do not want them to be made public, as was the situation in this case. Litigants may prefer to try their cases rather than settle because of a widely-held perception that public knowledge of the amounts of settlement payments or of settlement obligations encourages suits against the paying or obligated party. This frustrates the public policy favoring settlements.

Tacitly acknowledging this detrimental effect on public policy, Appellees alternatively contend that requiring a dismissal entry to expressly state that a trial court reserves jurisdiction to

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[5]*See Schwarz v. Bd. of Trustees of Ohio State Univ.*, 31 Ohio St.3d 267, 272, 510 N.E.2d 808 (1987) (courts of common pleas are courts of "original and general jurisdiction.").

enforce the terms of a settlement agreement will impose "little or no burden" on a trial court. (Appellees' Brief at p. 11). Maybe so, but this is inimical to the concept that courts of common pleas are courts of general jurisdiction that are ***presumed*** to have jurisdiction unless a contrary showing is made. Such a requirement imposes an unnecessary restriction on a trial court's exercise of its presumed jurisdiction.

More importantly, imposition of such a requirement can have costly and unintended consequences. In this case, the trial court clearly understood and accepted that it could have been called upon to enforce the settlement agreement by deciding the issue of priority to the settlement funds. It understood that after the extensive motion practice in these consolidated cases, it was in the best and most efficient position to enforce the agreement. Requiring that a dismissal entry specifically reserve jurisdiction to enforce the settlement in this case, and likely in many others like it, will force the parties to litigate such enforcement in a separate suit before a judge who is unfamiliar with the facts of the case, resulting in months of delays and the additional costs of re-litigating the issues with which the trial court is already familiar. This is a waste of judicial time and resources.

Additionally, in this case, and likely in others like it, the parties were not afforded an opportunity to suggest to the trial court the language to be included in the dismissal entry. The trial court, without forewarning, drafted the dismissal entry on its own with knowledge that the parties would ask it to enforce the agreement if they could not agree upon a division of the settlement proceeds. (R. 220 at pp. 15-18, 21-22; Supp. 15-18, 21-22). It is not fair or equitable that the parties should be forced to bear the costs and delays in enforcement of the agreement in a new lawsuit or in

a new court simply because of an inadvertent omission of heretofore unrequired language in the dismissal entry.[6]

The certified conflict question should be answered in the negative. It should not be necessary for a dismissal entry to embody the terms of a settlement agreement or expressly reserve jurisdiction to the trial court to enforce the terms of a settlement agreement in order for it to be a conditional dismissal.

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.

Appellees' arguments against adoption of this Proposition of Law appear to be (1) that dismissals containing the four elements improperly act as stays, not dismissals, (2) that they promote "premature" dismissal of cases by trial courts who seek to manipulate reporting requirements established by this Court, and (3) that "any antecedent event mentioned in the dismissal could be construed as a condition, the failure of which would allow the case's resurrection." (Appellees' Brief at p. 5). This Court has already addressed the first contention. In concluding that a trial court did not lack jurisdiction to reactivate a case that had been dismissed without prejudice, this Court explained in *Page v. Riley*, 85 Ohio St.3d 621, 710 N.E.2d 690:

> As [the trial judge] asserts, her "dismissal" of the case actually operated as a stay. Although the March 31, 1998 entry stated that the proceedings in case No. 95-3658 were dismissed without prejudice, ***courts do not accord talismanic significance to the use of that language***. See, *e.g., United States v. Milwaukee* (C.A.7, 1998), 144 F.3d 524, 528, fn. 7. ***In fact, the dismissal***

[6]As noted by the Appellate Court in its decision, the instant case was a case of first impression in the Sixth District on the certified conflict issue.

> ***of a civil action without prejudice may be the equivalent of a stay where the "dismissal" order contemplates further proceedings in the case.*** *Willhelm v. Eastern Airlines, Inc.* (C.A.7, 1991), 927 F.2d 971, 972-973; *Brace v. O'Neill* (C.A.3, 1977), 567 F.2d 237, 242-243. . . .

Id. at 623-624 (Emphasis added.) Thus, it is acceptable for a court to utilize a dismissal without prejudice that contemplates further proceedings in a case to, in effect, stay the case pending such future activity. Such a dismissal does not deprive the court of jurisdiction to address the contemplated future activity.

As for Appellees' second contention, if courts are utilizing dismissals without prejudice to deliberately skew or manipulate statistics reported to this Court, as Appellees suggest, that should be addressed through the Rules of Superintendence on a prospective basis and not by punishing a litigant, such as Appellant, for a trial court's improper motive. Neither Appellant nor Appellees asked the trial court to dismiss this case when it did, nor did they suggest the language to be used in the entry.

Appellees' second contention also misses the mark in the context of this case. The trial court's dismissal of this case was not premature because the parties had entered into a settlement. The settlement included an agreement that Infinite would make a monetary payment to settle Appellees' and Appellant's claims against Infinite in the two consolidated cases. The settlement also included an agreement that Appellant and Appellees would attempt to resolve their competing claims to the Infinite payment amount, ***and that if they were unable to do so, they would submit the dispute to the trial court.*** (R. 220 at pp. 7-8, 12-13, 16-17, 21-23; Supp. 7-8, 12-13, 16-17, 21-23). The following colloquy between the trial court and Appellees' counsel confirms this:

> THE COURT: Mr. Reagan [counsel for Appellees], were you here in May when the matter was resolved?

MR. REAGAN: I was here, yes, when the settlement was reached, May 19th.

THE COURT: And was Mr. Nestico [co-counsel for Appellees] here?

MR. REAGAN: Yes.

THE COURT: Okay. Your memorandum opposing Travelers' motion is devoid of any reference to what she has argued here, which is that you advised this Court, me, that all matters had been resolved. There is one lingering issue, as Ms. Chapnick [counsel for Travelers] has articulated, and that is how do you split up the balance of the [$XXX] between the two of you. There's nothing, nothing in this memorandum addressing that. Do you agree with that?

MR. REGAN: I can address that, Your Honor.

THE COURT: Do you agree you didn't address it at all in your memorandum?

MR. REAGAN: I did not address the issue of the settlement conference. ***There was a settlement.*** I think –

THE COURT: Well, the extent is – the question is what's the extent of that. She's saying there's a settlement with one caveat, and that caveat has to do with this very issue. You don't deny that. You just say everything is settled, there's a federal case which is now handling that priority issue.

MR. REAGAN: Well –

THE COURT: That's an excellent job of wordsmithing without confronting the issue head-on, and that is ***do you agree or not that you came before this Court and you agreed with Ms. Chapnick that everything had been resolved save how to split the [$XXX]***?

MR. REAGAN: ***We did, your Honor.***

THE COURT: You made that representation to me?

MR. REAGAN: ***Yes.***

THE COURT: Okay. So, at least that part of the record is clear. Now, the only issue is how do you deal with my judgment entry and what consequence, if any, does

that judgment entry have on this lingering priority issue.

* * *

MR. REAGAN: . . . ***We left here that day considering that we might approach the Court, and I don't recall agreeing that we would approach the Court on that issue, but that we may approach the Court if we were unsuccessful in resolving that issue.*** We left here that day, had numerous conversations, had lengthy correspondence back and forth between Travelers, and we were, unfortunately, not able to resolve that issue. . . .

* * *

THE COURT: . . . So you don't believe you could have come to this court – I think you – actually, I think you implied that you could. You could have come back to this Court and said, Judge, we can't work it out, can we use your assistance, can we file a brief to help establish the priority and how to split up the [$XXX].

MR. REAGAN: ***We were confronted with that issue that afternoon***, Your Honor, and ***we agreed that we may do that.*** Okay.

(R. 220 at pp. 15-18, 21-22; Supp. 15-18, 21-22) (emphasis added). Based upon such representation having been made to the trial court, it issued the Dismissal Entry, which stated:

> Parties having represented to the court that their differences have been resolved, this case is dismissed, without prejudice, with the parties reserving the right to file an entry of dismissal within thirty (30) days of this order.

(R. 165; Appx. 66).[7]

The trial court was correct. The parties had a settlement agreement, the terms of which were that Infinite would pay a sum of money, which sum was agreed upon by Appellant and Appellees, to

[7]While acknowledging the widespread use of this type of dismissal entry (Appellees' Brief at p. 4), Appellees contend that they are not authorized by the Civil Rules. The Civil Rules may not expressly authorize such entries, but they also do not prohibit them.

resolve the claims against Infinite; Appellant and Appellees would attempt to agree on how that amount was to be divided between them; and if no agreement could be reached, Appellant and Appellees would ask the trial court to resolve the priority issue. Therefore, the trial court did not dismiss the case before a settlement had been achieved. The submission of the priority issue to the trial court was not the result of a failure of negotiation to consummate the settlement agreement; rather, it was an attempt by Appellant to ***enforce*** the settlement agreement by submitting the priority issue to the trial court.

Finally, Appellees' third contention, that adoption of Travelers' Proposition of Law will 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" (Appellees' Brief at p. 5), mischaracterizes Travelers' Proposition of Law. It requires that a dismissal entry state "the parties have resolved their differences or have arrived at a settlement agreement." Thus, the Proposition of Law contemplates the occurrence of a ***specific*** event - a settlement - not "any antecedent event."

Appellees have not explained to this Court why the inclusion of the four elements in Appellant's Proposition of Law in a dismissal entry would not make it clear that the dismissal is conditional. The instant Dismissal Entry, which embodied all four elements, acknowledged that a settlement agreement had been reached, and in reserving to the parties the right file a final entry of dismissal, it stated that it contemplated ***future*** action, which is the essence of a condition.

The trial court clearly ***believed*** that the language it used made the Dismissal Entry a conditional dismissal. As the trial court explained in its final Decision and Judgment Entry:

> In this case, the parties represented to this Court, at a settlement pretrial conference, that a settlement had been reached and that the appropriate documentation would be prepared and executed by the parties. The Judgment Entry issued by this Court was ***not*** an unconditional dismissal . . . as the language used in the Judgment Entry was equivalent to the fact that a settlement had been reached between the parties. The Judgment Entry dismissed this matter without prejudice and allowed the parties to file their own dismissal order within 30 days. Therefore, this Court's May 26, 2011 Judgment Entry was ***not*** an unconditional dismissal but was a dismissal ***with a stated condition*** that allows this Court to retain the authority to enforce the settlement agreement. . . .

(R. 192 at p. 3)(Emphasis added.) The court of appeals below incorrectly ignored the stated intent of the trial court. *See Lieberman v. Crawford*, 2nd Dist. No. 13163, 1992 WL 120622, *2 (June 5, 1992)("[W]e...defer to the trial court's apparent interpretation of its own order to the extent that it purports to be 'conditional.'"). Because there was no rule in the Sixth District on this issue when the Dismissal Entry was filed, the Court of Appeals should have given deference to the trial court's intention.

Travelers respectfully requests that its Proposition of Law be adopted and that this Court hold that an 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 (4) provides a timeframe 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 a settlement agreement.

CONCLUSION

Travelers respectfully requests that this Court answer the certified conflict question in the negative, adopt Travelers' Proposition of Law, reverse the Decision and Judgment of the Sixth

Appellate District and remand the case to that court for consideration of the other issues presented in Appellees' appeal of the trial court's Opinion and Judgment Entry.

Respectfully submitted,

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I certify that a copy of the foregoing Reply Brief of Appellant The Travelers Indemnity Company was served by regular U.S. Mail this 20 day of June, 2014 upon the following:

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