

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

APPELLEES ROBERT AND DIANE BERRY'S MOTION FOR RECONSIDERATION

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MOTION FOR RECONSIDERATION

Now come Appellees Robert and Diane Berry (the "Berrys"), by and through undersigned counsel, and hereby respectfully submit their Motion for Reconsideration pursuant to Sup.Ct.Prac.R. 11.2. "The standard for reconsideration is nebulous, but [this Court] has suggested that [it will] grant such motions when persuaded, 'upon reflection,' to deem [a] prior decision as having been made in error." *State ex rel. Gross v. Indus. Comm.* (2007), 115 Ohio St.3d 249, 265 (O'Connor, J., dissenting), citing *State ex rel. Huebner v. W. Jefferson Village Council* (1996), 75 Ohio St.3d 381, 383.

The Berrys respectfully submit that this Court, after reflecting upon the reconsideration brief and concise arguments set-forth below, should be persuaded to grant their Motion for Reconsideration. The majority's decision in this matter was rendered in error in light of: (1) the unique factual circumstances of this case and (2) the legal issues not fully considered, but briefed and argued to the Court. As the dissent cogently recognized: "This case is for fraud, not to set aside the previous settlement or judgment, and the Berrys should be entitled to litigate their claim."

A. The Berrys' Motion for Reconsideration should be granted because, even if the majority's holding is accepted, it does not apply to the unique factual circumstances of this case.

The majority held that "When parties to a tort claim have executed a settlement agreement and consent judgment entry, one party may not subsequently institute a separate cause of action for fraud in the inducement of the settlement agreement without seeking relief from the consent judgment and rescinding the settlement agreement." This holding however, even if accepted, does not apply to the unique set of factual circumstances that were before this Court in this appeal. In fact, the Berrys respectfully submit that the majority erroneously failed to recognize, or simply ignored the fact, that the Berrys never sought to rescind the settlement agreement or re-litigate the underlying legal malpractice claim. Rather, the Berrys simply sought to **enforce** the consent judgment and pursue a fraud claim against Appellant Javitch, Block & Rathbone, L.L.P.

("Javitch") for Javitch's blatant misrepresentation concerning their legal malpractice insurance carrier. Simply put, the Berrys' fraud claims against Javitch were entirely separate and distinct from their malpractice claim. Indeed, the Berrys' fraud claim arose approximately five (5) years after their malpractice claim and stemmed from an entirely different set of circumstances. In other words, the Berrys' fraud claims did not even exist when the malpractice case was settled.¹ Thus, this Court's conclusion that the settlement agreement and consent judgment constituted a valid release of the Berrys' fraud claims is factually and legally erroneous.

When the Berrys discovered the fraud that had been perpetrated upon them, they appropriately **chose** to sue Javitch for their damages caused by Javitch's fraudulent conduct. By doing so, the Berrys were in no way seeking to enforce part of their tort claim that they accepted consideration not to enforce, i.e., their legal malpractice claim. The Berrys were pursuing their contract claim and fraud damages. This fact was ignored by the majority, but not the dissent. In fact, the majority's conclusion that "the Berrys cannot be permitted to retain the benefit of the settlement agreement and at the same time attack the validity of that agreement" demonstrates the majority's fundamental misunderstanding of the facts of this case. The Berrys never sought to attack the validity of the settlement agreement. Rather, as stated above, the Berrys were/are merely seeking compensation for their contract damages caused by Javitch's fraud.

Thus, the above-stated factual circumstances of this case demonstrate that even if the majority's holding is accepted, the law set-forth therein does not apply to the Berrys because: (1) their fraud claims against Javitch did not arise until years after the settlement and consent judgment were entered into and therefore the fraud claims could not have been released; (2) they never attacked the validity of, or sought rescission of, the settlement agreement or consent judgment; (3) they never accepted consideration to not

¹ It is a legal axiom that a party cannot (1) release a claim which does not yet exist **OR** release a claim which it does not know exists.

enforce their fraud claims; and, (4) they were not attempting to re-litigate their legal malpractice claims.² Therefore, the Berry's respectfully submit that their Motion for Reconsideration should be granted and this Honorable Court should vacate its decision and affirm the decision of the appellate court.

B. The Berrys' Motion for Reconsideration should be granted in light of the legal issues that were not fully considered by the majority.

The majority, despite its initial recognition of the fact that the Berrys sued Javitch for fraudulent misrepresentation, fraudulent concealment, gross negligent misrepresentation, and gross negligent concealment, chose to treat and analyze the Berrys' claims as if they were all one (1) fraudulent inducement claim seeking to attack the validity of the settlement agreement. Therefore, the majority concluded that the Berrys' fraud claims were subject to the one-year limitation period imposed by Civ.R. 60(B)(3). By doing so, the majority did not address or consider the fact that the four-year statute of limitations imposed by *R.C. 2305.09* applies to the Berrys' fraud claims because the Berrys were not seeking relief from the consent judgment or rescission of the settlement agreement.³ The majority's holding, therefore, effectively creates an exception to *R.C. 2305.09*'s four-year statute of limitations in those instances when a party is fraudulently induced to enter into a settlement agreement. Moreover, it creates a legal distinction between settlement agreements and contracts, that until now, did not exist.

Additionally, the majority did not consider the effect of its holding upon those instances when a party is fraudulently induced to enter into a settlement agreement without entering into a consent judgment. In such a case, Civ.R. 60(B) would not apply because there would be no judgment to seek relief from, and,

² This fact distinguishes this case from the *Picklesimer*, *Shallenberger*, and *Haller* line of case relied upon by the majority because in those cases the defrauded party was attempting to undue the settlement agreement and re-litigate their original tort claims.

³ The Berrys were pursuing their contract and fraud damages, which they had the right to elect and pursue in lieu of rescission. *Frederickson v. Nye* (1924), 110 Ohio St. 459, at 468-469; *Colvenbach v. McLaughlin* (June 18, 1982), Ashtabula App. No. 1082; *Summa Health Sys. v. Viningre* (2000), 140 Ohio App.3d 780, 749 N.E.2d 344.

presumably, the defrauded party would be able to assert their fraud claims pursuant to *R.C. 2305.09*. Thus, the majority apparently considers the existence of a consent judgment to be of such import that it has the effect of reducing the statute of limitations for fraud from four (4) years to one (1) year. The Berrys respectfully submit that placing such significance upon a consent judgment is improper and unwarranted.

Furthermore, as the dissent points out, the on point and persuasive out-of-state case law, that was not addressed by the majority, demonstrates a separate action for fraud must be enforceable against a party who fraudulently induces another to settle a claim, without having to first rescind the settlement agreement, because once the settlement agreement is rescinded, the original tort claim is re-opened and there is no basis for the fraud claim.⁴ This legal holding is sound public policy and should be followed in Ohio.

Finally, the dissenting opinion also brings to light the likely troubling effect that the majority's holding will have on settlement negotiations. To wit: "If the only remedy for a fraudulent settlement is paying or receiving back the funds and starting over, there is actually an incentive, and no downside, for an unscrupulous party to engage in fraud and concealment." The Berrys respectfully submit that this Court surely did not intend to set-forth a proposition of law that would encourage dishonesty. However, unless reconsideration is granted, the majority's holding will unfortunately lead to such results. In other words, the majority's holding protects the fraudulent party and leaves the defrauded party without any remedy if the fraud is not discovered within one (1) year. Moreover, the majority's holding leaves a defrauded party who may have spent the consideration received for settling the original claim, with no remedy at all for the other party's separate and fraudulent conduct, even if the fraud is discovered within one (1) year.

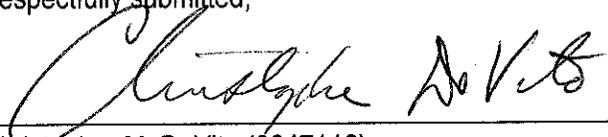
⁴ *Exotics Hawaii-Kona, Inc. v. E.I. Du Pont DeNemours & Co.* (2007), 116 Hawaii 277, 172 P.3d 1021; *Matsuura v. Alston & Bird* (C.A.9, 1999), 166 F.3d 1006, 1010; *DiSabatino v. United States Fid. & Guar. Co.* (D.Del. 1986), 635 F.Supp. 350; *Siegel v. Williams* (Ind.App.2004), 818 N.E.2d 510; *Hanson v. Am. Natl. Bank & Trust Co.* (Ky.1993), 865 S.W.2d 302.

Conclusion.

The majority's opinion loses sight of the fact that the Berrys were not attacking the validity of the settlement agreement and were not seeking to re-litigate their underlying tort claim. The Berrys were seeking to **enforce** the consent judgment and pursue their claim for fraud. Moreover, the majority, because of its misinterpretation of the facts, incorrectly concluded that to allow the Berrys to pursue their fraud claims would be to allow them to enforce a claim that they accepted consideration not to enforce. This is not accurate. The Berrys are merely seeking to re-affirm the consent judgment and pursue their separate and distinct claims for fraud. Therefore, the majority's holding does not apply to the facts of this case.

Furthermore, the majority's opinion conflicts with existing statutory law, creates unnecessary and convoluted legal distinctions that did not previously exist, and its application will have illogical and absurd results. The legal holding also conflicts with persuasive sister-state decisions directly on point and based upon sound public policy. Therefore, this Honorable Court should grant the Berrys' Motion for Reconsideration, vacate its prior opinion, and affirm the appellate court's decision.

Respectfully submitted,



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