

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

LYNN ANN LEPOLE,	:	O P I N I O N
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2003-P-0020
LONG JOHN SILVER'S, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2000 CV 0943.

Judgment: Affirmed.

William A. Zavarello, 313 South High Street, Akron, OH 44308 (For Plaintiff-Appellant).

James L. Glowacki, James J. Imbrigiotta and Christopher M. Corrigan, 510 Leader Building, 526 Superior Avenue, East, Cleveland, OH 44114 (For Defendants-Appellees).

CYNTHIA WESTCOTT RICE, J.

{¶1} This accelerated appeal arises from the Portage County Court of Common Pleas wherein, appellant, Lynn Ann Lepole appeals the trial court's order enforcing a settlement agreement.

{¶2} In April 2000 appellant sustained injuries to her teeth and jaws after eating cole slaw which contained a two-inch foreign object at a Long John Silver's restaurant in Streetsboro. On October 2, 2002, appellant filed a claim against the Long John Silver's restaurant in Streetsboro, Performance Food Corporation (the owner and franchise holder of that restaurant), and Long John Silver's Corporation (the franchisor).

{¶3} On November 19, 2001, the defendants offered to settle the case for \$1,500. Appellant rejected that offer. According to the record, on August 21, 2002, counsel for appellant, Bradley McClain ("McClain"), contacted Long John Silver's regarding the settlement offer. A settlement agreement was then reached and a settlement release, dismissal, and the funds were forwarded to McClain on September 5, 2002.

{¶4} On October 10, 2002, McClain then contacted defense counsel to inform him that he was filing a motion to extend discovery and that appellant was consulting with another physician regarding her injuries.

{¶5} Appellees filed a brief in opposition to the request for extension of discovery, requesting the court reduce the settlement agreement to judgment. Appellant then filed a motion to rescind the settlement agreement, arguing that, although there may have been an agreement, plaintiff did not want to sign the agreement, as she wanted to consult with one last physician.

{¶6} An evidentiary hearing before a magistrate was scheduled for December 9, 2002. On December 4, 2002, McClain withdrew as counsel. At the hearing, appellant testified that she was aware of the \$1,500 settlement offer but never gave

McClain the authority to accept the offer. She testified that her medical bills could total as much as \$20,000. McClain was subpoenaed for the hearing but did not appear.

{¶7} At the conclusion of the hearing, the magistrate issued a decision denying appellant's motion to rescind the settlement agreement, stating that "Even assuming that Attorney McClain did not have the actual authority to settle the case for \$1500, he had the apparent authority to do so. Defendants properly relied on this apparent authority and settled the case in good faith. Any misconduct on the part of Plaintiff's counsel should not be visited upon Defendants."

{¶8} The magistrate determined that appellees' motion to reduce the settlement to judgment should be granted and the case dismissed with prejudice. Appellant filed objections to the magistrate's decision on January 9, 2003. Those objections were overruled, and the magistrate's decision was adopted by the trial court on January 29, 2003.

{¶9} Appellant subsequently filed this timely appeal, citing two assignments of error. The first assignment of error is:

{¶10} "The trial court erred in finding that the Lepoles authorized McClain to settle their claims for \$1,500 and that McClain had apparent authority."

{¶11} The second assignment of error is:

{¶12} "The trial court erred in concluding that any misconduct by McClain should be imputed to the Lepoles and that the remedy, if any, lies elsewhere and not again (sic) Long John Silver's."

{¶13} In both her first and second assignments of error, appellant contends that the trial court erred in finding that the appellant authorized McClain to settle the claim

and that any misconduct by McClain is imputed to appellant. Because of the related nature of both assignments of error, we shall address them jointly.

{¶14} We first address the standard of review applicable to rulings on a motion to enforce settlement. Because it is an issue of contract law, Ohio appellate courts “must determine whether the trial court’s order is based on an erroneous standard or a misconstruction of the law. The standard of review is whether or not the trial court erred.”¹

{¶15} “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.”² It is also well settled that the neglect of an attorney is imputed to the party.³

{¶16} As the trial court noted, in her motion to rescind the settlement agreement, appellant stated, “Plaintiff seeks to rescind and set aside the settlement agreement on the ground that she has information now that she did not have at the time she sought settlement.” This would tend to negate her contention, offered here and at the hearing, that McClain lacked any authority to execute the settlement and, instead, reveals that appellant had a change of heart regarding the settlement. However, notwithstanding this contradiction, this court has held that when an attorney exceeds his settlement

1. *Continental W. Condominium Unit Owners Ass’n v. Howard E. Ferguson, Inc.* (1996), 74 Ohio St.3d 501, 502.

2. (Citations omitted.) *Mentor v. Lagoons Point Land Co.* (Dec. 17, 1999), 11th Dist. No. 98-L-190, 1999 Ohio App. LEXIS 6127, at *7.

3. *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 153.

authority, that misconduct must be imputed to the client and the client's remedy lies elsewhere.⁴

{¶17} In the instant case, appellant testified that McClain had no authority to execute a settlement agreement. However, appellees assert that they entered into the settlement agreement based on the good faith notion that, as appellant's counsel, McClain possessed the apparent authority to do so. As noted above, appellant did not argue a lack of apparent authority when the motion to rescind the settlement agreement was filed.

{¶18} Therefore, when a party has entered into a settlement agreement on good faith, maintaining a suit against them because of supposed misconduct by the opposing party's own attorney is untenable. Thus, we conclude that the trial court did not err in finding that McClain possessed the apparent authority to execute the settlement agreement. Appellant's first assignment of error is without merit.

DIANE V. GRENDALL, J., concurs.

WILLIAM M. O'NEILL, J., dissents with dissenting opinion.

WILLIAM M. O'NEILL, J., dissenting.

4. *Mollis v. Rox Construction Company* (Dec. 4, 1992), 11th Dist. No. 92-T-4688, 1992 Ohio App. LEXIS 6083, at *12.

{¶19} I must respectfully dissent. In order to have entered into a valid settlement agreement, there must have been an enforceable contract between the parties, consisting of a meeting of the minds, as well as an offer and an acceptance.⁵ Without all of the essential elements of a contract, the parties cannot be deemed to have terminated all claims and stand prepared to end the litigation.⁶

{¶20} In the instant case, the majority opinion concludes that a valid settlement agreement was reached when appellant's attorney entered into a verbal agreement with appellee. Subsequently, a written release and settlement agreement were drawn up and sent to appellant but were never formally executed. The majority concludes that, as appellant stated in her motion to rescind the settlement that she wished to set aside the settlement agreement based on new information, appellant simply had a change of heart and did not want to proceed with an already valid settlement.

{¶21} However, this court has recently held that a verbal settlement agreement is not valid where there is a dispute over whether a settlement actually occurred.⁷ In *Thirion*, verbal negotiations took place between the parties, which one party contended constituted a complete settlement agreement. The other party asserted that the negotiations failed to include all settlement terms and a subsequent written release and settlement were never executed.⁸

{¶22} In the case sub judice, it is undisputed negotiations took place between appellant's attorney and appellee. However, appellant subsequently received new information which affected her desire to settle, and she never executed the written

5. *Rulli v. Fan Co.* (1997), 79 Ohio St.3d 374, 376, citing *Noroski v. Fallet* (1982), 2 Ohio St.3d 77, 79.

6. *Id.*

7. *Thirion v. Neumann*, 11th Dist. No. 2003-A-0006, [2003-Ohio-6419](#).

settlement agreement. “Where parties dispute the meaning or existence of a settlement agreement, a court may not force an agreement upon the parties.”⁹

{¶23} Thus, appellant’s counsel entered into settlement negotiations on her behalf but, as demonstrated by the unsigned settlement release, that settlement was never completed, and a valid, enforceable settlement agreement does not exist.

{¶24} Therefore, based on the foregoing, I must respectfully dissent.

8. Id.

9. Id. at ¶17, quoting *Rulli*, supra, at 377.