[Cite as *Gildner v. Accenture, Ltd.*, 2009-Ohio-652.]

Court of Claims of Ohio
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

LANCE A. GILDNER, et al.

Plaintiffs/Counter Defendants

v.

ACCENTURE, LTD.

Defendant/Counter Plaintiff

v.

OHIO DEPARTMENT OF JOB AND FAMILY SERVICES

Counter Defendant
Case No. 2007-05067-PR

Judge Clark B. Weaver Sr.

DECISION

{¶ 1} On September 8, 2008, defendant/counter plaintiff, Accenture, LTD. (Accenture), and counter defendant, Ohio Department of Job and Family Services (ODJFS), filed separate motions for summary judgment. Accenture seeks summary judgment in its favor on the complaint filed by plaintiffs/counter defendants, Lance and Joanne Gildner (the Gildners). ODJFS seeks summary judgment in its favor on the Gildners' counterclaim.

{¶ 2} On September 19, 2008, the Gildners filed a motion for leave to file a memorandum in opposition in excess of the page limitation. The memorandum was filed on September 25, 2008. The motion for leave is GRANTED instanter. On October 16, 2008, an oral hearing was conducted.

{¶ 3} Civ.R. 56(c) states, in part, as follows:

{¶ 4} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." See also *Gilbert v. Summit County,* 104 Ohio St.3d 660, 2004-Ohio-7108, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317.

{¶ 5} In 1995, ODJFS set out to overhaul its welfare system by installing a new computer program to replace the outdated "Ohio Jobsnet." To that end, ODJFS hired Accenture to develop "Ohio Works." According to the complaint, Accenture received millions of dollars from ODJFS for consulting and technical services pursuant to a series of five, unbid contracts spanning several years. It is alleged that Ohio Works was a complete failure and that ODJFS had no choice but to abandon the project in 2001 and to re-employ the outdated Jobsnet system.

{¶ 6} This case arises out of the 2001 settlement agreement by and between Accenture and ODJFS that purports to be a complete settlement, release, and waiver of all claims arising from the Ohio Works project. The complaint, filed by the Gildners in their capacity as representatives of a group of state taxpayers, alleges that the execution of the settlement agreement was the culmination of a five-year conspiracy between several ODJFS employees and Accenture.[1]

{¶ 7} In their complaint, the Gildners claim that ODJFS employees conspired with Accenture to defraud the state of Ohio by circumventing the competitive bidding procedures for public contracts, providing an unusable product, and then entering into a

[1]The Gildners also filed a direct action against ODJFS in this court. See *Lance A. Gildner, et al. v. Ohio Dept. of Job and Family Services,* Ct. of Cl. No. 2005-10241. That action was dismissed by plaintiffs without prejudice on November 16, 2005.

settlement agreement that permitted Accenture to escape liability without compensating the state. Accenture has filed a counterclaim against ODJFS seeking, in part, a declaration that the settlement agreement is valid and enforceable. In the alternative, Accenture alleges that it is entitled to additional compensation for the work it performed on the Ohio Works project.

{¶ 8} In their capacity as representatives of Ohio taxpayers, the Gildners allege that the settlement agreement is the product of fraud. Accenture argues that the settlement agreement bars the Gildners' claims.[2]

{¶ 9} Accenture and ODJFS seek summary judgment on the following grounds. First, Accenture and ODJFS argue that the Gildners do not have standing to bring this action. In the alternative, Accenture and ODJFS contend that the Gildners have failed to present any evidence to support an inference of fraud in the making of the settlement agreement.

{¶ 10} The issue of taxpayer standing was first raised by Accenture in its November 6, 2007 motion for summary judgment, which was denied by the court on June 9, 2008. In the June 9, 2008 entry, the court found that the Gildners have standing as general fund taxpayers. In the pending motion, Accenture and ODJFS ask the court to reconsider its prior ruling.

{¶ 11} The issue of taxpayer standing was addressed by the Supreme Court of Ohio in *State ex rel. Masterson v. Ohio State Racing Comm.* (1954), 162 Ohio St. 366, paragraph one of the syllabus, which provides in relevant part:

{¶ 12} "In the absence of statutory authority, a taxpayer lacks legal capacity to institute an action to enjoin the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are placed in jeopardy.

{¶ 13} "It is equally fundamental that at common law and apart from statute, a taxpayer cannot bring an action to prevent the carrying out of a public contract or the expenditure of public funds unless he has some special interest therein by reason of which his own property rights are put in jeopardy. In other words, private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained by the public generally." Id. (Citation omitted.)

{¶ 14} In *State ex rel. United McGill Corp. v. Hamilton* (1983), 11 Ohio App.3d 102, the Tenth District Court of Appeals interpreted *Masterson* as authorizing a taxpayer who contributes to the state's general revenue fund to challenge a general revenue expenditure, in the same manner as a contributor to a special fund has standing to challenge an expenditure from a special fund. Id. at 103. The general fund taxpayer standing rule announced in *United McGill*, supra, has been followed in a number of subsequent Tenth District opinions. See, e.g.; *State ex rel. Paul v. Ohio State Racing Comm.* (1989), 60 Ohio App.3d 112, 115; *Corbett v. Ohio Bldg. Auth.* (1993), 86 Ohio App.3d 44, 49; *Tiemann v. Univ. of Cincinnati* (1998), 127 Ohio App.3d 312, 321; *Griffin Indus., Inc. v. Ohio Dept. Of Admin. Servs.* (Aug. 2, 2001) Franklin App. No. 00AP-1139.

{¶ 15} Accenture and ODJFS rely on a series of opinions issued by the Supreme Court of Ohio in support of their contention that *United McGill Corp.* and its progeny are no longer the law in Ohio. The most relevant of the cases cited by Accenture is *State ex rel. Dann v. Taft,* 110 Ohio St.3d 252, 254, 2006-Ohio-3677 (*Dann III*). In *Dann III*, a state senator sought a writ of mandamus in order to gain access to various executive communications and reports held by then Governor Taft. In arguing that he had a particularized need for such documents, Dann asserted that he was contemplating the filing of a taxpayer action against Taft. Id.

{¶ 16} In response to that assertion the court stated: "Dann's status as a taxpayer who paid taxes into the general fund and paid gasoline taxes is shared by nearly all adult Ohio citizens. There is nothing particularized about a need asserted on that basis. Nor would the fact that Dann may be contemplating the filing of a taxpayer suit alleging unspecified misconduct on the part of government officials demonstrate a particularized need, because, in the absence of statutory authority, a taxpayer in his position lacks standing to file a taxpayer suit. (Citation omitted.) *Ohio law does not authorize a private Ohio citizen, acting individually and without official authority, to prosecute government officials suspected of misconduct based on the citizen's status as a taxpayer of general taxes* * * *." Id. at ¶9. (Emphasis added.)

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[2]Throughout this case, ODJFS has generally agreed with Accenture's position regarding the validity of the settlement agreement.

{¶ 17} The court notes that the Tenth District Court of Appeals has not yet addressed the continued viability of *United McGill* in light of *Dann III*. However, this court does not believe that the above-cited dicta from *Dann III* was intended as an implied reversal of the general taxpayer-standing rule announced in *United McGill*. First, *Dann III* was a public records case, not a taxpayer-standing case. Second, the dispositive issue in *Dann III* was whether the relator had demonstrated a particularized need for government records in light of the respondent's claim that such records were protected by a qualified gubernatorial privilege. Third, in *Dann III*, the discussion of taxpayer standing focused on the relator's status as a contributor to a special fund. Relator did not contemplate the filing of a taxpayer action based upon his status as a general-fund taxpayer. In this case, as was the case in *United McGill*, the issue is general-fund, taxpayer standing.

{¶ 18} Finally, the present action was not brought by the Gildners to *"prosecute government officials suspected of misconduct."* Rather, the complaint asserts a civil action in which the taxpayers look to recoup general revenue funds paid to Accenture pursuant to a settlement agreement that was allegedly procured by fraud. In short, *Dann III* is legally and factually distinguishable from the instant case.

{¶ 19} In the event that this court were to find that *United McGill* is no longer the law and that the Gildners do not have taxpayer standing by virtue of their payment into the general fund, the Gildners argue, in the alternative, that Lance Gildner has a special interest in the fund at issue inasmuch as he has a partnership interest in one of the thousands of Ohio employers that Ohio Works was intended to benefit.

{¶ 20} However, under *United McGill*, the focus of the inquiry for purposes of determining taxpayer standing is the source of the taxpayer funds, and not whether the taxpayer can draw some tenuous relationship to their usage. "In a situation that does not involve a special fund and which only involves the state's general revenue fund, the taxpayer will meet the special interest requirement of *Masterson* by demonstrating that he, as a taxpayer, has contributed to the general fund." *Paul* at 115. (Citation omitted.) Inasmuch as the money spent on Ohio Works originated from the general revenue fund, plaintiffs' standing arises from *United McGill* and its progeny. Thus, the Gildners'

standing as taxpayers arises either from their status as general fund taxpayers under the rule of law set forth in *United McGill*, or not at all.[3]

{¶ 21} The alternative basis for summary judgment raised by the motions is whether the settlement agreement bars the Gildners' claims for fraud and conspiracy to commit fraud. On October 9, 2001, the parties executed a mutual release which provides in pertinent part:

{¶ 22} "[Accenture] and [ODJFS] hereby mutually remise, release and discharge each other, * * * from all liabilities, obligations, claims, causes of action, appeals and demands of any kind whatsoever, administrative or judicial, legal or equitable, including claims for attorneys' fees and interest, which they now have or hereafter may have, whether known or unknown * * *." (Plaintiffs' Complaint, Exhibit 3.)

{¶ 23} Ordinarily, a release of a cause of action for damages is an absolute bar to a later action on any claim within the release. *Perry v. M. O'Neil & Co.* (1908), 78 Ohio St. 200. However, upon a showing of fraud, a release of liability may be found to be either void or merely voidable depending on the nature of the fraud. *Haller v. Borror Corp.* (1990), 50 Ohio St.3d 10, 13-14.

{¶ 24} Fraud in the factum occurs when an "intentional act or misrepresentation of one party precludes a meeting of the minds concerning the nature or character of the purported agreement." Id. Under this theory of fraud, a party fails to understand the nature or consequence of his release. Id. A victim of fraud in the factum lacks the intention to sign *any* release whatsoever, or at least, such a release as the one executed. *Picklesimer v. Baltimore & Ohio R.R.* (1949), 151 Ohio St. 1, 5. The second type of fraud is fraud in the inducement. Fraud in the inducement involves a plaintiff who, while admitting that he released his claim for damages and received a consideration therefore, asserts that he was induced to do so by defendant's fraud or misrepresentation. *Haller* at 14. This type of fraud may include, but is not limited to, misrepresentations about the economic value of the claim released. *Picklesimer* at 4.

{¶ 25} A release obtained by fraud in the factum is void ab initio, while a release obtained by fraud in the inducement is merely voidable upon the plaintiff's return or

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[3]As the court noted in its June 9, 2008 decision, the Twelfth District Court of Appeals has reached a different conclusion regarding general taxpayer standing. See *Brinkman v. Miami Univ.* 12th Dist. No. CA2006-12-313, 2007-Ohio-4372. ¶46-48.

"tender-back" of the consideration received. *Picklesimer* at 4-5. "In Ohio, the necessity of tender depends upon the character of fraud involved, that is, whether it renders the release void, or merely voidable. In the former case, a tender of the consideration is not necessary to maintain the action * * *; in the latter case it is. In other words, the releasor must offer to place the releasee in statu quo." 35 Ohio Jurisprudence, 288, Section 50.

{¶ 26} Here, the distinction between fraud in the factum and fraud in the inducement is critical in that there has been no tender-back to Accenture of consideration.[4] Consequently, in order to avoid summary judgment, the Gildners must produce evidence which permits the inference that the release was a product of fraud in the factum.

{¶ 27} The settlement agreement was signed on behalf of ODJFS by Thomas Hayes who had been appointed director on September 4, 2001, shortly before the settlement agreement was executed. (Hayes Deposition, Page 9.) Hayes testified that he was not involved in the "strategy of the negotiations and the numbers that ultimately came out of the settlement agreement," but that he signed the agreement on the advice of counsel for ODJFS Bob Mullinax and Christopher Carlson, the former deputy director of ODJFS. (Hayes Deposition, Pages 97-104.) Although Hayes was not particularly knowledgeable about the myriad issues surrounding the Ohio Works project, he was fully aware that he was executing a settlement agreement and that signature upon the agreement meant that the parties' dispute over the Ohio Works project would end.

{¶ 28} Carlson was actively involved in drafting the settlement agreement and he testified that each party was adequately represented by counsel at the settlement discussions. (Carlson Deposition, Pages 340-341.) Carlson also confirmed that it was the parties' desire to resolve "any and all issues that related to the performance of Accenture under [the] contracts." (Carlson Deposition, Page 349.)

{¶ 29} Assistant Attorney General Craig Mayton testified that when he signed the settlement agreement he included the notation "approved as to form." According to Mayton, this meant that he was signing off on the legal sufficiency of the settlement agreement as opposed to the wisdom of the settlement. Mayton explained that where

the state is receiving monies pursuant to a written agreement, rather than paying them out, "full unqualified concurrence and approval" by the attorney general is not required. (Mayton Deposition, Pages 62, 80.) Nevertheless, Mayton's testimony establishes that he was well aware that he was signing a settlement agreement.

{¶ 30} Former Assistant Attorney General Art Marziale was present during settlement negotiations. Marziale testified that the settlement agreement was the result of arms-length negotiations between Accenture and the state of Ohio. In addition, he testified that as far as he knew, the intent of the settlement agreement was to resolve "all issues arising from or relating to the performance of the contract that existed between Accenture and ODJFS." (Marziale Deposition, Pages 141-143.)

{¶ 31} The Gildners rely on the conviction of Arnold Tompkins, former ODJFS director, who was found to have had an illegal interest in a public contract, and the conviction of Donna Givens, an Accenture consultant, who received improper compensation, as evidence of the fraudulent nature of the settlement agreement. However, there is no allegation in this case that any of the ODJFS or Accenture employees responsible for the award and implementation of the Ohio Works contracts either participated in settlement negotiations or executed the settlement agreement. Additionally, all employees who were identified as alleged conspirators in the underlying Ohio Works debacle were either prosecuted, removed from their positions or had simply moved on prior to the commencement of settlement negotiations. Although this evidence and other evidence submitted by the Gildners clearly permits the inference of fraud in the inducement as to both the execution and implementation of the Ohio Works contracts, such evidence does not permit an inference that the subsequent settlement agreement was the product of fraud in the factum.

{¶ 32} The Gildners also produced evidence that calls into question the accuracy of certain recitals contained in the settlement agreement. For example, the Gildners dispute the language of "Attachment B" to the settlement agreement which contains the representation: "As of September 14, 2001, the OhioWorks system was available in all 88 Ohio counties for use by members of the public, county agencies and ODJFS." In "Attachment C" the parties represent that Accenture had "satisfactorily addressed the

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[4]Pursuant to the settlement agreement, Accenture returned $3 million in contract payments and agreed to

issues pertaining to its performance that were raised by the Inspector General's report * * *." Even if the court were to accept the Gildners' assertion that these and other representations in the settlement agreement were blatantly false and that they were intentionally made part of the settlement agreement in order to dupe taxpayers into believing that the settlement was fair and advisable, such evidence does not permit the inference of fraud in the factum. As noted above, fraudulent misrepresentations as to the economic value of the claim being released render the release merely voidable. See *Picklesimer*, supra. In short, such misrepresentations constitute fraud in the inducement rather than fraud in the factum. Id.

{¶ 33} Even when construed most strongly in the Gildners' favor, the evidence is insufficient to permit an inference of fraud in the factum. Indeed, the only reasonable conclusion to be drawn from the evidence is that the state officers who signed the agreement did so with a full and complete understanding that they were executing a settlement agreement and that such agreement included a release of all possible claims against Accenture. Although the taxpayers produced evidence in support of their contention that the consideration received in return for the release was inadequate and that some of the factual representations made in the settlement were false, such evidence merely permits the inference of fraud in the inducement. Under Ohio law, where there has been no tender-back, proof of fraud in the inducement will not defeat a settlement and release.[5]

{¶ 34} Although the strict application of the tender rule in this case may seem harsh in light of the fact that the specific settlement proceeds are not under the control of the taxpayers, the tender rule is the product of a long-standing public policy which favors the compromise and settlement of controversies. *Haller* at 14, citing *White v. Brocaw* (1863), 14 Ohio St. 339, 346. Indeed, counsel for ODJFS argued quite

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forego an additional $2.5 million claimed to be due and owing.

[5]Ohio's strict adherence to the tender rule is not universally accepted. See, e.g., *Slotkin v. Citizens Casualty Co. of New York* (C.A.2, 1979), 614 F.2d 301, 312 (applying New York law); *Bilotti v. Accurate Forming Corp.* (1963), 39 N.J. 184, 188 A.2d 24, 34-35; *Automotive Underwriters v. Rich* (1944), 222 Ind. 384, 53 N.E.2d 775, 777. Nonetheless, Ohio has been identified by other jurisdictions as a state that requires a party to return consideration received before challenging a release. See, e.g., *Matsuura v. Alston & Bird* (C.A.9, 1999), 166 F.3d 1006, FN 4; *DiSabatino v. United States Fid. & Guar. Co.* (D.Del. 1986), 635 F.Supp. 350, 352. But see, *Cundall v. U.S. Bank, N.A.,* 174 Ohio App.3d 421, 2007-Ohio-7067, ¶34. (Given the highly suspect nature of documents that purport to release the fiduciary from liability, a beneficiary of the relationship may challenge the transaction without first returning the consideration.)

persuasively that the judicial deference shown to good faith settlements of disputed claims, is of vital importance where the government is a party. The policy underlying such deference is articulated in *Cincinnati ex rel. Ritter v. Cincinnati Reds, L.L.C.* 150 Ohio App.3d 728, 2002-Ohio-7078, ¶37-39, wherein the First District Court of Appeals stated:

{¶ 35} "'[I]t is elementary that the mere fact that a [governmental entity] may sue and be sued confers upon it also the power to compromise and settle both threatened and pending suits.'

{¶ 36} "* * *

{¶ 37} "'The paramount public welfare demands that such settlement may not be hindered or thwarted by a single taxpayer, even though he be courageous in the cause of public justice. The responsibility for action or nonaction in such matter must rest upon the public officials.'" Id., quoting *Oakman v. Eveleth* (1925), 163 Minn. 100, 203 N.W. 514.

{¶ 38} While *Ritter* was a statutory taxpayer action against a municipality and not a general fund taxpayer action against the state, the public welfare concerns underlying *Ritter* are also paramount to the state. Thus, under Ohio law, where a settlement agreement is the product of fraud in the factum, a taxpayer may intervene and set aside such agreement. Absent proof of fraud in the factum, however, the settlement and release may not be hindered or thwarted by the taxpayer.

{¶ 39} In short, given the absence of any evidence to support an inference of fraud in the factum and given the undisputed fact that the consideration for the release has not been returned to Accenture, the Gildners' claims are barred by the settlement agreement and release of claims. Accordingly, Accenture and ODJFS are entitled to judgment as a matter of law and their respective motions for summary judgment shall be granted.

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Judge Clark B. Weaver Sr.

JUDGMENT ENTRY

An oral hearing was conducted in this case upon defendant/counter plaintiff's and counter defendant's motions for summary judgment. For the reasons set forth in the decision filed concurrently herewith, the motions for summary judgment are GRANTED. Judgment is rendered in favor of defendant/counter plaintiff on the complaint and in favor of counter defendant on the counterclaim. The clerk is directed to return the original papers to the Montgomery County Court of Common Pleas. Court costs are assessed against plaintiffs/counter defendants. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

_____
CLARK B. WEAVER SR.
Judge

cc:

Aaron T. Brogdon
Aneca E. Lasley
Jessica D. Goldman
John R. Gall
Philomena M. Dane
2000 Huntington Center
41 South High Street
Columbus, Ohio 43215-6106

Armistead W. Gilliam Jr.
David C. Greer
Gretchen M. Statt
James H. Greer
James P. Fleisher
400 National City Center
6 North Main Street
Dayton, Ohio 45402-1908

Pamela H. Thurston
1300 Huntington Center
41 South High Street
Columbus, Ohio 43215

Peter E. DeMarco
Randall W. Knutti
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

Steven K. Dankof Sr.
1500 Kettering Tower
Dayton, Ohio 45423

LP/cmd
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