

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

TINA RICE, ETC	:	JUDGES:
	:	Hon: John F. Boggins, P.J.
Plaintiff-Appellant	:	Hon: W. Scott Gwin, J.
	:	Hon: William B. Hoffman, J.
-vs-	:	
	:	Case No. 2004-CA-00213
AMERICAN SELECT INSURANCE	:	2004-CA-00333
COMPANY, DBA WESTFIELD	:	
INSURANCE COMPANY, ET AL	:	
	:	<u>OPINION</u>
Defendants-Appellees	:	

CHARACTER OF PROCEEDING: Civil appeal from the Stark County Court of  
Common Pleas, Case No. 2002CV01909

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: May 23, 2005

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

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Gwin, J.

{¶1} Plaintiff Tina Rice, as the legal guardian of Chrisha Poto appeals two judgments of the Court of Common Pleas of Stark County, Ohio, the first of which overruled appellant's motion to enforce a settlement agreement, and the second of which overruled appellant's motion to vacate the judgment. This court consolidated the two appeals. Appellant assigns two errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED IN DETERMINING THAT NO CONTRACT OF SETTLEMENT WAS FORMED BETWEEN THE PARTIES.

{¶3} "II. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT."

{¶4} In 1992, Chrisha Poto was seriously injured in an automobile crash. She was a passenger in a vehicle struck by a semi tractor-trailer. Appellant sought underinsured motorist coverage against the insurance carriers of various employers pursuant to *Scott-Pontzer v. Liberty Mutual Insurance Company* (1998), 85 Ohio St. 3d 660 and *Ezawa v. Yasuda Fire & Marine Insurance Company* (1999), 86 Ohio St. 3d 557. On March 26, 2003, appellant amended her complaint to add appellee Indiana Insurance Company. The other insurance companies are not parties to this appeal.

{¶5} The parties agree on or about September 22, 2003, appellee extended a settlement offer of \$75,000 to resolve all of appellant's claims against appellee. The offer contained no time restraints or additional conditions.

{¶6} On November 5, 2003, the Ohio Supreme Court announced its decision in *Westfield Insurance v. Galatis* (2003), 100 Ohio St. 3d 216. In *Galatis*, the Ohio

Supreme Court overruled *Ezawa* and limited the application of the rule in *Scott-Pontzer*. This destroyed appellant's *Ezawa* claim against appellee.

{¶7} Also on November 5, 2005, at approximately 11:15 a.m., appellant accepted appellee's settlement offer via facsimile. The fax requested a draft of the settlement agreement and release to be sent as soon as possible. On November 6, 2003, appellee notified appellant the offer was withdrawn.

{¶8} After some exchange between counsel, appellant filed a motion to enforce the settlement agreement. The trial court found there was no meeting of the minds and hence, no contract.

{¶9} Appellant then filed a motion for relief from judgment pursuant to Ohio Civ. R. 60 (B). In it, appellant challenged the affidavit of appellee's counsel, which the court had reviewed in making its original decision.

I.

{¶10} Appellant first challenges the trial court's determination the parties did not reach an agreement to settle the case. In its judgment entry of June 4, 2004, the trial court found after the initial offer was made, counsel for the appellee contacted appellant's counsel suggesting the parties create a structured settlement. Appellee offered to prepare some structured settlement proposals, and counsel for appellant agreed to pass along any proposals to appellant. The trial court concluded from this the parties had not reached a meeting of the minds regarding the terms and conditions of the settlement.

{¶11} Appellant denies appellee ever modified its settlement offer by suggesting a structured settlement. Appellant argues the trial court's judgment entry

is incorrect in as far as it finds these facts are undisputed, and urges appellees' affidavit is hearsay to the extent it alleges how appellant responded to the offer to structure the settlement.

{¶12} As appellee points out, settlement agreements are contractual in nature, and the party asserting the existence of the settlement agreement has the burden of establishing the existence and the terms of the agreement, see *Nilavar v. Osborn* (1998), 127 Ohio App. 3d 1. Basic principles of contract law apply in construing or enforcing an alleged settlement agreement, *Rulli v. Fan Company* (1997), 79 Ohio St. 3d 374. A motion to enforce the settlement may present a mixed question of law and fact, and this court's standard of reviewing a trial court's determination of factual issues is to review the record to see if the courts findings are supported by competent and credible evidence.

{¶13} Here, we are presented with a factual dispute as to whether the settlement offer was modified by a proposal to offer a structured settlement. While the trial court may have been incorrect in finding the facts were undisputed, the court must weigh the evidence regarding any disputed fact, and choose which version to believe. Further, we find the issue is moot, because of the intervening decision of *Galatis*, supra.

{¶14} Appellant concedes the Supreme Court's decision in *Galatis* was announced prior to her attempt to accept the settlement offer. In overruling *Ezawa*, *Galatis* effectively eliminated the basis of appellant's claim against appellee's insurance policy. In addition to finding no meeting of the minds regarding the

specific settlement terms, the trial court found any change in law made before acceptance will impact the settlement in this case.

{¶15} In *Clark v. Bureau of Workers' Compensation* (Franklin App. No. 02AP-743), 2003-Ohio-2193, the Tenth District Court of Appeals reviewed a settlement agreement entered into prior to the Supreme Court's decision in *Holeton v. Crouse Cartage Company* (2001), 92 Ohio St. 3d 115, 748 N.E. 2d 111. In *Clark*, the claimant entered into a settlement agreement with the Bureau of Workers' Compensation to repay benefits he had received from the Bureau out of the proceeds of his personal injury action. The *Holeton* case later held subrogation was unconstitutional. The Franklin County Court of Appeals held the law in existence at the time the parties entered into the contract applies to any agreement, and a change in law does not affect those rights unless the decision overruling the law is retrospective. In the case at bar, the law in effect at the time of settlement was *Galatis*.

{¶16} We find at the time appellant attempted to accept this settlement offer, the law in Ohio had changed and the basis for her claim, *Esawa*, had been overruled. Further, the Ohio Supreme Court has made it very clear its decision in *Galatis* applies retrospectively, see *In Re: Uninsured & Underinsured Motorist's Coverage Case*, 100 Ohio St. 3d 302, 2003-Ohio-5888; *Hopkins v. Dyer*, 104 Ohio St. 3d 461, 2004-Ohio-6769, 820 N.E. 2d 329; *Shirley v. Republic-Franklin Insurance Company*, 104 Ohio St. 3d 638, 2005-Ohio-182, 821 N.E. 2d 188.

{¶17} We find the trial court correctly determined the change in law as set forth in *Galatis*, supra, effectively destroyed appellant's cause of action brought

pursuant to *Ezawa*, supra. Thus, any attempt to settle the claim after the change in law was ineffective.

{¶18} The first assignment of error is overruled.

II.

{¶19} In her second assignment of error, appellant urges the trial court erred in overruling her motion for relief from judgment. To prevail on a motion for relief from judgment, the movant must demonstrate, inter alia, that he has a meritorious claim, see *GTE Automatic Electric v. ARC Industries*, (1976), 47 Ohio St. 2d 146. The trial court found appellant could not establish a meritorious claim if relief were granted. We agree. In *Shirley*, supra, the Ohio Supreme Court found an insurance company may successfully bring a motion pursuant to Civ. R. 60 (B) to reverse a previously entered judgment made pursuant to *Scott-Pontzer*, and pre-dating the Supreme Court's decision in *Galatis*. It is clear the Ohio Supreme Court has determined *Scott-Pontzer* and *Ezawa* claims will not be recognized in Ohio.

{¶20} The second assignment of error is overruled.

{¶21} For the foregoing reasons, the judgments of the Court of Common Pleas of Stark County, Ohio, are affirmed.

By Gwin, J., and

Boggins, P.J., concur

Hoffman, J., concurs

separately

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JUDGES

WSG:clw 0425

*Hoffman, J., concurring*

{¶22} I agree with the majority's disposition of both of appellant's assignments of error, but disagree with its reason for doing so.

{¶23} The majority apparently bases its decision on the fact *Galatis* effectively eliminated the underlying grounds for appellant's claim against appellee and because *Galatis* is to be retroactively applied. Unlike the majority, I do not find the issue "moot" because of the intervening *Galatis* decision. (Maj. Op. at para. 13). I find neither the fact *Galatis* is an intervening decision nor the fact *Galatis* applies retroactively is determinative of whether the alleged settlement agreement can be enforced. Although I concede *Galatis* arguably impacts whether there is adequate consideration on the part of appellant at the time appellant accepted the offer<sup>1</sup>, I do not find *Galatis*, in and of itself, bars appellant from accepting an offer to settle prior to revocation of that offer.

{¶24} Nevertheless, I concur in the majority's decision to affirm the trial court's judgment. I do so because I find the trial court's determination the initial offer was materially modified relative to structuring of payment is supported by the evidence.<sup>2</sup> I find unpersuasive appellant's argument the offering of a structured settlement is "completely irrelevant." (Appellant's Reply Brief at 6). Appellant confuses mode of payment with manner of payment. The issue is not merely one as to whether payment is to be made in dollar bills or pennies as suggested by appellant, but rather includes issues as to varying amounts and timing of payments.

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<sup>1</sup> When determining whether there is adequate consideration to support the settlement, I believe it appropriate to look to the rights and obligations of the parties at the time the offer was made rather than when acceptance of the offer is made where, as here, it is foreseeable there may be a subsequent change in the law affecting those prospective rights and obligations. (The trial court found the *Galatis* decision made it "questionable" whether consideration existed. June 4, 2004 Judgment Entry at 4.)

<sup>2</sup> I reject appellant's assertion the trial court relied upon hearsay in the Geiser affidavit because I find the challenged statement was not hearsay per Evid. R. 801(D).

{¶25} Accordingly, I join in affirming the trial court's decisions, but would limit my reason for doing so solely based upon the trial court's finding there was no meeting of the minds on all the material terms of the settlement before revocation of the offer.





[Cite as *Rice v. Am. Select Ins. Co.*, 2005-Ohio-2597.]