

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

OLIVIA GOODING

Plaintiff-Appellee

-vs-

NATIONAL UNION FIRE INSURANCE COMPANY of PITTSBURGH, PA

Defendant-Appellant

JUDGES:

Hon. William B. Hoffman, P. J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 2003CA00209

OPINION

CHARACTER OF PROCEEDING: Civil Appeal from the Court of Common
Pleas, Case No. 2002CV01308

JUDGMENT: Reversed

DATE OF JUDGMENT ENTRY: February 9, 2004

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

JOHN S. COURY
116 Cleveland Avenue NW, Suite 717
Canton, Ohio 44702

AND

LOUIS H. KHOUREY
510 Tomlinson Avenue
Moundsville, West Virginia 26041

STEVEN G. JANIK
MATTHEW J. GRIMM
BROOKE D. TURNER-BAUTISTA
JANIK & DORMAN, LLP
9200 South Hills Boulevard
Suite 300
Cleveland, Ohio 44147

Wise, J.

{¶1} Appellant National Union Fire Insurance Company of Pittsburgh, PA (“National Union”) appeals the decision of the Stark County Court of Common Pleas that found coverage under two policies it issued to Appellee Olivia Gooding’s father’s employer, Greif Board. The following facts give rise to this appeal.

{¶2} This lawsuit is the result of an accident that occurred on July 6, 1997. On this date, sixteen-year-old Olivia Gooding was a front-seat passenger in a vehicle driven by Randy Moreland. Moreland lost control of the vehicle, left the road and struck a tree. Although Gooding safely exited from the vehicle, she received serious injuries when she returned to the vehicle and it rolled over on her.

{¶3} On the date of the accident, Moreland was insured by State Farm. Gooding subsequently settled with Moreland, for the policy limits of \$100,000, and executed a release. Also on the date of the accident, Gooding’s father, James Heaston, was employed at Greif Board, which is a subsidiary of Greif Brothers.

{¶4} Greif Board is the named insured, under an automobile liability policy, issued by Appellant National Union. The policy provides \$1,000,000 in liability coverage. Appellant National Union also issued Greif Board an umbrella policy which has liability limits of \$25,000 excess of the automobile liability policy. The automobile liability policy fronts motor vehicle protection for Greif Brothers and, in turn, Greif Brothers is required to reimburse National Union for the first \$500,000 of exposure under the policy.

{¶5} Greif Board is also the named insured, under a business auto policy, issued by National Fire Insurance Company of Hartford (“Hartford”). This policy

provides \$1 million in liability coverage and \$1 million in UM coverage. Continental Casualty Company (“Continental”) also provides coverage, under an umbrella policy, which provides \$7 million in excess coverage for four underlying policies.¹

{¶6} Subsequently, Gooding filed a complaint against National Union, Hartford and Continental seeking a declaration of UIM coverages under the various policies issued to Greif Board and Greif Brothers. Gooding claims she is entitled to benefits, under these policies, because her father was employed by Greif Board at the time of her accident. Appellee Gooding’s claims are based upon the Ohio Supreme Court’s decision in *Scott-Pontzer v. Liberty Mut. Fire Ins. Co.*, 85 Ohio St.3d 660, 1999-Ohio-292 and *Ezawa v. Yasuda Fire & Marine Ins. Co.*, 86 Ohio St.3d 557, 1999-Ohio-124.

{¶7} In October 2002, Appellee Gooding filed a motion for summary judgment in which she argued she is an insured entitled to UM/UIM coverage under these various policies. National Union filed a brief in opposition and a cross-motion for summary judgment. On November 15, 2002, the trial court granted National Union’s motion for summary judgment.

{¶8} Thereafter, the trial court agreed to vacate the decision because it filed its judgment entry before the extended time for responding to the summary judgment motions expired. In the meantime, the Ohio Supreme Court issued its decision in *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 2002-Ohio-7217.

{¶9} On May 8, 2003, the trial court issued a second judgment entry finding coverage under National Union’s policies. National Union timely appealed and sets forth the following assignment of error for our consideration:

¹ The policies issued by Hartford and Continental are addressed in Case No. 2003CA00199.

{¶10} “I. WHETHER THE TRIAL COURT ERRED, AND COMMITTED REVERSIBLE ERROR AS A MATTER OF LAW, WHEN IT DENIED SUMMARY JUDGMENT TO DEFENDANT-APPELLANT NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA (“NATIONAL UNION”), AND GRANTED SUMMARY JUDGMENT TO PLAINTIFF-APPELLEE OLIVIA GOODING (“GOODING”).”

“Summary Judgment Standard”

{¶11} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. As such, we must refer to Civ.R. 56 which provides, in pertinent part:

{¶12} “* * * Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case 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. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, 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, such party being entitled to have the evidence or stipulation construed most strongly in the party’s favor.

* * *”

{¶13} Pursuant to the above rule, a trial court may not enter summary judgment if it appears a material fact is genuinely disputed. The party moving for summary judgment bears the initial burden of informing the trial court of the basis for its motion

and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The moving party may not make a conclusory assertion that the non-moving party has no evidence to prove its case. The moving party must specifically point to some evidence which demonstrates the non-moving party cannot support its claim. If the moving party satisfies this requirement, the burden shifts to the non-moving party to set forth specific facts demonstrating there is a genuine issue of material fact for trial. *Vahila v. Hall*, 77 Ohio St.3d 421, 429, 1997-Ohio-259, citing *Dresher v. Burt*, (1996), 75 Ohio St.3d 280.

{¶14} It is based upon this standard that we review appellant's assignment of error.

I

{¶15} We will review National Union's sole assignment of error pursuant to the Ohio Supreme Court's recent decision in *Galatis v. Westfield Ins. Co.*, 100 Ohio St.3d 216, 2003-Ohio-5849. Based upon the *Galatis* decision, we sustain National Union's sole assignment of error.

{¶16} The Court decided *Galatis* after the parties submitted this case for review. The *Galatis* decision limited the Court's previous decision in *Scott-Pontzer*. In doing so, the Court held as follows:

{¶17} "Absent specific language to the contrary, a policy of insurance that names a corporation as an insured for uninsured or underinsured motorist coverage covers a loss sustained by an employee of the corporation only if the loss occurs within the course and scope of employment." *Id.* at paragraph two of the syllabus.

{¶18} The *Galatis* decision also overruled the Court's previous decision in *Ezawa*. The Court held:

{¶19} "Where a policy of insurance designates a corporation as a named insured, the designation of 'family members' of the named insured as other insureds does not extend insurance coverage to a family member of an employee of the corporation, unless that employee is also a named insured." *Id.* at paragraph three of the syllabus.

{¶20} The Court's decision to overrule *Ezawa* is pertinent to the case sub judice because appellee's claims are based upon her being a family member of an employee covered under the application of *Scott-Pontzer*. In general, a decision issued by a court of superior jurisdiction that overrules a former decision is retrospective in operation. *Peerless Elec. Co. v. Bowers* (1955), 164 Ohio St. 209, 210. "[T]he effect is not that the former [law] was bad law, but that it never was the law." *Id.*

{¶21} There are three recognized exceptions to this general rule. The first exception occurs when a court expressly indicates that its decision is only to apply prospectively. See *Lakeside Ave. L.P. v. Cuyahoga Cty. Bd. of Revision* (1999), 85 Ohio St.3d 125, 127 and *State ex rel. Bosch v. Indus. Comm.* (1982), 1 Ohio St.3d 94, 98.

{¶22} The second exception occurs when contractual rights have arisen under a prior decision. See *Wayne Mut. Ins. Co. v. Travelers Ins. Grp.*, Vinton App. No. 03 CA 582, 2004-Ohio-225, at ¶ 10. This exception is premised upon the state and federal constitutional prohibitions against the impairment of the obligation of contracts. *King v. Safeco Ins. Co.* (1990), 66 Ohio App.3d 157, 161.

{¶23} Section 28, Article II of the Ohio Constitution provides that “[t]he general assembly shall have no power to pass * * * laws impairing the obligation of contracts.” The Contract Clause of the federal Constitution similarly provides that “[n]o state shall * * * pass any * * * law impairing the obligation of contracts.” Section 10, Article I, United States Constitution.

{¶24} In the *King* case, the First District Court of Appeals recognized the impairment of contractual obligations is clearly directed against the retrospective application of legislation that operates to impair the obligation of contracts. “The federal Contract Clause also proscribes the retrospective application of legislation that impairs contractual obligations, and although the federal proscription is more broadly stated than the state prohibition, judicial decisions do not, as a general rule, constitute ‘law[s]’ for purposes of the federal prohibition.” *King* at 161, citing *Barrows v. Jackson* (1953), 346 U.S. 249, 259.

{¶25} The *King* case also adopted the rule that “* * * judicial decisions, even if they alter the constructions or interpretation of a statute, do not constitute ‘law[s]’ for purposes of the federal prohibition against the impairment of the obligation of contracts.” *King* at 163.

{¶26} This exception is not applicable to the case sub judice because it was not legislation that limited the *Scott-Pontzer* decision and overruled the *Ezawa* decision, but rather a decision from the Ohio Supreme Court. Thus, according to the *King* case, the contractual rights exception does not apply.

{¶27} The third exception occurs when a party has acquired vested rights under prior law. See *Peerless*, supra; *Cartwright v. The Maryland Ins. Grp.* (1995), 101 Ohio

App.3d 439; *King v. Safeco Ins. Co.*, supra, at 161-163. By filing a declaratory judgment action, appellee has sought to establish that she has a vested right to coverage under National Union's policies. However, this right cannot vest until a judgment is secured. See *Cincinnati Ins. Co. v. Consol. Equip. Co.*, Montgomery App. No. 19390, 2003-Ohio-47; *McGlone v. Spade*, Crawford App. No. 3-01-26, 2002-Ohio-2179; *Estate of Shoff v. Estate of Zimmerman* (Dec. 16, 1998), Wayne App. No. 19045; *Lawreszuk v. Nationwide* (1977), 59 Ohio App.2d 111; *Celina Mut. Ins. Co. v. Sadler* (1966), 6 Ohio App.2d 161; *Evans v. Grange Mut. Cas. Co.* (1964), 12 Ohio Misc. 108; *Spears v. Ritchey* (1958), 108 Ohio App 358; *Alms & Doepke Co. v. Johnson* (1954), 98 Ohio App 78; *Ermakora v. Dailakis* (1951), 90 Ohio App. 453; *Med. Protective Co. v. Light* (1934), 48 Ohio App. 508; *Hartford Acc. & Indem. Co. v. Randall* (1932), 125 Ohio St. 581.

{¶28} The record in this matter indicates, at this point in the proceedings, appellee has not yet established damages. Therefore, because appellee has not secured a judgment against National Union, she does not have a vested right to coverage under National Union's policies issued to Greif Brothers and Greif Board and the *Galatis* decision may be applied retroactively.

{¶29} Accordingly, the trial court should have granted National Union's motion for summary judgment and overruled appellee's motion for summary judgment because there was no conceivable contractual liability according to *Galatis*.

{¶30} National Union's sole assignment of error is sustained.

{¶31} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is hereby reversed.

By: Wise, J.

Hoffman, P. J., and

Farmer, J., concur.