[Cite as *Rengel v. Valley Forge Ins. Co.*, 2004-Ohio-5248.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Judith Rengel, et al.	Court of Appeals No. OT-03-045
Appellants	Trial Court No. 02-CVH-290
v.	
Valley Forge Insurance Company, et al.	**DECISION AND JUDGMENT ENTRY**
Appellees	Decided: September 30, 2004

* * * * *

D. Jeffrey Rengel and Thomas R. Lucas, for appellants.

James H. Irmen, Michael L. McCluggage, Vilia M. Drazdys and Melissa Skilken, for appellee Valley Forge Insurance Company.

Merle D. Evans, III, for appellee Motorists Mutual Insurance Company.

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PIETRYKOWSKI, J.

{¶ 1} This case is before the court on appeal of the Ottawa County Court of Common Pleas' October 28, 2003 judgment granting appellees Valley Forge Insurance Company and Motorists Mutual Insurance Company's motions to dismiss appellants' first amended complaint concerning post-settlement interest payments. Appellants, Judith Rengel and Pizza Bros., Inc., raise the following assignments of error:

{¶ 2} "First assignment of error: Under R.C. 1343.03(A), the obligation to pay interest 'upon any settlement between parties' is triggered on the settlement date, not the date a release of claims is signed.

{¶ 3} "Second assignment of error: The trial court erred in determining that the insurer was not obligated for statutory interest upon a settlement pursuant to ORC §1343.03(A)."

{¶ 4} The facts of this case are as follows. On September 16, 2002, appellants filed a complaint against Valley Forge Insurance Company ("Valley Forge")[1] and Motorists Mutual Insurance Company ("Motorists") seeking post-settlement interest, pursuant to *Hartmann v. Duffey*, 95 Ohio St.3d 456, 2002-Ohio-2486,[2] individually, and on behalf of a purported class which was defined as:

{¶ 5} "Any person or entity who obtained monetary proceeds from a defendant within fifteen (15) years prior to the date of filing of this action as a result of a settlement agreement with a defendant, or on behalf of an insured of a defendant, within the jurisdiction of any Ohio court and who was not paid full statutory interest under ORC §1343.03(A) from the date of the settlement agreement to the date of actual receipt of payment."

{¶ 6} Appellants contemporaneously filed a motion for class certification

[1]Appellants improperly named CNA Insurance Company instead of Valley Forge. On December 9, 2002, appellant filed an amended complaint naming the proper party.

{¶ 7} By way of background, appellant Rengel, in the underlying action, filed a lawsuit against The Riverfront Group, Inc. ("Riverfront") in Hamilton County, Ohio, for injuries she sustained in an automobile accident in Covington, Kentucky. Valley Forge insured Riverfront. The matter was settled on June 25, 2002, and the settlement was executed on July 24, 2002. Rengel received the settlement proceeds on August 5, 2002. On November 15 2002 and January 15, 2003, Valley Forge filed Civ.R. 12(B)(6) motions to dismiss, for failure to state a claim for which relief may be granted, in response to each of appellants' complaints. In Valley Forge's second motion to dismiss, it argued that appellant Rengel had no direct action against Valley Forge and that Rengel must first pursue her claim against the tortfeasor.

{¶ 8} Conversely, Motorists, which was directly sued by Pizza Bros. in the underlying action and settled the matter in 1996, filed answers to appellants' complaint and first amended complaint; the answers set forth several defenses including the defense that the trial court lacked jurisdiction over the class action claim based on the priority rule. Specifically, Motorists argued that because another class action claim was previously filed in Stark County, Ohio, against Motorists, with the same proposed class, the Ottawa County Court of Common Pleas lacked jurisdiction to maintain the class. Separately, on November 18, 2002 and April 14, 2003, in response to each complaint, Motorists filed Civ.R. 12(B)(1) motions to dismiss appellants' class action claim. In its

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[2]*Hartmann* provides at its syllabus: "Pursuant to R.C. 1343.03(A), a plaintiff who enters into a settlement agreement that has not been reduced to judgment is entitled to interest on the settlement, which becomes due and payable on the date of settlement."

motions to dismiss, Motorists argued that the certification of the "same purported class" was pending in Stark County, Ohio. That case, captioned *Gilson v. Motorists Mut. Ins. Co.*, had been filed on June 17, 2002, and, at the time of Motorists "supplemental" motion to dismiss, was on appeal following the denial of class certification.[3]

{¶ 9} On March 21, 2003, arguments were held on the motions to dismiss. Per agreement of the parties, the deadline for filing oppositions to appellants' motion for class certification was vacated pending the trial court's ruling on the dismissal. On October 28, 2003, the court granted the parties' motions on the authority of a Lucas County Court of Common Pleas' case captioned *Bellman v. Am. Internatl. Group*, CI2002-6003[4] and, as relied on in *Bellman*, *Marks v. Allstate Ins. Co.*, 5th Dist. No. 2002CA00417, 2003-Ohio-4043. This appeal timely followed.

{¶ 10} The standard of review for dismissals granted pursuant to Civ.R. 12(B)(1) and (6) is de novo. Under Civ.R. 12(B)(1), lack of subject matter jurisdiction, the question of law is whether the plaintiff has alleged any cause of action for which the court has authority to decide. *McHenry v. Indus. Comm*. (1990), 68 Ohio App.3d 56, 62. Under Civ.R. 12(B)(6), failure to state a claim, the court must determine whether it

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[3]On November 10, 2003, just days prior to the filing of the instant appeal, *Gilson* was affirmed. The *Gilson* court concluded that the trial court did not abuse its discretion in determining that common question of law or fact did not predominate over individual questions. See *Gilson v. Motorists Mut. Ins. Co.*, 5th Dist. No. 2003CA00091, 2003-Ohio-6049.

[4]As of the date of this decision, *Bellman* is pending before this court.

appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Guess v. Wilkinson* (1997), 123 Ohio App.3d 430, 434.

{¶ 11} Before this court begins its analysis, we must note that although appellants filed a notice of appeal including both Valley Forge and Motorists, their assignments of error relate only to the arguments raised below by Valley Forge. We acknowledge that the trial court's October 28, 2003 judgment specifically addressed and adopted the arguments promoted by Valley Forge; that is, that appellants, under Civ.R. 12(B)(6), had failed to state a claim for which relief was available. Though the court dismissed Motorists from the lawsuit, it did not address the jurisdictional argument, which was the basis of Motorists' motion to dismiss.

{¶ 12} Motorists, in its appellate brief, asserts that even though the court dismissed the entire action against Motorists on other grounds; on review, this court may affirm the dismissal of the class action portion based upon the jurisdictional arguments it raised below. Motorists cites to App.R. 3(C)(2), and its Staff Note, which provide:

{¶ 13} "(2) Cross appeal not required. A person who intends to defend a judgment or order appealed by an appellant on a ground other than that relied on by the trial court but who does not seek to change the judgment or order is not required to file a notice of cross-appeal.

{¶ 14} "* * *.

{¶ 15} "Staff Note: 7-1-92 Amendment

{¶ 16} "* * *. If the appellee seeks only to support the judgment or order, it can do so on grounds adopted by the trial court or on grounds rejected or considered by the trial court without filing a notice of appeal."

{¶ 17} Upon review, we find that Motorists falls directly within this rule. It does not seek to change the judgment. Rather, Motorists seeks to defend the judgment on the jurisdictional issue relative to the class action on "a ground other than that relied on by the trial court * * *." Thus, under App.R. 3(C)(2), we find that Motorists may argue the jurisdictional issue. See *Krause v. Spartan Stores, Inc*., 6th Dist. No. L-03-1244, 2004-Ohio-4365.

{¶ 18} Turning to the merits of appellants' appeal, we will first address appellants' two delineated assignments of error. In appellants' first assignment of error, they argue that under R.C. 1343.03(A), the obligation to pay interest is triggered on the date of the settlement, not the date the release is signed.

{¶ 19} After review of the lower court proceedings, we find that the merits of the appeal, appellants' right to interest and the accrual date, were not before the trial court on Valley Forge's motion to dismiss appellants' first amended complaint. Valley Forge argued, and the trial court found under *Marks* and *Bellman*, that appellants could not maintain a direct action against the insurer; rather, appellants must first proceed against the tortfeasor. Because the trial court did not rule on appellants' entitlement to post-settlement interest, we find that appellants' first assignment of error is not well-taken and is denied.

{¶ 20} Appellants' second assignment of error challenges the trial court's determination that the insurers, specifically Valley Forge, were not proper parties to the action.[5] Appellants contend that because the obligation to pay the settlement is on the insured, it has a contractual duty to the insured and may be sued for a breach of that agreement. Conversely, Valley Forge argues that under Ohio law, a tortfeasor is the sole entity liable for payment of the damages claim or of a statutory interest award.

{¶ 21} Appellants rely on the cases captioned *Haluka v. Baker* (1941), 66 Ohio App. 308 and *Lovewell v. Physicians Ins. Co. of Ohio* (1997), 79 Ohio St.3d 143, to support their argument that the insurer is primarily obligated to the plaintiff for payment of the settlement. After review of these cases, we find that they fail to support appellants' claim. First, in *Haluka* the court held that where an insurer, through its contract, reserves the right to handle all aspects of the litigation or settlement and prevents the insured from interfering, such insurer in settling the litigation without the insured's consent or subsequent ratification acts on its own behalf, not as the agent of the insured. *Haluka* at 313. Next, *Lovewell* involved an award of prejudgment interest and the interpretation of the contract between the tortfeasor and his insurer. The court concluded that the insurance policy simply did not provide coverage for prejudgment interest. *Lovewell* at 148.

[5]Appellants contend that the basis for which the trial court granted appellees' motions to dismiss is unclear from the court's decision; appellants concede that Valley Forge argued that it was not the proper party.

{¶ 22} In the present case, unlike *Haluka*, there is no evidence that the settlement between Rengel and Riverfront through its insurer, Valley Forge, was executed without the full consent of the tortfeasor, Riverfront. Further, unlike *Lovewell*, the instant matter does not involve the issue of contract interpretation; the award of post-settlement interest is statutory and from whom the interest is to be paid is a question of law.

{¶ 23} We believe the correct rule of law is set forth in the cases including *Chitlik v. Allstate Ins. Co.* (1973), 34 Ohio App.2d 193; *Peyko v. Frederick* (1986), 25 Ohio St.3d 164; and *Marks v. Allstate Ins. Co.* (2003), 153 Ohio App.3d 378, 2003-Ohio-4043. *Chitlik* provides the basic proposition that in a personal injury action, a plaintiff must sue the alleged wrongdoer. In *Peyko*, the Ohio Supreme Court extended this reasoning to include the payment of prejudgment interest. The court stated:

{¶ 24} "A defendant ultimately is responsible for the payment of prejudgment interest awarded to a plaintiff as a result of the defendant's failure (or the failure of others acting on his behalf) to make a good faith effort to settle the case against him. The defendant's insurer, however, may be liable to the defendant for the amount of the prejudgment interest award, if the insurer's conduct was the basis for the award." (Citations omitted.) Id. at 167, n.1. Accord, *Lovewell v. Physicians Ins. Co. of Ohio*, 79 Ohio St.3d 143.

{¶ 25} The Fifth Appellate District's case captioned *Marks v. Allstate Ins. Co.* is closely aligned with the facts of this case. In *Marks*, the plaintiff sued the tortfeasor for injuries she sustained in an automobile accident. The matter settled and the plaintiff

voluntarily dismissed the action. Thereafter, the plaintiff commenced a lawsuit against Allstate, the insurer, for post-settlement interest. The court granted Allstate's motion for summary judgment and the matter was appealed.

{¶ 26} Affirming the trial court, the appellate court noted that "a settlement agreement is a compromise achieved by the adverse parties in a civil action before final judgment whereby they agree between themselves upon their respective rights and obligations

- * *." (Citations omitted.) Id. at 384. Thus, the court concluded that the compromise was between the plaintiff and the tortfeasor and that Allstate did not become a party to the action simply because it represented the tortfeasor during the proceedings, which resulted in a settlement. Id. at 385. The court further concluded that the "direct action" rule applied and prevented the plaintiff from filing an action against Allstate. Id.

{¶ 27} In this case, appellant Rengel, with the aid of Valley Forge, negotiated a settlement with Riverfront. We agree with the *Marks* court's discussion of the insurer/insured relationship and its application to the payment of post-settlement interest. Thus, as in *Marks*, we conclude that a tortfeasor is responsible for the payment of post-settlement interest. This does not prevent, as stated in *Peyko*, supra, the tortfeasor from seeking reimbursement from the insurer if the insurer was responsible for the delay of payment.

{¶ 28} Based on the foregoing, we find that the trial court did not err in dismissing appellants' action against Valley Forge. Appellants' second assignment of error is not well-taken.

{¶ 29} Pursuant to our discussion, supra, we will now address the jurisdictional argument raised by Motorists in the trial court and discussed in its appellate brief. Motorists contends that the trial court lacked jurisdiction over the class action claims because a class action claim with the identical proposed class had previously been filed in Stark County, Ohio. Motorists also contends that appellants' class action claim is barred by the doctrine of collateral estoppel. Motorists concedes that the trial court erred when it dismissed appellant Pizza Bros.' individual claim for post-settlement interest.

{¶ 30} The jurisdictional priority rule provides: "'As between courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of proper proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties.'" *State ex rel. Racing Guild of Ohio v. Morgan* (1985), 17 Ohio St.3d 54, 56, quoting *State ex rel. Phillips v. Polcar* (1977), 50 Ohio St.2d 279, syllabus. Generally, the jurisdictional priority rules applies when the causes of action are the same in both cases; if the second case does not involve the same cause of action or the same parties as the first, the first case will normally not prevent the second case. *State ex rel. Red Head Brass, Inc. v. Holmes Cty. Ct. of Common Pleas* (1997), 80 Ohio St.3d 149, 151.

{¶ 31} Though the application of the priority rule is generally limited to identical actions, the rule may apply where the causes of action and the requested relief are not the same. *Langaa v. Pauer*, 11th Dist. No. 2001-G-2405, 2002-Ohio-5603, ¶10, citing *State ex rel. Sellers v. Gerken* (1995), 72 Ohio St.3d 115, 117.

{¶ 32} "That is, if the claims in both cases are such that each of the actions 'comprises part of the "whole issue" that is within the exclusive jurisdiction of the court whose power is legally first invoked[,]' the jurisdictional priority rule may be applicable. *State ex rel. Racing Guild of Ohio v. Morgan* (1985), 17 Ohio St.3d 54, 56, 17 Ohio B. 45, 476 N.E.2d 1060. To determine whether two cases involve the 'whole issue' or matter requires a two-step analysis: 'First, there must be cases pending in two different courts of concurrent jurisdiction involving substantially the same parties. Second, the ruling of the court subsequently acquiring jurisdiction may affect or interfere with the resolution of the issues before the court where suit was originally commenced.' *Michaels Bldg. Co. v. Cardinal Fed. S. & L. Bank* (1988), 54 Ohio App.3d 180, 183, 561 N.E.2d 1015." Id.

{¶ 33} Here, identity of parties is demonstrated by the fact that the same defendant, Motorists, and the same potential plaintiffs exist in both cases.[6] Further, we

[6]Again, the proposed Ottawa County class included:

"Any person or entity who obtained monetary proceeds from a defendant within fifteen (15) years prior to the date of filing of this action as a result of a settlement agreement with a defendant, or on behalf of an insured of a defendant, within the jurisdiction of any Ohio court and who was not paid full statutory interest under ORC

conclude that a ruling of the Ottawa County Court of Common Pleas as to the proposed class action claim would likely affect or interfere with the Stark County action. *Langaa*, supra. Accordingly, we find that the jurisdictional priority rule is applicable and that the Stark County Court of Common Pleas first obtained jurisdiction in this matter.

{¶ 34} Motorists further argues that the proposed class action is barred by the doctrine of collateral estoppel because the Fifth Appellate District has affirmed the dismissal of the Stark County proposed class action. See *Gilson v. Motorists Mut. Ins. Co.*, 5th Dist. No. 2003-CA-00091, 2003-Ohio-6049. First, we note that Motorists did not raise the issue of collateral estoppel in the trial court proceedings. More importantly, however, is the fact that under Ohio law, collateral estoppel may not be raised by a motion to dismiss. See *State ex rel. Freeman v. Morris* (1991), 62 Ohio St.3d 107, 109; *Wisner v. Grange Mut. Cas. Co.*, 3d Dist. No. 1-03-92, 2004-Ohio-2621; *Calloway v. Calloway*, 5th Dist. No. 2001CA00274, 2002-Ohio-904; and *Gault v. Springfield Bd. of Edn.* (July 3, 1996), 9th Dist. No. 17709. Accordingly, the issue of collateral estoppel is not properly before this court.

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§13423.03(A) from the date of the settlement agreement to the date of actual receipt of payment."

The proposed Stark County class consisted of the following:

"The class which the plaintiff proposes to represent is composed of all persons who have entered into a settlement agreement with the defendant and/or an insured of the defendant for a claim or action based on tortious conduct, contract, or other transaction, and who upon receipt of the payment of the settlement proceeds from the defendant did not receive statutory interest from the date of such settlements, as required by R.C. 1343.03(A) and *Hartmann v. Duffey*, 95 Ohio St.3d 456, 2002-Ohio-2486 (the "Class")."

{¶ 35} Based on the foregoing, we find that the trial court, though not specifically enumerating its reasons, properly dismissed appellants' class action claim as it relates to Motorists. However, we agree with Motorists that the court erroneously dismissed appellant Pizza Bros.' individual claim.

{¶ 36} On consideration whereof, we find that the judgment of the Ottawa County Court of Common Pleas is affirmed, in part, and reversed, in part. The matter is remanded for further proceedings as to Pizza Bros.' individual claim against Motorists Mutual Insurance Company for post-settlement interest. Pursuant to App.R. 24, the court costs of this action will be equally divided between appellants and Motorists Mutual Insurance Company.

JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, P.J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE