IN THE SUPREME COURT OF GUAM

RICHARD A. SHARROCK and CHRISTINA M. SHARROCK,
Plaintiffs-Appellants,

v.

QUINTEN M. McCOY, PACIFIC INDEMNITY INSURANCE COMPANY, and DOE DEFENDANTS 1-10,
Defendants-Appellees.

Supreme Court Case No.: CVA14-037
Superior Court Case No.: CV1131-07

OPINION

Cite as: 2016 Guam 7

Appeal from the Superior Court of Guam
Argued and submitted on August 14, 2015
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

CARBULLIDO, J.:

[1] Plaintiffs-Appellants Richard A. Sharrock and Christina M. Sharrock ("the Sharrocks") appeal the trial court's February 13, 2014 Decision and Order granting Defendants' Motion to Enforce Settlement ("the February 13 Decision and Order") and the November 6, 2014 Decision and Order denying Plaintiffs' Motion for Reconsideration and granting Defendants' Motion to Dismiss ("the November 6 Decision and Order"). The Sharrocks argue that the trial court erred in finding that the case had settled and in not holding an evidentiary hearing prior to ruling on the Defendants' Motion to Enforce Settlement. On appeal, this court *sua sponte* raised the issue of whether the February 13 Decision and Order was a final appealable order, and if so, whether the court lacks jurisdiction over this appeal. The parties submitted supplemental briefs on this limited issue.

[2] For the reasons set forth herein, we have jurisdiction to hear the appeal and affirm the trial court's decisions.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Underlying Case

[3] The Sharrocks brought suit against Quinten McCoy and his insurer, Pacific Indemnity Insurance Company ("PIIC") (collectively referred to as "the Defendants") for injuries and damages sustained in an automobile accident that occurred in October 2005.

[4] In a separate lawsuit filed in the United States District Court for the District of Guam, the Sharrocks also brought suit against the United States on a theory of *respondeat superior*. In November 2008, the parties stipulated to a stay of the trial court proceedings because the

outcome of the Sharrocks' federal action bore on the Superior Court case. "From 2009 to 2012, [the trial court] repeatedly granted continuances at the request of Defendants' counsel due to the pendency of the federal matter . . . ." Record on Appeal ("RA"), tab 69 at 2 (Dec. & Order Defs.' Mot. Enforce Settlement, Feb. 13, 2014). The Sharrocks' counsel rarely appeared for these hearings. On June 3, 2010, the District Court granted the United States summary judgment, and the Ninth Circuit subsequently affirmed. *See Sharrock v. United States*, 2010 WL 2278580 (D. Guam 2010), *aff'd*, 673 F.3d 1117 (9th Cir. 2012).

B. Events Leading Up to the Defendants' Motion to Enforce Settlement

[5] On June 25, 2008, PIIC offered to settle for $25,000.00, McCoy's policy limit, and conditioned its offer of settlement on the United States releasing its claims against McCoy under the Federal Medical Care Recovery Act ("MCRA") for the cost of medical treatment provided to Sharrock at government medical facilities.

[6] On October 17, 2008, Defendants' counsel wrote to their client, PIIC, that he "spoke with [the Sharrocks' attorney] this morning about the status of [PIIC's] $25k policy limits settlement offer, made back in June. [The Sharrocks' attorney] says he is waiting for a response from the feds on the MCRA release, which is a required term of the settlement." RA, tab 43 at Ex. 2 (Att'y Jon Visosky's E-mail to Stephanie Finona, Pac. Indemnity, Oct. 17, 2013).

[7] On October 21, 2008, Wayson Wong, attorney for the Sharrocks, notified the attorneys for the United States that "[McCoy's] car insurer wants to pay the $25,000[.00] policy limit he has to Mr. Sharrock and the Government. Can we place these funds in an escrow or trust account pending the determination of the [federal lawsuit], and at least allow me to close my case against [McCoy's] insurer." RA, tab 43 at Ex. 3 (Att'y Wayson Wong E-mail to Gerald Cowle, Oct. 21, 2008).

[8] On November 7, 2008, Wong wrote to Defendants' counsel notifying him that "[i]t appears that I cannot settle under the terms and conditions you are requiring." RA, tab 43 at Ex. 4 (Wong E-mail to Att'y Jon Visosky, Oct. 21, 2008). However, Wong noted that he was "willing to personally indemnify your clients . . . against any and all liability it may have to the United States to pay any part of the $25,000, if it will agree to settle around the United States." *Id.*

[9] On November 20, 2008, the parties stipulated to a stay of the Superior Court proceedings pending the federal lawsuit filed by the Sharrocks against the United States. RA, tab 69 at 2 (Dec. & Order Defs.' Mot. Enforce Settlement).

[10] On November 29, 2011, at a status hearing before the trial court, Wong requested that the case be stayed another year and stated: "The defendant has already tendered his policy limit. He doesn't want to, and neither do I, litigate this particular case in the [S]uperior [C]ourt. It's been basically settled in the [S]uperior [C]ourt; but we cannot affect the settlement until the federal court case has been fully decided." Transcripts ("Tr.") at 2-3 (Status Hr'g, Nov. 29, 2011).

[11] On June 5, 2012, at another status hearing, Wong reported to the trial court that the federal case had concluded and stated:

> Unfortunately, in this case, although I can recommend my client to accept the policy limit tender of [the Defendant's], there are others involved. The United States has a Medical Care Recovery Act claim probably in excess of a quarter million dollars and there's a workers comp carrier in Guam also with a claim, a subrogated claim. These matters have got to be cleared up for us to be able to settle the case and it's going to take some time dealing with both these entities. I think there will be some teeth-gnashing between the entities as to who is going to share reimbursement for the medical expenses involved in this case.

Tr. at 2-3 (Status Hr'g, June 5, 2012). At that same hearing, Leslie Travis, attorney for the Defendants, stated that "it would be good . . . to kind of touch base with Mr. Wong and get an

update on what we're looking at before we can even really discuss a good-faith settlement, Your Honor." *Id.* at 4.

[12] On August 30, 2012, Wong contacted the United States regarding settlement of the case for $25,000.00 and a release of the MCRA claim by the United States. Wong proposed that the United States receive two-thirds of the $25,000.00 settlement and release the remaining one-third to Wong for his attorney's fees.

[13] On September 5, 2012, a representative from Takagi & Associates ("T&A")[1], McCoy's worker's compensation carrier, wrote to T&A's attorney regarding a conversation between Wong and the representative. The representative stated that Wong contacted T&A informing them that he had accepted a $25,000.00 settlement with PIIC, but that before he took payment, he wanted T&A to sign a release of its subrogation claim. Wong also informed T&A that two-thirds of the settlement would go to the United States and one-third would go to Wong's attorney's fees.

[14] On September 6, 2012, Wong wrote to Travis

> to confirm that I proposed a settlement under which the three described would release only (not indemnify) Mr. McCoy for the payment of $25,000[.00], the represented policy limit. But as indicated, I would need two release agreements, one for my clients and the U.S. and the other for my clients and Aioi Ins. Co (the WC Carrier).

RA, tab 43 at Ex. 14 (Wong E-mail to Att'y Leslie Travis, Sept. 6, 2012).

[15] On September 22, 2012, Wong wrote to Travis that he is "good with the U.S., but still have yet to hear from the WC insurer, Aioi" and asked Travis if the Defendants were willing to settle along the lines that he had suggested. RA, tab 43 at Ex. 15 (Wong E-mail to Travis, Sept. 22, 2012).

[1] T&A has also been referred to in this litigation as Aioi and ACE.

[16] Two days later, Wong wrote to Travis indicating that he would not be in Guam on September 25, 2012, and to "continue the case until we have a chance to settle it." RA, tab 43 at Ex. 22 (Wong E-mail to Travis, Sept. 24, 2012).

[17] On September 25, 2012, at a status hearing which Wong did not attend, Travis informed the trial court that before settlement could be achieved, cooperation regarding the issue of waivers from the United States was necessary. Tr. at 2-3 (Status Hr'g, Sept. 25, 2012). Travis requested additional time to "complete this." *Id.* at 3.

[18] On October 1, 2012, Wong contacted Travis regarding his proposed settlement with "dual releases with no indemnification provisions." RA, tab 43 at Ex. 21 (Wong E-mail to Travis, Oct. 1, 2012).

[19] On October 10, 2012, Wong wrote to Patrick Civille and Travis, attorneys for the Defendants, to follow up regarding the settlement which included "releasing but not indemnifying with respect to any and all claims the Sharrocks have against [the Defendants], with the United States releasing its claims, all in a separate release." RA, tab 43 at Ex. 22 (Wong E-mail to Travis, Sept. 24, 2012). Wong also stated that "there needs to be the same but separate release among my clients and Aioi, the worker's comp insurer." *Id.*

[20] On November 9, 2012, the United States wrote to Wong regarding release of its MCRA claim and stated that "it has been determined that full collection of the [United States]'s claim would result in an undue hardship to your client. Therefore, the [United States] agrees to compromise the amount of its claim and accepts $8,333.33 in full and complete satisfaction of its claim." RA, tab 43 at Ex. 20 (Letter from G.G. Schaff, MEDCARE Claims Att'y to Wong, Nov. 9, 2012). Under these terms, the United States would take one-third of the settlement, rather than the two-thirds initially proposed by Wong.

[21] On November 10, 2012, Wong wrote to Civille and Travis stating that the United States wrote to him the preceding day asking for an update.

[22] On December 4, 2012, Wong wrote to Travis asking her to "explain the delay in the settlement to the court in the Sharrock case – that I have been waiting for at least two months for the releases." RA, tab 43 at Ex. 24 (Wong E-mail to Travis).

[23] The following day, at a status hearing during which Wong was not present, Travis informed the court that the parties were "inching forward . . . towards settlement. I believe that we have – that we may have an agreement, however we do need to consult with our clients." Tr. at 2 (Status Hr'g, Dec. 5, 2012).

[24] On December 26, 2012, Travis informed the court that the parties had settled. On January 30, 2013, Travis again informed the court that the parties settled.

[25] During two telephone conversations in January and February 2013 between Wong and Civille, Civille reaffirmed PIIC's longstanding readiness to settle for $25,000.00, but expressed uncertainty regarding the structure of the two releases.

[26] On February 19, 2013, Wong wrote to Civille and Travis stating that "[i]n effect, this case has been settled since September 2012, and we have been waiting for you to send me two releases for review and approval. After numerous personal and telephone conference for the releases and many emails, I give up!" RA, tab 43 at Ex. 2 (Wong E-mail to Att'ys Civille & Travis, Feb. 19, 2013). Wong further stated that if he did not receive the requested releases by the end of the week, he would recommend to his clients to pursue McCoy for their fullest damages.

[27] On February 26, 2013, at a status hearing, Wong stated that the matter did not settle,[2] but that he had been trying since September 2012 to get releases from Defendants' counsel. Wong stated that he had given up on settlement and wanted to take the case to trial. Civille disagreed and noted his intention to file a Motion to Enforce Settlement. He stated, "[t]he problem is that Mr. Wong is trying to get us to sign -- to prepare two different releases so that the release, the settlement can be, as far as I can tell, to not be disclosed to another party." Tr. at 2 (Status Hr'g, Feb. 26, 2013).

[28] That same day, Wong wrote to Civille stating the following:

> [Y]ou never agreed to my settlement terms and conditions, which were on the table for about six months. I withdrew my offer to settle before any acceptance by you of it. You knew or should have known that any terms and conditions of the settlement were subject to the review and approval of both the United States and the Worker's Compensation insurer, and they never got the chance to approve them, much less review them because you never gave us anything. Thus, I do not see how you can contend that there was a valid settlement.

RA, tab 43 at Ex. 30 (Wong E-mail to Civille and Travis, Feb. 19, 2013).

[29] On March 5, 2013, the United States wrote a second letter to Wong asking for the $8,333.33 in full and complete satisfaction of its claim, as agreed in the November 9, 2012 letter.

[30] On June 20, 2013, the United States wrote a third letter to Wong again asking for the $8,333.33 in full and complete satisfaction of its claim.

[31] On October 17, 2013, Defendants filed a Motion to Enforce Settlement. Defendants argued that a settlement for the policy limits of $25,000.00 had been agreed to by the parties.

[2] The transcript actually states that "the matter has been settled." Tr. at 2 (Status Hr'g, Feb. 26, 2013). However, it is clear from the context of the transcript that a transcription error was committed. Mr. Wong goes on to describe a lack of cooperation between the parties and his desire to take the case to trial.

C. Procedural History Following the Defendants' Motion to Enforce Settlement

[32] The trial court issued the February 13 Decision and Order and found that there was a settlement. RA, tab 69 at 7 (Dec. & Order Defs.' Mot. Enforce Settlement). The trial court held that an evidentiary hearing was not needed because none of the parties requested one and the matter was thoroughly briefed and argued by the parties. Moreover, the trial court held that the Defendants showed by a preponderance of the evidence that the parties orally agreed to settle the Sharrocks' suit for PIIC's policy limit of $25,000.00. The court further reasoned that:

> Plaintiffs' denial of the settlement is plainly inconsistent with the facts. Plaintiffs' assertion that settlement was impeded by Defendants' refusal to issue releases is likewise unpersuasive because Plaintiffs' request originated in late 2012. The great weight of the evidence supports the conclusion that, from 2008 onward, this case was settled but remained in a holding pattern.

Id. at 7 (citations omitted).

[33] After the trial court granted Defendants' Motion to Enforce Settlement, Defendants moved to dismiss the case arguing that there was no matter of controversy remaining for the court to resolve.

[34] The Sharrocks filed a Motion for Reconsideration of the Decision and Order Granting Defendants' Motion to Enforce Settlement. The trial court denied the Sharrocks' Motion for Reconsideration and held that "[t]he development of the factual record has been extensive" and that "[t]he heightened evidentiary standard appropriate to summary judgment is not applicable." RA, tab 99 at 8 (Dec. & Order Pls.' Mot. Recons. Dec. & Order Granting Defs.' Mot. Enforce Settlement & Defs.' Mot. Dismiss, Nov. 6, 2014). The trial court concluded that it "did not commit a clear error of law by ruling on the Defendants' Motion to Enforce Settlement without taking testimony via a live evidentiary hearing." *Id.* Additionally, the trial court granted

Defendants' Motion to Dismiss because its February 13 Decision and Order left no matter of controversy remaining for the court to resolve.

[35] On December 4, 2014, the Sharrocks filed a Notice of Appeal.

II. JURISDICTION

[36] This court has jurisdiction over an appeal from a final judgment. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-114 (2015)); 7 GCA §§ 3107, 3108(a) (2005). In determining the court's jurisdiction over this appeal, we first consider whether the trial court's February 13 Decision and Order was a final appealable order. Second, we consider whether the Sharrocks timely filed their Notice of Appeal. Finally, we consider whether the Sharrocks' Motion for Reconsideration tolled the time to appeal.

A. Whether the February 13 Decision and Order Was a Final Appealable Order

[37] The Sharrocks argue that the February 13 Decision and Order was not a final appealable order because "it did not dispose of the subrogation claims involved." Appellants' Supplemental Br. at 2 (July 31, 2015). The two subrogation claims refer to two potential claims, by the United States and by T&A, for medical treatment provided to Richard Sharrock. *See* Tr. at 2-3 (Status Hr'g, June 5, 2012). We find this argument unavailing. The subrogation claims were never asserted in this case and were only relevant as far as the Sharrocks' and the Defendants' settlement negotiations. Thus, the issues surrounding the subrogation claims were never before the court.

[38] The issue of whether an order granting a motion to enforce settlement is a final appealable order has not been decided by the Guam Supreme Court. Foreign jurisdictions are split on this issue. Some jurisdictions have held that an order granting a motion to enforce settlement is interlocutory and becomes final only after the trial court has entered a judgment on

the settlement and dismissed the underlying petition. *See, e.g., Ulmer v. Tracker Marine, LLC*, 154 So. 3d 77, 81 (Miss. Ct. App. 2015); *Torres v. Elkin*, 730 S.E.2d 518, 521-22 (Ga. Ct. App. 2012); *St. Louis Union Station Holdings, Inc. v. Discovery Channel Store, Inc.*, 272 S.W.3d 504, 505 (Mo. Ct. App. 2008); *Valley Bank of Nev. v. Ginsburg*, 874 P.2d 729, 733-34 (Nev. 1994). Other jurisdictions have held that where an order granting a motion to enforce settlement leaves no more pending issues, the order is a final, appealable judgment. *See, e.g., Critzer v. Enos*, 115 Cal. Rptr. 3d 203, 209-11 (Ct. App. 2010); *Travelers Indem. Co. v. Walker*, 401 So. 2d 1147, 1149 (Fla. Dist. Ct. App. 1981).

[39] Guam law provides that a judgment is final if it disposes of the entire case by determining the rights of the parties in an action. 7 GCA § 21101 (2005) ("A judgment is the final determination of the rights of the parties in an action or proceeding."); *see also Marriott v. Marriott*, 2014 Guam 28 ¶¶ 7, 9 (citations omitted); *Duenas v. George & Matilda Kallingal, P.C.*, 2013 Guam 28 ¶ 15 (citations omitted); *A.B. Won Pat Guam Int'l Airport Auth. v. Moylan*, 2004 Guam 1 ¶ 21 (citations omitted).

[40] Guam's jurisprudence on the issue of what constitutes a final appealable order aligns with jurisdictions that hold that an order granting a Motion to Enforce Settlement is a final, appealable order if it resolves all matters between the parties. Pursuant to that rule, the February 13 Decision and Order was a final appealable order because there were no pending issues when the trial court found that the parties settled. RA, tab 69 (Dec. & Order Defs.' Mot. Enforce Settlement). The February 13 Decision and Order essentially disposed of the entire case because all the remaining rights of the parties in the action had been conclusively determined. *See Marriott*, 2014 Guam 28 ¶ 9 ("Upon issuance of the Order, all remaining rights of the parties in the divorce action had been conclusively determined. Thus, the Order essentially disposed of the

entire case and was an appealable final judgment."). Thus, we find that the February 13 Decision and Order was a final, appealable judgment.

B. Whether the Sharrocks Timely Filed Their Notice of Appeal

[41] In general, appeals from a judgment or order must be certified no later than 30 days after the judgment or order has been entered by the Superior Court. Guam R. App. P. ("GRAP") 4(a)(1). However, an order granting a Motion to Enforce Settlement is subject to the separate document rule, and the trial court did not enter a separate document setting forth the entry of a final judgment. With certain exceptions that do not include an order granting a Motion to Enforce Settlement, Rule 58(a)(1) of the Guam Rules of Civil Procedure ("GRCP") requires that "[e]very judgment and amended judgment must be set forth in a separate document." GRCP 58(a)(1). Regardless, if no separate judgment is entered, Rule 58(b)(2)(B) allows a judgment to be effectively entered, for the purpose of the separate document rule, 150 days after entry of the underlying Decision and Order on the docket. GRCP 58(b)(2)(B).

[42] The February 13 Decision and Order was entered on February 13, 2014. RA, tab 70 (Notice of Entry on Docket, Feb. 13, 2014). The 150th day after entry of the February 13 Decision and Order was Sunday, July 13, 2014. Therefore, a final judgment was deemed entered for purposes of the separate document rule on July 14, 2014. *See* GRCP 58(b)(2)(B); *see also* GRAP 11(a)(1)(C) (providing that if the last day of a given period is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday).

[43] The Sharrocks had 30 days from July 14, 2014, to file their Notice of Appeal. Accordingly, the Notice of Appeal, filed on December 4, 2014, would be untimely absent another method of finding jurisdiction.

C. Whether the Sharrocks' Motion for Reconsideration Tolled the Time to Appeal

[44] Rule 4(a)(4) provides an exception to the 30-day time limitation, and allows the time to appeal to toll until the Superior Court rules on a limited class of motions made after a judgment or order. GRAP 4(a)(4). Two such motions are a motion to alter or amend the judgment under GRCP 59 and for relief under GRCP 60 if the motion is filed no later than ten days after the judgment is entered. GRAP 4(a)(4)(A)(iv), (vi).

[45] The Sharrocks' Motion for Reconsideration was made pursuant to GRCP 59 and 60. RA, tab 81 (Pl.'s Mot. Recons. Dec. & Order Granting Def.'s Mot. Enforce Settlement, May 27, 2014). Rule 59(e) provides that "[a]ny motion to alter or amend a judgment shall be filed no later than 10 days after entry of judgment." GRCP 59(e). Furthermore, GRAP 4(a)(4)(vi) provides that the time to appeal is only tolled if a motion for relief under GRCP 60 is filed no later than ten days after the judgment is entered. GRAP 4(a)(4)(vi).

[46] The ten-day time limit to file a Motion for Reconsideration, for the purposes of tolling the time to appeal, begins to run upon "entry" of a final judgment that complied with the procedures governing entry of judgments including the requirement that every judgment be set forth in a separate document. The Ninth Circuit has held "that the time requirements of Rule 60(b) only commence running upon entry of final judgment that complies with Rule 58." *Carter v. Beverly Hills Sav. & Loan Ass'n*, 884 F.2d 1186, 1189 (9th Cir. 1989) (citations and internal quotation marks omitted).

[47] Thus, in order to toll the time to appeal, the Sharrocks should have filed their Motion for Reconsideration within ten days of July 14, 2014. The Sharrocks filed their motion on May 27, 2014. The Sharrocks' Motion for Reconsideration was timely even though it was filed before July 14, 2014. The Tenth Circuit has stated that "'[a]lthough Rule 59 motions are to be served

not later than ten days after entry of judgment, . . . this ten-day limit sets only a maximum period and does not preclude a party from making a Rule 59 motion before formal judgment has been entered.'" *Warren v. Am. Bankers Ins. of Fl.*, 507 F.3d 1239, 1244 (10th Cir. 2007) (alteration in original) (quoting *Hilst v. Bowen*, 874 F.2d 725, 726 (10th Cir. 1989)).

[48] Thus, regardless of whether the Sharrocks' motion is characterized as a Rule 59 motion or a Rule 60 motion, it was timely for the purposes of tolling the time to appeal pursuant to GRAP 4(a)(4).

[49] The trial court entered the order disposing of the Sharrocks' Motion for Reconsideration on November 6, 2014. RA, tab 100 (Notice of Entry on Docket, Nov. 6, 2014). Thus, the Sharrocks had 30 days from November 6, 2014, to file their Notice of Appeal. Accordingly, the Sharrocks' Notice of Appeal, filed on December 4, 2014, was timely, and this court has jurisdiction over this appeal.

III. STANDARD OF REVIEW

[50] The issue of whether there should have been an evidentiary hearing is reviewed for an abuse of discretion. *Bath Junkie Branson, L.L.C. v. Bath Junkie, Inc.*, 528 F.3d 556, 560 (8th Cir. 2008) ("[W]e review [the district court's] decision not to hold an evidentiary hearing for abuse of discretion." (citations omitted)); *see also Callie v. Near*, 829 F.2d 888, 890 (9th Cir. 1987) (finding that the district court abused its discretion by not conducting an evidentiary hearing prior to enforcing a settlement agreement).

[51] "Interpretation of a settlement agreement is a question of law subject to de novo review, but we defer to any factual findings made by the district court in interpreting the settlement agreement unless they are clearly erroneous." *City of Emeryville v. Robinson,* 621 F.3d 1251, 1261 (9th Cir. 2010) (citations omitted).

[52] The issue of whether the Motion to Enforce Settlement should have been treated as a Motion for Summary Judgment is a question of law reviewed *de novo*. *See Guam Waterworks Auth. v. Civil Serv. Comm'n*, 2014 Guam 35 ¶ 8 ("Questions of law are reviewed *de novo*." (citations omitted)).

[53] "This [c]ourt reviews the grant or denial of a Rule 60(b) motion for abuse of discretion." *In re N.A.*, 2001 Guam 7 ¶ 13 (citations omitted). This court will not reverse a trial court's decision unless this court has a definite and firm conviction that the trial court committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors. *Id.* (citations omitted). This court "'does not substitute its judgment for that of the trial court.'" *Id.* (quoting *People v. Tuncap*, 1998 Guam 13 ¶ 12). The trial court abused its discretion if it "did not apply the correct law, erroneously interpreted the law, relied upon a clearly erroneous interpretation of the facts, or rendered a decision of which the record contains no evidence in support thereof." *Id.* (citing *Tuncap*, 1998 Guam 13 ¶ 12).

[54] "Review of the trial court's grant of a motion to dismiss is *de novo*." *Perez v. Guam Hous. & Urban Renewal Auth. (GHURA)*, 2000 Guam 33 ¶ 9 (citations omitted).

IV. ANALYSIS

A. Whether this Court Should Strike Portions of Sharrocks' Brief and Excerpts of Record to Exclude Exhibits Previously Struck by the Trial Court

[55] As a preliminary matter, we must decide whether to strike portions of the Sharrocks' Brief and Excerpts of Record to exclude exhibits previously struck by the trial court, and whether Wong should be sanctioned for including irrelevant materials in his Excerpts of Record.

[56] In its Order after 11/7/2013 Hearing, the trial court excluded the following documents from the Sharrocks' opposing memorandum: (1) the thirteen-page "APPENDIX (Excerpt of

Plaintiffs' Memorandum in Opposition to Defendants' Ex Parte Application to Shorten Time, more specifically Section II and Exhibits A-B)" attached to the opposing memorandum filed on November 4, 2013 (hereinafter "the Appendix"); (2) Plaintiffs' First Amended Memorandum in Opposition to Defendants' Motion to Enforce Settlement; Decl. of Wayson W.S. Wong; Declaration of Richard A. Sharrock; Exhibit "I" Certificate of Service (hereinafter "Plaintiff's First Amended Memorandum"); and (3) Second Declaration of Wayson W.S. Wong to Supplement His Declaration Filed with Plaintiffs' First Amended Memorandum in Opposition to Defendants' Motion to Enforce Settlement; Exhibits "1-7"; Certificate of Service (hereinafter "Second Declaration of Wong"). RA, tab 63 at 1-2 (Order After 11/7/2013 Hr'g, Nov. 13, 2013). Hereinafter, these three documents will be collectively referred to as "the Excluded Documents."[3]

[57] Rule 7(a) of the GRAP provides as follows: "Composition of the Record on Appeal. The following items constitute the record on appeal: (1) the original papers and exhibits filed in the Superior Court; (2) the transcript of proceedings, if any; (3) a certified copy of the docket entries prepared by the Superior Court." GRAP 7(a). Rule 7(a) is substantially similar to Rule 10(a) of the Federal Rules of Appellate Procedure ("FRAP"). *Melwani v. Arnold*, 2010 Guam 7 ¶ 24 n.6. *Compare* GRAP 7(a), *with* FRAP 10(a). The purpose of this rule is to limit the record to what was before the district court. *United States v. Burke*, 781 F.2d 1234, 1246 (7th Cir. 1985). This

[3] The three documents that Defendants claim should be excluded are: (1) Declaration of Wayson W.S. Wong to Supplement His Declaration Filed with Plaintiffs' First Amended Memorandum in Opposition to Defendants' Motion to Enforce Settlement, ER at 186-94; (2) Plaintiffs' First Amended Memorandum in Opposition to Defendants' Motion to Enforce Settlement; Declaration of Wayson W.S. Wong; Declaration of Richard A. Sharrock; Exhibit "I" Certificate of Service, ER at 195-241; and (3) Second Declaration of Wayson W.S. Wong to Supplement His Declaration Filed with Plaintiffs' First Amended Memorandum in Opposition to Defendants' Motion to Enforce Settlement; Exhibits "1-7"; Certificate of Service, ER at 242-60. Appellees' Br. at 34 (June 2, 2015). However, the trial court did not exclude the first document in its Order After 11/7/2013 Hearing. *See* RA, tab 63 (Order After 11-7-2013 Hr'g). Instead, the trial court excluded the second and third documents, along with the Appendix.

rule complements the "basic tenet of appellate practice that an appellate court reviews only matters considered in the first instance by a trial court." *Del. Elec. Coop., Inc. v. Duphily*, 703 A.2d 1202, 1206 (Del. 1997); *see, e.g.*, *Burke*, 781 F.2d at 1246 ("Appellate judges are entitled to see all the materials that the district judge considered.").

[58] In interpreting FRAP 10(a), the Court of Appeals for the Ninth Circuit has held that generally, "[p]apers not filed with the [trial] court or admitted into evidence by that court are not part of the clerk's record and cannot be part of the record on appeal." *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1077 (9th Cir. 1988) (citation omitted).

1. Papers not admitted into evidence or considered by the trial court

[59] Despite the general rule, it is not always the case that a document must have been admitted into evidence in order to be included in the record. 16A Fed. Prac. & Proc. Juris. § 3956.1 (4th ed.), Contents of the Record on Appeal. A document not admitted into evidence may still be included in the record, but "it must have been *considered* by the court." *Id.* (citing *Torrington Co. v. Local Union 590 of Int'l. Union, United Auto., Aerospace and Agr. Implement Workers of Am.*, 803 F.2d 927, 932 (7th Cir. 1986) ("[A] deposition which was not admitted into evidence, not considered by the district court, or added by stipulation of both parties to the record on appeal, cannot be included in the record on appeal."); *Kirshner*, 842 F.2d at 1078 (concluding that document not filed with the district court or considered by the court not a part of record on appeal)). For example, a document is "considered" by the trial court "when the [trial] judge considers a proffered exhibit and refuses to admit it into evidence." 16A Fed. Prac. & Proc. Juris. § 3956.1, Contents of the Record on Appeal.

[60] Here, because there was no trial, the rule regarding admission into evidence or consideration by the trial court for admission into evidence is inapplicable. The Excluded

Documents were neither admitted into evidence, nor proffered by the parties for the trial judge's consideration for admission into evidence at a trial.

2. Papers not properly filed with the trial court

[61] Motions and supporting documents constitute "original papers" under GRAP 7(a) and therefore are considered a part of the record on appeal. *See* GRAP 7(a) ("*the original papers* and exhibits filed in Superior Court[,]" among other things, constitute the record on appeal (emphasis added)); *see also Del. Elec.*, 703 A.2d at 1206 (recognizing motions and supporting documents as "original papers" within the meaning of a local court rule similar to FRAP 10(a)).

[62] Although GRAP 7(a), read literally, might suggest that all original papers and exhibits filed with the trial court are part of the record on appeal, there are limits to such a reading. Courts have held that the record on appeal includes only those documents that were properly filed. 4 C.J.S. *Appeal and Error* § 564 at 1.

[63] It is unclear from the record the exact reasoning of the trial court in excluding the Excluded Documents. The trial court did not state its reasoning in its Order After 11/7/2013 Hearing. *See* RA, tab 63 (Order After 11/7/2013 Hr'g). In addition, the parties did not request the transcripts for the November 7, 2013 hearing, and thus, no transcripts for that hearing are part of the record on appeal.

[64] However, the Minutes of that hearing provide that the hearing concerned the Sharrocks' Ex Parte Application to File Two More Pages of Memorandum and Points of Authorities. RA, tab 59 (Mins., Nov. 7, 2013). In opposition to that Ex Parte Application, the Defendants argued that the Sharrocks failed to obtain leave to file their Plaintiff's First Amended Memorandum, failed to include a "Declaration of Counsel" stating that the moving counsel has made a good faith effort to contact opposing counsel regarding the substance of the ex parte application

pursuant to CVR 7.1.1, and that the Sharrocks' counsel was attempting to add twenty pages to his opposition, rather than two pages as indicated in the title of his motion. RA, tab 57 at 1-3 (Defs.' Opp'n to Sharrock's Ex Parte Mot., Nov. 6, 2013). Specifically, Defendants argued that "[t]he main part of the memorandum is 22 pages, accompanied by a 10 page 'Appendix of Excerpts of Plaintiffs' Memo in Opposition to Defendants' Ex Parte Application to Shorten Time' in which Plaintiffs impermissibly try to gain extra pages by incorporating pages from a prior filing." *Id.* at 3.

[65] As Defendants argued, the record does not contain evidence that the trial court granted the Sharrocks leave. "Unless the order indicates that the trial court granted leave, an appellate court generally will presume the trial court did not consider untimely summary judgment evidence." *Pink v. Goodyear Tire & Rubber Co.*, 324 S.W.3d 290, 294 (Tex. App. 2010) (citations omitted). Here, nothing in the trial court's order indicates that the trial court considered the Excluded Documents. *See* RA, tab 69 at 1-7 (Dec. & Order Defs.' Mot. Enforce Settlement).

[66] Therefore, it seems that the trial court excluded the Excluded Documents because they were not properly filed. Moreover, by excluding the documents from the Sharrocks' opposition, the trial court did not "consider" the Excluded Documents.

[67] Because the Excluded Documents were not properly filed with the trial court, not admitted into evidence, and not considered by the trial court, we find that the Excluded Documents are not part of the record on appeal.

3. Whether the court should, pursuant to GRAP 7(e), supplement the record with the Excluded Documents

[68] The Sharrocks do not directly argue that the court should supplement the record with the Excluded Documents pursuant to GRAP 7(e). However, the Sharrocks assert that that these

documents should be included for a policy reason, to "let the truth be told." Appellants' Reply Br. at 24 (June 16, 2015).

[69] Rule 7(e) of the GRAP provides:

> Correction or Modification of the Record.
>
> (1) If any difference arises about whether the record truly discloses what occurred in the Superior Court, the difference must be submitted to and settled by that court and the record conformed accordingly.
>
> (2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:
>
> (A) on stipulation of the parties;
> (B) by the Superior Court before or after the record has been forwarded; or
> (C) by the Supreme Court.
>
> (3) All other questions as to the form and content of the record must be presented to the Supreme Court.

GRAP 7(e). Rule 7(e) is substantially similar to FRAP 10(e). *Compare* GRAP 7(e), *with* FRAP 10(e). In interpreting FRAP 10(e), the Ninth Circuit has held that the rule may not be used "to supplement the record with material not introduced or with findings not made." *United States v. Garcia*, 997 F.2d 1273, 1278 (9th Cir. 1993) (citations omitted); *see, e.g.*, *United States v. Walker*, 601 F.2d 1051, 1054-55 (9th Cir. 1979) (holding that affidavits not in original record disallowed). The Court of Appeals for the Fifth Circuit has similarly held that "[a] court of appeals will not ordinarily enlarge the record on appeal to include material not before the district court." *Kemlon Prods. & Dev. Co. v. United States*, 646 F.2d 223, 224 (5th Cir. 1981) (citations omitted). This interpretation complements the general purpose of FRAP 10, which is to limit the record to what was before the district court. *See Burke*, 781 F.2d at 1246. Here, as discussed above, the Excluded Documents were not part of the record before the trial court. Therefore, we

refrain from exercising our discretion under GRAP 7(e) to supplement the record on appeal with these documents.

4. Whether monetary sanctions should be imposed upon the Sharrocks for attempting to supplement the record with the excluded exhibits

[70] Citing *Lowry v. Barnhart*, 329 F.3d 1019 (9th Cir. 2003), Defendants argue that the court should impose monetary sanctions upon Sharrocks' counsel pursuant to GRAP 15(i) for the Defendants' reasonable attorney's fees in preparing its Appellees' Brief, as well as fees for any additional briefing precipitated by this issue. Appellees' Br. at 36-37 (June 2, 2015).

[71] However, *Lowry* involved an arguably more serious violation of the rule. The offending party in *Lowry* included in its supplemental excerpts of record a new document that did not exist at the time of the district court's decision or at the time the appellant filed his opening brief. *Lowry*, 329 F.3d at 1024-25. Further, the offending party in *Lowry* acknowledged that its conduct was indefensible. *Id.* at 1025. Furthermore, in determining that sanctions were appropriate under the circumstances of that case, the Ninth Circuit also noted instances where monetary sanctions were found to be improper. The Ninth Circuit declined to impose monetary sanctions where the offending party "contended that the documents were, in fact, part of the record[,]" and also in instances where "the issue is one of first impression." *Id.* at 1026 n.7 (citing *Barcamerica Int'l USA Trust v. Tyfield Imps., Inc.*, 289 F.3d 589, 593-95 (9th Cir. 2002); *Tonry v. Sec. Experts, Inc.*, 20 F.3d 967, 973 (9th Cir. 1994)).

[72] Here, the Sharrocks contend that the documents were part of the record. Appellants' Reply Br. at 22 ("It is also important to note that the trial court did not exclude the other two documents from the record; it merely excluded them as part of the Sharrocks' opposing memorandum. They have been part of the record of this case."). This court reserves monetary sanctions for GRAP 7(a) violations for those instances where there has been "blatant disregard of

the rules and regulations which permit the judicial machinery to function smoothly." *Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1128 (2d Cir. 1989) (citations omitted); *see also Lowry*, 580 F.3d at 1024-25; 16A Fed. Prac. & Proc. Juris. § 3956.1 (4th ed.), Contents of the Record on Appeal. Accordingly, we decline to impose monetary sanctions upon Wong.

B. Whether the Trial Court Abused Its Discretion by Not Holding an Evidentiary Hearing Prior to Ruling on Defendants' Motion to Enforce Settlement

[73] The Sharrocks argue that the trial court erred in not holding an evidentiary hearing prior to ruling on the Defendants' Motion to Enforce Settlement because there were genuine issues of material fact as to the existence of a settlement agreement. Appellants' Br. at 40-46 (May 4, 2015); Appellants' Reply Br. at 16.

[74] In opposition, the Defendants argue that the Sharrocks waived any right they had to an evidentiary hearing by failing to request one in advance of the scheduled hearing on the Defendants' motion. Appellees' Br. at 46-47. Thus, the Defendants contend the following:

> In the absence of a request for such a hearing, the trial court properly resolved PIIC's Motion to Enforce Settlement on the record before it, which was very extensive, and substantially more robust than the record in *Baza* [sic]. The trial court had more than sufficient evidence before it to resolve the Motion to Enforce Settlement, and it did not err in issuing a decision on the motion without an evidentiary hearing.

Id. at 47.

[75] Rule 43(e) of the Guam Rules of Civil Procedure provides that "[w]hen a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or deposition." GRCP 43(e). Rule 43(e) is virtually identical to Rule 43(e) of the Federal Rules of Civil Procedure, and therefore we look to cases which interpret and apply the principles of the federal rule for guidance. *Compare* GRCP 43(e), *with* FRCP 43(e); *see also*

Benavente v. Taitano, 2006 Guam 15 ¶ 48 (finding GRCP 19(a)(b) "virtually identical" to FRCP 19(a)(b) and looking to federal case law for guidance).

[76] Federal courts have held that Rule 43(e) "invests the district court with considerable discretion to tailor the proceedings to the practical realities surrounding the particular motion." *Stewart v. M.D.F., Inc.*, 83 F.3d 247, 251 (8th Cir. 1996). Further, "[d]istrict courts are given 'considerable discretion' in deciding whether to hold an evidentiary hearing." *Bath Junkie Branson, L.L.C.*, 528 F.3d at 560 (quoting *Stewart v. M.D.F., Inc.*, 83 F.3d 247, 251 (8th Cir. 1996)). "When deciding whether to hold a hearing, a court may also consider the need to conserve judicial resources and the unseemliness of holding, in effect, a mini-trial to resolve a dispute between attorneys arising from their oral settlement talks." *Chaganti & Assocs., P.C. v. Nowotny*, 470 F.3d 1215, 1223 (8th Cir. 2006) (citations and internal quotation marks omitted).

[77] As a general rule, "[a] trial court has the power to summarily enforce a settlement agreement entered into by the litigants while the litigation is pending before it." *United States v. Hardage*, 982 F.2d 1491, 1496 (10th Cir. 1993) (citations omitted). However, if material facts regarding "the existence or terms of an agreement to settle are in dispute, the parties must be allowed an evidentiary hearing." *Id.* (citations omitted); *see also Mass. Cas. Ins. Co. v. Forman*, 469 F.2d 259, 260 (5th Cir. 1972) ("[W]here material facts concerning the existence of an agreement to settle are in dispute, the entry of an order enforcing an alleged settlement agreement without a plenary hearing is improper." (citations omitted)).

[78] Nevertheless, courts have also held that "this rule presupposes that there are essential issues of fact that can only be properly resolved by such a hearing. There is no automatic entitlement to an evidentiary hearing simply because the motion concerns a settlement agreement." *Stewart*, 83 F.3d at 251 (citations omitted). "A court . . . need only hear so much

evidence as is necessary for it to resolve the 'essential issues of fact' concerning the settlement." *Chaganti & Assocs., P.C.*, 470 F.3d at 1222-23. Thus, "when the parties' counsel are the sole witnesses to their own conversations, the court may properly determine whether a settlement exists by relying exclusively on the representations of counsel." *Id.* at 1223 (alterations, citations, and internal quotation marks omitted).

[79] In the instant case, the trial court ruled "that there is little dispute about the applicable law and the facts of this case: the parties diverge only in their use of the documentary evidence to corroborate their respective positions." RA, tab 69 at 5 (Dec. & Order Defs.' Mot. Enforce Settlement). However, in reviewing the record, there seems to have been a dispute regarding the terms of the settlement and whether a settlement was reached.

[80] Specifically, there were differences in the representations by the parties' counsels of whether obtaining releases from the United States and T&A for their respective subrogation claims was an essential term of the agreement. Wong argued that it was an essential term. RA, tab 53 at 4 (Wong Decl., Nov. 5, 2013). On the other hand, Defendants' counsel claimed that as of 2012, the Defendants did not require any releases from the United States or from T&A. RA, tab 40 at 6 (Mem. P. & A. Supp. Mot. Enforce Settlement). Thus, it is apparent that material facts regarding the existence or terms of an agreement to settle were in dispute in the instant case. As such, citing *Hardage* and *Forman*, the Sharrocks argue that the trial court erred in not holding an evidentiary hearing prior to ruling on the Defendants' Motion to Enforce Settlement. Appellants' Br. at 40-46; Appellants' Reply Br. at 16.

[81] However, unlike *Hardage* and *Forman*, the trial court's factual record in the instant case was not barren. In *Hardage*, the Tenth Circuit described the district court's development of the factual record as a "brief hearing" in which "the court received no sworn testimony subject to

cross-examination" and that "[t]he court also received no briefings or affidavits in regard to the dispute over whether Appellants had agreed to settle." *Hardage*, 982 F.2d at 1496. In *Forman*, the Fifth Circuit held that "[f]rom the meager record before the district court, consisting primarily of unsworn statements by opposing counsel, it is clear that a material dispute of fact existed as to whether a settlement had been reached." *Forman*, 469 F.2d at 260.

[82] In contrast, in the instant case, the trial court described its development of the factual record as follows:

> The parties thoroughly briefed and argued this matter. In particular, the parties supplied the Court with declarations from the principal actors in the settlement, including Defendants' three counsels, Plaintiff Richard A. Sharrock, and Plaintiffs' counsel. The Court has considered the parties' assertions – as gleaned from court appearances, memoranda, declarations, and oral arguments on the instant motion – in conjunction with emails and letters from current and former counsel drafted throughout the pendency of the instant litigation as well as its federal counterpart.

RA, tab 69 at 5 (Dec. & Order Defs.' Mot. Enforce Settlement).

[83] Moreover, the record indicates that the parties' counsels were the sole witnesses to their own conversations. Additionally, rather than relying on the testimony of witnesses, the trial court's main sources of evidence came from documentary evidence such as emails and letters. Further, no request for an evidentiary hearing was made prior to the trial court's ruling on Defendants' Motion to Enforce Settlement.

[84] Accordingly, we find that the trial court did not abuse its discretion by not holding an evidentiary hearing prior to ruling on Defendants' Motion to Enforce Settlement.

C. Whether the Trial Court Erred in Finding a Settlement Agreement

1. Standard of review

[85] The Sharrocks argue that Defendants' Motion to Enforce Settlement was "tantamount to a motion for summary judgment." Appellants' Br. at 3 (footnote omitted). Thus, they argue that

"[t]he standard of review . . . on what was tantamount to a motion for summary judgment should be *de novo* because the standard of review as to whether a motion for summary judgment should have been granted is *de novo*." *Id.* (citations omitted).

[86] The Defendants argue that under *Blas v. Cruz*, 2009 Guam 12, the standard of review of the trial court's interpretation of the parties' agreement, including whether any agreement existed, is *de novo*. Appellees' Br. at 37 (citing *Blas*, 2009 Guam 12 ¶ 11). However, Defendants cite a Ninth Circuit case that held that "[w]here the [trial] court oversaw the extensive litigation giving rise to the settlement agreement and approved the agreement, we review the [trial] court's interpretation of the agreement with due respect for the [trial] court's superior perspective." Appellees' Br. at 37-38 (quoting *Congregation ETZ Chaim v. City of Los Angeles*, 371 F.3d 1122, 1124 (9th Cir. 2004)). Thus, Defendants contend that under these circumstances, the trial court's decision is entitled to some deference, and an abuse of discretion standard is more appropriate.

[87] In *Blas*, this court held:

> This court applies contract principles to the interpretation of settlement agreements. Principles of contract interpretation are legal questions reviewed *de novo*. We thus review the Superior Court's interpretation of the parties' Agreement, including whether any agreement existed, *de novo*.

2009 Guam 12 ¶ 11 (emphasis added) (citations omitted). Federal case law complements this holding. Federal courts have held that the "[i]nterpretation of a settlement agreement is a question of law subject to de novo review, but we defer to any factual findings made by the district court in interpreting the settlement agreement unless they are clearly erroneous." *Robinson*, 621 F.3d at 1261 (citations omitted); *see also Sanofi-Aventis v. Apotex Inc.*, 659 F.3d 1171, 1178 (Fed. Cir. 2011) ("The Second Circuit reviews the district court's interpretation of a

settlement agreement *de novo*." (citations omitted)); *Thatcher v. Kohl's Dep't Stores, Inc.*, 397 F.3d 1370, 1374 (Fed. Cir. 2005) ("The plain meaning of language of a contract or consent decree is a pure question of law, subject to *de novo* review by the appellate court. However, if the intent of the parties is not unambiguously expressed by the language of the decree, the district court may review extrinsic evidence and enter subsidiary factual findings as to the parties' intent, which are reviewed only for clear error." (citations and internal quotation marks omitted)); *Foretich v. Am. Broad. Cos., Inc.*, 198 F.3d 270, 273 (D.C. Cir. 1999) ("With regard to the district court's order enforcing the settlement, we review factual findings for clear error and legal issues *de novo*." (citations omitted)).

[88] The instant case involves questions of contract formation. As such, the issue of whether a settlement existed is reviewed *de novo*, but the trial court's factual findings are reviewed for clear error.

2. The Sharrocks' argument that the parties intended to be bound only by a writing

[89] The Sharrocks' argue for the first time on appeal that the parties intended to be bound only upon the signing of a written settlement agreement. Appellants' Br. at 31-32. Because there was no written settlement agreement, the Sharrocks contend that there was no settlement. *Id.* at 32.

[90] Defendants argue that this argument is raised for the first time on appeal and, thus, should be rejected. Appellees' Br. at 43. The Sharrocks concede that the argument is raised for the first time on appeal. Appellants' Reply Br. at 8.

[91] As a general rule, "'this court will not address an argument raised for the first time on appeal.'" *Tanaguchi-Ruth + Assocs. v. MDI Guam Corp.*, 2005 Guam 7 ¶ 78 (quoting *Univ. of Guam v. Guam Civil Serv. Comm'n*, 2002 Guam 4 ¶ 20). This rule is discretionary:

> [A]n appellate court may recognize such exceptions as: (1) when review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process; (2) when a change in law raises a new issue while an appeal is pending; and (3) when the issue is purely one of law.

Id. ¶ 80 (quoting *Dumaliang v. Silan*, 2000 Guam 24 ¶ 12 n.1).

[92] The Sharrocks argue that the court should consider their argument because "the Sharrocks justifiably believed that it was not relevant to the proceedings before the trial court." Appellants' Reply Br. at 8. This argument is unconvincing because the issue was relevant as to contract formation. If the parties had intended to form a contract only upon the execution of a written agreement, the Sharrocks could have raised that argument when the trial court was determining the existence and formation of the settlement agreement.

[93] Furthermore, the Sharrocks argue that "[t]he issue presented is one of law because it is based on the June 25, 2008 written settlement offer already in the record and the trial court's apparent determination that such settlement offer was accepted in part." Appellants' Reply Br. at 9. This argument is likewise unavailing because the issue of whether the parties intended that a contract be formed only upon the execution of a written agreement is a question of fact. *See Callie*, 829 F.2d at 890-91 ("Whether the parties *intended* only to be bound upon the execution of a written, signed agreement is a factual issue." (citations omitted)); *see also Shiroma v. Ysrael*, No. 86-0029A, 1987 WL 109889, at *2 (D. Guam App. Div. July 17, 1987) (holding that the parties' intent at the time of contracting is a question of fact); *Cunha v. Ward Foods, Inc.*, 804 F.2d 1418, 1428 (9th Cir. 1986).

[94] The policy behind the rule requiring arguments to be raised in the trial court in the first instance is intended "to allow the trial judge the opportunity to address potential errors in rulings which could possibly negate the necessity of an appeal, and further ensure that the issues are adequately briefed at the lower court and a record developed for appeal." *Tanaguchi-Ruth* +

Assocs., 2005 Guam 7 ¶ 81 (citations omitted). In considering this policy, together with our conclusions that review is not necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process and that the issue is not purely one of law, we decline to address the Sharrocks' argument that the parties only intended to be bound by a written settlement agreement.

3. Whether there was a settlement

[95] "This court applies contract principles to the interpretation of settlement agreements." *Blas*, 2009 Guam 12 ¶ 11 (citations omitted). "The three recognized elements of a contract are an offer, acceptance, and consideration." *Mobil Oil Guam, Inc. v. Tendido*, 2004 Guam 7 ¶ 34 (citations omitted). Moreover, there must be "mutual assent to the terms essential to the formation of a contract." *Id.* (quoting *Ex parte Grant*, 711 So. 2d 464, 465 (Ala. 1997)). "In order to meet their burden in establishing the existence of a contract, . . . plaintiffs must show: 'an offer encompassing all essential terms, unequivocal acceptance by the offeree, consideration, and an intent to be bound.'" *Id.* (quoting *Magill v. Nelbro Packing Co.*, 43 P.3d 140, 142 (Alaska 2001)). The parties' consent "to a contract must be free, mutual, and communicated by each to each other." *Blas*, 2009 Guam 12 ¶ 18 (citing 18 GCA § 85301 (2005)). "Consent is not mutual, unless the parties all agree upon the same thing in the same sense." *Id.* (quoting 18 GCA § 85316 (2005)).

[96] Acceptance must mirror the offer in order to ensure mutual consent:

> Because the offeror is entitled to receive what it has bargained for, if a purported acceptance includes additional terms to which the offeror did not assent, the consequence is not merely that the addition is not binding and that no contract is formed, but that the offer is rejected, and that the offeree's power of acceptance thereafter is terminated.

Id. (citations omitted).

[97] There is no dispute over the existence of mutual assent as to the settlement amount. In 2008, PIIC offered to settle for $25,000.00, McCoy's policy limit, RA, tab 43 at Ex. 1 (Visosky E-mail to Wong, June 25, 2008); RA, tab 42 at 1-2 (Civille Decl., Oct. 17, 2013), and in early 2013, Civille, the Defendants' attorney, reaffirmed PIIC's longstanding readiness to settle for $25,000.00. RA, tab 42 at 1-3 (Civille Decl.). There is no evidence in the record that the Sharrocks ever rejected the settlement amount. In fact, the opposite is true – the record is full of evidence of the Sharrocks' agreement to a settlement amount of $25,000.00. For instance, on November 29, 2011, at a status hearing before the trial court, Wong, the Sharrocks' attorney, stated that "[t]he defendant has already tendered his policy limit . . . but we cannot affect the settlement until the federal court case has been fully decided." Tr. at 2-3 (Status Hr'g, Nov. 29, 2011). Additionally, on August 30, 2012, Wong contacted the United States regarding a settlement of the case for $25,000.00 and requested a release of the United States' MCRA subrogation claim. RA, tab 43 at Ex. 18 (Wong E-mail to United States Attorneys Mikel Schwab and Jessica F. Cruz, Aug. 30, 2012). Moreover, on September 6, 2012, Wong contacted the Defendants' attorney "to confirm that [he] proposed a settlement under which the three described would release only (not indemnify) Mr. McCoy for the payment of $25,000, the represented policy limit." RA, tab 43 at Ex. 14 (Wong E-mail to Travis, Sept. 6, 2012). Furthermore, on February 19, 2013, Wong wrote to the Defendants' attorneys stating that "[i]n effect, this case has been settled since September 2012, and we have been waiting for you to send me two releases for review and approval." RA, tab 43 at Ex. 29 (Wong E-mail to Civille & Travis, Feb. 19, 2013). Thus, we find that the parties agreed to a settlement amount of $25,000.00.

[98] The only dispute as to the existence of a settlement agreement concerns whether obtaining two releases for potential subrogation claims by the United States and T&A was an essential term of the settlement. Wong claims that obtaining the releases was an essential term and a condition precedent to formation of a settlement contract. Appellants' Br. at 31; Appellants' Reply Br. at 26. On the other hand, the Defendants argue that obtaining the releases was not an essential term of the agreement. Appellees' Br. at 40-43. Thus, our analysis turns on whether either of the potential subrogation claims had legal effect on February 26, 2013, when Wong stated at a status hearing that the matter did not settle because the defendants failed to deliver the two separate releases, Tr. at 2 (Status Hr'g, Feb. 26, 2013), or at the time the trial court granted the Defendants' Motion to Enforce Settlement.

[99] We first turn to the United States' subrogation claim. The United States agreed to "full and complete satisfaction of the [MCRA subrogation] claim" in exchange for $8,333.33, or one-third of McCoy's policy limit in a letter to Wong on November 9, 2012. RA, tab 43 at Ex. 20 (Letter from G.G. Schaff, MEDCARE Claims Att'y to Wong). Consequently, the Defendants were no longer at risk of a subrogee's claim on the part of the United States at the time of the status hearing on February 26, 2013.

[100] We next turn to T&A's potential subrogation claim and find that the claim no longer had legal effect at the time of the trial court's ruling on the Defendants' Motion to Enforce Settlement. The Sharrocks cite case law from Arizona and Ohio in support of their contention that T&A's claim was preserved even though the statute of limitations for T&A to assert its subrogation claim had expired. Appellants' Opp'n Mot. & Further Supplemental Br. at 5, 8-9 (Aug. 12, 2015) (citing *In re Yakel*, 97 B.R. 580 (D. Ariz. Jan. 26, 1989); *United Pac./Reliance Ins. Co. v. Kelley*, 618 P.2d 257 (Ariz. Ct. App. 1980); *Holibaugh v. Cox*, 148 N.E.2d 677 (Ohio

1958)). There is a split of authority regarding the issue of whether a subrogee may assert a subrogation claim after the expiration of the statute of limitations. Some jurisdictions, including those of the cases cited by the Sharrocks, hold that a subrogee may do so. For instance, in *Holibaugh*, the Ohio Supreme Court held:

> Upon such partial assignment, the assignor and the partial assignee become parties united in interest and, even though the assignor may commence or continue prosecution of an action for the full amount of damages in his own name, or the partial assignee may commence or continue prosecution of an action for that part of the claim to which he has been subrogated, if the issue of joinder is not raised, the insured or the insurer must be joined as parties to the action either if such joinder is requested by motion or upon the raising of the issue by the defendant tort-feasor, and *such joinder may be had after the expiration of the period of the statute of limitations*.

Holibaugh, 148 N.E.2d at 682 (emphasis omitted and added). Additionally, in *Smith v. Parks Manor*, the California Court of Appeal held that the "right of a subrogee to intervene is not dependent on its own compliance with the statute of limitations." 243 Cal. Rptr. 256, 261 (Ct. App. 1987) (citations omitted). Instead, "[a]s long as the original action is timely filed, a complaint in intervention based on the right of subrogation is timely, though filed after the expiration of the statute of limitations." *Id.* (citations omitted). Moreover, a federal district court in New York held that "intervention by an insurance carrier to protect its subrogation rights is, in effect, a substitution of the real party in interest which relates back to the time of filing of the original complaint so as to prevent a statute of limitations bar." *Range v. Nat'l R.R. Passenger Corp.*, 176 F.R.D. 85, at *88 (W.D.N.Y. Nov. 3, 1997) (citing *Cummings v. United States*, 704 F.2d 437 (9th Cir. 1983); *Wadsworth v. United States*, 511 F.2d 64 (7th Cir. 1975); *St. Paul Fire & Marine Ins. Co. v. U.S. Lines Co.*, 258 F.2d 374 (2d Cir. 1958); *Berry v. St. Peter's Hosp. of the City of Albany*, 660 N.Y.S.2d 795 (Sup. Ct. Albany Co. 1997)).

[101] In contrast, other jurisdictions have held that a subrogation claim cannot be brought after the statute of limitations has expired. For instance, in *Powell v. Brantly Helicopter Corp.*, 396 F. Supp. 646 (E.D. Tex. June 27, 1975), a federal district court in Texas, applying the Texas statute of limitations for subrogation claims, held that the filing of a products liability complaint by a helicopter passenger's family charging a helicopter manufacturer with liability did not toll the running of a two-year statute of limitations for the filing of a subrogation claim by the insurer against the manufacturer to recover sums paid under the policies insuring the helicopter. Additionally, the Supreme Court of Wisconsin, in *Heifetz v. Johnson*, 211 N.W.2d 834 (Wis. 1973), held that an automobile liability insurer, which paid $2,000.00 to its insured toward medical expenses and which was thereby subrogated to the claim of its insured, was an indispensable party to the insured's negligence action, but the failure to join the subrogated insurer as a plaintiff could not be corrected as to the insurer because the statute of limitations had run.

[102] We need not adopt a position in this case. Even if we were to adopt the line of cases supporting the Sharrocks' position, we find that there is no unity of interest between the Sharrocks and T&A, as discussed by *Holibaugh*, 148 N.E.2d at 680. The Sharrocks do not have a direct contractual relationship with T&A, as was the case between the insurer and insured in *Holibaugh* that allowed the insurer to gain the benefit of its insured's compliance with the statute of limitations. Instead, since T&A is a worker's compensation provider, the direct contractual relationship in the instant case is between T&A and Richard Sharrock's employer, not Sharrock himself. Sharrock's employer is not a party to this action. T&A does not have the same unity of interest with the Sharrocks as that described in *Holibaugh*. Therefore, in order for T&A to have preserved its subrogation claim, it must have intervened or joined before the expiration of the

statute of limitations. Because T&A had not done so, we find T&A's subrogation claim to have been extinguished at the time the trial court ruled on the Defendants' Motion to Enforce Settlement.

[103] Thus, by operation of law, neither of the subrogation claims had legal effect at the time the trial court ruled on the Defendants' Motion to Enforce Settlement. In turn, neither of the releases would have had legal effect at the time the trial court ruled on the Defendants' Motion to Enforce Settlement. T&A's claim for subrogation had expired by virtue of the expiration of the statute of limitations, and the United States took a clear position of settlement, thus releasing its subrogation claim. The Defendants were no longer faced with the exposure of potential subrogation claims. Even if the Defendants failed to communicate to the Sharrocks that they no longer required the releases, obtaining the releases was no longer a condition of settlement.

[104] Accordingly, at the time the trial court ruled on the Motion to Enforce Settlement, obtaining the releases was no longer an essential term of the agreement. Moreover, it was unreasonable for the Sharrocks to state that obtaining the releases was an essential term of the agreement when the subrogation claims were no longer viable. In other words, there was no longer a reasonable expectation on the part of the Sharrocks that the releases were a condition precedent to settlement when the subrogation claims no longer had legal effect.

[105] Because obtaining the releases was not an essential term of the agreement, we find that a settlement agreement existed between the parties to settle for the policy amount of $25,000.00.

D. Whether the Motion to Enforce Settlement Should Have Been Treated as a Motion for Summary Judgment

[106] In their Opening Brief, the Sharrocks argue that "the Defendant's Motion to Enforce Settlement was really one for summary judgment on the issue of whether or not there was a settlement." Appellants' Br. at 35. The Sharrocks contend that it was clearly erroneous for the

trial court "to weigh the facts presented by the parties and determine who was credible" in granting Defendants' Motion to Enforce Settlement. *Id.*

[107] While acknowledging that "no similar Guam and California statute is involved in this case," the Sharrocks cite *Levy v. Superior Court*, 896 P.2d 171 (Cal. 1995), to support their argument that the Motion to Enforce Settlement should have been treated like a summary judgment motion. Appellants' Br. at 37. In that case, the California Supreme Court noted that prior to the enactment of a reform statute, a majority of California Courts of Appeal held that "settlement agreements . . . could be enforced only by a motion for summary judgment, a separate suit in equity, or an amendment to the pleadings." *Levy*, 896 P.2d at 175. The reasoning behind this rule:

> was based on the theory that non[-]statutory motions to enforce settlements were motions based on facts outside the pleadings and under this court's decisions had to be treated as motions for summary judgment that could be granted only if all of the papers submitted showed there was no triable issue of facts.

Id.

[108] Other jurisdictions follow this rule as well. *See, e.g.*, *Anderson v. Benton*, 673 S.E.2d 338, 339 (Ga. Ct. App. 2009) ("To prevail on either a motion for summary judgment or a motion to enforce a settlement agreement, a party must show the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of the appellant's case." (footnote and internal quotation marks omitted)); *Voicestream Minneapolis, Inc. v. RPC Prop. Inc.*, 743 N.W.2d 267, 273 (Minn. 2008) ("[W]e hold that a district court shall treat a motion to enforce a settlement agreement as it would a motion for summary judgment, and explicitly grant or deny each claim."); *Gilmartin v. Abastillas*, 869 P.2d 1346, 1352 (Haw. Ct. App. 1994).

[109] However, as the trial court noted, federal courts seem to allow enforcement of settlement agreements without the use of summary judgment procedures. *See, e.g., Chaganti & Assocs., P.C.*, 470 F.3d at 1222-23; *United States. v. Hardage*, 982 F.2d 1491, 1496 (10th Cir. 2006). *But see Tiernan v. Devoe*, 923 F.2d 1024, 1032 (3rd Cir. 1991) (applying a standard of review similar to that of an order granting a motion for summary judgment in reviewing a district court's order enforcing settlement). Specifically, federal courts note that "[w]hen relief from a judgment hinges upon a factual issue and credibility determinations are involved, a hearing should be held to determine entitlement to relief," but "no hearing is necessary where there is no dispute as to the existence of a settlement." *Tiernan*, 923 F.2d at 1030 (citations and internal quotation marks omitted). The Guam Rules of Civil Procedure are based on the Federal Rules. Accordingly, we adopt the federal line of cases and find that a trial court may summarily enforce a settlement agreement if no material facts are in dispute, but that the parties must be allowed an evidentiary hearing on disputed issues of the validity and scope of the agreement. *See In re Deepwater Horizon*, 786 F.3d 344, 354 (5th Cir. 2015).

[110] Here, as discussed, there was no dispute that the parties agreed to settle for the policy limit of $25,000.00. The only disagreement was the separate releases as a condition to settlement. Because the subordination claims of third parties were not legally viable at the pertinent times, it was unreasonable for Sharrock to continue to insist that the releases remain a condition of settlement. Since no genuine issue of material fact existed regarding the validity of the settlement agreement or the terms of the settlement, the trial court did not err in refusing to treat the Motion to Enforce Settlement as a Motion for Summary Judgment.

E. Trial Court's February 13 Decision and Order

[111] Because we find that the trial court did not abuse its discretion in not holding an evidentiary hearing prior to ruling on the Defendants' Motion to Enforce Settlement, that the trial court did not err in finding a settlement agreement, and that the trial court did not err in refusing to treat the Motion to Enforce Settlement as a Motion for Summary Judgment, we find that the trial court did not err in granting the Defendants' Motion to Enforce Settlement.

F. Trial Court's November 6 Decision and Order

[112] Because we find that the trial court did not err in granting the Defendants' Motion to Enforce Settlement, we find that the trial court did not abuse its discretion in denying Plaintiffs' Motion for Reconsideration and did not err in granting Defendants' Motion to Dismiss.

V. CONCLUSION

[113] The trial court did not abuse its discretion by not holding an evidentiary hearing prior to ruling on defendants' motion to enforce settlement. Additionally, the trial court did not err in finding that a settlement agreement had been reached between the parties or in refusing to treat the motion to enforce settlement as a motion for summary judgment. In turn, we find that the trial court did not err in granting defendants' motion to enforce settlement. Finally, we find that the trial court did not abuse its discretion in denying plaintiffs' motion for reconsideration and did not err in granting defendants' motion to dismiss. Accordingly, we **AFFIRM** the trial court's decision.

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[114] We strike portions of the Sharrocks' brief and excerpts of record to exclude exhibits previously struck by the trial court, but do not impose sanctions upon the Sharrocks' attorney.

/s/
F. PHILIP CARBULLIDO
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
ROBERT J. TORRES
Chief Justice