STATE OF MICHIGAN

COURT OF APPEALS

THE ESTATE OF CHARLOTTE R. MORSE, by RONALD E. MORSE, personal representative,

Plaintiff-Appellee,

v

TITAN INSURANCE COMPANY,

Defendant-Appellant,

and

BRIAN CHARLES HAYNES, ADRIAN INSURANCE AGENCY, and AUTO OWNERS INSURANCE COMPANY,

Defendants.

UNPUBLISHED
August 14, 2014

No. 309837
Jackson Circuit Court
LC No. 05-005823-NI

Before: BORRELLO, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Titan Insurance Company ("Titan") appeals as of right a judgment entered in favor of plaintiff and against it, reforming a contract of insurance issued by Titan to Charlotte Morse to become effective on November 19, 2004, rather than its written date of November 25, 2004. Because Adrian Insurance Agency was the agent of Charlotte Morse and not Titan and there was thus no basis for reformation of the Titan insurance policy, we vacate the judgment in favor of plaintiff and remand for entry of a judgment of no cause of action in favor of Titan.

This insurance benefits case arises out of a car accident that occurred on November 24, 2004. Charlotte Morse and her husband owned several vehicles and for many years purchased insurance through Adrian Insurance Agency ("Adrian"). For several years, their insurer was Auto Owners Insurance Company ("Auto Owners") but, in 2004, Auto Owners indicated it would not be renewing the policies for Ms. Morse due to her driving record. The Auto-Owner's policies on her and her husband's insured vehicles was set to expire at midnight on November 24, 2004. On November 19, 2004, Ms. Morse went to Adrian to insure a 1996 Ford Taurus, a

vehicle that she owned but was not insured, as it was an "extra" vehicle. Ms. Morse planned to drive this vehicle due to her primary vehicle being in need of repairs. Ms. Morse obtained insurance for the Taurus under a Titan policy and paid the premium for six months of full coverage on the Taurus on November 19, 2004. Testimony differed as to whether an effective date for the policy was discussed. The Adrian agent, however, prepared the application for insurance with an effective policy date of November 25, 2004, and sent the information to Titan who, in turn, issued a policy to become effective on that date. Ms. Morse began driving the Taurus prior to November 25, 2004, and was rear-ended by another driver on November 24, 2004. She suffered serious injuries in the accident which left her a quadriplegic. Titan denied liability for any type of coverage or benefits arising from the accident because the policy did not become effective until November 25, 2004, and Ms. Morse sued Adrian, Auto Owners, Titan, and the driver of the vehicle that had rear-ended her. Ms. Morse claimed breach of contract as to Titan as well as an equitable claim seeking reformation of the insurance contract.

During the course of the litigation, Ms. Morse passed away and her estate was substituted as plaintiff.[1] Also during the course of the litigation, plaintiff settled her claim with Adrian, and summary disposition was granted in favor of Auto Owners based upon the trial court's finding that because there was no insurance on the Taurus at the time of the accident, Ms. Morse was not entitled to PIP benefits from this insurer due to an exclusion in Auto Owner's policies and under relevant statutory provisions. The matter proceeded to trial against Titan only, with the sole and special question submitted to the jury being when the insurance policy issued by Titan went into effect.

The jury determined that the liability policy issued by Titan to Ms. Morse went into effect on November 19, 2004. The trial court thereafter entered a judgment in favor of plaintiff and against Titan, reforming the insurance contract *nunc pro tunc* to make November 19, 2004, the effective date for coverage by Titan. The parties agreed to waive trial by jury on the issue of damages and allow the court to enter a final judgment based upon plaintiff's offers of proof. Such a judgment was entered on April 2, 2012, in plaintiff's favor in the amount of $1,154,244.43.

On appeal, Titan first contends that the trial court erred in denying its motion for summary disposition on the issue of contract reformation and in thereafter reforming the insurance policy where the record was devoid of any evidence of a mutual mistake shared by Ms. Morse and Titan as to the effective date of the policy. We agree.

We review motions for summary disposition de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). This Court also reviews de novo the trial court's decision to grant or deny equitable relief. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994).

An insurance policy is a contract between the insurer and the insured. *Radenbaugh v Farm Bureau Gen Ins Co of Michigan*, 240 Mich App 134, 138; 610 NW2d 272 (2000), citing

[1] "Plaintiff' shall continue, throughout this opinion, to be used to refer to Ms. Morse.

Auto–Owners Ins Co v Churchman, 440 Mich 560, 566; 489 NW2d 431 (1992). Michigan courts possess the equitable power to reform a contract that does not express the true intent of the parties as a result of fraud, mistake, accident, or surprise. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 371–372; 761 NW2d 353 (2008). To reform a written instrument on the ground of mistake, the mistake must be mutual and common to both parties to the contract. *Emery v Clark*, 303 Mich 461, 472-473; 6 NW2d 746 (1942), quoting *Lahey v Hackley Union National Bank*, 270 Mich 438; 259 NW 130 (1935). Reformation will generally not be granted, however, for a mistake of law (i.e., a mistake regarding the legal effect of the agreement). *Olsen v Porter*, 213 Mich App 25, 28-29; 539 NW2d 523 (1995). Nor is a unilateral mistake sufficient to warrant reformation. *Casey v Auto Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006). Instead, courts will reform an instrument to reflect the parties' actual intent where there is clear evidence that both parties reached an agreement, but as the result of mutual mistake, or mistake on one side and fraud on the other, the instrument does not express the true intent of the parties. *Ross v Damm*, 271 Mich 474, 480-481; 260 NW 750 (1935). Reformation is appropriate if "the evidence of the mistake and mutuality thereof" is "so clear as to establish the fact beyond cavil." *Lyons v Chafey*, 219 Mich 493; 189 NW 86 (1922). The burden of proof is upon the party seeking reformation. *Emery*, 303 Mich at 472-73.

It has been found that where, through the fault of the insurer, an insurance policy does not cover the person or property intended, it may be reformed. *Heath Delivery Service v Michigan Mut Liability Co*, 257 Mich 482, 485-486; 241 NW 191 (1932). The question of whether a mutual mistake exists is "one entirely of fact," which generally depends on an assessment of credibility in cases where the issue is in dispute. *Goldberg v Cities Service Oil Co*, 275 Mich 199, 210; 266 NW 321 (1936).

It is undisputed that the actual policy of insurance in this matter, or contract, was between Titan and Ms. Morse. It is also undisputed that the insurer, Titan, had no contact with Ms. Morse, the insured. As indicated by Titan, it intended to issue the policy of insurance in conformity with the specific information relayed to it by Adrian, including the date the policy was to become effective. In fact, Karen Gines, operations manager for Titan, testified that it makes no difference to Titan what the effective date of an insurance policy is and that Titan simply uses the date provided to it by the independent insurance agent, such as Adrian. In this case, that date was November 25, 2004, as stated on the application prepared by Adrian. Thus, even if plaintiff, as the first contracting party, intended the policy to become effective on November 19, 2004, Titan, the other contracting party, nevertheless intended the policy to become effective on November 25, 2004. Reformation is appropriate only where there is clear evidence that the *parties to the contract* reached an agreement, but as the result of mutual mistake, the instrument does not express the true intent of the parties. *Ross*, 271 Mich at 480-481. Where Titan simply accepted the date provided by Adrian and issued the policy with the provided date on it, it clearly intended that the policy become effective on that date. Having had no contact with Ms. Morse, it would have no reason to intend that the policy become effective on any other date and there is thus no mutual mistake between the two parties named in the contract.

However, as indicated in *Droste v City of Highland Park*, 258 Mich 1, 4; 241 NW 823 (1932) quoting *Adams v Iowa Gas & Electric Co*, 200 Iowa 782, 783; 203 NW 229 (1925), "Unless it may be said that the representation of the agent was binding upon this defendant, the alleged mistake cannot be said to be mutual. It is elementary, that if one party is acting through

an agent, it is necessary that he have authority to make the stipulations alleged to have been omitted from the contract." Thus, if Adrian, who provided the date the policy was to become effective to Titan, was acting as the agent of Titan and both plaintiff and Adrian intended to have made the policy effective on November 19, 2004, a mutual mistake could be found.

This leads us to Titan's second allegation of error: that the trial court erred in finding, as a matter of law, that Adrian was an agent of both plaintiff and Titan and in so instructing the jury at the trial. Again, we agree.

The existence of an agency relationship and the scope of the relationship are generally questions of fact. *Caldwell v Cleveland-Cliffs Iron Co*, 111 Mich App 721, 732; 315 NW2d 186 (1981). An agency relationship may arise based on a manifestation by the principal that the agent may act on behalf of the principal. *Meretta v Peach*, 195 Mich App 695, 697; 491 NW2d 278, 279-80 (1992). Where there is a disputed question of agency, any testimony, either direct or inferential tending to establish agency creates a question of fact for the jury to determine. *Meretta*, 195 Mich App at 697. However, "where the relationship of the parties has been defined by written agreement, it is the province of the trial judge to determine the relationship." *Birou v Thompson-Brown Co*, 67 Mich App 502, 506-507; 241 NW2d 265 (1976), citing *Keiswetter v Rubenstein*, 235 Mich 36, 42; 209 NW 154 (1926).

"An insurance agent typically acts on behalf of the parties to facilitate the sale and execution of the policy." *Genesee Foods Services, Inc v Meadowbrook, Inc*, 279 Mich App 649 654; 760 NW2d 259 (2008). A "captive" agent works for one insurer and is the agent of that insurer.[2] Independent insurance agents, on the other hand, sell policies from many different insurers and have long been deemed to be the agent of the insured. When an insurance policy "is facilitated by an independent insurance agent or broker, the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer." See, *Genesee Foods Services, Inc*, 279 Mich App at 654, quoting *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW2d 548 (1998). Testimony that an agency deals with numerous insurance companies is generally sufficient to prove that the independent agent is an agent of the insured and not of the insurer. See, e.g. *Harwood v Auto-Owners Ins Co*, 211 Mich App 249, 254; 535 NW2d 207 (1995).

"It is a longstanding legal principle that a duly authorized agent has the power to act and bind the principal to the same extent as if the principal acted." *In re Estate of Capuzzi*, 470 Mich 399, 402; 684 NW2d 677 (2004). "In effect, the agent stands in the shoes of the principal." There are circumstances where an agent can be deemed to be serving the interests of more than one principal. For example, in *Vargo v Sauer*, 457 Mich 49; 576 NW2d 656 (1998), a medical malpractice action, our Supreme Court found that a factual dispute existed as to whether a doctor, who was both a professor of medicine at Michigan State University and treated patients

[2] See United States Department of Labor, Bureau of Labor Statistics website, "What Insurance Sales Agents Do," (http://www.bls.gov/ooh/Sales/Insurance–sales–agents.htm# tab–2) (" *Captive agents* are insurance sales agents who work exclusively for one insurance company. They can only sell policies provided by the company that employs them.").

at St. Lawrence Hospital was simultaneously acting as an agent of both the university and the private hospital when he allegedly committed malpractice. In that case, a pregnant woman appeared at St. Lawrence Hospital due to difficulties with her pregnancy. She was admitted and examined by medical residents and ultimately by the defendant doctor who ordered an immediate c-section. Shortly after the delivery, the woman passed away due to cardiac arrest and her estate sued the doctor and St. Lawrence Hospital, among others. Relevant to the lawsuit, MSU did not have its own hospital facility and thus had an agreement with St. Lawrence to provide its medical students with residency experience there. In exchange for the use of its facilities, MSU physicians (including the defendant doctor) provided services to the hospital on an "on-call" basis. The defendant doctor had staff privileges at St. Lawrence, but received his pay from MSU. The doctor moved for summary disposition arguing he was entitled to governmental immunity because, as an employee of MSU, he was a government employee. Our Supreme Court noted that "[D]ual agency occurs when two persons or entities agree to share the services of an individual for a single act." 457 Mich at 69, citing comments to 1 Restatement Agency, 2d, § 226, and that while the doctor was clearly an agent of MSU, because the facts of the case with respect to whether he also had an agency relationship with St. Lawrence Hospital had yet to be developed, summary disposition was inappropriate.

Because an independent agent such as Adrian is generally an agent of the insured rather than the insurer, to establish that a mutual mistake was even a possibility in this matter, plaintiff must first establish that Adrian was not only the agent of plaintiff (the insured) but also of the insurer (Titan). In other words, plaintiff must establish that dual agency existed and applies to the circumstances at hand such that the alleged mistake in the date of effective date of the policy can be attributed to Titan. Plaintiff cannot do so.

First, the written producer agreement between Titan's predecessor in interest, Imperial Midwest Underwriting Services, Inc, and Adrian entered into in March 1993 provides Adrian with the authority to solicit the business of Titan "subject always to acceptance by [Titan]." The agreement further provides that Adrian shall submit to Titan the appropriate copy of any and all binders issued by Adrian with applications for insurance and that Titan may, "at its sole discretion, elect to review, approve, reject, re-rate, or quote alternatives to such applications." The agreement further specifies at Article I, Section C that "[Adrian] shall have NO AUTHORITY to execute any policies, endorsements or documents other than binders." Notably, the agreement contains an express provision concerning agency in article VI:

> Notwithstanding the provisions contained in Article I, Section C,[Titan] may appoint [Adrian] as an agent of [Titan] for the express limited purpose of authorizing [Adrian] to sign and/or countersign policies, bonds, endorsements, or certificates of [Titan]. In the event of such appointment, [Titan] shall give written notice of such appointment to [Adrian]. [Adrian] will be limited only to the power granted in the written notice.

Thus, under the agreement, Adrian could write no policies, only binders, (a binder is "a contract of temporary insurance pending issuance of a formal policy or proper rejection by [the insurer]." (*Universal Underwriters Group v Allstate Ins Co*, 246 Mich App 713, 720-721; 635 NW2d 52 (2001)), which Titan reserved the authority to reject at its sole discretion. Titan also reserved the authority to appoint Adrian an agent for Titan with certain authorities but would given written

notice of such appointment to Adrian if it elected to appoint Adrian an agent with these authorities. There has been no assertion that Adrian was given the written authorities to act as Titan's agent. There would be no reason to include language in the producer agreement specifying how Titan could appoint Adrian as its agent for authority purposes if Adrian already were its agent.

Second, as previously indicated, it is well established that independent agents are considered agents of the insured, rather than agents of the insurer. See, e.g., *W Am Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW2d 548 (1998); *Auto-Owners Ins Co v Michigan Mut Ins Co*, 223 Mich App 205, 215; 565 NW2d 907 (1997). Plaintiff has not directed us to any binding authority specifically holding that an independent insurance agent is the *sole* agent of the insured. At best, whether an agent was acting as an agent for both the insured and the insurer has occasionally been deemed a question of fact. See, e.g., *MCW, Inc v Hamilton Mut Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued January 28, 2003 (Docket No. 233480). While experts in this case testified at trial that Adrian *could* be acting as Titan's agent, at the time the trial court ruled as a matter of law that Adrian was Titan's agent (in ruling on Titan's motion for summary disposition), the evidence before it was that Adrian was an independent agent. There was nothing in the record to support the trial court's finding that Adrian was Titan's agent with respect to the submission of the application.

Finally, there is a distinct difference between an agent who represents and acts on behalf of the interests of two parties at the same time (having two principals) and one who acts as the agent of one party and facilitates that party's transaction with another party. Being a conduit to a transaction does not translate into being a dual agent. And, even where dual agency can be found, one is not necessarily a dual agent for *all* purposes. "It is hornbook learning that because one is an agent for one purpose he is not an agent for all." *Sherman v Korff*, 353 Mich 387, 397; 91 NW2d 485 (1958).

In Restatement Agency 3d § 3.14, comment c. notes that the same actor may occupy different roles at successive points in an ongoing interaction among the same parties and also provides the key to determining the legal relationship that an intermediary actor has with each party because it disaggregates an ongoing interaction into discrete relationships. "For example, an insurance intermediary who obtains a policy from an insurer on behalf of a prospective insured acts as the prospective insured's agent. The same intermediary may act as the insurer's agent in receiving premium payments from the insured." The comment goes on to relate:

> An insurance intermediary who applies for or procures insurance coverage on behalf of a prospective insured is generally termed an insurance "broker" and characterized as the agent of the prospective insured in the insurance application. Additionally, an insurance broker may subsequently be treated as the insured's agent for purposes of receiving and giving notice. A broker owes no special allegiance to any particular insurer. However, when an insurance policy is issued by an insurer through a broker, the broker is treated as the insurer's agent who may bind the insurer within the scope of the broker's authority. An "independent" insurance agent who represents several insurers is generally, like an insurance broker, characterized as the insured's agent in procuring or applying for insurance. An insurance "agent" (who is not an "independent" one) generally has a fixed

> relationship with one insurer whom the agent represents and to whom the agent owes duties and allegiances. To determine whether an intermediary acts as an "agent" or as a "broker," it is relevant whether the insurer or the prospective insured calls the intermediary into action, whether the insurer or the prospective insured controls the intermediary's actions, and whether the intermediary represents the insurer's or the prospective insured's interests . . . .

Thus, even if Adrian could be construed as Titan's agent for some limited purposes, such as collecting premiums, those purposes are very specific and this does not alter the fact that Adrian is, for most purposes, and for purposes of submission of the application bearing the effective policy date, considered an agent of plaintiff, the insured.

Applying the reasoning of comment c. above, there is no question that Adrian was an intermediary who applied for insurance coverage on behalf of plaintiff. Adrian received notice of Auto Owners intent not to renew plaintiff's polices and advised plaintiff of the same, then sought and applied for Titan coverage on her behalf. Adrian did not issue an *insurance policy* to plaintiff. Rather, plaintiff was the party who called Adrian into action, requesting that it procure insurance for her, controlled Adrian's actions because she provided the information for the application for insurance, and there has been no allegation that Adrian represented the interests of Titan. In fact, there has been no indication that Titan was involved in the insurance process other than quoting a price to Adrian, at Adrian's request. It was then up to plaintiff to determine if the price was acceptable. Titan was described by the trial court as a "substandard carrier" who takes "all comers."

In light of these facts, Adrian was the agent for plaintiff, not Titan, in the facilitation of the insurance contract and specifically in submitting the application for insurance. Consequently, plaintiff's argument that Adrian was the agent of Titan and that Titan should be bound by any mistakes made by Adrian on that matter fails. And, the trial court erred in finding as matter of law that Adrian was acting as both plaintiff and Titan's agent, particularly in the submission of plaintiff's application for insurance bearing an effective insurance date. That being true, there was no mutual mistake shared by plaintiff and Titan (either personally or as through Adrian) as to the effective date of the policy and the trial court erred in denying Titan's motion for summary disposition on this issue and in thereafter reforming the insurance policy.

The judgment in this matter is thus VACATED. We remand for entry of a judgment of no cause of action in favor of Titan Insurance Company. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Deborah A. Servitto
/s/ Jane M. Beckering