COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-0289

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

JAMIE A. REKOWSKI, GERALD REKOWSKI, AND BERNADINE REKOWSKI, HIS PARENTS,

PLAINTIFFS,

V.

PEKIN INSURANCE CO., WALTER L. REKOSKE, MID-STATE BROKERS, INC., HERITAGE MUTUAL INSURANCE COMPANY, WAYNE PRZYBYLSKI,

DEFENDANTS,

BADGER SATELLITE SYSTEMS,

DEFENDANT-RESPONDENT,

HERRSCHNERS, INC., AND AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

NOMINAL-DEFENDANTS,

MID-STATE BROKERS, INC.,

DEFENDANT-THIRD-PARTY PLAINTIFF-RESPONDENT,

V.

PEKIN INSURANCE COMPANY,

THIRD-PARTY DEFENDANT-APPELLANT,

KOSTKA INSURANCE AGENCY, INC., JACK BROOKS, AND UTICA MUTUAL INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Portage County: PATRICK J. TAGGART, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

ROGGENSACK, J. Pekin Insurance Company (Pekin) appeals from a judgment reforming its business automobile policy to provide non-owned auto coverage of $1,000,000 to Mid-State Brokers, d/b/a Badger Satellite Systems (Mid-State). We conclude that the circuit court's determination that Pekin's insurance policy should be reformed to provide non-owned auto coverage with $1,000,000 limits was not an erroneous exercise of discretion because the court applied the proper legal standard to factual findings which are not clearly erroneous and reached a conclusion a reasonable judge could reach. Therefore, we affirm.

BACKGROUND

On October 9, 1992, Walter Rekoske, an employee of Mid-State, was driving his own vehicle to a service call for Mid-State when he was involved in an automobile accident with Jamie Rekowski. Rekowski was injured and he and his parents sued Rekoske, Mid-State, Pekin, and certain other defendants who are either nominal defendants or who are no longer a part of this action.

At the time of the accident, Mid-State had two insurance policies with Pekin: a commercial general liability (CGL) policy and a business automobile policy. Pekin denied liability under both policies because Rekoske was driving his personal vehicle at the time of the accident and neither Pekin policy provided coverage for vehicles that were not owned by Mid-State. Mid-State filed a third-party claim on the coverage issue against Pekin; Kostka Insurance Agency (Kostka), the agency that issued the policies; Jack Brooks, an insurance agent employed by Kostka; and Utica Mutual Insurance Company (Utica), Kostka's errors and omissions insurer. Mid-State sought reformation of the business automobile policy to add coverage for vehicles that were not owned by Mid-State, but which were used for business purposes. Mid-State also alleged that Brooks was negligent in failing to procure the type of coverage requested.

On July 1 and 2, 1997, the third-party claims were tried to an advisory jury. John Kaminski, the president of Mid-State, testified concerning his 1990 meetings with Brooks to purchase insurance. Kaminski said he reviewed his then existing insurance polices with Brooks and requested coverage equal to or better than what he had at the time. He claimed he showed Brooks Mid-State's previous polices, including a CGL policy from Minnesota Mutual Insurance Company (Minnesota Mutual), which provided $1,000,000 coverage for non-

owned vehicles. Kaminski also testified that he specifically asked Brooks for non-owned auto coverage.

Brooks testified that he had little recollection of his conversations with Kaminski, and he did not recall whether Kaminski had asked for non-owned auto coverage. However, Brooks said that although he normally reviews policies currently in force prior to issuing a new policy, he had never seen Mid-State's CGL policy with Minnesota Mutual.

Kaminski and Brooks also testified about their early 1991 meeting to discuss a new CGL policy for Mid-State. During that meeting, Kaminski and Brooks did not discuss business auto insurance or non-owned auto coverage. Kaminski testified that he did not renew his CGL policy with Minnesota Mutual in June 1991 because " we had a new policy with Jack Brooks that took over from it. We assumed it was the same coverage."

On the issue of reformation, the advisory jury found, in answering questions one, two and three of the special verdict, that Kaminski requested Brooks to procure non-owned auto insurance coverage, that Brooks's failure to procure the requested coverage resulted from a mutual mistake, and that if the mistake had not been made, Pekin would have issued non-owned auto coverage to Mid-State. On Mid-State's alternative claims, the jury found both Brooks and Kaminski causally negligent with respect to the failure to procure non-owned auto coverage for Mid-State. The jury apportioned seventy-five percent negligence to Brooks and twenty-five percent negligence to Kaminski.

In motions after verdict, Pekin requested that the court set aside the jury's advisory verdict and give Pekin a new trial because: (1) of legal errors committed during the trial, (2) the verdict was contrary to applicable law and the

great weight of the evidence, and (3) in the interests of justice. Pekin also moved to have the court change the answers to questions one and two of the special verdict, find that Pekin's policy should not be reformed, or in the alternative, if Pekin's policy was reformed, to set per person limits of liability for non-owned auto coverage at $100,000.

The circuit court denied Pekin's motions and reformed the business auto policy to add non-owned auto coverage for Mid-State, in the amount of $1,000,000. The court also dismissed all claims against Brooks, Kostka, and Utica. This appeal followed.

DISCUSSION

Standard of Review.

Reformation of an insurance policy to correct a mutual mistake is a discretionary act, taken in equity. ***Pouwels v. Cheese Makers Mut. Cas. Co.***, 255 Wis. 101, 106, 37 N.W.2d 869, 872 (1949). There is no right to a jury trial of equitable issues; however, a court may try equitable issues with an advisory jury. Section 805.02(1), STATS. An advisory verdict is only an aid to the court in determining issues of fact. If the circuit court is not satisfied with the jury's findings, it has discretion to set aside the verdict and substitute its own findings. ***Dombrowski v. Tomasino***, 27 Wis.2d 378, 385-86, 134 N.W.2d 420, 424 (1965). Because the findings of fact made after the use of an advisory jury are in actuality the findings of the circuit court, we will not set them aside unless they are clearly erroneous. *See* § 805.17(2), STATS.; *see also* ***Noll v. Dimiceli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (1983); ***Paterson v. Paterson***, 73 Wis.2d 150, 154, 242 N.W.2d 907, 909 (1976). And, we will not reverse a discretionary decision of the circuit court, when it applies the correct legal standard to a

reasonable view of the facts of record and reaches a conclusion a reasonable judge could reach. ***Rodak v. Rodak***, 150 Wis.2d 624, 631, 442 N.W.2d 489, 492 (Ct. App. 1989).

Advisory Jury.

Pekin argues that the advisory verdict should be set aside. We disagree with all of Pekin's arguments concerning the advisory verdict. An advisory verdict in an action in equity is not binding on the circuit court. ***Dombrowski***, 27 Wis.2d at 385-86, 134 N.W.2d at 424. The court is free to accept or reject the decision of an advisory jury. ***Paterson***, 73 Wis.2d at 154, 242 N.W.2d at 909. Therefore, alleged errors regarding jury instructions for an advisory jury are not appealable. ***Huse v. Washburn***, 59 Wis. 414, 416, 18 N.W.2d 341, 341-42 (1884); ***Galvan v. Peters***, 22 Wis.2d 598, 608, 126 N.W.2d 590, 595 (1964). Furthermore, because an advisory jury is not the final arbiter of fact, it is not appropriate to argue on appeal to set aside the jury's findings as contrary to the great weight of the evidence or because the interests of justice require it. Instead, an appeal reviews the factual findings of the circuit court to determine whether they are clearly erroneous. ***Galvan*** at 608, 126 N.W.2d at 595.

Reformation.

An insured may seek reformation of an insurance policy to correct a mutual mistake. ***Scheideler v. Smith & Associates, Inc.***, 206 Wis.2d 480, 486, 557 N.W.2d 445, 447 (Ct. App. 1996). A mistake is mutual when the insured requests coverage for a particular risk and the agent understands the wishes of the insured, but, by mistake, issues a policy that does not contain the requested coverage. ***Id.*** Although the agent made the mistake, if the agent is an authorized agent of the insurer, the mistake is attributable to the insurer for purposes of

reforming the policy. Once the policy is reformed, the insurer must provide coverage under the reformed policy. ***Id.*** at 486, 557 N.W.2d at 447-48.

The legal standards for contract reformation must be properly applied to the facts of record. Where the circuit court is the fact finder, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [circuit] court to judge the credibility of the witnesses." Section 805.17(2), STATS.

> In addition, when the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.

Cogswell v. Robertshaw Controls Co., 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979) (citation omitted).[1]

The circuit court concluded that the factual predicates for reformation based on mutual mistake had been established in this case, and the record reflects the following testimony supportive of that conclusion: (1) Kaminski had $1,000,000 non-owned auto coverage when he met with Brooks and he asked for coverage that would be the same or better than that coverage; (2) it

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[1] In ***Cogswell*** the supreme court applied the "great weight and clear preponderance" standard of review; however,

> [w]hile we now apply the "clearly erroneous" test as our standard of review for findings of fact made by a [circuit] court without a jury, cases which apply the "great weight and clear preponderance" test to the same situation may be referred to for an explanation of this standard of review because the two tests in this state are essentially the same.

Noll v. Dimiceli's, Inc., 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (1983).

was Brooks's standard practice to review existing policies and discuss insurance needs and requirements with the insured, before a new policy was issued; and (3) Kaminski specifically asked Brooks for non-owned auto coverage, such as Mid-State had in the Minnesota Mutual CGL policy. The court's findings that Kaminski requested Brooks to procure non-owned auto coverage and that Brooks's failure to procure the requested coverage resulted from mutual mistake were not clearly erroneous. Furthermore, the court's determination that if the mistake had not been made, Pekin would have issued non-owned auto coverage to Mid-State, was a reasonable inference from the testimony at trial.

Although there was conflicting testimony about whether Brooks reviewed Mid-State's current policies prior to issuing the business auto policy and whether Brooks understood that Kaminski wanted non-owned auto coverage, the court properly weighed the conflicting testimony and determined that Kaminski was more credible. Therefore, we will not disturb the court's findings of fact on the issue of reformation.

With regard to the amount of coverage, the court reformed the policy to provide non-owned auto insurance coverage of $1,000,000. The court arrived at that amount because Mid-State had $1,000,000 of coverage for non-owned autos with Minnesota Mutual at the time Kaminski met with Brooks to discuss his business insurance needs, and because Kaminski asked for the same or better coverage than he had. Reasoning from those facts, the court concluded that the policy should be reformed to provide the same coverage as Mid-State had under the Minnesota Mutual policy. We are obligated to support that reasonable inference concerning the amount of intended coverage.

Additionally, before making its decision concerning reformation of the policy and the amount of intended coverage, the circuit court thoroughly reviewed all of the evidence presented and the motions after verdict. Then it properly applied the law to the facts of record. Therefore, its decision to reform the policy to provide non-owned auto coverage of $1,000,000 was not an erroneous exercise of discretion.

CONCLUSION

The circuit court's conclusion that the Pekin insurance policy should be reformed to provide non-owned auto coverage of $1,000,000 was not an erroneous exercise of discretion because the court applied the law concerning contract reformation to factual findings that are not clearly erroneous and came to a conclusion a reasonable judge could reach. Therefore, its judgment is affirmed.

By the Court.—Judgment affirmed.

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