COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-0826

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

MAUREEN RAINER,

PLAINTIFF-APPELLANT,

V.

JEROME C. GATHIER,
AMERICAN FAMILY MUTUAL INSURANCE COMPANY,
JAMES G. MCGAW AND
FORTIS INC. EMPLOYEES' INSURANCE PLAN,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MICHAEL P. SULLIVAN, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Maureen Rainer appeals from the trial court's grant of summary judgment in favor of James G. McGaw, dismissing McGaw

from Rainer's suit against McGaw, Fortis Inc. Employee's Insurance Plan, Jerome C. Gathier and American Family Insurance Company. Rainer also appeals from the trial court's order denying her motion to amend the complaint. Rainer argues that the trial court erred in granting McGaw's motion for summary judgment because there are genuine issues of material fact concerning whether McGaw breached his duty to Rainer as her insurance agent. Rainer also argues that the trial court erred in denying her motion to amend the complaint to include a claim for reformation of the insurance contract. We reject Rainer's arguments and affirm.

I. BACKGROUND.

¶2 For approximately seventeen to eighteen years, Rainer and her husband purchased automobile insurance from McGaw, an exclusive agent for American Family Mutual Insurance Company. In March 1995, Rainer and her husband divorced, and Rainer moved back home with her mother. She then contacted McGaw to request that he remove her from the automobile insurance policy she shared with her ex-husband. Rainer told McGaw that she would be living with her mother, who also purchased automobile insurance through McGaw, and that she would eventually be buying her own car. McGaw suggested that Rainer contact him when she needed insurance. Shortly thereafter, Rainer bought a car and contacted McGaw to obtain automobile insurance. McGaw recommended that she purchase insurance with the same coverage limits she had under the old policy, and Rainer agreed. McGaw procured an automobile insurance policy for Rainer with the requested coverage limits.

¶3 On December 12, 1995, Rainer was involved in an accident while riding in her mother's car. Rainer was seriously injured and sustained damages in

excess of the coverage available through her mother's insurance policy. The driver of the other car involved in the accident was uninsured. Rainer then sought additional compensation under the underinsured motorist provision of her own policy. However, due to a "drive other car" exclusion in her policy, her claim was denied. The exclusion reads: "This coverage does not apply for bodily injury to any person: while occupying, or when struck by, a motor vehicle that is not insured under this policy, if it is owned by you or any resident of your household."

¶4 Rainer sued, claiming, *inter alia*, that McGaw, as her insurance agent, was negligent in failing to inform her of the "drive other car" exclusion in her policy, "after he had specific knowledge that she had moved in with her mother who had lower policy limits." McGaw filed a motion for summary judgment, arguing that he was not under a legal duty to give advice to Rainer regarding her insurance coverage. The trial court agreed and granted McGaw's motion, dismissing him from the suit. Rainer then filed a motion seeking to amend the complaint and to add a claim against American Family seeking reformation of the insurance contract. The trial court also denied this motion. Rainer appeals.

II. ANALYSIS.

A. *Summary Judgment*

¶5 Our review of the trial court's grant of summary judgment is *de novo*. ***Green Springs Farm v. Kersten***, 136 Wis. 2d 304, 315-16, 401 N.W.2d 816 (1987). We follow the same summary judgment methodology as the trial court. ***Id.*** That methodology has been described in many cases, *see, e.g.,* ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980), and, therefore, we need not set out the entire methodology here. Summary judgment must be granted if the

evidentiary material demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).

¶6 To prevail on her negligence claim against McGaw as her insurance agent, Rainer would need to establish facts which prove: (1) a duty on the part of McGaw; (2) a breach of that duty; (3) a causal connection between McGaw's breach and her injury; and (4) an actual loss or damages resulting from her injury. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 238, 568 N.W.2d 31 (Ct. App. 1997). Whether an insurance agent has a duty to an insured is a question of law. ***Lisa's Style Shop, Inc. v. Hagen Ins. Agency***, 181 Wis. 2d 565, 572, 511 N.W.2d 849 (1994). Rainer argues that "the trial court erred by granting McGaw's motion for summary judgment because there are genuine issues of material fact as to whether McGaw was negligent and breached his duty to [her]." We disagree.

¶7 In ***Smith v. Dodgeville Mutual Insurance Co.***, 212 Wis. 2d at 238, this court noted that, under Wisconsin law, an insured whose claim has been denied by her insurer may bring a tort action against her insurance agent for failing to procure the proper insurance coverage. The tort is derived from an insurance agent's duty to "'use reasonable skill and diligence to put into effect the insurance coverage requested by his or her policy holder.'" ***Id.*** (citation omitted). While the insurance agent will be held liable if this duty is breached, "[t]he agent has fulfilled his duty if he procures 'a binding contract of insurance that conforms to the agreement between the agent and the insured.'" ***Id.*** (citation omitted).

¶8 Here, Rainer contends that genuine issues of material fact exist as to whether McGaw "breached his duty to use reasonable skill to put into effect the

insurance coverage Rainer requested." However, the undisputed facts in the record clearly establish that McGaw procured the same coverage limits Rainer requested and had had under the policy she shared with her husband prior to their divorce. Therefore, under the standard set forth above, McGaw fulfilled his duty to Rainer. Nevertheless, Rainer contends that McGaw failed to procure the coverage she requested because he failed to inform her of the "drive other car" exclusion in the policy and, therefore, she alleges, she did not receive the identical protection she had previously. We reject her argument.

¶9 Rainer has not established that McGaw had a duty to advise her of the effect of the "drive other car" exclusion in her policy. In Wisconsin, "[a]n insurance agent has no affirmative duty, absent a statutory obligation or special circumstances, to inform an insured about the availability or adequacy of insurance coverage." ***Lisa's Style Shop***, 181 Wis. 2d at 572; *see also* ***Nelson v. Davidson***, 155 Wis. 2d 674, 682, 456 N.W.2d 343 (1990).[1] This court is not aware of, nor has Rainer directed our attention to, any statute imposing an obligation on McGaw to advise Rainer of the adequacy of her underinsured

[1] Rainer attempts to distinguish this case from ***Nelson v. Davidson***, 155 Wis. 2d 674, 456 N.W.2d 343 (1990), by arguing that the holding in that case is "limited to factual issues concerning an agent's duty to advise on the availability of [u]nderinsured motorist coverage." Rainer contends that the ***Nelson*** holding is inapplicable here because this case involves whether an insurance agent has a duty to advise an insured on the effects of the "drive other car" exclusion in her policy. However, as the supreme court indicated: "We accepted certification to determine whether an insurance agent owes an affirmative duty to advise its insureds of the availability or advisability of underinsured motorist (UIM) coverage." ***Id.*** at 676. The court also recognized "the majority rule that generally an insurance agent does not have an affirmative duty to advise a client regarding the availability or adequacy of coverage." ***Id.*** at 682. Thus, the holding applies not only to the "availability" of insurance coverage, but also to the "adequacy of insurance coverage." Distilled to its essence, Rainer's argument involves an insurance agent's alleged duty to advise the insured of the "adequacy of insurance coverage" and, therefore, this court rejects Rainer's argument that ***Nelson*** is inapplicable.

motorist coverage.[2] Therefore, unless special circumstances created such a duty, no such duty existed.

¶10 Wisconsin courts have recognized three special circumstances that "might create a duty on the part of an insurance agent to advise an insured about coverage." ***Lisa's Style Shop***, 181 Wis. 2d at 572-73. Those three circumstances are:

> (1) an express agreement between the agent and the insured; (2) a long established relationship of entrustment from which it clearly appears that the agent appreciated the duty of giving advice and the agent received compensation for this consultation and advice beyond the agent's standard commission; and (3) the agent held himself or herself out as being a highly-skilled insurance expert, and the insured relied on the expertise of the agent to the insured's detriment.

Id. at 572-73. Rainer has not demonstrated that any of these special circumstances existed in this case.

¶11 First, Rainer fails to establish the existence of an express agreement with McGaw that required him to provide advice concerning her insurance coverage. Rainer never alleged that such an agreement existed, nor is there any evidence of such an agreement. Moreover, in his affidavit supporting his motion

[2] Rainer further argues that "the holding in ***Nelson*** has been weakened by the fact that the Legislature has enacted a statute requiring that in policies issued after October 1, 1995, the insurance agent has an affirmative duty to provide written notification to the insured of the availability of underinsured motorist coverage. [WIS. STAT] § 632.32(4m)." We reject this argument as well. Section 632.32(4m) requires an insurer to provide written notification of the availability of underinsured motorist coverage to those insureds whose policies do not already provide underinsured motorist coverage. However, the statute only applies to the availability, and not the adequacy, of insurance coverage. Further, the statute does not impose a duty upon insurance agents to advise an insured of the effects of the insured's underinsured motorist coverage and, therefore, it is inapplicable here and the statute does not implicate the holding in ***Nelson***.

for summary judgment, McGaw asserted that he never agreed to provide insurance advice to Rainer.

¶12 Second, although Rainer and McGaw's relationship could possibly be considered "long established," based on the fact that Rainer purchased automobile insurance from McGaw for approximately eighteen years, it was certainly not a "relationship of entrustment from which it clearly appears that the agent appreciated the duty of giving advice and the agent received compensation for this consultation and advice beyond the agent's standard commission."

¶13 In ***Lisa's Style Shop***, 181 Wis. 2d at 573, the court determined that the customer and the insurance agent did not have a relationship of entrustment as contemplated under the standard because the customer and the insurance agent rarely spoke. Here, the record indicates that Rainer and McGaw had very limited contact during the eighteen years Rainer purchased insurance through McGaw. Specifically, other than the phone conversations in which Rainer asked McGaw to remove her from her ex-husband's policy, and then the later call asking him to provide her with her own policy, she recalled speaking with him only one other time to assist her mother in obtaining coverage. McGaw, too, confirmed their limited contact, recalling only one other occasion in the late 1980's when he spoke to the Rainers about increasing their coverage. There is also no indication that McGaw "appreciated the duty of giving advice" or received additional compensation for giving advice. In his affidavit, McGaw stated that he did not believe that he was expected to advise Rainer regarding her insurance coverage. In fact, McGaw admitted that he did not know the "drive other car" exclusion would affect Rainer's coverage due to her residing with her mother. Moreover, McGaw asserted that he never received additional compensation for any insurance advice.

¶14 Finally, there is no indication that McGaw ever represented to Rainer that he was a highly-skilled insurance expert. McGaw testified that he is not a certified insurance counselor, and he never suggested to Rainer that he was an expert. Thus, there is no indication that McGaw held himself out as possessing special knowledge regarding insurance coverage.

¶15 For these reasons, we conclude that, under the facts of this case, there were no special circumstances that existed which created a duty on the part of McGaw to advise Rainer of the adequacy of her insurance coverage.

¶16 Nevertheless, Rainer contends that McGaw assumed the alleged duty because he undertook to advise certain other customers regarding their insurance coverage. *See* ***Tackes v. Milwaukee Carpenters***, 164 Wis. 2d 707, 712, 476 N.W.2d 311 (1991) ("Nothing, of course, prevents an insurance agent from specifically undertaking a duty to advise clients on insurance matters."). Specifically, Rainer asserts that McGaw's deposition testimony indicated that "he has undertaken the duty to advise clients of the effects of circumstances which would reduce coverage," and, therefore, "by failing to so advise Rainer [he] was negligen[t]."[3] Even if we accept Rainer's premise, that McGaw has advised certain clients regarding their coverage, it does not *ipso facto* place a duty on McGaw to advise Rainer of the adequacy of her underinsured motorist coverage. Here, the evidence was devoid of any attempt by McGaw to advise Rainer of the adequacy of her coverage. Therefore, we reject Rainer's argument that McGaw

[3] Rainer directs this court's attention to a portion of McGaw's deposition testimony in which he related that in dealing with customers with minors in the household, he tells them that "[t]he only thing I would probably say is just keep in mind if you are driving the car with the lesser coverage at that given time, you are going to have the car with the lesser coverage; but that's your decision, fine." However, we note that this particular admonition does not constitute advice on the availability or adequacy of the particular customer's coverage.

had undertaken a duty to advise her of the effects of her underinsured motorist coverage simply because he may have occasionally advised others regarding coverage.

¶17 In sum, we are satisfied that McGaw's duty to procure the insurance coverage Rainer requested did not include a duty to explain the effects of the "drive other car" exclusion contained in the policy's underinsured motorist provision. Further, based on the facts of this case, such a duty was neither created by special circumstances nor specifically undertaken by McGaw. Consequently, we further conclude that the trial court correctly determined that there were no genuine issues of material fact as to whether McGaw was negligent, and properly granted summary judgment in McGaw's favor.

B. *Reformation of the insurance contract*.

¶18 Rainer argues that the trial court erred in denying her motion to amend her complaint to include a cause of action for reformation of the insurance contract. Rainer asserts that she was entitled to reformation because when she renewed her policy, "she had the expectation of receiving insurance protection that was identical to [the coverage] she had prior to moving in with her mother." Rainer contends that although the new policy provided the same amount of insurance *coverage*, as indicated by the coverage limits, it did not provide the same amount of *protection* due to the "drive other car" exclusion. Relying on this proposed distinction between insurance coverage and protection, Rainer concludes that she was entitled to reformation of the insurance contract to reflect her expectation that she would receive the same amount of protection provided by the previous policy. We disagree.

¶19 "To win the reformation of an insurance contract, the insured must prove that there was a prior oral agreement between the parties which, through mistake or negligence, the written policy does not express, although it was intended to so state." ***International Chiropractors Ins. Co. v. Gonstead***, 71 Wis. 2d 524, 528-29, 238 N.W.2d 725 (1976). A mistake is mutual and warrants reformation "when the insured makes statements to an agent concerning coverage and the agent understands but by mistake causes a policy to be issued that does not contain the requested coverage." ***Scheideler v. Smith & Assocs.***, 206 Wis. 2d 480, 486, 557 N.W.2d 445 (Ct. App. 1996).

¶20 Rainer fails to make the requisite showing that she was entitled to reformation of the contract. There is no indication that the parties ever discussed the "drive other car" exclusion. To win reformation under ***Gonstead***, Rainer would have to demonstrate that she and McGaw addressed the consequences of the "drive other car" exclusion in her insurance contract and they agreed to a solution to circumvent its effect, but that through mistake or negligence, the written contract did not reflect their oral agreement. Rainer has not demonstrated that such an oral agreement existed. Moreover, the record clearly indicates that the only oral agreement between the parties was that McGaw would procure the same coverage limits Rainer had under her old policy. McGaw, in fact, did procure the same coverage limits. Further, Rainer provides no support for her technical distinction between insurance coverage and insurance protection; thus, we reject her argument. We are satisfied that Rainer was not entitled to reformation of the insurance contract and, therefore, we conclude that the trial court properly denied her motion to amend the complaint.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.