COURT OF APPEALS
DECISION
DATED AND FILED

February 10, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP879 **Cir. Ct. No. 2013CV2**

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

NELS L. JOHNSON,

PLAINTIFF-APPELLANT,

V.

GEICO GENERAL INSURANCE COMPANY,

DEFENDANT-RESPONDENT,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT.

APPEAL from an order of the circuit court for Ozaukee County: PAUL V. MALLOY, Judge. *Affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. Nels Johnson appeals from an order of the circuit court granting summary judgment to Geico General Insurance Company (GEICO). Johnson was involved in an automobile accident and GEICO, his insurer, denied his claim. Johnson contends that even though his insurance policy itself does not cover the accident, the policy should be reformed to provide coverage because GEICO neglected to include the agreed upon terms. At the heart of this dispute is Johnson's statement that he only drove the car at issue—a 2005 Mercedes Benz SL55 AMG—in the summer, and a GEICO representative's response saying, "We can take care of that." Johnson claims that this shows an oral agreement between himself and GEICO that the policy would provide only comprehensive coverage during the winter and full coverage during the summer. The question before us is whether this statement and response raise a genuine issue of fact as to the existence of an oral agreement that GEICO would automatically fully cover Johnson's Mercedes during the summer and automatically switch to limited coverage during the winter. We hold that the statement and response do not raise a genuine dispute of fact, and the circuit court properly granted summary judgment for GEICO.

Background

¶2 Before February 2012, Johnson purchased auto insurance from Pekin Insurance. Johnson regularly stored one of his vehicles during the winter months. Each fall, Johnson would contact his insurance agent and inform the agent that he would be storing one of his vehicles. Johnson would also request that the agent remove full coverage for the vehicle and apply only comprehensive coverage while it was stored. This downgrade in coverage saved Johnson a good amount of money in premiums. In the spring, Johnson would again contact his agent to

restore "full coverage" on his stored vehicle.[1] Johnson would receive a bill in the spring reflecting an increased premium to pay for the additional coverage.

¶3 In February 2012, Johnson was informed that his agent was being dropped by Pekin, and if he desired to keep his policy he would face an increased premium. As a result, Johnson began looking for another insurer for his vehicles. During his search, Johnson spoke with a representative at GEICO about insuring his 2003 Cadillac Escalade and his 2005 Mercedes Benz SL55 AMG. Johnson testified in his deposition that he told the representative, "I want you to be aware that my Mercedes I only drive in the summer months and from [November to April] … it is stored in my garage or another storage facility."[2] Johnson testified the representative responded, "We can take care of that," and that his bill "would reflect a difference." In an affidavit, Johnson stated that no one from GEICO "ever informed [him] that if [he] wanted the full coverage starting in April of each given year that [he] would have to take further steps" to advise GEICO that he was putting the Mercedes on the road. At the time Johnson purchased the policy from GEICO, his 2005 Mercedes was in storage.

¶4 After purchasing the policy, Johnson received four declarations pages from GEICO specifically providing that his 2003 Cadillac Escalade—and later his 2007 Cadillac Escalade—were fully covered while his Mercedes only had "comprehensive" coverage. On February 22, 2012, GEICO sent a packet of documents to Johnson, which included a declarations page. The declarations page

[1] By "full coverage," Johnson meant liability and certain other coverage.

[2] It appears that Johnson mistakenly switched the months from "November to April" to "April to November" in his deposition. In context it is clear that he wanted to store the Mercedes for the winter, not from April to November.

listed a coverage period from February 22, 2012 through August 22, 2012. The page listed the 2003 Cadillac Escalade as vehicle 1 and the 2005 Mercedes Benz as vehicle 2. The page clearly stated that "[c]overage applies where a premium or $0.00 is shown for a vehicle." The column for the Cadillac Escalade listed dollar amounts for every category of coverage, reflecting the fact that the Cadillac Escalade was fully covered. On the other hand, the column for the Mercedes only listed a dollar amount for the coverage category "comprehensive." All other coverage categories for the Mercedes were marked by a dash instead of a dollar amount or $0.00. The absence of a premium amount or $0.00 for any of the other coverage categories clearly indicated that the only category of coverage for the Mercedes was "comprehensive." Additionally, the premium for the Mercedes only reflected the amount listed in the comprehensive coverage category.

¶5 On April 23, 2012, GEICO sent Johnson another declarations page that again reflected that the only coverage for the Mercedes was comprehensive.[3] On June 14, 2012, Johnson received another packet from GEICO which included a declarations page with a coverage period from August 22, 2012 through February 22, 2013. This page likewise provided that coverage only applied where there was a premium listed or $0.00. The only amount listed for the Mercedes was for comprehensive coverage. All other coverage categories for the Mercedes were marked by a dash and no premium amount or $0.00. On August 18, 2012, GEICO sent a yet another packet to Johnson which contained yet another declarations page.[4] The 2005 Mercedes remained on the policy but was now identified as

[3] The new page also reflected a multi-line discount applied to the policy.

[4] The page reflected that the 2003 Cadillac Escalade was no longer covered and a 2007 Cadillac Escalade was added to the policy.

vehicle 1. Like the previous declarations pages, this new page provided that coverage only applied where a premium amount or $0.00 was listed. As before, the only premium amount listed for the Mercedes was for comprehensive coverage. All other coverage categories were marked by a dash with no premium amount or $0.00.

¶6 On October 16, 2012, Johnson was involved in an automobile accident while driving the Mercedes. Johnson contacted GEICO about the accident and GEICO denied his coverage claim because Johnson only had comprehensive coverage on the Mercedes, not liability or property damage coverage. Johnson filed suit against GEICO for denying his claim.[5] The complaint set forth claims for breach of contract, negligence, reformation, and bad faith. The circuit court granted GEICO's motion to bifurcate and stay the bad faith claim. After discovery, GEICO then filed a motion for summary judgment. The circuit court granted summary judgment because the declarations pages clearly provided that the Mercedes only had comprehensive coverage, and the court concluded that reformation was not appropriate. Johnson appeals the order granting summary judgment.

[5] American Family Mutual Insurance Company was also named as a defendant because it insured the other driver in the accident and made payments following the accident.

Standard of Review

¶7 We review the circuit court's order granting summary judgment de novo. ***Hinrichs v. American Family Mut. Ins. Co.***, 2001 WI App 114, ¶5, 244 Wis. 2d 191, 629 N.W.2d 44. Summary judgment is appropriate if there are "no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." ***Wiegert v. Goldberg***, 2004 WI App 28, ¶9, 269 Wis. 2d 695, 676 N.W.2d 522.

Discussion

¶8 Johnson claims that there was an agreement that his Mercedes would be fully covered during the summer. Johnson argues that his statement regarding the Mercedes and the GEICO representative's response, "We can take care of that," show a prior oral agreement to provide full coverage for the Mercedes during the summer months—or at least raises a genuine issue of fact as to the existence of such an agreement. Johnson argues that because the policy did not reflect this interchange, it should be reformed to include this prior oral agreement. Additionally, Johnson claims that the declarations reflecting that the Mercedes only had comprehensive coverage do not preclude a genuine dispute over whether there was an agreement to fully cover the Mercedes. He argues that he initially interpreted the dashes to mean that the Mercedes had identical coverage to his Escalade, not that it only had comprehensive coverage. Thus, he claims that "[a] jury could reasonably find [the representative's] statement was an agreement to provide full coverage" automatically without Johnson giving any further instructions to GEICO. We disagree.

¶9 A contract can be reformed when the "writing that evidences or embodies an agreement in whole or in part fails to express the agreement because

of a mistake of *both* parties as to the contents or effect of the writing." ***Vandenberg v. Continental Ins. Co.***, 2001 WI 85, ¶50, 244 Wis. 2d 802, 628 N.W.2d 876 (emphasis added; citation omitted). Thus, for Johnson to prevail on his claim for reformation he must show: (1) there was a prior oral agreement and (2) the written agreement does not contain the oral agreement despite the parties' intent that the oral agreement be included. ***Id.***, ¶50 n.35. A policy may not be rewritten to bind an insurer to a risk it did not contemplate and for which it was not compensated. ***Id.***, ¶53. However, in an insurance dispute, there is heightened sensitivity in a reformation context to the fact that "the insured ordinarily relies upon the agent to set out properly the facts in the application." ***Artmar, Inc. v. United Fire & Cas. Co.***, 34 Wis. 2d 181, 187, 148 N.W.2d 641 (1967) (citation omitted).

¶10 We conclude that Johnson fails to raise a genuine issue of fact as to whether there was a prior oral agreement. There was no meeting of the minds between Johnson and GEICO that his Mercedes would be fully covered in the summer. Johnson asks us to infer an agreement from his statement to the representative that he only drove the Mercedes in the summer, and the representative's response, "We can take care of that."[6] It is important to note the nature of the agreement which Johnson asks us to infer. He argues not only that GEICO agreed to change coverage during the summer, but that it would

[6] Contrary to Johnson's assertion, his affidavit does not create an issue of fact as to whether there was an agreement. Johnson's characterization of his affidavit is problematic and not supported by the document. He cites his affidavit claiming that he "specifically advised the GEICO representative he … would require full coverage … during [the summer]." However, the affidavit he submitted provided that "no one ever informed me that if I wanted the full coverage starting in April of each given year that I would have to take further steps such as a telephone call to GEICO advising them of the coverage change." Thus, even though it is possible for an affidavit to create a genuine issue of fact, his affidavit falls short of doing so.

automatically change coverage without any further direction from Johnson. Johnson's statement and the representative's response are completely silent with respect to the details of this supposed arrangement. The representative never said that GEICO would provide full coverage during the summer but simply stated, "We *can* take care of that." (Emphasis added.) There was no agreement regarding what dates GEICO should instate full coverage on the Mercedes. There was no agreement by GEICO to automatically change coverage without any direction from Johnson. At most, the evidence shows that GEICO would be willing to accommodate Johnson. However, the statements never coalesced into anything a jury could find resembled an agreement or a meeting of the minds that was simply inaccurately reduced to writing.[7]

¶11 Furthermore, Johnson's reliance on ***Artmar*** and ***Vandenberg*** is misplaced. ***Artmar*** involved a suit for reformation brought by an insured against his insurer. ***Artmar***, 34 Wis. 2d at 186. Although the court in ***Artmar*** found there was a genuine issue of fact regarding reformation, it did so based on the parties previous dealings during a long-standing business relationship. ***Id.*** at 190. From this the court inferred that the insurance agent knew about the desired coverage. ***Id.*** There is no similar course of conduct here. Before 2012, Johnson was not even a customer of GEICO. More importantly, there is nothing in the record to suggest that GEICO had dealt with Johnson's specific requests before. GEICO had never automatically switched coverage on Johnson's Mercedes or changed its coverage. During the entire period Johnson was insured by GEICO, the Mercedes only had comprehensive coverage. Thus, we are not presented with a long-

[7] *See* ***Frantl Indus., Inc. v. Maier Constr., Inc.***, 68 Wis. 2d 590, 594, 229 N.W.2d 610 (1975) (reformation requires that the party seeking it show that there was a meeting of the minds).

standing business relationship from which we may infer some understanding between GEICO and Johnson. The only previous course of conduct regarding Johnson's specific request for alternate coverage is Johnson's conduct with his previous insurer, Pekin. Unlike the supposed agreement Johnson argues existed between himself and GEICO, Johnson's previous practice with Pekin was that he would contact his agent and inform him when he wanted full coverage.

¶12 ***Vandenberg*** is likewise inapposite. In ***Vandenberg***, a day care provider sought reformation of an insurance policy that did not cover the day care business. ***Vandenberg***, 244 Wis. 2d 802, ¶¶2-4. The insurance agent in ***Vandenberg*** knew that the plaintiff was a day care provider, and there was a previous policy issued by the same company that did in fact provide day care coverage. ***Id.***, ¶48. On these facts, the court held that it was "not prepared to say, as a matter of law … that no reasonable trier of fact could find that a mutual mistake occurred …." ***Id.***, ¶57. Unlike the day care provider in ***Vandenberg***, Johnson did not have a previous policy with GEICO that provided the coverage that his current policy lacks. GEICO had never agreed in a previous policy to automatically switch the Mercedes to full coverage during the summer months. Thus, contrary to Johnson's assertion, ***Vandenberg*** does not support his argument that a mutual mistake occurred here.

Conclusion

¶13 The purpose of summary judgment is to avoid a trial if there is nothing to try.[8] In order to prevail on his claim for reformation, Johnson needed to

[8] ***Rollins Burdick Hunter of Wis., Inc. v. Hamilton***, 101 Wis. 2d 460, 470, 304 N.W.2d 752 (1981).

prove that there was a prior oral agreement that was not incorporated in the final policy. Johnson has failed to produce enough evidence to raise a genuine dispute of fact as to whether there was such an agreement. As a result, there is nothing to try, and the circuit court properly granted GEICO's motion for summary judgment.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2013-14).