COURT OF APPEALS
DECISION
DATED AND FILED

May 16, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2015 **Cir. Ct. No. 00-CV-20**

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

TERRI L. KNOWLES AND ANTHONY J. KNOWLES,

PLAINTIFFS-APPELLANTS,

UNIVERSITY OF WISCONSIN MEDICAL FOUNDATION, UNIVERSITY OF WISCONSIN HOSPITAL AND CLINICS, AND ROYSTER CLARK, INC., MEDICAL AND DENTAL CARE PLAN,

INVOLUNTARY-PLAINTIFFS,

V.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: DAVID T. FLANAGAN, Judge. *Reversed and cause remanded with directions*.

Before Dykman, Roggensack and Deininger, JJ.

¶1 DEININGER, J. The underinsured motorist coverage in an insurance policy issued by State Farm Mutual Automobile Insurance Company to Terri and Anthony Knowles did not contain a reducing clause that had been included in a previous policy issued to the Knowleses.[1] The trial court entered judgment reforming the policy to include the reducing clause, and the Knowleses appeal. They claim that the trial court erred in concluding on summary judgment that the omission in the policy was due to a "mutual mistake." They also argue that, even if a mutual mistake occurred when the policy was issued, State Farm ratified the omission by renewing the policy without adding a reducing clause endorsement.

¶2 We conclude that a factual dispute exists as to whether the parties acted under a mutual mistake and, therefore, that State Farm is not entitled to a summary judgment reforming the policy. We also conclude that State Farm's renewal of the allegedly erroneous policy did not constitute a ratification of the prior policy as a matter of law. Accordingly, we reverse and remand for further proceedings in the circuit court.

BACKGROUND

¶3 We have gathered the following background facts from the parties' pleadings and submissions on summary judgment. Terri and Anthony Knowles owned a pickup truck and a 1989 Buick station wagon. State Farm insured both vehicles under separate policies. Anthony primarily drove the pickup truck and

[1] A reducing clause for underinsured motorist (UIM) coverage "permits a setoff from the insured's UIM coverage the amount paid to the insured by the underinsured tortfeasor." ***Dowhower v. West Bend Mut. Ins. Co***., 2000 WI 73, ¶1, 236 Wis. 2d 113, 613 N.W.2d 557.

Terri primarily drove the Buick. The policy on the Buick included underinsured motorist (UIM) coverage with initial coverage limits of $25,000 per person and $50,000 per accident. State Farm renewed the policy every six months on the Knowleses' payment of renewal premiums.

¶4 In March 1996, State Farm mailed the Knowleses a renewal notice for April to October 1996. The notice informed the Knowleses that the limits of their UIM coverage on the Buick would be increased to $50,000 per person and $100,000 per accident at a reduced premium. The notice also added "Endorsement 6083BB," which contained a reducing clause for the UIM coverage:

> 2. The most we will pay is the lesser of:
>
> a. the limits of liability of this coverage reduced by any of the following that apply:
>
> (1) the amount paid to the *insured* by or on behalf of any *person* or organization that may be legally responsible for the *bodily injury*; or
>
> ….
>
> b. the amount of damages sustained, but not recovered.

The Knowleses renewed the Buick policy with the new UIM coverage limits and reducing clause.

¶5 In August 1997, Anthony Knowles's driver's license was suspended. Anthony met with a State Farm agent to discuss continuing insurance coverage on the vehicles without interruption. According to Anthony, the agent told him "we would try and work something out." The agent told Anthony that he would have to be insured through another branch of State Farm which insures high risk

drivers. The agent also said that State Farm would try to maintain the same coverage and premium on the Buick, but that there may be some changes to the policy.

¶6 After this meeting, the agent recommended to State Farm that the Knowleses' policies be changed such that the pickup truck would be insured by a high risk branch of State Farm at a higher premium, and coverage on the Buick would be continued without interruption. On September 30, 1997, State Farm sent the Knowleses a cancellation notice for both vehicles with an effective date of October 13, 1997. According to Anthony, after receiving the cancellation notice in the mail, he "was a little upset" and "assumed the worst." Anthony called the agent who told him not to worry, that the notice should not have been sent. According to Anthony, the agent told him that he conferred with the home office "and that it looked like they were going to reissue [Anthony] a different policy under a different branch of State Farm."

¶7 Anthony met with the agent again and signed an "Acknowledgment of Cancellation or Nonrenewal," which stated that the policy on the 1987 Ford truck was cancelled and a policy would be issued in its place from State Farm Fire and Casualty Company at a higher premium. Anthony does not remember, however, whether the coverage on the Buick was discussed at this meeting or in the prior phone conversation with the agent. The new policy issued to him for his truck did not include the Buick. According to Terri, who had spoken briefly with the agent on the phone, the agent told her that there may be some changes to the policy on the Buick, but that State Farm would try to maintain similar coverage.

¶8 After Anthony's meeting with the agent, the Knowleses received a policy for the Buick for the period October 13, 1997 to April 10, 1998. The policy

appeared to contain the same coverages as before, for the same premiums. The endorsement containing the UIM coverage reducing clause ("6083BB") was not included in this policy, however. State Farm and the Knowleses renewed the new policy for another six months in April 1998.

¶9 While Terri was driving the Buick on September 7, 1998, another vehicle struck it and she suffered serious injuries. State Farm also insured the other driver, and the company paid the Knowleses $100,000, the personal injury liability limit of the other driver's policy, plus $1,822.98 for property damage. Terri's damages exceeded the $100,000 she recovered from the other driver's policy, however, and the Knowleses sought additional compensation from State Farm under the UIM coverage in their policy on the Buick.

¶10 Counsel for the Knowleses requested a copy of the policy in effect at the time of the accident. State Farm sent him a certified copy of the 1997-98 policy, which did not contain the UIM reducing clause endorsement. Counsel pointed out to State Farm that the 1997-98 policy included no UIM reducing clause. State Farm then sent him a copy of the "Apr 10 1996 to Oct 10 1996" policy, which did include the reducing clause endorsement, together with a certificate that this "policy was in effect on the loss date of September 7, 1998."

¶11 State Farm refused to pay the Knowleses the $50,000 they demanded under their UIM coverage on the Buick, and they commenced this action. The Knowleses alleged that the policy in effect at the time of the accident did not contain a UIM reducing clause. State Farm responded by asserting that the omission of the reducing clause in the 1997-98 policy was due to a clerical error; that the parties had agreed in October 1997 to reinstate the prior Buick policy which included the reducing clause; and therefore, that the omission of the

reducing clause from the 1997-98 policy was a "mutual mistake." State Farm moved for summary judgment seeking reformation of the 1997-98 policy to include the UIM reducing clause. The circuit court granted State Farm's motion, concluding that a "mutual mistake" had occurred. The Knowleses appeal.

ANALYSIS

¶12 We review an order granting summary judgment de novo, owing no deference to the trial court. ***Waters v. United States Fid. & Guar. Co***., 124 Wis. 2d 275, 278, 369 N.W.2d 755 (Ct. App. 1985). In so doing, we employ the same methodology as the trial court, and we will affirm a summary judgment only "when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc***., 195 Wis. 2d 485, 496-97, 536 N.W.2d 175 (Ct. App. 1995); WIS. STAT. § 802.08(2) (1999-2000).[2] We will reverse a decision granting summary judgment if the trial court incorrectly decided legal issues or if material facts are in dispute. ***Coopman v. State Farm Fire & Cas. Co***., 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993).

¶13 The Knowleses first argue that the trial court erred in concluding that there was a mutual mistake in the formation and issuance of the 1997-98 insurance policy on the Buick. An insurance policy may be reformed due to mutual mistake if "it does not contain the provisions intended by the parties to be included." ***Williams v. State Farm Fire & Cas. Co.***, 180 Wis. 2d 221, 233, 509 N.W.2d 294 (Ct. App. 1993). The policy may be reformed in equity to correct a mutual

[2] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

mistake regardless of whether the mistaken provision favors the insured or the insurer. ***Schmidt v. Prudential Ins. Co. of America***, 235 Wis. 503, 515-16, 292 N.W. 447 (1940). The burden is on the party seeking reformation to prove by clear and convincing evidence that "through inadvertence, accident or mutual mistake the contract of insurance does not set forth the intention of the parties." ***Williams***, 180 Wis. 2d at 233.

¶14 In order to obtain reformation of the Knowleses' policy, State Farm must therefore establish by clear and convincing evidence that both it and the Knowleses intended that the policy issued in October 1997 would provide UIM coverage reducible by amounts received from a tortfeasor as set forth in Endorsement 6083BB. State Farm asserts that the Knowleses desired the same UIM coverage in the new Buick policy that they had prior to the cancellation of the former policy, and that the "undisputed evidence establishe[s] that neither State Farm nor the Knowles intended the fundamental change to UIM coverage that would result if this clerical error is not corrected."

¶15 State Farm points to deposition testimony in which both Terri and Anthony expressed that their desire in October 1997 was to have the same coverages in effect when State Farm issued the new policy on the Buick. In an affidavit, the Knowleses' State Farm agent states that when he met with Anthony, he explained "that the policy on the Buick would be reinstated without interruption in coverage, change in coverage or change in premium." The Knowleses claim, however, that the agent told them that he would try to have the company issue a new policy on the Buick having the same coverages at the same premium, but that there might be "some changes" in the new policy. The agent testified at deposition that he could not recall specifically what, if anything, he told the Knowleses regarding coverage on the Buick, but that what he told them would

have been based on what he knew of "how it works," an apparent reference to State Farm's customary policies and procedures.

¶16 Based on the foregoing, the Knowleses acknowledge that State Farm may well have intended to include the UIM reducing clause endorsement in the 1997-98 Buick policy. The Knowleses contend, however, that State Farm has not established by clear and convincing evidence that they intended the new policy to include the endorsement. They point to their testimony regarding the agent's statements that the new Buick policy might contain some changes as showing that they believed the new policy would *not* be exactly the same as the one it replaced. They note further the lack of any indication in the record that they either applied or asked for the new Buick policy to include the UIM reducing clause endorsement, or that they had any specific expectations regarding whether the new policy would or would not do so.

¶17 In sum, the Knowleses maintain that a mistake on State Farm's part, plus their lack of specific intentions regarding the omitted clause, do not add up to a mutual mistake that permits reformation of the policy as a matter of law. We agree. Given the conflicting testimony regarding what the Knowleses were told regarding possible changes in the terms of their new Buick policy, State Farm has not established beyond dispute that there was a mutual understanding that the Knowleses would continue to receive the same UIM coverage and terms as before. *See* ***Artmar, Inc. v. United Fire & Cas. Co.***, 34 Wis. 2d 181, 188-90a, 148 N.W.2d 641 (1967).

¶18 State Farm may be able to convince a trier of fact, based on the testimony of its agent and the Knowleses, that a mutual understanding was reached that all terms of the cancelled policy, including the UIM coverage with its

reducing clause endorsement, would continue without change in the new policy. Or, at a minimum, State Farm might convince the fact-finder that such an understanding is the more reasonable inference from the testimony presented. We, however, cannot weigh credibility on summary judgment. Neither may we choose between competing reasonable inferences, inasmuch as we are constrained to view the facts developed in a summary judgment record in the light most favorable to the nonmoving party, drawing all reasonable inferences in that party's favor. *See* ***Grams v. Boss***, 97 Wis. 2d 332, 338-39, 294 N.W.2d 473 (1980).

¶19 The trial court acknowledged in its review of the summary judgment record that "[t]he evidence is not such that the Court can conclude as undisputed fact that Anthony Knowles was told there would be no change as to the Buick coverage when he met with [State Farm]." The court concluded, however, that considering the Knowleses' concerns that they may lose coverage on the Buick or have to pay a higher premium, they could not have reasonably expected to receive additional coverage at the same premium. State Farm contends that the court properly concluded that no reasonable insured would expect "that they would receive increased coverage … for the same premium." It also contends that because the UIM coverage it offers in Wisconsin is universally subject to the reducing clause, the Knowleses could not have reasonably expected to receive any different coverage terms in their new policy.[3]

[3] At his deposition, Anthony was asked, and responded "yes," to the following question regarding the 1997-98 Buick policy:

> Was it your assumption that the … policy that you got contained, subject to the coverages you picked and the limits that you picked, was the same coverage that was being offered everybody else in Wisconsin?

¶20 We disagree that an assessment of the reasonableness of the Knowleses' expectations should govern our disposition. An "insured's reasonable expectations of coverage" become relevant when a court is called upon to interpret ambiguous language in an insurance policy. ***Taylor v. Greatway Ins. Co.***, 2001 WI 93, ¶10, 245 Wis. 2d 134, 628 N.W.2d 916. Here, however, there is no dispute that the policy at issue clearly and unambiguously grants UIM coverage unreduced by payments received from or on behalf of the tortfeasor. We would be hard pressed to conclude, as a matter of law, that the Knowleses could not reasonably have expected to have obtained UIM coverage on the terms unambiguously stated in their policy. Nothing in the record, for example, indicates that the Knowleses knew that all State Farm policies issued in Wisconsin in 1997-98 contained UIM reducing clauses, as State Farm asserts.[4]

¶21 We thus conclude that the Knowleses' "reasonable expectations of coverage" are simply not dispositive on the issue of whether a mutual mistake occurred in the issuance of the 1997-98 Buick policy. As we have discussed, the standard for reformation of the Knowleses' State Farm policy is whether there is undisputed proof that is "'clear, plain, convincing, and beyond reasonable controversy'" that both State Farm and the Knowleses intended the missing UIM reducing clause endorsement to be a part of the 1997-98 Buick policy. *See* ***Frantl***

[4] We also note that it would not necessarily be unreasonable for the Knowleses to expect that State Farm might change the terms of UIM coverage without raising premiums. In April 1996, when it increased the UIM coverage limits in the Knowleses' policy, the premium for their UIM coverage actually decreased, no doubt owing to the simultaneous inclusion of the reducing clause endorsement. State Farm informed the Knowleses in policy renewal notices that the company periodically reviews its "loss experience" and increases or decreases its premiums accordingly, and further that "[i]f any coverage you carry is changed to give broader protection, without additional premium, we will give you the broader protection without the issuance of a new policy." In short, we are not convinced that an insured may reasonably be expected to correlate changes in premiums, or the lack of them, with particular changes in coverage terms.

Indus., Inc. v. Maier Constr., Inc., 68 Wis. 2d 590, 594, 229 N.W.2d 610 (1975). The reasonableness of the Knowleses' expectations may be a factor for the trier of fact to consider in determining their intent, but it cannot be a substitute for that factual determination. *See* ***Muchow v. Goding***, 198 Wis. 2d 609, 629, 544 N.W.2d 218 (Ct. App. 1995) ("Intent is a fact seldom determinable on summary judgment.").

¶22 Finally, we disagree with State Farm that this case is "on all fours" with the supreme court's decision in ***Schmidt v. Prudential Insurance Co. of America,*** 235 Wis. 503, 292 N.W. 447 (1940), and that its holding must govern our disposition. The supreme court affirmed in ***Schmidt*** the trial court's reformation of a life insurance policy to correct an error which caused the plaintiff to receive greater benefits than the parties intended. The court considered the fact that the plaintiff, an employee of the defendant insurance company, was "an experienced insurance agent and superintendent, [who] applied for a certain life insurance policy." ***Id***. at 513. The court stated:

> It is … argued that no mutual mistake was made since if a mistake was made, it was made by the defendant's clerks and not by the plaintiff. That argument, in our opinion, ignores the nature of an application for life insurance, its acceptance by the company, followed by the issuance of a policy pursuant to such application.… Clearly, what the plaintiff applied for … and what he intended to have issued to him was such a policy as the defendant customarily issued for its regular premium rates then existing. There is no suggestion in the evidence that the plaintiff intended to obtain a policy containing benefits in excess of those which his premiums would purchase. Clearly, the defendant intended to issue the policy applied for. When the plaintiff's application was accepted there was a meeting of the minds as to the kind of policy to be issued. In our opinion, the mistake was mutual.

Id.

¶23 We note first that ***Schmidt*** was decided not on summary judgment but following a full development of the facts in a trial "to the court and a jury." ***Id***. at 506. Other distinctions include the facts that the Knowleses neither filled out an application for specific coverages in September 1997, nor were they "experienced insurance agents" in the employ of State Farm. We emphasize that our holding is not that State Farm cannot prevail in having the policy reformed, only that it has not established its entitlement to reformation as a matter of law on the record before us. We see no conflict between the holding in ***Schmidt*** and our reversal and remand for further proceedings on State Farm's request for policy reformation.[5]

¶24 We next address the Knowleses' argument that WIS. STAT. § 631.13 precludes the reformation of an insurance policy to include provisions not set forth in the policy.[6] We disagree that the statute precludes the reformation of an insurance policy when there has been a mutual mistake as to its provisions. Section 631.13 addresses only the issue of how extrinsic documents may be incorporated into a policy: they must be "attached to and made a part of the policy at the time of its delivery." ***Id***. Reformation, however, is a well-established

[5] The Knowleses also moved for summary judgment in their favor, which the trial court denied. Although cross-motions for summary judgment may be viewed as a mutual assertion of the parties that no material facts are in dispute, a court is not precluded from concluding otherwise. We have an independent duty to determine whether a factual dispute precludes summary judgment for either party. *See* ***Grotelueschen v. American Family Mut. Ins. Co.***, 171 Wis. 2d 437, 462, 492 N.W.2d 131 (1992) (Abrahamson, J., dissenting) (noting that parties may "erroneously conclude that no factual dispute exists when in reality one does," and thus a court must determine on its own whether a genuine issue of material fact exists, which is "a question of law for the court, not for the parties").

[6] WISCONSIN STAT. § 631.13 states in relevant part: "No insurance contract may contain any agreement or incorporate any provision not fully set forth in the policy or in an application or other document attached to and made a part of the policy at the time of its delivery."

equitable remedy which allows the correction of errors or omissions which result in the issuance of an insurance policy that does not comport with what the parties mutually intended. *See* ***Williams***, 180 Wis. 2d at 233.

¶25 We also reject the Knowleses' claim that they are entitled to summary judgment because State Farm ratified the 1997-98 policy when it renewed the policy in 1998 for another term. Ratification is "'the confirmation of a previous act done either by the party himself or by another.'" ***Estate of Bydalek v. Metropolitan Life Ins. Co.***, 220 Wis. 2d 739, 746, 584 N.W.2d 164 (Ct. App. 1998) (quoting BLACK'S LAW DICTIONARY 1261 (6th ed. 1990)). Ratification, however, cannot be based on "'mere silence and failure to repudiate'" unless the purported principal had full knowledge of all material facts relating to the act to be ratified. ***Id***. at 747.

¶26 The Knowleses all but concede that State Farm did not acquire actual knowledge of the alleged clerical error omitting the reducing clause endorsement from the 1997-98 policy until after Terri's September 1998 accident. They assert, however, that we should impute to State Farm "constructive knowledge" of the omission because the company had ample opportunity to discover the error during the eleven months following the issuance of the policy, especially at the time it renewed the policy in April 1998. A party may be charged with having constructive knowledge of existing facts when one "has the opportunity, by the exercise of ordinary care, to possess" knowledge of those facts. ***Attoe v. State Farm Mut. Auto. Ins. Co***., 36 Wis. 2d 539, 546, 153 N.W.2d 575 (1967).

¶27 We decline, however, to impute to State Farm, as a matter of law, constructive knowledge of the omission of the UIM reducing clause from the

1997-98 Buick policy simply on the basis of the passage of time and one six-month renewal of the policy. Rather, like the question of the Knowleses' intentions regarding the terms of the 1997-98 policy, we conclude that what State Farm knew or should have known about the contents of the policy it issued in October 1997 is a matter to be determined by a trier of fact. *See* ***Home Sav. Bank v. Gertenbach***, 270 Wis. 386, 403, 71 N.W.2d 347 (1955) (noting that "where ratification is sought to be established by acquiescence based upon silence," the burden is on the party seeking ratification to prove knowledge of the requisite facts).

CONCLUSION

¶28 For the reasons discussed above, we reverse the appealed judgment and remand for further proceedings in the circuit court consistent with this opinion.

By the Court.—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.