IN THE MISSOURI SUPREME COURT

BRITTANY HUNTER,

Respondent

vs.

CHARLES MOORE, SR.,

Appellant

CASE NO. SC 95083

Appeal from the Circuit Court of the City of St. Louis
The Honorable David L. Dowd, Circuit Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

On June 21, 2009, sixteen-year-old Brittany Hunter and her family were guests at Delta Motel in Sullivan, Missouri. L.F. 55. During her stay at the motel, Hunter was raped and sexually assaulted in a vacant room. L.F. 55-56. Her two assailants obtained the key to the vacant room from the manager's building. L.F. 56. Hunter sued Delta Motel and Charles Moore, Sr., the motel's resident manager, for negligence in the Circuit Court of Franklin County, Missouri. L.F. 54.

Delta Motel maintained a liability insurance policy through American Family. L.F. 159, L.F. 175-176. Delta Motel and Moore asserted claims under that policy and demanded that American Family defend and indemnify them against Hunter's claims. L.F. 160. American Family notified Moore that it would defend him in the Franklin County litigation under a reservation of rights, Ex. 17, and filed a petition for declaratory judgment seeking to establish that it owed no duty to defend or indemnify Delta Motel and Moore based on two policy exclusions. L.F. 159.

After Moore received American Family's reservations of rights letter, he hired attorney Patrick Horsefield to assist him in the declaratory judgment action. Tr. 29-30, 32-33. On May 22, 2012, Horsefield notified American Family that Moore was "refusing its defense under a reservation of rights." Ex. 14, at 187. He demanded American Family to defend and indemnify Moore and to dismiss the declaratory judgment claim against Moore. Ex. 14, at 187. Observing that Moore was exposed to a sizeable judgment and that the policy affords coverage to him, Horsefield warned American Family that unless it withdraws its reservation of rights and fully defends and indemnifies Moore, Moore

would consider entering a settlement with Hunter pursuant to Section 537.065 and American Family "will not be allowed to control the litigation." Ex. 14, at 188.

On June 1, 2012, American Family's staff attorney Gene Hou informed Horsefield that American Family "is withdrawing its reservation of rights and is hereby tendering a full defense and indemnification" to Moore. Ex. U. Hou explained that "Moore will continue to be represented by Attorney Jon Sanner," that "American Family will continue to control and direct the litigation in this matter pursuant to the terms of the policy," and that coverage would be "subject to all terms, conditions, and provisions of the policy." Ex. U. Hou confirmed that American Family would dismiss Moore from the declaratory judgment action. Ex. U.

American Family Moves for Summary Judgment Against Moore

American Family did not dismiss Moore from the declaratory judgment action as it had promised. Ex. 15, at 7. On August 20, 2012, American Family moved for summary judgment against Moore in the declaratory judgment action. L.F. 164, 173-188; Ex. 15, at 3, 7. Its summary judgment filing requested a judgment "finding that no coverage exists for Defendants Delta Motel, LLC, and Charles Moore, Sr." L.F. 173-188. Hou acknowledged that American Family would have known about the summary judgment motion and authorized its filing. Ex. 15, at 2-4. American Family's corporate representative conceded that his company had taken conflicting positions by pursuing a declaratory judgment against Moore after it had informed him that it would withdraw its reservation of rights and provide coverage. Ex. 16, at 2.

Hunter and Moore Enter a Settlement Pursuant to Section 537.065

Upon learning that American Family was pursuing summary judgment against Moore, Horsefield and O'Leary discussed the possibility of their clients entering into a settlement agreement pursuant to Section 537.065. Ex. 14, at 123, 171.[1]

O'Leary and Horsefield discussed the terms of the settlement agreement in multiple telephone conversations and email exchanges. Tr. 37-38, 54, 68-70, 72, 84, 108. O'Leary believed that he and Horsefield had agreed that the parties would conduct an uncontested bench trial in the Franklin County case to determine liability and damages and that Moore would not permitted American Family to control his defense in that proceeding. Tr. 68-69, 82-85, 88-89, 108.

Horsefield met with Moore on September 4 and reviewed the terms of the settlement with him. Tr. 39-40. Moore had no questions about the settlement and he signed the document denominated "Settlement Agreement." Tr. 38, 41; Ex. 2; App. at A-16.

The settlement agreement identifies the consideration as "the mutual promises contained herein, as well as other good and valuable consideration flowing between the

[1]The circuit court concluded that American Family's attempt to obtain summary judgment against Moore constituted an unjustified refusal to defend Moore and permitted Moore to enter into a settlement with Hunter pursuant to Section 537.065. L.F. at 367; App. at A-9.

parties." Ex. 2, at 4; App. at A-19. The agreement sets forth the following mutual promises:

1. Plaintiff agrees that for the Judgment she obtains against Moore for her claims arising from The Lawsuit, that neither the Plaintiff nor any person, firm, corporation or agent claiming by and through the Plaintiff shall seek to obtain satisfaction of the Judgment from Moore, individually, levee upon any assets of Moore, garnish any of Moore's wages (unless his net income exceeds FIFTY THOUSAND DOLLARS ($50,000.00) in any calendar year, in which Plaintiff will be entitled to any and all money in excess of those earnings) or in any way collect monies or anything of value from Moore, other than lottery winnings, because of the Plaintiff's claims, judgment or suit, except as follows:

   (a) The American Family Policy; and

   (b) Any insurance issued by, or the assets of American Family, which insured the legal liability of Moore; and

   (c) An agreed portion of the proceeds of any such claims or cause of action, Moore may have against American Family, its employees and/or agents, stemming from its refusal to adequately investigate, handle, and defend against Plaintiff's claims, fully indemnify Moore against Plaintiffs claims, dismiss Moore from the DJ action and/or for Moore's

damages and injuries relating to American Family's negligent and/or fraudulent misrepresentations and/or its breach of The American Family Policy.

2. Moore agrees to do the following:

(a) To specifically assign Plaintiff a portion of the proceeds, not to exceed the amount of any Judgment less the amount recovered from the American Family Policy or any insurance or assets of American Family which insured the legal liability of Moore, (except as set forth in 2(b) below) from any claims or causes of action which he possesses against American Family, its employees and/or agents, (including, but not limited to, claims of bad faith, breach of fiduciary duty, negligence, or breach of contract) arising out of the failure of American Family to adequately investigate, handle, and defend it and to indemnify Moore for costs, expenses, attorneys' fees, and any Judgment from the Lawsuit.

(b) Moore also agrees he is obligated to authorize and empower Plaintiff's counsel, James O'Leary, along with [Moore's] Personal Attorney, to pursue such claims, to file such claims or suit in the names of Moore, to cooperate in the pursuit of such claims, and that a portion of the proceeds or recovery

> from such claims or suit for breach of contract, bad faith or otherwise, shall be divided between Plaintiff and Moore….

Ex. 2, at 4-5; App. at A-19-A-20.

The settlement agreement contained several recitals, including that in entering the agreement the parties "specifically considered" the decisions in *Butters v. City of Independence*, 513 S.W.2d 418 (Mo. 1974) and *State ex rel. Rimco v. Dowd*, 858 S.W.2d 307 (Mo.App. E.D.1993). Ex. 2, at 3; App. at A-18. Each of these cases involved a settlement pursuant to Section 537.065 in which the insurer was not allowed to control its insured's defense and the insured cooperated with the plaintiff in the underlying tort litigation.

Immediately after Moore signed the settlement agreement, Horsefield informed Hou and Sanner of the settlement. Tr. 48-49; Ex. 8. In his letter, Horsefield declared that American Family materially breached the contract of insurance by "filing of the Motion for Summary Judgment after promising to dismiss my client from the case." Ex. 8. He stated that Moore had "enter[ed] into the 537 agreement with the plaintiff in the underlying action in order to protect his personal assets." Ex. 8. Because Moore "did not trust American Family or anyone hired by American Family to represent him in the underlying action," Horsefield instructed Sanner "to file a motion to withdraw and notice the same up for hearing in the Circuit Court of Franklin County as soon as possible." Ex. 8.

Six days after learning of Moore's settlement, American Family dismissed Moore from the declaratory judgment action without prejudice. Ex. W, at 3.

Moore Refuses to Cooperate

On September 22, 2012, O'Leary sent an email to Horsefield expressing his desire "to get the case set for trial in the next couple of months." Ex. 14, at 231. He noted that Sanner had not withdrawn as Moore's attorney in the Franklin County lawsuit and asked Horsefield for a copy of the letter he sent to American Family. Ex. 14, at 231.

O'Leary contacted Horsefield on September 26 and October 4 to inquire whether he had talked to Sanner about withdrawing as Moore's attorney. Ex. 14, at 232-233. On October 5, Horsefield informed O'Leary that he no longer represented Moore and stated that Moore had indicated that he was going to seek representation from Roy Williams in West Plains. Ex. 14, at 241. When Moore did not contact Williams and did not return Horsefield's calls, O'Leary sent an email to Horsefield stating that Moore's "lack of cooperation will void our agreement." Ex. 14, at 247.

On October 31, O'Leary sent an email to Sanner inquiring whether he had withdrawn from the Franklin County case in accordance with Horsefield's September 4 letter. Ex. 14, at 255. Sanner responded by requesting a copy of the settlement agreement. Ex. 14, at 256. O'Leary and Horsefield both expressed disbelief at Sanner's refusal to withdraw as Moore's attorney. Ex. 14, at 264. In an email to Horsefield, O'Leary stated he was "stunned that [Sanner] has yet to do what he was instructed to do – withdraw from the case.' Ex. 14, at 264. Horsefield replied: "Me too." Ex. 14, at 266.

Sanner told Moore to retrieve his "entire file" from Horsefield's office. Ex. 9, at 1-2. On November 9, Sanner met Moore at a Steak 'n Shake in Rolla and examined the

legal file. Ex. 9, at 2-4. He located the settlement agreement and reviewed it with Moore. Ex. 10, at 1.

On November 13, Sanner sent the settlement agreement to Hou. Ex. 10. In his accompanying letter, Sanner stated: "I have reviewed the terms of the agreement with Moore and it is clear to me that he did not understand all of the terms." Ex. 10, at 1.[2] Sanner reported that Moore "insists he never told Mr. Horsefield that he wanted this office to withdraw as his lawyers in the original lawsuit." Ex. 10, at 1. Sanner testified that Moore never claimed that Horsefield lacked authority to negotiate the settlement agreement. Ex. 9, at 11.

On November 14, Sanner sent an email to O'Leary stating that Moore "never authorized anyone to terminate my services" and announcing his intention "to continue with the defense of Mr. Moore." Ex. 14, at 274.

On November 16, Hunter's counsel demanded Moore's compliance and cooperation with the settlement agreement "or suit would be filed." Ex. 17, part 1, at 69.

[2] Sanner met with Moore again on November 20, 2012. Ex. 9, at 9. The next day Sanner faxed a letter to Moore for the stated purpose of "providing … a summary of the facts that we discussed" the day before. Ex. 11, at 1. Sanner represented as "facts" that they "did not discuss the content of the 537 Agreement" at their meeting on November 9 and that "the first time that we discussed the content of the 537 Agreement" was the meeting on November 20, 2012. Ex. 11, 1-3.

In his response, Sanner stated that Hunter intended to have him represent him in the Franklin County litigation. L.F. 20, 42.

Hunter Sues Moore to Enforce the Settlement

Due to Moore's failure to comply the terms of the settlement agreement, Hunter sued him for breach of contract, specific performance, and reformation.[3] L.F. 18, 193-194.

The trial court heard evidence as to whether the settlement agreement required Moore to cooperate in the Franklin County case. O'Leary and Horsefield both testified that they discussed the terms of the settlement in telephone conversations and via email. Tr. 37-38, 46, 54, 68-70, 72, 84, 108. Horsefield testified that he could not recall any details about their telephone conversations. Tr. 37-38, 46, 54. Horsefield could not "recall specifically any conversation with O'Leary" but did not deny that these conversations occurred. Tr. 46, 54. When asked whether the parties' intentions regarding the settlement were discussed, Horsefield replied: "I can't recall specifics, but I assume they were." Tr. 38. Horsefield had no recollection whether they "discussed anything regarding what this agreement required of [Moore] as to the underlying action." Tr. 43. Due to his inability to

[3] Hunter requested reformation in her affirmative avoidances. L.F. 193-194. The circuit court concluded that Hunter's request for reformation was properly before it because the parties "argued and introduced evidence relevant to reformation" and addressed "reformation in their post-trial briefs and proposed findings of fact and conclusions of law." L.F. 370; App. at A-12. Moore has not challenged that ruling.

recall any of his conversations with O'Leary, Horsefield could not say that the written settlement document marked as Exhibit 2 incorporated all of the terms of the agreement:

> Q. Is every single thing or every single term that you and Mr. O'Leary discussed or negotiated in that written agreement, or are there some terms that aren't?
>
> A. I told you, I don't specifically recall what Mr. O'Leary and I talked about, but I do know after reviewing this [written settlement agreement], what's in the agreement.

Tr. 46.

O'Leary recalled the details of his conversations with Horsefield about the terms of the settlement relating to Moore's obligation to cooperate. O'Leary testified that they agreed to an uncontested bench trial on liability and damages in the Franklin County lawsuit and to preclude American Family from controlling Moore's defense in that proceeding. Tr. 68-69, 82-85, 88-89, 108. O'Leary testified that he discussed these terms with Horsefield several times in late August 2012 and they agreed that Moore would cooperate by "not put[ting] on evidence counter to plaintiff's evidence" and by not "cross-examin[ing] our liability and our damage experts" at the bench trial. Tr. 88. When they discussed the settlement, "that was always the intent." Tr. 83. According to O'Leary,

these terms were "clear to [Horsefield]" in late August 2012 and served as "consideration" for Hunter's agreement to settle with Moore. Tr. 89.[4]

The written settlement agreement did not include these terms. Ex. 2; App. at A-16. O'Leary testified that he meant to reduce these terms to writing. Tr. 88. Regarding the drafting of the settlement agreement document, O'Leary testified as follows:

> Q. Did you try to make sure that all of the terms and intentions that you discussed with Mr. Horsefield and covenants of Ms. Hunter and Mr. Moore made it into the Settlement Agreement and were written out?
>
> A. I tried to draft the agreement. My thought was the most important aspect is that it's a 537.065 Agreement, both parties were represented by counsel, understands the significance of a 537.065 Agreement in the State of Missouri and what our intention was to carry that out which was, essentially, to ensure that American Family did not no longer control the defense and that we would have an uncontested hearing on liability and damages. That was our vehicle to get to that.

Tr. 85. O'Leary testified that he "tried … to reduce those intentions to writing." Tr. 88. He acknowledged that his drafting of the agreement was imperfect and that he "didn't connect the dots as well [as] I should." Tr. 89.

[4] O'Leary had previously testified that "[p]art of the consideration for Brittany entering into this agreement was that we were going to have an uncontested hearing." Tr. 86.

The Circuit Court's Judgment

The circuit court entered judgment in favor of Hunter and against Moore. L.F. 372-373; App. at A-14-A-15. The judgment prohibits Moore from "allow[ing] American Family Mutual Insurance to have control over the defense" of the Franklin County litigation and requires Moore "to cooperate with Plaintiff in the Franklin County lawsuit … either by agreeing to a consent judgment or having an uncontested hearing on liability and damages." L.F. 14-15.[5]

The court concluded that Hunter had proven by "clear, convincing and satisfactory evidence that the parties mutually agreed" to these terms as part of their settlement. L.F. 369; App. at A-11. The court rejected Horsefield's testimony as non-credible:

> To the extent that Mr. Horsefield's testimony could be construed to stand for the proposition that the parties did not agree Defendant would cooperate with Plaintiff in the Franklin County lawsuit either by agreeing to a consent judgment or having an uncontested hearing on liability and damages, the Court finds that testimony to lack credibility.

[5] As Moore observes in his brief, no evidence was presented that the parties intended for Moore to agree to a consent judgment. The court's finding amounts to harmless error because Moore is not required to consent to a judgment. Moore has the choice of cooperating in the Franklin County case "either by agreeing to a consent judgment or having an uncontested hearing on liability and damages." L.F. 373; App. at A-15.

L.F. 365-366; App. at A7-A-8. The court made additional findings of fact that support its judgment, including:

- "[T]he parties discussed the purpose of the Settlement Agreement and their intent as to the Settlement Agreement several times before entering the Settlement Agreement." L.F. 364, ¶ 27; App. at A-6.
- "[T]he parties intended not to allow American Family Mutual Insurance to have control over the defense of Plaintiff's case against Defendant following entry of the Settlement Agreement." L.F. 364, ¶ 28; App. at A-6.
- "[I]t was the parties' intent that the Settlement Agreement would result in Defendant cooperating with Plaintiff either by agreeing to a consent judgment or having an uncontested hearing on liability and damages." L.F. 364, ¶ 29; App. at A-6.
- "The email communications between Mr. O'Leary and Mr. Horsefield are consistent with Mr. O'Leary's testimony that the parties intended American Family Mutual Insurance to no longer control the defense of Plaintiff's case against Defendant and that Defendant would cooperate with Plaintiff in the underlying litigation…." L.F. 364-365; App. at A-6-A-7.
- After the parties settled, Horsefield "communicated to American Family Mutual Insurance" that Moore "'does not trust American Family or anyone hired by American Family to represent him in the underlying action'" and "instructed the attorney provided by American Family …to withdraw from representing Defendant." L.F. 365; App. at A-7.

- The *Rimco* and *Butters* cases referred to in the settlement agreement and "used as a guide and specifically considered by the parties in entering the Settlement Agreement … involve[d] settlements under Section 537.065 RSMO under which the insurance company was not allowed to control the defense of the case and the settling defendant fully cooperated with the plaintiff in reaching a judgment in favor of the plaintiff in the underlying litigation." L.F. 363-64, ¶¶ 23-24; App. at A-5-A-6.

ARGUMENT

I.

The trial court did not err in entering judgment in favor of Hunter and against Moore because there is substantial evidence supporting the reformation of the settlement agreement, in that evidence presented at trial established that the parties agreed that American Family would not be permitted to control Moore's defense in the Franklin County case and that the issues of liability and damages would be determined in an uncontested bench trial, and that the omission of these terms from the written settlement agreement was due to mutual mistake.

Standard of Review: In deciding whether the circuit court's judgment is supported by substantial evidence, "appellate courts view the evidence in the light most favorable to the circuit court's judgment," "defer to the circuit court's credibility determinations," and "accept as true the evidence and inferences … favorable to the trial court's decree and disregard all contrary evidence." *Ivie v. Smith*, 439 S.W.3d 189, 200 (Mo. banc 2014) (internal citations and quotation marks omitted). The rule of deference applies to circuit court findings whether they are derived from testimony, pleadings, stipulations, exhibits, or depositions. *Business Men's Assurance Co. of America v. Graham*, 984 S.W.2d 501, 506 (Mo. banc 1999). Evidence contrary to the judgment is not considered regardless of the burden of proof at trial. *Ivie*, 439 S.W.3d at 200. "Circuit courts are free to believe any, all, or none of the evidence presented at trial." *Id*. Where the

court makes findings of fact, "[a]ll fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." *Id*. (citing Supreme Court Rule 73.01(c)).

Moore maintains that the circuit court "erred in using reformation to materially change the § 537.065 agreement" by requiring Moore "to agree to a consent judgment, or an uncontested hearing on liability and damages, and prohibiting American Family from defending Moore." App. Subst. Br. 21. According to Moore, reformation was improper "because there was no evidence that the failure to include these terms was because of a mutual mistake." App. Subst. Br. 22.

Moore's argument should be denied for several reasons. First, the circuit court's findings of fact and conclusions of law supported the entry of judgment in favor of Hunter in her claim for reformation as well as her claim for breach of contract. In his appeal, Moore does not argue that the court erred in entering judgment on the contract claim. As discussed in Point II *infra*, Moore's failure to challenge this independent basis for the entry of the judgment warrants affirmance. Second, Moore argues that the court's finding of mutual mistake is not supported by substantial evidence but does not set forth the evidence in the light most favorable to the judgment. Moore's failure to comply with the standard of review warrants the denial of the point relied on. Third, should this Court elect to review Moore's appeal despite these deficiencies, the judgment should be affirmed because there is substantial evidence that the parties mutually agreed to the additional terms as part of their settlement.

A. Moore's argument should be rejected because he has failed to present the evidence in accordance with the standard of review.

To present his not-supported-by-substantial-evidence challenge,[6] Moore must: (1) identify a challenged factual proposition, the existence of which is necessary to sustain the judgment; (2) identify all of the favorable evidence in the record supporting the existence of that proposition; and (3) demonstrate why that favorable evidence, when considered along with the reasonable inferences drawn from that evidence, does not have probative force upon the proposition such that the trier of fact could not reasonably decide the existence of the proposition. *Houston v. Crider*, 317 S.W.3d 178, 187 (Mo.App. S.D.2010).

While Moore has identified the court's finding of mutual mistake as the challenged factual proposition,[7] he has not satisfied the other two requirements for

[6] In his recitation of the standard of review, Moore states "the underlying judgment for reformation and specific performance" should be affirmed "unless the judgment lacks substantial evidence or if it is against the weight of the evidence." App. Subst. Br. 23. Because the only error Moore asserts is a lack of substantial evidence supporting mutual mistake, he has abandoned the argument that the judgment is against the weight of the evidence. *Boyer v. Grandview Manor Care Center*, 793 S.W.2d 346, 348 (Mo. banc 1990).

[7] The existence of mutual mistake is "normally a question of fact." *Husch & Eppenberger, LLC v. Eisenberg*, 213 S.W.3d 124, 134 (Mo.App. E.D.2006).

presenting his claim of error. Moore has failed to catalog all the evidence favorable to the judgment which necessarily prevents him from demonstrating how that evidence lacked probative force upon the issue of mutual mistake.

Moore's brief violates the standard of review by omitting and mischaracterizing critical evidence supporting the judgment. Moore repeatedly misrepresents O'Leary's testimony as representing "his intent" and "his opinion" rather than the mutual intent of the parties. *See* App. Subst. Br. 12-13, 28. Moore states that O'Leary testified that "it was his intent that Moore would not put on evidence to counter Hunter's uncontested evidence and that there would be no cross examination on Moore's behalf." App. Subst. Br. 28 (citing Tr. 59-60 (Horsefield's testimony), 104). Moore, however, omits O'Leary's testimony that he and Horsefield agreed that Moore would be required to cooperate in the Franklin County case by not countering Hunter's evidence or cross-examining her witnesses and that these terms were "clear" to Horsefield. Tr. 88-89. Moore also leaves out O'Leary's testimony that "our overall intent was … not to allow American Family to further defend Brittany's case against Mr. Moore in Franklin County." Tr. 84.

Moore does not mention non-testimonial evidence supporting the circuit court's finding that the parties mutually agreed to the additional cooperation terms. This evidence includes Horsefield's exchanges with American Family in which he equates a settlement pursuant to Section 537.065 with American Family's inability to control Moore's defense, Ex. 8; Ex. 14, at 188, and Horsefield's surprise at Sanner's failure to withdraw as Moore's attorney after the settlement was announced. Ex. 14, at 264, 266.

The circuit court specifically relied on this evidence in entering judgment in favor of Hunter. L.F. 364-365, ¶¶ 30-32; App. at A-6-A-7.

Moore further contravenes the standard of review by citing evidence contrary to the judgment. Moore's reliance on Horsefield's testimony (App. Subst. Br. 13-14, 17, 29-30) is particularly egregious since the circuit court specifically found it lacked credibility. L.F. 365-366, ¶¶ 35-36; App. at A-7-A-8.

Because Moore's argument "ignores the testimony and evidence favorable to the circuit court's findings and conclusions" and "recites evidence and purported inferences favorable to his position," it is "of no analytical or persuasive value." *J.A.R. v. D.G.R.*, 426 S.W.3d 624, 632 (Mo. banc 2014). This Court should reject Moore's argument due to his failure to comply with the basic requirements for asserting a not-supported-by-substantial-evidence challenge. *Houston*, 317 S.W.3d at 189.

B. The record contains substantial evidence of mutual mistake justifying reformation

Reformation may be granted upon proof that, due to mutual mistake, a "writing fails to set forth accurately the terms of the true agreement or fails to incorporate the true prior intentions of the parties." *Husch & Eppenberger, LLC v. Eisenberg*, 213 S.W.3d 124, 133-134 (Mo.App. E.D.2006). *See also Duenke v. Brummett*, 801 S.W.2d 759, 765 (Mo.App. S.D.1991) (stating that "when by mutual mistake a contract is not expressed in such terms as have the force and effect that the parties intended, it is the clear duty of the court to correct the mistake"). "A mutual mistake occurs when both parties, at the time of contracting, share a misconception about a basic assumption or vital fact upon which they

based their bargain." *Alea London Ltd. v. Bono–Soltysiak Enter.*, 186 S.W.3d 403, 415 (Mo.App. E.D.2006) (quoting 27 *Williston on Contracts* 4th ed., § 70:107, at 536). "To be entitled to reformation all a party need show is that the parties intended to agree to a particular result by the instrument but the instrument as executed was insufficient to effectuate their intention." *Kopff v. Economy Radiator Serv.*, 838 S.W. 2d 449, 453-454 (Mo.App. E.D.1992). Reformation may be granted where only one of the parties to the agreement asserts that there was a mutual mistake. *Leimkuehler v. Shoemaker*, 329 S.W.2d 726, 731 (Mo. 1959); *Net Realty & Investment Co. v. Dubinsky*, 94 S.W.2d 1108, 1117 (Mo.App. St.L.D.1936).

"Reformation may be established by circumstantial evidence provided that the natural and reasonable inferences drawn from it clearly and decidedly prove the alleged mistake." *Everhart v. Westmoreland*, 898 S.W.2d 634, 638 (Mo.App. W.D.1995). "In determining the propriety of granting reformation, the trial court has a duty to consider the wording of the contract as signed by the parties, the relationship of the parties, the subject matter of the contract, the usages of the business, the circumstances surrounding the execution of the contract, and its interpretation by the parties." *Id*.

Hunter presented substantial evidence that the parties mutually agreed that Moore would cooperate in the Franklin County action as she alleged and the circuit court found. O'Leary testified that he and Horsefield negotiated the settlement during multiple phone conversations and in email exchanges. Tr. 68-70, 72, 84, 108. In their telephone conversations, O'Leary and Horsefield agreed that there would be an uncontested bench trial to determine liability and damages in the Franklin County case and that American

Family would not be permitted to control Moore's defense in that proceeding. Tr. 68-69, 82-85, 88-89, 108. O'Leary testified that he and Horsefield agreed that Moore would "cooperate in the pursuit of all the underlying claims," including the claims pending in Franklin County. Tr. 88. With respect to the Franklin County case, Moore's cooperation would entail "not put[ting] on evidence counter to plaintiff's evidence" and not "cross-examin[ing] our liability and our damage experts" at the bench trial. Tr. 88. O'Leary testified that these terms were "clear" to Horsefield in late August 2012. Tr. 89.

Horsefield acknowledged that he and O'Leary had several conversations discussing the terms of the settlement. Every time Horsefield was asked about these negotiations at trial, he testified that he could not recall them but did not deny that they had taken place. Tr. 37-38, 46, 54.

> Q. And at the time that you had discussions with Mr. O'Leary, went back and forth on the 537, and discussed the 537 with Mr. Moore, and agreed to the form to the 537, all that time, it was your belief or intention that there would be a trial on liability and damages in the underlying Franklin County case?
>
> A. With the clarification that **I don't recall specifically any conversations with Mr. O'Leary. I'm not saying they didn't happen, regarding negotiations**. I know reviewing the file after this time that he sent me a proposed version and I sent my revisions.

Tr. 54 (emphasis added). Because he had no specific memory of these negotiations, Horsefield was unable to say that "every single term that you and Mr. O'Leary discussed

or negotiated [is] in that written agreement." Tr. 46. In weighing this testimony, the circuit court could have reasonably accepted O'Leary's account of the negotiations and found that Horsefield had agreed to these terms.

Horsefield's conduct at or near the time of the settlement is probative evidence that he shared O'Leary's understanding regarding Moore's obligation to cooperate in the Franklin County case. *Everhart*, 898 S.W.2d at 638 (stating that "the circumstances surrounding the execution of the contract" and "its interpretation by the parties" are relevant in determining whether to grant reformation). Horsefield's correspondence with American Family shows that he believed that American Family would not be permitted to control Moore's defense once he entered a settlement pursuant to Section 537.065. In his May 22, 2012, letter to American Family, Horsefield warned American Family that if it did not defend and indemnify Moore, Moore "will be free to enter into a settlement agreement with the plaintiff" and American Family "will not be allowed to control the litigation." Ex. 14, at 188. Horsefield carried out that threat the same day the settlement was reached when he instructed Sanner to withdraw from the Franklin County case. Ex. 8. The timing of Horsefield's demand for Sanner to withdraw supports an inference that the terms of the settlement barred American Family from controlling Moore's defense. O'Leary testified that these actions were "consistent with our overall intent… not to allow American Family to further defend Brittany's case against Mr. Moore in Franklin

County." Tr. 83-84.[8] The judgment reflects the circuit court's reliance on Horsefield's letter to Hou and Sanner. L.F. 365, ¶¶ 31-32; App. at A-7.

Email communications between O'Leary and Horsefield also confirm their mutual understanding that Moore was required to cooperate in the Franklin County case. That O'Leary and Horsefield were "stunned" that Sanner had not withdrawn as Moore's attorney supports an inference that Moore was required to terminate Sanner and refuse American Family's offer of representation as part of the settlement. Ex. 14, at 264, 266. The circuit court found that these email communications were "consistent with Mr. O'Leary's testimony that the parties agreed American Family Mutual Insurance to no longer control the defense of Plaintiff's case against Defendant and that Defendant would cooperate with Plaintiff in the underlying litigation either by agreeing to a consent judgment or having an uncontested hearing on liability and damages." L.F. 364-365; App. at A-6-A-7. Moore's failure to contest this finding in and of itself provides a sufficient basis to affirm the judgment. Perhaps that explains Moore's failure to mention this evidence and the court's finding in his brief.

[8] Horsefield's letter demanding Sanner's withdrawal contradicts Moore's claim that the purpose of the settlement agreement was limited to protecting Moore's personal assets. App. Subst. Br. 21. If asset protection was the sole purpose of the settlement, there would have been no reason for Moore to demand Sanner's withdrawal. According to Moore's view of the settlement agreement, his assets are entitled to the same protection whether or not Sanner represents him.

The provisions of the settlement document support the circuit court's judgment. The agreement states that the parties "specifically considered" *State ex rel. Rimco v. Dowd*, 858 S.W.2d 307 (Mo.App. E.D.1993) and *Butters v. City of Independence*, 513 S.W.2d 418 (Mo. 1974), and indicates that the parties were "guide[d]" by these decisions. Ex. 2, at 3; App. at A-18. *Rimco* explains that "statutory settlement procedure established by the general assembly" in enacting Section 537.065 "places the insurer at risk that if coverage is found it will have no opportunity to defend on the issue of liability of the tortfeasor." 858 S.W.2d at 308-09. The parties' reliance on *Rimco* in entering the settlement agreement supports a finding that they understood and agreed with *Rimco's* conclusion that the insurer has no right to defend its insured's liability once a settlement is reached. The circuit court found that the settlement agreement's reference to *Rimco* and *Butters* supported its entry of judgment in favor of Hunter because those cases "involve[d] settlements under Section 537.065 RSMO under which the insurance company was not allowed to control the defense of the case and the settling defendant fully cooperated with the plaintiff in reaching a judgment in favor of the plaintiff in the underlying litigation." L.F. 363-64, ¶ 24; App. at A-5-A-6.

Moore argues that Section 537.065 does not require a tortfeasor to agree to an uncontested trial on liability and damages or to decline his insurer's offer to defend him. App. Subst. Br. 32. His argument is inconsistent with *Rimco* as discussed above. Moore cites no case law where an insurance company controlled the defense of an insured who had settled pursuant to Section 537.065.

If Moore has no obligation to cooperate in the Franklin County case as he contends, Hunter will receive no benefit from the settlement and, in fact, would be better off without the settlement. Hunter will have to establish Moore's liability and her damages in a contested trial opposed by counsel furnished by American Family. But her recovery will be capped at the limits of American Family's policy because the settlement agreement bars her from pursuing Moore's personal assets or garnishing his wages.[9] A major benefit of the settlement is Hunter's right to share in Moore's recovery for his claims against American Family for breach of contract and bad faith. Ex. 2, at 4-5; App. at A-19-A-20. However, Moore will forfeit those claims as well as his and Hunter's potential recovery if he is allowed to let American Family control his defense. He cannot claim he was damaged by American Family's failure to defend and indemnify him if he accepted American Family's defense and indemnification. Thus, as conceived by Moore, the settlement's sole beneficiaries are Moore, whose personal assets are protected, and American Family, which averts potential liability for wrongfully denying Moore a defense and indemnification.

Moore's position that the tortfeasor and his insurer may obtain all of the benefits of the statute while providing no consideration for those benefits cannot be reconciled with *Rimco's* view that settlements pursuant to Section 537.065 allow the tortfeasor to

[9] While Hunter could execute against Moore's future lottery winnings and income in excess of $50,000 per year, Ex. 2, at 4; App. at A-19, Moore's earnings history indicated that his annual income had never exceeded $50,000. Tr. 93.

"buy his peace" and give the insurer "no opportunity to defend on the issue of liability of the tortfeasor."858 S.W.2d at 308-09. *See also* Bough, et al., *Charting a Course Through the Perils and Pitfalls of 537.065 Litigation*, 70 J. Mo. Bar 80 (Mar.-Apr. 2014) (stating that the consideration for a 537 agreement is the tortfeasor's "agree[ment] either to settle or compromise the claim or not to oppose the tort victim's prosecution of the claim at trial").

Moore's reliance on *Schmitz v. Great American Assur. Co.*, 337 S.W.3d 700 (Mo. banc 2011), is misplaced. *Schmitz* does not support Moore's argument that "a § 537.065 does not preclude the defendant from participating in a contested trial on liability and damages." App. Subst. Br. 32. This Court's decision in *Schmitz* makes clear that liability and damages were decided in an uncontested bench trial:

> **At a bench trial**, the parents introduced evidence regarding their damage and CPB's liability. **CPB neither objected to the entry of evidence nor offered any defense.** The court entered judgment finding that CPB was liable for Christine's death and found the parents' damages to be $4,580,076.

337 S.W.3d at 704 (emphasis added).

Moore's argument that Hunter "could have included specific terms in the agreement limiting Moore's ability to contest liability and damages" is unpersuasive. App. Subst. Br. 33. Reformation is a remedy designed to correct a writing that "fails to set forth accurately the terms of the true agreement." *Eisenberg*, 213 S.W.3d at 133-134. Moore's argument fails to grasp that in seeking reformation Hunter was not attempting to

change terms of the settlement, but only to correct the written agreement so that it accurately reflects their true agreement. *Duenke v. Brummett*, 801 S.W.2d 759, 766 (Mo.App. S.D.1991) (stating that in a reformation action, "[t]he thing being reformed is the writing, not the contract").

Contrary to Moore's argument, the settlement agreement contains two provisions demonstrating that the parties did not intend to permit Moore to contest liability and damages. First, the agreement requires Moore "to cooperate in the pursuit" of all claims that he has against American Family. Ex. 2, at 5; App. at A-20. Moore's acceptance of American Family's defense and indemnification violates the cooperation provision because his actions will result in the forfeiture of his claims against American Family. Second, the settlement agreement requires Moore to authorize O'Leary to pursue his claims against American Family on his behalf. Ex. 2, at 5; App. at A-20. Moore's claim that he is allowed to present a defense in the Franklin County case is inconsistent with this provision because he could put O'Leary in a conflicted position, *see* Supreme Court Rule 4-1.7, which would preclude O'Leary from representing him in his claims against American Family as the agreement expressly contemplates. The circuit court could have reasonably concluded from these provisions that Moore agreed to cooperate in the Franklin County case and was not empowered to singlehandedly vitiate critical aspects of the settlement. *See Everhart*, 898 S.W.2d at 638 (stating that in the circuit court should consider the subject matter of the contract in deciding whether to grant reformation).

Moore's reliance on *Lavelock v. Cooper Tire & Rubber Co.*, 169 S.W.3d 865 (Mo. banc 2005), is misplaced. In *Lavelock* the parties reached a settlement agreement that

required the plaintiffs to return confidential documents to defendant. The circuit court ordered the parties to perform the terms of the settlement agreement and required defendants to preserve the documents returned as plaintiff had requested in a post-trial motion. *Id*. at 866. This Court modified the judgment to eliminate the document preservation requirements the judgment imposed on defendant that were not required by the settlement agreement. *Id*. at 867. This Court held that judgments approving settlements "should not impose terms not contemplated or negotiated by the parties." *Id*. at 866.

Lavelock is distinguishable. It did not involve an action for reformation, and the plaintiffs did not claim that the settlement agreement contained the additional terms included in the judgment or that the parties had otherwise agreed to them. In this case, however, Hunter established that the parties had negotiated and mutually agreed to the additional terms regarding Moore's cooperation before the settlement agreement was signed.

O'Leary's testimony that he and Horsefield agreed to these additional terms and the circumstantial evidence demonstrating that Horsefield believed Moore was obligated after settling with Hunter to decline American Family's defense provide ample evidence of mutual mistake and justified reformation of the settlement agreement. Because the judgment is supported by substantial evidence, it should be affirmed.

II.

The judgment should be affirmed because the circuit court's conclusion that the parties agreed that Moore would cooperate in the Franklin County case is not dependent on the existence of mutual mistake and is sustainable on the independent ground that the circuit court determined that the parties had orally agreed to these terms and that Moore breached that agreement when he continued to allow American Family to control his defense and refused to cooperate with Hunter.

While there was sufficient evidence for the court to grant reformation for the reasons discussed in Hunter's response to Point I, the judgment may be affirmed on the alternate ground that the circuit court concluded that there was a prior or contemporaneous agreement requiring Moore to cooperate in the Franklin County case and that Moore breached that agreement when he refused to discharge Sanner and cooperate in the Franklin County case.

In her breach of contract claim, Hunter pled that Moore agreed "to cooperate with Hunter in pursuing her claims to final judgment," that Hunter "sought Moore's cooperation" in the "pursuit of her claims to final judgment," and that Moore's decision to continue to allow American Family to defend him in the Franklin County case breached the settlement agreement. L.F. 19-20. At trial Hunter established that in negotiating the settlement, O'Leary and Horsefield agreed that Moore would be required to cooperate in the Franklin County litigation by not permitting American Family to control his defense and by participating in an uncontested bench trial on liability and damages. It is undisputed that those terms are not in the written settlement agreement.

When contracting parties memorialize an agreement in writing, the parol evidence rule governs whether the terms of the agreement may be altered by a prior or contemporaneous agreement. "The parol evidence rule prohibits a trier of fact from using evidence of prior or contemporaneous oral agreements that varies or contradicts the terms of an unambiguous, final, and complete written contract unless there is fraud, accident, mistake, or duress." *Barone v. United Indus. Corp.*, 146 S.W.3d 25, 29 (Mo.App. E.D.2004). "A contract is integrated where it constitutes a complete statement of the bargain made between parties." *Executive Bd. of Missouri Baptist Convention v. Carnahan*, 170 S.W.3d 437, 448 (Mo.App. W.D.2005). "Where the contract contains an integration or merger clause, the law conclusively presumes all prior and contemporaneous agreements have been merged into the written contract." *Rosenfeld v. Boniske*, 445 S.W.3d 81, 88 (Mo.App. E.D.2014) (internal quotation marks omitted).

The written settlement agreement does not constitute the parties' full agreement. This is evident because it lacks an integration or merger clause and identifies the consideration for the settlement as "the mutual promises contained herein, as well as other good and valuable consideration." Ex. 2, at 4; App. at A-19. A contract that refers to additional unspecified consideration is not "full and complete on its face." *Don King Equipment Co. v. Double D Tractor Parts, Inc.*, 115 S.W.3d 363, 373-374 (Mo.App. S.D.2003) (holding that real estate contract "indicated that [it] was not the entire agreement by referring to 'other good and valuable consideration.'"). Because the settlement agreement is not integrated, the parol evidence rule does not bar evidence of a prior or contemporaneous verbal agreement to prove the parties' entire agreement. *Id.* at

373; *Barone*, 146 S.W.3d at 29 (stating that "when a written contract appears to be an incomplete agreement on its face may extrinsic evidence be admitted to show the final and complete agreement between the parties").[10]

Hunter presented substantial evidence that the additional consideration for the settlement was Moore's agreement to cooperate in the Franklin County case by refusing to allow American Family to control his defense and by participating in an uncontested hearing to determining liability and damages.[11] O'Leary testified that he and Horsefield agreed to these terms when they negotiated the other terms of the settlement in late August. Tr. 68-69, 82-85, 88-89, 108. O'Leary testified that these terms served as consideration for Hunter's agreement to settle with Moore. *See* Tr. 86 ("Part of the consideration for Brittany entering this agreement was that we were going to have an uncontested hearing."); Tr. 89 ("[T]hat the insurance company no longer has the right to control the defense and … that there's cooperation between the parties … that's the consideration").

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[10] The parol evidence rule was inapplicable to Hunter's reformation claim. *Duenke*, 801 S.W.2d at 766 (stating that "the very nature of a reformation action is such that it is outside the field of operation of the parol evidence rule" because parol evidence "is not received for the purpose of varying the contract of the parties but to show what their contract really was").

[11] In bilateral contracts, "consideration is a return promise." *Carter v. St. John's Reg'l Med. Ctr.*, 88 S.W.3d 1, 10 (Mo.App. S.D.2002).

Where, as here, a contract contains both written and oral terms, the actual terms of the contract are for the trier of fact to determine. *Chase Elec. Co. v. Acme Battery Mfg. Co.*, 798 S.W.2d 204, 209 (Mo.App. E.D.1990). The circuit court found that Hunter showed "by clear, convincing and satisfactory evidence that the parties mutually agreed to not allow American Family Mutual Insurance to have control over the defense of Plaintiff's case against Defendant in the Franklin County lawsuit and that Defendant would cooperate with Plaintiff in the Franklin County lawsuit either by agreeing to a consent judgment or having an uncontested hearing on liability and damages." L.F. 369; App. at A-11. As discussed herein, there was substantial evidence supporting this finding.

In its judgment the circuit court stated that it found in favor of Hunter on Count I of her petition, which was denominated "Breach of Contract/Specific Performance" (L.F. 19), and ordered Moore to not allow American Family "to have control over the defense of the Lawsuit" and to "cooperate with Plaintiff in the Franklin County lawsuit … either by agreeing to a consent judgment or having an uncontested hearing on liability and damages." L.F. 373; App. at A-14.

In this appeal Moore does not contend that the circuit court erred in entering judgment for Hunter on her claims for breach of contract and specific performance. Moore challenges the sufficiency of the evidence of mutual mistake, but mutual mistake is not an element of a breach of contract claim. Moore's failure to assert that the entry of judgment in Hunter's favor on the breach of contract claim was erroneous provides an independent basis for affirmance. *Wells v. Carpenter*, 916 S.W.2d 405, 407 (Mo.App. S.D.1996). This Court should affirm on this basis "since the judgment of the trial court

must be affirmed if it is correct on any theory." *Id. See Graham*, 984 S.W.2d at 506 (stating that because appellate courts are "primarily concerned with the correctness of the trial court's result, … the judgment will be affirmed if cognizable under any theory").

CONCLUSION

For the reasons stated herein, the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that pursuant to Rule 84.06(c), this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 8,312 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft Word 2010.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of Respondent's Substitute Brief was submitted to the Court's electronic filing system on December 14, 2015, to be served by that system upon counsel of record:

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