**SC 95083**

**In the Missouri Supreme Court**

**Brittany Hunter, Respondent**

**v.**

**Charles Moore, Appellant**

**Appeal from the Circuit Court of St. Louis City**
**The Honorable David L. Dowd**
**Case No. 1222-CC10665**

# Appellant Charles Moore's Substitute Appellant's Brief

**Cheryl A. Callis #32955**
**Kenneth M. Lander #30296**
**Kortenhof McGlynn & Burns LLC**
**1015 Locust Street, Suite 710**
**St. Louis, MO 63101**
**314-621-5757 (phone)**
**314-621-5799 (fax)**
**cheryl@kmblaw1.com**
**ken@kmblaw1.com**

**Susan Ford Robertson #35932**
**J. Zachary Bickel #58731**
**The Robertson Law Group, LLC**
**1903 Wyandotte, Suite 200**
**Kansas City, MO 65108**
**816-221-7010 (phone)**
**816-221-7015 (fax)**
**susanr@therobertsonlawgroup.com**
**zachb@therobertsonlawgroup.com**

**Attorneys for Appellant Charles Moore**

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## Statement of the Issue

The issue is whether the trial court erred in entering judgment reforming a §537.065 agreement—which by its language was designed to protect Charles Moore's personal assets in the event an adverse judgment was entered in a pending personal injury case brought by Brittany Hunter—to add language changing the essential nature of the agreement—to require Charles Moore to agree to entry of a consent judgment or agree to an uncontested hearing on liability and damages, and to prohibit American Family from defending Moore. The stated terms protect Moore's personal assets in the event of an adverse judgment.

There are no terms within the agreement requiring Moore to agree in the future to a consent judgment or to an uncontested hearing on liability and damages, or prohibiting American Family from defending its insured. There are no written communications or draft agreements by and between the parties or their counsel evidencing an agreement to these terms. Nothing in the language of §537.065 R.S.Mo. requires the terms. Interpretive cases do not conclude §537.065 agreements assume the existence of the terms if not specifically set forth in the agreement. Instead, courts enforce §537.065 agreements pursuant to the specifically defined terms.

The trial court erred in reforming the agreement to include these terms because there was no evidence that the failure to include these terms was because of a mutual mistake. No evidence was adduced of any mistake in the language of the agreement, or that the agreement as written was not what the parties intended. Hunter's counsel's

testimony of what discussed and "understood" between the parties, and of what §537.065 agreements are "understood" to mean, is not sufficient to support reforming the agreement to materially alter its nature terms. Neither is the trial court's finding that "some" of Moore's counsel's testimony lacked credibility and showed "a lack of understanding as to how the case would proceed after the Settlement Agreement was entered into."

The court erred in materially altering the nature of the §537.065 agreement, from one of protection of assets to one requiring entry of a consent judgment or an uncontested hearing on liability and damages, and prohibiting American Family from defending Moore in the personal injury action. There is no evidence the failure to include these terms was because of a mutual mistake.

Reformation is an extraordinary remedy requiring clear and convincing evidence of a mutual mistake—in the language and terms used in the agreement, or the agreement fails to contain terms because of a mutual mistake. Missouri courts have enforced §537.065 agreements pursuant to the express stated terms, which have included terms such as the ones Hunter wants through her request for reformation. However, there is no case supporting reformation of a §537.065 based on an "understanding" of what a §537.065 agreement can mean—but does not expressly state. Hunter's evidence viewed under the relevant standard of review does not support reformation because of a "mutual mistake." The court's judgment lacks substantial evidence to support it and should be reversed.

## Jurisdictional Statement

This appeal is from a final judgment entered on March 4, 2014, in favor of Brittany Hunter reforming terms of a §537.065 agreement by adding terms requiring Charles Moore to enter into a consent judgment, or to not contest liability and damages, and to prohibit American Family from defending Moore in a pending personal injury case brought by Hunter against Moore. On April 11, 2014, Moore appealed to the Missouri Court of Appeals for the Eastern District. On April 14, 2015, the Missouri Court of Appeals for the Eastern District reversed the trial court's judgment. On April 29, 2015, Hunter filed an application for transfer at the appellate court level, which was denied on June 3, 2015. On June 18, 2015, Hunter filed an application for transfer before this Court, which was granted on September 22, 2015. This Court has jurisdiction pursuant to Article V, Section 3 of the Missouri Constitution.

## Statement of Facts

In the underlying action, the trial court entered judgment in favor of Brittany Hunter against Charles Moore reforming a §537.065 agreement entered into between the parties by adding the following terms:

1. Moore shall not allow American Family Mutual Insurance Company to have control over the defense of a liability case filed by Hunter against Moore pending in Franklin County;

2. Moore shall cooperate with Hunter in the Franklin County case, either by agreeing to a consent judgment or having an uncontested hearing on liability and damages. (L.F. 14, 15; Judgment attached at App. A-1.)

Hunter brought the underlying action seeking breach of contract and specific performance alleging Moore signed the §537.065 agreement, but then indicated that he no longer wanted to abide by the settlement agreement, and preferred American Family to defend him in the Franklin County litigation. Hunter requested that the trial court order Moore to take no further action in the Franklin County case and to cooperate in fulfilling all terms of the settlement agreement including payment of any sums due. (L.F. 18-21.)

Moore filed an answer admitting he signed the agreement but denied the agreement was enforceable because at the time he signed the agreement he was mistaken in believing that American Family was denying coverage, when in fact it was not and, in the alternative, the agreement applied "only in the event there was a judgment entered against him," which had not yet occurred. (L.F. 40-44.)

In response to Moore's answer, Hunter filed a pleading entitled "Affirmative Avoidances" asserting: "any discrepancy between the intention or understanding of the parties to the Settlement Agreement and the written expression of the intention or understanding of the parties is due to mutual mistake in drafting and scrivener error for which a decree of reformation is requested to fully express the intentions." (L.F.192-195.)

The §537.095 settlement agreement, signed by the parties states Hunter instituted litigation in Franklin County in the case titled B.J., a minor, by and through her next friend, J.S., v. Delta Motel, LLC and Charles Moore, Sr. seeking damages for personal injuries and damages she sustained as a result of negligence on the part of Delta Motel and Moore. (L.F.22; A-16-22)

The §537.065 agreement states at the time of the alleged negligence, Moore was insured under a policy of insurance issued by American Family and that Hunter desires to settle her claim against Moore within the limits of the American Family policy. The agreement recites Moore tendered the defense to American Family, who initially issued a reservation of rights letter, but upon Moore's refusal and rejection of the reservation of rights, American Family withdrew its reservation of rights. The agreement asserts American Family misrepresented its withdrawal of its reservation of rights and breached its policy of insurance by not dismissing Moore from a pending declaratory judgment action in St. Charles County and by filing a motion for summary judgment in the declaratory judgment action. (L.F. 21-28; A-16-22)

In the §537.065 agreement, Hunter agrees she will not seek satisfaction of any judgment reached in the Franklin County case against Moore's personal assets unless his net income exceeded $50,000 in any calendar year and she will seek satisfaction from the American Family policy. (L.F. 25, 26; A-16-22)

In the agreement, Moore's duties are defined as:

(a) To specifically assign to 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 his Personal Attorney, to pursue such claims, to file such claims or suit in the names of Moore, to cooperate in 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 on the basis of fifty percent (50%) distributed to Plaintiff and, fifty percent (50%) to be distributed to Moore for any Judgment or Settlement. However, if 50% of the amount recovered by Moore in such claims against American Family exceeds the amount necessary to satisfy any Judgment in the underlying lawsuit, the excess amount shall be divided between Plaintiff and Moore on the basis of fifty percent (50%) distributed to Plaintiff and, fifty percent (50%) to be distributed to Moore. (L.F. 37; A-16-22)

**An evidentiary hearing occurred on Hunter's claim for specific performance and reformation.**

An evidentiary hearing occurred on Hunter's request for specific performance and reformation on January 16, 2014. (Tr. 1-127.) James O'Leary, counsel for Hunter, and Patrick Horsefield, counsel for Moore, testified the terms Hunter requested the court enforce are not included in the agreement. (Tr. 42, 43, 49, 50, 104.)

Hunter presented evidence through her counsel, O'Leary, who testified that he had conversations with Moore's counsel, Horsefield, and thought it was "understood" that there would be an uncontested hearing in the personal injury action brought by Hunter against Moore, however, he testified it was "never our intent to have him confess judgment." (Tr. 86, 88.) Hunter's counsel admitted the agreement does not require Moore to agree to an uncontested hearing on liability and damages:

Q. Nowhere on Exhibit 2 does it say there will be an uncontested hearing on liability and damages in Franklin County in the underlying case, does it?

A. That's correct . . . (Tr. 64.)

O'Leary, testified that though the agreement he drafted did not set forth the terms 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. (Tr. 59-60, 104.) It was his opinion that "anybody that's been practicing tort law for more than five years" would understand that when you enter a 537 agreement those things are part of "overall umbrella" of the agreement. (Tr. 44.) O'Leary testified that he "intended" the

document to require Moore to roll over and allow a judgment against him in an uncontested trial, even though the agreement itself contains no such provision. (Tr. 104.)

When asked why he didn't include specific terms requiring Moore to agree to an uncontested hearing, he explained:

> Because it was understood between two practicing attorneys with substantial experience that the whole purpose of the 537.065 is to ensure that the insurance company no longer has the ability and the right to control the defense and according to all the case law that I reviewed on the mater, what typically occurs, the plaintiff either gets and agreement with the defendant as to as specific amount or what we were going to do in this case, have an uncontested hearing on liability and damages in front of a Judge and have the Court make a determination on the amount. (Tr. 107, 108.)

When asked regarding whether American Family was to be able to continue to defend Moore, O'Leary stated:

> Absolutely not. It's a 537.065. By the spirit of the statute and the case law that interprets that, it's an understanding that they absolutely have no right to control it. That's one of the benefits to the injured victim to enter into these type of arrangements. When there's been an improper denial of defense or DJ action. That's why the statute's there. (Tr. 87, 88.)

Hunter presented the testimony of Moore's counsel, Horsefield, who explained he had discussed the intent of the 537.065 with O'Leary. Horsefield explained to Moore his

personal assets would be protected by entering into the agreement because the plaintiff was agreeing to only execute any judgment against the American Family policy and certain assets (if his income exceeded $50,000 a year.) (Tr. 37-40, 42-44, 49, 50.) When questioned by Hunter's counsel regarding the issue of whether American Family could continue to defend Moore, Horsefield stated: "My understanding is it didn't address that one way or the other…What the agreement says, that if—actually, I don't know that we discussed anything regarding what this agreement required of him as to the underlying action." (Tr. 42, 43.) He explained it "depends, I think, on the situation" of whether insurance companies are permitted to continue to defend the insured after a 537.065 agreement is executed. (Tr. 43, 44.)

Horsefield's understanding and belief that a jury or a court (if there was no jury request) would still hear evidence and determine liability and damages.

Q . . . when you negotiated this 537 with attorney O'Leary, you believed that there would be a trial on liability and damages; is that correct?

A. I believe so, yeah.

Q. That was your intention at the time that you entered – assisted Mr. Moore, as you have testified, in entering into that agreement?

A. Yes. (Tr. 49-50.)

O'Leary testified he discussed the terms of the settlement agreement with Horsefield several times and exchanged multiple emails between them before executing the agreement and explained the parties' intent:

> Well, a 537.067 Settlement Agreement is a statutorily approved action in the State of Missouri. There's several cases that discuss how those are undertaken, but generally what occurs is there's a breach of a defense by the insurance company, by either filing a DJ action or filing a reservation of rights, which is rejected by the insured. As a result, the insured and the plaintiff or the person who was injured in the case are able to enter into an agreement whereby they agree to do certain things, and the general spirit of a 537 is stated in the statute and interpreted in Missouri law for the last several decades, is that essentially when a 537 is executed, the insurance company is no longer able to control the defense. That's one of the important overall views of a 537. The other portion of a 537, is the parties can make several different agreements and typically what's done is there is an agreement that there will be an uncontested hearing on liability and damages that the plaintiff will put on her evidence on liability and damages, the defense won't cross, the defense won't put on any evidence and then they'll either agree to a settlement, which wasn't done in this case, or they'll allow a Judge to make a determination based on the evidence on liability and damages which was the intent I had in this case and what I discussed with Patrick Horsefield several times throughout August of 2012. (Tr. 68, 69.)

O'Leary testified regarding his communications with Horsefield about settlement agreement:

> I contacted Mr. Horsefield, we negotiated terms back and forth. We finally reached what I believed was a document that would lay out the general spirit of the agreement, certainly calling it a 537.065 with counsel understanding that with the 537.065…the insurance company doesn't have the control of the defense anymore and that the plaintiff was going to have an uncontested hearing on liability and damages in front of a Judge to make a determination of first of all, is there liability and second of all, what is the extent of her harms and losses from her rape. So yes, we had that conversation. (Tr. 70.)

O'Leary explained the drafting process of the agreement. He prepared a draft 537 agreement and sent it to Horsefield for his review. (Tr. 85.) Some of the language in the 537 drafted by O'Leary was not acceptable to Horsefield. (T. 52.) Horsefield prepared an alternative 537 agreement which, in addition to some minor changes, completely eliminated O'Leary's fourth paragraph. (T. 53; A-42.) O'Leary's fourth paragraph provided:

> The parties further agree that in the event of a global settlement of all claims, including the underlying litigation and the claims for bad faith failure to settle, bad faith failure to defend and indemnify, and any other claim filed by Moore against American Family, plaintiff shall receive full compensation, plus interests and costs awarded plaintiff, set forth in any underlying judgment in the lawsuit before the parties split the proceeds from any settlement, verdict or judgment against American Family pursuant to the terms of paragraph 2 herein. (L.F. 27).

Hunter sought to enforce the 537 agreement which she represented had been agreed to and signed off on by both parties. (L.F. 18-39.) Horsefield testified regarding the negotiations as follows:

> I recognize the overall agreement. There were actually two versions. There was an initial agreement that was proposed. I offered some changes to that and sent it back to Mr. O'Leary that I assumed he agreed to because he told me he had his client sign it." (Tr. 34.)

According to Horsefield, he attached Moore's signature page to the 537 agreement that he prepared, which omitted the controversial paragraph, and returned that to O'Leary. (Tr. 52-53.) The 537 agreement signed by Hunter was O'Leary's proposed version which included the controversial paragraph. (Tr. 53-54.) O'Leary admitted that when he received the 537 agreement with Moore's signature from Horsefield, he may have removed Moore's signature page from that document and attached it to the back of his version of the agreement. (Tr. 91.)

**The trial court entered judgment reforming the settlement agreement.**

The trial court entered judgment in favor of Hunter reforming the settlement agreement to contain the following terms:

1. Moore shall not allow American Family Mutual Insurance Company to have control over the defense of a liability case filed by Hunter against Moore pending in Franklin County;

2. Moore shall cooperate with Hunter in the Franklin County case, either by agreeing to a consent judgment or having an uncontested hearing on liability and damages. (L.F. 14, 15; Judgment attached at App. A-1.)

In reaching its conclusions, the trial court found some of Horsefield's testimony showed a lack of understanding as to how the case would proceed after the agreement was entered into and to the extend his testimony could be construed to stand for the proposition that the parties did not agree Moore would cooperate with Hunter in the Franklin County case "either by agreeing to a consent judgment or having an uncontested hearing on liability and damages, the Court finds that testimony to lack credibility." (L.F. 365, 366.)

The trial court found that the settlement agreement references Butters v. City of Independence, 513 S.W.2d 418 (Mo. 1974); State ex rel. Rimco v. Dowd, 858 S.W.2d 307 (Mo.App. 1993) and Ballmer v. Ballmer, 923 S.W.2d 365 (Mo.App. 1996). The court stated the agreement recites these cases were used as a guide and notes Butters and Rimco involve settlements under §537.065 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. (L.F. 363, 364.)

The court concludes Hunter showed by clear and convincing evidence the parties mutually agreed to not allow American Family to have control over the defense and Moore would cooperate with Hunter by either agreeing to a consent judgment or having

an uncontested hearing on liability and damages. (L.F. 369.) From the trial court's judgment Moore appealed.

The Missouri Court of Appeals for the Eastern District of Missouri reversed the judgment concluding the court erred in granting reformation finding there was no mutual mistake in putting the parties' agreement into writing. (A-23-31.) The appellate court recognized an agreement under §537.065 does not require either party to agree to a consent judgment or admit liability, and directly analogous to Schmitz v. Great Am. Assurance Co., 337 S.W.3d 700, 704 (Mo. banc 2011), the parties in the instant case agreed to limit any potential recovery to an insurance policy, but did not make any agreement as to liability or damages. (Op. at 8, 9.) The appellate court concluded "there was no mutual mistake in putting the parties' agreement into writing." (Op. at 9.)

Hunter filed an application for transfer, which this Court sustained on September 22, 2015.

## Point Relied On

**The trial court erred in entering judgment against Charles Moore reforming a §537.065 agreement requiring Moore to agree to a consent judgment or an uncontested hearing on liability and damages and prohibiting American Family from defending him in a personal injury case brought by Britney Hunter against Moore pending in Franklin County because the judgment lacks substantial evidence in that: 1) the §537.065 agreement was one regarding collection of assets in the event a judgment was entered and did not contain the terms at issue; 2) neither §537.065 R.S.Mo. nor interpretive cases assume or require these terms to be included in a §537.065 agreement; and 3) no substantial evidence was adduced the language used, or the failure to include the terms at issue, in the agreement was because of mutual mistake.**

Husch & Eppenberger, LLC, v. Eisenberg,

213 S.W.3d 124 (Mo. App. 2007).

Schmitz v. Great American Assur. Co.,

337 S.W.3d 700 (Mo. banc 2011).

Lavelock v. Cooper Tire & Rubber Co.,

169 S.W.3d 865 (Mo. banc 2005).

Section 537.065 R.S.Mo.

## Argument

**The trial court erred in entering judgment against Charles Moore reforming a §537.065 agreement requiring Moore to agree to a consent judgment or an uncontested hearing on liability and damages and prohibiting American Family from defending him in a personal injury case brought by Britney Hunter against Moore pending in Franklin County because the judgment lacks substantial evidence in that: 1) the §537.065 agreement was one regarding collection of assets in the event a judgment was entered and did not contain the terms at issue; 2) neither §537.065 R.S.Mo. nor interpretive cases assume or require these terms to be included in a §537.065 agreement; and 3) no substantial evidence was adduced the language used, or the failure to include the terms at issue, in the agreement was because of mutual mistake.**

The trial court erred in using reformation to materially change the §537.065 agreement entered into between Hunter and Moore—from an agreement regarding collection of assets in the event a judgment was entered in a pending personal injury action brought by Hunter against Moore—to one requiring Moore to agree to a consent judgment, or an uncontested hearing on liability and damages, and prohibiting American Family from defending Moore. The agreement was designed to protect Moore's personal assets in the event of an adverse judgment, but it did not require Moore to agree in the

future to a consent judgment or to an uncontested hearing on liability and damages or prohibit American Family from defending its insured.

Hunter adduced no written communications or draft agreements by and between the parties or their counsel evidencing an agreement to these terms. Nothing in §537.065 R.S.Mo. or interpretive cases assume or require these terms. (A-32.) Instead, courts enforce §537.065 agreements pursuant to the specifically defined terms.

The trial court erred in reforming the agreement to include these terms because there was no evidence that the failure to include these terms was because of a mutual mistake. No evidence was adduced of any mistake in the language of the agreement, or that the agreement as written was not what the parties intended. Hunter's counsel's testimony of what discussed and "understood" between the parties, and of what §537.065 agreements are "understood" to mean, is not sufficient to support reforming the agreement to materially alter its nature and terms. Neither is the trial court's finding that "some" of Moore's counsel's testimony lacked credibility and showed "a lack of understanding as to how the case would proceed after the Settlement Agreement was entered into."

The court erred in materially altering the nature of the §537.065 agreement, from one of protection of assets to one requiring entry of a consent judgment or an uncontested hearing on liability and damages, and prohibiting American Family from defending Moore in the personal injury action. Absent evidence of mutual mistake, reformation was improper and the trial court's judgment should be reversed.

**Standard of review**

This court affirms the underlying judgment for reformation and specific performance unless the judgment lacks substantial evidence or if it is against the weight of the evidence. Ivie v. Smith, 439 S.W.3d 189, 198, 199 (Mo. banc 2014); Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976); Eaton v. Mallinckrodt, Inc., 224 S.W.3d 596, 599 (Mo. banc 2007). The same standard of review applies in all types of court-tried cases, regardless of the burden of proof at trial. Ivie, 439 S.W.3d at 199. Both specific performance (moving for specific performance of a purported settlement agreement) and reformation carry a high burden of proof requiring proof by clear, cogent and convincing evidence. Everhart v. Westmoreland, 898 S.W.2d 634, 637 (Mo.App. 1995); Eaton, 224 S.W.3d at 599; Landmark Bank v. First Nat. Bank in Madison, 738 S.W.2d 922, 923 (Mo.App. 1987); Grant v. Sears, 379 S.W.3d 905, 914 (Mo.App. 2012).

Substantial evidence is "evidence that, if believed, has some probative force on each fact that is necessary to sustain the circuit court's judgment." Ivie, 429 S.W.3d at 199. Evidence has probative force if it "has any tendency to make a material fact more or less likely." Id. Appellate courts view the evidence in the light most favorable to the circuit court's judgment, defer to the circuit court's credibility determinations, accept at true the evidence and inferences favorable to the judgment and disregard all contrary evidence. In re J.A.R., 426 S.W.3d 624, 626, 631, 632, n. 14 (Mo. banc 2014); Ivie, 429 S.W.3d at 200; Zweig v. Metro. St. Louis Sewer Dist., 412 S.W.3d 223, 231 (Mo. banc 2013). To prevail on a substantial-evidence challenge, the appellant must demonstrate

there is no evidence in the record tending to prove a fact that is necessary to sustain the circuit court's judgment as a matter of law. Ivie, 439 S.W.3d at 200.

**The court erred in reforming the §537.065 agreement materially altering its nature from one specifying obligations and protections regarding collection of assets in the event a judgment is entered to one requiring entry of a consent judgment or uncontested hearing and prohibiting American Family from defending Moore.**

The §537.065 agreement entered into between Hunter and Moore does not contain the terms Hunter requested the circuit court specifically enforce. (A-16-22.) Moore's specified duties are:

> (a) To specifically assign to 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 his Personal Attorney, to pursue such

> claims, to file such claims or suit in the names of Moore, to cooperate in 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 on the basis of fifty percent (50%) distributed to Plaintiff and, fifty percent (50%) to be distributed to Moore for any Judgment or Settlement. However, if 50% of the amount recovered by Moore in such claims against American Family exceeds the amount necessary to satisfy any Judgment in the underlying lawsuit, the excess amount shall be divided between Plaintiff and Moore on the basis of fifty percent (50%) distributed to Plaintiff and, fifty percent (50%) to be distributed to Moore. (L.F. 37; A-16-22.)

Hunter requested the circuit court "reform" the agreement to require Moore to agree to a consent judgment or an uncontested hearing on liability and damages and to prohibit American Family from defending Moore in the pending personal injury action brought by Hunter. Hunter asserted reformation was necessary because of "mutual mistake."

**Reformation is an extraordinary remedy requiring proof of mutual mistake causing the contract language to differ from what the parties intended.**

"Reformation is a remedy by which a party to the contract may obtain a modification of the terms of the contract such that those terms reflect the original intent of the parties in forming the contract." Husch & Eppenberger, LLC, v. Eisenberg, 213

S.W.3d 124, 133 (Mo.App. 2007); Lunceford v. Houghtlin, 170 S.W.3d 453, 464 (Mo.App. 2005). "A party seeking reformation must establish that a mistake occurred that caused the contract language to differ from what the parties intended in their agreement." Id.

Reformation is an extraordinary equitable remedy that requires a showing that due to either mutual mistake or fraud, the 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, 213 S.W.3d at 133, 134; Elton v. Davis, 123 S.W.3d 205, 212 (Mo.App. 2003); Alea London, Ltd. v. Bono-Soltysiak Enterprises, 186 S.W.3d 403, 416 (Mo.App. 2006). Reformation will only be granted where there is "clear, cogent, convincing evidence, beyond a preponderance of the evidence and so as to leave no room for reasonable doubt." American Family Mut. Ins. Co. v. Bach, 471 S.W.2d 474, 477 (Mo. 1971).

A mutual mistake is determined to have occurred when both parties, at the time of contracting, share a misconception about a basic assumption or vital fact upon which they based their bargain. Husch & Eppenberger, 213 S.W.3d at 134. A unilateral mistake is a mistake on the part of only one of the parties and it is not generally sufficient to provide a basis upon a trial court can reform the terms. Id.; State ex rel. State Highway Commission v. Schwabe, 335 S.W.2d 15, 19 (Mo. 1960); Cardinal Partners LLC v. Desco Investment Co.. LLC, 301 S.W.3d 104, 110 (Mo.App. 2010).

In Husch & Eppenberger, both parties to the release at issue testified that they intended that though the release named the law firm, that it was to include two of the law firm partners, even though their names were not specified. The appellate court concluded that under these facts, the trial court did not err in reforming the release to include Goss and McKee. Id.

**Reformation was improper because there was no evidence of mutual mistake causing the contract language to differ from what the parties intended.**

Hunter failed to present evidence sufficient to support reformation of the settlement agreement. James O'Leary, counsel for Hunter, and Patrick Horsefield, counsel for Moore, testified the terms Hunter requested the court enforce are not included in the agreement. (Tr. 42, 43, 49, 50, 104.)

Hunter presented evidence through her counsel, O'Leary, who testified that he had conversations with Moore's counsel, Horsefield, and thought it was "understood" that there would be an uncontested hearing in the personal injury action brought by Hunter against Moore, however, he testified it was "never our intent to have him confess judgment." (Tr. 86, 88.) Hunter's counsel admitted the agreement does not require Moore to agree to an uncontested hearing on liability and damages:

> Q. Nowhere on Exhibit 2 does it say there will be an uncontested hearing on liability and damages in Franklin County in the underlying case, does it?
>
> A. That's correct . . . (Tr. 64.)

O'Leary, testified that though the agreement he drafted did not set forth the terms 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. (Tr. 59-60, 104.) It was his opinion that "anybody that's been practicing tort law for more than five years" would understand that when you enter a 537 agreement those things are part of "overall umbrella" of the agreement. (Tr. 44.) O'Leary testified that he "intended" the document to require Moore to roll over and allow a judgment against him in an uncontested trial, even though the agreement itself contains no such provision. (Tr. 104.)

When asked why he didn't include specific terms requiring Moore to agree to an uncontested hearing, he explained:

> Because it was understood between two practicing attorneys with substantial experience that the whole purpose of the 537.065 is to ensure that the insurance company no longer has the ability and the right to control the defense and according to all the case law that I reviewed on the mater, what typically occurs, the plaintiff either gets and agreement with the defendant as to as specific amount or what we were going to do in this case, have an uncontested hearing on liability and damages in front of a Judge and have the Court make a determination on the amount. (Tr. 107, 108.)

When asked regarding whether American Family was to be able to continue to defend Moore, O'Leary stated:

> Absolutely not. It's a 537.065. By the spirit of the statute and the case law that interprets that, it's an understanding that they absolutely have no right to control it. That's one of the benefits to the injured victim to enter into these type of arrangements. When there's been an improper denial of defense or DJ action. That's why the statute's there. (Tr. 87, 88.)

Hunter presented the testimony of Moore's counsel, Horsefield, who explained he had discussed the intent of the 537.065 with O'Leary. Horsefield explained to Moore his personal assets would be protected by entering into the agreement because the plaintiff was agreeing to only execute any judgment against the American Family policy and certain assets (if his income exceeded $50,000 a year.) (Tr. 37-40, 42-44, 49, 50.) When questioned by Hunter's counsel regarding the issue of whether American Family could continue to defend Moore, Horsefield stated: "My understanding is it didn't address that one way or the other…What the agreement says, that if—actually, I don't know that we discussed anything regarding what this agreement required of him as to the underlying action." (Tr. 42, 43.) He explained it "depends, I think, on the situation" of whether insurance companies are permitted to continue to defend the insured after a 537.065 agreement is executed. (Tr. 43, 44.)

Horsefield's understanding and belief that a jury or a court (if there was no jury request) would still hear evidence and determine liability and damages.

> Q . . . when you negotiated this 537 with attorney O'Leary, you believed that there would be a trial on liability and damages; is that correct?

A. I believe so, yeah.

Q. That was your intention at the time that you entered – assisted Mr. Moore, as you have testified, in entering into that agreement?

A. Yes. (Tr. 49-50.)

O'Leary testified he discussed the terms of the settlement agreement with Horsefield several times and exchanged multiple emails between them before executing the agreement and explained the parties' intent:

> Well, a 537.067 Settlement Agreement is a statutorily approved action in the State of Missouri. There's several cases that discuss how those are undertaken, but generally what occurs is there's a breach of a defense by the insurance company, by either filing a DJ action or filing a reservation of rights, which is rejected by the insured. As a result, the insured and the plaintiff or the person who was injured in the case are able to enter into an agreement whereby they agree to do certain things, and the general spirit of a 537 is stated in the statute and interpreted in Missouri law for the last several decades, is that essentially when a 537 is executed, the insurance company is no longer able to control the defense. That's one of the important overall views of a 537. The other portion of a 537, is the parties can make several different agreements and typically what's done is there is an agreement that there will be an uncontested hearing on liability and damages that the plaintiff will put on her evidence on liability and damages, the defense won't cross, the defense won't put on any evidence and then they'll either agree to

> a settlement, which wasn't done in this case, or they'll allow a Judge to make a determination based on the evidence on liability and damages which was the intent I had in this case and what I discussed with Patrick Horsefield several times throughout August of 2012. (Tr. 68, 69.)

O'Leary testified regarding his communications with Horsefield about settlement agreement:

> I contacted Mr. Horsefield, we negotiated terms back and forth. We finally reached what I believed was a document that would lay out the general spirit of the agreement, certainly calling it a 537.065 with counsel understanding that with the 537.065…the insurance company doesn't have the control of the defense anymore and that the plaintiff was going to have an uncontested hearing on liability and damages in front of a Judge to make a determination of first of all, is there liability and second of all, what is the extent of her harms and losses from her rape. So yes, we had that conversation. (Tr. 70.)

**§537.065 and interpretive cases do not require a defendant to agree to the terms.**

Section 537.065 states:

> Any person having an unliquidated claim for damages against a tort-feasor, on account of bodily injuries or death, may enter into a contract with such tort-feasor or any insurer in his behalf or both, whereby, in consideration of the payment of a specified amount, the person asserting the claim agrees that in the event of a judgment against the tort-feasor, neither he nor any person, firm or corporation

> claiming by or through him will levy execution, by garnishment or as otherwise provided by law, except against the specific assets listed in the contract and except against any insurer which insures the legal liability of the tort-feasor for such damage and which insurer is not excepted from execution, garnishment or other legal procedure by such contract. Execution or garnishment proceedings in aid thereof shall lie only as to assets of the tort-feasor specifically mentioned in the contract or the insurer or insurers not excluded in such contract. (A-32.)

Nothing in the statute requires a tortfeasor to enter into a consent judgment or to and uncontested hearing on liability and damages. Nothing in the statute prohibits an insurance company from continuing to defend its insured who may have entered into a §537.065 agreement. Instead, this statute provides a claimant and tortfeasor may contract to limit recovery to specific assets or insurance contracts. Butters v. City of Independence, 513 S.W.2d 418 (Mo. 1974).

There is nothing in the statute or in the §537.065 agreement requiring Moore to consent to judgment or prohibited him or his insurer, American Family, from defending on the issues of liability and damages. The mere existence of a §537.065 agreement does not preclude the defendant from participating in a contested trial on liability and damages. Schmitz v. Great American Assur. Co., 337 S.W.3d 700, 704 (Mo. banc 2011) (though the §537.065 agreement specified if a judgment was entered against the tortfeasor and the plaintiffs would limit any recovery to the insurance policies, there was no agreement

concerning the tortfeasor's liability or damages; "Instead, those matters would be submitted to the trial court.").

Hunter could have included specific terms in the agreement limiting Moore's ability to contest liability and damages. Whitehead v. Lakeside Hosp. Ass'n, 844 S.W.2d 475, 477 (Mo.App. 1992) (pursuant to the terms of the §537.065 agreement, the tortfeasor agreed not to defend the suit, or present evidence or cross-examine any witnesses at trial); Rinehart,et al v. Anderson, 985 S.W.2d 363, 365, 371 (Mo.App. 1999) (defendant agreed in the §537.065 agreement "to allow a default judgment to be taken against him" and submit the issue of damages to the trial court); Shelter Mut. Ins. Co. v. Crunk, 102 S.W.23d 560 (Mo.App. 2003); Cologna v. Farmers and Merchant's Ins. Co., 785 S.W.2d 691, 695 (Mo.App.1990); Intermed Ins. Co. v. Doyle B. Hill, D.O.. 376 S.W.3d 84 (Mo.App. 2012).

In Cologna, the agreement stated in part:

(1) " Rita Agrees:

a. To speak truthfully when giving testimony concerning the facts and circumstances surrounding the death of Eugene F. Cologna, Jr. and any investigation conducted thereafter;

b. To refuse to permit any insurance company to defend the lawsuit filed by [Paulette] unless the company first admits that the applicable insurance policy provides coverage for any liability on the part of [Rita] for the death of Eugene F. Cologna, Jr.; and

> c. To allow [Paulette] to take a default judgment against her if no insurance company defends the lawsuit in conformity with the terms outlined in Section (b) above."

Cologna, 785 S.W.2d at 695.

In Intermed, the agreement stated in part:

> (2) "Prior to trial, Dr. Hill, Clinic, Management Company, and Cincinnati Insurance Company entered into a section 537.065 settlement agreement with Appellant. Under that agreement, Cincinnati Insurance Company agreed to pay Appellant against all defendants except Clinic. As for Clinic, it agreed: 1) to stipulate to many of the facts alleged in Appellant's lawsuit; and 2) that it would not oppose any evidence Appellant offered at trial. In return, Appellant agreed that she would seek to recover no more than $1,242,500 from Clinic and would seek to enforce any such judgment only against Intermed. Dr. Hill, Clinic, and Management Company also assigned their rights under the Intermed policy to Appellant."

Intermed, 376 S.W.3d at 87.

These cases demonstrate that parties do on occasion insert specific terms requiring a tortfeasor to agree to a consent judgment or an uncontested hearing on liability and/or on damages. However, absent specific terms contained in the judgment, the trial court was prohibited from adding the terms unless Hunter proved by clear and convincing evidence the failure to include the terms in the agreement was because of mutual mistake.

Hunter and the trial court note that the §537.065 agreement recites State ex rel. Rimco, Inc. v. Dowd, 858 S.W.2d 307 (Mo.App. 1993); Butters v. City of Independence, 513 S.W.2d 418 (Mo. 1974); Ballmer v. Ballmer, 923 S.W.2d 365 (Mo.App. 1996). However, none of these cases support reformation. Rimco addressed whether it was proper for the trial court to stay a liability proceeding to permit the insurance company to proceed in a declaratory judgment action addressing coverage; Butters was a garnishment proceeding; and Ballmer involved the denial of an insurer's request to intervene in an underlying liability case. None involved the issues present before this Court.

Hunter failed to adduce clear and convincing evidence that the agreement contained the terms she requested the trial court to enforce and the trial court erred in adding terms that the parties did not agree to. Lavelock v. Cooper Tire & Rubber Co., 169 S.W.3d 865, 866 (Mo. banc 2005); Lugena v. Hanna, 420 S.W.2d 335, 341 (Mo. 1967) Lugena, 420 S.W.2d at 341. See also Bearup v. Equitable Life Assurance Soc. Of the U.S., 172 S.W.2d 942, 945 (Mo. 1943) (absent a meeting of the minds, and in the presence of open propositions, the contract is not complete or binding); Roberts v. City of St. Louis, 254 S.W.3d 280, 284, 285 (Mo.App. 2008) (same); New Medico Associates, Inc. v. Snadon, 855 S.W.2d 489 (Mo.App. 1993) (same).

In Lavelock, this Court found that the release documents signed by the parties did not require Cooper Tire to maintain or index the confidential documents as required by the trial court. This Court found that the parties contemplated the handling of confidential documents post-settlement (because the agreement stated that Customers to

return the confidential material to Cooper Tire within 20 days of the termination of the cause), "but did not include maintenance or indexing requirements as part of their written agreement." Lavelock, 169 SW.3d at 866, 867. This Court reversed the trial court's judgment adding terms to the settlement agreement because the 'trial court erred in imposing provisions that were not included in the settlement agreement." Id., at 867.

The court erred in materially altering the nature of the §537.065 agreement, from one of protection of assets to one requiring entry of a consent judgment or an uncontested hearing on liability and damages, and prohibiting American Family from defending Moore in the personal injury action. There is no evidence the failure to include these terms was because of a mutual mistake.

Reformation is an extraordinary remedy requiring clear and convincing evidence of a mutual mistake—in the language and terms used in the agreement, or the agreement fails to contain terms because of a mutual mistake. Hunter's evidence viewed under the relevant standard of review does not support reformation because of a "mutual mistake." The court's judgment lacks substantial evidence to support it and should be reversed.

**Conclusion**

Wherefore, for the above set forth reasons, Appellant Charles Moore moves that this court reverse the trial court's judgment in all respects and for whatever further relief this court deems fair and just.

/s/ Susan Ford Robertson
Susan Ford Robertson #35932
The Robertson Law Group, LLC

1903 Wyandotte, Suite 200
Kansas City, MO 64108
816-221-7010 (phone)
816-221-7015 (fax)
susanr@therobersonlawgroup.com
zachb@therobertsonlawgroup.com

Cheryl A. Callis - #32955
Kenneth M. Lander - #30296
1015 Locust Street, Suite 710
St. Louis, Missouri 63101
(314) 621-5757 (phone)
(314) 621-5799 (fax)

Attorneys for Appellant Charles Moore

## Appendix—electronically filed separately

## Certificate of Service and Compliance

Susan Ford Robertson, of lawful age, first being duly sworn, states upon her oath that on November 9, 2015, a copy of Appellant's Substitute Appellant's Brief and Appendix was served by electronic mail upon: Mr. Michael W. Manners at mike@lelaw.com; Mr. Joseph F. Yeckel at joe@yeckel-law.com and Mr. Matthew P. O'Grady at mpo@gradylawfirm.net as counsel for Respondent Brittany Hunter. I also certify that the attached brief complies with the Supreme Rule 84.06(b) and contains 8,109 words, excluding the cover, the certification and the appendix as determined by Microsoft Word software.

/s/ Susan Ford Robertson
SUSAN FORD ROBERTSON, Attorney