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 Reply Brief

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Argument

In the underlying action, the trial court erred in reforming the §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.

Hunter admits the court was wrong in adding language requiring Moore to agree to a consent judgment. (Respondent's brief at page 15, footnote 5.) Hunter's attempt to avoid a reversal by this Court by arguing the error is "harmless" is in itself wrong. Reformation is an extraordinary remedy that should be granted "with great caution and only in clear cases of fraud or mistake." Alea London Ltd, v. Bono-Soltysiak Enterprises, 186 S.W.3d 403, 415 (Mo.App. 2006). There is nothing "harmless" about reforming the 537.065 agreement that by its terms 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 requiring Moore to agree to a consent judgment. Hunter asserts Moore has a "choice" of agreeing to a consent judgment or an uncontested hearing. That does not cure the error or make it "harmless." The trial court had no evidence upon which to reform the agreement to add a provision requiring Moore

to agree to a consent judgment. At a minimum, the trial court's judgment must be reversed in part as there is no evidence to support reformation to require Moore to agree to a consent judgment.

In addition, the judgment should be reversed in full because there is no substantial evidence to support the other two additions. Hunter's brief fails to point to any language of §537.065 R.S.Mo. or any case requiring these terms for every §537.065 agreement or concluding that every $537.065 agreement necessarily includes these terms—even if the agreement is silent on these terms.

By definition, §537.065 agreements are contracts to limit recovery to specified assets or insurance contracts. Nothing in the statute requires a defendant entering into a §537.065 to agree to an uncontested hearing on liability or damages or requires the defendant to prohibit the insurance company from continuing to provide a defense. This Court recognizes a defendant may—but is not required—to agree to admit liability and/or damages when entering into a §537.065 agreement. Schmitz v. Great American Assur. Co., 337 S.W.3d 700, 708, 709 (Mo. banc 2011) (the agreement did not admit liability or damages; instead, it simply limited the collection of any judgment against the defendant to the insurance policies); see Rinehart v. Anderson, 985 S.W.2d 363, 365, 366 (Mo.App. 1998) (plaintiff and defendant entered into §537.065 agreement allowing plaintiff to take a default on liability but damages issue was contested).

The trial court and Hunter rely upon the fact that the agreement states the parties "specifically considered" State ex rel. Rimco v. Dowd, 858 S.W.2d 307 (Mo.App. 1993)

and Butters v. City of Independence, 513 S.W.2d 418 (Mo. 1974). However, these cases do not provide support for Hunter's request to reform her agreement with Moore to require him to consent to a judgment for liability and damages or to prohibit American Family from continuing to defend him in the action—when the agreement is silent on these terms and the party to the agreement disputes he agreed to them.

In fact, all cases consistently recognize and enforce these agreements pursuant to the expressed terms. Schmitz, 337 S.W.3d at 704 (the parties agreed that if a judgment was entered against the defendant, the plaintiffs would limit any recovery to the insurance policies and there was no agreement concerning the defendant's liability or damages); Whitehead v. Lakeside Hosp. Ass'n, 844 S.W.2d 475, 477 (Mo.App. 1992) (tortfeasor agreed, pursuant to the terms of the §537.065 agreement, not to defend the suit, or present evidence or cross-examine any witnesses at trial); Cologna v. Farmers and Merchant's Ins. Co., 785 S.W.2d 691, 695 (Mo.App.1990) (within the terms of the §537.065 the defendant agreed to refuse to permit the insurance company to defend the liability case unless the insurance company first admits coverage exists); Intermed Ins. Co. v. Doyle B. Hill, D.O.. 367 S.W.3d 84, 87 (Mo.App. 2012) (defendant agreed, pursuant to the terms of the §537.065 settlement agreement to stipulate to and to not oppose any evidence offered by plaintiff).

As in Schmitz, Hunter and Moore signed an agreement that limited any potential recovery to an insurance policy but did not make any agreement as to liability or damages. The trial court erred in reforming the agreement to include the disputed terms. Hunter

argues the terms added by the trial court are material and critical to the nature of the agreement. Yet, Hunter, despite her counsel's drafting of the agreement never included these terms. She can point to no draft agreement, email or correspondence between the parties that documents, memorializes or even mentions these terms. She has her counsel's testimony that he and Moore's counsel agreed to these terms, but Hunter's counsel gave no explanation as to why these terms (particularly if so material) are absent from the signed agreement—other than her counsel's belief that is what all 537.065 agreements are designed to do.

Reformation is inappropriate to materially change the 537.065 agreement from one protecting Moore's assets in the event of a judgment to one requiring a judgment without Moore's or his counsel's active participation. Unlike other reformation cases, Hunter actually wants enforcement of every term in the agreement as worded—but she also wants additional terms added separate and independent of the existing terms. She can point to no case authorizing reformation in this circumstance.

Hunter's cases do not support reformation. In Kopff v. Economy Radiator Service, 838 S.W.2d 449 (Mo.App. 1992), the court reformed the amount of coverage shown on an insurance policy because the policy coverage amount shown was wrong in containing a clerical error, which was the product of a mutual mistake between the parties on reciting the amount of coverage. In Everhart v. Westmoreland, 898 S.W.2d 634 (Mo.App. 1995) the court reformed a general release because both parties to the release

agreed that at the time of entering into the release, both parties were mistaken because neither knew that someone else was responsible for the accident.

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 base their bargain. Alea, 186 S.W.3d at 415. In other words, reformation is proper "only when the instrument reflects what neither party intended." Galemore v. Haley, 471 S.W.2d 518, 524 (Mo.App. 1971). Reformation is improper as Hunter failed to present substantial evidence that the agreement entered into between her and Moore reflected what neither intended. To the contrary, under the evidence presented, the agreement as worded does what Hunter and Moore wanted—in the event of an adverse judgment, Moore's personal assets are protected and Moore will cooperate with and assist in an any actions he may have against American Family and any recovery will be divided between Hunter and Moore as specified.

There is no case supporting reformation of an agreement, drafted and executed in conformity with §537.065 R.S.Mo., containing no mistake as to the language used, to add separate and independent terms not contained in the agreement—and not in the agreement because of a mutual mistake. Intent, absent a mutual mistake, is insufficient. Reformation is improper "when the complaining party had within his reach the true state of facts, and, without being induced by the other party, neglected to avail himself of his opportunities of information." Alea, 186 S.W.3d at 416, quoting, Croy v. Zalma Reorganized School Dist. R-V, 434 S.W.2d 517, 522 (Mo. 1968).

Contrary to Hunter's assertion, Moore provided this Court with a complete description of the record, in conformity with the appropriate standard of review, which does not support reformation. The agreement, as worded, does what Hunter and Moore wanted—in the event of an adverse judgment—Moore's assets are protected and Moore agrees to assist Hunter in the pursuit of any claims he may have against American Family and share with Hunter any recovery. The judgment of reformation should be reversed. The trial court did not find in favor of Hunter on any breach of contract, instead, the court reformed the agreement prior to finding specific performance was to be ordered. At the crux of the court's judgment is its finding of reformation. Without it, there is nothing to breach or order specifically performed. The agreement as worded is a standard §537.065 that specifies duties in the event of an adverse judgment. As the agreement was not a settlement between the parties, and as the underlying Franklin County action is still pending, Moore cannot be in breach or ordered to perform the terms Hunter wanted absent reformation.

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 indefinite or the language used in the agreement was not what the parties intended. To the contrary, Hunter's evidence is clear that Hunter and Moore agreed to the terms contained in the agreement. However, there is not substantial evidence supporting the addition of what Hunter characterizes as material terms requiring

Moore to agree to an uncontested hearing on liability and damages and to prohibit American Family from continuing to defend him. 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 the terms were not included because of a mutual mistake, reformation was improper and the trial court's judgment 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.

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Certificate of Service and Compliance

Susan Ford Robertson, of lawful age, first being duly sworn, states upon her oath that on January 8, 2016, a copy of Appellant's Substitute Reply Brief 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 1,962 words, excluding the cover, the certification and the appendix as determined by Microsoft Word software.

/s/ Susan Ford Robertson
SUSAN FORD ROBERTSON, Attorney