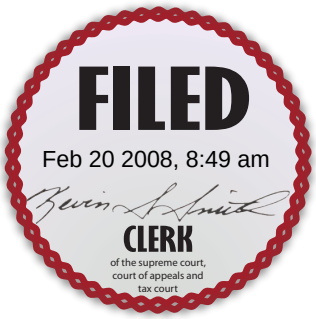

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IN THE
COURT OF APPEALS OF INDIANA

BRIAN S. ENTWISTLE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 62A05-0707-CV-410
	)	
JAMES ROGAN,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE PERRY CIRCUIT COURT
The Honorable Jonathan Parkhurst, Judge
Cause No. 62C01-0602-CT-82

February 20, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Brian S. Entwistle appeals the trial court's denial of his motion for summary judgment and entry of partial summary judgment in favor of James Rogan on the issue of whether a release executed by Rogan should be rescinded.

We affirm.

ISSUE

Whether the trial court properly granted Rogan's motion for partial summary judgment and denied Entwistle's motion for summary judgment.

FACTS

On February 17, 2004, Entwistle was driving a truck on County Road 11 in Perry County when he turned left in front of a vehicle being driven by Rogan. As a result of the collision, Rogan sustained bodily injuries and his vehicle was damaged. Jeffrey Simpson owned the truck driven by Entwistle and had given Entwistle permission to drive the truck.

At the time of the accident, Rogan maintained automobile-insurance coverage, which included underinsured-motorist ("UIM") coverage, through a policy issued by State Farm Mutual Automobile Insurance Company ("State Farm"). Entwistle maintained automobile-insurance coverage through a policy issued by American Family Insurance ("American Family"). Entwistle's policy provided liability limits for bodily injury in the amount of $50,000 per person and $100,000 per accident. Simpson maintained automobile-insurance coverage through a policy issued by Farmers

Automobile Insurance Association ("Farmers"). The Farmers policy provided liability limits for bodily injury in the amount of $50,000.

A deputy with the Perry County Sheriff's Department investigated the accident and completed an Indiana Officer's Standard Crash Report (the "Report"). The deputy listed Entwistle's personal information in the drivers information section of the Report. This area did not include a section for insurance coverage maintained by the driver.

The Report had a separate section for information regarding the vehicle driven by Entwistle. In this section, the investigating officer listed the vehicle's make, model and under what company the vehicle was insured. The investigating officer wrote "Farmers Auto" for the insurance company. (App. 115). The investigating officer also listed Simpson as the registered owner and included Simpson's personal information.

Following the accident, Entwistle contacted Richard Werner, an agent for American Family, and notified him of the accident. Based on his conversation with Werner, Entwistle was led to believe that Farmers "would take care of the accident." (App. 108). Accordingly, Entwistle "expected [Farmers] to investigate, adjust and/or settle any claims made against [him] arising from the February 17, 2004, motor vehicle accident within the limits of their coverage." (App. 108). Entwistle did not inform either Rogan or Farmers that he maintained automobile insurance.

With respect to the accident, Farmers considered Entwistle an "insured" under its policy due to his use of the truck with Simpson's permission and pursuant to Indiana

Code section 27-8-9-7.[1] Farmers, however, did not contact Entwistle and inquire whether he maintained his own automobile insurance.

On or about January 26, 2006, Farmers offered Rogan the limits of its liability coverage in exchange for his release of all claims against Simpson and Entwistle. When Farmers made its offer to Rogan, Farmers "was not aware that [Entwistle] was a named insured on any automobile liability insurance policy(ies) applicable to the collision of February 17, 2004." (App. 102).

Rogan agreed to execute a release in exchange for $50,000—the liability limits for bodily injury. Rogan first sought to exhaust liability limits of the Farmers policy; Rogan then could pursue a UIM claim against State Farm.[2] Rogan therefore asked Farmers to include a provision in the release specifically reserving Rogan's claims against State Farm for UIM coverage. Farmers complied and "revised the release . . . to state that [Rogan] 'is specifically reserving his claims against his underinsured motorist and umbrella insurer(s).'" (App. 103).

Subsequently, State Farm authorized Rogan to release Entwistle from liability because State Farm did not believe that Entwistle had assets that State Farm could pursue through subrogation. State Farm based this belief on a report from International Claims

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[1] Indiana Code section 27-8-9-7(b) provides as follows:

> In any case arising from a permittee's use of a motor vehicle for which the owner of the vehicle has motor vehicle insurance coverage, the owner's motor vehicle insurance coverage is considered primary if both of the following apply:
> (1) The vehicle, at the time damage occurred, was operated with the permission of the owner of the motor vehicle.
> (2) The use was within the scope of the permission granted.

[2] Rogan's claims, including medical expenses and lost wages, totaled more than $900,000.00.

Specialists, which State Farm had received on or about January 12, 2006. Although the report listed few assets owned by Entwistle, it did indicate that he owned a 1993 Chevy truck and that American Family insured the truck.

On or about February 10, 2006, Rogan entered into a settlement agreement with Farmers and executed a release, releasing all claims against Entwistle, Simpson and Simpson's spouse. The release stated, in pertinent part, as follows:

> For the sole consideration of the sum of Fifty Thousand Dollars ($50,000.00) paid to the undersigned, receipt of which is hereby acknowledged, the undersigned hereby forever releases and discharges Jeffrey Simpson and Angela Simpson and Brian Entwhistle [sic], their heirs, executors, administrators, agents and assigns, none of whom admit any liability to the undersigned, but all dispute any liability to the undersigned, of and from any and all manners of action, causes of action, suits, accounts, contracts, debts, claims, and demands whatsoever, at law or in equity, and however arising, up to the date of these presents, including particularly, but not exclusively, to damages and injuries claimed to have been suffered by the undersigned as a result of an automobile collision on February 17, 2004 . . . .
>
> * * *
>
> It is . . . understood and agreed that this Release extends to all claims of every nature and kind whatsoever, known or unknown, suspected or unsuspected, and that the undersigned is executing this Release upon the advice and with the consent of his own counsel, and on no representations of the parties release or their counsel.
>
> The undersigned is specifically reserving his claims against his underinsured motorist and umbrella insurer(s).

(App. 19-20).

After further review of his files on February 15, 2006, Robert Balbach, a State Farm auto claim representative, realized that Simpson was not operating the truck at the time of the accident. Balbach then confirmed that Entwistle maintained automobile

insurance at the time of the accident. Upon learning that Entwistle had his own insurance policy, Rogan returned the $50,000 settlement check to Farmers and asked that the release be rescinded. Farmers refused.

On February 17, 2006, State Farm and Rogan filed a complaint against Entwistle and Farmers, seeking to have the release declared void. In the complaint, State Farm and Rogan asserted mutual mistake of fact, actual fraud and constructive fraud as to the existence of automobile-insurance coverage maintained by Entwistle. Rogan also asserted that Entwistle was negligent in his operation of the truck.

On February 13, 2007, Rogan filed a motion for partial summary judgment and memorandum in support thereof, asserting that—as a matter of law—the release should be rescinded "by reason of mutual mistake of fact . . . ." (App. 21). Specifically, Rogan argued that rescission of the release was warranted because both he and Farmers "executed the release based upon the mistaken belief that there was no additional liability coverage available" and the release would allow Rogan to pursue UIM benefits. (App. 29).

Rogan's designation of evidence consisted of his affidavit, the Report, Farmers' response to request for admissions and Entwistle's response to request for admissions. In his affidavit, Rogan averred, in part, as follows:

> 6. While in the hospital Emergency Room, the investigating police officer met and interviewed me and provided me with a copy of his report. I asked the officer if Mr. Entwistle was insured. The officer told me that he was not insured, but that the owner of the car was. The accident report, which I understood to have been prepared by the officer based on his interview of Mr. Entwistle, indicated that Mr. Entwistle had no insurance.

7. Shortly after the accident, Mr. Greg Schmitt, a Senior Adjuster with [Farmers] contacted me . . . . He advised me that his company insured [Simpson] . . . . He further advised me that, although Mr. Entwistle did not have insurance, the Simpson's insurance would cover the accident and that his company would "take care of everything." During the next several months, I had several conversations with Mr. Schmitt to resolve my claim for the loss of my automobile, and to keep him apprised of my progress in resolving my physical injuries.

8. At no time subsequent to the accident did [Entwistle], Mr. Schmitt or anyone else ever inform me that Mr. Entwistle was a named insured through a policy of insurance with American Family . . . .

* * *

12. Prior to signing [the release], I made clear to [Farmers] that I wanted to make a claim against my underinsured motorist carrier and/or umbrella carrier(s), and we eventually prepared a new release to make clear that these rights were being preserved.

13. Believing that the [Farmers] policy was the only available coverage through the Simpsons and/or Mr. Entwistle, I accepted [Farmers'] offer on February 10, 2006. At this point, I believed that the tortfeasor's liability insurance limits had been exhausted, and that I was now eligible to recover underinsured motorist insurance benefits under my own policy with State Farm . . . .

* * *

16. At no time prior to (or after) signing the release did I negotiate or even discuss the release with Mr. Entwistle or American Family . . . . To the best of my knowledge, neither Mr. Entwistle nor American Family . . . were even aware of the release until the settlement funds were returned in anticipation that the release was being rescinded.

17. If I had know that Mr. Entwistle was a named insured on any insurance policy applicable to this collision, I would not have agreed to release my claims against Mr. Entwistle, his heirs, executors, administrators, agents and assigns.

(App. 92-95).

On February 26, 2007, Entwistle filed a motion for summary judgment and memorandum in support thereof. Entwistle argued that there was no mutual mistake because whether Rogan could pursue UIM coverage was not the purpose of the Release; rather, "[t]he purpose or the essence of the Release was to obtain a release from James Rogan for the Simpsons, Entwistle and [Farmers] of liability for the February 17, 2004, accident in exchange for paying [Farmers'] $50,000 policy limits to James Rogan for his injuries." (App. 47).

Entwistle designated as evidence his affidavit, Farmers' response to Rogan's request for admissions, a copy of the Report, and the deposition testimony of Balbach, along with several deposition exhibits. In his affidavit, Entwistle averred, in pertinent part, as follows:

> 3. At the scene of the accident, affiant spoke to the investigating police officer who inquired about how the accident occurred, requested information on the ownership of the vehicle and its insurance, but the investigating police officer never made any inquiry as to whether I personally had automobile insurance. To the best of affiant's recollection, the investigating police officer asked me for my insurance information and affiant advised him that I did not own the vehicle so I did not have insurance on it, but affiant did advise that [Simpson] owned the vehicle and provided the insurance information to the police officer. At no time did affiant tell the investigating police officer or anyone else that he did not have automobile insurance.
>
> 4. As a result to [sic] the accident, affiant contacted Richard Werner, his automobile insurance agent, to advise him that he had been in an accident with a relative's vehicle. Affiant was advised that the vehicle owner's automobile insurance would take care of the damages from the accident since the insurance coverage went with the vehicle.
>
> 5. [A]t no time relevant did anyone from Farmers . . . ever contact affiant to inquire whether affiant had automobile insurance on his own

> vehicle. In fact, no one from [Farmers] ever contacted him about anything regarding the accident.
>
> 6. [A]t no time prior to February 15, 2006, did anyone from State Farm . . . or any other insurance company or any person on behalf of James Rogan contact affiant or affiant's wife to inquire as to whether they carried automobile insurance at the time of the accident.
>
> * * *
>
> 9. It was and continues to be the affiant's belief and understanding that [Farmers] . . . would obtain a release of liability from James Rogan in order to protect his interest.

(App. 89-91).

According to Balbach's deposition, as early as February 17, 2004, State Farm had information that Entwistle was driving the truck at the time of the accident and that his address was different from Simpson's address.

Entwistle filed a response to Rogan's motion for partial summary judgment on April 9, 2007. Farmers also filed a response to Rogan's motion for partial summary judgment. Farmers designated the affidavit of Gregory Schmitt, a senior claims adjuster for Farmers, as evidence. In his affidavit, Schmitt swore to the following:

> 7. As part of my investigation I did not ask [the Simpsons] whether Defendant Entwistle had his own insurance policy which could provide coverage to him in connection with the Accident.
>
> 8. As part of my investigation, I did not speak with either Defendant Entwistle or his wife.
>
> 9. Prior to February 16, 2006, I did not know, one way or the other, whether Defendant Entwistle had his insurance policy which could provide coverage to him in connection with the Accident.

> 10. Prior to February 16, 2006, I did not know, one way or the other, whether Defendant Entwistle was a named insured under an insurance policy issued by American Family . . . .
>
> * * *
>
> 12. I did not tell Dr. Rogan that Defendant Entwistle did not have insurance.
>
> 13. I did tell Rogan that Defendant Entwistle was covered under [Farmers'] Policy as a permissive operator of the Truck at the time of the Accident.
>
> 14. I did not tell Dr. Rogan that [Farmers] would "take care of everything."
>
> 15. I did not tell Dr. Rogan that [Farmers] would investigate for him the issue of whether Defendant Entwistle had his own insurance policy which could provide coverage to him in connection with the Accident.

(App. 97-98).

Rogan filed a response to Entwistle's motion for summary judgment on April 12, 2007. Also on April 12, 2007, the trial court entered its order, dismissing State Farm's claims against Farmers and Entwistle, with prejudice. On May 4, 2007, the trial court granted Entwistle leave to assert as an additional affirmative defense that State Farm is a non-party defendant against whom fault could be assessed.

The trial court held a hearing on the parties' motions for summary judgment on June 13, 2007. On June 18, 2007, the trial court granted Rogan's motion for partial summary judgment and entered judgment in favor of Rogan and against Entwistle and Farmers.

DECISION

When reviewing a grant or denial of summary judgment, our well-settled standard of review is the same as it was for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. *Landmark Health Care Assocs., L.P. v. Bradbury*, 671 N.E.2d 113, 116 (Ind. 1996). Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party deserves judgment as a matter of law. Ind. T.R. 56(C); *Blake v. Calumet Const. Corp.*, 674 N.E.2d 167, 169 (Ind. 1996). "A genuine issue of material fact exists where facts concerning an issue which would dispose of the litigation are in dispute or where the undisputed facts are capable of supporting conflicting inferences on such an issue." *Scott v. Bodor, Inc.*, 571 N.E.2d 313, 318 (Ind. Ct. App. 1991). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996). However, once the movant has carried his initial burden of going forward under Trial Rule 56(C), the nonmovant must come forward with sufficient evidence demonstrating the existence of genuine factual issues, which should be resolved at trial. *Otto v. Park Garden Assocs.*, 612 N.E.2d 135, 138 (Ind. Ct. App. 1993), *trans. denied*. If the nonmovant fails to meet his burden, and the law is with the movant, summary judgment should be granted. *Id*.

"The fact that the parties make cross-motions for summary judgment does not alter our standard of review. Instead, we must consider each motion separately to determine

whether the moving party is entitled to judgment as a matter of law." *Indiana Farmers Mut. Ins. Group v. Blaskie*, 727 N.E.2d 13, 15 (Ind. Ct. App. 2000).

Entwistle asserts that the trial court erred in granting Rogan's motion for partial summary judgment because Entwistle "demonstrated the existence of a unilateral mistake of fact, not a mutual mistake of fact. Further, [Rogan's] unilateral mistake of fact was not the product of misrepresentation or fraud on the part of [Entwistle]." Entwistle's Br. 11.

Generally, a contract my not be avoided unless there is 1) a mutual mistake; or 2) "where there has been a mistake by one party, accompanied by fraud or inequitable conduct by the remaining party." *Mid-States Gen. & Mech. Contracting Corp. v. Town of Goodland*, 811 N.E.2d 425, 435 (Ind. Ct. App. 2004).

> The doctrine of mutual mistake provides that "[w]here both parties share a common assumption about a vital fact upon which they based their bargain, and that assumption is false, the transaction may be avoided if because of the mistake a quite different exchange of values occurs from the exchange of values contemplated by the parties." "It is not enough that both parties are mistaken about any fact; rather, the mistaken fact complained of must be one that is 'of the essence of the agreement, the sine qua non, or, as is sometimes said, the efficient cause of the agreement, and must be such that it animates and controls the conduct of the parties.'"

Perfect v. McAndrew, 798 N.E.2d 470, 478 (Ind. Ct. App. 2003). "A mistake of law, a mistake as to the legal import of language used, will not normally support a claim for reformation of an instrument." *Peterson v. First State Bank*, 737 N.E.2d 1226, 1229 (Ind. Ct. App. 2000).

The intent of the parties controls in a reformation action. *Meyer v. Marine Builders, Inc.*, 797 N.E.2d 760, 772 (Ind. Ct. App. 2003). "To determine the true intent of the parties, we may look to their conduct during the course of the contract." *Id.*

Resolution of this issue is fact-based, i.e., whether there is any designated evidence to support Rogan's claim of mutual mistake. Here, there is designated evidence that Rogan agreed to sign the release on the condition that his claims against his own insurer would be reserved. In signing the release, Rogan did so under the belief that Entwistle did not have separate insurance coverage. Clearly, Rogan signed the release subject to a mistake regarding the total insurance coverage available.

As to Farmers, it was unaware of Entwistle's insurance policy. Furthermore, it acknowledged that Rogan sought to reserve his claims against State Farm when he entered into the release. As to Entwistle, while aware of the existence of his policy through American Family, he was led to believe that the accident did not trigger coverage under his own policy.

Here, the mutual mistake of fact is the existence of an insurance policy and additional coverage thereunder. Whether that policy existed was "of the essence of the agreement," as Rogan agreed to enter into the release only to pursue claims against his underinsured-motorist and umbrella policies, and in fact, specifically reserved those claims in the release. The mistake regarding Entwistle's policy resulted in an exchange of values "quite different . . . from the exchange of values contemplated by the parties." *See Perfect*, 798 N.E.2d at 478. Rogan, Entwistle, and Farmers contemplated that the release would exhaust all insurance coverage available under Simpson's and Entwistle's

insurance policies when, in fact, it did not. Accordingly, we find that the trial court properly granted Rogan's motion for summary judgment.

Affirmed.

BAKER, C.J., and BRADFORD, J., concur.