[Cite as *Gooslin v. B-Affordable Tree Serv.*, 2011-Ohio-4048.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
SANDUSKY COUNTY

Heather Gooslin

Appellee

v.

B-Affordable Tree Service, et al.

Appellee

[State Automobile Insurance Company—Appellant]

Court of Appeals No. S-10-045

Trial Court No. 08CV000084

DECISION AND JUDGMENT

Decided: August 12, 2011

* * * * *

William H. Bartle and Margaret Murray, for appellee Heather Gooslin.

Ronald R. Smith, for appellee William Mira.

Timothy C. James and Shannon J. George, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} This is an appeal from a judgment of the Sandusky County Court of Common Pleas, following a bench trial, in which the court denied intervenor-appellant

State Automobile Mutual Insurance Company's ("State Auto") claim for declaratory relief, and instead established insurance coverage in favor of co-defendant-appellee B-Affordable Tree Service, Inc. ("B-Affordable"). For the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings.

{¶ 2} On March 19, 2006, co-defendant-appellee William (Bill) Mira was involved in an automobile accident with plaintiff-appellee Heather Gooslin at the intersection of State Route 20 and County Road 260 in Sandusky County. Gooslin suffered serious injuries. At the time of the accident, Mira was driving his personal pickup truck, which displayed advertisements for B-Affordable, an Ohio corporation. Mira is a 50 percent shareholder of B-Affordable; Mike Weber owns the other 50 percent. Mira had a personal automobile insurance policy through State Auto. B-Affordable believed that it also had automobile insurance through a State Auto policy covering employee-owned autos used during the course and scope of employment.

{¶ 3} On January 22, 2008, Gooslin filed a claim for damages caused by the accident against Mira and B-Affordable on the theories of negligence and respondeat superior respectively. On March 31, 2008, State Auto intervened as a party defendant in the action pursuant to Civ.R. 24(A), and filed for a declaratory judgment that it was not obligated to defend, indemnify, or provide insurance coverage to Mira or B-Affordable. State Auto named Mira, B-Affordable, and Gooslin as defendants to the declaratory judgment action. Both State Auto's complaint and Gooslin's answer contained jury

demands. However, Gooslin later indicated to the court that she would waive a jury trial if all the other parties similarly agreed.

{¶ 4} Subsequently, State Auto and Mira[1] filed cross-motions for summary judgment. The parties' motions centered on two issues: (1) whether the commercial automobile insurance policy with State Auto, which identified the named insured as "Mike Weber & Bill Mira DBA Affordable Tree Service," provided coverage to B-Affordable, and (2) if the policy did cover B-Affordable, whether Mira was acting within the course and scope of his employment with B-Affordable at the time of the accident. The parties do not dispute that coverage was provided to Mira through his personal automobile insurance policy.

{¶ 5} On December 30, 2008, after considering the motions for summary judgment, memoranda in support and opposition, and replies, the trial court stated that the insurance policy did cover B-Affordable. However, the court denied the motions for summary judgment, holding that an issue of fact existed as to whether Mira was acting within the course and scope of his employment. State Auto filed a motion for reconsideration, which the trial court denied on May 22, 2009. The matter was then set for a jury trial on the sole issue of whether Mira was acting within the scope of his employment with B-Affordable at the time of the accident.

[1]For purposes of the declaratory judgment action only, Mira and B-Affordable were represented by Mira's counsel and filed their motions and briefs jointly.

{¶ 6} On March 25, 2010, five days before the trial was set to commence, the trial court sua sponte vacated its order allowing a jury trial, concluding that State Auto does not have a right to a jury trial in a declaratory judgment action. Thereafter, a bench trial was held on March 30, 2010, in which Gooslin, Mira, and State Auto participated. In its judgment entry filed March 31, 2010, the trial court found that Mira was acting within the course and scope of his employment with B-Affordable at the time of the accident, and therefore State Auto's claim for declaratory relief was denied, and coverage was established. On September 17, 2010, the trial court amended its March 31, 2010 judgment entry for the sole purpose of including language pursuant to Civ.R. 54(B) that there is no just cause for delay. Having timely appealed, State Auto now raises the following four assignments of error:

{¶ 7} "1. The Trial Court Erred By Creating a Partnership for Garnering Coverage Under the Applicable Insurance Contract Because the Named Insured Was Different Than the Named Defendant.

{¶ 8} "2. The Trial Court Erred By Denying Appellant's Right to a Jury Trial on its Declaratory Judgment Action.

{¶ 9} "3. The Trial Court Erred by Finding That Appellee William Mira Was Acting in the Course and Scope of His Employment at the Time of the Accident.

{¶ 10} "4. The Trial Court Erred by Not Considering Evidence That Appellee Mira Failed to Make a Claim for Worker's Compensation."

I

{¶ 11} Under its first assignment of error, State Auto contends that the trial court erred by reforming the insurance contract to grant coverage in favor of B-Affordable when the insurance contract expressly listed the insured as "Mike Weber & Bill Mira DBA Affordable Tree Service." The reformation occurred when the court stated in its order on the parties' motions for summary judgment that "[o]n the date in question, defendant B-Affordable Tree Service, Inc. maintained a business auto policy of insurance, issued by State Auto." State Auto argues that such reformation was improper because no mistake existed on the part of State Auto as to who was the intended insured, and because Mira failed to show any ambiguity in the terms defining who was insured under the insurance contract. Mira and Gooslin, on the other hand, argue that the clear intent of the parties was for State Auto to insure the tree trimming business owned by Weber and Mira, and that State Auto should be estopped from now denying coverage based on the form and name of the business.

{¶ 12} The remedy of reformation is available whenever an instrument fails, "through fraud or mutual mistake, to express the real agreement or intention of the parties." *Greenfield v. Aetna Cas. & Sur. Co.* (1944), 75 Ohio App. 122, 128. Mutual mistake "requires that the contract provision in question be contrary to the understanding of all of the contracting parties." *Snedegar v. Midwestern Indem. Co.* (1988), 44 Ohio App.3d 64, 69. In Ohio, in order to grant reformation of an insurance policy on the grounds of mutual mistake, such mutual mistake must be established by clear and

convincing evidence. *Shear v. West Am. Ins. Co.* (1984), 11 Ohio St.3d 162, 164. Clear and convincing evidence is that degree of proof that produces "a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford* (1954), 161 Ohio St. 469, paragraph three of the syllabus.

{¶ 13} Applying these rules, the issue we must address is whether the contract provision in question—that the insured is "Mike Weber & Bill Mira DBA Affordable Tree Service"—is clearly and convincingly contrary to the understanding of all the parties. We hold that it is.

{¶ 14} The record in this case provides clear and convincing evidence that the parties understood and intended that State Auto was to insure the tree trimming business owned by Weber and Mira. The parties do not dispute that Weber and Mira contacted their insurance agent to obtain liability insurance for their tree trimming business. In the deposition of the agent, Gary Strayer, he agreed that it was his goal "to make sure there was insurance coverage for [the tree trimming] business [Weber and Mira] were starting up." Further, the insurance policy shows that State Auto considered the risk of insuring the tree trimming business, and accepted that risk in exchange for an annual premium of over $30,000 for general liability coverage, and an annual premium of over $1,000 for business automobile liability. Finally, the record indicates that during the approximately 18 months between when Weber and Mira applied for insurance and the accident for which they are now seeking coverage occurred, Weber and Mira renewed their insurance policy with State Auto, and consistently paid the premiums as they became due. Thus,

based on this undisputed evidence, we have a firm belief that the parties intended and understood that State Auto would provide coverage to the tree trimming business owned by Weber and Mira.

{¶ 15} However, despite the parties' intention, the insurance contract as written does not provide coverage to the business. The contract specifically identifies "Mike Weber & Bill Mira DBA Affordable Tree Service" as the insured. Yet, all the parties agree that no such business entity has ever existed. It follows then that the contract did not provide coverage to the non-existent business. Consequently, both parties mistakenly believed that, under the insurance contract, Weber and Mira's tree trimming business was insured by State Auto. Because a mutual mistake as to a material fact exists, reformation is appropriate to bring the contract into conformity with the parties' intent. Here, the parties intended to insure a tree trimming business owned by Weber and Mira, and B-Affordable is the only tree trimming business those two ever owned. Accordingly, the trial court did not err when it reformed the contract to name B-Affordable as the insured. See *Justarr Corp. d.b.a. The Terrace at Westside v. Buckeye Union Ins. Co.* (1995), 102 Ohio App.3d 222 (reformation appropriate where evidence supported a finding of mutual mistake of fact as to whether coverage was intended for a corporation that was not a named insured).

{¶ 16} State Auto argues against this result, and urges us to interpret the contract as written. At its core, State Auto's argument is that, despite its clear intention to insure the tree trimming business, and its acceptance of 18 months' worth of premiums, it agreed

to insure only "Mike Weber & Bill Mira DBA Affordable Tree Service." State Auto argues that because no one ever informed it that the business does not exist, State Auto could only be obligated to Weber and Mira individually, otherwise it is obligated to no one at all. In effect, State Auto is asking us either to reform the contract to make the named insured "Mike Weber and Bill Mira as individuals," a result that clearly contradicts the parties' intention to insure a business, or to invalidate the contract, a result that directly conflicts with the parties' conduct and course of dealing demonstrating that a contract exists. We note that "[t]he court cannot make a different contract for the parties, either by abortive reformation or refusal to reform a writing which fails to express the pre-existing agreement on which the minds did meet, thus maintaining a different written agreement than intended." *Greenfield*, 75 Ohio App. 122 at 129. Therefore, because the parties' minds clearly met on the agreement to insure Weber and Mira's tree trimming business, we decline to make a different contract that states otherwise.

{¶ 17} State Auto also argues that because the insurance application defined the applicant as "Mike Weber & Bill Mira DBA Affordable Tree Service," this was not "a case of a 'mistake' by the insurance company in improperly identifying the named insured on the policy." State Auto concludes that because no mistake existed on its part, there was no mutual mistake, and therefore reformation is inappropriate. However, in the context of contracts, mistake means "a belief that is not in accord with the facts." Restatement of the Law 2d, Contracts (1981) 383, Mistake Defined, Section 151. Here, the belief is that the insurance contract as written provided coverage to the tree trimming

business owned by Weber and Mira. The facts, on the other hand, indicate the opposite. Thus, even if there was a unilateral error on the part of Weber and Mira for filing an application with the wrong business name, mutual mistake still exists, and reformation is appropriate.

{¶ 18} State Auto next argues that reformation is inappropriate because it never received notice that the named insured was incorrect. This argument attempts to incorporate the additional element of notice into the requirements for reformation. However, no such requirement exists. As stated above, reformation is appropriate where the contract does not conform to the parties' intent because of fraud or mutual mistake. While we acknowledge that in some cases, notice may be relevant to determine the intent of the parties as to who is an insured, for example where an existing company has undergone several different name and ownership changes as in *Kelley v. Erie Ins. Co.*, 2d Dist. No. 19409, 2003-Ohio-1563, notice is not by itself determinative of intent. In this case, Weber, Mira, the business owned by them, and State Auto were at all times the only parties to this transaction. Although notice would have provided evidence of the parties' intent to insure B-Affordable specifically, the absence of notice does not detract from the conclusion that the parties intended and understood that the insurance contract would provide coverage to the tree trimming business owned by Weber and Mira.

{¶ 19} Finally, State Auto argues that reformation is improper because Mira never established that the contract was ambiguous. This argument is without merit because ambiguity is not necessary for reformation. Indeed, if the contract was ambiguous we

could simply interpret the contract to comport with the parties' intent. It is precisely because the contract is unambiguous that reformation is appropriate and necessary. See *Kelley*, at ¶ 25.

{¶ 20} Accordingly, State Auto's first assignment of error is not well-taken.

II

{¶ 21} In support of its second assignment of error, State Auto argues that it was entitled to a jury trial on the factual issue of whether Mira was acting within the scope of his employment with B-Affordable because this same issue is necessary to Gooslin's respondeat superior claim in the underlying tort action for damages. We agree.

{¶ 22} R.C. 2721.10 provides that "[w]hen an action or proceeding in which declaratory relief is sought under this chapter involves the determination of an issue of fact, that issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the action or proceeding is pending." R.C. 2311.04 addresses the manner in which issues are tried in civil actions, and states:

{¶ 23} "Issues of law must be tried by the court, unless referred as provided in the Rules of Civil Procedure. *Issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury*, unless a jury trial is waived, or unless all parties consent to a reference under the Rules of Civil Procedure.

{¶ 24} "*All other issues of fact shall be tried by the court, subject to its power to order any issue to be tried by a jury*, or referred." (Emphasis added.)

{¶ 25} Initially, we note that the Ohio Supreme Court has held that "a declaratory judgment action filed by an insurer against an insured, the purpose of which is to construe an insurance policy and determine the insurer's obligations to the insured, and is not for the purpose of determining liability in an action for the recovery of money, is properly triable to the court." *Erie Ins. Group v. Fisher* (1984), 15 Ohio St.3d 380, 383. Here, the declaratory judgment action is to determine whether State Auto is obligated to defend or provide coverage to B-Affordable for Mira's alleged negligence. Thus, if State Auto had brought a declaratory judgment action solely against its insured, State Auto would clearly have no right to a jury trial.

{¶ 26} However, State Auto also brought the action against Gooslin, the injured party. The issue we must address then is whether State Auto's addition of Gooslin converts the declaratory judgment action from having the narrow purpose of determining the obligations of an insurer to its insured, to having the broader purpose of determining liability in an action for the recovery of money, thereby entitling the parties to a jury trial on issues of fact. Under the particular facts of this case, we hold that it does.

{¶ 27} The key consideration in this case involves the doctrine of collateral estoppel, which requires four elements: "(1) The party against whom estoppel is sought was a party or in privity with a party to the prior action; * * * (2) There was a final judgment on the merits in the previous case after a full and fair opportunity to litigate the issue; * * * (3) The issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and * * * (4) The issue must have been identical to

the issue involved in the prior suit." *Monahan v. Eagle Picher Indus., Inc.* (1984), 21 Ohio App.3d 179, 180-181.

{¶ 28} Here, all four elements are met. Depending on the outcome of the declaratory judgment action, the party being estopped in the tort action would be either B-Affordable or Gooslin, both of whom are parties to the declaratory action. Both parties have the opportunity to fully and fairly litigate the issue, and the issue is necessary to the determination of the declaratory action. Finally, the issue of whether Mira was acting within the course and scope of his employment with B-Affordable is identical in both actions. Specifically, to prove that it is not obligated to defend or provide coverage to B-Affordable for the accident, State Auto must show that Mira *was not* acting within the course and scope of his employment. In contrast, Gooslin must show that Mira *was* acting within the course and scope of his employment to prove that B-Affordable is liable in tort under the doctrine of respondeat superior. Thus, because the four elements are met, collateral estoppel would apply to bar re-litigation of the issue in the subsequent tort action. Cf. *Broz v. Winland* (1994), 68 Ohio St.3d 521 (injured persons who are not parties to a separate declaratory action are not bound by the decision in that action).

{¶ 29} Because collateral estoppel would apply, litigation of the scope and employment issue in the declaratory action necessarily determines liability in the tort action based on respondeat superior. That is, once the court determines whether Mira was acting within the course and scope of his employment to determine insurance coverage, that fact is settled, and the parties cannot later argue otherwise when trying to

prove whether B-Affordable is liable to Gooslin under respondeat superior. In this regard, the declaratory judgment action is in reality an action to determine liability for the recovery of money damages. Therefore, the issue of whether Mira was acting within the scope of his employment "shall be tried to a jury, unless a jury trial is waived." R.C. 2311.04.

{¶ 30} Gooslin and Mira urge a different conclusion relying on *Erie Ins. Group v. Fisher*, supra. However, we think the facts in the present situation are distinguishable. In *Erie*, the victim, Hess, was injured in a motor vehicle accident allegedly caused by the negligent driving of Fisher, an employee of Starkey Refrigeration. Thereafter, Hess brought a claim against Fisher and Starkey Refrigeration. Erie Insurance Group ("Erie"), along with Starkey Refrigeration, its insured, then filed an action against Fisher seeking a declaratory judgment that it had no duty to defend him because Fisher's driving of the company van exceeded the scope of his permission. Hess intervened in the declaratory judgment action as a party-defendant, and made a jury demand. The trial court ruled that the action should be tried to the bench, and declared that Erie had no duty to defend Fisher. Id. at 380-381.

{¶ 31} Hess appealed, arguing, inter alia, that she was entitled to a jury trial. Hess contended that although the declaratory judgment action "[was] styled as one in equity to construe a contract, its actual purpose [was] to determine whether Erie [would] be liable in an action for 'the recovery of money only.'" Id. at 382.

{¶ 32} The Supreme Court of Ohio disagreed. The court identified that the declaratory judgment action was brought "*only against Fisher* to determine Erie's obligation to Fisher, and not to recover money." (Emphasis sic.) Further, the court determined that the declaratory judgment action "could not have been an attempt to determine any monetary obligation to Hess, as any findings would not be binding upon a person who was not a party to the action. See *Goodson v. McDonough Power Equip., Inc.* (1983), 2 Ohio St.3d 193, 443 N.E.2d 978. * * * It was in this equitable action that Hess chose to intervene. If Hess had not intervened, she would have been free to bring her own legal action against Erie to determine whether Fisher was an insured." Id. at 383. Therefore, the court held that the declaratory judgment action was properly triable to the court. Id.

{¶ 33} Like *Erie*, the issue to be determined in this case is relevant to both the declaratory judgment action for the purpose of determining insurance coverage, and the underlying tort action for the purpose of determining the employer's vicarious liability. However, the declaratory action here was brought against the insured and the injured party, not just the insured. Thus, unlike *Erie*, the declaratory action in this case is an attempt to determine liability to Gooslin as any findings would be binding on her because she is a party to the action.

{¶ 34} We recognize that the resulting situation is the same in this case and *Erie*, in that both involve a declaratory action and a tort action between identical parties requiring the resolution of an identical issue. We reach a different conclusion than in

Erie, however, because in the present case, a jury demand was properly made and *not* waived. In *Erie*, the court never indicated that Erie made a jury demand, and in fact, Erie argued against a jury trial on appeal. Thus, Erie clearly did not assert its right to a jury trial. Moreover, although Hess did make a jury demand, the *Erie* court implicitly held that by voluntarily intervening in the declaratory action, Hess had waived her right to a jury trial on the factual issue of whether Fisher was acting within the scope of his permission. *Erie* at 383. As a result, because the parties either never demanded a jury trial, or waived a jury trial, it was appropriate to try the issue to the bench. In contrast, in this case, State Auto properly demanded a jury trial in its complaint for declaratory judgment, and never waived this right. Therefore, because all of the parties did not waive it, a jury trial was required to determine the scope of employment issue in the declaratory action.

{¶ 35} Gooslin and Mira also rely on this court's decision in *Hrynciw v. State Auto Ins. Cos.* (Mar. 31, 1998), 6th Dist. No. L-97-1267, in which we held that the trial court did not err in denying a jury trial in a declaratory judgment action between an insurer and its insured. Again, the facts in this case are readily distinguishable. *Hrynciw* involved another situation in which the plaintiff was involved in an automobile crash with an employee of a company. However, the issue in *Hrynciw* was whether the employee himself was an insured under the employer's policy, not whether the insurance company was obligated to defend or provide coverage to the employer for the accident, as in the present case. Resolution of that issue required the court to determine whether the

employee was a member of his mother's household at the time of the accident—a determination that had no bearing on whether the employee was liable to the victim. Thus, even though the parties may have been estopped from re-litigating the fact of whether the employee was an insured, the declaratory action "was not for the purpose of determining liability in an action for the recovery of money." Id.

{¶ 36} In contrast, the fact that must be determined here—whether Mira was acting in the course and scope of his employment—controls both whether State Auto is obligated to defend and provide coverage to B-Affordable, and whether B-Affordable is vicariously liable to Gooslin for negligence. It follows that by resolving that factual issue, the declaratory judgment action is for the purpose of determining liability in an action for the recovery of money, and thus State Auto is entitled to a jury trial.

{¶ 37} In conclusion, we hold that where an insurer brings a declaratory judgment action against the insured and the injured party, and the same issue of fact is necessary to determine both coverage in the declaratory judgment action and liability for money damages in the underlying tort action, that issue of fact "shall be tried by a jury, unless a jury trial is waived." Accordingly, the trial court erred when it sua sponte vacated the jury trial, and State Auto's second assignment of error is well-taken.

{¶ 38} Consequently, State Auto's third and fourth assignments of error are rendered moot, and need not be addressed.

{¶ 39} For the foregoing reasons, the judgment of the Sandusky County Court of Common Pleas is affirmed in part, reversed in part, and remanded for further proceedings consistent with this decision. Pursuant to App.R.24, costs are assessed to appellees.

JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE