

disclaiming, measured from the date its final letters were returned unclaimed, was unreasonable as a matter of law. The dissent disagreed, reasoning that Continental's need to carefully analyze Stradford's conduct and to consult with counsel to ensure that the company had discharged its "heavy burden" of attempting to bring about his cooperation prior to disclaiming, supported the conclusion that Continental's delay was "explained and ... reasonable under the circumstances"

The New York Court of Appeals determined that the Appellate Division's order should be modified by denying the defendants' cross motion for summary judgment. The state high court concluded that a question of fact remained regarding the amount of time required for Continental to complete its evaluation of Stradford's conduct in the two underlying actions. The court observed that in some cases, such as where an insured openly disavows its duty to cooperate, little time is needed to evaluate the relevant noncooperative conduct before disclaiming. But where the insured has punctuated periods of non-compliance with sporadic cooperation or promises to cooperate, some reasonably longer period for analysis may be warranted. In Stradford's case the reasonableness of an approximately two-month delay to analyze the pattern of obstructive conduct that permeated the insurer's relationship with its insured for almost six years presented a question of fact that precluded entry of summary judgment for either plaintiff or for defendants. // Holt

Reformation

No Insurance Policy Can Be Reformed under Rhode Island Law without Proof by Clear and Convincing Evidence of a Mutual Mistake

Rhode Island Supreme Court Rejects Trial Court's Finding of Mutual Mistake Based on Concept of "Vicarious Mistake"—Insurer's Unwillingness to Provide Coverage Insured Did Not Intend to Purchase

Merrimack Mutual Fire Insurance Co. v. Dufault, 958 A.2d 620 (R.I. 2008)

Case at a Glance

Insurer may not reform liability policy to exclude named insured's resident son on ground that named insured did not intend to purchase coverage for his son and insurer would not provide such coverage had it known the named insured's true intent. Reformation of an insurance policy is permissible under Rhode Island law only upon clear and convincing evidence of mutual mistake. If a policy provides more coverage than the insured intended to purchase, and the insurer would have issued an endorsement restricting coverage had it known of the insured's intention, the policy is not the product of "mutual" mistake. The mistake is unilateral—by the insured—and the insurer may not "vicariously" rely on the insured's mistake to argue that the policy it intended to issue would have been different had it known of the insured's mistake.

Summary of Decision

Merrimack Mutual Fire Insurance Company issued a personal umbrella policy to Ronald H. Dufault and with wife Pauline Dufault. The policy covered auto-related liability in excess of the minimum required by the Rhode Island financial responsibility law. The policy unambiguously covered the named insured's resident relatives. Since the Dufault's son, Ronald Dufault, Jr., lived with them, he unquestionably qualified as an insured under the

policy. Ronald Jr. sought coverage as a resident relative when, while driving his own vehicle, he allegedly injured one Frank Beauparlant in an automobile accident.

The issue in the ensuing coverage litigation was whether Merrimack could reform the policy to exclude Ronald, Jr., or rescind the policy as to Ronald, Jr., on the ground that the policy's extension of coverage to him was the result of a mutual mistake between the contracting parties. The trial court decided in favor of the insurer based on an agreed statement of facts suggesting that the named insureds, Ronald's parents, intended to exclude his vehicle from coverage, and Merrimack would have done so if it had known of the Dufault's intent. According to the agreed statement of facts, Merrimack biannually sent renewal questionnaires to the Dufaults, who were asked to list the members of their household and the operators of any vehicles. In the renewal questionnaire in effect at the time of the alleged injury to defendant, neither Ronald Jr. nor his vehicle was listed; instead, only the Dufaults and their two vehicles were included in the response. The parties also agreed that Ronald Jr. was not included because Ronald Sr. "intended that the personal umbrella liability [policy] only appl[y] to his own vehicles." Furthermore, the parties agreed that, if Merrimack knew that Ronald Jr. was a member of the household and owned a motor vehicle that fell short of the minimum coverage required by the policy and that Ronald Sr. did not intend to provide his son with umbrella insurance, the carrier would have issued a restricted endorsement that would have excluded Ronald Jr.

The Rhode Island Supreme Court reversed, holding that Merrimack failed to meet its burden of proving by clear and convincing evidence the existence of a mutual mistake sufficient to warrant reformation of the insurance policy and thus the trial justice's finding of mutual mistake was wrong. Initially, the supreme court explained that evidence extrinsic to the insurance policy is inadmissible in the absence of a finding by the trial court that the policy is ambiguous. Here, there was no such finding, and the supreme court found the policy clearly and unambiguously covered Ronald, Jr. Thus, the trial court improperly based its finding of mutual mistake on extrinsic evidence.

The court further noted that the evidence the

court considered did not support a finding of mutual mistake sufficient to support rescission. In order to obtain reformation, the party seeking it must prove that there was a common and mutual mistake between the two parties, "manifest in the agreement at the time it was entered into," so that the agreement itself "fails in a material respect to reflect the understanding of both parties." In addition, the party seeking reformation must prove mutual mistake by clear and convincing evidence.

Any mistake in appreciating the terms of the policy here was, in the court's view, unilateral—the Dufaults' lack of intention to cover their son's vehicle. The record contained no evidence that Merrimack intended, at the time it sold the policy to the Dufaults, to insure some, but not all of the named insured's relatives who were living in the household. To the contrary, the plain language of the policy extended coverage to relatives of the named insured who reside in the same household. Ronald Jr. squarely fell within that language, and the court refused to allow Merrimack to "retreat from the terms of the policy based on what the named insured may have intended when the policy was purchased or renewed."

The court rejected Merrimack's "endeavors to invoke a novel theory of 'vicarious mistake.'" Merrimack maintained that if it knew that Ronald Sr. did not intend for his son to be covered by the policy, then it would have issued the Dufaults a restricted endorsement that excluded Ronald Jr. from its terms. The court said "[t]his assertion evades the basic premise of mutual mistake. Merrimack may not rely on the insured's alleged mistake (or the insured's intent when buying the policy or answering a questionnaire) to modify the agreement in its favor. Rather, the parties to the contract must both be laboring under the same mutual mistake of fact at the time the agreement was made"

Comment

The Supreme Court vacated and remanded the final judgment. The trial court had actually tried the case, and the holding in the appellate court was that the insurer did not prove its case by clear and convincing evidence, once the extrinsic evidence was gone. Since mutual mistake is an issue of fact, presumably the insurer gets a new trial, if it wants it, and if the plaintiff cannot succeed on summary

judgment. Of course, the Supreme Court seems to hint that such a motion should be granted, at least on the evidence it has seen. // Quinn

UM/UIM

Guest Passenger May Stack Underinsured Motorist Benefits Available Under Her Own Policy After Recovering Such Benefits from Driver's Insurer

"Other Insurance" Provision Violates Public Policy

Generette v. Donegal Mutual Insurance Company, 957 A.2d 1180 (Pa. 2008)

Case at a Glance

An insured's waiver of the right to stack underinsured motorist benefits did not apply where she recovered first priority benefits under a policy issued to the owner of a vehicle in which she was injured while riding as a guest passenger.

An "other insurance" provision that prevented stacking of underinsured motorist benefits violated public policy and therefore was unenforceable.

Summary of Decision

Plaintiff was injured while riding as a passenger in an automobile that was struck by another vehicle. Plaintiff obtained the \$25,000 limit that was available under the third-party tortfeasor's automobile liability insurance policy. She then recovered an additional \$50,000 that was available under the underinsured motorist coverage of the policy that covered the driver of the vehicle in which she was riding. These payments did not fully compensate plaintiff for her injuries, and she sought additional benefits under the underinsured motorist coverage provided by her own automobile insurance policy. That policy contained a liability limit of \$35,000. The insurer denied coverage, asserting that plaintiff had waived the right to stack underinsured motorist benefits in exchange for a lower premium. The insurer invoked an "other insurance" clause that was included in plaintiff's

policy providing that when other insurance was available, (a) a policy providing underinsured motorist coverage for the vehicle the "insured" was occupying at the time of the injury would apply first; and (b) the maximum recovery under plaintiff's policy would not exceed the amount by which her underinsured motorist coverage limit exceeded the amount of similar coverage provided by the first-priority insurance covering the vehicle she was occupying. The insurer took the position that no underinsured motorist coverage was available under plaintiff's policy because she had already recovered \$50,000 in underinsured motorist benefits under the policy covering the vehicle in which she was riding, and that amount exceeded the limit of her own underinsured motorist coverage.

Plaintiff filed an action for declaratory relief, seeking a determination that she was entitled to recover underinsured motorist benefits under her own policy. The trial court rendered summary judgment favor of the insurer, rejecting plaintiff's argument that the "other insurance" provision and the waiver of her right to stack underinsured motorist benefits violated public policy. A state intermediate court affirmed that result.

The Pennsylvania Supreme Court reversed. Initially, the court observed that Pennsylvania's statute governing uninsured and underinsured motorist benefits expressly allows an "insured" to waive stacking of benefits. The court then determined, however, that this statutory waiver provision applied only to multiple policies held by the insured and did not extend to cases where the insured was entitled to recover benefits as a guest passenger under a policy covering a vehicle owned by another. In so ruling, the court interpreted the policy term "insured" in conformity with the statutory definition that applies generally in Pennsylvania with respect to uninsured and underinsured motorist benefits. That definition limits the scope of an "insured" to the named insured relatives of the named insured, and members of the named insured's household. The court rejected the insurer's attempt to invoke a broader statutory definition of "insured" that applies in bad faith litigation. Because the policy under which plaintiff had recovered 50,000 in underinsured motorist benefits was held by an unrelated individual and covered a vehicle that was not owned by plaintiff or her family, the court concluded that recovery of