STATE OF MICHIGAN

COURT OF APPEALS

HARLEYSVILLE LAKE STATES INSURANCE COMPANY,

Plaintiff-Appellant,

v

MASON INSURANCE AGENCY, INC., and PETER HANOVER,

Defendants-Appellees.

UNPUBLISHED
September 22, 2005

No. 255195
Ingham Circuit Court
LC No. 02-001427-CK

Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

In this breach of contract claim between an insurance underwriter and an insurance agency that sold one of its policies, plaintiff appeals as of right from a judgment entered after a jury verdict for defendants. Plaintiff also appeals the denial of its motion for summary disposition. We affirm.

Defendant Hanover sells insurance for defendant Mason Insurance Agency, Inc. In October 2000, defendants placed a commercial auto insurance policy for a customer, CSM Corporation, with plaintiff. However, the name of a CSM employee, James Nader, was not listed on the application nor was it noted that one of the listed vehicles was Nader's personal car. In October 2001, Nader was driving his car with his sister as a passenger. Nader drove into a stone barrier in front of a home. Nader's sister suffered a spinal cord injury and resulting paralysis. Plaintiff has paid no-fault benefits for her injuries and settled Nader's sister's suit against him.

Plaintiff sued to recover these payments, alleging that defendants breached their agency agreement with plaintiff.[1] However, the agency agreement plaintiff attached to the complaint was executed in June 2001, months after the CSM policy began. The court permitted plaintiff to

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[1] Plaintiff also sued for negligence, but the court dismissed the negligence count after observing that " you can't have a common law claim and a contract claim at the same time."

amend its complaint to add a count for indemnity, based on a clause in the parties' agency agreement. Plaintiff also attached the 2001 agency agreement to the amended complaint.

The case evaluated at $700,000, which both sides rejected. Plaintiff moved for summary disposition under MCR 2.116(C)(10), again attaching the 2001 agreement to the motion as the contract in dispute. In their response, defendants argued that plaintiff had not shown there was any contract between plaintiff and defendants, noting that the attached agreement was dated months after the CSM policy began and that the agency agreement in effect in October 2000 (executed in 1998) was between defendant Mason and plaintiff's predecessor, Lake States Insurance Agency. Plaintiff replied, arguing that it is the successor to Lake States Insurance Company. The court denied the motion, concluding that "questions of fact abound in this case, including whether the Agreement relied on by Plaintiff was in effect between these parties at the relevant period of time, and whether its breach warrants indemnification."

After deliberating a few hours, the jury requested a copy of the 1998 agency agreement. The court explained to the jurors that they could not have the 1998 agreement because it was not admitted into evidence and that they should ignore any reference to it in their notes. The jury unanimously found for defendants, finding that there was no "written agency contract between the plaintiff and the defendants at the time the insurance application was submitted by defendant." The court entered judgment and denied plaintiff's motion for a new trial.

Plaintiff first argues that the court erred in failing to grant it summary disposition. We disagree. "This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. In making this determination, the Court reviews the entire record to determine whether defendant was entitled to summary disposition." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999) (citation omitted).

In their response to plaintiff's motion for summary disposition, defendants challenged plaintiff's ability to prove the existence of a contract between the parties, pointing out that the 2001 agency agreement attached to the complaint was made after the alleged breach. Defendants submitted their 1998 agency agreement with Lake States, arguing that Lake States and plaintiff were different entities, which they also argued at the motion hearing. Plaintiff submitted a reply brief on the day of the hearing, arguing that it and Lake States were the same. However, the only documentation plaintiff submitted in support of this assertion were two uncertified printouts of state insurance commission websites purporting to show that plaintiff changed its name from Lake States to Harleysville Lake States in 2001.

Although the summary disposition hearing was nearly two weeks before the start of trial, plaintiff did not file a renewed motion for summary disposition, amend its complaint, or submit any admissible evidence on the question. Instead, plaintiff failed to show through admissible evidence that there was no genuine issue of material fact concerning a fundamental element of its claim, i.e., that there was a contract in force at the time of the alleged breach between plaintiff and defendants. Therefore, considering the admissible evidence submitted in the light most favorable to defendants, we see no error on the part of the trial court.

Plaintiff next argues that the court abused its discretion by failing to permit it to amend its complaint mid-trial to add the 1998 agency agreement. We again disagree. "This Court will not reverse a trial court's decision on a motion to amend a complaint absent an abuse of discretion

that results in injustice." *Phillips v Deihm*, 213 Mich App 389, 393; 541 NW2d 566 (1995) (citation omitted).

With certain exceptions, a party suing on a contract must attach that contract to its complaint: MCR 2.113(F)(1). Plaintiff amended its complaint once and was then alerted to the problem regarding the agreement in issue no later than when defendants filed their answer to plaintiff's motion for summary disposition. Thus, plaintiff had several weeks before trial to move to amend their complaint again, either to provide the proper contract or to prove that Lake States and plaintiff were the same. It appears that plaintiff tried to follow the latter course. Again, however, plaintiff submitted uncertified printouts of pages from a state web page instead of admissible evidence.

Plaintiff was further alerted to the continuing problem with its claim when the court in denying the motion for summary disposition noted that "questions of fact abound in this case, including whether the Agreement relied on by Plaintiff was in effect between these parties at the relevant period of time."

Plaintiff argues that the court erred in denying its mid-trial motion to amend its complaint. We disagree. The second time plaintiff proffered the 1998 agency agreement at trial, defendants objected, which led to plaintiff's mid-trial motion to amend. Plaintiff cites to MCR 2.118(A)(2) in support of its assertion of error. However, plaintiff fails to address another section of that rule dealing with amending complaints during trial over an opponent's objections:

> If evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings, amendment to conform to that proof shall not be allowed unless the party seeking to amend satisfies the court that the amendment and the admission of the evidence would not prejudice the objecting party in maintaining his or her action or defense on the merits. The court may grant an adjournment to enable the objecting party to meet the evidence. [MCR 2.118(C)(2).]

Under MCR 2.118(C)(2), the court correctly denied the motion. A defense that defendants used throughout the trial—that plaintiff had failed to either show that defendant Mason had violated an agreement with plaintiff in October 2000 or that Lake States was the same as plaintiff—was crucial to their ability to meet plaintiff's claim. Accordingly, we see no abuse of discretion in the denial of the mid-trial motion.

Plaintiff next argues that the court also abused its discretion by failing to admit the 1998 agency agreement into evidence.[2] However, plaintiff has not shown that the exclusion of the

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[2] The record shows that the 1998 agency agreement in the name of Lake States was actually admitted into evidence once. The record does not offer any explanation for why plaintiff proffered it again. The second time it was proffered, defendants objected and the court sustained their objection. Because both parties had the opportunity to challenge the record, we must assume its accuracy.

exhibit was the sole reason for the jury's verdict. The jury may not have doubted that Mason had entered into the 1998 agency agreement with Lake States, which was very similar to the 2001 agency agreement. However, the jury could also have been unconvinced that these two firms were the same legal entity. Plaintiff's failure to provide documentary evidence on the point may have persuaded the jury that there was merit to defendants' argument that there would have been no need for the 2001 agreement if the old one was still effective. Plaintiff did not foreclose that possibility. Therefore, plaintiff cannot show that the exhibit was a dispositive factor in the case. See MCR 2.613(A).

Finally, we reject plaintiff's argument that the court abused its discretion by failing to grant a mistrial after defendant raised reinsurance during the trial. "Whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion resulting in a miscarriage of justice." *Persichini v William Beaumont Hosp*, 238 Mich App 626, 635; 607 NW2d 100 (1999).

But, by its terms, the statute that plaintiff relies on does not apply to this case:

> *In the original action brought by the injured person, or his or her personal representative in case death results from the accident*, as mentioned in section 3006, the insurer shall not be made or joined as a party defendant, nor, except as otherwise provided by law, shall any reference whatever be made to such insurer or to the question of carrying of such insurance during the course of trial. [MCL 500.3030 (emphasis added).]

This Court has previously refused to apply this statute to an indemnity case. *Liberty Mut Ins Co v Curtis Noll Corp*, 112 Mich App 182, 192; 315 NW2d 890 (1982). Further, had plaintiff established its breach of contract claim, an insufficient damages award would have been subject to a motion for new trial because of "inadequate damages appearing to have been influenced by prejudice or passion" or a "verdict clearly or grossly inadequate." MCR 2.611(A)(1)(c), (d). Therefore, because the statute does not apply and because the discussion of reinsurance appears to have been used to attack plaintiff's claimed damages rather than to "inflame the passions of the jury," the court did not abuse its discretion in refusing to grant plaintiff's request for a mistrial. Further, even if it were error to permit the topic to be raised, plaintiff's failure to establish a contract meant that any such error was harmless. MCR 2.613(A).

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Talbot
/s/ Stephen L. Borrello