

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 04-1679-FT
STATE OF WISCONSIN**

Cir. Ct. No. 03CV159

**IN COURT OF APPEALS
DISTRICT III**

DARLENE A. BARTELT AND ANDREW BARTELT,

PLAINTIFFS,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

DEFENDANT-APPELLANT,

MICHAEL J. PEETERS,

DEFENDANT-RESPONDENT,

SECURITY HEALTH PLAN OF WISCONSIN,

DEFENDANT.

APPEAL from an order of the circuit court for Lincoln County:
J. MICHAEL NOLAN, Judge. *Reversed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. State Farm Mutual Automobile Insurance Company appeals a nonfinal order denying its summary judgment motion.¹ The circuit court determined there was a disputed material fact regarding whether statements by State Farm's agent resulted in a reformation of Michael Peeters' homeowner's insurance resulting in coverage for Peeters' vehicle. State Farm argues its agent could not orally reform Peeters' homeowner's policy to provide coverage for the vehicle. We agree and reverse the order.

BACKGROUND

¶2 Before March 22, 2003, Peeters owned a Chevrolet Blazer and a Chevrolet Silverado. Both vehicles were insured by State Farm. On March 22, 2003, Peeters purchased a 2003 Toyota Camry. On March 24, Peeters' wife, Kathy, contacted June Bonke at Grunenwald Agency, which sells insurance for State Farm. Kathy wanted to place coverage on the Camry. However, there is a dispute regarding what Kathy and Bonke discussed regarding coverage for the Blazer. Kathy told Bonke the family was going to drive the Blazer in the winter and the Camry in the summer. Kathy wanted to keep coverage for the Blazer in case someone had to drive it in the summer. Kathy states Bonke told her it would not be necessary to keep coverage for the Blazer because it would be covered by her homeowner's insurance, also provided through State Farm. Bonke denies telling Kathy the Blazer would be covered by the Peeters' homeowner's insurance. Regardless, it is undisputed that the homeowner's policy did not provide coverage for the Blazer.

¹ We granted leave to appeal a nonfinal order on July 27, 2004. This is an expedited appeal under WIS. STAT. RULE 809.17 (2003-04).

¶3 On June 21, 2003, the Peeters' Silverado was being repaired so Peeters drove the Blazer. While driving the Blazer, Peeters was involved in an accident with Darlene Bartelt. On July 16, Bartelt filed suit against Peeters and State Farm, alleging State Farm was estopped from denying coverage due to Bonke's statements to Kathy that the Blazer was covered by the Peeters' homeowner's insurance.

¶4 State Farm moved for summary judgment. It argued there was no coverage under the Peeters' automobile policy because Kathy removed the Blazer from the policy. It also argued there was no coverage under the Peeters' homeowner's policy. The circuit court granted summary judgment as to the automobile policy. However, turning to the issue of the homeowner's policy, the court stated:

[I]t seems to me that Ms. Bonke can bind the company to some coverage that maybe really isn't there when she's talking about what the policy will cover as opposed to simply saying to her, well, don't worry, your homeowners will cover

....

I think that there is this issue of whether or not if in fact Ms. Bonke is found—that Ms. Bonke made that statement to Ms. Peeters and she relied on it, that therefore that maybe the need to reform the homeowner's policy.

Therefore, the court denied State Farm's summary judgment motion as to the homeowner's policy. State Farm petitioned this court for leave to appeal the summary judgment order. We granted the petition in order to clarify whether the Peeters' homeowner's policy could be reformed by Bonke's statements.

DISCUSSION

¶5 We review summary judgments de novo, employing the same methodology as the trial court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Generally, summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

¶6 “Reformation of a written instrument is appropriate when the instrument fails to express the intent of the parties, either because of the mutual mistake of the parties, or because of the mistake of one party coupled with fraud or inequitable conduct of the other.” *Hennig v. Ahearn*, 230 Wis. 2d 149, 174, 601 N.W.2d 14 (Ct. App. 1999). Additionally, the mistake or fraud must have existed at the time of execution of the contract. *See St. Norbert College Found., Inc. v. McCormick*, 81 Wis. 2d 423, 432, 260 N.W.2d 776 (1978). “A mutual mistake is one reciprocal and common to both parties, where each alike labors under a misconception in respect to the terms of the written instrument.” *Continental Cas. v. Wisconsin Patients Comp. Fund*, 164 Wis. 2d 110, 117, 473 N.W.2d 584 (Ct. App. 1991).

¶7 The Peeters argue Bonke’s statements created an oral contract for automobile insurance. We first note that the Peeters argue not only is their homeowner’s policy reformed, but their automobile policy is also reformed to cover the Blazer. However, this appeal deals only with whether there can be coverage under the Peeters’ homeowner’s policy.

¶8 State Farm argues that the Peeters’ homeowner’s policy clearly expressed that it does not cover automobiles and that it specifically prohibits oral reformation. State Farm points to two portions of the policy in support of this

argument. First, “Section II—Exclusions” states that the policy does not apply to “a motor vehicle owned or operated by or rented or loaned to any insured.” Second, “Section I and Section II—Conditions” states, “A waiver or change of any provision of this policy must be in writing to be valid.” We agree with State Farm that these provisions preclude the Peeters from arguing there was an oral modification of the contract based on Bonke’s statements.

¶9 The Peeters do not argue that they intended to insure their automobiles under their homeowner’s policy when they entered into the policy. Therefore, the policy’s provision excepting automobiles from coverage accurately reflects the parties’ intent when the insurance policy was created. Neither party had any misconception regarding what the policy would and would not cover. Thus, there was no mutual mistake regarding what the policy covered.

¶10 Furthermore, the homeowner’s policy specifically excluded oral modification. The Peeters do not argue that this was a mistake or that the parties did not intend that this provision be part of the policy. Again, there is no mutual mistake regarding how the policy could be modified.

¶11 The Peeters also argue that State Farm is estopped from denying coverage. “The general rule is well established that the doctrine of waiver or estoppel based upon the conduct or action of the insurer or its agent is not applicable to matters of coverage as distinguished from grounds for forfeiture.” *Shannon v. Shannon*, 150 Wis. 2d 434, 450-51, 442 N.W.2d 25 (1989). Furthermore, estoppel and waiver cannot be applied to create a liability for coverage not contracted for. *Id.* at 451-52. “The rule in Wisconsin is that estoppel can neither create an insurance contract where none exists, nor enlarge existing

coverage.” *Hoefl v. United States Fire Ins. Co.*, 153 Wis. 2d 135, 144, 450 N.W.2d 459 (Ct. App. 1989).

¶12 The Peeters’ homeowner’s policy already existed when Kathy talked to Bonke. The policy did not include, and the parties did not intended to include, automobile coverage. Estoppel cannot create automobile coverage where it did not exist. *See id.* It also cannot enlarge the homeowner’s coverage to include the Blazer. *See id.* Thus, the court improperly denied State Farm’s motion for summary judgment on this issue.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

