

STATE OF VERMONT

SUPERIOR COURT
Rutland Unit

CIVIL DIVISION
Docket No. 54-1-10 Rdev

GEICO Insurance Co.
Plaintiff

CONFORMED COPY
VERMONT SUPERIOR COURT

v.

OCT 31 2011

Nancy and Thomas Bernheim
Defendants

RUTLAND

DECISION

Defendants' Motion to Alter Judgment Pursuant to VRCP 59(e)

This matter is before the court on Defendants' Motion to Alter Judgment Pursuant to VRCP 59(e) filed on July 28, 2011. Defendants argue that the court improperly granted summary judgment to Plaintiff in an order dated July 14, 2011. Plaintiff GEICO Insurance Co. ("GEICO") is represented by Antonin Robbason, Esq. Defendants Nancy and Thomas Bernheim are proceeding pro se.

This case originates with an automobile accident between Nancy Bernheim, who is insured by GEICO, and another driver, who was insured by Liberty Mutual. GEICO seeks to recover \$10,000 paid to the Bernheims under the medical payments provisions of their auto insurance policy. The language of the policy includes a subrogation clause. GEICO did not, however, pursue Liberty Mutual itself, and the Bernheims settled with Liberty Mutual for \$30,000. The settlement agreement states that it is "inclusive of any liens, including but not limited to the GEICO Insurance Company." In an order dated July 14, 2011, the court denied the Bernheims' Motion for Summary Judgment and granted GEICO's Motion for Summary Judgment.

The Bernheims ask the court to alter its previous judgment, pursuant to VRCP 59(e). Under this rule, the court may reconsider the correctness of the prior judgment. *In re Robinson/Keir P'ship*, 154 Vt. 50, 54 (1990). The rule gives the court broad powers to alter or amend the judgment if "necessary to relieve a party against the unjust operation of a record resulting from the mistake or inadvertence of the court and not the fault or neglect of a party." *Osborn v. Osborn*, 147 Vt. 432, 433 (1986).

In seeking to alter the judgment, the Bernheims do not bring new facts to the attention of the court, but rather argue that the court made mistakes of law in granting GEICO summary judgment. The Bernheims' arguments misconstrue the grounds on which the court granted summary judgment. The decision was ultimately based on the trustee theory of settlement proceeds, whereby the Bernheims hold their recovery from Liberty Mutual in trust for GEICO to the extent of GEICO's prior payment under the

policy. See *Moultroup v. Gorham*, 112 Vt. 317, 320 (1943). The legal points that the Bernheims challenge do not alter this fundamental conclusion.

The Bernheims first argue that the court mischaracterized the Iowa Supreme Court's decision in *Allied Mut. Ins. Co. v. Heiken*, 675 N.W.2d 820 (Iowa 2004), cited in *Utica Nat. Ins. Co. v. Cyr*, 2007 VT 134A, 183 Vt. 564. The language that the Bernheims point to must be read in the context of the entire opinion. When the opinion is considered as whole, it is clear that GEICO is entitled to recovery under the trustee theory—a conclusion that the *Heiken* decision itself supports. See *id.* at 830 n.7 (acknowledging the possibility of a trust theory of recovery)

The Bernheims' argument based on the necessity of GEICO pleading the statute of limitations encounters the same problem. GEICO's entitlement to recovery is based on the fundamental principles of the trustee theory. The statute of limitation issue is discussed in the prior opinion in the context of explaining why GEICO's recovery from the Bernheims is an equitable result. The trustee theory is the basis for the conclusion that the Bernheims held the \$10,000.00 in trust for the benefit of GEICO. The specific basis for GEICO's entitlement to recovery against the Bernheims in this suit is their obligation to share the \$10,000.00 pursuant to their contractual duty not to prejudice GEICO's rights.

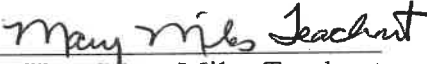
The Bernheims' remaining arguments seek merely to relitigate issues previously decided by the court. The court continues to reject the argument that GEICO is barred from recovery because of alleged bad faith conduct. The court also continues to reject the argument that, because the settlement agreement between the Bernheims and Liberty Mutual did not delineate what portion of the recovery was meant to cover medical costs, GEICO is not entitled to recoup its payment of medical expenses from the settlement funds. This argument was explicitly considered and rejected in the court's prior opinion, and the court finds no reason to alter or amend the judgment now.

ORDER

Defendants' Motion to Alter Judgment Pursuant to VRCP 59(e) is *denied*.

The Court will schedule a status conference.

Dated at Rutland, Vermont this 31st day of October, 2011.


Hon. Mary Miles Teachout
Superior Judge