STATE OF MICHIGAN

COURT OF APPEALS

NICK A. MADIAS,

Plaintiff/Counter-
Defendant/Appellant,

v

MADIAS BROTHERS, INC.,

Defendant/Counter-
Plaintiff/Appellee,

and

M.E. TRUCKING COMPANY, INC., and
FIRST EVERGREEN, INC.,

Defendants/Counter-
Plaintiffs.

UNPUBLISHED
April 29, 1997

No. 188697
Wayne Circuit Court
LC No. 93-432884-CB

Before: Young, P.J., and Taylor and R.C. Livo,* JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment granting defendant Madias Brothers, Inc. ("Madias"), reformation of a stock purchase agreement entered into by the parties. We reverse and remand.

This appeal involves a contested provision in a stock purchase agreement entered into between Madias and its shareholders. A provision of the agreement stated that Madias would pay shareholders whose employment with Madias was terminated the greater of $10 per share or book value. After terminating his employment with defendant, plaintiff demanded payment of his shares at book value. When Madias refused, plaintiff initiated this action, alleging breach of contract. Madias counterclaimed

---

* Circuit judge, sitting on the Court of Appeals by assignment.

alleging, among other things, that a mutual mistake was made in drafting the provision and that all of the shareholders had intended to pay a terminated shareholder only $10 per share. Madias also requested reformation of the provision to reflect the intended provision. The reformation issue was severed and tried separately without a jury. In its findings, the trial court stated that a mutual mistake had occurred and then reformed the agreement to reflect that the parties intended that terminated shareholders receive $10 per share.

Plaintiff first contends that an amended stock purchase agreement that was drafted, signed and executed by Madias and its shareholders subsequent to the filing of plaintiff's complaint and before trial was ineffectual as to plaintiff. Plaintiff did not raise this issue below. Thus, we decline to consider it. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 182; 521 NW2d 499 (1994). Further, we conclude that failure to review is not unjust since the trial court did not consider the amended agreement in reaching its decision.

Plaintiff next argues that the trial court applied the incorrect burden of proof when finding that a mutual mistake occurred. We agree. Courts will reform an instrument to reflect the parties' actual intent where there is clear evidence that both parties reached an agreement, but as the result of mutual mistake, or mistake on one side and fraud on the other, the instrument does not express the true intent of the parties. *Ross v Damm*, 271 Mich 474, 480-481; 260 NW 750 (1935). A mutual mistake occurs when the belief by parties to a contract is not in accord with the facts, and the mistaken belief relates to basic assumption upon which contract is made and which materially affects agreed performances of parties. parties. *Lenawee County Bd of Health v Messerly* , 417 Mich 17, 29-30; 331 NW2d 203 (1982). The party seeking reformation of a contract has the burden of proving by clear and convincing evidence that it is necessary in order to carry out the true agreement of the parties. *Dingeman v Reffitt*, 152 Mich App 350, 358; 393 NW2d 632 (1986). Furthermore, a "[c]ourt [sitting in] equity [can]not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of evidence . . . ." *Holda v Glick*, 312 Mich 394, 404; 20 NW2d 248 (1945); *Windham v Morris*, 370 Mich 188, 192; 121 NW2d 479 (1963).

In this case, the trial court held that Madias had proven a mutual mistake by a preponderance of the evidence. Because the court based its holding upon an incorrect burden of proof, we remand this case for a determination of whether a mutual mistake was shown by clear and convincing evidence. In light of our decision to remand, it is unnecessary to address plaintiff's argument that the evidence was insufficient to show that a mutual mistake occurred.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219 are warranted, neither party having prevailed in full.

/s/ Robert P. Young, Jr.
/s/ Clifford W. Taylor
/s/ Robert C. Livo