

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MERLO CONSTRUCTION COMPANY, INC,  
Plaintiff-Appellee,

UNPUBLISHED  
September 25, 2012

v

No. 304184  
Wayne Circuit Court  
LC No. 10-000814-CK

CITIZENS INSURANCE COMPANY OF  
AMERICA,  
Defendant-Appellant,

and

MADIGAN INSURANCE AGENCY, INC, d/b/a  
MADIGAN PINGATORE INSURANCE  
SERVICES,  
Defendant.

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Before: JANSEN, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Defendant, Citizens Insurance Company of America, appeals as of right from orders granting summary disposition in favor of plaintiff, Merlo Construction Company, Inc., and fixing the amount of judgment.<sup>1</sup> For the reasons set forth in this opinion, we reverse and remand.

**FACTS**

This case arises from plaintiff's commercial insurance policy with defendant, effective from February 1, 2009, to February 1, 2010, that covered many of the machines plaintiff used in its construction business (the policy or the insurance policy). Plaintiff's insurance policy with defendant specified that it only covered equipment included on the policy's equipment schedules. The equipment schedules listed each piece of equipment, along with the coverage

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<sup>1</sup> Madigan Insurance Agency, Inc., d/b/a Madigan Pingatore Insurance Services, was dismissed from this case by stipulation on April 8, 2010, and has taken no part in this appeal.

type, coverage limit, and a description of each particular machine. At all times pertinent to this appeal, item 21 on plaintiff's "Inland Marine Schedule Declarations" was listed as "2000 CATERPILLAR 950g WHEEL LOADER #2SJ01074." Plaintiff owned a caterpillar 950-G wheel loader matching that year and serial number (the 2000 950-G) until December of 2008. In December of 2008, plaintiff traded in the 2000 950-G for a 2002 Caterpillar 950g wheel loader (the 2002 950-G). However, plaintiff did not modify its equipment schedule to reflect the year and serial number of the new machine. When plaintiff renewed its policy in February of 2009, plaintiff made other changes to the policy and equipment schedules. In fact, plaintiff reduced the coverage limit for the "2000 CATERPILLAR 950g WHEEL LOADER" from \$125,000 to \$105,000. However, plaintiff did not change the description to match the year and serial number of the 950-G.

The 2002 950-G was stolen in October of 2009. After defendant denied the claim because the machine described on the equipment schedule did not match the stolen machine, plaintiff filed this suit. In its motion for summary disposition, plaintiff argued that the equitable remedy of contract reformation was proper because the insurance policy was the result of mutual mistake. Plaintiff requested reformation of the insurance policy it had with defendant so that the policy provided coverage for the 2002 950-G instead of the 2000 950-G. The trial court granted that request and plaintiff's motion for summary disposition. This appeal then ensued.

#### STANDARD OF REVIEW

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Cedroni Assoc v Tomblinson, Harburn Assoc*, 290 Mich App 577, 584; 802 NW2d 682 (2010). A motion for summary disposition brought pursuant to MCR 2.116(C)(10) applies to the factual support for a party's cause of action. *Id.* When reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, and other evidence in the light most favorable to the nonmovant. *Id.* A motion for summary disposition should be granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A genuine issue of material fact exists when "reasonable minds could differ . . . after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). This Court reviews de novo a trial court's decision in matters involving equity. *Forest City Enterprises, Inc v Leemon Oil Co*, 228 Mich App 57, 67; 577 NW2d 150 (1998). The trial court's findings of fact are reviewed for clear error. *Id.*

#### LEGAL ANALYSIS

"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." *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 24; 592 NW2d 379 (1998), quoting *Olsen v Porter*, 213 Mich App 25, 29; 539 NW2d 523 (1995). The party seeking reformation must prove by clear and convincing evidence the existence of a mutual mistake. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 379; 761 NW2d 353 (2008). "A mutual mistake may be one of fact or one of law." *Id.*

A court may also grant the equitable remedy of reformation, in some situations, on the basis of unilateral mistake. *Johnson*, 281 Mich App at 380. Reformation may be appropriate if a unilateral mistake was the result of fraud. *Id.* However, reformation does not require a finding of fraud if “one party at the time of the execution of a written instrument knows not only that the writing does not accurately express the intention of the other party as to the terms to be embodied therein, but knows what that intention is . . . .” *Id.*

Plaintiff does not assert, and we do not find, any ambiguity in the insurance contract. Additionally, plaintiff concedes that while it listed a 950-G on the equipment schedule, the 950-G that was stolen from plaintiff was not the same 950-G listed in the equipment schedule. In finding that reformation was “called for” the trial court ruled, in relevant part:

Where, as here, there has been a simple error in describing one of the items of the insured, the full premium has been paid for the actual item, and where the description as stated does adequately describe the item (it was indeed a Caterpillar model 950-G wheel loader), then reformation to correct the year and serial number, to verify coverage, is equitably called for.

Hence, the trial court based its remedy on its finding that equity supports a finding that a simple error in the year and serial number of the listed equipment mandated reformation. Seemingly, the trial court reached this conclusion based on its additional finding that plaintiff continued to pay, and defendant continued to receive premium payments for the 950-G.<sup>2</sup> In support of its contention that the insurance contract at issue should be reformed to include the stolen 950-G, plaintiff argues, and the trial court seemingly agreed, that a mutual mistake was present here based on plaintiff’s failure to update its equipment schedule in accordance with the express language of the policy and defendant continuing to receive premiums for equipment which was no longer part of plaintiff’s inventory. Such an assertion and finding begs, rather than directly answers the main issue in this case of whether there existed a *mutual* rather than a *unilateral* mistake.

In the absence of fraud, case law mandates that in order for the equitable remedy of reformation to apply, there must be a mutual mistake.<sup>3</sup> See, *Johnson*, 281 Mich App at 379. Importantly, mere lack of knowledge by one party cannot form the basis of a mutual mistake; rather, our Supreme Court has defined the phrase “mutual mistake of fact”<sup>4</sup> as “an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the

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<sup>2</sup> While we are mindful of defendant’s argument that plaintiff requested and defendant agreed to refund a portion of the insurance premiums to a date prior to the theft of the 950-G, based on our finding that defendant’s lack of consideration and election of remedies defenses have been waived by not being asserted in a responsive pleading as required by MCR 2.111(F), we do not consider this argument.

<sup>3</sup> Plaintiff does not assert, and we do not find, any evidence of fraud on the part of defendant in this case.

<sup>4</sup> Plaintiff did not allege, and we do not find any evidence of a “mistake of law” in this case.

substance of the transaction.” *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 442; 716 NW2d 247 (2006). The party seeking reformation must prove mutual mistake by “clear and satisfactory” evidence, “so as to establish the fact beyond cavil.” *Crane v Smith*, 243 Mich 447, 450; 220 NW 750 (1928), as quoted in *Johnson*, 281 Mich App at 379. With regard to the issue of the mutuality of mistake, we glean plaintiff’s argument to be that by continuing to charge and receive premiums for equipment which plaintiff no longer possessed, defendant accepted plaintiff’s equipment schedule mistake and thereafter adopted that mistake as its own. Such an argument belies the undisputed facts, and to some extent, logic.

By the express terms of the insurance contract, plaintiff was required to prepare and was also entitled to amend its equipment schedule. There is no similar duty placed on defendant or its agents. The record reveals that plaintiff added and deleted items on its equipment schedule, but failed to do so relative to the 950-G. However, there is no evidence that defendant knew or had any reason to know, that plaintiff no longer possessed the listed 950-G. Such a conclusion is based, in part, on the fact that during the period of coverage, plaintiff decreased the insured value of the 950-G from \$125,000 to \$105,000. Such a decrease in value could logically lead defendant to conclude that the value of the listed 950-G depreciated over time. What it does not legally or logically lead defendant to conclude is that the equipment listed was not the actual equipment owned and insured by plaintiff. Simply stated, plaintiff has failed to produce evidence such that the trial court could conclude that there existed – in this case – a mutual mistake. In the absence of such evidence, case law cited herein dictates that plaintiff has not met its burden of proof and accordingly, is not entitled to reformation of the insurance contract.

In its brief on appeal, plaintiff argues that if there was not a mutual mistake of fact, then defendant was providing illusory coverage in violation of public policy. Although this argument was not raised or addressed below, an appellee can argue on appeal for alternative grounds of affirmance. See *Vanslebrouck v Halperin*, 277 Mich App 558, 565; 747 NW2d 311 (2008). This Court recently addressed the concept of an illusory contract with respect to insurance:

The “doctrine of illusory coverage” encompasses “[a] rule requiring an insurance policy to be interpreted so that it is not merely a delusion to the insured. Courts avoid interpreting insurance policies in such a way that an insured’s coverage is never triggered and the insurer bears no risk.” [*Ile v Foremost Ins Co*, 293 Mich App 309, 315-316; 809 NW2d 617 (2011), citing Black’s Law Dictionary (9th ed) (doctrine of illusory coverage).]

In *Ile*, 293 Mich App at 321-322, the insurer charged a joint premium for two types of coverage, even though one type of coverage would not pay out under any reasonably foreseen circumstance. The facts of that case are distinguishable from the facts presented here. In *Ile*, the insurer knew that the one type of coverage would not pay out under any reasonably foreseen circumstance. In this case, there is no evidence that defendant knowingly or purposefully provided coverage for a machine that plaintiff no longer owned. In fact, plaintiff provided and approved the equipment schedule and values that defendant used to calculate plaintiff’s premium. Defendant insured a piece of equipment that plaintiff no longer owned as a result of plaintiff’s actions, not defendant’s actions.

Finally, the parties include some arguments in their briefs regarding whether the 950-G was “newly acquired.” This question is irrelevant. The policy provides that plaintiff has a grace period to modify its equipment schedule when it purchases new equipment. For 60 days after new equipment is purchased, the equipment is covered under the policy even though it is not specifically listed on the equipment schedule. In this case, it is undisputed that plaintiff owned the 2002 950-G for more than 60 days when it was stolen. It was purchased in December of 2008 and stolen in October of 2009, approximately 300 days later. It was clearly not insured under the 60 day grace period provision, so whether it was newly acquired is immaterial.

Because we conclude that the trial court erred in reforming the insurance policy and granting plaintiff’s motion for summary disposition, defendant’s other arguments on appeal are inapplicable and we will not address them.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. We do not award costs in this matter. MCR 7.219.

/s/ Kathleen Jansen  
/s/ Stephen L. Borrello  
/s/ Jane M. Beckering