FOURTH DIVISION
October 15, 2015

No. 1-13-3420

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MIDWEST FAMILY MUTUAL INSURANCE COMPANY, Plaintiff and Counterdefendant-Appellee, v. WALSH CONSTRUCTION COMPANY, Defendant and Counterplaintiff-Appellant, (Bonaparte Corporation, Divane Brothers Electric Company, Homer L. Chastain & Associates, LLP, John Lingle, and Levonne Kinnard, Defendants).	)	Appeal from the Circuit Court of Cook County No. 09 CH 37744 Honorable Mary Anne Mason Jean Prendergast Rooney Judges Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court's judgment affirmed in all respects. Denial of contractor's request for reformation of insurance policy was not against manifest weight of evidence. Grant of summary judgment in favor of insurer on promissory estoppel count of contractor's counterclaim was proper, where no promise of coverage was made and contractor could not show it relied on certificate of insurance. Trial court correctly granted summary judgment in favor of insurer on its amended complaint for declaratory judgment where it had no duty to defend contractor, who was not an additional insured on insurance policy. Because contractor was not additional insured under insurance policy, contractor could not argue insurer was estopped from denying coverage.

¶ 2 This appeal involves an insurance coverage dispute involving a commercial general liability insurance policy. After defendant-counterplaintiff, Walsh Construction Company (Walsh) was sued by a subcontractor's employee, who was injured while working, Walsh tendered its defense to plaintiff-counterdefendant Midwest Family Mutual Insurance Company (Midwest), claiming it was an additional insured on a policy that Midwest had issued to the subcontractor, defendant Bonaparte Corporation (Bonaparte). Midwest refused to defend Walsh and later prevailed in an action against Walsh, both on its declaratory-judgment claim and in defending against Walsh's counterclaims.

¶ 3 Walsh appeals from the following three orders entered by the circuit court: (1) the October 30, 2012 order denying Walsh's motion for summary judgment; (2) the April 17, 2013 order entering judgment, after an evidentiary hearing, in favor of Midwest and against Walsh on count I of Walsh's counterclaim for reformation of the subject insurance policy; and (3) the September 30, 2013 order granting summary judgment in favor of Midwest and against Walsh on Midwest's amended complaint for declaratory judgment and on Walsh's counterclaims for promissory estoppel and estoppel.

¶ 4 Finding no error in any of these rulings, we affirm.

¶ 5 I. BACKGROUND

¶ 6 Walsh was hired by the City of Chicago to be the construction manager for a project called the "Solidarity Drive Underpass and Museum Campus Circle Drive" (the Project). Walsh entered into a subcontract with defendant Divane Brothers Electric Company (Divane) for the electrical work on the Project. The subcontract required Divane to procure general liability insurance naming Walsh as an additional insured and also obligated Divane to require its subcontractors to do the same on their insurance policies. One of Divane's subcontractors was

Bonaparte, an electrical contractor; that subcontract required Bonaparte to procure general liability insurance naming Walsh, among others, as an additional insured.

¶ 7 Bonaparte started work on the Project on September 11, 2008. Bonaparte had a commercial general liability insurance policy issued by Midwest (the Policy), which covered the policy period of August 1, 2008 to August 1, 2009. The Policy, however, did *not* specifically name Walsh as an additional insured. Nor did it contain what is known as a "blanket additional insured endorsement," which is an endorsement sometimes contained in liability insurance policies that automatically grants insurance coverage to a person or entity that, by virtue of a contract with the named insured, is required to be included as an additional insured. See, *e.g.*, *Liberty Mutual Fire Insurance Co. v. St. Paul Fire & Marine Insurance Co.*, 363 Ill. App. 3d 335, 341 (2005). We have already noted that Bonaparte's subcontract required that Walsh be added to Bonaparte's insurance policy for the Project, so had Bonaparte's policy with Midwest contained a blanket additional insured endorsement, Walsh would have been automatically covered.

¶ 8 Walsh permitted Bonaparte to begin work on the Project on September 11, 2008 without verifying that Bonaparte's insurance policy included Walsh—either specifically or by virtue of a blanket endorsement—as an additional insured to its insurance policy.

¶ 9 Nearly a month after Bonaparte began work on the Project, on October 9, 2008, defendant Levonne Kinnard, a Bonaparte employee, was injured while working on the Project. While there is some evidence in the record that this accident happened around 9:15 AM, the precise time of the accident was never conclusively established.

¶ 10 On the same day, a representative of Bonaparte contacted its insurance agent on the Policy, the John L. Saisi Insurance Agency, Inc. (the Saisi Agency), and requested a certificate of

insurance which listed Walsh as an additional insured on the Policy. The precise time of the request from Bonaparte to the Saisi Agency for that certificate of insurance is not clear from the record, but the evidence did show that the Saisi Agency sent the certificate of insurance, listing Walsh as an additional insured on the Policy, via facsimile to Bonaparte at 1:40 PM on that date.

¶ 11 A week later, on October 16, 2008, Kinnard filed a personal injury action against several defendants, including Walsh (the Kinnard lawsuit). Walsh tendered its defense of the Kinnard lawsuit to Bonaparte and Midwest on November 11, 2008, based on its status as an additional insured under the Policy. Along with that tender letter, Walsh included the certificate of insurance naming Walsh as an additional insured, which Walsh had received from the Saisi Agency the same day as Kinnard's accident.

¶ 12 On December 11, 2008, Midwest denied Walsh's tender of defense because Walsh was not listed as an additional insured on the Policy, and because the certificate of insurance that Walsh had provided was not signed by an agent or representative acting on behalf of Midwest.

¶ 13 On October 7, 2009, Midwest filed the instant declaratory judgment action (later amended to add an additional defendant not relevant to this appeal). Midwest sought a declaration that it had no duty to defend or indemnify Walsh, among others, in connection with the Kinnard lawsuit because Walsh was not an additional insured under the Policy.

¶ 14 Walsh filed its answer and a three-count counterclaim against Midwest. Count I sought reformation of the Policy to include Walsh as an additional insured. Count II alleged promissory estoppel. Count III alleged that Midwest should be estopped from denying coverage or asserting policy defenses based on its untimely filing of the declaratory judgment action.

¶ 15 The parties filed cross-motions for summary judgment, each of which the trial court denied. On March 6 and 7, 2013, a bench trial was held on count I of Walsh's counterclaim, the

reformation count. The trial judge heard testimony from four witnesses, Jason Bonaparte, John Saisi, Carol Roller, and Daniel Miller. We summarize the evidence below.

¶ 16 Bonaparte's president, Jason Bonaparte, to whom we will refer by his first name to avoid confusion with the company bearing his name, testified first. Jason testified that John Saisi of the Saisi Agency had long been Bonaparte's insurance broker and insurance agent, and that the company relied on Saisi to procure insurance. Jason testified that it was his understanding that the policy purchased from Midwest would provide coverage to Walsh on this Project. But he had no direct involvement with the insurance for Bonaparte; two office clerks, Bennie Callahan and Selena Swopes, dealt with day-to-day insurance issues.

¶ 17 In regard to the Kinnard lawsuit, Jason attempted to, but did not find, any documents related to the Project, other than the certificate of insurance issued on the day of Kinnard's accident. Referring to a trial exhibit that was a 2005 additional insured endorsement for a different project, Jason stated he had not seen a similar additional insured form for the Project.

¶ 18 John Saisi testified that he had been the president of the Saisi Agency for 24 years, a captive agent of Farmers Insurance. Saisi would always place coverage with Farmers Insurance unless it did not provide the type of insurance needed by a client. In that instance, Saisi could refer the client to a number of other carriers.

¶ 19 Until a period in or around 2005, Saisi had always insured Bonaparte with Farmers Insurance. But then Farmers Insurance decided to stop offering commercial general liability insurance policies that covered "completed" projects and, instead, began limiting itself to "business owners policies" that covered a project during the work phase only. The difference was that if a lawsuit was filed after the completion of a project, the "business owners policy" would

not cover it. Thus, Saisi determined that a Farmers policy was no longer suited to Bonaparte, given that lawsuits stemming from construction jobs often come after the project is completed.

¶ 20 So Saisi sought different insurance for Bonaparte. He ultimately decided to place insurance for Bonaparte with Daniel Miller (Miller) of Miller Insurance Group (Miller Insurance). The policy was with Midwest.

¶ 21 Saisi and Miller split the commission for placing the Policy. Saisi testified that he believed the Policy contained a blanket additional insured endorsement because he discussed it with Miller, who said "it would cover it." Saisi testified that it was his understanding that the additional insured endorsement came automatically with the Policy as part of the premium charge (as it used to with Farmers Insurance), but he learned after Kinnard's accident that Midwest was going to charge a separate fee for specific additional insured endorsements.

¶ 22 The evidence showed, however, that on January 9, 2005—over three years before the Kinnard accident, back when the Policy was first issued—Miller sent this letter to Saisi by facsimile, which we include in pertinent part below:

> "Midwest Family has agreed to issue the CG 2037 & CG 2010. This time we will be OK with what you already sent. *From now on Midwest will charge $100 per addtl* [sic] *insured. Please notify Bonaparte of this cost so they can increase there* [sic] *bid.*" (Emphasis added.)

¶ 23 Saisi identified this document at trial and acknowledged its contents. He could not recall if he examined the Policy in detail, when Miller provided it to him, to determine what endorsements it contained or whether it contained a blanket additional insured endorsement. He admitted that, in hindsight, the Policy did *not* contain a blanket additional insured endorsement.

¶ 24 But he also testified that it was his understanding, based on what Miller had told him, that the Saisi Agency was authorized to issue certificates of insurance on the Policy that included additional insureds. He testified that the Saisi Agency sent Miller Insurance certificates of insurance routinely, as many as 50 per year. He identified the certificate of insurance which listed Walsh as an additional insured on the Policy—which the Saisi Agency had issued on the day of Kinnard's accident—as one such example.In further support of this claim, Saisi identified a letter he sent to Midwest on January 27, 2009, concerning the Kinnard accident and Walsh's coverage under the Policy. In that letter, Saisi informed Midwest that, "[d]ue to the significant number of certificates issued for Bonaparte *** each year," Miller had instructed him to issue them and retain a copy of the certificates in Saisi's office, and that they had been following this practice since the policy was originally placed in force in 2005. As the trial court pointedly noted, however, the only certificate of insurance issued by the Saisi Agency, concerning Bonaparte, that was introduced at trial (or at any other time in the record) was the one Saisi issued on the day of Kinnard's accident, naming Walsh as an additional insured.

¶ 25 Carol Roller, an agent and office manager with the Saisi Agency, likewise testified that, on an annual basis, she issued approximately 50 to 100 certificates of insurance for Bonaparte under the Policy. She further testified that she faxed a copy of each certificate of insurance to both Bonaparte and Miller Insurance. Roller testified that she was familiar with blanket additional insured endorsements from working with Farmers Insurance. Roller also testified that she did not know that other companies had different procedures, had never reviewed the Policy, and was not involved in the Policy's application or renewal processes.

¶ 26 Roller testified that, prior to October 9, 2008, she had not been contacted to prepare a certificate of insurance for the Project. She prepared the October 9, 2008 certificate of insurance

and believed that she was authorized to do so; she was unaware of any need to charge $100 for each additional insured. It was her understanding that the policy had a blanket additional insured endorsement.

¶ 27 Roller checked the facsimile activity reports for the Saisi Agency and could not locate any documentation that Miller Insurance received a copy of the October 9, 2008 certificate of insurance. Roller also testified that Bennie Callahan from Bonaparte called her that day and told her that Kinnard had been injured. Callahan did not tell Roller what time Kinnard had been injured. Roller identified an activity report from the facsimile machine at the Saisi Agency showing that she faxed the certificate of insurance at 13:40 (which we take as military time for 1:40 PM). Roller subsequently understood that Kinnard had been injured before the certificate was issued.

¶ 28 Daniel Miller testified by a videotaped evidence deposition. He testified that all of his contact with Bonaparte came through Saisi. During the years Miller had an agency agreement with Midwest, he wrote 25 insurance policies with Midwest.

¶ 29 He testified that a blanket additional insured endorsement allows agents to issue certificates of insurance without notifying the insurance company, but that Midwest did not offer blanket additional insured coverage. Miller placed insurance with other companies, including Allied, which did offer blanket additional insured coverage. Miller did not offer Bonaparte a quote on insurance with Allied.

¶ 30 Miller testified that the additional charge to place each additional insured on the Policy was $100. He also testified that he told Saisi—in 2005 or 2006—how much it was going to cost to add individual additional insureds to the Policy. Miller explained the date of 2005 or 2006 was "[b]ased upon some of the exhibits from the prior deposition." (We assume Miller was

referring to the January 9, 2005 facsimile we detailed above, which Saisi admitted receiving from Miller, informing Saisi that Midwest would charge $100 per additional insured; in any event, Miller's testimony is consistent with that facsimile transmission).

¶ 31 Miller did not recall any certificates of insurance for Bonaparte being issued from his agency or office between 2007 and 2009. He also testified that he did not authorize the certificate of insurance dated October 9, 2008 to be issued.

¶ 32 After closing arguments, the parties submitted trial briefs. On April 17, 2013, the trial court issued a memorandum opinion and order. The court entered judgment in favor of Midwest on Count I of Walsh's counterclaim for reformation of the Policy.

¶ 33 In doing so, the court first made a factual finding regarding the day that triggered this entire controversy—October 9, 2008, the day that Kinnard was injured on the Project, and the day that Bonaparte requested and received a certificate of insurance from the Saisi Agency, indicating that Walsh was an additional insured on the Policy. The court wrote in its memorandum opinion as follows:

> "the court finds that the request from Bonaparte to add Walsh [and another party, not part of this appeal] to the Midwest policy was not made until after Kinnard was injured. It is simply not credible to argue that after being on the worksite for nearly one month, Bonaparte happened to realize on October 9, 2008, that it had not made a request to add additional insureds required in its [subcontract] and, coincidentally, requested the certificate of insurance from Saisi on the same day, but prior to the time Kinnard was injured.

> The more likely scenario is that Kinnard's accident triggered a search by Walsh [and the other contractor] for information relating to all carriers that should receive notice of the occurrence and, hence, the belated request by Bonaparte to Saisi."

¶ 34 After having found, as a matter of fact, that Walsh was *not* added as an insured prior to the accident that would trigger coverage, the court proceeded to rule that Walsh failed to make its case to reform the contract to read as if a blanket additional insured endorsement were a part of the Policy. Thus, it entered judgment in favor of Midwest on the reformation count of Walsh's counterclaim.

¶ 35 The disposition of the reformation count—count I of Walsh's counterclaim—left remaining Walsh's counterclaims for promissory estoppel and estoppel, as well as Midwest's amended declaratory judgment, seeking a declaration that it had no duty to defend Walsh. These issues were decided on September 30, 2013, when the trial court entered summary judgment in favor of Midwest on its amended complaint for declaratory judgment and on Walsh's remaining two counts in its counterclaim.

¶ 36 In its appeal, Walsh argues that the trial court erred in (1) denying Walsh summary judgment on the reformation count; (2) finding in favor of Midwest and against Walsh on the reformation count following the evidentiary hearing; and (3) granting summary judgment to Midwest on all remaining counts.

¶ 37 II. ANALYSIS

¶ 38 A. October 30, 2012 Order Denying Walsh's Motion For Summary Judgment

¶ 39 We first address the denial of Walsh's motion for summary judgment on the reformation count, count I of its counterclaim. Midwest raises a procedural issue that Walsh does not address in its reply brief. We agree with Midwest that, because the reformation count was decided as a

matter of fact after an evidentiary hearing, we may not review the earlier denial of Walsh's motion for summary judgment on this count. After an evidentiary trial, an order denying a motion for summary judgment is not reviewable, because any error in the denial is merged in the subsequent trial. *C. Szabo Contracting, Inc. v. Lorig Construction. Co*., 2014 IL App (2d) 131328, ¶19 n.2; *Moy v. Ng*, 371 Ill. App. 3d 957, 959 (2007); *Paz v. Commonwealth Edison*, 314 Ill. App. 3d 591, 594 (2000). " 'The rationale for this rule is that it would be unjust to the prevailing party, who won the judgment after the evidence was more completely presented.' " *Moy*, 371 Ill. App. 3d at 959-60 (quoting *Battles v. La Salle National Bank*, 240 Ill.App.3d 550, 558 (1992)). As the first issue raised on appeal is not reviewable, we reject is as a basis for reversal and proceed to the second issue.

¶ 40 B. April 17, 2013 Judgment Against Walsh for Reformation of the Policy

¶ 41 On April 17, 2013, after an evidentiary hearing, the circuit court order entered judgment in favor of Midwest and against Walsh on count I of Walsh's counterclaim for reformation of the subject insurance policy. Walsh now asserts that our review is *de novo*. Citing *Hobbs v. Hartford Insurance Co*., 214 Ill. 2d 11, 17 (2005), Walsh notes that the construction of the provisions of an insurance policy presents a question of law to which the *de novo* standard of review is applicable. But *Hobbs* is inapposite, because there is no dispute here regarding the terms of the Policy; it is conceded by all parties that the Policy did *not* contain a blanket additional insured endorsement. There is no need to interpret the terms of the Policy.

¶ 42 Indeed, the entire point of a claim for reformation is to concede that a contract does not contain a certain provision, but to argue that it was *supposed* to have contained it—that the parties meant to include it but failed to do so by virtue of a mistake of some kind. In other words, in seeking reformation, as the title of the cause of action suggests, a party seeks to *re-write* the

language of a contract so that it reflects what the parties truly intended and would have written, but for the mistake. *Suburban Bank of Hoffman-Schaumburg v. Bousis*, 144 Ill. 2d 51, 58 (1991).

¶ 43 Here, the parties tried the issue regarding count I of Walsh's counterclaim for reformation of the Policy. The trial court did not construe the policy but, instead, after hearing evidence, decided that reformation of the undisputed provisions of the Policy was not warranted.

¶ 44 Thus, rather than apply a *de novo* review to the trial court's judgment, our standard of review in a bench trial is whether the order or judgment is against the manifest weight of the evidence. *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871, ¶ 12; *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002). A trial court's decision is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence. *Eychaner*, 202 Ill. 2d at 252. A reviewing court must not substitute its judgment for that of the trier of fact. *Id*. The trial judge, as the trier of fact in a nonjury case, is in a superior position to observe the demeanor of the witnesses, to judge their credibility, and to determine the weight their testimony should receive. *Habitat Co. v. McClure*, 301 Ill. App. 3d 425, 440-41 (1998). If, in a bench trial, contradictory testimony is given that could support conflicting conclusions, we will not disturb the trial court's factual findings based on that testimony unless a contrary finding is clearly apparent. *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 859 (2008).

¶ 45 With the appropriate standard of review in mind, we turn to the issue of reformation facing the trial court at the evidentiary hearing. As we have just noted, the purpose of a reformation action is to change a written instrument by inserting an omitted provision or deleting an existing provision so that the document conforms to the original agreement of the parties. *Wheeler-Dealer, Ltd. v. Christ*, 379 Ill. App. 3d 864, 869 (2008). The party seeking reformation

must show that the parties came to an understanding, but that, in reducing that understanding to writing, some provision was inadvertently included or excluded or miswritten, either (1) through a mutual mistake of the parties or (2) through one party's mistake, coupled with fraudulent conduct by the other party. *Bousis*, 144 Ill. 2d at 59. Here, there is no suggestion that Midwest or Miller engaged in fraud; the only issue is mutual mistake. The mistake "must be of fact and not of law, mutual and common to both parties, and in existence at the time of the execution of the instrument." *Zannini v. Reliance Insurance Co. of Illinois*, 147 Ill. 2d 437, 449 (1992).

¶ 46 The parties' original written agreement is presumed to express their mutual intentions, and "this conclusion will not yield to any other unless the contrary evidence is clear and convincing." *Bousis*, 144 Ill. 2d at 59. Thus, a party seeking reformation of a contract bears the burden of showing mutual mistake by clear and convincing evidence. *Fisher v. State Bank of Annawan*, 163 Ill. 2d 177, 182 (1994). The doctrine of reformation, and this higher level of proof, applies to insurance policies just as it does to any other written instrument. *Zannini*, 147 Ill. 2d at 449-50.

¶ 47 Accordingly, Walsh had the burden to present clear and convincing evidence at trial that Midwest and Bonaparte had agreed that the Policy would contain a blanket additional insured endorsement, and that the Policy did not contain this provision due to a mutual mistake of fact. The trial court concluded that Walsh failed to meet its burden on either point. Based on the evidence presented, the trial court's decision was not against the manifest weight of the evidence. Walsh has failed to convince this court that the opposite conclusion is apparent or that the trial court's findings were unreasonable, arbitrary, or not based on the evidence. *Eychaner*, 202 Ill. 2d at 252.

¶ 48 Walsh presented no evidence that Midwest and Bonaparte agreed that the Policy contain a blanket additional insured endorsement. The only witness from Bonaparte was Jason Bonaparte, who testified that he did not have direct involvement in securing certificates of insurance for projects, and that he relied on Saisi, his insurance broker, to find the "correct" types of insurance. Jason was not asked if he told anyone, including Saisi or Miller, that he expected, or even needed, his insurance policy to contain a blanket additional insured endorsement. He also was not asked if he informed anyone, including Saisi or Miller, of the contractual insurance requirements for the Project. Thus, there was no evidence that Bonaparte had requested a blanket additional insured endorsement or a scheduled additional insured endorsement for the Project. Indeed, as the trial court found, the fact that Bonaparte contacted Saisi on the day of the accident, to secure a certificate of insurance for Walsh, was "a tacit admission that at least Bonaparte understood that it was necessary to make a specific request to add Walsh before coverage would be afforded under the Policy," because if the Policy contained a blanket endorsement, Bonaparte would have had no need to secure the certificate—Walsh would have been automatically covered.

¶ 49 Because it could not prove that Bonaparte and Midwest had agreed to a blanket additional insured endorsement, Walsh tried to prove that agreement through the insurance agents, Saisi and Miller. As the trial court noted in its written decision, Walsh failed to do so. As the court stated: "With respect to the evidence of the alleged meeting of the minds, Saisi's general testimony that he discussed Bonaparte's insurance needs with Miller and that Miller represented that the Midwest policy would 'cover it' cannot satisfy [Walsh's] burden of proof, particularly given Miller's testimony that Midwest did not write policies containing blanket additional insured endorsements and that he was aware of that fact when he was quoting insurance for

Bonaparte." The trial court also noted that Miller was never asked during his evidence deposition about that conversation between Saisi and him.

¶ 50 However, as the trial court further reasoned: "Assuming Miller did represent that Midwest would 'cover it,' it is just as likely that he was referring to the fact, as he informed Saisi, that Midwest would issue the type of additional insured endorsement that prompted Saisi to seek new coverage for Bonaparte in the first place and would cover additional insureds under separate endorsements at a charge of $100 per endorsement." The trial court was referring to Miller's 2005 fax to Saisi that we quoted above (see *supra*, ¶ 22), in which Miller referenced the $100 charge for each additional insured endorsement, acknowledging that Miller wanted Bonaparte to be aware of this charge so that it could be factored into Bonaparte's bid on any project.

¶ 51 We find that 2005 fax to be perhaps the most convincing evidence defeating Walsh's claim. Telling Saisi that he could name additional insureds for a specified cost is essentially the polar *opposite* of promising a blanket additional insured endorsement, because with a blanket endorsement, the insured would not need to even disclose the additional insureds to the insurance company, much less pay an additional premium for each one. It is unimaginable that Saisi could have taken that 2005 fax as suggesting, in any way, that Bonaparte was receiving a blanket additional insured endorsement.

¶ 52 The trial court also discussed evidence that could have been presented but was not. Walsh did not call anyone from Midwest to testify. Nor did Walsh specifically ask Miller, in his evidence deposition, whether he promised Saisi that the Policy would contain a blanket endorsement. Moreover, though both Saisi and Roller testified that they routinely faxed certificates of insurance to Miller for Bonaparte projects, not a single one was introduced at trial (other than the one for Walsh on the day of the accident).

¶ 53 Suffice it to say that Midwest did not remotely approach the standard of clear and convincing evidence to cause the court to reform the language of the Policy to include a blanket additional insured endorsement. The trial court's written order was thoughtful, detailed, and well-reasoned. Its judgment denying reformation was not against the manifest weight of the evidence.

¶ 54 C. September 30, 2013 Order Granting Summary Judgment in Favor of Midwest

¶ 55 After the bench trial, Midwest moved for summary judgment on its amended complaint for declaratory judgment, and on Walsh's two remaining counterclaims. Count II of Walsh's counterclaim alleged promissory estoppel. Count III alleged that Midwest should be estopped from denying coverage or asserting policy defenses based on its untimely filing of the declaratory judgment action. On September 30, 2013, the circuit court granted summary judgment in favor of Midwest on both counts, as well as entering summary judgment in favor of Midwest on its amended complaint for declaratory judgment, finding that Midwest did not owe Walsh a duty to defend the Kinnard lawsuit.

¶ 56 Summary judgment should be granted where the pleadings, depositions, admissions and affidavits on file, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Schultz v. Illinois Farmers Insurance Co.*, 237 Ill. 2d 391, 399 (2010); 735 ILCS 5/2–1005(c) (2008). Our review is *de novo*. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc*., 223 Ill. 2d 352, 360 (2006).

¶ 57 1. Promissory Estoppel (Count II of Walsh's Counterclaim)

¶ 58 We first address the trial court's order granting summary judgment in favor of Midwest on count II of Walsh's counterclaim sounding in promissory estoppel. To establish a claim for promissory estoppel, a plaintiff must plead and prove that "(1) defendant made an unambiguous

promise to plaintiff, (2) plaintiff relied on such promise, (3) plaintiff's reliance was expected and foreseeable by defendants, and (4) plaintiff relied on the promise to its detriment." *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 233 Ill. 2d 46, 51 (2009); *Quake Construction, Inc. v. American Airlines, Inc.*, 141 Ill.2d 281, 309-10 (1990).

¶ 59 In count II of its counterclaim, Walsh alleges that, on October 9, 2008, Saisi issued a certificate of insurance to Walsh that listed Walsh as an additional insured on the Policy, and that Saisi was acting as an actual or apparent agent of Midwest, with the authority to bind Midwest. That, according to Walsh, was the required "unambiguous promise," made by Midwest to Walsh, necessary to satisfy the first prong of the promissory estoppel test. Walsh further alleges that it reasonably relied upon the certificate of insurance to its detriment, and that Midwest is thus obligated to provide additional insured coverage to Walsh.

¶ 60 The biggest problem with this argument is that the trial court already found, as a matter of fact, following an evidentiary hearing, that Bonaparte did not request or receive the certificate of insurance naming Walsh as an additional insured until *after* Kinnard was injured that day on the Project. Thus, Walsh could not possibly have relied on this certificate for coverage at the time of Kinnard's accident.

¶ 61 Walsh claims that the timing of the accident vis-à-vis the receipt of the certificate of insurance that day is a question of fact. But the point of arguing that a question of fact exists, precluding summary judgment, is that a party is entitled to a trial on the factual dispute—and Walsh already had a trial on that factual dispute, where it was free to introduce as much evidence as it could to prove that claim. The trial court found against Walsh, and we have affirmed that finding. At this stage, following that evidentiary hearing and the trial court's factual finding, there is no genuine issue of material fact regarding the timing of the accident compared to the

issuance of the insurance certificate. With the trial court having found that the accident happened before Bonaparte requested or received the insurance certificate naming Walsh, a finding that we have upheld, Walsh cannot show that the issuance of the certificate was an unambiguous promise on which it relied.

¶ 62 There are other bases, as well, on which to affirm the trial court's entry of summary judgment on the promissory estoppel counterclaim. First, the certificate of insurance was not an insurance contract. See, *e.g.*, *Clarendon American Ins. Co. v. Aargus Security Systems, Inc.*, 374 Ill. App. 3d 591, 597 (2007). And the language of this particular certificate clearly said so: "This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below." Nor is there any evidence to suggest that Midwest even *knew* about the issuance of this certificate of insurance at the time it was sent. The Saisi Agency did not send it to Miller or Midwest. For all of these reasons, the faxing of the certificate of insurance did not, as a matter of law, constitute an unambiguous promise from Midwest to Walsh.[1]

¶ 63 Nor could Walsh have reasonably relied on such a certificate. This court has interpreted certificates of insurance containing this language—that "this certificate does not amend, extend or alter the coverage afforded by the policies"—and held that the certificate holder cannot rely on the certificate in order to establish that it is an additional insured under the policy. See *Westfield Ins. Co. v. FCL Builders, Inc.*, 407 Ill. App. 3d 730, 736-37 (2011); *United Stationers Supply Co. v. Zurich American Ins. Co.*, 386 Ill. App. 3d 88, 105 (2008) ("where the certificate refers to the

[1] Midwest further argues that the insurance certificate, even if it constituted an unambiguous promise, could not be attributed to Midwest, because Saisi sent it without conferring with either Midwest or Miller, and Saisi lacked any authority—actual or apparent—to bind Midwest to that promise. Given our resolution of this issue, we need not reach this question.

policy and expressly disclaims any coverage other than that contained in the policy itself, the policy should govern the extent and terms of the coverage").

¶ 64 We would finally note, as did the trial court, that Walsh worked on this Project with Bonaparte and other subcontractors for a month without confirming its status as an additional insured. Walsh clearly did not "rely" on any certificate of insurance during any of that time before the day of Kinnard's accident. Even if the evidence showed that Walsh suddenly and coincidentally decided to request that insurance certificate only minutes or hours before Kinnard's accident—which the evidence did not show—Walsh did not change its position during that short window of time compared to the entire previous month, when it allowed work on the Project to proceed without that promise of insurance. See *Parkside Senior Servs., L.L.C. v. Nat'l Dev. & Consultants, Ltd.*, 303 Ill. App. 3d 1022, 1026-27(1999) (party asserting detrimental reliance must show change in position based on asserted promise). There is no evidence in the record suggesting that, on that fateful day, Walsh had suddenly become reticent about continuing work without confirmation of insurance coverage, or that Walsh did anything different than it had the previous four weeks on the Project.

¶ 65 For all of these reasons independent of one another—because the trial court found that the insurance certificate was not issued until after the Kinnard accident that would have triggered the need for coverage, because Walsh could not rely on that certificate as a matter of law, and because there is no evidence whatsoever that Walsh did, in fact, change its position in any way based on that asserted promise—the trial court properly granted summary judgment on the claim for promissory estoppel.

¶ 66 2. Midwest's Amended Complaint for Declaratory Judgment

¶ 67 Having found that (1) the Policy did not contain a blanket additional insured endorsement (which is undisputed); (2) Walsh was not named as an additional insured on the Policy before the Kinnard accident, a finding that we have determined is not against the weight of the evidence; (3) Walsh is not entitled to reform the Policy to read as if it contained a blanket additional insured endorsement, a finding we also uphold; and (4) Walsh is not entitled to coverage based on the doctrine of promissory estoppel, which we also affirm, the trial court was left to decide whether Midwest owed Walsh a duty to defend. After its resolution of the other questions, this question became elementary. Walsh was not *automatically* named as an additional insured by virtue of a blanket endorsement, nor was it *specifically* named on the Policy before the accident that spawned the lawsuit for which Walsh seeks coverage. Under no scenario could one argue that Walsh was insured under the Policy. The trial court correctly, and obviously, determined that under these circumstances, Midwest did not have a duty to defend Walsh in the underlying Kinnard lawsuit.

¶ 68 3. Estoppel (Count III of Walsh's Counterclaim)

¶ 69 That leaves us with count III of Walsh's counterclaim, where Walsh alleges that Midwest should be estopped from denying coverage or asserting policy defenses based on its untimely filing of the declaratory judgment action. The trial court found estoppel inapplicable because Walsh was not an insured on the Policy. We agree.

¶ 70 The doctrine of estoppel holds that an insurer may not simply deny coverage when a complaint alleges facts potentially covered by a policy. *Employers Ins. of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 150 (1999). The insurer must either seek a declaratory judgment that the policy does not cover the suit or defend the suit while reserving its rights under the policy. *Id.* If the insurer fails to take these steps, and is subsequently found to have

wrongfully denied coverage, then it may not later assert policy defenses to avoid coverage. *Id.* at 150–51; see also *Waste Management, Inc. v. International Surplus Lines Insurance Co.* 144 Ill.2d 178, 208 (1991). For example, an insurer may not wrongfully deny coverage and then raise defenses such as the insured's failure to provide timely notice of a lawsuit (*Ehlco*, 186 Ill.2d at 154), waiver (*Statewide Insurance Co. v. Houston General Insurance Co.*, 397 Ill.App.3d 410, 424 (2009)), or cancellation of the policy (*American Standard Insurance Co. of Wisconsin v. Gnojewski*, 319 Ill.App.3d 970, 978 (2001)).

¶ 71 But estoppel does not apply where, in the end, the insurer has no duty to defend. *Ehlco* 186 Ill.2d at 151 ("Application of the estoppel doctrine is not appropriate if the insurer had no duty to defend, or if the insurer's duty to defend was not properly triggered."). In other words, the estoppel doctrine cannot create coverage where none existed in the first place. *Bartkowiak v. Underwriters at Lloyd's, London*, 2015 IL App (1st) 133549, ¶ 48; *Ismie Mutual Insurance Co. v. Michaelis Jackson & Associates, LLC*, 397 Ill.App.3d 964, 974 (2009).

¶ 72 Here, because Walsh was not an insured under the Policy, Midwest owed Walsh no duty to defend the Kinnard lawsuit. The trial court correctly found that Walsh could not rely on estoppel to create coverage where none existed. The court's grant of summary judgment in favor of Midwest on the estoppel counterclaim was proper.

¶ 73 III. CONCLUSION

¶ 74 We affirm the judgment of the circuit court denying Walsh's request for reformation of the Policy, as the decision was not against the manifest weight of the evidence. We affirm the trial court's grant of summary judgment in favor of Midwest on count II of Walsh's counterclaim (promissory estoppel), as no promise of coverage was made, and Walsh offered no evidence to show it did rely or could have relied on the certificate of insurance. We affirm the grant of

summary judgment in favor of Midwest on its amended complaint for declaratory judgment, as it had no duty to defend or indemnify Walsh, who was not an additional insured on the Policy. Finally, we affirm the grant of summary judgment in favor of Midwest on count III of Walsh's counterclaim (estoppel), because Walsh was not an insured under the Policy and, as such, could not use an estoppel theory to create coverage that did not otherwise exist.

¶ 75 Affirmed.