

IN THE COURT OF APPEALS OF IOWA

No. 7-143 / 96-0566

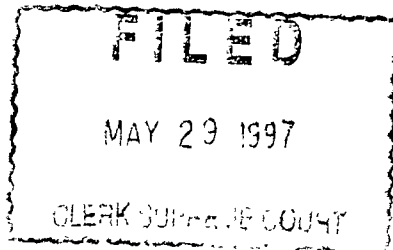
STEVEN ALEXANDRES and
VERNELL ALEXANDRES,
Plaintiffs-Appellees,

vs.

CARL SOLUM d/b/a
SOLUM ENTERPRISES,
Defendant-Appellant,

and

DAN SOLUM,
Defendant.



Appeal from the Iowa District Court for Cerro Gordo County, Jon Stuart
Scoles, Judge.

Defendant Carl Solum appeals from the district court's judgment for the
plaintiffs on a jury verdict rendering him liable under theories of agency and joint
venture for the damages caused by the negligence of Dan Solum. **AFFIRMED.**

Douglas L. Phillips, Sioux City, for appellant.

Joel J. Yunek and Richard R. Winga of Laird, Heiny, McManigal, Winga,
Duffy & Stambaugh, P.L.C., Mason City, for appellees.

Heard by Sackett, P.J., and Cady and Streit, JJ., but decided en banc.

STREIT, J.

Defendant Carl Solum appeals from the district court's judgment for the plaintiffs on a jury verdict rendering him liable under theories of agency and joint venture for the damages caused by the negligence of Dan Solum. The defendant claims there was insufficient evidence to support jury verdicts based on agency and a joint venture and claims that the district court erred in permitting the plaintiffs to amend their petition.

On February 9, 1994, a fire occurred at the residence of the plaintiffs, Steven and Vernell Alexandres. The fire occurred when electricity generated from a portable welding unit used to heat frozen water pipes of the nearby residence of Robert Cappel migrated into the water pipes of the Alexandres home causing the fire ignition.

John Cappel, son of Robert, had discovered the frozen pipes in the Cappel home and called Solum Enterprises. Carl Solum said the frozen pipes could be thawed with welding equipment and someone could handle the problem later in the day. Cappel called back later that day and Carl Solum said that someone would come out to the Cappel home.

Carl Solum claims he told Cappel that he was not equipped to thaw the frozen pipes, but his son, Dan, did portable welding jobs on his "off" hours. Carl Solum claims to have told Cappel that if he saw Dan, he would give him Cappel's address and, if Dan came out, he would want to know how far it was from the shut-off valve

to the house, and whether Cappel planned to pay as soon as the work was done.

Dan Solum arrived at the Cappel home later that day. He knew about the problem at the Cappel home and began his work. He attached the welding equipment to the frozen pipes. Being unsuccessful, he called his father. After this telephone conversation, Solum changed his procedure and the pipes began to thaw. Cappel wrote a check payable to "Solum Enterprises" for the thawing of the pipes. Dan Solum accepted the check without asking for any corrections on the check. Carl Solum denies he was involved with advice to his son and claims he did not receive any money from the job.

The Alexandreses commenced a negligence action against Carl Solum and Dan Solum asserting Dan was negligent in using welding equipment to thaw frozen water pipes of the Cappel residence. The Alexandreses claimed the negligence caused a fire damaging their home and personal property. The Alexandreses also asserted Dan was acting as agent for Carl Solum rendering Carl liable for Dan's negligence. A few days prior to the trial, the Alexandreses included in their requested jury instructions on the theory of joint venture between Dan and Carl. The court allowed them to amend their petition to conform to proof. The case proceeded to a jury trial. Solum moved for a directed verdict on the grounds the Alexandreses did not present sufficient evidence of an agency relationship or joint venture to raise a jury question. The district court denied the motion.

Carl objected to the submission of instructions on agency and joint venture asserting there was insufficient evidence to submit either theory to the jury. Carl also objected to the submission of the joint venture theory on the grounds the plaintiffs had failed to plead such a claim. The district court overruled Carl's objections.

The jury returned an approximately \$53,000 verdict for the Alexandreses against both Solums. The jury found Dan Solum was acting as an agent for Carl Solum and the Solums' joint venture caused the fire. Carl Solum filed a motion for judgment notwithstanding the verdict or for new trial, which the court denied. The district court entered a judgment for the plaintiffs. Carl Solum filed a notice of appeal.

I. Standard of Review. We review a trial court's denial of a motion for judgment notwithstanding the verdict for errors in the application of the law and consider only those grounds the movant raised in the motion. *Lawrence v. Grinde*, 534 N.W.2d 414, 420 (Iowa 1995). We view the evidence in the light most favorable to the nonmovant and seek to determine whether sufficient evidence existed to generate a jury question. *Federal Land Bank of Omaha v. Woods*, 480 N.W.2d 61, 65 (Iowa 1992); *Johnson v. Dodgen*, 451 N.W.2d 168, 171 (Iowa 1990); *In re Will of Pritchard*, 443 N.W.2d 95, 97 (Iowa App.1989). If substantial evidence exists to support a claim or defense, a motion for judgment notwithstanding the verdict should

have been denied. *Johnson*, 451 N.W.2d at 171. Evidence is substantial if a reasonable mind would accept it as adequate to reach a conclusion. *Id.*

II. Principle/Agent Relationship. Carl Solum claims there was insufficient evidence to submit agency theory to the jury and the finding an agency relationship existed between his son, Dan Solum, and Solum Enterprises. Specifically he claims there was insufficient evidence of control and authority to support the verdict. He claims Dan had no actual authority, either express or implied, nor did he have apparent authority.

The burden of proving an agency relationship is upon the party asserting its existence. *Farmers Grain Co., Inc. v. Irving*, 401 N.W.2d 596, 601 (Iowa App. 1986); *Chariton Feed and Grain Co., Inc.*, 369 N.W.2d 777, 789 (Iowa 1985). Though the question of whether an agency relationship exists is ordinarily one of fact, there must be substantial evidence on the question to generate a jury question; a scintilla is not enough. *Id.*; *C.F. Sales, Inc. v. Amfert, Inc.*, 344 N.W.2d 543, 553 (Iowa 1983). An agency relationship is a fiduciary relationship resulting from the manifestation of consent by one person, the “principal,” that another, the “agent,” shall act on the former's behalf and subject to the former's control and from consent by the latter to so act. *Pillsbury Co. v. Ward*, 250 N.W.2d 35, 38 (Iowa 1977).

An agency relationship may be proven from the parties' words and conduct, from which an intention to create an agency may be implied. *Thorp Credit, Inc. v.*

Wuchter, 412 N.W.2d 641, 646 (Iowa App. 1987). In *Thorp*, this court discussed the different ways an agency relationship can be created and where an agent's actions will bind his principle. *Id.* We stated:

A fundamental principle of agency law is that whatever an agent does, within the scope of his actual authority, binds his principal. Actual authority to act is created when a principal intentionally confers authority on the agent either by writing or through other conduct which reasonably interpreted allows the agent to believe he has the power to act. Apparent authority to do acts or make contracts is that which, although not actually granted, has been knowingly permitted by the principal or which he holds the agent out as possessing. Thus, when apparent authority exists, the manifestations of the principal to another party to a transaction must be interpreted in light of what the other party knows or should know instead of what the agent knows or should know. But the principal must have acted in such a manner as to lead persons dealing with the agent to believe the agent has authority.

Id. (Citations omitted).

Solum Enterprises placed an advertisement in the Yellow Pages that offered "Portable Welding Services." Carl Solum answered the phone at Solum Enterprises when John Cappel called for help. Carl never explained to Cappel that his son owned an independent business, although he may have referred to portable welding as his son's side-job. Carl Solum told Cappel how much he could expect it would cost to have the pipes thawed. Carl Solum relayed the message to Dan Solum that Cappel needed someone to thaw frozen water pipes. Carl Solum acted in a manner which led Cappel to believe when Dan Solum showed up at the Cappel residence, knowing about the frozen pipes, he was working for Solum Enterprises. It is evident John

Cappel believed Dan was acting on behalf of Carl and Solum Enterprises by the fact John paid Dan for the services by check written out to “Solum Enterprises.”

Although there was no express agreement establishing an agency relationship between Carl and Dan Solum, we believe there was enough evidence to submit to the jury the theory of an agent/principle relationship. We also find under the concept of apparent authority, there was substantial evidence to support the jury’s finding an agent/principle relationship existed.

III. Joint Venture. Carl Solum also argues the trial court erred in submitting the issue of joint venture to the jury and the evidence was insufficient to sustain the jury’s verdict on plaintiff’s joint venture claim. He claims he had no proprietary interest in the job, he had no control over the manner in which Dan performed the work at the Cappel residence, and he did not share in the profits, thus he should not be held liable for damages.

The theory of joint venture intertwines with the applicability of the laws of agency or partnership. *Farmers Grain Co., Inc. v. Irving*, 401 N.W.2d 596, 601-602 (Iowa App. 1986). If the findings of fact determine a partnership or agency existed, the same facts will generally support a joint venture theory. *Id.*

A joint venture is characterized as an association of two or more persons to carry out a single business enterprise or a common undertaking in which they combine their property, money, efforts, skill, or knowledge. *Hartig v. Francois*, 519

N.W.2d 393, 395 (Iowa 1994). The existence of a joint enterprise need not be expressed but may be implied in whole or in part from the conduct of the parties. *Farm-Fuel Prods. Corp. v. Grain Processing Corp.*, 429 N.W.2d 153, 156 (Iowa 1988).

Dan Solum does not have a separate phone, office, or shop for Solum Welding Service. His only advertisement is his father's yellow page advertisement. He has a sales tax permit for his business, but does not have an Employer Identification Number. Solum arrived at the Cappel residence because his father told him the Cappels' pipes were frozen. He used a welding machine on the job owned by Solum Enterprises. When the pipes failed to thaw, Solum called his father, received suggestions at thawing tactics, and changed his procedure. The pipes began to thaw and plaintiffs' house to burn.

The welder used by Dan Solum on the job is apparently being purchased from Solum Enterprises, although no evidence was presented regarding payments made toward the purchase. It was bought by Carl Solum in 1992 and claimed as a business expense on Solum Enterprises tax returns, even though he claimed he went out of the portable welding business in 1990. Carl Solum has supplied welders and welding tanks in the past. Dan Solum charges welding supplies to Solum Enterprises at other stores.

We find there is evidence of a common undertaking and combining of property, efforts, skill, or knowledge between Dan and Carl. Although there may have not been an exchange of money on this specific job, Dan and Carl have worked on large contracts together in the past. There is also a profit motive for Carl to pass work over to his son, so Dan can pay Carl for the welder and supplies that are charged to Solum Enterprise's account. Also, Solum Enterprises benefited by being able to offer the portable welding service to potential customers, rather than sending clients to other welders. The trial court correctly denied the motion for directed verdict and the jury verdict stands.

IV. Motion to Amend to Conform to Proof. Finally, Carl argues the trial court erred in permitting the Alexandreses to amend to conform to proof, adding a claim of joint venture to their petition. Plaintiffs submitted a joint venture instruction with their proposed instructions a few days before trial.

Standard of review is for corrections of error at law. Iowa R. App. P. 4. Iowa Rule of Civil Procedure 88 states:

A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial calendar, the party may so amend it at any time within twenty days after it is served. Otherwise, a party may amend a pleading only by leave of court or by written consent of the adverse

party. Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires.

Iowa R. Civ. P. 88.

Elaborating upon the rule 88 standard for amendments, the Iowa Supreme Court has said:

Allowance of an amendment to a pleading is the rule and denial the exception, although an amendment is not permissible which will substantially change the issue. Additionally, a trial court has considerable discretion as to whether an appropriate request for leave to amend should be granted or denied and we will reverse only where a clear abuse of discretion is shown.

M-Z Enter. Inc. v. Hawkeye Sec. Ins. Co., 318 N.W.2d 408, 411 (Iowa 1982). Thus, the timing of an attempt to amend is not the determinative factor; instead, the critical determination is whether the proposed amendment substantially changes the issues before the court. *Kitzinger v. Wesley Lumber Co.*, 419 N.W.2d 739, 741 (Iowa App. 1987).

The relevant “issues” are established either by the initial pleadings, *see Davis v. Ottumwa Young Mens Christian Assoc.*, 438 N.W.2d 10, 14-15 (Iowa 1989), or by those matters on which the parties have “consented” to litigate, either expressly or impliedly. *See* Iowa R. Civ. P. 249; *Allison-Kesley Ag Center, Inc. v. Hildebrand*, 485 N.W.2d 841, 845-46 (Iowa 1992).

We have already said the facts and evidence necessary to support a theory of an agency relationship are essentially the same as those necessary to support a joint

venture theory. The plaintiffs pled an agency theory in their initial pleadings. The defendants were given notice prior to trial a joint venture theory was also going to be pursued. We affirm the district court's ruling allowing plaintiffs to amend their pleading to allege the joint venture.

AFFIRMED.