

FILED

FEB 26 1986

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CARROLL THOMAS ALLMON,)

Plaintiff-Appellee/)
Cross-Appellant,)

vs)

HALE INSURANCE COMPANY,)
A Corporation,)

Defendant-Appellant/)
Cross-Appellee,)

and)

DAKOTA FIRE INSURANCE COMPANY,)
A Corporation,)

Defendant-Appellee/)
Cross-Appellant.)

Filed February 26, 1986

1

5-448
84-1256

Appeal from the Iowa District Court for Pottawattamie County (No. 9618) -

Keith E. Burgett, Judge.

Defendant Hale Insurance Agency appeals from adverse judgment, asserting that plaintiff failed to prove damages arising out of destruction by fire of his building and contents. **AFFIRMED IN PART, REVERSED IN PART.**

Richard J. Gilloon of Sodoro, Daly & Sodoro, Omaha, Nebraska, and Richard D. Crotty, Council Bluffs, for defendant-appellant/cross-appellee.

Lyle A. Rodenburg, Council Bluffs, for plaintiff-appellee/cross-appellant.

Philip Willson of Smith, Peterson, Beckman & Willson, Council Bluffs, for defendant-appellee/cross-appellant.

Heard by Snell, P.J., and Schlegel and Hayden, JJ.

Plaintiff Carroll Allmon purchased a restaurant for \$80,000 on December 29, 1981 from Richard and Kathie Comley on contract. Comleys had purchased this restaurant in 1980 from Everett Pittman for \$30,000. Pittman originally wanted \$150,000 for the restaurant but later agreed to sell it for \$80,000 to Allmon. Allmon believed the lowered sale price occurred because Pittman's wife was pregnant and wanted him to get out of the restaurant business.

A condition of sale was that Allmon obtain insurance to secure Comleys' interest before he took over. Allmon purchased a fire insurance policy on the restaurant from Dakota Fire Insurance Co. through Hale Insurance Agency, Inc. to cover his purchase contract obligation. The coverage under this policy was \$80,000—\$50,000 for the building and \$30,000 for its contents. Hale had arranged the coverage through a broker, Dependable Insurance Associates. Allmon later purchased another fire insurance policy on the restaurant from United Fire and Casualty (hereinafter UFC) insuring the restaurant for \$80,000.

On February 4, 1982, Allmon's restaurant was totally destroyed by fire. Allmon received \$80,000 from UFC for the fire loss with proof of loss showing total loss at \$163,000 (\$98,000 building, \$67,000 contents). However, Dakota refused to pay on the loss claiming Allmon had already received the actual cash value of the property.

After his insurance claim was denied, Allmon brought this action alleging that Hale breached its contractual duty to obtain insurance for the restaurant, to timely notify the insurer of Allmon's loss, and to adjust Allmon's fire claim. Allmon also alleged that Dakota breached its contract to cover plaintiff's loss.

On the question of valuation, Allmon testified that the building was worth \$115,000 and the restaurant equipment was worth \$50,000 or \$60,000, totalling \$165,000 or more. He acknowledged he only paid \$80,000 for the whole thing.

A valuation expert for plaintiff testified that the replacement cost for the building would be \$113,081. No evidence of value was presented by defendants other than the purchase price paid by Allmon and by his seller, Pittman.

The jury received the following instruction to guide its determination of "actual cash value:"

The actual cash value of the property involved immediately prior to the loss should be ascertained by applying the rules as follows:

If the property involved were of a kind and character which was bought and sold in the market in the ordinary course of dealing, its market value would be its actual cash value at the time of the loss. This means the cash price which would be arrived at between a voluntary seller willing but not compelled to sell, and a voluntary purchaser willing but not compelled to buy, bargaining in open market for the sale and purchase of the property involved.

If, however, the property involved has no market value that is fairly indicative of its real value, then the actual cash value of the property must be determined without resort to market value in the manner hereinafter explained.

When it appears from the evidence that a fair and reasonable market value is not available, you should consider all the facts and circumstances established by the evidence which fairly tend to prove the actual cash value of the property. These facts may include the size and dimensions of the property, the kind and quality of material of which it is constructed, its age, the amount of wear and tear to which it has been subjected, its state of repair, its adaptability to the use to which it was being put and to other uses, and all other pertinent matters established by the evidence.

It may likewise be shown as bearing on the question of actual value what it would cost at the time and place of the loss to replace the property with material of like kind and quality within a reasonable time after the loss. If the reproduced property would be more valuable than the former because of its age or condition, proper deductions from the reproduction cost should be made because of such depreciation or obsolescence.

The actual cash value of the property immediately prior to the time of the loss should be determined by

applying the foregoing rules to the facts and circumstances established by the evidence.

The case was submitted to the jury on special verdict forms by submission of three issues which were answered as follows:

Issue No. 1: Did Plaintiff notify Defendant Hale Insurance Agency of the fire loss with due diligence and without unreasonable delay?

Answer: Yes.

(If your answer is no, do not answer Issues No. 2 or 3).

Issue No. 2: If your answer to Issue No. 1 is yes, did Defendant Hale Insurance Agency notify Dakota Fire Insurance Company of the fire loss with due diligence and without unreasonable delay?

Answer: No.

Issue No. 3: If your answer to Issue No. 1 or 2 is yes, what is the total of the actual cash value of property (building and contents) of the Plaintiff directly lost which was caused by the fire on February 4, 1982, without taking into consideration the deductible provisions of the policy or any amounts received from any other insurance company?

Answer:	Building: \$50,000.00
	Contents: \$25,000.00

On receiving the jury's verdict, the trial court determined that the jury had found that plaintiff sustained damages from the fire loss of \$75,000 over and above the payment of \$80,000 paid by UFC. Judgment was entered against Hale Insurance Company for \$75,000 plus interest and costs. The case against Dakota Fire Insurance Company was dismissed based on the jury's answer to special interrogatory no. 2. Hale filed several post-trial motions, including a motion to credit the \$80,000 payment for the same fire loss recovered by Allmon from UFC. The motions were overruled. Hale appeals and Allmon cross-appeals from the judgment entered.

Our scope of review in this law action is for correction of errors at law only. Iowa R. App. P. 4. Special verdict findings are governed by rule 205.

The primary argument made by Hale and Dakota is that the trial court misinterpreted the jury's answer to special interrogatory no. 3. They claim that the jury's answer was that the total value of the building and contents before the fire occurred was \$75,000. They read the question to ask for the "actual cash value" (valuation) of the property as though no insurance policy was issued on the property by UFC or by anyone else ("without taking into consideration any amounts received from any other insurance company"). Thus, *as so construed, the total loss on the building and contents to Allmon was \$75,000*

Dakota's policy contained a pro rata liability provision. That clause provided that Dakota shall not be liable for a greater proportion of any loss than the amount insured shall bear to the whole insurance covering the property. Since plaintiff has already received \$80,000 from UFC, Hale and Dakota argue that this limitation applies so that no damages would be assessable against either of them. The error by the trial court came, they assert, in reading the jury's finding as an assessment of damages rather than of valuation.

The problem with defendant's argument is that it is more an exercise in abstract thinking than a fit with the reality of the case. The jury knew that plaintiff Allmon had already received \$80,000 from UFC. He testified that he bought that policy to pay for his investment in the property. The insurance bought from Hale and Dakota was to pay the contract obligations of Allmon to Pittman and Comleys. In fact, the UFC money was used to pay the contract obligations since Hale and Dakota refused payment. Allmon received \$10,000, (his down payment on the purchase contract) plus one installment payment of \$800. The rest of the \$80,000 insurance payment was used to pay the mortgages and contract obligations. Thus, the jury knew that when the case was submitted,

Allmon had a cash payment of \$10,800 and a pile of rubble that used to be his building. Despite this knowledge, defendants argue that the jury concluded that Allmon's building and contents were only worth \$75,000 when destroyed by fire. The result of this reasoning is that UFC paid \$5,000 too much on their insurance loss and Allmon bears the fire loss of \$64,200 (\$75,000 less \$10,800). Is it reasonable and likely that the jury came to this result? We don't think so in light of the evidence presented.

The jury also had valuation testimony that the building and contents were worth \$163,000 to \$165,000. It was instructed that replacement cost could be considered with proper deductions made for depreciation or obsolescence. A determination by the jury that the total loss of building and contents amounted to \$155,000 would have been so reported if the jury counted in the \$80,000 payment by UFC. If it did not count the \$80,000 payment, the jury's determination of plaintiff's loss caused by the fire would be \$75,000. The jury was instructed to establish the actual cash value of property plaintiff lost without taking into consideration any amount received from any insurance company. This is exactly what the jury did in fixing plaintiff's loss at \$75,000 over and above the \$80,000 received from UFC.

The trial court found no difficulty in understanding the jury's result. It noted that the interrogatory was not objected to by either defendant and so was presumed to be clear in intent. The trial court interpretation is supported by Iowa R. Civ. P. 205. Applying that rule, the court in PHCC Inc. v. Johnston, 340 N.W.2d 744, 777 (Iowa 1983), said:

Even if we were to assume that the time of payment could not be decided against defendant as a matter of law, neither could it be decided in his favor as a matter of law. Any issue of fact not submitted to the jury was left for the trial court to resolve under Iowa Rule of Civil Procedure 205. That rule provides, in part:

If the submission omits any issue of fact, any party not demanding submission of such issue before the jury retires waives jury trial thereof, and the court may find upon it; failing which, it shall be deemed found in accord with the judgment on the special verdict.

See also Pillsbury Co. v. Ward, 250 N.W.2d 35, 38 (Iowa 1977); Janda v. Iowa Industrial Hydraulics Inc., 236 N.W.2d 339 (Iowa 1982). The law is well established that verdicts should be upheld if possible and not overturned. In Fjerstad v. Sioux Valley Hospital, 291 N.W.2d 786, 788 (S.D. 1980), the court said:

We hold that the verdict in this case is sustainable. A verdict should be sustained and should not be set aside unless it is irreconcilably inconsistent or is so vague that its meaning is uncertain. The verdict of a jury may be construed in light of the pleadings, the issues made by the evidence, and the jury instructions. NEDA Const. Co., Inc. v. Jenkins, 137 Ga. App. 344, 223 S.E.2d 732 (1976). It is presumed that a jury understands and abides by the court's instructions. Giltner v. Stark, 219 N.W.2d 700 (Iowa 1974). Even if the verdict is susceptible of two constructions, the construction that sustains the verdict must be applied. Baker v. Jewell, 77 S.D. 573, 96 N.W.2d 299 (1959).

We find the evidence supports the conclusion reached by the trial court in interpreting interrogatory no. 3.

The jury also found that plaintiff notified Hale Insurance Company of the fire loss, but that Hale failed to notify Dakota of the loss. Based on this finding, the suit against Dakota was dismissed. Plaintiff and Hale both object to this result claiming that Dakota is liable because Hale was its agent. As such, notice to Hale was notice to Dakota, even if Dakota was not given timely notice of the loss by Hale.

Dakota counters this assertion by pointing out that it dealt through an independent broker, Dependable Insurance Company of Des Moines, and not Hale Insurance Company. Dakota claims that Hale was plaintiff's agent, not its agent. Hale admits in its pleading that it was plaintiff's agent. The testimony

of Clyde D. McCarty, employee of Hale Insurance Company, was that Hale acted as agent for plaintiff in finding insurance and also had an agency relationship with insurance companies. In this case, it sought the insurance through Dependable Insurance Company, which secured coverage from Dakota Insurance Company. McCarty notified Allmon shortly after January 1, 1982, that insurance coverage had been obtained but failed to tell him the insurer's name. After the fire on February 4, 1982, Allmon notified Hale, but not Dakota since that identity was not known to him.

Ordinarily an insurance company is charged with having knowledge of information given to its agent. Iowa has codified these principles. See Iowa Code § 515.123-.125 (1985). On the question of constructive notice, the court has interpreted these sections as follows:

While it is true the evidence refuted any actual knowledge by the company, we are satisfied under the law it was charged with that knowledge because it was gained by its representative acting within his scope of employment. It matters not whether such adjuster was hired for each job as it arose or was in full time employment, just as long as the knowledge obtained was at a time when he was performing a related duty imposed upon him by his employment.

Briney v. Tri-State Mutual Grain Dealers Fire Insurance Co., 254 Iowa 673, 117 N.W.2d 889, 894 (1962); see also Terry v. American Insurance Company, 202 Iowa 1291, 1293; 211 N.W. 716, 717 (1927); cf. Corson v. Anchor Mutual Farm Insurance Company, 113 Iowa 641, 85 N.W. 806 (1901); cf. Imperial Cas. & Indemnity Company v. Carolina Cas. Insurance Co., 402 F.2d 41 (1968). In Imperial, the eighth circuit held that an insurance company was estopped to deny coverage when its agent should have known that an exclusionary clause would render the insurance void when he obtained similar coverage from another company he represented.

While recognizing the general rule, Dakota argues it comes within an exception. It cites Ballagh v. Polk-Warren Mutual Insurance Association, 257 Iowa 1334, 136 N.W.2d 496, 500 (1965), for the proposition that independent insurance agencies are an exception to the general rule that information obtained by an agent in the course of his agency belongs to his principal. That case, however, involved a determination of who owned the expirations of policies written by a former owner of the agency with the insurance company. The court held the expirations were owned by the agency and that information on policyholders was not the exclusive property of the company, but could be used by either party in soliciting business. We deem this authority to have no bearing on the issue of notice of a loss given a principal by its agent.

We find nothing in logic or law that rebukes the usual agency principles when a broker is relied on to obtain the insurance coverage. Should Dakota be able to reap the benefit of a contract in receiving premiums and yet deny it has any legal relationship with the agency through which the business was transacted? The presence of the broker in the middle, unknown to plaintiff, should be no legal barrier.

Also, according to most courts, where an insurance agent who is unable or unwilling to sell insurance in his own company to one who has made application for insurance to him in his capacity as an agent representing an insurer, and has not employed him as a broker to obtain insurance, procures insurance in a company not represented by himself, either by direct application to the company or through an agent of such company, he acts as the agent of the insurer and not of the insured, and in some jurisdictions it is expressly provided by statute that under such circumstances the insurer shall be charged with the agent's knowledge of any facts affecting the risk issued, and that he shall be considered the agent of the company issuing the insurance.

On the facts of this case, it is apparent that Hale acted both as agent for the insured, Allmon, and the insurer, Dakota. Accordingly, we hold that even if Dakota did not timely receive notice of the fire loss as required by its insurance contract, that notice to Hale constituted notice to Dakota. Thus, the trial court erred in dismissing the case against Dakota. On remand, the court shall enter judgment against defendant Dakota.

The judgment against Hale is affirmed. Costs are assessed equally against defendants.

AFFIRMED IN PART, REVERSED IN PART.