

IN THE COURT OF APPEALS OF IOWA

FILED

MAR 1 6 1989

CLERK SUPREME COURT

SHADYREST ACRES, LTD.,)
GATES GRAIN CO., LTD.)
and FERRAL GATES,)

Plaintiffs-Appellants,)

vs.)

BUTLER MANUFACTURING CO.)
and AGRICULTURAL BUILDING)
SERVICE CO.,)

Defendants-Appellees.)

221

8-533
87-922

Appeal from the Iowa District Court for Cedar County
(29059), Max R. Werling, Judge.

Plaintiffs-appellants appeal district court rulings and
a jury verdict denying them recovery against
defendants-appellees. **AFFIRMED.**

James W. Hall and Joe H. Harris of Hall & Associates,
P.C., Cedar Rapids, for plaintiffs-appellants.

Henry A. Harmon of Grefe & Sidney, Des Moines, for
defendant-appellee Butler Manufacturing.

Patrick M. Roby, Kevin H. Collins, and Constance Alt of
Shuttleworth & Ingersoll, P.C., Cedar Rapids, for
defendant-appellee Agricultural Building Service.

Considered by Oxberger, C.J., and Donielson and
Schlegel, JJ.

OXBERGER, C.J.

Plaintiffs-appellants Shadyrest Acres, Gates Grain Co., and Ferral Gates appeal from district court rulings and a jury verdict denying them recovery against defendants-appellees Butler Manufacturing Co. and Agricultural Buildings Service Co. (A.B.S.) for the allegedly defective construction of two grain bins. We affirm the trial court.

Gates Grain is a grain storage corporation and Shadyrest is a farm corporation, both of which are owned by the Gates family. Gale Gates is an officer of both businesses and makes the major decisions. Ferral Gates is Gale's brother. In 1981 Gale decided to increase the storage capacity of the Gates Grain facility and proceeded to negotiate with A.B.S. for purchase of a fifty-nine foot, 500,000 bushel grain bin. A.B.S. was a local agri-builder who ordered parts for the bin from Butler. In 1982 construction on the foundation was stalled due to heavy rains. Gale became concerned that soil on the site would not adequately support the bin. He contacted two engineering firms that ran tests on the soil and gave recommendations. Eventually the plan to build a single bin was abandoned and Gale decided to erect two forty-foot bins instead. Gale testified he made this decision with the encouragement of Ron Peterson, co-owner of A.B.S., who assured him the Butler engineering department advised

A.B.S. the existing foundation was more than adequate to support a forty-foot bin. A.B.S. and Butler employees testified no such representation was made to Gale and he alone made the decision to construct the two bins, having obtained reports from the two engineering firms indicating the soil could support the smaller bins.

Because Gates Grain could not incur the debt necessary to purchase the bins and still keep its Iowa warehousing license, the bins were purchased by Ferral Gates and Shadyrest from A.B.S. Butler supplied the materials. In 1982 the bins were built on Gates Grain property that was transferred to the actual owners of the bins. Shadyrest and Ferral Gates then leased the bins to Gates Grain. Although the dates are not certain, Ferral Gates and Shadyrest sold the bins to Gates Grain on approximately August 31, 1984 and March 3, 1986, respectively. Gale Gates testified problems began to occur with the bins right away. He noticed water leakage, problems with the aeration system, tilting of the foundation and twisting of the bins.

In September 1985 plaintiffs filed suit alleging breach of contract, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, negligent construction, fraud and sought punitive damages. Upon defendants' motion, the district court dismissed Ferral Gates as plaintiff at the conclusion of plaintiffs' case stating there are "no allegations or proof

showing Ferral Gates has any interest in this lawsuit whatsoever." At the conclusion of all the evidence the court granted defendants' motion and dismissed Shadyrest concluding "Shadyrest has disgorged itself of whatever interest it has by sale [of the bins to Gates Grain]." The court also granted Butler a directed verdict on all claims and dismissed all causes of action against defendant A.B.S. but those based on breach of implied warranty of merchantability and negligent construction. The jury indicated on a special verdict form that Gates Grain failed to establish Shadyrest or Ferral Gates acted as its agents when purchasing the bins and were therefore not entitled to recovery against A.B.S.

Plaintiffs have appealed contending the district court erred in (1) dismissing Shadyrest and Ferral Gates, (2) requiring the jury find an agency relationship between the plaintiffs as a precondition for recovery, (3) not specifying in the agency construction that an agency agreement need not be in writing, (4) dismissing the breach of implied warrant of fitness for a particular purpose, (5) excluding as evidence a brochure plaintiffs contend was relevant to the agency relationship between the defendants, (6) excluding testimony concerning the cost to reconstruct the bins, and (7) dismissing the fraud claim against both defendants.

Our review is for correction of errors at law. Iowa R. App. P. 4. Findings of fact by the trial court are binding upon this court if supported by substantial evidence. Iowa R. App. P. 14(f)(4).

I.

Plaintiffs argue the district court dismissed Shadyrest and Ferral Gates having found they were not real parties in interest as required by Iowa R. Civ. P. 2 which states:

2. Real party in interest. Every action must be prosecuted in the name of the real party in interest. But an executor, administrator, guardian, trustee or an express trust; or a party with whom or in whose name a contract is made for another's benefit, or a party specially authorized by statute, may sue in his own name without joining the party for whose benefit the action is prosecuted.

The purpose of this rule is to protect defendants against later actions by a party entitled to recover and is a liberally construed rule. Kimmel v. Iowa Realty Co., 339 N.W.2d 374, 379-80 (Iowa 1983); City of Ames v. Schill Buildings, Inc., 274 N.W.2d 708, 713 (Iowa 1979). Plaintiffs argue Ferral Gates and Shadyrest purchased the bins solely for Gates Grain's benefit and they are therefore allowed to sue defendants in their own names. Defendants contend even if this was true when the bins were purchased, this rule requires Shadyrest and Ferral Gates have some type of legal or equitable interest in the bins at the time of trial and their sale of the bins to Gates Grain for fair market value left them with no such interest.

A.B.S. and Butler further contend these plaintiffs were properly dismissed for failing to meet the two-pronged test for standing to bring suit set forth in Hawkeye Bancorporation v. Iowa College Aid, 360 N.W.2d 798 (Iowa 1985). This test requires a complaining party (1) have a specific personal and legal interest in the litigation, and (2) be injuriously affected. Id at 801. See also City of Des Moines v. PERB, 273 N.W.2d 753, 759 (Iowa 1979). In Clark v. Hawkeye Federal Sav. Bank, 423 N.W.2d 891, 893 (Iowa App. 1988), this court indicated the two-prong standing test is to be used when determining if the real party in interest is bringing the action.

The district court's comments when dismissing Shadyrest and Ferral Gates and the undisputed evidence showing sale of the bins to Gates Grain for fair market value support a finding these parties lacked standing to bring this action. Gale Gates testified the bins were leased and then sold to Gates Grain for fair market value. He testified some crop spoilage had occurred as well as damage to the bins but no evidence indicated cost of the lease or the sale price of the bins were altered resulting in damages to Shadyrest and Ferral Gates. The undisputed evidence also showed the bins were continuously used from completion through the trial date. We affirm the district court's dismissal of Shadyrest and Ferral Gates.

II.

227

At trial, the district court overruled defendants' motion to dismiss Gates Grain on the grounds it lacked privity with A.B.S. to assert the claims being brought. The court allowed Gates Grain to remain as a plaintiff on the theory Shadyrest and Ferral Gates purchased the bins for the benefit of Gates Grain and were acting solely as its agents. Essentially, Gates Grain was arguing that as the real principal in the transaction it always had the right to assert the claims and the sale of the bins after discovering the problems was just a final step in completing the temporary agency relationship. The jury evidently did not agree with this version of the facts and found no such agency relationship existed between the plaintiffs. Gates Grain now argues on appeal the district court erred when requiring the jury find such an agency relationship existed as a precondition to recovery.

We agree with A.B.S.'s contention that having asserted the agency theory at trial, Gates Grain cannot now appeal submission of the agency instruction to the jury. Gates Grain did not object to submission of this issue to the jury at trial. Objections or exceptions to instructions must be made before arguments to the jury. Iowa R. Civ. P. 196; Schuller v. Hy-Vee Food Stores, Inc., 407 N.W.2d 347, 351 (Iowa App. 1987). The record reveals numerous statements made during discussions with the court in which

Gates Grain asserted sufficient evidence was presented from which the jury could find an agency relationship existed between the plaintiffs and that A.B.S. knew of this relationship. We find Gates Grain failed to preserve error on submission of the agency instruction to the jury. See Hoekstra v. Farm Bureau Mutual Ins. Co., 382 N.W.2d 100, 107 (Iowa 1986).

III.

Gates Grain did request, and asserts on appeal, that an additional sentence should have been added to the agency instruction indicating an agency agreement need not be in writing. Trial courts generally have much discretion in framing jury instructions. Schuller v. Hy-Vee Food Stores, Inc., 407 N.W.2d 347, 351 (Iowa App. 1987). The instruction, as given, did not state a written agreement was required. At the time the objection was made the trial court stated Gates Grain was free to clarify to the jury that a written agency agreement between plaintiffs was not necessary to find an agency relationship existed. The trial court was not required to word the agency instruction in the particular way suggested by plaintiff as long as it correctly stated the applicable law. State v. Morrison, 368 N.W.2d 173, 175 (Iowa 1985). Having applied the above principles we conclude the agency instruction fairly submitted this issue to the jury. See Clemens Graf Drost Zu Vischering v. Kading, 368 N.W.2d 702 (Iowa 1985); Pillsbury Co. v. Ward, 250 N.W.2d 35 (Iowa 1977).

IV.

We conclude the jury's verdict finding no agency relationship existed between the plaintiffs resolves the remaining issues as well. Gale Gates testified that as representative for Gates Grain he purchased, for fair market value, the bins from Shadyrest and Ferral Gates. He did so with full knowledge of the alleged defects having leased the bins prior to the sale. Gates Grain lacks privity of contract to assert the claims brought by plaintiffs. No evidence indicated the legal duties owed to the original purchasers of the bins were passed on to Gates Grain. Therefore, the remaining alleged errors pertaining to breach of these duties need not be addressed.

The district court's entry of judgment on the special verdict denying plaintiffs recovery is affirmed. Costs of this appeal are taxed to plaintiffs-appellants.

AFFIRMED.