

IN THE COURT OF APPEALS OF IOWA

No. 6-364 / 94-1982

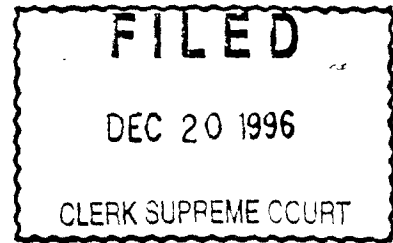
H & H DISTRIBUTING COMPANY, INC.,

Plaintiff-Appellee,

vs.

H & H DISTRIBUTING CO. OF CLEAR LAKE,

Defendant-Appellant,



H & H DISTRIBUTING CO. OF CLEAR LAKE,

Third-Party Plaintiff-Appellant.

vs.

**SANDRA K. BALDWIN, DONALD E. HANSEN,
and RUTH L. HANSEN,**

Third-Party Defendants-Appellees.

Appeal from the Iowa District Court for Fayette County, John Bauercamper,
Judge.

H & H Distributing Co. Of Clear Lake (H & H Clear Lake) appeals a district
court judgment awarding H & H Distributing Company, Inc. (H & H West Union)
damages for an unpaid open business account. **AFFIRMED.**

M. Wayne Oltrogge of Oltrogge Law Office, P.C., Clear Lake, for appellant.

Les V. Reddick of Kane, Norby & Reddick, P.C., Dubuque, for appellee H & H Distributing and third-party appellees Sandra Baldwin, Donald Hansen, and Ruth Hansen.

Considered by Habhab, P.J., and Streit and Vogel, JJ.

HABHAB, P.J.

Plaintiff H & H Distributing Company, Inc., is an Iowa corporation based in West Union, Iowa (H & H West Union), and is in the business of selling industrial foods and other products to institutions, schools, hospitals, nursing homes, and restaurants. The company was founded in 1940 by Don Hansen, the father of Sandra Baldwin, the present president of H & H West Union, and James E. Hansen, president of defendant H & H Distributing Co. of Clear Lake (H & H Clear Lake). H & H Clear Lake bought food and related products from H & H West Union on an open account and later sold these products to customers. H & H West Union¹ would charge H & H Clear Lake for products purchased using a formula of cost of the merchandise less any cash discounts the manufacturer would allow, plus the costs of freight and handling. The pricing and determination of charges was always set by H & H West Union.

H & H West Union and H & H Clear Lake had entered into a pricing agreement in 1973 which expired ten years later. No new written agreement was made thereafter; however, the unique relationship between the two companies continued.

¹ The stock ownership in H & H West Union is: 100% of the voting stock is owned by Don Hansen and his wife Ruth; 50% of the non-voting stock is owned by Sandra's family; and 50% of the non-voting stock is owned by James' family.

In the mid-1980's, Sandra (who at that time, along with her husband, owned the stock in H & H Distributing Co. of Dubuque) and James raised questions regarding the amounts being charged by H & H West Union to their respective corporations and spoke with their father Don about their concerns. Don informed them he had not been aware that the mark-up charged was as high as it was. Ultimately, H & H West Union paid H & H Clear Lake \$186,000² representing reimbursement for mark-up overcharges.³

H & H West Union was a member of a buying cooperative called Comsource. Comsource is a consolidation of two independent purchasing groups and required H & H West Union to purchase stock in order to obtain membership. H & H West Union did not pass on the cost of this stock to H & H Clear Lake. Comsource paid H & H West Union ~~rebates and dividends~~. The rebates and dividends paid to H & H West Union by Comsource contributed substantially to H & H West Union's profitability. H & H Clear Lake, however, was much less profitable.

James complained to Sandra of H & H Clear Lake's lack of profit. He maintained, in light of the rebates and dividends H & H West Union had received from Comsource, H & H Clear Lake had been overcharged. He felt H & H Clear

² Although Sandra requested a rebate payment for her Dubuque corporation, it was denied. However, H & H West Union did purchase H & H - Dubuque in September 1986.

³ During the late 1980's, a non-family member served as president of H & H West Union. He set the prices charged to the two purchasing corporations. He was compensated, in part, based on the profitability of H & H West Union.

Lake was entitled to a rebate similar to the one paid in 1987. Sandra refused James' request.

In 1991, H & H Clear Lake had accumulated a sizable debt. H & H West Union made a number of demands to pay all account balances based on the invoice charges. It also required H & H Clear Lake to pay for all future orders in cash. James continued to argue that H & H Clear Lake had been overcharged and refused the demands for payment.

H & H West Union ceased supplying H & H Clear Lake in September 1992. When James learned that H & H West Union had begun contacting his client base, he stopped payment on checks payable to H & H West Union. As of July 6, 1994, the open account balance on H & H Clear Lake's account was \$226,511.56.

H & H West Union brought this law action seeking a money judgment based on H & H Clear Lake's nonpayment of the open account and fraud. H & H Clear Lake answered, counterclaimed, and filed a third-party claim against the named parties in the caption of these proceedings alleging, in substance, interference with prospective business advantage, unfair competition, unjust enrichment, and breach of contract. As it relates to the breach of contract assertion, H & H Clear Lake argues in its brief that there existed between the parties a pricing contract that determined the ultimate cost of the products sold to H & H Clear Lake. H & H Clear Lake further argues that the rebates and dividends H & H West Union received from Comsource

should have been factored into the pricing formula charged to it. (We note here that this is the basis of H & H Clear Lake's appeal.)

Following trial, the district court concluded there was no written or oral contract regarding price. The district court concluded that the contract asserted by H & H Clear Lake did not exist. The court further ruled H & H Clear Lake had an open account with H & H West Union and entered judgment against H & H Clear Lake in the amount of \$226,511.56. H & H Clear Lake's third-party claim was dismissed. H & H Clear Lake has appealed.

H & H Clear Lake contends the district court erred in holding no contractual relationship existed with H & H West Union. It asserts there was an assumption by all parties that the terms of the 1973 agreement were still in effect after the expiration date because their actual *working relationship* was not altered. It further notes H & H West Union paid it \$186,000 in overcharges, indicating the terms of the 1973 agreement were still in effect.

We review the trial court's decision for correction of errors at law. Iowa R. App. P. 4.

H & H Clear Lake maintains the trial court incorrectly applied the law to the evidence and, furthermore, the trial court's decision was not supported by substantial evidence. We disagree. The district court relied on Iowa Civil Jury Instruction 2400.3

and cited authority therein in rendering its decision.⁴ In our review of the record, we find the trial court's application of Iowa law was not in error.

The trial court found that H & H Clear Lake failed to establish H & H West Union made any contract or agreement to continue business with it for any particular time period. The trial court concluded H & H West Union had established that the relationship between itself and H & H Clear Lake was merely an open account and that it acted reasonably in terminating their relationship in light of H & H Clear Lake's refusal to provide security for the account. We agree.

"A party who seeks to recover on a contract has the burden to prove the existence of a contract." *Hawkeye Land Co. v. Iowa Power & Light*, 497 N.W.2d 480, 486 (Iowa App. 1993). Whether an oral contract existed and whether it was breached are ordinarily questions for the trier of fact. *Employee Benefits Plus v. Des Moines General Hospital*, 535 N.W.2d 149, 153 (Iowa App. 1995). We are bound by the findings of fact made by the trial court when they are supported by substantial evidence. Iowa R. App. P. 14(f)(1).

A finding of fact is supported by substantial evidence if the finding may be reasonably inferred from the evidence. In evaluating sufficiency of the evidence, we view it in its light most favorable to sustaining the

⁴ Iowa Civil Jury Instruction 2400.3 provides:

2400.3 Existence of a Contract. The existence of a contract requires a meeting of the minds on the material terms. This means the parties must agree upon the same things in the same sense. You are to determine if a contract existed from the words and acts of the parties, together with all reasonable inferences you may draw from the surrounding circumstances.

court's judgment. We need only consider evidence favorable to the judgment, whether or not it was contradicted.

Hawkeye Land Co., 497 N.W.2d at 486.

H & H Clear Lake has not met its burden of showing that a contract existed between the parties. James testified at trial that after the ten-year contract ended there was no oral agreement nor any discussion about cost. James also acknowledged he had the ability to negotiate a new written contract but had not done so, and he was not obligated to purchase from H & H West Union.

There is no substantial evidence in the record to establish there was any agreement between the parties that H & H West Union would sell to H & H Clear Lake at any certain or guaranteed price. H & H Clear Lake had no specific knowledge as to how costs were determined. Evidence presented at trial established H & H West Union alone determined the price to charge H & H Clear Lake for products. We find the trial court's conclusion that an open account existed between the parties and the amount due thereon of \$226,511.56 is supported by substantial evidence.

AFFIRMED.

Vogel, J., concurs; Streit, J., specially concurs.

STREIT, J. (specially concurring)

I concur specially. Although I agree with the majority's analysis and conclusions, I would also find that the evidence simply proves a contract was entered into which would not include the price adjustments being sought by defendant.

A contract requires no particular form of expression or formality of execution. It need not be express but may be implied in whole or in part from the conduct of the parties. *Pay-N-Taket, Inc. v. Crooks*, 259 Iowa 719, 145 N.W.2d 621, 625 (1966).

A contract may be express or implied. When the parties manifest their agreement by words, the contract is said to be express. An implied in fact contract arises from the conduct of the parties, not merely from their relationship, and requires an expression of assent. Both are true contracts formed by a mutual manifestation of assent by the parties to the same terms of the contract. The differentiation arises from the method of proving the existence of the contract. Restatement (Second) of Contracts § 4 (1981); *Irons v. Community State Bank*, 461 N.W.2d 849, 855 (Iowa App. 1990).

The 1973 special pricing agreement expired by its own terms in 1983. Defendant continued to order goods from plaintiff. Defendant continued to accept performance of the contract and the prices charged, even after they complained of the prices. Such actions speak of a contract and the prices being charged. The district court was correct in its findings that the contract did not contain any special pricing mechanism different from those charged in the invoices.