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IN THE COURT OF APPEALS OF IOWA

No. 3-200 / 92-1526

PETIT CONSTRUCTION CO.,
A Nebraska Corporation,
Plaintiff-Appellee,

vs.

VAN BUSKIRK CONSTRUCTION CO.,
An Iowa Corporation; and
MERCHANTS BONDING COMPANY,
An Iowa Corporation,
Defendants-Appellants.

Appeal from the Iowa District Court for Woodbury County, Philip S. Dandos, Judge.

Defendants appeal a judgment against them in this breach of contract action between a subcontractor and general contractor. **AFFIRMED.**

Robert R. Eidsmoe of Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz, Sioux City, for appellant.

Sam S. Killinger of Rawlings, Nieland, Probasco, Killinger, Ellwanger, Jacobs & Mohrhauser, Sioux City, for appellee.

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

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OXBERGER, C.J.

Van Buskirk Construction Company was the general contractor for a project to build a golf course for the City of Columbus, Nebraska. Van Buskirk entered into a written subcontracting agreement with Petit Construction Company to do the clearing, grubbing, and earth moving for the golf course. Merchants Bonding Company executed a performance bond as surety for Van Buskirk.

Under the subcontract, Petit was to remove certain trees according to a tree removal plan. Before Petit could remove the trees, Van Buskirk had to have the golf course staked. The architect for the project was delayed in staking the course, and this delayed Petit's performance of its job.

Time was of the essence under the contract. In order to expedite matters, Art Kallsen, project supervisor for Van Buskirk, contacted Larry Barcell of Barcell Logging Company. Barcell agreed to remove some of the trees. Marlin Kalin, Petit's project supervisor, knew of Van Buskirk's agreement with Barcell and acquiesced to it. Barcell testified that all of his contacts were with Kallsen. He stated that on one occasion he met with Kallsen and a representative of Petit, but the Petit representative really had no input at the meeting.

Barcell accidentally removed some trees which were not scheduled for removal under the tree clearing plan. The City of Columbus made a claim against Van Buskirk for the

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erroneous removal. Van Buskirk settled the claim for $20,000. Van Buskirk then deducted $20,000 from the amount it owed Petit under the subcontract.

Petit filed the present suit claiming Van Buskirk breached the contract between them. Petit sought damages of $20,000, which it claimed Van Buskirk owed under the subcontract. Van Buskirk claimed Petit improperly performed its duties regarding tree removal under the terms of the subcontract.

The district court concluded the parties had modified the subcontract by agreeing that Van Buskirk could hire an outside company to perform a portion of the tree removal. The court found there was consideration to support the modification. Van Buskirk received the benefit of having the trees removed earlier than it would have otherwise. Petit was relieved of the obligation to remove the trees. The court determined the liability for the removal of the trees should be decided between Van Buskirk and Barcell. The court awarded judgment in favor of Petit against Van Buskirk for $20,000 plus interest.

Van Buskirk filed a motion pursuant to Iowa Rule of Civil Procedure 179(b). The district court denied the motion. Van Buskirk now appeals.

In a law action tried to the court, our scope of review is for the correction of errors of law. Iowa R. App. P. 4. The trial court's findings of fact have the force of a special jury verdict and are binding on us if supported by

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substantial evidence. R.E.T. Corp. v. Frank Paxton Co., 329 N.W.2d 416, 419 (Iowa 1983). We view the evidence in the light most consistent with the judgment. Id. Our deference to the trial court's findings of fact does not extend to its determinations of law. Id.

Van Buskirk contends that even if its subcontract with Petit was modified, Petit still had responsibility to see that the tree clearing plan was followed. Van Buskirk points to testimony of Kalin admitting that the tree clearing plan was part of the contract, and under the terms of the contract it was responsible for the removal of the trees.

The parties to an executory contract may mutually consent to a modification of the contract. Davenport Osteopathic Hospital Association v. Hospital Service, Inc., 261 N.W.2d 247, 253, 154 N.W.2d 153, 157 (1967). Modification occurs where contracting parties incur different duties and obligations from those in their original contract. Quigley v. Wilson, 474 N.W.2d 277, 280 (Iowa App. 1991), aff'd 474 N.W.2d 277 (Iowa 1991). Generally, new consideration is needed to support the new agreement. Recker v. Gustafson, 279 N.W.2d 744, 758 (Iowa 1979). However, an executory contract may be modified without consideration where the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made. Quigley, 474 N.W.2d at 281.

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We find there is substantial evidence to support the district court's decision that the parties modified the subcontract in this case. The modification was supported by consideration; Barcell's removal of the trees allowed both Van Buskirk and Petit to proceed with the remainder of the work on the golf course more quickly. The modification made Barcell responsible for removing certain trees, and thus, Petit was excused from that obligation.

Van Buskirk argues that Petit assisted in directing Barcell's work. However, the evidence shows otherwise. Barcell testified he always dealt with Kallsen, Van Buskirk's project supervisor. Barcell testified Petit's project supervisor had very little input at the one meeting where he was present.

We affirm the district court's conclusion that Petit should not be liable for the improper removal of the trees. We affirm the judgment for Petit against Van Buskirk. Costs of this appeal are assessed to Van Buskirk Construction Company.

AFFIRMED.