FILED
MAY 31 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ESTHERVILLE SAND & GRAVEL, INC.,	)	
Plaintiff-Appellee,	)	Filed May 31, 1983
vs.	)	
WESTERN CONTRACTING CORPORATION and AETNA CASUALTY & SURETY CO.,	)	3-29
Defendants-Appellants,	)	2-68991
and	)	
IOWA DEPARTMENT OF TRANSPORTATION,	)	
Defendant.	)	

Appeal from Dickinson District Court - Thomas Hamilton, Judge.

Defendants appeal from the trial court's judgment awarding plaintiff the balance allegedly due on a contract entered between the parties for the purchase of crushed rock. AFFIRMED.

Jeffrey T. Myers, Sioux City, for defendants-appellants.

James D. Hart of Anderson, Pelzer & Hart, Estherville, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Schlegel, JJ. Hayden, J. takes no part.

DONIELSON, J.

Defendants appeal from the trial court's judgment awarding plaintiff the balance allegedly due on a contract entered between the parties for the purchase of crushed rock. Defendants contend that plaintiff raised the price of the crushed rock above the price agreed upon in the contract of purchase. On appeal they contend the trial court erred 1) by not finding the time for performance of the written contract was extended by conduct of the plaintiff; 2) by concluding that certain employees of Western had agreed to a price increase and had possessed the authority to agree to a price increase on Western's behalf; and 3) by taxing plaintiff's attorney fees to defendants. We affirm.

Our scope of review is on assigned errors at law.

I.

The plaintiff is a supplier of crushed rock and gravel. The primary defendant, Western Contracting Company, is engaged in roadbuilding. Western agreed to purchase crushed rock from the plaintiff for use in construction of a road for the Iowa Department of Transportation (DOT). In the written contract Western agreed to purchase crushed rock at a specified price for delivery during the "second quarter 1979, as req'd." The written contract provided further that "time of delivery is of the essence of this purchase order."

Western's construction project was delayed, allegedly because of the acts or omissions of the DOT. As a result, Western did not request delivery of the crushed rock during the second quarter of 1979. A representative of the plaintiff testified that on two occasions after the expiration of the second quarter of 1979, he visited Western's job site and informed Western's job site superintendents that the plaintiff had raised its price for crushed rock. The plaintiff's representative testified further that Western's job site superintendents did not object to this price increase. Western denies that any such conversations took place or that its

job site superintendents would have been authorized to agree to a price increase.

At some point after the end of the second quarter of 1979, Western eventually requested delivery of crushed rock from the plaintiff. The plaintiff delivered crushed rock and billed Western at the higher price. Plaintiff filed the present lawsuit against Western and its surety, the DOT, after Western refused to pay the increased price.

After trial without a jury, the trial court ruled in the plaintiff's favor. The trial court found that the original written contract terminated as of the end of the second quarter of 1979 and that the sales of crushed rock occurring after that date were negotiated on an individual basis between plaintiff's representative and Western's job site superintendents. Defendants then instituted this appeal.

II.

Western and its surety contend the trial court erred by rejecting their contention that the time for performance of the original written contract had been extended beyond the second quarter of 1979 by the plaintiff's conduct. They also contend the trial court erred by concluding that Western's job site superintendents had agreed to a price increase. Initially, we note that defendants cite no authority in support of their argument. They assert that the legal authorities on 'time of the essence' contract clauses, and on extension, waiver and estoppel are "so well established that they need not be cited." These are not the type of propositions recognized by our rules as those for which support need not be cited. See Iowa R. App. P. 14(f). Further, we note that a party's failure to cite authority for an issue is deemed to be a waiver of that issue. Iowa R. App. P. 14(a)(3). While we are inclined to impose this sanction, we address the issue on the merits to clarify the legal points raised.

The law regarding 'time of the essence' clauses in contracts is not well documented in Iowa. In Lane v. Crescent Beach Lodge & Resort, Inc., 199 N.W.2d

78, 82 (Iowa 1972), however, the court reiterated the general rule that the "general statement that time is of the essence does not automatically make time of the essence of every promise in it or implied from it." The time of the essence provision affects only those performances for which a definite time is specified. Id. Here the time of the essence clause refers only to the time of delivery of the crushed rock and gravel, which was to be delivered during the "second quarter of 1979 as req'd." As specified in the contract, time of delivery was the essence of "this purchase order" (emphasis added). Plaintiff was ready and willing to perform during the second quarter of 1979, but defendant Western was unable or unwilling to demand or accept at that time, presumably due to a conflict with defendant DOT.

Western contends that it had no place to put the gravel and that this constituted 'impossibility of performance.' We find this argument to be without merit. Western could have had the gravel stored, or 'stockpiled' until it was ready for use. It chose not to do so, perhaps due to costs associated with such storage. It has been held, however, that increased costs do not constitute 'impossibility of performance.' See Nora Springs Coop Co. v. Brandau, 247 N.W.2d 744, 747-48 (Iowa 1976). We believe there was no impossibility of performance which would excuse defendants' refusal to accept plaintiff's proffered delivery of the crushed rock during the time stated in the contract.

In determining the effect of the delay in accepting delivery, we find the following statements in 17 Am. Jur. 2d Contracts §§ 332, 508 (1964), to be of help:

> Where time is of the essence of a contract and there has been a failure of performance at or within the time promised, a breach of the contract results, which brings some of the consequences attendant upon a breach. Where time is of the essence, the right to recover on the contract is conditioned upon performance within the time limited, and moreover, if the time is specified by an hour, there must be a compliance on or prior to such hour. There may, however, be a recovery on the quantum meruit where there

> has been performance and subsequent acceptance. Where there has been delay and time is of the essence, the other party may rescind the contract.
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> A clause of a contract providing in general terms that time is of the essence ordinarily applies to the obligations of both parties. . . . A provision in an instrument conferring a privilege or an option in which time is ordinarily of the essence should be structly construed.
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> Time is not generally of the essence of a contract which is to be performed within a reasonable time. And upon an unrestricted waiver of the time for the performance of a contract, that condition ceases to be of the essence of the agreement.
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> As a general rule, where time is of the essence of a contract, and one of the parties has not performed, and is not ready and able to perform, his part of the agreement on the day fixed, the adverse party may elect to consider it at an end. It has been said, moreover, that in a transaction in which prompt action was evidently contemplated by both parties, mutual delinquency gives rise to the presumption of mutual assent to a rescission. (emphasis added).

Since defendant Western was not ready to accept delivery, the contract, as written, was subject to rescission by plaintiff. As a general rule, parties to a valid contract may rescind or abandon it, or substitute another in its place by conduct inconsistent with the continued existence of the original contract. Holi-Rest, Inc. v. Treloar, 217 N.W.2d 517, 524 (Iowa 1974). When evidence of such conduct is susceptible to differing inferences, this issue is for the trier of fact. Severson v. Elberon Elevator, Inc., 250 N.W.2d 417, 421-22 (Iowa 1977). The trial court in the instant case found that, by not requesting or allowing delivery of the crushed rock, the purchase order for which time was of the essence was terminated. By their conduct the parties entered into a new agreement for the purchase and delivery of the crushed rock at the higher price. In essence, the court found this to be a substituted, new purchase order.

The following principles guide our review of the record to determine the effect of the parties' conduct in the instant case:

> [The] trial court's findings of fact are equivalent to the special verdict of a jury; if supported by substantial evidence they will not be disturbed; we view the evidence in its light most favorable to the judgment, whether contradicted or not; the findings of the trial court are to be broadly and liberally construed, rather than narrowly or technically, and in case of ambiguity, they will be construed to uphold, rather than defeat, the judgment. Frantz v. Knights of Columbus, 205 N.W.2d 705, 708 (Iowa 1973); Reichle v. Zeman, 204 N.W.2d 636, 637 (Iowa 1973); Dobson v. Jewell, 189 N.W.2d 547, 550 (Iowa 1971).
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> These principles do not preclude inquiry into whether trial court applied erroneous rules of law which materially affected its decision. We are not bound by trial court determinations of law. Frantz v. Knights of Columbus, supra; Hensley v. Aetna Casualty and Surety Company, 200 N.W.2d 552, 553 (Iowa 1972).

Farmers' Insurance Group v. Merryweather, 214 N.W.2d 184, 186-87 (Iowa 1974).

We believe there is sufficient evidence in the record to support the trial court's findings that defendant's job site personnel were notified of the increased price of the crushed rock and gravel and that defendant sought to proceed with delivery of the materials. When defendant was billed for the subsequent delivery, the higher price quoted to the foreman was used. Defendant paid the initial billing without protest. Defendant on appeal disagrees that price increases were discussed. The testimony regarding this matter is conflicting and we must defer to the court's judgment of the witnesses' credibility. We thus find that defendant's job site superintendents were informed of the price increases and no objections were raised at that time, at the time of delivery, or when the initial billing was paid. The defendant's job site foreman ordered delivery of the crushed rock at the higher price. We find that the parties rescinded the original contract and renegotiated a new one for the higher price in its place.

III.

Defendant also contends that a new contract could not have been negotiated between plaintiff and defendant's job site foreman because such foremen did not have authority to contract on defendant's behalf. Whether the foremen had

authority to act as defendant's agent is a question of fact. See Mayrath Company v. Helgeson, 258 Iowa 543, 547, 139 N.W.2d 303, 305-06 (1966). Actual authority includes both express and implied authority. Newberry v. Barth, Inc., 252 N.W.2d 711, 714 (Iowa 1977). Express authority is power specifically mentioned by the principal in setting out the agent's duties. Implied authority is incidental authority which is necessary, usual and proper to effectuate the authority expressly conferred on an agent. Id. " 'Apparent authority, or ostensible authority to do such acts or to make such contracts, is that which, although not actually granted, has been knowingly permitted by the principal or which he holds the agent out as possessing.' " Mayrath Co. v. Helgeson, 258 Iowa at 548, 139 N.W.2d at 306.

The record does not show that the foreman had any express authority to contract for the crushed rock. But the foreman did have the authority to order the rock. When he did so, plaintiff informed him of the higher price and the foreman agreed. We believe he had the implied or apparent authority to agree to the higher price and thus bind his principal, Western Contracting Company. Moreover, after the initial billing was made at the higher price, no objection was immediately raised by the principal to plaintiff. This fact supports a finding of apparent or implied authority. We thus agree with the trial court on this issue and affirm the award for the balance of the renegotiated contract.

IV.

Finally, defendant complains that the court abused its discretion in taxing plaintiff's attorney fees to him. We disagree. Iowa Code § 573.21 (1981) provides that "the court may tax, as costs, a reasonable attorney fee in favor of any claimant for labor or materials who has, in whole, or in part, established his claim." This court will not find an abuse of discretion unless defendants show "that such discretion was exercised on grounds or for reasons clearly untenable to

an extent clearly unreasonable." State v. Morrison, 323 N.W.2d 254, 256 (Iowa 1982)(quoting State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979)). We find no abuse of discretion in the instant case in awarding plaintiff $1,995. However, we refuse to increase the award to cover additional costs alleged by plaintiff.

Having considered all contentions raised in connection with this appeal, the judgment is affirmed.

AFFIRMED.