IN THE COURT OF APPEALS OF IOWA

No. 8-029 / 97-0511

000259

OCHEYEDAN COOPERATIVE ELEVATOR ASSOCIATION,

Plaintiff-Appellant,

vs.

ELWIN MORITZ,

Defendant-Appellee.

FILED
FEB 25 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Osceola County, Patrick M. Carr, Judge.

Plaintiff appeals a district court ruling granting defendant's motion for directed verdict on various claims raised by plaintiff against defendant for grain purchases for defendant's hog operation. **REVERSED AND REMANDED.**

Daniel E. DeKoter of Zito, DeKoter, Thole, Dawson & Honken, P.L.C., Sibley, for appellant.

Harold W. White of Fitzgibbons Law Firm, Estherville, for appellee.

Heard by Cady, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

Plaintiff Ocheyedan Cooperative Elevator Association ("Coop") appeals the grant of a motion for directed verdict and also alleges the trial court failed to properly instruct the jury. The Coop alleges the trial court erred when it: (1) granted defendant Elwin Moritz's motion for a directed verdict as to the claim of partnership by estoppel by public representation; and (2) failed to instruct the jury on the theory of implied agency. We reverse and remand.

The Coop is suing Elwin Moritz to collect on an account opened by Bruce Tiedemann, Moritz's son-in-law. The Coop sued Moritz under the theories of partnership by estoppel, express agency, and implied agency. Moritz denies a partnership or agency existed.

As evidence of the partnership, the Coop alleges Moritz, Tiedemann, and Tiffany Tiedemann, Moritz's daughter, took out a loan for a partnership to be known as "Moritz-Tiedemann Pork." According to the bank officer, they informed him they were establishing a partnership to custom feed hogs. Moritz and Tiedemann also set up a promissory note with the bank showing them as "Bruce E. Tiedemann and Elwin A. Moritz dba Moritz & Tiedemann." Further, Moritz and Tiedemann opened a checking account under the name "Moritz-Tiedemann Pork." Moritz and Tiedemann were not named as individuals on the checks. Moritz and Tiedemann also signed a security agreement and financing statement in the name of "Moritz & Tiedemann." Checks bearing the Moritz-Tiedemann Pork name were written to several businesses

in the area. Tiedemann established an open account at the Coop in the name of "Tiedemann & Moritz." The Coop states the account was always paid with the Moritz-Tiedemann Pork checking account.

The Coop alleges Moritz knew of the account with the Coop. In 1993, the elevator sent Moritz a statement because the account was becoming a concern. According to the Coop, Moritz never denied he was responsible, and shortly after sending Moritz a statement the account was paid in full.

Moritz denies the existence of a partnership or agency relationship. He notes the signature card for the checking account shows it as a "joint account," not a "partnership account." Moritz contends he signed the security agreement as an individual, not as a representative of a partnership. Moritz also contends there is no evidence in the record to show "Moritz & Tiedemann" is the name of a partnership.

I. DIRECTED VERDICT. The Coop contends the trial court erred when it sustained Moritz's motion for a directed verdict regarding the claim of partnership by estoppel under the theory of public representation. The Coop alleges a factual issue existed and the judge should have let the jury decide whether or not a public representation had been made.

We review a trial court's grant of a motion for directed verdict for correction of errors of law. Iowa R. App. P. 4; *Scoggins v. Wal-Mart Stores, Inc.*, 560 N.W.2d 564, 566 (Iowa 1997). We view the evidence in the light most favorable to the nonmoving party and afford the nonmovant every legitimate inference we can

reasonably deduce from the evidence. Iowa R. App. P. 14(f)(2); *Scoggins* 560 N.W.2d at 566. We must determine whether reasonable minds could differ on the issue presented, and if such is the case, a jury question exists and the grant of directed verdict was inappropriate. *Scoggins* 560 N.W.2d at 566.

Iowa Code section 486.16 provides:

> When a person, by words spoken or written or by conduct, represents that person, or consents to another representing that person to anyone, as a partner in an existing partnership or with one or more persons not actual partners, the person is liable to any person to whom the representation has been made, who has, on the faith of the representation, given credit to the actual or apparent partnership, *and if the person has made a representation or consented to its being made in a public manner that person is liable to the person, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.*

Iowa Code § 486.16 (1995) (emphasis added).

The trial court sustained Moritz's motion for a directed verdict on the grounds of public representation. The trial court stated, "[T]he holding out to the public generally must appear so public and so long continued as to justify an inference as a matter of fact that one dealing with the partnership knew of it and relied on it without direct testimony to that effect."

In its denial of the Coop's motion for a new trial, the trial court noted "a representation made in a public manner may permit a finding of partnership by estoppel under both common law and under the mentioned code section without proof that the representation *was communicated to the party* but alleging partnership by

estoppel." The trial court stated pre-existing case law held public representation "must be sufficiently broad and pervasive enough so as to permit the inference, in the absence of proof, that the party alleging the partnership by estoppel knew and relied upon the same." The trial court determined the evidence of the printing of the checks, the signing of the U.C.C.-1 financing statement, and the "very limited use of the two names Moritz and Tiedemann together," did not rise to the necessary level.

We find the trial court erred in sustaining Moritz's motion for a directed verdict. When viewed in the light most favorable to the Coop, reasonable minds could differ on the issue of public representation. A jury question exists and the grant of directed verdict was inappropriate.

II. JURY INSTRUCTIONS. The Coop contends the trial court failed to instruct the jury on the concept of implied agency. The Coop argues the words "intentionally" and "expressly" as used by the trial court in its instruction made the instruction solely one based on express agency and left the jury unable to find an implied agency existed.

We review jury instructions for an abuse of discretion. *State v. Holtz*, 548 N.W.2d 162, 164(Iowa App. 1996). The trial court has a duty to instruct fully and fairly on the law regarding all issues raised by the evidence. *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa 1996). We will not find an abuse of discretion unless such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Selestan*, 515 N.W.2d 356, 358 (Iowa App. 1994). The

burden of proving abuse of discretion lies with the defendant. *Id.* Any error in jury instruction must be prejudicial to warrant reversal. *Holtz*, 548 N.W.2d at 164. As long as a requested instruction correctly states the law, has application to the case, and is not stated elsewhere in the instructions, the court must give the requested instruction. We will not grant a reversal on the basis of error in giving or refusing to give a particular instruction unless the action results in prejudice to the defendant. *Foggia v. Des Moines Bowl-O-Matic, Inc.*, 543 N.W.2d 889, 892 (Iowa 1996).

Agency is a fiduciary relationship in which one person acts for and on behalf of another. *Walnut Hills Farms, Inc, v. Farmers Coop Co. Of Creston*, 244 N.W.2d 778, 780 (Iowa 1976). A relationship may be created by express contract or by implication. *Id.* at 780-81. An implied agency is an actual agency which may be established by the surrounding circumstances and inferences arising therefrom. *Id.* at 781. An agency may be proven not only by direct evidence of an agreement between the parties but also by circumstantial evidence, such as their words and conduct, from which an intention to create an agency may be fairly implied. *Id.*

The judge instructed the jury the Coop must prove:

> 1. Mr. Moritz intentionally in words or spoken or in a written document or by conduct (which reasonably interpreted by Mr. Tiedemann allowed him to believe he had the power to act) requested that Mr. Tiedemann act in his behalf.
> 2. Mr. Tiedemann consented to so act; and
> 3. Incurring charges to the Tiedemann & Moritz account was a necessary, usual and proper act by Mr. Tiedemann to carry out the authority expressly conferred by Mr. Moritz.

In denying the Coop's motion for a new trial, the trial court stated it believed the instruction adequately stated the applicable law for both implied and express agency. The trial court found the jury could have found implied agency based on instruction fourteen.

We find the instruction given by the trial court failed to adequately instruct the jury on the theory of implied agency. We think the instruction given explained the theories of express agency and implied authority, but not implied agency. The trial court should have given a separate instruction on implied agency.

For the reasons stated, we reverse and remand to the district court for a new trial on the issues of implied agency and partnership by estoppel by public representation.

REVERSED AND REMANDED.