FILED
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CLERK SUPREME COURT
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IN THE COURT OF APPEALS OF IOWA

No. 3-529 / 92-1863

HOLLIMAN, LTD.,

Appellee,

vs.

GOOD SEED & GRAIN CO., STEPHEN EUGENE GOUND, TOM GOOD GOUND, JOHN CHARLES GOUND, RUTH TIDRICK, FERD GOOD, OWEN GOOD, PAULINE WHITLOW, GILBERT GOOD, BERTIE LELA GOOD and EMILY ANN GOUND WRAY,

Appellants.

Appeal from the Iowa District Court for Fremont County, Leo F. Connolly, Judge.

Good Seed appeals a jury verdict awarding damages to Holliman on an alleged oral contract. **REVERSED WITH DIRECTIONS AND REMANDED FOR A NEW TRIAL.**

Jon H. Johnson of Johnson & Graeser, P.C., Sidney, for appellants.

Gary T. Gee, Shenandoah, for appellee.

Heard by Oxberger, C.J., and Sackett and Habhab, JJ.

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SACKETT, J.

Defendants-appellants Good Seed & Grain Co., Stephen Eugene Gound, Tom Good Gound, John Charles Gound, Ruth Tidrick, Ferd Good, Owen Good, Pauline Whitlow, Gilbert Good, Bertie Lela Good and Emily Ann Gound Wray appeal after a jury found defendants had made an oral contract with plaintiff-appellee Holliman, Ltd. for the cleanup of damage following a fire. We reverse and remand.

Plaintiff contracted to remove an annex to a grain elevator defendants owned in Omaha. The contract price was $40,000 for removing the annex. During demolition, a fire broke at the elevator. Plaintiff cleaned up after the fire damage and billed defendants for both the removal of the annex and the fire cleanup.

Defendants paid $40,000 as contracted but refused to pay a bill plaintiff submitted for the fire cleanup. Defendants denied they had contracted with plaintiff for the cleanup and blamed plaintiff for causing the fire. Plaintiff sued defendants for the fire cleanup. Defendants counterclaimed against plaintiff for the fire damage contending plaintiff caused the fire.

Prior to trial, plaintiff's liability insurance carrier settled defendants' claim plaintiff had caused the fire by paying defendants $395,000. Defendants' counterclaim was dismissed and defendants gave a release. Plaintiff's claim against defendants for cleanup after the fire was not a part of the settlement. Plaintiff's claim for cleanup

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went to jury trial. Plaintiff made a motion in limine seeking to limit defendants from introducing evidence of the origin of the fire and opinions of the fire's cause. Plaintiff contends the evidence was not admissible because the release defendants gave plaintiff's insurer provided:

> RELEASORS SPECIFICALLY UNDERSTAND, ACKNOWLEDGE AND AGREE that, by accepting these settlement proceeds and signing this Release, they relinquish any right to claim any sort of counterclaim, setoff, credit or other diminution (on the basis of the allegation that Holliman, Ltd., or its employees caused the aforementioned fire) and Releasors agree not to attempt to assert the same defense of the Petition at Law filed by Holliman, Ltd., previously described; however, nothing in this Release shall preclude Releasors from explaining the reasons for their nonpayment, presuming the court otherwise deems it admissible.

Defendants resisted the motion in limine contending the evidence was essential to the circumstances surrounding the alleged oral contract for cleanup.

The trial court granted plaintiff's motion in limine. The court instructed the jury the matter of the cause of the fire had been resolved and they were not to consider the cause of the fire in their deliberations.

Plaintiff introduced evidence showing the cleanup bill was $65,646.22. The jury returned a verdict for plaintiff of $102,226.22.

Defendants first contend the trial court erred in sustaining plaintiff's motion in limine.

The evidence is contradictory whether defendants contracted with plaintiff to cleanup after the fire. Plaintiff testified after the fire Robert Zuck, manager of

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defendant company, agreed to pay plaintiff to cleanup the debris caused by the fire on a cost/plus basis. Zuck testified he never agreed to such an arrangement and has never agreed to a cost/plus contract. Zuck testified he did not expect to pay plaintiff more than the original $40,000. Defendants made offers of proof that showed plaintiff negligently caused the fire and that Zuck believed that plaintiff caused the fire.

Defendants argue evidence of the cause of the fire and Zuck's opinion that plaintiff caused the fire could be essential elements in the jury's determination as to what was agreed to by the parties. They advance Zuck, believing plaintiff negligently caused the fire, would have no reason to contract for additional work other than the original contract because plaintiff would be responsible for removal of the debris caused by its own negligence. Defendants argue in the absence of evidence as to the cause of the fire and Zuck's opinion plaintiff negligently caused the fire, a jury would be erroneously led to the conclusion there was no reason for plaintiff to undertake additional cleanup of the fire debris without an agreement for extra compensation.

Defendants contend, and we agree, the facts surrounding the fire were relevant to the issue of a contract for cleanup. Consideration must be given to the surrounding circumstances when construing an oral contract. See Gildner Bros. v. Ford Hopkins Co., 235 Iowa

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191, 195-97, 16 N.W.2d 229, 232 (1944). The existence of an agreement or the meeting of the minds in a contract should not alone be determined from the words used by the parties, but also from the situation and surrounding circumstances and by inferences which can ordinarily and reasonably be drawn from such situations and circumstances. McCarter v. Uban, 166 N.W.2d 910, 913 (Iowa 1969); LaFontaine v. Developers & Builders, Inc., 156 N.W.2d 651, 655 (Iowa 1968). In determining whether parties entered into a contract, particularly an oral contract which is disputed, the parties are entitled to the benefit of all reasonable inferences most favorable to their case in an effort to prove the real intent of the parties to an agreement, and if reasonable minds may differ as to the conclusions to be drawn from that evidence, a question of fact exists. Evidence the defendants were precluded from introducing is relevant.

Plaintiff argues even if the evidence is relevant, defendants agreed, through the release, not to assert the origin of the fire in defense of plaintiff's petition, and there is no reservation in the release which allowed defendant Good Seed to argue a "lack of contract", which argument would clearly be in the nature of a defense to plaintiff's cause of action for breach of contract.

The question, therefore, is did defendants agree when they settled the claim with plaintiff's insurance company that evidence of the fire and its origin would not be allowed as evidence in the trial of plaintiff's claim.

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In interpreting the release, we give effect to all the language in the release. See Setterberg v. Sheaffer Eaton, Inc., 473 N.W.2d 217, 220 (Iowa App. 1991). We give the language used in the document its common and ordinary meaning. Id.

The release clearly precludes defendants from proceeding with its counterclaim; however, we disagree with the trial court's conclusion that the release precludes any mention of the fire. We look to the language, "however, nothing in this Release shall preclude Releasors from explaining the reasons for their nonpayment, presuming the Court otherwise deems it admissible". The only conclusion we reach from this language is the release does not preclude defendants from explaining they did not pay plaintiff because they felt plaintiff caused the fire. The trial court erred in sustaining the motion for new trial.

Defendants also contend the verdict was not supported by substantial evidence because plaintiff introduced evidence the maximum amount of its damages was $65,646.22, and the jury awarded $102,226.22. Plaintiff contends the verdict was supported by evidence.

Our review of the record causes us to agree with defendants that the maximum amount of damages shown in evidence was $65,646.22. Interest and attorney fees were not proper elements for the jury to add.

REVERSED WITH DIRECTIONS AND REMANDED FOR A NEW TRIAL.