IN THE COURT OF APPEALS OF IOWA

No. 6-243 / 05-1112
Filed June 28, 2006

AG PARTNERS, L.L.C.,
Plaintiff-Appellee,

vs.

CHICAGO CENTRAL & PACIFIC RAILROAD COMPANY, d/b/a CANADIAN NATIONAL/ILLINOIS CENTRAL RAILROAD,
Defendant-Appellant.

Appeal from the Iowa District Court for Pocahontas County, Joel Swanson, Judge.

Railroad appeals from adverse ruling and judgment for damages following a derailment. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Edward Krug of Krug Law Firm, P.L.C., Cedar Rapids, for appellant.

Robert Brinton of Brinton, Bordwell & Johnson, Clarion, and Tony Krall of Hanson, Lulic & Krall, L.L.C., Minneapolis, Minnesota, for appellee.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

PER CURIAM

Chicago Central & Pacific Railroad Company (CCP) appeals from a judgment in favor of Ag Partners, L.L.C. for damages caused by a derailment. We affirm in part, reverse in part, and remand.

I. Background Facts and Proceedings

Ag Partners filed a petition at law in January 2003, seeking damages from CCP following the derailment of empty grain cars on January 14, 2001, at Ag Partner's elevator facility in Fonda, Iowa. The derailment was caused by the build-up of ice and snow on the railroad tracks servicing the elevator. The grain cars struck and damaged the support legs of a railcar loading structure called a loadout tower, situated near the tracks.

In its petition, Ag Partners alleged negligence and trespass. CCP filed an answer denying the claims and raising affirmative defenses, including that Ag Partners' failure to adhere to its contractual obligations relieved CCP of liability for the derailment.

The parties agreed to bifurcate Ag Partners' negligence claim and CCP's contract defenses. Following a jury trial on the negligence claim, the jury determined Ag Partners' damages were $352,657.51. The jury found CCP seventy percent at fault and Ag Partners thirty percent at fault.

The district court heard the contract defenses portion of the case in May 2005. In its ruling, the court reviewed several agreements between the parties and concluded CCP failed to meet its burden of proving the applicability of an overhead license agreement, and failed to prove Ag Partners had violated any of the leases, licenses, or sales agreements between the parties. The court applied

the percentage of fault assigned by the jury and entered judgment in favor of Ag Partners for $246,860.25. CCP appeals, arguing the district court erred in (1) interpreting the various agreements between the parties, (2) failing to direct a verdict with respect to the loadout damages, and (3) allowing subsequent remedial evidence at the jury trial.

II. Contract Claims

We review the construction and interpretation of a contract for correction of errors at law. *Hartig Drug Co. v. Hartig*, 602 N.W.2d 794, 797 (Iowa 1999). We are not bound by the construction or interpretation made by the trial court. *Id.*

"It is a cardinal principle of contract law the parties' intention at the time they executed the contract controls." *Hofmeyer v. Iowa Dist. Ct.*, 640 N.W.2d 225, 228 (Iowa 2001). Absent ambiguity, intent is determined by the written words of the contract itself. *Id.* A contract is not ambiguous merely because the parties disagree over its meaning. *Hartig Drug Co.*, 602 N.W.2d at 797. "'[M]eaning can almost never be plain except in a context'"; therefore, "the rule that words and other conduct are interpreted in the light of all the circumstances is not limited to cases when ambiguity in the agreement exists." *Fausel v. JRJ Enters., Inc.*, 603 N.W.2d 612, 618 (Iowa 1999) (quoting Restatement (Second) of Contracts § 212 cmt. b (1979)).

At issue are several agreements between the parties,[1] including: the 1977 lease, the 1979 overhead license, and the 1992 lease. The district court reviewed the proximity and indemnity provisions of the leases and license.

The proximity requirement of the 1977 lease provides "no building, structure or physical obstruction shall be erected, maintained, or allowed to exist within eight and one-half (8½) feet of the center line of any railroad track . . . ." The 1977 lease includes an indemnification provision, by which the parties agreed the lessee (Ag Partners) would indemnify and hold harmless the lessor (CCP) unless the railroad was solely negligent. An elevator/storage bins and loadout tower were constructed in compliance with the 1977 lease agreement shortly after its execution.

In 1979 Ag Partners decided to expand its business by building bins on the south side of the railroad track and a bridge containing a conveyor system to transfer grain to the existing bins on the north side of the track. The parties entered into an overhead license agreement that granted the licensee (Ag Partners) permission "to construct and maintain a structural steel truss bridge carrying a conveyor and a service walkway . . . across and over the property and tracks of the Railroad Company at Fonda, Iowa, approximately 750 feet east of Main Street . . . ." The 1979 license agreement included the following proximity provision: "Licensee shall not allow to exist or to be stored on said property any work equipment, fixture or material of any kind within 15 feet of the centerline of

[1] The agreements were entered into by the parties' predecessors. For simplicity, we refer to Ag Partners and CCP as the parties to these agreements.

any track." An indemnification provision provided Ag Partners would indemnify and hold harmless the railroad unless the railroad was solely negligent.

In 1992 the parties entered into a property lease agreement for the same property that was the subject of the 1977 lease. The 1992 lease agreement did not contain a proximity provision, but modified the 1977 lease indemnification provision. The new indemnification provision required Ag Partners to indemnify and hold harmless the railroad, except to the extent any damage or loss of property arose out of the acts or omissions of the railroad (rather than the sole negligence of the railroad). The 1992 lease also provided: "This lease is subject and subordinate to all existing leases, easements, [and] licenses . . . ."

The district court, after reviewing these agreements, concluded

> as it pertains to the issues in this proceeding, the eight and one-half foot proximity provision [of the 1977 lease] is applicable to the lessor and the lessee. The indemnification provisions of the current lease between Ag Partners and CCP would indemnify the railroad except to the extent of their own negligence as set forth in the [1992 lease]. The court finds that the [1979 license] pertains to the construction of the steel truss bridge and conveyor system over the railroad and is not a lease to the extent it changes the proximity provisions of the [1977 lease].
>
> [CCP] has failed to meet its burden of proving the applicability of the [1979 license], has failed to meet its burden in proving that the plaintiff, Ag Partners, has violated any of the leases, licenses, or sales agreement. [Ag Partners] ha[s] established that they have complied with the applicable lease agreements.

On appeal, CCP argues the district court erred in concluding the 1979 license only applied to the construction of the loadout. Ag Partners contends CCP has misinterpreted the district court's order. Although our interpretation of the relevant documents differs somewhat from that of the district court, we also

conclude CCP has failed to meet its burden of proving the applicability of the 1979 license.

The proximity requirement of the 1979 license contradicts the proximity requirement found in the 1977 lease. Therefore, we must construe these conflicting instruments in a manner that makes sense. The record supports the district court's finding that the loadout tower existed before the parties entered into the 1979 license. A construction of the two documents that would conclude the parties entered into an agreement (the 1979 license) whereby a pre-existing structure (the loadout tower) would be immediately and automatically in violation of its terms is simply illogical. *See American Soil Processing, Inc. v. Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd.*, 586 N.W.2d 325, 334 (Iowa 1998) (citation omitted) ("[A]n interpretation which gives a reasonable, lawful, and effective meaning to all terms" of a contract "is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."). Therefore, we conclude the provisions of the 1979 license do not apply to the pre-existing loadout tower.

In reaching our conclusion, we also consider the plain language of the 1979 license. The 1979 license refers only to the construction and maintenance of the overhead bridge and conveyor, *not* the loadout tower. Thus, by its plain language, the provisions of the 1979 license do not apply to the loadout tower.

Our conclusion finds further support by noting the differences between a license and a lease. A license involves the exclusive occupation of the property, "but only 'so far as is necessary to do the act, and no further, whereas a lease gives the right of possession of the land, and the exclusive occupation of it for all

purposes not prohibited by its terms.'" *Robert's River Rides, Inc. v. Steamboat Dev. Corp.*, 520 N.W.2d 294, 301 (Iowa 1994) (citation omitted), *abrogated on other grounds by Barreca v. Nickolas*, 683 N.W.2d 111 (Iowa 2004). Given these differences, it is clear that the license granted pertained only to the overhead bridge and conveyor, not the loadout tower. The license granted Ag Partners permission to construct and maintain a bridge over the railroad's property; in other words, it granted to Ag Partners a "'privilege to use land in possession of'" CCP. *Id.* at 301 (citation omitted). It did not permit exclusive occupation of the land. The lease, however, granted the right of possession and exclusive occupation and included the land on which the loadout tower was located.

Because we have concluded the 1979 license does not apply to the pre-existing loadout tower, we must apply the indemnity provision of the 1992 lease.[2] That provision contains an exception to Ag Partners' duty to indemnify, to the extent any damage or loss of property arose out of the acts or omissions of the railroad. Given the language of the 1992 lease's indemnity provision and the jury's determination the railroad was partially at fault, CCP must share in the cost of damages.[3]

III. Directed Verdict – Damages

We review rulings on motions for directed verdict for correction of errors at law, viewing the evidence in the light most favorable to the party opposing the

[2] The parties do not argue the effect, if any, of the 1992 lease's subordination clause on the indemnity provision of the 1992 lease. Therefore, we assume the 1992 indemnity provision applies.

[3] Because we conclude that the indemnity provision of the 1992 lease applies in this case, we need not address the parties' alternative arguments relative to Iowa Code section 327G.63 (2003) (addressing the liability of railroads for damage to property on the railroad's right of way).

motion. *Estate of Pearson ex rel. Latta v. Interstate Power & Light Co.*, 700 N.W.2d 333, 340 (Iowa 2005). A directed verdict for CCP was required only if there was no substantial evidence to support the elements of Ag Partner's claim. *Bellville v. Farm Bureau Mut. Ins. Co.*, 702 N.W.2d 468, 472 (Iowa 2005). Substantial evidence means "evidence that a reasonable mind would accept as adequate to reach a conclusion." *Id.* at 473 (citation omitted).

During jury trial on Ag Partners' negligence claim, the parties stipulated that the fair and reasonable cost to repair damage to the loadout and conveyer caused by the derailment was $290,176.[4] CCP moved for "directed verdict" as to the loadout damages, urging that Ag Partners had presented no evidence as to the value of the loadout tower. Ag Partners resisted, arguing that the evidence of the cost of repair as shown by the stipulation was sufficient. Ag Partners in the alternative requested to reopen to recall a witness to provide additional evidence. The district court overruled CCP's motion, stating its belief "that the legal argument to the valuation was covered by the stipulation." The court did not address or rule on Ag Partners' alternative request to present additional evidence. On appeal, CCP contends the court erred in failing to "direct a verdict" with respect to loadout damages.

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[4] The district court instructed the jury as follows:

> The parties have stipulated that the damages sustained by Ag Partners as a result of the derailment that occurred on January 14, 2001, are as follows:
> 1. Damage to loadout: $290,176.00
> 2. Expense of trucking grain: $62,481.51
> TOTAL: $352,657.51
>
> The defendant does not agree that the trucking expenses were necessary or incurred because of the derailment.

As reflected in its damage award of $352,657.51, the jury concluded the reasonable cost of trucking grain was necessary because of the derailment.

The parties agree the general rule for the measure of damage to property is "the fair and reasonable cost of replacement or repair, but not to exceed the value of the property immediately prior to the loss or damage." *State v. Urbanek*, 177 N.W.2d 14, 16 (Iowa 1970). Ag Partners contends testimony during the jury trial regarding the construction of improvements to the loadout tower in 2000, combined with CCP's stipulation as to the reasonable costs of repairs, constitute substantial evidence to support Ag Partner's damages claim.

Pursuant to the parties' agreement the issues had been bifurcated for trial. The negligence and damages issues were first tried to a jury, followed by a non-jury trial on CCP's contract defenses. During the jury trial stipulated evidence was admitted concerning the reasonable *cost to repair* the damaged loadout tower, but no evidence was admitted concerning its pre-accident *value*. The district court therefore erred in overruling CCP's "motion for directed verdict" with respect to Ag Partners's claim for damage to the loadout tower.[5]

IV. Evidence

We review the district court's ruling concerning the admission of evidence for correction of errors at law. Iowa R. App. P. 6.4; *Bangs v. Maple Hills, Ltd.*, 585 N.W.2d 262, 264 (Iowa 1998).

During the jury trial, over CCP's objections, Ag Partners introduced evidence that after the derailment the CCP crew ran engines over another track at the Fonda elevator to break up any ice before placing railcars on another

[5] The admission during the later, non-jury trial of evidence of the cost to construct the loadout tower, even if arguably sufficient to prove its pre-accident value, came too late to cure the absence of evidence of value during the earlier, jury trial during which the issue of damages, in which the question of value inhered, was tried, submitted, and decided.

track. CCP contends testimony violated Iowa Rule of Evidence 5.407, which prohibits the introduction of subsequent remedial measures evidence.

Rule 5.407 prohibits the admission of evidence of "measures . . . which, if taken previously, would have made the event less likely to occur" when such evidence is offered "to prove negligence or culpable conduct in connection with the event." The rule "does not require the exclusion of evidence of subsequent remedial measures when offered . . . for another purpose, such as proving . . . feasibility of precautionary measures, if controverted . . . ." Iowa R. Evid. 5.407. The rule "is not a general rule of exclusion"; rather, it is "a rule precluding the evidentiary use of remedial measures to prove negligence." *McIntosh v. Best Western Sleepgate Inn*, 546 N.W.2d 595, 597 (Iowa 1996). The rule "does not preclude that type of evidence from being used to prove other legitimate matters." *Id.*

The evidence at issue was not that of a subsequent remedial measure. CCP's crew was not attempting to repair the location of the accident to prevent similar accidents in the future. Rather, it was attempting to complete its assigned task of delivering empty railcars to the Ag Partners facility. Therefore, the crew was not taking "remedial" measures. *See Black's Law Dictionary* 1319 (8th ed. 2004) (defining "remedial" as "intended to correct, remove, or lessen a wrong, fault, or defect"). In addition, the CCP crew had been trained prior to the accident that they were to run engines alone over snow- and ice-covered tracks to break up the ice and prevent derailments. Thus, the actions by the crew were not a *subsequent* remedial measure. *See Tucker v. Caterpillar, Inc.*, 564 N.W.2d 410, 413 (Iowa 1997) (holding the term "event" in the rule refers to the accident

or injury to plaintiff). Even if the evidence was that of a subsequent remedial measure, it was introduced to prove the feasibility of precautionary measures, and therefore was admissible. The district court did not abuse its considerable discretion in admitting the testimony at issue.

V. Conclusion

We reverse that portion of the district court's judgment consisting of damages awarded for damage to the loadout tower; affirm that portion of the district court's judgment consisting of damages awarded for trucking expense; and remand for entry of an amended judgment consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.