**IN THE COURT OF APPEALS OF IOWA**

No. 7-458 / 06-0294
Filed August 8, 2007

**CRAIG ROGERS and**
**TRACI ROGERS,**
Plaintiffs-Appellants,

**vs.**

**ENERGY PANEL STRUCTURES, INC.,**
**and FRANK MANNING, d/b/a FRANK**
**MANNING CONSTRUCTION,**
Defendants-Appellees.

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Appeal from the Iowa District Court for Marion County, John D. Lloyd, Judge.

Plaintiffs appeal district court judgment dismissing their claims against one of the co-defendants. **AFFIRMED.**

Thomas P. Murphy of Hopkins & Huebner, Des Moines, for appellants.

Stephanie L. Marett of Nymester, Goode, West, Hansell & O'Brien, P.C., Des Moines, and Daniel L. Manning of Connolly, O'Malley, Lillis, Hansen & Olson, L.L.P., Des Moines, for appellees.

Considered by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

**HUITINK, P.J.**

This is an appeal from the district court's judgment dismissing Craig and Traci Rogers's claims against Energy Panel Structures, Inc. (EPS) based upon its finding that there was no agency relationship between EPS and co-defendant Frank Manning. We affirm.

**I. Background Facts and Proceedings**

In early 2003 Craig Rogers met Frank Manning while Manning was building a structure for Craig's employer. Craig noticed Manning wore a hat with an EPS logo and drove a truck with an EPS logo, so he struck up a conversation about EPS and the products used to construct the building. Manning explained EPS made energy efficient panels that were constructed off-site for faster installation. Craig and his wife were planning to build their own new house, so he asked for Manning's business card. Later, Craig and Traci met with Manning and looked at other buildings that Manning had constructed with EPS materials.

The Rogers also viewed the EPS website. Craig Rogers called the phone number listed on the EPS website. The receptionist informed him that EPS materials could not be purchased directly from EPS; they had to be purchased from an EPS dealer. He was referred to Steve Stroud, a sales manager for EPS. Craig asked Stroud whether he had an EPS builder in the area. Stroud told him Manning was the dealer in their area.

The Rogers had never built their own home before, let alone the berm home they envisioned. They did not have an engineer or architect draw up plans for the house. Instead, they looked at some designs in magazines and came up

with a floor plan, approximate shape and size, and roof line for the house. This design was boiled down to a pencil drawing on a standard sheet of paper.

Craig Rogers approached Manning and asked for his price to build them a berm home out of EPS materials. Craig said he would do the electrical work himself and arrange his own contractors for the plumbing, heating, excavating, and concrete work. Manning told him the price for his work would be $44,000.[1] Manning and the Rogers entered into an oral contract to build the home. They also entered into an agreement to build a shed from EPS materials.

When the materials arrived, Manning began building the house. Eventually, the Rogers became frustrated with Manning's workmanship and the speed at which he was building the house. At one point, Traci called Steve Stroud at EPS and expressed her frustration that Manning was not paying enough attention to the project. The next day Manning appeared at the worksite.

When the Rogers discovered serious errors in the construction of their home, they called Stroud and demanded he fire Manning. Stroud told them EPS could not fire Manning. He told them that they had hired Manning to build their house and Manning was merely using EPS materials to construct the house. He further explained EPS was just the manufacturer of the product. The Rogers eventually fired Manning themselves and refused to pay him any more money.

Manning and EPS put mechanic's liens on the property. In response, the Rogers filed the present petition challenging the mechanic's liens and also alleging breach of contract, breach of implied warranties, and negligent

[1] At trial, Manning and Craig disagreed as to whether this price included labor. The court ultimately concluded this price included labor.

construction against Manning.[2] The Rogers also asserted these claims against EPS based on his alleged agency relationship with EPS.

After a bench trial, the district court awarded the Rogers a $90,000 judgment against Manning on their breach of contract and breach of warranty claims.[3] However, the court dismissed the Rogers's claims against EPS because it found there was no agency relationship between Manning and EPS.

The Rogers's sole claim on appeal is that the "district court erred in finding there was not an agency relationship between defendants EPS and Manning."

**II. Standard and Scope of Review**

Our scope of review is determined by the nature of the trial proceedings. *Nepstad Custom Homes Co. v. Krull*, 527 N.W.2d 402, 405 (Iowa Ct. App. 1994). This case involved actions challenging mechanic's liens. An action to enforce a mechanic's lien is tried in equity. *Griess & Ginder Drywall, Inc. v. Moran*, 561 N.W.2d 815, 816 (Iowa 1997). All of the issues brought by Rogers were tried together before the district court in equity. Because all of these issues were tried before the court in equity, our review is de novo. *See Nepstad Custom Homes*, 527 N.W.2d at 405.

**III. Merits**

The Rogers claim the district court erred in finding there was not an agency relationship between EPS and Manning. They claim there was sufficient proof of an implied or apparent agency.

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[2] Claims of infliction of emotional distress and punitive damages against Manning were dismissed prior to trial. The claim for negligent construction was dismissed by the district court.

[3] This figure was later reduced to $86,000, plus $25,000 in attorney fees.

**A. Implied Agency**

An agency relationship is:

> a fiduciary relationship resulting from the manifestation of consent by one person, the "principal," that another, the "agent," shall act on the former's behalf and subject to the former's control and from consent by the latter to so act.

*Farmers Grain Co., Inc. v. Irving*, 401 N.W.2d 596, 601 (Iowa Ct. App. 1986). "[I]mplied in any agency relationship is the notion that the principal exercises some type of control over the agent in performance of the act to be done and that the agent agrees to be subject to that control." *Benson v. Webster*, 593 N.W.2d 126, 130 (Iowa 1999). Proof of an agency relationship can come from either an express agreement or by an implication from the facts and circumstances of the relationship. *Walnut Hills Farms, Inc. v. Farmers Co-op Co. of Creston*, 244 N.W.2d 778, 780-81 (Iowa 1976). The burden of proving a principal and agent relationship is upon the party asserting such a relationship. *Farmers Grain Co., Inc*, 401 N.W.2d at 601.

The Rogers claim Manning was an agent of EPS because (1) the EPS website referred to Manning as an "EPS builder," (2) the website did not indicate builders were independent of EPS, (3) the president of EPS stated that EPS builders or dealers are an "arm" of EPS and if they do not follow EPS policies they will receive "the boot," and (4) a complaint to Stroud resulted in Manning coming back to the job site.

Upon our de novo review, we find the Rogers did not prove there was an implied agency relationship between EPS and Manning because there was insufficient evidence to prove both a manifestation of consent and control.

The written "Sales & Dealer Agreement" between EPS and Manning unequivocally states there is no agency relationship between the two. The agreement indicates that Manning "is an independent contractor and not an agent, employee, or in any other way affiliated with EPS and has no authority to bind EPS."

The Rogers discount this express agreement and claim the president of EPS, William Brown Jr., exposed their true relationship when he referred to the EPS dealers or builders as an "arm" of EPS. We find Brown's loose language does not prove the existence of an agency relationship. The context of his testimony describes how the dealer network is the means by which EPS products make their way to the customer. Brown explained how EPS does not sell its products directly to the general public. Instead, it enters into agreements with a limited number of dealers who sell the products to the public. An individual dealer works with a customer to determine what products are needed for the project. The dealer then buys the product from EPS and sells it to the customer at a higher price. The dealer does not receive any payment from EPS; its sole profit is derived from whatever mark-up it decides to make on the materials sold to the customer. Many dealers, like Manning, also run their own construction company. In this capacity, they have the opportunity to make further profit by offering their building services to coincide with the purchased materials. We find Brown's use of the term "arm" did not mean the dealers were actual employees of the company; instead, he used the term to illustrate they were the means by which a customer acquired EPS products.

Manning's testimony about his relationship with EPS also coincides with the relationship established by the written agreement. Manning described how Frank Manning Construction was his own business. He did not receive any monetary payments from EPS. He also testified that EPS did not supervise his activities at the job site.

Beyond the insufficient evidence to prove consent, we also find the Rogers did not prove EPS had control over Manning. The Rogers claim there was control because, after the Rogers called to complain to Stroud, Manning returned to the job site. Stroud testified that he did not exercise any control to get Manning to return to the job site. In order to facilitate good customer relations, he simply called Manning to pass on Traci's concerns.

We find no evidence that Stroud made any threats or exerted any control over Manning. The Rogers's argument merely invites the court to speculate that Manning returned to the job site because he was ordered to do so. We, like the district court, find this speculation does not sustain their burden of proof.

The Rogers also claim there is evidence of control because Brown testified that EPS can give dealers "the boot." This statement was made in the following colloquy between the Rogers's attorney and Brown:

> Q. A dealer gets polices and procedures he's supposed to follow; right? A. Yes.
> Q. If he didn't follow them, your're going to give him the boot; right? A. Yes.

The context of this statement undercuts its value to the issue of control. The written "Sales & Dealer Agreement" specifies that Manning is to "[a]ctively and diligently pursue the sale of EPS products" and "[t]o adhere to and be bound by"

the policies and procedures attached to the agreement. A review of these policies and procedures reveals that they control the terms of payment and procedures for placing and receiving materials. Obviously, if a dealer is not paying EPS, then EPS would be inclined to take steps to cancel their agreement and, in effect, give that dealer "the boot." This does not establish the control necessary for an agency relationship.

In total, both the written agreement and the testimony from Manning, Brown, and Stroud indicate that EPS had no control over any agreements made between Manning and the Rogers. Also, despite the Rogers's claims to the contrary, EPS did not supervise Manning's activities. The Rogers's remaining arguments—that EPS sometimes referred to its dealers as builders and that it did not specifically identify them as "independent contractors"—do not prove either consent or control. These statements apply towards the Rogers's next argument, that EPS led them to believe Manning had the authority to bind EPS to the contract.

**B. Apparent Authority**

The Rogers claim EPS's actions would lead a reasonable person to conclude that Manning was working as their agent. Specifically, they argue "EPS engaged in myriad activity from which it is more than reasonable to assume there was a grant [of] authority to Manning to act on EPS's behalf while subject to its control."

"For apparent authority to exist, the principal must have acted in such a manner as to lead persons dealing with the agent to believe the agent has

authority." *Clemens Graf Droste Zu Vischering v. Kading*, 368 N.W.2d 702, 711 (Iowa 1985). Stated another way,

> [T]he rule is that if a principal acts or conducts his business either intentionally, or through negligence, or fails to disapprove of the agent's act or course of action so as to lead the public to believe that his agent possesses authority to act or contract in the name of the principal, such principal is bound by the acts of the agent within the scope of his apparent authority as to any person who, upon the faith of such holding out, believes, and has reasonable ground to believe, that the agent has such authority, and in good faith deals with him.

*State v. Sellers*, 258 N.W.2d 292, 297 (Iowa 1977) (quotations omitted).

The Rogers point to the following facts to support their assumption that Manning "was EPS": (1) sometimes Manning wore an EPS hat; (2) Manning had an EPS logo on the side of his truck; (3) an EPS brochure contained a picture of Manning sitting in his truck; (4) EPS signs appeared on the front of buildings constructed with EPS materials; (5) the website, telephone operators, and district sales managers directed the Rogers to Frank Manning Construction; and (6) the website did not identify Frank Manning Construction or any other EPS dealer as an independent contractor.[4]

Upon our de novo review of the evidence, we find this is insufficient evidence to prove EPS led the Rogers to believe that Manning had the authority to make a contract on their behalf.

[4] The Rogers also refer to Stroud's attempts to get Manning back on task months into the project as proof of this apparent agency. We find this evidence inapplicable because it does not relate to the Rogers's perception at the time the contract was created with Manning.

The EPS logos and the reference to Manning as an "EPS builder" do not mechanically bestow upon Manning the authority to act on EPS's behalf. As noted by the district court,

> The modern American economy is saturated with clothing items bearing particular company logos or advertising. No one assumes that the kid selling sneakers at the local shoe store is an agent of Nike simply because he is selling Nike shoes and wearing an item of clothing with the distinctive Nike trademark. No one assumes that the local automobile service technician is an agent of General Motors simply because he works at a GM dealership, wears a hat with a GM logo, a shirt that identifies him as "Mr. Goodwrench" and sells "genuine GM parts."

Similarly, referring to someone as a "GM mechanic" does not automatically make that person an agent of General Motors. It is reasonable to assume that this title does not confer upon the mechanic the authority to act on GM's behalf, but rather communicates that they have some knowledge of how to service GM vehicles.

We, like the district court, find the Rogers's actual interactions with EPS and Manning more significant. When the Rogers contacted EPS about buying products, they were told they would have to contact an EPS dealer on their own. This is markedly different than EPS directing Manning to contact the Rogers. The Rogers did contact Manning. The ensuing agreement they made with Manning is also far removed from any agreement with EPS. The Rogers did not sign a contract with EPS or sign a contract bearing the EPS logo. Instead, they entered into an oral contract with Manning and wrote a check payable specifically to Manning as a down payment on the project.

We also reject the claim that the brochure was proof that Manning was cloaked with apparent authority to act as an agent for EPS. One small photograph in the brochure depicts Frank Manning sitting in a truck in front of a

building. The truck bears the logo "EPS."[5] Underneath the logo is the phrase "Manning Construction." Underneath that phrase is a phone number for Manning Construction. The following text appears next to the photograph.

> "This project was converted from stick to panels and made my owner very happy! We are now on our third building for him." – Frank Manning Construction

This photograph serves as a testimonial, not a means of endorsing Manning as an agent for EPS. Furthermore, the reference in the quote to "my owner" clearly indicates that Manning, not EPS, performed the work for the owner of the building. We find the brochure does not in any way set forth Manning as an agent for EPS.

Finally, we do not find Manning became an agent simply because EPS did not place a disclaimer on its website indicating its dealers were independent contractors. The sum total of EPS's actions did not create a presumption of agency; therefore it was not necessary to publish such a statement under these circumstances.

**IV. Conclusion**

Having considered all arguments set forth in this appeal, whether or not specifically mentioned in this opinion, we conclude the Rogers failed to prove the existence of an implied or apparent agency. Therefore, we affirm the district court's decision.

**AFFIRMED.**

[5] EPS did not direct Manning to place this logo on his truck.