STATE OF MINNESOTA
IN COURT OF APPEALS
A09-908

Russel Blad, et al.,
Respondents,

vs.

Richard K. Parris, Jr.,
Appellant.

Filed May 11, 2010
Affirmed
Peterson, Judge

Meeker County District Court
File No. 47-CV-08-147

Jon C. Saunders, Anderson Larson Hanson & Saunders, P.L.L.P., Willmar, Minnesota (for respondents)

Richard S. Eskola, Columbia Heights, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Shumaker, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this land-rental dispute, appellant-owner appeals a determination that he breached an agreement to rent his land to respondents. Appellant argues that (1) he is entitled to judgment as a matter of law (JMOL) because the record does not support the

jury's finding that a contract existed, (2) comments by respondents' counsel during final arguments entitle him to a new trial, and (3) the damages awarded respondents were excessive. We affirm.

FACTS

Respondents Russel and Nancy Blad farm about 3,500 acres of land, most of which is leased property. Since about 1997, respondents have leased 180 acres of property that appellant Richard K. Parris became the owner of in 2001. Each year, from 2002 through 2006, there was a written lease agreement between the parties.

All of the lease agreements between appellant and respondents were executed through the mail. Near the beginning of each year, appellant would send respondents a proposed lease agreement for the upcoming year. Respondents would sign the lease agreement and return it to appellant with a deposit. Respondents' signatures on the lease agreements are all dated in January or February of the year to which the agreement applies. Every lease agreement was for a one-year term, described as the "crop year," and no lease contained any automatic renewal or extension option.

The proposed lease agreement for crop year 2006 contained a rent increase from $87 per acre to $90 per acre. Respondents signed and returned the lease agreement to appellant along with a $1,000 deposit and a letter that stated: "I noticed that the rent was increased by $3.00 per acre. In the future we would like to be notified by October 1st as to any increase in land rent due to the fact that we apply fall fertilizer after the crop is harvested for the next crop year." Appellant testified that he had two telephone

conversations with respondents in 2006 and that respondent Russel Blad stated that respondents would not be renting from appellant anymore.

Nancy Blad testified that after harvesting the crop in the fall, it is a common practice for farmers to apply fertilizer to prepare the land for planting the following spring. Nancy Blad testified that appellant did not contact her before October 1, 2006, about any rent increases or about whether respondents would be renting the land in 2007. Russel Blad testified:

> Q: Now you understood you didn't have a long-term lease with [appellant]?
> A: But we had been farming the land for many years, so I had no idea that I wasn't going to keep farming it.
> Q: . . . And were you ever notified by [appellant] prior to October 1st that either the rent was going up or you wouldn't be farming it?
> A: No.

After October 1, 2006, respondents applied manure and other fertilizer to the land. On February 27, 2007, having not received a proposed lease agreement from appellant for crop-year 2007, respondents sent appellant a letter that stated: "I tried calling the telephone directory service to find a phone number for you, but you must have an unlisted phone number. We have not received a renewal on the land rent contract for 2007. We applied fall fertilizer on the land after the crop was harvested last fall." The letter provided Russel Blad's cell-phone number to appellant and requested that appellant call Russel Blad. Respondents were not contacted by appellant after sending the letter. In April 2007, respondents sent a $1,000 deposit to appellant by certified mail. The receipt showed that the check was delivered to appellant on April 6, 2007. On May 1,

2007, respondents planted 100.3 acres of corn and sent appellant a check for rent for the first half of the year, as had been the custom under the written lease agreements.

On May 2, 2007, respondents received a phone message from appellant stating that he had rented the land to someone else. The lease agreement between appellant and the third party was signed by appellant on January 25, 2007, and by the third party on February 15, 2007.

Respondents brought breach-of-an-implied-contract and equitable-estoppel claims against appellant. The case was tried to a jury, which found that (1) a contract existed between the parties; (2) appellant breached the contract; and (3) as a result of the breach, respondents incurred damages in the amount of $35,081.69. The district court denied appellant's motion for JMOL, a new trial, and remittitur. This appeal followed.

D E C I S I O N

I.

Because the denial of JMOL[1] is a question of law, we review it de novo. *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 199 (Minn. 2000). This court will affirm the district court's denial of JMOL if the record contains "any competent evidence reasonably tending to sustain the verdict. Unless the evidence is practically conclusive against the verdict, [this court] will not set the verdict aside." *Pouliot v. Fitzsimmons*, 582 N.W.2d 221, 224 (Minn. 1998) (quotation omitted).

[1]The 2006 amendments to the Minnesota Rules of Civil Procedure changed the label of a motion for JNOV to a motion for JMOL but did not alter the substantive practice relating to these motions. *Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 n.1 (Minn. App. 2007) (citing Minn. R. Civ. P. 50.02 (2006) advisory comm. cmt).

Generally, the existence of a contract and the terms of that contract are questions of fact to be determined by the fact-finder. *Bergstedt, Wahlberg, Berquist Assocs., Inc. v. Rothchild*, 302 Minn. 476, 480, 225 N.W.2d 261, 263 (1975). The formation of a bilateral contract requires a "specific and definite offer, [an] acceptance, and consideration." *Thomas B. Olson & Assoc., P.A. v. Leffert, Jay & Polglaze, P.A.*, 756 N.W.2d 907, 918 (Minn. App. 2008). Whether a contract arose depends on an objective evaluation of the parties' actions and words, not on the parties' subjective intent. *Id.* Not only are the words and actions of the parties relevant, but "the surrounding facts and circumstances in the context of the entire transaction, including the purpose, subject matter, and nature of it" may also be considered. *Morrisette v. Harrison Int'l Corp.*, 486 N.W.2d 424, 427 (Minn. 1992) (quotation omitted).

Appellant argues that the evidence is insufficient to prove the existence of a contract for crop-year 2007 because all previous agreements were in writing and were executed near the beginning of the crop year, there was no written agreement for 2007, there was no evidence of an express oral agreement between the parties, and the essential price term had not been agreed on.

> The form of the assent, whether it be written, oral, or by conduct, is not relevant as long as objective standards are applied and the essential finding of mutual assent is made. The Restatement (Second) of Contracts § 19 (1979) provides: "(1) The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act. (2) The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents."

> Comment c to section 19 provides: "[E]ven though the intentional conduct of a party creates an appearance of assent on his part, he is not responsible for that appearance unless he knows or has reason to know that his conduct may cause the other party to understand that he assents."

Holman Erection Co. v. Orville E. Madsen & Sons, Inc., 330 N.W.2d 693, 695 (Minn. 1983) (citation omitted). "Ordinarily, mere silence does not amount to an acceptance." *Gryc v. Lewis*, 410 N.W.2d 888, 892 (Minn. App. 1987). But "when the relationship between the parties is such that an offeror is justified in expecting a reply or the offeree is under a duty to respond, silence will be deemed an acceptance." *Id.*

In a January 2006 letter, respondents requested that appellant notify them of any rent increase for the upcoming year by October 1st of the contract year because land is fertilized in the fall after crop harvesting. Viewing the evidence in the light most favorable to the verdict, the jury apparently did not find credible appellant's testimony that respondents stated that they would not be renting from appellant and instead believed that appellant did not notify respondents about a rent increase, rented the land to a third party in a lease agreement that was fully executed by February 15, 2007, and then did not respond to respondents' February 27, 2007 letter and did not promptly return the $1,000 check that he received on April 6, 2007. This view of appellant's conduct, considered in light of the nature of the farming business and respondents' request to be notified by October 1st of the contract year of any rent increases, is sufficient to support the finding of a contract. *See Holt v. Swenson*, 252 Minn. 510, 516, 90 N.W.2d 724, 728 (1958) (stating that "[i]t is well settled that acceptance of an offer may be by conduct, and where the relation between the parties is such that the offeror is justified in expecting a reply, or

where the offeree is under a duty to reply, the latter's silence will be regarded as an acceptance" and finding acceptance by conduct when party allowed other party to perform contract without objection).

II.

"The decision whether to grant a new trial due to improper argument by counsel rests almost entirely within the discretion of the trial court and should not be reversed on appeal absent a clear abuse of discretion." *Jewett v. Deutsch*, 437 N.W.2d 717, 721 (Minn. App. 1989). A new trial is not warranted unless the argument resulted in prejudice to the losing party that is sufficient to affect the outcome of the case. *Boland v. Morrill*, 270 Minn. 86, 100, 132 N.W.2d 711, 720 (1965). The district court remains in the best position to determine whether improper arguments by counsel resulted in prejudice. *Ellingson v. Burlington N. R.R. Co.*, 412 N.W.2d 401, 405 (Minn. App. 1987), *review denied* (Minn. Nov. 13, 1987).

Appellant objects to the following argument by respondents' counsel during closing argument:

> [T]he bottom line is [the new tenant] or whoever got the $18,272 worth of benefits – somebody fertilized his land, somebody planted it, and somebody dug it – he didn't have to incur that expense. It came right out of [respondents'] pockets. . . .
>
> Now [appellant] could go back after [the new tenant] for that.
>
> . . . .
>
> . . . I don't care if [appellant] has to go back after [the new tenant] to get it.

Appellant also objects to the following argument:

> [The new tenant] wasn't called today to testify as to why it was substantially more. All we have once again is [appellant]. [Appellant] is the only one. . . . He even was quoting [the new tenant] about what [the new tenant] would say. Well, I was at [the new tenant's] deposition, and he never said it was a 25 bushel yield. What he talked about is he didn't know and it was 25 percent less than the year before.

After respondents' counsel completed closing argument, appellant's counsel objected to these arguments. The district court agreed that the arguments were probably improper but stated that it was too late for a curative instruction. This court has stated that it is "[p]roper procedure . . . to make an objection at the close of argument, and normally prejudicial arguments can be corrected by a curative instruction." *Molkenbur v. Hart*, 411 N.W.2d 249, 254 (Minn. App. 1987). Appellant's counsel did not request a curative instruction or dispute that it was too late for a curative instruction and instead stated that he was making the objection for the record.

In the order denying appellant's new-trial motion, the district court stated that the jury's finding of a contract and breach did not necessarily indicate that the statement about appellant's ability to collect from a third party affected the jury's decision. We agree. That argument was made in the context of addressing damages and unjust enrichment, not the existence of a contract. Appellant's counsel had argued: "Whatever crop was raised by [the new tenant], he's the one who benefited from the – the seeding, the insurance, and the fertilizing. . . . So [appellant] as the owner – as the owner, who leased the farm, does not benefit." The argument regarding the new tenant's deposition

was not based on evidence in the record but was an isolated statement and also was made in the context of addressing damages and unjust enrichment.

The district court did not clearly err in finding that to the extent the argument was improper, it did not cause prejudice to appellant. Appellant, therefore, is not entitled to a new trial based on counsel's argument, and the district court did not abuse its discretion in not awarding one. *Cf. Anunti v. Payette*, 268 N.W.2d 52 (Minn. 1978) (concluding that references to "high wages" of professional athletes followed by references to defendant as "the little guy, the working guy" were not improper and would constitute harmless error if improper); *Powell v. Standard Oil Co.*, 168 Minn. 248, 210 N.W. 55, 59 (1926) (concluding that argument that jury should consider that verdict against defendant would leave defendant and his family "forever in want and poverty" improper but no so prejudicial as to warrant a new trial when curative instruction had been given).

III.

A district court may grant a new trial because of excessive damages that appear to have been given under the influence of passion or prejudice or are not justified by the evidence. Minn. R. Civ. P. 59.01(e), (g). A district court possesses "the broadest possible discretion in determining whether a new trial should be granted for excessive damages." *Bisbee v. Ruppert*, 306 Minn. 39, 48-49, 235 N.W.2d 364, 371 (1975). Likewise, a district court has discretion to grant or deny remittitur, and appellate courts will not reverse unless there was "a clear abuse of discretion." *Kwapien v. Starr*, 400 N.W.2d 179, 184 (Minn. App. 1987). The nonbreaching party may recover both the expenses it incurred in preparation for performance and the profit it would have received

had the contract been performed. *Dick Weatherston's Assoc. Mech. Servs. v. Minnesota Mut. Life Ins.*, 257 Minn. 184, 193-94, 100 N.W.2d 819, 825 (1960).

Respondents sought damages for expenses and lost profits. The jury awarded respondents $35,081.69 "for the damages directly caused by the breach of the contract." Appellant does not dispute that a damages award could include both expenses and lost profits. Rather, based on a handwritten notation on the special-verdict form, appellant argues that the damages award counted expenses twice and, therefore, was excessive. The handwritten notation states:

22,430.36 total ~~expenses~~ input
21,975.14 total expenses
44,405.52
- 9,323.83 Rent
$35,081.69 Damages

The crossed-out word on the first line of the notation suggests that the jury did not intend the amount on that line to represent expenses. Also, exhibit 26, which was admitted at trial and allowed into the jury room, describes respondents' calculation of damages. One line on the exhibit states, "Lost Profit on Planted Acres $22,430.36." The district court did not clearly err in finding that no "double dipping" was present and, therefore, did not abuse its discretion by denying remittitur.

Affirmed.