IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KEN WILCOX and KIM WILCOX, husband and wife, doing business as KW Farms,	)	**No. 28588-0-III**
Respondents,	)	**Division Three**
v.	)	
CLASEN FRUIT & COLD STORAGE COMPANY, a Washington corporation,	)	
Appellant,	)	
ST. PAUL PROPERTY & LIABILITY INSURANCE COMPANY, a surety, and VALORIA H. LOVELAND, Director of the Washington State Department of Agriculture,	)	**UNPUBLISHED OPINION**
Defendants.	)	

Siddoway, J. — Clasen Fruit & Cold Storage Company appeals the outcome of a bench trial, in which the trial court found that an apple crop delivered to Clasen by Ken and Kim Wilcox met the quality requirements of the parties' agreement and that Clasen

was in breach for failure to pay a guaranteed minimum price. Clasen assigns error to the trial court's refusal to read industry grading standards into a requirement that, at harvest, the Wilcoxes "pick optimum color and size" and to its finding that there was a meeting of the minds notwithstanding the parties' dispute at trial over the quality terms. We find substantial evidence to support the trial court's interpretation and finding of mutual assent, and affirm.

FACTS AND PROCEDURAL BACKGROUND

This case arises out of a contract by which Clasen, a Yakima County packer and shipper, agreed to pack and sell apples grown by the Wilcoxes, farmers and orchardists doing business as KW Farms.[1]

The Washington apple industry initially projected the 2004 apple crop to be a small one, although it would not turn out to be the case after harvest. In order to procure sufficient fruit, Brian Sali, described by the parties and identified by the court's findings as Clasen's fieldman,[2] called upon the Wilcoxes in June 2004 and commenced negotiations toward procuring their 2004 Fuji and Gala apples. Both Mr. Sali and Clasen's quality control officer, Doug Carey, inspected the Wilcoxes' apple crop in the

[1] Other defendants were named solely in connection with the Wilcoxes' claim asserted against Clasen's commission merchant's bond.

[2] Mr. Sali's duties are not sufficiently clear from the record for us to substitute a generic description of his position.

orchard. Both reported to Clasen that the Wilcoxes had a good looking crop with big fruit, some of the biggest they had seen to that point in the season.

Among fruit needed by Clasen from the 2004 apple crop were apples meeting minimum standards imposed by Costco, from whom Clasen anticipated orders. Clasen representatives testified that Costco only accepts apples with a minimum diameter of three inches and at least 60 percent full red color. The Wilcoxes were aware that Clasen wanted fruit for the Costco market; they discussed it with Clasen before entering into an agreement. Ken Wilcox told Gene and Wayne Clasen that he grew his fruit to target the Costco market.

Based upon the observations of Mr. Sali and Mr. Carey and on photographs and packout information provided by the Wilcoxes, Clasen signed a letter agreement, drafted by the Wilcoxes, to acquire the Wilcoxes' apples on consignment. The Wilcoxes had told Mr. Sali they would not deliver their 2004 apples to Clasen unless they received a guaranteed price and Clasen agreed to guarantee to the Wilcoxes $175 per wood bin of Galas and $275 per wood bin of Fujis. The letter agreement stated that Clasen would pay the guaranteed minimum price per bin for "approximately 800-900 bins" of Galas and "approximately 2500 bins" of Fujis. Ex. 7. These bin estimates were the parties' good faith estimates of the volume they could reasonably expect the Wilcoxes' orchard to produce.

The first paragraph of the parties' letter agreement dealt generally with the type and amount of fruit to be acquired, the price guarantee, and delivery. The second paragraph dealt with purchase order requirements and Clasen's status as a commission merchant. The disputed third paragraph provides, in its entirety:

> The quality control program will be executed at harvest time with Ken & Kim Wilcox to pick optimum color and size. There will also be a second quality control check performed at Clasen Fruit and Cold Storage Company by Doug Carey upon delivery. In the event inferior fruit is delivered (cullage in excess of 15%), that load will be put on hold for inspection by Ken and Kim Wilcox and Clasen Fruit representatives. In the event this load is rejected by Clasen Fruit and Cold Storage Company, Ken and Kim Wilcox will then have the option to haul the fruit to another area warehouse at their expense.

Ex. 7. Remaining provisions of the agreement are not at issue.

At harvest, the Wilcoxes conducted a quality control program with a view to picking the fruit from each tree at its peak maturity based on their understanding, obtained from Mr. Sali, that the contract phrase "pick optimum color and size" was a reference to maturity and, according to Mr. Wilcox, "that we were to pick the fruit at its optimum -- for every piece of fruit on a tree it reaches an optimum condition of maturity." I Report of Proceedings (RP) at 14. He explained further that "every apple only obtains so much color and so much size that at some point in time you either pick it or it's going to go beyond its optimum and then it's going to go backwards on you." *Id.* If the apple goes beyond optimum, Mr. Wilcox testified, "[i]t begins to lose pressure,

begins to water core and sometimes will get skin problems, show blemishes, blotches . . . that sort of thing." *Id*. Mr. Sali testified similarly, adding that if you get over the optimum color "you're going to end up with an inferior apple to store or you could end up with an apple that has been split if it goes too far over the maturity line." *Id*. at 41. Mr. Sali was in the Wilcoxes' orchard daily during the harvest and had no objection to how it was conducted.

The Wilcoxes' and Mr. Sali's predictions of the size and color of the fruit proved wrong as a result of multiple factors, including weather. Mr. Sali's testimony supported the Wilcoxes' position that Clasen had relied upon its own employees' evaluation of the prospects for the crop, including Mr. Sali's testimony that Wayne Clasen was unhappy with him, and said to him, "[T]his didn't size up as well as you thought, did it?" *Id.* at 74. Although saleable, much of the fruit did not meet Costco's requirements. The Wilcoxes delivered some fruit sufficient for the Costco market, but not as much as the Wilcoxes predicted or as Clasen had hoped.

The 2004 crop proved much larger than projected. To make matters worse, the Taiwan market closed due to coddling moth. The larger than expected supply and smaller than expected demand caused prices to decline substantially.

Clasen knew soon after it began packing and marketing the Wilcoxes' fruit that it would not return the price it had agreed to pay. Yet Clasen did not notify the Wilcoxes

during harvest, upon delivery, or during packing that there was anything wrong with their apples or with their performance. Clasen accepted the apples, packed them, and sold them.[3] Indeed, it continued to deliver empty bins to the Wilcoxes' orchard and pick them up when filled even after the estimates in the agreement were exceeded. The Wilcoxes ultimately delivered and Clasen accepted 1,353 bins of Galas and 3,330 bins of Fujis.

Clasen had the opportunity and contractual obligation to inspect the apples for culls (unsaleable fruit) as bins were delivered but presented evidence that in inspecting for culls it did not inspect for color and size and did not realize until later the full extent to which the Wilcox fruit fell short of the requirements of the Costco market. By April 2005, Clasen had completed sorting and packing and did have the full measure of the size and color of the apples delivered by the Wilcoxes.

Thereafter, in June 2005, Gene Clasen sent a letter to the Wilcoxes to clarify a couple of issues prospectively: first, that the guaranteed price applied only to the 2004 crop, not to future crops, and second, as to volume, that Clasen would be required to purchase "the number of bins referred to in the letter agreement and not to any more than maybe a 5% excess." Ex. 22. The letter implicitly acknowledged Clasen's obligation to

[3] The trial court concluded that the parties' agreement was a consignment contract, not a sale of goods, and was not governed by Article 2 of the Uniform Commercial Code. Clerk's Papers (CP) at 15 (Conclusion of Law 3). This conclusion is not challenged on appeal. The trial court pointed out the words "accepted" and "acceptance" as used in its findings and conclusions were not intended to have any special meaning that may be attributable under the Uniform Commercial Code. CP at 15 (Finding of Fact 26).

pay the guaranteed price per bin on the 2,625 bins of Fujis and 945 bins of Galas delivered from the 2004 crop and did not mention any issue with the size or color of the fruit.

Gene and Wayne Clasen testified at trial that they thought the provision requiring that the Wilcoxes "pick optimum color and size" meant that the Wilcoxes must deliver at least 60 percent "premium" fruit, meaning fruit large in size ("80s and 88s") and with high color (80 percent red). III RP at 255-56, 342; Br. of Appellant at 12. The size of an apple is represented by the number of apples that will fit into a 42-pound box, with a 3-inch apple equating to a size 88.

The trial court concluded that the Wilcoxes performed their obligation under the agreement, including the provision requiring that they "pick optimum color and size," which it interpreted to mean that care would be taken to pick the apples at their peak maturity. It concluded that Clasen was in breach for failing to pay the guaranteed amount on the apples it packed and sold and awarded the Wilcoxes a judgment in the amount of $949,108.72. This appeal followed.

ANALYSIS

Assignments of Error and Standard of Review

Clasen assigns error to the trial court's finding and conclusions as to the meaning of the provision requiring that the Wilcoxes "pick optimum color and size" and to its

conclusion that there was a meeting of the minds as to the Wilcoxes' obligations under the agreement.[4]

The parties dispute the standard of review to be applied to these determinations. Clasen contends that our review is de novo, because we are largely reviewing issues of law. The Wilcoxes argue that the trial court's interpretation relied on extrinsic evidence and presents a factual issue, as does its determination that there was mutual assent. They contend that the standard of review is substantial evidence to support the determinations. Three of the contested determinations were characterized by the trial court as conclusions of law, while only one was characterized as a finding of fact. However, the trial court's labeling of its determinations as "findings of fact" or "conclusions of law" does not necessarily make them so. *Ridgeview Props. v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982).

In *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990), the court established the framework by which we now analyze contract issues, distinguishing between interpretation, a process that ascertains the parties' intent through the admission of extrinsic evidence, and construction, a process by which legal consequences are made to follow from the terms of the contract. *Burgeson v. Columbia Producers, Inc*., 60 Wn. App. 363, 366-67, 803 P.2d 838 (citing *Berg*, 115 Wn.2d at 663), *review denied*, 116

[4] Clasen's assignments of error 1 through 4.

Wn.2d 1033 (1991). It adopted the interpretation process, under which extrinsic evidence is admissible as to the entire circumstances under which a contract was made, as an aid in ascertaining the parties' intent and regardless of whether the contract language is deemed ambiguous. *Berg*, 115 Wn.2d at 667-68. In so doing, it adopted the Restatement (Second) of Contracts § 212(2) (1981), which provides, in part, that "[a] question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence." *Berg*, 115 Wn.2d at 667-68.

The parties presented and the court considered evidence of the parties' negotiations, market practice, market conditions, and communications and actions during the period the agreement was being performed, all of which reasonably bore on the trial court's interpretation of the "optimum color and size" provision. Even Clasen concedes that the term "optimum color and size" is ambiguous and susceptible to different interpretations, a concession supported by the record. Accordingly, the portions of the trial court's challenged determinations that deal with the meaning of the disputed provision—one characterized as a finding and two as conclusions—are findings of fact.

Clasen's other assignment of error disputes the trial court's determination that there was a meeting of the minds between the parties as to the Wilcoxes' obligations under the agreement.[5] This determination, included by the court in its conclusions of law,

is also typically a question of fact. *Sea-Van Invs. Assocs. v. Hamilton*, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994). Whether there is mutual assent must be gleaned from the parties' words and acts, to which we impute a corresponding intention. *Multicare Med. Ctr. v. Dep't of Soc. & Health Servs.*, 114 Wn.2d 572, 587, 790 P.2d 124 (1990). Here, too, extrinsic evidence was necessarily considered by the trial court and its determination that there was mutual assent is also a finding of fact, notwithstanding its label.

The trial court's findings of fact will not be disturbed if supported by substantial evidence. *Frank Coluccio Constr. Co. v. King County*, 136 Wn. App. 751, 761, 150 P.3d 1147 (2007). Substantial evidence means sufficient evidence to persuade a rational, fair-minded person that the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). We defer to the trier of fact on issues of credibility and the weight of conflicting evidence. *Burnside v. Simpson Paper Co*., 123 Wn.2d 93, 108, 864 P.2d 937 (1994).

Interpretation of Provision Dealing with "Optimum Color and Size"

Clasen argues that the court erred when it found that the phrase "optimum color and size" does not refer to a specific size or color of apple (assignment of error 1); that the term means that the fruit crop as a whole, as opposed to each piece of fruit, has

[5] The essential contractual element of a "meeting of the minds" is also commonly referred to as mutual assent. The terms are used interchangeably.

reached maturity and is ready for harvest (assignment of error 2); and that the term imposed upon the Wilcoxes no duty to deliver a fruit crop of any particular size or any particular color, and so long as the fruit crop had reached its peak maturity for color and size, the Wilcoxes were free to deliver fruit of any size and any color (assignment of error 3).

In order to ascertain the parties' intent, the trial court was entitled to consider (1) the subject matter and objective of the contract, (2) the circumstances surrounding the making of the contract, (3) the subsequent conduct of the parties to the contract, (4) the reasonableness of the parties' respective interpretations, (5) statements made by the parties in preliminary negotiations, (6) usages of trade, and (7) the course of dealing between the parties. *Berg*, 115 Wn.2d at 666-68.

Clasen challenges the trial court's interpretation as commercially unreasonable. It describes the industry as built on grading standards under which all apples in the market are compared, size and color are the qualities that determine an apple's price, and varying grades of fruit are sold at correspondingly varied price points. In this commercial context, it argues, considering an apple "optimum" when it is comparatively small and/or comparatively green is illogical. Br. of Appellant at 13. The context for this particular contract was the 2004 crop year, however, and an exceptionally competitive apple market. Unusual market conditions can and do alter what is commercially reasonable,

and in this case, they elevated the importance to packers of securing sufficient product to keep a packing line busy. With a crop that as of June appeared particularly good, the Wilcoxes had bargaining power to demand favorable terms, such as a guaranteed price, that might not have been available in another year.[6]

Both Ken Wilcox and Mr. Sali understood at the time the agreement was made that the term in question meant the Wilcoxes were to pick the fruit when it was at its best size and best color. The placement of the provision within the agreement supports this testimony. The argument that it was intended as a market-based benchmark for product qualifying for the guaranteed minimum price would be more persuasive if the "optimum color and size" criterion appeared in the first paragraph of the letter agreement, identifying the type and amount of apples to be delivered and sold subject to the price guarantee. The fact that the disputed language appears in a paragraph dealing with "quality control . . . at harvest time" and requires the Wilcoxes "*to pick* optimum color and size" (emphasis added) supports the "harvest at peak maturity" meaning testified to by Mr. Wilcox and Mr. Sali and found by the court.

Clasen argues that the trial court's interpretation makes the contract meaningless,

[6] Widespread use of accepted grading standards in one respect undercuts the proposition that "optimum color and size" was intended as a market-based benchmark for the quality of fruit eligible for the guaranteed price—if the parties intended to require delivery of size 80-88, 80 percent red apples, they could easily have said so.

but it does not. The requirement to "pick optimum color and size" as interpreted by the trial court added something to the agreement—it required the Wilcoxes to harvest in a manner that would maximize the value of the crop.

Clasen finally argues that the trial court erred by failing to construe the contract language against the Wilcoxes, as drafters of the letter agreement. But the reviewing court should not resort to this rule of interpretation unless the intent of the parties cannot otherwise be determined; "[the] primary goal in interpreting a contract is to ascertain the parties' intent." *Paradise Orchards Gen. P'ship v. Fearing*, 122 Wn. App. 507, 516, 94 P.3d 372 (2004), *review denied*, 153 Wn.2d 1027 (2005); *Forest Mktg. Enters., Inc. v. Dep't of Natural Res.*, 125 Wn. App. 126, 132, 104 P.3d 40 (2005) (concluding that if the intent of the parties can be determined, there is no need to resort to the rule that ambiguity be resolved against the drafter).

These specific challenges by Clasen to the trial court's findings therefore fail. Moreover, there is a variety of support in the record in the form of statements, admissions, conduct, and acquiescence that support the trial court's interpretation of the "optimum color and size" provision as requiring harvest at optimum maturity. The majority of the trial court's findings are not challenged by Clasen, and unchallenged findings are verities on appeal. *In re Interest of Mahaney*, 146 Wn.2d 878, 895, 51 P.3d 776 (2002). All of the following findings are uncontested: (1) both Gene and Wayne

Clasen knew that the letter agreement with the Wilcoxes contained no specifics for color or size; (2) Mr. Wilcox's and Mr. Sali's mutual understanding that the provision meant the Wilcoxes were to pick the fruit when it was at its best size and best color; (3) Mr. Sali was in the Wilcoxes' orchard daily and had no objection to how harvest was conducted; (4) the Wilcoxes did not make any guarantees as to size or color; (5) Clasen accepted, packed, and sold all of the apples delivered by the Wilcoxes; and (6) Clasen knew precisely the size, color, and cullage of the apples delivered by the Wilcoxes after packing in April 2005 and did not object. Additionally, a letter sent by Clasen to the Wilcoxes on June 6, 2005 did not raise any issue with the size or color of the apples delivered.

The trial court's findings as to the meaning of the "optimum color and size" provision are supported by substantial evidence.

Meeting of the Minds

Clasen argues alternatively that if the "optimum color and size" provision does not necessarily impose a requirement for delivery of 60 percent "premium" grade product, then testimony establishes that the parties attach different meanings to an essential term. It contends that the trial court therefore erred in finding a meeting of the minds. It contends in particular that the court unreasonably attributed its finding of mutual assent largely to the fact that Clasen accepted, packed, and sold the allegedly nonconforming

fruit without objection. Its quarrel with that reasoning is that the parties' agreement only obligated Clausen to inspect for and timely reject excessive cullage and it therefore had no obligation to inspect deliveries to see if the Wilcoxes were failing to meet the "optimum color and size" standard. Br. of Appellant at 17-18. According to Clasen, the parties' "distinctly different impressions" compel the conclusion that a contract does not exist "[r]egardless of the parties' conduct after signing the Letter Agreement." Br. of Appellant at 18.

An enforceable contract requires a meeting of the minds on the essential contractual elements. *Sea-Van Invs. Assocs.*, 125 Wn.2d at 125-26. The subject matter of the contract is an essential element. *Bogle & Gates, PLLC v. Holly Mountain Res.*, 108 Wn. App. 557, 561, 32 P.3d 1002 (2001). Mutual assent requires that parties manifest to each other their mutual assent to the same bargain at the same time and generally takes the form of an offer and an acceptance. *Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388-89, 858 P.2d 245 (1993).

Clasen appears to argue that because a failure of agreement may result where parties have in good faith attached different meanings to an essential term (*see, e.g.*, Restatement, *supra*, § 201 & cmt. *d*) then the trial court was required, on the basis of Gene and Wayne Clasen's testimony, to find a failure of agreement.[7] We note first that

[7] Clasen points to the Wilcoxes' testimony as to their subjective understanding, the Clasens' testimony as to their different understanding, and from that, asserts "[i]t is thus

this assumes the trial court was obliged to accept the Clasens' testimony and disregard considerable countervailing evidence. A finder of fact is not obliged to accept a witness's testimony as to his or her subjective belief, understanding, or intent, and, as earlier noted, we defer to the trial court on issues of credibility. *Burnside*, 123 Wn.2d 93. More to the point, this argument overlooks the fact that whether there is a meeting of the minds is determined by the objective manifestations of the parties. *Hearst Commc'ns, Inc. v. Seattle Times Co*., 154 Wn.2d 493, 503, 115 P.3d 262 (2005). The trial court must "determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." *Id*. (citing *Max L. Wells Trust v. Grand Cent. Sauna & Hot Tub Co. of Seattle*, 62 Wn. App. 593, 602, 815 P.2d 284 (1991)). Accordingly, the trial court properly attached importance to Clasen's objective conduct in continually accepting, packing, and selling the Wilcoxes' fruit without objection. Whether Clasen had an obligation to inspect for color and size, the fact that it accepted almost 4,700 bins of apples without ever raising any issue of breach is nonetheless an objective manifestation that the parties did not have an essential disagreement about the contract's requirements.

The trial court's finding is also supported by substantial evidence that Clasen knew

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uncontested that the parties to the contract never had a meeting of the minds about an essential contract term." Reply Br. of Appellant at 3.

or had reason to know of the Wilcoxes' understanding. Even where parties have attached different meanings to a term, it will be interpreted in accordance with the meaning attached by an innocent party (one who did not know or have reason to know of the meaning attached by the other party) if the other party knew or had reason to know of the meaning attached by the innocent party. Restatement, *supra*, § 201. The same evidence that supports the trial court's interpretation of the "optimum color and size" provision supports a finding that Clasen had reason to understand the meaning attached to that provision by the Wilcoxes.

The record contains substantial evidence to support the trial court's finding of mutual assent.

Finding substantial support for all the challenged findings, we affirm.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

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Sweeney, J.

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Brown, J.