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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA11-089

RICELAND SEED COMPANY d/b/a STRATTON SEED COMPANY APPELLANT	**Opinion Delivered** September 7, 2011 APPEAL FROM THE ARKANSAS COUNTY CIRCUIT COURT, NORTHERN DISTRICT [NO. CV-2008-101]
V. WINGMEAD INC. d/b/a WINGMEAD SEEDS APPELLEE	HONORABLE DAVID G. HENRY, JUDGE AFFIRMED

JOSEPHINE LINKER HART, Judge

Riceland Seed Company, doing business as Stratton Seed Company (Stratton) , appeals from a judgment in favor of Wingmead Incorporated, doing business as Wingmead Seeds (Wingmead). That judgment rejected Stratton's argument that a contract requiring Wingmead to sell Stratton certified rice seed had been modified to allow the seeds to be picked up more than a month after the time specified in a written instrument. On appeal, Stratton argues that the trial judge clearly erred because he ignored clear and convincing testimony that the parties had modified the written contract. We affirm.

The parties entered into an express written contract for the sale of certified seed on November 21, 2007. The writing specified that "March/April 2008" was the shipment period. During the specified shipment period, Stratton failed to pick up most of the rice seed identified in the contract. On May 27, 2008, Wingmead's farm manager, Darren Walker,

called Stratton's director of marketing operations, Jim Craig, to inquire when Stratton intended to pick up the remainder of the seed. Craig stated that Stratton would have the rice "totally cleared out" by the "end of the following week." Walker told Craig that he would have to inform the board of Stratton's proposal. Later that day, Walker reported what Craig had told him to the Wingmead board of directors. Walker was in charge of Wingmead's day-to-day operations, but had no authority to bind the company to a contract without board approval. The board meeting minutes reflect that Walker informed the board of Stratton's stated intention to pick up the rice by June 6, 2008, but there is no indication that the board assented to that new deadline. According to Walker, he called Craig on June 2 and was promised that the trucks would arrive on June 3. None did. After no trucks arrived on the morning of June 4, Wingmead informed Stratton that it was terminating the contract. Stratton sent a truck on the afternoon of June 4, but it was turned away by Wingmead. Wingmead subsequently sold the rice seed to a third party at a higher price than was specified in its contract with Stratton.

Stratton asserts that this case turns on a single issue: whether the parties agreed to modify the contractual deadline for Stratton to pick up the rice seed that it had agreed to buy from Wingmead. Stratton acknowledges that, at trial, Wingmead denied that it had agreed to such a modification. However, citing *Caplener v. Bluebonnet Milling Co.*, 322 Ark. 751, 911 S.W.2d 586 (1995), it asserts that the trial judge erred in relying on Wingmead's denial at trial because it was contradicted by prior depositions and affidavits that were submitted pursuant to summary-judgment motions. Specifically, it points to Wingmead's Chief Financial Officer Rick Shutt's deposition in which he stated that Wingmead's board of directors accepted

Stratton's plan to pick up the remainder of the seed by June 6. Further, Stratton concedes that Wingmead's board did not communicate its assent to the contract modification, but, without citation of authority, it argues that a "mutual understanding" of what Stratton proposed was all that was required. We find this argument unpersuasive.

In bench trials, the standard of review on appeal is not whether there is substantial evidence to support the finding of the court, but whether the court's findings were clearly erroneous or clearly against the preponderance of the evidence. *Marx Real Estate Invs., LLC v. Coloso*, 2011 Ark. App. 426, 384 S.W.3d 595. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that a mistake has been committed. *Id.* Disputed facts and determinations of credibility are within the province of the fact-finder. *Id.*

We note first that in asserting that the trial court erred in failing to credit what it contends were inconsistent statements made in depositions, Stratton has misunderstood the role of the trial judge. It is axiomatic that it is the province of the trial judge to make credibility determinations. *Id.* Accordingly, Stratton's reliance on *Caplener v. Bluebonnet Milling Company*, *supra*, is clearly misplaced. In *Caplener*, the supreme court held that in a summary-judgment proceeding, an affidavit that is inherently and blatantly inconsistent with prior deposition testimony may not be used to establish a question of fact to ward off the granting of a summary-judgment motion. The case at bar is of course not a summary judgment proceeding, but a full trial, so *Caplener* is clearly inapposite. Secondly, we do not believe that Shutt's testimony is inconsistent. The essence of his testimony was that Wingmead was willing to accept Stratton's late pick-up of the seed until it failed to begin taking delivery on the morning of June 4.

Regarding the balance of Stratton's argument, while we agree that there is ample evidence that Wingmead was *aware* that Stratton wanted to take possession of the seed at a later time than was expressly provided for in the written contract, mere knowledge of Stratton's proposal is insufficient to affect an oral modification of a written contract. The general rule is that a written contract may be modified or substituted by a subsequent oral agreement, but the burden is on the party asserting the subsequent modification to show the assent of the other party thereto. *Southern Acid & Sulphur Co. v. Childs*, 207 Ark. 1109, 184 S.W.2d 586 (1945). Further, the assent of both parties to a modification is necessary; the mental purpose of one of the parties to a contract cannot change its terms. *Id.* Here, Stratton concedes that Wingmead's board did not communicate its assent to the contract modification, so at best, there was mere acquiescence to Stratton's dilatory contract performance until it failed to fulfill its promise to begin cleaning out the seed on June 3. Accordingly, we do not believe that the trial court erred in concluding that the contract was not modified.

Affirmed.

VAUGHT, C.J., and GLOVER, J., agree.