

FILED

AUG 26 1982

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JOE LaMASTERS,

)

Plaintiff-Appellee,

)

Filed August 26, 1982

309

vs.

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C & K TRANSPORT, INC.,

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2-172

Defendant-Appellant.

)

2-67190

Appeal from Hamilton District Court - David R. Hansen, Judge.

Defendant trucking company appeals from the judgment for plaintiff in this contract dispute over amounts owed on leases of plaintiff's over-the-road semi truck tractors. On appeal, defendant contends (1) the contract establishes incompetence rather than negligence as the legal standard, the breach of which would require plaintiff to indemnify defendant for loss of cargo, that this is a higher standard than negligence, and that the trial court's use of the negligence standard was prejudicial; (2) that defendant did not waive its right to be reimbursed by plaintiff for certain fees paid for permits and plates; (3) that it was not reasonable for plaintiff to fail to assist defendant in obtaining refunds for these fees; (4) that defendant was entitled to charge plaintiff for obtaining some refunds of these fees; and (5) that there was an accord and satisfaction as to the amounts owed plaintiff for certain trips. **AFFIRMED.**

Charles N. Edmiston of Karr, Karr & Karr, P.C., Webster City, for defendant-appellant.

James C. Wilson of Wilson, Hall, Wilson & Craig, Eldora, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, and Johnson, JJ.

DONIELSON, J.

Defendant trucking company appeals from the judgment for plaintiff in this contract dispute over amounts owed on leases of plaintiff's over-the-road semi truck tractors. On appeal, defendant contends (1) the contract established incompetence rather than negligence as the legal standard the breach of which would require plaintiff to indemnify defendant for loss of cargo, that this is a higher standard than negligence, and that the trial court's use of the negligence standard was prejudicial; (2) that defendant did not waive its right to be reimbursed by plaintiff for certain fees paid for permits and plates; (3) that it was not reasonable for plaintiff to fail to assist defendant in obtaining refunds for these fees; (4) that defendant was entitled to charge plaintiff for obtaining some refunds of these fees; and (5) that there was an accord and satisfaction as to the amounts owed plaintiff for certain trips. We affirm.

Since plaintiff sought relief in the form of damages, the action was tried at law. We are, therefore, bound by the trial court's findings of fact when supported by substantial evidence. Iowa R. App. P. 14(f)(1). Our scope of review shall be for errors at law. Iowa R. App. P. 4.

I.

Defendant, C & K Transport, Inc., is a corporation engaged in the transport of meat products from the Midwest to the East Coast and of other commodities on the return trip to the Midwest. Plaintiff, Joe LaMasters, is a sole proprietor in the business of leasing semi truck tractors. In 1976 and 1977, these parties entered into contracts wherein defendant leased five of plaintiff's tractors to transport trailers loaded with meats to the East Coast. These leases provided that plaintiff would provide competent and qualified drivers and would indemnify defendant for "any loss or damage resulting from the negligence, incompetence or dishonesty of such driver(s)."

The compensation clause was not filled in, but is phrased in terms of a payment of dollars per load or of a percentage of load revenue. Although the lease is headed "Long Term," the printed portion of it is phrased in terms of any specific number of loads over the life of the lease, and as payment to plaintiff is to be per load, the lease does not commit defendant to do anything except when it provides loads.

The court found that the parties had agreed that plaintiff was to be paid seventy percent (70%) of the load revenue when the trip was under authority held by defendant—these being eastbound loads with meat—and eighty percent (80%) of the revenue when the trip was under authority held by others—as when plaintiff's drivers could get "back hauls" from the East Coast.

Defendant procured all of the license plates, fuel permits, and regulatory agency permits necessary for plaintiff to operate his tractors in Iowa and the sister states through which he would travel. Plaintiff was to pay for these expenses, called "prorates," by deducting \$50 from each eastbound load settlement until defendant was fully reimbursed. While the leases were entered at different times, all were to run until December 31, 1977.

In April, 1977, plaintiff's son was the employee who drove defendant's refrigeration trailer containing meats to New York. Defendant had leased the trailer from a third party and had agreed to assume full carrier responsibility for the loss or damage to cargo transported in the trailer. Pursuant to this agreement, defendant purchased cargo insurance with a \$1,000 deductible clause.

The refrigeration unit on the trailer was equipped with a temperature gauge which can be read from outside the trailer. This gauge tells the temperature of the air just before it is circulated through the trailer. The temperature was to be kept at 30° on this particular trip.

En route, plaintiff's driver experienced trouble with the refrigeration unit.

The driver checked the unit periodically and found it to be malfunctioning. He determined the cause to be a blown fuse and after replacing it, the unit functioned properly. This happened on several occasions. Each time he replaced the fuse, the temperature gauge read normal. Eventually, the driver took the truck to the authorized refrigeration unit service center in Illinois. The repairman gave his assurance that the unit was fine so the driver proceeded east.

While the driver was still in Illinois the unit broke again. Once more, he replaced the fuse and the unit began operating. This time, however, he called the defendant and explained the problem. The defendant told him where the nearest refrigerator dealer and service center was located. After inspecting the unit themselves, plaintiff's son and another driver discovered a loose electrical wire which was causing the fuses to blow. They called defendant back and told them the problem had been fixed and that they were proceeding to New York. The unit never blew another fuse and continued to register a normal 30° temperature.

When he arrived with the load in New York and the sealed doors of the trailer were opened, the meat had begun to spoil from being too warm. The meat was in an "off" condition, and defendant was docked by the purchaser for the bad condition. The cargo insurance carrier paid all except the first \$1,000 of the loss, which defendant paid.

The defect which kept the meat from being cooled was not the electrical problem, but rather, it was a seized bearing in the shutter mechanism which inhibited the cooled air from circulating through the trailer. Nevertheless, cool air was still circulating past the temperature gauge. Hence, the explanation why the temperature gauge always showed normal but the meat spoiled.

For reasons not specified in the record, defendant terminated its business relationship with plaintiff in May, 1977. Defendant paid plaintiff amounts owed for trips previously made, but withheld \$1,000 for the cargo damage, allegedly due

to the fault of the driver; \$1,770.19 for amounts paid by defendant for prorates not reimbursed by plaintiff; and \$293.14 in payments on westbound return trips taken on other than company authority. The plaintiff sued and recovered these amounts under the contract. The defendant then instituted this appeal.

II.

Defendant's first contention is that the trial court did not apply the correct legal standard of care to determine plaintiff's liability for the \$1,000 deductible paid under the cargo insurance contract. It claims plaintiff is liable for this amount under the clause of the lease providing for indemnification if the damage is due to the driver's "negligence" or "incompetence." The court applied the negligence standard to determine whether the driver was at fault. Defendant contends that the court erred by not applying the indemnification provision in its entirety and, therefore, by not using the higher standard of care contemplated by the term "incompetence." This is the first time defendant has taken this position. The allegation that plaintiff's driver did not possess the requisite competence was never pleaded or proved at the trial level as is required by our prior cases. Baron v. Crossroads Center of Iowa, Inc., 165 N.W.2d 745, 753 (Iowa 1969). Because this issue was never presented to the trial court, it cannot be raised and considered for the first time on appeal. Davidson v. Van Lenzen, 266 N.W.2d 436, 439 (Iowa 1978).

In the alternative, defendant contends that the court erred by applying an ordinary negligence standard to determine whether plaintiff's driver acted as would a reasonable and prudent man under like circumstances. Defendant believes that the driver should have been held to a higher standard of negligence, measured by the skill and knowledge normally possessed by a member of that trade in good standing in a similar community. See Kastler v. Iowa Methodist Hospital, 193 N.W.2d 98, 101 (Iowa 1971). Defendant argues that plaintiff's driver would be liable

under this standard since qualified members in the meat transport trade would have inspected the meat itself when the refrigeration unit broke down. The trailer was equipped with smaller vent doors located near the top of the trailer in both the front and rear. Those doors provide enough access to the cargo so that a temperature probe can be inserted into the meat and the meat "pulped" to determine its temperature and condition. Defendant asserts that the driver was negligent under the higher standard of care because he didn't pulp the meat.

We find that the trial court did apply the standard of care advocated by defendant. Mr. Hemmen, President of defendant corporation and its subsidiary company, which leased the refrigerated trailer to defendant, testified at the trial. We believe, as president of these corporations, Mr. Hemmen possesses the knowledge and skill normally possessed by members of the meat transport trade in good standing in similar communities. He testified that it would be reasonable for a driver to rely on the temperature gauge to accurately report the temperature inside the trailer. Further, it was Mr. Hemmen who spoke to the driver when he called from the service center in Illinois. In this conversation, Mr. Hemmen never asked whether the driver had pulped the meat, nor did he instruct him to do so. In addition, it is clear that the driver made a diligent effort to keep the refrigerator unit running. We believe this is sufficient evidence to support the finding that the damage was not due to the negligence of the driver and that the \$1,000 was, therefore, wrongfully withheld by defendant.

III.

Defendant's second contention is that it did not waive its right to recover prorates held by plaintiff when the contract was terminated. The plaintiff was to reimburse defendant for the prorates at \$50 per trip. Defendant's unilateral termination of the contract made it impossible for plaintiff to repay according to this schedule. See Salinger v. General Exchange Insurance Corporation, 250 N.W.

13, 15, 217 Iowa 560, 563 (1933) (citing rule that performance under contract is excused when acts of other party made performance impossible). The lease does not indicate who should pay for the fuel permits and prorates in the event of a breach. Since these items are purchased on an annual basis, it is inevitable that one of the parties will suffer a financial loss. Of these items, only the prorates could be returned for a refund or could be transferred for the second half of the year.

The prorate license plates had to be returned by June 30 in order to avoid the second half fee from being assessed. With this date in mind, defendant asked plaintiff to return the plates in June. Plaintiff told defendant where the plates were and said to come and retrieve them. Instead, defendant wrote a check on June 8 to pay for the second half. Later in the year, three of these prorates were transferred to tractor units not owned by plaintiff. Defendant could have transferred all of the licenses to other units or taken them in for a refund immediately after the breach. Since plaintiff had no legal or contractual duty to return them and did not impede defendant's ability to retrieve them, it cannot be claimed that the prorates were wrongfully withheld by plaintiff. We believe, therefore, that the costs of the prorates should be borne by the parties in proportion to the period of time they were able to use them to generate income. Defendant could have availed himself of this opportunity immediately after the contract was breached but failed to do so. Instead, it charged plaintiff for this period. Thus, the conclusion that defendant overcharged plaintiff \$1,770.19 for prorates and related items finds substantial support in the record.

IV.

Defendant's final claim is that plaintiff, through an accord and satisfaction, waived his right under the contract for 80% compensation on westbound trip leases without company authority by cashing checks tendered by defendant which

contained only 70% compensation. It also claims that the defendant company authority referred to in the agreement also related to authorities owned by defendant's subsidiary and sister companies. The record indicates that the leases which mention company authority were strictly between defendant C & K Transport, Inc. and plaintiff. These leases are not ambiguous and authority is discussed in relation to only C & K Transport, Inc. and no other company. Since only one type of authority is presented, plaintiff cannot be held bound by authority of companies irrelevant to the agreement.

The lower court found as fact that the actual compensation plaintiff was to receive was eighty percent (80%) of the westbound load revenue. Plaintiff was paid seventy percent (70%) of the load revenue and defendant claims that this constitutes an accord and satisfaction. But part payment of a liquidated or undisputed sum does not necessarily result in an accord and satisfaction. Gibson v. Deuth, 220 N.W.2d 893, 896 (Iowa 1974). The defendant has the burden of establishing accord and satisfaction. Electra Ad Sign Company, Inc. v. Cedar Rapids Truck Center, 316 N.W.2d 876, 880 (Iowa 1982). To do so it must show valid consideration which is offered, intended, and accepted as full satisfaction of the original debt. Id. at 879. There is no showing that the parties intended this payment to be in full satisfaction of the debt. Defendant did not carry its burden to establish accord and satisfaction. Accordingly, the trial court properly awarded the sum of \$293.14 to plaintiff.

AFFIRMED.