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IN THE COURT OF APPEALS OF IOWA

LEWIS S. McKEOWN, )

Plaintiff-Appellant, )

Filed October 7, 1977

vs. )

FRY TRUCKING, INC., )

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2-59589

Defendant-Appellee. )

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Appeal from Muscatine District Court - R. K. Stohr, Judge.

Plaintiff appeals the amount of damages awarded in his suit for an accounting and wrongful delay in transferring title to trucking vehicles; he appeals the denial of a 6% gasoline surcharge and exemplary damages. - Affirmed.

L. Jeffrey Zearley, of Norton & Freese, of Lowden, for Plaintiff-Appellant.

Jerome W. Conway, of Rosenberger, Petersen, Conway & Petersen,  
of Muscatine, for Defendant-Appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

## PER CURIAM

Plaintiff Lewis S. McKeown, a long-haul trucker, appeals the amount of recovery allowed in his suit against the defendant Fry Trucking, Inc. McKeown sued for an accounting upon termination of an oral contract and for damages for failure to transfer title to a tractor and trailer purchased by McKeown during the term of the contract. He appeals also the denial of his claim for a 6% gasoline surcharge upon all freight hauled, allegedly due under I.C.C. regulations. Finally, he appeals the denial of his claim for exemplary damages for Fry's allegedly wrongful conduct. We affirm.

In this law action where the trial court sits as a trier of fact, we may disturb its findings of fact only if they are unsupported by substantial evidence. *Gordon v. Pfab*, 246 N.W.2d 283, 286 (Iowa 1976). Upon a full review of the exhibits of McKeown and Fry and the testimony elicited at trial, we affirm the trial court's acceptance of Fry's Exhibit C as a true and correct record made in the normal course of business. Exhibit C establishes the amount of recovery due McKeown in the Division I accounting claim at \$798.07. We note McKeown made no request for the appointment of a master to disentangle the bookkeeping entries related to the offsetting claims made by Fry in Exhibit C. Neither did he request the production of the company's receipts book which according to bookkeeper Marie Fry would be necessary to any testing of the ultimate accuracy of Exhibit C. Rather, McKeown rested his claim upon three selected invoices not listed on Exhibit C which he alleged shorted him in the amount of \$297.35. He rested on these apparent discrepancies and upon his claim that he was to receive 85% of the amount charged, rather than the amount ultimately paid Fry by the invoiced parties.

McKeown failed to produce any evidentiary basis upon which the trial court could find as a matter of fact that Fry agreed to pay him upon the amount of the original invoice charge. He failed to establish that Fry's record of the variance between the amount charged and the amount received represented by Exhibit C was not the accurate summation of their agreement that upon termination the variance between charges and receipts would be deducted from any amounts owed to McKeown. The trial court, therefore, could properly find that the Fry Exhibit C

represented "the true account of the transactions between the parties. . . ." Division I recovery is affirmed as determined by the trial court.

Division II damages for Fry's failure to timely transfer title to the tractor and trailer concerns a sufficiency of the evidence question as well. On appeal McKeown neglects to inform this court that he possessed the improperly endorsed title to the truck tractor, and knew of its defective endorsement, for months before he terminated his work agreement with Fry. Likewise he neglects to acknowledge the final \$300 payment due on the truck trailer had been allowed to remain unpaid for months before the termination. The trial court as trier of fact was fully within its prerogative to countenance the Fry testimony that it was at least as much McKeown's rebuffs as their own inaction which led to the title delay. *Arthur Elevator Co. v. Grove*, 236 N.W.2d 383, 388 (Iowa 1975). It also credited Marie Fry's testimony that at the time of termination Fry honestly considered McKeown was in its debt for more than the amount owing to him and therefore had no balance from which to deduct the \$300 trailer payment.

Upon this record the trial court properly determined the time frame during which Fry should pay damages for failure to properly transfer titles to the tractor and trailer. The damage recovery allowed is reasonable and supported by sufficient evidence, we will therefore not interfere with what is basically a question for the trier of fact. *Olsen v. Drahos*, 229 N.W.2d 741, 742 (Iowa 1975). Division II recoveries are affirmed.

Like the trial court, we find no merit in the Division III claims for a 6% gasoline surcharge under I.C.C. regulations. No such regulations were introduced into evidence.

The Division IV claim for exemplary damages was rejected by the trial court. It noted each parties' stubborn intransigence had impeded the settlement of their accounts but that as soon as Fry discovered a bookkeeping error the correction of which resulted in its net indebtedness to McKeown in the amount of \$798.07 Fry immediately filed an offer to confess judgment in this amount. We affirm the trial court ruling that "there is nothing in this record upon which this court could predicate exemplary damages." See *Earl v. Clark*, 219 N.W.2d 487, 491-92 (Iowa

1974).

We find each of McKeown's arguments depends upon the existence of facts contrary to those found by the trial court. Because the trial court's findings are supported by substantial evidence we are precluded from interfering with such findings. *Gordon*, 246 N.W.2d at 287.

Affirmed.