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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JAYDEL MATTHIESEN, d/b/a MATTHIESEN TRUCKING,	)	
Plaintiff-Appellant,	)	Filed November 30, 1983
vs.	)	
SIOUXLAND BEEF PROCESSING COMPANY,	)	
Defendant,	)	3-288 / 2-69438
and	)	
MEIER BODY SHOP AND TOWING SERVICE,	)	
Defendant-Appellee.	)	

Appeal from Woodbury District Court - Richard J. Vipond, Judge.

Plaintiff appeals a judgment holding defendants not negligent and plaintiff's driver contributorily negligent for injury to plaintiff's refrigerated meat trailer. REVERSED AND REMANDED.

John G. Martens of Sanderson, Sanderson, Ridout, Martens & Surfass, Estherville, for plaintiff-appellant.

Charles T. Patterson of Gleysteen, Harper, Eidsmoe, Heidman & Redmond, Sioux City, for defendant-appellee Meier.

William L. Edmonds of Carter, Sar & Edmonds, Sioux City, for defendant Siouxland.

Heard by Oxberger, C.J., and Snell and Hayden, JJ.

HAYDEN, J.

Plaintiff appeals a judgment holding defendants not negligent and plaintiff's driver contributorily negligent for injury to plaintiff's refrigerated meat trailer. We reverse and remand.

Plaintiff is the owner and operator of a trucking business. One of plaintiff's trucks was left with defendant Siouxland Beef Processing Company to be loaded. When plaintiff's driver, Grover Reiser, arrived the trailer was stuck in a mudhole. It was hooked up to a yard truck of Siouxland Beef and a tow truck of defendant Meier Body Shop and Towing Service. Plaintiff brought suit alleging that his trailer was injured by the negligent way in which it was removed from the hole. Defendant Meier Body Shop claimed that plaintiff was barred from recovering because plaintiff's driver was contributorily negligent.

Judgment was entered for the defendants. Plaintiff appeals only the judgment for Meier Body Shop. Three allegations of error in the jury instructions are asserted. Our review of this action at law is on assigned error. Iowa R. App. P. 4.

The trial court gave the following instruction to the jury regarding the conduct of plaintiff's driver:

> A truck driver who observes his trailer being pulled from a mudhole must recommend a different procedure for removing it from the mudhole if he has an opportunity to make such a recommendation and if a reasonably knowledgeable and prudent truck driver would do so under all of the circumstances. Failure to recommend a different procedure would then be negligence. However, if a truck driver does not have an opportunity to make such a recommendation or if a reasonably knowledgeable and prudent truck driver would not do so under all of the circumstances, failure to make such a recommendation would not be negligence.

The existence of a duty is a prerequisite to a finding of negligence. Larsen v. United Federal Savings and Loan Association, 300 N.W.2d 281, 285 (Iowa 1981). This instruction implies that there is an affirmative duty on the truck driver to

correct mistakes made by the towing company while towing his truck. We agree with plaintiff that the instruction is erroneous. Defendant Meier Body Shop was engaged in the towing business. Plaintiff's truck was in defendant's control. Plaintiff should be able to rely upon defendant's skill and experience in this type of work. To require the truck driver to tell defendant how to do its business imposes too heavy a burden on him.

This would be a different case if the truck driver had special knowledge of the situation which he would reasonably expect to be unknown to defendant. No evidence of any special knowledge was presented in this case. Furthermore, if the driver did undertake to offer advice, he must not do so negligently. However, in the present case we will not require someone inexperienced and unskilled in towing to recommend a different procedure to those who are experienced and skilled in the towing business.

We have considered plaintiff's other allegations and find them unpersuasive. However, since the contributory negligence instruction was in error, we reverse the judgment and remand the case for a new trial.

REVERSED AND REMANDED.