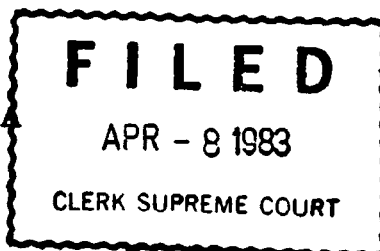


IN THE COURT OF APPEALS OF IOWA



PRAIRIE ARTISTS PHOTOGRAPHIC, INC.,)

Plaintiff-Appellant,)

vs.)

AMERICAN FREIGHT SYSTEM,)

Defendant-Appellant.)

Filed April 8, 1983

2-511
 2-68898

Appeal from Mahaska District Court, Richard J. Vogel, Judge.

Plaintiff appeals from dismissal of its action at law against a motor carrier for damages to an interstate freight shipment. **AFFIRMED.**

Garold F. Heslinga, Oskaloosa, for plaintiff-appellant.

Timothy J. McKay of McKay and Moreland, P.C., Ottumwa, for the defendant-appellee.

Heard en banc.

PER CURIAM

Plaintiff appeals from dismissal of its action at law against a motor carrier for damages to an interstate freight shipment. The trial court dismissed the suit on the ground that plaintiff had failed to prove a prima facie case that the property was in good condition when delivered to defendant carrier. Plaintiff challenges this finding on appeal. We affirm.

Plaintiff ordered certain photographic equipment from a manufacturer in Pennsylvania. The equipment was packed in five large crates and shipped via North Penn Transfer to Philadelphia, Pennsylvania, then by East Texas Motor Freight to Moline, Illinois, and finally by defendant American Freight System to New Sharon, Iowa. Defendant delivered the equipment to a New Sharon warehouse late on the afternoon of November 2, 1979, at which time plaintiff conditionally accepted the equipment, pending later inspection for hidden damage. None of the crates showed outward signs of physical damage, either when plaintiff accepted them or during the unpacking. The crates remained in the warehouse, unsupervised, until early on the morning of November 5. They were then loaded and moved by truck to plaintiff's business, where they were lifted by crane to the roof of plaintiff's building. The damage to the eight photographic racks was discovered during the uncrating.

Plaintiff thereupon filed a damages claim with defendant American Freight. An inspection of the damaged racks and the crate in which the racks had been shipped was conducted on November 8. Plaintiff later testified he was told that the inspection report was completed by an agent of defendant. Defendant wrote a letter to plaintiff denying the claim "pending some action to minimize the loss and to establish the actual amount of repairs."

Plaintiff filed its petition on May 28, 1981. Plaintiff now appeals from the trial court's dismissal of its action, contending that its evidence established that defendant received the equipment in good condition, and that the damage

therefore must have occurred due to defendant's negligence.

Since this is an action at law, our review is on assigned errors only. Iowa R. App. P. 4.

The liability of common carriers in interstate commerce is governed by 49 U.S.C. § 11707 (Supp. IV 1980), a provision of the Interstate Commerce Act. A plaintiff seeking damages under this provision has the burden of establishing a prima facie case of liability against a carrier, and only after such a case has been presented does the burden of proving nonnegligence shift to the defendant carrier. A prima facie case requires proof of three elements: (1) the property shipped was in good condition when received by the carrier; (2) the property was damaged on delivery; and (3) the amount of damages. Frosty Land Foods International, Inc. v. Refrigerated Transport Co., Inc., 613 F.2d 1344, 1346-47 (5th cir. 1980); see United States v. Cloverleaf Cold Storage Co., 286 F. Supp. 680, 681-82 (N.D. Iowa 1968).

We agree with plaintiff's assertion that circumstantial evidence is as probative as direct evidence. See Iowa R. App. P. 14(f)(16). However, we conclude that the circumstantial evidence urged by plaintiff, plaintiff's Exhibits 12 and 18, does not prove that defendant carrier received the property in good condition.

Plaintiff's Exhibit 12 is an investigative report written by an alleged agent of defendant. The report describes the damaged articles, and states further: "Looks like the box had something heavy on it while in transport the lid showed damage on the inside." Plaintiff claims that this report constitutes an admission of defendant's liability because it suggests that the damage occurred while the property was in defendant's possession. However, the printed investigative report states specifically that it "is not an admission of liability [by] the carrier."

Even if the report were to be construed as an admission of liability, the report could not be construed as an admission by defendant until plaintiff had proven that (1) the writer of the report was defendant's agent, (2) writing such reports was a duty within that agent's scope of employment with defendant, and (3) the reports were made during the performance of this agent's duties.

McPherrin v. Jennings, 66 Iowa 622, 623-24, 24 N.W. 242, 242-43 (1885); accord, Fed. R. Evid. 801(d)(2)(D).¹ Plaintiff, as offeror of the alleged admission, has the burden of proving that the agent was authorized to act for the principal, American Freight System, concerning the subject matter of the admission. Absent proof, the court will not presume that an agent has such authority. Walters v. Iowa Electric Co., 203 Iowa 467, 470, 212 N.W. 886, 887 (1927).

The trial record contains no evidence of either the scope of the alleged agent's employment or the degree of authority given to that agent. The burden of proving such facts lies with plaintiff. Id. at 470, 212 N.W. at 887. Plaintiff has not met the standard required to prove that the investigative report is an admission by defendant.

Plaintiff's Exhibit 18 is a letter from defendant's customer service director to plaintiff. The letter acknowledges receipt of plaintiff's claim for damages. It clearly states that, if defendant is proven liable, such liability extends only to the cost of repairs, and not to the cost of complete replacement of the equipment. The letter was signed by an alleged agent of the defendant, and liability was denied for plaintiff's damage.

Plaintiff argues that this exhibit also constitutes an admission by defendant, and is thus probative of defendant's liability. Again, however, there is no evidence in the record purporting to prove either the scope of the agent's duties as employee of defendant or the agent's authority to speak on behalf of defendant. Exhibit 18 therefore cannot be said to constitute an admission by defendant.

¹The Iowa Supreme Court has adopted the Federal Rules of Evidence policy of excluding admissions from the definition of hearsay. State v. Hamilton, 236 N.W.2d 325, 330 (Iowa 1975)(adopting Fed. R. Evid. 801(d)(2)(B)). The court, however, has not adopted the policy of excluding admissions by an agent from the definition of hearsay. Compare id. with Fed. R. Evid. 801(d)(2)(D).

Plaintiff emphasizes in its brief on appeal that its initial burden is only to present a prima facie case of liability against the carrier. We agree wholeheartedly. However, plaintiff did not meet that burden. There is no evidence in the record establishing that the photographic equipment was received by defendant in good condition. We therefore affirm the district court's dismissal of plaintiff's action.

AFFIRMED.