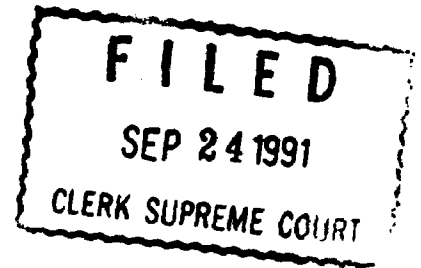


IN THE COURT OF APPEALS OF IOWA

No. 0-735 / 90-0988



DALE AXMEAR,

Appellant,

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vs.

OTTUMWA FLYING SERVICE, INC.,

Appellee.

Appeal from the Iowa District Court for Wapello County,
James D. Jenkins, Judge.

Dale Axmear, plaintiff, appeals a directed verdict in
favor of Ottumwa Flying Service, defendant. **AFFIRMED.**

Allan C. Orsborn of Keith, Orsborn, Milani & Neary,
Ottumwa, for appellant.

J. Terrence Denefe of Kiple, Kiple, Denefe, Beaver &
Gardner, Ottumwa, for appellee.

Considered by Schlegel, P.J., and Sackett and Habhab,
JJ.

HABHAB, J.

In July 1988, Dale Axmear had 144,000 bushels of corn which was subject to redemption under the farm program. At that time, Axmear determined he could purchase PIK certificates on the open market, redeem the corn, and then sell it at a sizable profit. On July 29, 1988, Axmear borrowed money to buy a sufficient number of PIK certificates to redeem his 144,000 bushels of corn from the ASCS office in Sigourney, Iowa. The money was then wired to Cargill in Kansas City to purchase the certificates. The certificates were located in Kansas City and Cargill was to deliver them to Axmear by noon on August 1, 1988. Axmear had to deliver the PIK certificates to the ASCS office in Sigourney by 4:30 p.m. August 1 to take advantage of the favorable corn price spread.

On August 1, 1988, Axmear learned Cargill could not deliver the certificates until the next day. Axmear then made arrangements with Ottumwa Flying Service to fly his son, Alan, to Kansas City, pick up the certificates, and deliver them at the Ottumwa airport or to drop them over Sigourney. Apparently the plane could not land in Sigourney. Axmear alleges the pilot responded "no problem" when asked if a drop could be made. However, the pilot was given no indication of the item which might be dropped, the worth of the item (\$300,000 in negotiable paper certificates), nor the height from which the drop might have to be made.

During the return flight, it was decided, due to time constraints, to try and drop the certificates at the Sigourney airport. It was at this time that Alan Axmear discussed with Steve Black how he wanted to drop the PIK certificates. Alan testified he wanted to make the drop only a hundred feet from the ground so his father could retrieve the certificates. Alan did not want to drop them any higher for the PIK certificates were negotiable and he did not want them lost in the cornfield. If the certificates were lost, his father would be out \$300,000.

When the attempt was made to drop the certificates via the plane door, the plane became unstable. The pilot then rejected the possibility of dropping the certificates out the plane window. The plane returned to Ottumwa. By then it was too late to deliver the PIK certificates in Sigourney before the ASCS office closed. It was later discovered the pilot had never made a drop from a two-engine plane such as the one used to pick up the PIK certificates.

As a result of the delay in delivering the certificates, Axmear lost almost \$30,000. Axmear brought this action in tort and contract based on the failure of the service to timely deliver the certificates as promised. Following trial, the district court entered a directed verdict against Axmear. Axmear has filed this appeal.

Our review is for errors of law. Iowa R. App. P. 4.

A court ruling on a motion for directed verdict must view the evidence in the light most favorable to the nonmoving party. Beitz v. Horak, 271 N.W.2d 755, 757 (Iowa 1978); Iowa R. App. P. 14(f)(2). Movant is considered to have admitted the truth of all evidence offered by nonmovant and every favorable inference that may be deduced from it. B & B Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 279, 284 (Iowa 1976). To overrule the motion the court must find substantial evidence in support of each element of nonmovant's claim. Beitz, 271 N.W.2d at 757. If reasonable minds could differ, that issue is for the jury. Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443, 444 (Iowa App. 1984).

I. Contract.

The trial court found as a matter of law Axmear failed to provide substantial evidence of breach of contract. In sustaining the defendant's motion for a directed verdict, the trial court stated

[T]he only contract that I can see that the parties entered in was that the parties entered into an agreement whereby the defendant would fly the plaintiff and the plaintiff's representative to Kansas City and pick up some PIK certificates and bring them back to Ottumwa or to drop them over the north airport in Sigourney. Now, they were not able to drop them over the north airport in Sigourney, but they did deliver them on the ground to Ottumwa. (Emphasis added.)

When we view the evidence in the light most favorable to the plaintiff, we agree with the trial court's

assessment of the testimony. We, of course, agree with appellant that he must be afforded every legitimate inference that reasonably can be deduced from the evidence. In addition, if reasonable minds can differ on an issue, then that issue should be submitted to the jury.

Here there is no question the parties reached an agreement before flight commenced. That agreement is as the trial court found. It is clear the defendant complied with the terms of the agreement as originally reached. In this respect, reasonable minds could not differ on this issue. As such, there was nothing to submit to the jury.

We affirm on this issue.

II. Tort.

The trial court also ruled as a matter of law Axmear failed to produce substantial evidence of a tort by the flying service in performance of its service for Axmear. Again, we point out the evidence the pilot had no idea of the weight of the object to be dropped. Nor did the pilot know until the return trip the small lightweight package contained \$300,000 of negotiable paper. The pilot certainly had no idea the item must be dropped within 100 feet of the ground to avoid being lost in the surrounding cornfields. Further, it appears from the record the elder Axmear, and not the pilot, was making the strategic decisions from the ground.

We agree with the trial court the plaintiff failed to show the flying service breached a known duty or the damages were foreseeable by the flying service at the time Axmear hired the plane. Indeed, at the time the pilot and the flying service had no idea of what Axmear was going to Kansas City for or what his plans were regarding the item he was to pick up there. The evidence is clear that the duty agreed to was performed when the pilot delivered the PIK certificates to Ottumwa.

Viewed in the light most favorable to the plaintiff, we determine the trial court properly directed a verdict on the tort issue. We affirm on this issue.

The trial court is affirmed on all issues.

Costs of this appeal taxed to the appellant.

AFFIRMED.