

IN THE COURT OF APPEALS OF IOWA

No. 7-451 / 96-1175

B&D LIVESTOCK, INC.,

Plaintiff-Appellant,

vs.

JOHN BOYDSTON AND MFA INC.,

Defendants-Appellees.

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JOHN BOYDSTON,

Defendant\Cross-Claimant.

vs.

MFA INC.,

Defendant\Defendant to Cross Claim

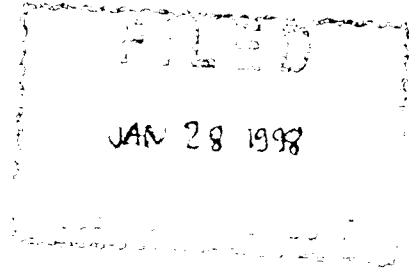
JOHN BOYDSTON,

Defendant\Defendant to Cross-Claim,

vs.

MFA Inc.,

Defendant\Cross-Claimant.



Appeal from the Iowa District Court for Clinton County, David H. Sivright, Jr., Judge.

The plaintiff appeals from an adverse verdict in an indemnity action.

AFFIRMED AS MODIFIED.

Brian T. Fairfield of Norton & Norton, Lowden, for appellant.

Joseph C. Creen of McDonald, Stonebraker & Cepican, P.C. Davenport, for appellee Boydston.

Steven E. Mayer of Mayer, Mayer, Lonergan & Roles, Clinton, for appellee MFA, Inc.

Heard by Cady, C.J., and Sackett, and Huitink, JJ.

CADY, C. J.

B&D Livestock, Inc. appeals from the district court verdict in an indemnity action. It claims the trial court erred in finding it waived all implied warranties and in failing to enter a judgment in its favor in a dispute involving the sale of sick feeder pigs. We modify the trial court's judgment in our de novo review.

The events giving rise to this cause of action stem from a series of transactions involving the sale of feeder pigs. MFA, Inc., a Missouri corporation, sold the pigs to John Boydston, a Missouri pig broker. Boydston in turn sold the pigs to B&D Inc., an Iowa pig broker. B&D then sold the pigs to Westview of Monroe, Inc.

Boydston orally represented to B&D representatives during negotiations for the sale that the pigs were healthy with good genetics. Boydston agreed to warrant the pigs to the point of destination in Monroe, Iowa. He had a policy that any unsatisfactory pigs could be returned to him at the point of delivery.

The pigs were delivered from MFA's facilities in Missouri to Westview in Iowa. When the pigs arrived, a Westview representative indicated some of the pigs were coughing, bleeding from the nose, and teary eyed. Some of the pigs were later found to have rhinitis and mycoplasmal pneumonia. Westview told B&D at the time of delivery it was unhappy with the health of the pigs and did not want to accept them. A B&D representative persuaded Westview, however, to keep the pigs to see if they would improve. At this point, the pigs could have been returned to Boydston

at his expense. Instead of returning the pigs to Boydston, B&D sent him a form receipt detailing the number, type, and price of the pigs sold. The receipt also stated:

Seller makes no other warranties of any kind whatsoever, expressed or implied. Seller does not warranty effectiveness of vaccination, ability to grow, freedom from disease, or livability. ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE WHICH EXCEED THE AFORESTATED OBLIGATIONS ARE HEREBY DISCLAIMED BY SELLER AND EXCLUDED FROM THIS AGREEMENT.

MFA also provided a certificate of veterinary inspection to Boydston who in turn gave it to B&D. This certificate stated "[n]o warranty is made or implied."

Due to the health problems with the pigs, B&D agreed to pay Westview \$36,671 for the losses Westview incurred. Westview's costs included extra feed, medication, heat, bedding, and labor. B&D then sought to recover this amount from Boydston and MFA. The trial court found B&D was liable to Westview and the settlement they reached was reasonable, but rejected the claim for indemnity based on the disclaimer language contained in the B&D receipt. It acknowledged the pigs were not healthy or free of disease when delivered to B&D, but found the implied warranty of merchantability in the transaction between B&D and Boydston was disclaimed and excluded by the language in the receipt.

On appeal B&D claims the trial court erred by ruling it waived all implied warranties and in failing to enter a judgment in its favor.

I. Standard of Review

The right of indemnity is essentially equitable in nature. *See Howell v. River Products Co.*, 379 N.W.2d 919, 921 (Iowa 1986); *Ward v. Loomis Bros., Inc.*, 532 N.W.2d 807, 813 (Iowa App. 1995). We review equitable matters de novo. Iowa R. App. P. 4. We give weight to the findings of the trial court, but are not bound by them. *See Gildea v. Kapenis*, 402 N.W.2d 457, 459 (Iowa App. 1987); Iowa R. App. P. 14(f)(7).

II. Choice of Law

We must first address whether Missouri or Iowa law governs the issues in this case. Choice of law in a contract action can be determined by agreement of the parties. Absent such agreement, the “most significant relationship” test is applied. *See Cole v. State Auto. & Cas. Underwriters*, 296 N.W.2d 779, 781 (Iowa 1980); Iowa Code § 554.1105. In this case, there was no agreement between the parties.

In determining which state has the most significant relationship to the issue in question, we consider the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, the place of incorporation, and the place of business. *See Harlan Feeders, Inc. v. Grand Laboratories, Inc.*, 881 F. Supp. 1400, 1411 (N.D. Iowa 1995); *Joseph L. Wilmotte & Co. v. Rosenman Bros.*, 258 N.W.2d 317, 326 (Iowa 1977). We also consider the needs of the interstate systems, the relevant policies of the forum, the relevant policies of other interested states, the protection of justified expectations, the basic policies underlying the particular field of law, certainty, predictability,

uniformity of result, and ease of determination and application of the law to be applied. *Harlan Feeders, Inc.*, 881 F. Supp. at 1411; *Joseph L. Wilmotte & Co.*, 258 N.W.2d at 326.

We find Iowa has the most significant relationship to the issues in this case. While MFA and Boydston were Missouri pig brokers, the incident giving rise to B&D's cause of action took place in Iowa. The pigs were delivered to Iowa where the basis for the indemnity action developed. Additionally, Boydston entered into a contract with B&D, an Iowa corporation, and warranted the pigs to the point of delivery in Iowa. Although MFA sold pigs to Boydston, another Missouri pig broker, it knew the pigs were destined for Iowa. Further, Iowa has a significant and substantial interest in regulating the quality of livestock brought into this state. We therefore find Iowa law applies to the issues in this case.

III. Waiver of Implied Warranties

The Uniform Commercial Code (UCC) governs sales of livestock. *See* Iowa Code § 554.2105(1) (1993). Under the UCC, a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.¹

¹ Iowa Code section 554A.1 provides for instances where livestock sales are exempt from the implied warranty rule. However, the parties did not raise the applicability of section 554A.1 at trial, and did not present evidence to support its application to this case.

B&D claims the receipt it sent Boydston after the purchase, sale, and transfer of the pigs did not constitute a waiver of all implied warranties of fitness and merchantability. Specifically, B&D relies on *W&W Livestock Enterprises Inc. v. Dennler*, 179 N.W.2d 484, 491 (Iowa 1970), arguing a written bill of sale delivered after the purchase of feeder pigs had no effect on oral, express, or implied warranties of the diseased pigs. We must decide in this case if the terms in the receipt sent to Boydston after delivery of the pigs became part of the contract.

A contract is formed when the last act necessary to its formation is complete. See 17A Am. Jur. 2d *Contracts* § 16 (1991); Iowa Code § 554.2204. Typically, this occurs when the offer is accepted. See 17A Am. Jur. 2d *Contracts* § 16 (1991); Iowa Code § 554.2206. An acceptance which contains additional terms, such as a disclaimer of warranties, may become part of the contract. See Iowa Code § 554.2207. However, additional terms communicated after acceptance are treated differently. Additional terms, such as a disclaimer, communicated after the formation of the contract and which were not a part of the bargain between the parties do not become part of the contract. See *Duhme v. Duhme*, 260 N.W.2d 415, 419 (Iowa 1977) (contracts are formed by a mutual manifestation of assent by the parties to the same terms of the contract); *W&W Livestock Enterprises Inc. v. Dennler*, 179 N.W.2d 484, 491 (Iowa 1970) (bill of sale delivered after purchase of pigs had no effect on warranty of pigs sold under contract); *Turner v. Kunde*, 128 N.W.2d 196, 198 (Iowa 1964) (disclaimer of warranty in weigh slip provided by seller could not vary implied

warranty where contract had been formed); *Fleck v. Jacques Seed Co.*, 445 N.W.2d 649, 654 (N.D. 1989) (whether seed company excluded warranty was a question of fact for trial court); 3A Ronald A. Anderson, Uniform Commercial Code § 2-316:62, 64 (1995).

It is also important to recognize that an invoice or receipt is generally not regarded as a complete expression of the agreement between the parties. Anderson, *supra*, § 2-316:62. Thus, a disclaimer of warranties contained in an invoice or receipt does not necessarily prevent proof of a prior oral warranty. *Id.*; see *Turner*, 128 N.W.2d at 198.

In this case, B&D sent Boydston a receipt containing the waiver of warranties language after the sale of the pigs. The contract between the parties, however, had been formed when B&D accepted the pigs. Consequently, the waiver was not a term bargained for in the original agreement, nor was it intended by the parties to become an additional term of the contract. Moreover, Boydston orally represented he would warrant the pigs to the point of delivery. When warranty terms are in conflict, we construe them as consistent with each other, but if such construction is unreasonable, the intention of the parties governs the transaction. See Iowa Code § 554.2317.

Boydston's representations occurred prior to the formation of the contract and were a bargained for term of the agreement. The intent of the parties, therefore, was clearly to warrant the pigs until the point of delivery. Additionally, as in *Turner v. Kunde*, the entire course of negotiations reveal Boydston and MFA knew the pigs

were intended to be feeder pigs. *See Turner*, 128 N.W.2d at 198; *Folkers v. Southwest Leasing*, 431 N.W.2d 177, 184 (Iowa App. 1988) (in determining meaning in a hold harmless agreement, the court considered the intention of the parties as revealed by the language used, the situation of the parties taken as an entirety, the attendant circumstances, and the objects sought). It follows the pigs would need to be healthy for their purpose. We therefore conclude, because B&D timely notified Boydston of the breach, B&D did not waive the implied warranties of merchantability and fitness of purpose of the feeder pigs. *See Iowa Code* § 553.2607(3)(a) (1995) (buyer has reasonable time after acceptance to notify the seller of a breach). It could accept the pigs without waiving its rights to bring a claim for breach of warranty.

IV. Indemnity

A right of indemnity exists whenever the relationship between the parties is such that either in law or equity there is an obligation on one party to indemnify the other, as where one person is exposed to liability by the wrongful acts of another unless the party is barred by its own wrongful conduct. *Howell v. River Products Co.*, 379 N.W.2d 919, 921 (Iowa 1986). The duty to indemnify may arise from an expressed or implied-in-fact agreement to indemnify, or by operation of law. *Ke-Wash Co. v. Stauffer Chemical Co.*, 177 N.W.2d 5, 9 (Iowa 1970).

B&D asserts the district court erred by failing to find Boydston and MFA should indemnify B&D for the costs it incurred in compensating Westview. It

maintains MFA and Boydston expressly and impliedly represented the feeder pigs were of sufficient quality and condition to make it to market weight.

Based on Boydston's expressed and implied representations to B&D concerning the feeder pigs, we find Boydston should indemnify B&D for the expenses it incurred with Westview. Boydston warranted the pigs to the point of delivery in Westview. The record indicates the pigs arrived in Iowa with symptoms of illness. B&D timely informed Boydston of its problems with the pigs. It was later discovered the pigs had several illnesses. Consequently, the pigs were not suited for the purpose they were purchased. B&D made reasonable accommodations to Westview under the circumstances. As a result, equity demands Boydston indemnify B&D for the expenses of \$36,671 it incurred in returning the pigs to health. We do not find MFA should indemnify B&D as the record indicates Boydston made the representations to B&D. The record reveals no sales agreement or representations existed between MFA and B&D.²

In conclusion, we modify the district court verdict to enter judgment against Boydston in favor of B&D in the sum of \$36,671, plus interest as provided by law and costs of the action.

² The cross-claim by Boydston against MFA is not involved in this appeal. The judgment entered by the district court did not address this claim.

V. Appendix

We have considered B&D's request for division of costs for the appendix. We do not find the appendix contained substantial unnecessary portions and deny the request. Costs of the appeal to Boydston.

AFFIRMED AS MODIFIED.

Huitink, J., concurs; Sackett, J. concurs in part and dissents in part.

SACKETT, J. (concurring in part; dissenting in part)

I would affirm.