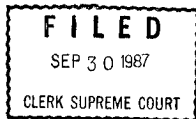


IN THE COURT OF APPEALS OF IOWA



RICHARD ALBERTSON, MARK GIESE,)
RONALD BRADY and GEORGE "MIKE"
ROBERTS d/b/a STONEY RIDGE BAND,)

Plaintiffs-Appellees,)

Filed September 30, 1987

vs.)

SID FROEHLICH d/b/a THE STABLE)
SALOON,)

Defendant-Appellant.

7-246
86-1556

Appeal from the Iowa District Court for Scott County (No. 68909), C. H. Pelton, Judge.

Defendant appeals from a trial court judgment which found him liable for breaching his duty of due care as a gratuitous bailee when the plaintiff's band equipment was destroyed in a fire. **AFFIRMED.**

Michael J. McCarthy of McCarthy & Lammers, Davenport, for defendant-appellant.

C. Stephan Marsh of Winstein, Kavensky, Wallace & Doughty, Rock Island, Illinois, for plaintiff-appellee.

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

DONIELSON, P.J.

The defendant appeals from a trial court judgment which found him liable for breaching his duty of care as a gratuitous bailee when the plaintiffs' band equipment was destroyed in a fire. The defendant claims that there was not substantial evidence to support the trial court's findings that: (1) leaking gas at the defendant's premises caused the fire that destroyed plaintiffs' property; and (2) the defendant failed to repair the leak. We affirm.

The defendant, Sid Froehlich, was the tenant of the building housing the Stable Saloon. The plaintiff band members provided entertainment there on weekends and would leave their bulky and heavy equipment at the saloon. Froehlich was not paid to store the plaintiffs' property, but he allowed the plaintiffs to leave their equipment on stage between performances. Froehlich also told the plaintiffs his insurance did not cover their equipment.

The saloon had a suspended gas space heater, which was close to the stage. The premises caught on fire, destroying all of plaintiffs' musical equipment. A fire marshall testified that the fire started when the space heater overheated and ignited the material below it. The thermostat had been turned to its highest setting and the furnace fan was turned off. Prior to the fire, two of the plaintiffs had told Froehlich that they smelled gas in the stage area. Froehlich testified on direct examination that he told the owner of the building about the gas smell and that the owner repaired a leaking pilot light. Froehlich testified on cross-examination that he did not recall testifying during his deposition (1) that he told one of the plaintiffs shortly after the fire that if gas had been smelled, he should have been advised, and that nothing was said to him prior to the night the tavern caught fire; (2) that no one had ever told him prior to the fire that he smelled gas in the building; and (3) that he had not talked to the owner of

the building prior to the fire about complaints concerning the smell of gas around the stage area. The deposition of Froehlich was not offered into evidence.

The plaintiffs brought suit against Froehlich claiming that he breached his duty of due care as a gratuitous bailee. The trial court made the following finding:

The evidence in this case shows that all of the Plaintiffs and the Defendant knew of the space heater's location just above the stage floor and that it had leaked gas recently. One or more of the Plaintiffs advised the Defendant of the smell of gas emanating from the heating and Defendant told them he would get it fixed. Defendant's testimony that he had it fixed conflicts with prior statements he made in deposition testimony.

The court further found defendant to be 60 percent negligent and each plaintiff to be 40 percent negligent on his own claim. Based on these percentages of negligence and taking into account a final settlement from a previously-named additional party, judgment against the defendant totaled \$3,104.60. Defendant has appealed from this judgment.

Our scope of review is for correction of errors of law. Iowa R. App. P. 4. The trial court's findings of fact have the force of a special verdict and are binding on this court if supported by substantial evidence and justified as a matter of law. Chariton Feed and Grain, Inc. v. Harder, 369 N.W.2d 777, 782 (Iowa 1985). This court is to view the evidence in the light most consistent with the judgment. R.E.T. Corp. v. Frank Paxton Co., Inc., 329 N.W.2d 416, 419 (Iowa 1983). In a civil case such as this, the plaintiff's burden of proof is measured by the test of preponderance of the evidence. Iowa R. App. P. 14(f)(6).

The case herein involved an action for damages based upon a gratuitous bailment. A gratuitous bailee of personal property, such as Froehlich, is not an insurer of the safety of such property while in his possession. See Kubli v. First National Bank, 199 Iowa 194, 195, 200 N.W. 434, 435 (1922). However, such a bailee is liable if he has failed to exercise that degree of care for such

property that would be exercised by persons prudent in keeping property of like value under like circumstances. See Bowen v. First National Bank, 200 Iowa 40, 41, 203 N.W. 569, 570 (1925); I Iowa Uniform Jury Instruction (civil) No. 12.7 (1970). In addition, a presumption of negligence occurs when property is delivered to the bailee in good condition and returned in a damaged condition or destroyed. Stevenson v. Reimer, 240 Iowa 652, 656, 35 N.W.2d 764, 766 (1949). This presumption is rebuttable and may be overcome if the damage is shown to have occurred through the operation of forces over which the bailee had no control. Id.

Froehlich argues that he was not negligent. He states the fire was not caused by leaking gas, but by the space heater overheating. Froehlich claims there is no evidence to support a finding that the fire was caused by leaking gas.

Froehlich also argues that there was not substantial evidence to support the trial court's finding that he failed to report the gas leak to the owner and have it fixed. Froehlich states that he was not impeached because his deposition was not offered into evidence. The plaintiffs point out that the trial court's decision was based largely on the credibility of the witnesses; hence, the court's decision should be given substantial weight.

We agree with the trial court's findings that plaintiffs have proved their case by a preponderance of the evidence that Froehlich was negligent in failing to exercise ordinary care for the safety of their equipment which was the proximate cause of plaintiffs' damages.

We find Froehlich was warned about the gas smell before the fire occurred by at least two of the plaintiffs. The fact that Froehlich told plaintiffs his insurance would not cover plaintiffs' equipment is not material to the issue involved here. The trial court as a trier of fact is in the most advantageous

position to view and judge the credibility of witnesses and to make a judgment as to their demeanor. Here, the trial court found defendant's testimony not to be credible based on plaintiffs' cross-examination of him; therefore, the trial court chose not to believe Froehlich's testimony that he had the gas leak repaired.

We therefore find there was substantial evidence in the record to support the trial court's decision and accordingly affirm the trial court's decision.

AFFIRMED.