

IN THE COURT OF APPEALS OF IOWA

No. 5-161 / 94-855

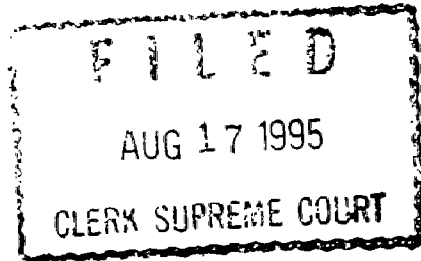
PAUL ANDERSON,

Plaintiff-Appellant,

vs.

**LANSING GARAGE, INC., d/b/a
ALLAMAKEE IMPLEMENT CO.,**

Defendant-Appellee.



Appeal from the Iowa District Court for Allamakee County, John Bauercamper, Judge.

Paul Anderson challenges the order denying his petition, seeking damages against Lansing Garage for allegedly tendering nonconforming goods. **AFFIRMED.**

R. L. Van Veldhuizen, Oelwein, for appellant.

W. Richard White of Morrow and White, Waukon, for appellee.

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

HABHAB, J.

Paul Anderson is a self-employed buyer and reseller of used farm machinery, primarily selling to farmers and ranchers in Wyoming and Montana. He is a resident of Montana. Lansing Garage, Inc. d/b/a Allamakee Implement (Allamakee) is an Iowa corporation, selling new and used farm implements.

Anderson contacted John Weber at Allamakee, seeking to purchase used John Deere forage wagons Allamakee advertised in the Des Moines Register. Weber is an officer, shareholder and employee of Allamakee. He handled all the communications between Allamakee and Anderson. Weber eventually agreed to sell Anderson two used forage wagons, both of which were over ten years old. Anderson agreed to pay \$3500 for each wagon. Anderson was planning to sell the wagons to the Hoodoo Ranch in Cody, Wyoming.

Weber claims he asked Anderson to come to Iowa to inspect the wagons. Anderson denies being asked to come to Iowa. He claims Weber assured him the wagons were in good operating order, not rusted out and had good tires. Upon Anderson's request, Weber mailed him pictures of the wagons. Anderson phoned Weber and complained the pictures were not clear. Anderson claims that, at this time, Weber assured him the wagons were in operating condition, structurally sound, not beat up or rusted out, and ready to go to work without repair. Weber denies making such claims. He testified he told Anderson the sale was "as is."

After Anderson mailed Allamakee a personal check for \$7000, Allamakee released the wagons to an independent trucker hired by Anderson. The trucker hauled the wagons to the Hoodoo Ranch, without inspection by Anderson.

The Hoodoo Ranch rejected the wagons, citing specific defects it found unacceptable. Hoodoo Ranch sent Anderson a facsimile of the list of defects.

Anderson immediately phoned Weber and rejected the wagons. Weber refused to accept return of the wagons, but he did offer to replace several tires. Anderson rejected this offer.

Anderson filed suit against Allamakee, seeking damages for the mailed payment, travel expenses to eventually inspect the wagons, shipping charges, lost profits, attorney fees and travel expenses to trial. The district court denied Anderson's petition. It found Weber's testimony more credible than Anderson's and determined the parties entered into an oral contract to sell the wagons "as is."

Anderson appeals.

Initially, we consider the proper scope of review. The essential character of a cause of action and the relief it seeks, as shown by the complaint, determine whether an action is at law or equity. *Moseback v. Blythe*, 282 N.W.2d 755, 758 (Iowa App. 1979). An action on a contract is generally treated as an action at law. *Atlantic Veneer Corp. v. Sears*, 232 N.W.2d 499, 502 (Iowa 1975); *Moseback*, 282 N.W.2d at 758. The present action is based on a claim of a breach of an oral contract.

We determine our scope of review to be limited to corrections of errors at law. Iowa R. App. P. 4. Findings of fact in a law action are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). The district court's findings of fact had the effect of a jury verdict and are binding on us if supported by substantial evidence. *Grinnell Mut. Reinsurance Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988).

The contract at issue in this action was an oral contract. The parties agree regarding the subject matter of the contract, the price, and the basic shipping terms. On all other relevant contractual matters, the parties provided strongly conflicting testimony at trial.

Anderson contends this case primarily involves the rejection of nonconforming tendered goods. A buyer in a sale of goods has the right to reject, in whole or in part, goods which do not conform to the contract. Iowa Code § 554.2601 (1993). Before we can examine Anderson's rights after a rejection, we must first determine whether Anderson had a right to reject the goods under section 544.2601.

Anderson on appeal contends he had a right to reject the goods because they were nonconforming goods. In this respect, he contends the four conditions which must exist to give a buyer the right to reject are:

- (1) A non-conforming tender;
- (2) Absence of effective cure by the seller;
- (3) Absence of acceptance; and
- (4) Absence of a contract term prohibiting rejection.

The parties **appear** to be in general agreement that Conditions 2, 3 and 4 exist. The argument revolves around Condition 1, i.e., a nonconforming tender.

Whether there is a nonconforming tender is generally a question that must be decided by the fact finder. In making this determination, the trier of fact must determine the terms of the agreement. When doing so, the trial court tested and evaluated the credibility of witnesses. It concluded the merits of the dispute rested with the defendant-appellee.

From the credible evidence before it, the trial court found the wagons conformed to the agreement of the parties. Our task now is to determine whether there is substantial evidence to support this finding. In making this determination, we are faced with the question of where the burden of proof rests under the rejection theory. We agree with appellant that Allamakee must carry this burden and show that the wagons did conform with the agreement of the parties. From our review of the record, we find substantial evidence to support the trial court's conclusion that the wagons did conform with the agreement of the parties. Since there was conformance, the buyer was not in a position to reject. We thus affirm the trial court.

The **appellant** insists the trial court erred in resolving this question under warranty theories. It is true the trial court did conclude that the parties were in disagreement as to whether the terms of the contract included express and implied warranties. There is strong testimony in the record which may have given the trial

court reason to believe the plaintiff was relying on warranty theories. For instance, from our review of the record, we find several questions where Mr. Anderson on direct examination was asked whether the wagons were "inconsistent with the warranty that you received from Mr. Weber" and "Did you communicate to Mr. Weber that the wagons were not as warranted?" and further "And is that telephone call to Mr. Weber, advising him that the wagons were not as warranted?" This type of direct questioning undoubtedly persuaded the trial court to address the warranty theory. Although, because of our ruling, we need not address the warranty question, we will do so since the question was raised on appeal.

Regarding the modification or exclusion of warranties, Iowa Code section 544.2316(3) (1993) states:

- a. [U]nless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and
- b. when the buyer before entering into the contract has examined the goods or the sample or model as fully as the buyer desired or has refused to examine the goods, there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to the buyer; and
- c. an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

Words or conduct which negate or limit warranties shall be inoperative if such a construction is unreasonable. Iowa Code § 544.2316(1) (1993).

Under section 544.2316(3)(a), warranties can be excluded by the specific language "as is" or language which in common understanding calls the buyer's attention to the exclusion of warranties. Weber testified he told Anderson that the wagons were operational, that Anderson was buying them wholesale, that because he was buying them wholesale the wagons would not be re-conditioned, and that if Anderson wanted to know more about the wagons he should inspect them himself. Weber further testified he was not made aware of the fact the wagons would go directly to the end user. The district court found this amounted to an "as is" sale. The trial court determined Weber's testimony to be more credible. We find substantial evidence to support this finding.

In addition, we further conclude the district court's finding is correct that any potential warranties were waived under section 554.2316(3)(b). In order for the "refused to examine" language to take effect, there must first be a demand by the seller for an inspection by the buyer. *Holm v. Hansen*, 248 N.W.2d 503, 510 (Iowa 1976). Weber testified he requested Anderson to inspect the wagons on numerous occasions. Weber testified Anderson stated at one point that he was too busy to take the time to inspect the wagons prior to the purchase. It is undisputed Anderson made no inspection of the wagons prior to delivery. There is substantial evidence in the record to support the trial court's conclusion that Anderson waived any warranties.

There is substantial evidence to support the district court's determination that the wagons which were shipped to Anderson's customer were conforming goods. Since the wagons were conforming goods, Anderson did not have the right to reject them under section 554.2601. The district court properly denied Anderson's petition.¹

We affirm the decision of the district court.

AFFIRMED.

¹ Our determination on this issue renders Anderson's second issue regarding damages moot