FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

EVELYN BOYER,

Appellee,

v.

MARK MIHM, d/b/a MARK'S JEWELRY,

Appellant.

Filed October 7, 1977

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2-59166

Appeal from Fayette District Court - Joseph C. Keefe, Judge.

Defendant appeals judgment entered on jury verdict awarding plaintiff damages for defendant's negligence in failing to return the same ring left with him. Affirmed.

James L. Beeghly, of Antes & Beeghly, of West Union, for appellant.

James Villont, of Donohue Law Office, P.C., of West Union, for appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

This action involves a bailment for services. Evelyn Boyer delivered a valuable diamond ring to Mark Mihm, d/b/a Mark's Jewelry, to have its finger size changed. Boyer alleges Mihm negligently returned to her a different ring of substantially less value. Trial to a jury resulted in a verdict for Boyer of $2500; Mihm appeals from the judgment entered thereon. We affirm.

I. Defendant Mihm attacks the sufficiency of the petition, as amended, and claims that paragraph two of the amendment is confused and unintelligible. We find that the petition states a cause of action under Hawkeye Specialty Co. v. Bendix Corp., 160 N.W.2d 341, 343 (Iowa 1968). Trial court's refusal to order the paragraph stricken or recast, and its refusal to dismiss the petition, were correct.

II. Defendant next challenges the sufficiency of Boyer's proof of his negligence. We are bound by the jury verdict if supported by substantial evidence. Rule 14(f)(1), Rules of Appellate Procedure. The transaction between the parties here is identical in all material respects to Hawkeye Specialty Co. v. Bendix Corp., wherein the court explained:

> The rule is well established a bailor makes out a prima facie case by proof of delivery of property in good condition, redelivery in damaged condition and the amount of damages. The bailee must then go ahead with his proof to rebut this presumption or prima facie case by showing the cause occurred through something consistent with due care on his part, in which case he is entitled to the verdict, unless the bailor sustains his burden of proof with evidence that nevertheless the loss would not have occurred but for the negligence of the bailee. Naxera v. Wathan [159 N.W.2d 513 (Iowa 1968)]; Jones v. O'Bryon, 254 Iowa 31, 38, 116 N.W.2d 461, 465 [1962], and citations.

It is undisputed a bailment existed, and our examination of the record reveals substantial evidence to support the jury's finding of negligence.

III. Turning to defendant's next assertion of error, it is certain that damages were sustained. We also find a reasonable basis for the jury's approximation of the amount. See Basic Chem. Co. v. Benson, 251 N.W.2d 220, 233 (Iowa 1977). Both parties and Mr. Knealing gave testimony which could provide a basis for the jury's award. See Beneficial Fin. Co. of Black Hawk Cty. v. Reed, 212 N.W.2d 454, 459 (Iowa 1973) (owner qualified to place value on property).

IV. Finally, defendant complains that trial court should have submitted the issue of waiver to the jury. Waiver is an affirmative defense. Williams v. Stroh Plumbing &

Elec., Inc., 250 Iowa 599, 601, 94 N.W.2d 750 (1959). It is a question of the intent of the party who is contended to have waived his right, and must be shown by clear, satisfactory and unambiguous evidence. Bankers Trust Co. v. Economy Coal Co., 224 Iowa 36, 43, 276 N.W. 16 (1937); cf. Pillsbury Co. v. Ward, 250 N.W.2d 35, 39-40 (Iowa 1977).

An issue should not be submitted to the jury unless it is supported by substantial evidence. Petersen v. Farmers Cas. Co., 226 N.W.2d 226, 232 (Iowa 1975). Defendant failed to produce adequate evidence of waiver. Trial court's action in taking the issue from the jury was correct.

All errors asserted have been considered and found to lack merit.

AFFIRMED.