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Court of Appeals of Nebraska.

THOMAS LIVESTOCK COMPANY, INC.,
Appellant,
v.
Charles C. RAPP, doing business as Rapp Trucking, Appellee.

No. A-99-299. | April 25, 2000.

Appeal from the District Court for Custer County, Ronald D. Olberding, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Attorneys and Law Firms

Bradley D. Holbrook, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellant.

William J. Erickson, for appellee.

IRWIN, Chief Judge, and HANNON and CARLSON, Judges.

Opinion

INTRODUCTION

HANNON.

***1** Thomas Livestock Company, Inc. (Thomas), sued Charles C. Rapp, doing business as Rapp Trucking (Rapp), in contract and tort after Thomas' livestock trailer and livestock were damaged in a one-vehicle accident while the trailer was being pulled by Rapp's semi-tractor pursuant to an agreement that was oral at the time but later reduced to writing. Thomas alleged that the driver's negligence caused the damage to Thomas' livestock and trailer. Rapp maintained he was not liable because the written contract between the parties required Thomas to carry insurance on the livestock and trailer and to hold Rapp harmless from liability for damage to the same. Both parties moved for summary judgment, and the trial court granted Rapp's motion but denied Thomas' on the basis that the written agreement precluded recovery. Thomas appeals, arguing (1) that the agreement does not prevent recovery as a matter of law because the agreement was not supported by consideration; (2) that properly interpreted, the agreement does not prevent recovery; (3) that the agreement was ambiguous and that parol evidence establishes a question of fact on whether the parties' actual contract provided that Thomas was to hold Rapp harmless from Rapp's negligence; and (4) that because Rapp was a common carrier and a bailee, the hold harmless provision was ineffective. We find for Rapp on all issues except the latter, that is, we conclude that under Nebraska bailment law, the hold harmless provision of the agreement is ineffective to preclude Thomas' recovery for Rapp's alleged negligence, if such negligence is proved. Accordingly, we affirm in part, and in part reverse and remand for further proceedings.

SUMMARY OF EVIDENCE

The facts of this case are relatively simple. The parties agreed that Rapp would haul Thomas' livestock using Thomas' trailer. On April 28, 1997, Gene Wood, one of Rapp's employees, was involved in a one-vehicle accident while driving the semi-tractor pulling the trailer with Thomas' cargo of swine aboard. Due to the accident, the trailer came to rest upside down in the ditch, doing damage to the trailer and the livestock therein. Under theories of negligence, contract, bailment in tort, and bailment in contract, Thomas sued Rapp for damages alleged to be $8,193.37 for loss of the swine and $32,500 for loss of the trailer. Both parties agree they signed a "Memorandum of Contractor Operating Agreement" (hereinafter Agreement) dated August 13, 1997, which reads as follows:

> This document memorializes the terms of an agreement made on or about April 15, 1996, by and between R.J. Thomas, d/b/a Thomas Livestock, hereinafter "Thomas", and Charles C. (Cliff) Rapp, d/b/a Rapp Trucking, hereinafter "Rapp".
>
> 1. Thomas was lessee of a certain 1996 EBY

semi-trailer, VIN # 4A2LS5326T1003843, owned by Farm Credit Leasing Services Corporation. Rapp was to be paid $1.80 per loaded mile to transport such trailer while loaded with Thomas' swine.

2. The parties recognized that this agreement was that of an independent contractor relationship, and not a master-servant, employer-employee or principal-agent relationship. As such, Rapp was responsible for providing suitable semi-tractors and drivers, operating and maintaining such vehicles in compliance with applicable federal, state and local laws, and for all expenses, maintenance and repairs of such semi-tractors.

***2** 3. Thomas agreed to purchase and keep in force property damage and cargo insurance on the above-described semi-trailer, and further agreed to assume the risk of and hold Rapp harmless from liability for damage to the above-described semi-trailer. Rapp agreed to purchase and keep in force suitable liability insurance and further agreed to assume the risk of and hold Thomas harmless from liability for damage to the above-described semi-tractors.

Both parties moved for summary judgment. Rapp based his defense on paragraph 3, which provided for Thomas to carry cargo insurance and to assume the risk and hold Rapp harmless for damages. Thomas maintained that the provision was ineffective for each of the several reasons summarized above and discussed below. The trial court denied Thomas' motion and granted Rapp's motion, thus dismissing the case.

ASSIGNMENTS OF ERROR

Thomas' argument, reorganized, is that the trial court erred in sustaining Rapp's motion for summary judgment (1) by finding that consideration existed to support the Agreement, (2) by finding that the Agreement's provision precluded recovery, (3) by finding the agreement was unambiguous and therefore excluding Thomas' affidavit which contradicted the terms of the Agreement with respect to the hold harmless provision, (4) by finding that Rapp was not a common carrier, and (5) by not finding that a genuine issue of fact existed as to whether Rapp was a bailee for hire.

STANDARD OF REVIEW

"In reviewing an order granting a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from the evidence." *Fackler v. Genetzky*, 257 Neb. 130, 135, 595 N.W.2d 884, 889 (1999). "Both statutory interpretation and the construction of a contract are matters of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below." *State ex rel. Fick v. Miller*, 255 Neb. 387, 393, 584 N.W.2d 809, 815 (1998).

ANALYSIS

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 256 Neb. 406, 412, 591 N.W.2d 532, 537 (1999). "The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law." *Stiver v. Allsup, Inc.*, 255 Neb. 687, 693, 587 N.W.2d 77, 81 (1998).

The theories of recovery pled by Thomas overlap somewhat; thus, the issues on appeal in this case intertwine to some degree. While we find reason to overrule the trial court's grant of summary judgment in favor of Rapp with respect to Thomas' bailment theory, we also discuss the merits of the other arguments made by Thomas on appeal. We do so because Thomas' petition seeks recovery upon several grounds other than Rapp's alleged negligence, and in our view, recovery upon any theory other than negligence, as it pertains to the bailment, is precluded by the Agreement.

Consideration

***3** Thomas claims that the Agreement was void for lack

of consideration and cites authority for the proposition that parties cannot create a contract based on past consideration. He then argues that because the Agreement was signed on August 13, 1997, after the date of the accident, which occurred on April 28, 1997, the Agreement was supported only by past consideration and was therefore invalid.

We are unpersuaded by Thomas' argument. He correctly states the authority that a contract cannot be supported by past consideration. See *Massachusetts Bonding & Ins. Co. v. Master Laboratories*, 143 Neb. 617, 10 N.W.2d 501 (1943). However, Thomas mischaracterizes the circumstances in this case. The Agreement was not a separate contract that needed proper consideration. Rather, the Agreement was simply the belated written embodiment of the parties' agreement, memorializing the terms under which Rapp hauled Thomas' trailer and swine.

The Agreement does not contain a promise by Thomas to have Rapp do this hauling or a promise by Rapp to haul the swine. It is easier to analyze the Agreement as specifying the terms of a unilateral contract. "In a unilateral contract, the promisor does not receive a promise as consideration for his or her promise. A unilateral contract involves an offer which invites acceptance not in the form of a promise, but rather in the form of actual performance." 17 C.J.S. Contracts § 9 at 430 (1999). In this case, there is no doubt that Rapp was pulling Thomas' trailer pursuant to certain terms and conditions and that Rapp was thereby accepting Thomas' offer. That the parties had a contract which was supported by adequate consideration cannot seriously be disputed, although that contract apparently was oral when Rapp was performing it. Our concern is with resolving the issues which will determine the outcome as a matter of law or fact, that is, what were the terms of that contract.

Meaning of Hold Harmless Provision, Ambiguity, and Parol Evidence

Thomas argues the ambiguity of the Agreement in two separate sections of his brief. Thomas argues that paragraph 3 of the Agreement was ambiguous and that a question of fact exists as to whether Thomas was to procure insurance to cover the negligent acts of Rapp or his employees. He also argues that the Agreement, as written, shielded Rapp for damage only to the trailer and not to the livestock within. Thomas further argues that the hold harmless clause, if it has any effect at all, applied only to Rapp personally. Finally, he argues that the Agreement is ambiguous and that therefore, he is entitled to offer parol evidence to establish the correct terms of the Agreement. A determination of what the hold harmless provision and the Agreement mean necessarily includes a determination of whether the hold harmless provision is ambiguous. We therefore have combined these interrelated issues.

Thomas offered exhibit 3 into evidence, and the trial court refused to receive it. Exhibit 3 is Thomas' affidavit. The only portion that could be objectionable is the statement contained therein that the parties agreed that "I [Thomas] would hold the defendant [Rapp] harmless from acts of God, but that I would not hold the defendant harmless from the defendant's own conduct or from any conduct of any third persons." Thomas argues that this evidence is admissible because the Agreement is ambiguous.

***4** To support his position, Thomas asserts that the Agreement was ambiguous in two respects. First, Thomas argues that nothing in the Agreement shows that Thomas knew Rapp would employ Wood to drive the semi-tractor, thereby creating a latent ambiguity. Second, Thomas alleges a patent ambiguity in the term "liability" as used in paragraph 3 because it is unknown if that term was to include vicarious liability for Wood's actions. According to Thomas, "[w]ithout a clear and concise statement as to what actions (negligent or willful), and whose actions (Rapp's or his employee's) are covered by Paragraph 3, the language is ambiguous and therefore required construction." Brief for appellant at 16.

In *Shivvers v. American Family Ins. Co.*, 256 Neb. 159, 165, 589 N.W.2d 129, 134 (1999), the Nebraska Supreme Court stated:

> An instrument is ambiguous if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.... Where the terms of such a contract are clear, they are to be accorded their plain and ordinary meaning.... The language of [a contract] should be read to avoid ambiguities, if possible, and the language should not be tortured

to create them.

(Citations omitted.) The Shivvers court concluded that the term "household," while not specifically defined in an insurance policy, was not ambiguous as applied to roommates rather than family members. In *Shivvers*, 256 Neb. at 166, 589 N.W.2d at 135, the court explained that " 'an otherwise unambiguous provision is not made ambiguous simply because it is difficult to apply to the facts of a particular case.' " The court also explained that "[t]he fact that parties to a contract suggest different interpretations of its language does not necessarily, or by itself, compel the conclusion that the document is ambiguous." Id. at 165, 589 N.W.2d at 134.

Here, paragraph 1 of the Agreement described the trailer by listing its registration number and cargo as well as the rate of payment per loaded mile. Paragraph 3, which required Thomas to carry property and cargo insurance and to hold Rapp harmless for damage, makes reference to the "above-described semi-trailer." We believe that the words and phrases of the Agreement are clear and unambiguous. Since the Agreement describes the trailer in terms of "loaded with Thomas' swine" and requires cargo insurance on the "above-described semi-trailer," we also conclude that the phrase "above-described semi-trailer" as used in the hold harmless clause must be consistent with the rest of the contract and therefore means the trailer and its cargo.

We find Thomas' argument that the hold harmless clause applied only to Rapp personally also without merit. By reading the Agreement consistently throughout, the term "Rapp" was used as a shorter description of Charles C. Rapp doing business as Rapp Trucking. Further, paragraph 2 made Rapp responsible for providing suitable semi-tractors and drivers for the work to be performed. We agree with the trial court that the contract is clear and unambiguous on this point.

***5** "When the parties have executed a completely integrated written document purporting to express the terms of their agreement, the parol evidence rule renders ineffective any evidence of a prior or contemporaneous oral agreement which adds to, alters, varies, or contradicts the terms of the written document." *Rowe v. Allely*, 244 Neb. 484, 486, 507 N.W.2d 293, 296 (1993). Further, "[w]here negotiations between the parties result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity." Id. See, also, *Anderzhon/Architects v. Oxbow II Partnership*, 250 Neb. 768, 553 N.W.2d 157 (1996) (stating that when parties reduce agreement to writing which appears to be complete agreement, then writing is taken to be integrated agreement unless it is established by other evidence that writing did not constitute final expression).

Thomas did not allege fraud or mistake. The first sentence of the Agreement explains that the Agreement memorializes the terms of the contract which existed between the parties. As we explained above, we do not find that the Agreement is ambiguous, and therefore, parol evidence in the form of Thomas' affidavit was not admissible. See *Spilker v. First Nat. Bank & Trust Co.*, 211 Neb. 540, 319 N.W.2d 429 (1982) (holding that for oral testimony to be admissible under ambiguity exception to parol evidence rule, testimony must clarify existing ambiguity and cannot establish understanding at variance with plain terms of written instrument). We conclude that the Agreement is not ambiguous, that by its terms it provides that Thomas was to procure insurance and to hold Rapp harmless for any damage to Thomas' livestock trailer or livestock while Rapp was performing under the contract, and that Thomas' parol evidence of the parties' agreement is not admissible. We conclude the insurance provision and the hold harmless provision are effective except as discussed below.

Common Carrier

Thomas cites old law to the effect that a common carrier cannot avoid liability for its damage to property it carries, and therefore, Thomas assigns error to the trial court's finding that Rapp did not constitute a common carrier. Thomas cites *Jeffries v.. Chicago, B. & Q.R. Co.*, 88 Neb. 268, 129 N.W. 273 (1911), which stated that common carriers of livestock, a railroad in that case, could not by contract relieve themselves of liability for injury or loss caused by the carrier's negligence. Jeffries relied on this rule as cited in *C., R.I. & P.R. Co. v. Witty*, 32 Neb. 275, 49 N .W. 183 (1891).

Since Witty and Jeffries were decided, Neb.Rev.Stat. § 75-302 (Reissue 1996) was enacted to empower the Public Service Commission to supervise motor carriers. Section 75-302(5) defines a common carrier as "any person who or which undertakes to transport passengers or household goods for the general public in intrastate commerce by motor vehicle for hire, whether over regular

or irregular routes, upon the highways of this state." Household goods are essentially personal effects and property used in a dwelling. See § 75-302(9). A contract carrier, on the other hand, is "any motor carrier which transports passengers or household goods for hire other than as a common carrier designed to meet the distinct needs of each individual customer or a specifically designated class of customers without any limitation as to the number of customers it can serve within the class." § 75-302(6).

***6** In *Livestock Carriers Div. of M.C. Assn. v. Midwest Packers Traf. Assn.,* 191 Neb. 1, 213 N.W.2d 443 (1973), the Nebraska Supreme Court held that the Public Service Commission was without authority or jurisdiction to fix rates and charges for motor vehicle carriers transporting livestock in intrastate commerce. Chapter 54 of the Nebraska Revised Statutes, which generally governs livestock, makes only a passing reference to "common carriers" and does not otherwise define the term. See Neb.Rev.Stat. § 54-1908(11) (Reissue 1998). However, we conclude that while livestock carriers are not governed by the above-quoted definitions, those definitions help us to resolve this issue in light of the authority cited by Thomas.

Witty, supra, and Jeffries, supra, specifically ruled with respect to common carriers of livestock. Using the above definitions as a guide to the difference between a common carrier and the contract carrier, we conclude that Rapp would be a contract carrier rather than a common carrier. Rapp did not transport livestock for the general public, but, rather, contracted to transport Thomas' livestock under terms specifically designed by the parties to meet Thomas' distinct needs. Accordingly, the authority cited by Thomas does not apply, and we further question the applicability of a rule created in another era so far removed in time and similarity from the circumstances of today.

Bailment

Finally, Thomas argues that Rapp, as a bailee, may not limit his liability for his negligence. We begin here by noting that the bailment theory of possibly holding Rapp liable notwithstanding the provision of the Agreement necessarily applies only if Rapp or his employee negligently damaged Thomas' property. The petition contains only a general allegation of negligence, and the evidence on the motion in no way proves or disproves negligence.

In *Gerdes v. Klindt,* 253 Neb. 260, 268, 570 N.W.2d 336, 342-43 (1997), the Nebraska Supreme Court defined "bailment" as

> the delivery of personal property for some particular purpose or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled, it shall be redelivered to the person who delivered it or otherwise dealt with according to that person's directions or kept until reclaimed, as the case may be.... "[B]ailment" may be said to import the delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed and the property returned or duly accounted for when the special purpose is accomplished.

(Citations omitted.) In *Bozell & Jacobs, Inc. v. Blackstone Terminal Garage, Inc.,* 162 Neb. 47, 52, 75 N.W.2d 366, 369 (1956), the Nebraska Supreme Court stated:

> "The rights, duties, and liabilities of the bailor and the bailee must be determined from the terms of the contract between the parties, whether express or implied. Where there is an express contract, the terms thereof control, since both the bailor and the bailee are entitled to impose on each other any terms they respectively may choose, increasing or diminishing their rights, and their express agreement will prevail gainst general principles of law applicable in the absence of such an agreement."

***7** See, also, *Chadron Energy Corp. v. First Nat. Bank,* 236 Neb. 173, 459 N.W.2d 718 (1990) (explaining that special contract of bailment prevails in determining liabilities of parties, as against general principles of law).

However, " '[t]he right of a bailee to limit his liability as such by contract does not extend to exemption from the consequences of his own negligence, if resulting in damages to bailor.' " *Peck v. Masonic Manor Apartment Hotel*, 203 Neb. 308, 313, 278 N.W.2d 589, 593 (1979) (quoting *Nagaki v. Stockfleth*, 141 Neb. 676, 4 N.W.2d 766 (1942)).

We conclude that under the above-given definition, this case clearly involves a bailment between Thomas and Rapp. While the hold harmless clause is generally valid as discussed above, it cannot work to protect Rapp from liability for damage caused by his own negligence or by the negligence of his employee vis-a-vis vicarious liability. The question then becomes whether any such negligence caused the damages alleged by Thomas. Thomas pleads that Wood's negligence caused the accident, and Rapp's affidavit in support of his motion for summary judgment states that Rapp is unaware of any negligence which caused the accident. The record contains no further evidence regarding the cause of the accident. The cause of the accident is certainly material in this case because paragraph 3 cannot protect Rapp from liability if negligence by Wood caused Thomas' alleged damages. Because this material question of fact exists, summary judgment was not proper.

In *Zimmerman v. FirsTier Bank*, 255 Neb. 410, 417, 585 N.W.2d 445, 451 (1998), the Nebraska Supreme Court explained:

> Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct such further proceedings as it deems just.

Pursuant to this authority, we affirm the trial court's denial of Thomas' motion for summary judgment because the issue of negligence is completely unsettled.

CONCLUSION

For the reasons stated above, we affirm the trial court in overruling Thomas' motion for summary judgment and in the various conclusions discussed above, but we reverse the trial court's order granting Rapp's motion because questions of fact remain which prevent holding Rapp harmless as a matter of law. Accordingly, we remand the cause for further proceedings consistent with this opinion.

Affirmed in part, and in part reversed and remanded for further proceedings.