IN THE COURT OF APPEALS 2/27/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00120 COA

W. C. FORE TRUCKING, INC.

APPELLANT

v.

BRANDI & SUZETTE TRUCKING, INC.

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. BILL JONES

COURT FROM WHICH APPEALED: JACKSON COUNTY CIRCUIT

ATTORNEY FOR APPELLANT:

J. HENRY ROS

ATTORNEYS FOR APPELLEE:

JOHN L. HUNTER & MICHELE L. WARD

NATURE OF THE CASE: CIVIL ACTION: CONTRACT

TRIAL COURT DISPOSITION: AFFIRMED JUDGMENT OF THE COUNTY COURT WHICH AWARDED PLAINTIFF THE SUM OF $ 10,276.90 AND PREJUDGMENT INTEREST AT THE RATE OF EIGHT PERCENT PER ANNUM

BEFORE BRIDGES, P.J., KING, AND PAYNE, JJ.

KING, J., FOR THE COURT:

On February 5, 1993, the County Court of Jackson County, Mississippi entered a judgment against Fore Trucking and awarded Suzette Trucking $10,276.90 in damages and attorney's fees plus prejudgment interest at the rate of eight percent per annum. Fore Trucking appealed the judgment to the Circuit Court of Jackson County, Mississippi. The circuit court affirmed the judgment.

On appeal to this Court, Fore Trucking argues that the judgment should be reversed for the following reasons: (1) the trial court erred in interpreting basic contract principles; (2) the judgment was not supported by sufficient evidence and was against the overwhelming weight of the evidence; and (3) the court erred in awarding attorney's fees. We agree that the award of attorney's fees was improper and therefore, reverse the award of attorney's fees and prejudgment interest.

FACTS

Fore Trucking orally arranged for the transport of a Mantiowoc Crane from Mantiowoc, Wisconsin by Suzette Trucking. Suzette Trucking transported the crane over a six week period and billed Fore Trucking $24,195.22 for the services. Fore Trucking disagreed with the charges assessed by Suzette Trucking and only tendered $15, 000.00 in payment for the services. When Fore Trucking refused to remit payment for the balance of the charges, Suzette Trucking sued for the balance of the charges, attorney's fees, and court costs.

After a bench trial, the court entered a judgment, awarding Suzette Trucking $8,221.52 in damages, $2,055.38 in attorney's fees, and prejudgment interest.

ANALYSIS OF THE ISSUES AND LAW

I.

DID THE TRIAL COURT ERR IN INTERPRETING BASIC CONTRACT PRINCIPLES AND IN FAILING TO ENTER A DIRECTED VERDICT IN FAVOR OF W. C. FORE TRUCKING?

Fore Trucking argues that the trial court erred in interpreting basic contract principles; however, the facts and evidence cited in Fore's brief support a contention that the trial court's findings regarding the terms and conditions of the oral contract were erroneous. Thus, we find that the issue is more appropriately framed as whether the trial court erred in determining the terms and conditions of the contract.

The findings of a trial judge sitting without a jury receive the same deference as the findings of a chancery court. *Sweet Home Water and Sewer Ass'n. v. Lexington Estates*, 613 So. 2d 864, 872 (Miss. 1993) (citing *Kight v. Sheppard Bldg. Supply, Inc.*, 537 So. 2d 1355, 1358 (Miss. 1989)). When a trial court fails to make specific findings of fact, we assume that the trial court resolved the issue in favor of the prevailing party. *Lexington Estates*, 613 So. 2d at 872. No specific findings regarding the terms and conditions of the contract appear in the trial court's judgment; therefore, our deferential standard of review allows us to presume that the trial court found that Suzette Trucking agreed to move the crane at rates of $ 1.15 per mile for legal loads, $ 1.15 per mile for heavy loads

plus the actual costs of permits, and $ 3.50 per mile for super loads. Therefore, this assignment of error by Fore Trucking lacks merit.

II.

DID THE TRIAL COURT ERR IN AWARDING ATTORNEY'S FEES TO SUZETTE TRUCKING?

Fore Trucking argues that the trial court erred in awarding attorney's fees to Suzette Trucking because no statutory authority or express contractual provision allows for recovery of attorney's fees. We agree.

It is often stated that in the absence of a statute or contract providing expressly therefor, or when there is insufficient proof to support an award of punitive damages, there can be no recovery of attorney's fees or prejudgment interest. *Stanton & Assoc. v. Bryant Constr. Co,* 464 So. 2d 499, 502 (Miss. 1985) (citations omitted). In the instant case, no evidence was adduced at trial indicating that the parties' contract contained a provision allowing for the recovery of attorney's fees should litigation arise, nor was the proof sufficient to support an award of punitive damages. Therefore, a statutory provision authorizing the recovery of attorney's fees is necessary.

Suzette Trucking argues that the action was based upon an open account and pursuant to Mississippi Code, section 11-53-81, attorney's fees are authorized. An open account has been defined as a type of credit extended through an advance agreement by a seller to a buyer which permits the buyer to make purchases without a note of security, and it is based on an evaluation of the buyer's credit. *Cox v. Howard, Weil, Labouisse, Friedricks Inc.,* 619 So. 2d 908, 914 (Miss. 1993) (citation omitted). In addition, accounts based on continuing transactions which have not been closed or settled but are kept open in anticipation of further transactions qualify as open accounts. *Westinghouse Credit Corp. v. Moore, McCalib, Inc.,* 361 So. 2d 990, 992 (Miss. 1978).

We are unable to find anything in the record which suggests that Suzette Trucking extended a line of credit to Fore Trucking. Indeed, the record indicates that Suzette Trucking forwarded Fore Trucking freight bills each time it delivered a portion of the crane. Although the billing occurred subsequent to delivery, we find that the delayed billing was necessitated by the parties' rate agreement and not a willingness or desire to extend credit.

In addition, the record does not suggest or reveal that the account was kept open in anticipation of further transactions. Because Fore Trucking is also engaged in the freight transportation business, there is very little likelihood that future transactions would arise. Indeed, the evidence revealed that Fore Trucking was capable of transporting the crane, but believed that it would be more economical for Suzette Trucking to transport the crane because Suzette Trucking periodically delivered freight to Mantiowoc, Wisconsin. Thus, it is reasonable to conclude that the transaction was a one-time occurrence. Therefore, the evidence does not support a finding that an open account existed.

Because no statutory or contractual provision authorized the recovery of attorney's fees, we find that the trial court erred in awarding Suzette Trucking attorney's fees and prejudgment interest.

Therefore, we reverse that portion of the judgment which awarded attorney's fees and prejudgment interest to Suzette Trucking.

THE CIRCUIT COURT OF JACKSON COUNTY JUDGMENT AWARDING THE APPELLEE $8,221.52 IN DAMAGES IS AFFIRMED. THE AWARD OF ATTORNEYS FEES AND PREJUDGMENT INTEREST TO THE APPELLEE IS REVERSED AND RENDERED. COSTS OF THIS APPEAL ARE TAXED EQUALLY TO THE PARTIES.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.