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E. L. Murphy Trucking Company v. Climate Control, Inc., v. American Standard, Inc. : Brief of Appellant

Utah Supreme Court

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UTAH SUPREME COURT

BRIEF

COMPANY,
Plaintiff-Appellant,

vs.

CLIMATE CONTROL, INC.,
Defendant-Respondent,

vs.

AMERICAN STANDARD, INC.,
Co-Defendant — Co-Respondent.

APPELLANT'S BRIEF

Appeal from a Summary Judgment of the Third Judicial
District for Salt Lake County,
Honorable Stewart M. Hanson, Judge

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

Page

AUTHORITIES CITED

CASES

TABLE OF CONTENTS (Continued)

IN THE SUPREME COURT OF THE STATE OF UTAH

E. L. MURPHY TRUCKING COMPANY,
Plaintiff-Appellant,

vs.

CLIMATE CONTROL, INC.,
Defendant-Respondent,

vs.

AMERICAN STANDARD, INC.,
Co-Defendant — Co-Respondent.

Case No. 13555

APPELLANT'S BRIEF

NATURE OF THE CASE

This is an action by an interstate motor carrier to recover freight charges from the consignee on four shipments of goods delivered to and accepted by the consignee.

DISPOSITION IN LOWER COURT

On cross motions for Summary Judgment, Judge Stewart M. Hanson granted Respondent's and Co-Re-

spondent's Motion for Summary Judgment on the grounds that the Appellant was estopped from recovering the unpaid freight charges and denied Appellant's Motion for Summary Judgment.

RELIEF SOUGHT ON APPEAL

The Appellant seeks a reversal of the Amended Order granting Summary Judgment to the Respondent and Co-Respondent and a reversal of the Order denying Appellant's Motion for Summary Judgment or, in the alternative, vacating the Order for Summary Judgment and remanding the case for further proceedings.

STATEMENT OF FACTS

1. On December 20, 1972, a complaint (R-195) was filed by the Appellant to recover from the Respondent $7,283.20 for freight charges resulting from the transportation of four truckloads of air conditioning units from Carteret, New Jersey, to Salt Lake City, together with interest on that amount at the rate of eight percent (8%) per year from November 16, 1971.

2. The air conditioning units delivered by the Appellant, E. L. Murphy Trucking Company, were units ordered by the Respondent, Climate Control, Inc., from the Co-Respondent, American Standard, Inc., pursuant to a purchase order contract (R-185) entered into between the parties which specifically prescribed that freight charges were to be prepaid by American Standard, Inc.

3. Climate Control, Inc. paid American Standard, Inc. the sum of $100,000.00 (R-124) on December 30, 1971, and a balance of $65,280.78 on January 14, 1972, pursuant to their contract and that such sum constituted payment in full for both the air conditioning units and freight charges incurred in transporting them from New Jersey to Salt Lake City.

4. Upon receiving a purchase order from Climate Control, Inc. for the air conditioning units, American Standard, Inc. contracted with a New Jersey company, B & M Trading Company, to pick up the air conditioning units at the American Standard plant in Carteret, New Jersey, for shipment to Climate Control in Salt Lake City (R-41).

5. On November 9, 1971, American Standard, Inc. sent B & M Trading Company a check (No. 9765) in the amount of $16,771.17 (R-40) to cover the freight charges for the air conditioning units and also to cover freight charges for at least one other unrelated shipment.

6. B & M Trading Company contracted with another New Jersey company, East Coast Drayage Company (consignor), to deliver the air conditioning units to Salt Lake City.

7. East Coast Drayage Company contracted with E. L. Murphy Trucking Company to transport the air conditioning units for shipment on November 5, 1971 under Bills of Lading (R-163-166) which named Climate Control as consignee and East Coast Drayage as consignor.

8. Two of the four Bills of Lading were unmarked (R-164-165), that is, they did not indicate on their face whether they were "Prepaid" or "To Be Prepaid". The other two Bills of Lading were marked as being either "Prepaid" or "To Be Prepaid". (R 166 and 163). Each Bill of Lading covered a separate shipment delivered by four trucks at different times during a two-day period.

9. The air conditioning units were delivered and accepted by Climate Control on or about November 15-16, 1971 (R-79.

10. E. L. Murphy Trucking Company first billed East Coast Drayage Company on November 17 and 18, 1971 (R-79) within the seven (7) day period prescribed by the I.C.C. Regulations.

11. E. L. Murphy Trucking Company virtually had daily communications with East Coast Drayage Company from the date of billing, including personal visits by E. L. Murphy's representatives, and although receiving promises that payment would be made, were unable to collect the charges that were due.

12. Continuous attempts were made from February to April 7, 1972 to collect from East Coast Drayage Company (R-83, 84), after which time E. L. Murphy was advised by their New Jersey counsel that East Coast Drayage Company was in financial difficulties and was probably judgment-proof. On May 5, 1972 (R-94), American Standard was notified that Murphy was not able to collect from East Coast Drayage.

13. Subsequently the matter of collection was turned over to an attorney in Salt Lake City and an action was filed on December 20, 1972 naming Climate Control, Inc. as defendant. Immediately thereafter, Climate Control, Inc. joined American Standard, Inc. as third party defendant and still subsequently, by motion, the plaintiff joined American Standard, Inc. as co-defendant.

14. In preparation for the Motions for Summary Judgment, Murphy obtained an Affidavit (R-19) from Mr. John Dillon, Vice President of Climate Control, Inc., on October 19, 1973, stating that the payment of $165,280.78 to American Standard for the air conditioning units delivered by E. L. Murphy Trucking Company was based on the following:

(a) the invoices submitted to Climate Control, Inc. by American Standard,

(b) the assurance of Evan Beauldegard that the goods specified in the invoices were received, and

(c) that the invoices of E. L. Murphy Trucking Company were not considered by Climate Control and were not relied upon by Climate Control when payment of the above monies were made to American Standard, Inc.

15. The motions for cross summary judgment were heard on October 29, 1973 with an amended order (R-1) subsequently entered by the Court granting the motions of Climate Control and American Standard and denying the motion of E. L. Murphy for Summary Judgment.

ARGUMENT

POINT I

THE LOWER COURT ERRED IN GRANTING CLIMATE CONTROL'S AND AMERICAN STANDARD'S MOTIONS FOR SUMMARY JUDGMENT, AS THE RECORD FAILS TO SUPPORT A JUDGMENT BASED ON THE DOCTRINE OF EQUITABLE ESTOPPEL.

It is well settled that before the Doctrine of Equitable Estoppel can be applied to prevent a party from enforcing a right, it is essential that it be affirmatively shown that a representation has been made which induced the other party to rely upon that representation to his detriment. Equitable estoppel is applied only as a defense. It thus operates as a shield and not as a sword. The party invoking estoppel must show that they relied on and acted upon the declarations or conduct of the party sought to be estopped and was misled thereby. *28 Am. Jur. 2d,* Estoppel and Waiver Sect. 1 et seq.; *Northern State Construction Co. v. Robbins et al,* 76 Wash. 2d 357, 457 P.2d 187, (1969).

In the matter currently under review, the Respondent Climate Control, Inc., set forth, in its amended answer, the affirmative defense of estoppel, alleging that E. L. Murphy was estopped from asserting its claim for carrier charges on each shipment as set forth in its Complaint on the grounds that Climate Control, Inc., relying on the Bills of Lading evidencing "Freight Prepaid", fully paid for all freight charges attendant to the transactions.

In other words, if Climate Control's defense of estoppel is to prevail, it is essential that Climate Control establish from the record that each shipment covered by a separate Bill of Lading was, in fact, marked "Prepaid" and that they did, in fact, rely upon each Bill of Lading when paying the freight charges and, but for the representations, would have not paid the freight charges which were then due.

In reviewing the Bills of Lading, the Courts attention is respectfully directed to the fact that only Bill of Lading 2930 was marked "To Be Prepaid" and that only Bill of Lading 2931 was marked "Prepaid". The other two shipments, covered by Bills of Lading 2926 and 2918 *were unmarked and did not indicate on their face whether the Bills of Lading were or were not prepaid.* The only document submitted to Climate Control upon delivery of each shipment was the corresponding Bill of Lading. Where the party invoking estoppel was not induced to act to his detriment or did not rely on the representations made by the party sought to be estopped, the defense of estoppel cannot be sustained. *Farmers & Merchants Bank v. Universal C.I.T. Credit Corporation,* 4 Utah 2d 155, 289 P.2d 1045 (1955); *Green v. Garn,* 11 Utah 2d 375, 359 P.2d 1050, (1961).

All other papers relating to the transaction, such as shipping orders and invoices, were either retained by Murphy or submitted to East Coast Drayage. The fact that two of the Bills of Lading were unmarked (R 164-165) and did not indicate on their face whether the shipment was or was not prepaid, placed Climate Control on

notice that two of the shipments may not have been prepaid. It also placed Climate Control on notice that they ought to make inquiry as to whether the other two shipments may have been mistakenly marked "Prepaid".

If Climate Control and American Standard are to prevail in their defense of estoppel, it is essential that the record support the allegation that the Bills of Lading were marked "Prepaid" and that they relied on such declarations to their detriment. The record, and particularly the Affidavit executed by John Dillon, Vice President of Climate Control, Inc., supports E. L. Murphy's position that Climate Control did not in any way rely upon Murphy's Bills of Lading in making payment but rather paid the freight charges pursuant to their obligation arising from the contract entered into with American Standard. As the Affidavit states, the money paid to American Standard for the goods delivered by Murphy was based on, (1) invoices of American Standard, and (2) assurance of one Evan Beauldegard (employee of Climate Control, Inc.) that the goods delivered by E. L. Murphy were, in fact, received.

In addition, Mr. Dillon states in his Affidavit that the Bills of Lading of E. L. Murphy Trucking Company *were not relied* upon by Climate Control in making payment to American Standard. This means that Murphy's Bills of Lading could not have misled, or induced, or influenced, or, for that matter, played any part at all in Climate Control making payment to American Standard. E. L. Murphy submits that the record clearly supports Murphy's position that neither Climate Control nor

American Standard relied on Murphy's Bills of Lading as alleged by Climate Control in its answer. In the absence of reliance, the defense of estoppel cannot be sustained.

To further support E. L. Murphy's position that the lower court erred in granting Climate Control's and American Standard's Motions for Summary Judgment, the Court's attention is directed to *Northern State Construction Co. v. Robbins et al, supra.* This case sets forth the proposition that estoppel cannot be based upon representations which tend to induce a party to do an act which he is legally bound to do.

When the above proposition is applied to the case under review, it is E. L. Murphy's position that since Climate Control was obligated under its contract with American Standard to pay American Standard for the carrier charges, Climate Control cannot now claim that its payment was based on any representation made by E. L. Murphy Trucking Co. Climate Control's legal obligation to American Standard could not in any way be affected by what E. L. Murphy may have done or by what E. L. Murphy may not have done. Climate Control is alleging, in essence, that E. L. Murphy Trucking Co. should be estopped because Climate Control was induced to do what it was legally bound to do under its contract with American Standard. This is contrary to the basic principles of equity and justice.

POINT II

THE LOWER COURT ERRED IN ACCEPTING THE CASES CITED BY CLIMATE CONTROL & AMERICAN STANDARD AS BASIS FOR GRANTING THEIR MOTIONS FOR SUMMARY JUDGMENT.

Climate Control and American Standard relied on *Missouri Pacific Railroad Co. v. National Milling Co.,* 409 F. 2d 882 (3rd Cir., 1969) and *Consolidated Freightways Corporation v. Admiral Corporation,* 442 F. 2d 56 (7th Cir. 1971) as support for their Motions for Summary Judgment. E. L. Murphy respectfully points out that estoppel cannot be subjected to fixed and settled rules having universal application and cannot be hampered by the narrow confines of a technical formula. *Dalton Hwy. Dist. v. Souder,* 88 Idaho 550, 401 P. 2d 813 (1965). Each case of estoppel must stand on its own bottom. *Houston County Board of Review v. Poyner,* 236 Ala. 384, 182 So. 455. (1938).

In the Missouri Pacific case, the facts were substantially different from the matter currently under appeal. For example, all of the Bills of Lading were marked "Prepaid" and, in addition thereto, the record included an uncontradicted Affidavit by the president of the company, clearly reciting facts which established an estoppel against the railroad. In the instant case, all of the Bills of Lading *were not marked* "Prepaid" and, further, the Affidavit from the Vice President of Climate Control clearly establishes that Climate Control did not rely upon Murphy's Bills of Lading in making payment.

The Missouri Pacific case certainly does not stand for the proposition that a carrier is summarily estopped from collecting unpaid carrier charges from a consignee on four shipments when only one of the four Bills of Lading is marked "Prepaid". Nor does the Missouri Pacific case stand for the proposition that equitable estoppel can be established and upheld in the absence of a clear showing that the party asserting estoppel did, in fact, rely upon representations made by the party sought to be estopped.

In the Admiral case, as in the Missouri case, all of the Bills of Lading were marked "Prepaid" and the carrier's contention of nonreliance *was factually unsupported.* In addition, the Court put considerable weight on the carrier's acts of extending credit beyond the seven (7) day limit imposed by the Interstate Commerce Commission. According to the section of the Interstate Commerce Act relating to credit, 9 C.F.R. 1322.1, the carrier may extend credit to the shipper for a period of seven days. In the case now before the Court, the Appellant billed the shipper within two days after delivery and continually thereafter made attempts on a daily basis to collect the charges due. The fact that Appellant was diligent in attempting to seek payment of the carrier charges is not denied or contradicted by either Climate Control or American Standard. Murphy submits that it was not the intent of Congress to penalize and prevent a carrier from obtaining payment of all or part of the money due from a consignee if payment from a consignor cannot be collected within a period of seven days. If this interpretation is given to this provision of the Interstate Commerce Act, it would mean that a carrier would never collect unpaid freight charges

from a consignee because, in essentially every instance, it would take at least seven days for the carrier to determine whether the consignor was able or would pay the carrier charges. E. L. Murphy submits that the purpose of the provision was to prevent preferred and prejudicial treatment by a carrier of one consignor over another. The seven day limitation was imposed to prevent discrimination and was not imposed for the benefit of the consignee. *Consolidated Freightways Corporation of Del. v. Eddy,* 513 P 2d 1161, ... Or. ..... (1973)

The Court further stated in the Admiral case that since all of the Bills of Lading were marked "Prepaid", Admiral was under no obligation to check with the carrier to see if payment was in fact received by the carrier. In the instant case, however, all of the Bills of Lading *were not* marked "Prepaid". This, Murphy submits, placed an obligation upon Climate Control to inquire and determine if E. L. Murphy was, in fact, paid. Failing to do so, any payments made by Climate Control should be construed as being made at Climate Control's own risk. Had Climate Control made an inquiry to E. L. Murphy, E. L. Murphy would have advised them that they did not receive payment. A "lack" of diligence by a party claiming estoppel is generally fatal, *28 Am. Jur. 2d,* Estoppel & Waiver, Section 80, p. 721. The Court also determined from the facts submitted that the consignee did in fact rely on the carrier's Bills of Lading. In the instant case, Climate Control admitted that they *did not rely* on Murphy's Bills of Lading in making payment but rather relied

solely on the representations of American Standard that the carrier charges were in fact prepaid by American Standard (R 46-57).

It is respectfully submitted that the holdings of the Missouri Pacific case and the Admiral case are not applicable to the case on appeal as Climate Control and American Standard have failed to establish, (1) that all four Bills of Lading were marked "Prepaid", (2) that representations of prepayment were made by the carrier and that they relied on such representations, and (3) that they acted prudently and diligently prior to making payment.

POINT III

THE COURT ERRED IN DENYING E. L. MURPHY'S MOTION FOR SUMMARY JUDGMENT.

As set forth in Section 223 of the Motor Carrier Act, 49 U.S.C. 323 and the cases decided under this section, the consignee is generally liable for all freight charges not paid by the consignor. This liability is further set forth in Section 7 of the Uniform Straight Bills of Lading under which the shipments to Climate Control were transported.

Section 7 of the Uniform Straight Bills of Lading and Section 223 of the Motor Carrier Act are essentially identical and state in pertinent part, "The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property . . . *Only* if he (consignee) is an agent with no beneficial interest in

the property which was shipped and has notified the carrier of that fact may a consignee avoid his liability for payment of the freight charges." (emphasis added) *Pittsburgh, Cincinnati, Chicago & St. Louis Railroad v. Fink,* 250 U.S. 577, 40 S. Ct. 27, 63 L.Ed. 1151 (1919); *Louisville & N.R.R. v. Central Iron & Coal Co.,* 265 U.S. 59, 70, 44 S. Ct. 441, 444, 68 L. Ed. 900 (1924); *Boston & Me. R.R. v. Hannaford Bros.,* 144 Me. 306, 68 A.2d 1 (1949); *Central Warehouse Co. v. Chicago, R.I.&P. Ry.,* 20 F.2d 888 (8 Cir. 1927); *Aero Mayflower Transit Co. v. Rae,* 118 N.Y.S. 2d 895, 203 Misc. 801 (1952); *National Van Lines, Inc. v. Herbert,* 140 N.W. 2d 36, 81 S.D. 633, (1966); *Aero Mayflower Transit Co. v. Harbin,* 190 S.E. 2d 91, 126 Ga. App. 72 (1972).

The above cases support the rule that both the consignor and the consignee are both contractually and or statutorily liable for all charges incident to goods transported by a carrier. However, recent cases have held that the consignee's liability is not an absolute liability and that the carrier may be estopped from enforcing its rights if the carrier's conduct warrants such action. *None of the recent cases have held that a consignee may avoid liability for unpaid carrier charges in the absence of estoppel.*

In both the Admiral and the Missouri Railroad cases, the defense of estoppel was upheld under the following circumstances: (1) the consignee had paid the carrier charges to the consignor, (2) all of the Bills of Lading were marked "Prepaid", and (3) it was affirmatively shown that the consignee relied on the prepayment nota-

tion on the Bills of Lading. Under the above specific facts, it was held that the consignee was not liable for unpaid carrier charges.

In the instant case, however, the facts are substantially different: (1) The consignee did not pay the consignor, (2) All of the Bills of Lading were not marked "Prepaid", and (3) The consignee affirmatively stated that he did not rely on the carrier's Bills of Lading.

It is generally well settled that the effect of equitable estoppel is to prevent the assertion of what would otherwise be an unequivocal right. *State v. Mutual Life Ins. Co.,* 175 Ind. 59, 93 N.E., 213 (1910); *P. V. & K. Coal Co. v. Kelly,* 301 Ky. 186, 191 S.W. 2d. 231 (1954). Estoppel serves to prevent losses otherwise unescapable. *Peacock v. Horne,* 159 Ga. 707, 126 S.E. 813 (1925); *Sudden & Christensen v. Crossett Western Lumber Co. (The Tampico),* 270 F. 537 (9th Cir., 1921). In other words, but for the estoppel, the consignee would be liable for the carrier charges.

In an Oregon case just recently decided, the consignee was held liable to a carrier for unpaid carrier charges even though the consignee had paid the freight charges pursuant to a contract made with the consignor, *Consolidated Freightways Corp. v. Eddy, Supra.*

In this case the defendant Eddy had a contract with a shipper which provided that the shipper was responsible for the freight charges. Eddy paid the shipper the contract price in full which included the freight charges. The contracted shipment was transported by the carrier to Eddy

"Collect". The carrier released the shipment to Eddy without collecting the charges. Some two years later, and after being unable to collect from the insolvent shipper, the carrier brought suit against the consignee Eddy for the unpaid carrier charges. Eddy alleged that the carrier's transaction with the shipper involved an extension of credit beyond the seven (7) day limit imposed by the Interstate Commerce Commission and that he (Eddy) had no knowledge when he paid the shipper that the shipment was collect.

The defendant (Eddy) set forth the affirmative defense of estoppel. The Court held that Eddy was liable for the carrier charges as Eddy had failed in his answer to allege that the Bills of Lading contained a notation that the freight had been prepaid or that the consignee was misled by representations or conduct of the carrier into assuming that the freight charges had been prepaid.

In essence, the Oregon Court held that the consignee was liable for payment of the carrier charges even though the consignee had earlier paid the carrier charges to the consignor.

The reason for the Court's holding was that the consignee had failed to adequately establish the elements necessary to sustain their affirmative defense of estoppel. In other words, the consignee failed to establish,

(1) that representations of prepayment were made by the carrier to the consignee, and

(2) that the consignee relied on these representations to their detriment.

The Court suggests though that if the consignee had been able to establish estoppel, the carrier would have been estopped from collecting the unpaid freight charges from the consignee.

In light of the above, E. L. Murphy submits that in the absence of estoppel Climate Control is liable to the carrier, either contractually or statutorily, for all unpaid carrier charges.

POINT IV

THE COURT ERRED IN NOT CONSIDERING THE EQUITIES OF E. L. MURPHY OR THE POLICIES THAT MAY BE ESTABLISHED IN THE FUTURE AND ITS EFFECT ON MOTOR CARRIERS GENERALLY.

In all of the cases relied on by Climate Control and American Standard, the parties and transactions involved were, for the most part, straightforward, eg., the consignor delivered the goods to the carrier for shipment to the consignee under Bills of Lading marked "Prepaid". The consignee then paid the consignor who in turn did or did not pay the carrier.

However, in the case before the Court, the consignee (Climate Control, Inc.) ordered the goods from a supplier, (American Standard, Inc.). The supplier in turn contracted with B & M Trading to ship the goods to Climate Control, Inc. B & M Trading in turn contracted with the consignor, East Coast Drayage Co., who con-

tracted with the carrier, E. L. Murphy Co., to deliver the goods to Climate Control. (See Exhibit "A".)

Climate Control paid American Standard and American Standard paid B & M Trading. It is not known whether B & M Trading paid East Coast Drayage. However, it is known that East Coast Drayage, the consignor, never did pay the carrier, E. L. Murphy.

Carriers are, in effect, servants of the public. This means that unless E. L. Murphy had good cause, they could not arbitrarily refuse to accept the goods from East Coast Drayage for delivery, 46 USC 316. American Standard, on the other hand, voluntarily selected B & M Trading, presumably after careful investigation.

If the Court upholds the Summary Judgment granted to Climate Control and American Standard, E. L. Murphy believes that the door will be opened to encourage future fraudulent transactions wherein the carrier will be unable to collect unpaid carrier charges from a consignee whenever the consignee can establish that they had paid a third party even though the third party is not named on the Bills of Lading. In order to protect itself, the carrier would have no alternative but to operate on a cash, non-credit basis. This would obviously be contrary to the intent of the ICC which has just recently permitted carriers to extend credit under 9 C.F.R. 1322.1. The courts should support this change in policy rather than hamper it.

Further on the question of credit extension, the Court's attention is respectfully directed to the fact that it was American Standard who contacted B & M Trading

to arrange for the shipment of goods to Salt Lake City. Possibly, if American Standard exercised greater care in selecting the shipper, this predicament would never have arisen. Should the carrier be penalized for a supplier's negligence or lack of diligence in selecting a shipper?

E. L. Murphy can further foresee that if the Summary Judgment granted to Climate Control and American Standard is upheld, an invitation shall be extended to unscrupulous shippers and suppliers to collude and successfully bilk a carrier out of the charges due. The entire risk in transporting freight would then fall on the carrier who is in the poorest position of any of the parties to determine the financial responsibility of the shipper. The consignee or the supplier can conduct extensive credit checks before letting out a contract for shipment. The carrier, however, which operates as a public service, and, for the most part, is required by law to accept goods tendered to them for delivery, has little, if any, opportunity to adequately protect itself from a collusive effort between a supplier and a shipper or to protect itself from a potentially insolvent shipper.

If the equities of the carrier are not considered by the courts, it will not be long before the I.C.C. will intervene and make the consignee's liability absolute or in the alternative prevent any form of credit extension by the carrier.

CONCLUSION

It is Appellant's contention that Respondent's and Co-Respondent's Motion for Summary Judgment was erroneously granted. It is Appellant's contention that the record fails to establish that Appellant made any mislead-

ing representations to the Respondent, and further that if representations were made that the record fails to establish that the Respondent relied on those representations and that such reliance was to their detriment. Instead, the record, and particularly the Affidavit of John Dillon, clearly establishes that payment of the carrier charges was made on their own volition and in accordance with the contract and invoices submitted to them by American Standard, Inc.

Appellant further contends that the lower court's action in denying Appellant's Motion for Summary Judgment was in error as the case law supports Appellant's position that in the absence of estoppel the consignee becomes statutorily and/or contractually liable to the carrier for unpaid freight charges.

Finally, Appellant submits that if a balance of equities is to be achieved, and if potentially fradulent transactions are to be avoided, liability of the consignee for payment of the carrier charges must be established, particularly when parties beyond and those listed in the Bills of Lading intercede.

Respectfully submitted,

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EXHIBIT "A"