

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

HAUBOLD V. NEBRASKA TRUCK CENTER

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RONALD HAUBOLD, APPELLANT,
V.
NEBRASKA TRUCK CENTER, INC., A NEBRASKA CORPORATION, APPELLEE.

Filed July 24, 2012. No. A-11-364.

Appeal from the District Court for Hall County: WILLIAM T. WRIGHT, Judge. Affirmed.

Michael J. Synek for appellant.

Timothy J. Thalken, of Fraser Stryker, P.C., L.L.O., for appellee.

MOORE and PIRTLE, Judges, and CHEUVRONT, District Judge, Retired.

MOORE, Judge.

INTRODUCTION

Ronald Haubold appeals from an order of the district court for Hall County, which entered judgment in favor of Nebraska Truck Center, Inc. (NTC), a Nebraska corporation, in this action for breach of a contract to repair Haubold's truck. Because the district court's findings are not clearly wrong, we affirm.

BACKGROUND

Parties.

Haubold owned a 2000 Freightliner semi-tractor truck and worked as an over-the-road truckdriver from 1977 through 2008. He hauled refrigerated loads of meat and other perishable products as an independent contractor for Priority Transportation, LLC (Priority). Haubold's work for Priority required very stringent and demanding schedules for pickup and delivery, which required punctuality and left very little margin of availability for any downtime.

NTC is in the business of performing sales and service for over-the-road trucks.

The dispute that led to the present appeal involves repairs made to Haubold's truck by NTC in December 2004 and January 2005.

First NTC Visit.

Near the end of 2004, Haubold experienced problems with the mechanical operation of his truck. It had a loss of power and poor gas mileage. He obtained leave from his dispatcher to not take any loads while he sought help to repair the truck. Haubold took his truck to NTC's facility in Grand Island, Nebraska, for repair on December 31 (the first visit). At that time, Haubold's truck had 635,328 miles on it. Haubold had numerous complaints regarding the operation of his truck, the foremost of which was low power. Upon examining the truck, NTC made a number of significant findings, which explained the cause of the truck's low power: the air to air boot was leaking, fuel pressure was low, and one of the six fuel injectors, injector No. 5, was inoperable. These conditions can cause low power.

During the first visit, NTC also found that there was coolant in the fuel tanks of Haubold's truck. Various witnesses who testified at trial agreed that this is a bad and noteworthy condition. Coolant mixed with fuel is corrosive, not combustible, and is nonlubricating. Having coolant in fuel can cause significant damage to the components of an engine and can cause injectors to fail. Because there are so many variables, it is hard to know with any certainty how long it would take for injectors which have been exposed to coolant to fail. Haubold's truck also had fuel in the coolant, which can only occur if the coppers (also known as cups or injector tubes) are leaking.

Tom Kowalski was NTC's diesel technician who diagnosed and repaired Haubold's truck during the first visit. Kowalski pressure tested the cooling system, which involves placing a device on the radiator cap which attaches to shop air. The cooling system is then pressurized with air. If the pressure holds, there is no leak in the cooling system. If the pressure falls, that is an indication that there is a leak in the system, and the mechanic then tries to pinpoint the location of the leak.

Haubold's truck was equipped with a fuel heater, which is an optional component that inserts into the fuel tanks. Coolant or antifreeze circulates from the engine through the fuel heater in a closed-loop system. The coolant in the fuel heater keeps diesel fuel from gelling in the fuel tanks in cold weather. Because the fuel heater is part of the closed-loop cooling system, by pressure testing the cooling system, one is also pressure testing the fuel heater. If the fuel heater was leaking, it would be detected by pressure testing the cooling system.

During the first visit, Kowalski's pressure test revealed that coolant was leaking into the fuel system through the coppers. It was undisputed that Kowalski found that the coppers in Haubold's truck were damaged and leaking during the first visit. The record shows that damaged coppers can allow coolant to enter the fuel system and, eventually, the fuel tanks. During the first visit, Kowalski determined that bad coppers were the reason Haubold had coolant in his fuel and made the necessary repairs.

The record shows that if coolant is in the fuel, it will plug the fuel filters. Because NTC found coolant in the fuel of Haubold's truck during the first visit, NTC replaced Haubold's fuel filters. Although Haubold's truck was serviced again by NTC and by other service providers

after the first visit to NTC, the fuel filters on Haubold's truck were not replaced during any of these subsequent visits.

On January 3, 2005, during the first visit, Kowalski found evidence that the coolant in the fuel had already damaged the truck's engine, noting that the "liners are scored needs overhauled." The record shows that operating a truck with coolant in the fuel as Haubold had done before he brought his truck to NTC for the first visit would cause damage to the components of the engine.

Because Haubold had been operating his truck with coolant in the fuel and NTC found that the liners had already been scored and one injector had already failed, on January 3, 2005, NTC recommended that Haubold overhaul his engine. An overhaul would replace all six injectors which had already been exposed to coolant. NTC's service advisor, Mike Krejci, provided Haubold with an estimate of the costs and time needed to perform an overhaul by providing Haubold with a copy of an overhaul estimate he prepared for another customer earlier in the year. An overhaul would have cost between \$10,872.39 and \$12,192.57. On January 4, Krejci prepared an internal approval form he submitted to his supervisor to authorize an overhaul of Haubold's truck.

Haubold chose not to overhaul his engine as documented on the invoice from the first visit, which Haubold signed, and which stated: "MADE UP ESTIMATE TO OVERHAUL. CUSTOMER OPTED TO PUT BACK TOGETHER." According to Krejci, Haubold told him he did not have the money to do an overhaul at that time. Accordingly, Krejci modified the approval form to request his supervisor's permission to replace the engine head, the only repair authorized by Haubold. In contrast, Haubold testified that he authorized the overhaul, but 3 or 4 days later, NTC told him it could not get the parts necessary for an overhaul. Krejci stated at trial that the engine in Haubold's truck, a Detroit 60, is the most common engine on the highway and that parts necessary to perform an overhaul are readily available and are typically in NTC's stock. If NTC did not have the parts in stock, it could get them the next day with freight costs or within 3 or 4 days without freight costs.

Having elected not to overhaul the engine, Haubold authorized NTC to replace the engine head. NTC replaced the fuel filters, drained the contaminated fuel from the truck, power washed the tanks, and filled the tanks with 50 gallons of fresh fuel so that the contaminated fuel could do no additional damage. On January 7, 2005, Kowalski test drove the truck, found no further power problems, and returned the truck to Haubold.

When NTC returned the truck to Haubold on January 7, 2005, NTC had made all of the repairs authorized by Haubold. While the truck left NTC in roadworthy condition, the truck was not fully repaired. Because Haubold did not authorize NTC to overhaul the engine, Haubold continued to operate the truck with scored liners and five injectors which previously had been exposed to coolant.

Problems After First Visit.

Haubold testified that the first time he had problems with his truck after the first visit was a few days after January 7, 2005, when he was in Billings, Montana, and noticed he was low on coolant. Haubold noticed no other problems on that trip and did not experience low power.

Haubold's story changed between the time he answered interrogatories, was deposed, and testified at trial. In his deposition, he testified that he was "absolutely sure" the first time he had problems with his truck after visiting NTC was on January 8 or 9, 2005, when he was in Lexington, Nebraska. He admitted at trial that he "completely got that screwed up" and that his memory was off. He also testified in his deposition that he drove only 250 to 300 miles after getting his truck back from NTC before he began having problems. He admitted at trial that this testimony was wrong.

On August 26, 2005, Haubold wrote a letter to NTC stating, among other things, that after picking up his truck from NTC on January 7, he went to Lexington and then Dakota City, Nebraska. According to the letter, on January 8, while in Dakota City, he had problems with large clouds of white smoke. Documents in the record show, however, that Haubold and his truck were in the State of Washington on January 9. When asked at trial whether everything he wrote in his August 26 letter to NTC about the problems he had experienced with his truck was true, he conceded, "Not now, it isn't." Haubold admitted that despite the problems he was having with his truck, he was able to make all of his scheduled deliveries on time until January 18.

Fairbanks International Visit.

On January 17, 2005, Haubold brought his truck in for repairs at Fairbanks International (Fairbanks) in Kearney, Nebraska. Haubold recalled that, when they opened the hood at Fairbanks, he was able to observe green drops of liquid on different parts of his engine near the radiator. Fairbanks pressure tested the cooling system and found leaks in the radiator hoses, not the fuel heater. Fairbanks found that it was "pretty plain" that the radiator hoses on Haubold's truck were leaking coolant. Fairbanks replaced three radiator hoses, tightened clamps, and added 3 gallons of antifreeze. Fairbanks then pressure tested the entire cooling system again and found no leaks. Fairbanks' mechanic testified that if the pressure test is passed and no external leaks are found, it would not be necessary to check inside the fuel tanks for leaks. He testified that when Haubold's truck left Fairbanks' shop on January 17, it was in good running order and nothing was wrong which needed correction.

Second NTC Visit.

Haubold claims that while in Dakota City on January 18, 2005, his truck began emitting white smoke when he started it that morning and that the smoke obscured traffic traveling in and out of the plant where his truck was parked for 20 to 30 minutes. Haubold was dispatched to Sioux City, Iowa, to pick up a load to take to Los Angeles, California. After picking up the load, he stopped in Aurora, Nebraska, and noted that there were "gobs of oil--overflowing oil" in his engine, that his engine was "growing oil," and that he was low on antifreeze.

Close to midnight on January 18, 2005, Haubold brought his truck back to NTC, complaining that he was losing 1 gallon of coolant every 100 miles. The mileage on Haubold's truck at the time of the second visit was 639,718. Haubold testified that an NTC employee, Jim Harrison, looked in the fuel tanks, tasted the fuel, and determined that it was contaminated with coolant.

On direct examination, Harrison's testimony about his actions in diagnosing coolant in the fuel tanks was consistent with Haubold's recitation of events. However, on cross-examination, Harrison admitted that he had no independent recollection of doing the things

Haubold described. Harrison assumed he did those things because that is what Haubold, in trying to refresh Harrison's memory prior to Harrison's deposition, told Harrison had happened. Harrison did testify that tasting fuel to check for coolant was something that he did quite frequently. During his deposition in May 2010, Harrison testified that he did not remember seeing coolant in Haubold's truck's fuel tanks. He testified during his deposition he did not remember any of the prediagnosis work he did on Haubold's truck. We note that Harrison's employment was terminated by NTC at some time after the second visit for reasons unrelated to this case. Harrison also volunteered at trial that he had a stroke in September 2010, which rendered his long-term memory "kind of sketchy."

Kowalski testified that Haubold's claim of going through 40 gallons of coolant between January 7 and 19, 2005, was extraordinary. During the second visit, Kowalski ran two pressure tests on the cooling system of Haubold's truck, one hot and one cold, which showed no signs of leaks anywhere. Kowalski's repair log notes from the second visit state, "Pressurize cooling system and no leaks found. Put outside and run at high idle with pressure tester on surge tank. Built pressure to 13 psi, bleed off pressure left running did not build pressure over 4 psi second time and no coolant leaks." Kowalski testified that although he had no independent recollection of whether he did so on January 19, 2005, his usual practice is to open the fuel tanks and check the fuel for coolant when running a pressure test for leaks in a cooling system. Kowalski did not repair any coolant leaks because no coolant leaks were found.

With respect to the reported problem of fuel in the oil, Kowalski did find that the injector cups or coppers were leaking. Injector No. 3 had failed and was causing fuel to get in the oil. Having a failed injector can cause low power. Kowalski replaced the failed injector. Following this repair, Kowalski test drove the truck, which was running fine.

Haubold testified that after getting his truck back from NTC on January 19, 2005, his truck died within a block of NTC's facility. He claimed he returned immediately to NTC but that Krejci locked the door and would not let Haubold enter, an incident which Krejci denied. Haubold testified that after the January 19 visit to NTC, his truck was "significantly worse," its power was "fading fast," and he had to stop and add antifreeze all of the time; however, he admitted that the problems with the operation of his truck affected his ability to make timely deliveries "only a little bit." He testified that he drove "day and night" without sleeping and that he falsified his logs so he could stay on the road and make his deliveries on time.

Processed Beef Express Visit.

Haubold continued to have problems with the operation of his truck, and he testified at trial that after a telephone conversation with Krejci about the problems he continued to have, Krejci told him, "When you get to a shop, get your fuel heater bypassed." On January 28, 2005, Haubold took his truck to Processed Beef Express (PBX) in Dakota City. PBX ran a pressure test of the fuel heater. PBX's first test showed no leaks. Later that day, PBX "blew" antifreeze out of the fuel heater and then retested it, finding that pressure was leaking. PBX then bypassed the fuel heater. Haubold testified that after the fuel heater was bypassed, he experienced no additional coolant loss but still continued to experience power loss problems.

Amarillo Truck Center Visits.

Haubold brought his truck to Amarillo Truck Center (ATC) in Amarillo, Texas, on February 17, 2005. The mileage on his truck at that time was 651,661. According to the invoice from ATC, Haubold's complaints on that date were that his clutch rod was rattling and the driver's-side clearance light was inoperable. At trial, Haubold claimed that his truck had been running terribly since the January 19 visit to NTC and that he informed ATC of his problems with low power and poor fuel mileage. He agreed, however, that ATC did not make any repairs for those problems on February 17 and that the invoice from ATC does not make reference to problems with low power or poor miles per gallon.

Haubold returned to ATC on March 5, 2005, at which time the mileage on his truck was 658,048. ATC found that two injectors had failed. The invoice from Amarillo shows that Haubold complained of fuel in the oil, but that ATC did not find any fuel in the oil. ATC spoke with Haubold and noted that he had just had the oil changed and may have overfilled. Haubold wanted to replace all six injectors at that time, and after ATC got an estimate for the repairs, it removed the injectors and found that two injector plungers were stuck. ATC did not identify which injectors failed, so there is nothing in the record to show whether either of the two injectors NTC previously replaced were the ones that failed. Haubold testified at trial that he told ATC in March 2005 about his problems with low power and that after ATC replaced all six injectors, his truck ran "great," was a "joy to drive," had "unlimited power," and had no more low power issues. In his August 2005 letter to NTC, Haubold wrote about the result of the second visit to ATC, that "[t]his truck works as well as I wanted it to when I brought it to [NTC] in January."

Termination of Haubold's Contract.

Priority terminated its contract with Haubold on March 28, 2005, which was the same day, or the day after, that Haubold delivered a load of live plants a day early and an employee at the delivery location became upset with him. This testimony is consistent with information Haubold included in his August 2005 letter to NTC. Priority later rehired Haubold to work as an independent contractor owner/operator, and Haubold began hauling loads for Priority again on October 25. Between March and October 2005, Haubold received income from bonds, stocks, and an apartment house rental, but he did not generate any income from driving his truck.

Pleadings.

Haubold filed a complaint in the county court for Adams County on February 27, 2006. He alleged that on December 28, 2004, he delivered his truck to NTC for the purpose of determining the cause of and repairing a power loss to his truck; that NTC accepted the truck and agreed to make the necessary repairs; that NTC made repairs on the truck between December 28 and January 7, 2005; that NTC billed him \$5,637.09 for the work performed; and that he paid the bill in full. Haubold alleged that NTC negligently diagnosed the problem with his truck and negligently performed its repair services by failing to correctly diagnose and repair the cause of the power loss, failing to correct the source of an antifreeze leak into the truck's fuel tanks, damaging the truck and causing excessive amounts of antifreeze to leak into the fuel tanks, and failing to warn him that it had not correctly repaired the truck. Haubold alleged that after the repair by NTC, his truck still failed to run properly, displayed a loss of power, and required

significant use of extra fuel and antifreeze to operate. He further alleged that he could not use his truck to haul required loads according to schedule, that his employment was therefore terminated by his employer, and that he had to have another truck repair garage make or correct the repairs NTC was supposed to make. Haubold alleged that he suffered monetary loss and damages totaling \$82,199.71. We note that the proceedings were later certified to the district court because of the amount in controversy and that venue was eventually transferred to Hall County for the convenience of the parties and witnesses.

Haubold filed an amended complaint on January 19, 2011, to correct dates, to correct the amount paid to NTC for repairs, and to allege total damages of \$101,844.20.

In its answer, NTC stated that it performed certain repairs on Haubold's truck in a good and workmanlike manner and that it recommended to Haubold that other repairs were necessary but he expressly instructed NTC not to perform those necessary repairs. NTC further alleged that the proximate cause of Haubold's damages, if any, was Haubold's negligence in failing to authorize service and repairs as recommended by NTC.

Subpoena of NTC.

On April 2, 2010, the district court entered an order for pretrial conference, providing that all discovery was to be completed before the conference. The pretrial conference was held on August 19, and a pretrial conference order was entered on August 20. Among other things, the court noted in its order that the parties had already filed their separate witness lists and ordered that "[o]nly those witnesses set forth on the parties' Witness List filed at the time of the pretrial hearing shall be allowed to testify except for good cause shown." We note that although Haubold's witness list identified several employees of NTC, it did not identify "Nebraska Truck Center, Inc." as a witness.

On December 2, 2010, Haubold issued a subpoena duces tecum requiring "Nebraska Truck Center, Inc[.]" to appear at trial on December 15 and "testify as a witness in this case on behalf of . . . Haubold." The subpoena required NTC to bring certain documents with it to trial, including copies of "all notes, log entries, employee time cards, or other documents prepared . . . or contributed to in any way by [NTC's] former employee, . . . Harrison, regarding [Haubold's] truck."

On December 10, 2010, NTC filed a motion to quash the subpoena duces tecum. NTC asserted that the subpoena should be quashed because "Nebraska Truck Center, Inc[.]" had not been identified as a witness in the previously filed witness lists, NTC was a corporation and not a natural person, and Haubold had separately subpoenaed individual employees of NTC who could speak to the relevant actions taken by NTC. NTC also noted that discovery was closed and expressed its belief that the documents requested in the subpoena were duplicative of that which it produced in discovery. Finally, NTC asserted that Neb. Ct. R. Disc. § 6-334 was the exclusive means of requesting documents from a party.

At the hearing on NTC's motion to quash, Haubold's counsel informed the court that on his exhibit list, he had identified "notes of . . . Harrison," which were documents that were not in his possession at the time he prepared the exhibit list. Haubold's counsel stated that he identified the notes as an exhibit, because in conversing with Harrison before and during his deposition, Harrison represented that he made certain notes while employed by NTC that would have been

entered into NTC's computer system and that because of the length of time that had passed, those notes would help refresh his memory. Haubold's counsel stated that the requested notes were not disclosed during discovery. He further indicated that he was not asking for a corporate agent to testify and was not intending to offer the notes as an exhibit, but only to use them to refresh Harrison's memory.

The district court quashed the subpoena, finding that Haubold was impermissibly attempting to use the subpoena to conduct additional discovery from a party after the discovery deadline.

Trial.

Trial was held on December 15 and 16, 2010. The court received documentary evidence and heard testimony from Haubold, representatives of NTC and the other facilities that made repairs on Haubold's truck, and expert witnesses retained by the parties. The evidence is as set forth above. We have set forth further details of the evidence as necessary in the analysis section below.

Ruling by District Court.

The district court entered judgment in favor of NTC and dismissed Haubold's complaint on March 30, 2011. The court wrote a comprehensive 30-page order in support of its decision. Because of the length of the order, we decline to set forth a detailed description of the court's findings here and have set forth in the analysis section below only those findings necessary to discuss in our resolution of this appeal. Haubold subsequently perfected his appeal to this court.

ASSIGNMENTS OF ERROR

Haubold asserts that the district court erred in (1) quashing the subpoena duces tecum, (2) analyzing Haubold's claim as one for breach of contract rather than negligence, (3) finding Haubold's testimony with respect to Harrison not credible, (4) making numerous purported factual findings without sufficient basis in the evidence, and (5) failing to find that NTC breached its duty to him and caused damages.

STANDARD OF REVIEW

A suit for damages arising from breach of a contract presents an action at law. *Thomas & Thomas Court Reporters v. Switzer*, 283 Neb. 19, 810 N.W.2d 677 (2012). In a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Hooper v. Freedom Fin. Group*, 280 Neb. 111, 784 N.W.2d 437 (2010). An appellate court will not reevaluate the credibility of witnesses or reweigh testimony but will review the evidence for clear error. *Id.* In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Thomas & Thomas Court Reporters, supra*. The appellate court does not reweigh the evidence, but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Id.*

ANALYSIS

Quashing Subpoena Duces Tecum.

Haubold asserts that the district court erred in quashing the subpoena duces tecum. Haubold argues that the subpoena was proper under statutes allowing courts to subpoena witnesses, issue subpoenas duces tecum, and to subpoena corporations. See, Neb. Rev. Stat. § 25-1223 (Reissue 2008) (subpoena witnesses); Neb. Rev. Stat. § 25-1224 (Reissue 2008) (subpoenas may direct witness to bring “any book, writing or other thing under his control, which he is bound by law to produce as evidence”); Neb. Rev. Stat. § 8-1401(1)(g) (Reissue 2007) (disclosure of confidential records or information by corporation when subpoena issued). The district court quashed Haubold’s motion, finding that the correct method for obtaining records from a party was through § 6-334 of the discovery rules and finding that Haubold was attempting to use the subpoena to conduct additional discovery after the discovery deadline.

Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion. *Schropp Indus. v. Washington Cty. Atty.’s Ofc.*, 281 Neb. 152, 794 N.W.2d 685 (2011). A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *Prime Home Care v. Pathways to Compassion*, 283 Neb. 77, 809 N.W.2d 751 (2012).

The particular documents Haubold sought by issuing the subpoena were the “night notes” prepared by Harrison. At trial, Harrison testified that he prepared a work order based on the information he received from Haubold when Haubold brought his truck in to NTC during the early morning hours of January 19, 2005. Harrison also prepared night notes, which were a page or two of notes he typed into a computer terminal every night that detailed work yet to be done. Copies of the night notes were then printed out and given to the parts department and the day shift to advise them of work that needed to be done. Harrison did not look at the night notes again after preparing them. Haubold wanted to use the night notes at trial to refresh Harrison’s recollection of events occurring on January 19, such as whether he observed or tasted coolant in the fuel in Haubold’s truck at that time. Harrison was asked at trial about the normal process at NTC with respect to storing or retaining night notes after a particular job is finished. Harrison testified to his belief that night notes were saved for a year and then purged from the computer system.

We find no merit to Haubold’s assignment of error. Even if the district court erred in quashing the subpoena, which we do not decide, Haubold was not prejudiced. Harrison testified that the night notes were purged from NTC’s system after a year, and there is nothing in the record to show that the night notes created by Harrison on January 19, 2005, were in existence at the time of trial. Haubold’s assignment of error is without merit.

Breach of Contract or Negligence?

Haubold asserts that the district court erred in analyzing his claim as one for breach of contract rather than negligence.

The Nebraska Supreme Court has stated:

Although the dividing line between breaches of contracts and torts is often dim and uncertain, it has been said that the character of an action as one in tort or on contract is determined by the nature of the grievance, not by the form of the pleadings, with consideration being given to the facts which constitute the cause of action.

Henriksen v. Gleason, 263 Neb. 840, 846, 643 N.W.2d 652, 657 (2002). To determine whether an action is based on a contract or a tort, a court must examine and construe a petition's essential and factual allegations by which the plaintiff requests relief, rather than the legal terminology utilized in the petition or the form of a pleading. *Id.* Contract actions, which arise from a breach of a duty imposed on one by an agreement, protect a plaintiff's interest in or right to performance of another's promises, whereas tort actions, which arise from a breach of a duty imposed by law, protect a plaintiff's interest or right to be free from another's conduct which causes damage or loss to the plaintiff's person or property. *Id.* In order to recover in an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant's duty. *Id.* In order to prove a breach of a service contract, the plaintiff must show that the defendant failed to exercise the skill and knowledge normally possessed by members of that trade in good standing in similar communities. *Id.*

In the operative complaint, Haubold alleged that he brought his truck to NTC in December 2004 and again in January 2005 for the purposes of determining the cause of and the repairing of a power loss and coolant loss problem with his truck, that NTC accepted his truck and agreed to make the necessary repairs, that NTC negligently diagnosed the problem and negligently performed its services in attempting to repair the truck, and that he was damaged by NTC's actions. In other words, Haubold alleged that NTC promised to repair his truck and that NTC breached that promise by negligently repairing the truck or failing to exercise the skill and knowledge normally possessed by members of the truck repair trade in good standing in similar communities. Haubold alleged a breach of NTC's duty imposed on it by virtue of its promise to repair his truck.

We note that Haubold alleged that he suffered "monetary loss and damages." The economic loss doctrine precludes tort remedies only where the damages caused were limited to economic losses and where either (1) a defective product caused the damage or (2) the duty which was allegedly breached arose solely from the contractual relationship between the parties. *Lesiak v. Central Valley Ag Co-op*, 283 Neb. 103, 808 N.W.2d 67 (2012). Economic losses are defined as commercial losses, unaccompanied by personal injury or other property damage. *Id.* Where only economic loss is suffered and the alleged breach is of only a contractual duty, then the action should be in contract rather than in tort. *Id.*

Because Haubold alleged a breach of a contractual duty and alleged that he suffered only economic loss, the district court did not err in analyzing the claim as one for breach of contract rather than negligence.

Haubold's Credibility.

Haubold asserts that the district court erred in finding that his testimony with respect to Harrison's actions was not credible. Haubold complains of the following findings by the district court with respect to whether there was a coolant leak in the truck's fuel system on January 19, 2005:

Ultimately, whether there was evidence of a coolant leak into the fuel system on January 19, 2005, is most entirely dependent on the credibility of Haubold's testimony as to what he saw and observed . . . Harrison to say and do in the early morning hours of January 19, 2005, and the credibility of [Kowalski's] testimony that it would have been his normal practice to check the fuel tank for signs of any coolant leak under these circumstances, but that he would not have recorded such a check unless he found a leak.

While Haubold's testimony indicates that it is likely that . . . Krejci eventually diagnosed the problem after January 19, 2005, but prior to January 28, 2005, after various telephone conversations he had with Haubold, if there was no clear indication of a leak at the time the January 19, 2005 service was performed, it would appear that the standard of care was still met. . . . Harrison's testimony in this regard is really of no assistance given that he clearly admitted that whatever information he testified to, was no more than a restatement of what Haubold told him Haubold observed.

Under the circumstances, Haubold's confusion as demonstrated in . . . the complaint letter to [NTC] in August, 2005, suggests a memory problem of the events associated with the two visits to [NTC] and calls into question his credibility. The Court notes, moreover, that in this letter of complaint to [NTC], Haubold fails to even mention his conversation with and his observations of Harrison in the early hours of January 19, 2005.

Haubold also complains of this finding by the court:

The [August 2005] letter . . . is disjointed and difficult to follow and confuses and conflates the two visits Haubold's 2005 Freightliner made to [NTC] in December, 2004/January, 2005. It relates a chronology obviously different from that Haubold testified to at trial with regard to the stops at Aurora and the Dakota City smoke incident and appears to isolate the loss of coolant to a period of time following the second visit. In some degree it appears to attribute conversations which Haubold attributed at trial to be with . . . Krejci, to conversations that he may have had with representatives of the [ATC] where he obtained a complete overhaul in March, 2005.

Finally, Haubold complains of this finding:

Haubold testified that much of his confusion as shown in the letter was the result of his misreading of payment schedules that he received from Priority before he wrote the letter. This does, however, call under question the credibility of Haubold's testimony on what he observed or heard at [NTC] while his truck was being serviced on both occasions and when the conversations he testified to or his observations occurred.

Haubold essentially argues that he should not be penalized for failing to include all relevant details of his complaint in the August 2005 letter to NTC, which Haubold describes as "a catharsis for [him] to vent his frustrations, more than a thoughtful or analytical summation of

his interactions with [NTC].” Brief for appellant at 21. He also argues that Harrison’s testimony about his common practice of inspecting fuel tanks by tasting fuel to see if it was sweet, an indication of coolant, bolstered the credibility of Haubold’s testimony about seeing Harrison do these things on January 19, 2005.

Haubold’s arguments ignore the fact that in a bench trial of an action at law, the trial court is the sole judge of the credibility of the witnesses and the weight to be given their testimony. See *Hooper v. Freedom Fin. Group*, 280 Neb. 111, 784 N.W.2d 437 (2010). An appellate court will consider the fact that the trial court saw and heard the witnesses and observed their demeanor while testifying, and will give great weight to the trial court’s judgment as to credibility. *Huffman v. Peterson*, 272 Neb. 62, 718 N.W.2d 522 (2006). We defer to the district court’s findings on credibility. The court’s findings are supported by the record, and while we do not set forth the details in support of the court’s findings here, those findings are not clearly erroneous. Haubold’s assignment of error is without merit.

Support for Factual Findings.

Haubold asserts that the district court erred in making numerous purported factual findings without sufficient basis in the evidence.

Haubold first attacks several findings made by the district court with respect to the standard of care. The court found that no evidence specifically identified the standard of care required for the diagnosis of Haubold’s complaints except by implication, that neither party’s expert testified that the appropriate standard required bypassing the fuel heater, that a leak in the coolant system to which a thermostatically controlled fuel heater is attached is not necessarily a common occurrence for which a recognized diagnostic procedure exists, and that if there was no clear indication of a leak during the second visit, it would appear that the standard of care was met.

There was evidence that if a pressure test of the cooling system shows no leaks, there is no reason to perform further tests. There was also opinion evidence that NTC complied with the standard of care of a good diesel mechanic in the area.

As to the need to bypass the fuel heater, Haubold’s expert witness testified that when he tested the fuel heater for leaks for purposes of this litigation, he bypassed it and tested it independently. He did not testify that it is the standard in the trade when repairing a truck that the fuel heater must be bypassed and tested independently. Another of Haubold’s experts testified that you would test a fuel heater by pressurizing the cooling system. He testified that while not “infallible,” pressure testing the cooling system is “about the only way” to check for cooling leaks. He further testified that to be more specific, a person could bypass the heater and independently test only the fuel heater. He never testified that doing so was the standard in the trade. Another expert, Fairbanks’ mechanic, testified that there would be no reason for a mechanic to independently test a fuel heater when checking for a coolant leak. The record shows that the fuel heater is in a closed loop with the cooling system and that pressure testing the cooling system tests the fuel heater.

The district court’s findings with respect to the standard of care are supported by the record.

Haubold next complains about the district court's finding that

[t]he only apparent leak found, however, was temporarily resolved by the replacement of a single injector and head, but it was clear that the damage to other injectors and other engine components had probably occurred. . . . Pressure testing following this temporary fix detected no further leaks, and thus it appears the standard of care was met on Haubold's first visit to [NTC].

The evidence was undisputed that coolant causes damage to engine components and that coolant had run through Haubold's engine before he brought his truck to NTC. At the time of the first visit, NTC found scored liners. This condition was not repaired because Haubold did not authorize an overhaul as recommended by NTC. It was unknown how long it would take for the components, which had been exposed to coolant, to fail. Based on this evidence, it was reasonable for the district court to infer that Haubold's engine was damaged before he brought his truck to NTC and that his injectors were susceptible to failure because of their preexisting exposure to coolant. The court's finding is supported by the record.

Haubold complains of the district court's finding of an explanation for certain "symptoms" of his truck on January 19, 2005. The court stated:

Whether the standard was met on the second visit to [NTC] is essentially a function of whether there was a clear indication of a coolant leak into the fuel system which could not be manifested by pressure testing. Haubold argues that: 1) The performance problems he had on a return trip from the west coast, particularly in cold environments; 2) The incident at Dakota City; 3) his complaints of significant coolant loss; 4) Harrison's recording of those complaints as a loss of "one gallon of coolant every 100 miles" and 5) . . . Harrison's comment to him that the fuel in the fuel tank "looked awful green" and "tasted sweet", was sufficient evidence to establish such a coolant leak, notwithstanding that pressure testing failed to detect it. These symptoms are not necessarily indicative of a coolant leak from the fuel heater, however, as they are otherwise explained by:

1) A continuing deterioration of Haubold's engine from the pre-December 31, 2004, contamination of the fuel system and associated damage to components of his engine that were not repaired by replacing injector 5 and the head in early January, 2005.

2) Leaking of fuel by the injectors into the oil which created "gobs of oil" and could clearly cause a hot engine to smoke as it did at Dakota City on January 18, 2005.

3) A significant loss of coolant from the leaks Fairbanks . . . found in the area of the radiator diagnosed and "repaired" on January 17, 2005.

The court went on to conclude that whether there was evidence of a coolant leak into the fuel system on January 19, 2005, was most entirely dependent on the credibility of Haubold's testimony as to what he saw and observed Harrison say and do in the early morning hours of January 19 and Kowalski's credibility that it would have been his normal practice to check the fuel tanks for signs of any coolant leak but that he would not have recorded such a check unless he found a leak.

We agree with the district court that the symptoms of Haubold's truck on January 19, 2005, are not necessarily indicative of a coolant leak from the fuel heater. The day before

returning to NTC for the second visit, Fairbanks had replaced radiator hoses in the truck which were leaking coolant. During the second visit, Kowalski ran both hot and cold pressure tests on the truck to account for thermostatic control, which testing revealed no leaks. There is also evidence of excess oil in the truck's engine at the time of the Dakota City smoking incident. Haubold essentially asks us to characterize and weigh the evidence differently than did the lower court, and he also relies on the evidence of Harrison's January 19 observations, which the lower court found to be less than credible, an issue which we have already addressed above. The court's explanations for the truck's symptoms are reasonable inferences supported by the evidence.

Haubold next complains of portions of the findings the district court made about the PBX visit. The court stated:

The failure of PBX to report finding coolant in the fuel and taking any action with regard to same or even suggesting that any corrective action be taken, notwithstanding that PBX detected a pressure leak in the heater with the fuel heater bypassed, suggests rather strongly that there was no coolant leak at the time about which Haubold should have been significantly concerned. There was no evidence of how significant the coolant leak was at this point if, in fact, it existed to any significant degree, or what amount of pressure in the coolant system would necessarily result in a significant leak of coolant through the leak site into the fuel in the fuel tank, given that fuel in the tank itself would exert pressure on the exterior of the fuel heater. Indeed, PBX itself appeared at least initially, to believe any leak was in the "injector tubes" of the engine.

The invoices from the PBX visit do not state that PBX found coolant in the fuel tanks, that PBX replaced fuel filters, or that PBX drained and cleaned the tanks and installed fresh fuel. The record supports a conclusion that all of those things should have been done if there was coolant in the fuel. It was reasonable for the district court to infer that the fuel heater had not leaked coolant into the fuel tanks when the truck was under NTC's care.

Haubold next complains of certain findings with respect to causation of damages. The district court stated:

Moreover, even assuming that this Court found that [NTC] failed to exercise the requisite skill and knowledge on January 19, 2005, in diagnosing a clear coolant leak, the causation of the damages of which [Haubold] complains is purely speculative. When [Haubold] left [NTC] on January 7, 2005, he clearly left with a patched up but significantly damaged engine. Regardless of whether Haubold declined at this time a complete overhaul because he found it too expensive or because he was told that there would not be sufficient parts to conduct a complete overhaul during the time which he could wait for same, he clearly left [NTC] with a damaged engine which had received only temporary first aid, not the major surgery the engine required. [Krejci's] uncontroverted testimony was that he advised Haubold of the significance of the leak of coolant into the fuel system and the probable damage to his engine. The continued loss of performance, power, mileage, and profits about which Haubold complains are explained as much by the ongoing deterioration of his engine from the contamination discovered by

[NTC] during his first visit as they are by any additional damage caused by any coolant leak after January 7, 2005.

Haubold had to prove that the problems with his truck were caused by coolant which leaked into his fuel tanks after December 31, 2004, when NTC first saw his truck as opposed to being caused by coolant which ran through the engine before that date. Haubold's own experts admitted they did not know if the fuel heater was leaking when the truck was under NTC's care. The district court's conclusions are supported by the record.

Finally, Haubold complains of the district court's finding about the cause of his termination by Priority. The court stated, "In the absence of any testimony from any representative of Priority with regard to the reasons why Haubold lost his contract for a period of six months, attributing the loss of that contract to the actions or failures of [NTC] is pure speculation." Contrary to Haubold's assertions, the record does not support a conclusion that his termination by Priority was attributable to NTC's actions. Haubold's own evidence indicates that he made all of his deliveries in a timely fashion during the relevant time period. Further, the evidence shows that Haubold's termination occurred immediately after he delivered live plants a day ahead of schedule, which clearly upset the customer in question. The lower court's inference was reasonable and supported by the record.

Breach of Duty and Causation.

Haubold asserts that the district court erred in failing to find that NTC breached its duty to him and caused damages. In order to recover in an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant's duty. *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002). In order to prove a breach of a service contract, the plaintiff must show that the defendant failed to exercise the skill and knowledge normally possessed by members of that trade in good standing in similar communities. *Id.*

Viewing the evidence in the light most favorable to NTC, we cannot say that the district court was clearly wrong in finding that NTC did not breach its duty to Haubold concerning the repairs to his truck. As we determined above, the district court was not clearly wrong in finding that Haubold failed to prove that any damages he incurred were caused by NTC. Haubold's assignment of error is without merit.

CONCLUSION

The district court was not clearly wrong in analyzing this case as one in contract rather than negligence, in finding that Haubold's testimony was not credible, in its numerous factual findings, and in failing to find that NTC breached its duty to Haubold and caused him damages. We further find no error arising from the district court's quashing of the subpoena duces tecum.

AFFIRMED.