S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

WHITETAIL ENTERPRISES, Plaintiff-Appellee,	UNPUBLISHED September 14, 2001
v WEST BRANCH FARMERS COOPERATIVE, INC., Defendant-Counterplaintiff, and COUNTRYMARK COOPERATIVE, INC., Counterdefendant-Appellant.	No. 222881 Ogemaw Circuit Court LC No. 97-901829-NP

Before: Neff, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals from a judgment of the circuit court entered on the jury's verdict in favor of plaintiff for $287,200. We affirm.

Plaintiff is a deer farming operation owned and operated by Scott Turner in the Rose City area. He also has a partnership interest in deer farms in Linwood, Lupton and Rogers City. In early 1996, Turner brought an article from *Northern American Elk* magazine to the West Branch Co-op, his source for the deer feed. The article discussed mineral levels in the feed for optimum antler growth. He was told that the levels of zinc and copper were lower in the feed he used than the article recommended.

The co-op brought in a nutritionist, Wayne Cook, from its supplier, defendant Countrymark. After meeting with Turner, Cook indicated adjustments could be made to the feed to achieve the desired mineral levels, but it would take a little time to make the adjustments. In the interim, Cook recommended adding a product known as HC salt to the current feed mix to achieve the desired mineral levels. The recommendation was sixty pounds of HC salt per ton of feed, or three percent.

Turner began using the HC salt recipe in June 1996. Approximately two weeks later, he discovered that deer were dying. He was also contacted by his partner in the Lupton operation,

Steve Fritz, who had begun using the HC salt recipe two weeks earlier than Turner, and Fritz also reported problems. Turner checked with his partner in the Linwood operation, Harvey Haney, who reported no problems. However, it was later discovered that, although Linwood was supposed to have received the HC salt recipe, there had been a mix-up and Linwood had not received the HC salt feed mix.

The deer were experiencing diarrhea and eventual death. Stool samples taken to the veterinarian indicated no parasitic problems. The feed became a suspect and the HC salt recipe was discontinued in July. The problem then resolved itself. Turner counted 31 dead adult deer by the end of August, with ten more dying later. Also, the entire 1996 fawn crop was lost.

Defendant first argues that the economic loss doctrine bars plaintiff's negligence claim as a matter of law. We need not address this issue, however, because plaintiff raised both a negligence claim and a breach of warranty claim and the jury found in favor of plaintiff on both claims. Because the total damages may be attributable to either claim, even if we agree with defendant on this issue and strike the negligence claim, the verdict would still be supported by the breach of warranty claim. Therefore, submission of the negligence claim was, at most, harmless error.[1]

Next, defendant argues that the trial court erred in denying its motion for directed verdict on the basis that there was no evidence of causation to support the jury's verdict. We disagree. When considering a motion for directed verdict, the court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party. *Meagher v Wayne State Univ*, 222 Mich App 700, 708; 565 NW2d 401 (1997). The motion should be granted only when no factual question exists upon which reasonable minds could differ. *Id.*

We are satisfied that plaintiff presented sufficient evidence of causation to warrant submitting the issue to the jury. Although defendant focuses on what evidence plaintiff did not procure, particularly the lack of an autopsy on the dead deer, plaintiff did, in fact, present a substantial case. Plaintiff's expert, Gavin Meerdink, DVM, a veterinarian at the University of Illinois and head of diagnostic toxicology and extension for beef and feed safety, testified that it was his opinion that the deer died of salt poisoning. Specifically, Dr. Meerdink stated that it was his opinion, to a reasonable degree of veterinary certainty, that the deer died from nutritional loss caused by the consumption of too much salt.[2] He testified that ruminants should have less than one-half of one percent salt in their diet; according to tests run on the feed, the salt content was almost four percent. He also found it significant that the two herds fed the HC salt recipe had similar problems, while the third herd, which continued on the old feed formula, did not have

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[1] In its reply brief, defendant argues that the error was not harmless because consideration of the tort claim allowed the jury to consider evidence of negligence that would otherwise be barred. Defendant, however, points to no specific evidence that would have been excluded had the negligence claim not been before the jury. Therefore, we cannot assess defendant's claim that certain evidence would have, in fact, been excluded and whether inclusion of that evidence prejudiced defendant.

[2] The fawns, however, died as a result of the does' udders drying up due to the excess salt intake.

such problems. Dr. Meerdink also found it significant that the problems began one to two weeks after the HC salt was introduced and the problem was resolved one to two weeks after the HC salt was removed.[3] Dr. Meerdink also testified that the nature of the deer's diarrhea was consistent with salt poisoning. He also dismissed defendant's theory of the cause of death, grain engorgement, noting that grain engorgement is a "disease of change" which is found when there is a sudden increase in the amount of grain in a ruminant's diet, while the amount of grain fed plaintiff's deer had been essentially unchanged since the operation began a few years earlier.

Plaintiff's attending veterinarian, Dr. Timothy Eyth, similarly supported plaintiff's position. Dr. Eyth testified that plaintiff's herd was healthy as of May 1996. Lab analysis of the stool samples taken after the diarrhea developed was negative for parasites. A feed sample tested at 3.98% salt, a level at which diarrhea and weight loss could result. Although, as defendant points out, Dr. Eyth could not completely eliminate grain engorgement as the cause of death, he did not find it to be very likely. He stated that where deer have adequate roughage available, as did plaintiff's deer, they do not often overeat grain; deer are roughage eaters by choice and more common is that they do not eat enough grain rather than too much. In sum, he ascribed the feed change as a high probability of being the cause and suspects no other cause of death than the change in feed.

In short, plaintiff presented sufficient evidence of causation to warrant submitting the issue to the jury. Both the attending veterinarian and plaintiff's expert testified to a high likelihood of salt poisoning and only a very low likelihood of some other cause, such as grain engorgement. Causation is further supported by the fact the problem commenced shortly after the HC salt was introduced and the problem was resolved shortly after the HC salt was removed, and there was a similar problem with the second herd that was fed the HC salt and no problem with the herd that was not fed the HC salt. In sum, at minimum, it was reasonable for the jury to conclude that plaintiff had established that the cause of death was excess salt in the feed. Accordingly, the trial court properly denied defendant's motion for directed verdict on this issue.

Defendant next argues that the trial court erred in denying its motion for remittitur. The trial court's order indicates that the motion was denied for the reasons stated on the record at the September 22, 1999, hearing. However, the lower court record is devoid of any transcript of that hearing. There is no court reporter certificate in the lower court file indicating that the transcript for that hearing has ever been ordered, not do the records of this Court indicate that the court reporter has ever certified that a transcript of the hearing has been ordered. Because defendant has failed to comply with its obligation under MCR 7.210(B) to procure the entire lower court record and we cannot adequately consider this issue without considering the trial court's reasons for denying the motion, we decline to review this issue.

Next, defendant challenges several evidentiary rulings by the trial court which defendant alleges denied it a fair trial. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Szymanski v Brown*, 221 Mich App 423, 435; 562 NW2d 212 (1997).

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[3] There were some additional deaths later in the year, which Dr. Meerdink attributed to the deer being weakened by the excess intake and not able to survive later challenges.

First, defendant argues that the trial court erred in excluding plaintiff's tax records from evidence. Defendant had asked Turner various financial questions, as reflected on the 1996 tax return, and then moved for admission of the 1996 tax return. The trial court denied the motion, finding the return to be irrelevant. We are not persuaded that the trial court erred. The return consolidated information for both the Rose City operation (which suffered the massive die-off) and the Linwood operation (which had no problem). Defendant argues that the return was essential to establish the amount of any lost profits. However, we fail to see why the tax return was essential to that purpose. Defendant could, and did, ask Turner specific questions regarding the farm's financial activities before and after the die-off, without the need to introduce the tax return as an exhibit. We also note that, because the tax return included information from the Linwood operation, admission of the tax return itself would necessitate disclosure of financial information of plaintiff's partner in the Linwood operation, who was not a party to this action. In short, defendant has not persuaded us that it could only obtain essential information by admission of the tax return. Accordingly, we are not persuaded that the trial court abused its discretion in denying admission of the tax return.

Second, defendant argues that the trial court erred in refusing to allow evidence that an elk herd receiving the same feed did not have a problem. The second herd, on the Fritz farm, which also had a problem also included elk. During both the cross-examination of plaintiff's expert, Dr. Meerdink, and of Fritz, defendant attempted to bring evidence that the elk were not affected. The trial court excluded it in both instances, indicating that it was not "a case about elk" and that they would not be "going into the elk business." While the feed's effect on the elk (or lack of effect) could potentially be relevant upon the laying of the proper foundation, we are not persuaded that, under the circumstances of this case, such a foundation was adequately established. Accordingly, the trial court did not abuse its discretion in denying admission of the evidence.

Third, defendant argues that the trial court should have excluded evidence regarding the similar problems at the Fritz farm as being irrelevant. We disagree. The fact that the deer at the Fritz farm were also fed the HC salt recipe and experienced problems was relevant. See *Savage v Peterson Distributing Co, Inc*, 379 Mich App 197; 150 NW2d 804 (1967). Therefore, the trial court did not err in admitting the evidence.[4]

Finally, defendant argues that the trial court erred in instructing the jury that plaintiff was under no obligation to obtain an autopsy of the dead deer. We disagree. The trial court gave the following curative instruction during defendant's closing argument:

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[4] Defendant's reliance on *Royal Mink Ranch v Ralston Purina Co*, 18 Mich App 695; 172 NW2d 43 (1969), is misplaced. In *Royal Mink*, the plaintiff had wanted to present testimony from the same expert as in the *Savage* case regarding events in the *Savage* case. This Court held that the evidence was inadmissible because *Royal Mink* and *Savage* involved different feed mixes and different allegations of the specific problem with the feed, salmonella bacteria in *Savage* and vitamin deficiency in *Royal Mink*. *Id.* at 700. The case at bar, on the other hand, involves allegations of the same feed producing the same problems for the same reasons. Therefore, *Savage* is the relevant authority, not *Royal Mink*.

> Ladies and gentlemen, as this case has proceeded there has been an understanding between the Court and the attorneys that certain evidence or certain information wouldn't be provided. I'm instructing the jury that plaintiff was under no obligation to cause or seek any autopsies or necropsies of deer in this situation.

This instruction was given in response to defense counsel's referring during closing argument to Dr. Eyth's testimony that he wishes that there had been an autopsy done. However, there had been an agreement between the parties not to discuss Turner's failure to obtain autopsies in exchange for not raising the fact that Ed Wicke, an employee of the co-op, had advised Turner that autopsies were not needed because it was obviously a feed problem and a check would be sent to Turner as soon as the insurance companies sorted it out. Defense counsel stated his understanding of the agreement on the record during the objection to the closing argument:

> My understanding was that we would not get into the issue as to Scott Turner's decision not to do autopsies in exchange for no evidence as to Ed Wicke's statements, which, incidentally, would have no bearing on me, in any event, because he wasn't representing my client's interest. That was my understanding.

We are satisfied that the cautionary instruction was an appropriate method for the trial court to enforce the parties' agreement not to discuss the autopsy issue. For that matter, even absent the agreement, the trial court's instruction is not inaccurate. That is, defendant points to no rule of law that obligated plaintiff to obtain autopsies. Rather, the presence or absence of autopsy results merely affects the nature and extent of the evidence available. As the trial court told the jury, plaintiff was under no obligation to obtain an autopsy. Further, in the general jury instructions, the trial court properly instructed the jury that plaintiff had the burden of proving its case.

Affirmed. Plaintiff may tax costs.

/s/ Janet T. Neff
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald