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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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INGRID NELSON and DALE NELSON,	)	
Plaintiffs-Appellees,	)	Filed January 27, 1988
vs	)	
TODD'S, LTD.,	)	7-354 87-60
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County (53-31328), Harry Perkins, Judge.

Defendant appeals the jury verdict awarding the plaintiffs $142,714, asserting the trial court erred by submitting the theories of strict liability and breach of express warranty to the jury. **REVERSED AND REMANDED FOR A NEW TRIAL**

Thomas C. Farr and John M. Wharton, Des Moines, for defendant-appellant.

Jacques D. Schira and Nick Critelli, Des Moines, for plaintiffs-appellees.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

HAYDEN, J. 149

Defendant, Todd's, Ltd., appeals the jury verdict awarding the plaintiffs, Dale and Ingrid Nelson, $142,714. Todd's asserts the trial court erred by submitting the theories of strict liability and breach of express warranty to the jury. Todd's also asserts there was insufficient evidence to support instructions permitting the jury to award damages for past and future lost business profits and for loss of value to the business property. Todd's final assertion is the trial court erred by awarding the Nelsons interest on their judgment from the date of an earlier mistrial.

I. **Background.** The Nelsons operate the Green Valley Butcher Shop, which is located in Creston, Iowa. The business includes retail sales of cured meat products produced by the Nelsons, custom butchering, and freezer-locker space. In preparing some of their cured meat products, the Nelsons used a chemical product produced by Todd's called "quick cure." In late September 1981, a number of customers returned bad meat they had purchased from the Nelsons.

At trial, the Nelsons alleged the quick cure they purchased from Todd's was defective, since sodium nitrite, the active preservative ingredient, had been omitted. The Nelsons alleged this caused the rapid spoilage of their meat products, which in turn seriously damaged the profitability of their retail sales of cured meat products. This allegedly resulted in a decline in the value of the business real estate.

The first trial of the Nelsons' product liability suit ended in a mistrial after their expert witness on business valuation made an open reference to Todd's insurance coverage in front of the jury. At the second trial, the jury awarded them $16,000 for past lost profits, $46,714 for future lost profits, and $80,000 for loss of value to the business property. Todd's now appeals this judgment.

II. Express Warranty. Todd's asserts the trial court erred in submitting the theory of breach of express warranty to the jury. The boxes of quick cure purchased by the Nelsons from Todd's stated on the outside label:

> Contents: Salt, Sugar, Sodium Nitrite 6%. This lot has been sampled by laboratory analysis and conforms with labeling shown thereon.

The label on the packages of quick cure stated, "[t]he Contents of this Package is Sufficient to Process 100 Lbs. Meat." Todd's contends there was insufficient evidence showing the Nelsons purchased the quick cure in reliance on the warranty on these labels.

The questions of whether Todd's made an express warranty and whether the Nelsons relied thereon are fact issues generally to be submitted to the trier of fact. Ertl Co. v. Lange Plastics Co., 158 N.E.2d 93, 98 (Iowa 1968). This action was tried at law, so the findings of fact are binding upon us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). Evidence is substantial if a reasonable mind could find it adequate to reach the given conclusion. See Baty v. Binns, 354 N.W.2d 777, 780 (Iowa 1984). In determining whether a jury question existed, we view the evidence in the light most favorable to the Nelsons. Paulsen v. Russell, 300 N.W.2d 289, 294 (Iowa 1981). We note it was not necessary for the Nelsons to show by direct evidence they relied on the express warranty; it is sufficient if, from all the facts and circumstances shown, reliance thereon fairly appears. Merkle-Hines Mach. Co. v. Gaynor, 185 Iowa 210, 218 (1919).

The Nelsons were referred to Todd's by other meat locker owners and began purchasing quick cure from Todd's because, in part, Todd's was located in Des Moines. The Nelsons believed in patronizing Iowa businesses, if possible. Todd's asserts the Nelsons merely relied on the representations of these third parties, and not on the warranty provided by the label. We disagree.

The Nelsons purchased quick cure from Todd's for over a year and one-half prior to the incident now at issue, for the obvious purpose of curing their meat products. Mrs. Nelson testified she understood the need for quick cure in the curing process and that she was aware the active ingredient in quick cure was sodium nitrite. Since neither she nor her husband were trained in chemistry, or otherwise capable of ascertaining the presence of sodium nitrite in the quick cure, Mrs. Nelson stated, "Well, I trust what it says on the label. It says it's in there, so I assumed it was in there."

Todd's contends this statement does not show reliance on the warranty at the time of purchase. We agree the statement does not provide direct evidence of reliance. The statement, viewed in conjunction with all the facts and circumstances, however, provides evidence a reasonable mind could find adequate to conclude the Nelsons relied on the warranty. As such, the trial court did not err in submitting the issue to the jury.

III. Strict Liability. Todd's asserts the trial court erred in submitting the theory of strict liability to the jury. Todd's contends strict liability does not apply in this case since the Nelsons allegedly were not the ultimate users or consumers of the quick cure and since the Nelsons did not sustain physical harm to their persons or to any property owned by them. The Nelsons sought only economic damages of lost profits from the retail sale of their meat products and economic damages from the decline in the value of their business property.

Section 402A of the Restatement (Second) of Torts, approved in Hawkeye Security Ins. Co. v. Ford Motor Co., 174 N.W.2d 672 (Iowa 1970) (Hawkeye I), provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the proper preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

2 Restatement (Second) of Torts § 402A at 347-48 (1965).

The question of whether "commercial and economic" loss is recoverable under this section defining strict liability has not been ruled on by the Iowa Supreme Court. Van Wyk v. Norden Laboratories, 345 N.W.2d 81, 88 (Iowa 1984). We conclude such loss may not be recovered under strict liability.

As stated in Hawkeye Security Ins. Co. v. Ford Motor Co., 199 N.W.2d 373, 382 (Iowa 1972) (Hawkeye II), "[p]erhaps the best known case involving the conflict between the warranty theories (under the U.C.C.) and strict liability in tort, is the case of Seely v. White Motor Co., 63 Cal.2d 9, 45 Cal. Rptr. 17, 403 P 2d 145 [(1965)]." In Seely, Chief Justice Traynor noted that the doctrine of strict liability in tort was designed, not to undermine the warranty provisions of the Uniform Commercial Code but, rather, to govern the distinct problem of physical injuries. Seely, at 15, 45 Cal. Rptr. at 21, 403 P.2d at 149. He went on to state:

> The distinction that the law has drawn between tort recovery for physical injuries and warranty recovery for economic loss is not arbitrary and does not rest on the "luck" of one plaintiff in having an accident causing physical injury. The distinction rests, rather, on an understanding of the nature of the responsibility a manufacturer must undertake in distributing his products. He can appropriately be held liable for physical injuries caused by defects by requiring his goods to match a standard of safety defined in terms of conditions that create unreasonable risks of harm. He cannot be held for the level of performance of his products in the consumer's business unless he agrees that the product was designed to meet the consumer's demands. A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with

> the risk that the product will not match his economic expectations unless the manufacturer agrees that it will.

Id. at 18, 45 Cal. Rptr. at 23, 403 P.2d at 151.

The importance of the distinction between tort recovery for physical injuries (to person or property) and warranty recovery for economic loss has been acknowledged by our supreme court in its recognition that, as a practical matter, not many cases will involve both theories sufficiently to warrant having them presented for the consideration of a jury. Hawkeye II, 199 N.W.2d at 381. We conclude this is not one of those rare cases. The Nelsons urge us to equate the economic damage to their business with physical harm to their persons or property. We decline to do so.

In the alternative, the Nelsons assert this case should be governed by exceptions to the general rule that commercial and economic loss is not recoverable under strict liability. They contend two exceptions apply: (1) where the parties are of unequal bargaining position, and (2) where the plaintiff seeks recovery in addition to "loss of the bargain" and economic losses concomitant to that loss. See Sioux City Comm. School Dist. v. Int. Telephone and Telegraph, 461 F. Supp. 662, 665 (N.D. Iowa 1978).

The Nelsons assert their inability to test the quick cure prior to use constituted an unequal bargaining position. We disagree. As in Seely, this case does not involve an attempt by the defendant to enforce an industry-wide disclaimer of liability for personal injuries. See Seely, at 19, 45 Cal. Rptr. at 23-24, 403 P.2d at 151-52. Moreover, the Nelsons were free to shop around, and did so, until they found the quick cure product that would fulfill their business needs. As such, the Nelsons could be fairly charged with the risk that the quick cure would not match their economic expectations, unless Todd's agreed that it would.

Id. at 19, 45 Cal. Rptr. at 24, 403 P.2d at 152. We conclude the bargaining positions of the parties were not unequal.

The Nelsons also assert, however, they seek recovery beyond the "loss of the bargain" and economic losses concomitant to that loss. Economic losses concomitant to the loss of the bargain, and therefore not recoverable under strict liability, include physical damage to the defective product itself and commercial or economic losses which involve no physical harm but which are occasioned by the unfitness of the product. Sioux City Comm. School Dist. v Int. Telephone and Telegraph, 461 F. Supp. at 665 ("see, e.g., categories of harm (3) and (4) supra"). The Nelsons' economic damages fit this description precisely. Their lost retail sales and the decline in the value of their business property are losses which involved no physical harm but which were occasioned by the unfitness of the quick cure. The Nelsons also assert the damage to their specialty meats constituted physical harm to their property. They did not, however, raise this issue at trial and cannot, therefore, rely on it now. We conclude the exception for recovery in addition to the "loss of the bargain" and economic losses concomitant to that loss is inapplicable to this case.

We have concluded, as a general rule, commercial and economic loss is not recoverable under strict liability. We have further concluded the exceptions to that rule asserted by the Nelsons do not apply in this case. It was error, therefore, for the trial court to submit the theory of strict liability to the jury. And because the verdict did not specify upon which theory, express warranty or strict liability, the jury based its award of damages, the error in submitting the strict liability theory requires reversal. Gordon v. Noel, 356 N.W.2d 559, 561 (Iowa 1984). The burden, we note, is on the plaintiffs to request special verdicts or interrogatories to protect their record when multiple theories of

recovery are submitted. Id. at 565. The Nelsons, unfortunately, neglected to do so.

Since the Nelsons' express warranty claim was properly submitted, we remand for a new trial on that issue.

IV. Damages. On appeal, Todd's asserts the trial court erred in submitting the theory of loss of value to real estate and the theory of lost profits to the jury. In essence, Todd's challenges the sufficiency of the evidence to support those submissions. We decline to address these issues as we have ordered a new trial, in any event. For the sake of the trial court on remand, however, we do note the applicable law.

The "new business rule," which deems potential profits from an untried business as too speculative to be recoverable, is recognized in Iowa. Harsha v. State Sav. Bank, 346 N.W.2d 791, 797 (Iowa 1984). The new business rule is not, however, absolute; if factual data are presented which furnish a basis for compilation of probable loss of profits, evidence of future profits should be admitted and its weight, if any, should be left to the jury. Id. at 798. Profits are the net pecuniary gain from a transaction, the gross pecuniary gains diminished by the cost of obtaining them. King Features Syndicate v. Courrier, 240 Iowa 870, 882, 43 N.W.2d 718, 726 (1950). Costs which would be incurred regardless of whether the transaction occurred need not be included. Id. The plaintiff is required to introduce evidence that will enable lost profits to be evaluated with reasonable certainty. Id. There must be proof of a reasonable basis from which the amount can be approximated or inferred. See Conley v. Warne, 236 N.W.2d 682, 687 (Iowa 1975).

V. Judgment Interest. We have reversed and remanded this case to district court for a new trial. Therefore, we do not address the interest on judgment issue presented by Todd's, Ltd.

REVERSED AND REMANDED FOR A NEW TRIAL.