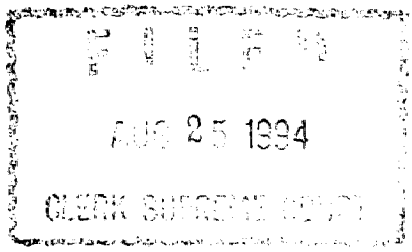
IN THE COURT OF APPEALS OF IOWA

No. 4-196 / 93-0899



RAYMOND BALLARD and
CLAUDETTE BALLARD,

Plaintiffs-Appellees,

vs.

AMANA SOCIETY, INC.,

Defendant-Appellant.

Appeal from the Iowa District Court for Iowa County, Lynne E. Brady, Judge.

The defendant challenges the jury verdict awarding the plaintiffs damages associated with injuries to their swine herd. **AFFIRMED IN PART; REVERSED IN PART.**

Kevin H. Collins, William H. Courter, and Christopher J. Henderson of Shuttleworth & Ingersoll, P.C., Cedar Rapids, for appellant.

Peter C. Riley of the Tom Riley Law Firm, P.C., Cedar Rapids, for appellees.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

The focal issue in this case is the amount of damages for lost profits plaintiff can recover for the death of hogs. Plaintiffs-appellees Raymond Ballard and Claudette Ballard have a swine herd. Defendant-appellant Amana Society, Inc. sold plaintiffs corn. Plaintiffs fed the corn to their hogs. Five of plaintiffs' sows and about 160 of their baby pigs died. Plaintiffs sued claiming the corn contained toxins that caused the sickness and death of the animals. The case was tried to a jury. The jury found plaintiffs were twenty percent at fault and defendant was eighty percent at fault. The jury found plaintiffs' replacement costs were $12,000 and their lost profits were $75,000. Defendant appeals. We reverse and remand. We do not retain jurisdiction.

Defendant contends the trial court erred in submitting: (1) lost profits; and (2) both the theory of strict liability and breach of warranty.

Defendant first contends the trial court erred in submitting lost profits. Defendant contends both that lost profits are not recoverable under law and that plaintiffs failed to introduce substantial evidence on the issue. Plaintiffs argued, in addition to being entitled to recover for the fair market value of the hogs that died or got sick after consuming the corn, they were also entitled to lost profits from future hog litters for a period of four years after the swine ate the corn.

Ordinarily, damages for total destruction of tangible property is the reasonable market value of the property before destruction. Mills v. Guthrie County Rural Elec., 454 N.W.2d 846, 850 (Iowa 1990); see also Walters v. Iowa Elec. Co., 203 Iowa 467, 470, 212 N.W. 886, 888 (1927). There may also be additional compensation when the loss results in business interruption and, in certain limited instances involving income generating property, lost profits is an acceptable measure of loss of use. Mills, 454 N.W.2d at 850. In Mills, id., the court discussed that a plaintiff cannot recover for the market value of animals at the time they were destroyed and also recover for profits which would have been realized from the sale of the same animals. The court in Mills went on to reason that while recovery of the market value of hogs that were destroyed precludes plaintiffs from also recovering profits based on their inability to sell those hogs, the circumstances should not preclude additional damages based on interruption in the production of additional litters during the period of time reasonably required to replace the destroyed farrowing facility. Id. at 851.

The holding in Mills appears to instruct where, as here, the loss of breeding animals may carry with it a greater loss than merely the fair market value of the animals because the loss interrupted the breeding cycle, additional reasonable animals may be allowable.

Plaintiffs introduced evidence showing the death and sickness of the animals destroyed their reproductive abilities and effected their breeding cycle. Plaintiffs also introduced evidence their herd had been healthy and the replacement livestock was diseased thereby there was an additional delay in regaining their level of production. Because of the evidence of the interruption in the breeding cycle, we find with proper evidence, plaintiff would be entitled to recover reasonable lost profits on the sows' death but not on the pig loss.

The next question raised by defendant is whether plaintiffs introduced substantial evidence to support the recoverable lost profits of $75,000.

Plaintiffs advance there is sufficient evidence to support the submission of lost profits. Plaintiffs' brief quoted what the experts allegedly said. Plaintiff, however, failed to site a single reference to where the evidence they quoted appeared in the record. This failure has hindered our review.

The only evidence plaintiffs introduced that would go to the issue of lost profits was the testimony of Dr. Michael Behr. Dr. Behr, in his direct and cross-examination, did not speak of lost profits; rather, he talked of lost revenues. On cross-examination Behr, when asked whether lost revenues were lost profits, said he was not able to answer the question. Additionally, Behr did not separate from the plaintiffs' damages the alleged loss

that occurred as a result of defendant's corn and the loss that occurred as a result of plaintiffs' purchase of diseased animals as replacements. Behr based his testimony on a number of theoretical assumptions rather than specifically applying the evidence in the record about plaintiffs' herd and its prior performance. In 1988 (the year before the loss), plaintiffs sold 810 hogs and Behr predicted Plaintiff would have sold 2011 hogs in 1989, a 250 percent increase in production. Plaintiffs had never realized such a substantial increase in production in any prior years. Behr also was not able to allocate costs between plaintiffs' hog and cattle operations and, therefore, did not consider those costs. Behr then projected the loss would not be recouped for four years.

The law does not allow recovery of damages that are overly speculative. Hoefer v. Wisconsin Educ. Ass'n Ins. Trust, 470 N.W.2d 336, 341 (Iowa 1991); see also Jamison v. Knosby, 423 N.W.2d 2, 6 (Iowa 1988). The damage evidence must be certain enough that a jury can ascertain damages by other than speculation, conjecture, or surmise. See Morris v. Getscher, 708 F. 2d 1306, 1309 (8th Cir. 1983). We agree with defendant that the evidence of lost profits is so speculative that there was not substantial evidence. We reverse plaintiffs' judgment for lost profits.

Defendant also contends the trial court erred in submitting the theories of strict liability and breach of warranty because, under Iowa law, a plaintiff is not

entitled to have both of these theories submitted to the jury in cases involving purely economic injuries without accompanying physical injury to the user or consumer's property. Defendant advances plaintiffs are entitled to have only the theory of breach of warranty submitted to the jury because their claim is based strictly on contract. Defendant contends plaintiffs were not prejudiced. The well established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable. Nelson v. Todd's Ltd., 426 N.W.2d 120, 123 (Iowa 1988); Nebraska Innkeepers, Inc. v. Pittsburg-Des Moines Corp., 346 N.W.2d 124, 126 (Iowa 1984). We find no reason that this rule should be different under strict liability than it is under negligence theory merely because the need to prove negligence is removed in strict liability cases. Nelson, 426 N.W.2d at 123. We agree with the defendant on this issue.

We affirm the judgment for replacement cost and reverse the judgment for lost profits. Costs of this appeal are taxed one-half to plaintiff and one-half to defendant.

AFFIRMED IN PART AND REVERSED IN PART.

HABHAB, J. (dissenting)

I respectfully dissent. I would affirm the trial court.