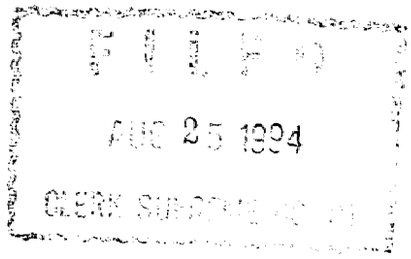
IN THE COURT OF APPEALS OF IOWA

No. 4-190 / 93-0699



FIRST MIDWEST CORPORATION f/k/a MIDWEST PACKAGING CORPORATION,

Plaintiff-Appellant,

vs.

PACKER MANUFACTURING COMPANY,

Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Ross A. Walters, Judge.

The plaintiff challenges the orders granting partial summary judgment and entering judgment on a jury verdict favoring the defendant. **AFFIRMED.**

CeCelia C. Ibson and Michael R. Blaser of Brown, Winick, Graves, Donnelly, Baskerville & Schoenbaum, Des Moines, for appellant.

Steven Augspurger and William L. Dawe of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ. Donielson, C.J., takes no part.

SACKETT, J.

Plaintiff-appellant First Midwest Corporation purchased a printing press from defendant-appellee Packer Manufacturing Company. Plaintiff, who manufactures sacks, bags and packaging, specially ordered the press and it was manufactured for plaintiff's special purpose. The press allegedly did not operate as it should and plaintiff sued defendant under a number of theories, some of which were removed from the suit when defendant filed a motion for summary judgment. The case was tried to a jury on plaintiff's contract claim, and the jury found for defendant. Plaintiff appeals contending the trial court erred in sustaining defendant's motion for summary judgment and in submission of the damage issue and in taxing the costs of a deposition. We affirm.

The facts are not in dispute. Plaintiff prints and fabricates paper bags and sacks. Plaintiff contacted defendant about buying a press capable of printing sacks at a rate faster than the presses plaintiff already owned. Specifically, plaintiff wanted a press that would print four color bags at 1000 feet a minute. Plaintiff wanted the higher speed press to shorten delivery time, to decrease the need for warehousing, and to provide more flexibility in providing products to their customers.

Plaintiff is a financial manager for Imperial Packaging that has a plant in Clarksdale, Mississippi. The Clarksdale facility had an old Packer press that was

experiencing problems. Harry Pomerantz of plaintiff corporation contacted Roger Kane of defendant company and the men went together to look at the press. During the trip, Pomerantz told Kane about plaintiff's wish for a new press. Further negotiations followed. On October 22, 1987, defendant made a formal proposal setting forth the equipment needed to meet plaintiff's requirements and the modifications necessary to adapt the press to any change in plaintiff's requirements. Plaintiff decided to purchase the press, wrote to Kane of that intention, and sent a down payment. Kane, on behalf of defendant, accepted plaintiff's offer on December 4, 1987. At that time, plaintiff was told work on the press had started and the press would be completed during the week of August 21, 1988. The press was not delivered in August 1988. Defendant told plaintiff they were having difficulty with the drive system in the press and held the press they had manufactured for plaintiff in their plant in an attempt to work out the problems. On May 8, 1989, Kane wrote plaintiff a letter and told them "the press is complete except for the main and rewind drives and those components that directly interface with the drives." Defendant said they had ordered the drives and would receive them no later than May 11, 1989. Attached to this letter was a letter to defendant from Fox Valley Instrumentation where defendant had ordered the drives and other component parts. The letter told of the reason for the delay and said Fox would

"immediately ship the motors, tachometer and dancer roll potentiometer" so defendant could install those parts while it waited for the drives.

The drives were built by Powertec to specifications that would enable the machine to operate at 1000 feet per minute during four-color flexographic printing. When Fox ultimately delivered the drives to defendant, defendant received five instrument manuals which were not given to plaintiff. Plaintiff requested an instrument manual from Fox and received one.

On October 30, 1989, the press and components were shipped to plaintiff. Since that time, plaintiff has experienced difficulties with the equipment. Plaintiff claims the press has not met their specifications. Plaintiff claimed: the control board was inadequate to rewind drive; the wiring was not sufficient for the press to handle the specified load; the flexographic printer was not able to maintain a consistent print quality at the speeds in the specifications; defendant did not provide adequate blueprints as required by the contract and that resulted in repair delays; and defendant did not provide adequate training and repair assistance.

Plaintiff contends on a number of occasions they had to repair the pins that hold the rewind shaft because the pins were not strong enough to hold the tension and pressure of the printing operations. The pins were rebuilt and replaced. Plaintiff also contends they have experienced

electrical problems, including a complete failure of the electronic controls in late 1990.

In early 1990 the press rewind drive shaft sprung from the machine and the rewind shaft was damaged as was the product on the shaft. The rewind drive on the press failed to maintain a tight rewind roll of paper causing coning in the paper roll and inhibiting the tubing process that converts printed paper to bags.

Plaintiff contends that while they were having difficulties with the press, they tried to resolve the problems with the defendant or with the help of local firms. They said their efforts were more difficult because the press had a variety of hydraulic, electrical and mechanical problems. They said defendant contended once the machine was shipped the press was not his company's responsibility, and defendant denied there was anything wrong with the press. In February 1991 plaintiff sent defendant a certified letter setting forth four alleged breaches of warranties.

Plaintiff sought replacement parts but defendant refused to assist plaintiff. Ultimately, plaintiff brought this action. Plaintiff sought damages under a claim of negligence, strict liability, negligent misrepresentation and contract. Defendant moved for summary judgment, and the trial court dismissed the negligence, strict liability, and negligent misrepresentation claims. The case was submitted to the jury on a contract theory and a verdict

returned for defendant. Plaintiff appeals contending: (1) the trial court improperly granted defendant's motion for summary judgment on plaintiff's claim of negligence; (2) the trial court improperly granted defendant's motion for partial summary judgment on plaintiff's claim of strict liability; (3) the trial court improperly granted defendant's motion for summary judgment on plaintiff's claim of negligent misrepresentation; (4) the trial court erred in excluding evidence of consequential damages to plaintiff from the jury's consideration; and (5) the trial court incorrectly taxed certain costs associated with the trial of this case.

Plaintiff contends the trial court erred in dismissing on summary judgment their tort theory of negligence. We must determine whether plaintiff showed a genuine issue of material fact existed and if the law was correctly applied. Ottumwa Hous. Auth. v. State Farm Fire and Casualty Co., 495 N.W.2d 723, 726 (Iowa 1993). The trial court granted the motion finding liability in tort for economic loss is confined to damages caused by sudden and dangerous occurrences and 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.

Plaintiff contends this is not correct because Iowa does allow recovery in tort under factual circumstances similar to the one before us; not only for a manufacturer's

negligence, but also for strict products liability and defendant ignored that plaintiff claimed damages were not just in the form of economic loss but, property damage and consequential damages as well and Iowa law allows recovery for these when a claim is predicated on negligence.

Our review of plaintiff's first contention is hindered by their failure to direct us to where in the record the challenged ruling appeared, what the standard of review is on the issues, and where in the record their resistance to the summary judgment appears. See Iowa R. App. P. 14(a)(5).[1]

Operating under these limitations, we will make a concerted effort to review plaintiff's first challenge. Plaintiff claims that had the machine operated at 1000 feet a minute, they would not have been damaged.

In Nelson v. Todd's Ltd., 426 N.W.2d 120 (Iowa 1988), the Iowa court addressed the issue of when tort remedies are available to the purchaser of a product:

> The damage was the foreseeable result from a failure of a product to work properly because of a defect or omission from the product. When, as here, the loss relates to a consumer or user's disappointed expectations due to deterioration, internal breakdown or non-accidental cause, the remedy lies in contract. Tort theory, on the

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1. The argument shall contain . . . citations to the authorities relied on and to the pertinent parts of the record . . . Each division of the argument shall begin with a . . . . standard of appellate review (e.g., "on error," "abuse of discretion," "de novo") and shall state how the issue was preserved for review, with reference to the places in the record where the issue was raised and decided. (Emphasis added).

> other hand, is generally appropriate when the harm is a sudden or dangerous occurrence, frequently involving some violence or collision with external objects, resulting from a genuine hazard in the nature of the product defect. (Emphasis added).

Id. at 125.

Plaintiff's claim for damages is not the result of a sudden or dangerous occurrence. Plaintiff complained of regular and continuing difficulties.

Furthermore, the nature of plaintiff's claimed damages also demonstrates its remedies are properly confined to the law of contract rather than the law of tort. Damages that plaintiff claimed at trial included: (1) cost to repair the press when it broke down; (2) down time and lost overhead; and (3) lost profits when jobs were sent out to be done by other printing companies. These are damages that come from the alleged failure of the press to function as promised in the contract or as warranted. When a buyer loses the benefit of his bargain because goods are defective, he has his contract to look to for remedies. Tort law need not, and should not, enter the picture. Fireman's Fund Am. Ins. Co. v. Burns Elec. Sec. Serv., 417 N.E.2d 131, 133-34 (Ill. App. 1980) (cited in Nelson, 426 N.W.2d at 124). We affirm on this issue.

Plaintiff's next claim is the trial court should not have dismissed on summary judgment its strict liability claim. We find no error here. The rule of recovery for damages under strict liability is no different under strict liability than negligence. Nelson, 426 N.W.2d at 123.

Plaintiff's third claim is its claim for negligent misrepresentation should not have been dismissed on the ruling on the motion for summary judgment.

Proof of claim for negligent misrepresentation is defined as follows:

> One who, in the course of his business, profession or other employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Beeck v. Kapalis, 302 N.W.2d 90, 96-97 (Iowa 1981).

Plaintiff contends plaintiff was told the press would operate at 1000 feet a minute and, because it could not, this was evidence of negligence misrepresentation.

Liability under the theory of negligent misrepresentation is limited to persons in the profession or business of supplying information for the guidance of others. See Meier v. Alfa-Laval, Inc., 454 N.W.2d 576, 581-82 (Iowa 1990). While defendant manufacturing press according to a customer's stated need, defendant sells presses, not information, for the benefit and guidance of others. We affirm on this issue. See generally McCracken v. Edward D. Jones & Co., 445 N.W.2d 375 (Iowa App. 1989); see also G.H. Soybean Oil v. Diamond Crystal Specialty Foods, Inc., 796 F. Supp. 1213 (S.D. Iowa 1992).

Plaintiff next claims the trial court should have submitted consequential damages. The clear language of the contract provided:

> Packer Manufacturing Company shall not be liable for damages or loss arising out of delay in shipment occasioned by any of the above causes, not in any event for consequential damages.

Parties to a contract can agree to exclude consequential damages from one party's possible recovery upon a breach of that contract. Boone Valley Coop. Processing Ass'n v. French Oil Mill Mach. Co., 383 F. Supp. 606, 612 (S.D. Iowa 1974).

Plaintiff contends they should not have been taxed with the cost of the deposition of Thomas Wood. We review the trial court decision to tax court costs for an abuse of discretion. See Coker v. Abell-Howe Co., 491 N.W.2d 143, 151 (Iowa 1992). To recover the cost of a deposition, the deposition must be introduced in whole or in part in evidence during the trial. See Meyer v. City of Des Moines, 475 N.W.2d 181, 192 (Iowa 1991); Woody v. Machin, 380 N.W.2d 727, 730 (Iowa 1986).

Defendant took the questioned deposition of Tom Wood. Plaintiff read the deposition in evidence. Apparently, plaintiff's contention is because they read defendant's deposition, not their own in evidence, the costs should not be taxed. We find no merit in this argument.

AFFIRMED.