

FILED

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IN THE COURT OF APPEALS OF IOWA
CLERK SUPREME COURT

HEBEL FERTILIZER & CHEMICAL, INC.,)

Plaintiff-Appellant,)

Filed April 29, 1980

vs.)

MONROE BRANSTAD,)

Defendant-Appellee.)

0-40

2-62971

Appeal from Winnebago District Court - L. E. Plummer, Judge.

Plaintiff appeals from a judgment for defendant on defendant's counterclaim for damages to corn crop from improper application of a herbicide. AFFIRMED.

Edward R. Boyle of Boyle, Schuler, Stanton & Grabinski, Clear Lake, Iowa, for plaintiff-appellant.

Terry Branstad of Branstad & Schwarm, Lake Mills, Iowa; and Thomas R. Eller of Nash, Eller, Brink & Claussen, Denison, Iowa; for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Plaintiff, Hebel Fertilizer & Chemical, Inc., appeals from a judgment for defendant, Monroe Branstad, on defendant's counterclaim for damages to corn crop from improper application of a herbicide. The jury returned a verdict of \$31,000 for defendant, based upon his claim that plaintiff had negligently failed to apply the herbicide at the proper time of the growing season. We affirm.

I. Plaintiff contends the trial court erred in allowing defendant's claim of negligence to be submitted to the jury on an issue not properly raised in the pleadings. As a basis for this contention plaintiff asserts defendant's theory of negligence was based upon the existence of an agreement between the parties to apply the herbicide atrazine using the "pre-emergence" method¹ of application, but that this theory was not alleged in defendant's pleadings. Plaintiff points out defendant's counterclaim alleges "defendant relied on the skill and knowledge of plaintiff to select the herbicide atrazine and apply it to defendant's field in amounts and times as chosen by the plaintiff." Plaintiff argues that, under the allegation of negligence in defendant's pleading, plaintiff was free to choose to spray defendant's fields using the post-emergence method of application. At trial, however, defendant was allowed to testify that plaintiff had agreed to spray his farms as soon as planting was completed. Even assuming plaintiff is correct in his claim that this testimony was beyond the scope of the pleading, the record fails to disclose where plaintiff made such an objection to the trial court. Where the parties, without objection, proceed to try an issue not in the pleadings, it is tantamount to consent and the issue is thereafter rightfully in the case. Harper v. Cedar Rapids Television Co., Inc., 244 N.W.2d 782, 787 (Iowa 1976); Goss v. Johnson, 243 N.W.2d 590, 594 (Iowa 1976); see Iowa R. Civ. P. 249.

II. Plaintiff next contends the trial court erred in submitting to the jury defendant's claim based upon plaintiff's alleged negligence "in failing to apply the herbicide at the proper time of the growing season."

Our review is not *de novo* but rather for correction of errors at law. Iowa R. App. P. 4. It is the trial court's duty to submit to the jury all issues raised by the pleadings for which substantial supporting evidence is presented. Franken v. City of Sioux Center, 272 N.W.2d 422, 428 (Iowa 1978); Miller v. International Harvester Co., 246

¹ The record indicates that there are three methods for applying atrazine to corn fields. The pre-plant method involves spraying the soil with atrazine and incorporating it into the soil with a disc before the corn crop is planted. The pre-emergence method involves applying the atrazine with a sprayer after the corn crop has been planted but before the corn, or weeds, have emerged from the soil. The post-emergence method involves applying the atrazine with a sprayer after the corn plants, and quite possibly the weeds, have emerged from the soil.

N.W.2d 298, 300 (Iowa 1976). Issues not pleaded, or those having no substantial evidentiary support, should not be submitted to the jury. Seaway Candy, Inc. v. Cedar Rapids YMCA, 283 N.W.2d 315, 316 (Iowa 1979); Miller, 246 N.W.2d at 300-01. To determine the sufficiency of the evidence, it must be given the most favorable construction it will reasonably bear in favor of the requesting party. Franken, 272 N.W.2d at 428; Miller, 246 N.W.2d at 301.

Expert testimony given by Dr. Vivan Jennings, an extension weed control specialist for Iowa State University, was that most weeds could be controlled if the atrazine was applied early enough and at a high enough rate. Weeds over an inch and one-half tall, he stated, become hardened and resistant, and therefore more difficult to control. He further testified that if at all possible, atrazine should be incorporated on a pre-plant or pre-emergence basis due to extreme difficulty in achieving weed control once the weeds have emerged from the soil.

The evidence is undisputed that defendant first contacted plaintiff's agent on May 5, 1976, to inform him that planting was completed. He contacted plaintiff's office in Lake Mills a second and third time, leaving instructions that he was ready to have his fields sprayed. Plaintiff eventually sprayed defendant's fields on May 19 and 20, which at the minimum was two weeks after defendant's fields had been planted.² At this time, a witness for defendant testified the grasses in defendant's fields were three inches high.

On the basis of this evidence, we believe the trial court was correct in submitting to the jury defendant's theory of negligence based upon failure to apply the herbicide at the proper time of the growing season. This is not to say use of a post-emergence method, as done by plaintiff, would in all cases amount to negligence. But rather, on the facts of this case, a jury could properly find from the evidence that by waiting plaintiff negligently allowed a superior time for application to pass, necessitating the use of a time and method of application having predictably less certain results.

III. The trial court's instruction to the jury regarding damages properly stated the Iowa law on the measure of damages for injury to or partial destruction of a growing crop. See Martin v. Jackel, 188 N.W.2d 331, 336 (Iowa 1971). Accordingly, no exception to such instruction was made by plaintiff. Plaintiff contends, however, there was no

² Defendant spent approximately five or six days planting his corn crop in 1976. Depending upon when the fields that plaintiff sprayed were planted, the application was made anywhere from fourteen to nineteen days after planting.

substantial evidence supporting the jury's award of \$31,000 to defendant for damages to his crops resulting from plaintiff's negligence. We disagree.

Defendant presented extensive evidence regarding the location of and type of soil on each of the farms where he planted corn in 1976. Evidence was introduced showing, in bushels per acre for each of defendant's farms, the normal corn yields expected for an average crop year, defendant's estimated potential corn yields for 1976, and the actual corn yields for 1976. Defendant, in making the estimated potential yields, testified that he attempted to make allowances for the particular factors affecting corn yields during 1976, such as weather and insects. The jury was able to compare defendant's projected yields for fields sprayed by plaintiff with the actual 1976 yields for similarly situated fields sprayed by defendant. Also presented was evidence of daily market prices for corn at two nearby elevators. Viewed in its entirety, the evidence of damages is sufficient to support the verdict.

Plaintiff complains that the jury did not take into account the evidence presented describing the extent of root-worm damages and effect of dry weather on defendant's yields. Plaintiff's evidence regarding effect of these factors on defendant's yields was, however, contradicted by defendant's evidence tending to minimize their effect. Questions of fact are ordinarily reserved for jury determination. See Wadell v. Peet Feed, Inc., 266 N.W.2d 29, 32 (Iowa 1978); Olson v. Drahos, 229 N.W.2d 741, 742 (Iowa 1975). The evidence having been presented by each side, it was for the jury to evaluate the evidence and accordingly set the amount of damages attributable to plaintiff's negligence.

Plaintiff also complains that defendant failed to provide evidence of comparable yields from neighboring farms. Each of the farms sprayed by defendant, whose yields were used for comparison was, however, located in the same geographic area as were the farms sprayed by plaintiff. The jury was also provided with detailed information regarding the location of and soil conditions on each farm used for comparison as well as those whose diminished productivity was being ascertained. Additionally, defendant presented evidence indicating the same farming techniques, except for herbicide spraying, were utilized on all of the farms he farmed in 1976. We believe the basis of comparison afforded the jury for determination of damages was sufficient.

We have considered all issues presented and find no grounds for reversal.

AFFIRMED.