

IN THE COURT OF APPEALS OF IOWA

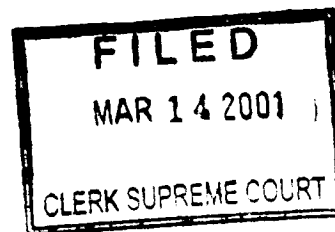
No. 0-792 / 99-2040

Filed March 14, 2001

MIKE HAMILTON,
Plaintiff-Appellee/Cross-Appellant,

vs.

ROLLING HILLS FS, INC.,
Defendant-Appellant/Cross-Appellee.



Appeal from the Iowa District Court for Madison County, William H. Joy,
Judge.

Rolling Hills FS, Inc. appeals, and Mike Hamilton cross-appeals, from a
judgment in a tort and contract action claiming damages for lost crop yields
caused by herbicide. **AFFIRMED.**

David H. Luginbill and Steven L. Serck of Ahlers, Cooney, Dorweiler,
Haynie, Smith & Albee, P.C., Des Moines, for appellant.

Eldon L. McAfee of Beving, Swanson & Forrest, P.C., Des Moines, for
appellee.

Heard by Huitink, P.J., and Vogel and Mahan, JJ.

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HUITINK, P.J.

I. Background Facts and Proceedings.

In May 1997 Hamilton hired Rolling Hills to custom spray herbicide on approximately two hundred acres of corn. Rolling Hills sprayed Hamilton's entire acreage with Basis Gold brand herbicide.

In 1998 Hamilton sued Rolling Hills claiming reduced corn crop yields in 1997 resulting from Rolling Hills' use of Basis Gold rather than Pursuit brand herbicide on his corn. Under Hamilton's theory of liability, Rolling Hills was contractually obliged to spray Pursuit herbicide on his crops and its failure to do so was both negligent and a breach of contract.

Rolling Hills denied any liability for Hamilton's crop loss citing their agreement to the use of Basis Gold rather than Pursuit. Rolling Hills also claimed Hamilton's failure to timely respray reemergent weed growth was the cause of any damages claimed.

The trial court's findings of fact and conclusions of law provided in pertinent part:

So we have a contract, we have a contract that was breached by the Defendant when it applied Basis Gold rather than Pursuit to 32 acres. The parties then negotiate a change in that contract, and the change is, let us continue on using the Basis Gold and it will cost you less, and what the Plaintiff required is that it do the same job as the Pursuit. The problem that the Defendant has with that is that the testimony there was that then Mr. Bennett [Rolling Hills' employee] attempted to treat the farm land to take care of the problems he saw or that he observed. There's no testimony that he ever asked Mr. Hamilton or that he was ever told by Mr. Hamilton what Mr. Hamilton's expectations were. Mr. Hamilton's expectations in using the Pursuit program was to take care of shattercane and to take care of foxtail. Nowhere did the Defendant ever attempt to satisfy or even know of Mr. Hamilton's expectations. After the initial application of the Basis Gold, within

two weeks, weeds had reappeared. The Plaintiff contacted the Defendant, the Defendant came out, the Defendant called the chemical expert out or chemical rep out, time went by, and we have a fairly narrow window for trying to address these weeds that came back up. It appears that what the Defendant finally offered to do was to supply more chemical, free of cost, and the Plaintiff was going to find someone to spray the chemical by using a Highboy. The Plaintiff arranged for BB & P to do the work, it was never done, he contacted them once or twice during June. The weeds were never addressed. The chemical that the Defendant offered was never picked up, and as a result of the weed problem, the crop suffered.

... The court believes that the Plaintiff could have expected in the 1997 growing year in corn on his father's farm, that he could have harvested 160 bushel an acre. There were 175.2 bushels planted to corn which would have generated 28,032 bushel. He harvested 6,310 bushel. That was the corn hauled to the Farmer's Co-op. That would mean that he lost 21,722 bushel because of the weed infestation. If the fair market value of that crop was \$2.51, the loss would have been \$54,522.22. The Defendant was negligent when it applied the wrong herbicide to Plaintiff's crop. The Defendant was negligent when it attempted to remedy that situation by failing to determine why Mr. Hamilton had used Pursuit, which was a bean herbicide on corn grounds, what he was after. They never addressed the shattercane and the foxtail, which led to problems on that farm.

The Plaintiff was also negligent. The Plaintiff was required when he found that substitute chemicals, the Basis Gold, hadn't worked, to do what he could to mitigate his loss. Certainly he did somewhat, he thought he had arranged for someone to spray, but he knew it wasn't being done, and a reasonable person would have taken more steps to have tried to have salvaged as much of that crop as possible. The Defendant's action when the Basis Gold was found not to have worked to take care of the second crop of weeds, its action was also negligent.

... With the court finding that both parties are negligent and negligence is one of the counts put forth by the Plaintiff, the court needs to apportion negligence. The court believes that the Defendant is 75 percent responsible for the loss. The Plaintiff would have to bear 25 percent of the loss for his own negligence. What that would mean is that the award would be reduced to \$40,892.00. If we examine this case from a contract law theory we would reach the same result, the contract was first breached by the Defendant when it failed to spray Pursuit herbicide as contracted for by the Plaintiff. It further breached its responsibility when in

attempting to rectify the situation it failed to address the concerns that brought the Plaintiff to ask for Pursuit so that he could still get the benefit of his bargain. The damages would be the same, the loss of the benefit would be the reduced crop yield, the Plaintiff would still be required to mitigate under a contract theory and so we would reach the same result.

On appeal Rolling Hills contends the district court erred in determining the legal and contractual duties arising out of its relationship with Hamilton. Rolling Hills also challenges the sufficiency of the evidence supporting the district court's findings of negligence and breach of contract.

On cross-appeal, Hamilton contends the district court's award of damages was inadequate. He argues that the court erroneously determined his expected corn crop yield for 1997. Hamilton does not cross-appeal the district court's finding that he was negligent for failing to mitigate his damages.

II. Standard of Review.

This case was tried to the court as a law action, and our review is for the correction of errors at law. *Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 490 (Iowa 2000). The district court's findings of fact have the effect of a jury verdict and are binding on us if supported by substantial evidence. *Grinnell Mut. Reins. Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988). Evidence is substantial when a reasonable mind would accept it as adequate to reach the same findings. *Id.* Evidence is not insubstantial merely because it would have supported contrary inferences. *Id.*

We construe the district court's findings broadly and liberally. *Hendricks*, 609 N.W.2d at 490. In case of doubt or ambiguity we construe them to uphold,

rather than defeat, the judgment. *Id.* A corollary rule prohibits us from weighing the evidence or the credibility of the witnesses. *Id.*

III. Duty Issues.

As noted earlier, Hamilton's claims against Rolling Hills were premised on both tort and contract theories. A successful tort claim based on allegations of negligence required Hamilton to establish Rolling Hills owed him a duty of care, that Rolling Hills breached that duty, and that its breach was the actual and proximate cause of the damages claimed. See *Hartig v. Francois*, 562 N.W.2d 427, 429 (Iowa 1997). The existence and nature of Rolling Hills' duty of care arising out of the parties' relationship was a matter of law for the court to decide. See *Downs v. A & H Constr. Ltd.*, 481 N.W.2d 520, 522 (Iowa 1992).

The gist of Rolling Hills' argument is that there was no evidence introduced from which the court could determine Rolling Hills' duty of care owed to Hamilton. We disagree.

The record indicates Rolling Hills was engaged in the trade or business of custom herbicide spraying. Its duty to Hamilton was to "exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." *Hartig*, 562 N.W.2d at 430 (quoting Restatement (Second) of Torts § 299A, at 73 (1965)). Contrary to Rolling Hills' assertions, the record includes evidence concerning the skill and knowledge of those engaged in the business of custom spraying herbicides. Marvin Bennett, a certified crop specialist employed by Rolling Hills, testified concerning the field observations and other considerations made in the selection of recommended herbicides suitable for the eradication or control of specific weed varieties.

Hamilton's expert witness, Robert Ascheman, testified about the relative effectiveness of Basis Gold and Pursuit herbicides based on the maturity and size of shattercane and foxtail weeds. The record of his direct examination also includes the following:

Q. Because there was no preemergence here in Mike Hamilton's situation was Basis Gold a poor choice?

A. Yes.

It was Ascheman's opinion that Hamilton's poor yields in 1997 were caused by ineffective herbicide.

We believe the record supports the district court's determination that Rolling Hills' duty of care included selection and use of herbicide suitable to the weed varieties and conditions particular to Hamilton's needs. We affirm on this issue.

IV. Sufficiency of Evidence and Proximate Cause.

The resolution of these issues is controlled by our standard of review. The district court's findings of negligence were premised on Rolling Hills' failure to use the appropriate herbicide on Hamilton's cornfields. Rolling Hills' use of Basis Gold rather than Pursuit herbicide is not disputed. We find Ascheman's and Bennett's testimony sufficient to support the district court's findings that Rolling Hills breached its duty of care to Hamilton. We also find the same testimony sufficient to support the district court's finding of proximate cause and allocation of fault. We therefore affirm on these issues.

V. Hamilton's Cross-Appeal.

We reject Hamilton's argument that the district court's determination of expected crop yields was not supported by substantial evidence. The only

evidence presented on this issue at trial was from Hamilton and a crop consultant that was testifying on Hamilton's behalf. Hamilton estimated the expected crop yield to be approximately 206 bushel per acre, based on comparisons of the yield of a neighboring farm. Hamilton's expert stated as follows: "I thought maybe in the range of 150, 160 would have been expected, and then if he had 180 I would have not been surprised, it could happen on a good yield, if it's over 200 you have got a prize field." The court adopted the expert's opinion and determined expected crop yield to be 160 bushel per acre. We defer to the trial court's findings and affirm on this issue. See *Neimann v. Butterfield*, 551 N.W.2d 652, 654-55 (Iowa Ct. App. 1996) (The trial court has a superior vantage point to make credibility determinations due to its ability to consider firsthand the demeanor and appearance of the parties.).

VI. Summary.

We have carefully considered all of the issues Rolling Hills raised on appeal and find they have no merit or are effectively resolved by the foregoing. The judgment of the district court is affirmed in its entirety.

AFFIRMED.