

IN THE COURT OF APPEALS OF IOWA

RONALD BALLENGER,)
Plaintiff-Appellant,)
vs.)
NA-CHURS PLANT FOOD COMPANY,)
Defendant-Appellee.)

Filed June 29, 1982

2-127 CLERK SUPREME COURT
2-56128

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Appeal from Muscatine District Court --- J. Hobart Darbyshire, Judge.

Plaintiff tomato producer appeals from a directed verdict and judgment notwithstanding the verdict in his suit against a fertilizer manufacturer for damages to his tomato crop. REVERSED AND REMANDED.

David W. Newell, Muscatine, for the plaintiff-appellant.

Rand S. Wonio, of Lane & Waterman, Davenport, for defendant-appellee.

Considered by Oxberger, C.J., Snell and Carter, JJ.

PER CURIAM

Plaintiff tomato producer appeals from a directed verdict and judgment notwithstanding the verdict in his suit against a fertilizer manufacturer for damages to his tomato crop. We reverse and remand.

Plaintiff applied defendant's fertilizer to his tomato crop in 1976 with good results that year. He bought defendant's fertilizer again in 1977, but on the parts of his crop where he applied the fertilizer, his crops failed.

Plaintiff filed a products liability suit alleging both strict liability and negligence based on *res ipsa loquitur*. At the close of the evidence, the trial court sustained defendant's motion for a directed verdict on the negligence count, but overruled its motion on strict liability. The case went to the jury only on the question of strict liability, and the jury returned a \$30,592.99 verdict for the plaintiff. When the defendant moved for a judgment notwithstanding the verdict and for a new trial, the court granted the judgment notwithstanding the verdict, but did not rule on the motion for a new trial. However, after the supreme court granted a limited remand to obtain a ruling on the motion for a new trial, the trial court conditionally granted that motion.

On appeal the plaintiff argues that the trial court erred when it granted defendant's motion for a judgment notwithstanding the verdict, when it conditionally granted defendant's motion for a new trial, and when it refused to submit his negligence theory to the jury by granting defendant's motion for a directed verdict on that theory.

I. A plaintiff must establish the following elements to prevail on a claim of strict liability in tort in Iowa:

- (1) manufacture of a product by defendant; (2) the product was in a defective condition; (3) the defective condition was unreasonably dangerous to the user or consumer when used in a reasonably foreseeable use; (4) the manufacturer was engaged in the business of manufacturing such a product; (5)

said product was expected to and did reach the user or consumer without substantial change in condition, i.e. the defect existed at the time of the sale; (6) said defect was the proximate cause of personal injuries or property damage suffered by the user or consumer; (7) damages suffered by the user or consumer.

Wernimont v. International Harvester Corp., 309 N.W.2d 137, 140 (Iowa Ct. App. 1981), citing Osborn v. Massey-Ferguson, Inc., 290 N.W.2d 893, 901 (Iowa 1980). The jury returned a verdict for plaintiff on the strict liability count, but the court granted defendant's motion for a judgment n.o.v., ruling that the evidence did not generate a factual question for the jury on whether the fertilizer was defective.

Before ruling on defendant's motion, the trial court was to have viewed the evidence in the light most favorable to plaintiff regardless of whether his evidence was contradicted, and must have made every legitimate inference which could be deduced from the evidence. Then, if reasonable minds could differ on the issue, the question was properly considered only by the jury. Meeker v. City of Clinton, 259 N.W.2d 822, 828 (Iowa 1977).

The trial court noted that it viewed the evidence in the light most favorable to plaintiff Ballenger, but that without affirmative expert testimony, the only evidence of a product defect was plaintiff's own testimony. Iowa law does not require expert testimony in all cases in order to prevail in a products liability case. Wernimont v. International Harvester Corp., 309 N.W.2d at 141. This circumstance is not fatal to petitioner's claim.

Our function is to determine not whether the fertilizer was defective, but whether the evidence was sufficient for the trial court to have submitted that question to the jury. Meeker, 259 N.W.2d at 828.

Plaintiff testified that he had considerable and successful experience growing both tomato and other crops, and that in the past he had not encountered any problems similar to the ones he encountered when he used defendant's

product. He testified carefully and explicitly about how he mixed the fertilizer with the recommended amounts of water in his tanks. He dispelled the notion that he let the concentration of fertilizer become too great in the tanks when he testified that he always only added proper proportions of water and chemicals each time and periodically filled the tank with only water. He testified that he did not fill his tanks with a gravity fed system, as defendant tried to imply. Thus each time the water and fertilizer chemicals were properly mixed.

The evidence also shows that it was only where the chemical fertilizer was added that the plants died. One of defendant's experts agreed that it was highly unusual for good and bad rows of plants to exist side by side, and the difference in the rows could only be explained by possible problems with the fertilizer, planting technique, water, or the time of planting. Defendant's expert testified that the Ballenger soil samples showed higher chemical amounts from the bad rows than what were in the good rows. Additionally, when defendant's vice-president of research and development, Owen McIntyre, testified about the normal testing procedures done on the truckloads of fertilizer that are delivered to the bulk stations, he testified that of ten truckloads delivered, only nine sample tests could be found. The rust samples taken from plaintiff's tank were found to be inert and could not have affected plaintiff's tomato crop. Many of the tests performed by defendant's experts were performed in 1979, several years after plaintiff's crop failure

Proof of a defect can be, and usually is, established by circumstantial evidence. Wernimont, 309 N.W.2d at 141; Kleve v. General Motors Corp., 210 N.W.2d 568, 571 (Iowa 1973). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(6). Plaintiff refers us to several cases where circumstantial, rather than direct evidence, was successfully offered. In one case, the members of a family who consumed defendant's product became ill and those

who did not, remained healthy. Davis v. Van Camp Packing Co., 189 Iowa 775, 176 N.W. 391 (1920). In Doane v. Farmers Cooperative Co., 250 Iowa 390, 94 N.W.2d 115 (1959), the cows which were fed defendant's corn became ill and many of them died. The cows in the adjoining lot which were not fed defendant's corn, remained healthy. Tests done on the carcasses and the corn were negative, and there was no direct proof that the corn caused the animal's deaths. A similar case is Haberer v. Moorman Manufacturing Co., 341 Ill. App. 521, 94 N.E.2d 611 (1950). In none of these cases was there direct proof of a defect, rather, the evidence was heavily circumstantial.

In the instant case, the jury heard evidence that the crop died only where the defendant's fertilizer was applied, that the fertilizer was applied according to instructions, that many of defendant's experts' tests were performed several years after the incident, that one of the test samples from defendant's fertilizer shipments could not be found, and that the fertilizer was a possible explanation for the unusual occurrence of having good and bad rows side by side. Under this set of facts, the trial court should not have granted defendant's motion for judgment notwithstanding the verdict because there was sufficient evidence for the jury to have found the elements of a strict liability products case, including the existence of a defect.

II. Plaintiff additionally argues that the trial court erred in granting defendant's motion for a directed verdict on his negligence claim which he based on the theory of *res ipsa loquitur*. In view of our disposition on the strict liability claim, it is unnecessary to reach this point.

III. Plaintiff's last assignment of error is the trial court's conditional grant of a new trial. Given our disposition of the present case, this question is moot.

We reverse the trial court's judgment, and remand for entry of judgment consistent with the jury's verdict.

REVERSED AND REMANDED.