IN THE COURT OF APPEALS OF IOWA

No. 1-428 / 90-1746

FILED
FEB 26 1992
CLERK SUPREME COURT

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**SMITH FERTILIZER AND GRAIN, INC.,**

Plaintiff-Appellee,

vs.

**JOHN McDONALD,**

Defendant-Appellant.

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**JOHN McDONALD,**

Counterclaimant-Appellant,

vs.

**SMITH FERTILIZER AND GRAIN, INC.,**

Counterclaim Defendant-Appellee.

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Appeal from the Iowa District Court for Lucas County, Darrell J. Goodhue, Judge.

Purchaser of bulk fertilizer appeals jury verdict and court order rejecting his contention seller's action on account is barred as a result of seller's alleged statutory violations concerning weighing and issuance of scale tickets. **AFFIRMED.**

Carol A. Wendl and Brent A. Cashatt of Neiman, Neiman, Stone & Spellman, P.C., Des Moines, for appellant.

Steven W. Guiter of Johnston, Hicks, Guiter & Griffith, Knoxville, for appellee.

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

**SCHLEGEL, P.J.**

For a number of years, up to and including 1987, farmer John McDonald purchased fertilizer, herbicide, pesticide, and other agricultural chemicals from Smith Fertilizer and Grain, Inc. (Smith). The parties' custom was for Smith to apply many of the chemicals directly to McDonald's land. Generally McDonald paid for a year's worth of chemicals after that year's harvest.

After the 1987 crop year a dispute arose between the parties. Smith complained McDonald had failed to pay for the supplies he received in 1987. McDonald responded he had suffered crop loss and other damages due to Smith's negligent delivery and application of the fertilizer and chemicals in the spring of 1987.

In 1989 Smith filed the present action on account against McDonald. McDonald counterclaimed for crop loss and other damages, relying on theories of negligence, breach of the parties' contract, breach of express warranties concerning crop yields, and breach of implied warranties of fitness for a particular purpose.

In addition to his counterclaim, McDonald asserted as an affirmative defense that Smith had violated several statutory provisions found in Title X of the Iowa Code. Title X includes chapters 189-215A and deals with the regulation and inspection of foods, drugs, chemicals, weights and measures, and other articles. One provision of Title X, found in Iowa Code section 189.30, provides as follows:

> No action shall be maintained in any of the courts of the state upon any contract or sale made in violation of or with the intent to violate any provision of this title by one who was knowingly a party thereto.

McDonald relied on this provision to argue Smith's action was barred by its numerous alleged violations of Title X. The alleged violations included inadequate documentation of bulk deliveries and improper inspection, calibration, licensing, and record-keeping regarding Smith's commercial scale.

Smith's suit and McDonald's counterclaim were tried to a jury. The jury returned a verdict in favor of Smith for $21,247.77 plus interest. The jury also returned a verdict in favor of McDonald for $5,784.25 plus interest on his counterclaim. After McDonald's counterclaim verdict was set off against Smith's verdict, and after interest on both sums was computed, the verdicts yielded a net recovery of $17,653.45 for Smith. The district court entered a judgment in favor of Smith for that amount.

McDonald appeals the judgment in favor of Smith. All of McDonald's appellate issues revolve around his affirmative defense claim that Smith's suit is barred under Iowa Code section 189.30 by Smith's alleged violations of numerous statutory provisions of Iowa Code Title X. McDonald contends the evidence supported his position on these affirmative defense claims so overwhelmingly that the district court should have granted him either a pretrial

summary judgment, a directed verdict at the close of the evidence, a judgment notwithstanding the verdict, or at the least a new trial. McDonald also contends the district court erred by declining to submit his requested jury instructions regarding the applicability to these facts of Iowa Code chapters 212 (bulk commodity sales) and 214 (licensing and inspection of commercial scales).

Smith has previously been involved in this same type of action. In the recent case of Smith Fertilizer and Grain Co. v. Wales, 450 N.W.2d 814, 816 (1990), the supreme court determined Iowa Code section 189.30 "is intended to preclude actions on sales or other contracts in which the seller is shown to have violated some provision in Title X of the Iowa Code which is an integral part of the sales agreement." The issue in that case was whether knowledge was required for section 189.30 to apply. The court held an action on account is barred if the seller has violated the statute even if the seller did not know it was violating any laws. Id. We find the applicable sections of those allegedly violated by Smith all to be "an integral part of a bulk sale of fertilizer by weight." See id. However, we determine no violations have occurred.

Our scope of review for an action at law is for correction of errors at law. Iowa R. App. 4.

I.

McDonald first contends the trial court erred in failing to grant his motion for summary judgment because

Smith's sale and application was allegedly in violation of numerous provisions of Title X, and thus Smith's action was barred. Summary judgment is appropriate only if there exists no genuine issue of material fact. Farm Bureau Mut. Ins. Co. v. Milne, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact. Id. The evidence must be viewed in the light most favorable to the nonmoving party. Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). This procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the nonmoving party. Id. A fact issue is generated if reasonable minds can differ on how the issue should be resolved. Id. If the conflict in the record consists only of legal consequences flowing from undisputed facts, entry of summary judgment is proper. Milne, 424 N.W.2d at 423.

A. McDonald alleges Smith violated Iowa Code section 200.6(2). This section provides:

> If distributed in bulk, the shipment must be accompanied by a written or printed statement giving the purchaser's name and address in addition to the labeling requirement set forth in subsection 2 of section 200.5

The trial court found this section did not apply to McDonald; it noted section 200.6(3) is the applicable subsection. That section states:

> A commercial fertilizer formulated according to specifications which are furnished by a consumer prior to mixing shall be labeled to show the net weight, guaranteed analysis, and the name and

> address of the distributor and may show the net weight and guaranteed analysis of each of fertilizer materials or soil conditioners used. It is the responsibility of the distributor to mix these materials uniformly and intimately so that when sampled in the prescribed manner, the resulting analysis would meet the guarantee.

We agree that only the latter section is applicable in this situation. In addition, we find no violation by Smith here.

McDonald ordered from Smith the specific amount of nitrogen, phosphorous, and potash he desired. The information concerning the net weight, guaranteed analysis, and name and address of the distributor was provided to McDonald in his monthly billing statement. Evidence shows the required information was provided to McDonald.

B. McDonald next contends Smith violated Iowa Code section 212.2. This section requires duplicate delivery tickets be provided for the delivery of any bulk commodities other than liquids. We agree with the trial court that this section is not applicable to the transaction between McDonald and Smith. Section 212.2 specifically excludes liquids; despite McDonald's argument to the contrary, we find the fertilizer and chemicals delivered in this case were in liquid form.

C. McDonald also alleges violations of Iowa Code sections 214.2 (license required for public scale), 214.6 (oath of persons keeping public scales required), and 214.7 (registers required in use of public scale). We find Iowa Code chapter 214 does not apply to this fertilizer

transaction. The trial judge ruled chapter 214 was not applicable, and instructed the jury using chapter 215, "Inspection of Weights and Measures."

Sections 214.2, 214.6, and 214.7 do not apply to this situation because the scales used by Smith are not public. "'Public scale' shall mean any scale or weighing device for the use of which a charge is made or compensation is derived." Iowa Code § 214.1 (1991). Smith did not receive compensation for weighing items. The trial court properly noted:

> The court believes that the public scale provision is as to scales which are being used for a fee. To hold otherwise would indicate that every grocery store that sells bulk meat or anything of the sort would be obligated to have a weighmaster.

The provisions listed above apply only to public scales and thus are inapplicable to Smith.

In the Wales case, the supreme court stated in a footnote that the trial court determined the hopper scale used by Smith was a public scale within the definition of Iowa Code section 214.1. Wales, 450 N.W.2d at 816 n.1. This dicta is not useful in the case before us. The supreme court did not acknowledge agreement with this proposition; the court was concerned solely with the knowledge requirement issue. Although we find Smith complied with all the requirements of the division's inspector, we determine from the record and from the testimony of the acting director of the Iowa Department of

Agriculture Weights and Measures Division that Smith's scale was not, at the time pertinent to this action, a public scale.

D. McDonald additionally argues Smith has violated Iowa Code section 215.6. This section provides:

> If any person engaged in the purchase or sale of any commodity by weight or measurement, or in the employment of labor where the price thereof is to be determined by weight or measurement of the articles upon which such labor is bestowed, has in the person's possession any inaccurate scales, weights, or measures, or other apparatus for determining the quantity of any commodity, which do not conform to the standard weights and measures, the person shall be punished as provided in chapter 189.

Evidence shows the truck scale used by Smith during 1987 had been inspected and approved by the State of Iowa. The hopper scale used to measure McDonald's fertilizer was used with the approval and authorization of the division of weights and measures. We find Smith's hopper scale was not an "inaccurate scale." Though the scale was not approved by the division at that time, the scale inspector did allow the continued use of the scale. If it had been a substantially inaccurate scale, the scale would have been sealed.

E. We find there were genuine issues of material fact and that the law was correctly applied. Smith's action was not barred by Iowa Code section 189.30. The trial court properly denied McDonald's motion for summary judgment.

II.

McDonald further argues on appeal the trial court erred in denying his motion for directed verdict and his motion

for judgment notwithstanding the verdict and not granting a new trial. For the reasons stated above, we find Smith did not violate the alleged sections and as such the verdict in its favor was warranted. We find no merit in these contentions and affirm the trial court's actions on this motion.

III.

Finally, McDonald claims the court erred in failing to grant jury instructions concerning Iowa Code chapters 212 and 214. McDonald wanted to instruct the jury that if it found certain violations of Title X of the Iowa Code, it must find for McDonald and against Smith on Smith's claim. The court refused the proposed instructions because it found the scales were not public and because the goods delivered were in liquid form. Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978). Submission of issues that have no support in the evidence to the jury is error. W.T. Rawleigh Medical Co. v. Bane, 181 Iowa 734, 739, 165 N.W. 42, 43-44 (1917); accord Borough v. Minneapolis & St. Louis R. Co., 191 Iowa 1216, 1223, 184 N.W. 320, 323 (1921); see Miller v. International Harvester Co., 246 N.W.2d 298, 301 (Iowa 1976). The proposed instructions were correctly rejected since they were not the law governing this case.

We affirm the decisions of the trial court and jury in this case.

**AFFIRMED.**