

IN THE COURT OF APPEALS OF IOWA

No. 4-149 / 93-869

FILED

JUN 28 1994

CLERK SUPREME COURT

VICTOR C. TOMKA,

Appellant,

vs.

CARROLL VETERINARY CLINIC, P.C., CRAIG ROWLES, D.V.M.,
MITCH HISCOCKS, D.V.M., HOECHST CELANESE CORP., HOECHST
CELANESE CORP. d/b/a HOECHST-ROUSSEL AGRI-VET CO.,
HOECHST-ROUSSEL AGRI-VET CO., SYNTEX AGRI-BUSINESS, INC.,
SYNTEX ANIMAL HEALTH, INC., SYNTEX ANIMAL HEALTH INC., A
Subdivision of Syntex Agri-Business, Inc., THE UPJOHN
COMPANY, INTERNATIONAL MULTIFOODS CORPORATION, KOSTER
GRAIN, INC., and FARMERS COOPERATIVE ELEVATOR CO.,

Appellees.

Appeal from the Iowa District Court for Carroll County,
Gary L. McMinimee, Judge.

Tomka appeals the district court order denying his
motion to amend the pleadings and granting appellee's
motion for directed verdict. **AFFIRMED.**

Robert Kohorst of Kohorst Law Firm, Harlan, for
appellant.

Roland D. Peddicord and Joseph M. Barron of Peddicord,
Wharton, Thune & Spencer, Des Moines, for appellee Hoechst
Celanese Corp.

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

DONIELSON, C.J.

Victor Tomka operates a cattle feeding business. He entered into various contracts with Bob Brummer under which Tomka was to feed Brummer's cattle and Brummer would pay Tomka for each pound of weight the cattle gained. Under these contracts, Brummer delivered cattle in October 1988, January 1989, and March 1989.

Brummer told Tomka he wanted the cattle implanted with synthetic growth hormones, trade named Ralgro and Finaplix. Tomka relayed this request to the veterinarians. The heifers actually were implanted with Synovex-H and Finaplix-H, synthetic male hormones. Tomka testified the cattle became restless, their appearance changed, and their "mooing" sounded different shortly after implantation of the hormones. The cattle did not gain weight as expected. The veterinarians originally diagnosed the problem as the feed being used. Tomka switched the cattle to better quality feed.

Tomka filed suit against the manufacturer of Finaplix-H, Hoechst Celanese Corporation, and other defendants who are no longer parties. Tomka alleged breach of express warranties, negligence, and product liability. At the close of Tomka's case, Hoechst moved for a directed verdict. Tomka moved to amend the pleadings to conform to the proof. The district court granted the motion for a directed verdict and overruled the motion to amend. Tomka appeals. We affirm the district court.

A directed verdict is appropriate in cases where each element of the claim is not supported by substantial evidence. Oberreuter v. Orion Indus., Inc., 398 N.W.2d 206, 209 (Iowa App. 1986). A court ruling on a motion for directed verdict must view the evidence in the light most favorable to the nonmoving party. Cincinnati Ins. Co. v. Evans, 493 N.W.2d 798, 801 (Iowa 1992); Iowa R. App. P. 14(f)(2). Movant is considered to have admitted the truth of all evidence offered by nonmovant and every favorable inference that may be deduced from it. B & B Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 279, 284 (Iowa 1976). To overrule the motion, the court must find substantial evidence in support of each element of nonmovant's claim. Beitz v. Horak, 271 N.W.2d 755, 757 (Iowa 1978). If reasonable minds could differ, an issue is for the jury. Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443, 444 (Iowa App. 1984). The trial court is vested with considerable discretion in determining whether evidence is sufficient. Hoover's Hatchery, Inc. v. Utgaard, 447 N.W.2d 684, 687 (Iowa App. 1989).

In considering issues on appeal, review only is proper as to those grounds raised in the motion for directed verdict. Ragee v. Archbold Ladder Co., 471 N.W.2d 794, 798 (Iowa 1991). Arguments made for the first time as part of a motion for new trial or on appeal come too late for us to consider. Jacobson v. Benson Motors, Inc., 216 N.W.2d 396, 405 (Iowa 1974); see Miller v. Young, 168 N.W.2d 45, 49-50

(Iowa 1969). Errors must be raised with specificity in the motion for directed verdict or in resisting such motion. Randa v. U.S. Homes, Inc., 325 N.W.2d 905, 910 (Iowa App. 1982); see Stortenbecker v. Goos, 310 N.W.2d 535, 537 (Iowa App. 1981).

During its consideration of defendant's motion for a directed verdict, the following dialogue took place between the court and Mr. Kohorst, counsel for plaintiff:

KOHORST: . . . And the damages actually suffered by Mr. Tomka are the loss of revenues for his facilities, labor, etc.

COURT: Just a moment. I want you to tell me precisely what you claim his damages are and you are claiming in this case.

KOHORST: What we claim as damages is essentially grounded on the 20 cents per pound per head per day kind of --

COURT: 20 cents per pound per head?

KOHORST: Mm-hm.

COURT: Which was the profit --

KOHORST: Over feed costs.

COURT: Okay. Profit. Gross profit, I guess.

KOHORST: Gross revenue, shall we say, Your Honor?

COURT: But that's over feed costs?

KOHORST: Right. Above. It would be that 30 cents would be in a finishing ration.

COURT: All right.

KOHORST: Okay. And 20 cents at a growing ration.

COURT: Okay.

KOHORST: And those profits were lost both during the feeding of this bunch of cattle and thereafter because it lost in the revenue in business from Brummer and others. And that is the type of damages.

COURT: Any other damages?

KOHORST: No. We are not claiming other than those kind of economic losses, Your Honor.

COURT: That's the only economic losses. That's the only damage you are claiming is this contractual economic loss. Or not contractual. It's an economic loss, though.

KOHORST: Yeah. You can almost consider it as like loss of revenue from premises that was otherwise committed.

COURT: Now, how does that -- What's the 20 cents represent?

KOHORST: That represents the revenue for the use of the farm building and facilities, the equipment, the labor, and what would eventually be the profit that Mr. Tomka would have. From conducting his custom feeding operation.

The court understood this to be a claim for economic damages based on lost revenue, which the court equated with the situation in Nebraska Innkeepers v. Pittsburgh-Des Moines Corp., 345 N.W.2d 124 (Iowa 1984). We agree. There was no physical damage to Tomka's property. "[P]urely economic injuries without accompanying physical injury to the user or consumer or to the user or consumer's property is not recoverable under strict liability." Nelson v. Todd's Ltd., 426 N.W.2d 120, 123 (Iowa 1988). Nor are such damages recoverable under negligence. Nebraska Innkeepers, 345 N.W.2d at 126. Based on the evidence presented at trial and the claims made by counsel, the court correctly granted defendant's motion for a directed verdict.

After the court granted the directed verdict against Tomka, counsel argued to the court the damages claimed were to property -- to business good will. The court determined there was not substantial evidence in the record to support this claim. We agree. The evidence reveals Brummer did not send more cattle to Tomka to feed. It also reveals several others only used Tomka once. Nothing in the record, other than Tomka's assertion, suggests this

incident with the implants affected the good will of his business. There is no evidence others even knew of any problem. The district court correctly refused to change its decision granting a directed verdict for defendant.

On appeal, Tomka argues the relationship between himself and Brummer was that of bailor-bailee. This claim was not raised at trial nor in any of the discussions concerning the motion for directed verdict or the motion to amend to conform to the proof. Arguments made for the first time as part of a motion for new trial or on appeal come too late for us to consider. Jacobson, 216 N.W.2d at 405.

Appellant next argues the district court erred in not granting his motion to amend to conform to the proof. We disagree. "A trial court has considerable discretion as to whether an appropriate request for leave to amend should be granted or denied and we will reverse only where a clear abuse of discretion is shown." Allison-Kesley AG Center, Inc. v. Hildebrand, 485 N.W.2d 841, 845 (Iowa 1992) (quoting M-Z Enter. Inc. v. Hawkeye Sec. Ins. Co., 318 N.W.2d 408, 411 (Iowa 1982)).

The "critical determination is whether the proposed amendment substantially changes the issues." Id. The trial proceeded on claims of negligence, product liability, and breach of express or implied warranties. The motion to amend sought to claim intentional tort. The district court found the record did not have substantial evidence to

support a claim of intentional tort. Counsel argued violation of FDA rules, but provided no showing of any violation or that any violation would give rise to a private cause of action. The court also expressed concern about any surprise from an amended claim. Simply because some evidence introduced at trial may support a claim, it does not follow the initial claim may be amended.

More specifically, when the movant seeks to amend based on trial testimony that the movant knew or should have known about beforehand, amendments that might well have otherwise been allowed earlier in the course of the proceedings may properly be denied by the district court judge.

Hildebrand, 485 N.W.2d at 846; Mora v. Savereid, 222 N.W.2d 417, 422-23 (Iowa 1974); Trask v. Gibbs, 200 N.W.2d 565, 568-69 (Iowa 1972). We therefore affirm the district court's denial of Tomka's motion for leave to amend to conform to the proof.

Appellant finally argues the holding of Nebraska Innkeepers should be modified to allow claims for economic damages such as Tomka suffered. Even if we agreed the holding should be modified, this court is not the proper body to change a supreme court opinion.

We have considered all the issues raised by the parties on appeal and determine they are either covered by this opinion or are without merit. For the reasons discussed, we affirm the decisions of the district court granting defendant's motion for directed verdict and denying plaintiff's motion for leave to amend.

AFFIRMED.