IN THE COURT OF APPEALS OF IOWA

No. 0-393 / 09-1447
Filed February 23, 2011

ROZEBOOM DAIRY, INC.,
RICHARD ROZEBOOM and
MICHELLE ROZEBOOM,
Plaintiffs-Appellees,

vs.

VALLEY DAIRY FARM AUTOMATION, INC.,
Defendant-Appellant.

Appeal from the Iowa District Court for Sioux County, Jeffrey A. Neary, Judge.

Valley Dairy Farm Automation, Inc. appeals the district court's denial of its motions for judgment notwithstanding the verdict and for new trial following a jury verdict awarding money damages to plaintiffs. **AFFIRMED.**

Ned A. Stockdale of Fitzgibbons Law Firm, Estherville, for appellant.

Jeff W. Wright and Deena A. Townley of Heidman Law Firm, L.L.P., Sioux City, and John G. DeKoster of DeKoster & DeKoster, Hull, for appellees.

Heard by Sackett, C.J., and Potterfield and Tabor, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

Richard Rozeboom is a dairy farmer and has been in the dairy business since 1998.[1] In 2002, Rozeboom decided to expand his dairy parlor and contacted Valley Dairy to obtain a bid for the construction of a new parlor. Valley Dairy is a merchant that designs, sells, and installs equipment for dairy farmers.

On September 11, 2002, Rozeboom accepted Valley Dairy's written proposal to design and install a dairy parlor that included a water storage and distribution system (System) and a milk transfer system. Kevin Bouwman, part-owner and principal manager of Valley Dairy, visited Rozeboom's farm to design the dairy parlor. Rozeboom informed Kevin that he wanted the System, which was fed by a rural water source, to store water to be used as drinking water for his cattle herd as well as for cleaning purposes. In January 2003, Kevin designed a customized system for Rozeboom that included four water storage tanks. Water was piped into and out of these tanks at the bottom. Water was distributed from these storage tanks to three stock tanks from which the herd drank. Rozeboom also had nine stock tanks that were not hooked to the System, but instead were supplied with direct rural water. The System was placed into service on March 31, 2003.

Rozeboom testified the System consistently caused problems. He testified that the stock tanks that were hooked to the System were persistently dirty and that he noticed smelly, mushroom-like organisms growing in the stock tanks despite his regular efforts to keep them clean. Rozeboom testified that his

[1] For ease of discussion, we will refer to all plaintiffs as "Rozeboom."

herd's health deteriorated and its milk production declined sharply during this time. Rozeboom testified that prior to May 2003, he would clean the stock tanks weekly by draining the tanks, rinsing them with rural water, and scrubbing the sides with a brush. In addition he would use bleach to clean the stock tanks once per month. However, he testified that once the System was in place, the water in the stock tanks connected to the System "kept getting dirtier and dirtier," so he had to increase the frequency with which he cleaned them. He testified that by the fall of 2004, he cleaned the stock tanks connected to the System three times per week, but the organisms would return to the tanks the next day. Rozeboom testified that neither the nine stock tanks that were not connected to the System nor the storage tanks that were connected to the System had contamination problems, and neither required increased cleaning.

Beginning on December 10, 2004, Rozeboom added rumensin to the ration for his cows for about one month. Rumensin is a feed additive that improves feed efficiency. Several experts and the herd's nutritionist testified that the amount of rumensin used by Rozeboom would have no effect on the herd's milk production.

On December 12, 2004, Rozeboom opted to supply the herd with rural water directly and bypass the System installed by Valley Dairy about twenty months earlier. Rozeboom cleaned the tanks with bleach before he refilled them using rural water. He also began to add bleach to the herd's drinking water in January or February of 2005. Rozeboom testified that these changes immediately improved the health of his heard and that its milk production increased markedly as well. Upon seeing this change in health, Rozeboom

collected from the storage tanks a water sample that he had tested at the Iowa State University Veterinary Diagnostic Laboratory. The water was found to contain a growth of the bacillus species.

Within a few days after bypassing the System, Rozeboom informed Valley Dairy of his problems with the stock tanks. William Bouwman, president of Valley Dairy, speculated that perhaps the problem was that the water was not circulating well in the storage tanks. Within a day or two, William changed the design of the System so that the water entered from the tops of the storage tanks rather than the bottoms. Rozeboom then put the System back into use. He testified that he began using the system again in January 2005 and has not had problems with contamination in the stock tanks since.

On April 8, 2008, Rozeboom filed an amended petition at law to recover money damages, claiming Valley Dairy's defective design of the System caused the water in the stock tanks to become stagnant and grow harmful bacteria, which was responsible for his herd's decreased milk production while the System was in use. In addition to the problems with the water storage and distribution system, Rozeboom was critical of Valley Dairy's selection of a one-horsepower pump to transfer milk within the dairy parlor. Rozeboom's claims submitted to the jury included negligence, breach of implied warranty of fitness for particular purpose, and breach of implied warranty of merchantability. After a jury trial, on July 7, 2009, the district court entered judgment against Valley Dairy for $439,750 plus interest and costs.

Valley Dairy now appeals, arguing: (1) substantial evidence does not support a causal relationship between Valley Dairy's System and Rozeboom's

losses; (2) the district court erred in determining that an expert witness was qualified to testify; (3) the district court erred in admitting evidence regarding the presence of bacillus; (4) the district court erred in submitting Rozeboom's negligence claim as it was precluded by the doctrine of economic loss; (5) the district court erred in submitting Rozeboom's claim of implied warranty of fitness for a particular purpose as there was no evidence that at the time of contracting, Valley Dairy had reason to know of a particular use not normally associated with a water storage and distribution system and milk pump; and (6) the district court erred in submitting Rozeboom's claim of implied warranty of merchantability because at the time of sale, the storage system and milk transfer pump were fit for the ordinary purposes for which such goods are used.

II. Standard of Review

We review the denial of a motion for judgment notwithstanding the verdict for correction of errors at law. *Van Sickle Const. Co. v. Wachovia Commercial Mortg., Inc.*, 783 N.W.2d 684, 687 (Iowa 2010).

> Our role is to decide whether there was sufficient evidence to justify submitting the case to the jury when viewing the evidence in the light most favorable to the nonmoving party. Each element of the plaintiff's claim must be supported by substantial evidence to warrant submission to the jury. Evidence is substantial if a reasonable mind would find it adequate to support a finding. We must take into consideration all reasonable inferences that could fairly be made by the jury. Simply put, we ask, was there sufficient evidence to generate a jury question?

Id. (internal quotations and citations omitted).

III. Substantial Evidence of Causation

Valley Dairy argues there was not substantial evidence of a causal relationship between the System and Rozeboom's losses. Valley Dairy asserts

expert evidence was essential to Rozeboom's claim, and because no expert opinion connected the design of the System to any toxin, pathogen, or medical condition that resulted in economic loss, the district court erred in declining to sustain Valley Dairy's motion for directed verdict. We agree with Valley Dairy's contention that expert testimony is essential to generate a jury question given the issues in this case.

> The longstanding Iowa rule is that in a tort action the necessity of expert testimony or the quality of necessary expert testimony determines whether substantial evidence supports the submission of the causal relationship between the act of the wrongdoer and the injury. . . . [F]or substantial evidence to exist on causation, the plaintiff must show something more than the evidence is consistent with the plaintiff's theory of causation. The evidence must show the plaintiff's theory of causation is reasonably probable—not merely possible, and more probable than any other hypothesis based on such evidence. The evidence, however, need not be conclusive of causation.

Doe v. Cent. Iowa Health Sys., 766 N.W.2d 787, 792–93 (Iowa 2009) (internal citations and quotations omitted). Several experts testified regarding the health of the herd before, during, and after the System was in use. Their consensus was that during the time the System was in use, something in the water the cows drank was causing a significant decrease in milk production. Valley Dairy did not refute Rozeboom's expert testimony with any expert testimony, other than that of its part-owner and principal manager, Kevin Bouwman.

Dr. Laverne Sheldahl testified that his opinion, in which he expressed a reasonable degree of certainty, was that the water coming out of the water tanks contributed to the herd's problems. Dr. Randall Shaver testified that the decline in milk production and later increase once Rozeboom bypassed the System was because of the water. Dr. Donald Sanders also testified that he believed the

decrease and later increase in milk production were related to the use of the System to supply drinking water to the herd. Sanders testified that although laboratory work did not exist to confirm that the water was the source of problems, as soon as the water was changed, the cows started producing more milk, and "cows don't lie." Brad Remmers, the herd's nutritionist testified that "the water was involved with the turn-around [in herd health and milk production] and that was the cause of the problem."

The experts went into great detail as to how they arrived at this conclusion. They testified regarding their research into numerous other possibilities as to the cause of the decrease and later increase in milk production and herd health. Ultimately, they were able to rule out rumensin, food, weather, comfort, illness, and stray voltage to arrive at the conclusion that the cause of the Rozeboom's problem was the herd's drinking water. This conclusion was further supported by the fact that the time period in which milk production was reduced and the herd was unhealthy corresponded with the time period in which the System was in use.

Daniel Moore, an experienced worker in the dairy industry, then explained to the jury how the design of the System promoted a build-up of harmful substances. He testified the System was not designed according to industry standards in two significant ways. First, he testified that because the System was designed so that water entered and exited through the bottom of the storage tanks, water would not be evenly circulated throughout all of the vessels. His testimony is supported by the fact that Rozeboom has had no problems with cleanliness in any of his tanks since William Bouwman changed the design of the

System so that the water entered the storage tanks from the top. Moore also testified that Valley Dairy's use of square tanks instead of round tanks would not promote water circulation.

We find the expert testimony, when considered as a whole, showed Rozeboom's theory of causation to be reasonably probable and was sufficient to generate a jury question. The evidence presented by Rozeboom's experts was subject to Valley Dairy's cross-examination both as to content and qualification of the expert. *See Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 535 (Iowa 1999) (finding certain factors "could, and possibly did, affect the weight of [an expert's] testimony, but they do not render his testimony inadmissible"). Therefore, the district court did not err in denying Valley Dairy's motion for judgment notwithstanding the verdict as to evidence of causation.

Valley Dairy argues on appeal that this is a "toxic tort" case with a complex causation issue, like *Ranes v. Adams Laboratories, Inc.*, 778 N.W.2d 677 (Iowa 2010), and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), in which a "more expansive judicial gatekeeping function" for expert witness testimony is appropriate. *See Ranes*, 778 N.W.2d at 686. Further, Valley Dairy contends that the nature of this case requires a "bifurcated toxic-tort-causation analysis into two separate but related parts: general causation and specific causation." *See id.* at 687. Under this analysis, Rozeboom's experts would be required to prove both that a specific pathogen in the water from the System was capable of causing illness and reduced milk production (general causation) and that this pathogen in fact caused these harms (specific causation). *See id.* at 688. Valley Dairy failed to

include those arguments in its motion to determine admissibility of testimony of Daniel Moore or its argument on the motion and also failed to object to the court's causation instruction or propose a causation instruction based upon its "toxic tort" theory. Because Valley Dairy did not preserve error on this issue, we decline to consider this argument. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

IV. Qualification of Moore as an Expert Witness

Valley Dairy argues[2] the district court erred in finding Moore was qualified to testify as an expert witness. We review the district court's decision to admit expert testimony for an abuse of discretion. *Leaf*, 590 N.W.2d at 531.

Iowa has been committed to a liberal view on the admissibility of expert testimony. *Ranes*, 778 N.W.2d at 685. "Our broad test for admissibility of expert testimony has two preliminary areas of judicial inquiry that must be considered before admitting expert testimony." *Id.* First, the court must determine if the testimony will assist the jury in understanding the evidence or determining a fact at issue. Iowa R. Evid. 5.702; *Ranes*, 778 N.W.2d at 685. This has been described as a relevancy requirement. *See Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929 (8th Cir. 2001); *Ranes*, 778 N.W.2d at 685.

Contrary to Valley Dairy's argument, Moore's testimony was not limited to personal opinions of what he would have done; rather, Moore testified regarding industry standards. Moore specifically testified that it was not standard practice

[2] Rozeboom asserts that Valley Dairy did not preserve error on this issue because it did not dedicate any brief points to this issue. Because Valley Dairy cited authority for its argument in its statement of the case, we opt to address this issue in the interest of being thorough.

to fill a water reclamation system from the bottom. We find that Moore's specialized knowledge was relevant to assist the jury in understanding the potential inadequacies or defects in the design of the System.

Second, the court must determine if the witness is qualified to testify as an expert "by knowledge, skill, experience, training, or education." Iowa R. Evid. 5.702; *Ranes*, 778 N.W.2d at 685. "[A]n expert does not need to be a specialist in the area of the testimony as long as the testimony is within the general area of expertise of the witness." *Ranes*, 778 N.W.2d at 687. "[T]he qualifications of an expert can only be properly assessed in the context of the issues to be determined by the fact finder." *Id.* In this case, the issue before the jury was whether the design of the System could have caused a build-up of any harmful substances in the water tanks. At the time of trial, Moore had eleven years of experience in the dairy equipment industry. His job directly involved the design and installation of water reclamation systems. He testified that he received hands-on field training in these areas. The district court did not abuse its discretion in determining that Moore was qualified to express an opinion that was reliable and helpful to the jury. *See Hyler v. Garner*, 548 N.W.2d 864, 868 (Iowa 1996).

V. Admission of Bacillus Evidence

Valley Dairy also argues the district court erred in admitting evidence of the presence of a bacillus species. We review the district court's ruling on the admission of evidence for an abuse of discretion. *Scott v. Dutton-Lainson Co.*, 774 N.W.2d 501, 503 (Iowa 2009).

Valley Dairy first argues the evidence was not relevant and should have been excluded under Iowa Rule of Evidence 5.402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401. We believe the existence of a growth of the bacillus species, which expert testimony established to be a potential pathogenic bacteria, in the storage tanks was relevant to the issue of whether water in the System caused the decline in the herd's health. Though no one tested to determine which species of bacillus was found, Dr. Sanders testified that some members of the bacillus family can cause serious infections. We believe this evidence meets the definition of relevant under rule 5.401.

Valley Dairy next argues that the evidence of bacillus should have been excluded pursuant to Iowa Rule of Evidence 5.403. This rule provides that relevant evidence may be excluded "if its probative value is substantially outweighed by danger of unfair prejudice . . . or misleading the jury . . . ." Iowa R. Evid. 5.403. Valley Dairy argues the evidence was materially misleading and prejudicial because it allowed Rozeboom to argue that the storage tank water was infected by harmful bacteria when there was no medical evidence to support this claim.

We cannot find the district court abused its discretion in admitting this evidence. Valley Dairy established on cross examination that none of Rozeboom's experts could conclusively identify the bacillus as the cause of the decline in herd health. The jury was free to determine how much weight to give

to this evidence after hearing such testimony. However, the probative value of this evidence was not substantially outweighed by a danger of unfair prejudice or misleading the jury.

VI. Economic Loss Doctrine

Valley Dairy argues the district court erred in submitting Rozeboom's negligence claim, asserting it was precluded by the doctrine of economic loss. This doctrine states that a "plaintiff cannot maintain a claim for purely economic damages arising out of [a] defendant's alleged negligence." *Determan v. Johnson*, 613 N.W.2d 259, 261 (Iowa 2000) (internal quotation omitted).

> [T]he line to be drawn is one between tort and contract rather than between physical harm and economic loss. . . . When . . . the loss relates to a consumer or user's disappointed expectations due to deterioration, internal breakdown or non-accidental cause, the remedy lies in contract.

Nelson v. Todd's Ltd, 426 N.W.2d 120, 125 (Iowa 1988). We require "at a minimum that the damage for which recovery is sought must extend beyond the product itself." *Determan*, 613 N.W.2d at 262

In drawing the line between contract and tort, we have consistently allowed recovery in tort where the product was dangerous to the user and caused injuries extending to property other than the product itself. *See Am. Fire & Cas. Co. v. Ford Motor Co.*, 588 N.W.2d 437, 438–39 (Iowa 1999) (allowing tort recovery when a truck caught fire and caused property damage to the truck and its contents); *Ballard v. Amana Soc., Inc.*, 526 N.W.2d 558, 562 (Iowa 1995) (allowing plaintiffs to recover in tort for injury to their swine herd caused by toxic corn feed).

However, we have consistently found the proper remedy is in contract, not tort, in actions where the only damage was a loss of the benefit of the bargain or was to the product itself. *See Determan*, 613 N.W.2d at 264 (barring recovery in tort on plaintiff's claim based on structural defects in a home she purchased); *Flom v. Stahly*, 569 N.W.2d 135, 141 (Iowa 1997) (finding plaintiff's claim was contractual in nature because the harm caused by the defect was limited to the product); *Tomka v. Hoechst Celanese Corp.*, 528 N.W.2d 103, 107 (Iowa 1995) (finding plaintiff's remedy was in contract when the operator of a cattle feeding business sued the manufacturer of a growth hormone because it caused cattle to gain weight slower than expected); *Nelson*, 426 N.W.2d at 125 (finding plaintiffs' proper remedy was in contract for damages suffered when a meat curing agent failed to work as designed and prevent treated meat from spoiling).

In drawing the line between tort and contract, we must also analyze the nature of the defect, the type of the risk, and the manner in which the injury arose. *Determan*, 613 N.W.2d at 262. This case involved a defective design that created a risk of unreasonable dangerousness, not merely an issue of product quality. *See Am. Fire*, 588 N.W.2d at 439 ("[D]efects of suitability and quality are redressed through contract actions."). The injuries to Rozeboom's herd are similar to the injuries in *Ballard*, where the hazard was "peripheral to the sale and a serious product defect" that caused property other than the product to sustain damage. *See Ballard*, 526 N.W.2d at 562. This was not a case where a product simply failed to do what it was supposed do, as in *Tomka* and *Nelson*. We believe the injuries to Rozeboom's herd support damages in tort.

VII. Implied Warranty of Fitness for a Particular Purpose

Valley Dairy argues the district court erred in submitting Rozeboom's claim of implied warranty of fitness for a particular purpose to the jury.

> Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose.

Iowa Code section 554.2315 (2007); *Renze Hybrids, Inc. v. Shell Oil Co.*, 418 N.W.2d 634, 637 (Iowa 1988). "A 'particular purpose' differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business . . . ." *Renze*, 418 N.W.2d at 637.

> Recovery under this section depends upon a showing that (1) the seller had reason to know of the buyer's particular purpose; (2) the seller had reason to know the buyer was relying on the seller's skill or judgment to furnish suitable goods; and (3) the buyer in fact relied on the seller's skill or judgment to furnish suitable goods.

Id.

A. Water Storage and Distribution System

Valley Dairy asserts that Rozeboom's contemplated use of the System was the general purpose for which such Systems are used on dairy farms. Thus, Valley Dairy argues there was no evidence that at the time of contracting, a particular purpose existed for which Rozeboom would use the System or that Valley Dairy had reason to know of a particular purpose. We disagree.

First, we find that Valley Dairy had reason to know of Rozeboom's particular purpose. Valley Dairy custom designed and installed a dairy parlor for Rozeboom. Rozeboom testified that Kevin Bouwman visited the dairy "quite a

few times" to plan the design of the parlor. Rozeboom informed Kevin that he wanted the parlor to include a water storage and distribution system that would serve two specific purposes: provide potable water to his herd and provide water that could be used for cleaning. Kevin testified that he did research to determine the best design for the System taking into account the size of the building, the location of the System within the building, and the purposes it was supposed to serve. Valley Dairy originally installed a system that included only two storage tanks and planned to "expand the system as needed." When two storage tanks proved to be inadequate, Valley Dairy added two more storage tanks. The storage tanks were tanks that had previously been used to transport product and were not typically used for water distribution and storage systems. Kevin testified that he had never plumbed a water reclamation system like he plumbed the System at Rozeboom's farm. The record establishes that Valley Dairy custom designed and installed a System that would fit Rozeboom's particular use of the system that was peculiar to his farm and his needs.

Second, Kevin testified that he knew Rozeboom was relying on him as an "expert in the field of this design" to provide him with a system that would work and serve his needs. Finally, it is evident that Rozeboom did in fact rely on Valley Dairy's expertise and skill in furnishing the System. The district court did not err in submitting this issue to the jury.

B. Milk Pump

Valley Dairy also argues the district court erred in submitting Rozeboom's claim of implied warranty of fitness for a particular purpose as it related to the milk pump. Rozeboom presented evidence at trial that the milk transfer system

installed by Valley Dairy included an inadequate milk pump that caused soils, milk fat, and milk protein to accumulate in the milk transfer lines over time. Stan Gable, a specialist in dairy parlor cleaning and milk movement, testified that the pump was not sufficient and that a larger pump would remedy Rozeboom's problems.

Just as with the System, the record shows Valley Dairy knew that it was designing the milk transfer system to meet the specific needs of the Rozeboom farm. Through Bouwman's conversations with Rozeboom, Valley Dairy had reason to know Rozeboom was relying on Valley Dairy's skill and judgment to properly design the system. It is also evident that Rozeboom did in fact rely on Valley Dairy's expertise and skill in designing and installing the milk transfer system. The district court did not err in submitting this issue to the jury.

VIII. Implied Warranty of Merchantability

Valley Dairy argues the district court erred in submitting Rozeboom's claim of implied warranty of merchantability to the jury. Iowa Code section 554.2314(1) provides, "[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." The implied warranty of merchantability relates only to the quality of the goods at the time of the sale. *Van Wyk v. Norden Labs., Inc.*, 345 N.W.2d 81, 87 (Iowa 1984). Valley Dairy asserts that at the time of sale, the System was fit for the ordinary purpose for which it is used.[3]

[3] As part of the heading on this issue in its brief, Valley Dairy asserts that district court erred in submitting this issue as it related to the milk transfer pump as well. However, Valley Dairy did not argue in support of this in the argument section of its brief.

Though Valley Dairy argues that the System worked as expected because it stored and supplied water, the System in this case was clearly expected to do more than supply water; it was expected to supply *potable* water. As discussed above, there was a significant amount of evidence to the effect that the System did not provide potable water. This evidence was sufficient to generate a jury question on the issue of breach of implied warranty of merchantability. The district court did not err in submitting this issue to the jury.

AFFIRMED.

Therefore, we deem this issue waived pursuant to Iowa Rule of Appellate Procedure 6.14(1)(*c*).