COURT OF APPEALS
DECISION
DATED AND FILED

October 17, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1914

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

ROBERT PERRY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

PLAINTIFF-APPELLANT,

V.

FOREMOST FARMS USA COOPERATIVE, D/B/A GOLDEN GUERNSEY,

DEFENDANT-RESPONDENT,

D'ARCY A. KEMNITZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

PLAINTIFF-APPELLANT,

V.

FOREMOST FARMS USA COOPERATIVE, D/B/A GOLDEN GUERNSEY DAIRY COOPERATIVE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, JR., Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

¶1 PER CURIAM. Robert Perry and D'Arcy A. Kemnitz, individually and on behalf of others they sought to include in a proposed class action, appeal from the trial court's grant of summary judgment to Foremost Farms USA Cooperative, a milk distributor. Perry and Kemnitz claim that Foremost underfilled its milk containers, entitling them to damages, and that the trial court erred by: (1) granting summary judgment to Foremost when genuine issues of material fact existed regarding damages; and (2) denying their request for injunctive relief. We affirm.

I. BACKGROUND

¶2 Perry and Kemnitz, retail consumers, purchased containers of milk packaged by Foremost at its Waukesha plant between 1995 and 1997. They discovered that some of the containers were underfilled and attempted to bring a class action on behalf of other consumers who, presumably, also purchased underfilled milk containers.[1] As evidence of underfilling, Perry and Kemnitz relied on statistics derived from a state agency survey. While these statistics showed some underfilling of milk containers by Foremost, they also showed overfilling that exceeded the underfilling.[2]

[1] With the parties' approval, the trial court postponed a ruling on class certification until it decided the summary judgment motion.

[2] The Wisconsin Department of Agriculture, Trade & Consumer Protection conducted milk studies in 1995 and 1997. Some of the milk tested did not apply to this case because it was either non-retail (used at schools or institutions) or was not processed at the Waukesha plant. The (continued)

¶3 Foremost moved for summary judgment asserting that no evidence of damages had been presented by Perry or Kemnitz, and that their claim under WIS. STAT. § 100.18 (1997-98) was preempted by federal law, which expressly permitted "reasonable variations" in filling milk containers.[3] The trial court granted the motion, holding that "there is no genuine issue of material fact and that's … because the plaintiffs have no evidence to present to any trier of fact … that either of these individual plaintiffs or the punitive class has suffered pecuniary loss" since they "got more instances of overfill than underfill." The trial court noted that Perry and Kemnitz's entire set of evidence consisted of statistics, some of which documented the overfill, and that "the statistics have to be viewed as a whole, otherwise we're playing a joke on the justice system." The trial court also determined that Perry and Kemnitz had not shown a need for injunctive relief.

II. DISCUSSION

¶4 We review the trial court's grant of summary judgment de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816, 820 (1987). When reviewing the trial court's decision, we apply the same standards as did the trial court. *See* ***id.***, 136 Wis. 2d at 315, 401 N.W.2d at 820. WISCONSIN STAT. § 802.08(2) sets forth the standard by which summary judgment motions are to be judged:

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applicable studies indicate, however, that 58 percent of the milk containers were at or above the labeled amount and that 42 percent of the milk containers were underfilled. Total overfill was .584 lbs. while total underfill amounted to .241 lbs. On average, the tested milk containers were overfilled by more than one-tenth of an ounce.

[3] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

> The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

¶5 Wisconsin's deceptive trade practices act requires proof of "pecuniary loss."[4] Both state and federal regulations, however, permit reasonable variations due to either change of moisture content or unavoidable variations in the production process so long as the production process is a "good manufacturing process."[5] According to the Food and Drug Act, "reasonable variations shall be permitted" by regulation. 21 U.S.C. § 343(e).[6] "Reasonable variations caused by

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[4] WISCONSIN STAT. § 100.18(11)(b)2 provides, in pertinent part:

> **Fraudulent representations.** Any person suffering pecuniary loss because of a violation of this section by any other person may sue in any court of competent jurisdiction and shall recover such pecuniary loss, together with costs, including reasonable attorney fees…. Any person suffering pecuniary loss because of a violation by any other person of any injunction issued under this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including reasonable attorney fees.

[5] The Food and Drug Act expressly preempts all requirements for food labeling that are not identical to the requirements found in federal law. *See* 21 U.S.C. § 343-1(a). The Fair Labeling Act preempts all state laws relating to the labeling of net quantities that are "less stringent than or require information different from" federal labeling requirements. 15 U.S.C. § 1461. Preemption applies not only to state action, but to private enforcement actions brought under state law. *See* ***Cipollone v. Liggett Group, Inc.***, 505 U.S. 504, 521 (1992); *see also* ***Kuiper v. American Cyanamid Co.***, 913 F. Supp. 1236, 1240 (E.D. Wis. 1996) ("insofar as the [plaintiffs'] claims are premised upon inaccuracies or falsehoods contained in [the defendant's] labeling or packaging, such claims are clearly preempted by [federal law]").

[6] 21 U.S.C. § 343(e) provides:

> A food shall be deemed misbranded—
> (e) Package form. If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count, except that under clause (2) of this paragraph reasonable variations shall be permitted, and

(continued)

loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized." 21 C.F.R. § 101.105(q).[7] According to Wisconsin law, "[w]ith respect to commodities packaged prior to sale, the department shall issue rules permitting reasonable variations from declared quantity which unavoidably occur in good packaging and distribution practices." WIS. STAT. § 98.07(3). The rules promulgated as a result provide that "no person may sell any commodity … containing a net quantity of that commodity which is less than [that] declared on the package label [unless] the shortage is a result of unavoidable variations … that occur despite good packaging and distribution practices [and] [t]he shortage is not … unreasonable." WIS. ADMIN. CODE § ATCP 90.09.[8]

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exemptions as to small packages shall be established, by regulations prescribed by the Secretary.

[7] 21 C.F.R. § 101.105(q) provides:

> The declaration of net quantity of contents shall express an accurate statement of the quantity of contents of the package. Reasonable variations caused by loss or gain of moisture during the course of good distribution practice or by unavoidable deviations in good manufacturing practice will be recognized. Variations from stated quantity of contents shall not be unreasonably large.

[8] WISCONSIN ADMIN. CODE § ATCP 90.09 provides:

> **Variations from declared net quantity.**
>
> **(1)** INDIVIDUAL PACKAGE. (a) Except as provided under par. (b), no person may sell any commodity in a package containing a net quantity of that commodity which is less than the net quantity declared on the package label.
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> (b) A shortage in an individual package does not violate par. (a) if both of the following apply:
>
> 1. The shortage is a result of unavoidable variations in quantity that occur despite good packaging and distribution practices.

(continued)

¶6 In order to recover, therefore, Perry and Kemnitz must not only prove underfilling, but also underfilling that resulted from a violation of the rules permitting "reasonable variations."[9] While Perry and Kemnitz argue the existence of underfilled milk containers at length, they failed to provide the trial court with any evidence that Foremost did not employ a "good manufacturing process." This is fatal to their claim. Indeed, the instances of overfilled containers in this case indicate that whatever underfilling there was constituted a normal variation of the manufacturing process. Thus, summary judgment was appropriate.[10]

¶7 Perry and Kemnitz also claim that the trial court erred by "averaging" the underfilled containers with the overfilled ones, arguing that they are entitled to compensation for the underfillings while the overfillings should be ignored as separate transactions. They contend that, under the RESTATEMENT (SECOND) OF TORTS § 920 (1977), their damages cannot be reduced by subsequent purchases of overfilled milk containers.[11] We disagree with their premise. Here,

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2. The shortage is not an unreasonable shortage.

[9] Perry and Kemnitz argue that the regulations require all of the allowable variations to be due to the "loss or gain of moisture." *See* App. Brief at 6, 13. As the regulations we have cited above indicate, this is not true.

[10] The issue of "reasonable variations" was not reached by the trial court, which granted summary judgment to Foremost based on its conclusion that Perry and Kemnitz "got more instances of overfill than underfill." We may affirm the trial court's grant of summary judgment on any valid ground, however, including grounds other than those decided by the trial court. *See* ***Vanstone v. Town of Delafield***, 191 Wis. 2d 586, 595, 530 N.W.2d 16, 20 (Ct. App. 1995).

[11] RESTATEMENT (SECOND) OF TORTS § 920 (1977) provides:

> **Benefit to Plaintiff Resulting from Defendant's Tort**
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> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that it is equitable.

Perry and Kemnitz's case for fluid recovery was based on the claim that they, along with the proposed class, were damaged in the aggregate. To prove their case, Perry and Kemnitz relied on statistical projections to establish damages. The trial court then considered all of the statistics offered. These statistics, however, did not support their damage claim. Instead, the statistical evidence provided by Perry and Kemnitz supported the trial court's conclusion that "the plaintiffs have no evidence to present to any trier of fact … that either of these individual plantiffs or the punitive class has suffered pecuniary loss." Perry and Kemnitz's attempt to prove damages on the basis that *any* underfilled container is actionable is contrary to WIS. ADMIN. CODE § 90.09 as well as federal law. In addition, Perry and Kemnitz's claim, that a genuine issue of material fact exists because Foremost did not allege or offer evidence that the underfill damages were wiped out by the overfills, is without merit: The statistics *they* offered provided such evidence. Thus, the trial court correctly concluded that no issue regarding damages existed because the aggregate effect of the variation in the manufacturing process was to benefit, not penalize, the consumer. Accordingly, the trial court properly granted summary judgment.

¶8 Finally, Perry and Kemnitz contend that the trial court erred by not granting injunctive relief to them. We review a decision whether to grant injunctive relief for an erroneous exercise of discretion. *See* ***Pure Milk Prods. Coop. v. National Farmers Org.***, 90 Wis. 2d 781, 800, 280 N.W.2d 691, 700 (1979). To obtain an injunction, a plaintiff must show "a sufficient probability that the future conduct of the defendant will violate a right of and will [irreparably] injure the plaintiff. ***Bubolz v. Dane County***, 159 Wis. 2d 284, 296, 464 N.W.2d 67, 72 (Ct. App. 1990). Here, the trial court determined that there was "no showing that there is a current need for any injunctive relief." Based on

our determination that there was no evidence that Foremost did not use a "good manufacturing process," we conclude that the trial court properly exercised its discretion when it denied injunctive relief to Perry and Kemnitz.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.