

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 27, 2004**

Cornelia G. Clark  
Clerk of Court of Appeals

**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.

**Appeal No. 03-3078  
STATE OF WISCONSIN**

Cir. Ct. No. 02SC002159

**IN COURT OF APPEALS  
DISTRICT IV**

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**FOREMOST FARMS USA,  
  
PLAINTIFF-RESPONDENT,  
  
V.  
  
SHELLY ZETTLER,  
  
DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Sauk County:  
GUY D. REYNOLDS, Judge. *Affirmed.*

¶1 VERGERONT, J.<sup>1</sup> In this small claims action, the circuit court awarded Foremost Farms USA \$4324.43 against Shelly Zettler for damages resulting from contaminated milk shipped by Zettler to Foremost. Zettler appeals, contending that: (1) the circuit court erred in admitting test results into evidence,

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

and (2) the evidence was insufficient to establish damages to a reasonable degree of certainty. We reject both contentions and affirm.

## BACKGROUND

¶2 Zettler, a milk producer, shipped milk to Foremost on November 30, 1999. The milk was delivered by Teresa Bartnik, an independent contractor for Foremost. Although Bartnik did not have a specific recollection of picking up Zettler's milk on that date, she did affirm her handwriting and signature on her weight ticket from that date. Bartnik explained the procedures she routinely uses in loading the milk from a bulk tank at each farm to her truck, including inspecting the milk and taking and storing samples, before going on to pick up milk at other farms.

¶3 Milk collected or received from a dairy farm may not contain "any drug residue," WIS. ADMIN. CODE § ATCP 60.15(3), including antibiotics. WIS. ADMIN. CODE § ATCP 60.01(8m). Foremost, as the operator of a dairy plant, is required to perform a drug residue test on every bulk load of raw milk received at the plant. WIS. ADMIN. CODE § ATCP 60.19(2)(a). When a load arrives at Foremost, an intake worker takes a sample from the commingled milk in the truck and runs a screening test for antibiotics.

¶4 The sample Foremost took from Bartnik's truck on November 30, 1999, tested positive, meaning that it was presumptively positive for antibiotics. According to Foremost's established procedure, if a load tests positive, the intake worker calls the lab and a certified lab technician performs further testing. The certified lab technician called to perform further testing on Bartnik's load on November 30, 1999, was Julie Guden. Guden testified that she tested the load sample twice, explaining her procedures, and both tests were positive. Bartnik

then tested the individual samples she had taken from each farm. Only Zettler's sample tested positive. Guden tested Zettler's sample two more times, and each time it tested positive. Guden filled out a form to notify the Wisconsin Department of Agriculture, Trade and Consumer Protection (ATCP) of the positive test for antibiotics.

¶5 When a bulk load tests positive for a drug residue, the dairy plant operator must reject the entire load and it may not be used for human food; the dairy plant operator must "denature or take responsibility for disposing of the rejected bulk load in a manner that precludes its use for human food." WIS. ADMIN. CODE § ATCP 60.19(4). The evidence in this case shows that Bartnik disposed of the load at a manure pit.

¶6 After getting the positive test results, Guden contacted Foremost's field representative, Herb Wheeler, who went to Zettler's farm that same day to notify her of the test results. Wheeler testified as follows. Zettler had milked that day since Bartnik had left, so there was milk in her bulk tank. Wheeler tested the milk in the tank using a screening test called a "snap test," and the results were positive for antibiotics. Zettler said she had not treated any cows and she did not know where the antibiotics came from. Wheeler volunteered to test all her cows, and he did this that same night, again using the snap test. These tests showed that four or five cows possibly had antibiotics in their milk. The next day Wheeler picked up a sample of milk from Zettler's bulk tank after she milked and before the hauler picked up the milk. He took this sample to the lab for testing because, under the administrative code, Foremost could not accept more milk from Zettler until a test showed there was no drug residue. The results of this test were negative. Wheeler's explanation for this negative result was that Zettler had not included the milk of the cows who tested presumptively positive on the screening

test. On December 13, 1999, Zettler brought in samples from four individual cows, which she had collected herself for a screening test. This is a service Foremost provides to farmers to help them decide when to start commingling the milk of a cow that has been treated with the milk of other cows. Three of the samples tested negative and one tested positive.

¶7 On cross-examination, Wheeler acknowledged that it is possible for screening tests to produce false positives. He also explained that the use of too much bleach or soap can result in a positive on the screening test, because those are sanitizer antibiotics.

¶8 Foremost sent Zettler an invoice for \$5263.85, which, the invoice stated, was the value of 43,717 pounds of milk on the load that was dumped on November 30, 1999, because of milk contamination. The invoice stated the per pound price to be \$0.120407. Wheeler testified that the invoice shows that the value of the milk dumped was \$5263.85. Because of offsets, Foremost was seeking only \$4324.43. On cross-examination, Wheeler testified that there were seventeen farms on that load and the amount paid each farmer is based on a value per hundred weight of milk, which is then applied to the number of pounds of milk from each farmer. The amount paid each farmer can vary based on somatic cell count and butter fat content, all determined by a scale. Foremost does not have a separate contract with each farmer establishing the price it pays each farmer.

¶9 Zettler did not present any witnesses. After hearing argument, the circuit court determined that Foremost had established that Zettler's milk tested positive for antibiotics on November 30, 1999. It rejected Zettler's argument that the test results were inadmissible because Bartnik's testimony did not establish that she followed the procedures in WIS. ADMIN. CODE §§ ATCP 82.10 and 82.12

for collecting and testing samples. The court reasoned that whether the procedures were followed went to weight rather than admissibility in this civil action. The court found that Foremost had established that Zettler's milk tested positive for antibiotics by a preponderance of the evidence. The court also rejected Zettler's argument that Foremost had not established damages. The court acknowledged that the evidence on the precise contractual arrangement was "thin," but found that the reasonable inference was that Foremost had lost money, and it awarded \$4324.43.

## DISCUSSION

¶10 On appeal, Zettler renews her argument that the court erred in admitting the results of the tests conducted by Guden because Bartnik's testimony did not show compliance with WIS. ADMIN. CODE §§ ATCP 82.10 and 82.12. She contends that under WIS. STAT. § 97.23(2)(a), Foremost may not recover from Zettler the value of the milk it dumped unless there was compliance with every applicable rule, including §§ ATCP 82.10 and 82.12. Zettler also argues that the presumption of validity in WIS. ADMIN. CODE § ATCP 60.19(10) requires that Foremost show compliance with every rule governing the collection and testing of samples.

¶11 Resolution of this issue requires that we construe this statute as well as administrative regulations, thus presenting questions of law, which we review de novo. *Moonlight v. Boyce*, 125 Wis. 2d 298, 303, 372 N.W.2d 479 (Ct. App. 1985). We apply the same rules in construing statutes and administrative regulations. *State v. Bucheger*, 149 Wis. 2d 502, 506, 440 N.W.2d 366 (Ct. App. 1989). We begin with the language itself and, if that is plain, we apply the language to the facts at hand. *Id.* at 507. If the language is susceptible to more

than one reasonable construction, we may consider extrinsic evidence to arrive at the more reasonable construction. See *Franklin v. Housing Authority of Milwaukee*, 155 Wis. 2d 419, 426, 455 N.W.2d 668 (Ct. App. 1990).

WISCONSIN STAT. § 97.23(2)(a) provides:

(2) (a) If, in accordance with a rule promulgated by the department under s. 93.07 (1), 97.09 (4), 97.20 (4), 97.22 (8), 97.24 (3) or 97.52, a dairy plant operator rejects a bulk milk shipment because it is adulterated with a drug residue and if the dairy plant operator incurs a monetary loss as a result of the rejection of the bulk milk shipment, the dairy plant operator may recover the amount of the monetary loss from the milk producer who caused the bulk shipment to be adulterated with the drug residue. A dairy plant operator may deduct the amounts recoverable by him or her under this paragraph from the proceeds of milk sold to or through the dairy plant operator by the milk producer who caused the adulteration.

The various statutes referred to in the first sentence give the department the authority to promulgate rules for consumer protection and handling of foods in general, and the operation of dairy plants and dairy farms, milk production, and milk hauling in particular.

¶12 WISCONSIN ADMIN. CODE §§ ATCP 82.10 and 82.12 provide procedures for milk haulers to follow in collecting and testing milk samples from a farmer's bulk tank before commingling it in the truck with milk from other producers. The milk hauler is required to "promptly deliver the sample to the dairy plant operator, or to a milk testing laboratory designated by the dairy plant operator." WIS. ADMIN. CODE § ATCP 60.17(2). As noted above, the dairy plant operator is required to test a sample from every bulk load for drug residue. WIS. ADMIN. CODE § ATCP 60.19(2)(a). If the bulk load tests positive for a drug residue under § ATCP 60.19(2), "the dairy plant operator shall perform a drug

residue test on each of the individual milk producer samples collected for that bulk load under s. ATCP 60.17.” Section ATCP 60.19(3). If any test positive for any drug residue, the dairy plant operator must perform a confirmatory test. *Id.* As noted above, if the bulk load tests positive for a drug residue, the operator must reject and either denature or dispose of the load. Section ATCP 60.19(4).

¶13 We first address Zettler’s argument based on WIS. STAT. § 97.23(2)(a). She relies on the language “in accordance with a rule promulgated by the department.” According to Zettler, unless the sample from her bulk tank that Bartnik collected and gave to Foremost was collected in conformity with WIS. ADMIN. CODE §§ ATCP 82.10 and 82.12, Foremost did not reject the load “in accordance with a rule.”<sup>2</sup> However, there is nothing in the regulation Zettler has referred us to that obligates Foremost to reject a load only if the milk producer’s sample was collected by the hauler in conformity with §§ ATCP 82.10 and 82.12. Rather, Foremost is obligated to reject the load under WIS. ADMIN. CODE § ATCP 60.19(4) “[i]f a bulk load of milk from one or more producers tests positive under sub. (2).” Section ATCP 60.19(2) does not relate to the tests the dairy plant operator performs on the sample of each individual producer’s milk collected by the hauler, but on the sample the dairy plant operator itself takes from the bulk load.

¶14 The evidence in this case established that the tests on the sample Foremost took from the bulk load were positive for drug residue. Therefore, Foremost rejected the load in accordance with WIS. ADMIN. CODE § ATCP

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<sup>2</sup> Zettler appears to assume that, in the absence of WIS. STAT. § 97.23(2)(a), Foremost could not recover from her for the contaminated load it rejected. Without deciding whether that assumption is correct, we accept it for purposes of discussion.

60.19(4). Accordingly, under WIS. STAT. § 97.23(2)(a), if Foremost incurs a monetary loss because of the rejection of that load, it is entitled to “recover the amount of the monetary loss from the milk producer who caused the bulk shipment to be adulterated with the drug residue.”

¶15 We next address Zettler’s argument that because there was a lack of compliance with administrative procedures, Foremost should not be entitled to the presumption of validity given to test results under WIS. ADMIN. CODE § ATCP 60.19(10)(c), and therefore these results are inadmissible. Section ATCP 60.19(10)(c) provides:

(c) *Test result presumed valid.* For purposes of this section and s. ATCP 60.275, whenever a dairy plant operator reports a positive test result to the department under sub. (8), that test result is rebuttably presumed to be valid.

¶16 WISCONSIN ADMIN. CODE § ATCP 60.19(8)(a)2 requires the dairy plant operator to report to the department whenever it performs a drug residue test under sub. (3) and the milk producer sample tests positive. Thus, when a dairy plant operator reports that a producer’s milk has tested positive, as Foremost did here, the test result is rebuttably presumed valid, but only “for purposes of this section and s. ATCP 60.275.” “This section,” § ATCP 60.19, establishes a procedure for a dairy plant operator to recover for a rejected milk load from the producer whose milk tested positive by deducting the amount from the dairy plant operator’s obligation to the producer; the procedure includes notice to the producer and an opportunity to contest the validity of the recovery. Section ATCP 60.19(5).

¶17 We conclude that WIS. ADMIN. CODE § ATCP 60.19(10)(c) does not support Zettler’s position for three independent reasons. First, the plain language



states that the presumption applies only to proceedings under § ATCP 60.19. Second, even if the presumption were available in court actions, there is no language indicating that the presumption does not apply unless the dairy operator first establishes that the tests producing the positive results were conducted on samples that were collected in compliance with all the regulatory provisions; indeed, construing the paragraph in this way leaves little if any function for the presumption. The more reasonable construction is that this paragraph gives the positive test results a presumption of validity that the producer can then rebut by showing a lack of compliance with procedures that affect the validity of the results. Third, even if the presumption were available in court actions and worked as Zettler contends—that is, Foremost does not have the benefit of the presumption because it did not establish compliance with WIS. ADMIN. CODE §§ ATCP 82.10 and 82.12—there is nothing in this regulatory provision to prevent Foremost from establishing its case through evidence showing how Zettler’s sample was collected and tested and the results.

¶18 In summary, we conclude that neither WIS. STAT. § 97.23(2)(a) nor WIS. ADMIN. CODE § ATCP 60.19(10)(c) requires Foremost to establish Bartnik’s compliance with WIS. ADMIN. CODE §§ ATCP 82.10 and 82.12 in order for the test results to be admissible.

¶19 Zettler also appears to challenge the court’s decision to admit Bartnik’s testimony because she could not specifically remember collecting milk from Zettler on November 30, 1999. Under WIS. STAT. § 799.209(2), the rules of evidence do not apply “except those relating to privileges under ch. 905 or to admissibility under s. 901.05. The court or court commissioner shall admit all other evidence having reasonable probative value, but may exclude irrelevant or repetitious evidence or arguments.” Even under the rules of evidence, evidence of

a person's routine practice is admissible to prove that the person's conduct on a particular occasion was in conformity with the routine practice. WIS. STAT. § 904.06. The court certainly did not erroneously exercise its discretion in admitting Bartnik's testimony. See *State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983) (generally, admissibility of evidence is committed to the circuit court's discretion).

¶20 Based on the testimony of Bartnik, Guden, and Wheeler, there was ample testimony on which the court could find that the load delivered by Bartnik on November 30, 1999, tested positive for antibiotics and also find that milk produced at Zettler's farm caused that test result.

¶21 Finally, Zettler contends the evidence on damages was insufficient to support the award. In her view, Foremost had to present documentary evidence of the amounts it paid the other producers whose milk was in the same load. In addition, she points out that Wheeler's testimony that producers are paid based on milk content is inconsistent with the invoice that shows one price per pound.

¶22 Zettler relies on *Thorp Sales Corp. v. Gyuro Grading Co.*, 107 Wis. 2d 141, 152-53, 319 N.W.2d 879 (Ct. App. 1982), which Foremost agrees sets forth the correct standard:

Damages for breach of contract are recoverable only to the extent that the evidence permits the loss to be established to a reasonable degree of certainty. However, such damages need not be ascertainable with absolute exactness or mathematical precision. The evidence is sufficient if it enables the trier of fact to make a fair and reasonable approximation. The plaintiff bears the burden of establishing reasonably certain damages.

¶23 When we review an award of damages, we do not substitute our judgment for that of the court or the jury but instead, viewing the evidence most

favorably to sustaining the award, we decide only if the award is reasonable. *Cords v. Anderson*, 80 Wis. 2d 525, 552-53, 259 N.W.2d 672 (1977). In addition, because this is a small claims action, we bear in mind that the circuit court has wider discretion on the type of evidence to admit and to consider in reaching its decision. *See* WIS. STAT. § 799.209.

¶24 We conclude there was a sufficient basis in the record for the damages the court awarded. The court could choose to rely on the invoice, coupled with Wheeler's testimony that the dollar amount on the invoice represented the value of the milk rejected. It is not clear that Wheeler's testimony on how milk prices are determined in general was inconsistent with having one price per pound for this entire load. In any event, it is the role of the circuit court sitting as trier of fact, not this court, to decide how to construe a witness's testimony and how to resolve any inconsistencies. *Thomas v. State*, 92 Wis. 2d 372, 381-82, 284 N.W.2d 917 (1979).

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.



