IN THE COURT OF APPEALS OF IOWA

No. 0-274 / 09-0835
Filed June 30, 2010

ELDON C. STUTSMAN, INC.,
Plaintiff-Appellee,

vs.

TYLER ROGERS,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Douglas S. Russell, Judge.

A defendant farmer appeals from the district court's verdict in favor of an agricultural chemical supply company, contending the district court erred in dismissing his counterclaims. **AFFIRMED.**

Davis L. Foster of Foster Law Office, Iowa City, for appellant.

Bruce L. Walker and Anna Stone of Phelan, Tucker, Mullen, Walker, Tucker, Gelman, L.L.P., Iowa City, for appellee.

Heard by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

DOYLE, J.

A defendant farmer appeals from the district court's verdict in favor of an agricultural chemical supply company, contending the district court erred in dismissing his counterclaims for (1) breach of contract, (2) negligence, (3) breach of express warranty, and (4) breach of implied warranty. Stutsman requests appellate attorney fees. We affirm.

***I. Background Facts and Proceedings*.**

Tyler Rogers, twenty-eight years old at the time of trial, grew up assisting his father and grandfather in their farming operations. Rogers began farming for himself in 2003, and he took over for his grandfather in 2005. Additionally, Rogers expanded his farming acreage in 2005 by about four times the amount he had farmed in the past, including renting additional tracts of land from the Iowa Department of Natural Resources (DNR). In contracting with the DNR, Rogers was required to leave ten percent of his crop grown on those fields unharvested as a nature and wildlife preserve. Rogers acknowledged that the DNR land had some sandy soil that was affected by heat and moisture issues.

In planning his 2005 crops, Rogers consulted with a seed company to decide whether to plant seeds that had been genetically modified (GMO) or non-GMO, conventional seeds. The GMO seeds are engineered to be tolerant of a particular brand of herbicide. As a result, weeds are more easily controlled because the GMO crops can be sprayed with the herbicide generally anytime without damaging the GMO crops. Conventional, non-GMO crops require more weed maintenance and are more risky than the GMO crops, but the non-GMO crops generally sell for a higher premium.

Rogers's grandfather had previously planted conventional seeds, and Rogers wanted to continue with conventional crops. Rogers discussed his planting options with Matt Peterson. At that time, Peterson was a salesman for Eldon C. Stutsman, Inc. (Stutsman), an agricultural product supply company that supplied, among other things, chemicals for controlling weed growth in fields. Rogers and Rogers's grandfather had worked with Peterson and Stutsman previously, and Rogers had an open account with Stutsman. Rogers and Peterson were friends.

Rogers told Peterson he was thinking of planting conventional crops, and Peterson gave Rogers a bid on behalf of Stutsman for a chemical treatment program to control weeds based upon Rogers's decision to plant conventional crops. The program called for two sprays of chemicals, one prior to the planting of crops in the field and one after the crops began to emerge to control weeds and insects. Stutsman was to determine what chemicals to use and when to spray Rogers's fields, and a Stutsman employee would then spray Rogers's fields.

Rogers ultimately decided to plant conventional soybean and corn seeds, and he accepted Stutsman's bid for its chemical treatment program. It was understood by Peterson and Rogers that Rogers would later execute a promissory note and security agreement to finance the payment of the chemical treatment program, with Rogers repaying the note when he harvested the crops in the fall. Rogers also obtained crop insurance from an insurance provider, insuring his corn crop yield at 124 bushels per acre and his soybean crop yield at 43 bushels per acre.

At or about the end of April into May 2005, Stutsman applied the first spray of chemicals to Rogers's fields. Thereafter, Rogers planted his crops. Rogers believed that Peterson would monitor his fields and determine when the second spray should be applied to his fields; Rogers did not receive or obtain any directions from Stutsman regarding the spraying of the chemicals. About a month after the first spray, starting about June 1, 2005, Stutsman began applying the second spray of chemicals to Rogers's fields.

On or about August 1, 2005, Rogers signed a promissory note promising to pay Stutsman $108,019.12, due on December 1, 2005, with interest at 10.25%, based on the amounts currently due in Rogers's open account, including the cost of the chemical treatment program. The promissory note also provided for attorney fees. Additionally, Rogers executed a security agreement securing his crops as security for the note.

Peterson left Stutsman at the end of October 2005. Rogers harvested his crops in the fall. Rogers's soybean crop yielded approximately 36.68 bushels per acre. Rogers's corn crop yielded approximately 114.59 bushels per acre.

Rogers failed to pay the promissory note when due in December 2005. In March 2006, Rogers gave two checks he had received from the sale of his crops to Stutsman. Stutsman applied the checks to Rogers's other open accounts and then towards payment of the note, reducing the amount due on the note to $63,159.29 plus interest.

In November 2006, Stutsman filed its petition for judgment on note and foreclosure of a security interest. The petition asserted that Rogers had not made any payments on the note since March 2006 and was in default. Stutsman

requested attorney fees. Stutsman later amended its petition to add Rogers's other outstanding Stutsman accounts it claimed were in default. Additionally, Stutsman added a conversion claim, seeking punitive damages for Rogers's failure to tender monies paid to Rogers and due to Stutsman under the security agreement.

In January 2007, Rogers filed his answer and counterclaims against Stutsman. Rogers admitted he had executed the promissory note and security agreement, but asserted that nonperformance by Stutsman excused his nonpayment of amounts claimed and discharged his obligations under the security agreement. Additionally, Rogers asserted four counterclaims against Stutsman for (1) breach of contract, (2) negligence, (3) breach of express warranty, and (4) breach of implied warranty. Rogers claimed the chemicals chosen by Stutsman or Stutsman's method of application were inappropriate or ineffective, resulting in weeds growing in his field which substantially reduced his crop yield. Rogers asserted he presented this information to Stutsman but Stutsman refused to remedy the situation.

A bench trial was held in November 2008. At trial, Rogers testified that weeds were a serious problem for his 2005 crops. Rogers testified that he brought the weed issue to Peterson's attention and that Peterson immediately applied the second spray once Rogers alerted him to the problem. Rogers testified that after the second spray, weeds continued to be a problem, and he again talked to Peterson. He testified that Peterson told him to give the chemicals time to work. When the weeds continued to grow, Rogers testified that Peterson told him there was nothing further that could be done to combat the

weeds, as any additional spraying of chemicals would cause more damage to the non-GMO crops than would benefit the crops. He testified that he signed the promissory note and security agreement with Peterson knowing about the weed problem; Rogers did not immediately follow up with anyone else at Stutsman about his weed problem.

After Peterson left Stutsman, Rogers testified he talked to Steve Meyerholtz, Stutsman's agronomy sales manager, in approximately November 2005 about settling his bill. Rogers testified he asked Meyerholtz if he knew anything about the weed problem that he had, and Meyerholtz told him he did not know anything about it. Rogers testified that he then left because he was a little worked up, and he did not communicate with Stutsman again until approximately end of December 2005 or beginning of January 2006.

Rogers did not present any photographic evidence of his alleged weed problem, nor did he provide any prior or subsequent years' crop yield information from which to compare his 2005 yields. Rogers acknowledged that 2005 had a dry summer. He estimated he lost 12 bushels per acre on 700 acres of corn, 50 bushels per acre on 130 acres of corn, and 5 to 7 bushels per acre on 255 acres of soybeans. Based on the government guaranteed prices for these crops in 2005, Rogers claimed a total crop loss of $39,850. Rogers testified he received $600 to $700 in crop insurance payments for his crop loss.

Peterson testified that he monitored Rogers's fields that summer and rode along during Rogers's harvest that fall. Peterson testified that weeds were a problem in Rogers's fields and that the beans were very weedy that season. Peterson testified that there was crop loss due to the weeds in Rogers's fields,

estimating sometimes up to fifty percent of the crop was lost. He testified that he assured Rogers he would receive some compensation from the chemical companies for his weed problem and that he had talked to the chemical companies about getting Rogers a settlement for his weed issue. He further testified that he discussed a settlement with Meyerholz regarding Rogers's weed issue three times before he left.

Meyerholtz, appearing as Stutsman's corporate representative, testified that Peterson told him just before he left that he "might have to throw [Rogers] a bone because he thinks he has a weed problem." He admitted that in November, Rogers came to his office and asked if he was aware of any problems and that he told Rogers he was not aware of any problems. Meyerholtz agreed that Rogers was relying on Peterson to make the determination about when to apply the second chemical spray to his fields. Additionally, Meyerholtz agreed that Rogers's crops were reduced because of the presence of weeds in his fields. However, Meyerholtz said he disputed the timing of Rogers's raising the weed issue, as Rogers signed the note after his fields had been sprayed. Meyerholtz maintained that when Rogers signed the note and security agreement, Rogers accepted all responsibility of his fields and his crop and released Stutsman of any liability. Meyerholtz testified that Rogers was the only one of the conventional bean planting farmers where Stutsman's applied the chemicals who had a problem with the yield, and he testified that other farmers had reduced yields in 2005. He also testified that Rogers did not properly monitor his fields, as he did not notify Stutsman before harvest of any problems, or the chemical companies, and Peterson never said anything until after harvest.

An employee of Stutsman who mixes and sprays chemicals testified that he looked at Rogers's fields after harvest, and he saw signs of crop stress and some signs of weeds in the light, sandy soil areas. He testified that he personally had a reduced yield in 2005 in farming his own lands due to drought.

Two employees of chemical companies testified that Peterson had contacted them, one in September and the other later in October, advising that one of his clients may have had a weed problem. They testified that Peterson essentially told them he would follow up with them and never did. Both employees thought the problem was a minor issue.

Tom Bayliss, a Stutsman employee and family friend of Rogers's, testified Rogers talked to him around harvest about his bill. Bayliss testified that Rogers told him that he was harvesting and had a poor yield and thought there was going to be a problem with weeds. Bayliss told him he would look into it. Bayliss testified that he, Mark Stutsman, and the Stutsman employee who had sprayed Rogers's fields examined the DNR grounds. He testified that at that time, the crops had already been harvested and he did not see anything unusual about the weed pressure in that area. He testified that Rogers had planted some conventional soybeans for him that year, and he estimated that he got about thirty bushel of soybeans an acre.

Mark Stutsman (Mark), a third-generation owner of Stutsman, testified Rogers came in to talk to him and asserted Stutsman had overcharged him, but Rogers did not complain of a weed problem in the initial conversation. He testified that Rogers later indicated there was a weed problem in the DNR lands, and he and other Stutsman employees went to the DNR land to observe any

issues. Mark testified that some crops were left on the DNR land as required under the DNR contract, and where those crops were left, he observed no weeds but a shorter crop height than average. He testified that the shorter crop height is attributable to stress from lack of moisture. He testified that he did not know that Rogers asserted a weed problem in his other fields until later, and he testified that if he had known in advance, he would have sent out a weight wagon to determine whether weeds were in fact an issue. He testified that lots of farms had reduced yields in 2005 where moisture in the soil was an issue. He further testified that in his opinion, Rogers did not have a weed problem.

Robert Ascheman, an agricultural consultant, testified as an expert on behalf of Stutsman. He testified that in 2005, farms in drought-affected regions suffered lower yields, and he testified that some of Rogers's fields were in the drought-affected regions. Ascheman testified some of the first chemical sprays applied to Rogers's fields were ineffective because the spray required rainfall to take effect and there was a lack of rain after the first spray. He further testified the application of second chemical spray to Rogers's fields should have been earlier in time and that a window of opportunity in controlling weeds had been missed in spraying later. He testified that Rogers's crop yields could have been reduced in part by ineffective weed treatment compounded by hot, dry weather, but he could not separate out yield reduction due to weather versus weed conditions. In his opinion, Rogers's inexperience, coupled with choosing non-GMO seeds, low rainfall, and high heat conditions lead to Rogers's reduced yields. He also testified that Rogers's yield on the DNR lands would have been reduced by the amount he had to leave unharvested.

On March 23, 2009, the district court entered its findings of fact, conclusions of law, and judgment, finding in favor of Stutsman and dismissing Rogers's counterclaims. The court explained:

> The success of herbicides depends on the farmer in cooperation with the salesman monitoring the fields, the manufacture of the chemicals, the Stutsman staff who mix the chemicals, and the Stutsman operator who applies them. The success of the crop also depends on the seed and fertilizer used and on the soil, moisture and weather conditions at the time.
>
> . . . .
>
> Rogers presented no accurate data as to his 2005 harvest from the GPS monitor on his combine . . . .
>
> Rogers presented no accurate dat[a] or documentary evidence on the 2004, 2006, and 2007 crop yields on the ground he had farmed before 2005 to prove his crop loss in 2005 by comparative analysis. He presented no expert evidence on the amount of his claimed crop loss. Mr. Peterson's estimates of the crop loss were estimates and were not given weight by the court because he was not designated as an expert witness by Rogers and no notice was given to Stutsman of such testimony. Mr. Rogers'[s] own testimony on crop loss was also based on estimates.
>
> Further, Rogers'[s] crop losses on all but the home place and the DNR leased ground related to acres he had not farmed before and for which he presented no evidence of yields in previous years. Rogers based his loss calculation on his estimates of what the 2005 crop yields would be rather than the experience of others who had farmed the same acres previously. The estimates he used for his 2005 corn and bean crops were made for his financial lenders and may well have been optimistic. . . .
>
> . . . .
>
> . . . Neither party is responsible for weather conditions. . . . It should be apparent within a week whether the first application [of chemicals] was effective. It is the duty of Rogers, not Peterson, to carefully observe the fields after the first application of chemicals, especially in the first seven to ten days, for reason that if the first application fails, a second application must be made promptly. . . .
>
> . . . The court notes that Stutsman began the second spraying the very next day after Rogers had Peterson look at the weeds in the fields. A remedial second spraying could have been done sooner if Rogers had notified Stutsman sooner. . . . The court concludes Rogers was negligent in not monitoring his fields more closely and in not notifying Stutsman of the weed problem sooner.

> . . . As it appears to the court, Rogers only began to complain to Stutsman management after Peterson left the employment of Stutsman, the harvest results were less than Rogers expected, and he was faced with a promissory note obligation he could not pay on time. His claims of negligence, breach of contract, and breach of warranty were not raised as original claims but only in response to the petition filed against him. It appears to the court that Rogers was looking for someone besides himself to be responsible for his disappointing harvest in 2005.

The court concluded:

> [W]hile Rogers has proven that Stutsman was partially responsible for his crop loss by the failure of the products it sold him to control his weeds, [Rogers] has not met his burden of proof that the actions or omissions of Stutsman or its agents were more than 50% of the fault causing his loss. Further, Rogers has failed to meet his burden of proving that the acts or omissions of Stutsman were the proximate cause of his claim for reduced crop yield and has failed to meet his burden of proof as to the amount of damages attributable to the negligence of Stutsman.
>
> The cause of Rogers'[s] crop loss was a combination of weeds and the hot and dry weather and soil conditions in 2005 that affected everyone in the Johnson County area.
>
> . . . .
>
> Upon a review of the record as a whole, the court concludes that the counterclaim must fail on all its theories because Rogers has failed to meet his burden of proof on the two elements common to all theories—causation and damages.

The court awarded Stutsman damages on its breach of contract and conversion claims, along with attorney fees. The court dismissed Rogers's counterclaim.

Rogers now appeals the dismissal of his counterclaims. He essentially contends the district court erred in determining he failed to meet his burden of proof on the elements of causation and damages. He asserts he is therefore entitled to a judgment for the damages of his crop loss, to be offset against Stutsman's judgment.

***II. Scope and Standards of Review*.**

> We review the judgment of a district court following a bench trial in a law action for correction of errors at law. The district court's findings of fact have the force of a special verdict and are binding on us if supported by substantial evidence. Evidence is substantial if a reasonable person would accept it as adequate to reach a conclusion. "'Evidence is not insubstantial merely because we may draw different conclusions from it; the ultimate question is whether it supports the finding actually made, not whether the evidence would support a different finding.'" In determining whether substantial evidence exists, we view the evidence in the light most favorable to the district court's judgment. If the district court's "findings are ambiguous, they will be construed to uphold, not defeat, the judgment."

Chrysler Fin. Co. v. Bergstrom, 703 N.W.2d 415, 419 (Iowa 2005) (internal citations omitted). However, the district court's "legal conclusions and application of legal principles are not binding on the appellate court." *EnviroGas, L.P. v. Cedar Rapids/Linn County Solid Waste Agency*, 641 N.W.2d 776, 781 (Iowa 2002) (citation omitted). We will reverse a district court's judgment if we find the court has applied erroneous rules of law, which materially affected its decision. *Falczynski v. Amoco Oil Co.*, 533 N.W.2d 226, 230 (Iowa 1995).

***III. Discussion*.**

To prevail on any of his counterclaims, Rogers was required to prove the damages resulting from Stutsman's actions or omissions. *See generally Raas v. State*, 729 N.W.2d 444, 447 (Iowa 2007) (noting fourth element of establishing negligence claim is damages); *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998) (noting fifth element of establishing breach of contract claim is "damages as a result of the breach"); *see also* Iowa Code § 554.2714(2) (2009) (setting the measure of damages for breach of warranty claims). Rogers does not assert that the damages elements of the counterclaims

contain different elements, and we therefore will assume the damages elements of the counterclaims are coextensive. *See generally William C. Mitchell, Ltd. v. Brown*, 576 N.W.2d 342, 351 (Iowa 1998) (noting jury "had two theories of recovery from which to choose which involved essentially the same elements of damages").

The party seeking damages has the burden to prove them. *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 641 (Iowa 1996). However, "[t]here is a distinction between proof that a party has suffered damages and proof regarding the amount of those damages." *Id*. "If the record is uncertain and speculative whether a party has sustained damages, the fact finder must deny recovery." *Id*. "But if the uncertainty is only in the amount of damages, a fact finder may allow recovery provided there is a reasonable basis in the evidence from which the fact finder can infer or approximate the damages." *Id*. Even if it is difficult to ascertain the amount of damages with any precision or certainty, that alone is not a basis for denying recovery. *Bangert v. Osceola County*, 456 N.W.2d 183, 190 (Iowa 1990). Damages should not be denied so long as there is evidence that some damages were sustained. *Palmer v. Albert*, 310 N.W.2d 169, 174 (Iowa 1981). However, recovery should not be allowed where the damage estimate is overly speculative. *See Jamison v. Knosby*, 423 N.W.2d 2, 6 (Iowa 1988).

Here, Stutsman's corporate representative testified that Rogers was relying upon Peterson to monitor his fields and to spray them when needed. At trial, the parties stipulated that "it was reasonable and expected by Stutsman's that Tyler Rogers could rely on Stutsman's to monitor his fields and determine

when to spray his crops and what chemicals to use." Stutsman's expert testified that the second spray of Rogers's fields came too late to control weeds. Additionally, the corporate representative testified that Rogers's crops were reduced because of the presence of weeds in his fields. Thus, it is clear Rogers sustained some crop damage due to weed infestation, of which Stutsman is partially responsible.

Nevertheless, as stated above, recovery should not be allowed where the damage estimate is overly speculative. Rogers provided estimates for the amounts he believed his yields to have been reduced due to weed infestation. However, Rogers admitted he had not farmed many of the tracts before 2005, giving him no basis from which to estimate his 2005 crop yield and thus the amount the yield was reduced by weeds. Rogers did not provide any prior or subsequent crop yield data to which to compare his 2005 harvest yield. Rogers did not provide any expert testimony as to the amounts of his crop loss. Rogers admitted 2005 was a dry summer, and Stutsman's expert testified that many fields in drought-affected areas had a yield reduction simply due to a lack of rain. Although Peterson's testimony supports that there was a weed problem in Rogers's fields, he testified that Rogers's yield was reduced as much as fifty percent in some fields, but gave nothing from which to compare the reduction, and he did not provide any totals as to Rogers's crop loss. Additionally, Rogers testified he received crop insurance payments of only $600 to $700 for his loss of crops in 2005. In viewing the evidence in the light most favorable to the district court's judgment, we find no error in the district court's determination that Rogers failed to meet his burden of proof on the damages elements of his counterclaims.

***IV. Attorney Fees*.**

On appeal, Stutsman requests an award of appellate attorney fees. A successful party ordinarily cannot recover attorney fees unless they are authorized by statute or contractual agreement. *W.P. Barber Lumber Co. v. Celania*, 674 N.W.2d 62, 66 (Iowa 2003). Stutsman asserts that it is entitled to recover appellate attorney fees under the promissory note signed by Rogers, which states that Rogers agreed to pay all reasonable attorney fees and costs of collection "[i]n the event that this note shall be in default and placed for collection." We disagree. The appeal before us challenges the district court's dismissal of Roger's counterclaims, not Stutsman's original claims for breach of the promissory note. Stutsman points to no other statute or agreement authorizing an award of appellate attorney fees in this case. Accordingly, we decline to award appellate attorney fees. Court costs on appeal are taxed to Rogers.

***V. Conclusion*.**

In employing the applicable standards of review, we find no error in the court's determination that Rogers failed to meet his burden of proof on the damages elements of his counterclaims. Accordingly, we affirm the judgment of the district court, and we decline to award appellate attorney fees.

AFFIRMED.