COURT OF APPEALS
DECISION
DATED AND FILED

January 12, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2015AP739 **Cir. Ct. No. 2012CV74**

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

PAUL HALDERSON, LYN M. HALDERSON AND ARCTIC VIEW FARMS, LLC,

PLAINTIFFS-APPELLANTS,

V.

STAR BLENDS, LLC,

DEFENDANT-RESPONDENT,

ABC INSURANCE COMPANY,

DEFENDANT,

NORTHERN STATES POWER COMPANY D/B/A XCEL ENERGY SERVICES, INC.,

DEFENDANT-CO-APPELLANT.

APPEAL from a judgment of the circuit court for Trempealeau County: JOHN A. DAMON, Judge. *Affirmed in part; reversed in part and cause remanded for further proceedings.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Paul Halderson, Lyn Halderson, and Arctic Farms, LLC, (collectively, the Haldersons) appeal a judgment dismissing their breach of contract and breach of warranty claims against Star Blends, LLC. Northern States Power Company, d/b/a Xcel Energy Services, Inc., also appeals, arguing the circuit court erred by dismissing its cross-claims against Star Blends for contribution and indemnification. We conclude the circuit court properly dismissed Northern States' cross-claims against Star Blends, but it erred by dismissing the Haldersons' breach of contract and breach of warranty claims. Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

BACKGROUND

¶2 The Haldersons own and operate a dairy farm in Galesville, Wisconsin. Star Blends is a Wisconsin company engaged in the business of mixing, distributing, and selling livestock feed. The Haldersons were customers of Star Blends for several years prior to 2011. The Haldersons would order product from Star Blends, which would mix the product based on a recipe or ration provided by the Haldersons or their dairy nutritionist and then deliver it to the Haldersons' farm.

¶3 One of the products that Star Blends sold to the Haldersons was a vitamin/mineral premix that was to be included in the total mixed ration fed to the

Haldersons' cows. Each delivery of the vitamin/mineral premix lasted for about two weeks. Star Blends delivered an order of the vitamin/mineral premix to the Haldersons' farm on or about June 1, 2011. The Haldersons contend that, after this delivery, cows in their herd began to experience illness, significant decreases in milk production, and death. The Haldersons assert they had "numerous local veterinarians … out to the farm in an attempt to find a cause to the health problems." The local veterinarians "posted [the] dead cows and did a visual examination" but did not conduct mineral tests on tissue from the affected animals.

¶4 On September 15, 2011, after the local veterinarians failed to produce an explanation for the herd's declining health, the Haldersons took some of their sick cows to Dr. Jeremy Schefers, a veterinarian and food animal diagnostician at the University of Minnesota Veterinary Diagnostic Laboratory. Doctor Schefers euthanized the cattle in order to perform necropsies, which included mineral testing. The test results showed abnormally high levels of copper, selenium, and zinc. Doctor Schefers emailed his findings to the Haldersons on September 27, 2011.

¶5 At his deposition, Paul Halderson testified he called Tom Lohr at Star Blends in early October of 2011. Halderson testified he informed Lohr "that I have high concentrations of heavy metal type in the necropsies of the tissues of the cows[,]" and he asked "if [Lohr] had some retained samples to see if there was a problem." According to Halderson's deposition testimony, Lohr responded that Star Blends keeps samples only for the current month and the three previous months. Conversely, in an affidavit submitted in opposition to summary judgment, Halderson averred, "During my multiple conversations with Tom Lohr,

I was informed that Star Blends retained samples and that the samples would be sent out for testing."[1]

¶6 The Haldersons contend they began purchasing feed and mineral mix from a different feed mill in early October 2011. The Haldersons also assert that, at some unspecified time, Paul Halderson told Star Blends he "would not pay [his] bill" because he "believed Dr. Schefers' results showed that [Star Blends] had given [him] some bad feed that was harming [his] cows." The Haldersons further assert that they filed a complaint regarding Star Blends with the Wisconsin Department of Agriculture, Trade, and Consumer Protection in early or mid-October of 2011.

¶7 The Haldersons filed the instant lawsuit against Star Blends on April 4, 2012. They alleged the vitamin/mineral premix delivered by Star Blends on or about June 1, 2011, "caused illness and deaths in [their] dairy herd[,]" along with decreased milk production. The Haldersons claimed the defective premix breached the parties' contract, as well as the implied warranties of merchantability and fitness for a particular purpose. *See* WIS. STAT. §§ 402.314, 402.315.[2] The Haldersons further alleged, "On March 8, 2012, written notice of the breach and

[1] On appeal, the Haldersons contend, without citation to the record, that Lohr "sent six samples of feed from June, July, and August to a laboratory." Assertions of fact in an appellate brief that are not properly demonstrated to be part of the record on appeal will not be considered. *See* ***Nelson v. Schreiner***, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991).

[2] It is undisputed that the Haldersons' claims are governed by the Uniform Commercial Code (UCC).

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

buyers' revocation of acceptance was given to Star Blends following the discovery that the vitamin/mineral premix had been confirmed as toxic."[3]

¶8 The Haldersons filed an amended complaint on April 30, 2012, and a second amended complaint on October 29, 2012. Those pleadings repeated the same basic claims and factual allegations with respect to Star Blends, including the allegation that the Haldersons provided written notice of the breach on March 8, 2012. In addition, the second amended complaint added negligence and nuisance claims against Northern States. Specifically, the Haldersons alleged their farm "was accessed by stray electricity and earth current from the distribution system of [Northern States]," which caused decreased milk production and other injuries to their herd. Northern States answered the Haldersons' second amended complaint and asserted a cross-claim against Star Blends for "Common Law Contribution/Indemnification."

¶9 On April 1, 2014, Star Blends moved for summary judgment on the Haldersons' breach of contract and breach of warranty claims, arguing the Haldersons' written notice of the alleged breaches failed to comply with WIS. STAT. §§ 402.607(3)(a) and 402.608(2), both of which require timely notice of a breach as a precondition to recovery.[4] The Haldersons opposed Star Blends'

[3] The March 8, 2012 notice advised Star Blends that the Haldersons were revoking their acceptance of the vitamin/mineral premix, pursuant to WIS. STAT. § 402.608. Alternatively, it stated the Haldersons were notifying Star Blends, "in compliance with WIS. STAT. § 402.607," that the "dangerous and defective state of the vitamin/mineral premix" was a breach of the parties' contract.

[4] WISCONSIN STAT. § 402.607(3)(a) provides that, where tender has been accepted, "[t]he buyer must within a reasonable time after the buyer discovers or should have discovered any breach notify the seller of the breach or be barred from any remedy[.]"

(continued)

motion. However, they did not rely on their March 8, 2012 written notice of the breach. Instead, they claimed for the first time that Paul Halderson's telephone conversation with Tom Lohr in early October 2011 satisfied the notice requirements of § 402.607(3)(a). They did not argue this oral notice satisfied the requirements of § 402.608(2).

¶10 The circuit court granted Star Blends' motion for summary judgment on May 28, 2014. The court concluded the October 2011 conversation between Halderson and Lohr was "too vague to meet the requirements of notice within a reasonable time of a breach of contract as required under [WIS. STAT. §] 402.607." The court subsequently denied the Halderson's motion for reconsideration. The Haldersons then appealed, but we dismissed the appeal on jurisdictional grounds, concluding the order appealed from was not final because it did not resolve Northern States' cross-claims against Star Blends.

¶11 Thereafter, Star Blends moved for summary judgment on Northern States' cross-claims, and the circuit court granted its motion. The Haldersons now appeal the dismissal of their claims against Star Blends, and Northern States appeals the dismissal of its cross-claims.

DISCUSSION

¶12 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Malzewski v. Rapkin***, 2006 WI App 183,

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WISCONSIN STAT. § 402.608 permits a buyer to revoke his or her acceptance of goods under certain circumstances. Subsection 402.608(2) states, in relevant part, "Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects."

¶11, 296 Wis. 2d 98, 723 N.W.2d 156. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). When applying this standard, we construe all facts and reasonable inferences in the light most favorable to the nonmoving party. ***Thomas ex rel. Gramling v. Mallett***, 2005 WI 129, ¶4, 285 Wis. 2d 236, 701 N.W.2d 523.

I. The Haldersons' claims against Star Blends

¶13 As noted above, WIS. STAT. § 402.607(3)(a) requires a buyer subject to the UCC, as a precondition to recovery, to notify a seller of a breach "within a reasonable time after the buyer discovers or should have discovered any breach[.]" The Haldersons argue they met this standard because: (1) they discovered the breach on September 27, 2011, when they received Dr. Schefers' test results; and (2) Paul Halderson notified Star Blends of the breach several days later, in early October, during a telephone conversation with Tom Lohr. Star Blends does not dispute that the Haldersons discovered the alleged breach on September 27, 2011, nor does it argue the Haldersons should have discovered the breach sooner. In addition, Star Blends does not argue the telephone conversation in early October did not occur within a reasonable time after the Haldersons discovered the alleged breach.

¶14 Instead, Star Blends argues the Haldersons cannot rely on the October 2011 conversation as providing notice of the breach because neither their complaint, their amended complaint, nor their second amended complaint contained any allegations pertaining to that conversation. The Haldersons' pleadings simply alleged that they provided written notice of a breach on March 8, 2012. Because the Haldersons no longer contend the March 8, 2012 notice was

timely, Star Blends argues they are "left with a pleading insufficient to state a viable claim[,]" and summary judgment was therefore proper.

¶15 However, Wisconsin is a notice pleading state. ***Wolnak v. Cardiovascular & Thoracic Surgeons of Cent. Wis., S.C.***, 2005 WI App 217, ¶47, 287 Wis. 2d 560, 706 N.W.2d 667. "Under notice pleading, one need only give the opposing party fair notice of what the claim is and the grounds upon which it is based." ***Id.*** When reviewing a complaint's sufficiency, "we examine whether it contains sufficient details to give the defendant and the court a fair idea of what the plaintiff is complaining about." ***Id.***, ¶48. Here, the Haldersons' various complaints gave Star Blends fair notice of the claims they were asserting and the factual basis for those claims, including the fact that the Haldersons were claiming they had provided notice of a breach. That the Haldersons now rely on a different occurrence of notice than that specifically alleged in their pleadings is of no import because the pleadings clearly informed Star Blends of the general grounds on which the Haldersons' claims were based. Indeed, under notice pleading, the Haldersons could simply have alleged that they provided Star Blends with timely notice of the breach, without stating how or when notice was provided. Star Blends' argument regarding the sufficiency of the second amended complaint is essentially an attempt to penalize the Haldersons for being too specific in their allegation regarding notice.

¶16 In the alternative, Star Blends argues the telephone call to Lohr was insufficient, as a matter of law, to constitute notice of a breach. During the telephone conversation, Halderson stated there were high concentrations of heavy metals in tissue samples taken during necropsies of the Haldersons' cattle. He then asked if Lohr "had some retained samples to see if there was a problem." Star Blends asserts these statements "did not tell Star Blends that [it], as opposed

to others, … potentially did anything wrong." Star Blends also contends the telephone conversation "did not inform Star Blends of a claim or describe a product defect." Similarly, the circuit court concluded the telephone conversation was insufficient to constitute notice because Halderson did not explicitly state that he was rejecting the vitamin/mineral premix, that he was making a claim against Star Blends, or that he was giving Star Blends notice of a contract violation.

¶17 We disagree, based on our supreme court's decisions in ***Paulson v. Olson Implement Co.***, 107 Wis. 2d 510, 319 N.W.2d 855 (1982), and ***Wojciuk v. United States Rubber Co.***, 19 Wis. 2d 224, 120 N.W.2d 47 (1963). In ***Paulson***, the plaintiffs purchased grain drying equipment from the defendants, based on the defendants' representation that it could dry 5000 bushels of corn in twenty-four hours. ***Id.*** at 512-14. After the plaintiffs used the equipment three or four times, they discovered it actually took forty to fifty hours to dry 5000 bushels. ***Id.*** at 514. The plaintiffs telephoned the defendants to complain, and the defendants visited the plaintiffs' farm on multiple occasions to discuss the problem. ***Id.*** On one of these occasions, the defendants recommended increasing the drying temperature. ***Id.*** When that failed to alleviate the problem, they replaced a drying fan. ***Id.*** After that measure also failed, they installed a new drying floor. ***Id.*** However, the plaintiffs continued to have problems with the drying equipment. ***Id.*** at 514-15. Finally, about two years after purchasing the equipment, the plaintiffs sued the defendants for breach of warranty. ***Id.*** at 515.

¶18 Following a jury trial, the circuit court dismissed the plaintiffs' claims, reasoning that the plaintiffs' did not notify the defendants of a breach until they filed suit, and a two-year delay in giving notice was unreasonable as a matter of law. ***Id.*** at 515-16. On appeal, our supreme court reversed. The court rejected the circuit court's conclusion that notice was not provided until the plaintiffs filed

suit. Instead, the court observed that the plaintiffs, after attempting to dry three or four bins of corn, "provided notice within approximately two months following installation of the facility that the grain drying equipment was not performing as expected." ***Id.*** at 525.

¶19 The ***Paulson*** court further concluded the plaintiffs' notice satisfied the requirements of WIS. STAT. § 402.607(3)(a). ***Paulson***, 107 Wis. 2d at 526. Based on cases decided before Wisconsin adopted the UCC, the defendants had argued notice under § 402.607(3)(a) "must apprise the seller that the buyer looks to seller for damages for such breach." ***Id.*** at 522. However, the ***Paulson*** court clarified that, under the UCC, "this is no longer intended to be a requirement of notice." ***Id.*** at 523. "[I]n order to protect purchasers[,]" the court then explicitly adopted the following comment to § 2-607 of the UCC, which is the counterpart to WIS. STAT. § 402.607:

> The content of the notification need merely be sufficient to let the seller know that the transaction *is still troublesome and must be watched.* There is no reason to require that the notification which saves the buyer's rights under this section must include a clear statement of all the objections that will be relied on by the buyer .... *Nor is there reason for requiring the notification to be a claim for damages or of any threatened litigation or other resort to a remedy.*

Paulson, 107 Wis. 2d at 523-24 (emphasis and ellipses in ***Paulson***).

¶20 In ***Wojciuk***, a pre-UCC case, the plaintiffs sued the defendant for breach of warranty after a tire they purchased from him suffered a blowout, causing a rollover accident. ***Wojciuk***, 19 Wis. 2d at 227-28. One of the plaintiffs testified he telephoned the defendant on the day of the accident and said, "Herb, what kind of tires did you sell me? … We had a blowout and a terrible accident resulted from it." ***Id.*** at 235.

¶21 On appeal, our supreme court initially concluded this was insufficient to constitute notice of a breach because "[t]he notice requirement is not satisfied by informing the seller of the facts concerning the breach, but the notice must inform the seller, either expressly or by implication, of the buyer's claim that a breach exists and that the buyer will look to the seller for damages." ***Id.*** at 235a. On rehearing, however, the court concluded that, viewing the evidence in the light most favorable to the plaintiff, "a jury could reasonably infer that [the plaintiff] was asserting, in his telephone conversation, a violation of plaintiffs' legal rights arising out of their purchase of a tire." ***Id.*** at 235f. The court explained:

> It is true that [the plaintiff] made no demand for damages nor statement that he would hold [the defendant] accountable. Had the same words been said in a casual conversation, the case might be different, but here the circumstances are of substantial importance. The call was made the same day as the accident, while [the plaintiffs] were several hundred miles from Milwaukee. The record suggests no reason for [the plaintiff] to call [the defendant] unless he felt that [the defendant] had some obligation because of the tire failure.

Id. at 235g. Thus, even under the more stringent, pre-UCC standard applied in ***Wojciuk***, the notice the plaintiff provided was not insufficient as a matter of law.

¶22 The plaintiffs in ***Paulson*** and ***Wojciuk*** did not expressly tell the defendants that a breach of contract had occurred, that the plaintiffs were rejecting or revoking acceptance of the goods, or that the plaintiffs believed they had a claim against the defendants for damages. In ***Paulson***, the plaintiffs merely informed the defendants the equipment was not performing as expected. ***Paulson***, 107 Wis. 2d at 525. In ***Wojciuk***, the plaintiff informed the defendant an accident had occurred and asked "what kind of tires" the defendant had sold him. ***Wojciuk***, 19 Wis. 2d at 235. Here, Paul Halderson informed Tom Lohr that necropsies of

his cattle had revealed high concentrations of heavy metals, and he then asked whether Star Blends had retained samples of the vitamin/mineral premix "to see if there was a problem." This conversation arguably informed Star Blends the transaction was "troublesome" and should be watched. *See* ***Paulson***, 107 Wis. 2d at 523. Consequently, as in ***Wojciuk***, we conclude a reasonable jury could infer from the evidence that Halderson provided Star Blends with notice of a breach. *See* ***Wojciuk***, 19 Wis. 2d at 235f.[5]

¶23 Star Blends relies on the following language from a footnote in ***Paulson*** to support its position that the October 2011 telephone conversation could not, as a matter of law, constitute sufficient notice under WIS. STAT. § 402.607(3)(a):

> Under the cases we have cited, it is clear that Wisconsin does not utilize a different notice standard than the [UCC] provides. Inherent in notice is the concept of reasonableness. The seller must be informed by the buyer that the buyer considers him (as opposed to others) responsible to remedy a troublesome situation. The Code seeks to eliminate an element of unfair surprise where a seller has not been informed that a situation is troublesome and, therefore, cannot take steps to correct it but only later has a lawsuit filed against him.

Paulson, 107 Wis. 2d at 523 n.8. Star Blends argues Halderson's statements to Lohr did not inform Star Blends that the Haldersons blamed it, as opposed to

[5] Citing ***Kennedy-Ingalls Corp. v. Meissner***, 11 Wis. 2d 371, 105 N.W.2d 748 (1960), Star Blends implies that a different, more stringent standard than the one set forth in ***Paulson v. Olson Implement Co.***, 107 Wis. 2d 510, 319 N.W.2d 855 (1982), applies when a buyer provides oral, as opposed to written, notice of a breach. We reject this contention. ***Kennedy-Ingalls Corp.*** was decided before ***Paulson***. ***Paulson*** expressly adopted a more liberal notice requirement than that set forth in pre-UCC cases. Nothing in ***Paulson*** suggests that this more liberal standard applies only to written notices. Indeed, the notice in ***Paulson*** was made through a telephone call. *See* ***id.*** at 514.

another party, for the damages to their cattle. We disagree. Halderson informed Lohr of abnormal mineral test results, and immediately thereafter, he asked whether Star Blends had retained samples of the premix to see whether there was a "problem." One reasonable inference from Halderson's statements is that he believed Star Blends was responsible for the high concentrations of heavy metals found in the sick cattle.

¶24 Citing ***Marsh Wood Products Co. v. Babcock & Wilcox Co.***, 207 Wis. 209, 240 N.W.2d 392 (1932), Star Blends also argues the Haldersons did not provide sufficient notice of the breach because they continued purchasing vitamin/mineral premix from Star Blends after the allegedly defective product was delivered on or about June 1, 2011. However, ***Marsh Wood Products*** is distinguishable. There, the plaintiff continued purchasing the defendant's product after the plaintiff discovered, or should have discovered, the product's defective condition. ***Id.*** at 224. The plaintiff did not notify the defendant of any defect until one year and eight months later. ***Id.*** Conversely, in this case, there is nothing in the record to indicate that the Haldersons discovered Star Blends' product might be to blame for their herd's health problems before September 27, 2011. Paul Halderson then contacted Star Blends about the problem in early October. Shortly thereafter, the Haldersons stopped purchasing feed and vitamin/mineral premix from Star Blends. Under these circumstances, the fact that the Haldersons continued purchasing vitamin/mineral premix from Star Blends after June 1, 2011 does not render the October 2011 notice untimely or otherwise insufficient as a matter of law.

¶25 Finally, Star Blends argues the October 2011 telephone conversation between Halderson and Lohr did not serve the purposes of the notice required by

WIS. STAT. § 402.607(3)(a). In ***Wilson v. Tuxen***, 2008 WI App 94, ¶41, 312 Wis. 2d 705, 754 N.W.2d 220, we explained:

> A notice of breach serves two purposes. First, if the seller is not aware that the goods are defective, the notice can serve to inform the seller of the defect and give the seller an opportunity to remedy it. In addition—and perhaps more importantly—the notice serves to advise the seller that "the buyer considers him [or her] ... responsible to remedy a troublesome situation." This is intended to "open the way for settlement through negotiation between the parties" and permit the seller to "investigate the claim while the facts are fresh, avoid the defect in the future, minimize his damages, or perhaps assert a timely claim of his own against third parties."

(Citations omitted.) Because the allegedly defective premix had been consumed and, according to Star Blends, the retained samples were destroyed before October 2011, Star Blends argues it had no opportunity to remedy the breach or investigate the Haldersons' claim. Star Blends therefore argues the October 2011 conversation cannot constitute sufficient notice of a breach.

¶26 There are two problems with Star Blends' argument. First, Paul Halderson averred in his affidavit that Tom Lohr informed him Star Blends had retained samples of the vitamin/mineral premix. We must accept this assertion as true for purposes of this appeal. *See* ***Thomas***, 285 Wis. 2d 236, ¶4.

¶27 Second, even if we were to assume the samples were destroyed before the October 2011 conversation between Halderson and Lohr, it is undisputed that the Haldersons did not discover the breach alleged in this case until September 27, 2011. Star Blends does not argue the Haldersons should have discovered the alleged breach any sooner. Thus, the Haldersons could not possibly have notified Star Blends of the breach before the allegedly defective product was consumed and the samples were destroyed. If Star Blends were

correct that notice was required while the product was still in existence, any notice provided in October 2011 would have been defective, as a matter of law, regardless of its form or content. This result would fly in the face of the statutory language, which requires notice within a reasonable time after the buyer "discovers or should have discovered any breach[.]" WIS. STAT. § 402.607(3)(a).

¶28 Moreover, we agree with the Haldersons that the consumption of the product and destruction of samples did not prevent Star Blends from investigating the Haldersons' claim. The Haldersons suggest a number of reasonable methods of investigation Star Blends could have pursued, including: interviewing its own employees and examining its equipment to determine whether it was in proper working order; sending representatives to the Haldersons' farm to observe the farm's mixing practices; contacting the Haldersons' nutritionist or Dr. Schefers to discuss how the high concentrations of heavy metals found in the necropsied cattle could have occurred; or obtaining an independent analysis of the tissue samples. That the Haldersons did not provide notice of the breach until October 2011 did not prevent Star Blends from taking any of these, or other, steps.

¶29 Viewing the evidence in the light most favorable to the Haldersons, and drawing all reasonable inferences in their favor, we conclude a jury could find that the October 2011 telephone conversation between Halderson and Lohr constituted sufficient notice of a breach. Accordingly, the circuit court erred by granting Star Blends summary judgment on the Haldersons' claims. We therefore reverse the grant of summary judgment and remand for further proceedings.

II. Northern States' cross-claims

¶30 Northern States asserted cross-claims against Star Blends for contribution and indemnification. When the facts are undisputed, whether a party

is entitled to contribution or indemnification is a question of law that we review independently. ***Jasmine J.E. v. John E.P.***, 198 Wis. 2d 114, 117, 542 N.W.2d 171 (Ct. App. 1995). In this case, we conclude the circuit court properly granted Star Blends summary judgment on the cross-claim because, based on the undisputed facts, Northern States is not entitled to either contribution or indemnification from Star Blends.

A. Contribution

¶31 "Contribution involves apportionment of liability where two or more parties share liability for the same injury." ***Estate of Kriefall v. Sizzler USA Franchise, Inc.***, 2012 WI 70, ¶58, 342 Wis. 2d 29, 816 N.W.2d 853. "When no express agreement confers a right of contribution, a party's right to seek contribution against another is premised on two conditions: (1) the parties must be liable for the same obligation; and (2) the party seeking contribution must have paid more than a fair share of the obligation." ***Kafka v. Pope***, 194 Wis. 2d 234, 242-43, 533 N.W.2d 491 (1995). The requisite "same obligation" is also referred to as "common liability."[6] *See* ***Johnson v. Heintz***, 73 Wis. 2d 286, 295, 243 N.W.2d 815 (1976) (quoting ***Farmers Mut. Auto. Ins. Co. v. Milwaukee Auto. Ins. Co.***, 8 Wis. 2d 512, 515, 99 N.W.2d 746 (1959)).

[6] Citing ***Teacher Retirement System of Texas v. Badger XVI Ltd. Partnership***, 205 Wis. 2d 532, 556 N.W.2d 415 (Ct. App. 1996), Northern States argues the existence of common liability is a question of fact. However, ***Teacher Retirement System*** merely held that, in that particular case, there were questions of fact pertaining to the determination of common liability. ***Id.*** at 546. ***Teacher Retirement System*** did not, and could not, overrule the previously decided ***Jasmine J.E. v. John E.P.***, 198 Wis. 2d 114, 117, 542 N.W.2d 171 (Ct. App. 1995), which held that a party's entitlement to contribution presents a question of law where the facts are undisputed. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997) (only the supreme court has the power to overrule, modify or withdraw language from a published court of appeals opinion).

¶32 Mere liability to the same person for damages is insufficient to establish the "common liability" required for a contribution claim. For instance, "'successive tortfeasors—those whose negligent acts produce discrete, albeit overlapping or otherwise related, injuries—may not assert claims of contribution against one another.'" ***General Accident Ins. Co. of Am. v. Schoendorf & Sorgi***, 202 Wis. 2d 98, 104, 549 N.W.2d 429 (1996) (quoted source omitted); *see also* ***Johnson v. Heintz***, 61 Wis. 2d 585, 600, 213 N.W.2d 85 (1973) ("[S]uccessive tort-feasors are not subject to contribution, even though the injuries sustained are apparently indivisible[.]").

¶33 Here, Star Blends and Northern States do not share common liability for the same damages to the Haldersons' cattle. The Haldersons claim Star Blends injured the cattle by providing defective feed on one occasion in June 2011. Meanwhile, they claim stray voltage produced by Northern States injured their cattle over the course of many years, beginning in January 2004. Although the alleged conduct of Star Blends and Northern States may have caused the same type of damages during an overlapping time frame, that phenomenon would not mean they are jointly liable for those damages. In fact, the Haldersons' damages expert separated the damages attributable to each defendant, submitting one report on the damages purportedly caused by stray voltage and another report on the damages allegedly caused by defective feed.[7] Notably, Northern States has not offered any contrary expert opinion stating that any damages arising from the two defendants' conduct are inseparable.

[7] Although Northern States does not agree with the expert's opinion and questions whether he is qualified to apportion the damages, those concerns merely go to the weight of the expert's opinion; they do not form a basis for Northern States to assert a cross-claim for contribution against Star Blends.

¶34 Because the only evidence in the record shows that the damages allegedly caused by Star Blends and Northern States are separable, the circuit court properly granted Star Blends summary judgment on Northern States' cross-claim for contribution. As the circuit court noted, the jury in this case can be instructed to assign to each defendant responsibility for only those damages caused by its conduct. For example, the court can give an instruction similar to WIS JI—CIVIL 1722 (Damages from Nonconcurrent or Successive Torts), which provides:

> Where a person has received injuries from separate acts which are not related to each other, the total damages sustained by the injured person must be divided among the separate acts which caused such damages.
>
> You should not be concerned that you cannot divide the damages exactly or with mathematical precision. In answering this question (these questions), you should use your best judgment based on the evidence received during the trial to determine the damages incurred by (plaintiff) in the accident involving (defendant).

The court can also fashion a special verdict asking the jury to apportion the Haldersons' damages between Star Blends and Northern States. In this way, the court can prevent the jury from awarding damages against Northern States that are not attributable to its conduct. "[I]f there is no possibility of a party paying more than its proportionate just share, there can be no possibility of the right to contribution." ***Jackson v. Ozaukee Cty.***, 111 Wis. 2d 462, 466, 331 N.W.2d 338 (1983).

¶35 ***Housing Authority v. Barrientos Designs & Consulting, LLC***, 2006 WI App 203, 296 Wis. 2d 744, 724 N.W.2d 395, supports our conclusion that Northern States' contribution claim fails, as a matter of law. There, the Housing Authority of the City of Milwaukee sought breach of contract damages from two

defendants—Dehling Voigt, Inc., which reroofed four housing developments for the Housing Authority; and Barrientos Design & Consulting, LLC, which provided plans and specifications for the project. ***Id.***, ¶¶2-3. Dehling asserted a cross-claim against Barrientos for contribution and/or indemnification. ***Id.***, ¶3. Barrientos then settled with the Housing Authority and moved for summary judgment on the cross-claim. ***Id.*** The circuit court granted Barrientos's motion, on the ground that the damages could be separated, and the court "anticipated fashioning a jury verdict form that asked the jury to individually determine the damages caused … by the two defendants[.]" ***Id.***, ¶1.

¶36 Dehling appealed, and we affirmed. We explained:

> Dehling contends that the trial court erred in granting summary judgment because the allegations raised by the Housing Authority accuse the two businesses of breaching their separate contracts, resulting in the same damages; thus, the two have common liability which gives rise to a potential contribution claim and this is a question a jury should determine. Dehling submits that it is unfair to extinguish its right to contribution from Barrientos when what is alleged is that they caused the identical damages. While we agree that it would be unfair to require Dehling to pay more than its share of the damages that flow from its alleged breach of contract, we affirm the trial court because the trial court determined that the damages could be separated out between the two companies and it expected to craft a jury verdict that asked the jury to separately assess which damages were caused by Dehling's breach of contract and which were caused by Barrientos's breach. Consequently, the alleged damages are not indistinguishable, as Dehling claims, and it will have no claim for contribution.

Id., ¶4.

¶37 Similarly, the damages at issue in this case are not indistinguishable. As noted above, the Haldersons' damages expert created two separate loss reports—one relating exclusively to the bad feed claim, and the other relating

exclusively to the stray voltage claim. Given that the Haldersons' only expert on damages was able to separate the Haldersons' losses, Northern States can hardly argue that a properly instructed jury would fail to limit the damages awarded against Northern States to those caused by stray voltage. Northern States' contribution claim therefore fails, as a matter of law.

B. Indemnification

¶38 Under Wisconsin law, indemnification can arise by contract or based on equitable principles. ***Estate of Kriefall***, 342 Wis. 2d 29, ¶34. Here, because there was no contract between Northern States and Star Blends, Northern States' cross-claim for indemnification is grounded in equity. The doctrine of equitable indemnification "'shifts the entire loss from one person who has been compelled to pay it to another who, on the basis of equitable principles, should bear the loss.'" ***Id.*** (quoting ***Swanigan v. State Farm Ins. Co.***, 99 Wis. 2d 179, 196, 299 N.W.2d 234 (1980)). The two basic elements of equitable indemnification are the payment of damages and lack of liability. ***Brown v. LaChance***, 165 Wis. 2d 52, 64, 477 N.W.2d 296 (Ct. App. 1991). "The granting of indemnity in any situation represents a judicial choice of policy." ***Gies v. Nissen Corp.***, 57 Wis. 2d 371, 386, 204 N.W.2d 519 (1973).

¶39 Northern States argues dismissal of its indemnification claim was improper because "[e]quity precludes forcing [Northern States] to bear a penny of bad feed damages. Those losses, if any, could only have been caused by Star Blends. [Northern States] needs recourse against Star Blends if the Haldersons charge [Northern States] with damages that are attributable to bad feed." However, as discussed above, given the evidence of record, a properly crafted jury instruction and special verdict will prevent this result by directing the jury to

allocate responsibility for the Haldersons' damages between Northern States and Star Blends. Thus, contrary to Northern States' assertion, it will not be required to pay damages for injuries caused by bad feed.

¶40 Moreover, an indemnification claim involves shifting the entire loss, not just part of it, from one party to another. *See* ***Estate of Kriefall***, 342 Wis. 2d 29, ¶34. Northern States has not demonstrated that it would be equitable to shift responsibility for the entirety of the Haldersons' losses, including any portion stemming from stray voltage, to Star Blends. Accordingly, the circuit court properly granted summary judgment on Northern States' indemnification claim.

¶41 The Haldersons may recover their WIS. STAT. RULE 809.25 appellate costs. Star Blends may recover its RULE 809.25 appellate costs only as they relate to Northern States' appeal.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

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