COURT OF APPEALS
DECISION
DATED AND FILED

JANUARY 27, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2625-FT

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

FOUR SEASONS FS, INC.,

PLAINTIFF-APPELLANT,

V.

GLEN MOHN,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for St. Croix County: C. A. RICHARDS, Judge. *Reversed in part and cause remanded with directions.*

Before Cane, P.J., Myse and Hoover, JJ.

CANE, P.J. Four Seasons FS, Inc., raises two issues on appeal.[1] First, it contends that the trial court erred by affirming the jury's verdict finding damages for a deficient corn crop at a price other than at maturity. Second, it

[1] This is an expedited appeal under RULE 809.17, STATS.

argues that the jury failed to consider the cost of applying the more expensive herbicide when arriving at its damage figure. Because evidence does not support the jury awarding damages at a price considerably later than maturity, and the jury failed to consider the cost of applying the more expensive herbicide on eighty of the acres, we reverse in part and remand with directions.

The essential facts are undisputed. In 1995, Glen Mohn planted 187 acres of corn and retained Four Seasons FS, Inc., to spray the corn fields for weed control. Eighty[2] of these acres were second year corn where corn had been grown the previous year and the remaining 107 acres were first year corn where alfalfa had been grown the prior year. This was considered important because different herbicide mixes are sometimes applied depending on whether the fields are first or second year corn. Four Seasons recommended a combination of Accent and Atrazine on the first year corn (107 acres), but Atrazine alone on the second year corn (eighty acres). Mohn accepted its recommendations. However, when Four Seasons applied the herbicide, it forgot to mix in the Accent when spraying a twenty-one-acre parcel of the first year corn. Consequently, 101 acres received no Accent.

Good weed control was obtained where the combination of Accent and Atrazine was applied, but in the 101 acres where only Atrazine was applied, weeds were exceptionally heavy. As a result of the herbicide application, Mohn's corn crop was substantially less. The jury found that Four Seasons was negligent in its business relationship with Mohn and that such negligence resulted in a crop loss. Essentially, the jury agreed that Four Seasons was negligent in its

[2] The transcript states 60 acres, but counsel are in agreement that this is a typographical error and that 80 is correct.

recommendation of the herbicide to be applied since both Accent and Atrazine should have been applied on all the corn crop. Four Seasons does not challenge this portion of the jury's findings. However, it does challenge the jury's damage award, which is undisputedly based on the price of corn at a date later than maturity. It also contends the jury failed to account for the additional cost of applying Accent on the 101 acres. The cost of applying the combination of Accent and Atrazine is $30 per acre while it cost $4.50 per acre for Atrazine, a difference of $25.50 per acre.

Both sides agree on our standard of review. If there is any credible evidence which, under any reasonable view supports a jury finding as to damages, especially when the verdict has the trial court's approval, the reviewing court will not disturb the finding. ***Hunter v. Kuether***, 38 Wis.2d 140, 144, 156 N.W.2d 353, 354-55 (1968). Four Seasons contends that the evidence is insufficient to support the jury's determination on damages because application of the law to the uncontroverted evidence requires at least a partial reversal. Whether evidence is sufficient to support a jury's verdict is a question of law we review independently of the trial court. *See* ***State v. Poellinger,*** 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990).

The dispute arises from Mohn's claim that after storing corn for his own use, he normally sells half of the excess crop in the fall and half in the spring. He in fact sold 5,000 bushels in December at $3.10 per bushel and another 200 bushels in the spring at $4.60 per bushel. Had the corn production been normal, he would have sold an additional 1,895 bushels of corn in December at $3.10 per bushel and another 6,895 bushels in spring at $4.60 per bushel. It is undisputed that the jury accepted these figures and determined Mohn's damages at $37,591.50 (1,895 bushels x $3.10 = $5,874.50; and 6,895 bushels x $4.60 = $31,717).

Four Seasons argues correctly that the corn crop's loss must be determined by computing the difference between the value of the probable crop at maturity if there had been no injury and the value of the actual crop at maturity, less the expense of cultivation, harvesting and marketing that portion of the probable crop which was prevented from maturing. *See* ***Cutler Cranberry Co. v. Oakdale Elec. Co-op***, 78 Wis.2d 222, 229, 254 N.W.2d 234, 238 (1977). In ***First Wisconsin Land Corp. v. Bechtel Corp.***, 70 Wis.2d 455, 463-64, 235 N.W.2d 288, 292 (1975), the court held that in estimating the value of the crop before the injury, it was necessary to know what the crop could be expected to bring at harvest time and what the cost of growing the crop would be.

Four Seasons concedes that although there is some evidence that the crop matured in mid- to late-October, the actual time of harvesting is disputed and the jury could reasonably accept December as the harvest time. We agree. When determining time of harvest, we recognize that this is an elastic concept which must take into account the grower's additional time to prepare and ship the probable crop for sale. Here, although the crop may have been "mature" earlier than December in the sense that it was ready to be removed from the fields, the jury is entitled to consider the additional time necessary to prepare the crop for sale.

Four Seasons reasons, that, therefore, the value of the lost crop should have been determined at the price of $3.10 per bushel which was the undisputed price in December when Mohn sold 5,000 bushels of corn. Thus, they argue that the loss of 6,895 bushels sold in the spring at $4.60 per bushel should have been determined as a matter of law at $3.10 per bushel, resulting in a $10,342.50 reduction of the jury's verdict ($4.60 - $3.10 = $1.50 x 6,895 bushels =

$10,342.50).[3] We agree. Obviously the crop was ready for sale in December and, therefore, that must be the time for determining the value of the probable crop.

In ***Cutler Cranberry*** and ***Bechtel,*** the supreme court made it very clear that damages for loss of crop production are determined at time of maturity which is when the probable crop could have been sold. This rule makes sense in that damages are determined and made certain at a time and price when the probable crop could have been sold. It also avoids speculation as to when the grower would have sold the probable crop. For example, a grower might argue that his intent was to sell at a time which corresponded with a market high. As Four Seasons suggests, speculation could run rampant.

Here, it is undisputed that Mohn harvested his crop no later than December and sold 5,000 bushels at $3.10 per bushel. If Mohn had wanted to retain an additional 6,895 bushels in December, thereby placing himself in the same position he would have been had there been no crop loss, he could have purchased comparable corn at $3.10 per bushel in December and then continued to assume the same risk of what the market would bring later in the spring.[4] Accordingly, we agree with Four Seasons that under the uncontroverted evidence, the verdict must be reduced by $10,342.50.

Next, Four Seasons contends that under the uncontroverted evidence, the jury failed to account for the additional expense of spraying the additional 101 acres (80 acres + 21 acres) with the more expensive herbicide at

[3] Four Seasons ignores Mohn's sale of 200 bushels at $4.60 per bushel in the spring when determining damages and, therefore, so do we.

[4] Admittedly this ignores any costs associated with purchasing the corn which would have to be factored in determining his loss.

$25.50 per acre. A review of the record, however, shows that Four Seasons in its post-trial motions argued that the jury failed to factor in the additional cost of applying the herbicide to the eighty acres recommended for application of Atrazine only. We address only those issues raised before the trial court, not those raised for the first time on appeal. *See* ***Wirth v. Ehly,*** 93 Wis.2d 433, 443, 287 N.W.2d 140, 145 (1980). Therefore, Four Seasons waived any claim for a miscalculation of damages in excess of the eighty acres.

Mohn's claim against Four Seasons is predicated on the fact that the combined herbicide should have been applied on all of the acres in order to control the weed growth and provide a normal corn production. Under the holdings in ***Cutler Cranberry*** and ***Bechtel***, the jury is required to deduct the costs associated with growing the crop. Here, the uncontradicted evidence is that this would have cost Mohn an additional $25.50 per acre by applying the combined herbicide. Accordingly, the jury was required to reduce its damage award by $2,040 ($25.50 x 80 acres).

In sum, because the jury improperly used the spring date as the time of maturity for a portion of the probable crop loss and failed to deduct the cost of applying the more expensive herbicide which Mohn claims should have been applied, the damage award must be reduced by $10,342.50 and $2,040, totaling $12,382.50. We, therefore, reverse the judgment on damages and remand this matter to the trial court with directions to enter a judgment consistent with this opinion.

By the Court.—Judgment reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.