COURT OF APPEALS
DECISION
DATED AND RELEASED

October 24, 1996

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

NOTICE

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

No. 96-0258

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

SCOTT BOOTH AND
JANE BOOTH,

Plaintiffs-Respondents,

v.

TOMORROW VALLEY COOPERATIVE SERVICES
AND FARMLAND MUTUAL INSURANCE CO.,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

DYKMAN, P.J. Tomorrow Valley Cooperative Services (TVC) and Farmland Mutual Insurance Company appeal from a judgment awarding Jane and Scott Booth $14,754.20, plus costs, for crop losses they sustained due to TVC's application of the herbicide Atrazine to their field. The appellants raise

the following issues: (1) whether the jury's finding of causation is supported by credible evidence; (2) whether the trial court erroneously exercised its discretion in upholding the jury's award of damages; and (3) whether a new trial should be ordered in the interest of justice. We conclude that: (1) the jury's finding of causation is supported by credible evidence; (2) the trial court erroneously exercised its discretion in upholding the jury's damage award; and (3) TVC is not entitled to a new trial in the interest of justice. Because we conclude that the jury awarded excessive damages, we reverse the judgment in part and grant the Booths the option under § 805.15(6), STATS., to either accept judgment in a reduced amount within ten days of remittitur of the record or have a new trial on the issue of damages.

BACKGROUND

On May 18 and 19, 1994, Jeff Duch, a TVC employee, sprayed the Booths' field with Round-up, a herbicide. On May 19, Duch informed Scott Booth that his prior spray job involved Atrazine, a herbicide usually used with corn, and that he did not rinse the tank on his spray rig prior to applying Round-up the Booths' field.

Mr. Booth began planting the field with peas, barley and lowland pasture mix (a mixture of red clover, aslike clover and timothy) seventy-five hours after Duch had completed his spraying. About two to three weeks after planting, Booth believed that the whole field had germinated and noticed that the peas and barley had grown to three to four inches, but looked yellow. After about five weeks, however, he noticed that the barley plants and most of the pea plants were gone. The surviving pea plants were yellow and discolored.

The Booths brought suit against TVC and its insurer, alleging that TVC was negligent in failing to rinse the Atrazine from its tank prior to the application of Round-up to their field and that this negligence caused damage to their crops. After a three-day trial, the jury found that TVC was negligent in its application of chemicals to the Booths' field, but also found that Scott Booth was negligent in the planting, management and cultivation of the crops. The jury found that TVC's negligence and Booth's negligence were both causes of the damage to the Booths' 1994 crop and attributed 82.5% of the negligence to TVC and the rest to Booth. Finally, the jury found that $17,883.88 would fairly

and reasonably compensate the Booths for damages to their 1994 crops caused by Atrazine. Accounting for the contributory negligence of Booth, the court entered a judgment against TVC and its insurer in the amount of $14,754.20 plus costs.

After verdict, TVC moved the trial court to either dismiss the Booths' complaint on the merits, change the jury's determination on causation, change the jury's award of damages from $17,883.88 to $0.00, or grant a new trial in the interest of justice because no credible evidence supported the jury's finding that Atrazine was a cause of the Booths' damages. TVC also moved the trial court to reduce damages from $17,883.88 to $4,500 because no credible evidence supported the jury's award of damages. The trial court denied TVC's motion, and TVC and its insurer appeal.

SUFFICIENCY OF THE EVIDENCE

TVC argues that the jury's finding that Atrazine caused damage to the Booths' 1994 crop is not supported by sufficient evidence. In ***Fehring v. Republic Ins. Co.***, 118 Wis.2d 299, 347 N.W.2d 595 (1984), the court set forth the standard for reviewing a jury verdict:

> [A] jury verdict ... will be sustained if there is any credible evidence to support the verdict. When the verdict has the trial court's approval, this is even more true. The credibility of the witnesses and the weight afforded their individual testimony is left to the province of the jury. Where more than one reasonable inference may be drawn from the evidence adduced at trial, this court must accept the inference that was drawn by the jury.

Id. at 305-06, 347 N.W.2d at 598 (citations omitted). We review the record for credible evidence to sustain the jury's verdict, not to search for evidence to sustain a verdict the jury could have reached, but did not. ***Id.*** at 306, 347 N.W.2d at 598.

Richard Scholl, a private soil, plant and animal nutritionist who had experience with Atrazine-related crop problems, testified that in his opinion, the damage to the Booths' crop was caused by Atrazine. Larry Dieck, who teaches production agriculture at Fox Valley Technical College and has experience with Atrazine problems affecting plants, also testified that the appearance of the crops in the Booths' field was consistent with the appearance of crops damaged by Atrazine. Based on this testimony, we conclude that the jury's finding of causation is supported by credible evidence.

Some peas and alfalfa eventually grew in the Booths' field in 1994. Mr. Booth attempted to harvest this crop, but testified that it cost him more to harvest the crop than its value. TVC argues that the Booths' unsatisfactory harvest was caused by late germination and that Atrazine could not have been a cause of the Booths' damages because no expert testimony was offered to prove that Atrazine causes late germination. The Booths argue, however, that peas were scattered throughout the field when they attempted to harvest the crop, and it was this scattering of peas, not late germination, that caused the late crop to grow.

The Booths did not need to offer expert testimony to prove that Atrazine causes late germination because the jury could have concluded that the late crop grew from the scattering of peas during harvest. Whether the growth was caused by late germination or the scattering of seeds during harvest goes to the weight and credibility of the evidence, which is a question for the jury, not us, to decide.

Several soil tests were conducted to determine the field's Atrazine concentration. The highest test result showed 57 parts per billion (ppb) of Atrazine in the soil. TVC argues that the reported test results were insufficient to show that Atrazine caused damage to the Booths' barley because Scholl testified that the stress threshold for barley is between 100 and 150 ppb of Atrazine. Again, this question goes to the weight and credibility of the testimony. Scholl and Dieck, who both have experience with Atrazine-related problems, testified that the appearance of the crops was consistent with the appearance of crops damaged by Atrazine. The jury could properly rely on this testimony and not the soil test results in concluding that Atrazine caused the damage.

TVC also argues that no credible evidence was adduced at trial as to the amount of Atrazine required to cause damage to the lowland pasture mix. Evidence as to the amount of Atrazine needed to damage the lowland pasture mix was not required, however, as Scholl had already testified that Atrazine damaged the Booths' crop.

DAMAGES

At motions after verdict, TVC moved the court to reduce damages to $4,500 because the jury's award was not supported by the evidence. The court denied TVC's motion. TVC argues that the trial court erroneously exercised its discretion in failing to reduce the damage award.

Section 805.15(6), STATS., provides the authority for the trial court to reduce an award of excessive damages:

> EXCESSIVE OR INADEQUATE VERDICTS. If a trial court determines that a verdict is excessive or inadequate, not due to perversity or prejudice or as a result of error during trial (other than an error as to damages), the court shall determine the amount which as a matter of law is reasonable, and shall order a new trial on the issue of damages, unless within 10 days the party to whom the option is offered elects to accept judgment in the changed amount....

The amount of damages awarded rests largely within the jury's discretion. ***Brogan v. Industrial Casualty Ins. Co.***, 132 Wis.2d 229, 238, 392 N.W.2d 439, 443 (Ct. App. 1986). In determining whether the jury's award is excessive, the trial court must view the evidence as a whole in the light most favorable to the plaintiff. ***Wester v. Bruggink***, 190 Wis.2d 308, 326, 527 N.W.2d 373, 381 (Ct. App. 1994).

In this case, the trial court did not analyze the evidence in concluding that the jury's award of damages was appropriate. In ***Carlson & Erickson Builders, Inc. v. Lampert Yards***, 190 Wis.2d 650, 529 N.W.2d 905 (1995). The court stated:

> If ... a circuit court ... fails to state the reasoning behind its decision, the reviewing court should place no weight upon the trial court's findings. In such a situation, the reviewing court must then review the entire record and determine, as a matter of first impression, whether the jury award is excessive. In conducting its analysis, the reviewing court must view the evidence in the light most favorable to the party prevailing with the jury.

Id. at 669-70, 529 N.W.2d at 912 (footnotes omitted). Therefore, we will examine the evidence *ab initio* to determine whether there is any credible evidence to support the award of damages. *See* ***Brogan***, 132 Wis.2d at 238, 392 N.W.2d at 443.

After reviewing the record, we find no credible evidence to support the jury's determination that $17,883.88 would fairly and reasonably compensate the Booths for damages to their 1994 crops caused by Atrazine. The court's instruction to the jury on the issue of damages was as follows:

> To measure damages for an injury to a growing crop, you should determine the market value which the probable crop would have had at maturity in the absence of the injury. Deduct from this amount the market value of the actual crop at maturity. You should also deduct the expenses that the plaintiff saved by not having to cultivate, harvest, and market that portion of the probable crop which was prevented from maturing.
>
> In determining what the value of the probable crop ... would have been if there had been no injury, you may consider crop production figures on the land in years other than the year of the injury and the average of these production figures. You may also compare the 1994 yield of the damaged crop with the yield in the same year in other fields in the same locality which were not damaged.

See WIS JI-CIVIL 1806.

Scott Booth testified that, based on his knowledge of how his other fields had produced, he should have received eighty-eight to ninety tons of crops from his first cutting of the field and forty to forty-five tons on his second cutting. He also testified that the retail price of the type of crop he was attempting to grow was $130 to $140 a ton. However, the Booths concede in their brief that the tonnage of wet haylage coming off the field should be reduced by fifty-five to sixty percent before the price per ton for dry hay should be applied.[1] If the jury reduced Booth's 135 ton figure by fifty-five percent and multiplied this amount by $140, it would calculate damages at $8,505. Booth also testified that he saved approximately $150 in harvesting costs, which would reduce damages to $8,355. Further reducing this amount due to Mr. Booth's contributory negligence, a judgment in the amount of $6,892.88, plus costs, is the highest sustainable amount that the court could award, viewing the evidence in the light most favorable to the Booths.

Because the jury's award of damages is excessive, we reverse the award of damages and remand this matter to the trial court. If the Booths do not accept judgment in the changed amount of $6,892.88, plus costs, within ten days of remittitur, the trial court shall order a new trial on the issue of damages. *See* §§ 805.15(6) and 809.26, STATS.

TVC argues that, based on Scholl's testimony, the trial court should have reduced damages to $4,500. Booth testified that he planted twenty-five acres of rented land. Scholl testified that the value of the Booths' crops would have been $85 to $90 per ton and that he had no reason to believe that the field would produce more than the state average of two tons per acre. TVC multiplied twenty-five acres by two tons per acre by $90 per ton to calculate damages of $4,500.

[1] In their brief, the Booths state, "If we take Mr. Booth's numbers of 135 tons of wet haylage and reduced them by 55 percent, there would be a loss of 81 tons of dry hay." This is incorrect. The Booths only reduced the 135 ton figure by forty percent. Reducing 135 tons by fifty-five percent, the Booths should have calculated a loss of 60.75 tons, not 81 tons.

TVC argues that the jury should have used a fifty-ton yield in calculating damages because Booth's 135 ton figure was not based on credible evidence. Booth's determination that the field would produce 135 tons was based on his knowledge of how his other fields had produced. TVC argues that this determination was not credible because there was no attempt to compare soil types, drainage, nutrients, weather conditions, years of production or other factors to give any relevance to Booth's speculation as to anticipated yields for this field.

The Wisconsin Supreme Court rejected a similar argument in ***Cutler Cranberry Co. v. Oakdale Elec. Coop.***, 78 Wis.2d 222, 254 N.W.2d 234 (1977). Cutler brought suit against Oakdale Electric, alleging that Oakdale Electric's negligence caused damage to Cutler's cranberry crop in 1971. ***Id.*** at 223-24, 254 N.W.2d at 235-36. At trial, Cutler offered evidence of its cranberry production in the years 1968 through 1972 to establish 1971's damages. ***Id.*** at 226-27, 254 N.W.2d at 236-37. Oakdale Electric argued that evidence of Cutler's cranberry production in other years was too speculative and conjectural to afford a fair basis for the determination of the probable 1971 crop because:

> (1) yearly cranberry production figures for both Cutler's marshes and the industry statewide, for whatever reasons, fluctuate significantly; (2) there are numerous potential threats to cranberry crops, e.g., different types of worms, grass or weeds, lack of pollination, and severe weather; and (3) while in most of the instances where a small crop is produced a cause can be identified, on a few occasions the cause of a low crop cannot be identified.

Id. at 231, 254 N.W.2d at 239.

The court concluded that this evidence does not go to the admissibility of the evidence of crop production figures from other years, but only to its weight and sufficiency. ***Id.*** Likewise, we conclude that differences in soil types, drainage, nutrients and other factors do not go to the admissibility of the evidence of crop production on the Booths' other fields, but only to its weight and sufficiency, which is within the province of the jury. Therefore, the jury could appropriately use Booth's 135 ton figure.

TVC also argues that Booth's $140 per ton figure is not credible because it is based on the price he paid to replace the lost crop, not the market value of the probable crop as stated in the jury instructions. Booth's testimony, however, indicates that he was referring to the market value of the crop:

> [Booths' counsel:] What was the retail price of that type of crop that year?
>
> ....
>
> [Booth:] The price of hay was--'93 was a wet year, so hay prices were up, high prices ran between 130 to 160 or even 200 a ton. That was not unusual to have prices running that high.
>
> Q: Did you in fact buy hay to replace the crops that you lost?
>
> A: Yes, I did.
>
> Q: And how much did you pay per ton for that hay?
>
> A: My price of hay was about $130.00 a ton to $140.00 a ton.

This testimony indicates that Booth was attempting to establish the market value of the hay he lost with evidence of the price he paid for hay on the open market. The $130 to $140 per ton figure is evidence of both the market value for Booths' lost crop and the cost of replacing the crop. Therefore, the jury could appropriately use Booth's $140 per ton figure in its calculation of damages.

The Booths argue that the jury's verdict compensates them not only for 1994's crop damages, but for damages in 1995 and 1996 also. The special verdict, however, only provided: "What sum of money will fairly and reasonably compensate Scott and Jane Booth for damages to their 1994 crops caused by atrazine?" The Booths do not argue here that the form of the special verdict was incorrect, and we generally do not address issues not specifically raised on appeal. ***Waushara County v. Graf***, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19, *cert. denied*, 506 U.S. 894 (1992). According to the special verdict, it was

only appropriate for the jury to consider 1994 damages. Therefore, the jury could not consider future damages in its calculation of damages.

NEW TRIAL IN THE INTEREST OF JUSTICE

TVC argues that it should be granted a new trial in the interest of justice under § 752.35, STATS. We have already directed the court to order a new trial on damages, unless the Booths accept the reduced judgment amount, because the jury's award of damages is excessive. We therefore do not need to address the issue of damages under § 752.35. We decline to order a new trial for a redetermination of TVC's negligence because the jury's verdict on causation is supported by credible evidence, and we do not believe that justice has miscarried.

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

Not recommended for publication in the official reports.