

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 19, 2009

David R. Schanker
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. 2007AP1791

Cir. Ct. No. 2004CV146

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DANDY VEAL, LLC,

PLAINTIFF-APPELLANT,

V.

MIDWEST MILK PRODUCTS, INC.,

DEFENDANT-RESPONDENT,

GRINNELL MUTUAL REINSURANCE COMPANY,

INTERVENING DEFENDANT.

APPEAL from a judgment of the circuit court for Kewaunee County: D. T. EHLERS, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Dandy Veal, LLC, appeals from a judgment dismissing breach of implied warranty claims against Midwest Milk Products,

Inc., and granting Midwest's counterclaim for unpaid invoices concerning a liquid fat blend used in veal feed that Dandy Veal provided its calves. The circuit court concluded Dandy Veal failed to sufficiently prove it was Midwest's fat blend that caused an emulsion stability problem in the veal feed resulting in illness and high death rates in its calves. Dandy Veal argues on appeal the circuit court's findings and conclusions are clearly erroneous and that the circuit court improperly applied the burden of proof. We disagree and affirm the judgment.

FACTUAL BACKGROUND

¶2 The fat in cows' milk is in suspension. The role of emulsifiers in Dandy Veal's feed¹ is to keep the fat immiscible with the water solution (containing proteins and carbohydrates) so the liquid feed can be delivered to the animal in a form the calf will drink. In order to ensure digestibility of the fat blend contained in milk replacer, the fats must be distributed and kept in suspension. To accomplish this, the fat particles are broken apart, but they naturally act to reunite over time.

¶3 Veal feed contains two significant components: protein and fat. In Dandy Veal's feed, the protein is delivered through milk-derived products such as whey protein concentrate, dry whey, skim powder, chocolate mix, raw whey, condensed whey and buttermilk. The fat is delivered through Midwest's liquid fat blend, and through the chocolate, condensed whey and butterfat present in the whey protein concentrate, and the other milk-derived products mentioned above.

¹ Dandy Veal's feed was referred to as "milk replacer," "liquid milk replacer" and "formula."

¶4 As with cows' milk, the fat in milk replacer does not stay in emulsion indefinitely. Typical liquid feed storage ranges from two to four days, but a standard emulsion is not designed to maintain emulsion for that long. Therefore, homogenization is needed to further stabilize the product.

¶5 Emulsification can be disrupted in many ways, including through damaged protein, bacteria, high mineral content or the presence of ammonias or bases. When a protein is damaged through excessive heat or otherwise, its ability to act as an emulsifier is reduced. Bacteria can affect emulsification because it produces lactic or other organic acids that lower the pH levels. PH levels are important because they indicate the fat's progression towards rancidity. Rancid fat in feed produces diarrhea, intestinal environment changes and may provoke poisoning and metabolic disorders. Minerals in milk products such as whey contain substantial levels of calcium and magnesium, which can interfere with emulsification. Ammonias or bases added to whey to reduce acidity can interfere with emulsification. Adding hydrogen peroxide to feed to kill bacteria can also cause faster breakdown of the fat emulsion.

¶6 Serious problems developed in Dandy Veal's calves in late June 2004. Dandy Veal observed through a microscope that a sample of the finished liquid feed was "coming apart," i.e, clumping, coalescing or separating.² Dandy Veal alleged the problems were caused by three loads of Midwest liquid fat blend supplied on June 8 and July 6 and 12, 2004. Portions of these loads were mixed

² Testimony indicated that although a microscopic view of finished feed might identify an emulsification problem, it would not explain the problem's cause. Betty Wilder, a laboratory director for Veal Tech, Inc., testified a microscopic view of finished feed alone does not provide enough information to determine whether there is a problem with emulsifiers because there are too many variables, such as the age of the feed, the pH levels and the feed's protein status.

with other feed ingredients by Dandy Veal in manufacturing the liquid milk replacer fed to its veal calves.³ Dandy Veal contended Midwest's fat blend was not emulsifying properly or was rancid. Dandy Veal commenced a lawsuit alleging Midwest breached implied warranties of merchantability and fitness for particular purpose, pursuant to WIS. STAT. §§ 402.314 and 402.315.⁴ The case was tried to the court for seventeen days over a five-month period. The court heard twenty-four witnesses and reviewed 250 exhibits.

¶7 Following trial, the circuit court issued a fourteen-page written decision. It also made twenty-eight findings of fact and twelve conclusions of law. Among other things, the court found Dandy Veal's calves were suffering from nutritional stressors that were weakening their immune systems, making them susceptible to diseases and causing many of them to die. The court found the feed batches were experiencing emulsion stability problems. However, the court concluded Dandy Veal failed to prove it was Midwest's fat blend that caused the emulsion stability problem. Dandy Veal now appeals.

³ The fat blend supplied by Midwest was a combination of tallow, lard, coconut oil, lecithin and synthetic emulsifiers. Dandy Veal inspected the fat blend upon delivery. The feed was pumped into storage silos at a facility called Thiry Daems Whey, Inc., and stored in a tank where it was heated and agitated until used. The feed was mixed by one of Dandy Veal's principals, Scott Ratajczak, and trucked to the veal barns. The fat blend was injected during a homogenization process and the mixture was then cooled and pumped into a storage silo. The feed was stored for up to three days at Thiry Daems and then transported to Dandy Veal's barns for further storage and feeding. The feed was warmed, a vitamin-mineral-amino acid premix was added and it was pumped into calf rooms. Feed was then dispersed into a pail for each calf.

⁴ All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

DISCUSSION

¶8 Findings of fact by a trial judge sitting without a jury will not be upset on appeal unless they are clearly erroneous. WIS. STAT. § 805.17(2).⁵ Where there are a number of reasonable inferences that might be drawn, the reviewing court must accept the one drawn by the trial court sitting as finder of fact. *See State v. Poellinger*, 153 Wis. 2d 493, 506-07, 451 N.W.2d 752 (1990). When there is conflicting testimony, the trial court is the ultimate arbiter of the witnesses' credibility and the weight of the evidence. *Bank of Sun Prairie v. Opstein*, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979).

¶9 The circuit court concluded Dandy Veal failed to prove it was Midwest's liquid fat that was not appropriately disbursing and emulsifying in its feed. The court stated:

I conclude the Plaintiff has met its burden to convince me that there was an emulsion stability failure in its feed during portions of the relevant time frame....

Where the Plaintiff's case fails though in my ultimate conclusion is the Plaintiff's failure to prove to me to the requisite burden that it was the Defendant's liquid fat blend that caused this emulsion stability problem or failure in the feed it was feeding to its veal calves in mid 2004.

¶10 In light of the evidence, we cannot disturb the circuit court's findings and conclusions. Dr. Blaine Ellison, a veterinarian and nutritional consultant, testified as follows:

⁵ While the parties also refer to the "great weight and clear preponderance" test, we now apply the clearly erroneous test as the standard of review for findings of fact made by a trial court without a jury. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). "[T]he two tests in this state are essentially the same." *Id.*

Q: Was it apparent to you then as to what the cause of the production problems were at Dandy Veal in the summer of 2004?

A: No, it was not apparent to me what the precise cause of the increased death loss was at Dandy Veal.

Q: Why not?

A: There [are] too many unanswered questions. Obviously, this case [revolves] around a nutritional question but that doesn't necessarily mean that's what it was, and as an expert witness I needed to evaluate – try to examine all potential causes of that increased death loss, and I don't believe that I've been presented any conclusive evidence that says exactly what the cause was that caused this increased death loss at Dandy Veal.

¶11 Ellison testified that he was “quite suspect” of Dandy Veal’s testing of feed samples because of “some serious chain of custody issues....” He also testified, “I didn’t see any testing of other samples of other feed ingredients....” Ellison further stated, “[T]he animal evidence is not supportive of that claim.” In that regard, Ellison concluded:

Q: Do you have an opinion to a reasonable degree of veterinarian probability as to whether the fat blend in the veal feed fed to Dandy Veal’s calves in June and July of 2004 was a cause of the deaths in the production problems Dandy Veal experienced and complains of in this case?

A: Yes.

....

Q: And what is that opinion, sir?

A: My opinion is that the lipids⁶ cannot be the cause of the production failures experienced by Dandy Veal in the time frame of this case.

⁶ Doctor Ellison testified “lipid” means “fat source, blended fat source, which I believe is what the defendant in this case vended to Dandy Veal.”

Q: And why do you say that?

A: I say that because the carcass photos from the postmortems, the postmortem notes, the references to that from the lab reports, none of that supports a mobilization of energy in a – in a calf that would have been struggling to get enough energy from the fats in its diet. Also, you know, if we ignore the chain of custody issues on these lipid samples, it doesn't appear that that is out of spec as far as what was vended to Dandy Veal.

¶12 Contrary to Dandy Veal's perception, the circuit court reasonably relied upon Ellison's opinion. Dandy Veal's expert witness, Dr. Dan Shields, also testified under cross-examination:

Q: And you didn't look in the storage tanks of any of the other raw ingredients, did you?

A: Not at that visit.

Q: You didn't test any of the other raw ingredients, did you?

A: That was not a priority.

Q: And you didn't send any of the other raw ingredients out for testing, did you?

A: Not at that time.

Q: You didn't send any finished feed samples out for testing, did you?

A: That would be correct.

....

Q: Could there have been problems with any other ingredients within the feed besides the fat?

A: Those weren't tested.

Q: Can you rule that out?

A: They weren't tested. You can't rule that out.

¶13 Betty Wilder, a laboratory director for Veal Tech, Inc., also testified regarding the testing performed on each outgoing Midwest fat blend product. Among other things, an emulsification test was performed on all outgoing products, either before delivery or within seventy-two hours of delivery. No Midwest fat blend failed this testing. Moreover, after Dandy Veal reported the fat was separating in the finished feed, Midwest pulled a retained sample of the June 8 shipment and performed emulsification testing. The testing was normal.

¶14 Wilder also testified regarding two emulsification tests on fat returned by Dandy Veal from the June 8 shipment. First, she placed the fat blend with water at a twenty percent concentration that included red dye for staining. A microscopic view found sizes ranging from two to five microns, which she testified is better than expected with fat in water alone. When fat was added to a solution of proteins and carbohydrates, as was present in the feed making process, it was further stabilized. When the product was homogenized, the fat globules were reduced even further and also further stabilized.

¶15 The second emulsification test Wilder performed involved placing the fat blend into a graduated cylinder and allowing it to sit for twelve hours. The test results confirmed the emulsion was stable at twelve hours. Dandy Veal criticizes the circuit court's reliance on this test because Dandy Veal's problem with fat particles occurred after twenty-four hours. As mentioned, however, other ingredients added to Dandy Veal's feed and the homogenization further stabilized the emulsion. When Wilder performed the emulsion testing using only Midwest's fat blend and water, it showed the fat blend had emulsifiers present and also that the solution was remaining emulsified over time. Dandy Veal's arguments to the contrary go to the weight of the evidence.

¶16 In its decision, the circuit court also indicated it specifically reviewed trial exhibits 25, 26 and 27, which were three of Dandy Veal's composition sheets for mixed feed.⁷ These exhibits demonstrated Midwest's fat blend comprised approximately eighty to eighty-three percent of the total fat that went into those batches of feed. As the court emphasized, however, seventeen to twenty percent of the fat in those feed batches necessarily came from other ingredients. The court noted, "These are not insignificant numbers in my ultimate conclusion." The court correctly observed, "If fat is determined to be the problem, the sources of that fat which comprise up to 20 percent of the total fat content in the feed should be tested."

¶17 Dandy Veal claims Wilder testified the other twenty percent of the fat components were milkfats and, once homogenized, the emulsion stability of the fat particles in cows' milk will last anywhere from ten days to two weeks. Therefore, Dandy Veal insists the natural milkfat components are necessarily ruled out as being a cause of the emulsion stability problem. This argument misconstrues Wilder's testimony. Wilder stated emulsion stability was affected by many factors, including but not limited to, damage to proteins by temperature or overmixing, bacteria growth dropping the pH levels, and high mineral concentration in milk products, especially whey protein concentrate.

¶18 Dandy Veal also insists a "review of the formula sheets" shows the only other "key" fat-bearing ingredient was chocolate. It claims all the other components contributed only trace amounts of fat, with no component

⁷ "Exhibit 25 [was] a copy of the formula for batch number 1379 on June 30, 2004. Exhibit 26 [was] a copy of the formula for batch number 1380 on July 2, 2004. Exhibit 27 [was] a copy of the formula for batch number 1385 on July 19, 2004."

contributing more than five percent of the total fat in any one batch.⁸ Dandy Veal argues that Midwest's fat combined with the chocolate accounted for over ninety percent of the fat in each batch of feed. According to Dandy Veal, "In actuality, the circuit court determined that Dandy Veal's failure to test the chocolate did not permit the [sic] Dandy Veal to meet its burden of proof."

¶19 Dandy Veal misrepresents the circuit court's findings.⁹ In addition, it fails to provide record support for its argument that any of the other fat bearing ingredients, even those having trace amounts, could not have caused the emulsion instability problems. Nor does the record indicate it was clearly erroneous for the court to group the other fat-bearing ingredients together. The court's decision recognized that Dandy Veal failed to prove what was interfering with the emulsion stability. The court's findings are not clearly erroneous.

¶20 Dandy Veal also argues Shields testified that "no external lab would do a fat emulsion test. That is not AOAC approved."¹⁰ However, the viewing of finished feed under a microscope, utilized and approved by Shields, was also not AOAC approved. When asked at trial how many times he tested emulsion under the microscope, Shields stated, "probably into the thousands over ... 20 years." When asked why he does that, Shields answered:

In the milk replacer business, because we are such a small industry, and we are a very small industry comparatively speaking to other agricultural industries and industry in general, there are no sanctioned or approved testing for fat

⁸ Dandy Veal does not directly address exhibits 25-27 but, rather, points to exhibit 75.

⁹ The circuit court did not hold that Dandy Veal failed to meet its burden of proof because it failed to test the chocolate.

¹⁰ During this questioning Shields was not asked to identify AOAC.

particle size. There are none. The Europeans use Sudan red and they like to mix it up and put it in a graduated cylinder and spend time measuring how much Sudan red migrates to the top, which that's fine. It's a very inaccurate test. And we don't like using Sudan red because it – it stains everything that it touches.

So in lieu of using some kind of churning out test or some kind of creaming test, we decided that we would take the sample and directly put it on the microscope and look at it under the microscope to get a better feel for fat particle size.

And, again, it's not an approved technique. Everybody does their own little thing. And this is the system that we've decided is the best to meet our needs, to give us the best feel for how our emulsion is taking place.

¶21 The finding that Dandy Veal did not perform in-house testing of other raw ingredients after it indentified problems with the feed is not clearly erroneous. Dandy Veal retained no samples of its ingredients. Moreover, although Dandy Veal claims to have checked its raw ingredients' invoices and found nothing suspicious, the record reflects numerous loads of whey received during the relevant time periods with high temperatures and/or pH levels outside specifications. Scott Ratajczak testified, contrary to his deposition testimony, that raw whey for Dandy Veal's feed was kept separate from the out-of-spec hot whey or that it was rejected by returning it to the source. However, the whey invoices did not verify his testimony. Ratajczak acknowledged hot whey is a concern because it can be a source of bacteria. Invoices identified incoming loads of raw or processed whey used in Dandy Veal's feed with out-of-spec pH levels. Ratajczak admitted under cross-examination that he testified at his deposition that there was no way to go back through the records to determine where the whey came from in the whey protein concentrate that was used in the batches of feed Dandy Veal claimed were bad. Ratajczak admitted no loads were rejected and all loads were probably used. The records also show quality control issues with

chocolate, buttermilk and condensed whey. Even though there were quality control issues with buttermilk, Ratajczak testified Dandy Veal did not send buttermilk out for testing. In addition, after the feed was mixed by Thiry Daems, it was then stored for up to three days before being transported to the barns for further storage and feeding.

¶22 The record also indicates that Midwest eventually picked up the fat blend returned by Dandy Veal, retested it and put it back into production, including in its own feed. No other customer complaints were received and Midwest's plant manager testified he would not have used the fat blend in Midwest's own feed if he thought something was wrong with it. Dandy Veal insists the returned fat was slowly incorporated back into Midwest's system and diluted with other fat over the course of a month. This argument also goes to the weight of the evidence and is insufficient to demonstrate the court's findings are clearly erroneous.

¶23 Dandy Veal also argues it relied upon Midwest's skill and judgment to test its feed formulated with Midwest's fat to ensure the fat was performing properly and was acceptable for use in the feed. Dandy Veal further claims it relied upon Midwest's advice to use the microscope to test samples of finished feed to ensure that Midwest's fat was properly distributed. Dandy Veal insists it tested the finished feed to check the fat particle size in the manner approved by Midwest. However, Dandy Veal does not indicate it was either discouraged or prevented from seeking independent consultation.

¶24 We conclude Dandy Veal's arguments to a large extent merely take umbrage with the circuit court's decision and rehash arguments made during its closing argument. However, the standard of review in this case is heavily

weighted in support of the circuit court findings. The court's decision indicates a thorough analysis of lengthy and detailed evidence. The circuit court gave well-reasoned explanations supporting its findings that Dandy Veal failed to prove it was Midwest's fat that was not appropriately disbursing and emulsifying in its feed. We cannot say the court's findings and conclusions were clearly erroneous.

¶25 We also reject Dandy Veal's contention that the circuit court incorrectly applied the burden of proof in deciding this case. Dandy Veal simply did not sufficiently persuade the court, sitting as fact finder, that Midwest's fat blend was rancid or that an emulsification problem in Midwest's fat blend caused the problem experienced with its calves. The court reviewed Dandy Veal's proof and explained why it was not persuaded. The court neither incorrectly applied nor improperly shifted the burden of proof. The record supports the court's conclusion that Dandy Veal did not sufficiently determine the cause of its feed problem.

By the Court.—Judgment affirmed.

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

