COURT OF APPEALS
DECISION
DATED AND FILED

February 17, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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Appeal No. 2009AP2236 **Cir. Ct. No. 2003CV35**

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

FOREMOST FARMS USA, COOPERATIVE,

PLAINTIFF-APPELLANT,

V.

PERFORMANCE PROCESS, INC. AND AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Monroe County: MICHAEL J. MC ALPINE, Judge. *Reversed and cause remanded with directions.*

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 LUNDSTEN, J. This case returns to us after remand. In ***Foremost Farms USA Cooperative v. Performance Process, Inc.***, 2006 WI App 246, 297

Wis. 2d 724, 726 N.W.2d 289 (***Foremost I***), we reversed the circuit court's judgment granting summary judgment in favor of Performance Corp. and directed the circuit court to reinstate Foremost's tort claims. Following remand, Performance Corp. again moved for summary judgment, seeking dismissal of the tort claims, and, once more, the circuit court dismissed the claims.

¶2 The issue on appeal is the same as before—whether Foremost's tort claims are barred by the economic loss doctrine because Foremost's damaged dairy products were not "other property" with respect to the damage-causing substance provided by Performance Corp. In this appeal, we address whether new evidence or new arguments support a different result. We conclude they do not and, therefore, reverse and remand with directions.

Background

¶3 The parties are somewhat different from those in ***Foremost I***. Since then, claims against Nelson Jameson, Inc. and Murnco, Inc., and their insurers have settled or been dismissed—those parties are no longer a part of the action. Also, we have a new party, Performance Corp's insurer, American International Specialty Lines Insurance Company. In this opinion, we refer to Performance Corp. and American International collectively as Performance Corp.

¶4 Most of the pertinent facts are set forth in ***Foremost I*** and will not be repeated here. *See* ***id.***, ¶¶2-9. Instead, we pick up where we left off.

¶5 Following remand, more witnesses provided sworn statements. For purposes of our summary judgment analysis, the only "new" evidence that Performance Corp. relies on is undisputed evidence that Foremost "required" that the defoamer be food-grade, non-silicone, and kosher. Before remand, the

evidence indicated only that Foremost "wanted" the defoamer to satisfy these three requirements.[1]

¶6 Performance Corp. again moved for summary judgment and again argued that the end dairy products were not "other property" under the economic loss doctrine. The circuit court granted the motion. Because our review is *de novo*, we choose not to recount the circuit court's lengthy reasoning. Foremost appeals.

Discussion

A. Introduction

¶7 In ***Foremost I***, we summarized applicable economic loss doctrine law. We wrote:

> Foremost seeks "consequential" economic damages based on its assertion that the defoamer damaged "other property." Tort actions based on damage to "other property" are not barred by the economic loss doctrine.
>
> ... The dispositive question [in this appeal] is whether Foremost's recon and end dairy products are "other property" with respect to Performance Corp.'s defoamer. If they are "other property," as that term is used in economic loss doctrine parlance, Foremost's tort claims based on damage allegedly caused by the defoamer were improperly dismissed.
>
> ... At least two tests are used to determine whether damaged property is "other property" in a legal sense: the

[1] Foremost points to submissions before us at the time of ***Foremost Farms USA Cooperative v. Performance Process, Inc.***, 2006 WI App 246, 297 Wis. 2d 724, 726 N.W.2d 289 (***Foremost I***), containing the terms "wanted" and "wished." After remand, a Foremost employee averred that Foremost "required" that the products it used in production be food-grade, non-silicone, and kosher.

> "integrated system" test and the "disappointed expectations" test....
>
> Under the "integrated system" test, we look to see whether the allegedly defective product is a component in a larger system. "[O]nce a part becomes integrated into a completed product or system, the entire product or system ceases to be 'other property' for purposes of the economic loss doctrine." If a product has no function apart from its value as a part of a larger system, the larger system and its component parts are not "other property." ...
>
> If damaged property is not "other property" under the "integrated system" test, the economic loss doctrine applies and tort claims are barred. The "other property" inquiry ends. However, if the damaged property appears to be "other property" under the "integrated system" test, then the "disappointed expectations" test is applied....
>
> The "disappointed expectations" test is directed at determining whether the purchaser should have anticipated the need to seek protection against loss through contract. This test focuses on the expected function of the product and whether, from the purchaser's perspective, it was reasonably foreseeable that the product could cause the damage at issue.

Id., ¶¶12-17 (citations omitted).

¶8 Applying this law, we concluded that a factual dispute remained as to whether the defoamer, or the phenol in the defoamer, were "components" of the end dairy products within the meaning of the "integrated system" test. ***Id.***, ¶34. We also concluded that a factual dispute remained as to whether, under the "disappointed expectations" test, Foremost should have anticipated that the defoamer might function properly as a defoamer, yet contain a contaminant such as phenol that might damage Foremost's recon and, eventually, its end dairy products. ***Id.***, ¶¶35-36.

¶9 Here, we revisit both topics. But first, we address an entirely new argument based on food regulations.

B. Food Regulations

¶10 Performance Corp. argues that the application of various provisions of federal food regulations to the undisputed facts here compels the conclusion that Foremost's damaged end dairy products are not "other property" under the economic loss doctrine. However, as explained below, we discern no reason why federal food regulations—designed to protect public health—inform whether something is "other property" within the meaning of a doctrine developed for a very different purpose.

¶11 Performance Corp. asserts, but nowhere explains, why the food regulations should affect our economic loss doctrine analysis. Foremost, on the other hand, explains that those regulations do not apply here because all that Performance Corp. has done, at best, is to demonstrate that the defoamer, and any contaminants in it, are subject to food regulations designed to protect public health. *See* ***Young v. Community Nutrition Inst.***, 476 U.S. 974, 976-77, 982-83 (1986) (the regulations "ensure the purity of the Nation's food supply"). Protecting the public food supply is a very different endeavor than deciding whether an injured party should be limited to contract remedies under the economic loss doctrine. Performance Corp. does not come to grips with the fact that these two areas of law have completely different underlying purposes.

¶12 The flaw in Performance Corp.'s argument is exemplified by the following passage in its appellate brief. Performance Corp. writes:

> The commercial reality of food manufacturers is that their products are "integrated systems" by law. It seems incongruous for a food manufacturer to deny that a food safety statute is applicable to its commercial reality. This is particularly true where the use of an "unsafe additive" (21 USC 348) can trigger the adulteration provisions of 21 USC 342 and make the sale of such food products

> unlawful. Wisconsin treats adulterated food products the same way. Wis. Stats. § 97.02.

Although this passage is one of the few in Performance Corp.'s brief that purports to explain the relevance of the food regulations, it does nothing of the sort. The dispute here is not over the application of food safety laws. If Performance Corp. supplied a bad barrel of defoamer to Foremost and, as a result, there was a federal food regulation violation, that fact might affect damages, but it says nothing about whether Foremost is limited to contract remedies.

¶13 Performance Corp. asserts that Foremost has implicitly admitted that food regulations are "relevant" for purposes of the economic loss doctrine. Performance Corp. points to statements about the food regulations by one of Foremost's experts and by Foremost's attorneys. The statements, however, read in context, do not constitute admissions on this topic. For example, Performance Corp. contends that an e-mail written by Foremost expert Dr. Robert Lindsay contains an implicit admission because, in it, Lindsay discussed whether the excess phenol in the defoamer might trigger an adulteration action by the Food and Drug Administration. However, Dr. Lindsay was merely opining that Foremost should not allege that the defoamer created an "unreasonably dangerous" product, even though the amount of phenol "could possibly trigger an adulteration action by FDA." Dr. Lindsay's e-mail addresses the harm caused by the phenol; Dr. Lindsay does not expressly or by implication admit anything with respect to the economic loss doctrine analysis.

¶14 Accordingly, we conclude that Performance Corp.'s reliance on food regulations is misplaced.

¶15 To clarify, we do not hold that food regulations would never be relevant to an economic loss doctrine analysis. For example, if Performance Corp. had presented testimony showing that a food producer like Foremost should anticipate the risk of a contaminant like phenol, it might be that Foremost's actual knowledge of extensive regulations implicating contaminants would support the view, under the "disappointed expectations" test, that Foremost should have anticipated that the defoamer might function properly as a defoamer yet contain a contaminant such as phenol that would affect the end dairy products. But the fact that food regulations govern the defoamer, and any contaminants in it, does not, standing alone, say anything about whether the end dairy products are "other property" within the meaning of the economic loss doctrine.

¶16 Before moving on, we note that Foremost argues that, on remand, the circuit court lacked authority to entertain Performance Corp.'s new food regulation argument. Performance Corp. disagrees with this lack-of-authority argument and also responds that Foremost should be judicially estopped from making the argument. We need not resolve these disputes because we conclude that, regardless whether Performance Corp.'s food regulation argument was properly raised and addressed on remand, that argument lacks merit for the reasons explained above.

C. "Integrated System" Test

¶17 As we have seen, the "integrated system" test looks to see whether the allegedly defective product is a component in a larger system. ***Foremost I***, 297 Wis. 2d 724, ¶15. In the following subsections, we address and reject each of Performance Corp.'s "integrated system" arguments. In addition, we address a separate reason provided by the circuit court.

1. Removed Or Dissipated

¶18 Taking on the question of whether the defoamer continued in existence and became, physically, a part of the end dairy products, Performance Corp. repeats the argument it made in ***Foremost I***. Performance Corp. asserts that, because it is undisputed that Foremost took no action to remove the defoamer from the recon, the defoamer must have ended up as a part of the end dairy products. The simple response to this argument is the one supplied by Foremost—there is still no evidence that the defoamer remained in the recon after the mixing process, much less that it remained and became a component of the end dairy products.

¶19 Performance Corp. makes the remarkably inaccurate assertion that in ***Foremost I*** we "drew no legal inferences from the absence of evidence regarding the defoamer's removal or hypothetical dissipation from the recon." To the contrary, in ***Foremost I*** we explained:

> Apart from phenol, a topic we discuss separately below, so far as the evidence discloses, the defoamer may completely dissipate after it has served its function of reducing foam. There simply is no evidence as to whether the defoamer remains or disappears after it has served its function. Given the state of the record, it is not undisputed that the defoamer remained as a part of the final recon or end dairy products.

Id., ¶30 (footnotes omitted). In an accompanying footnote, we wrote:

> Performance Corp. asserts in its appellate brief that "Foremost conceded to the circuit court that water, recon and the … defoamer are *ingredients* which are mixed to become the Foremost product" (emphasis added). But the record citation Performance Corp. provides does not back up its assertion. In the pleading cited, Foremost's counsel says only that the allegedly defective defoamer was used "in the recon manufacturing process." Counsel conceded only that the defoamer was "mixed" with water and then

> the non-fat dry milk powder. Nowhere does counsel concede that the defoamer was an ingredient in the final recon or the end dairy products.

Id., ¶30 n.10. Once again, we address the topic of phenol separately below. And, once again, we reject Performance Corp.'s assertion that pure logic supports the factual conclusion that the defoamer remained after it had served its anti-foam function.

¶20 In light of our clear statement on this topic, it is curious that, on remand, Performance Corp. did not produce additional evidence regarding the physical presence of the defoamer in the end dairy products. We remain in the dark because Performance Corp., for the most part, chose a different route on remand, essentially repeating arguments it made or could have made based on the submissions already in the record.

2. Food-Grade, Non-Silicone, And Kosher

¶21 In a new argument based on somewhat new evidence, Performance Corp. points to Foremost's requirement that the defoamer be food-grade, non-silicone, and kosher and then argues that these requirements show that the defoamer must have been in the end dairy products.[2] More specifically, Performance Corp. argues as follows:

- The obvious reason Foremost required that the defoamer be "food grade" was because it was intended for human consumption. Performance Corp. reasons that, because recon "is not a final food product in itself, ... it must be expected that the defoamer will be incorporated into a final edible and saleable food product."

[2] Our reference here to "somewhat new evidence" is a reference to the difference between Foremost *wanting* the defoamer to meet certain requirements and new evidence on remand that it *required* the defoamer to meet those requirements. *See* footnote 1.

- Foremost's non-silicone requirement shows that the defoamer must have remained in the recon. A Foremost employee averred that Foremost required that the defoamer be non-silicone because "silicone based products interfere with the filtering equipment at Foremost's cheese plants." Performance Corp. contends that the only reasonable inference from this testimony is that the defoamer must have remained in the recon during the cheese-making process.

- As to Foremost's kosher requirement, Performance Corp. asserts: "Kosher means that all the ingredients are kosher. Since recon is not a sales product, if defoamer in recon needs to be a kosher ingredient of a kosher food product, the defoamer must be expected to be an ingredient in a kosher end product."

Performance Corp. contends that the food-grade, non-silicone, and kosher requirements show not only that the defoamer remained, but also that Foremost knew or presumed that it would remain.

¶22 Foremost replies succinctly that there is still no evidence showing that the defoamer remained in the final recon and that it makes sense that Foremost would impose these requirements *just in case* the defoamer ended up in the final product.

¶23 This debate is easily resolved. We agree that it makes sense to impose the requirements without knowing whether the defoamer in fact remained. If the defoamer remained, or customers suspected it remained, Foremost had covered its bases. And, even if Foremost believed that the defoamer remained in the recon and end dairy products, such a belief does not establish that the defoamer actually remained.

3. Fulfilling Its Purpose

¶24 The circuit court reasoned that the defoamer must have been present in the recon when the end dairy products were produced because "[t]he defoamer

had to remain in the end product to ensure that its purpose of removing the foam was one that was completed." Foremost argues that this factual conclusion does not follow from the evidence. We agree. As Foremost correctly observes, nothing in the record suggests that the defoamer's function continued past the time the recon was mixed.

¶25 Rather than simply agree with Foremost that the circuit court's reasoning is not supported by the record, Performance Corp. responds by pointing out that in ***Foremost I*** we "did not require that the defoamer remain functional as a defoamer throughout the manufacturing process." This observation about ***Foremost I*** is accurate, but it does not support the circuit court's ensure-its-purpose-is-complete reasoning.

4. Phenol

¶26 In ***Foremost I***, we addressed the presence of phenol in the defoamer as follows:

> The undisputed evidence shows that the damaged recon was made using a particular drum of defoamer containing phenol. Viewing the evidence in a light most favorable to Foremost, the non-moving party, that evidence supports the factual inference that phenol was a contaminant in the defoamer, rather than a defoamer ingredient.
>
> Foremost used Performance Corp.'s defoamer for about two years without a problem. When Foremost discovered that some of its end dairy products were defective, testing showed that the source of the problem was phenol in defoamer from a particular drum purchased from Performance Corp. As described in more detail in the background section of this opinion, when the phenol in the defoamer interacted with bromide in water during recon mixing, the combination of the two substances produced bromophenols. The bromophenols, in turn, damaged the recon and end dairy products. Testing also showed that another drum of Performance Corp. defoamer received by Foremost at about the same time as the suspect drum did

> not contain phenol. A reasonable inference from this evidence is that phenol is a contaminant, rather than normal defoamer ingredient.
>
> Under this view of the evidence, phenol is not, in any meaningful sense, part of Performance Corp.'s defoamer product, but instead a contaminant in a particular drum of defoamer. So far as the record discloses, the phenol served only one purpose—to damage the recon and, in turn, damage the end dairy products. At a minimum, a factual dispute remains as to whether the phenol was a component of the recon and end dairy products.
>
> Accordingly, we conclude that a factual dispute remains as to whether the defoamer or the phenol were components of the recon or end dairy products within the meaning of the "integrated system" test.

Foremost I, 297 Wis. 2d 724, ¶¶31-34. Thus, in ***Foremost I***, we held that, so far as the current record discloses, phenol may purely be a contaminant and not, in any meaningful sense, a part of a "system" or a "component" of the end dairy products within the meaning of the "integrated system" test. Nothing has changed. Apart from Performance Corp.'s food regulation argument, which we reject above, the company provides no answers to the phenol questions we raised in ***Foremost I***.[3]

D. "Disappointed Expectations" Test

¶27 As explained in ***Foremost I***, the pertinent "disappointed expectations" question is this: "Does the undisputed evidence show that Foremost should have anticipated that the defoamer might function properly as a defoamer,

[3] In ***Foremost I***, based on the way the parties discussed the issue, we understood that the suspect barrel contained phenol. This time around, Performance Corp. has clarified that the barrel of defoamer contained "aerobic bacteria" that led to the creation of phenol when the barrel was opened. Performance Corp. does not suggest that this difference matters. Accordingly, we continue to speak as if the barrel contained phenol.

yet contain a contaminant such as phenol that might damage Foremost's recon and, eventually, its end dairy products?" ***Id.***, ¶36.

¶28 On remand, Performance Corp. neither provided new evidence nor pointed to existing evidence addressing what Foremost should have anticipated. Instead, Performance Corp. relied on food regulations and made factual assertions unsupported by evidentiary submissions. The following excerpt from its appellate brief is representative:

> Knowing the defoamer would necessarily be a part of the end products, Foremost must have been aware of the potential for off-tastes from the minute amount of chemicals. The recognition of the effects of various factors on the taste and smell of cheese and milk is well known. For example, cheddar cheese is graded on flavor characteristics imparted from feed. Such flavor characteristics are variously described as "malty," "old milk," "barny," "onion," or "utensil." (Wis. Adm. Code ATCP 81.40.) "Barny" means "a flavor trait characteristic of the odor of a barn, stable or cow yard." (Wis. Adm. Code ATCP 81.01(12)(b).) These are imparted to the final cheese from the cow's feed; that the defoamer ingredients can also impart tastes and smells when directly added to milk is not surprising.
>
> In Foremost's business, the necessity of being aware of all trace chemicals is obvious and well known. Given the ease at which milk develops "off-tastes" or "flavor notes," the risk that Foremost's product might be rendered unfit for consumption by added substances was foreseeable.

Performance Corp. fails to differentiate between seemingly reasonable argument and argument supported by evidence. It is undeniably reasonable to believe that food makers try to anticipate problems that will affect the taste and quality of their products. But this reasonable assertion amounts to nothing more than reasonable speculation—it is not evidence. Inexplicably, Performance Corp. did not put on a person with knowledge of Foremost, or companies like it, to say what is common

knowledge generally or why, more specifically, such companies should anticipate the sort of contamination that occurred here.

¶29 Because the above quote from Performance Corp.'s appellate brief includes references to Wisconsin food regulations, it bears repeating here that Performance Corp.'s reliance on food regulations is misplaced. The content of regulations is not, standing alone, evidence that Foremost should have anticipated the phenol problem here.

¶30 Performance Corp. asserts that ***Grams v. Milk Products, Inc.***, 2005 WI 112, 283 Wis. 2d 511, 699 N.W.2d 167, supports the proposition that "[i]f a product is expected and intended to interact with other products and property, it naturally follows that the product could adversely affect and even damage that property." We addressed and rejected this misreading of ***Grams*** in ***Foremost I***:

> We note that "reasonable foreseeability" should not be equated with "foreseeable interaction" between the purchased product and the damaged property. Foreseeable interaction, by itself, does not show that damage was reasonably foreseeable within the meaning of the "disappointed expectations" test. We broach this topic because a sentence in [***Grams v. Milk Products, Inc.***, 2005 WI 112, 283 Wis. 2d 511, 699 N.W.2d 167,] might be read to suggest otherwise. The ***Grams*** court stated: "If a product is expected and intended to interact with other products and property, it naturally follows that the product could adversely affect and even damage that property." ***Grams***, 283 Wis. 2d 511, ¶47. Read in isolation, the sentence seemingly suggests that, any time a purchaser knows a product will come into some sort of contact with other property, the purchaser should anticipate that the purchased product may damage the other property and bargain accordingly. But the full discussion in ***Grams*** indicates that foreseeable interaction, by itself, is not enough.

Foremost I, 297 Wis. 2d 724, ¶20. We later summarized: "Foreseeable interaction between damaged property and the damage-causing product is insufficient, by itself, to meet the 'disappointed expectations' test." ***Id.***, ¶35.[4]

¶31 In sum, our answer to the "disappointed expectations" question posed in ***Foremost I*** remains the same. The undisputed evidence does not show that Foremost should have anticipated that the defoamer might function properly as a defoamer yet contain a contaminant such as phenol that might damage Foremost's recon and, eventually, its end dairy products.

E. De Minimis

¶32 Performance Corp. invites us to expand the economic loss doctrine to include a "*de minimis*" test. Performance Corp. points to ***Rich Products Corp. v. Kemutec, Inc.***, 66 F. Supp. 2d 937 (E.D. Wis. 1999), which, according to Performance Corp., applies a "*de minimis*" exception that acts to bar tort actions. We decline Performance Corp.'s invitation.

¶33 The economic loss doctrine discussion in ***Rich*** is lengthy and complicated. It seemingly applies a combination of a "*de minimis* exception" and the "***Dakota*** exception" to bar the tort action in that case. ***Id.*** at 975. Rather than provide our own summary of the ***Rich*** "*de minimis*" holding, we will accept, for the sake of argument only, Performance Corp.'s characterization:

> In ***Rich***, a buyer purchased a mechanical conveyer to be used in the production of its food products. The conveyor's

[4] Performance Corp. points to federal regulatory commentary stating that it is not possible to produce food that is entirely free from contaminants. This fact, however, does not deal with whether tort claims should be disallowed if a food maker like Foremost is damaged by particular levels of a particular contaminant.

> wires frayed and wire strands entered the food product. Although the buyer suffered $11 million of damage as a result of food recall, the court found that the minimal amount of wire in the food product compared to the amount of product produced (29 pieces of wire in 6 million cases of product processed) was such a de minimis damage to "other property" as to be insufficient to engage tort theories of recovery.

Accepting this characterization of ***Rich*** as accurate, and even assuming that we were inclined to adopt this addition to the economic loss doctrine, a similar result is not warranted here. In ***Rich***, damage to a small number of bakery items required the recall of about 400,000 cases of product, resulting in claimed damages of $11 million. ***Id.*** at 951-52.[5] Thus, in ***Rich*** the actual damage *was* de minimis. Here, it is alleged that over half a million dollars' worth of end product was damaged. Nothing before us suggests that this damage was in any sense de minimis.

Conclusion

¶34 We reverse the grant of summary judgment in favor of Performance Corp. and direct the circuit court to reinstate Foremost's tort claims.

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

Not recommended for publication in the official reports.

[5] The plaintiff in ***Rich Products Corp. v. Kemutec, Inc.***, 66 F. Supp. 2d 937 (E.D. Wis. 1999), was able to identify approximately 29 damaged items of bakery, which included items returned to the company as part of the recall. The recall number cited in the text above—about 400,000 cases—is comprised of 216,904 cases of product that were destroyed in the field and 195,730 cases of product that were returned. The court apparently assumed that a similar small percentage of damaged items would have been found in the cases destroyed in the field. *See* ***id.*** at 952 & n.13.