

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAND O'LAKES FARMLAND FEED,
LLC, A DELAWARE LIMITED
LIABILITY COMPANY,
Appellant

vs.

COTTONWOOD CATTLE COMPANY,
LLC, A NEVADA LIMITED LIABILITY
COMPANY,
Respondent.

LAND O'LAKES FARMLAND FEED,
LLC, A DELAWARE LIMITED
LIABILITY COMPANY,
Appellant,

vs.

COTTONWOOD CATTLE COMPANY,
LLC, A NEVADA LIMITED LIABILITY
COMPANY,
Respondent.

No. 45805

FILED

DEC 01 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Ribaud*
CHIEF DEPUTY CLERK

No. 46097

ORDER OF AFFIRMANCE

These are consolidated appeals from a district court judgment in a negligence and breach of express and implied warranties case and a post-judgment order awarding attorney fees. Fourth Judicial District Court, Elko County; Andrew J. Puccinelli, Judge.

In these consolidated appeals, Land O'Lakes Farmland Feed, LLC ("Lakes") challenges the district court's judgment in favor of Cottonwood Cattle Company, LLC ("Cottonwood") in two respects. First, Lakes argues that the district court erred in awarding Cottonwood \$16,692 for business interruption losses in 2003 and 2004. Second, Lakes asserts that the district court erred in awarding Cottonwood \$23,108 for the cost of hay purchased to feed Cottonwood's herd after Cottonwood

abandoned the toxic nutritional supplement developed by Lakes. Separately, Lakes appeals from the district court's order awarding attorney fees to Cottonwood.

We will address each of Lakes's arguments, in turn, below. The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition. For the following reasons, we affirm.

Business Interruption Damages (\$16,692)

First, Lakes argues that the district court erred when it awarded \$16,692 in business interruption losses to Cottonwood for lost calf crops in 2003 and 2004 because this amounted to double recovery and was inconsistent with the court's finding that Cottonwood mitigated its losses. We disagree.

We have "repeatedly held that 'findings of fact and conclusions of law, supported by substantial evidence, will not be set aside unless clearly erroneous.'"¹ Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion."²

In fixing damages, the district court first awarded Cottonwood \$675 per head for the 23 marketable yearling heifers held back by Cottonwood as replacements for the pregnant cattle killed by Lakes' supplement. This value did not represent the value of the deceased pregnant cattle, but rather their non-pregnant replacements. The district

¹Sheehan & Sheehan v. Nelson Malley & Co., 121 Nev. ___, ___, 117 P.3d 219, 223 (Nev. 2005) (quoting Edwards Indus. v. DTE/BTE, Inc., 112 Nev. 1025, 1031, 923 P.2d 569, 573 (1996)).

²Taylor v. Thunder, 116 Nev. 968, 974, 13 P.3d 43, 46 (2000) (internal quotations omitted).

court then granted business interruption damages to compensate for the losses suffered by Cottonwood in 2003 and 2004, when the replacement heifers had yet to begin producing marketable offspring. The district court found that Cottonwood suffered lost profits totaling \$16,692 during this period, and that Cottonwood acted reasonably in mitigating its damages by replacing the calf-production of the deceased cattle with 23 heifers from its crop of marketable yearlings. We conclude this damages award is supported by substantial evidence.

We have recognized the general principle that “purely economic losses can be recovered for breach of warranty” in cases governed by the UCC.³ In Ballard v. Amana Society Inc., the Iowa Supreme Court held that the plaintiffs could recover business interruption damages for the time necessary to restore the reproductive abilities of a herd of swine after defendant’s toxic feed caused the death of several hogs and reduced the reproductive abilities of others.⁴

³Nevada Contract Servs. v. Squirrel Cos., 119 Nev. 157, 161, 68 P.3d 896, 899 (2003).

⁴526 N.W.2d 558, 560-61 (Iowa 1995). In Ballard, the court noted,

While recovery of the market value of the hogs that were destroyed precludes plaintiffs from also recovering profits based on their inability to sell those hogs, this circumstance should not preclude additional damages based on interruption in the production of additional litters during the period of time reasonably required to replace the destroyed farrowing facility.

Id. at 560 (quoting Mills v. Guthrie County Rural Elec., 454 N.W.2d 846, 851 (Iowa 1990)). Thus, the Iowa Supreme Court permitted the plaintiff to recover business interruption losses for a period of four years. Id.

In this case, as in Ballard, it took several years before Cottonwood's herd returned to normal reproduction levels after Lakes provided the defective supplement. Thus, the district court did not err when it divided Cottonwood's damages into separate categories: (1) replacement damages for the deceased cattle, and (2) business interruption damages to replace lost calf crops in 2003 and 2004. Essentially, Cottonwood recovered the value of 66 animals. First, the \$675 per head award served as replacement damages for the 23 deceased cows. Second, the \$16,692 in business interruption damages served to compensate Cottonwood for the fact that it could not sell approximately 43 yearlings in 2003 (23) and 2004 (20). While Cottonwood would have been able to sell the 23 market yearlings that it held back in 2003 as replacements for the deceased cattle if it had replaced the cattle with cows from outside the herd, the district court determined that Cottonwood's decision to replace the cows internally was reasonable. Because that finding is supported by substantial evidence, we do not disturb it here.

Accordingly, we conclude that it was not double recovery when Cottonwood received an award of replacement damages and business interruption losses as compensation for the lowered productivity of its herd. Rather, each award was a distinct measure of damages for a separate injury. The district court viewed this approach to measuring Cottonwood's damages as more appropriate than simply awarding the market value of the deceased pregnant cattle immediately before their demise. We conclude that the district court's decision to award damages in this manner was supported by substantial evidence and not clearly erroneous, and we thus affirm the award.

Cost of Replacement Feed Hay (\$23,108)

Second, Lakes argues that the cost of hay to Cottonwood after Cottonwood abandoned the supplement program in 2002 was not foreseeable at the time the parties entered into the contract, and therefore, cannot be awarded as consequential damages. We disagree.

Applicable to this case is NRS 104.2715(2)(a), which provides, “[c]onsequential damages resulting from the seller’s breach include . . . [a]ny loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise.”

At trial, Agee Smith testified that he told Lakes’ salesperson that Cottonwood was implementing the new supplement program to lower costs and “get away from feeding hay.” Smith’s testimony was corroborated by Lakes’ salesperson, who testified that Smith told him Cottonwood “was going to grazing fall feeding.” Thus, Lakes was on notice that Cottonwood planned to use the supplement to replace feeding hay.⁵ Additionally, at the time of contracting, Lakes had reason to know that a defective shipment of supplement would require Cottonwood to find an alternative form of nutrition for its herd of cattle. This made Cottonwood’s purchase of additional hay foreseeable after the supplement proved defective.

Moreover, Smith made clear during examination by the trial judge that the \$23,108 spent on feed hay was for hay “over and above” what Cottonwood would have purchased had the ranch continued with the

⁵See NRS 104.1202(6).

feed supplement program. Ultimately, the district court concluded that, after the urea poisoning in December 2002, Cottonwood immediately ceased feeding the supplement to the herd and began feeding the herd hay and block salt because Cottonwood was unsure of the cause of the deaths. In addition, the court found that Cottonwood had to purchase \$23,108 worth of hay over and above what it would have used under normal circumstances, if the supplement had been properly prepared and mixed. In doing so, it appears that the trial court did not accept Lakes' expert's testimony that Cottonwood would have required the hay even if the nutritional supplement had worked.

In light of Smith's testimony, the finding that Cottonwood purchased hay over and above what it would have purchased is supported by substantial evidence, and we will not disturb it here. Thus, we affirm the \$23,108 award granted by the trial court as consequential damages for extra feed hay.

Attorney Fees

Lastly, Lakes asserts that the district court erred in granting Cottonwood's request for attorney fees. Specifically, Lakes challenges the district court's finding that Lakes disputed causation unreasonably and in bad faith after Cottonwood's November 2004 offer of judgment. We conclude that the district court did not abuse its discretion in awarding attorney fees to Cottonwood.

In Beattie v. Thomas, we recognized four factors relevant to the determination of whether a party may recover attorney fees when the party's offer of judgment is rejected by the opposition and the party is ultimately successful on the merits: (1) whether the plaintiff's claim was brought in good faith; (2) whether the [the offeror's] offer of judgment was

reasonable and in good faith in both its timing and amount; (3) whether the [offeree's] decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.⁶

No single Beattie factor is determinative, and district courts have broad discretion to grant a request for attorney fees "so long as all appropriate factors are considered."⁷ On appeal, unless the trial court's exercise of discretion in evaluating the Beattie factors is "arbitrary or capricious, this court will not disturb the lower court's ruling[.]"⁸

Lakes' opening brief states that "only Beattie No. 3 is at issue on appeal."⁹ Concerning the third Beattie factor, the district court found that no reasonable person would have continued to challenge causation after Cottonwood's second offer of judgment, and therefore, Lakes acted grossly unreasonably and in bad faith when it rejected this offer. Lakes argues that this finding was an abuse of discretion in three respects.

⁶99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983). When the defendant is the offeree instead of the offeror, the first factor becomes "whether the defendant's claim or defense was brought in good faith." Yamaha Motor Co. v. Arnoult, 114 Nev. 233, 252, 955 P.2d 661, 673 (1998).

⁷Yamaha Motor Co., 114 Nev. at 252, n. 16, 955 P.2d at 673, n.16.

⁸Id. at 251, P.2d at 672-73 (quoting Schouweiler v. Yancey Co., 101 Nev. 827, 833, 712 P.2d 786, 790 (1985)).

⁹In its reply brief, Lakes argues for the first time that the district court failed to apply the first Beattie factor properly. However, because "[r]epley briefs shall be limited to answering any new matter set forth in the opposing brief," this argument is not properly before the court. NRAP 28(c).

First, Lakes contends that it admitted causation by making its own offer of judgment in December 2004. However, causation was a major trial issue. Therefore, Lakes must have continued to dispute causation after December 2004.

Second, Lakes asserts that the trial court should have given Lakes "credit" for a reduction in Cottonwood's damages from \$1000 per head to \$675 per head for the deceased cattle. However, the parties entered into a stipulation as to the cost of the replacement heifers. Thus, the district court did not abuse its discretion in finding that Lakes did not prevail on this issue.

Third, Lakes contends that it even now continues to present good faith challenges to the amount of damages awarded to Cottonwood. However, the district court felt that there was no reasonable basis for these arguments after Cottonwood's \$30,000 offer in December 2004.

Under NRCP 68(f), the district court has broad discretion to award attorney fees after considering the Beattie factors. Here, the district court presented a thorough analysis of its reasoning, particularly in relation to the third Beattie factor. In its order, the court noted that Lakes was not acting grossly unreasonably or in bad faith when it rejected Cottonwood's first, pre-discovery offer of judgment. This was because Lakes' theory of causation (i.e., that the defective feed did not cause the cattle deaths) was at least plausible at that point in time. On the other hand, the court found that Lakes did act grossly unreasonably and in bad faith when it rejected Cottonwood's second offer of judgment for \$30,000 in November 2004. This was because most of the discovery had been completed by the time Cottonwood made its second offer of judgment and it should have been readily apparent to any reasonable person or entity

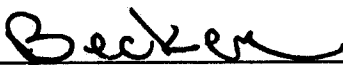
what caused Cottonwood's cattle death loss. Because the total amount of the judgment against Lakes exceeds Cottonwood's second offer of judgment, it was within the district court's discretion to award attorney fees pursuant to NRCP 68(f).

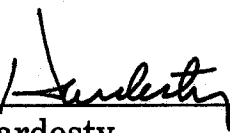
As the record supports the district court's well-reasoned order, the decision to grant attorney fees to Cottonwood was not "arbitrary or capricious."¹⁰ Thus, the district court did not abuse its discretion when it awarded attorney fees to Cottonwood.

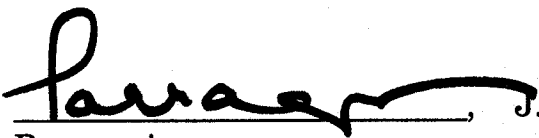
Conclusion

The district court properly awarded Cottonwood \$16,692 in business interruption losses, \$23,108 for the cost of replacement hay, and attorney fees. Accordingly, we

ORDER the judgments of the district court AFFIRMED.


_____, J.
Becker


_____, J.
Hardesty


_____, J.
Parraguirre

¹⁰Yamaha Motor Co., 114 Nev. at 251, 955 P.2d at 672-73.

cc: Hon. Andrew J. Puccinelli, District Judge
Wilson & Barrows, Ltd.
Matthews & Wines
Elko County Clerk