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Tedd Bish Farm, Inc., a Nebraska corporation, appellant, v. Southwest Fencing Services, LLC, a Nebraska limited liability company, appellee.

867 N.W.2d 265

Filed August 7, 2015. No. S-14-915.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted, and gives the party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.
3. ____. Summary judgment is proper if the pleadings and admissible evidence offered show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
4. ____. When reasonable minds can differ as to whether an inference can be drawn, summary judgment should not be granted.
5. **Damages.** The issue of whether an injured party actually exercised reasonable efforts in mitigating the damage is a question of fact.
6. **Summary Judgment: Damages.** A trial court must decide the issue of mitigation of damages as a matter of law on summary judgment where the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom.
7. **Damages.** Under the doctrine of avoidable consequences, which is another name for the failure to mitigate damages, a wronged party will be denied recovery for such losses as could reasonably have been avoided, although such party will be allowed to recover any loss, injury, or expense incurred in reasonable efforts to minimize the injury.

8. ____. A plaintiff's failure to take reasonable steps to mitigate damages bars recovery, not in toto, but only for the damages which might have been avoided by reasonable efforts.
9. ____. The avoidable consequences doctrine creates responsibility only for those hypothetical ameliorative actions that could have been accomplished through ordinary and reasonable care.
10. ____. An injured party may be excused from the duty to mitigate if the injured party lacks the financial ability to do so.
11. ____. The duty to mitigate is often excused in cases where the defendant inhibits the plaintiff from taking actions to avoid additional damages.
12. **Damages: Intent.** The repeated assurances of a defendant after an injury has begun that he or she will remedy the condition is sufficient justification for a plaintiff's failure to take steps to minimize loss, so long, at least, as there is ground for expecting that the defendant will perform.

Appeal from the District Court for Hamilton County, Rachel A. Daugherty, Judge, on appeal thereto from the County Court for Hamilton County, Linda S. Caster Senff, Judge. Judgment of District Court affirmed.

Scott D. Pauley, of Conway, Pauley & Johnson, P.C., for appellant.

Matthew B. Reilly, of Erickson & Sederstrom, P.C., L.L.O., for appellee.

Heavican, C.J., Wright, Connolly, McCormack, Miller-Lerman, and Cassel, JJ.

Heavican, C.J.

I. NATURE OF CASE

Tedd Bish Farm, Inc., owns a 120-acre tract of farmland in Hamilton County, Nebraska. We refer to Tedd Bish Farm and its owner, Tedd Bish, collectively as "Bish." One 6.5-acre corner of the land is irrigated by a gravity irrigation system, which is fed by a pipe that runs along the property fence line. Southwest Fencing Services, LLC (Southwest Fencing), damaged a section of the pipe while removing and replacing the

fence along Bish's property. Bish discovered the damage to the pipe in July 2011. According to Bish, the pipe needed to be repaired by June 1, 2012, in order to avoid crop damage in the 6.5-acre corner for the 2012 crop year. Bish took the pipe in to be repaired on May 15, 2012, and was informed that repairs could be made by June 1. Bish, according to the county court, "chose not to authorize repairs" at that time, and the pipe was not repaired before June 1.

Bish filed a complaint in the county court for Hamilton County, seeking damages for repair of the pipe and lost profits from loss of use of the pipe for the 2012 crop year. The county court granted Southwest Fencing's motion for partial summary judgment on the issue of whether Bish failed to mitigate damages and complete the repairs within a reasonable amount of time. That order was affirmed by the district court for Hamilton County. Bish now appeals to this court from the district court's order affirming the county court's order granting Southwest Fencing's motion for partial summary judgment on the issue of whether Bish had made reasonable efforts to mitigate its damages.

We determine that summary judgment on an issue of fact, such as whether a party exercised reasonable efforts in mitigating damages, is appropriate when reasonable minds could draw but one conclusion from the facts. Further, we find that the district court did not err in affirming the county court's order, because the cost of the repair was reasonable in comparison to the damages avoided; Bish had the financial ability to pay for the repairs; and Southwest Fencing's own actions did not prevent Bish from authorizing the repairs itself.

II. BACKGROUND

As acknowledged by the county and district courts, the underlying facts of the case are largely not in dispute by the parties. Bish owns a 120-acre tract of farmland in Hamilton County, and one side of Bish's property, lined by a fence, is directly adjacent to Interstate 80. The majority of Bish's land

is irrigated by a center pivot, but a 6.5-acre corner of Bish's land cannot be reached by the pivot and is instead irrigated by gravity irrigation.

Bish utilizes approximately 660 feet of irrigation pipe, which runs along the property fence line adjacent to Interstate 80, to supply water to the gravity irrigation system. Southwest Fencing contracted with Nebraska's Department of Roads to replace sections of fence separating private property from Interstate 80 in Hamilton County. During the course of replacing the fence on Bish's property in 2011, an employee from Southwest Fencing ran over portions of Bish's irrigation pipe with a skid loader and caused damage to the pipe.

On July 25, 2011, Bish discovered the damage to the pipe and contacted Southwest Fencing. A representative for Southwest Fencing denied that Southwest Fencing caused the damage and refused to pay for the repairs. On the same day, Bish contacted the Department of Roads. Bish testified in his deposition that the department informed him that Southwest Fencing's insurance company would pay for the damage to the pipe. Bish then contacted Southwest Fencing again that day, but its representative again denied any liability. Bish testified in his deposition that he did not remove the pipe or seek to get the pipe repaired at that time because Southwest Fencing had yet to admit to the damage.

Bish contacted Southwest Fencing again in 2012 regarding the damaged irrigation pipe, and its representative gave Bish the contact information for Southwest Fencing's insurer. On May 14, 2012, Bish met with an insurance claims investigator for Southwest Fencing's insurer. The claims investigator acknowledged that the damage to the pipe was caused by Southwest Fencing and told Bish to take the pipe to Northern Agri-Services, Inc., to get an estimate for the repair. Bish testified that he told the claims investigator the pipe needed to be repaired by June 1 in order to utilize the gravity irrigation system for the 2012 crop year. In its motion for partial summary judgment, Southwest Fencing did not dispute the significance of the June 1 cutoff date.

On May 15, 2012, Bish took the damaged pipe to Northern Agri-Services for an estimate. Bish also informed Northern Agri-Services that the pipe needed to be repaired by June 1. Northern Agri-Services estimated the cost to repair the pipe would be $1,772.40 and informed Bish that it could complete the repairs by June 1. Bish, however, did not authorize the repairs at that time. Bish testified in his deposition that he did not authorize the repairs because he believed Southwest Fencing's insurance company needed to approve the repairs before Northern Agri-Services could make the repairs. Bish testified that he had the financial ability to pay for the repairs himself at that time.

On June 5, 2012, Southwest Fencing requested its own estimate, and on July 13, it verbally offered Bish $1,772.40 to fix the pipe and later offered the same amount in writing on August 21. The pipe was not repaired in time for the 2012 crop year. Bish eventually had the pipe repaired before the 2013 crop season, and Northern Agri-Services sent Bish an invoice totaling $2,854.83 for the repairs. Southwest Fencing never paid Bish for the repairs.

Bish filed a complaint on May 22, 2013, in the county court for Hamilton County alleging that Southwest Fencing negligently damaged the irrigation pipe. In an amended complaint, Bish requested $13,578.62 in damages: $2,854.83 for the cost of the repair of the damaged irrigation pipe and $10,723.79 in lost profits for the 2012 crop year. In Southwest Fencing's answer to Bish's complaint, Southwest Fencing affirmatively pled that Bish failed to mitigate its damages with respect to the lost profits.

Southwest Fencing filed a motion for partial summary judgment on the issue of mitigation of damages. In support of its motion for partial summary judgment, Southwest Fencing submitted Bish's response to a request for admissions and a portion of Bish's deposition testimony. Bish submitted an affidavit from Bish and Southwest Fencing's answers to interrogatories. On January 31, 2014, the county court determined

that Bish did not seek to repair the pipe within a reasonable amount of time and that therefore, Bish could not recover any lost profits associated with not having the pipe repaired by June 1, 2012.

A bench trial on the issues of negligence and the amount of damages for repair or replacement of the pipe was held on May 12, 2014. On May 23, the county court entered judgment in favor of Bish and awarded Bish $2,854.83. Bish then appealed to the Hamilton County District Court the county court's order granting Southwest Fencing's partial motion for summary judgment. On September 19, the district court affirmed the county court's order granting Southwest Fencing's motion for partial summary judgment on the issue of whether Bish made reasonable efforts to mitigate its damages. Bish now appeals to this court.

III. ASSIGNMENT OF ERROR

Bish assigns, consolidated and restated, that the district court erred in affirming the county court's order granting partial summary judgment on the issue of whether Bish failed to mitigate damages as to the 2012 crop year.

IV. STANDARD OF REVIEW

[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted, and gives the party the benefit of all reasonable inferences deducible from the evidence.[1]

V. ANALYSIS

Bish assigns that the district court erred in affirming the county court's order granting partial summary judgment on the issue of mitigation of damages. Bish argues that (1) summary judgment was not appropriate and (2) the evidence, viewed in

[1] *Green v. Box Butte General Hosp.*, 284 Neb. 243, 818 N.W.2d 589 (2012).

a light most favorable to Bish, shows that Bish exercised reasonable efforts in attempting to mitigate the damages.

1. Summary Judgment

[2-4] Bish contends that summary judgment was not appropriate, because the issue of whether Bish acted reasonably in mitigating the damages is a question of fact and should have been resolved by the jury. Southwest Fencing, on the other hand, contends that mitigation is a question of law. Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.[2] Summary judgment is proper if the pleadings and admissible evidence offered show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[3] When reasonable minds can differ as to whether an inference can be drawn, summary judgment should not be granted.[4]

[5,6] The decision over whether the issue of mitigation of damages should be presented to the jury lies with the court and is a question of law.[5] However, the issue of whether an injured party actually exercised reasonable efforts in mitigating the damage is a question of fact.[6] But a trial court must

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[2] *O'Brien v. Bellevue Public Schools*, 289 Neb. 637, 856 N.W.2d 731 (2014).

[3] *Kercher v. Board of Regents*, 290 Neb. 428, 860 N.W.2d 398 (2015).

[4] *Hughes v. School Dist. of Aurora*, 290 Neb. 47, 858 N.W.2d 590 (2015).

[5] See *Gottsch Feeding Corp. v. Red Cloud Cattle Co.*, 229 Neb. 746, 429 N.W.2d 328 (1988).

[6] See, e.g., *Manufacturers Life Ins. v. Mascon Inform. Techn.*, 270 F. Supp. 2d 1009 (N.D. Ill. 2003); *Aircraft Guar. Corp. v. Strato-Lift, Inc.*, 991 F. Supp. 735 (E.D. Pa. 1998); *McCormick Intern. USA, Inc. v. Shore*, 152 Idaho 920, 277 P.3d 367 (2012); *Lewis v. Community First Nat. Bank, N.A.*, 101 P.3d 457 (Wyo. 2004); *Tincher v. Interstate Precision Tool Corp.*, No. 19093, 2002 WL 1396097 (Ohio App. June 28, 2002) (unpublished opinion) (cause dismissed at 96 Ohio St. 3d 1531, 776 N.E.2d 111 (table captioned "Supreme Court of Ohio Table Decisions")).

decide the issue of mitigation of damages as a matter of law on summary judgment "[w]here the facts are undisputed or are such that reasonable minds can draw but one conclusion therefrom . . . ."[7] Applying this same principle, courts in other jurisdictions have found summary judgment to be appropriate for the issue of mitigation "where the facts clearly demonstrated the injured party, by his own avoidable action or inactions, caused the damages about which he complained."[8] Thus, even though the issue of whether an injured party's actions constituted reasonable efforts to mitigate is a question of fact, summary judgment would still be appropriate so long as "reasonable minds could not differ concerning efforts to mitigate."[9]

2. Reasonable Efforts

[7,8] Keeping in mind that we view the evidence in a light most favorable to Bish, we next move to the question of whether Bish took reasonable steps to mitigate the damage as a matter of law.

> Under the doctrine of avoidable consequences, which is another name for the failure to mitigate damages, a wronged party will be denied recovery for such losses as could reasonably have been avoided, although such party will be allowed to recover any loss, injury, or expense incurred in reasonable efforts to minimize the injury.[10]

"A plaintiff's failure to take reasonable steps to mitigate damages bars recovery, not in toto, but only for the damages which might have been avoided by reasonable efforts."[11] In assessing

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[7] *Sweem v. American Fidelity Life Assurance Co.*, 274 Neb. 313, 319, 739 N.W.2d 442, 447 (2007).

[8] *Lewis, supra* note 6, 101 P.3d at 460.

[9] *Id.*

[10] *Borley Storage & Transfer Co. v. Whitted*, 271 Neb. 84, 95, 710 N.W.2d 71, 80 (2006).

[11] *Id.*

the reasonableness of Bish's efforts, we look to (a) the cost of mitigation, (b) Bish's financial ability to mitigate, and (c) the actions of Southwest Fencing.

(a) Cost of Mitigation

[9] The avoidable consequences doctrine creates responsibility only for "those hypothetical ameliorative actions that could have been accomplished through ordinary and reasonable care."[12] In property damage cases, courts generally measure reasonableness by comparing the cost of the threatened injury against the cost of the repair.[13] To put it another way, the injured party has the responsibility to protect himself or herself if it can be done at a "'"trifling expense."'"[14] "The word 'trifling' means a sum which is trifling in comparison with the consequential damages which the party is seeking to recover in a particular case."[15]

A New Hampshire case similarly involving lost crops illustrates this principle.[16] In that case, the plaintiffs, owners of farmland, entered into a landfill removal contract with the defendant. Pursuant to the terms of the agreement, the defendant was allowed to remove earthfill from the farmland, but was also obligated to restore the excavation area to its original condition after completion of the work. The defendant failed to satisfactorily complete the restoration of the land, and the plaintiffs sued for breach of contract. The trial court awarded the plaintiffs $10,500 in damages for the cost to restore the topsoil and $3,000 in lost profit for 2 years'

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[12] 25 C.J.S. *Damages* § 184 at 548 (2012) (citing *System Components Corp. v. Florida DOT*, 14 So. 3d 967 (Fla. 2009)).

[13] See 25 C.J.S., *supra* note 12, § 45.

[14] See, e.g., *Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d 854, 857 (Tex. 1999).

[15] *Tatum v. Morton*, 386 F. Supp. 1308, 1311 (D.D.C. 1974) (citing 22 Am. Jur. 2d *Damages* § 32 (1965)).

[16] *Emery v. Caledonia Sand and Gravel Co.*, 117 N.H. 441, 374 A.2d 929 (1977).

worth of lost crops from the damaged area. On appeal, the defendant argued, with respect to the award of lost profit, that the plaintiffs failed to mitigate damages by replacing the topsoil themselves. The New Hampshire Supreme Court determined that it would not be reasonable to expect the plaintiffs to spend $10,500 in order to avoid $3,000 in lost profits. Cases from other jurisdictions have reached similar conclusions when the cost of mitigation outweighed the damages avoided.[17]

Contrary to the cases cited above, the cost of mitigation in this case is far less than the potential damages avoided. The $2,845 cost of the repair is a reasonable expense by comparison, considering Bish stood to gain almost four times that amount in additional income (Bish alleged approximately $10,700 in lost profits) if it was able to farm the 6.5-acre corner section for the 2012 crop year. An ordinarily prudent person in Bish's position would have viewed the cost of the repair as a reasonable expense given the circumstances.

(b) Bish's Financial Ability

[10] Even if mitigation could be achieved through reasonable expense compared to the damages avoided, an injured party may be excused from the duty to mitigate if the injured party lacks the financial ability to do so.[18] If Bish did not have the financial ability to pay for the repairs of the pipe before June 1, 2012, then it may be excused from the duty to mitigate. Bish admitted in his deposition that Bish had the ability to pay for the repairs, and eventually did fund the repair of the pipe before the 2013 crop year. Bish also stated in his deposition that had he caused the damage to the pipe himself, he would have immediately taken the pipe in

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[17] See, *Lochthowe v. C.F. Peterson Estate*, 692 N.W.2d 120 (N.D. 2005); *Avco Financial Services v. Ramsey*, 631 So. 2d 940 (Ala. 1994); *Lake Village Impl. Co. v. Cox*, 252 Ark. 224, 478 S.W.2d 36 (1972).

[18] See, e.g., *McPherson v. Kerr*, 195 Mont. 454, 636 P.2d 852 (1981).

to be repaired. The record reveals Bish had the wherewithal to make the repairs, which further leads us to the conclusion that Bish did not exercise reasonable efforts in minimizing the injury.

(c) Southwest Fencing's Actions

[11,12] The duty to mitigate is also often excused in cases where the defendant inhibits the plaintiff from taking actions to avoid additional damages.[19] For example, it has been said that "'[t]he repeated assurances of the defendant after an injury has begun that he will remedy the condition is sufficient justification for the plaintiff's failure to take steps to minimize loss, so long, at least, as there is ground for expecting that [the defendant] will perform.'"[20] Bish testified that he did not authorize the repair because he believed Southwest Fencing needed to request an estimate, and in his affidavit, he stated that after taking the pipe to Northern Agri-Services, he "had done everything reasonably necessary to ensure the irrigation pipe was repaired by June 1, 2012." But there is no evidence that a representative of Southwest Fencing actually assured Bish that Southwest Fencing would pay for the repairs before June 1. In both his deposition and affidavit, Bish stops short of stating that Southwest Fencing indicated to Bish that it should not or could not authorize the repairs itself. Bish also acknowledged in his deposition that nothing prevented Bish from authorizing Northern Agri-Services to start the repairs. Although we give Bish the benefit of all reasonable inferences, there is nothing in the record which indicates that Southwest Fencing, or anyone acting on behalf of Southwest Fencing, prevented Bish from authorizing and paying for the repairs to avoid the lost profits for the 2012 crop year.

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[19] See 22 Am. Jur. 2d *Damages* § 356 (2013) (citing *First Nat'l Bank v. Milford*, 239 Kan. 151, 718 P.2d 1291 (1986)).

[20] *Little v. Rose*, 285 N.C. 724, 728, 208 S.E.2d 666, 669 (1974). See, also, *United States v. Russell Electric Co.,* 250 F. Supp. 2 (S.D.N.Y. 1965).

Accordingly, we find the record indicates the cost to mitigate the damage was reasonable, Bish had the financial ability to mitigate the damages, and Southwest Fencing did not give any assurances that would justify Bish's inaction. In this case, the record clearly demonstrates that Bish, through its own inaction, did not exercise reasonable efforts in attempting to avoid the lost profits for the 2012 crop year; as a result, reasonable minds could not differ concerning the efforts to mitigate. The district court did not err in affirming the county court's order granting Southwest Fencing's motion for partial summary judgment with respect to the issue of mitigation.

VI. CONCLUSION

The district court's order affirming the county court's order is affirmed.

Affirmed.

Stephan, J., not participating.