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Contracts – Damages – Compensating the Farmer For Lost Profits

by

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CONTRACTS—DAMAGES—COMPENSATING THE FARMER FOR LOST PROFITS

I. INTRODUCTION

The courts of North Carolina allow compensation for lost profits in tort and contract actions as long as those profits are capable of being shown with a reasonable degree of certainty.[1] Achieving this rule has not been an easy matter and applying it has been even more arduous, especially in cases dealing with damage to and/or destruction of crops.[2]

The purpose of this note is to examine briefly past decisions concerned with compensation for lost profits in contract actions[3] in light of *Gore v. Ball*,[4] a recent North Carolina case which held a farmer could recover approximately $10,000 for using $5.00 worth of mislabeled tomato seeds. This examination intends to give one an understanding of *Gore* and provide some insight into the potential ramifications *Gore* possesses in the field of special damages.

II. THE FACTS

The plaintiff, Gore, owned six acres of land to be used solely for producing tomatoes. This land was divided into three two-acre tracts. The first two-acre tract would be used for planting and growing tomatoes in April. A May planting of tomatoes was planned for the second two-acre tract. The third tract was to accommodate a June crop.

Heinz 1350, the seed in question, was ordered by Gore and delivered by the defendant. In April the first two-acre crop was planted. After sowing the second two-acre tract (May crop), the plaintiff noticed oddly shaped tomatoes growing on his first tract of land. Expert consultation determined that these tomatoes were not of the special table variety purchased, Heinz 1350, but in fact were paste tomatoes, ". . . wholly unsuited for sale for table use and useful only in the production of tomato paste."[5]

Acting upon this information and with the hope of mitigating his

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1. Brandis and Trotter, *Some Observations on Pleading Damages in North Carolina*, 31 N.C. L. REV. 249, 266 (1953). This rule is used by a majority of states. *See* notes 15 and 16 *infra*; Anvil Mining Co. v. Humble, 153 U.S. 540, 549 (1893); Venie v. South Central Enterprises, Inc., 401 S.W.2d 495 (Mo. App. 1966); Pearson v. Schmitt, ___ Ore. ___, 487 P.2d 84 (1971).

2. Note, *Damages—Destruction of Fruit Trees—A Proper Rule of Valuation*, 14 WAYNE L. REV. 1211 (1968).

3. For an exhaustive treatment of tortious damages to growing crops, *see* Annot. 175 A.L.R. 159 (1948).

4. 279 N.C. 192, 182 S.E.2d 689 (1971).

5. *Id.* at 195, 182 S.E.2d at 690.

loss,[6] plaintiff sold the now mature paste tomatoes and uprooted the growing tomatoes on his second two-acre tract. As the profit for growing such inferior tomatoes was negligible, Gore planted an entirely different crop on the third two-acre tract and another variety of table tomatoes on his second tract.

The proffered $5.00 reimbursement for the seed being refused by the plaintiff,[7] Gore now sought to recover the amount he would have received on the tomato market but for the inferior seed less the small sum gleaned from the sale of the paste tomatoes and the unincurred expenses of cultivating and preparing the soil.[8]

III. HISTORICAL BACKGROUND

Earlier decisions in North Carolina as well as in other agriculturally inclined states in the Southeast were reluctant to award farmers the benefit of their yield expectancy when injury had befallen them.[9]

Representative decisions include *Reiger v. Worth*[10] and *Butler v. Moore*.[11] In the former case rice seed failed to germinate because of bad seed delivered by the defendant-distributor, and the entire crop was lost. Compensation was limited to the amount paid for the rice, the reasonable rental value of the land, and the plaintiffs' expenditures in preparing

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6. On the subject of mitigating losses *see* 21 AM. JUR. 2d *Crops* § 81 (1965).

7. Defendant argued that implied warranty of merchantibility was displaced by a limitation of warranty to the extent of the purchase price. This limitation of warranty was found on the order blank used by the plaintiff, the packets containing the seed, the defendant's invoice and in the seed catalogue. The court, strongly influenced by THE NORTH CAROLINA SEED LAW OF 1963 106-277 to 166-277.28, decided the limitation was against public policy and therefore void. This could have a tremendous effect on the seed industry and could explain the paucity of cases from 1900 (Reiger v. Worth, 127 N.C. 230, 37 S.E. 217 (1900)) to 1971 (Gore v. Ball, 279 N.C. 192, 182 S.E.2d 689 (1971)) and the relative immunity enjoyed by seed distributors. *See* Gore v. Ball, 10 N.C. App. 310, 178 S.E.2d 237 (1970). Nominal damages only were suggested because of this limitation of warranty.

8. Plaintiff recovered this amount. The measure of damages rule used by the court is found in 46 AM. JUR. *Sales* § 750 (1943):

> The ordinary measure of damages, or the measure of general damages, for breach of a warranty as to the variety of seeds is the difference between the value of the crop raised from the seeds furnished and the value of the crop which would have been raised if the seeds furnished had been warranted, apparently taking also into consideration the difference, if any, between the expense of raising the crop from the seeds which were furnished and the expense of raising the crop from seeds complying with the warranty.

9. "The value of the crop made is capable of definite calculation, but what it would have made . . . is and must be purely and wholly conjectural. The season may have been more favorable to later planting, and many contingencies may be supposed, in a greater or less degree affecting and determining the result." Roberts v. Cole, 82 N.C. 292, 294 (1880). Other cases include Boyle v. Reeder, 23 N.C. 607 (1841) (anticipated profits of mill); Foard v. Railroad, 53 N.C. 235 (1860) (same); Horres v. Berkeley Chemical Co., 57 S.C. 184, 35 S.E. 500 (1900).

10. 127 N.C. 230, 37 S.E. 217 (1900).

11. 68 Ga. 780, 45 Am. R. 508 (1882).

the soil and sowing the seed. The Georgia Supreme Court in *Butler* also saw lost profits as being too speculative to determine and awarded the plaintiff-farmer the purchase money plus interest paid for the spurious millet seed and the expenses of preparing the soil.[12]

North Carolina relaxed its strict interpretation of lost profits as being "conjectual estimates" after many state and federal jurisdictions began employing the "reasonable certainty" rule.[13] The adoption by the court of this rule did not expressly reject *Reiger* or the earlier cases. However, that case in particular was distinguished from *Gore* on the basis of the facts and lack of evidence to support compensation for lost profits.

IV. ANALYSIS

Along with expert opinion in the *Gore* decision, the evidence of the productivity of the first two-acre tract (April crop) negatived any inference that the planned table tomato crop would not have prospered. The fact that paste-type tomatoes did grow meant other-type tomatoes would also have grown. Using this premise as a springboard, the court reasoned that the second two-acre tract would have produced worthwhile mature May tomatoes, and also successful June tomatoes on the third tract had the right variety of tomatoes been planted.

Numerous decisions dating back to 1877[14] sanction the compensation for lost profits of a matured crop (such as the April crop in *Gore*) rendered unmarketable by inferior or spurious seed. Destruction of the unmatured growing tomatoes on the second two-acre tract in May was justified under the doctrine of mitigation of damages; the replanting of a variety of tomatoes other than Heinz 1350 helped to offset damages for the profits anticipated from this field. Although these tomatoes had not reached maturity, the court, not without precedent,[15] suggested they too should be fully compensated for by figuring lost profits.

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12. *Cf.* White v. Miller, 71 N.Y. 118, 27 Am. R.13 (1877); RESTATEMENT OF CONTRACTS § 331, subsection 1, illustration 4 (1933).

13. Trucking Co. v. Payne, 233 N.C. 637, 65 S.E.2d 132 (1951); Steffan v. Meiselman, 223 N.C. 154, 25 S.E.2d 626 (1943); Brandis and Trotter, *Some Observations on Pleading Damages in North Carolina*, 31 N.C. L. REV. 249, 266 (1953).

14. White v. Miller, 71 N.Y. 118, 27 Am. R.13 (1877). Damages for the impure cabbage seed were figured by taking the difference in value between the crop raised and a crop of Bristol cabbage of that year.

15. Nakanishi v. Foster, 64 Wash. 2d 647, 393 P.2d 635 (1964) (unmarketable lettuce noticed two weeks prior to harvest); Martin v. Jaekel, ____ Iowa ____, 188 N.W.2d 331 (1971) (probable yield figured); L.A. Green Seed Co. of Arkansas v. Williams, 246 Ark. 454, 438 S.W.2d 717 (1969) (inferior tomato seed); Dessert Seed Co. v. Drew Framers Supply, Inc., 248 Ark. 858, 454 S.W.2d 307 (1970) (recovery in excess of $15,000 for inferior tomato seed); Blackburn v. Carlson Seed Co., 321 S.W.2d 520 (Mo. App. 1959).

16. Henderson v. Berce, 142 Me. 242, 50 A.2d 45, 168 A.L.R. 572 (1946); *See Annot.* 16

The specific rule employed in *Gore*, upon which the court framed its reasoning, stems from a federal decision[17] not utilized in any previous North Carolina Supreme Court decision:

> If under the evidence in a particular case, the damages are susceptible of reasonable computation, and are within the actual contemplation of the parties to the contract, there can be no valid reason for rejecting them merely because they are in the nature of lost profits, or depend upon the estimated value of a growing, but unmatured crop.[18]

The principal cases relied upon by the North Carolina court, including *Malone v. Hastings*[19] from which the above rule was extracted, have as their premise the situation in which seed, although inferior, has been planted and has germinated.[20] As no tomatoes of any kind were even planted on the third two-acre tract, it follows that there was no mature crop of inferior seed nor damage to a growing, unmatured crop. How then could lost profits be calculated? Without citing any precedent,[21] Justice Lake stated:

> As to the third two-acre tract which the plaintiff intended to use for his late crop of Heinz 1350 tomatoes, but which he diverted to another use in view of his discovery of the defendant's breach of the contract, we again are of the opinion that the jury could reasonably estimate the amount of the crop which the plaintiff would have produced on that tract, in the light of the actual results obtained by him on the other two tracts and in the light of evidence as to the similarity or difference in weather condition and other factors, entering into production of tomatoes, between the harvesting of the early crop and the time at which the late crop would have been harvested.[22]

This reasoning is wholly logical. Suppose, however, that instead of anticipating a third crop in June the plaintiff planned for a July crop.

A.L.R. 859, 887 (1922); *See Annot.* 32 A.L.R. 1241, 1246 (1924); *See Annot.* 168 A.L.R. 592 (1947); 25 C.J.S. *Damages* § 41 (1966); Zvolanek v. Bodger Seeds, 5 Cal. App. 2d 106, 42 P.2d 92 (1935) (growing sweet peas); West Coast Lumber Co. v. Wernicke, 139 Fla. 363, 188 So. 357 (1939) (cane seed).

17. Malone v. Hastings, 193 F. 1 (5th Cir. 1912), *aff'd*, 201 F. 1020 (5th Cir. 1913). Proof for lost profit of unmarketable onion crop consisted of evidence of similar crops on adjoining land under identical conditions of season, climate, cultivation and irrigation.

18. Gore v. Ball, 279 N.C. 192, 208, 182 S.E.2d 389, 398 (1971). There is no question but that the damages were in contemplation of the parties; clearly the defendant, as distributor of seed, knew what his customer intended to use them for.

19. 193 F. 1 (5th Cir. 1912), *aff'd on rehearing*, 201 F. 1020 (5th Cir. 1913).

20. *See* notes 15 and 16 *supra*.

21. Only one case could be found which awarded lost profits for a crop which was not planted and therefore did not germinate. Gledhill v. State, 123 Neb. 726, 343 N.W. 909 (1932) allowed recovery for corn not planted due to flooding.

22. Gore v. Ball, 279 N.C. 192, 209, 182 S.E.2d 389, 400 (1971).

August? A crop for the next year? The point is that prior similar crops and weather statistics alone may furnish the quantum of evidence necessary to compensate one for profits lost from a seed which was never planted. Generally, the greatest weight is given not to prior plantings, expert testimony, or weather conditions, as was the case in *Gore*, but to farming results on land adjoining that of the plaintiff or in his immediate vicinity of the same year.[23] Plaintiffs in earlier cases, most notably *Reiger v. Worth*,[24] have failed because they have not given enough information relating to farm production in their area; the plaintiff in *Gore* succeeded without supplying *any* such information.

V. CONCLUSION

The position taken by the North Carolina Supreme Court in respect to damage actions for lost profits is now more certain. The reasonable certainty rule prevails. *Gore* has provided substance to that rule and, although not overruling *Reiger*, will provide a foundation for relief to the farmer litigating for lost profits.

The most significant aspect of *Gore* appears to be its literal application of the reasonable certainty rule allowing damages for lost profits. The court's decision indicated that the particular facts in the case controlled this result. Thus, it is possible for the court to distinguish the next lost profit litigation from *Gore* in denying recovery. It is suggested, therefore, that all pertinent facts—from average annual yield to irrigation methods—be gathered to insure that the "reasonable" requirement of the reasonably certain rule is satisfied, for the court in the future may require something more than expert testimony, results of prior plantings, and weather conditions to compensate the farmer for his lost profits.

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23. *See* note 17 *supra*; 15 AM. JUR. *Crops* § 84 (1938); 21 AM. JUR.2d *Crops* § 87 (1965).

24. 127 N.C. 230, 37 S.E. 217 (1900). In explaining *Reiger*, Justice Lake stated: "There, the only evidence upon which the jury could estimate what the crop would have been, had the seed been as warranted, related to the average yield. Apparently, this average did not reflect only those crops grown in the immediate vicinity in the same year." Gore v. Ball, 279 N.C. 192, 210, 182 S.E.2d 389, 400 (1971).