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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 19-260

Filed: 7 January 2020

Randolph County, No. 16CVS1372

CROP PRODUCTION SERVICES, INC., Plaintiff,

v.

MATTHEW C. PEARSON and HELEN F. PEARSON, Defendants and Third-Party Plaintiffs,

v.

PERDUE AGRIBUSINESS LLC, d/b/a PERDUE-AGRIRECYCLE, and PERDUE-AGRIERCYCLE, LLC, Third-Party Defendants.

Appeal by Defendants from orders entered 20 July 2018 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 16 October 2019.

*Daughtry, Woodard, Lawrence, & Starling, by Luther D. Starling and Andrew J. Dickerhoff, for Plaintiff-Appellee.*

*Strauch Green & Mistretta, P.C., by Stanley B. Green, Dawn T. Mistretta, and Lindsey A. Bullard, for Defendants-Appellants.*

*J. Gray Wilson and Christopher R. Kiger for Third-Party Defendants-Appellees.*

INMAN, Judge.

This appeal concerns crops that failed and the farmers’ refusal to pay for fertilizer they claim caused the failure. We affirm the trial court’s entry of summary judgment denying the farmers’ claims and concluding that the farmers owe a debt for the fertilizer. We reverse and remand the summary judgment order with respect to damages only because the record is unclear regarding what evidence as to the amount of the debt was properly before the trial court.

## **I. FACTUAL AND PROCEDURAL HISTORY**

Matthew and Helen Pearson (“the Pearsons”) are experienced farmers, having grown a number of crops for over thirty years. In the summer of 2015, the Pearsons planted 360 acres of organic soybeans on land in Randolph and Guilford counties.

The previous year, the Pearsons had also grown organic soybeans, using Perdue microSTART60 3-2-3 organic fertilizer<sup>1</sup> (“Perdue Fertilizer”) purchased from Plaintiff Crop Production Services, Inc. (“CPS”) and manufactured by Third-Party Defendant Perdue Agribusiness, LLC (“Perdue”). For their 2015 crop, the Pearsons initially ordered two different fertilizers from CPS, neither manufactured by Perdue.

After this order was placed, in May of 2015, representatives from CPS and Perdue made a sales visit to the Pearsons. During this meeting, the representatives gave the Pearsons marketing materials asserting that the Perdue Fertilizer had a

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<sup>1</sup> These numbers refer to minimum nutrient contents of fertilizers: a “3-2-3” fertilizer product contains at least 3% nitrogen, 2% phosphorous, and 3% potassium.

low salt index and made representations regarding the effectiveness of the product and its safety when applied to soybeans. Following this meeting, the Pearsons ordered the Perdue fertilizer for their 2015 crop.

The Pearsons planted their soybean crop, which sprouted and began to grow. Once the Pearsons received the Perdue Fertilizer, they broadcast it over all 360 acres of soybeans. “Soon after” the fertilizer was broadcast, the Pearsons’ soybean crop stopped growing or died. The roots were stiff and discolored, and the plants were dehydrated. Believing the Perdue Fertilizer was to blame, the Pearsons contacted Colby Lambert (“Lambert”), an agronomist with the North Carolina Department of Agriculture & Consumer Services (“NCDA”). Lambert inspected the Pearsons’ fields and took soil and fertilizer samples for analysis.

Lambert submitted these fertilizer samples to NCDA’s Waste Analysis Lab, which performed tests and generated documents known as “Waste Reports” describing the results of the testing. Three of the four Waste Reports contained an automatically generated note stating that the samples reflected high electrical conductivity, which can indicate a high salt content. Lambert drafted a preliminary letter interpreting these testing results and observations and concluded that “salt injury appears to have been a factor in the poor growth and/or death of the soybeans” in the Pearsons’ fields.

*Opinion of the Court*

The preliminary letter was not finalized and sent to the Pearsons. Lambert consulted with Dr. Michelle McGinnis, NCDA's Field Services Section Chief, and Dr. David Hardy, NCDA's Soil Testing Section Chief, and all three agreed that the testing data and field observations did not support a conclusion that the crop problems were attributable to salt injury. Accordingly, Lambert drafted a revised letter that was sent to the Pearsons concluding that "a specific cause for poor soybean growth cannot be determined."

Dr. Kirstin Hicks, a third NCDA section chief and director of the Waste Analysis Lab, explained the electrical conductivity warning generated in three of the four Waste Reports. She explained via affidavit:

The above-quoted comment about high electrical conductivity concerns the use of the tested material as a growing medium for planting in pots or containers. Essentially, the comment means that if one were to attempt to grow a plant in a pot containing only the tested material, the EC content of the material should be taken into account and if allowed to dry out could potentially cause damage. The comment is not directed to the use of the tested material as a fertilizer on a field crop and is not applicable in that context. This is one of the reasons why commercial fertilizers are not typically run through the Waste Analysis Lab.

In her opinion, the soluble salts and electrical conductivity levels did not indicate a risk of salt injury when applied to soybeans as the Pearsons had. At some point after the Waste Reports at issue in this case were prepared, Dr. Hicks modified the software used by the Waste Analysis Lab to no longer automatically generate the

electrical conductivity warning because she was concerned those receiving reports containing the warning might “incorrectly interpret it as raising concerns about the suitability of the tested material for field application.”

The Pearsons’ crop insurance carrier determined that “the fertilizer was not at fault for the failed crop, and that drought is most likely why the beans did not make.”

On 13 July 2016 CPS filed suit against the Pearsons for the unpaid balance of their account. The Pearsons counterclaimed for breach of express warranty and negligent misrepresentation and asserted third-party claims against Perdue on the same theories.

Perdue and CPS each moved for summary judgment in April of 2018. The Pearsons moved for leave to amend their third-party complaint against Perdue. These motions came on for hearing in June of 2018 and the trial court granted summary judgment in favor of CPS on their claims against the Pearsons, and in favor of CPS and Perdue on all claims the Pearsons had asserted against them. The court also denied the Pearsons leave to amend their third-party complaint. The Pearsons appeal.

## **II. ANALYSIS**

The Pearsons argue that the trial court erred by (1) granting summary judgment in favor of Perdue and CPS on the Pearsons’ claims of breach of warranty and negligent misrepresentation; (2) granting summary judgment for CPS on its

*Opinion of the Court*

claim for money owed by the Pearsons; and (3) denying the Pearsons' motion to amend their complaint. We address each argument in turn.

*A. The Pearsons' Claims*

The Pearsons first argue that the trial court erred in granting summary judgment against them on their claims of breach of warranty and negligent misrepresentation. Because the Pearsons have failed to forecast evidence supporting their claims, we disagree.

Summary judgment is proper when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). We review *de novo* a trial court's grant of summary judgment. *Esposito v. Talbert & Bright, Inc.*, 181 N.C. App. 742, 745, 641 S.E.2d 695, 697 (2007). We are not limited in our inquiry by the trial court's order or the arguments of the parties but must examine the entire record to determine if summary judgment was appropriate. *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) (“If the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal.”).

A defendant may show it is entitled to summary judgment by proving that an essential element of the plaintiff's case is nonexistent or by showing through discovery that the plaintiff cannot produce evidence supporting an element of the

*Opinion of the Court*

claim. *Draughon v. Harnett Cty. Bd. Of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003). Once the defendant has done this, the burden shifts to the plaintiff to forecast evidence demonstrating specific facts that establish a *prima facie* case. *Pacheco v. Rogers and Breece, Inc.*, 157 N.C. App. 445, 447, 579 S.E.2d 505, 507 (2003).

The Pearsons in their complaint against CPS and third-party complaint against Perdue assert two claims: breach of express warranty and negligent misrepresentation. They argue that the record shows genuine issues of material fact. We disagree.

A claim for breach of express warranty requires the plaintiff to show that (1) the defendant made an express warranty as to a fact or promise relating to the goods (2) that the plaintiff relied upon in purchasing the goods; and (3) that the defendant breached this warranty. *Hall v. T.L. Kemp Jewelry, Inc.*, 71 N.C. App. 101, 104, 322 S.E.2d 7, 10 (1984). The Pearsons allege in their complaint that Perdue expressly warranted:

- a. That the 2015 Fertilizer was suitable for and could be safely used on organic soybeans in Third-Party Plaintiffs' 2015 Crop;
- b. That the 2015 Fertilizer could be safely applied to Third-Party Plaintiffs' 2015 crop in certain quantities;
- c. That the 2015 Fertilizer contained sufficiently low salt content to be suitable for the organic soybeans in Third-Party Plaintiffs' 2015 Crop
- d. That the 2015 Fertilizer possessed electrical conductivity levels such that it would be suitable for the

*Opinion of the Court*

- organic soybeans in Third-Party Plaintiffs' 2015 Crop
- e. That the 2015 Fertilizer was, in fact, 3-2-3 as described by Perdue; and
  - f. That the 2015 Fertilizer conformed to descriptions and warranties of the 3-2-3 contained within the product labels, advertisements, and/or material data safety sheets provided to Third-Party Plaintiffs prior to purchase of the 2015 Fertilizer.

To support a claim of negligent misrepresentation, a plaintiff must show that they (1) justifiably relied (2) on information prepared without reasonable care (3) by one who owed the plaintiff a duty of care and (4) this reliance was detrimental. *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 369, 760 S.E.2d 263, 267 (2014). The statements the Pearsons alleged were misrepresentations by Perdue and CPS are substantially identical to those they identified as express warranties: that the Perdue fertilizer was safe to use on their soybean crops, had low salt content and electrical conductivity levels, and that it conformed to the descriptions written on labels and marketing materials.

For both claims, the Pearsons must show that the Perdue Fertilizer was defective and caused the damage to their crops. The Pearsons argued to the trial court that the salt content of the fertilizer was unacceptably high. Assuming that the Pearsons have met their burden on the other elements of these claims, they have failed to forecast sufficient evidence that the Perdue Fertilizer was defective, either in design or manufacture, and that it caused the crop damage.

The evidence relied upon by the Pearsons to show that the fertilizer was



defective is limited to the preliminary letter from Colby Lambert of the NCDA and Mr. Pearson's evaluation that the Perdue Fertilizer was the cause of the crop failure. The Pearsons have not identified any testing of the fertilizer, crops, or waste that shows unacceptably high salt levels or that the fertilizer was otherwise unsuitable for use on their soybeans. The evidence contained in the record is insufficient to show that the Perdue Fertilizer caused the damage to the Pearsons' crops.

Lambert's preliminary letter was never finalized and has been unequivocally disclaimed by the author. A genuine issue of material fact is not created where the only disputed issue is which of two conflicting versions of an expert's testimony is correct. *Hawkins v. Emergency Med. Physicians of Craven Cty., PLLC*, 240 N.C. App. 337, 345, 770 S.E.2d 159, 164 (2015).

Affidavits by Lambert's colleagues, all of them NCDA scientists, explain the confusion that led to the drafting of the preliminary letter. Lambert relied on data generated from four Waste Reports, and he primarily relied on an automatically generated warning that the electrical conductivity of the fertilizer sample was above a certain threshold. The affidavits show that (1) the automatic warning was generated because the testing performed was inappropriate for the Perdue Fertilizer; (2) the software used by NCDA no longer automatically generates this warning because it is inappropriate and confusing; (3) nothing in the reports, including the electrical conductivity readings, indicated the potential for crop damage from the

*Opinion of the Court*

Perdue Fertilizer; and (4) that the Perdue Fertilizer was generally consistent with the nutrient values on its labeling.

The Pearsons do not contest this evidence, but argue that the conductivity warning itself raises a genuine issue of material fact. We disagree. The evidence, taken in the light most favorable to the Pearsons, *Brice v. Moore*, 30 N.C. App. 365, 167, 226 S.E.2d 882, 883 (1976), shows that the warning did not indicate any danger to the soybean crops, and that the Perdue Fertilizer's salt content and other composition fell within the levels advertised on product labeling and marketing materials.

The only other evidence the Pearsons cite to show that the Perdue Fertilizer was defective is the crop failure shortly after the application of the fertilizer. Crop failure after the application of fertilizer, in the absence of other evidence, is not sufficient to prove that the fertilizer caused the crop failure. In *L. Harvey and Son Co. v. Jarman*, farmers, following the distributor's recommendation, purchased liquid "Super Kic" fertilizer for use on corn. 76 N.C. App. 191, 193-94, 333 S.E.2d 47, 49 (1985). Super Kic was applied to only some of the farmers' fields, and those fields yielded far less corn than fields to which the Super Kic was not applied. *Id.* This Court upheld the trial court's dismissal of the farmers' claim for breach of warranty, holding that there was "absolutely no evidence . . . indicating that 'Super Kic' was not a suitable corn fertilizer." *Id.* at 198, 333 S.E.2d at 51.

*Opinion of the Court*

The Pearsons have tendered Mr. Pearson as an expert in diagnosing issues inhibiting crop growth, and Mr. Pearson opined that the Perdue Fertilizer caused the damage to his crops. Expert opinion testimony as to causation can raise a genuine issue of material fact that precludes a grant of summary judgment. However, in this case Mr. Pearson's methodology does not meet the standard required to form a basis for an expert opinion.

Although this matter is before us on appeal from the trial court's grant of summary judgment, we may address the admissibility of expert testimony relevant to the appeal, whether or not the record indicates a motion to exclude that testimony. *Webb v. Wake Forest Univ. Baptist Med. Ctr.*, 232 N.C. App. 502, 509, 756 S.E.2d 741, 745 (2014) (citing *Crocker v. Roethling*, 363 N.C. 140, 143, 675 S.E.2d 625, 629 (2009)). We normally review exclusion or admission of expert testimony for an abuse of discretion by the trial court. *State v. Moore*, 245 N.C. 158, 164, 95 S.E.2d 548, 552 (1956). However, in this case the record does not indicate the trial court's ruling on the admissibility of Mr. Pearson's opinion testimony. During the summary judgment hearing, the Pearsons designated Mr. Pearson as an expert. Counsel for Perdue argued that Mr. Pearson's methodology did not meet the standards adopted for the admissibility of expert testimony. The trial court did not at that hearing rule on the issue and, because the record is silent as to the basis of the trial court's grant of

*Opinion of the Court*

summary judgment,<sup>2</sup> we cannot determine whether the trial court admitted or excluded Mr. Pearson's opinion testimony. Accordingly, we review Mr. Pearson's testimony to determine if it satisfies the requirements of Rule 702(a) of our Rules of Evidence.

Our General Assembly amended Rule 702(a) in 2011 in a manner which our Supreme Court has held adopts the standard promulgated by the United States Supreme Court in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 125 L. Ed.2d 469 (1993) for determining the reliability of expert testimony. *State v. McGrady*, 368 N.C. 880, 888, 787 S.E.2d 1, 8 (2016). An expert qualified by skill, experience, training, or education may testify as to their opinion as long as that testimony is (1) based upon sufficient facts or data, and (2) is the product of reliable principles and methods (3) applied reliably to the facts of the case. N.C. Gen. Stat. § 8C-1, Rule 702(a) (2019). This three-pronged standard of reliability is more rigorous than our approach prior to the amendment, which favored liberal admission of expert testimony and left the role of determining its weight to the jury. *McGrady* at 886, 787 S.E.2d at 7.

Mr. Pearson's affidavit and deposition testimony detail the process he used to determine that, in his opinion, the Perdue Fertilizer had caused his crops to fail. After noticing damage, he dug up a number of plants and found the roots were stiff

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<sup>2</sup> The trial court's ruling may have been based upon, for example, a determination that the North Carolina Fertilizer Law barred the Pearsons' action.

*Opinion of the Court*

and discolored. His technique involved examining the way the plants had split open, and he noted that he cut the plant open and tasted it. Pearson concluded from this inspection that salt damage was the problem “long before [he] called anyone.” The only chemical testing or other data Mr. Pearson used to form his opinion were the Waste Reports containing the automatically generated electrical conductivity warning. He also used a process of elimination to determine (1) the damage could not have been caused by other fertilizer products used because they were not applied to every field; (2) drought could not have been the cause because there had been sufficient rainfall<sup>3</sup> and the fields spanned two counties where other nearby farmers produced healthy soybean crops; and (3) weed pressure was unlikely to be the cause because weed growth was also inhibited.

A number of indicia of reliability have been articulated by courts analyzing expert testimony under *Daubert*. *McGrady* at 890-891, 787 S.E.2d at 9-10. There is no “checklist” or definitive test, but factors should be applied when they are reasonable measures of reliability in a specific case. *Id.* We note that the existence of most of the articulated factors cannot be determined from Mr. Pearson’s deposition

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<sup>3</sup> While the raw amount of precipitation may have been sufficient to support the Pearsons’ crops, the insurance analysis noted that drought from June through September and excess precipitation from September through December caused “small beans and low yields” and other “quality issues,” and ultimately determined the cause of the crop failure to be drought. We do not base our decision on this analysis, however, as we do not weigh conflicting evidence on review of summary judgment but only determine whether there is a genuine issue of material fact. *Bird v. Bird*, 193 N.C. App. 123, 131, 668 S.E.2d 39, 44 (2008).

*Opinion of the Court*

testimony or affidavit. For example, there is no indication of whether his technique for determining the source of crop damage is generally accepted within the field, or the known or potential rate of error of that technique. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 156-58, 143 L. Ed.2d 238, 255-56 (1999) (affirming exclusion of experience-based expert testimony due to, among other indicators of unreliability, the absence of any indication that other experts used the test in question or articles or papers validating the approach). Mr. Pearson only describes his process of visual inspection.

Mr. Pearson's technique of visually inspecting his crops and comparing to other crops, without any supporting chemical analysis, does not satisfy the reliability requirements of Rule 702 to show that the Perdue Fertilizer was defective and damaged the Pearsons' crops. The only chemical analyses Mr. Pearson used in coming to his conclusion were the NCDA Waste Reports, which he opined indicated high electrical conductivity levels based upon the disclaimed computer-generated notation. His continued use of the reports as the exclusive chemical testing supporting his conclusion that the fertilizer contained an unacceptably high salt level indicates that his testimony is not "based upon sufficient facts or data," as required by Rule 702(a).

Our legislature has made clear the importance of chemical analysis in determining whether fertilizer is defective in such a way as to create liability. The

*Opinion of the Court*

North Carolina Fertilizer Law promulgates methods of sampling and testing fertilizer and provides that “no suit for damages claimed to result from the use of any lot of mixed fertilizer or fertilizer material may be brought” unless the fertilizer has been chemically tested in accordance with the statute. N.C. Gen. Stat. § 106-662(e)(4) (2019).<sup>4</sup>

Even if Mr. Pearson’s method for determining that salt damage caused his crops to fail met the reliability requirements provided by case law and statute, his testimony provides no evidence that the Perdue Fertilizer contained an unacceptably high amount of salt. Because the Pearsons have failed to forecast evidence showing that the Perdue Fertilizer was defective or caused the damage to their crops, the trial court’s grant of summary judgment on their claims for negligent misrepresentation and breach of warranty was appropriate.

*B. Debt Claim by Crop Production Services*

The Pearsons also argue that the trial court erred when it granted summary judgment to CPS on its claim against them for \$177,902.29 owed for agricultural supplies, as well as \$26,685.34 in attorney’s fees. They argue that CPS produced no evidence of the debt owed. We conclude that summary judgment as to the existence

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<sup>4</sup> CPS and Perdue have argued that the North Carolina Fertilizer Law bars the Pearsons’ claims in their entirety. Because the Pearsons have failed to forecast sufficient evidence to support their claims, we need not reach that issue.

*Opinion of the Court*

of the debt was proper, but we reverse the judgment and remand for further proceedings as to damages.

CPS alleged in their complaint that the Pearsons are indebted to CPS in the amount of \$177,902.29 for goods and merchandise sold, and that no part of their account has been paid. Mr. Pearson admitted to buying fertilizer from CPS on credit, and the Pearsons both admitted that they had not paid amounts demanded by CPS. We can identify no genuine issue of material fact as to a breach of contract by the Persons and the existence of a debt for the purchased fertilizer.

However, the record does not indicate that CPS presented to the trial court evidence of the amount owed by the Pearsons.<sup>5</sup> Without such evidence to consider, the trial court erred in calculating damages in its order granting summary judgment. We remand this case to the trial court for further proceedings on the issue of damages.

*C. Leave to Amend*

Finally, the Pearsons argue that the trial court erred in denying them leave to amend their complaint. A trial court's denial of a motion to amend is reviewed for abuse of discretion, and reversal is only warranted by a showing that the denial was manifestly unsupported by reason. *Pruett v. Bingham*, 238 N.C. App. 78, 86, 767

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<sup>5</sup> CPS, in its brief, repeatedly refers to its memorandum of law submitted to the trial court rather than to evidence of the amount owed. This Court requested additional documentation pursuant to Rule 9(b)(5)(b) of the Rules of Appellate Procedure, and CPS filed documents including an affidavit verifying the amount owed and invoices sent to the Pearsons. The Pearsons objected to the inclusion of these documents in the record and, because we cannot determine that these documents were properly submitted to the trial court, we sustain the Pearsons' objection.



S.E.2d 357, 363 (2014). The Pearsons argue that, because they withdrew their motion for leave to amend, the trial court abused its discretion by denying a motion no longer before it. The Pearsons have not identified any way in which they were prejudiced by the trial court's denial of a motion withdrawn by the movant. Also, the additional claims in their proposed amended complaint each rely upon showing that the Perdue Fertilizer was defective and caused the damage to their crops. A motion to amend is properly denied where the proposed amendment would be futile. *Martin v. Hare*, 78 N.C. App. 358, 361, 337 S.E.2d 632, 634 (1985). Accordingly, we conclude they have failed to demonstrate reversible error.

### **III. Conclusion**

Because the Pearsons have failed to forecast sufficient evidence that the fertilizer they purchased was defective or damaged their crops, we affirm the trial court's grant of summary judgment on their claims against CPS and Perdue. We also affirm the trial court's conclusion that the Pearsons are liable to CPS for debt incurred by purchasing the fertilizer on credit. We reverse the judgment and remand this matter to the trial court for further proceedings as necessary to determine the amount of damages resulting from CPS's claim against the Pearsons.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Judges DIETZ and YOUNG concur.

Report per Rule 30(e).

CROP PROD. SERVS., INC. V. PEARSON

*Opinion of the Court*