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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0693**

Rozanne Rector, et al.,
Respondents,

vs.

Karlstad Farmers Elevator,
Appellant.

**Filed August 12, 2008
Affirmed in part, reversed in part, and remanded
Shumaker, Judge**

Kittson County District Court
File No. 35-C1-03-000095

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Considered and decided by Hudson, Presiding Judge; Shumaker, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

In an action involving claims for damages for both breach of contract and Uniform Commercial Code (U.C.C.) breach of warranty, appellant contends that the district court erroneously submitted its common-law breach-of-contract claim to the jury because claims relating to sales of goods are governed exclusively by the U.C.C. We agree and reverse as to that issue. Respondents challenge the district court's refusal to allow preverdict interest on their award of damages under Minn. Stat. § 549.09, subd. 1(b) (2006). Because the court correctly applied that statute, we affirm that issue. Affirmed in part, reversed in part, and remanded.

FACTS

Respondents Rozanne and Cal Rector operate an equine business in Marshall County that includes, among other things, horse breeding and the collection of pregnant mare urine and its sale to a pharmaceutical company. The Rectors bought grain to feed to their horses from appellant Karlstad Farmers Elevator.

In several grain purchases, Rozanne Rector noticed large amounts of dust in the product. She did not think the dusty grain would jeopardize the health of the horses but, more than once, she complained to Karlstad about it; yet she continued to buy grain from Karlstad.

Before October 2000, when Karlstad delivered a particularly dusty load, the Rectors noticed that some horses were losing weight and becoming ill. By June 2001, many had died. Rozanne Rector then inspected a bag of grain she had purchased from

Karlstad and noticed a warning that the grain should not be fed to horses because it contained the potentially lethal ingredient of lasalocid. She returned the bag to Karlstad and stopped doing business with the elevator.

Thereafter, the Rectors had various grain purchases from Karlstad tested for lasalocid. Some results were negative and others revealed the presence of a miniscule amount of the substance.

Believing that Karlstad had been selling contaminated grain to them for several years, the Rectors sued in 2003, alleging breach of contract, breach of warranty, negligence, and strict liability. Karlstad denied the claims and raised affirmative defenses.

The case was tried before a jury for three weeks. The jury found Karlstad causally negligent, strictly liable for the sale of defective gain, and in breach of contract and of an implied warranty of merchantability. The jury also apportioned Karlstad's fault at 51% and the Rectors' comparative fault at 49%, and awarded damages to the Rectors in the amount of \$1,400,000.

Karlstad moved for a new trial, or in the alternative, for amended findings and conclusions, alleging in part that there could be no recovery for breach of contract because the U.C.C. provides the exclusive remedy. Karlstad also urged the district court to reduce the damages in accordance with the comparative-fault verdict. The court denied the motion and ordered judgment in favor of the Rectors in the sum of \$1,400,000, plus interest. Karlstad appealed. The Rectors filed a notice of review, arguing that the district court erred by ruling that the Rectors' "high/low" settlement offer did not

constitute an offer under Minn. Stat. § 549.09 (2006), and by refusing the Rectors' proposed jury instruction on damages.

DECISION

Karlstad does not challenge the jury's determination of negligence, strict liability, comparative fault, or damages. Rather, Karlstad contends that the district court should not have submitted to the jury the breach-of-contract claim—as to which comparative fault does not apply—because the U.C.C. controls and provides the exclusive breach-of-warranty remedy here. Karlstad also raises issues of notice and mitigation of damages.

We will not reverse a jury verdict on the ground that the district court erroneously instructed the jury unless the court clearly abused its discretion in doing so. *Alholm v. Wilt*, 394 N.W.2d 488, 490 (Minn. 1986). If the district court errs in submitting a claim to the jury, the court thereby abuses its discretion, and appellate relief may be granted. *See Smits v. Wal-Mart Stores, Inc.*, 525 N.W.2d 554, 559 (Minn. App. 1994) (ordering a new trial when district court erroneously submitted negligence claim to the jury and the jury awarded damages based on that claim), *review denied* (Minn. Feb. 14, 1995).

U.C.C. Preemption Issue

The parties do not dispute that a contract or a series of contracts existed regarding the Rectors' grain purchases. But the Rectors contend that common-law principles of contract apply and Karlstad argues that, because the contracts were for sales of goods, the U.C.C. governs exclusively. “Whether a transaction is governed by the UCC is a question of law, which we review de novo.” *Duxbury v. Spex Feeds, Inc.*, 681 N.W.2d 380, 386 (Minn. App. 2004), *review denied* (Minn. Aug. 25, 2004).

Article 2 of the U.C.C. applies to all transactions for the sale of goods. Minn. Stat. §§ 336.2-102 (2006). “Goods” are all things that are movable at the time of their identification for sale. Minn. Stat. §§ 336.2-105(1) (2006). Grain for use as animal feed is within the U.C.C. category of goods. *Duxbury*, 681 N.W.2d at 386 (holding that animal feeds are “goods” for U.C.C. purposes). Thus, Article 2 of the U.C.C. applies to Karlstad’s sales of grain to the Rectors.

But the availability of a U.C.C. remedy does not necessarily bar a common-law remedy except by the U.C.C.’s “express wording or necessary implication.” *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000) (citing long-held principal that statutes are consistent with common law unless abrogation is clearly expressed); *see also* Minn. Stat. §§ 336.1-103(b) (2006) (“Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity . . . supplement its provisions.”). Minnesota courts have interpreted and applied the U.C.C. as a bar to common-law claims arising from the sale of goods and other transactions. *See Hapka v. Paquin Farms*, 458 N.W.2d 683, 688 (Minn. 1990) (holding that Article 2 of the U.C.C. preempts common law claims); *see also Bradley v. First Nat’l Bank of Walker, N.A.*, 711 N.W.2d 121, 127 (Minn. App. 2006) (holding that Article 3 of the U.C.C. bars common-law breach-of-fiduciary-duty claims); *Hedged Inv. Partners, L.P. v. Norwest Bank Minn., N.A.*, 578 N.W.2d 765, 770-71 (Minn. App. 1998) (holding that Article 4A of the U.C.C. preempts common-law claims that are inconsistent and duplicative). In addition to the specific application of the U.C.C. as preemptive of the common law in *Hapka*, it appears that, when the issue had arisen in various contexts, Minnesota courts have applied the U.C.C.

Thus, we hold that Article 2 of the U.C.C. provides the exclusive remedies here respecting Karlstad's sales of defective grain. The district court erred by submitting to the jury a common-law breach-of-contract claim and by denying Karlstad's posttrial motion urging the court to correct that erroneous submission.

The Rectors contend that Karlstad failed to preserve the issue of U.C.C. preemption for appellate review and that the common-law breach-of-contract claim became the law of the case. This court will review only issues presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). But the Rectors are mistaken. Karlstad raised the issue of U.C.C. preemption during the trial when it objected to the inclusion of the breach-of-contract claim on the special verdict form and to jury instructions related to that claim. Karlstad raised the issue again in its motion for a new trial or amended findings and conclusions, and the district court addressed the issue when denying the motion.

Karlstad alleges various other errors, particularly pertaining to lack of notice of the Rectors' breach-of-warranty claim. But we need not reach those allegations. It is undisputed that the comparative-fault statute applies to all claims except the common-law breach-of-contract claim. Karlstad has not challenged the verdict finding that it was negligent and strictly liable in the grain sales. Thus, even if we were to conclude, after analysis of the record, that the Rectors failed to give proper notice as to the alleged breach of warranty and, therefore, that the verdict as to the warranty claim could not stand, Karlstad would remain liable on the unchallenged claims.

Accordingly, we reverse the verdict as to common-law breach of contract, and we affirm as to negligence and strict liability. We decline to rule as to U.C.C. breach of warranty because, whatever our ruling might be, the outcome of the case will not be altered. The Rectors, therefore, are entitled to recover \$1,400,000 in damages, but as reduced by 49% to reflect the degree of fault the jury attributed to them, together with the interest and costs and disbursements allowed by the district court. The matter must be remanded to correct the judgment accordingly.

Notice-of-Review Issues

Although the Rectors noted for review the district court's alleged error in refusing their proposed jury instruction as to the measure of damages, that was not one of the seven issues they addressed in their brief. Issues not briefed or argued are deemed waived. *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982).

The Rectors seek preverdict interest on their damages award under section 549.09, which provides that a prevailing party is entitled to "interest on any judgment or award from the time of commencement of the action . . . until the time of verdict . . . only if the amount of its offer is closer to the judgment or award than the amount of the opposing party's offer." Minn. Stat. § 549.09, subd. 1(b) (2006). If the losing party's offer was closer to the award, the prevailing party is entitled to "interest only on the amount of the settlement offer or the judgment or award, whichever is less, and only from the time of commencement of the action . . . until the time the settlement offer was made." *Id.*

The Rectors made a "high/low" offer of settlement during the trial with a range of \$2,500,000 to \$250,000. Because the upper end of the range was closer to the jury's

verdict than the lower, the Rectors claim entitlement to preverdict interest in the higher amount as provided in section 549.09. The district court ruled that “[t]he high/low offer during trial was not an offer of settlement or judgment but a cap on gain or loss.” We review de novo interest awards under Minn. Stat. § 549.09. *S.B. Foot Tanning Co. v. Piotrowski*, 554 N.W.2d 413, 420 (Minn. App. 1996), *review denied* (Minn. Dec. 17, 1996).

Section 549.09, subdivision 1(b), is clear in its reference to the “amount” of each offer. That word has a standard meaning: “The total of two or more quantities; . . . [a] number; . . . [t]he full effect or meaning . . . [a] quantity.” *The American Heritage Dictionary* 62 (3d ed. 1992). Thus “amount” refers to a specific sum, a fixed monetary figure. As the district court correctly held, the Rectors offered a range of sums, capping the bottom and the top. Having failed to comply with Minn. Stat. § 549.09, subd. 1(b), the Rectors are not entitled to the preverdict interest award they seek.

Furthermore, the issue might well be moot because, after the comparative-fault reduction, Karlstad’s settlement offer of \$300,000 is closer to the ultimate award than is the Rectors’ written offer of \$3,000,000 or their oral offer of \$2,500,000.

Affirmed in part, reversed in part, and remanded.