

PETER and TANYA ROTHING, d/b/a
DIAMOND R ENTERPRISES, INC.,
Plaintiffs and Appellants,
v.
ARNOLD KALLESTAD,
Defendant and Respondent.

BY: Ricky, Marcos, Eileen, Nataly

Factual and Procedural Background

Peter and Tanya Rothing own business in Belgrade, Montana

Diamond R Enterprises:

- Diamond R Stables
- Diamond R Kennels
- Diamond R Cattle Company



Arnold Kallestad

- Owns ranch in Gallatin County
- Primarily raises hay and small amount of grain
- Raises Red Angus cattle
- Selling since 1984
- Estimates 300-1,000 tons of hay sold annually





- Rothings purchased 45-48 large bales of hay from Kallestad
- Kallestad testified that hay was exposed to moisture and was unsure whether it had made contact with the ditch water



- 19 horses dead from Botulism
- Dr. Robert Whitlock tested samples and show evidence of preformed *Clostridium botulinum* type B toxin
- Rothings filed suit against Kallestad



- The Districted Court granted both of Kallestad's Motions for Summary Judgement:
- granted Kallestad's several Motions to Compel
- awarded Kallestad attorney's fees incurred in preparing the Motions to Compel
- granted Kallestad's Motion to Protective Order
- sanctioned the Rothings by excluding evidence including Dr. Whitlock's reports

Rothings appeal all of the orders entered by the District Court

- **#1** - Peter and Tanya Rothing (the Rothings) brought this action to recover damages resulting from the death of nineteen horses owned by the Rothings that they alleged were fed botulism contaminated hay purchased from Arnold Kallestad (Kallestad). The Rothings sought recovery under theories of strict liability in tort, negligence and breach of contract. The District Court for the Eighteenth Judicial District, Gallatin County, granted Kallestad's Motions for Summary Judgment thereby dismissing the Rothings' Amended Complaint. The court also granted two Motions to Compel filed by Kallestad, awarded Kallestad his attorney's fees and granted Kallestad's Motion for a Protective Order regarding the determination of attorney's fees. The Rothings appeal. We affirm in part, reverse in part and remand for further proceedings consistent with this Opinion.
- The Rothings filed suit against Kallestad to recover significant damages such as veterinarian services bill and antitoxin. They sought damages for emotional distress from watching their horses die and resulting economic devastation to their business. Under the theories of strict liability in tort, negligence and breach of contract, the Rothings sought to recover damages, however, because the courts find Rothing's breach of contract dispositive of this case, they did not address the Rothing's strict liability and negligence claims. The Rothings failed to provide requested information, therefore the District court granted Kallestad's Motions for Summary Judgment. The court also granted Kallestad's two Motions to Compel which he argues that hay is not a product and he is not a manufacture. The other is if botulism was present, it was no way foreseeable. The Rothings would also have to pay Kallestad's attorney fees. The Rothings appeal. We affirm that the courts did not erred in imposing discovery sanctions against the Rothings. We hold that the courts erred in granting Kallestad's Motion for Summary Judgment on the Rothing's breach of contract claim. Accordingly, the judgment of the District Court on the issue of attorney's fees is vacated and the cause remanded for an evidentiary hearing to determine the proper amount of attorney's fees to be awarded.
- **#2** - The Rothings raise several issues on appeal which we have restated as follows: ¶3 1. Whether the District Court erred in concluding that hay is not a "product" for purposes of a strict liability in tort cause of action. ¶4 2. Whether the District Court erred in concluding that the Rothings' negligence claim against Kallestad fails because it was unforeseeable that the hay could cause injury and death to the Rothings' horses, thus no duty of care existed. ¶5 3. Whether the District Court erred in concluding that the Rothings' breach of contract claim against Kallestad fails because it was unforeseeable that the hay could cause injury and death to the Rothings' horses.
- The Rothings appeal on several issues to the courts. The District Court did erred in concluding that hay is not a "product". The Rothing's purchase of hay from Kallestad was a transaction of in goods. Goods are all things which are movable at the identification to the contract of sale. Therefore, the courts determine that Kallestad was a merchant for the purpose of sale of his hay to Rothings. A breach of contract under the UCC does not require foreseeability if an injury to person or property proximately results from any breach of warranty. The district courts erred in granting Kallestad's Motion for Summary Judgment on the Rothing's breach of contract claim. Because the courts find Rothing's breach of contract claim dispositive of this case, they do not address Rothing's negligence claim.

- #3** - In the instant case, the Rothings' purchase of hay from Kallestad was a transaction in goods, thus it may be governed by Montana's Uniform Commercial Code (UCC) pertaining to sales if it meets the other requirements of Title 30, Chapter 2, Montana Code Annotated (1999).^[1] Section 30-2-102, MCA, provides: "Unless the context otherwise requires, this chapter applies to transactions in goods" "Goods" are defined at § 30-2-105(1), MCA, to mean: all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty [Emphasis added.] Hence, as the Official Comment to § 30-2-105, MCA, provides: "The definition of goods is based on the concept of movability It is not intended to deal with things which are not fairly identifiable as movables before the contract is preformed." The hay in this case had been cut, baled and stacked and was "movable" at the time the Rothings purchased it from Kallestad.
- This case statement tells us that the purchase of hay the Rothings' made from Kallestad counts as the selling of goods because according MCA it defines goods as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action. "Goods" According to Commercial Code §2105: also states that the Rothings can be consulted for the horses and of the horses unborn cattle.
- #4** - In addition to the requirement that the transaction consist of the sale of "goods," the seller must meet the definition of a "merchant." A "merchant" under the UCC "means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction" Section 30-2-104(1), MCA. Whether or not a person qualifies as a merchant under the UCC is a mixed question of law and fact. [Smith, 291 Mont. at 430, 968 P.2d at 726](#) (citing [Dawkins & Co. v. L & L Planting Co., 602 So. 2d 838, 843 \(Miss. 1992\)](#)). We further stated in Smith that [d]espite the split of authority on this issue, a majority of courts have held that under the Uniform Commercial Code, a farmer may be included under the definition of "merchant" in some instances. However, whether a particular farmer qualifies as a merchant cannot be determined through application of a per se rule; rather, it is a conclusion that must be reached on a case by case basis.
- Besides selling "goods" the seller must meet the definition of a "merchant", according to MCA Section 30-2-104 (1) a merchant is not only a seller but a person who has both knowledge and skill "goods" involved in a transaction. Although Farmers may be consider Merchants it is not by means of an application but by a case to case basis.

- **#5** - Thus, in this case, if the trial court determines that Kallestad was a merchant for purposes of the sale of his hay to the Rothings, then the provisions of the UCC, and more specifically, the Implied Warranty of Merchantability, would apply to this transaction. "Unless excluded or modified [], a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." Section 30-2-314(1), MCA
- IF THE COURT DETERMINES THAT KALLESTAD IS A MERCHANT FOR THE SALE OF GOODS BEING HAY. UNDER THE UCC PROVISIONS SPECIFICALLY THE IMPLIED WARRANTY OF MERCHANTABILITY, THAT ROTHINGS PURCHASED HAY FROM KALLESTAD. THE HAY WAS MEANT TO FEED THE HORSES NOT TO CAUSE INJURY OR DEATH TO THE HORSES. SINCE, THE HAY MADE THE HORSES SICK BECAUSE OF BOTULISM IN THE HAY. HENCE IMPLIED WARRANTY OF MERCHANTABILITY EXISTED.
- UNLESS THE AGREEMENT WAS ALTERED, IMPLIED IN THE CONTRACT UNDER THE WARRANTY THAT THE GOODS(HAY) WERE GOOD ENOUGH TO BE SOLD, IF THE SELLER IS A MERCHANT.
- **#6** - Prior to the advent of the UCC, the common law concept of "implied warranty" developed in cases of food stuffs sold for immediate human consumption where "a warranty of soundness or wholesomeness will be implied." [Larson v. Farmers Warehouse Co., 297 P. 753, 754 \(Wash. 1931\)](#). Courts extended the concept of implied warranty to products to be fed to livestock, but initially limited its application to "processed and packaged" food. See, e.g., [Midwest Game Co. v. M.F.A. Milling Co., 320 S.W.2d 547, 550 \(Mo. 1959\)](#) (attaching implied warranty where the animal food "is not in its raw state but has been processed and packaged by the manufacturer").
- BEFORE THE UCC IN QUESTION, "IMPLIED WARRANTY" COMMON LAW WAS CREATED FOR THE PURPOSE OF CASES, WHERE FOOD WAS SOLD FOR HUMAN CONSUMPTION. IT WOULD BE IMPLIED AS A WARRANTY OF "SOUNDNESS OR WHOLESOME." THE COURTS ALSO BRANCHED OUT TO PRODUCTS THAT WERE FED TO LIVESTOCK AS AN IMPLIED WARRANTY, HOWEVER WAS LIMITED TO "PROCESSED AND PACKAGED" FOOD. (WHERE THE FOOD IS NOT FRESH IS WAS PROCESSED AND PACKAGED BY THE MANUFACTURER.

- **#7** - These principles were carried over into the UCC.^[2] Now, under the UCC, goods to be merchantable must be at least such as: (a) pass without objection in the trade under the contract description; and (b) in the case of fungible goods, are of fair average quality within the description; and (c) are fit for the ordinary purposes for which such goods are used; and (d) run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and (e) are adequately contained, packaged, and labeled as the agreement may require; and (f) conform to the promises or affirmations of fact made on the container or label if any. Section 30-2-314(2), MCA (emphasis added). "Surely goods are not merchantable, if in their ordinary use, the goods cause damage to the property to which they are applied or harm to the person using them." *Streich v. Hilton-Davis, Div. of Sterling Drug*, 214 Mont. 44, 59, 692 P.2d 440, 448 (1984).
- THE COURT WENT IN DEPTH TO REVIEW PVIOUS CASES SIMILAR TO THIS ONE WHERE THE PURCHASES OF FED TO LIVESTOCK AS A CONCEPT OF "IMPLIED WARRANTY THAT APPLIES TO THE SALES OF GOODS." THEY WERE INCLUDED IN THE UCC, AND PRESENT UCC GOODS TO BE MERCHANTABLE.
- (A) THE GOODS LOOKED LIKE THE CONTRACTS DESCRIPTION AND THEIR WAS NO ISSUE WHEN IT WAS TRADED.
- (B) ACCORDING TO FUNGIBLE GOODS THAT ARE IN THE CASE OF GRAIN, OIL, OR FLOUR, THAT ARE GOOD ENOUGH TO BE SOLD TO MEET THE DESCRIPTION.
- (C) ALSO, ARE SUITED FOR USUAL PURPOSES WHERE THESE GOODS ARE USED.
- (D) THEY FOLLOW AND ARE WITHIN THE STANDARDS PERMITTED BY THE AGREEMENT OF QUALITY, QUANTITY OF EACH UNIT AND ALL UNITS INVOLVED IN THIS AGREEMENT.
- (E) UNDER THE AGREEMENT THAT ALL GOODS SHOULD BE CONTAINED, PACKAGED, AND LABELED IF REQUIRED.
- (F) THAT EVERYTHING ON THE LABEL OF THE CONTAINER IS TRUE.
- IN SECTION 30-2-314(2), MCA STATES THAT "GOODS ARE MERCHANTABLE," IF THE HAY CAUSED DAMAGE TO THE HORSES AND RESULTED IN HARMING THE HORSES USING THE GOODS, THE HAY WAS NOT MERCHANTABLE.
- **#8** - Furthermore, Article 2-715(2)(b), does not contain a foreseeability requirement, thus a seller "is liable for injury to person or property even if the seller did not know of or have reason to know of the buyer's intended use." James J. White & Robert S. Summers, *Uniform Commercial Code* vol. 1, § 10-4, 733 (5th ed., Thomson West 2006). Analogously, this Court has established that foreseeability is not required in connection with causation in negligence cases. See [Prindel v. Ravalli County, 2006 MT 62, 331 Mont. 338, 133 P.3d 165](#) ("In order to establish proximate causation, however, the specific injury to a plaintiff need not have been foreseen.") (internal quotation marks and italics omitted); [Busta v. Columbus Hosp. Corp., 276 Mont. 342, 916 P.2d 122 \(1996\)](#) (where this Court held that in cases which do not involve issues of intervening cause, proof of causation is satisfied by proof that a party's conduct was cause-in-fact of damage alleged, and no consideration of foreseeability is required in connection with causation). ¶38 Thus, contrary to the District Court's conclusion that all breach of contract actions in Montana require foreseeability, a breach of contract action under the UCC does not require foreseeability if injury to person or property proximately results from any breach of warranty.
- Basically The article 2-714(2)(b) doesn't have the ability to perceive, know in advance, or anticipate that damage or injury therefore the seller is responsible for any damages or injuries to the person or property. The court also agreed that the foreseeability is not needed with this case. The court also said that all the damages didn't need to be predicted in order for them to establish the cause. The court also said that this case did not have an intervening cause which is basically a defense to a negligence claim and that proof of causation which is the cause and effect relationship between an act or omission and damages alleged in a tort or personal injury action was enough to see the damages and that no foreseeability was needed. Even though the district court believes that every breach of contract needs foreseeability in this case under the UCC it is not needed.

- #9 - ¶39 Accordingly, we hold that the District Court erred in granting Kallestad's Motion for Summary Judgment on the Rothings' breach of contract claim.
- The District court believes that because of this case that not all breaches of contract need to be handled with foreseeability under the UCC.
- #10 - Explain who won the case and provide a conclusion
- I believe the Rothings won the case because the courts did reverse granting Kallestad's Motion for Summary Judgment on the Rothings' breach of contract claim. However, because the Rothings failed to provide information on time, the courts granted Kallestad's Motion to Compel. But the Rothings did get the courts to rule the award of attorney's fees in this case was improper. Accordingly, the judgment of the District Court on the issue of attorney's fees is vacated and the cause remanded for an evidentiary hearing to determine the proper amount of attorney's fees to be awarded. Affirmed in part, reversed in part and remanded for further proceedings consistent with this Opinion.

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