CONCLUSION

For the reasons discussed, the judgment of the district court is affirmed.

AFFIRMED.

WRIGHT and GERRARD, JJ., not participating.

THOMAS LESIAK AND ANGELINE LESIAK, HUSBAND AND WIFE, ET AL., APPELLANTS AND CROSS-APPELLEES, V. CENTRAL VALLEY AG COOPERATIVE, INC., A COOPERATIVE CORPORATION, APPELLEE AND CROSS-APPELLANT.

808 N.W.2d 67

Filed January 27, 2012. No. S-10-323.

1. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Summary Judgment.** A court should grant summary judgment when the pleadings and evidence admitted show that no genuine issue exists regarding any material fact or 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. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Directed Verdict: Evidence.** A directed verdict is proper only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law.
5. **Crops: Damages.** Where a growing crop is injured but not rendered entirely worthless, the damage to it may be measured by the difference between the value at maturity of the probable crop, if there had been no injury, and the value of the actual crop, less the expense of fitting for market that portion of the probable crop which was prevented from maturing by the injury.
6. **Courts: Juries: Damages.** While it is the jury's duty to determine the amount of damages, it is the duty of the trial court to refrain from submitting the issue of damages to the jury where the evidence is such that a jury could not determine the issue without indulging in speculation or conjecture.

7. **Damages: Evidence: Proof.** Damages are not required to be proved with mathematical certainty, but the evidence must be sufficient to enable the trier of fact to estimate with a reasonable degree of certainty and exactness the actual damages.
8. **Summary Judgment.** A motion for summary judgment is a proper mechanism to dispose of individual legal theories.
9. **Products Liability: Torts: Contracts: Negligence: Damages.** Where a defective product causes economic loss and is unaccompanied by personal injury or damage to other property, the aggrieved party's remedy lies in contract law rather than tort law.
10. **Products Liability: Torts: Contracts: Negligence: Breach of Contract.** The economic loss doctrine precludes tort remedies only where the damages caused were limited to economic losses and where either (1) a defective product caused the damage or (2) the duty which was allegedly breached arose solely from the contractual relationship between the parties.
11. **Damages: Words and Phrases.** Economic losses are defined as commercial losses, unaccompanied by personal injury or other property damage.
12. **Breach of Contract: Damages: Torts.** Where only economic loss is suffered and the alleged breach is of only a contractual duty, then the action should be in contract rather than in tort.
13. **Summary Judgment: Appeal and Error.** The denial of a summary judgment motion is neither appealable nor reviewable.

Appeal from the District Court for Merrick County: MICHAEL J. OWENS, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

David A. Domina, Brian E. Jorde, and Anneliese Wright, of Domina Law Group, P.C., L.L.O., for appellants.

Jordan W. Adam and D. Steven Leininger, of Leininger, Smith, Johnson, Baack, Placzek & Allen, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

Thomas Lesiak and Angeline Lesiak, husband and wife; Timothy Lesiak, their son; and Ronald Lesiak, Thomas Lesiak's brother, are Nebraska farmers who own land in Merrick and Nance Counties. The Lesiaks suffered a reduced corn yield in 2005, allegedly due to the overapplication of herbicide to their crops by Central Valley Ag Cooperative, Inc. (CVA). The main issues presented in this case are whether sufficient evidence existed to allow a jury to reasonably estimate the

extent of the Lesiaks' damages and whether the economic loss doctrine precluded the Lesiaks from seeking relief under a negligence theory.

I. BACKGROUND

In early 2005, the Lesiaks began preparing for the upcoming farming season. The Lesiaks were planning on farming 20 different fields, encompassing approximately 2,000 acres of farmland. Randy Zmek, an employee for CVA, called on Thomas (Tom) Lesiak in an effort to earn more of the Lesiaks' business. In the past, the Lesiaks had purchased fertilizer and other chemicals from CVA. But, for the 2005 crop year, the Lesiaks took all of their business to CVA, purchasing a "complete package." This package included diesel fuels, chemicals, fertilizer, and seed. The package also included CVA's general farming knowledge and expertise. As a result of this transaction, CVA conducted soil tests on the Lesiaks' land in order to determine the soil composition and texture. CVA recommended which fertilizers, seed corn, pesticides, and herbicides to use. CVA then sold all of these products to the Lesiaks.

The Lesiaks began to plant their corn in the spring. Following CVA's recommendation, the Lesiaks had purchased approximately 947 gallons of Guardsman Max, a herbicide, from CVA and Guardsman Max was applied to 16 of their 20 fields that year. Once the Lesiaks finished planting a field, they would notify CVA, who would then spray the field with Guardsman Max.

Guardsman Max is designed to kill a broad number of weeds in a cornfield without damaging the corn crop. In order to be effective, however, Guardsman Max must be applied at a specific rate based on a number of conditions; particularly important are the soil textures and organic content of the fields to be sprayed. The coarser the soil of the field, the less Guardsman Max was required. Also, if the field contained less than 3 percent organic matter, then less Guardsman Max was needed.

All of the Lesiaks' fields contained less than 3 percent organic matter, with the exception of a small portion of one of their fields. The record indicates that roughly 68 percent of the land consisted of coarse-textured soils and that 32 percent

of the land consisted of medium-textured soils. All but one of the Lesiaks' fields contained some medium-textured soils. For coarse-textured soils with less than 3 percent organic matter, the Guardsman Max label suggested an application rate of 2.5 to 3.0 pints per acre. And for medium-textured soils with less than 3 percent organic matter, the label suggested an application rate of 3.0 to 4.0 pints per acre. It is undisputed that CVA applied Guardsman Max at a uniform rate of 4.0 pints per acre across all of the Lesiaks' fields.

On June 2, 2005, Tom Lesiak called Zmek and advised Zmek that the Lesiaks' corn crop was stunted and that he suspected chemical damage. Zmek came out to inspect the crops the day after receiving Tom Lesiak's telephone call, and he initially found nothing wrong. But, after being shown to a specific area of the field, Zmek admitted to there being chemical damage, though he did not specifically reference Guardsman Max. After Zmek's inspection in June, the Lesiaks continued to notice problems with their crop throughout the summer and reported those problems to CVA. CVA allegedly did nothing until October, when the Lesiaks began reporting their yields to CVA. At that point, CVA inspected the Lesiaks' fields, but denied any damage resulting from its application of Guardsman Max.

The Lesiaks filed this action against CVA. The Lesiaks alleged that CVA's improper application of Guardsman Max caused damage to their corn crop, decreasing their total yield. The Lesiaks asserted multiple theories of recovery, including, as relevant to this appeal, negligence, breach of implied warranty of merchantability, and breach of implied warranty of services. CVA moved for summary judgment, which the district court granted on both the implied warranty of services and negligence claims. The court found that Nebraska law did not recognize the claim of implied warranty of services outside of the building and construction context. Additionally, the court found that the Lesiaks' negligence claim was precluded by the economic loss doctrine. This left the Lesiaks with only their claim for breach of implied warranty of merchantability.

Following the Lesiaks' presentation of their case, CVA moved for a directed verdict, asserting that the Lesiaks had

failed to prove the measure of the damage, if any, which resulted from the alleged overapplication of Guardsman Max to their cornfields. The court granted the motion for a directed verdict, explaining that the evidence was insufficient to allow the fact finder to determine what damage was attributable to Guardsman Max and what was attributable to a lack of irrigation. The Lesiaks appeal.

II. ASSIGNMENTS OF ERROR

The Lesiaks assign, restated and renumbered, that the district court erred in (1) directing a verdict for CVA on the basis that the Lesiaks' proof of damages was not sufficiently definite for submission to the jury, (2) allowing a motion for summary judgment to be used to dismiss individual theories of relief, (3) granting partial summary judgment on the Lesiaks' breach of implied warranty of services claim, and (4) granting partial summary judgment on the Lesiaks' negligence theory based on the economic loss doctrine.

On cross-appeal, CVA assigns, restated, that the district court erred in failing to grant CVA summary judgment on all of the Lesiaks' claims because the Lesiaks could only speculate as to the money they saved from not having to dry and transport crops which were allegedly lost.

III. STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.[1]

[2,3] A court should grant summary judgment when the pleadings and evidence admitted show that no genuine issue exists regarding any material fact or the ultimate inferences

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[1] *State of Florida v. Countrywide Truck Ins. Agency*, 275 Neb. 842, 749 N.W.2d 894 (2008).

that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[2] In reviewing a summary judgment, we view the evidence in a light most favorable to the party against whom the judgment is granted and give such party the benefit of all reasonable inferences deducible from the evidence.[3]

IV. ANALYSIS

We first address the Lesiaks' contention that the district court erred in directing a verdict in favor of CVA based on the Lesiaks' alleged inability to prove their damages. We address this issue first because the Lesiaks' other assigned errors are dependent on the outcome of this one. In other words, if the Lesiaks are unable to prove damages as a matter of law, then whether the district court properly granted summary judgment on the Lesiaks' various other theories of relief is irrelevant.

1. Directed Verdict

The Lesiaks assert that the district court erred when, at the close of the Lesiaks' case, the court directed a verdict in favor of CVA. The court determined that the jury, without speculating, would be unable to apportion the damage allegedly caused by the overapplication of Guardsman Max and damage caused by a lack of irrigation. Because the Lesiaks presented sufficient evidence to allow a jury to calculate damages to a reasonable degree of certainty and exactness, this assigned error has merit.

(a) *Hahn v. Weber & Sons Co.*

In making its ruling, the district court relied upon *Hahn v. Weber & Sons Co.*[4] In *Hahn*, a farmer planted soybeans in two tracts of land lying directly north of, and adjacent to, his neighbor's land. The neighbor sprayed his land with herbicide to control the weeds on his acreage. The farmer claimed that the neighbor acted negligently and that the herbicide spray

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[2] *Golden v. Union Pacific RR. Co.*, 282 Neb. 486, 804 N.W.2d 31 (2011).

[3] *Id.*

[4] *Hahn v. Weber & Sons Co.*, 223 Neb. 426, 390 N.W.2d 503 (1986).

drifted onto his land and damaged his soybeans. The trial court found that the spray did drift onto the farmer's crops, but that the farmer also failed to irrigate at the proper time, and that the plants which were irrigated properly produced a normal yield.[5] The court found that any attempt to determine what damage to the field was attributable to the sprayed herbicide, as opposed to a lack of irrigation, would be "'conjectural, speculative and a "guesstimate"'" and dismissed the petition.[6]

On appeal, we explained that the farmer had the burden of proving that some or all of the damage was proximately caused by the neighbor's negligent act. In explaining the farmer's burden, we said:

> Where the injury is the result of two separate, independent causes, and the defendant is responsible for only one of the causes, the plaintiff must establish that the entire damage would have occurred from the cause for which the defendant is liable or establish the amount of damage directly caused by the defendant's negligence.[7]

We concluded that absent any evidence to properly allocate damages between the herbicide application and the lack of irrigation, "any attempt to determine what damage was attributable to vapor drift would be conjectural and speculative."[8] In essence, then, *Hahn* sets forth the Lesiaks' burden of proof in this case. *Hahn* stands for the proposition that there must be some evidence to allow a jury to properly allocate damages between two independent causes.

[4] But *Hahn* does not speak to the propriety of a directed verdict. We have stated that a directed verdict is proper "only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is, when an issue should be decided as a matter of law."[9] And, as understood from our

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[5] See *id.*

[6] *Id.* at 428, 390 N.W.2d at 505.

[7] *Id.* at 429, 390 N.W.2d at 506.

[8] *Id.* at 430, 390 N.W.2d at 506.

[9] *American Central City v. Joint Antelope Valley Auth.*, 281 Neb. 742, 747, 807 N.W.2d 170, 177 (2011).

standard of review, we view a directed verdict skeptically, resolving every controverted fact in favor of the aggrieved party and giving that party the benefit of every inference reasonably deducible from the evidence.[10]

Here, while the directed verdict was granted on the basis of an inability to prove damages, the issues of damages and causation are intertwined. Essentially, CVA argues that as a matter of law, the Lesiaks were unable to prove what damage, if any, resulted from the alleged overapplication of Guardsman Max to their cornfields. But, as will be explained more fully below, the record presents sufficient evidence to allow a jury to find that Guardsman Max injured the Lesiaks' corn crop. And the record also presents sufficient evidence to allow a jury to estimate damages to a reasonable degree of certainty and exactness. Thus, the trial court erred in directing a verdict in favor of CVA.

(b) Could Jury Find That Guardsman Max Had Damaged the Lesiaks' Corn Crop?

The Lesiaks alleged that CVA applied Guardsman Max at too high a rate, which caused significant damage to their corn crop. CVA, on the other hand, asserted that other events caused the damage, including a lack of irrigation and the presence of weeds in the fields (other than those that were supposed to have been controlled by Guardsman Max). Here, the record presents sufficient evidence to allow a jury to find that Guardsman Max, as applied, had injured the Lesiaks' corn crop.

The Lesiaks called Dale Flowerday, an agronomist, as their expert witness, and his status as an expert is undisputed by the parties. Flowerday inspected five or six of the Lesiaks' fields, relying upon Tom Lesiak to show him fields representative of the entire farming operation, as Flowerday testified was customary in his profession because it is the farmer who knows his or her land best. Flowerday explained that he was able to determine the cause of the damage from reviewing the crop residue and root systems following harvest. Flowerday opined that the improper application of Guardsman Max to the Lesiaks'

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[10] See *Countrywide Truck Ins. Agency, supra* note 1.

cornfields caused a lower yield at harvest. Flowerday noted that his opinion applied only to the Lesiaks' irrigated fields. And Flowerday also explained that he did not know whether Guardsman Max had injured the areas of the fields containing medium-textured soils, but could only be certain as to the areas of the fields containing coarse-textured soils.

CVA asserts that there is no evidence establishing that Guardsman Max caused damage to the Lesiaks' crops grown in medium-textured soils, because the 4-pints-per-acre rate was within the range prescribed by the label for medium-textured soils. Notably, Flowerday did not rule out Guardsman Max as the cause of the damage to the crops grown in medium-textured soils. Rather, he simply stated that he did not know if it caused the damage, because it was applied at a rate within that prescribed by the Guardsman Max label. Flowerday did explain that he saw damage throughout the fields, on crops in both medium- and coarse-textured soils, and that the damage was simply more extensive with the crops in the coarse-textured soils. Moreover, in examining the relevant land value sheets and soils maps, Flowerday determined that a majority of the Lesiaks' land consisted of coarse-textured soils—specifically, 68 percent of the soils were coarse textured, and 32 percent were medium textured. Based on those soil compositions, and the Guardsman Max label instructions, Flowerday opined that CVA had applied Guardsman Max at too high a rate.

Thus, in Flowerday's opinion, all of the fields were coarse textured for purposes of applying herbicide. The Guardsman Max label explains that "[w]hen use rates are expressed in ranges, use the lower rates for more coarsely textured soils lower in organic matter and use the higher rates for more finely textured soils that are higher in organic matter." Thus, the instructions contemplated situations where the fields were not easily classified wholly as coarse or medium textured. And in those situations, the label directs the applicator to, essentially, err on the side of caution and apply Guardsman Max at the lower end of the rate range.

In other words, the record contained evidence that despite the combination of coarse- and medium-textured soils in the Lesiaks' fields, CVA should have applied Guardsman Max

conservatively, as if the soil were coarse textured. The record also contained evidence that the Lesiaks' crop was damaged. And the record contains evidence explaining the biological mechanism by which overapplication of Guardsman Max can cause the kind of damage that was observed in the Lesiaks' corn. In short, there was evidence from which the jury could have found that something damaged the Lesiaks' crop on coarse- and medium-textured soils, that Guardsman Max can cause that kind of damage, and that Guardsman Max was overapplied to the Lesiaks' fields. This was sufficient evidence to allow a jury to find that Guardsman Max injured the corn on both coarse- and medium-textured soils.

(c) Was Jury Capable of Allocating Damages Without Engaging in Speculation or Conjecture?

Flowerday's opinion was limited to the irrigated fields. Here, many of the fields contained both irrigated and nonirrigated portions and there was evidence that a lack of irrigation, among other things, caused damage to a number of fields. The issue is whether there is enough evidence in the record to allow a jury to reasonably apportion damages between each of these independent causes of yield loss. There is.

[5-7] We have explained that where a growing crop is injured but not rendered entirely worthless, the damage to it may be measured by the difference between the value at maturity of the probable crop, if there had been no injury, and the value of the actual crop, less the expense of fitting for market that portion of the probable crop which was prevented from maturing by the injury.[11] While it is the jury's duty to determine the amount of damages,[12] it is the duty of the trial court to refrain from submitting the issue of damages to the jury where the evidence is such that a jury could not determine the issue without indulging in speculation or conjecture.[13] But this duty

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[11] See, *Bristol v. Rasmussen*, 249 Neb. 854, 547 N.W.2d 120 (1996); *Hopper v. Elkhorn Valley Drainage District*, 108 Neb. 550, 188 N.W. 239 (1922).

[12] See *Bristol, supra* note 11.

[13] See *Peterson v. North American Plant Breeders*, 218 Neb. 258, 354 N.W.2d 625 (1984).

is balanced against the realization that determining the extent of crop loss, much like lost profits, requires reasonable estimation.[14] As a result, damages are not required to be proved with mathematical certainty, "'but the evidence must be sufficient to enable the trier of fact . . . to estimate with a reasonable degree of certainty and exactness the actual damages. . . .'"[15] We have also explained that if there is evidence establishing that damage occurred, "it is proper to let the jury determine what the loss probably was from the best evidence the nature of the case allows."[16] In short, we require enough evidence to provide a reasonable basis for the jury to estimate the extent of the damage.

At trial, the Lesiaks introduced exhibit 305, summarizing their estimated loss. Exhibit 305 contained the projected and actual yields for each field. Then, based on those figures, along with the price of corn and the estimated savings from not having to dry and transport a full crop, the Lesiaks estimated their loss. But the accuracy of exhibit 305 was called into question during trial. CVA asserts that exhibit 305 was unreliable and that therefore, a jury could only speculate as to the amount of damages suffered by the Lesiaks.

Specifically, CVA makes two points. First, the evidence was in conflict over what reasonable projected yields for each field would be. Second, CVA points out that the Lesiaks did not have exact records of each field's individual crop yield; instead, the Lesiaks worked from their total yield and used that number to estimate each field's yield. In effect, CVA asserts that without accurate projected yield figures, and because the Lesiaks did not track each individual field's actual yield, it would be impossible for the jury to accurately calculate damages because of the multitude of other events which caused crop loss on each field.

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[14] See, *Bristol, supra* note 11; *Peterson, supra* note 13.

[15] *Peterson, supra* note 13, 218 Neb. at 269, 354 N.W.2d at 633, citing *Shotkoski v. Standard Chemical Manuf. Co.*, 195 Neb. 22, 237 N.W.2d 92 (1975).

[16] *Gary's Implement v. Bridgeport Tractor Parts*, 281 Neb. 281, 292, 799 N.W.2d 249, 259 (2011).

But that is not the case. Here, there is sufficient evidence to allow a jury to reasonably calculate damages. First, there is sufficient evidence regarding the projected yields. The soil tests each listed a yield goal ranging from 180 to 200 bushels per acre (BPA) on each field. Tom Lesiak also testified that he created a "conservative" estimate for each field, projecting an average yield of approximately 180 BPA. And exhibit 305's projected yield figures were based on the alleged promises of Zmek and the performance of other farmers' fields in the nearby area under CVA's program. The jury could choose which evidence was most credible and work from those figures.

Furthermore, there is sufficient evidence in the record to establish the actual yields in each field, to a reasonable degree of certainty and exactness. The names of each field, where each is located, and the number of irrigated acres may be determined by cross-referencing exhibit 58 (the names and legal descriptions of each field), exhibit 173 (land value sheets), and exhibit 220 (diagrams of certain irrigation systems). Additionally, exhibit 93 contains all of the "yield maps" for each field. A yield map is created by the combine harvester as the crop is being harvested. A yield map calculates the average BPA based on the total crop input and the speed at which the combine is traveling. The yield maps also indicate the total number of harvested acres for each field.

At trial, Tom Lesiak testified that although the yield maps are not 100 percent accurate, they were about 90 percent accurate—certainly accurate enough to be a valuable guide to farmers analyzing their crop yields. The inaccuracy stems from the lag which occurs between a change in combine speed and the subsequent update of the combine's harvesting monitor, which produces the yield maps. Additionally, there is a drop in accuracy when the combine is forced to turn around at the end of rows. This is because the harvest rate calculation dips as the combine is forced to slow and there is no harvesting occurring.

It is undisputed that testimony adduced at trial indicates that multiple fields suffered crop loss from sources other than the alleged overapplication of Guardsman Max. But the record would allow a jury to subtract those damages out of the

calculation. For example, Tom Lesiak admitted that one of his fields, the "Sigea" field, suffered a loss from a lack of irrigation. The Sigea field was center-pivot irrigated, meaning that a large circular pivot irrigated the majority of the field. Thus, the corners of the field did not receive any irrigation. But, additionally, the pivot had a few plugged nozzles which caused a small circle in the interior of the pivot circle to receive an inadequate amount of water. This resulted in a loss attributed to a lack of irrigation.

A jury could deduct that loss out without resorting to speculation or conjecture. The Sigea yield map provides extensive information, including the total number of acres harvested, the average BPA yield for the entire field, and the number of acres harvested for each BPA range. For example, the Sigea field indicates that 156.18 acres were harvested, at an estimated 128.28 BPA. Of those 156.18 acres, 35.9 acres yielded less than 90 BPA, while 16.4 acres yielded 180 or more BPA. Those 35.9 acres correspond to the areas which received inadequate or no irrigation. Without going into the mathematical specifics, a jury could estimate the Sigea field's average BPA yield without those 35.9 nonirrigated acres. In other words, a jury could estimate the average BPA yield for just the irrigated portions of the field. From there, it is a matter of comparing that yield to the projected yield and then calculating the estimated economic loss.

A similar approach could be used for each of the fields where there were multiple causes of yield loss, regardless of whether that loss was from a lack of irrigation, sandburs, or other weeds or pests. Granted, the Sigea field is one of the easier examples, compared to some of the others, but the fact remains that there is a reasonable basis for the jury to approximate the damage allegedly caused by Guardsman Max. The law does not require mathematical certainty. Instead, the law requires a reasonable estimation based on the evidence in the record and the nature of the case. And the fact that such a calculation would require some sophistication from a jury, in that they would have to sift through large amounts of evidence, does not change that burden. Although the parties could have presented expert testimony to help the jury in performing that

task, it was not necessary for them to do so in order to avoid a directed verdict. Our system asks juries to make complex factual findings in many cases, and that is what the jury would have been asked to do here. There is evidence in the record which would allow a jury to find that the overapplication of Guardsman Max damaged the Lesiaks' fields and also to reasonably estimate the extent of the damage. The trial court erred in directing a verdict in favor of CVA.

2. Summary Judgment Disposition of Theories of Relief

[8] The Lesiaks also assert that the district court erred in various respects at the summary judgment stage. First, the Lesiaks assert that the district court improperly considered CVA's motion for summary judgment, in essence, because CVA's motion sought to strike particular legal theories of relief rather than claims. But there is no question that the parties may, in pretrial proceedings, seek to limit the scope of the issues on which evidence may be adduced and which may be submitted to the jury. A motion for summary judgment may be used for that purpose, and our case law is replete with instances where a motion for summary judgment was considered with regard to a specific legal theory.[17] In short, because a motion for summary judgment is a proper mechanism to dispose of individual legal theories, this assigned error has no merit.

3. Implied Services Warranty

Next, the Lesiaks argue that CVA breached its implied warranty to provide its services in a workmanlike and appropriate manner. The district court found that no such warranty existed under Nebraska law, except in cases involving building and construction contracts, and granted summary judgment to CVA on this issue. The Lesiaks assign this ruling as error. But because no implied services warranty exists in a contract for agronomical services or goods under Nebraska law, the district court's ruling was correct.

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[17] See, e.g., *Wilke v. Woodhouse Ford*, 278 Neb. 800, 774 N.W.2d 370 (2009); *Frerichs v. Nebraska Harvestore Sys.*, 226 Neb. 220, 410 N.W.2d 487 (1987).

The Lesiaks' argument presumes that their contract with CVA is a services contract. But regardless of whether the contract is for goods or services, the Lesiaks' claim fails. If the contract is determined to be a contract for the sale of goods, then Nebraska's Uniform Commercial Code controls.[18] The Uniform Commercial Code adopts only two implied warranties in a sale-of-goods contract: the implied warranty of merchantability[19] and the implied warranty of fitness for a particular purpose.[20] And while the Uniform Commercial Code explains that "other implied warranties may arise from course of dealing or usage of trade,"[21] the Lesiaks have offered no evidence that an implied services warranty arose through either source. As such, if the contract is considered a contract for the sale of goods, no services warranty is implied and the Lesiaks' assigned error lacks merit.

If the contract is determined to be a contract for the provision of services, then the common law would control. The only circumstance under which we have found an implied services warranty in a contract for services is in the context of building and construction contracts.[22]

The Lesiaks argue that an implied services warranty should be found here because CVA was hired to help "build" a corn crop. But it is a stretch to consider what was done here to be "building" similar to that in, for example, *Moglia v. McNeil Co.*[23] It has been explained that the rationale for allowing the purchaser of new construction to recover on a theory of breach of an implied warranty is that it may be impossible for the ordinary consumer to determine the building's structural quality, because many of the most important elements of its construction are hidden from view and are not discoverable

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[18] See Neb. U.C.C. § 2-102 (Reissue 2001).

[19] See Neb. U.C.C. § 2-314 (Reissue 2001).

[20] See Neb. U.C.C. § 2-315 (Reissue 2001).

[21] See § 2-314(3).

[22] See, e.g., *Moglia v. McNeil Co.*, 270 Neb. 241, 700 N.W.2d 608 (2005).

[23] *Id.*

even by careful inspection.[24] The consumer can determine little about the soundness of the construction but must rely upon the fact that the vendor-builder holds the structure out to the public as fit for use and of reasonable quality.[25] Therefore, the builder or seller of new construction, not unlike the manufacturer or merchandiser of goods, makes implied representations, ordinarily indispensable to the sale, that the builder has used reasonable skill and judgment in constructing the building.[26]

Obviously, that logic is not applicable to spraying a corn crop, for several reasons—most notably, a corn crop is not a finished product capable of having a latent defect at the time of contracting. And to conclude otherwise would be to effectively eliminate the requirement that negligence be proved and, instead, impose strict liability for the results of the vendor's performance. Thus, we conclude that it is both unnecessary and unwise to expand our application of the implied services warranty outside of the building and construction context. This assignment of error lacks merit.

4. Economic Loss Doctrine

Finally, the Lesiaks assert that the district court erred when it granted summary judgment on the Lesiaks' negligence claim. The court determined that the economic loss doctrine applied and that the Lesiaks could only proceed under contractual theories of relief. Because we find the doctrine inapplicable here, this assignment of error has merit.

(a) Overview

The economic loss doctrine, generally stated, is a "judicially created doctrine that sets forth the circumstances under which a tort action is prohibited if the only damages suffered are

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[24] See, e.g., *Dixon v. Mountain City Const. Co.*, 632 S.W.2d 538 (Tenn. 1982)*; McDonald v. Mianecki*, 79 N.J. 275, 398 A.2d 1283 (1979); *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974); *Smith v. Old Warson Development Company*, 479 S.W.2d 795 (Mo. 1972).

[25] See *Smith, supra* note 24.

[26] See *Pollard, supra* note 24. Accord *Dixon, supra* note 24.

economic losses."[27] While the doctrine may be easy to state, it is difficult to apply. Indeed, it has been described as a "confusing morass,"[28] and has been compared to the "ever-expanding, all-consuming alien life form portrayed in the 1958 B-movie classic *The Blob*"[29] that could "consume much of tort law if left unchecked."[30] We confront the doctrine's application and scope in this case.

[9] The economic loss doctrine originated in the context of products liability actions. The case attributed with the creation of the doctrine, and its modern application in courts today, is *Seely v. White Motor Co.*[31] In *Seely*, the California Supreme Court explained:

> A consumer should not be charged at the will of the manufacturer with bearing the risk of physical injury when he buys a product on the market. He can, however, be fairly charged with the risk that the product will not match his economic expectations unless the manufacturer agrees that it will. Even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone.[32]

The U.S. Supreme Court adopted *Seely*'s reasoning in *East River S.S. Corp. v. Transamerica Delaval.*[33] *East River S.S. Corp.* was an admiralty case which applied the doctrine in a products liability context. *East River S.S. Corp.* stands for the proposition that where a defective product causes economic loss and is unaccompanied by personal injury or damage to

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[27] *Indemnity Ins. Co. v. American Aviation*, 891 So. 2d 532, 536 (Fla. 2004).

[28] See *id.* at 544 (Cantero, J., concurring; Wells, J., joins).

[29] *Grams v. Milk Products, Inc.*, 283 Wis. 2d 511, 539, 699 N.W.2d 167, 180 (2005) (Abrahamson, C.J., dissenting; Butler, J., joins).

[30] *Id.* at 539, 699 N.W.2d at 181.

[31] *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965).

[32] *Id.* at 18, 403 P.2d at 151, 45 Cal. Rptr. at 23.

[33] *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986).

other property, the aggrieved party's remedy lies in contract law rather than tort law.[34]

We have adopted the doctrine, as described in *East River S.S. Corp.*, in Nebraska.[35] But the exact contours of the doctrine, particularly outside of the products liability context, have not been addressed. Each of our cases addressing the doctrine has involved a defective product.[36] And while the doctrine originated in the context of defective products, the doctrine's application has been expanding.[37] We take this opportunity to clarify the doctrine's application and scope in Nebraska.

(b) Analysis

[10,11] Here, we are presented with a situation where the product, Guardsman Max, was not alleged to be defective—instead, the Lesiaks claim the product was negligently applied, resulting in damage to their corn crop. After reviewing our own case law, the case law from other jurisdictions, and the scholarly work done on the subject, we hold that the economic loss doctrine precludes tort remedies only where the damages caused were limited to economic losses and where either (1) a defective product caused the damage or (2) the duty which was allegedly breached arose solely from the contractual relationship between the parties. And economic losses are defined as commercial losses, unaccompanied by personal injury or other property damage.[38]

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[34] See *id.*

[35] See, *Dobrovolny v. Ford Motor Co.*, 281 Neb. 86, 793 N.W.2d 445 (2011); *National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983).

[36] See, *Dobrovolny*, *supra* note 35; *Hilt Truck Line v. Pullman, Inc.*, 222 Neb. 65, 382 N.W.2d 310 (1986); *National Crane Corp., supra* note 35; *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973), *disapproved on other grounds, National Crane Corp., supra* note 35.

[37] See, e.g., *Neibarger v Universal Cooperatives*, 439 Mich. 512, 486 N.W.2d 612 (1992).

[38] See, *Giles v. General Motors Acceptance Corp.*, 494 F.3d 865 (9th Cir. 2007); *Miller v. U.S. Steel Corp.*, 902 F.2d 573 (7th Cir. 1990).

Multiple rationales have been given to support the doctrine's existence. But the primary rationale, and the one that we find most compelling, is to maintain the line of demarcation between tort law and contract law.[39] In other words, "'[t]he underlying purpose of the economic loss rule is to preserve the distinction between contract and tort theories in circumstances where both theories could apply.'"[40] The concern is that if tort remedies were available where the losses suffered were only economic, then private ordering (contract law) would be less effective. If a party could simply avoid its contractual bargain by suing in tort, which often offers more generous terms of recovery, then the effectiveness of contract law would be reduced. Or, in the words of the U.S. Supreme Court, the doctrine exists to prevent contract law from drowning in a "sea of tort."[41]

But the opposite must also be true, and the same type of concern must also exist for tort law. While the doctrine has its place in the law of damages, it should not be interpreted so broadly as to undermine tort law and preclude tort remedies in situations which, historically, have presented viable tort cases.[42] That is to say, the doctrine should not be expanded to allow traditional tort remedies to drown in a sea of contract.

To that end, we are expressly limiting the doctrine's application and take a position similar to that espoused by the Supreme Court of Florida.[43] First, we reaffirm the doctrine's continued application in the products liability context. As applied in that context, the doctrine requires that where a defective product causes harm only to itself, unaccompanied by either personal injury or damage to other property, contract law provides the exclusive remedy to the plaintiff.[44] The reasoning for this proposition is strong: Where the damage done is only to the product itself, the buyer has experienced only a loss of the benefit of its

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[39] See Vincent R. Johnson, *The Boundary-Line Function of the Economic Loss Rule*, 66 Wash. & Lee L. Rev. 523 (2009).

[40] *Id.* at 546.

[41] *East River S.S. Corp., supra* note 33, 476 U.S. at 866.

[42] See *Moransais v. Heathman*, 744 So. 2d 973 (Fla. 1999).

[43] See *Indemnity Ins. Co., supra* note 27.

[44] See *East River S.S. Corp., supra* note 33.

bargain, which is the essence of a warranty action.[45] We have recognized this reasoning in our case law.[46]

Second, the doctrine also applies where the alleged breach is only of a contractual duty, and no independent tort duty exists. Again, restated, the purpose of the doctrine is to preserve the distinction between tort law and contract law. Furtherance of that purpose requires that when the alleged breach is of a purely contractual duty—a duty which arises only because the parties entered into a contract—only contractual remedies are available. This is a commonsense conclusion. If the only duty breached is a contractual one, then only contractual remedies should be available. Thus, the doctrine serves to "weed[] out cases involving nothing more than an allegedly negligent failure to perform a purely contractual duty—a duty that would not otherwise exist."[47] Based on the doctrine's primary purpose of maintaining the boundaries of tort law and contract law, it is these cases where the doctrine most logically applies, because the plaintiff is suing for a breach of a contractual duty which would not have existed but for the contractual relationship.[48] This should be brought as a breach of contract action, and not a tort claim.[49]

We realize that this conclusion is somewhat at odds with past statements in some of our case law. Under Nebraska law, with each contract comes an accompanying duty "'to perform with care, skill, reasonable expediency, and faithfulness the thing agreed to be done.'"[50] We have previously stated that a violation of that duty may give rise to a breach of contract action or a tort action for negligent performance of the contract.[51]

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[45] See *id.*

[46] See *Dobrovolny, supra* note 35.

[47] Johnson, *supra* note 39 at 567.

[48] See *id.*

[49] See *id.*

[50] *Schwarz v. Platte Valley Exterminating*, 258 Neb. 841, 850, 606 N.W.2d 85, 91 (2000).

[51] See, *id.*; *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984).

[12] We qualify that statement now: Where only economic loss is suffered and the alleged breach is of only a contractual duty (such as the duty stated above), then the action should be in contract rather than in tort. In other words, the doctrine would apply to bar a tort action for the negligent performance of a contract when only economic losses were incurred. We also note that in each case where we have allowed a tort theory to proceed for breach of the above contractual duty, the outcome would remain the same under the standard we adopt today. That is to say, the doctrine would not bar tort theories in those cases, because either (1) the damages alleged were not solely economic losses or (2) there existed an independent tort duty alleged to be breached, which was separate and distinct from the above-stated contractual duty.[52]

In sum, we conclude that the primary purpose of the economic loss doctrine is to maintain the separateness of tort law and contract law. Generally speaking, the doctrine limits a party's ability to recover for economic losses (or commercial losses), unaccompanied by personal injury or damage to other property, allowing recovery only under contract law. But we expressly restrict the doctrine's application to where economic losses are (1) caused by a defective product or (2) caused by an alleged breach of a contractual duty, where no tort duty exists independent of the contract itself.

(c) Application

The question still remains whether the doctrine bars the Lesiaks' negligence claims here. It does not. It is true that the alleged breach was of a contractual duty which would not

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[52] See, *Thomas v. Countryside of Hastings*, 246 Neb. 907, 524 N.W.2d 311 (1994) (negligent installation of furnace damaged home and caused carbon monoxide injuries to residents); *Getzschman v. Miller Chemical Co.*, 232 Neb. 885, 443 N.W.2d 260 (1989) (action for professional negligence and breach of fiduciary duties); *Schuster v. Baumfalk*, 229 Neb. 785, 429 N.W.2d 339 (1988) (negligent repair of farm equipment damaged other buildings and equipment); *Lincoln Grain, supra* note 51 (action for professional negligence); *Driekosen v. Black, Sivalls & Bryson*, 158 Neb. 531, 64 N.W.2d 88 (1954) (negligent installation of propane system resulted in destruction of residence).

have existed but for the creation of the contractual relationship between the Lesiaks and CVA. But the damage allegedly caused by the breach was not purely economic loss; rather, CVA's actions allegedly caused damage to the Lesiaks' corn, which qualifies as "other property"—that is, property other than the property that was sold pursuant to the contract. Thus, this case is removed from the doctrine's reach.

CVA argues, however, that the doctrine should still apply to bar the Lesiaks' claim because their claim involves only their disappointed commercial expectations and that as a result, contract law should control. This "'disappointed expectations'" test has been adopted by some courts.[53] In essence, the test stands for the proposition that "whether particular damage qualifies as damage to 'other property' turns on the parties' expectations of the function of the bargained-for product."[54] In *Grams v. Milk Products, Inc.*,[55] the Wisconsin Supreme Court reasoned that a commercial buyer should anticipate that a product could fail or disappoint in its performance and that the responsibility for protecting itself against economic loss (i.e., through a warranty) falls on the buyer.[56] Failure to do so, and regretting it later, is not grounds for allowing pursuit of a tort remedy when the issue could have, or should have, been a part of the bargaining process and resulting contract.[57] Thus, the *Grams* court held that "if claimed damages are the result of disappointed expectations of a bargained-for product's performance, the economic loss doctrine applies to bar the plaintiff's tort claims and the plaintiff must rely upon contractual remedies alone."[58]

But we are not persuaded by the *Grams* court's reasoning, and we decline to adopt it here. Adoption of the "disappointed

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[53] Ralph C. Anzivino, *The Disappointed Expectations Test and the Economic Loss Doctrine*, 92 Marq. L. Rev. 749, 753 n.24 (2009) (collecting cases).

[54] *Grams, supra* note 29, 283 Wis. 2d at 530, 699 N.W.2d at 176.

[55] See *Grams, supra* note 29.

[56] See *id.*

[57] See *id.*

[58] *Id.*, 283 Wis. 2d at 516, 699 N.W.2d at 169.

expectations" test would virtually destroy the "other property" exception espoused by the U.S. Supreme Court and adopted by this court in *Dobrovolny v. Ford Motor Co.*,[59] because almost nothing would qualify as "other property" under the "disappointed expectations" test. This is because the "disappointed expectations" test precludes tort remedies whenever the purchaser should have anticipated the occurrence of the damage at issue—in essence, whenever the occurrence of the damage was reasonably foreseeable.[60] Thus, under this test, if "other property" damage occurs, but it was foreseeable at the time of contracting, then all tort theories would be precluded. Therefore, the only circumstance in which tort theories would not be precluded would be when the damages were not foreseeable. But, of course, then a plaintiff would likely have no remedy in tort either.[61] In effect then, the "disappointed expectations" test eliminates tort remedies for damage to "other property," but that type of damage has traditionally been recoverable in tort.[62]

As noted by one author, the "disappointed expectations" test seems to create a presumption that by entering into a contract, a party's exclusive remedy for foreseeable harm (traditionally the province of tort law) is found only through contractual protection.[63] This might make sense if the parties did in fact bargain over the possible occurrence of damage, because then a court would be deferring to the parties' intentions as expressed through their contract. But where the damages were never bargained for and are not expressly dealt with in the contract, it makes no sense to preclude a party's traditional tort remedies. "In other words, if a party to a contract has not relinquished independent tort rights through private ordering, it is unfair to say that those independent tort rights have been lost because

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[59] *Dobrovolny, supra* note 35.

[60] See, *Grams, supra* note 29; *Foremost Farms USA Co-op v. Perf. Process*, 297 Wis. 2d 724, 726 N.W.2d 289 (Wis. App. 2006).

[61] See Anzivino, *supra* note 53.

[62] See *East River S.S. Corp., supra* note 33.

[63] See Johnson, *supra* note 39.

they *might* have been bargained away."[64] In effect, this would be a substitution of contract law for tort law and would go well beyond the boundary-line function of the economic loss doctrine. We instead adhere to the underlying purpose of the economic loss rule.

Furthermore, the "disappointed expectations" test is not in keeping with U.S. Supreme Court precedent. The Court addressed the scope of the "other property" exception in *Saratoga Fishing Co. v. J. M. Martinac & Co.*[65] In *Saratoga Fishing Co.*, a defective hydraulic system was installed in a fishing boat. The initial user of the boat added fishing equipment to the boat, including a skiff, seine net, and various other spare parts, and then sold the boat to a second user. The hydraulic system then malfunctioned, causing a fire which destroyed the boat and the extra equipment. The issue was whether the extra equipment constituted "other property." The Court determined that the extra equipment was "other property" and that the plaintiff was able to pursue remedies in tort. The Court reasoned that while parties could theoretically have included a term in the contract which would have dealt with the occurrence of the damage in that case, whether a hypothetical contractual remedy was available was irrelevant. The Court explained that "[n]o court has thought that the *mere possibility* of such a contract term precluded tort recovery for damage to . . . other property."[66]

The "disappointed expectations" test does just that—it precludes tort recovery based on the mere possibility that the parties could have included a contract term dealing with the occurrence of the damage at issue. This reasoning was rejected by the U.S. Supreme Court, and we likewise reject it here. As a result, the Lesiaks' negligence claim is not barred by the economic loss doctrine, because the Lesiaks assert that CVA's conduct harmed their corn crop, which is considered "other

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[64] *Id.* at 578-79 (emphasis supplied).

[65] *Saratoga Fishing Co. v. J. M. Martinac & Co.*, 520 U.S. 875, 117 S. Ct. 1783, 138 L. Ed. 2d 76 (1997).

[66] *Id.*, 520 U.S. at 882 (emphasis supplied).

property." Therefore, the district court erred in granting summary judgment to CVA on this issue.

5. CVA's Cross-Appeal

On cross-appeal, CVA asserts that the Lesiaks were unable to prove the amount of money they saved from not having to dry and transport the corn that they allegedly lost; in essence, CVA claims that the Lesiaks could only speculate as to how much money they saved from having less corn to dry and transport. Therefore, CVA asserts that the district court erred in denying CVA summary judgment. But because the Lesiaks' estimation of per-bushel savings rests on competent evidence, this assignment of error is without merit.

[13] We have held that the denial of a summary judgment motion is neither appealable nor reviewable.[67] In *Moyer v. Nebraska City Airport Auth.*,[68] we explained that whether a motion for summary judgment should have been granted generally becomes moot after trial. This is because the overruling of such a motion does not decide any issue, but merely indicates that the trial court was not convinced that the moving party was entitled to judgment as a matter of law. And we explained that "'[a]fter trial, the merits should be judged in relation to the fully developed record, not whether a different judgment may have been warranted on the record at summary judgment.'"[69] Thus, we do not consider whether the district court erred in denying CVA summary judgment on this issue. Instead, this claimed error falls within CVA's general argument that the Lesiaks were unable to prove their damages with sufficient specificity. But the record reveals sufficient evidence to support the Lesiaks' per-bushel savings estimate.

Over objection, Tom Lesiak explained that the Lesiaks saved approximately $0.02 per bushel in drying costs and $0.10 per bushel in transportation costs. Adequate foundation was supplied for each figure. He explained that when a farmer deposits

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[67] See, e.g., *Moyer v. Nebraska City Airport Auth.*, 265 Neb. 201, 655 N.W.2d 855 (2003).

[68] *Id.*

[69] *Id.* at 208, 655 N.W.2d at 862.

his crop in a grain elevator, the farmer is charged a certain amount of money based on the moisture remaining in the crop. Tom Lesiak knew the grain elevators' moisture rates in 2005 and knew the moisture levels in his corn. From those figures, he was able to approximate the amount of money saved per bushel for drying costs. With regard to the transportation costs, he explained that he was familiar with what people were charging to transport crops in 2005. Transportation costs were an expense that the Lesiaks incurred every year, including in 2005, so they knew what had been spent to transport their actual yield. Based on this information, he was able to estimate how much money was saved from not having to haul the lost yield. This information forms a reasonable basis for the jury to calculate any savings obtained by the Lesiaks in not having to dry and transport the allegedly lost yield. Further specifics, such as fuel costs or machinery use-depreciation costs, are not necessary.[70] Therefore, CVA's cross-appeal is without merit.

V. CONCLUSION

We determine that the district court erred in granting a directed verdict in favor of CVA. We also find that the district court erred in granting summary judgment on the Lesiaks' negligence claim. The Lesiaks' other assigned errors, however, lack merit, as does CVA's assigned error on cross-appeal. The judgment is affirmed in part, and in part reversed and remanded for a new trial consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

WRIGHT, J., not participating in the decision.

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[70] See *Peterson, supra* note 13.