CASES DETERMINED

IN THE

NEBRASKA COURT OF APPEALS

JAMES JELINEK ET AL., APPELLEES, V. LAND O'LAKES, INC., DOING BUSINESS AS HYTEST SEEDS, APPELLANT.

797 N.W.2d 289

Filed May 10, 2011. No. A-10-367.

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. **Directed Verdict: Evidence: Appeal and Error.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court.
3. **Uniform Commercial Code: Warranty.** The existence and scope of an express warranty under the Uniform Commercial Code are ordinarily questions to be determined by the trier of fact.
4. ____: ____. The existence of an express warranty depends upon the particular circumstances in which the language is used and read. A catalog description or advertisement may create an express warranty in appropriate circumstances.
5. ____: ____. The trier of fact must determine whether the circumstances necessary to create an express warranty are present in a given case. The test is whether the seller assumes to assert a fact of which the buyer is ignorant or whether the seller merely states an opinion or expresses a judgment about a thing as to which they may each be expected to have an opinion and exercise a judgment.
6. ____: ____. Disclaimers of warranty made on or after delivery of the goods by means of an invoice, receipt, or similar note are ineffectual unless the buyer assents or is charged with knowledge as to the transaction.

Appeal from the District Court for Box Butte County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Roger G. Steele, of Steele Law Office, for appellant.

Steven W. Olsen and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellees.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

James Jelinek, Kenneth Jelinek, James Jelinek as personal representative of the estate of Edward Jelinek, and Kirk Keder (collectively the Appellees) purchased "sorghum-sudangrass" seed from a dealer, D and S Hansen Farms, Inc. (Hansen Farms). The seed was produced and marketed by Land O'Lakes, Inc., doing business as Hytest Seeds (Hytest). The Appellees brought suit against Hansen Farms and Land O'Lakes in the district court for Box Butte County, claiming the seed did not produce the warranted yield. Following a jury trial, the court entered judgment for each of the Appellees against Land O'Lakes. Judgments for dismissal were entered in favor of Hansen Farms. Land O'Lakes has appealed to this court, assigning error only to the district court's denial of its motion for directed verdict. Because we find that reasonable minds could differ with respect to the existence of a warranty concerning the seed, we find no error in the denial of the motion for directed verdict, and we affirm.

BACKGROUND

Initial Pleadings.

In the Appellees' amended complaint, they alleged that in 2002, upon Hansen Farms' recommendation, they purchased "Hytest BMR Sorghum Sudan grass seed," which was produced and marketed by Land O'Lakes; that Hansen Farms and Land O'Lakes warranted the seed to be free from defects and fit for the particular purpose intended by the Appellees; that Hansen Farms and Land O'Lakes expressly warranted that by using normal farming practices and proper maintenance, the Appellees would obtain yields of 4½ tons per acre; that the seed was defective, producing reduced yields and an inferior quality crop; and that the Appellees suffered damages as a result

of the defective seed and Hansen Farms' and Land O'Lakes' breaches of warranties. In Land O'Lakes' answer, it alleged, among other things, that the Appellees were barred from recovery because they failed to notify it of any alleged breach after they discovered or should have discovered any alleged breach. Land O'Lakes also alleged that the Appellees misused the seed by planting it in soil with a pH level that was greater than recommended in the Hytest brochures or pamphlets or by failing to provide adequate water during a period of severe drought. Finally, Land O'Lakes alleged that certain text on the seed bags and on the invoices from Hansen Farms excluded all warranties, express or implied, of merchantability, fitness for a particular purpose, or otherwise and that such text on the seed bags contained a limitation of damages which excluded incidental or consequential damages, including loss of profits.

Trial.

A jury trial was held on February 10 through 13, 2010. Land O'Lakes made a motion for directed verdict at the close of the Appellees' evidence, which motion was denied by the district court. Land O'Lakes renewed its motion at the close of all the evidence, and the court again denied the motion.

The Appellees.

The Jelineks are longtime family farmers from Alliance, Nebraska. James is Kenneth's son, and he is also the personal representative for the estate of his grandfather, Edward. Keder farmed in the Alliance area from 1982 until 2003. The Appellees had all purchased seed from Brad Hansen of Hansen Farms for many years at the time of the events in question.

Hansen's Relationship With Land O'Lakes.

Prior to 2002, Hansen Farms had never sold the Hytest sorghum-sudangrass seed. Hansen learned about the seed from a Nebraska farmer, who indicated that it produced a good yield in a dry year. The farmer referred Hansen to Rick Madl, the district sales manager for Land O'Lakes at the time. Hansen thereafter met with Madl and a person who was involved in the breeding of the Hytest seed. The contents of the Hytest brochure were discussed during the meeting. Hansen agreed to

Hansen Farms' being a sales distributor for Land O'Lakes in the Alliance area. Prior to that time, Hansen Farms had not sold much sorghum-sudangrass seed, but Hansen expected it to be a crop that farmers would turn to as an alternative type of forage during a drought when hay prices were high.

Sale of Seed and Brochure Language.

James met with Hansen the first week of April 2002 to discuss the Hytest seed. Hansen showed James the Hytest brochure and discussed with him the portion which reads in part as follows:

> HT311 BMR PPS-SS is another forage breakthrough from [Hytest] offering the dual benefits of the Brown MidRibbed trait and Photo-Sensitive gene. This Double-Stacked sorghum-sudan hybrid provides all the benefits of BMR including exceptional yield potential, significant increase in palatability and forage fiber digestibility over normal sorghum-sudan. . . . Highest yield and quality have been obtained on a 65 to 70 day first cut schedule.
>
> . . . .
>
> • Exceptional yield potential and high quality forage.
> • Extended window of harvest.
> • More PROFIT $$$ per acre return.

The second page of the brochure contains a chart, based upon "1999 Texas Research Data," showing yield comparisons between the Hytest seed and other varieties. The second page of the brochure mentions the seed's "[l]ow water requirement" and "good drought stress tolerance," and again references its "[e]xceptional high yield potential." The brochure further discusses soil temperature at planting and planting depth and warns against planting in soils "with pH greater than 7.5 to 8.0" as "[c]hlorosis can be a severe problem." Chlorosis will stunt a crop, retard its growth, and cause it to yellow. The brochure also warns against large nitrogen applications prior to expected drought periods.

James stated that in discussing the brochure, Hansen told him that the seed was "a very high yielder" and was "producing very good" and that it had "the potential for a very good net income." With respect to the statements in the brochure

that the seed had "[e]xceptional high yield potential" and had "[s]uperior forage quality," James testified that Hansen reported Land O'Lakes had seen "good results down south" and were "having very good tons" and "very high yields." Although James agreed that Hansen did not expressly warrant, promise, or guarantee anything in his discussion about the seed with James, James testified that Hansen represented to James that, according to Madl and Land O'Lakes, the seed was going to get "double the yields."

James testified about the yield comparison chart shown on the second page of the brochure, showing the Texas research data. The chart shows that the seed had a "drymatter yield" of 15,600 pounds. James testified that 15,600 pounds is about 8 tons and is almost double the yield over standard sorghum for two cuttings. James testified that traditional sorghum yields 2 to 2½ tons per cutting. James assumed that Hytest had researched the compatibility of the seed for Nebraska. James was persuaded to purchase the seed due to the statements in the brochure, Hansen's emphasis on the yield potential, and Hansen's use of the seed on his own farm. The seed cost about one-third more than traditional seed, which cost James was willing to pay to receive a higher yield.

After James met with Hansen, James discussed the brochure with Kenneth, and they decided to order the Hytest sorghum-sudangrass seed. Kenneth testified that he spoke with Hansen, who told him the seed had the potential to be "double in quantity." But Kenneth agreed that Hansen never explicitly guaranteed or promised a double yield.

Keder testified that in 2002, hay was worth a premium because of the drought and he was investigating other avenues of producing a crop. Keder testified that he spoke with Hansen at a local business where Hansen was promoting the sorghum-sudangrass seed. The district sales manager for Hytest, who Keder later learned was Madl, was also at this meeting. Hansen went through the brochure with Keder, discussing fertilizer needs, drought tolerances, the necessary ground temperature for planting, and planting depth. According to Keder, Madl said that with the Hytest seed, "it was not unreasonable to expect four and a half tons per cutting per acre." Keder

agreed that neither Madl nor Hansen said that a yield was promised, guaranteed, or warranted, but he stated that Madl told him "how fantastic it was and that they were getting super yields off it."

Hansen has been selling seed for over 20 years and sells seed, including seed for corn, wheat, grass, and soybeans, for five or six companies. Hansen testified that in his opinion, the Hytest brochure did not contain any language that promised, guaranteed, or warranted a particular yield. Hansen stated that "yield potential" means how seed would perform at its best under ideal or perfect conditions.

Planting and Harvest.

Kenneth's seed order was delivered on June 1 or 2, 2002, and planted during the first 2 or 3 days of June. James planted the seed on Kenneth's property. The ground was prepared, a dry fertilizer was applied to the soil, the seed was drilled to a depth of three-quarters of an inch to an inch, and the sprinklers were started at one-quarter of an inch of water every other day for three or four times, then slowed down the next week to three-tenths of an inch of water every 2 to 4 days until the crop started to come up. Kenneth's crop was slow in coming up, and by the end of June, the crop was "kind of erratic" with high spots, low spots, and a little "yellowing." At that point, nitrogen fertilizer was injected through the pivot system and the watering was increased. James testified that the nitrogen and watering helped "a little bit" with continued growth, but that the taller grass started to "lodge," or fall over, as it got "closer to waist high." Kenneth's crop was harvested during the third week of July. At that point, James had not discussed any problems with the crop with Hansen. In describing the first cutting of Kenneth's crop, James stated that it was not a good crop and did not yield 4½ tons. James described it as stunted in places, "laid back," and yellow, with some bare spots. After the first cutting, Kenneth's crop did start growing again.

James still had wheat on his property when Kenneth's grass seed was planted, so he had to wait until July to plant his seed. The seed was planted on James' and the estate's property

in late July or early August 2002. The seed was planted to a depth of an inch, and James followed a similar watering plan to what he used on Kenneth's crop. James observed that the seed planted on his property and the estate property was also slow and erratic in its growth. James described it as a "poor stand," with one field on the estate property that never came up. The crop on James' and the estate's property was very poor when compared to the crop of a neighbor who planted "traditional sudangrass."

During the third week of August 2002, James called Hansen, told him of the problem with all of the Jelinek sorghum-sudangrass crops, and asked him to contact Land O'Lakes. Hansen told James that he would inform Land O'Lakes. Hansen told James that he had similar issues in both the first and second stands of his own crop from the Hytest seed, with sparse growth, yellowing, and lodging. During several subsequent contacts, Hansen informed James that he had contacted Land O'Lakes, that Land O'Lakes was supposed to be sending a representative, and that he had observed the problems with the Jelineks' crops. A Land O'Lakes representative did not arrive until November 2002.

In the meantime, James simply continued to water the crop on his property and the estate property. Because fertilizer had been applied when the seed was planted, James did not feel that he needed to inject any nitrogen. Harvest of James' and the estate's grass, as well as Kenneth's second cutting, occurred between the last week of September 2002 and approximately October 10.

In March or April 2002, when the Jelineks were planning to plant the seed, they arranged for the sale of the grass at $100 a ton. By the end of October or the first of November, when the buyer needed hay, he was willing to pay only $60 or $65 per ton because of the poor quality of the grass. James calculated the Jelineks' losses based on an expected yield of 4½ tons per acre per cutting (i.e., 9 tons per acre for Kenneth because of two cuttings), the expected sale price of $100 per ton, the actual sale price of $65, and the actual yields received. James calculated his net loss at $165,053, the estate's net loss at $114,607.50, and Kenneth's net loss at $105,426.25.

Keder ordered his seed from Hansen and planted it in mid- to late May 2002. He began watering the seed to germinate it and then kept watering it as needed. Keder testified that when the grass began to grow in June, there were a few thin spots and some yellowing, and that he was concerned about the vigor or early growth of the crop. He did nothing to try to stimulate the growth other than irrigation. The growth continued to be erratic, and around the first part of July, the grass started to lodge. Keder observed similar conditions in the field of another individual who had planted the seed. Keder's first cutting of the grass was in early to mid-July and yielded three-quarters of a ton to a ton per acre.

Keder testified that, prior to his first cutting, he had mentioned to Hansen a couple of times that the grass was not getting as tall as he thought it would. Keder admitted that in his answers to interrogatories, he did not state whether he "gave the defendant notice of any alleged breach" or "problem with the sorghum grass." Hansen testified that the first time he learned that Keder had any complaints with the seed was when his name showed up in the initial complaint filed in this lawsuit in March 2006.

After the first cutting, Keder observed some weeds beginning to grow, so he applied herbicide after the bales were removed and he began watering again to promote regrowth. The grass began to grow again, and by the end of August, Keder observed similar issues with yellowing and erratic growth. In September 2002, the grass again began to lodge. At that point, Keder swathed the grass so that it could be baled. The yield of the second cutting was similar to the first. Keder testified that during the second growth period, he again mentioned to Hansen that the grass was not growing and looked like it would lodge again. According to Keder, Hansen reported that he had yellowing in his own crop.

Keder testified that he had an agreement to sell the grass for $100 a ton to an individual who needed hay. He took a load of grass to this individual, who had to quit using the grass after one of his cows died because of high nitrate levels in the grass. Keder had the hay analyzed, which revealed high nitrate levels. Keder testified that he was then unable to market the

grass despite attempts to do so. Keder calculated his loss at $118,800 (based on an expected yield of 9 tons per 132 acres for two cuttings and the price of $100 a ton, but with an actual yield of 0).

Other Factors Affecting the Appellees' Yield.

There was evidence about other factors which may have affected the Appellees' losses, including the pH levels of the soil, nitrogen application, and drought. The record shows that 2002 was the second year of a drought in Box Butte County.

Soil samples taken from James' and the estate's property between 2001 and 2007 showed pH levels ranging from 7.5 to 8.0 (the acceptable range noted in the Hytest brochure), with the exception of one test showing a pH level of 8.1 on James' property in 2003. Land O'Lakes took additional soil samples from James' property in 2007, which samples all showed pH levels of 8.1 or higher. At trial, James expressed concern that Land O'Lakes had taken samples from higher ground, which contains greater concentrations of lime. Keder testified that the last pH test of his soil was in 2000 with a result of 7.9. Kenneth testified that the pH level in the field where he planted the Hytest seed was 7.7.

Dale Flowerday, a crop consultant with a doctorate in agronomy and soil fertility, testified for the Appellees. Flowerday was critical of the use of the brochure with Texas field data to promote the sale of a product in Nebraska. He also stated that the phrasing of the statement in the brochure regarding pH levels was ambiguous as to whether a farmer could plant in soils with pH levels that fell between 7.5 and 8.0. Flowerday would have been reluctant to grow sorghum-sudangrass in soils with a pH level of 7.5 or greater. According to Flowerday, pH levels, however, do not affect germination. Flowerday opined, based on his review of facts in this case, that pH levels had no effect on the germination issues in the Appellees' crops but could have had an effect on the growth of the plants. Because of the symptoms, he assumed that some of the problems were due to pH levels. After reviewing the relevant information, Flowerday eliminated as causes of the growth problems in this case any issues involving planting, irrigation, and fertilizer or

herbicide application. Flowerday testified that he had eliminated all other concerns or considerations and concluded that problems with seed germination led to the poor seedling growth and vigor. Flowerday agreed that weather is a critical factor to consider in determining why a crop fails and that various sources showed a very severe drought in Box Butte County in 2002.

Hansen testified that Land O'Lakes tested a sample of the sorghum-sudangrass seed kept at their plant from the same lot as the seed sold to the Appellees and that Hansen was told by Land O'Lakes that the testing showed the seed had good germination and good vigor, although Hansen never saw any written test results.

Statements on Seed Bags.

Land O'Lakes relies on an exclusion of warranties found on the Hytest seed bags, which exclusion states in part as follows:

> Notice to Buyer:
> Exclusion of Warranties
>
> Seller warrants that this seed conforms to the label description, as required by federal and state seed laws. Seller makes no other warranties, express or implied, of merchantability, fitness for a particular purpose, or otherwise.
>
> Limitations of Damages and Remedies
>
> Liability for damages for any cause, including breach of contract, breach of warranty, and negligence, with respect to this sale of seeds is limited to a refund of the purchase price of the seeds. This remedy is exclusive. In no event shall the seller be liable for any incidental or consequential damages, including loss of profits.

Limitation of Warranties on Invoices.

There is reference to a limitation of warranties on the invoices sent by Hansen to the Appellees as follows:

> Limited Warranty - In lieu of all other warranties, express or implied (including any implied warranty of merchantability or fitness for a particular purpose) and

> all other obligations or liabilities . . . Hansen Farms . . . warrants to the extent of the purchase price that the seeds we sell are as described by us on our container with recognized tolerances. Our liability, whether contractual for negligence or otherwise, is limited in amount to the purchase price of the seeds under all circumstances and regardless of the nature, cause or extent of the loss, and as a condition to any liability on our part, we must receive notice by registered mail of any claim that the seed is defective, 30 days after the defect in the seed becomes apparent. Seeds not accepted under these terms and conditions must be returned at once in original unopened containers and the purchase price will be refunded.

Verdict and Posttrial Proceedings.

On February 13, 2010, the jury returned verdicts against Land O'Lakes and in favor of James for $47,199; in favor of Kenneth for $34,983; in favor of James as personal representative of Edward's estate for $40,469; and in favor of Keder for $44,220. Verdicts of dismissal were entered in favor of Hansen Farms against all four of the Appellees. The district court accepted the jury's verdicts.

Land O'Lakes filed a motion for new trial, which was denied by the district court on March 23, 2010. Land O'Lakes subsequently perfected its appeal to this court.

ASSIGNMENT OF ERROR

Land O'Lakes asserts that the district court erred in overruling its motion for a directed verdict.

STANDARD OF REVIEW

[1,2] 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. *Walton v. Patil*, 279 Neb. 974, 783

N.W.2d 438 (2010). A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *Id.* When reviewing questions of law, an appellate court resolves the questions independently of the conclusions reached by the trial court. *Shepherd v. Chambers*, 281 Neb. 57, 794 N.W.2d 678 (2011).

ANALYSIS

Land O'Lakes asserts that the district court erred in overruling its motion for a directed verdict. In this case, we must determine whether reasonable minds could differ on whether Land O'Lakes made any express warranties concerning the sorghum-sudangrass seed sold to the Appellees. In making this determination, we must resolve all factual issues in favor of the Appellees. See *Walton v. Patil, supra*.

[3] The existence and scope of an express warranty under the Uniform Commercial Code are ordinarily questions to be determined by the trier of fact. *Hillcrest Country Club v. N.D. Judds Co.*, 236 Neb. 233, 461 N.W.2d 55 (1990). Pursuant to Neb. U.C.C. § 2-313 (Reissue 2001):

> (1) Express warranties by the seller are created as follows:
>
> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
>
> (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
>
> (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
>
> (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make

> a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Land O'Lakes argues that the words "exceptional yield potential" and the yield comparison chart in the brochure are not an affirmation or promise of a specific yield that would be an express warranty. Land O'Lakes also takes issue with James' calculation of the yield potential.

[4,5] With respect to whether catalog descriptions or advertisements may create express warranties, the Nebraska Supreme Court has stated:

> "The existence of an express warranty depends upon the particular circumstances in which the language is used and read. . . . A catalog description or advertisement may create an express warranty in appropriate circumstances. . . . *The trier of fact must determine whether the circumstances necessary to create an express warranty are present in a given case. . . . The test is* '*whether the seller assumes to assert a fact of which the buyer is ignorant, or whether he merely states an opinion or expresses a judgment about a thing as to which they may each be expected to have an opinion and exercise a judgment.*' (Citation omitted.) (Emphasis in original.)"

Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co., 219 Neb. 303, 310, 363 N.W.2d 155, 161 (1985), quoting *Peterson v. North American Plant Breeders*, 218 Neb. 258, 354 N.W.2d 625 (1984).

In *Peterson, supra*, the Nebraska Supreme Court considered whether the express warranty issue was properly submitted to the jury in connection with sales literature regarding the qualities of hybrid seed corn. The court in *Peterson* stated:

> In connection with the fact question here, the sale of hybrid seed corn is unusual in that it is delivered to the ultimate buyer-user in sealed bags, inspection of the seed by the buyer will generally not reveal any of its growing qualities, and the first notice of the seed's worth and performance is after planting and well into the growing season. Consequently, in the absence of a prior planting

> experience or other reliable information, the buyer may be justified to rely on the claims of the producers as more than puffing; it is a fact question. Here, plaintiffs had no prior knowledge of or planting experience with [the hybrid seed in question]. The express warranty issue was properly submitted to the jury.

218 Neb. at 263, 354 N.W.2d at 630. In the interest of conciseness, we will not repeat the statements found in the advertising materials in that case, but observe that the statements are similar to those found in the brochure in this case. See, also, *Hillcrest Country Club v. N.D. Judds Co.*, 236 Neb. 233, 461 N.W.2d 55 (1990) (statements in letter from seller to buyer that roofing material would last 20 years constituted express warranty under Uniform Commercial Code); *Mennonite Deaconess Home & Hosp., supra* (representations contained in advertising brochure for roofing system designed, manufactured, and supplied by seller constituted express warranty under Uniform Commercial Code); *Hawkins Constr. Co. v. Matthews Co., Inc.*, 190 Neb. 546, 209 N.W.2d 643 (1973) (representations of load capacity in manufacturer's pamphlet constituted express warranty), *disapproved on other grounds, National Crane Corp. v. Ohio Steel Tube Co.*, 213 Neb. 782, 332 N.W.2d 39 (1983).

Resolving the controverted facts in favor of the Appellees in this case, we find that reasonable minds could differ on the question of whether the statements contained in the brochure were assertions of "a fact of which the buyer is ignorant." The comparison chart in the brochure supports the conclusion that, at least based on 1999 Texas research data, the Hytest seed produced yields double the production of some other varieties. James' calculations of the yield potential were derived from the information in the brochure and were consistent with the representations from Hansen and Land O'Lakes that James could receive double the yield over traditional sorghum-sudangrass seed. The brochure also stresses that the Hytest seed is a "forage breakthrough," provides "[e]xceptional yield potential and high quality forage" with an "[e]xtended window of harvest," provides "[m]ore PROFIT $$$ per acre return," has "high quality over the entire growing season," is

"[h]ighly palatable," and has "[l]ow water requirement, good drought stress tolerance." These assertions were supported by Hansen's statements to the Appellees as well as by Madl's statements to Keder. Land O'Lakes stresses the fact that the words "warranty" and "guarantee" do not appear in the brochure, but it was not necessary for it to use such words or for Land O'Lakes to have a specific intention in order to create a warranty. The Appellees did not have previous experience with the Hytest seed. The express warranty issue was properly submitted to the jury.

Land O'Lakes argues that the warranty of fitness for a particular purpose, an issue also raised by the Appellees in their complaint, does not apply when goods are purchased and used for ordinary purposes. Because we have already determined that the issue of an express warranty was properly submitted to the jury, we need not further consider Land O'Lakes' arguments in connection with the implied warranty of fitness for a particular purpose. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the controversy before it.

Limitation or Exclusion of Warranties.

Next, Land O'Lakes argues that the Appellees were aware of the limited warranty on Hansen's invoices and of the warranty exclusion on the seed bags. With respect to the exclusion or modification of warranties, Neb. U.C.C. § 2-316 (Reissue 2001) provides:

> (1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.
>
> . . . .
>
> (4) Remedies for breach of warranty can be limited in accordance with the provisions of this article on liquidation or limitation of damages and on contractual modification of remedy (sections 2-718 and 2-719).

Comment 1 to § 2-316 provides:

> This section is designed principally to deal with those frequent clauses in sales contracts which seek to exclude "all warranties, express or implied". It seeks to protect a buyer from unexpected and unbargained language of disclaimer by denying effect to such language when inconsistent with language of express warranty and permitting the exclusion of implied warranties only by conspicuous language or other circumstances which protect the buyer from surprise.

[6] In *Pfizer Genetics, Inc. v. Williams Management Co.*, 204 Neb. 151, 155, 281 N.W.2d 536, 539 (1979), the Nebraska Supreme Court stated:

> Although this court has not specifically addressed the question, other jurisdictions have generally held that disclaimers [of] warranty made on or after delivery of the goods by means of an invoice, receipt, or similar note are ineffectual unless the buyer assents or is charged with knowledge as to the transaction.

The court found this proposition to be an equitable and logical interpretation of the Uniform Commercial Code. *Pfizer Genetics, Inc., supra.*

Resolving the controverted evidence in favor of the Appellees, we conclude that reasonable minds could differ as to whether any limitation or exclusion of warranties was effectual in this case. The issue of exclusion of warranties was properly submitted to the jury in this case.

Notice of Defect.

Finally, Land O'Lakes argues that Keder did not notify it or Hansen Farms in a reasonable time and is barred from recovery under Neb. U.C.C. § 2-607(3) (Reissue 2001), which provides that "[w]here a tender has been accepted," the buyer "must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy." There is conflicting evidence as to whether Keder notified Hansen Farms of the problems with his crop. The motion for directed verdict was properly denied on this point.

CONCLUSION

The district court did not err in denying the motion for directed verdict.

AFFIRMED.

IN RE INTEREST OF LELAND B., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. RONALD B., APPELLANT.

797 N.W.2d 282

Filed May 10, 2011. No. A-10-936.

1. **Parental Rights: Abandonment.** In termination of parental rights cases, it is proper to consider a parent's inability to perform his or her parental obligations because of imprisonment.
2. **Parental Rights.** A parent's incarceration, standing alone, does not provide grounds for termination of parental rights.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Reversed and remanded for further proceedings.

Beau G. Finley, of Finley & Kahler Law Firm, P.C., L.L.O., for appellant.

Donald W. Kleine, Douglas County Attorney, Amy Schuchman, and Geoffrey Thomas, Senior Certified Law Student, for appellee.

Lynnette Z. Boyle, of Tietjen, Simon & Boyle, guardian ad litem.

INBODY, Chief Judge, and IRWIN and MOORE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Ronald B. appeals from the order of the separate juvenile court of Douglas County which terminated his parental rights to his son, Leland B. On appeal, Ronald challenges the juvenile court's finding that his parental rights should be