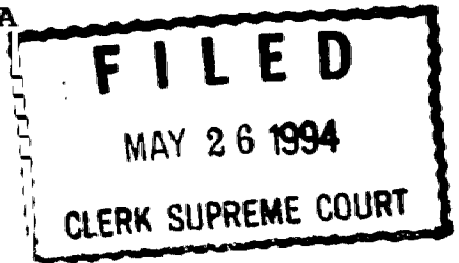


IN THE COURT OF APPEALS OF IOWA

No. 3-652 / 93-0431



VANESSA EDGINGTON and CHRIS EDGINGTON,

Appellants,

vs.

NED POLLARD and SCOTT POLLARD d/b/a POLLARD PEST CONTROL,

Appellees.

Appeal from the Iowa District Court for Mitchell
County, John S. Mackey, Judge.

Plaintiffs appeal the district court's grant of summary
judgment to defendants on their claims of negligence and
breach of contract. **REVERSED AND REMANDED.**

James R. Van Dyke of Van Dyke & Werden, P.C., Carroll,
for appellants.

F. Richard Lyford and Rebecca Boyd Parrot of Dickinson,
Throckmorton, Parker, Mannheimer & Raife, P.C., Des Moines,
for appellees.

Heard by Schlegel, P.J., and Habhab, J., and McCartney,
S.J.*, but decided by Donielson, C.J., and Hayden, Sackett,
Habhab, Cady, and Huitink JJ.

*Senior judge from the 2nd Judicial District serving
on this court by order of the Iowa Supreme Court.

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PER CURIAM

Vanessa and Chris Edgington live in rural Mitchell County, Iowa. On July 12, 1989, they entered into a contract with Pollard Pest Control Company, operated by Ned Pollard and Scott Pollard, (Pollard) for the control of ants, spiders, crickets, centipedes, silverfish, and mice. Pollard agreed to perform crack and crevice spraying, spot spraying, foundation treatment, and place five bait stations.

Pollard performed crack and crevice spraying with an insecticide called Ficam W on July 12 and August 9, 1989. The Edgingtons experienced no problems from the spraying.

On September 12, 1989, Ned sprayed Dursban 4E insecticide in the house. He used .66 ounces of Dursban in one gallon of water. Using a hand sprayer, he sprayed about .75 gallons of the solution in a crack and crevice method in the house and on the outside foundation of the house. The directions state that Dursban is to be applied as a coarse, low pressure spray of twenty pounds per square inch or less. The sprayer used by Ned did not have a pressure gauge.

During the afternoon of September 12, Chris arrived home and immediately noticed a strong smell in in the house. He opened most of the windows and then returned to work. Vanessa arrived home later that evening. She stated she experienced symptoms of drooling, headache, and nausea

that same day. She later developed permanent symptoms of fatigue and twitching muscles.

The Edgingtons filed suit against the Pollards on August 7, 1991. Count I alleged negligence due to negligent application of chemicals. Count II alleged breach of the defendants' duty to perform in a good and workmanlike manner under the parties' written contract. Count III stated the plaintiffs intended to rely upon the doctrine of res ipsa loquitur. Count IV alleged the chemicals sprayed in plaintiffs' house were inherently dangerous, and defendants should be subjected to strict liability.

The parties deposed Dr. Nyle Kauffman, who testified that Vanessa's symptomatology was consistent with toxicity from organophosphate exposure. Dursban is an organophosphate. He also stated that in a person who has sensitivity to chemicals, symptoms could develop in response to normal application levels. A second doctor, Dr. Bernard Kuipers, stated his diagnosis of Vanessa was possible organophosphate exposure.

A deposition was taken of Charles Clemons, a pesticide investigator for the Iowa Department of Agriculture and Land Stewardship. He stated there were trace amounts of Dursban in several areas in the home, although the highest concentration was found near the baseboards.

Defendants hired expert witness Dr. M. Joseph Fedoruk. Dr. Fedoruk did not personally examine Vanessa,

but he reviewed all of the depositions in the case and Vanessa's medical records. He gave the opinion that although Vanessa described symptoms which were characteristic of acute organophosphate exposure, there was no objective evidence that her symptoms were related to the toxic effects of Dursban.

Defendants filed a motion for summary judgment on all counts on the ground that plaintiffs could not prove that the application of Dursban by defendants caused any injury to Vanessa. Plaintiffs resisted the motion, claiming they had provided ample medical proof of causation due to the deposition testimony of Dr. Kuipers and Dr. Kauffman.

The district court granted the motion for summary judgment on all counts. The court stated that the case involved highly technical and scientific issues and that expert testimony regarding the manner in which defendants applied the insecticide would be necessary to generate a jury issue. The court found that because plaintiffs failed to support their claims with the requisite expert testimony, summary judgment was appropriate.

Plaintiffs filed a motion pursuant to Iowa Rule of Civil Procedure 179(b). In reconsidering its decision, the court determined the defendants' applicable standard of care would not have to be proven by expert testimony, but could be proven through evidence of industrial custom as to the application of pesticides. The court found that plaintiffs had listed no witnesses who would be competent

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to testify as the applicable industrial standard of care for exterminators. The court then found the record was completely void of any testimony by a witness familiar with pesticide application and extermination which would link the manner in which defendants applied the insecticide to plaintiff's claimed injuries. The court confirmed its ruling granting summary judgment to defendants.

Plaintiffs have appealed. They claim the district court erred in granting defendants' motion for summary judgment. Plaintiffs believe they have presented sufficient evidence to create several fact questions, and therefore, make summary judgment inappropriate.

In considering the district court's grant of a motion for summary judgment, our scope of review is whether genuine issues of material fact exist and whether the law was applied correctly. Stanfield v. Polk County, 492 N.W.2d 648, 649 (Iowa 1992). On appeal, we examine the record in the light most favorable to the party opposing the motion to determine if the movants have met their burden. Shaw v. Soo Line R.R. Co., 463 N.W.2d 51, 53 (Iowa 1990). Summary judgment is appropriate where there is no material fact in issue and the moving party is entitled to judgment as a matter of law. Id.

I. We find there are several genuine issues of material fact. There was evidence the defendants did not follow the label directions for Dursban. The directions state that Dursban is to be applied as a coarse, low

pressure spray of twenty pounds per square inch or less. Ned admitted the sprayer he used did not have a pressure gauge, and thus, there was no way of ascertaining the amount of pressure used in applying this highly toxic substance. In view of defendants' admission the Dursban was not applied according to label directions, we find there is no necessity for testimony by a witness experienced in pesticide application on the issue of whether defendants' actions breached the applicable standard of care. Defendants' admission was sufficient to create a jury issue on this question.

Additionally, there was evidence that traces of Dursban were found twelve to eighteen inches from the baseboard in the Edgingtons' kitchen. This would tend to show the Dursban was not applied exclusively in a crack and crevice manner and raises a question as to whether the Dursban was properly applied in the plaintiffs' home.

II. Plaintiffs also claim that based on the doctrine of res ipsa loquitur they should not be required to present evidence that defendants breached their duty of due care. The doctrine of res ipsa loquitur is a rule of evidence rather than one of pleading or substantive law. Wick v. Henderson, 485 N.W.2d 645, 648 (Iowa 1992). When the foundation facts of res ipsa loquitur are established then the plaintiff is not required to present expert testimony on the appropriate standard of care. Id.

In order to raise the doctrine of *res ipsa loquitur*, the plaintiffs must show: (1) the defendants had exclusive control and management of the instrument that caused plaintiff's injury; and (2) it was the type of injury that ordinarily would not occur if reasonable care had been used. Id. at 649. In this case, Dr. Kauffman testified that a person sensitive to chemicals may have a reaction, even if reasonable care had been used in applying the pesticide. Thus, we determine the doctrine of *res ipsa loquitur* is not applicable here.

However, even without the aid of the doctrine of *res ipsa loquitur*, we conclude plaintiffs have presented sufficient evidence to raise a jury question on the issue of negligence. As noted above, the plaintiffs allegations raise the issue of whether defendants breached their duty of due care by misapplying the pesticide Dursban.

III. The district court's decision was also based on its conclusion that plaintiffs needed to present evidence which would link the manner in which the insecticide was applied with Vanessa's injuries.

In Bloomquist v. Wapello County, 500 N.W.2d 1, 6 (Iowa 1993), the Iowa supreme court held that in toxic tort cases proof of causation may be based on traditional cause-and-effect testimony, such as treating doctors. There the plaintiffs presented evidence that Dursban had been improperly applied in the building where they worked. Id. at 7. They also presented testimony from their

treating physicians that they were suffering from chronic organophosphate poisoning. Id. at 3. The supreme court determined this evidence was sufficient to generate a jury issue on causation. Id. at 6. It held that epidemiological evidence was not required to establish causation.¹ Id. at 5.

In Kosmacek v. Farm Service Co-op, 485 N.W.2d 99, 103 (Iowa App. 1992), the plaintiffs did not show they had been exposed to a substantial degree of toxic substances. However, we found plaintiffs raised a jury question on the issue of causation where they introduced the testimony of a doctor who was a certified toxicologist that their illnesses were caused by chemicals or toxic exposures. Id.

We determine that in the present case plaintiffs have presented sufficient evidence to raise a jury question on the issue of causation. Plaintiffs have raised a fact question as to whether the Dursban was improperly applied and have raised a fact question as to whether Vanessa's injuries were caused by the Dursban. As in Bloomquist and Kosmacek, plaintiffs have shown Vanessa was exposed to a

1. Epidemiology is an accepted scientific discipline dealing with the integrated use of statistics and biological/medical science to identify and establish the causes of human disease. Bloomquist, 500 N.W.2d at 4 (citing B. Black & D. Lilienfeld, Epidemiologic Proof in Toxic Tort Litigation, 52 Fordham L. Rev. 732, 736 (1984)). Through epidemiology it is possible to assess a percentage of the risk of a disease that is properly attributable to a given factor such as exposure to an allegedly harmful substance. Id.

chemical which may have been misapplied and that she may be suffering injuries consistent with overexposure to the chemical.

We reverse and remand for further proceedings. Costs of this appeal are assessed to defendants.

REVERSED AND REMANDED.

All judges concur except Sackett and Habhab, JJ., who dissent and would affirm the district court.