IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

No. 9-310 / 98-71
Filed September 29, 1999

JERRY HUGHES, MIKE HUGHES, JOHN WEAVER, JOHN LAUGHLIN, and BRAD WILLIAMSON,
Plaintiffs-Appellants,

vs.

JAMES GREGORY and GREGORY FEEDLOTS, INC.,
Defendants-Appellees.

JAMES GREGORY and GREGORY FEEDLOTS, INC.,
Third-Party Plaintiffs-Appellees,

vs.

GREG CONNELL and SHENANDOAH COMMODITIES BROKERS,
Third-Party Defendants.

Appeal from the Iowa District Court for Fremont County, Timothy O'Grady, Judge.

Plaintiffs appeal following a jury verdict in favor of defendants which denied plaintiffs' claim that defendants had fraudulently induced them into purchasing custom feed cattle. **AFFIRMED.**

Robert Kohorst of the Kohorst Law Firm, Harlan, for appellants.

R. Laubenthal and Steven H. Krohn of the Smith Peterson Law Firm, Council Bluffs, for appellees.

Considered by Streit, P.J., and Mahan, and Zimmer, JJ.

ZIMMER, J.

Plaintiffs appeal following a jury verdict in favor of defendants which denied plaintiffs' claims against defendants arising from a custom cattle feeding operation. They contend the trial court abused its discretion in refusing to allow their expert witness to testify in rebuttal. Finding no abuse of discretion, we affirm.

I. Background Facts and Proceedings. Plaintiffs, Jerry Hughes, Mike Hughes, John Weaver, John Laughlin, and Brad Williamson (collectively "Hughes"), purchased cattle from Gregory Feed Lots, Inc. (Gregory Feed Lots). According to projections, the cattle should have been ready for market in April 1993. However, the cattle were not sold until August 19, 1993. Plaintiffs allegedly lost money on the deal.

Plaintiffs sued James Gregory and Gregory Feed Lots claiming they were fraudulently induced to purchase the cattle. Defendants counter-claimed, alleging entitlement to payment for feeding and other services related to the cattle. Defendants also filed a third party complaint against Greg Connell and Shenandoah Commodities Brokers.

A jury trial commenced in 1997. At the close of the evidence, Hughes sought to recall Dr. Bernie Tonroy, who had testified at length in Hughes' case in-chief, to testify telephonically as a rebuttal witness. The district court denied the request, finding that (1) without his presence in the court room, the jury could not adequately judge his demeanor; (2) no arrangement had been made to administer an oath to Dr. Tonroy in person or to present paper exhibits to Dr. Tonroy to use if he were to

testify by phone; and (3) Dr. Tonroy could have been brought to court to testify personally.

The district court allowed Hughes' attorney to make an offer of proof. Counsel stated Tonroy would have testified regarding an exhibit that the defendants' expert witness had referenced. The offer attempted to establish the circumstances of feeding results shown in one of the exhibits discussed by the defendants' expert.

The jury returned a verdict in favor of the defendants. Plaintiffs post-trial motions were denied by the district court.

The claims of plaintiff Brad Williamson were dismissed by order of court entered on October 28, 1997. No issue concerning the dismissal of the claims of the plaintiff Williamson is part of this appeal. In addition, the appeal filed by two of the plaintiffs, Jerry Hughes and Mike Hughes, has been voluntarily dismissed. The only plaintiffs remaining are John Weaver and John Laughlin. Weaver and Laughlin raise one issue on appeal. They contend the trial court abused its discretion by refusing to allow Dr. Tonroy to testify by telephone in rebuttal.

II. The Merits. Rebuttal evidence explains, repels, controverts, or disproves evidence produced by the opposing party. *State v. Johnson*, 539 N.W.2d 160, 163 (Iowa 1995). Evidence that does not serve these functions is inadmissible on rebuttal. *State v. Webb*, 309 N.W.2nd 404, 411 (Iowa 1981). A trial court's decision on the admission of rebuttal evidence, including evidence that technically could have been offered as part of the plaintiffs' case in-chief, will be disturbed on appeal only on a

clear abuse of its considerable discretion. *Carolan v. Hill,* 553 N.W.2d 882, 889 (Iowa 1996).

Pursuant to Iowa Rule of Evidence 611(a), the district court may exercise reasonable control over the mode of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth and to avoid needless consumption of time.

Plaintiffs fail to explain how they were prejudiced by the trial court's refusal to allow Dr. Tonroy's testimony in rebuttal. Weaver's and Laughlin's offer of proof was that Dr. Tonroy would testify regarding several exhibits defendants and their expert, Dr. Vermeiere, referenced in testimony. Plaintiffs claim that Dr. Tonroy should have been allowed to testify concerning the circumstances of the feeding results shown in one of the exhibits discussed by Dr. Vermeiere and to attempt to provide testimony concerning a conversation that Dr. Tonroy claimed to have had with the author of one of the exhibits referenced by Dr. Vermeiere. Tonroy's proposed testimony was, at least in part, hearsay. In addition, the subject of the performance of Holstein cattle on feed was not a new issue and had been raised throughout the trial by all parties. Finally, plaintiffs had adequate opportunity to question defendants' expert about the exhibits in question.

The record reveals no reason why Dr. Tonroy could not have returned in person for additional testimony if necessary, yet the testimony excluded by the trial court was to be offered by telephone. No arrangements had been made for the handling of documentary exhibits either on direct or cross-examination. The record

in this case reveals literally hundreds of exhibits and a number of them were likely to have been used by defendants in the cross-examination of Dr. Tonroy if his rebuttal testimony had been permitted. Under the circumstances, we conclude the district court did not abuse its discretion in excluding the rebuttal testimony of Dr. Tonroy.

AFFIRMED.