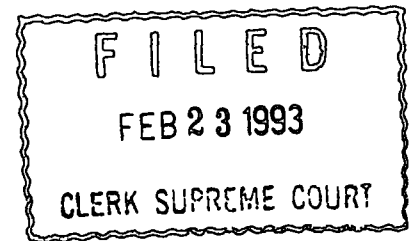


IN THE COURT OF APPEALS OF IOWA

No. 2-535 / 92-203



RODNEY RENKEN, SARAH RENKEN, JACQUELINE RENKEN, CHRISTINE
RENKEN, STEVEN RENKEN, and SANDRA RENKEN,

Plaintiffs-Appellees,

vs.

SIOUXLAND PROPANE CO.,

Defendant-Appellant.

Appeal from the Iowa District Court for Plymouth
County, Gary E. Wenell, Judge.

Siouxland Propane appeals from a jury verdict which
awarded damages to the Renkens. **AFFIRMED.**

Michael R. Hellige of Shull, Cosgrove, Hellige, Du Bray
& Lundberg, Sioux City, for appellant.

Colin J. McCullough of McCullough Law Firm, Sac City,
for appellees.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

HAYDEN, J.

Siouxland Propane Company appeals a jury verdict award in favor of Rodney Renken, Sarah Renken, Jacqueline Renken, Christine Renken, Steven Renken, and Sandra Renken. The jury awarded damages to appellees after an incident in which Rodney Renken was allegedly overcome by and suffered injuries from fumes generated by a space heater appellant temporarily installed in a hog confinement building on Rodney's farm. We affirm.

On January 4, 1988, Rodney discovered a heater in his hog confinement building was not operating properly. Rodney called Siouxland to repair the heater. Two Siouxland employees arrived at Rodney's farm the same afternoon. The employees were unable to repair the heater so the parties decided to temporarily install a space heater owned by Rodney. The space heater with a propane tank, supplied by Siouxland, was installed five to eight feet inside the door of the building. Fresh air for the heater was supplied through a doorway which was propped open by a shovel.

The next morning Rodney returned to the building and found his hogs were dead. Rodney was overcome by fumes and collapsed. Upon regaining consciousness, Rodney found himself on the floor of the building next to a floor plug to a manure slurry-trough which he had apparently knocked loose when he fell to the floor.

Rodney filed this action against Siouxland on December 29, 1989. In his petition Rodney alleged Siouxland's negligent installation of a propane heater in a hog confinement building caused permanent injuries to him and the other plaintiffs. The case proceeded to trial. At the close of the plaintiffs' case and all of the evidence, Siouxland moved for a directed verdict on the basis plaintiffs' failed to generate a jury question on defendant's fault and on proximate cause. The trial court overruled the motions. The case was submitted to the jury. The jury rendered a verdict for Rodney in the amount of \$114,483 and for his wife in the amount of \$20,000. The jury attributed fifty-five percent of the fault to Siouxland and forty-five percent of the fault to Rodney. The trial court denied Siouxland's motion for judgment notwithstanding the verdict.

On appeal Siouxland contends (1) there was not substantial evidence of negligence on behalf of Siouxland; (2) there was not substantial evidence Siouxland's actions or omissions were a proximate cause of injuries allegedly sustained by Rodney; (3) there was not sufficient evidence to support the jury's damage award; (4) there was not substantial evidence to support Sarah Renken's consortium claim.

Our scope of review is for the correction of errors of law. Iowa R. App. P. 4. The jury's findings of fact in a law action are binding on appeal if supported by

substantial evidence. Nadler v. City of Mason City, 387 N.W.2d 587, 591 (Iowa 1986); Iowa R. App. P. 14(f)(1).

In determining whether a jury issue is engendered the trial court views the evidence in the light most favorable to the party against whom the motion was made. Becker v. D & E Distributing Co., 247 N.W.2d 727, 729 (Iowa 1976). Evidence indicating a probability or likelihood of the causal connection is necessary to generate a jury issue. Becker, 247 N.W.2d at 730 (citation omitted). Every legitimate inference which may reasonably be deduced therefrom must be carried to the aid of the evidence. Id. at 729-30. A jury question is engendered if reasonable minds can differ on an issue in light of the evidence presented. Johnson v. Interstate Power Co., 481 N.W.2d 310, 318 (Iowa 1992) (citation omitted). The weight and credibility of testimony are matters for the jury. Becker, 247 N.W.2d at 730 (citation omitted). Generally questions of negligence and proximate cause are for the jury, and only in exceptional cases may they be decided as matters of law. Iowa R. App. P. 14(f)(10).

I. Negligence. The record contains substantial evidence in support of a finding of Siouxland's portion of fault. Evidence showed Siouxland violated numerous national safety standards for the propane industry in its installation of the temporary space heater. The standards which are relevant to this case dealt with ventilation and installation procedures and tests of the air quality in the

building by trained personnel. Testimony from a Siouxland employee indicates he knew of the standards but he failed to follow them. Evidence showed the air in the confinement building was sufficiently lethal to kill over three hundred head of sows and pigs. A jury finding of negligence on behalf of Siouxland for failing to test the air quality in the confinement building after the temporary installation would have been supported by substantial evidence.

In addition Siouxland's owner admitted the existing venting system in the building could have been used instead of the temporary heater system which was installed. Siouxland employees could have accomplished this by hanging a replacement heater and using the existing venting system in the building. In fact this alternative was used the next day after the discovering of dead sows and pigs.

Under the substantial evidence standard, if reasonable minds could disagree on an issue in light of the evidence presented, the trial court must submit the issue to the jury. Johnson, 481 N.W.2d at 318. The trial court properly submitted the negligence issue to the jury. We conclude substantial evidence exists from which the jury could have found Siouxland's actions and omissions constituted fault. We affirm the trial court on this issue.

II. Proximate Cause. Even though negligence may be established, existence of proximate cause does not necessarily follow. Northwestern Nat'l Ins. Co. v. Raid

Quarries Corp., 249 N.W.2d 640, 643 (Iowa 1977) (citation omitted). Proximate cause must be separately determined. Oak Leaf Country Club, Inc. v. Wilson, 257 N.W.2d 739, 746 (Iowa 1977). Proof of proximate cause must satisfy two criteria: (1) whether but for defendant's fault, plaintiff's injuries would not have occurred; and (2) whether defendant's fault must be a substantial factor in bringing about plaintiff's harm. Johnson v. Junkmann, 395 N.W.2d 862, 865 (Iowa 1986) (citing Pedersen v. Kuhr, 201 N.W.2d 711, 713 (Iowa 1972)). The proximate cause question is one of fact for a jury, and may be taken from the jury only in exceptional cases. Iowa R. App. P. 14(f)(10). Expert testimony indicating probability or likelihood of a causal connection is necessary for an issue to be submitted to the jury. Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 284 (Iowa 1979) (citing Winter v. Honeggers' & Co., 215 N.W.2d 316, 323 (Iowa 1974)).

Evidence exists from which the jury could have found Siouxland's actions and omissions were a proximate cause of Rodney's injuries. Dr. David Thomas, Rodney's treating physician, testified he found Rodney's health to be normal before the incident on January 5th, and not normal afterwards. Dr. Thomas testified Rodney has a lung disorder caused by the events occurring in the hog confinement building which occurred on January 5, 1988.

Q. Doctor, do you have an opinion within a reasonable degree of medical certainty as to whether or not Mr. Renken has sustained a permanent injury because of the gassing that he got out on his farm on January 5th, 1988?

* * *

A. My opinion is such that I believe that Rodney Renken does have a lung disorder caused by that event, in that prior to that event, he, by history, was working normally, was able to do his work in the hog containment barn without shortness of breath and without coughing.

Dr. Thomas also testified Rodney was forty to forty-five percent disabled as a result of the events. He concluded, within a reasonable degree of medical certainty, Rodney's injuries were permanent. Rodney testified he had never been unable to perform chores and farm work prior to the incident in his hog building. However, Rodney asserted, after the incident, he has become limited in what chores and work he can perform and the length of time he can work. Rodney's family members also testified to the deterioration in Rodney's physical condition which they had witnessed since the incident. Substantial evidence existed in the record to support a jury question on proximate cause. We affirm the trial court on this issue.

III. Loss of Consortium. Siouxland contends the trial court erred in submitting Sarah Renken's claim for lost consortium to the jury. Under the record in this case, the jury could have found pain, suffering, and disability on which a claim for consortium could be predicated. See DeBurkarte v. Louvar, 393 N.W.2d 131, 139 (Iowa 1986). Accordingly, the trial court did not err in submitting Sarah's claim for lost consortium to the jury. We affirm on this issue.

IV. Damages. Siouxland asserts the trial court erred in submitting Instruction 26, which was an instruction on damages, to the jury. Siouxland contends the verdicts were not supported by substantial evidence.

Damage awards are to be upheld so long as the record discloses a reasonable basis from which the amount can be inferred or approximated. Westway Trading Corp. v. River Terminal Corp., 314 N.W.2d 398, 403 (Iowa 1982) (citation omitted). "'The assessment of damages is traditionally a jury function and courts intervene only for compelling reasons. Where a verdict is within the evidence we will not disturb the jury's award.'" Gail v. Clark, 410 N.W.2d 662, 675 (Iowa 1987) (quoting Haumersen v. Ford Motor Co., 257 N.W.2d 7, 16 (Iowa 1977)). Viewing the evidence in the light most favorable to plaintiffs, we conclude the verdicts are supported by substantial evidence.

The jury awarded an amount of \$3650 for past medical expenses. There is sufficient evidence in the record of Rodney's medical expenses to support this award. The record also supports the jury's award of future medical expenses. Dr. Thomas testified Rodney would continue to experience health problems related to his injuries and would need medication intermittently during his lifetime. The doctor also stated Rodney may need to expend about \$600 every six months for health care. With Rodney's life expectancy being approximately twenty-seven more years, an award of \$30,000 for future medical expenses is supported by substantial evidence.

Instruction 26 also included two subparts for past earnings and future loss of earning capacity. The jury awarded \$18,500 for lost past earnings and \$57,000 for lost future earning capacity. Evidence showed Rodney was unable to work as much, his productivity decreased, and he was forced to reduce the size of his farming operations following the incident on January 5, 1988. Rodney testified he is no longer able to perform many chores because of the complications he experiences as a result of his injuries. Dr. Thomas also testified Rodney is forty to forty-five percent disabled.

We conclude the trial court's submission of the damages instruction to the jury was proper. Substantial evidence supports the amounts awarded for each item.

The trial court acted appropriately when it allowed the case to go to the jury rather than grant Siouxland's motions for directed verdict. See Johnson, 395 N.W.2d at 866 (citations omitted). Finding no error, we affirm the decision of the trial court in all respects.

AFFIRMED.

Habhab, J., concurs; Sackett, J., dissents.

SACKETT, J. (dissenting)

I dissent. I would reverse and dismiss the case because I fail to find substantial evidence a pulmonary disorder Rodney suffers was caused by defendant's negligent act.

Rodney, to support his claim his pulmonary disorder was the result of defendant's negligence, relied on the expert testimony of a Dr. Thomas. I cannot agree Dr. Thomas's evidence provided the necessary link. I find the trial court too had problems with Thomas's testimony. In ruling on defendant's motion for new trial, the trial court found defendant's expert appeared more qualified and defendant's cross-examination may have raised doubts about plaintiff's prior condition.

Dr. Thomas testified as follows:

Q. Would you term normal Rodney Renken before January 5, 1988? A. Based on the history that I obtained, I would say yes.

Q. Now, doctor, would you classify Rodney Renken normal after January 5, 1988, within a reasonable degree of medical certainty? A. No. Based on his history and his physical examination at various times and breathing tests, which are helpful, I would say that he is not normal.

Q. Doctor, do you have an opinion within a reasonable degree of medical certainty as to whether or not Mr. Renken has sustained a permanent injury because of the gassing that he got out on his farm January 5, 1988? A. Yes, I have an opinion.

Q. Would you please tell the jury your opinion?
A. My opinion is such that I believe that Rodney Renken does have a lung disorder caused by that event, in that prior to that event, he, by history, was working normally, and was able to do

his work in the hog confinement barn without shortness of breath and without coughing.

After the event, he appeared to have problems with shortness of breath, coughing, chest tightness and still has that on an intermittent basis today.

Q. Doctor, is that diagnosis that you've just told the jury a permanent problem that Rodney's going to have to live with for the rest of his life, again, within a reasonable degree of medical certainty? A. Within a reasonable degree of medical certainty, I would say that he has a lifetime problem. And I would call that lifetime problem reactive airway disease syndrome, which is a nondescript syndrome, which is a problem with the airways being easily irritated and easily constricted by exposure to--exposure to different irritants.

Irritants meaning airway irritants or proteins or chemical that you would breathe in. It is not termed asthma, although it is similar to asthma in that both asthma and reactive airway disease syndrome do have bronchoconstriction as their main disease entity (Emphasis supplied).

Dr. Thomas's opinion Rodney was normal before January 5, 1988, was based on the history supplied by Rodney. Dr. Thomas's opinion on causation was also based on this same history supplied by Rodney. The history Rodney supplied was he had never had any such problems in the past. I agree with the trial court, the evidence was he had had prior problems. The only conclusion I can draw from the record is Rodney was not truthful when he told Dr. Thomas he had had no prior problems. Therefore, there was no basis in the record for Dr. Thomas's opinion.

When fault is established, proximate cause must be determined separately. See Blackhawk Bldg. Sys. v. Law

Firm of Aspelmeier, Fisch, Power, Warner & Engberg, 428 N.W.2d 288, 290 (Iowa 1988). For conduct to be a proximate cause of an injury to another, it must be a substantial factor in bringing about the harm. See Oak Leaf Country Club, Inc. v. Wilson, 257 N.W.2d 739, 746 (Iowa 1977). It is necessary to prove the injuries were caused by the fault of the identified defendant. See Oberreuter v. Orion Indus., Inc., 398 N.W.2d 206, 209 (Iowa App. 1986). Substantial evidence, not a scintilla of evidence, is necessary to create a fact issue. See McCleary v. Wirtz, 222 N.W.2d 409, 412 (Iowa 1974). Circumstantial evidence giving rise to no more than innuendo and unsupported surmise is not substantial in nature. Tomash v. John Deere Indus. Equip. Co., 399 N.W.2d 387, 391 (Iowa 1987). Rodney has the burden of proving by a preponderance of the evidence that defendant caused the complained of harm or injury. See Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67, 72 (Iowa 1986). The damage claimed (lung problems) requires some expert testimony for this is not the type of injury an ordinary juror could determine without expert help. See Burton v. Theobald, 216 N.W.2d 299, 300 (Iowa 1974). If Rodney failed to prove causation by a fair preponderance of the evidence, then defendant is not liable for his injuries. See Hasler v. United States, 718 F.2d 202, 204 (6th Cir. 1983).

The fact Rodney has reactive airway disease syndrome is not sufficient to establish causation. Reactive airway disease syndrome is when people's lungs react very easily to an exposure of an irritant and can be the result of a number of things, including endotoxins and environmental dusts. To prove causation, plaintiff must show proof of a logical sequence of cause and effect showing something resulted from defendant's act or omission as a reason for the syndrome. A reputable medical or scientific explanation must support this logical sequence of cause and effect. Grant v. Secretary of Dep't of Health and Human Servs., 956 F.2d 1144, 1148 (Fed. Cir. 1992).

Rodney's testimony was he went in the facility, was temporarily rendered unconscious, got air and was revived.

Plaintiff never sought to show what substance the space heater system introduced into the air that allegedly caused Rodney's pulmonary disorder. The only evidence as to the substance introduced into the air is the space heater produced carbon monoxide. Carbon monoxide was determined to be responsible for the hog loss.

The diagnosis of Rodney's problem was reactive airways disease, formerly called asthma. Dr. Thomas was never directly asked if reactive airways disease was caused by exposure to carbon monoxide. Dr. Thomas testified he had no idea of the substance to which Rodney was exposed. The other medical evidence was carbon monoxide exposure would

not cause Rodney's problem. There is no evidence carbon monoxide exposure would have caused Rodney to develop the pulmonary disorder. There being no evidence a substance emitted from the heater caused Rodney's condition, I look for other evidence defendant's act or omission was a proximate cause of the injury.

Dr. Thomas based his opinion of causation on the history given by Rodney. Rodney first went to Dr. Thomas six or seven months after the occurrence. Rodney gave the doctor a history of the occurrence of the asphyxiation of the hogs. Rodney told the doctor when he entered the hog confinement building he noticed his hogs were down and he fainted or passed out but eventually revived and made his way out of the building. Rodney said he noted burning in his chest and coughing that began shortly after on the same day and since that time he related continual problems with shortness of breath.

Dr. Joseph P. Trotzig testified Rodney was having the same problems in the mid-1980's. Dr. Trotzig treated Rodney in 1983, 1984, and 1985 for breathing problems, including tightness in the chest, fatigue, shortness of breath, cough and spitting purulent sputum. Rodney then was diagnosed as having bronchitis with asthma and the symptoms he exhibited were, according to Trotzig's notes, suffered by a significant number of hog farmers.

Rodney attempted to conceal his prior history of similar problems by not telling Dr. Thomas about prior problems and not detailing Dr. Trotzig's treatment in interrogatories answered in May 1990. Rodney, however, did not contradict Dr. Trotzig's testimony about his prior history of problems.

The testimony of Dr. Thomas provides no more than a conjecture. As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions but not deductible from them as a reasonable inference. Hasler, 718 F.2d at 205. Dr. Thomas's testimony on causation is carefully couched and is based on Rodney's self-serving history, which history was clearly shown to be not reliable by evidence that contrary to Rodney's history to Dr. Thomas, he had contacted Dr. Trotzig about this problem prior to the January 5, 1988 incident and the fact the hog confinement building itself is a toxic environment that can cause pulmonary changes in normal lungs. See Viterbo v. Dow Chem. Co., 646 F. Supp. 1420, 1424-25 (E.D. Tex. 1986); see also Mulcahy, 386 N.W.2d at 72. If the data on which an expert bases an opinion is not reliable, then an opinion resting entirely on that data must be excluded. See In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1245 (E.D. N.Y. 1985). Dr. Thomas's opinion was based solely on history given by Rodney. The history Rodney gave Dr. Thomas was

not accurate and failed to detail prior similar problems and treatments. Plaintiffs failed to show causation. See Klein v. Council of Chem. Ass'n, 587 F. Supp. 213, 222-23 (E.D. Pa. 1984) (where plaintiff could not identify specific defendant's product that was a carcinogenic and which plaintiff inhaled plaintiff did not meet burden of proof on causation issue). When there is uncertainty or speculation whether damages have been suffered, recovery should be denied. See Patterson v. Estate of Patterson, 189 N.W.2d 601, 605 (Iowa 1971); Orkin Exterminating Co. v. Burnett, 160 N.W.2d 427, 430 (Iowa 1968).

I agree with the trial court that there was a question about Dr. Thomas's testimony because the testimony of Rodney's prior treating physicians clearly contradicted the history Rodney gave Thomas and the history that Thomas considered in rendering his opinion. However, I am of the opinion the trial court after making this determination should have excluded Thomas's opinion of causation because the opinion was based on facts that were not true. See "Agent Orange", 611 F. Supp. at 1245.