

IN THE COURT OF APPEALS OF IOWA

No. 4-421 / 93-1456

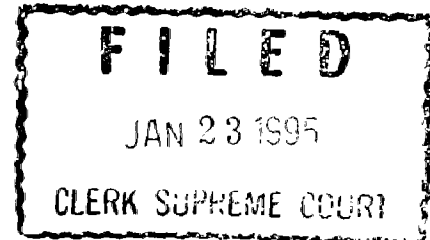
CAROL BRYAN, WILLIAM COLLINS,
and JOHN GAFFNEY,

Plaintiffs-Appellants,

vs.

MOBAY ANIMAL HEALTH CORP.,
DIAMOND SCIENTIFIC CO., and
PIONEER INTERNATIONAL, INC.,
MICROBIAL GENETICS DIVISION,

Defendants-Appellees.



Appeal from the Iowa District Court for Iowa County,
Kristin L. Hibbs, Judge.

Plaintiffs appeal a ruling of the district court
granting summary judgment in favor of the defendants.
REVERSED AND REMANDED.

Wythe Willey, Cedar Rapids, for appellants.

Stephen D. Hardy and Andrew D. Hall of Grefe & Sidney,
Des Moines, for appellees.

Heard by Sackett, P.J., Habhab, J., and Schlegel, S.J.*

*Senior judge from the Iowa Court of Appeals serving on
this court by order of the Iowa Supreme Court.

SCHLEGEL, S.J.

Plaintiffs Carol Bryan, William Collins, and John Gaffney appeal a ruling of the district court granting summary judgment to the defendants, Mobay Animal Health Corp., Diamond Scientific Co., Pioneer International, Inc. and Microbial Genetics Division. We reverse and remand for trial.

Plaintiffs filed suit against the defendants, manufacturers of allegedly defective cattle vaccines known as BRSV Vac-4 and Horizon IV. Plaintiffs claim the vaccines either caused or failed to protect their cattle from bovine viral diarrhea and related diseases.

Defendants filed a motion for summary judgment. They claimed the plaintiffs' evidence did not include the opinion of a sufficiently competent expert to establish the vaccines were defective or that any defect was the cause of the cattle's illness. Defendants claimed the plaintiffs' only expert, Dr. Loren Rickard, lacked any specialization or expertise in the field of pathology. They argued Rickard only practiced general veterinary medicine and only treated cattle for Bryan and Collins.

The district court granted defendants' motion for summary judgment. It determined expert testimony was necessary to aid the jury in the technical aspects of the allegedly defective vaccines. It found Dr. Rickard's testimony inadmissible because he lacked the necessary technical qualifications. It determined his opinion would

be too speculative to allow the issue of causation to be put before the jury. The plaintiffs appeal.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 237(c); see Farm Bureau Mut. Ins. Co. v. Milne, 424 N.W.2d 422, 423 (Iowa 1988). The moving party has the burden to show the nonexistence of a material fact, Milne, 424 N.W.2d at 423, and the evidence must be viewed in the light most favorable to the resisting party, Thorp Credit, Inc. v. Gott, 387 N.W.2d 342, 343 (Iowa 1986). The procedure is functionally akin to a directed verdict, and every legitimate inference that reasonably can be deduced from the evidence should be afforded the resisting party. Id.; Sherwood v. Nissen, 179 N.W.2d 336, 339 (Iowa 1970). A fact issue is generated if reasonable minds can differ on how the issue should be resolved, but if the conflict in the record consists only of the legal consequences flowing from undisputed facts, entry of summary judgment is proper. Milne, 424 N.W.2d at 423; Gott, 387 N.W.2d at 343. If the motion is properly supported, however, the resisting party "must set forth specific facts showing that there is a genuine issue for trial." Iowa R. Civ. P. 237(e). The language of our rule and case law are substantially similar or identical to that of rule 56 of

the Federal Rules of Civil Procedure, see, e.g., Matsushita Elec. Indust. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-88, 106 S. Ct. 1348, 1355-56, 89 L. Ed. 2d 538, 551-53 (1986), from which we may draw for guidance in interpreting our own rule, Sherwood, 179 N.W.2d at 339.

Iowa Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

We have a liberal tradition in the admission of opinion evidence under this rule. Hutchinson v. American Family Mut. Ins. Co., 514 N.W.2d 882, 886 (Iowa 1994).

An expert's learning and experience may provide the necessary elements of qualification to testify in a particular field. Id. (citations omitted). The expert need not be a specialist in a particular field of medicine to give an expert opinion. Id. (citing DeBurkarte v. Louvar, 393 N.W.2d 131, 138 (Iowa 1986)).

Dr. Rickard is a licensed and practicing doctor of veterinary medicine. The majority of his practice is centered on the care and treatment of bovines, both feedlot and cow-calf. He has used the BRSV Vac-4 vaccine over the course of several years and has found a recurring pattern of bovine viral diarrhea in those animals vaccinated with the product.

The district court found Rickard did not have any particular technical background regarding the products in question and did not run laboratory tests to isolate a defect, thus his testimony was insufficient as to causation. We disagree. Rickard need not be a pathologist to give an opinion on defect and causation since "knowledge from experience is every bit as good as that acquired academically." DeBurkarte, 393 N.W.2d at 138 (quoting Mark McCormick, Opinion Evidence in Iowa, 19 Drake L. Rev. 245, 263 (1970)). In addition, any lack of absolute certainty goes to the weight of his testimony, not to its admissibility. See State v. Buller, 517 N.W.2d 711, 713 (Iowa 1994).

Issues of proximate cause are only rarely decided as a matter of law. Bloomquist v. Wapello County, 500 N.W.2d 1, 5 (Iowa 1993). Viewing the evidence in the light most favorable to the plaintiffs, we determine there are genuine issues of material fact as to whether defendants' allegedly defective products proximately caused increased sickness and death among plaintiffs' cattle. We therefore reverse the judgment of the district court and remand for trial on these issues.

REVERSED AND REMANDED.

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

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HABHAB, J. (Dissenting)

I respectfully dissent. I would affirm the trial court for the reasons hereinafter set forth.

In dissenting, it appears the majority agrees with the trial court that this is the type of case where expert testimony is necessary to establish that the vaccines were defective and that the defects were the cause of the cattle's illness. It also appears the plaintiffs relied on the testimony of Dr. Lauren Rickard, a general practitioner of veterinary medicine, as their expert in this field.

Be that as it may, the circumstance that concerns me the most is the majority, by its ruling, has now qualified Dr. Rickard as an expert. It is here that I disagree with the majority, for in reaching its decision the proper standard was not employed.

Before any consideration can be given as to whether genuine issues of material fact exist, we must first determine whether the trial court acted properly in excluding Dr. Rickard's testimony. On appeal, our task is only to determine whether the trial court abused its discretion in excluding his testimony.

In assessing the propriety of the trial court's exclusion of Dr. Rickard's opinion testimony, we are guided by the rule that the admission of expert testimony rests within the sound discretion of the district court. Gale v. Clark, 410 N.W.2d 662, 673 (Iowa 1987). Reversal on this

ground, as the majority is now doing, is not justified absent manifest abuse of that discretion. Id.

It is undisputed that Dr. Rickard's credentials are impressive. However, it is not enough that Dr. Rickard be generally qualified in the field of veterinary medicine, he must also be qualified to answer the particular questions propounded to him.

Thus, assuming without deciding, that a general practicing veterinarian has the qualifications to give testimony in the field of pathology, Dr. Rickard was unable to identify any defect in the property in question other than "possibility" or "possible" cause of the disease.

As I review the record, all three plaintiffs rely on Dr. Rickard's testimony to establish defect and proof of causation. But when reviewing his testimony, he fails to identify either defect or causation beyond a speculative "possibility."

It is readily understandable why Dr. Rickard's testimony was so guarded. He admitted that he had never performed any testing or analysis of either of the Horizon IV or the BRSB vac IV vaccines. He did not know anything about the actual components of the vaccines or how they were processed. He was unable to answer what the killing agent is or the killing process was as it relates to the vaccines. When he was asked whether there was anything specifically wrong with the vaccines, he testified: "No. I can't prove that there was anything wrong with that

An expert can generally testify to the probability or possibility of a particular outcome but that conclusion must be more than conjecture. Haumersen v. Ford Motor Co., 257 N.W.2d at 11.

Dr. Rickard testifies merely that wild strains of virus have been known to exist in the course of the history of vaccinations and that he suspects the vaccine was defective. But, he offers no facts to show the existence of a wild strain in this vaccine. The testimony leaves the identification of the defect and the facts of causation entirely to be inferred. There is no hard evidence to show the probability or possibility of causation, only an unsubstantiated supposition.

The trial court had before it all the facts and circumstances it needed to reach its decision. In a well-reasoned and structured opinion, it held that Dr. Rickard's conclusions amounted to no more than speculation, that his testimony does not elucidate for the jury the technical information that it needs to correctly decide this case. Under the circumstances here, I am unable to find that there is a manifest abuse of discretion. I would affirm.