

1994 WL 33300

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN
APPROVED FOR PUBLICATION IN THE
PERMANENT LAW REPORTS.

Court of Appeals of Nebraska.

Daniel DORN and Delbert Dorn, Doing Business
as Double D Farms, Appellees,
v.
BOEHRINGER INGELHEIM ANIMAL HEALTH,
INC., Appellant.

No. A-92-410. | Feb. 8, 1994.

Appeal from the District Court for Kearney County;
Stephen Illingworth, Judge. Affirmed.

Attorneys and Law Firms

Daniel L. Lindstrom and Jeffrey H. Jacobsen, of
Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C.,
for appellant.

E. Dean Hascall, of Hascall, Jungers, Garvey & Delaney,
for appellees.

Before CONNOLLY, IRWIN and WRIGHT, JJ.

Opinion

WRIGHT, Judge.

*1 Boehringer Ingelheim Animal Health, Inc. (Boehringer), appeals the jury verdict which awarded \$125,721.45 to Daniel Dorn and Delbert Dorn, doing business as Double D Farms (Dorns), for damage to the Dorns' cattle. The Dorns alleged that Boehringer was strictly liable for damages caused by a vaccine, Bar-Vac-7/Somnus, manufactured by Boehringer.

[1] A verdict in a civil case will be sustained if the evidence, when viewed and construed most favorably to the prevailing party, is sufficient to support that verdict. *Haselhorst v. State*, 240 Neb. 891, 485 N.W.2d 180 (1992).

FACTS

The Dorns engage in a farming and cattle feeding enterprise, in which the Dorns acquire weaned calves, feed them on picked cornfields, and give them grain supplements. After the cattle reach a specified weight, they are sold.

Between August 19 and October 12, 1985, the Dorns purchased 787 cattle. Within a few days of delivery, 389 of the cattle were vaccinated with Bar-Vac-7/Somnus, which is manufactured by a division of Boehringer. Within a few days of the vaccination, all of the 389 vaccinated cattle became ill, and 186 eventually died. The remaining 203 cattle suffered health problems which arrested their growth and development.

The Dorns alleged that the vaccine was unreasonably dangerous and/or in a defective condition when purchased and that the vaccine was the proximate cause of the death of 186 cattle. They alleged that they suffered damages from the death of the cattle and from the failure of the remaining 203 cattle to convert feed to weight gain. The damages included expenses for labor in caring for the sick and dying cattle, veterinary care, and lost profits.

Upon arrival at the Dorns' operation, the cattle were inspected, counted, and placed in a processing area where they were fed, watered, and allowed to rest. The following day they were processed, which included branding in order to keep a record of the source of each calf, implanting a growth implant or hormone, treating external and internal parasites, and vaccinating.

The Dorns made the following cattle purchases in 1985:

SCOPE OF REVIEW

Date	Number of Cattle	Purchased From
------	------------------	----------------

8-19	12 head	Beatrice, Nebraska
9-5	150 head	Torrington, Wyoming
9-8	219 head	Ericson, Nebraska
9-17	254 head	Miles City, Montana
9-28	20 head	Lexington, Nebraska
10-11	123 head	Highmore, South Dakota
10-12	2 head	a neighbor

Only the Beatrice, Miles City, and Highmore cattle were vaccinated with Boehringer's Bar-Vac-7/Somnus serial No. 17-028B. Approximately 1 day after they were processed, all of the cattle from Beatrice became sick, and two died within 6 to 8 days. Fifteen days after processing, the remaining 10 head from Beatrice were sold. The Miles City cattle were processed on September 19 and became sick 3 to 4 days later. The cattle began dying about 12 days after processing. Approximately 130 of the Miles City cattle eventually died. The Highmore cattle were processed and vaccinated upon arrival on October 11. By November 23, 50 of these cattle had died.

*2 By the following spring, a total of 186 cattle had died. The two cattle purchased from a neighbor were not vaccinated, but were placed in the same pen with the Highmore cattle and remained healthy. Two cattle from the Ericson group died from what Daniel Dorn described as "pasteurella salmonella infection." Cattle from the remaining groups remained healthy and were marketed and sold by the Dorns.

Irvin Peterson, a veterinarian, made a preliminary diagnosis in 1987 that the cattle suffered from predominantly *Hemophilus somnus* infection, related to the Bar-Vac-7/Somnus vaccine. Peterson said he took into consideration the fact that all of the cattle vaccinated with one serial number had been severely affected. The onset of the disease did not follow a curve, as would be seen with the ordinary onset of a disease, where the first few cattle would become ill followed by an increase in the number of sick cattle and then a tapering off of the illness. In this case, all of the cattle became ill together. Peterson also noted that treatment saved very few, if any, of the cattle. Cattle vaccinated with other products or not vaccinated did not suffer from the condition. A diagnostic lab in Lincoln confirmed the presence of thromboembolic meningoencephalitis (TEME) in the brains of the cattle. TEME is caused only by *Hemophilus somnus* bacteria.

Jim Roth, a veterinarian and microbiologist, testified that the vaccine was the obvious source of the infection because it contained *Hemophilus somnus* and was

injected into all of the cattle in question. He said that animals from different ranches of origin had an extremely high percentage of TEME, which means that the bacteria was injected directly into the animal. Roth testified with scientific certainty that the symptoms in the Dorn cattle came from the injection of live Hemophilus somnus bacteria. Roth's opinion was based on information provided by the Dorns and Peterson and on Boehringer's outline of production of the subject vaccine. Roth did not view or examine the Dorn cattle. He opined that some of the Hemophilus somnus organisms used in the preparation of serial No. 17-028B were not killed prior to the packaging of the product and that the organisms found their way into the brains of the cattle via injection of the vaccine, causing the cattle to develop TEME.

Roth's opinion conflicted with the testimony of Ted Odle, Boehringer's director of production of Bar-Vac-7/Somnus vaccine. While Odle testified that the strains of Hemophilus somnus used in the production of the vaccine had been shown to have been effectively killed by the use of thimerosal, Roth said that thimerosal was not effective in killing the Hemophilus somnus bacteria. Odle maintained that the organisms used in the production of the vaccine were dead at the time the vaccine was packaged and marketed.

Veterinarians called to testify by Boehringer stated that while performing post mortem examinations on two of the dead animals, they noticed lesions consistent with an infection of bovine virus diarrhea. Dr. Ivan Nicholson noted that of the 660,000 doses of serial No. 17-028B produced by Boehringer, the company had never received any other complaints similar to the Dorns, and that the same was true for approximately 9 million other serials of the vaccine using the same type of preservative as serial No. 17-028B. Dr. Steven Cadula of the Animal Plant Health Inspection Service (APHIS) of the U.S. Department of Agriculture reviewed the test results of the USDA and Boehringer and informed the Dorns that the product was found to be satisfactory.

*3 Nicholson stated that, based on further testing, several other factors could have contributed to the disease and deaths of the Dorn cattle. According to Boehringer's witnesses, production of the vaccine followed stringent production outlines approved by APHIS pursuant to title 9 of the Code of Federal Regulations. The regulations require 64 separate tests of the various components of the vaccine during the production sequence.

The following costs were identified by the Dorns in

connection with the sick cattle:

Miles City and Highmore Cattle:

Purchase price \$104,423.99

Processing cost 2,334.00

Feed costs 36,639.50

Veterinary bills 9,096.18

Veterinary supplies 5,000.00

Yardage charge (\$.25/head/day) (fuel, water, electricity, facilities, use of the feed truck, and repairs)

Miles City cattle \$9,388.50

Highmore cattle 3,812.75

13,201.25 Extra labor 12,000.00

(100 hours/week for

12 weeks \$10/hour) TOTAL COSTS \$182,694.92

LESS PRICE RECEIVED WHEN SOLD 58,579.00 (191 survivors)

LOSS \$124,115.92

Beatrice Cattle: TOTAL COSTS \$5,138.33

(purchase price, processing

cost of \$6 per head, feed

costs, and yardage charge) PRICE RECEIVED WHEN SOLD 3,500.63

LOSS TESTIFIED TO BY DANIEL DORN \$1,610.53

TOTAL LOSS DUE TO SICK CATTLE \$125,726.45

ANALYSIS

Boehringer assigns as error the trial court's refusal to

allow Odle, its director of production, to state his opinion that tests conducted by Boehringer showed that the strains of *Hemophilus somnus* used in the Bar-Vac-7/Somnus could not induce TEME without injecting live *Hemophilus somnus* organisms directly into the animal's brain. We find no error in the refusal to allow this testimony.

At trial, Odle explained the process used to produce the vaccine. Bacteria are grown and harvested and then killed using an agent such as formaldehyde or thimerosal. A series of laboratory tests are conducted, various antigens are added to the vaccine, the bacteria is killed, and a preservative is added. Six to eight weeks later, the vaccine undergoes federally required tests for safety, sterility, and potency in Boehringer's quality control laboratory. A final sample of the product is inoculated with a growth medium and subjected to two temperatures. If no growth occurs, the bacteria is considered dead or sterile. Odle testified that the preservative used in the vaccine was changed from phenol to thimerosal beginning with serial No. 17-028B.

Odle stated that when testing on the vaccine in question was completed by the research department in the mid 1970's, he was not the project director, and that he had no connection with the testing of the vaccine or the *Hemophilus somnus* organism and TEME in cattle. The reports of the testing were available to any Boehringer employee involved with vaccine production. Odle said that he had reviewed the reports, which were business records of Boehringer, and he considered them to be reliable scientific information.

*4 The Dorns objected to Odle's testimony because Odle said that he had no connection with the actual testing of the *Hemophilus somnus* vaccine, but that he was relying solely upon his review of the company's records related to the testing.

Boehringer's counsel asked Odle: "On the basis of your review of those particular records, can you tell me what was done concerning the testing of the H. Somnus bacteria with TEME?" The Dorns' counsel objected to Odle's testimony as hearsay. The court sustained the objection, stating, "[I]t's as if defendant is trying to come in under an exception to the hearsay rule through business records, the records were not available for the plaintiff for cross-examination...."

Boehringer then made an offer of proof:

[I]f the witness [Odle] was allowed to testify, he would testify that if 400 pound calves were challenged with a live strain of the *Haemophilus* [sic] *Somnus* organism used in this vaccine, that they could not produce the disease known as TEME without injecting this organism directly into the brain of that animal, that these tests were scientifically done, that the reports of these tests exist as business records at Boehringer Ingelheim, that he has reviewed those records, and that that would be the basis of his testimony.

[2] The record does not show that the court made any ruling concerning the offer of proof other than to state, "[I]f those records were here, I would let you proceed, but they're not here." We find no error in the trial court's sustaining the hearsay objection. As a general rule, to constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of the litigant complaining about the evidence admitted or excluded. *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992). Evidence which is not admissible cannot unfairly prejudice a substantial right of the litigant. The objection to testimony about the contents of the records was properly sustained.

[3] The offer of proof referred to test results which existed as business records at Boehringer. Boehringer argues that the court abused its discretion in refusing to allow Odle to testify about the data (the test results) that he relied upon in giving his opinion. The party seeking admissibility of a document as a business record must establish that the activity recorded was the type which regularly occurred in the course of the business' day-to-day activity and that the record was made as a part of the regular business practice at or near the time of the event recorded. Also, the record must be authenticated by the custodian or other qualified witness. *Crowder v. Aurora Co-op Elev. Co.*, 223 Neb. 704, 393 N.W.2d 250 (1986). Boehringer did not prove that the reports were regularly recorded as part of its day-to-day activity. Odle was not the custodian and could not authenticate the records because he was not involved in the research reported in the records. His testimony was hearsay, could not qualify as a business records exception, and was therefore inadmissible.

*5 Boehringer argues that Odle's testimony should have been admitted pursuant to Neb. Rev. Stat. § 27-703 (Reissue 1989), which provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Boehringer's offer of proof came in response to the court's sustaining a proper hearsay objection to testimony concerning the contents of the records. The offer of proof, which was not in the form of an opinion, did not attempt to state Odle's expert opinion, but, instead, stated the contents of the test results. The contents of the reports were not admissible, and the objection to the testimony was properly sustained. Section 27-703 does not apply to the offer of proof in this case. Odle was never asked to give his opinion as to whether the cattle would have or could have contracted TEME without an injection of *Hemophilus somnus* into the brain. The contents of the tests and the reports do not become admissible simply because Odle made a statement via the offer of proof that the cattle would not have contracted TEME. The offer of proof did not provide the proper basis for admission of the contents of the reports. We do not comment on whether Odle should have been permitted to give such an opinion, since that question is not before us.

Odle's testimony also was not admissible because Boehringer did not comply with what is commonly referred to as the "best evidence rule," which excludes secondary evidence of a document. The rule provides that when a document's terms are in issue, the proponent must produce an original or duplicate or excuse the nonproduction of the original and present an admissible type of secondary evidence. See Neb. Rev. Stat. §§ 27-1001 to 27-1008 (Reissue 1989). Here, Boehringer did not offer the records or a copy of the records. Instead, Odle attempted to testify as to the contents of the records when, as the court noted, the records were not present at the trial.

Boehringer next argues that the Dorns failed to prove that any defect in the product was the proximate cause of the

injury because the Dorns did not present any reliable scientific evidence beyond speculation and conjecture that the presence of living *Hemophilus somnus* organisms in the vaccine was the proximate cause of the cattle's illness and death. Boehringer argues that Roth's testimony lacks probative value and was inadmissible under Neb. Rev. Stat. § 27-702 (Reissue 1989) because it was based on unfounded assumptions about the production method of the vaccine, on evidence of Boehringer's use of the same inactivating agent on millions of doses of *Hemophilus somnus* vaccine which had not caused prior injury to cattle, and on evidence of testing which conformed with the procedures recommended by the Dorns' experts.

*6 The evidence showed that lab tests confirmed the presence of TEME in the brains of the cattle and that TEME is caused only by *Hemophilus somnus* bacteria. Roth testified that even if some of the animals arrived at the Dorns' feed yard with *Hemophilus somnus* pneumonia, only 1 to 2 percent would have later developed TEME. In this case, animals from different ranches of origin had an extremely high percentage of TEME, which began appearing after vaccination with Bar-Vac-7/Somnus. Roth testified that in order to reach such a high percentage of TEME, the bacteria must have been injected directly into the animals. Based on scientific certainty, Roth testified that the symptoms in the Dorns' cattle came from the injection of live *Hemophilus somnus* bacteria.

[4,5] The admissibility of testimony from an expert depends in part on whether specialized knowledge will assist the jury in understanding the evidence. The trial court must make the initial decision on whether the testimony will be helpful. Among the factors which the trial court may consider are the qualifications of the witness, the nature of the issue upon which the opinion is sought, the foundation laid, and the particular facts of the case. *Nebraska Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. 36, 497 N.W.2d 657 (1993). The trial court in this case did not err in permitting Roth to give his opinion as to the cause of the symptoms in the Dorns' cattle. It is entirely within the province of the jury, as the trier of fact, to resolve any conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses. *Beauford v. Father Flanagan's Boys' Home*, 241 Neb. 16, 486 N.W.2d 854 (1992).

Boehringer also argues that the trial court should have granted its motion for a mistrial or for a new trial, which followed cross-examination of Odle by the Dorns' counsel: "Q: Isn't it a fact, Mr. Odle, that right now at this

moment Boehringer Ingelheim has Dr. Roth doing testing for it on the H. somnus-on a new series of H. somnus vaccine? A: I don't know, sir."

At a bench conference, Boehringer argued that the question was irrelevant and offered merely to prejudice the jury. Boehringer then asked for a mistrial.

[6,7] The decision as to whether to grant a motion for mistrial is within the discretion of the trial court, and such a ruling will be upheld absent an abuse of that discretion. *Bloomquist v. ConAgra, Inc.*, 240 Neb. 135, 481 N.W.2d 156 (1992). We find no abuse of discretion because we find no prejudice from Odle's response that he did not know whether a new *Hemophilus somnus* vaccine was being tested. Similarly, we find no error in the court's refusal to grant a new trial. The denial of a motion for new trial will be affirmed when the court's decision is neither prejudicial nor an abuse of discretion. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). A motion for new trial should be granted only where there is error prejudicial to the rights of the unsuccessful party. *First Nat. Bank v. Daggett*, 242 Neb. 734, 497 N.W.2d 358 (1993). We find no prejudice in the court's rulings on the motions for mistrial and new trial.

*7 Next, Boehringer argues that the trial court erred in permitting the Dorns to present evidence of damages that was speculative and contrary to the law and in giving the court's own damage instruction rather than the one proposed by Boehringer. Boehringer's proposed instruction stated:

If you decide that the defendant's product proximately caused damage to the plaintiffs' cattle, then you must decide how much money it will take to compensate the plaintiffs for that damage. They are entitled to recover the market value of the cattle before the cattle were damaged, minus the market value of the cattle after they were damaged.

The plaintiffs are also entitled to recover from the defendant the reasonable costs associated with veterinary treatment of the cattle that was proximately caused by the defendant's product.

The trial court instead gave the following instruction:

If you decide that the defendant's product proximately caused damage to the plaintiffs' cattle, then you must decide how much money it will take to compensate the plaintiffs for that damage. They are entitled to recover the market value of the cattle before the cattle died or were damaged, minus the market value of the cattle after they died or were damaged, less amounts the plaintiffs were able to recover upon the sale of the injured cattle.

The plaintiffs are also entitled to recover from the defendant any other reasonable costs that were proximately caused by the defendant's product. I am about to give you a list of the things you may consider in making this decision. From this list, you must only consider those things you decide were proximately caused by defendant's product.

1. Freight,
2. Processing costs,
3. Feed,
4. Veterinary costs,
5. Yardage charge,
6. Additional labor.

Remember, throughout your deliberations you must not engage in any speculation, guess, or conjecture and you must not award any damages by way of punishment or through sympathy.

Boehringer claims that the instruction for damages should have been based on *Shotkoski v. Standard Chemical Manuf. Co.*, 195 Neb. 22, 237 N.W.2d 92 (1975). In *Shotkoski*, a dairy farmer sued to recover for loss of milk production and injury to his cows. He alleged that the loss was caused by a feed supplement which was manufactured by the defendant. The court held that the plaintiff was entitled to claim consequential damages for the loss in milk production which was the proximate result of the breach of warranty. The damage was measured by the decrease in the production of milk by the

affected cows compared to what the production would have been if the injury had not occurred. The damage depended upon the number of cows affected, the length of the period during which they were affected, and the amount of decrease in production. We find that the facts in *Shotkoski* are readily distinguishable because none of the cattle died or required long-term care and treatment. *Shotkoski* does not set forth instructions on damages that are applicable to this case.

*8 Rather, we find guidance in *Colvin v. Powell & Co., Inc.*, 163 Neb. 112, 77 N.W.2d 900 (1956). In *Colvin*, the plaintiffs sued to recover damages for the death of 33 feeder cattle and 1 sow, and for permanent injuries to the remainder of the cattle herd after the animals ate molasses feed which contained poison. A livestock feed dealer had purchased the feed barrels from one of the defendants after being told that the barrels were new and had not previously been used. In reality, the barrels had earlier been filled with poison. The jury awarded the plaintiffs damages for the death of the animals, for expenses connected with the deaths, and for injury to the remainder of the cattle herd. The court instructed the jury that the measure of damages for the dead animals was the fair and reasonable market value of those animals at the time of their death and incidental expenses necessarily incurred by the plaintiffs in connection with the incident. The court further instructed that the measure of damages for the cattle which were injured but not rendered worthless was the difference between the reasonable market value of the cattle if there had been no injury and the reasonable market value of the injured cattle at the time they were marketed. The court recognized that a rule which is a definite measure of the extent of recovery in all cases is difficult to formulate because the facts must be considered in each case.

The model Nebraska jury instruction on strict liability of manufacture, N.JI2d Civ. 11.20, provides that the plaintiff must prove, inter alia, that the defect of the product was a proximate cause of some damage to the plaintiff and the nature and extent of that damage. Thus, if the plaintiff has introduced evidence which shows that the plaintiff's damage was proximately caused by the defective product, the plaintiff is entitled to an instruction on such damage. The amount of compensation must be measured by an amount which will fully compensate the plaintiff for the loss and which is fair for the defendant to pay. See *Colvin, supra*.

[8] As the party claiming that a jury instruction was wrong, Boehringer has the burden to show that the

questioned instruction was prejudicial or otherwise adversely affected a substantial right of the corporation. See *Vredevelde v. Clark*, 244 Neb. 46, 504 N.W.2d 292 (1993). We agree with Boehringer's assertion that generally the measure of damages to personal property is the difference between the market value immediately before and immediately after the injury. However, a general rule does not apply in this situation.

In this action based on strict liability, the damages which the Dorns are entitled to recover are those damages which reasonably compensate them for their loss proximately caused by Boehringer. The market value of the cattle before they were damaged minus the market value of the cattle after they were damaged would be part of the damages if the cattle had died instantly. Boehringer's proposed instruction recognizes that if the vaccine caused the injury, the Dorns are also entitled to recover the reasonable costs associated with any veterinary care for the treatment of the cattle which was proximately caused by Boehringer's product. Boehringer objects to including as damages costs for freight, processing, feed, yardage, and additional labor.

*9 [9] Where some of the animals survive an injury, the measure of damages should include the reasonable costs of treating the sick animals which would not have been incurred but for the injury. If the Dorns' evidence established that but for the use of the defective vaccine, the Dorns would not have incurred such costs, then an instruction on such issue was proper.

For Boehringer to establish that its instruction on damages should have been given, Boehringer must show that it was prejudiced by the court's refusal to give the tendered instruction, that the tendered instruction was a correct statement of the law, and that the tendered instruction was applicable to the evidence of the case. See *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). We find that Boehringer has not met this burden. Obviously, the refusal to submit Boehringer's instruction to the jury was prejudicial to Boehringer, but the tendered instruction did not set forth all of the damages the jury was entitled to consider.

The key in determining the proper measure of damages is whether the damages fairly compensate the plaintiff yet do not impose a greater burden than is reasonable upon the defendant. See *Colvin v. Powell & Co., Inc.*, 163 Neb. 112, 77 N.W.2d 900 (1956). When the cattle became sick, the Dorns had increased costs for feed, processing, and yardage, and for extra labor in tending the sick cattle.

Once the cattle became sick, they had no market value until they recovered. The Dorns continued to treat the sick animals because they did not know which would survive. The costs for the Highmore and Miles City cattle increased because the cattle had to be confined and given a more costly prepared feed, while the healthy cattle were turned out into the cornstalks, which was less expensive.

[10] We find that the court did not err in giving its jury instruction on damages. All of the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no error. *Vredeveld, supra*.

[11] The amount of damages to be awarded is to be determined only by the finder of fact, and the appellate court will not disturb that finding if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Schuessler v.*

Benchmark Mktg. & Consulting, 243 Neb. 425, 500 N.W.2d 529 (1993). A verdict in a civil case will be sustained if the evidence, when viewed and construed most favorably to the prevailing party, is sufficient to support that verdict. *Haselhorst v. State*, 240 Neb. 891, 485 N.W.2d 180 (1992). The jury decided the issues, and its decision is supported by competent evidence. The jury heard evidence concerning the background and preparation of the vaccine and the testimony of the witnesses who attributed the cause of death and illness to the vaccine. Viewing the evidence most favorably to the Dorns, we find that it is sufficient to support the verdict, and we decline to overturn the decision of the jury. The judgment of the district court is affirmed.

***10 AFFIRMED.**

End of Document

© 2014 Thomson Reuters. No claim to original U.S. Government Works.