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Hurtado v. Land O'Lakes Appellant's Reply Brief Dckt. 38406

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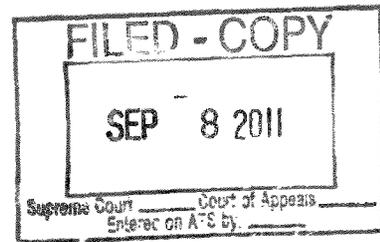
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IN THE SUPREME COURT OF THE STATE OF IDAHO

JESUS HURTADO and JOHN REITSMA, d/b/a J&J CALF RANCH;)	
)	
Plaintiffs-Respondents-Cross Appellants,)	SUPREME COURT
)	DOCKET NO. 38406
vs.)	
)	
LAND O'LAKES, INC., a Minnesota corporation, and LAND O'LAKES PURINA FEED, LLC,)	
)	
Defendants-Appellants-Cross Respondents,)	
)	
and)	
)	
VALLEY-CO-OPS, INC., an Idaho corporation; JOHN DOES and JANE DOES I-X; and JOHN DOE CORPORATIONS I-V,)	
)	
Defendants.)	



APPEAL FROM THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT FOR TWIN FALLS COUNTY
(The Honorable Randy J. Stoker presiding)

APPELLANTS' REPLY BRIEF

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A. THE “SCIENCE EXPERIMENT”

Respondents argue that this case is “the most conclusive of scientific experiments”, Respondent Brief p.5, arguing that there was only one variable in the comparison of the feed between the heifer calves and the bull calves — that being the milk replacer sold by Land O’ Lakes in spring and summer of 2005, it urges the court to uphold the verdict. ***Implicit is the argument is that this “experiment” was carefully done, properly documented, consistent with other available data and the results are reproducible.*** Using the respondents analogy and comparing it to the evidentiary rules governing this case, one can easily see the falsehood of the argument and should prompt this court to reverse the jury verdict and either order a new trial or enter judgment in favor of the Appellant.

A science experiment is part of the scientific method. The scientific method is composed of four elements: 1) observation of a phenomena or group of phenomena; 2) formulation of a hypothesis to explain the phenomena; 3) use of the hypothesis to predict an outcome; 4) performance of experiments to test the predictions in properly controlled environments and under circumstances where the results can be reproduced by independent investigators.¹

This science experiment fails for numerous reasons.

The experiment — feeding allegedly adulterated milk replacer to the heifer calves while feeding unadulterated government milk to the bulls — had no start date. Hurtado and his employees could only claim that sometime in April, May or June they noticed an increase in heifer calf deaths. Tr. 156 L. 9-16 Tr. 170 L.4-7. Tr. 172 L. 17-25 Tr. 173 L. 7-14. This was

¹ The scientific method is the process by which scientists, collectively and over time, endeavor to construct an accurate (that is, reliable, consistent and non-arbitrary) representation of the world. Recognizing that personal and cultural beliefs influence both our perceptions and our interpretations of natural phenomena, we aim through the use of standard procedures and criteria to minimize those influences when developing a theory. As a famous scientist once said, "Smart people (like smart lawyers) can come up with very good explanations for mistaken points of view." In summary, the scientific method attempts to minimize the influence of bias or prejudice in the experimenter when testing an hypothesis or a theory. Frank Wolfs, University of Rochester, Wikipedia

after they were told that the milk replacer which J & J had been buying was going to be manufactured at Black River Falls, Wisconsin rather than Chilton, Minnesota. This was not such a big change because the Black River Falls facility had been producing milk replacer since 2001. Tr. 329 L. 11-16. There were no records kept of heifer and bull calf death losses before that period of time in which to have a comparison of the alleged increase in death losses from prior years. Hurtado testified in his deposition that there were no such records, but then testified with amazing accuracy as to what the increase in death loss was without any documentation to support it. Tr. 165-166. Tr. 139 L. 21-22.

In the middle of this “science experiment” Hurtado obtained a completely new lot of milk replacer from Valley CO-OP after he discussed the matter with Scott McFarland, who replaced the original Purina Milk Replacer with a lot produced on a different date. ***But, this did not change the problem.*** Tr. 317 L. 1-19.

The persons in charge of the “science experiment”, Claudio Beltran, Francisco Cervantes, and Luis Lugo, told wildly divergent and inconsistent stories about when the deaths began, when they ended, and how many calves died. Tr. 216-218 (Cervantes unknown number of dead calves); Tr. 230 (Lugo 10-12 dead calves per night totaling more than 300); Tr. 242 L. 9-21 (Beltron 450 dead calves).

The “science experiment” had no end date. Again Hurtado, Beltran, Cervantes and Lugo gave inconsistent dates as to when they quit feeding the allegedly adulterated Purina milk replacer, thereby ending the heifer calf deaths.

In fact the “science experiment” continued long after the claimed end date because Hurtado continued to buy the very same milk replacer which he claimed was contaminated through October of 2005 — long after the elevated death rates ended. Trial Ex. 1007 (Valley CO-OP records of sale of Purina Milk Replacer to J & J in 2005).

The alleged poisonous milk replacer that McFarland picked up and replaced- approximately 2 tons- was sold in the open market in the same geographic area without problem. Tr. 317.

Hurtado made inconsistent and irreconcilable statements to his “expert”, Mr. Brad Brudevold, about when the problem with the milk replacer began. Hurtado sold Brudevold that the problem started about 2 weeks before the end of August when he went to the calf ranch to look at the calves and obtain milk and fecal samples. Tr. 81 L. 2-19. Tr. 98-99. Ex. 1033.

No testing was done to determine the actual cause of death of any of the heifer calves. It is undisputed that necropsies (autopsies) are one of the most important investigative tools to determine the cause of death of a heifer calves. Tr. 250. Tr. 182 L. 23-25 Tr. 183-186.

None of the “science experiment” subjects — dead calves or allegedly adulterated milk replacer was retained for independent examination. In fact, the only parts of the “science experiment” that Respondent’s actually put through a scientific analysis, fecal samples from sick calves and a sample of milk replacer, suggested another culprit for the alleged calf deaths — cryptosporidia. Tr. 275-276 (Dr. James England DVM); Tr. 447-450 (Dr. Richard Huston DVM).

J&J Calf Ranch had available modern investigative tools to determine the cause of death of the heifer calves but in every instance rejected those tools. Autopsies of the dead calves were not performed. Hurtado previously used this scientific method to determine the cause of a previous scours outbreak. Tr. 185-198. The Caine Veterinary Teaching Center had available qualified staff to go to the calf ranch to pinpoint the cause of the scours outbreak. Tr. 270-271 L. 1-7. TR. 287-289. Hurtado was willing to have fecal samples and milk replacer tested but when those tests did not support his claim of adulterated milk replacer he chose to ignore them. Finally, Hurtado’s own belatedly disclosed “expert” Brad Brudevold made it clear that there was

at least one independent test which could have been done to determine the efficacy of the milk replacer which was not done by Hurtado. Tr. 79-80 Tr. 126 L. 22-25, 127.

The refusal to use any of these modern scientifically reliable tests to prove or disprove Hurtado's claims brings to mind "scientific tests" from other eras to determine a fact in issue. "Spectral Evidence" relied upon by the "Salem Witch Trials" judges have long since been rejected as an unreliable method to prove a defendant guilty of witchcraft. "Ducking"—tying a defendant's hands and feet together and then tossing him in a deep body of water to see if he would float and thereby determining guilt or innocence has long since been determined to be a scientifically unsound method of proof. While these extreme examples are universally rejected today they point to the fact that science and technology have advanced and old methods are no longer tolerated when new methods of proof are readily available to sustain a case. Advances in scientific tests and investigation should be required to eliminate unnecessary "circumstantial evidence" and the accompanying speculation and unsubstantiated claims regarding calf death losses on a dairy farm when easily available and affordable scientific tests would make such proof more compelling and more reliable.

B. EXPERT TESTIMONY OF HURTADO AND BRUDEVOLD

These facts are reiterated in this reply brief as they relate to the testimony of at least two persons, Jesus Hurtado and Brad Brudevold, who were allowed to testify as expert witnesses over the objection of the Appellant. Since the United States Supreme Court decision in the case of *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 Supreme Court 2786, 125 Lawyers Edition 2nd 469 (1993), the Idaho Supreme Court has worked on tightening up the admissibility of scientific evidence at the district court level. Idaho Rule of Evidence 702 states, "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.” The inquiry under IRE 702 is whether the expert will testify to scientific knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue even if the experts’ opinion is not commonly agreed upon.” See, *State v. Merwin*, 131 Idaho 642, 646, 962 P2d. 1026, 1030 (1998). This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue.” See, *Daubert*, *supra*. In *State v. Trevino*, 132 Idaho 888, 893-94, 980 P2d. 552, 557-58 (1999) this court observed “the trial judge is assigned the task of ensuring that experts’ testimony both rests on a reliable foundation and is relevant to the task at hand. *Citing Daubert* at 598-599. In other words, for scientific evidence to be admitted it must be supported by appropriate validation establishing a standard of evidentiary reliability and must assist a trier of fact to understand the evidence or to determine a fact in issue. *Id.* at 590-91.

In the case of *Swallow v. Emergency Medicine of Idaho P.A.*, 138 Idaho 589, 67 P3d 68 (2003) the Idaho Supreme Court wrote that the district judge has the obligation to not only determine if a witness was qualified as an expert but also to determine whether or not there was a scientific basis for the expert’s opinion. The court said this, “to be admissible the expert’s testimony must assist the trier of fact to understand the evidence or to determine a fact in issue and expert opinion that is speculative or unsubstantiated by facts in the record is inadmissible because it would not assist the trier of fact to understand the evidence or determine a fact that is at issue” *Bromley v. Garey*, 132 Idaho 807, 979 P2d. 1165 (1999). When the experts’ opinion is based upon scientific knowledge there must likewise be a scientific basis for that opinion. If the reasoning or methodology underlying that opinion is not scientifically sound then the opinion will not assist the trier of fact to understand the evidence or determine a fact at issue. The court

went on to say, “The foundation for the admission of opinion testimony based upon scientific knowledge includes both that the witness be an expert in the field and that there is a scientific basis for the experts’ opinion.” *Swallow* at 592, 67 P3d 68, 72. In *State v. Faught*, 127 Idaho 873, 908 P2d. 566 (1995), the admission of expert opinion testimony linking Defendant to crime based upon DNA evidence was upheld where witness was qualified as an expert witness in the field and the statistical base used in determining the frequency of a random DNA match was scientifically reliable”. See also *State v. Gleesin*, 123 Idaho 62, 844 P2d. 691 (1992) regarding the admissibility of opinion testimony concerning the horizontal gaze nystagmus (HGN) test. See *State v. Rogers*, 119 Idaho 1047 812 P2d. 1208 (1991) concerning the admission of testimony regarding the interpretation of blood splatter evidence where evidence showed that blood splatter analysis was a well-recognized discipline based upon the laws of physics and that the witness were sufficiently qualified to testify as an expert regarding blood splatter evidence.

In *Swallow, supra* the district court made the determination that an expert witness, Dr. Tomoso, would not be allowed to testify that the ingestion of the drug Cypro tended to cause cardiac arrest or myocardial infarctions. The Supreme Court upheld that the judge’s decision excluding the testimony because of a lack of scientific evidence supporting a connection between Cypro and myocardial infarctions.

1. HURTADO’S TESTIMONY

Comparing these rules to the testimony of Jesus Hurtado one can draw the following conclusions: Hurtado was qualified as an expert in several respects: (1) He was qualified to testify regarding dairy calf operations and health measures used to protect young calves from illness, (2) He was qualified to testify as to whether or not young calves were suffering from scours (a disease more commonly known as dehydration), (3) He was qualified to testify that scours can cause death amongst dairy calves if it becomes severe enough. However, he was not

qualified to draw a correlation as to the cause of death of the One Hundred Thirty (130) calves that he claimed died as the result of the ingestion of Land O'Lakes milk replacer because he had not done any investigation or testing to actually determine the cause of death of the calves.² The Respondent recognizes that oftentimes a Plaintiff is given latitude with respect to testimony concerning causation at trial but, the Supreme Court should not blink at the unsupported and unsubstantiated testimony of Hurtado and his employees with respect to the cause of death in the calves in this case. As previously pointed out, there are scientifically reliable methods for the investigation and determination of scours and causes of death readily available to dairy operations that were not used by Hurtado in this instance.

Finally, Hurtado could point to nothing in the milk replacer that would tend to cause the death of calves beginning sometime in the spring of 2005 (maybe April, maybe May or maybe June) and ending in August 2005. In other words, there is nothing to indicate that there was something wrong with the milk replacer during this period of time which allegedly caused calf deaths. The district court committed error when it allowed this testimony over the objection of the Defendants. Tr. 131- 139. Further, the court committed an error when it failed to grant a directed verdict in favor of the Plaintiffs in light of the failure of the proof of Plaintiffs with respect to any scientifically reliable evidence to support the cause of the death of the calves in question.

In *Coombs v. Curnow.*, 148 Idaho 129, 219 P3d. 453 (Idaho 2009) the court made these observations regarding the admissibility of expert testimony. The court must evaluate “the experts ability to explain pertinent scientific principles and to apply those principals to the

² Hurtado never did explicitly testify as to the cause of the death. He claimed a temporal correlation between two events—feeding milk replacer from Black River Falls and an increase in heifer calf deaths. This was also true for the testimony of Beltron, Lugo and Cervantes. This court should reject this type of temporal evidence as the basis for a “prima facie” circumstantial evidence case if for no other reason that it fails to exclude other reasonable explanations for the outbreak of scours and deaths of calves.

formulation of his or her opinion. Admissibility therefore depends on the validity of the experts reasoning and methodology rather than his or her ultimate conclusion.” *Ryan v. Beisner* 123 Idaho 46, 46-47, 844 P2d. 28, 28-29 (Id. App. 1992). So long as the principles and methodology behind a theory are valid and reliable the theory need not be commonly agreed upon or generally accepted. *Weeks v. E. Idaho Health Service*, 143 Idaho 838, 153 P3d. 1148. The court must distinguish scientifically sound reasoning from that of the self-validating expert, who uses scientific technology to present unsubstantiated personal beliefs, but it may not substitute its judgment for that of the relevant scientific community. *Ryan v. Beisner, supra*. Relevant considerations in determining whether the basis of an expert’s opinion is scientifically valid include “whether the theory can be tested and whether it has been subjected to peer review and publication.” *Weeks*, 143 Idaho 838, 153 P3d. 1184 and *Daubert, supra*. Other indicia of reliability include “the close oversight and observation of the test subjects, the prospectively and goal of the studies,...the presence of safe guards in the technique,...analogy to other scientific techniques whose results are admissible,...the nature and breath of the differences drawn,...the extent to which the basic data are verifiable by the court and the jury and the availability of other experts to testify and evaluate the technique, and the proven significance of the evidence in the circumstances in this case.” *State v. Konechny*, 134 Idaho 410, 417-18, 3 P3d. 535, 543-45 (Ct. Appl. 2000). The Supreme Court reiterated its opinion from the Swallow case in which it stated, “An expert’s opinion does not meet the requisite standard of reliability when it is based upon the mere temporal connection between the administration of the drug and a particular consequence.” *Swallow v. Emergency Medicine of Idaho P.A.*, 138 Idaho 589, 593, 67 P3d. 68 72 (2003).

2. BRUDEVOLD’S TESTIMONY

Applying these rules to the “expert” opinion of Brad Brudevold it is clear that he should not have been allowed to testify as an expert. First, he was not properly disclosed as required by

Rule 26 (b)(4). Further, his opinions were not properly disclosed. The court was given a chance to rule on those issues before the trial and elected not to do so. That left the defendant to defend against expert opinion regarding claimed nutritional defects in the milk replacer nutrition which had not been properly disclosed and further had never been tested.

Brudevold's involvement in this case was limited to a discussion with Hurtado regarding a scours problem with the calves, a cursory examination of some of the sick calves, gathering samples of milk replacer and fecal samples from sick calves and delivering them to the Caine Veterinary Teaching Center for analysis. With this limited involvement Judge Stoker elected to allow him to testify that there was a nutritional problem with the milk replacer and to criticize and marginalize the findings of the Caine Teaching Center without having done any additional independent testing, investigation or analysis of the sick calves or the milk replacer itself. These opinions were nothing more than Brudevold's own personal and self serving opinions—the kind of opinions that this court has rejected as scientifically unsound. As Brudevold admitted, a sample of the milk replacer should have been sent to an independent lab for analysis to settle this issue. The bottom line is that there is no scientifically reproducible test that was performed that demonstrated that Purina milk replacer was somehow poisonous during a four month period in 2005 at one isolated calf ranch in Idaho but no where else in the country.

C. ATTORNEY'S FEES

Attorney's fees are appropriately awarded to the prevailing party in cases involving commercial transactions. I.C. §12-120(3). *Walker v. American Cyanamid Co.*, 130 Idaho 824, 948 P2d 1143 (1997). In the event that this Court affirms the verdict and findings of the district court, the Court should affirm the award of attorney's fees awarded by the district court for the reasons set forth in the district court's decision. Respondent's attorney had the case on a contingency basis and that represents a fair compensation, which is not unreasonable.

CONCLUSION

The Appellant LOL finds it unconceivable that it is found liable for a breach of an implied warranty of merchantability for its milk replacer which it produces in the millions of tons and ships it around the country and the northern hemisphere. The unrefuted testimony of Steve Zadnichak, Tr. 333-337, Ron Karstens, Tr. 523-532, Bob Resiberg, Tr. 413-415, and Scott McFarland support the contention that the milk replacer was not poisonous when it left the Black River facility.

Further, the Plaintiffs failure to exclude at least one other reasonable explanation for the scours, that being Cryptosporidia, should persuade this court to look carefully at evidence that was introduced and find that district court abused its discretion in allowing the testimony of Hurtado or Brudevold as to causation. Alternatively, that the plaintiff's failed to exclude other reasonable explanations for the calf losses. This court should reverse the verdict and either order a New Trial or Judgment Notwithstanding the Verdict.

Respectfully submitted,



David H. Maguire
MAGUIRE & PENROD

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was:

- mailed, postage prepaid
- hand delivered
- faxed
- e-mailed

to the following, this 6th day of September, 2011, and addressed as follows:

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