

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

HOFFBAUER V. FARMERS COOP

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ALLEN HOFFBAUER ET AL., APPELLANTS,
V.
FARMERS COOPERATIVE, APPELLEE.

Filed October 2, 2012. No. A-11-962.

Appeal from the District Court for Seward County: ALAN G. GLESS, Judge. Reversed and remanded.

Matthew D. Hammes, of Locher, Pavelka, Dostal, Braddy & Hammes, L.L.C., for appellants.

James B Luers and Renee Eveland, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellee.

IRWIN, SIEVERS, and PIRTLE, Judges.

SIEVERS, Judge.

Allen Hoffbauer and Karen Hoffbauer, husband and wife, and Lillian Skolnik, Karen's mother and the owner of the property involved in this suit (collectively the Hoffbauers), filed a complaint against Farmers Cooperative (the Coop) claiming that the Coop sold them a 121-gallon container of glyphosate, under the trade name Rascal Plus (Rascal), which was contaminated with an ACCase inhibitor, and that the application of such substance killed their corn crop. Their theories of recovery were negligence, breach of the implied warranty of merchantability, and breach of express warranties. The district court for Seward County granted summary judgment in favor of the Coop, and this appeal followed. After viewing the evidence in the light most favorable to the Hoffbauers, as our standard of view dictates, we reverse, and remand.

FACTUAL BACKGROUND

Allen testified by deposition that he and Karen “share rent” all of the land involved in this lawsuit from Lillian and that he farms the land with the assistance of his neighbor, Dan Kouma (Dan). Dan has been assisting the Hoffbauers in the planting, fertilizing, and harvesting of their crops for the past 10 to 15 years in exchange for similar assistance from Allen with the farming of his land. At the end of each year, Allen and Dan compare the labor they provided to one another, and in the event one person provided more labor than the other, that person is paid money in order to “settle up” the balance.

Allen testified that sometime in May 2009, he placed an order with the Coop’s Milford plant for a 121-gallon “shuttle” of Rascal. A shuttle is the vessel the Coop uses to transport the chemicals it sells in bulk to the customer. Rascal, a generic brand of Roundup, is a weedkiller and an herbicide that does not damage “Roundup-Ready” corn and soybeans. Allen testified that at the time he purchased the 121-gallon shuttle of Rascal from the Coop, he was growing about 121 acres of “Roundup-Ready” corn and about 121 acres of “Roundup-Ready” soybeans on Lillian’s land.

Allen testified that he also attempted to plant wheat in October 2008, but an insurance adjuster viewed the wheat and said there was not enough of a yield for it to be insurable. So, Allen had Dan “burn” the approximately 52-acre wheatfield by applying some of the Rascal he received from the Coop in the summer of 2009, because Rascal is deadly to wheat. Allen testified that he also had Dan do a “burn down” of his fields of corn and soybeans with Rascal from that same shuttle. A “burn down” in this context is simply an application of an herbicide to crops, either to kill the crop (such as the wheat) or to kill the weeds that may be growing in the crop, as Dan testified he did to the Hoffbauers’ “Roundup-Ready” corn and soybeans.

It is undisputed that ACCase inhibitors are deadly to corn. There are both preemergent ACCase inhibitors, which are applied to the soil before a plant emerges, and postemergent ACCase inhibitors, which are applied to a plant after it emerges from the soil. Fusilade is a postemergent ACCase inhibitor that, according to the testimony, kills corn but not soybeans. Both parties’ experts are in agreement that the culprit behind the damage to the Hoffbauers’ corn was the application of a postemergent ACCase inhibitor. However, when and how that ACCase inhibitor came to be applied to the corn is in dispute. The Hoffbauers claim that the Coop’s shuttle was contaminated with an ACCase inhibitor when they received it. The Coop claims the shuttle or sprayer became contaminated after its delivery, most likely by Dan, who admits to having purchased Fusilade from the Coop and applying a mixture of Fusilade and Rascal on his soybeans in June or July 2009 in order to kill volunteer corn with the Fusilade and weeds with the Rascal in the field of “Rascal Ready” soybeans.

Allen testified that the corn at issue was planted on May 5 and 6, 2009, and that he had Dan first apply the Rascal to the cornfield on May 14. Dan’s deposition testimony was that when he applied the first spray, the corn “would have just barely been poking [out of the ground].” Dan was asked whether he had an explanation as to why the first spray was not deadly to the corn if the Hoffbauers’ shuttle was contaminated with an ACCase inhibitor at the time they received it from the Coop. His response was “[b]ecause the corn really wasn’t out of the ground yet, it was just -- the ground would have been protecting it.” When Dan was asked to specify

how far out of the ground the corn was poking at the time of the first spray, he testified, "Well, not enough for me to be able to see it coming out of the ground from the sprayer." Dan further testified that he likely "spot sprayed" only the areas that needed it at the time of the first spray on May 14, as opposed to spraying the Hoffbauers' entire cornfield. He testified, "I'm guessing I probably spot sprayed. That's normally our practice so that's why I'm saying that." He testified that his "spray book" could verify whether or not he had spot sprayed the Hoffbauers' corn on May 14 and precisely how many gallons of Rascal he used for that spray. However, Dan's "spray book" was not entered into evidence, nor was there further testimony about its contents.

Dan's second application of Rascal to the Hoffbauers' corn was on June 24, 2009, and according to Allen, the corn was "no more than knee high" at that time. Allen testified that the damage to the corn appeared sometime shortly after July 4. Dan also testified that the corn was about knee-high when he applied the Rascal on June 24 and that the corn "looked good" at that time. Dan testified that he returned the Hoffbauers' shuttle to the Coop shortly after June 24 and that then a week or two thereafter, he first observed damage to the Hoffbauers' corn.

However, Dan testified that there were about 25 acres of the Hoffbauers' cornfields that were not damaged after the second application of Rascal. When Dan was asked if he had an explanation as to how those 25 acres were not harmed, he replied that it was because he used noncontaminated Rascal out of his own shuttle for that portion of the cornfield. He testified that he had just sprayed his own cornfield with Rascal out of his shuttle and that when he was finished with his field, he used up the rest of the Rascal remaining in his sprayer on the 25-acre strip of Hoffbauer corn that ultimately did not suffer damage. Dan testified that he then immediately filled up his sprayer from the Hoffbauers' shuttle and sprayed the rest of their corn--and it was that portion of their field that was ruined.

Dan testified that he also grows soybeans on his land and that he sprayed some of his soybeans in "June or July" 2009 with a mixture of Rascal and Fusilade purchased from the Coop's plant in Dorchester, Nebraska. He testified that he only has one sprayer and that he uses it to spray Fusilade as well as Rascal. He specifically testified that he did not spray any of the Hoffbauers' crops with Fusilade. Dan testified that to clean the sprayer after a Fusilade application, he fills it with water and runs about 4 gallons of ammonia through it and then he "agitates" the sprayer and the nozzles, takes off all the filters and cleans them out, and then fills it up with ammonia again, agitating it with water only. He then lets the water run out. Dan testified in the negative when he was asked whether he had any documentation showing that he cleaned the sprayer out after using the Fusilade and Rascal mixture on his soybeans in the summer of 2009, and he replied:

No, I don't. But, however, when I did spray [the Hoffbauers' damaged cornfields on June 24], I just came from [my] field, spraying corn, and that's where I sprayed the 25 acres or so [of the Hoffbauers' undamaged corn], went home and I filled up automatically right away and came right back to the field. The only difference was I filled up out of the shuttle that was marked for [the Hoffbauers] rather than my shuttle. And that is where the contaminated product came from.

After Dan observed the damage to the Hoffbauers' cornfield (about a week or two after he returned their shuttle to the Coop), he went to the Coop to address the issue. He testified that

he spoke to Jerry Nauenburg, the manager at the Coop's plant in Milford, Nebraska, for 19 years, "face-to-face" and said "hey, something's going on here with [the Hoffbauers'] corn. I don't know what it is, but something is." Dan testified that the "whole [corn] plant was just looking sick and turning yellow." Dan testified that he and Nauenburg then went and searched for the Hoffbauers' shuttle to see if they could get a sample of any remaining substance within it. Dan testified that they found the shuttle and that Nauenburg said "he would talk to someone [about getting a sample]." Dan testified that there was definitely something still in the shuttle because he noticed it "slushing" around.

Nauenburg's deposition testimony was that during May and August 2009, he supervised nine full-time employees of the Coop and dealt with customer complaints. He testified that he never had a complaint similar to the Hoffbauers', i.e., the wrong mixture of chemicals sent out in a shuttle, nor had he heard of such a complaint to the Coop in the past. Nauenburg testified that the Hoffbauers placed their Rascal order with the Coop and that he then told whoever was in the warehouse at that time to prepare a 121-gallon shuttle of Rascal so that another employee of the Coop, who has since retired, could pick it up and deliver it to Dan's farm--which is where the Hoffbauers' shuttle was stored. Nauenburg could not specifically remember filling the Hoffbauers' order, but he explained the general process of filling a shuttle order as follows:

[Nauenburg:] We . . . run off of a weight system. We go open the tank valve -- you've got to physically open two valves to fill.

Q. On the shuttle or on --

A. On our bulk tanks. And then from there we plug in the weight, because that stuff weighs like 9.7 pound[s] per gallon for instance, times 120, and it goes into the Koehler system, an automated system, and then from there we pump it out of there into the shuttle.

Q. Okay, so from the bulk tank, you're filling up another tank that weighs it?

A. Yes, that weighs it.

Q. And then from that you fill up the shuttle?

A. Yes.

Q. This object that you put the material in to weigh, what do you call that, the Koehler system?

A. Yes, it's a stainless steel tank.

. . . .

Q. How big are those?

A. Mine is 280 gallon[s], or 2,500 pounds.

Q. What types of materials are put into that Koehler system?

A. Everything runs through the Koehler system.

Q. When you say everything, can you tell me what that is?

A. There would be -- well, we got like the Rascal, we've got Roundup Power Max, there's Touchdown. That time of year, that's the only ones that are running through.

Nauenburg testified that they do not sell any kind of grass killers used to kill "Roundup-Ready" corn in bulk. He testified that, besides Roundup, the only other types of chemicals or fertilizers

that go into the Koehler system that kill grass are preemergent herbicides. Nauenburg testified that “nothing” would happen if you put a preemergent herbicide on standing corn.

Nauenburg testified that between fills of the different products in the Koehler system, they rinse the system out with “less than a quart” of water. Nauenburg testified affirmatively when asked if there might be a little water left in the system after each rinse that is inadvertently added to the next shuttle along with whatever substance it is being filled with. Nauenburg testified that the shuttles are not rinsed out after they are returned by customers, “unless [they’re] dirty or something.” Nauenburg says he can tell whether the shuttle is dirty, i.e., not empty, by taking the cap off, looking into the bottom of it and smelling it. He testified, “I’ve done this for years [smelling the shuttles], it’s a good test, everything has got its distinct smell, you can tell.” Nauenburg testified that the Coop does not have any shuttles designed to handle Fusilade or any shuttles designed to handle grass herbicides intended to kill “Roundup-Ready” plants.

Nauenburg testified that he spoke with the Hoffbauers about taking a sample of the substance remaining in the shuttle they returned to the Coop, but that he told them a sample was not possible because the shuttle was empty. Nauenburg testified in that regard:

As I recall, [Allen] wanted a sample taken, but when it’s completely empty you can’t take a sample of anything, there’s nothing in it, and I wasn’t really concerned because I seen [sic] what that corn looks like, and you see it every year, it’s just like somebody has got to get the sprayer cleaned out good. And I’m not saying anything bad about Dan . . . but it happens to everybody.

Nauenburg testified that he told Allen the shuttle was empty and that it had already been “put back into service.” He testified that he does not recall telling Dan that he would obtain a sample from the shuttle. As expressed above, Dan’s testimony was that Nauenburg said he would “talk to someone” about getting a sample.

Nauenburg testified that none of the shuttles in use at the Milford plant during the summer of 2009 ever had Fusilade or any other type of ACCase inhibitor in them. He testified that he had no record of who used the Hoffbauers’ shuttle before they did, nor any record that the shuttle was dry when they returned it or to whom it was delivered thereafter.

The Hoffbauers’ expert, Lowell Sandell, and the Coop’s agronomy expert, Jerry Baysinger, both testified via deposition. The expert status of neither witness is contested on appeal, and thus we dispense with recounting their credentials. Sandell’s summary report in evidence, which is in the form of an e-mail to Karen, states that the corn exhibited classic symptoms of an ACCase inhibitor injury. “This was clearly a misapplication [of an ACCase inhibitor],” Sandell opines in the e-mail. He continues, “It is difficult to determine where the ACCase herbicide entered the system. The [Rascal] transport came from a local coop, this was in [the Hoffbauers’] possession for a long period of time, and a neighbor[, Dan], was hired for custom application with his sprayer.”

Sandell’s deposition testimony during direct examination was that he would not expect the shuttle to have been contaminated by the Coop if the corn was not damaged as a result of the first spray on May 14, 2009. Immediately thereafter, on cross-examination, the following exchange occurred:

[Hoffbauers' counsel]: If they had planted the corn in early May and he did a burn-down on the field before the corn had emerged out of the ground, would that cause any damage to the [corn]?

A: If there was Fusilade in there, it is possible that Fusilade would damage the corn.

Q: If no corn had emerged, though, or had come out of the ground, can you say one way or the other?

A: You would have to examine the plant, the unemerged plant. It could be absorbed by the shoot that has not come out of the ground yet.

Q: But typically the way that Fusilade works is it had to come in contact with green leaf?

[Objection on form and foundation by the Coop's counsel.]

A: Its intended purpose is post-emergence, but there can be absorption from the soil solution as well.

Q: That's a possibility.

A: It's a possibility, correct.

On redirect examination, Sandell testified that although it would depend on the size of the dose of Fusilade, if Fusilade were sprayed on the corn on May 14, there would likely be visible damage to the corn. Sandell testified that he observed no damage to the corn that would correlate to a May 14 Fusilade spray.

According to Baysinger's report, the wrong chemical, "presumably Fusilade DX," was introduced into the spray mixture at the time of "post-emergence" application (i.e., the second June 24, 2009, application of Rascal to the corn by Dan) during the mixing and/or loading of the sprayer from an outside container, and not from the shuttle. He opined that if the shuttle had been contaminated with Fusilade at the time of the first May 14 application, the corn would have been damaged or killed as it emerged. His report recites, "Even if the corn was not emerged, there would have been a good chance that the corn would have been significantly injured or killed since most ACCase herbicides have soil activity and an average half-life in the soil of about 15 days (Herbicide Handbook, 8th Ed., page 189)." The report states that the Fusilade DX herbicide label provides for a 60-day replant interval for field corn, "So there is definitely soil activity and crop sensitivity due to applications of Fusilade DX or other ACCase herbicides, requiring this interval or delay in replant." Baysinger's report later recites, "Farmers Cooperative has Rascal in bulk and fills the shuttles from that bulk tank. They however do not have Fusilade DX in bulk and it is unlikely that it could be introduced [to a customer's shuttle] through their bulk delivery [system]."

However, Baysinger testified during his deposition that although it would be "rare," it is possible that the corn could have been sprayed with Fusilade on May 14, 2009, and emerged from the soil without being damaged. The Hoffbauers' counsel then asked Baysinger on what he based his opinion that it would be "rare" for the corn not to be damaged under such circumstance. Baysinger cited to publications referenced in his report that indicate that the damaging chemical components of ACCase inhibitors can exist up to 60 days on a field and have an average half-life of 15 days. He was asked to explain what that meant, and he testified:

The half life is referring to the active ingredient, in this case, it would be the butyl ester form of it with this particular flauzifop or Fusilade DX. As far as the 60 days, that's on the label, and that's what the chemical company with their research and all their findings on their research, that is their limit as far as how soon you can replant for crop safety.

Baysinger testified that he did not have any additional "actual publications" on hand upon which he was basing his opinion and that such opinion was based in part upon his own experience.

PROCEDURAL HISTORY

On May 26, 2010, the Hoffbauers filed a complaint in the district court for Seward County alleging that they purchased a 121-gallon shuttle of Rascal from the Coop and that the Coop improperly delivered a shuttle of Rascal that was contaminated with an ACCase inhibitor, which killed their corn. They also claim that the Coop intentionally failed to obtain a sample of the substance left in the shuttle after it was returned and that the Coop intentionally disposed of said substance without testing it. The causes of action set forth in the complaint are negligence, breach of implied warranty of merchantability, and breach of express warranty. Alleged damages are \$92,553.59, plus "[f]uture uninsured exposure to crop loss due to reduced yield in 2009 in an amount to be proven at trial."

On August 16, 2011, the Hoffbauers filed a motion in limine regarding the testimony of Baysinger, the Coop's expert witness. The motion asserts that certain of Baysinger's opinions do not meet the requirements of Neb. Rev. Stat. §§ 27-702 and 27-703 (Reissue 2008), specifically, his opinion that it is possible that ACCase inhibitors applied to barren ground can damage corn after it emerges from the soil. The motion contends that said opinion is not based upon any "scientifically valid methodology, tests, data or other reliable information. Rather, it is based upon [Baysinger's] own speculation and conjecture." Also on August 16, the Coop filed a motion for summary judgment. The motion alleges that the Hoffbauers do not have sufficient evidence of causation and that the Coop is thus entitled to judgment as a matter of law.

A summary judgment hearing was held on August 31, 2011. On October 18, the district court entered an order that began by overruling the Hoffbauers' motion in limine without additional comment. Then, the order contains a section that states the basic propositions of law applicable to summary judgment proceedings. The key proposition is taken from *Darrah v. Bryan Memorial Hospital*, 253 Neb. 710, 713, 571 N.W.2d 783, 786 (1998), where the court said that "a choice of possibilities do[es] not create material issues of fact for purposes of summary judgment." The trial judge's order then states:

Thus, upon consideration, I find this evidence does not create material issues of fact for purposes of summary judgment nor does this evidence create issues of fact as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

The court then dismissed the action with prejudice and taxed all costs against the Hoffbauers, who now appeal.

ASSIGNMENTS OF ERROR

The Hoffbauers allege, renumbered, that the district court erred in (1) overruling their motion in limine and allowing Baysinger to proffer opinions that lacked the minimum scientific

basis required for admissibility under Nebraska law, (2) granting summary judgment to the Coop on its negligence claim because there was sufficient evidence to create a genuine issue of fact as to whether the Coop sold them a contaminated shuttle, (3) dismissing their action with prejudice without ruling upon their implied and express breach of warranty claims, and (4) failing to consider uncontroverted evidence of the Coop's spoliation of evidence that "would directly prove [their] claims."

STANDARD OF REVIEW

Summary judgment is proper if the pleadings and admissible evidence offered at the hearing show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Ashby v. State*, 279 Neb. 509, 779 N.W.2d 343 (2010). In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the court granted the judgment giving such party the benefit of all reasonable inferences deducible from the evidence. *Federated Serv. Ins. Co. v. Alliance Constr.*, 282 Neb. 638, 805 N.W.2d 468 (2011).

ANALYSIS

Should Trial Court Have Granted the Hoffbauers' Motion in Limine Regarding Baysinger's Expert Testimony?

The Hoffbauers allege that the trial court erred in overruling their motion in limine with respect to Baysinger's expert opinion that "it is 'possible' that an ACCase type herbicide, when *first* applied to a planted field of corn *before* the corn plant(s) have emerged, can then later harm and/or damage the corn plant *after* it emerges from the soil." Brief for appellants at 29 (emphasis in original). The motion states that its basis is that such opinion is lacking foundation, is speculation and conjecture, and fails to meet the standards for expert testimony set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and adopted by our court in *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001).

The Coop claims that this allegation is merely a "red herring" because Dan testified that the corn was poking out of the ground when he first sprayed it on May 14, 2009, and thus, whether a postemergent ACCase inhibitor could damage corn if applied before it emerged from the soil is immaterial. However, as we outlined in our factual background, Dan also testified that "the corn really wasn't out of the ground yet [when he sprayed it on May 14], it was just -- the ground would have been protecting it." When Dan was asked to specify how far out of the ground the corn was poking at the time of the first spray, he testified, "Well, not enough for me to be able to see it coming out of the ground from the sprayer." Viewing the evidence in the light most favorable to the Hoffbauers, as our standard of review requires, we must take the view for summary judgment purposes that the corn had not emerged and was not out of the ground at the time of the first Rascal application on May 14, despite the existence of somewhat contradictory testimony from Dan.

In any event, the opinion from Baysinger's deposition is stated as only a possibility, as he says that spraying an ACCase inhibitor on ground where the planted corn has not yet emerged can "possibly" damage or kill the corn. The motion in limine should have been sustained, as testimony of mere possibilities is not sufficient proof. See, *Golden v. Union Pacific RR. Co.*, 282 Neb. 486, 804 N.W.2d 31 (2011) (Federal Employers' Liability Act plaintiff bears burden of presenting evidence from which jury could conclude existence of probable or likely causal relationship, as opposed to merely possible one); *Veatch v. American Tool*, 267 Neb. 711, 676 N.W.2d 739 (2004) (expert opinion in workers' compensation case based on mere possibility is insufficient, although standard also does not require absolute certainty). That said, the trial court's order granting summary judgment does not indicate that it relied upon or used this testimony. Thus, we are not able to say that there was prejudice from what we conclude was error in overruling the motion in limine. Our ultimate conclusion on whether there was a genuine issue of material fact makes further discussion of this assignment unnecessary.

Was There Sufficient Evidence the Coop Sold the Hoffbauers Contaminated Shuttle to Overcome Motion for Summary Judgment?

The Hoffbauers allege that summary judgment should not have been granted on their negligence claim. They assert that they presented sufficient evidence from which a jury could conclude that the Coop provided them with a shuttle of Rascal that was contaminated with an ACCase inhibitor. We agree.

There is no dispute that the cause of the damage to the Hoffbauers' corn was that an ACCase inhibitor was applied to the field, as both experts agree on that point. The crucial question is, How was the ACCase inhibitor applied when only Rascal was intended to be applied to the corn? The Hoffbauers assert that the Coop supplied them with a contaminated shuttle, which we find a viable theory based on the evidence before us when such is viewed in the light most favorable to the Hoffbauers--as the law requires. The evidence shows that Allen ordered a 121-gallon shuttle of Rascal from the Coop, which was delivered, and that Dan stored that shuttle on his own land. Dan sprayed the corn on May 14 out of the Hoffbauers' shuttle, after which the corn grew as it normally would. Giving the Hoffbauers the benefit of every reasonable inference deducible from the evidence, there is evidence that (1) the corn had not emerged from the soil after its planting 8 or 9 days earlier when this first spray occurred; (2) a postemergent ACCase inhibitor acts by being applied to the green leafy material of the plant and thus the first spray could have been contained with an ACCase inhibitor yet not damaged the unemerged corn; (3) the corn progressed normally to knee height; (4) on June 24, 2009, an approximately 25-acre strip of the Hoffbauers' corn was sprayed by Dan using his sprayer and Rascal from his shuttle and that corn was undamaged; (5) immediately thereafter, Dan refilled his sprayer from the Hoffbauers' shuttle and sprayed the balance of the corn, and it was that portion of the Hoffbauers' corn that was undisputedly damaged by application of an ACCase inhibitor; and (6) there is testimony that neither Dan nor the Hoffbauers added anything to the Hoffbauers' 121-gallon shuttle, such as Fusilade, an ACCase inhibitor which Dan incidentally had purchased for his own use around the time of the second spray.

From this evidence, we conclude that there are genuine issues of material fact with regard to how the ACCase inhibitor reached the corn, including that such happened because the Coop delivered a shuttle for the Hoffbauers that contained an ACCase inhibitor. As such, it was error to enter summary judgment for the Coop on the Hoffbauers' claims of negligence and breach of warranties.

In its brief, the Coop argues that the Hoffbauers have no direct evidence of any tort committed by the Coop and that they are instead relying on a “*res ipsa* type circumstantial proof argument.” Brief for appellee at 16. In support of its argument, the Coop relies in part on *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998), which was cited in the district court's order granting summary judgment in favor of the Coop, as mentioned above. In that case, Robert J. Darrah underwent back surgery after which he developed ulnar neuropathy. Darrah alleged that the ulnar neuropathy was due to the negligence of the hospital, and he filed his claim under the doctrine of *res ipsa loquitur*. Three factors must be demonstrated to trigger the application of *res ipsa loquitur*. *Id.* First, the instrumentality causing the injury must be under the exclusive control of the defendant; second, the injury must be one that would not ordinarily occur in the absence of negligence; and finally, the defendant cannot have an explanation/defense which precludes liability. *Id.* The Supreme Court ultimately found that the district court was correct in granting summary judgment to the hospital because Darrah did not satisfy the first element of the doctrine of *res ipsa loquitur*--exclusive control--because it was unable to determine who owed Darrah a duty of care and who was in exclusive control of the instrumentalities causing his injury. The *Darrah* court said:

The record is unclear as to when and where Darrah's injuries occurred [as such was not immediately manifested after his surgery]. As a result, the court is unable to determine who owed Darrah a duty of care and who was in exclusive control of the instrumentalities causing his injuries. In light of this uncertainty, we cannot say, as a matter of law, that there is no possibility a third party, other than [the hospital], could have caused Darrah's injuries.

253 Neb. at 716, 571 N.W.2d at 788.

Several things are noteworthy about *Darrah, supra*, which make the decision of little assistance in our analysis. First, the surgery was performed by three doctors, none of whom were defendants, and none of whom were agents or employees of the hospital. The evidence indicated that this type of injury probably resulted from pressure placed on the ulnar nerve during or after surgery. Additionally, there was evidence that such injury can “usually be prevented by appropriate elbow padding, body positioning, and arm movement,” but the need for such precautions varies from patient to patient, and that determining how much of Darrah's injuries were caused before, during, or after surgery was nearly impossible. *Id.*

Darrah is a much different case than the present case. First and foremost, the Hoffbauers have not alleged that this is a *res ipsa loquitur* case, and quite obviously, the Coop was not in exclusive control of the shuttle, because it was undisputedly stored on Dan's property prior to its use and after its delivery by the Coop. Moreover, as *Darrah* points out, the core of *res ipsa loquitur* is that the injury is one which would not ordinarily occur in the absence of negligence by the sued defendant. The classic Nebraska case on *res ipsa loquitur* is *Asher v. Coca Cola*

Bottling Co., 172 Neb. 855, 112 N.W.2d 252 (1961), where evidence that a Coke bottle which contained a dead mouse was sealed by the manufacturer was held sufficient to permit the application of *res ipsa loquitur* to the manufacturer notwithstanding that the drink was sold by another. *Asher* stands in stark contrast to *Darrah v. Bryan Memorial Hosp.*, 253 Neb. 710, 571 N.W.2d 783 (1998), where how the ulnar neuropathy was caused and by whom was uncertain, thus precluding application of *res ipsa loquitur*. The Coop argues that it is clear that the Hoffbauers cannot show that there is no possibility that a third party caused the damage. But this is part of the plaintiff's burden to show exclusive control when seeking the benefit of *res ipsa loquitur*. *Res ipsa loquitur* (literally meaning "the thing speaks for itself") is a procedural tool that, if applicable, allows an inference of a defendant's negligence to be submitted to the fact finder, where it may be accepted or rejected. *Roberts v. Weber & Sons, Co.*, 248 Neb. 243, 533 N.W.2d 664 (1995). The doctrine is an exception to the general rule that negligence cannot be presumed. *Id.*

In this case, the Hoffbauers do not allege *res ipsa loquitur*, nor do they seek to use this exception, but, rather, they have alleged breach of implied and express warranties and negligence. Thus, the question on this motion for summary judgment is not whether *res ipsa loquitur* applies, but whether, after viewing the evidence most favorably to the Hoffbauers, there is any genuine issue of material fact. Admittedly, the ultimate inference the Hoffbauers seek, that the Coop provided them with contaminated Rascal, can only come from circumstantial evidence. But as a general proposition, circumstantial evidence is not inherently less probative than direct evidence. *State v. Leibhart*, 266 Neb. 133, 662 N.W.2d 618 (2003), and we must view the evidence most favorably to the Hoffbauers. We acknowledge that there is ample evidence in the record tending to show that the Coop did not deliver a shuttle contaminated with an ACCase inhibitor. But, under our standard of review for summary judgment, it is not our task, nor that of the district court, to select one version or the other of these events.

The Coop also cites us to *Schafersman v. Agland Coop*, 262 Neb. 215, 631 N.W.2d 862 (2001), asserting that the present case is also a case of "fallacious post hoc propter hoc reasoning." Brief for appellee at 19, citing *Schafersman, supra*. The "post hoc propter hoc" logical fallacy is based upon the mistaken belief that because one thing happens after another, the first event was a cause of the second. The Coop claims that this situation is precisely the same as the factual situation presented in *Schafersman*. Again, we disagree.

In *Schafersman*, there was no dispute that 40 bushels of oats John and Eileen Schafersman purchased from Agland Coop to feed their dairy cows were contaminated with "Envirolean 2.5L Swine Concentrate" (Envirolean), a hog premix concentrate that included high-protein minerals, vitamins, and other micronutrients. 262 Neb. at 218, 631 N.W.2d at 867. The Schafersmans alleged that after consuming the feed, their dairy cows became ill or died. The Schafersmans' expert, Dr. Wallace Wass, testified that the problems with the cows were caused by the Envirolean, because the cows that had eaten the Envirolean-contaminated mix became sick. The basis for Wass' opinion was his theory that the cows were afflicted with "multiple mineral toxicity," which Wass claimed could result when a number of potentially toxic minerals were simultaneously fed to cows in otherwise-tolerable quantities. *Id.* at 218, 631 N.W.2d at 868. Wass admitted that no minerals were present in the feed that were, singly, above scientifically accepted toxic or even tolerable levels. The Supreme Court found that Wass' testimony was not

scientifically reliable and that without it there was no causal connection between Envirolean and the cows' illnesses and deaths. The opinion recites, "Essentially, the only basis for Wass' opinion, other than his theory of multiple mineral toxicity [a theory which was found to flunk the *Daubert* test for admissibility], was that since the cows consumed the feed and then became ill, the feed must have caused the illness." *Id.* at 223, 631 N.W.2d at 871.

The present case is distinguishable from *Schafersman* because, as stated throughout this opinion, there is no dispute as to what caused the corn to die--the application of an ACCase inhibitor. Rather, the issue is how the contaminant which damaged the corn reached the corn. Unlike *Schafersman*, we are not in a situation where unreliable scientific testimony is the only causal link between the defendant's action and the harm suffered by the plaintiff. Here, what caused the corn to die is undisputed. The issue for us on this motion for summary judgment is simply whether there is a material issue of fact that the ACCase inhibitor reached the corn because of the Coop's acts or omissions. After viewing the evidence most favorably to the Hoffbauers, we must answer that question in the affirmative.

Did Trial Court Err by Dismissing the Hoffbauers' Action Without Ruling on Their Breach of Implied and Express Warranty Claims?

The Hoffbauers' argument in regard to this assignment of error is that the trial court's failure to rule on their claims of breach of implied warranty of merchantability and breach of express warranties means we must reverse as to those causes of action, but we disagree. First, we note that the trial court made no express ruling regarding the warranty claims, but the court "dismissed the action with prejudice." Such clearly is a ruling against the Hoffbauers on their warranty claims because their entire action, containing three theories of recovery, was dismissed. We agree with the Coop's assertion that proof of the breach of warranty theories of relief is predicated on the Hoffbauers first proving a contaminated chemical was sold by the Coop. For the same reasons as those expressed in the previous section, we find that there is a genuine issue of material fact as to how the ACCase inhibitor was introduced to the corn. The Hoffbauers' theory is that the Coop provided a contaminated shuttle to them. Assuming the Hoffbauers can convince the trier of fact that such was the case, then there would certainly be an issue of material fact on the breach of warranty claims. We thus reverse the trial court's dismissal of the Hoffbauers' claims of breach of express and implied warranty.

Did Trial Court Err by Failing to Consider Evidence of the Coop's Spoliation of Evidence?

The Hoffbauers contend that the Coop intentionally destroyed the remaining contents of their shuttle rather than test it for an ACCase inhibitor and that such "spoliation" should have resulted in the "adverse inference" that the shuttle did in fact contain an ACCase inhibitor. "Spoliation" is the intentional destruction of evidence. *McNeel v. Union Pacific RR. Co.*, 276 Neb. 143, 753 N.W.2d 321 (2008). The intentional spoliation or destruction of evidence relevant to a case raises an inference that this evidence would have been unfavorable to the case or defense of the spoliator. *Id.* The rationale of the rule is that the intentional destruction amounts to an admission by conduct of the weakness of one's own case; thus, only intentional destruction supports the rationale of the rule. *Id.* The inference does not arise where destruction was a matter

of routine with no fraudulent intent because the adverse inference drawn from the destruction of evidence is predicated on bad conduct. *Id.* In Nebraska, the proper remedy for spoliation of evidence is an adverse inference instruction. *Id.*

Dan testified that after he observed the damage to the Hoffbauers' corn, he spoke to Nauenburg "face-to-face" at the Coop and said "hey, something's going on here with [the Hoffbauers'] corn. I don't know what it is, but something is." Dan testified that he and Nauenburg then went and searched for the Hoffbauers' shuttle to see if they could get a sample of any remaining substance within it. Dan testified that they found the shuttle and that Nauenburg said "he would talk to someone [about getting a sample]." Dan testified that there was definitely something still in the shuttle because he noticed it "slushing" around. Conversely, Nauenburg testified that the shuttle was empty when it was returned so there was no sample to be possibly taken and that in any event, he did not recall telling Dan he would obtain a sample. For our purposes on review of a summary judgment, we are obligated to take Dan's version of the facts as true, as such is most favorable to the Hoffbauers. Accordingly, we view the evidence in this regard as if the Coop intentionally destroyed the remaining contents of the Hoffbauers' shuttle and, thus, we apply the "adverse inference" from such spoliation, which is that, if tested, the contents of the shuttle would have contained an ACCase inhibitor.

Here, the issue of whether the shuttle contained an ACCase inhibitor when it was returned to the Coop is material. Based on what we can glean from the record with respect to the procedure for mixing chemicals prior to spraying a crop field, it appears that the chemicals are not mixed inside of the shuttle. Thus, if we apply the inference that the shuttle did contain ACCase inhibitors based on the evidence of spoliation, that tends to disprove that Dan was responsible for exposing the corn to such chemical because ACCase inhibitors were in Dan's sprayer rather than in the shuttle, as the Coop appears to postulate. In any event, the matter of spoliation of evidence by the Coop is an issue for the trier of fact. We might add that our conclusion that there is a genuine issue of material fact for trial is bolstered by such adverse inference. We do, however, emphasize that whether there was spoliation of evidence is an issue of fact to be determined at trial, which will determine whether it actually adds anything to the Hoffbauers' claim.

CONCLUSION

For the foregoing reasons, we reverse the district court's grant of summary judgment in favor of the Coop and remand the cause to the district court for further proceedings.

REVERSED AND REMANDED.