

**SWINE BREEDER BROUGHT ACTION UNDER THE FEDERAL TORT CLAIMS ACT
ALLEGING NEGLIGENCE BY THE NATIONAL VETERINARY SERVICES LABORATORY
IN CONDUCTING AND REPORTING RESULTS OF TEST RESULTS REQUIRED FOR
QUALIFYING PIGS FOR EXPORT TO CHINA.**

Compart's Boar Store, Inc. V. U.S.A, 122 F. Supp. 3d 818 (D. Minn, 2015)

BASIS OF THE COMPLAINT:

Porcine Respiratory Reproductive Syndrome (PRRS) is a viral disease of swine that can spread rapidly through swine herds and may cause pneumonia, lethargy, feeding problems, and spontaneous abortions. The export of pigs to China is governed by an Export Protocol which requires that only swine that come from facilities that have been free of PRRS for at least two years can be exported to China. Compart's Boar Store (CBS) contracted to ship 367 breeding-stock pigs to China.

Swine selected for export to China must undergo a battery of tests and quarantine procedures. (*Note: The opinion of the court contains a description of the testing procedure which will not be discussed here. In short, the test procedure is a four-step process. [1] Blood samples are drawn and subjected to a fluorescence test. [2] The pigs are quarantined and the fluorescence test is performed again. [3] The samples are subjected to a VI test. [4] The samples are again subjected to the fluorescence test. If any of the tests are positive the pigs cannot be shipped.*) After the testing and quarantine procedure of the CBS pigs, the testing lab reported that the last tests performed on some of the swine were "inconclusive". That report ultimately led not only to CBS losing the particular export deal for the swine being tested. But also to CBS being altogether banned from exporting swine to China.

CBS brought five somewhat overlapping claims against the government which the court said boiled down to two allegedly negligent acts: (1) negligent reporting - a claim that the government acted negligently when it reported the results as Inconclusive; and, (2) negligent testing - a claim that the government acted negligently when it conducted the tests. The government argues that the Court lacks jurisdiction over those claims because they fall within various exceptions to the Federal Tort Claims Act (FTCA) waiver of sovereign immunity. The government argues that the discretionary-function exception to the waiver of sovereign immunity bars CBS's claims.

DISCUSSION BY THE COURT:

Negligent Reporting:

The discretionary-function exception deprives the courts of jurisdiction in any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the government, whether or not the discretion involved was abused. Courts undertake a two-part inquiry to determine whether the discretionary-function exception applies.

First, the court asks whether the challenged conduct was discretionary - that is, whether it involved an element of judgment or choice. The exception does not apply if a federal employee is sued for violating a statute, regulation, or mandatory policy that prescribes the specific course of conduct that the employee must follow. If the conduct is deemed to be discretionary, the next step of the inquiry is to ask whether the challenged conduct involved the type of policy judgment that the discretionary-function exception is intended to protect. When government policy provides discretion, an employee exercising such discretion is presumed to be exercising protected policy judgment and the plaintiff has the burden of rebutting this presumption.

CBS argued that reporting the results of the VI test as inconclusive was not discretionary the tests showed no cytopathic effect and was therefore negative. However, that argument misconstrued the standard operating procedure by overlooking the fact that the "Special Notes" to the procedure sets forth the additional step of examining the sample for fluorescence. Thus, CBS cannot show that NVSL failed to follow its standard operating procedure. Additionally, even if CBS could show that NVSL failed to follow standard operating procedure, they cannot show that the standard operating procedure is mandatory. In fact, the only evidence in the record suggests that NVSL personnel have discretion to deviate from it. In short, CBS has failed to establish either that NVSL violated its standard operating procedure or that NVSL's standard operating procedure was mandatory.

The next question is whether the decision to report the results of the VI test as inconclusive involved the kind of policy judgment that the discretionary-function exception is meant to protect. The unusual results of the VI test presented the lab with a dilemma. Incorrectly reporting the results as negative would have undermined China's confidence in NVSL testing and that in turn could have had broad implications for trade with China and harsh consequences for swine breeders in the United States. At the same time, incorrectly reporting the results as positive could have had harsh consequences for CBS. Determining what to do in this sensitive situation plainly involved a high level of discretionary judgment and considerations of public outcry.

Negligent Testing:

CBS alleges that NVSL negligently performed the VI test. CBS cannot identify what NVSL did wrong, but broadly contends that, given the overwhelming evidence that the pigs were not infected with PRRS, somebody at NVSL must have done something wrong to cause the inconclusive test results, basically a claim of *Res ipsa loquitur*. That claim fails for two reasons. First, by invoking *res ipsa loquitur*, CBS is conceding that it cannot identify a specific negligent act or omission committed by a specific employee of NVSL. Thus, CBS cannot rebut the presumption that the allegedly negligent act or omission involved the kind of policy judgment that the discretionary-function exception is meant to protect. Second, even if the court had jurisdiction over this claim, the court would dismiss the claim on its merits. To succeed on a claim of negligence under *res ipsa loquitur* the occurrence must be such that, in the ordinary course of things, would not happen if reasonable care had been used. There is no dispute that the standard of care for laboratory testing is not within the common experience of lay people. Accordingly, expert testimony is necessary to establish that the observed staining of the samples would not have occurred in the absence of negligence. CBS's own expert testified that abnormal results are everyday occurrences in laboratory testing and are "nobody's fault". The Court would grant the government's motion for summary

judgment on the merits of the negligent testing claim, if the Court had jurisdiction over the claim. But, because the Court does not have jurisdiction over that claim, the Court will dismiss the claim without prejudice.

JUDGMENT:

1. Defendant's motion to dismiss or for summary judgment is granted, and this action is dismissed without prejudice for lack of jurisdiction.
2. Plaintiff's motion for partial summary judgment is denied insofar as it seeks a ruling that the court has jurisdiction over this case and denied as moot insofar as it seeks a ruling on the merits of any of the government's defenses.