

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

**IN RE GENETICALLY MODIFIED RICE
LITIGATION**

4:06 MD 1811 CDP

This Document Relates to:

*Gulf Pacific Rice Co., Inc., et al v.
Bayer CropScience LP, et al*
Case No. 4:08-cv-1545-CDP

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’ MOTION
FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANTS’
AFFIRMATIVE DEFENSES NOS. 6 AND 8**

Plaintiffs GULF PACIFIC RICE CO., INC., GULF RICE MILLING, INC., and HARVEST RICE, INC. (collectively, “Plaintiffs”), pursuant to E.D. Mo. L.R. 4.01, file this Memorandum in Support of Plaintiffs’ Motion for Partial Summary Judgment on Defendants’ Affirmative Defenses Nos. 6 and 8, and respectfully show the following:

INTRODUCTION

Defendants have asserted twenty-nine affirmative defenses. This motion relates to two of those defenses. First, Defendants assert that Plaintiffs’ claims are barred or limited by their own negligence, carelessness, and/or comparative fault. SOF ¶¶ 1-2. Plaintiffs move for partial summary judgment on this defense because there is no evidence of any negligence on Plaintiffs’ part that proximately caused the injuries and damages for which they seek recovery from the Defendants. Second, Defendants assert that Plaintiffs have failed to mitigate their damages. *Id.*, ¶¶ 3-5. Plaintiffs move for partial summary judgment on this defense because there is no evidence that Plaintiffs failed to exercise reasonable care in reducing or avoiding their damages,

and there is no evidence of the amount of Plaintiffs' damages that would have been mitigated. Plaintiffs are thus entitled to partial summary judgment on Affirmative Defense Nos. 6 and 8.

SUMMARY JUDGMENT STANDARD OF REVIEW

A party “may move . . . for summary judgment on all or part of the claim.” Fed. R. Civ. P. 56(a). *See, e.g., Blackford v. Action Prods. Co., Inc.*, 92 F.R.D. 79, 80 (D.C. Mo. 1981) (“The award of summary judgment on a portion of a claim is clearly covered by the words of Rule 56(a). It is a not uncommon occurrence, and has been the practice since early decisions applying the Federal Rules of Civil Procedure.”). Summary judgment is also appropriate to dispose of affirmative defenses. *See Gamma-10 Plastics, Inc. v. Am. President Lines, Ltd.*, 32 F.3d 1244 (8th Cir. 1994) (affirming partial summary judgment on defendant’s affirmative defense); *Spirco Envntl., Inc. v. Am. Intern. Specialty Lines Ins. Co.*, No. 4:05 CV 1437, 2007 WL 1460409 (E.D. Mo., May 16, 2007) (same).¹

Judgment “should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *UnitedHealth Group Inc. v. Wilmington Trust Co.*, 548 F.3d 1124, 1128 (8th Cir. 2008). Where a plaintiff uses a summary judgment motion to challenge the legal sufficiency of an affirmative defense, the plaintiff may satisfy its Rule 56 burden by showing an absence of to support an essential element of the defendant’s affirmative defense. *F.D.I.C. v. Giammettei*, 34 F.3d 51, 54 (2d Cir. 1994); *see also Beyer v. Firststar Bank, N.A.*, 447 F.3d 1106, 1107 (8th Cir. 2006) (“Once a movant for summary judgment has ‘[p]ointed out to the district court that there is an absence of evidence to

¹ By convention, Plaintiffs style their motion as one for partial summary judgment. The ruling sought is most accurately described as an “interlocutory summary adjudication” inasmuch as it is not appealable. *Hennepin County v. Aetna Cas. and Sur. Co.*, 587 F.2d 945, 946 (8th Cir. 1978).

support’ an essential element for which the nonmovant will have the burden of proof at trial, the nonmovant must make a sufficient showing that there is a genuine issue of fact as to this element.”) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986)).

ARGUMENT

I. Defendants Produced No Evidence of Plaintiffs’ Comparative Fault

A. Applicable Law

Both Texas and Arkansas law² maintain comparative fault statutes. *See* Tex. Civ. Prac. & Rem. Code §§ 33.001-.003; Ark. Code Ann. § 16-64-122. The burden is on the defendant to prove that the plaintiff was at fault. *Goldberg v. Dicks*, Not Reported in S.W.3d, No. 12-02-00053-CV, 2004 WL 253250 at *13 (Tex. App.—Tyler 2004, pet. denied); *Marx v. Huron Little Rock*, 198 S.W.3d 127, 131 (Ark. App. 2004) (citing *Rogers v. CWR Constr., Inc.*, 33 S.W.3d 506 (Ark. 2000); *Young v. Johnson*, 845 S.W.2d 510 (Ark. 1993)).

B. Defendants’ Live Pleadings Fail to Establish Facts Supporting Their Affirmative Defense

Defendants’ live pleadings state, in a conclusory fashion, that Plaintiffs’ claims are barred by their own negligence, carelessness, and/or comparative fault. The pleadings fail to set forth any facts supporting these allegations. *See* SOF at ¶¶ 1-2.

² Plaintiffs Gulf Pacific Rice Co., Inc., and Gulf Rice Milling, Inc., are Texas corporations with their headquarters in Houston, Texas. Plaintiff Harvest Rice, Inc., is an Arkansas corporation with its headquarters in McGeehee, Arkansas. When considering a question of state law, the MDL Court must apply the state law that would have applied had the case not been transferred to the MDL. *In re Temporomandibular Joint (TMJ) Implants Prods. Liab.*, 97 F.3d 1050, 1055 (8th Cir. 1996). This case was transferred to this Court from the Southern District of Texas, and this Court must therefore apply Texas’ choice-of-law rules. Texas uses the Restatement’s “most significant relationship” test to decide choice-of-law issues. *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 848-49 (Tex. 2000). Plaintiffs and Defendants agree that under Texas’ choice-of-law principles, Texas law governs the claims of Gulf Pacific Rice Co., Inc., and Gulf Rice Milling, Inc., and Arkansas law governs the claims of Harvest Rice, Inc.

C. Defendants' Discovery Failed to Produce Evidence Of Plaintiffs' Comparative Fault

Defendants have also failed to produce, during months of discovery, any evidence to support their comparative fault affirmative defense. Defendants have not disclosed any testifying expert witnesses who will opine that Plaintiffs were negligent.³ See SOF at ¶ 6. Without any evidence, that Plaintiffs acted negligently, and that such negligent acts or omissions were the proximate cause of Plaintiffs' damages claimed against the Defendants, Defendants' comparative fault defense must fail as a matter of law.

II. Defendants Produced No Evidence that Plaintiffs Failed to Mitigate Their Damages

A. Applicable Law

Defendants' failure to mitigate defense must fail for two reasons. First, there is no evidence that Plaintiffs failed to exercise reasonable care in reducing or avoiding damages. Second, even if evidence exists that Plaintiffs failed to exercise reasonable care in reducing or avoiding damages, there is no evidence of the amount of such damages that Plaintiffs failed to mitigate.

Texas law provides that a claimant must mitigate its damages if it can do so with trifling expense or reasonable exertions. *Gunn Infiniti, Inc. v. O'Byrne*, 996 S.W.2d 854, 857 (Tex. 1999). The duty to mitigate is an affirmative defense. *Taylor Foundry Co. v. Wichita Falls Grain Co.*, 51 S.W.3d 766, 774 (Tex. App.—Fort Worth 2001, no pet.). The defendant bears the burden of proving facts showing lack of mitigation and must also show the amount by which the damages were increased by the failure to mitigate. *Young v. Thota*, 271 S.W.3d 822, 830 (Tex.

³ Under Texas law, expert testimony is necessary in negligence cases to establish the standard of care and the violation of that standard when the nature of the negligence is not within the experience of a layperson. *FFE Transp. v. Fulgham*, 154 S.W.3d 84, 90 (Tex. 2004).

App.—Fort Worth 2008, pet. denied); *Cotton v. Weatherford Bancshares, Inc.*, 187 S.W.3d 687, 708 (Tex. App.—Fort Worth 2006, pet. denied); *U.S. Rest. Props. Operating, L.P. v. Motel Enters., Inc.*, 104 S.W.3d 284, 293 (Tex. App.—Beaumont 2003, pet. denied).

Arkansas law similarly requires that the defendant prove that the plaintiff could have taken steps to mitigate its damages, and the amount of damages that might have been avoided had the plaintiff mitigated its damages. *Minerva Enters. Inc. v. Howlett*, 824 S.W.2d 377, 382 (Ark. 1992); *Santifer v. Ark. Pulpwood Co., Inc.*, 991 S.W.2d 130, 149-50 (Ark. App. 1999).

B. Defendants' Live Pleadings Fail to Establish Facts Showing a Failure to Mitigate

Defendants' live pleadings do not state any factual allegations asserting that Plaintiffs failed to mitigate their damages. The live pleadings also fail to set forth any factual allegations of the amount that Plaintiffs' damages were increased as a result of their failure to mitigate. *See* SOF at ¶¶ 3-5.

C. Defendants Have No Evidence Establishing Plaintiffs Failed to Mitigate Their Damages

Defendants have also not produced any discovery setting forth evidence that Plaintiffs failed to mitigate their damages, and the amount by which they failed to mitigate. Defendants have not designated any expert to opine that Plaintiffs failed to mitigate their damages. Defendants also have not designated any expert witness to testify on the amount of damages Plaintiffs failed to mitigate. *See* SOF at ¶ 6. Absent this evidence, Defendants' mitigation defense must fail as a matter of law.

REQUEST FOR RELIEF

WHEREFORE PREMISES CONSIDERED, Plaintiffs respectfully move this Court for partial summary judgment on Defendants' Affirmative Defenses Nos. 6 and 8, and for any and all further relief, at law or in equity, the Court deems necessary.

Dated: June 14, 2011.

Respectfully submitted,

LOOPER REED & McGRAW, P.C.

By: /s/ Andrew K. York

WILLIAM B. CHANEY
Texas State Bar No. 04108500
ANDREW K. YORK
Texas State Bar No. 24051554
JAMES W. RIBMAN
Texas State Bar No. 00797762

1601 Elm Street, Suite 4600
Dallas, Texas 75201
Telephone: (214) 954-4135
Facsimile: (214) 953-1332

ATTORNEYS-IN-CHARGE FOR PLAINTIFFS
GULF PACIFIC RICE CO., INC.
GULF RICE MILLING, INC., AND
HARVEST RICE, INC.

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this 14th day of June, 2011, electronically filed a copy of the foregoing with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the parties of record.

/s/ Andrew K. York

ANDREW K. YORK