

Additionally, if Bayer's negligence resulted in contamination of other rice, the failure of others to detect the contamination is not an intervening cause. To the contrary, that is also an entirely foreseeable and natural product of the original negligence....Plaintiffs are entitled to summary judgment on defendants' affirmative defense of intervening cause.

Mem. & Order dated Oct. 9, 2009 (D.I. 1604) at 26-27. This Court also held that:

The evidence adduced by Bayer reveals that the negligence of third parties, if any, was foreseeable and reasonably anticipated by defendants. As the "responsible party" allowed to introduce LL601 and LL604 into the environment, Bayer had a duty to introduce those products without negligence. Contamination of non-GM rice by LL601 and LL604 is the known and foreseeable risk that Bayer had a duty to prevent. As a matter of law, plaintiffs are entitled to summary judgment on defendants' affirmative defense of intervening cause.

Mem. & Order dated Dec. 9, 2009 (D.I. 2075) at 11-12. Bayer seeks reconsideration on the strength of its own mischaracterization of this Court's order as "based entirely on a finding that any negligence on the part of LSU could be attributed to the Bayer Defendants" and that "negligence on the part of LSU (and other actors) might not be attributable to the Bayer Defendants and could constitute an intervening case." Bayer Resp. at 2. This argument is meritless. Under Arkansas law, the "mere fact that other causes intervene between the original act of negligence and the injury . . . is not sufficient to relieve the original actor of liability if the injury is the natural and probable consequence of the original negligent act or omission and is such as might reasonably have been foreseen as probable. In no case is the connection between an original act of negligence and an injury broken by an intervening act of another if a person of ordinary capacity and experience . . . could have reasonably anticipated that the intervening event might, in the ordinary course of things, follow his act of negligence or if the negligence is of a character which, according to the usual experience of mankind, is calculated to invite or induce the intervention of some subsequent cause. An intervening cause will not excuse the original misconduct but will be held to be the result of it." *Ouachita Wilderness Inst., Inc. v.*

Mergen, 947 S.W.2d 780, 785 (Ark. 1997). See also *Larson Mach., Inc v. Wallace*, 600 S.W.2d 1, 9 (Ark. 1980) (“The intervening cause must be such that the injury would not have been suffered except for the act, conduct or effect of the intervening agent totally independent of the acts or omissions constituting the primary negligence.”). The contamination that occurred in this case was a natural and probable consequence of Bayer’s failure to implement an adequate containment system. It also was foreseeable. As this Court has recognized numerous times, “the negligence of third parties, if any, was foreseeable and reasonably anticipated by defendants.” Mem. & Order dated Dec. 9, 2009 (D.I. 2075) at 12. Bayer offers nothing to the contrary. For all the reasons set forth in Plaintiffs’ opening memorandum, as well as the replies filed in connection with prior motions on this subject, incorporated herein (*see* D.I. 1567, 2006) Plaintiffs’ motion should be granted.

B. Industry Practices

This Court also previously ruled that Bayer’s Affirmative Defense No. 14, compliance with industry standards, was moot to the extent that the Missouri plaintiffs did not assert a claim for strict liability. D.I. 1604 at 24. Plaintiffs here are not asserting a strict liability claim against Bayer; therefore, Bayer’s affirmative defense of compliance with industry standards should be deemed moot as to these Plaintiffs as well. To the extent this Court ruled that factual disputes remain concerning the standard of care and whether Bayer met that standard (*id.*), Plaintiffs respectfully disagree and hereby incorporate by reference the arguments raised in their opening brief, as well as prior briefing on this subject (*see* D.I. 1432,1567, 2006). Even if evidence of conformance with industry practices is relevant, such conformance is in no way dispositive. “What . . . ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.” *Texas & Pac. Ry. Co. v. Behymer*, 189 U.S. 468, 470 (1903). The Court

should find at minimum that Bayer may not seek a jury instruction that Bayer's compliance, if any, with industry standards absolves it of liability.

For all these reasons, Plaintiffs respectfully request that the Court grant their Motion for Partial Summary Judgment on Defendants' Affirmative Defense Nos. 4 and 14.

Dated: February 7, 2011

Respectfully submitted,

GRAY, RITTER & GRAHAM, P.C.

By: /s/ Don M. Downing
Don M. Downing, Bar # 41786
Gretchen Garrison, Bar # 3189
Jason D. Sapp, Bar #5218238
701 Market Street, Suite 800
St. Louis, Missouri 63101-1826
Tel: (314) 241-5620
Fax: (314) 241-4140
ddowning@grgpc.com
ggarrison@grgpc.com
jsapp@grgpc.com

Plaintiffs' Designated Co-Lead and Liaison Counsel

By: /s/ Adam J. Levitt
Adam J. Levitt
Stacey T. Kelly
**WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLC**
55 West Monroe Street, Suite 1111
Chicago, Illinois 60603
Tel: (312) 984-0000
Fax: (312) 984-0001
levitt@whafh.com
skelly@whafh.com

Plaintiffs' Designated Co-Lead Counsel

Richard J. Arsenault
John Randall Whaley
Jennifer M. Hoekstra
NEBLETT BEARD & ARSENAULT, LLP
2220 Bonaventure Court, P.O. Box 1190
Alexandria, Louisiana 71309
Tel: (800) 256-1050
Fax: (318) 561-2591

Scott E. Poynter
EMERSON POYNTER LLP
500 President Clinton Avenue, Suite 305
Little Rock, Arkansas 72201
Tel: (501) 907-2555
Fax: (501) 907-2556

Stephen A. Weiss
Diogenes P. Kekatos
James A. O'Brien III
SEEGER WEISS LLP
One William Street
New York, New York 10004
Tel: (212) 584-0700
Fax: (212) 584-0799

Joe R. Whatley Jr.
Deborah Clark Weintraub
Adam P. Plant
WHATLEY DRAKE & KALLAS LLP
2001 Park Place North, Suite 1000
Birmingham, Alabama 35203
Tel: (205) 328-9576
Fax: (205) 328-9669

William B. Chaney
James L. Reed
William J. French
Michael Kelsheimer
Drew York
LOOPER REED & MCGRAW
1601 Elm Street, Suite 4600
Dallas, Texas 75201
Tel: (214) 237-6403
Fax: (214) 953-1332

Ralph E. Chapman
Sara B. Russo
CHAPMAN, LEWIS & SWAN

501 First Street
P. O. Box 428
Clarksdale, Mississippi 38614
Tel: (662) 627-4105
Fax: (662) 627-4171

Plaintiffs' Executive Committee

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this 7th day of February 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/ Don M. Downing