

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

**IN RE GENETICALLY MODIFIED RICE) 4:06 MD 1811 CDP
LITIGATION)
) TRIAL COMMENCING
) JUNE 21, 2010**

**THE BAYER DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR RENEWED
MOTION FOR JUDGMENT AS A MATTER OF LAW**

The Bayer Defendants ("Bayer") file this reply to respond to plaintiff's opposition to Bayer's renewed motion for judgment as a matter of law.

I. Plaintiff Failed to Establish the Applicable Standard of Care

Plaintiff spends the majority of its opposition rehashing the law of negligence, citing testimony of Bayer's alleged knowledge of the risk of escape, and repeating its allegations of what it believes Bayer did or did not do in its handling and testing of LLRICE. Plaintiff claims that this evidence alone establishes its negligence claim. Absent from its opposition, however, is plaintiff's identification of the specific standard of care of like companies during the relevant time period. To prevail on a Louisiana negligence claim, plaintiff had the burden of proving a specific standard of care that the defendants breached. *Joseph v. Dickerson*, 754 So.2d 912, 916 (La. 2000). Plaintiff's opposition memorandum merely outlines what it claims Bayer did wrong, or additional measures Bayer could have undertaken, not what the actual standard of care was for similar companies in like circumstances during the 1998-2001 timeframe. Because plaintiff failed to carry its burden, its negligence claim cannot stand.

Plaintiff's expert, Dr. Van Acker, did not testify as to the applicable standard of care during trial. He testified that it is *possible* to ensure 100% confinement if additional measures are taken. *See* Ex. A to Bayer's Mot., D.E. 3288, Trial Tr. vol. 6B, 69:17-70:25, June 28, 2010.

However, Plaintiff concedes that Dr. Van Acker testified that it was possible for a company to do everything he recommended and still have an escape. *See* Pls. Opp'n 7 n.11, D.E. 3369. Such testimony is not sufficient to establish a standard of care. In Dr. Van Acker's world, the only way to not be negligent is to not have an escape.

Furthermore, Dr. Van Acker merely gave illustrations of additional confinement measures that Bayer may have utilized, but he did not establish that these measures were required under an accepted standard of care. Although Dr. Van Acker discussed his experiences with Monsanto, he did not testify that his experience was the standard for other similarly-situated industry participants, or that these additional measures had ever become the established practice or standard of care. In short, Dr. Van Acker did not provide any evidence from which a reasonable jury could determine how a reasonable company in Bayer's position, at the relevant time, could or should have acted.

II. Plaintiff Failed to Introduce Sufficient Evidence of Causation

Plaintiff again attempts to justify its lack of evidence on causation by making the remarkable assertion that it did not need to prove that additional containment measures would have prevented its alleged injury. Under Louisiana law, plaintiff has the burden of proving that its injuries were caused by some negligent act or omission of the defendant. *Joseph*, 754 So.2d at 916. Without this proof, plaintiff's negligence claim is barred.

In its opposition, plaintiff concedes that Dr. Van Acker did not know the exact mechanism that caused the release. Pls. Opp'n 7. Without knowing the mechanism, Dr. Van Acker could only offer speculation that the risk of release would have been less if additional containment measures had been implemented.

Plaintiff then attempts to salvage its failure to prove causation by citing *Pyles v. Weaver*,

958 So.2d 753 (La. Ct. App. 2007), for the proposition that it did not need to prove that the additional containment measures would have prevented the release. *Pyles* stands for no such principle. In that case, the court addressed whether the allocation of twenty percent fault to a bar was reasonable and supported by the facts. *Id.* at 767. The Court held that bar personnel should have removed or calmed down an intoxicated patron who was not acting in the manner of a typical patron, and that if they had done so they would have prevented the incident. *Id.* at 770. That case does not hold that a plaintiff is excused from proving causation, or from showing that had additional measures been taken it would not have been injured.

III. Plaintiff Failed to Prove its Claimed Damages

Plaintiff agrees that lost profits must be proven with reasonable certainty, not speculation and conjecture. *In re Liljeberg Enters., Inc.*, 304 F.3d 410, 448 (5th Cir. 2002). Yet plaintiff cites to the speculative testimony of both Dr. Babcock and Dr. Carter. As outlined in Bayer's motion, their testimony is insufficient to establish market loss or future damages. Simply repeating this flawed testimony does not make it sufficient.

Moreover, plaintiff's attempt to distinguish the Louisiana jurisprudence forbidding the use of historic crop yields to estimate future yields fail. Louisiana courts reject the use of historic crops yields as a basis for future damages because such predictions are inherently speculative due to the numerous variables, such as weather. *Campesi v. Margaret Plantation*, 417 So.2d 1265, 1270-1271 (La. Ct. App. 1982) (it is virtually impossible to determine profits for crops due to the many variables involved, including the weather). And plaintiff itself does not refute its own accounting expert's testimony that future prices for rice cannot be predicted. *See Ex. M to Bayer's Mot., Trial Tr. Vol. 9A, 13:5-20, July 1, 2010.* Plaintiff's future damages claims are a matter of speculation.

Plaintiff next argues that it is entitled to recover its landlords' share of any alleged damages under crop share-rent leases because its landlords never requested their share of the rice crops. But that is not the test. The issue is whether the landlords had the right to control their share of the crop, not whether they did. Mr. Deshotels admitted that the landlords "have the right to sell the crop however they want to sell it." Ex. O to Bayer's Mot., Trial Tr. vol. 9B, 43:9-19, July 1, 2010. Under Louisiana law, the portions of the crops owned by the landlords should have been excluded from plaintiff's damages. *See* La Civ. Code arts. 2677 and 2706.

Finally, plaintiff makes an incomprehensible argument in support of its claim for damages relating to "Patrick's Farm." Plaintiff suggests that it is proper to include in its calculation of damages rice production on a field that was *not* owned or producing rice at the time of this incident, because it is the "total farm" that is relevant. This argument is nonsensical. Plaintiff cannot recover damages allegedly resulting from rice production on this farm when it neither owned the farm nor had rice production from this farm at the time of the announcement of the release. The plaintiff chose to plant rice on that field after the announcement, knowing the state of the market as a result of the escape. It cannot now be allowed to recover damages for its voluntary acts. *Oliveaux v. Sanders*, 535 So. 2d 1034, 1036 (La Ct. App. 1988); *Pitre v. La. Tech Univ.* 673 So. 2d 585, 591 (La. 1996).

IV. Plaintiff Failed to Establish a Master-Servant Relationship

Plaintiff cites to selected testimony in its attempt to establish that Bayer had control or the right of control over LSU. But there was extensive testimony and evidence showing a lack of control or right to control by Bayer over LSU. There simply was not overwhelming evidence, as this Court and plaintiff stated, that LSU was Bayer's employee or servant. As more fully

discussed in its motion for new trial and reply, which Bayer incorporates herein, plaintiff failed, as a matter of law, to establish any master-servant relationship between Bayer and LSU.

Dated: October 4, 2010

Respectfully submitted,

/s/ Glen E. Summers

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2010, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all attorneys of record.

/s/ Glen E. Summers _____

Glen E. Summers