

STATE OF MISSOURI)
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CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

CHRISTOPHER WADE, et al.,)
)
Plaintiffs,)
vs.)
MONSANTO COMPANY, et al.,)
)
Defendants.)
)
)

No. 1722-CC00370

Division No. 3

FILED
JAN 15 2020

22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

ORDER

The Court has before it Defendant Monsanto Company's Motion for Summary Judgment. The Court has reviewed the submissions of the parties, the relevant authorities, and the arguments of counsel, and now rules as follows.

Defendant moves for summary judgment on the following grounds:

- 1) Plaintiffs' claims are preempted by Federal Law;
- 2) Plaintiffs lack the necessary expert testimony to establish causation;
- 3) Mr. Batiste's claims are time-barred and preempted by the Louisiana Products Liability Act;

- 4) Mr. Meeks cannot rebut the presumption of "No Liability" provided by the Florida Government Rules Defense, and cannot recover under the Florida Deceptive and Unfair Trade Practices Act;
- 5) Mr. Ashelman's Pennsylvania Unfair Trade Practices Act claim fails because he purchased Roundup-branded products only for commercial use; and
- 6) Plaintiffs' claims for punitive damages fail as a matter of law.

When ruling on a motion for summary judgment, the Court must determine whether the moving party has the "undisputed right to judgment as a matter of law," on the basis of the facts about which there is no genuine dispute. ITT Commercial Finance Corporation v. Mid-America Marine Supply Corporation, 854 S.W.2d 371, 380 (Mo. banc 1993). The party moving for summary judgment bears the burden of establishing a right to judgment as a matter of law. Any evidence in the record presenting a genuine dispute as to the material facts defeats the moving party's prima facie showing. Id. at 382.

Federal Law Preemption

Glyphosate-based herbicides ("GBHs") were introduced in 1974 by Monsanto, under the brand name Roundup, to control weeds in "agriculture utility rights-of-way, on roadsides, along railways or in places around the home such as sidewalks and gardens." GBHs are among the world's most widely used herbicides. GBHs, like all pesticides sold or distributed in the United States, are registered by the Environmental Protection Agency ("EPA"). Defendant Monsanto argues that because the EPA "has consistently concluded that glyphosate is not carcinogenic to humans," Federal Law preempts Plaintiffs' claims. Defendant has not cited a single case that holds that the EPA's regulatory scheme preempts claims such as Plaintiffs'. Every Court presented with this issue has rejected it. In fact, the Supreme Court in Bates v. Dow Agrosciences L.L.C., 544 U.S. 431, 444 (2005), held that the petitioners' claims for defective design, defective manufacture, negligent testing, and breach of express warranty were not preempted by the EPA. Defendant has not shown that Plaintiffs' claims are preempted.

Causation

Defendant argues that Plaintiffs have no admissible expert testimony to support their claims of general and specific causation. While Plaintiffs have offered several experts who opine that GBHs cause Non-Hodgkin's lymphoma ("NHL"), Defendant has moved to strike each of those witnesses and exclude their testimony, arguing that the testimony is not "reliable." Section 490.065.2, regarding the admissibility of expert witness testimony, provides:

(1) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) The testimony is based on sufficient facts or data;

(c) The testimony is the product of reliable principles and methods; and

(d) The expert has reliably applied the principles and methods to the facts of the case....

Admission of expert evidence requires the Court to apply the same standards for relevance and admissibility that apply to other types of evidence. Shallow v. Follwell, 554 S.W.3d 878, 883 (Mo.

banc 2018). "Evidence is logically relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The current version of 490.065 mirrors FRE 702 and FRE 703, and cases interpreting those federal rules provide relevant and useful guidance in interpreting and applying section 490.065. In deciding whether to admit expert testimony, the Court must determine whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592 (1993). "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Id. at 592-93.

Daubert identifies several factors to be considered, such as a theory's testability, whether it has been a subject of peer review or publication, the known or potential rate of error, and the degree of acceptance within the relevant scientific community. Id. at 592-94. "[T]he test of reliability is 'flexible,' and

Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999).

Defendant describes Plaintiffs' experts as using processes that, while Defendant disagrees with them, are scientifically reliable. "As long as the expert's scientific testimony rests upon good grounds, based on what is known it should be tested by the adversary process with competing expert testimony and cross-examination, rather than excluded by the court at the outset." Johnson v. Mead Johnson & Co., LLC, 754 F.3d 557, 562 (8th Cir. 2014). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence... These conventional devices... are the appropriate safeguards where the basis of scientific testimony meets the standards of admissibility." Daubert, 509 U.S. at 596. Defendant has not shown that Plaintiffs will not be able to present any admissible evidence on causation.

Plaintiff Batiste

Plaintiff Batiste's claim arises under Louisiana law, which has a one-year statute of limitations. Plaintiff was diagnosed

with NHL on May 23, 2013, and filed this lawsuit on February 1, 2017. Plaintiff alleges that he did not know his NHL was caused by Roundup more than one year before he filed suit.

Louisiana law recognizes that the statute of limitation is tolled when "the cause of action is neither known nor reasonably knowable by the plaintiff even though plaintiff's ignorance is not induced by the defendant." Netherland v. Ethicon, Inc., 813 So. 2d 1254, 1260 (La. Ct. App. 2002). The issue, therefore, is whether Plaintiff's claim was "reasonably knowable" to Plaintiff prior to February 1, 2016. Defendant argues that it was "reasonably knowable" in July 2015, because that is when the IARC issued its monograph on glyphosate. The first Roundup-related NHL litigation began on October 9, 2015. Plaintiff responds that whether he "should have known" of his claim in 2015 is a question of fact for the jury. Even Monsanto, to this day, disputes the IARC monograph linking NHL to Roundup. The Court finds that questions of material fact preclude summary judgment on Batiste's claims.

Next, Defendant argues that Plaintiff's exclusive cause of action is under the Louisiana Products Liability Act and any other claims must be dismissed. Plaintiff has responded that his proposed jury instructions are based on the elements of the

Louisiana Products Liability Act. Defendant has not shown that Plaintiff Batiste's claims should be dismissed.

Plaintiff Meeks

Under Florida law, a manufacturer sued in a products liability action is entitled to a "rebuttable presumption" of "no liability" when the following conditions are satisfied:

[I]f, at the time the specific unit of the product was sold or delivered to the initial purchaser or user, the aspect of the product that allegedly caused the harm:

(a) Complied with federal or state codes, statutes, rules, regulations, or standards relevant to the event causing the death or injury;

(b) The codes, statutes, rules, regulations, or standards are designed to prevent the type of harm that allegedly occurred; and

(c) Compliance with the codes, statutes, rules, regulations, or standards is required as a condition for selling or distributing the product.

Fla. Stat. § 768.1256(1)(a)-(c). Defendant argues that it is entitled to summary judgment on a finding of "no liability" because Monsanto's manufacture, development, and sale of Roundup-branded products complied with federal law at all times.

A rebuttable presumption of law may, of course, be so rebutted. State ex rel. Baumann v. Doder, 121 S.W.2d 263, 265 (Mo.App. E.D. 1938). In civil cases, a presumption is a rule of

law which puts the burden of producing some substantial evidence on the party presumed against; that when substantial evidence, however slight, is adduced by the opponent, the presumption disappears and the triers of fact receive the issue free of any presumption. Neve v. Reliance Ins. Co., 357 S.W.2d 247, 251 (Mo.App. K.C. 1962). Defendant has not shown that Plaintiff will not be able to produce substantial evidence of Defendant's liability in order to rebut the presumption of no liability.

Next, Defendant argues that Plaintiff Meeks cannot recover for personal injury or death under the Florida Deceptive and Unfair Trade Practices Act (''FDUTPA''). As a general rule, the measure of actual damages under FDUTPA is the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered. Eclipse Med. v. Am. Hydro-Surgical Instruments, 262 F.Supp.2d 1334, 1357 (S.D.Fla.1999). Plaintiff has stated that Mrs. Meeks intends to submit a claim for damages consisting of the difference in value between a safe pesticide that would not cause NHL and the Roundup product that caused Mr. Meeks's NHL. Defendant has not shown that it is entitled to summary judgment on Plaintiff Meeks' claims.

Plaintiff Ashelman

The Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL") establishes a private right of action for any person who "purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act." Pa. Cons. Stat. § 201-9.2. "The obvious intent of this language is to restrict claims brought under the [act] to those which are legitimately of a consumer nature." Waldo v. N. Am. Van Lines, Inc., 669 F. Supp. 722, 725 (W.D. Pa. 1987). Thus, where the underlying transaction is of a commercial nature, a UTPCPL claim must be dismissed. See id. at 726.

Defendant argues that Plaintiff Ashelman purchased Roundup for commercial use, and therefore he is ineligible to recover under the UTPCPL. Plaintiff Ashelman is a farmer. He farms as a profession, but also lives on his farm. He testified that he used Roundup on the weeds around his home. Defendant has not shown that Plaintiff Ashelman did not use Roundup for personal, family or

household purposes, and has not shown that it is entitled to summary judgment.

Punitive Damages

Defendant argues that because Roundup has been consistently approved by the EPA and other regulatory agencies, its conduct cannot be considered willful, wanton or reckless as a matter of law. Plaintiffs respond that they will present evidence of Monsanto's reckless disregard for the safety of others, and despicable and vile conduct, which has been held sufficient to submit the claim of punitive damages to the jury in other cases that have been tried. Where sufficient allegations have been made, the submissibility of punitive damages is ordinarily a matter to be determined by the Court on the basis of evidence presented at trial, and not on the basis of a pre-trial motion. See, e.g., Smith v. Courter, 575 S.W.2d 199, 208 (Mo.App. 1979); Willett v. Slay Warehousing Co., 735 S.W.2d 60, 62 (Mo.App. 1987). Defendant is not entitled to summary judgment on punitive damages.

THEREFORE, it is Ordered and Decreed that Defendant Monsanto Company's Motion for Summary Judgment is DENIED.

SO ORDERED:



ELIZABETH B. HOGAN, Judge

Dated: _____

11/15/20

ENTERED
JAN 15 2020
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