APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 23-1134

BADER FARMS, INC.,

Plaintiff-Appellee

BILL BADER,

Plaintiff.

v.

MONSANTO COMPANY,

Defendant

BASF CORPORATION,

Defendant-Appellee.

Appeals from U.S. District Court for the Eastern District of Missouri – Cape Girardeau

Submitted: January 11, 2024
Filed: April 30, 2024

BEFORE BENTON, ERICKSON, AND KOBES, CIRCUIT JUDGES.

BENTON, Circuit Judge.

In *Bader Farms, Inc. v. BASF Corp.*, 39 F.4th 954, 974 (8th Cir. 2022), this court mandated: "This court reverses in part, vacates the award of punitive damages, and remands with instructions to hold a new trial on the single issue of punitive damages. In all other respects, the judgment is affirmed."

On remand—after a settlement between plaintiff Bader Farms and co-defendant Monsanto Company—the district court did not hold a new trial and found co-defendant BASF Corporation could not be liable for punitive damages. ***Bader Farms, Inc. v. Monsanto Co.***, 2022 WL 17338014, at *2-3 (E.D. Mo. Nov. 30, 2022). Bader Farms seeks to enforce this court's mandate. Having jurisdiction under 28 U.S.C. § 1291, this court remands with instructions to hold a new trial to separately assess the punitive damages for BASF.

In the original trial, Bader Farms sued Monsanto and BASF for negligent design and failure to warn, alleging its peach orchards were damaged by dicamba drift in 2015-19. The jury awarded $250 million in punitive damages against both Monsanto and BASF based on Monsanto's acts in 2015-16 (which the district court reduced to $60 million). ***Bader Farms***, 49 F.4th at 961.

The defendants appealed. This court affirmed except for punitive damages, holding BASF and Monsanto liable as co-conspirators in a civil conspiracy. *See* ***id.*** at 973-74, citing ***Moore v. Shelton***, 694 S.W.2d 500, 501-02 (Mo. App. 1985).

This court remanded to "'separately assess' punitive damages against Monsanto and BASF," stating: "The district court should have instructed the jury to 'separately assess' punitive damages against Monsanto and BASF." ***Id.*** at 972-73. "Under Missouri law, 'defendants shall only be severally liable for the percentage of punitive damages for which fault is attributed to such defendant by the trier of fact.'" ***Id.*** at 972, *quoting* **§ 537.067.2, RSMo 2016**. This court mandated a new trial so the trier of fact could make that determination. *See generally* **28 U.S.C. § 2106** (granting this court wide authority to direct an inferior court).

Before the new trial, Monsanto settled with Bader Farms. The district court did not conduct a new trial. Instead, it reverted to its prior ruling that "that BASF's individual conduct in 2015 and 2016 did not warrant separate imposition of punitive damages against BASF," believing that ruling was not appealed. ***Bader Farms, Inc. v. Monsanto Co.***, 2020 WL 1503395, at *1 (E.D. Mo. Feb. 28, 2020). The district court concluded that, under the law of the case, BASF could not be liable for any punitive damages. It labeled as "dicta" this court's holding that BASF could be liable for a "degree of culpability," as a co-conspirator, for Monsanto's acts in 2015-16. The district court dismissed all claims against BASF.

Bader Farms appeals, arguing the district court ignored (1) this court's mandate and (2) this court's holding that BASF can be assessed punitive damages for its acts in furtherance of the conspiracy.

This court reviews de novo a district court's interpretation of an appellate mandate. ***Petrone v.***

Werner Enters., Inc., 42 F.4th 962, 968 (8th Cir. 2022), quoting ***United States v. Parks***, 700 F.3d 775, 777 (6th Cir. 2012).

"On remand, a district court is bound to obey strictly an appellate mandate." ***Bethea v. Levi Strauss & Co.***, 916 F.2d 453, 456 (8th Cir. 1990), *citing* ***In re Sanford Fork & Tool Co.***, 160 U.S. 247, 255 (1895). "If the district court fails to comply with an appellate mandate, the appellate court has authority to review the district court's actions and order it to comply with the original mandate." ***Id.***, *citing* ***Houghton v. McDonnell Douglas Corp.***, 716 F.2d 526, 527-28 (8th Cir. 1983). Absent "explicit or implicit instructions to hold further proceedings, a district court has no authority to re-examine an issue settled by a higher court." ***Id.***, *citing* ***Nelson v. All American Life & Fin. Corp.***, 889 F.2d 141, 152 (8th Cir. 1989). "Every question decided by the appellate court, whether expressly or by necessary implication, is finally settled and determined." ***Thompson v. Commissioner***, 821 F.3d 1008, 1011 (8th Cir. 2016).

The district court did not hold a new trial on the issue of punitive damages, reasoning:

> The matter of an individual punitive damages claim against BASF was not before the Eighth Circuit because no one raised it. It was therefore waived. *See XO Missouri, Inc. v. City of Maryland Heights*, 362 F.3d 1023, 1025 (8th Cir. 2004). The Eighth Circuit's discussion regarding the appropriateness of the punitive damages submission against BASF appears to be dicta because it is

> not relevant to the issues that were presented on appeal.

Bader Farms, 2022 WL 17338014, at *2.

The district court ruled that "in the absence of any claim of negligence against BASF for the years 2015-16, obviously there can be no claim for punitive damages for those years." This court in *Bader Farms* held to the contrary: "Bader provided clear and convincing evidence that Monsanto and BASF acted with reckless indifference, and the Lopez factors did not prevent submission of punitive damages." ***Bader Farms***, 39 F.4th at 972, *discussing* ***Lopez v. Three Rivers Elec. Co-op., Inc.***, 26 S.W.3d 151, 160 (Mo. banc 2000).

Under a theory of vicarious liability, Missouri law, even in the absence of any freestanding negligence claim, allows for punitive damages against BASF. *See* ***McHaffie ex rel. McHaffie v. Bunch***, 891 S.W.2d 822, 826 (Mo. banc. 1995) ("Vicarious liability or imputed negligence has been recognized under varying theories, including . . . conspiracy . . . ."). "[U]nder the civil conspiracy theory, the conspiracy gives rise to a mutual agency of each conspirator to act for the others, which makes all conspirators liable for the tortious act of any one of them." **Restatement (Second) of Torts**, Sec. 876(a), cmt. a.; *see* ***Matthews v. Harley-Davidson***, 685 S.W.3d. 360, 369 (Mo. banc. 2024) (adopting, in Missouri, Section 876 of the Second Restatement of Torts).

BASF is vicariously liable for Monsanto's actions because "[p]robative facts support the jury's conclusion that Monsanto and BASF participated in a

conspiracy." ***Bader Farms***, 39 F.4th at 970. A jury found Monsanto liable for negligence in 2015-16 and awarded compensatory and punitive damages. BASF, as a co-conspirator, is vicariously liable. This court remanded for a trier of fact to apportion the punitive damages award. Of course, the district court may be correct that an "apportionment due to the conspiracy between Monsanto and BASF pertaining to the years 2015-16" could "be 100% against Monsanto and 0% against BASF." ***Bader Farms***, 2022 WL 17338014, at *2. Applying Missouri Law – and this court's mandate – that determination is for the trier of fact.

BASF cites two rationales for the district court's decision: (1) the law of the case and (2) the cross-appeal rule.

I.

The district court reasoned: "Because it is the law of the case that plaintiff did not make a submissible case for punitive damages against BASF individually, and because that ruling was not itself appealed by any party, the matter of punitive damages is settled." ***Id.*** at *3.

Under the law of the case, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." ***Arizona v. California***, 460 U.S. 605, 618 (1983). "This principle applies to both appellate decisions and district court decisions that have not been appealed." ***Alexander v. Jensen–Carter***, 711 F.3d 905, 909 (8th Cir. 2013), *citing* ***First Union Nat'l Bank v. Pictet Overseas Trust Corp.***, 477 F.3d 616, 620 (8th Cir. 2007).

At the original trial, a jury found BASF jointly and severally liable for punitive damages under a theory of joint venture between Monsanto and BASF, which this court reversed. On appeal, BASF (as appellant) had argued "that punitive damages should not have been awarded without a jury's individualized assessment of its wrongdoing."[1] ***Bader Farms***, 39 F.4th at 972. The issue of BASF's individual assessment for punitive damages was, thus, before this court. This court held that Missouri law required a separate, individual assessment of punitive damages to the two defendants as co-conspirators. ***Id.*** at 973-74

The district court erred in its application of the law of the case. "Appellants' law of the case argument is incorrect. . . . [T]his court is not bound by the district court's determination. . . . [T]he law of the case doctrine provides that once an appellate court has decided an issue in a case, the district court cannot revisit that determination on remand. It does not

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[1] BASF contends Bader Farms, by its responding arguments in the first appeal, waived the right to argue that BASF could be liable for punitive damages based on its individual degree of culpability. Bader Farms there argued that BASF's punitive damages liability came from Missouri joint venture law, without requiring proof of individual culpability. *See* ***Bader Farms***, 39 F.4th at 972. This argument responded to BASF's argument about joint venture law. This court resolved the issue based on civil conspiracy law and remanded for a new trial – a separate, individual assessment of punitive damages by the trier of fact. *See* ***United States v. Perkins***, 94 F.3d 429, 437 (8th Cir. 1996) ("one panel of the court cannot reverse another panel").

stand for the reverse proposition 'that superior courts are bound by the decisions of inferior courts.'" ***W. Virginia Pipe Trades Health & Welfare Fund v. Medtronic, Inc.***, 845 F.3d 384, 391 (8th Cir. 2016), *citing* ***In re Raynor***, 617 F.3d 1065, 1068 (8th Cir. 2010) (internal citations omitted). *Cf.* ***Pyramid Life Ins. Co. v. Curry***, 291 F.2d 411, 414 (8th Cir. 1961), *citing* 5B **C.J.S.** *Appeal & Error* § 1964 (explaining that when an appellate court has remanded for a jury trial on a question of fact, it is error for the inferior court to make a finding on that question of fact without a trial). "It is apparent that the issue of" an individual assessment of BASF's punitive damages "was before us for adjudication upon the prior appeal." ***Pyramid Life***, 291 F.2d at 413. "No purpose would be served by remanding for a jury trial if there was no material fact issue for the jury to determine." ***Id.***

This court's holding about BASF's individual assessment was not dicta. *See* ***Klein v. Arkoma Prod. Co.***, 73 F.3d 779, 785 (8th Cir. 1996) ("[T]he district court was not free to reject our legal conclusion."). Because BASF's individual assessment for punitive damages was before this court, this court's mandate was the law of the case.

BASF relies on *Macheca Transportation Co. v. Philadelphia Indemnity Insurance Co.*, 737 F.3d 1188 (8th Cir. 2013). After the defendant there did not appeal the damages instruction, but appealed other issues, this court issued an opinion and remanded for a second trial, without addressing the unappealed damages instruction. ***Id.*** at 1192. At the second trial, the defendant challenged that damages instruction. The district court rejected the challenge under the law

of the case. This court affirmed "because that issue was decided during the first trial and Macheca did not appeal it." ***Id.*** at 1194. Here, this court directly addressed BASF's individual liability for punitive damages, which was before this case in the first appeal.

II.

BASF invokes the cross-appeal rule. At the original trial, the district court found that BASF could not be individually liable for punitive damages but could be jointly and severally liable for punitive damages. BASF argues that, when this court mandated a separate, individual assessment of punitive damages, Bader Farms received an improper benefit without cross-appealing that original finding.

True, under "that unwritten but longstanding rule, an appellate court may not alter a judgment to benefit a nonappealing party. [The Supreme Court,] from its earliest years, has recognized that it takes a cross-appeal to justify a remedy in favor of an appellee." ***Greenlaw v. United States***, 554 U.S. 237, 244-45 (2008), *citing* ***McDonough v. Dannery***, 3 U.S. (3 Dall.) 188, 198 (1796). However, "federal appellate courts, do[] not review lower courts' opinions, but their *judgments*." ***Jennings v. Stephens***, 574 U.S. 271, 277 (2015), *citing* ***Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.***, 467 U.S. 837, 842 (1984).

Here, in the first appeal, this court's ruling was not to the benefit of Bader Farms but to its detriment. The judgment appealed to this court was joint and several punitive damages, which were not limited by individual culpability. *Contra* § **537.067.2, RSMo**

2016; ***Mills v. Murray***, 472 S.W.2d 6, 14 (Mo. App. 1971), *citing* ***State ex rel. Hall v. Cook***, 400 S.W.2d 39, 41 (Mo. banc. 1966) ("The rule is otherwise as to punitive damages which may be properly determined against joint tortfeasors in differing amounts, depending, among other factors, upon the degree of the culpability of each."). *Cf.* ***Bethea***, 916 F.2d at 456 ("[p]arties who receive all the relief sought are prohibited from appealing" but "parties who are satisfied with the final judgment" are not). This court altered the judgment by vacating the award of punitive damages, changing the defendants' theory of liability for punitive damages, and remanding for a new trial to re-determine punitive damages. Each alteration left Bader Farms in a worse position. Thus, this court's alterations did not benefit Bader Farms. The cross-appeal rule is inapplicable here.

* * * * * * *

This court reverses the judgment and remands with instructions to hold a new trial on the single issue of punitive damages.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 23-1134

BADER FARMS, INC.,

Plaintiff-Appellee

BILL BADER,

Plaintiff.

v.

MONSANTO COMPANY,

Defendant

BASF CORPORATION,

Defendant-Appellee.

Appeals from U.S. District Court for the Eastern District of Missouri – Cape Girardeau

(1:16-cv-00299-SNLJ)

JUDGMENT

Before BENTON, ERICKSON, and KOBES, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

April 30, 2024

Order Entered in Accordance with Opinion: Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Stephanie N. O'Banion

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

BADER FARMS, INC.,

Plaintiff,

v.

MONSANTO COMPANY AND BASF CORPORATION,

Defendants.

MDL No. 1:18-md-02820-SNLJ
Indiv. Case No. 1:16-cv-00299-SNLJ

MEMORANDUM and ORDER

This matter is before the Court on remand from the United States Court of Appeals for the Eighth Circuit. The defendants appealed this Court's entry of judgment following a three-week jury trial. Court of Appeals reversed in part, vacated the award of punitive damages, and remanded "with instructions to hold a new trial on the single issue of punitive damages. In all other respects, the judgment [was] affirmed." [Doc. 665-1, Opinion at 28.]

This Court ordered the parties to file memoranda addressing the scope of remand, including, but not limited to, (1) the effect of this Court's prior rulings on punitive damages, and (2) issues pertaining to additional discovery.

At the close of evidence during trial, this Court denied defendants' motions for judgment as a matter of law on the direct tort claims and on plaintiff's claims for joint venture and conspiracy. Both defendants also moved for judgment as a matter of law on plaintiff's punitive damages claims. This Court ruled that (1) punitive damages were appropriate only for the two-year period during which Monsanto's Xtend seeds were on the market without any corresponding low-volatility dicamba-based herbicide (2015-2016), and (2) the evidence failed as a matter of law to support a claim for punitive damages against BASF for conduct during that period. [Tr. at 2313, 2366.]

The jury found that BASF and Monsanto were co-conspirators and joint venturers and that they were liable for plaintiff's tort claims and $15,000,000 in compensatory damages. In a separate phase, the jury awarded $250,000,000 in punitive damages against Monsanto. Although this Court's judgment included that BASF and Monsanto were jointly and severally responsible for the award of punitive damages, such joint liability was a result of the jury's finding that the two defendants were engaged in a joint venture. This Court granted in part the defendants' post trial motions, reducing the punitive damages award to $60,000,000.

Defendants appealed. The Court of Appeals determined that the defendants had not been engaged in a joint venture, but it affirmed that the defendants had conspired together. On appeal, as summarized by the Eighth Circuit,

> The defendants challenge[d] the punitive damages award in three ways. First, Monsanto and BASF argue that punitive damages were not submissible under Missouri law. Second, BASF argues that, after instructing the jury to assess punitive damages against Monsanto only, the district court erred in holding Monsanto and BASF jointly and severally liable for punitive damages. Third, Monsanto and BASF believe that the amount awarded was unconstitutionally excessive under the Due Process Clause of the Fourteenth Amendment.

[Op. at 21.] Discussing whether submission of punitive damages to the jury had been proper, the Eighth Circuit concluded that "Bader provided clear and convincing evidence that Monsanto and BASF acted with reckless indifference, and the *Lopez* factors did not prevent submission of punitive damages." [Op. at 24.] Then, the Court of Appeals determined that although it might have been proper to hold joint venturers jointly liable for punitive damages, a joint venture had not existed here. Because a jury must apportion fault among conspirators for the purpose of assessing punitive damages under state law, the Court of Appeals held that this Court must retry the

matter of punitive damages as against BASF and Monsanto.

As indicated, though, this Court had already determined that punitive damages against BASF were not appropriate, and no party appealed that ruling. The Court of Appeals notably did not mention it. The Court of Appeals noted

> The jury was instructed it could "find that Defendant Monsanto Company is liable for punitive damages" if it "believe[d] the conduct of Defendant Monsanto Company . . . showed complete indifference to or conscious disregard for the safety of others." The instruction did not mention BASF at all. Only Monsanto presented a defense during the trial's punitive damages phase, and the only additional evidence was a stipulation of Monsanto's net worth.

[Op. at 23.] The punitive damages instruction "did not mention BASF at all" because this Court had granted BASF's motion for judgment as a matter of law with respect to the argument that plaintiff did not have a submissible claim for punitive damages against BASF individually. Indeed, the claim presented in Instruction 9, Negligent Design & Failure to Warn for 2015-2016, was against Monsanto alone. [Doc. 554 at 10.] BASF's negligence was considered only for the time period after the release of its product, Engenia, in 2017. [*Id.* at 11.] There was no suggestion that BASF could be held individually liable for punitive damages during a period for which BASF's negligence was not in question and was not submitted to the jury.

Indeed, plaintiff did not tender any instructions against BASF for its conduct before 2017. Plaintiff's tendered instructions pertained only to negligence related to BASF's herbicide Engenia, which was not released until 2017. [Doc. 544 at Instruction E, H, K.] The trial transcript also reveals that plaintiff's attorney offered instructions that omitted BASF from the punitive damages decision. She stated, "Your Honor, we understood that you told us that we couldn't submit against BASF for '15 and '16, and the only theory would be if they were found liable with joint venture. So that's why we removed them from there." [Tr. 2401-02.] This Court further explained that plaintiff's "entire case on 2015 and '16 is based on the early release," and "That doesn't have anything to do with BASF." [Tr. 2411-12.] Further, "The problem I have is you have no evidence that BASF did anything wrong in 2015 and 2016." [Tr. 2413.] Plaintiff's counsel confirmed that "I don't need the reference to other defendants to do anything against BASF. I want the jury to consider Monsanto's conduct by itself and what Monsanto did with BASF. I'm not saying to consider BASF's conduct to do anything against BASF." [Tr. 2412-13.]

Critically, no party appealed Instruction 9 (allowing the negligence claims for 2015-16 against Monsanto only), nor did any party appeal the ruling that BASF could not be responsible for punitive damages for 2015-2016. BASF appealed the joint-liability punitive damages ruling on appeal. The matter of an individual punitive damages claim against BASF was not before the Eighth Circuit because no one raised it. It was therefore waived. *See*

XO Missouri, Inc. v. City of Maryland Heights, 362 F.3d 1023, 1025 (8th Cir. 2004). The Eighth Circuit's discussion regarding the appropriateness of the punitive damages submission against BASF appears to be *dicta* because it is not relevant to the issues that were presented on appeal. In any event, in the absence of any claim of negligence against BASF for the years 2015-16, obviously there can be no claim for punitive damages for those years. Accordingly and necessarily, any apportionment due to the conspiracy between Monsanto and BASF pertaining to the years 2015-16 would be 100% against Monsanto and 0% against BASF.

> All in all, these rulings constitute the law of the case, meaning that
>
> "[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California,* 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983); *see also Morris v. American Nat'l Can Corp.,* 988 F.2d 50, 52 (8th Cir. 1993). This principle applies to both appellate decisions and district court decisions that have not been appealed. *First Union Nat'l Bank v. Pictet Overseas Trust Corp.,* 477 F.3d 616, 620 (8th Cir. 2007) (internal citation omitted).

Alexander v. Jensen-Carter, 711 F.3d 905, 909 (8th Cir. 2013). Because it is the law of the case that plaintiff did not make a submissible case for punitive damages against BASF individually, and because that

ruling was not itself appealed by any party, the matter of punitive damages is settled.

The Court will await the parties' proposed judgment to finally dispose of this matter.

Dated this 30th day of November, 2022.

/s/ Stephen N. Limbaugh, Jr.
STEPHEN N. LIMBAUGH, JR.
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

BADER FARMS, INC.,

Plaintiff,

v.

MONSANTO COMPANY AND BASF CORPORATION,

Defendants.

MDL No. 1:18-md-02820-SNLJ
Indiv. Case No. 1-16-cv-00299-SNLJ

JUDGMENT ON REMAND

This matter is before the Court on remand from the United States Court of Appeals for the Eighth Circuit. The defendants appealed this Court's entry of judgment following a three-week jury trial. The Court of Appeals reversed in part, vacated the award of punitive damages, and remanded "with instructions to hold a new trial on the single issue of punitive damages. In all other respects, the judgment [was] affirmed." [Doc. 665-1, Opinion at 28.]

Defendant Monsanto and Plaintiff have settled Plaintiff's claims, including its compensatory and punitive damages claims against Monsanto and any claims related to the interest owed on the compensatory damages.

Defendants have paid to Plaintiff all compensatory damages due to Plaintiff based on the jury's verdict, including all post-judgment interest on the compensatory damage award.

With respect to Plaintiff's punitive damage claim against BASF Corporation, this Court ruled at the conclusion of the original trial that Plaintiff did not make a submissible case for punitive damages against BASF individually. Because no party appealed that ruling, the law-of-the-case doctrine bars any relitigation of that claim in these remanded proceedings, and the Court has rejected Plaintiff's attempts to reassert the claim on remand.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that:

1. All remaining claims against defendant Monsanto Company are dismissed with prejudice.

2. All remaining claims against BASF Corporation are dismissed with prejudice, including Plaintiff's claim for punitive damages against BASF remanded to this Court by the Eight Circuit.

Dated this 12 day of January, 2023.

/s/ Stephen N. Limbaugh, Jr.
STEPHEN N. LIMBAUGH, JR.
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20-3663

JOHN S. HAHN,

Special Master

BADER FARMS, INC.,

Plaintiff-Appellee

BILL BADER,

Plaintiff

v.

MONSANTO COMPANY,

Defendant

BASF CORPORATION,

Defendant-Appellant

AMERICAN SEED TRADE ASSOCIATION, INCORPORATED; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; COALITION FOR LITIGATION JUSTICE, INC.; CROPLIFE AMERICA; DRI-THE VOICE OF THE

DEFENSE BAR; MISSOURI AGRIBUSINESS ASSOCIATION; MISSOURI CHAMBER OF COMMERCE AND INDUSTRY; NATIONAL ASSOCIATION OF MANUFACTURERS; PRODUCT LIABILITY ADVISORY COUNCIL, INCORPORATED; WASHINGTON LEGAL FOUNDATION,

Amici on Behalf of Appellant(s).

MISSOURI ASSOCIATION OF TRIAL LAWYERS; NATIONAL FAMILY FARM COALITION; CENTER FOR BIOLOGICAL DIVERSITY; PESTICIDE ACTION NETWORK; CENTER FOR FOOD SAFETY; SAVE OUR CROPS COALITION,

Amici on Behalf of Appellee(s).

No. 20-3665

JOHN S. HAHN,

Special Master

BADER FARMS, INC.,

Plaintiff-Appellee

BILL BADER,

Plaintiff

v.

MONSANTO COMPANY,

Defendant

BASF CORPORATION,

Defendant-Appellant

AMERICAN SEED TRADE ASSOCIATION, INCORPORATED; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; COALITION FOR LITIGATION JUSTICE, INC.; CROPLIFE AMERICA; DRI-THE VOICE OF THE DEFENSE BAR; MISSOURI AGRIBUSINESS ASSOCIATION; MISSOURI CHAMBER OF COMMERCE AND INDUSTRY; NATIONAL ASSOCIATION OF MANUFACTURERS; PRODUCT LIABILITY ADVISORY COUNCIL, INCORPORATED; WASHINGTON LEGAL FOUNDATION,

Amici on Behalf of Appellant(s).

MISSOURI ASSOCIATION OF TRIAL LAWYERS; NATIONAL FAMILY FARM COALITION; CENTER FOR BIOLOGICAL DIVERSITY; PESTICIDE ACTION NETWORK; CENTER FOR FOOD SAFETY; SAVE OUR CROPS COALITION,

Amici on Behalf of Appellee(s).

Appeals from U.S. District Court for the Eastern District of Missouri - Cape Girardeau

Submitted: February 16, 2022
Filed: July 7, 2022

Before SMITH, Chief Judge, BENTON, and KELLY, Circuit Judges.

Dicamba, an herbicide, kills broadleaf weeds that have grown resistant to other herbicides. Unfortunately, traditional dicamba herbicides harm crops. Traditional dicamba herbicides are also "volatile," meaning that they tend to vaporize and move off target. It was thus impractical—and unlawful—to spray dicamba herbicides over crops during growing season. *See* **7 U.S.C. § 136j(a)(2)(G)** (prohibiting "any person ... to use any registered pesticide in a manner inconsistent with its labeling").

Monsanto Company and BASF Corporation began developing dicamba-tolerant seed in the early 2000s. They sued each other over intellectual property. By the settlement agreement, BASF relinquished rights to its dicamba-tolerant seed technology in return for "value share payments" for each acre with dicamba-tolerant seed sold by Monsanto. Both companies began to develop lower-volatility dicamba herbicides.

In 2015, Monsanto obtained USDA deregulation of its dicamba-tolerant cotton seed (Xtend). However, the EPA had not yet approved any lower-volatility dicamba herbicide. Despite warnings from its own employees, academics, and others against selling a dicamba-tolerant seed without a lower-volatility dicamba herbicide, Monsanto began selling the Xtend cotton seed. It tried to cut the risk of dicamba misuse with a "communication plan," including letters to farmers warning against "over the top" dicamba use, and discounts to offset farmers' inability to benefit from the dicamba-tolerant trait. Monsanto also placed a pink label on each bag of seed: "NOTICE: DO NOT APPLY DICAMBA HERBICIDE IN-CROP TO BOLLGARD II® 7 XTENDFLEX™ COTTON IN

2015. IT IS A VIOLATION OF FEDERAL AND STATE LAW TO MAKE AN IN-CROP APPLICATION OF ANY DICAMBA HERBICIDE."

Off-label dicamba use exploded. By July 2016, 115 complaints of off-target "dicamba drift" had been filed in Missouri's Bootheel alone. Nevertheless, when the USDA deregulated Monsanto's dicamba-tolerant soybean seed that year, Monsanto began to sell it. The EPA later approved Monsanto's lower-volatility dicamba herbicide in November 2016. BASF's lower-volatility dicamba herbicide was approved in 2017.

Bader Farms, Inc. sued Monsanto and BASF for negligent design and failure to warn, alleging its peach orchards were damaged by dicamba drift in 2015-2019. The jury awarded $15 million in compensatory damages, and $250 million in punitive damages based on Monsanto's acts in 2015-2016. Monsanto and BASF moved for a new trial, remittitur, and judgment as a matter of law. The district court denied the motions for new trial and judgment as a matter of law but reduced punitive damages to $60 million. The district court's judgment also held Monsanto and BASF jointly and severally liable for the punitive damages, even though its instruction on punitive damages only discussed Monsanto.

Defendants appeal, arguing that Bader failed to prove causation, the measure of actual damages is the value of the land rather than lost profits, Bader's lost profits estimate was speculative, and the punitive damages award was unwarranted under Missouri law and excessive under the United States Constitution. BASF adds that it did not participate in a joint venture or conspiracy with Monsanto, and that

punitive damages should have been separately assessed. Having jurisdiction under 28 U.S.C. § 1291, this court affirms in part, reverses in part, and remands with instructions to hold a new trial only on punitive damages.

I.

The jury was instructed to return a verdict for Bader if it found that the Defendants' failure to "(i) design a safe dicamba-tolerant system or (ii) adequately warn of the risks of off-target movement .... directly caused or directly contributed to cause damage" to Bader.

To establish causation under Missouri law, the defendant's conduct must be both the cause in fact and the proximate cause of the plaintiff's injury. *See* ***Simonian v. Gevers Heating & Air Condit'g, Inc.***, 957 S.W.2d 472, 474 (Mo. App. 1997). Monsanto and BASF claim Bader failed to prove causation. They argue (a) no cause in fact because Bader cannot identify whose dicamba product harmed its trees, and (b) no proximate cause because third-party misuse of dicamba was an intervening cause.

A.

Monsanto and BASF's cause in fact argument relies on the Missouri Supreme Court's decisions in *Zafft* and *Benjamin Moore*.

The plaintiffs in *Zafft* sued all 13 manufacturers of a medication taken to prevent miscarriage, claiming that their cancer (or pre-cancer) resulted from in utero exposure to the medication. ***Zafft v. Eli Lilly & Co.***, 676 S.W.2d 241, 243 (Mo. banc 1984). The plaintiffs could not identify whose product their mothers took. ***Id.*** The Missouri Supreme Court dismissed the suit:

"Missouri tort law ... requires that [plaintiffs] establish a causal relationship between the defendants and the injury-producing agent as a precondition to maintenance of their causes of action." ***Id.*** at 247 (alteration added).

In *Benjamin Moore*, a city tried to recover abatement costs from nine manufacturers of lead paint. ***City of St. Louis v. Benjamin Moore & Co.***, 226 S.W.3d 110, 113 (Mo. Banc 2007). As in *Zafft*, the city could not show whose lead paint was used in the abated residences: "Absent product identification evidence, the city simply cannot prove actual causation." ***Id.*** at 115-16.

This case is unlike *Zafft* and *Benjamin Moore*. True, Bader cannot identify whose dicamba product affected its peach trees. But the dicamba itself is not the "injury-producing agent" here. The jury believed that Bader would not have been injured but for dicamba-tolerant seed sold before farmers could get low-volatility dicamba. Bader's theory of actual causation is that, but for seed that could withstand dicamba herbicide, neighboring farmers would not have sprayed volatile dicamba during growing season. Bader identified whose seed product injured its peach trees: Monsanto's Xtend seed—the only product of its kind on the market. Only if several companies had sold dicamba-tolerant seed products, and if Bader could not identify whose seed product was used by neighboring farmers, would this case resemble *Zafft* and *Benjamin Moore*.

B.

Monsanto and BASF argue that, by using dicamba herbicides illegally and contrary to express warnings,

third- party farmers broke the chain of proximate causation.

Proximate cause "includes a sprinkling of foreseeability," but "Missouri, like many other states has not applied a pure foreseeability test." ***Callahan v. Cardinal Glennon Hosp.***, 863 S.W.2d 852, 865 (Mo. banc 1993). In addition to foreseeability, proximate cause analysis considers intervening causes: "When two or more persons commit successive acts of negligence, the first person's negligence is not the proximate cause of the injury when there is an 'efficient, intervening cause.' " ***Brown v. Davis***, 813 F.3d 1130, 1138 (8th Cir. 2016), *quoting* ***Krause v. U.S. Truck Co.***, 787 S.W.2d 708, 710 (Mo. banc 1990). *See also* ***Consol. Rail Corp. v. Gottshall***, 512 U.S. 532, 553, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994) ("If one takes a broad enough view, all consequences of a negligent act, no matter how removed in time or space, may be foreseen."). Even if third-party acts are foreseeable, they may constitute an intervening cause. *See* ***Callahan***, 863 S.W.2d at 865 (holding that "intervening causes ... may cut off liability"); ***Finocchio v. Mahler***, 37 S.W.3d 300, 303 (Mo. App. 2000) (noting that while "[m]any opinions place great emphasis on foreseeability ... in determining proximate cause," "courts show great reluctance to hold a defendant liable if the chain of causation includes a series of events, subsequent to the initial act or omission, over which the defendant has absolutely no control").

As the district court ruled, the injury here was "foreseeable and in fact foreseen." A slideshow during Monsanto's launch-decision meeting identified "off-

label applications of dicamba" as a "risk." To address that risk, Monsanto implemented a "robust communication plan." Missouri courts have rejected the argument by Defendants (and amici) that "it is never objectively foreseeable that a third party will use a product unlawfully or in a way prohibited by the manufacturer." *See* ***Finocchio***, 37 S.W.3d at 303 ("[C]riminal conduct can hardly be said to be unforeseeable in this day and age ...."); ***Johnson v. Medtronic, Inc.***, 365 S.W.3d 226, 237 (Mo. App. 2012) ("[T]he fact that a particular use of a product is contrary to the manufacturer's instructions does not, per se, establish that the use could not be anticipated."), *citing* ***Chronister v. Bryco Arms***, 125 F.3d 624, 627 (8th Cir. 1997). *Cf.* ***Moore v. Ford Motor Co.***, 332 S.W.3d 749, 762 (Mo. banc 2011) (Missouri law "presum[es] that a warning will be heeded" for purposes of "aid[ing] plaintiffs in proving ... that a warning would have altered the behavior of the individuals involved in the accident" (alterations added)).

The closer question is whether third-party farmers' use of dicamba during growing season—contrary to Monsanto's warnings and the law—is an intervening cause. Monsanto and BASF emphasize *Ashley County v. Pfizer, Inc.*, 552 F.3d 659 (8th Cir. 2009). The plaintiffs there, Arkansas counties seeking costs from the methamphetamine epidemic, sued manufacturers and distributors of over-the-counter cold and allergy medications. ***Ashley Cty.***, 552 F.3d at 663-64. This court held that the counties established cause in fact: "but for the Defendants' sale of cold medicine containing pseudoephedrine, the cooks could not have

made methamphetamine in such large quantities, and the Counties would not have needed to provide additional government services to deal with the methamphetamine- related problems." ***Id.*** at 668. As for proximate cause, the manufacturers did not argue that meth production was an unforeseeable consequence of the sale of cold medicine; in fact, they conceded they sold cold medicine "*with the knowledge* that methamphetamine cooks purchase the cold medicine ... from the retailers and use it to manufacture methamphetamine." ***Id.*** at 667 (emphasis added). Nevertheless, this court held, as a matter of Arkansas law, that the counties could not establish proximate cause because "the criminal actions of the methamphetamine cooks and those further down the illegal line" were intervening causes that broke the causal chain. ***Id.*** at 670-71, *citing* ***City of Philadelphia v. Beretta U.S.A. Corp.***, 277 F.3d 415 (3d Cir. 2002) (gun manufacturers not liable for third parties' criminal use of handguns).

In Missouri, the question of proximate cause is for the jury unless the evidence reveals an intervening cause that "eclipses the defendant's role in the plaintiff's injury." ***Coin Acceptors, Inc. v. Haverstock***, ***Garrett & Roberts LLP***, 405 S.W.3d 19, 24 (Mo. App. 2013). *See also* ***Seeley v. Hutchison***, 315 S.W.2d 821, 825-26 (Mo. 1958) (defining intervening cause as "a new and independent force which so interrupts the chain of events as to become the responsible, direct, proximate and immediate cause of the injury").

This court concludes that the spraying of dicamba by third-party farmers did not "so interrupt the chain of

events" that the question of proximate cause was not for the jury. *Ashley County* is different. First, the third-party meth cooks there were "totally independent" from the defendant pharmaceutical companies. ***Ashley Cty.***, 552 F.3d at 670. In contrast, Monsanto had direct relationships with the third-party farmers by growers' licenses and technology-use terms. Monsanto therefore exercised some degree of control over their acts. Second, in *Ashley County*, consumers could receive the primary benefit of the product (cold medicine) without misusing it. Here, while Monsanto and BASF stress that the Xtend seed had other benefits (such as superior germplasm), its primary benefit was tolerance to dicamba. Consumers could not receive that benefit without misusing dicamba.

While a reasonable jury could have found intervening cause, the district court correctly declined to find it as a matter of law. *See* ***Gathright v. Pendegraft***, 433 S.W.2d 299, 308 (Mo. 1968) ("We cannot say as a matter of law that a negligent tampering with the pipe, or a negligent attempt by some third person to do an act which was the duty of Mr. Vaughn to perform and which he negligently did not perform, was the efficient intervening cause and not an act of concurring negligence. Defendant Vaughn was not entitled to a directed verdict on the basis of intervening cause.").

Monsanto and BASF argue that, at a minimum, the district court should have instructed the jury on intervening cause. Monsanto stresses that the Missouri Supreme Court ruled, "A defendant may submit the issue of an intervening cause by a converse

of the submission of proximate cause in plaintiff's instruction." ***Id.*** That court likened intervening cause to sole cause, which was not submissible as an instruction but, at the time, could be raised in an affirmative converse. ***Id.***, *citing* **Mo. Approved Jury Instr. (Civil) 1.03.**

However, the Missouri Supreme Court has since criticized affirmative converses, especially ones addressing sole cause:

> [I]t is apparent that the affirmative converse instruction is not favored for a number of reasons. Such instruction, like the true converse, is an accessory and unnecessary to the instruction package. An affirmative converse instruction tends to resemble a prohibited "sole cause" instruction. The affirmative converse instruction is often merely a resubmission of the issues found in the verdict director. It requires evidentiary support to justify its submission. In addition, it has the propensity to violate the general premise of the approved instruction format by including unnecessary evidentiary details instead of ultimate issues. These potential problems have led some experts to squarely advise, "Do not use the affirmative converse instruction." .... [T]he judicial landscape is littered with reversals and retrials in cases where affirmative converse instructions were given.

Hiers v. Lemley, 834 S.W.2d 729, 735-36 (Mo. banc 1992) (citations omitted), *discussing* **Mo. Approved Jury Instr. (Civil) 33.05(1).**

True, federal courts "are not required to give the precise instruction set out in an MAI." ***Hrzenak v.***

White-Westinghouse Appliance Co., 682 F.2d 714, 720 (8th Cir. 1982). But Defendants cite no cases finding reversible error where a district gave the precise MAI. On the other hand, three years after *Hiers*, this court held that a district court committed reversible error by giving an affirmative converse on intervening cause because it "forced [plaintiffs] to attempt to prove ... sole cause." ***Bening v. Muegler***, 67 F.3d 691, 697 (8th Cir. 1995), *applying* ***Hiers***, 834 S.W.2d at 736.

The district court properly refused to find intervening cause as a matter of law or give an affirmative converse on that issue.

II.

Monsanto and BASF argue that the compensatory damages were based on the wrong legal standard and lacked evidentiary support. They cite several Missouri appellate decisions measuring damage to fruit trees by "the difference in the value of the land before and after the destruction of the trees." ***Cooley v. Kansas City, P. & G.R. Co.***, 149 Mo. 487, 51 S.W. 101, 104 (1899). *See also* ***Matthews v. Missouri Pac. Ry. Co.***, 142 Mo. 645, 44 S.W. 802, 807 (1897) (the "diminution of the market value of the property ... rule has been applied as affording the measure of damages when ... fruit-bearing trees have been destroyed"); ***Doty v. Quincy, O. & K.C.R. Co.***, 116 S.W. 1126, 1128 (Mo. App. 1909) ("As bearing fruit trees, their chief value depended on their attachment to the land. Recoverable damages for the injury to them consists alone of the effect such injury had on the market value of the land[.]"); ***Steckman v. Quincy, O. & K.C.R. Co.***, 165 S.W. 1122, 1124 (Mo. App. 1914) (value of the

land rule used for damaged fruit trees because their replacement "is tedious and a thing of uncertainty, both as to cost and result"); ***Butcher v. St. Louis-San Francisco Ry. Co.***, 39 S.W.2d 1066, 1069 (Mo. App. 1931) ("It is well settled that the measure of damages in a case of this kind [damage to orchard trees] is the difference between the market value of the land immediately before and immediately after the fire.") (alteration added); ***Kelso v. C. B. K. Agronomics, Inc.***, 510 S.W.2d 709, 725 (Mo. App. 1974) (measuring compensatory damages by the "fair market value of the plaintiffs' farm property before it was damaged and its fair market value after it was damaged" where flood permanently damaged pecan trees), *applying* **Mo. Approved Jury Instr. (Civil) 4.02.**

However, in *Cooley*, the Missouri Supreme Court held that the land-value rule does not apply if the owner of the trees is not the owner of the land.

> Doubtless, the measure of damages of the owner of the land in such case is the difference in the value of the land before and after the destruction of the trees. But no such rule can apply to a case like this, where the ownership of the land is distinct from that of the trees. To apply the rule upon which the defendant insists would be to allow the plaintiff to recover for an injury to the value of the land which is the property of the defendant. This is, of course, preposterous.

Cooley, 51 S.W. at 104.

The *Cooley* exception applies here. Bader Farms, Inc. owned the peach trees, but not the land. Bill Bader testified—and Monsanto and BASF

acknowledge—that he owned all the orchard land individually (other than 117 acres which were leased from a local grower until 2018), and that no peaches were grown on land owned by Bader Farms, Inc. Before trial, Bill Bader voluntarily dismissed his personal claims against Monsanto and BASF with prejudice. In Missouri, a corporation is "a separate legal entity, separate and distinct from its stockholders, officers, and directors." ***Bick v. Legacy Bldg. Maint. Co. LLC***, 626 S.W.3d 700, 705 (Mo. App. 2021). *See also* ***Laredo Ridge Wind, LLC v. Nebraska Pub. Power Dist.***, 11 F.4th 645, 651 (8th Cir. 2021) ("A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities."), *quoting* ***Dole Food Co. v. Patrickson***, 538 U.S. 468, 474, 123 S.Ct. 1655, 155 L.Ed.2d 643 (2003). The district court properly instructed the jury to measure compensatory damages by lost profits rather than land value.

Monsanto and BASF also argue that Bader's lost-profits estimate was impermissibly speculative. "[C]urrent Missouri cases ... have maintained that the amount of lost-profit damages cannot rest upon mere speculation." ***Cole v. Homier Distrib. Co.***, 599 F.3d 856, 866 (8th Cir. 2010), *citing* ***Gateway Foam Insulators, Inc. v. Jokerst Paving & Contracting, Inc.***, 279 S.W.3d 179, 185-86 (Mo. banc 2009); ***Wandersee v. BP Prods. N. Am., Inc.***, 263 S.W.3d 623, 633-34 (Mo. banc 2008); ***Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc.***, 155 S.W.3d 50, 54 (Mo. banc 2005). *See also* ***Tipton v. Mill Creek Gravel, Inc.***, 373 F.3d 913, 919 n.6 (8th Cir. 2004) ("Missouri courts have consistently rejected

projections when they are based upon assumptions or hopeful expectations."). However, lost profits "often defy exactitude" and " 'an adequate basis for estimating lost profits with reasonable certainty' is sufficient." ***Cole***, 599 F.3d at 866, *quoting* ***Wandersee***, 263 S.W.3d at 633. A plaintiff provides an adequate basis for lost profits by "provid[ing] evidence of the income and expenses of the business for a reasonable time before the interruption caused by defendant's actions." ***Wandersee***, 263 S.W.3d at 633 (alteration added).

The lost-profits damages awarded to Bader did not rest upon mere speculation. The orchard had been productive for decades, and Bader provided financial statements showing that peach revenues averaged $2,285,354 from 2011-2014. *Cf.* ***Thoroughbred Ford, Inc. v. Ford Motor Co.***, 908 S.W.2d 719, 735-36 (Mo. App. 1995) (lost profits of a "non-existent [car] dealership" were too speculative). Bader's expert—an agricultural economist—calculated about $20.9 million in actual damages based on, among other factors, acre maturity, tree lifespan, historical yield, the interest rate on Bader's farm operating loans, the time value of money, and "university budgets" projecting maintenance costs. *See* ***Gateway Foam***, 279 S.W.3d at 186 ("Defendant contends that Plaintiff presented mere speculation to support its claim for lost profits, but the record does not support this argument. Plaintiff's accountant presented lengthy testimony about her calculations for its lost profits."). *Cf.* ***Racicky v. Farmland Indus., Inc.***, 328 F.3d 389, 398 (8th Cir. 2003) ("No independent experts testified to the Racickys' lost profits. No business records

supporting lost profits were offered. Without financial data establishing profitability, the lost profits award cannot stand.") (applying Nebraska law).

Monsanto and BASF cite other evidence, including tax returns and insurance claims, indicating that Bader's profits projection was unrealistically high. But it is the jury's task to weigh differing testimony; it found the expert's calculation reliable and reasonably certain. *See* ***Gateway Foam***, 279 S.W.3d at 187 ("It was the trial court's task to weigh the differing testimony offered by each party's accountant, and it deemed the testimony of Plaintiff's accountant reliable and found her testimony provided an adequate basis for estimating the lost profits with reasonable certainty."); ***Wandersee***, 263 S.W.3d at 634 ("The jury was free to accept ACT's factual theory and reject BP's."). Considering the evidence most favorably to the jury's determination, there was an adequate basis for the lost profits award. *See* ***Gateway Foam***, 279 S.W.3d at 187.

III.

The jury found Monsanto and BASF jointly and severally liable for actual damages as joint venturers and co-conspirators. After trial, BASF renewed its motion for judgment as a matter of law challenging Bader's joint-venture and conspiracy claims. The district court denied the motion. BASF appeals, arguing both claims fail as a matter of Missouri law. "We review de novo the denial of a motion for judgment as a matter of law, viewing the evidence and reasonable inferences in the light most favorable to the non-moving party." ***Hople v. Wal-Mart Stores***, 219 F.3d 823, 824 (8th Cir. 2000). "[I]t is improper to

overturn a jury verdict unless, after giving the nonmoving party the benefit of all reasonable inferences and resolving all conflicts in the evidence in the nonmoving party's favor, there still exists *a complete absence of probative facts* to support the conclusion reached so that no reasonable juror could have found for the nonmoving party." ***Hunt v. Nebraska Pub. Power Dist.***, 282 F.3d 1021, 1029 (8th Cir. 2002) (quotation marks omitted).

A.

In Missouri, the burden is generally on the plaintiff to prove a joint venture by a preponderance of the evidence. ***TooBaRoo, LLC v. W. Robidoux, Inc.***, 614 S.W.3d 29, 42-43 (Mo. App. 2020). The elements of a joint venture are: "(1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose, among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control." ***State ex rel. Henley v. Bickel***, 285 S.W.3d 327, 331-32 (Mo. banc 2009), *citing* **Restatement (Second) of Torts § 491** (1965). Viewing the evidence and reasonable inferences most favorably to Bader, the first three elements of a joint venture are established: (1) 2010's Umbrella Agreement, 2011's Dicamba Tolerant System Agreement (DTSA) and 2014's Amended and Restated Dicamba Tolerant System Agreement (ARDTSA) were express agreements;[*] (2) by them, Monsanto and

[1] While all three Agreements between Monsanto and BASF disclaimed the existence of a joint venture, "[w]hether a joint

BASF sought to accomplish the common purpose of developing dicamba-tolerant seed; (3) under the Agreements, Monsanto owned the seed, but BASF received "value share payments" for every acre with Xtend seed—a community of pecuniary interest. The issue is whether BASF had equal control over the direction of the enterprise.

The district court relied on the fact that agreements between Monsanto and BASF created an Alliance Management Team with equal representation and alternating chairs. Through the AMT, Monsanto and BASF worked together to develop dicamba-tolerant seed by conducting field trials and research studies, registering herbicides, recommending labels, forecasting seed volume, planning communications, and coordinating a commercial launch strategy. The district court concluded that "the AMT was structured to provide the parties with joint control over the project" and that Bader raised a question of fact about equal control.

However, there is no question that Monsanto maintained full control over the critical aspects of the project. As the district court found, "To be sure, the

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enterprise has been created or not may be determined from the apparent purposes and the acts and conduct of the parties who join in the undertaking" which "may speak above the expressed declarations of the parties to the contrary." ***Denny v. Guyton***, 327 Mo. 1030, 40 S.W.2d 562, 583 (Mo. banc 1931). *See also* ***Jeff-Cole Quarries, Inc. v. Bell***, 454 S.W.2d 5, 16 (Mo. 1970) ("There certainly was no evidence of an express agreement to create a joint venture; the question here is whether the evidence shows, by facts and circumstances, that one was in fact created.").

ARDTSA reserved to Monsanto alone the decision of whether, when, and how to commercialize DT seed, and Monsanto stipulated that BASF had no involvement in the decision."† Before trial, Monsanto filed a Stipulation Regarding Commercialization of Dicamba Tolerant Cotton and Soybean Seed:

> Monsanto Company ("Monsanto"), through its undersigned counsel, hereby stipulates as follows:
>
> 1. Effective March 8, 2011, BASF Corporation and Monsanto executed the Dicamba Tolerant System Agreement (hereinafter "DTSA").
>
> 2. Section 3.1 of the DTSA states as follows:
>
> DT Seed Product Commercialization. Monsanto shall, in its sole discretion and at its sole expense, determine when and how to commercialize any DT

† The DTSA says: " 'Commercialize' means, with respect to any DT System Crop Protection Product, DT Crop or DT Seed Product, (i) to make, use, recommend, promote, offer for sale, sell, distribute, import, or export, (ii) to permit any Distributor to recommend, promote, offer for sale, sell, distribute, import or export, and (iii) to permit any grower to use, in each case in accordance with the terms of this Agreement and the Pesticide Registration, Crop Registration or license for or label on such product, as applicable. For the avoidance of doubt, in the case of DT Seed Products, Commercialize includes the licensing of the Dicamba Trait therein by any member of the Monsanto Group." **Dicamba Tolerant System Agreement § 1.25** (2011). The ARDTSA contains a nearly identical definition. **Amended and Restated Dicamba Tolerant System Agreement § 1.33** (2014) (substituting the words "any product, crop or seed" for "any DT System Crop Protection Product, DT Crop or DT Seed Product").

> Seed Product in each country in the Territory. If Monsanto decides not to Commercialize, or to delay Commercialization of, any given DT Seed Product in a given country, it shall promptly notify BASF thereof in accordance with Section 3.2.
>
> 3. Prior to the 2015 growing season, Monsanto exercised its sole discretion under the DTSA and made the decision to commercialize Dicamba Tolerant Cotton Seed ("DT Cotton Seed").
>
> 4. Prior to the 2016 growing season, Monsanto exercised its sole discretion under the DTSA and made the decision to commercialize Dicamba Tolerant Soybean Seed ("DT Soybean Seed").
>
> 5. BASF Company was not involved in, and had no role in, Monsanto's decision to commercialize DT Cotton Seed prior to the 2015 growing season; and DT Soybean Seed prior the 2016 growing season.

Relying on this stipulation, BASF moved to exclude "evidence suggesting that BASF Corporation was involved in Monsanto's decision to release Xtend seeds in 2015 and 2016." Bader admitted having no "evidence that any BASF Corp. employee had a vote in the decision to release Xtend seeds." At trial, BASF's counsel read Monsanto's stipulation to the jury—without objection. *Cf.* ***Consol. Grain & Barge Co. v. Archway Fleeting & Harbor Serv., Inc.***, 712 F.2d 1287, 1289 (8th Cir. 1983) ("It is well settled that stipulations of fact fairly entered into are controlling and conclusive and courts are bound to enforce them."); ***Stern v. Stern***, 639 F.3d 449, 453 (8th Cir. 2011) (same).

On appeal, Bader acknowledges that "Monsanto controlled the release of the Xtend system" but argues that, through the DTSA, "[t]he parties jointly delegated responsibility for the seed launch to Monsanto." This argument overlooks that BASF relinquished its rights to dicamba-tolerant seed technology by a settlement agreement in 2007, years before the DTSA was executed. Control over the commercialization of dicamba-tolerant seed rested solely with Monsanto before its Agreements with BASF. Through them, Monsanto continued its sole control. BASF could not delegate rights it did not possess.

"[A]ssigned roles in the total project" are "usual in joint ventures." ***Johnson v. Pac. Intermountain Exp. Co.***, 662 S.W.2d 237, 242 (Mo. banc 1983). However, there "must be some evidence of the parties participating and having control over the enterprise," whether that be "joint or several control." ***Thompson v. Tuggle***, 183 S.W.3d 611, 617 (Mo. App. 2006) (quotation omitted). While the Agreements assign BASF a role in the development of Xtend seed, they reserve to Monsanto full control over its commercialization. Because BASF had no control over when, how, or even whether to release dicamba-tolerant seed, BASF did not have equal control over the direction of the enterprise.

BASF also lacked control over farmers who planted Xtend seed. Bader argues its injury was exacerbated by a failure to investigate and punish off-label dicamba use. But, citing the record, Bader acknowledges that "Monsanto controlled the release of the Xtend system and controls Xtend-seed

purchasers through its TUGs [technology use terms]. Monsanto could have stopped illegal spraying by rescinding offenders' licenses but refused." It is undisputed that BASF did not have control over either of the decisions that injured Bader.

Because the record does not support a finding that BASF "had any voice, much less an equal voice" over the critical aspects of the enterprise, Bader's joint-venture claim fails as a matter of law. ***Hatch v. V.P. Fair Found., Inc.***, 990 S.W.2d 126, 139 (Mo. App. 1999). *See* ***Jeff-Cole Quarries, Inc. v. Bell***, 454 S.W.2d 5, 16 (Mo. 1970) (joint-venture claim against a general contractor and landowners failed as a matter of law because "there [was] no evidence that [the landowners] participated in or controlled the construction" (alterations added)); ***Howard v. Winebrenner***, 499 S.W.2d 389, 396 (Mo. 1973) (truck driver's joint-venture claim against a transportation company failed as a matter of law because "there was no mutual right to control between plaintiff and defendant. Plaintiff only drove defendant's tractor; defendant had the right to remove and discharge him at any time."); ***Johnson***, 662 S.W.2d at 242 (joint-venture claim against a truck driver and a freight broker succeeded because evidence showed that the freight broker "had control over, or the right to control, [the truck driver] as he headed west with the truck" (alteration added)); ***Henley***, 285 S.W.3d at 332 (joint-venture claim against a husband and wife failed as a matter of law because plaintiff failed to plead facts "showing ... an actual ability [of the passenger wife] to control the driver [husband]" (alterations added)); ***Dillard v. Rowland***, 520 S.W.2d 81, 91 (Mo.

App. 1974) (joint-venture claim against a hospital and a university failed as a matter of law because "although facilities [were] shared for mutual benefit, no portion of the agreement between the two institutions [gave] either the right to control any of the operations of the other .... an important and necessary element, the right to control, was not present" (alterations added)); ***Inauen Packaging Equip. Corp. v. Integrated Indus. Servs., Inc.***, 970 S.W.2d 360, 371 (Mo. App. 1998) (manufacturer's joint-venture claim against a marketing company failed as a matter of law because "[w]hile [the owner of the marketing company] may have been successful in pursuing some of the changes he wanted to see made at [the manufacturer], it is clear [from] the record that [the marketing company]'s voice was not 'equal' to [the manufacturer]'s .... [the manufacturer] failed to prove [its] relationship with the [the marketing company] was anything more than people who had entered into a contract"); ***Ritter v. BJC Barnes Jewish Christian Health Sys.***, 987 S.W.2d 377, 388 (Mo. App. 1999) (joint-venture claim against two hospitals failed as a matter of law because while one hospital had "control over [the other hospital's] budget matters and the board of directors," it did not "control the way in which [the other hospital] delivers health care"); ***Hatch***, 990 S.W.2d at 139 (joint-venture claim against a bungee jumping company and a fair organizer failed as a matter of law because "evidence that [the fair organizer] chose the site, permitted [the bungee jumping company] to use its logo, took tickets and payment, controlled the crowd, and lined up prospective jumpers does not establish that [the fair organizer] had any voice, much less an

equal voice, in the details of the operation of the bungee jump" (alterations added)); ***Thompson***, 183 S.W.3d at 617 (joint-venture claim against tenants and their landlord failed as a matter of law because the landlord "had no control over the property .... there was no joint or several control required to form a joint venture"). *Cf.* ***Firestone v. VanHolt***, 186 S.W.3d 319, 326 (Mo. App. 2005) (joint-venture claim against a roofing company and a home-improvement company was for the jury because, since only the home-improvement company had the necessary permit and liability insurance to do the construction job, the home-improvement company may have had "the requisite control necessary to find a joint venture"); ***TooBaRoo***, 614 S.W.3d at 40-41 (software company's joint-venture claim against a printing company succeeded where the owner of the software company was also on the printing company's board of directors, which included only him and his immediate family members).

B.

"Civil conspiracy is an agreement or understanding between two or more parties to do an unlawful act or use unlawful means to do a lawful act." ***Park Ridge Assocs. v. UMB Bank***, 613 S.W.3d 456, 463 (Mo. App. 2020). Civil conspiracy is proven where the plaintiff establishes: "(1) two or more persons (2) an unlawful objective, (3) a meeting of the minds, (4) an act in furtherance of the conspiracy, and (5) damages." ***Id.*** at 463-64. "Plaintiffs need not plead or prove the conspirators intended to harm them if they can show harm resulted." ***Id.*** at 464.

Probative facts support the jury's conclusion that Monsanto and BASF participated in a conspiracy. Resolving conflicts in the evidence in Bader's favor, Monsanto and BASF agreed to use unlawful means—knowingly enabling widespread off-label use of dicamba during growing season —to increase sales of Xtend seed. Under the terms of the Umbrella Agreement, DTSA, and ARDTSA, both companies took acts in furtherance of this unlawful objective. They agreed to share access to proprietary testing and data for regulatory approval, share materials to enable testing and development, share in the costs of dicamba residue testing, and make capital expenditures to fulfill their respective obligations under the agreements. Monsanto also pursued a "protection from your neighbor" marketing campaign while BASF identified "defensive planting" as a "Market Opportunity" and "ramped up availability of its [higher-volatility dicamba] product after Monsanto announced the launch of Xtend seeds in 2015."

As a member of the civil conspiracy, BASF is jointly and severally liable for Bader's actual damages. ***W. Blue Print Co., LLC v. Roberts***, 367 S.W.3d 7, 22 (Mo. banc 2012) ("[C]ivil conspiracy .... acts to hold the conspirators jointly and severally liable for the underlying act."), *citing* ***8000 Maryland, LLC v. Huntleigh Fin. Servs. Inc.***, 292 S.W.3d 439, 451 (Mo. App. 2009). *See also* ***Taylor v. Compere***, 230 S.W.3d 606, 611 (Mo. App. 2007) ("Establishing a conspiracy will make all defendants jointly and severally liable for actual damages."), *quoting* ***Moore v. Shelton***, 694 S.W.2d 500, 501 (Mo. App. 1985).

IV.

The defendants challenge the punitive damages award in three ways. First, Monsanto and BASF argue that punitive damages were not submissible under Missouri law. Second, BASF argues that, after instructing the jury to assess punitive damages against Monsanto only, the district court erred in holding Monsanto and BASF jointly and severally liable for punitive damages. Third, Monsanto and BASF believe that the amount awarded was unconstitutionally excessive under the Due Process Clause of the Fourteenth Amendment. This court reviews "for abuse of discretion the district court's conclusion that the jury's award of punitive damages comported with state law." ***Hallmark Cards, Inc. v. Monitor Clipper Partners, LLC***, 758 F.3d 1051, 1060 (8th Cir. 2014). The award's constitutionality is reviewed de novo. ***Id.***

A.

According to Monsanto and BASF, the district court abused its discretion by submitting punitive damages to the jury.

In Missouri, punitive damages are awarded to deter and retribute. ***All Star Awards & Ad Specialties, Inc. v. HALO Branded Sols., Inc.***, 642 S.W.3d 281, 296 (Mo. banc 2022). They are warranted only with "clear and convincing evidence" that the defendant "acted with either an evil motive or a reckless indifference to the plaintiff's rights." ***May v. Nationstar Mortg., LLC***, 852 F.3d 806, 814 (8th Cir. 2017), *citing* ***Burnett v. Griffith***, 769 S.W.2d 780, 789 (Mo. banc 1989). Factors against submission of

punitive damages include (1) the defendant did not knowingly violate a statute, regulation, or clear industry standard designed to prevent the type of injury that occurred; (2) prior similar occurrences known to the defendant have been infrequent; and (3) the injurious event was unlikely to have occurred absent negligence on the part of someone other than the defendant. ***Lopez v. Three Rivers Elec. Co-op., Inc.***, 26 S.W.3d 151, 160 (Mo. banc 2000).

Monsanto and BASF argue that the *Lopez* factors weighed against the submission of punitive damages. First, they stress that "it is undisputed that Monsanto did not sell Xtend seeds until it received regulatory approval from USDA." However, as the district court said, evidence showed that "Monsanto consciously blocked testing for volatility to avoid evidence of off-target movement that could interfere with regulatory approval," implemented a "moratorium on testing ... to prevent off-site movement of dicamba while the EPA reviewed their data submissions," "denied academics' requests to perform volatility testing," and "blocked its own Technical Development employees from spraying dicamba over Xtend seed to avoid bad results." Under its agreements with Monsanto, BASF accessed, contributed to, and funded testing of the Xtend system. The best evidence: in February 2015, BASF "advised" its "biology and tech service" of Monsanto's "concerns that [field testing] results could negatively impact [the] EPA's registration decision."

Second, Monsanto and BASF emphasize that, when Monsanto began selling Xtend seed, "prior instances of off-target dicamba injury were minimal." But of course they were—before dicamba-tolerant seed,

farmers had no reason to spray dicamba during growing season. As the district court said, Monsanto "launched the Xtend seeds without a corresponding low-volatility herbicide in 2015 despite knowing that farmers intended to spray dicamba off-label," and so was not caught off guard by a lack of prior instances. The district court continued, "Despite knowing that farmers did use old-dicamba over-the-top in 2015, Monsanto continued to sell Xtend seeds in 2016." BASF officials also knew that off-label dicamba use was "widespread in cotton [in 2015] and that it will be rampant in 2016."

The third *Lopez* factor is neutral. True, the damage to Bader's peach trees required negligence on the part of third-party farmers. However, "Monsanto chose not to enforce its grower license to prevent off-label dicamba use over Xtend seeds" and "refused to investigate complaints of dicamba damage in the Bootheel in 2015 or 2016." If Monsanto had taken these measures, it would have limited the kind of third-party negligence that caused Bader's injury. BASF also chose to ramp up production of its volatile dicamba product to meet the demand created by Xtend seed.

Bader provided clear and convincing evidence that Monsanto and BASF acted with reckless indifference, and the *Lopez* factors did not prevent submission of punitive damages.

B.

The jury was instructed it could "find that Defendant Monsanto Company is liable for punitive damages" if it "believe[d] the conduct of Defendant Monsanto Company ... showed complete indifference

to or conscious disregard for the safety of others." The instruction did not mention BASF at all. Only Monsanto presented a defense during the trial's punitive damages phase, and the only additional evidence was a stipulation of Monsanto's net worth. The verdict stated, "We, the jury, assess punitive damages against Defendant Monsanto Company at $250,000,000.00." After trial, the district court remitted punitive damages to $60 million. It also adopted Bader's proposed judgment that Monsanto and BASF would be jointly and severally liable for the punitive damage award. BASF argues this was error, and that punitive damages should not have been awarded without a jury's individualized assessment of its wrongdoing.

1.

Under Missouri law, "defendants shall only be severally liable for the percentage of punitive damages for which fault is attributed to such defendant by the trier of fact." § **537.067.2, RSMo 2016**. Missouri defendants have a "right to have their conduct considered separately for the purpose of determining whether or not punitive damages should be awarded." ***Saunders v. Flippo***, 639 S.W.2d 411, 412 (Mo. App. 1982). *See also* ***Desai v. SSM Health Care***, 865 S.W.2d 833, 838 (Mo. App. 1993) ("*Saunders* stands for the proposition that MAI 10.03 must also be used if a claim for punitive damages is offered against multiple defendants."). *See generally* **Mo. Approved Jury Instr. (Civil) 10.03** (8th ed.) ("When submitting against more than one defendant for punitive damages, use an appropriate instruction ... as a separate paragraph for each such defendant.

Use the following sentence as the concluding paragraph of the punitive damage instruction: If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different."); **Mo. Sup. Ct. R. 70.02(b)** ("Whenever Missouri Approved Instructions contains an instruction applicable in a particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other instructions on the same subject.").

If Monsanto and BASF had formed a joint venture, a judgment holding BASF jointly and severally liable for punitive damages based on Monsanto's conduct may have been appropriate. *See* ***Ballinger v. Gascosage Elec. Co-op.***, 788 S.W.2d 506, 515 (Mo. banc 1990) ("A joint venture is a species of partnership and is governed by the same legal rules."); ***Binkley v. Palmer***, 10 S.W.3d 166, 169 (Mo. App.1999) (same); ***Firestone***, 186 S.W.3d at 324 ("A joint venture is a species of partnership."), *citing* ***Johnson***, 662 S.W.2d at 241; ***Blanks v. Fluor Corp.***, 450 S.W.3d 308, 402 (Mo. App. 2014) ("Missouri recognizes that partners are vicariously liable for punitive damages based on acts of their copartners done in the course of partnership business."); § **358.130, RSMo 2016** ("Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the

same extent as the partner so acting or omitting to act."). However, as discussed in part III.A. above, Bader's joint-venture claim fails as a matter of law because BASF did not have equal control over the direction of the enterprise.

Bader's conspiracy claim *is* supported by probative facts, but establishing a conspiracy "does not change the rule" that punitive damages against multiple defendants must be assessed separately. ***Moore***, 694 S.W.2d at 501. After a bench trial, the trial court in *Moore* ruled that the defendants had conspired and awarded punitive damages "against all of the defendants ... in the sum of $10,000." ***Id.*** On appeal, the defendants argued that the punitive damage award was "improper as the amount of punitive damages should have been specified as to each defendant." ***Id.*** Plaintiff "counter[ed] that [the joint and several award] was proper because there was a conspiracy." ***Id.*** (alterations added). The Missouri Court of Appeals reversed:

> Establishing a conspiracy will make all defendants jointly and severally liable for actual damages, but it does not change the rule that punitive damages are to be assessed against each tort - feasor depending, among other factors, upon his degree of culpability. There may be cases where punitive damages should be the same against each defendant. However, as prescribed in that verdict form, ordinarily they should be set forth separately.

Id., *applying* ***State ex rel. Hall v. Cook***, 400 S.W.2d 39, 41 (Mo. banc 1966). Because the evidence there "established different degrees of culpability and wealth of defendants ...the trial court should have

separately assessed the punitive damages against each defendant." ***Id.*** at 501-02. *See also* ***Taylor***, 230 S.W.3d at 611 (reiterating, where a debtor and his accountants conspired to commit fraudulent stock transfers, that "while the principles of joint and several liability and imputation of conduct may apply to an actual damages claim, such principles are not to be applied to a punitive damages claim when the evidence shows differing degrees of culpability and/or ability to pay"), *quoting* ***Brown v. New Plaza Pontiac Co.***, 719 S.W.2d 468, 473 (Mo. App. 1986); ***Heckadon v. CFS Enterprises, Inc.***, 400 S.W.3d 372, 381 n.9 (Mo. App. 2013) (affirming trial court's decision to separately assess punitive damages against co-conspirators "based upon their individual degree of culpability" "even though the actual damage awards [were] merged into a single award") (alteration added), *citing* ***Taylor***, 230 S.W.3d at 611. *Accord* ***BMW of North America, Inc. v. Gore***, 517 U.S. 559, 575, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) ("exemplary damages imposed on a defendant should reflect 'the enormity of his offense' "), *quoting* ***Day v. Woodworth***, 54 U.S. 363, 371, 13 How. 363, 14 L.Ed. 181 (1851).

The evidence here "establishe[s] different degrees of culpability" between the co-conspirators. ***Moore***, 694 S.W.2d at 501-02 (alteration added). The district court should have instructed the jury to "separately assess" punitive damages against Monsanto and BASF. ***Id.***

2.

Bader argues that BASF waived its right to separate assessment by failing to (1) object to the instruction's lack of apportionment, (2) object to introduction of

Monsanto's net worth, and (3) present argument during the punitive damages phase. Bader overlooks that months before trial, the district court dismissed Bader's claim against BASF "for joint liability for any punitive damages award" upon BASF's motion. Then, when Bader proposed the joint and several punitive damages judgment after trial, BASF filed a timely motion to alter the judgment stating the grounds for its objection. These acts sufficiently preserved BASF's separate assessment argument. *See* ***United States v. Ali***, 616 F.3d 745, 751-52 (8th Cir. 2010) ("[P]reserving an issue is a matter of making a timely objection to the trial court and clearly stating the grounds for an objection, so that the trial court has an opportunity to prevent or correct the error in the first instance."), *citing* ***Puckett v. United States***, 556 U.S. 129, 134, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009) ("If a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue. If he fails to do so in a timely manner, his claim for relief from the error is forfeited. No procedural principle is more familiar to this Court than that a right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." (citation and quotation marks omitted)).

This court therefore vacates the punitive damages award and remands the case with instructions to hold a new trial only on the issue of punitive damages. *See* ***Kirk v. Schaeffler Grp. USA, Inc.***, 887 F.3d 376, 390 (8th Cir. 2018) ("A partial new trial on damages is permitted by Rule 59(a)(1) .... [W]e have often

remanded for retrial of punitive damages only."), *citing* **Fed. R. Civ. P. 59(a)**. *See also* ***Burnett***, 769 S.W.2d at 790-91 ("[Missouri Supreme Court Rules give] authority to grant a new trial on a single issue of punitive damages if ... the evidence so justifies .... In our judgment the resubmission of the case on punitive damages only is in the interest of both judicial economy and judicial efficiency."); ***McCrainey v. Kansas City Missouri Sch. Dist.***, 337 S.W.3d 746, 756 (Mo. App. 2011) ("[W]here there [is] no error in the jury's finding of liability, the plaintiff should not have to risk his verdict where the only remaining issue was with regard to punitive damages." (alterations added)), *citing* ***Burnett***, 769 S.W.2d at 791.

C.

Monsanto and BASF argue that the $60 million punitive damages award is unconstitutional under the Due Process Clause of the Fourteenth Amendment, which prohibits "grossly excessive" civil punishment. *See* ***Grabinski v. Blue Springs Ford Sales, Inc.***, 203 F.3d 1024, 1025 (8th Cir. 2000), *citing* ***Gore***, 517 U.S. at 575, 116 S.Ct. 1589. This court need not address whether the amount of vacated punitive damages is unconstitutionally excessive.

* * * * * * *

This court reverses in part, vacates the award of punitive damages, and remands with instructions to hold a new trial on the single issue of punitive damages. In all other respects, the judgment is affirmed.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20-3663

JOHN S. HAHN,

Special Master

BADER FARMS, INC.,

Plaintiff-Appellee

BILL BADER,

Plaintiff

v.

MONSANTO COMPANY,

Defendant

BASF CORPORATION,

Defendant-Appellant

AMERICAN SEED TRADE ASSOCIATION, INCORPORATED; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; COALITION FOR LITIGATION JUSTICE, INC.; CROPLIFE AMERICA; DRI-THE VOICE OF THE

DEFENSE BAR; MISSOURI AGRIBUSINESS ASSOCIATION; MISSOURI CHAMBER OF COMMERCE AND INDUSTRY; NATIONAL ASSOCIATION OF MANUFACTURERS; PRODUCT LIABILITY ADVISORY COUNCIL, INCORPORATED; WASHINGTON LEGAL FOUNDATION,

Amici on Behalf of Appellant(s).

MISSOURI ASSOCIATION OF TRIAL LAWYERS; NATIONAL FAMILY FARM COALITION; CENTER FOR BIOLOGICAL DIVERSITY; PESTICIDE ACTION NETWORK; CENTER FOR FOOD SAFETY; SAVE OUR CROPS COALITION,

Amici on Behalf of Appellee(s).

No. 20-3665

JOHN S. HAHN,

Special Master

BADER FARMS, INC.,

Plaintiff-Appellee

BILL BADER,

Plaintiff

v.

MONSANTO COMPANY,

Defendant

BASF CORPORATION,

Defendant-Appellant

AMERICAN SEED TRADE ASSOCIATION, INCORPORATED; CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; COALITION FOR LITIGATION JUSTICE, INC.; CROPLIFE AMERICA; DRI-THE VOICE OF THE DEFENSE BAR; MISSOURI AGRIBUSINESS ASSOCIATION; MISSOURI CHAMBER OF COMMERCE AND INDUSTRY; NATIONAL ASSOCIATION OF MANUFACTURERS; PRODUCT LIABILITY ADVISORY COUNCIL, INCORPORATED; WASHINGTON LEGAL FOUNDATION,

Amici on Behalf of Appellant(s).

MISSOURI ASSOCIATION OF TRIAL LAWYERS; NATIONAL FAMILY FARM COALITION; CENTER FOR BIOLOGICAL DIVERSITY; PESTICIDE ACTION NETWORK; CENTER FOR FOOD SAFETY; SAVE OUR CROPS COALITION,

Amici on Behalf of Appellee(s).

Appeals from U.S. District Court for the Eastern District of Missouri - Cape Girardeau

(1:16-cv-00299-SNLJ)

JUDGMENT

Before SMITH, Chief Judge, BENTON, and KELLY, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in these causes is affirmed in part, reversed in part, and remanded to the district court for proceedings consistent with the opinion of this court.

July 07, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

BADER FARMS, INC.,

Plaintiff,

v.

MONSANTO COMPANY AND BASF CORPORATION,

Defendants.

MDL No. 1:18-md-02820-SNLJ
Indiv. Case No. 1:16-cv-00299-SNLJ

AMENDED JUDGMENT

This action came before the Court for trial by jury. The issues have been tried, the Court having dismissed certain claims and Plaintiff having withdrawn certain claims, and the jury rendered its verdict on all remaining claims.

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that:

Plaintiff shall have judgment against Defendant Monsanto Company and Defendant BASF Corporation, jointly and severally, for Actual

Damages in the amount of $15,000,000.00, and for Punitive Damages in the Amount of $60,000,000.00 plus post-judgment interest as allowed by 28 U.S.C. §1961, and the costs of this action.

Dated this 25th day of November, 2020.

/s/ Stephen N. Limbaugh, Jr.
STEPHEN N. LIMBAUGH, JR.
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

BADER FARMS, INC.,

Plaintiff,

v.

MONSANTO COMPANY AND BASF CORPORATION,

Defendants.

MDL No. 1:18-md-02820-SNLJ
Indiv. Case No. 1:16-cv-00299-SNLJ

MEMORANDUM and ORDER

The parties dispute the form of the judgment in this matter following a jury trial. The Court ordered briefing on this matter at defendant BASF Corporation's request. (#566.)

The jury found as follows:

- In Part 1 of Verdict A, that plaintiff had proven negligent design or failure to warn for 2015 and 2016 against defendant Monsanto and negligent design or failure to warn for 2017 to the present against both defendants Monsanto and BASF.

- In Part 2 of Verdict A, the jury awarded plaintiff $15 million in actual damages.
- In Part 3 of Verdict A, the jury found that Monsanto was liable for punitive damages for conduct during 2015-2016.
- On Verdict Form B, the jury found that the defendants were acting in a joint venture and in a conspiracy.
- On Verdict Form C, the jury assessed punitive damages against Monsanto for 2015 and 2016 in the amount of $250 million.

Plaintiff informally submitted a proposed judgment that states both Monsanto and BASF are responsible for the $250 million punitive damages award. BASF objects to the proposed judgment to the extent punitive damages are imposed against it as a joint venturer with Monsanto. Specifically, BASF contends that it should not be responsible for any part of that award for several reasons.

First, BASF argues that the proposed judgment is inconsistent with and unsupported by the jury's verdict because the Court's instructions on punitive damages and the jury's resulting findings addressed Monsanto's conduct and liability alone.

Instructions 9 and 14 underpin the punitive damage award. Instruction 9 defined the negligence claims against Monsanto for 2015 and 2016 acts and permitted the jury to find for plaintiff and against Monsanto if the jury found Monsanto failed to use ordinary care. (#554 at 10.) BASF was not mentioned. Instruction 14 cross-referenced the conduct the jury relied on in Instruction 9 and stated the jury could

find Monsanto liable for punitive damages "if you believe the conduct of Defendant Monsanto Company as submitted in Instruction No. 9 showed complete indifference to or conscious disregard for the safety of others." (#554 at 15.) Instruction 14 likewise did not mention BASF. Notably, this Court determined that the matter of punitive damages could only go to the jury on 2015 and 2016 conduct, which involved the rollout of Monsanto's Xtend seeds without a corresponding low-volatility dicamba-based herbicide. The Court ruled that BASF's individual conduct in 2015 and 2016 did not warrant separate imposition of punitive damages against BASF. The Court also ruled against the imposition of punitive damages against both defendants from 2017 forward.

BASF's concerns with respect to these instructions were discussed at length on the record. The structure of Verdict Form B was based on the Court's ruling that the jury's finding of joint venture or conspiracy would make the defendants jointly liable for any compensatory and punitive damages awards. Indeed, the verdict form expressly instructed the jury not to apportion fault between defendants if it found a joint venture or conspiracy. In lengthy discussions regarding whether the Court should include reference to BASF in the 2015-2016 verdict director or to add a separate special interrogatory for BASF, the Court observed—and plaintiff and BASF agreed—that BASF's liability for punitive damages would be subsumed and argued under the joint-venture claim, which was addressed by Instruction 16:

> [BASF counsel]: Because the only reason why we are in in 2015 or 2016 is because

> of the potential joint venture and the release of the seed. I mean, that's –
>
> [Plaintiff counsel]: Well, that's not what we pled.
>
> The Court: That's true for punitives.

(Tr. 2410.)

> The Court: Why do you have to have that [language referring to BASF's conduct] in there? Why didn't [Instruction] 16 take care of all your problems?
>
> [BASF counsel]: So you just want me to take the phrase out and just have – an instruct them that they can only consider Monsanto's conduct?
>
> [Monsanto counsel]: Take the words out and we are done.
>
> [BASF counsel]: That language would encompass necessarily conduct that Monsanto did with BASF. "Monsanto's conduct."
>
> ***
>
> The Court: Why doesn't 16 take care of the problem?
>
> [Plaintiff counsel]: Fine. I am tired.

(Tr. 2416.) The Court and the parties clearly understood, then, that the joint venture instruction (Instruction 16) would operate to make BASF liable for the 2015 and 2016 conduct, even though Monsanto alone was mentioned in the punitive damages verdict director. This is underscored by BASF counsel's closing argument:

> [BASF counsel]: I will spend the last bit of time I have talking about joint venture and conspiracy. The only reason these are on here is for BASF to be held liable for things that happened in '15 and '16. When you are asked about '15 and '16 both from the punitive side and on the liability side, you will only see Monsanto's name there.
>
> Now, again, I don't think you get there because I don't think there's causation, but for '15 and '16 you won't see BASF's name because we didn't have a product there. So for both punitives and liability, what the plaintiffs want you to do is find a conspiracy and joint venture because that means BASF shares Monsanto's losses.
>
> So I'm asking you, if you think it's unfair for BASF to share the losses for '15 and '16 when they had zero control over the seed, to say no to these two [conspiracy and joint venture]. And that's all you need to do.

(Tr. 2527 (emphasis added).) Thus, the Court made it clear on the record it was "true for punitives" that BASF would be liable in 2015 or 2016 because of the potential joint venture. In fact, BASF told the jury that it would be liable for any punitive damages if the jury found joint venture.

All this comports with Missouri law. The Uniform Partnership Act—which applies also to joint ventures, which are essentially partnerships for a limited

purpose— states that

> Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

§ 358.130 RSMo (emphasis added); *see Blanks v. Fluor Corp*., 450 S.W.3d 308, 401-02 (Mo. App. E.D. 2014). In *Blanks*, the court stated, "given that the partnership is liable for penalties incurred by a partner for acts done in the course of the partnership's business, including punitive damages...proof of individual culpability is not required." *Id.*; *see also Blue v. Rose*, 786 F.2d 349, 352 (8th Cir. 1986); *Rogers v. Hickerson*, 716 S.W.2d 439, 447 (Mo. App. S.D. 1986); *Martin v. Yeoham*, 419 S.W.2d 937, 950–52 (Mo. App. Kansas City 1967). "This liability attaches even if partners did not participate in, ratify, or have knowledge of the activity giving rise to the award of punitive damages." *Blanks*, 450 S.W.3d at 402 (citing *Rogers*, 716 S.W.2d at 447); *see also* 68 *C.J.S. Partnership* § 209 ("Partners are vicariously liable for punitive damages based on acts of their copartners done in the course of the partnership business; this liability attaches even if partners did not participate in, ratify, or have knowledge of the activity giving rise to the award of punitive damages.").

BASF's other arguments are also unavailing because they fail to recognize the special circumstance

present here—the jury found BASF and Monsanto were engaged in a joint venture. BASF's reliance on § 537.067 RSMo—the apportionment of fault statute—is misplaced. That statute states in pertinent part "defendants shall only be severally liable for the percentage of punitive damages for which fault is attributed to such defendant by the trier of fact." § 537.067.2 RSMo. However, that section purports to apply only where there are two or more co-defendants each of whom are independently liable for punitive damages, in which case an apportionment is necessary. The section does not apply in this case, where no allocation of fault was necessary.

To be sure, in its order of July 2020 and with plaintiff's agreement, this Court dismissed the plaintiff's joint liability claim for punitive damages claim in the context of this statutory apportionment analysis. But this Court was not asked to address an alternative theory of joint venture liability—the only theory of liability offered against BASF for punitive damages in the instructions. The Court notes that plaintiff's joint venture count (Count X) itself sought punitive damages. And, again, the finding of joint venture obviated the need for separate punitive damages awards that might have implicated the apportionment statute. Although BASF also claims that it was prejudiced by the submission of the "alternate" joint venture liability theory for punitive damages, it identifies no real effort it could have made to avoid that liability other than the constant and comprehensive defense it raised to joint venture liability throughout the trial.

Finally, BASF complains that, as a matter of due

process, the jury should have been required to make a specific finding that the punitive damages misconduct occurred in furtherance of the joint venture. Suffice it to say that the joint venture findings in Instruction 16 satisfied that requirement.

For the foregoing reasons, then, the Court will enter the judgment proposed by plaintiff and endorsed by Monsanto. BASF and Monsanto are jointly liable for the entirety of the verdict in light of the jury's finding that the defendants were in a joint venture.

It is SO ORDERED this 28th day of February, 2020.

/s/ Stephen N. Limbaugh, Jr.
STEPHEN N. LIMBAUGH, JR.
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

BADER FARMS, INC.,

Plaintiff,

v.

MONSANTO COMPANY AND BASF CORPORATION,

Defendants.

MDL No. 1:18-md-02820-SNLJ
Indiv. Case No. 1:16-cv-00299-SNLJ

JUDGMENT

This action came before the Court for trial by jury. The issues have been tried, the Court having dismissed certain claims and Plaintiff having withdrawn certain claims, and the jury rendered its verdict on all remaining claims.

IT IS HEREBY ORDERED, ADJUGED, and DECREED that:

Plaintiff shall have judgment against Defendant Monsanto Company and Defendant BASF Corporation, jointly and severally, for Actual

Damages in the amount of $15,000,000.00, and for Punitive Damages in the amount of $250,000,000.00, plus post-judgment interest as allowed by 28 U.S.C. §1961, and the costs of this action.

Dated this 28th day of February, 2020.

/s/ Stephen N. Limbaugh, Jr.
STEPHEN N. LIMBAUGH, JR.
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 20-3665

JOHN S. HAHN,

Special Master

BADER FARMS, INC.,

Appellee

BILL BADER,

v.

MONSANTO COMPANY,

Appellant

BASF CORPORATION

AMERICAN SEED TRADE ASSOCIATION, INCORPORATED, ET AL.,

Amici on Behalf of Appellant(s).

MISSOURI ASSOCIATION OF TRIAL LAWYERS, ET AL.,

Amici on Behalf of Appellee(s).

Appeal from the U.S. District Court
for the Eastern District of Missouri – Cape Girardeau
(1:16-cv-00299-SNLJ)

REVISED ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge Melloy did not participate in the consideration or decision of this matter.

September 02, 2022

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 23-1134

BADER FARMS, INC.,

Appellant.

BILL BADER,

v.

MONSANTO COMPANY,

BASF CORPORATION,

Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri – Cape
Girardeau
(1:16-cv-00299-SNLJ)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

June 20, 2024

Order Entered at the Direction of the Court:
Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureen W. Gornik