

IN THE CIRCUIT COURT OF DEKALB COUNTY
43RD JUDICIAL CIRCUIT
STATE OF MISSOURI

FILED
JUN 12 2009
JULIE WHITSELL
Circuit Clerk & Ex-Officio Recorder
DE KALB COUNTY, MO

MAYCEE GARDNER, a Minor,)
By Her Mother and Next Friend,)
CYNDEE GARDNER)
808 ROSEWOOD)
Cameron, Missouri 64429)
)
Plaintiff,)
)
v.)
)
PRIME TANNING CORP., et al.)
)
Defendants.)
_____)

Case No. 09DK-CC00056

**ANSWER OF DEFENDANT RICK REAM TO
PLAINTIFF'S PETITION FOR DAMAGES**

Defendant Rick Ream (hereinafter "this defendant"), by and through his counsel, Scharnhorst Ast & Kennard, P.C., responds to plaintiff's Petition for Damages by alleging and stating the following. Any factual allegation not specifically admitted is denied.

1. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth at Paragraph 1 of plaintiff's Petition for Damages and, therefore, denies the same.

2. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth at Paragraph 2 of plaintiff's Petition for Damages and, therefore, denies the same.

3. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth at Paragraph 3 of plaintiff's Petition for Damages and, therefore, denies the same.

4. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth at Paragraph 4 of plaintiff's Petition for Damages and, therefore, denies the same.

5. This defendant admits the allegations set forth in Paragraph 5 of plaintiff's Petition for Damages.

6. This defendant admits he was acting within the course and scope of his agency and employment in this State, but denies the rest of the allegations set forth in Paragraph 6 of plaintiff's Petition for Damages.

7. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth at Paragraph 7 of plaintiff's Petition for Damages and, therefore, denies the same.

8. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth at Paragraph 8 of plaintiff's Petition for Damages and, therefore, denies the same.

9. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth at Paragraph 9 of plaintiff's Petition for Damages and, therefore, denies the same.

10. This defendant denies the allegations set forth in Paragraph 10 of plaintiff's Petition for Damages.

11. This defendant denies the allegations set forth in Paragraph 11 of plaintiff's Petition for Damages.

12. This defendant denies the allegations set forth in Paragraph 12 of plaintiff's Petition for Damages. By further response, this defendant states that he was first employed by Prime, or its predecessor, in November of 1989 at which time the fertilizer application program was already developed and permitted by the State of Missouri.

13. This defendant denies Prime hauled and/or applied "sludge", fertilizer or any other product containing hexavalent chromium to Missouri farms. This defendant admits his employer applied fertilizer at no cost to area farmers. Further, this defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth at Paragraph 13 of plaintiff's Petition for Damages and, therefore, denies the same.

14. This defendant denies the allegations set forth in Paragraph 14 of plaintiff's Petition for Damages.

15. This defendant admits he was acting within the course and scope of his agency and employment in this State at all relevant times during his employment, but denies all remaining allegations set forth in Paragraph 15 of plaintiff's Petition for Damages.

16. This defendant denies the allegations set forth in Paragraph 16 of plaintiff's Petition for Damages.

17. This defendant denies the allegations set forth in Paragraph 17 of plaintiff's Petition for Damages.

18. This defendant denies the allegations set forth in Paragraph 18 of plaintiff's Petition for Damages.

COUNT I

19. This defendant incorporates by reference and reasserts his responses to the allegations in all preceding paragraphs.

20. This defendant denies the allegations set forth in Paragraph 20, including all subparts, of plaintiff's Petition for Damages.

21. This defendant denies the allegations set forth in Paragraph 21 of plaintiff's Petition for Damages.

22. This defendant denies the allegations set forth in Paragraph 22 of plaintiff's Petition for Damages.

COUNT II

23. This defendant incorporates by reference and reasserts his responses to the allegations in all preceding paragraphs.

24. This defendant denies the allegations set forth in Paragraph 24 of plaintiff's Petition for Damages.

25. This defendant denies the allegations set forth in Paragraph 25 of plaintiff's Petition for Damages.

26. This defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth at Paragraph 26 of plaintiff's Petition for Damages and, therefore, denies the same.

27. This defendant denies the allegations set forth in Paragraph 27, including all subparts, of plaintiff's Petition for Damages.

28. This defendant denies any allegation the "sludge" was "his" as alleged, and denies the "sludge", fertilizer or any other product produced by his employer contained hexavalent

chromium. This defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth at Paragraph 28 of plaintiff's Petition for Damages and, therefore, denies the same.

29. This defendant denies the allegations set forth in Paragraph 29 of plaintiff's Petition for Damages.

30. This defendant denies any allegation the "sludge" was "his" as alleged, and denies the "sludge", fertilizer or any other product produced by his employer contained hexavalent chromium. This defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth at Paragraph 30 of plaintiff's Petition for Damages and, therefore, denies the same.

31. This defendant denies the allegations set forth in Paragraph 31 of plaintiff's Petition for Damages.

AFFIRMATIVE DEFENSES

1. Plaintiff's Petition for Damages fails to state a claim upon which relief may be granted against this defendant.

2. This defendant denies the existence, nature, extent, and duration of plaintiff's alleged damages.

3. Plaintiff's purported claims are barred because, at all relevant times, this defendant acted within the course and scope of his employment and exercised reasonable and ordinary care.

4. Plaintiff's purported claims are barred because, at all relevant times, this defendant created no dangerous or unsafe conditions on farmland wherein fertilizer was spread.

5. Plaintiff's claims are barred, in whole or in part, by the applicable statute of

limitations or statute(s) of repose.

6. Plaintiff's claims are barred, in whole or in part, by the doctrine of laches, waiver, and estoppel.

7. Any injuries or damages sustained by plaintiff, which this defendant expressly denies, were directly and proximately caused or contributed to by the negligence or fault of other persons or entities over whom this defendant has no control and for whom he bears no legal responsibility.

8. Any injuries or damages sustained by plaintiff, which this defendant expressly denies, were not caused or contributed by any negligence or fault on the part of this defendant.

9. The negligence or fault of the parties to this case should be compared by the trier-of-fact, and any negligence or fault apportioned to plaintiff should act to bar any recovery or reduce any recovery in direct proportion to any such assessment of fault, all in accordance with the laws of the State of Missouri. Fault shall be apportioned among the parties.

10. The negligence or fault in this case should be apportioned by the trier-of-fact, and this defendant should be held responsible only for such percentage of fault, if any, as is apportioned to him by the trier-of-fact, all in accordance with the provisions of R.S.Mo. § 537.067.

11. Plaintiff's claims are barred by section R.S.Mo. § 537.764, so far as the product complied with "state of the art" at the time it was manufactured as defined by law.

12. Plaintiff's claims for damages are barred in whole or in part by their failure to mitigate their damages.

13. The product of which plaintiff complains was not defective.

14. If plaintiff sustained the injuries alleged in the petition, which is denied, there was

an intervening, superseding cause or causes leading to the alleged injuries, and therefore, any act or omission on the part of this defendant was not the proximate cause and/or competent producing cause of the alleged injuries.

15. This defendant denies that venue is proper in this Court.

16. If plaintiff was exposed to any alleged harmful product connected to this defendant, which is specifically denied, then such exposure was inconsequential or de minimis, thus barring any recovery by the plaintiff.

17. Plaintiff's claims are barred because the alleged dangerous nature of the alleged product was not known and could not reasonably be discovered at the time the product was placed in the stream of commerce.

18. Plaintiff's claims are barred because, at all relevant times, this defendant did not create a dangerous or unsafe condition on the farmland wherein fertilizer was spread.

19. Plaintiff's claims are barred or limited by any misuse of the alleged product.

20. This defendant was at all times in full compliance with all applicable industry standards regarding the manufacture, sale, or distribution of products to which plaintiff allegedly was exposed.

21. This defendant states that plaintiff's claims against it are barred because plaintiff failed to allege facts with sufficient specificity to provide this defendant with sufficient information regarding the bases of plaintiff's claims against this defendant to allow this defendant to reasonably develop and present its defenses to those claims, in that plaintiff failed to provide reasonable notice of the time, place, nature, and manner of its allegedly wrongful conduct.

22. This defendant states it is entitled to set-off from any recovery against it to the

extent of any and all benefits paid or payable to, or on behalf of, plaintiff or any other person from any and all collateral sources.

23. This defendant states that if plaintiff should have any judgment rendered in their favor for any alleged injuries, damages, and/or losses against any entity other than this defendant, then this defendant is entitled to a set-off in the amount of said judgment.

24. This defendant states that if it is proven at the time of trial that this defendant is liable for damages to plaintiff, said liability is not sole but rather proportionate between or among this defendant and one or more of the other defendants, and, consequently, this defendant is entitled to have his liability, if any, limited to its proximate share or, alternatively, is entitled to contribution and/or indemnity from such other defendant or defendants based on comparative fault and/or vicarious liability.

25. This defendant states that plaintiff's claims are barred by defendant's compliance with the specifications provided to it for any alleged product(s) produced, sold, or otherwise allegedly placed in the stream of commerce as alleged in plaintiff's petition.

26. This defendant states that plaintiff's claims are barred to the extent of any material modification or alteration of any alleged product(s) produced, sold, or otherwise allegedly placed in the stream of commerce as alleged in plaintiff's petition, so that any such alleged product(s) for which this defendant might be held legally accountable in which plaintiff used or was exposed to, if any, was/were not in the same condition as when sold, having been materially altered after the sale and prior to the use or exposure as alleged.

27. Plaintiff's claims may be preempted in whole or in part by federal and/or state statutes and/or regulations.

28. Plaintiff's claims may be barred because the alleged product produced and

supplied by defendants is licensed by the State of Missouri as a commercial fertilizer under the Missouri Fertilizer Law, and it is not a "Hazardous Substance," "Hazardous Waste" or "Toxic Substance" as defined by any federal or state law or regulation.

29. Plaintiff's claims are barred to the extent the alleged damages and injuries complained of were proximately caused by the acts and/or omissions of third parties constituting a superseding cause of any and all damages and claims.

30. Plaintiff's product liability claims are barred or limited by some or all of the provisions of the Missouri Product Liability Act, R.S.Mo. § 537.760 *et seq.*, including but not limited to R.S.Mo. §§ 537.764 and 537.765.

31. For other and further answer in defense to plaintiff's Petition for Damages, plaintiff's claims for punitive damages should be stricken and dismissed in that they violate both the Missouri Constitution and the United States Constitution as follows:

a. The standards for determining both the amount and/or the subsequent imposition of punitive damages are vague, supply no notice to this defendant of the potential repercussions of his alleged conduct and are subject to the unbridled discretion of the jury, thereby denying due process under the Missouri Constitution, Article 1, Section 10.

b. The standards for determining both the amount and/or the subsequent imposition of punitive damages are vague, supply no notice to this defendant of the repercussions of his alleged conduct and are subject to the unbridled discretion of the jury, thereby denying due process under the Fifth and Fourteenth Amendments of the United States Constitution.

c. Plaintiff's claims for punitive damages are criminal in nature and the rights given this defendant in criminal proceedings under the Fifth, Sixth, Eighth, and Fourteenth

Amendments of the United States Constitution are applicable.

- d. Plaintiff's claims for punitive damages are criminal in nature and the rights given this defendant in criminal proceedings under the Missouri Constitution, Article 1, Section 18A, 19, 21, and 22A are applicable.
- e. Plaintiff's claims for punitive damages constitute a request for and/or imposition of an excessive fine in violation of the Eighth Amendment of the United States Constitution.
- f. Plaintiff's claims for punitive damages constitute a request for and/or imposition of an excessive fine in violation of the Missouri Constitution, Article 1, Section 21.
- g. Plaintiff's claims for punitive damages constitute cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.
- h. Plaintiff's claims for punitive damages constitute cruel and unusual punishment in violation of the Missouri Constitution, Article 1, Section 21.
- i. Plaintiff's claims for punitive damages discriminate against this defendant and constitute a denial of equal protection under the law in violation of the Fifth and Fourteenth Amendments of the United States Constitution in that defendant's wealth or net worth may be requested to be considered by the jury in determining the amounts of any such damage awards.
- j. Plaintiff's claims for punitive damages discriminate against this defendant and constitute a denial of equal protection under the law in violation of Article 1, Section 2 and 10 of the Missouri Constitution.
- k. Plaintiff's claims for punitive damages constitute a subsequent imposition of punitive-type damages against this defendant and they cannot protect against multiple

punishments for the same alleged conduct or wrong, thereby denying due process under Article 1, Section 2 and 10 of the Missouri Constitution.

m. Missouri Law does not provide an adequate procedure for the determination of damages in the nature of aggravating circumstances or punitive damages in violation of the equal protection and substantive and procedural due process requirements of both the Missouri Constitution and the United States Constitution and in violation of the United States Supreme Court decisions in Pacific Mutual Insurance Company vs. Haslip; BMW of North America, Inc. vs. Gore; State Farm vs. Campbell.

n. The granting of relief requested by plaintiff would be unconstitutional under the Missouri and the United States constitutions in that it would violate due process and equal protection guarantees, place an undue burden on interstate commerce, and violate constitutional proscriptions against excessive fines.

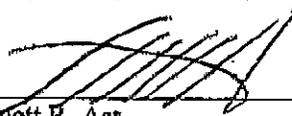
32. This defendant expressly requests that plaintiff's claims be reduced pursuant R.S.Mo. § 537.060 in the event plaintiff has previously settled or will settle any of their claims asserted in this lawsuit against any other defendant, any other party (person or entity), any other joint tortfeasor (person or entity), or any other person or entity liable for plaintiff's damages, if any, arising out of the incident that is the subject of this litigation,

33. To the extent that any defense arising out of the Missouri Tort Reform Act accrues to the benefit of this defendant, this defendant hereby reserves the right to assert the same should the facts warrant.

34. This defendant specifically reserves the right to plead additional affirmative defenses as they become known and available throughout the pendency of this case.

WHEREFORE, having answered plaintiff's Petition for Damages, defendant Rick Ream asks that judgment be entered against plaintiff, and in favor of this defendant, for costs, and for such other relief the Court deems just and appropriate.

Respectfully submitted,



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JURY DEMAND

Defendant Rick Ream, by and through his counsel, Scharnhorst Ast & Kennard, P.C., hereby demands trial by jury on all issues so triable.



Attorney for Defendant Rick Ream

CERTIFICATE OF SERVICE

I certify that on the 11th day of June, 2009, a true and accurate copy of the foregoing was served on the following counsel of record via United States Mail, postage prepaid:

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