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United States District Court,
D. Kansas.

Benjamin M. Eastman and
Marcita K. Eastman, Plaintiffs,
v.
Coffeyville Resources Refining
& Marketing, LLC, Defendant.

CIVIL ACTION No. 10-1216-MLB
|
Signed 01/08/2014

Attorneys and Law Firms

Randall K. Rathbun, Depew Gillen Rathbun & McInteer, LC, Wichita, KS, for Plaintiffs.

Arthur E. Rhodes, Lee M. Smithyman, Smithyman & Zakoura, Chtd., Overland Park, KS, Edmund S. Gross, Cvr Energy, Inc., Leawood, KS, Lynn D. Preheim, Stinson Leonard Street LLP, Wichita, KS, for Defendant.

ORDER

Monti L. Belot, UNITED STATES DISTRICT JUDGE

*1 Before the court are the following:

1. Coffeyville's motion in limine regarding Benjamin Eastman's damage calculations (Docs. 80, 81, 90 and 93); and

2. Plaintiffs' motion in limine (Docs. 82, 83 and 89).

Coffeyville's Motion

For several days in July, 2007, plaintiffs' pecan orchard was flooded with a water and oil mixture. The oil came from tanks at Coffeyville's refinery and was carried to the orchard in flood waters from the Verdigris River. Plaintiffs assert a claim based on K.S.A. § 65-6203, which generally requires a person responsible for an accidental release of pollutants to compensate affected property owners for any actual damages incurred as a result of the release.

Plaintiffs will call an expert witness, Dean McCraw, Ph.D., who will testify that the value of pecan production lost through 2009 is $39,496. McCraw will not express an opinion regarding loss after 2009. Plaintiff Ben Eastman, however, does have an opinion. He has estimated losses in 2010 and 2011 at $125,987. Coffeyville objects to Eastman's opinion.

Eastman was raised on a farm and started the pecan orchard in 1985. He "usually spend[s] 6 weeks or more in Kansas ..." working on the orchard. He presumably spends his remaining time in California where he is involved in accounting and pension administration. Eastman's production loss calculations (Doc. 81-6 and 81-7) seem to be based on diminished pecan harvest figures coupled with assumptions regarding increased pecan production in 2010 and 2011 by extrapolating production figures from earlier years.

Plaintiffs believe that Eastman's testimony is admissible under Fed. R. Evid. 701. The court disagrees. Based on what Eastman has presented, his opinion boils down to nothing more than post hoc ergo propter hoc: pecan production diminished; therefore it must be due to oil contamination. Eastman does not explain why his expert, whose credentials and opinion are not challenged, did not cover losses, if there were any, for years 2010 and 2011. Nor does Eastman explain why his loss figures are more than three times those of his expert and why they extend two years beyond the period covered by his expert. But most important, it is clear that Eastman's pecan farming experience provides no basis for him, as a layman, to opine on the effect of water/oil contamination of the orchard, something about which he has no experience or training.

Eastman can testify regarding his observations of the orchard in 2010 and 2011; i.e., what he saw. But he cannot offer his opinion that losses of pecan production, if any, during those years were caused by the water/oil contamination.

Eastman's opinion regarding damage to mechanical equipment used in the pecan orchard is a somewhat different matter. For example, if a piece of equipment required cleaning or repair because of water/oil residue, Eastman can testify regarding the cost and Coffeyville's counsel may cross-examine him. But Eastman's methodology seems to be that Coffeyville is

responsible for 50% of all equipment damage because that has been Coffeyville's methodology for settling claims. Plaintiffs offer no authority for the proposition that a settlement methodology in other cases is the appropriate way for a jury to evaluate damages for a disputed claim.

Plaintiffs' Motion

*2 Coffeyville has prepared what it calls a "computer animation" of the flood time line which it wants to use for illustrative purposes, but not as substantive evidence. The animation reviewed by the court obviously is not a PIXAR production. It is more akin to a 1940s Disney cartoon. Coffeyville describes what the animation will show (Doc. 89 at 5). For example, "the speed of the rising waters that ultimately breached the refinery's levees" is almost imperceptible. The "animation" purportedly shows "the difficulties refining personnel faced in reaching the East Tank ...." Perhaps these difficulties are depicted by the little helicopter which, at one point, flies from the refinery to the tank. Hard to say.

Plaintiffs' objection to the animation is vague, at best. They summarily assert that it lacks foundation, but they don't elaborate. Foundation might be an issue if the times shown on the clock faces appearing in the animation do not accurately reflect the events. But plaintiffs don't object on that basis. Absent some specific foundational problem, it will be a waste of time to require the appearance of witnesses to describe how the animation was prepared. Coffeyville says the animation will assist the jury in understanding the testimony of its plant manager. To the extent the plant manager refers to the animation, plaintiffs' counsel can cross-examine. Plaintiffs' motion regarding the animation is denied. However, the parties may submit proposed instructions regarding the jury's consideration of the animation.

Plaintiffs also seek to prevent Coffeyville from offering "good citizen" evidence as well as the significant amounts it has spent (and hopes to recover from its insurance carriers) to remediate the damage caused by the oil-contaminated flood waters.[1] Plaintiffs postulate that Coffeyville wants to use this evidence to keep a punitive damages award "low."

The court notes that plaintiffs' reliance on, and their cherry-picked citation language from, Tetuan v. A.H. Robins Co., 241 Kan. 441 (1987) misses the mark. True, the Supreme Court upheld the district court's refusal to admit "good guy" evidence that Robins had sponsored "orphan drugs" and had performed other philanthropic activities. But the paragraph immediately proceeding the Supreme Court's ruling on that issue puts the ruling in context:

> Far from simply being "grossly negligent" in marketing the Dalkon Shield, there was substantial evidence to conclude that Robins deliberately, intentionally, and actively concealed the dangers of the Shield for year after year until those dangers worked their tragic results on Loretta Tetuan. We find that the punitive damages award is not excessive nor does it shock the collective conscience of this court.

(Id. at 484).

Whatever may be the evidence about what Coffeyville did or failed to do, with respect to oil, it did not cause the flood, which was historically unprecedented. Robins, on the other hand, designed, sold and profited from the sale of the Dalkon Shield. In other words, the precedential value of cases like Robins to this case is problematic.

As the court noted on summary judgment in this case, before a claim for punitive damages can be submitted to the jury, plaintiffs must present clear and convincing evidence that Coffeyville's actions were wanton, as well as evidence showing that the questioned conduct was authorized or ratified by Coffeyville. See Doc. 70 at 8; K.S.A. § 3702(d)(1). Until plaintiffs produce evidence which can reasonably satisfy that threshold, plaintiffs' motion to exclude any and all "good citizen" evidence from Coffeyville is premature. The court may have to hear plaintiffs' evidence that allegedly justifies punitive damages before it can determine the relevance of any "good citizen" evidence from Coffeyville.

*3 Because of the approaching trial date, the parties shall submit short, simultaneous briefs regarding evidence which they believe is, or is not, admissible on punitive damages, including "good guy" evidence which the court assumes relates to Coffeyville's post-flood actions. The parties' attention is directed to the factors set forth in

K.S.A. § 60-3702(b)(1-7). The briefs shall be filed on or before January 20, 2014.

Conclusion.

Coffeyville's Motion in Limine (Doc. 80) is GRANTED to the extent stated above. Plaintiff's Motion in Limine (Doc. 82) is DENIED IN PART and otherwise taken under advisement pending further briefing.

IT IS SO ORDERED.

Dated this 8th day of January 2014, at Wichita, Kansas.

All Citations

Not Reported in F.Supp.3d, 2014 WL 12586385

Footnotes

1 Coffeyville has spent many millions to remediate the damages. As to the area adjacent to the refinery, plaintiffs' counsel may think it now resembles a "ghost town" but an argument can be made that the area's appearance has been improved by demolition of many run-down and vacant homes which were there prior to the flood. Counsel may recall that the undersigned lived in Coffeyville for nine years and is familiar with how the area looked both before and after the flood.