

United States Court of Appeals  
For the Eighth Circuit

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No. 20-3663

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John S. Hahn, Special Master

Bader Farms, Inc.

*Plaintiff - Appellee*

Bill Bader

*Plaintiff*

v.

Monsanto Company

*Defendant*

BASF Corporation

*Defendant - Appellant*

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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 Attorneys; 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)*

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Appeal from United States District Court  
for the Eastern District of Missouri - Cape Girardeau

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

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

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BENTON, Circuit Judge.

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 . . .

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