

IN THE CIRCUIT COURT OF CLINTON COUNTY, MISSOURI

BEVERLY LONG, et al.,

Plaintiffs,

v.

PRIME TANNING CORP., et al.,

Defendants.

Case No. 09CN-CC00422

FILED
MAR 4 - 2010
MOLLY LIVINGSTON
Clerk of Clinton Co. Circuit Court

**ANSWER AND AFFIRMATIVE DEFENSES OF
DEFENDANT BURNS & MCDONNELL ENGINEERING COMPANY, INC.**

COMES NOW Defendant Burns & McDonnell Engineering Company, Inc. ("Burns & McDonnell") and files its Answer and Affirmative Defenses to the Second Amended Petition for Damages of Plaintiffs Beverly Long and Norma Bingham. Unless hereinafter specifically admitted, Burns & McDonnell specifically denies each and every allegation within Plaintiffs' Petition. Burns & McDonnell responds to the averments of Plaintiffs' Petition as follows:

PARTIES

1. Burns & McDonnell is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 1 of Plaintiffs' Petition and therefore denies same.

2. Burns & McDonnell is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 2 of Plaintiffs' Petition and therefore denies same.

3. Burns & McDonnell is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 3 of Plaintiffs' Petition and therefore denies same.

4. Burns & McDonnell is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 4 of Plaintiffs' Petition and therefore denies same.

5. Burns & McDonnell is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 5 of Plaintiffs' Petition and therefore denies same.

6. Burns & McDonnell is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 6 of Plaintiffs' Petition and therefore denies same.

7. Burns & McDonnell is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 7 of Plaintiffs' Petition and therefore denies same.

8. Burns & McDonnell admits that it is a Missouri corporation and that its principal place of business is in Kansas City, Missouri.

JURISDICTION AND VENUE

9. Burns & McDonnell denies the allegations of Paragraph 9 of Plaintiffs' Petition.

10. Burns & McDonnell denies the allegations of Paragraph 10 of Plaintiffs' Petition.

ALLEGED FACTS

11. Burns & McDonnell is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 11 of Plaintiffs' Petition and therefore denies same.

12. Paragraph 12 calls for a legal conclusion, to which no response is necessary. To the extent a response is necessary, Burns & McDonnell states that it is without knowledge or

information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 12 and therefore denies same.

13. Burns & McDonnell admits that Prime utilized chromium in the tanning process at the St. Joseph facility. Further answering, Burns & McDonnell admits that, during certain time periods, Prime land applied fertilizer. Burns & McDonnell denies each and every remaining allegation contained in Paragraph 13.

14. Burns & McDonnell is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 14 and therefore denies same.

15. Burns & McDonnell is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the first and second sentences of Paragraph 15 of Plaintiffs' Petition and therefore denies same. Burns & McDonnell denies the allegations in the third sentence of Paragraph 15.

16. Burns & McDonnell admits that it provided engineering services in connection with improvements made to the Prime Tanning facility in St. Joseph, Missouri, including the trivalent chromium recovery system. Burns & McDonnell denies each and every remaining allegation in Paragraph 16.

17. Burns & McDonnell admits that Rick Ream was an agent or employee of Prime. Further answering, Burns & McDonnell states that it is without knowledge or information sufficient to form a belief as to the truth or falsity of the remaining allegations contained in Paragraph 17 and therefore denies same.

18. Burns & McDonnell denies the allegations of Paragraph 18 of Plaintiffs' Petition.

19. Burns & McDonnell denies the allegations of Paragraph 19 of Plaintiffs' Petition.

20. Burns & McDonnell states that it is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 20 and therefore denies same.

21. Burns & McDonnell denies the allegations of Paragraph 21 of Plaintiffs' Petition.

22. Burns & McDonnell denies the allegations of Paragraph 22 of Plaintiffs' Petition.

23. Burns & McDonnell states that it is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph 23 and therefore denies same.

24. Burns & McDonnell denies the allegations of Paragraph 24 of Plaintiffs' Petition.

25. Burns & McDonnell denies the allegations of Paragraph 25 of Plaintiffs' Petition.

26. Burns & McDonnell denies the allegations of Paragraph 26 of Plaintiffs' Petition.

27. Burns & McDonnell denies the allegations of Paragraph 27 of Plaintiffs' Petition.

COUNT I
(Negligence of Prime and National Beef)

28. Burns & McDonnell restates and incorporates by reference its responses to Paragraphs 1-27 of Plaintiffs' Petition.

29-30. The allegations in Paragraphs 29-30 of Plaintiffs' Petition (Count I) are not directed to Burns & McDonnell. Therefore, no responsive pleading from Burns & McDonnell is required. To the extent a response to Paragraphs 29-30 is required from Burns & McDonnell, all such allegations are denied. No response to Plaintiffs' prayer for relief is necessary. To the extent a response is necessary, Burns & McDonnell denies that Plaintiffs are entitled to any relief.

COUNT II
(Negligence of Wismo and Elementis)

31. Burns & McDonnell restates and incorporates by reference its responses to Paragraphs 1-30 of Plaintiffs' Petition.

32-33. The allegations in Paragraphs 32-33 of Plaintiffs' Petition (Count II) are not directed to Burns & McDonnell. Therefore, no responsive pleading from Burns & McDonnell is required. To the extent a response to Paragraphs 32-33 is required from Burns & McDonnell, all such allegations are denied. No response to Plaintiffs' prayer for relief is necessary. To the extent a response is necessary, Burns & McDonnell denies that Plaintiffs are entitled to any relief.

COUNT III
(Negligence of Burns & McDonnell)

34. Burns & McDonnell restates and incorporates by reference its responses to Paragraph 1-33 of Plaintiffs' Petition.

35. Burns & McDonnell denies the allegations of Paragraph 35 of Plaintiffs' Petition, including but not limited to the allegations contained in subparts a., b., and c. thereto.

36. Burns & McDonnell denies the allegations of Paragraph 36 of Plaintiffs' Petition.

No response to Plaintiffs' prayer for relief is necessary. To the extent a response is necessary, Burns & McDonnell denies that Plaintiffs are entitled to any relief and further denies that Plaintiffs have pled the elements for a claim of punitive damages against Burns & McDonnell.

COUNT IV
(Strict Liability Against Prime and National Beef)

37. Burns & McDonnell restates and incorporates by reference its responses to Paragraphs 1-36 of Plaintiffs' Petition.

38-42. The allegations in Paragraphs 38-42 of Plaintiffs' Petition (Count IV) are not directed to Burns & McDonnell. Therefore, no responsive pleading from Burns & McDonnell is required. To the extent a response to Paragraphs 38-42 is required from Burns & McDonnell, all such allegations are denied. No response to Plaintiffs' prayer for relief is necessary. To the extent a response is necessary, Burns & McDonnell denies that Plaintiffs are entitled to any relief.

AFFIRMATIVE DEFENSES

1. Plaintiffs' Petition fails to state a claim upon which relief can be granted.
2. Plaintiffs' claims are barred, in whole or in part, by the applicable statute of limitations and/or statute of repose, including but not limited to the limitations set forth in RSMo. §§ 516.097 and 516.120. Further, neither Plaintiffs nor Cynthia McQueen suffered any legally compensable injury within the applicable periods of limitation preceding the filing of this action.
3. Plaintiffs' claims are barred, in whole or in part, by the doctrines of waiver, laches, and estoppel.
4. Plaintiffs' claims against Burns & McDonnell are barred, in whole or in part, by the acceptance doctrine.
5. Venue is improper in this court.
6. Any injuries or damages sustained by Plaintiffs or Ms. McQueen, which Burns & McDonnell expressly denies, were not caused or contributed to by any negligence or fault on the part of Burns & McDonnell.
7. Burns & McDonnell denies all allegations of wrongdoing and damages as alleged in Plaintiffs' Petition, but if in fact Plaintiffs or Ms. McQueen did sustain damages, such

damages were caused by the acts or omissions of persons or entities for whose conduct Burns & McDonnell is not legally responsible and over whom Burns & McDonnell has no control.

8. If Plaintiffs or Ms. McQueen sustained the injuries alleged in Plaintiffs' Petition, which is denied, there was an intervening, superseding cause or causes leading to the alleged injuries, and therefore any alleged act or omission on the part of Burns & McDonnell was not the proximate cause and/or competent producing cause of the alleged injuries.

9. Any injuries or damages allegedly sustained by Plaintiffs or Ms. McQueen were the direct and unavoidable consequence of their pre-existing and/or unrelated medical conditions and were not caused or contributed to by any negligence or fault on the part of Burns & McDonnell.

10. Plaintiffs have failed to state facts to support any claim that any act or omission of Burns & McDonnell directly and proximately resulted in any injury to Plaintiffs or Ms. McQueen.

11. Plaintiffs' damages, if any, are not in the nature or to the extent alleged.

12. Plaintiffs' claims are barred, in whole or in part, because the damages they seek are too speculative or remote.

13. Burns & McDonnell denies all allegations of wrongdoing and damages as alleged in Plaintiffs' Petition, but if in fact Plaintiffs or Ms. McQueen did sustain damages, such damages are barred due to their failure to exercise reasonable and ordinary care to prevent, reduce, minimize and/or mitigate such damages.

14. Burns & McDonnell's actions were at all times relevant hereto in compliance with applicable federal and state regulatory requirements, permit requirements, and industry standards.

15. Burns & McDonnell complied with the standard of care for professional engineers in the State of Missouri at all times relevant to this action.

16. Plaintiffs' state law claims are barred, in whole or in part, as they are preempted by federal statutes and/or regulations.

17. Plaintiffs have failed to join all persons needed for a just adjudication.

18. Plaintiffs have failed to allege facts as to Burns & McDonnell with sufficient specificity to provide Burns & McDonnell sufficient information regarding the bases of Plaintiffs' claims against it or for Burns & McDonnell to reasonably develop and present its defenses to those claims, in that Plaintiffs have failed to provide Burns & McDonnell reasonable notice of the time, place, nature, and manner of its allegedly wrongful conduct.

19. Burns & McDonnell denies it is liable for negligence. To the extent a defendant can be held liable for negligence, the negligence or fault of the parties to the case should be compared by the trier-of-fact, and any negligence or fault apportioned to Plaintiffs should act to bar or reduce any recovery in accordance with the laws of the State of Missouri.

20. To the extent Plaintiffs seek to impose joint and several liability on Burns & McDonnell, such damages are precluded under RSMo. § 537.067.1.

21. Burns & McDonnell denies it is liable for any punitive damages. To the extent a defendant can be severally liable for punitive damages, such defendant can only be severally liable for the percentage of punitive damages, if any, for which the trier-of-fact attributes punitive damage fault to it.

22. Burns & McDonnell is entitled to a set-off or credit for any judgment, settlement, or proceeds paid to Plaintiffs involving other defendants, other defendants' representatives, or third parties.

23. Burns & McDonnell expressly requests that Plaintiffs' claims be reduced pursuant to RSMo. § 537.060 in the event that Plaintiffs have previously settled or do 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 Plaintiffs' damages, if any, arising out of the subject of this litigation.

24. Plaintiffs' claims are barred because the alleged product complied with the state of the art, applicable industry standards, and applicable state and federal laws and regulations in existence at the time it was manufactured as defined by law.

25. Plaintiffs' claims are barred because the alleged product of which Plaintiffs complain was not defective.

26. If Plaintiffs or Ms. McQueen were exposed to any allegedly harmful product connected to Burns & McDonnell, which it specifically denies, then such exposure was inconsequential or de minimis, thus barring any recovery by Plaintiffs.

27. Plaintiffs' 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.

28. Plaintiffs' claims are barred because, at all relevant times, Burns & McDonnell did not create a dangerous or unsafe condition on farmland where fertilizer was spread.

29. Plaintiffs' claims are barred or limited by any misuse, alteration, or modification of the alleged product.

30. Any product liability claims that may be asserted against Burns & McDonnell are barred or limited by some or all of the provisions of the Missouri Product Liability Act.

31. To the extent Plaintiffs' claims are based upon any theory providing for liability without proof of causation by Burns & McDonnell, they violate Burns & McDonnell's rights under the United States Constitution and the Constitution of the State of Missouri.

32. Plaintiffs and their claims have been misjoined.

33. Plaintiffs have failed to plead the necessary elements for a claim of punitive damages against Burns & McDonnell.

34. Plaintiffs' claims for punitive damages are barred under the Missouri Supreme Court's holding in *Alcorn v. Union Pacific R.R. Co.*, 50 S.W.3d 226 (Mo. 2001).

35. Plaintiffs cannot recover punitive damages and/or any non-pecuniary loss damages that are not subject to a predetermined limit because such damages would be unconstitutional in at least the following respects:

- a. They would violate Burns & McDonnell's rights under the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution and the applicable provisions of the Missouri Constitution, in part because they would punish Burns & McDonnell for conduct that was authorized by the State of Missouri;
- b. Adequate objective legal standards do not exist to guide and limit the jury's or fact finder's discretion regarding such damages, thus allowing an award of punitive damages or non-pecuniary loss damages to be irrational, arbitrary and capricious and/or based on vague, unpredictable, conflicting and purely subjective standards;
- c. No objective limitations are established concerning the amount or severity of the damages award;

- d. The vague and inconsistent legal standards for the imposition of such damages deprive Burns & McDonnell of sufficient notice of the type of conduct and mental state upon which such damage awards could be based;
- e. The guidelines, standards, procedures, and instructions for the imposition of such damages are ambiguous, indefinite, vague, uncertain, conflicting, purely subjective, and fundamentally unfair.

36. As a matter of law and public policy, punitive damages and/or any non-pecuniary loss damages not subject to a predetermined limit or objective quantifier should not be awarded against Burns & McDonnell.

37. To the extent any defense arising out of the Missouri Tort Reform Law accrues to the benefit of Burns & McDonnell, Burns & McDonnell hereby reserves the right to assert the same should the facts warrant.

38. Burns & McDonnell hereby incorporates by reference all other affirmative defenses raised by any other defendant in this action.

39. Burns & McDonnell reserves the right to amend its Answer as discovery progresses to plead additional defenses.

WHEREFORE, having answered Plaintiffs' Second Amended Petition, Burns & McDonnell respectfully requests that this Court enter judgment in favor of Burns & McDonnell and against Plaintiffs as to all claims alleged in Plaintiffs' Petition, award Burns & McDonnell its costs and attorneys' fees, and order such further relief as the Court deems just and proper.

Respectfully submitted,


Mark D. Anstoetter Mo. Bar #47638
George E. Wolf Mo. Bar #35920
Christopher M. McDonald Mo. Bar #39559
Shook, Hardy & Bacon L.L.P.
2555 Grand Blvd.
Kansas City, MO 64108
(816) 474-6550
(816) 421-5547 (fax)

**ATTORNEYS FOR DEFENDANT
BURNS & MCDONNELL
ENGINEERING COMPANY, INC.**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, by U.S. Mail postage prepaid, this 4th day of March, 2010, to:

Thomas P. Cartmell
Brian J. Madden
Thomas L. Wagstaff
Wagstaff & Cartmell LLP
4740 Grand Avenue, Suite 300
Kansas City, MO 64112

Thomas V. Girardi
Girardi Keese
1126 Wilshire Blvd.
Los Angeles, CA 90017-1904

Stephen Griffin
W. Mitchell Elliott
Troy Dietrich
Griffin Dietrich Elliott
416 N. Walnut
Cameron, MO 64429

ATTORNEYS FOR PLAINTIFFS

W.C. Blanton
Stephen J. Torline
Husch Blackwell Sanders LLP
4801 Main Street, Suite 1000
Kansas City, MO 64112

**ATTORNEYS FOR DEFENDANT
NATIONAL BEEF LEATHERS CO., LLC**

William G. Beck
Douglas R. Dalgleish
Robert G. Rooney
Lathrop & Gage LLP
2345 Grand Blvd., Suite 2800
Kansas City, MO 64108

**ATTORNEYS FOR DEFENDANT
ELEMENTIS LTP L.P.**

R. Dan Boulware
Todd H. Bartels
Seth C. Wright
Polsinelli Shughart PC
3101 Frederick Avenue
St. Joseph, MO 64506

Dennis J. Dobbels
Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, MO 64105

Melissa A. Hewey
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101

**ATTORNEYS FOR DEFENDANTS PRIME
TANNING CORP., PRIME TANNING CO., INC.,
AND WISMO CHEMICAL CORP.**



ATTORNEY FOR DEFENDANT
BURNS & MCDONNELL
ENGINEERING COMPANY, INC.