Nos. 20-3663, 20-3665

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOHN S. HAHN,
Special Master,
BADER FARMS, INC.,
Plaintiff-Appellee,
BILL BADER,
Plaintiff,
v.
MONSANTO COMPANY,
Defendant-Appellant,
BASF CORPORATION,
Defendant-Appellant.

On Appeal from the United States District Court
for the Eastern District of Missouri, 1:16cv299-SNLJ
District Judge Stephen N. Limbaugh, Junior

AMICI CURIAE BRIEF OF MISSOURI CHAMBER OF COMMERCE AND INDUSTRY, MISSOURI AGRIBUSINESS ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AND COALITION FOR LITIGATION JUSTICE, INC. IN SUPPORT OF DEFENDANTS-APPELLANTS

Mark A. Behrens (Counsel of Record)
Philip S. Goldberg
Kateland R. Jackson
SHOOK, HARDY & BACON L.L.P.
1800 K Street NW, Suite 1000
Washington, DC 20006
(202) 783-8400
mbehrens@shb.com
pgoldberg@shb.com
krjackson@shb.com
Attorneys for Amici Curiae

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DISCLOSURE STATEMENT PURSUANT TO RULES 26.1 AND 29

Pursuant to Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* states that the Missouri Chamber of Commerce and Industry (Missouri Chamber), Missouri Agribusiness Association (MO-AG), Chamber of Commerce of the United States of America (U.S. Chamber), National Association of Manufacturers (NAM), and Coalition for Litigation Justice, Inc. (Coalition) are the only parties appearing as *amici* on this brief. *Amici* have no parent corporations and have no issued stock.

Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* states that (1) no party's counsel authored this brief in whole or in part; (2) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person—other than *amici*, their members, or their counsel—contributed money that was intended to fund the preparation or submission of the brief.

Shook, Hardy & Bacon LLP is the only firm appearing for *amici* in this case.

/s/ Mark A. Behrens
Mark A. Behrens

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QUESTION PRESENTED

Whether the District Court erred in holding that Monsanto and BASF could be held liable under Missouri law in the absence of proof that either company manufactured or sold the herbicides that allegedly damaged Bader's peach trees.

City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110 (Mo. 2007) (per curiam); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (1984).

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are groups that represent Missouri companies and their insurers. *Amici* are concerned that the District Court's misapplication of Missouri law upends the long-standing rule that a manufacturer or seller is liable only for a product it places into the stream of commerce, and not for harm caused by a third party's product. If affirmed, the decision could have far-reaching negative effects for business defendants in tort cases applying Missouri law.

SUMMARY OF ARGUMENT

Under Missouri law, manufacturers and sellers of products are liable only for products they put into the stream of commerce. The Missouri Supreme Court has repeatedly held that proximate cause—a fundamental element for liability to be imposed in any tort case—is missing when a plaintiff fails to identify the manufacturer or seller of the particular product that caused the plaintiff's injury.

Here, the District Court misapplied Missouri law by allowing the case to proceed against Monsanto and BASF in the absence of proof that they manufactured the herbicides that allegedly caused damage to Bader's peach trees.

Missouri law is consistent with the majority rule. Cases nationwide hold that manufacturers and sellers of products are liable only for harms caused by products they put into the stream of commerce. Given this well-developed precedent, the Missouri Supreme Court would not adopt a new, different approach.

Finally, Plaintiff's novel tort theory is unprincipled and reflects unsound policy. Holding one manufacturer liable for another's product allows negligent actors to externalize the cost of their conduct and blunts incentives for safety. To be fair, tort liability must be connected to sale of a particular product that is used by the plaintiff and that causes harm.

Here, the only parties that may potentially bear liability are the unidentified manufacturers and applicator of the dicamba herbicides that allegedly damaged Bader's peach trees. Otherwise, Monsanto and BASF—both sellers of dicamba herbicides—could be forced to pay for harms caused by their competitors' products. Indeed, for two of the years at issue (2015 and 2016)—the only years for which punitive damages were allowed—Monsanto did not sell dicamba at all.

For these reasons, the judgment of the District Court should be reversed or, alternatively, vacated.

ARGUMENT

I. UNDER MISSOURI LAW, A PARTY IS NOT LIABLE FOR HARM CAUSED BY A PRODUCT IT DID NOT MAKE OR SELL

In *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110 (Mo. 2007) (per curiam), the Missouri Supreme Court held: "In *all tort cases*, plaintiff must prove that each defendant's conduct was an actual cause…of the plaintiff's injury." *Id*. at 113 (emphasis added). The court explained that "any attempt to find liability absent actual causation is an attempt to connect the defendant with an injury or event that the defendant had nothing to do with." *Id.* (quoting *Callahan v. Cardinal Glennon Hosp*., 863 S.W.2d 852, 862 (Mo. 1993)).

Benjamin Moore affirmed the well-established Missouri rule that "where a plaintiff claims injury from a product, actual causation can be established only by identifying the defendant who made or sold that product." *Id.* at 115. The court rejected public nuisance claims by the city of St. Louis against companies that manufactured lead paint and pigments used in the city's housing because the city could not establish the *particular* defendant that caused the problem. The court said, "Absent product identification evidence, the city simply cannot prove actual causation." *Id*. at 116.

The court drew support from *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984), where it rejected a novel "market share" approach to liability that would have facilitated recoveries by women alleging cancer from their mothers' ingestion

of DES, a drug once used to prevent miscarriage. Plaintiffs could not identify which of the defendants manufactured, sold, or distributed the particular DES ingested by their mothers. This was "fatal to their claims" because "to recover under . . . *any tort theory*, plaintiff must establish some causal relationship between the defendant and the injury-producing agent." *Id*. at 242, 244 (emphasis added). The court appreciated that the plaintiffs were "innocent" victims suffering "serious injuries," but was "not persuade[d] . . . to abandon the Missouri tort law which requires that [a plaintiff] establish a causal relationship between the defendants and the injury-producing agent as a precondition to maintenance of their causes of action." *Id.* at 246–47.

In *Hagen v. Celotex Corp*., 816 S.W.2d 667 (Mo. 1991), the Missouri Supreme Court again declined to relax the traditional causation standard where a plaintiff died of asbestos-related mesothelioma but could only show that defendant Fibreboard's products *may* have supplied the fatal exposure. *See id*. at 671. The court said that plaintiff's failure to identify Fibreboard's products as the source of his exposure "differ[ed] only in degree and not in kind" from *Zafft*, "which holds that the element of causation must be established as to each defendant sought to be held." *Id*.[1]

[1] *Cf. Chemical Design, Inc. v. American Standard, Inc.*, 847 S.W.2d 488, 491 (Mo. Ct. App. 1993) (manufacturer of gas condenser owed no duty to chemical plant employee who was injured by use of a different product copied by a third

The fact pattern in *Hagen* was repeated in *Wagner v. Bondex International, Inc*., 368 S.W.3d 340 (Mo. Ct. App. 2012), where the plaintiff was exposed to ceiling tile made by a manufacturer of both asbestos and non-asbestos ceiling tiles but could not establish the specific products used at his job sites. Citing *Benjamin Moore* and *Zafft*, the appellate court held that the trial court erred in denying the defendant's motions for directed verdict and JNOV. The court explained, "the identification requirement must be satisfied" whenever a "plaintiff seeks to hold the defendants liable on the basis that their products caused harm to the plaintiff." *Id*. at 351 (quoting *Benjamin Moore,* 226 S.W.3d at 115).

This Court has noted that "[t]he common thread among Missouri products liability cases is that an entity must have 'plac[ed] a defective product in the stream of commerce.'" *Ford v. GACS, Inc.,* 265 F.3d 670, 680 (8th Cir. 2001), *cert. denied*, 535 U.S. 754 (2002) (quoting *Bailey v. Innovative Mgmt. & Inv., Inc*., 916 S.W.2d 805, 807-08 (Mo. Ct. App. 1995)); *Long v. Cottrell*, *Inc*., 265 F.3d 663, 669 (8th Cir. 2001), *cert. denied*, 535 U.S. 931 (2002) ("Missouri courts require that an entity place a product in the stream of commerce before it can be liable

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party from the defendant manufacturer's plans and specifications); *Hill v. General Motors Corp*., 637 S.W.2d 383, 386 (Mo. Ct. App. 1982) (truck manufacturer not liable for injury resulting from foreseeable post-sale modification involving parts sold by third parties); *Johnson v. Auto Handling Corp*., 523 S.W.3d 452, 466 (Mo. 2017) (holding that in negligent manufacture, design, or warning product liability cases, Missouri law "requires the jury to consider whether defendant manufactured the product….").

under a products liability claim."). The Eastern District of Missouri in *Emmons v. Bridgestone Americas Tire Operations, LLC*, 2012 WL 6200411 (E.D. Mo. Dec. 12, 2012), rejected a claim seeking to hold Goodyear liable for an injury caused by a defective wheel rim made by another company where Goodyear allegedly "created the market" for the product. The court held that Goodyear could not be held liable "because [it] did not place the allegedly defective product in the stream of commerce." *Id*. at *3.

Other federal courts applying Missouri law have enforced Missouri's adherence to its traditional proximate cause standard. Courts have repeatedly rejected the novel "innovator liability" theory that seeks to hold brand-name pharmaceutical manufacturers liable for harms allegedly caused by ingestion of their generic competitors' copycat products. For instance, in *In re Zantac (Ranitidine) Prods. Liab. Litig.*, 2020 WL 7866660 (S.D. Fla. Dec. 31, 2020), the court predicted that the Missouri Supreme Court would not hold brand-name drug manufacturers liable for injuries to generic drug consumers because "Missouri products liability law requires product identification." *Id*. at *23. Similarly, in *In re Darvocet, Darvon, & Propoxyphene Prods. Liab. Litig.*, 2012 WL 3610237 (E.D. Ky. Aug. 21, 2012) (unreported), *aff'd on other grounds*, 756 F.3d 917 (6th Cir. 2014), the court cited *Benjamin Moore* to conclude "[t]here is no theory of product liability under which a defendant can be held liable for an injury caused by

a product it did not sell, manufacture, or otherwise supply to the plaintiff." *Id.* at *2 & n.7.

All of these cases make clear that BASF and Monsanto cannot be held liable under Missouri law for harms caused by herbicides sold by third parties.

II. MISSOURI IS ALIGNED WITH THE MAJORITY RULE NATIONWIDE THAT MANUFACTURERS ARE NOT LIABLE FOR PRODUCTS MADE OR SOLD BY THIRD PARTIES

Missouri's traditional tort law approach is the majority rule nationwide.

A Michigan appellate court, for instance, held that dialysis machine manufacturers owed no duty to warn hospital employees of the risk of exposure to formaldehyde supplied by another company even though the dialysis machine manufacturers had recommended the use of formaldehyde to clean their machines. *See Brown v. Drake-Willock Int'l, Ltd*., 530 N.W.2d 510 (Mich. App. 1995). The court held: "The law does not impose upon manufacturers a duty to warn of the hazards of using products manufactured by someone else." *Id*. at 515.

Courts in other cases have similarly concluded that:

- a pickup truck manufacturer had no duty to warn consumers against improper installation of aftermarket equipment, *Westchem Agric. Chems. v. Ford Motor Co*., 990 F.2d 426, 432 (8th Cir. 1993);

- an airplane manufacturer was not liable for passengers' circulatory problems caused by seats made by a third-party and installed post-sale, *In re Deep Vein Thrombosis*, 356 F. Supp. 2d 1055, 1068 (N.D. Cal. 2005);
- a maker of electrically powered lift motors used in conjunction with scaffolding equipment had no duty to warn of risks created by scaffolding made by others, *Mitchell v. Sky Climber, Inc*., 487 N.E.2d 1374, 1376 (Mass. 1986);
- a truck cab and chassis manufacturer was not liable for harm by a dump bed and hoist made by a third-party, *Shaw v. Gen. Motors Corp*., 727 P.2d 387, 390 (Colo. App. 1986);
- a crane manufacturer had no duty to warn about rigging it did not place in the stream of commerce, *Walton v. Harnischfeger*, 796 S.W.2d 225, 226 (Tex. App. 1990);
- a hydraulic valve manufacturer was not liable for a defective log splitter used in conjunction with its product, *Childress v. Gresen Mfg. Co*., 888 F.2d 45, 46, 49 (6th Cir. 1989);
- a paint sprayer manufacturer was not liable when a cleaning solvent from a third party burned a user, *Dreyer v. Exel Indus., S.A*., 326 F. App'x 353, 358 (6th Cir. 2009);

- a metal forming equipment manufacturer was not liable for defective wood planking used in conjunction with its product, *Toth v. Econ. Forms Corp*., 571 A.2d 420, 423 (Pa. Super. Ct. 1990);
- a manufacturer of a garbage packer mounted on a truck chassis was not liable for a defect in a chassis made by a third-party, *Sanders v. Ingram Equip., Inc*., 531 So. 2d 879, 880 (Ala. 1988);
- a truck manufacturer was not liable for a tire mechanic's injuries when a tire mounted on a replacement wheel rim assembly made by a third party exploded, *Baughman v. General Motors Corp.*, 780 F.2d 1131, 1133 (4th Cir. 1986);[2] and
- a swimming pool manufacturer was not liable for injuries sustained by a diver as a result of a lack of depth markers and warnings on a replacement pool liner made by another manufacturer, *Fleck v. KDI Sylvan Pools*, 981 F.2d 107, 118 (3d Cir. 1992).

[2] *See also Firestone Steel Prods. Co. v. Barajas,* 927 S.W.2d 608 (Tex. 1996); *Acoba v. General Tire, Inc*., 986 P.2d 288 (Haw. 1999); *Zambrana v. Standard Oil Co. of Cal.,* 26 Cal. App. 3d 209 (1972); *Wiler v. Firestone Tire & Rubber Co*., 95 Cal. App. 3d 621 (1979); *Lytell v. Goodyear Tire & Rubber Co.,* 439 So. 2d 542 (La. Ct. App. 1983); *Spencer v. Ford Motor Co*., 367 N.W.2d 393 (Mich. Ct. App. 1985); *Cousineau v. Ford Motor Co*., 363 N.W.2d 721 (Mich. Ct. App. 1985); *Reynolds v. Bridgestone/Firestone, Inc*., 989 F.2d 465 (11th Cir. 1993); *Rastelli v. Goodyear Tire & Rubber Co.,* 591 N.E.2d 222 (N.Y. 1992); *Ford Motor Co. v. Wood,* 703 A.2d 1315 (Md. Ct. Spec. App. 1998), *abrogated on other grounds, John Crane, Inc. v. Scribner*, 800 A.2d 727 (Md. 2002).

Plaintiff's liability theory is inconsistent with these cases and, if affirmed, will take Missouri law outside the legal mainstream—something the Missouri Supreme Court has refused to do.

III. PLAINTIFF'S NOVEL THEORY IS UNSOUND POLICY

Making companies pay for injuries caused by others—and allowing the actual tortfeasors to escape liability—improperly alters the parties' economic incentives and market behavior. For instance, if a manufacturer suspects a deep-pocket defendant will have to pay for harms caused by its products, that manufacturer may choose to forgo sufficient liability insurance or skip certain safety precautions. Companies that are forced to pay would face the difficult decision of either absorbing significant judgments or raising prices on their own consumers.

This case illustrates the extreme consequences of plaintiff's theory. In an effort to sell dicamba at a lower price point than Monsanto or BASF, lesser quality dicamba manufacturers might forego the cost of developing low-volatility dicamba products, eschew robust labeling, and avoid the cost of instructing applicators on best practices for safe use. Of course, none of these cost cutting behaviors is in the best interest of farms such as Bader. Harms such as those Bader alleges would continue to occur, and perhaps worsen.[3]

[3] Indeed, old formulations of dicamba remain on the market and are significantly cheaper than the new low-volatility formulations. There is evidence that some

This could happen because unscrupulous companies would know that the consequences of their behavior would be borne by BASF and Monsanto. In fact, as BASF and Monsanto may have to raise prices to pay for the additional liability, their competitors would enjoy an ever-bigger price advantage—providing further incentive to engage in conduct that society should not encourage.

An additional reason to reject the Plaintiff's theory is that the practical complications of holding a manufacturer liable for products it neither manufacturers nor sells are vast. Plaintiff's radical theory opens the door to nearly limitless liability for any manufacturer whose product could be used in conjunction with a third-party's product. This approach could create absurd results.

"Can't you just see a smoker with lung cancer suing manufacturers of matches and lighters for failing to warn that smoking cigarettes is dangerous to their health?" John W. Petereit, *The Duty Problem With Liability Claims Against One Manufacturer for Failing to Warn About Another Manufacturer's Product*, HarrisMartin's COLUMNS-Asbestos 2, 4 (Aug. 2005). Or "a syringe manufacturer would be required to warn of the danger of any and all drugs it may be used to inject." Thomas W. Tardy, III & Laura A. Frase, *Liability of Equipment Manufacturers for Products of Another: Is Relief in Sight?*, HarrisMartin's COLUMNS-Asbestos 6 (May 2007). A paint brush manufacturer may have to

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farmers continued to spray them illegally after the new low-volatility formulations went on the market (presumably because of the price differential), significantly contributing to drift problems. *See* Monsanto Brief p. 31 n.1.

caution against the hazards of breathing mineral spirits that are commonly used to clean paint brushes. *See* Joseph W. Hovermill, et al., *Targeting of Manufacturers*, 47 No. 10 DRI For the Def. 52, 54 (Oct. 2005). A broom manufacturer may be required to warn of the hazards of sweeping dust containing silica—which is not the law today. *See* Tardy & Frase, *supra*, at 6.

Dean John Wade, reporter of the Restatement (Second) of Torts, explained long ago the reasons product identification remains necessary for tort liability. He wrote that manufacturers do not have a responsibility to those who use another's product, have no moral or legal obligation to stand behind another's goods, and are not in a position to incorporate the costs of liability into their prices when liability is associated with products they did not make or sell. *See* John Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 828 (1973).

More recently, the Supreme Court of Iowa said that subjecting companies to liability for products they did not manufacture or sell—"deep-pocket jurisprudence"—is "law without principle." *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 380 (Iowa 2014) (internal citation omitted). The Iowa Supreme Court asked, "Where would such liability stop? If a car seat manufacturer recognized as an industry leader designed a popular car seat, could it be sued for injuries sustained by a consumer using a competitor's seat that copied the design?" *Id.*; *see also Phelps v. Wyeth, Inc.*, 2010 WL 2553619, at *2 (D. Or. May 28, 2010) ("I cannot

find a decision to hold a manufacturer liable for injury caused by its competitor's product is rooted in common sense.").

The Missouri Supreme Court has long understood the absurdity of making one company pay for harms caused by others. If the question presented here were before the Missouri Supreme Court, the court would again find the plaintiff's theory to be "unfair, unworkable, and contrary to Missouri law, as well as unsound public policy." *Benjamin Moore*, 226 S.W.3d at 115 (quoting *Zafft*, 676 S.W.2d at 246).

CONCLUSION

For these reasons, the judgment of the District Court should be reversed or, alternatively, vacated.

Respectfully submitted,

/s/ Mark A. Behrens
Mark A. Behrens (Counsel of Record)
Philip S. Goldberg
Kateland R. Jackson
SHOOK, HARDY & BACON L.L.P.
1800 K Street NW, Suite 1000
Washington, DC 20006
(202) 783-8400
mbehrens@shb.com
pgoldberg@shb.com
krjackson@shb.com
Attorneys for Amici Curiae

March 19, 2021

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limit of Fed. R. App. P. 29 because it contains 2,966 words.

2. This Brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)-(6) because it was prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman 14-point font.

3. The electronic version of this Brief has been scanned for viruses and has been found to be virus free.

/s/ Mark A. Behrens
Mark A. Behrens

CERTIFICATE OF SERVICE

I certify that on this 19th day of March, 2021, I caused to be electronically filed the foregoing *amici curiae* brief with the Clerk of the Court via the CM/ECF system. All parties are registered CM/ECF users, have consented to receive electronic service, and will be served by the CM/ECF system.

/s/ Mark A. Behrens
Mark A. Behrens