

IN THE CIRCUIT COURT OF DREW COUNTY, ARKANSAS

CORNELIUS KILGORE and)
LABOMMIE KILGORE,)
))
Plaintiffs,)
))
v.)
))
MONSANTO COMPANY, WALMART)
INC., and WAL-MART STORES)
ARKANSAS, LLC,)
))
Defendants.)

Civil Action No. 22CV-21-138

**ORDER DENYING DEFENDANT MONSANTO COMPANY'S
MOTION FOR PROTECTIVE ORDER**

Background

Plaintiffs, Cornelius Kilgore and Labommie Kilgore, allege six different counts in this suit: (i) strict liability for defective design against Monsanto; (ii) strict liability for failure to warn against Monsanto and Walmart; (iii) negligence against Monsanto and Walmart; (iv) breach of implied warranties against Monsanto and Walmart; (v) deceptive trade practices against Monsanto and Walmart; and (vi) loss of consortium. Plaintiffs are seeking compensatory and punitive damages.

Plaintiffs served a Notice of Deposition of Werner Baumann (the "Notice"), Bayer AG's CEO. In response, Monsanto Company ("Monsanto") filed a Motion for Protective Order (the "Motion") requesting that the Court strike the deposition notice regarding Werner Baumann. That Motion has been fully briefed by the parties, and, on July 26, 2022, the Court conducted a hearing on the Motion. After considering the parties' briefing, oral argument, and other matters of record, the Court, for the reasons stated on the record during the hearing and set forth herein, denies Monsanto's Motion for Protective Order.

Discussion

At the heart of this inquiry are Rules 26 and 30 of the Arkansas Rules of Civil Procedure. Plaintiffs have requested Mr. Baumann's deposition pursuant to Rule 26(a), under which parties may obtain discovery by deposition upon oral examination. Ark. R. Civ. P. 26(a). Under Rule 26(b), "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the issues in the pending actions" Ark. R. Civ. P. 26(b)(1).

Plaintiffs specifically seek to depose Mr. Baumann under Rule 30(b)(1) and not Rule 30(b)(6), which would ordinarily be the type of deposition you would take of a corporate representative. Federal cases interpreting this situation do not appear to allow this type of deposition unless the deposition is of a corporate party's managing agent. *Hensley v. Comput. Sciences Corp.*, No. CV-2005-059-3, 2008 WL 2713367, at *3 (Ark. Cir. Ct. Mar. 6, 2008); see *United States v. Afram Lines, Ltd.*, 159 F.R.D. 408, 413–14 (S.D.N.Y. 1994).

Courts consider the following factors in determining whether an individual is a managing agent: (1) whether the individual can be expected to identify with the interests of the corporation as opposed to the interests of the adverse party; (2) whether the corporation has invested the individual with discretion to exercise judgment; (3) whether the individual has general responsibility over matters involved in the litigation; (4) whether the individual can be expected to carry out corporate directions; and (5) whether there is an individual with higher authority in the area on which the information is sought. *Hensley*, 2008 WL 2713367, at*3.

The Court will not belabor the details that Plaintiffs put forward on each of these factors in their briefs and at oral argument, other than to say that there is certainly enough evidence to believe that Plaintiffs have met the threshold burden of establishing that Mr. Baumann is a managing agent

of Monsanto. Thus, under the managing agent analysis, it appears that Plaintiffs may move forward with Mr. Baumann's deposition.

Next, the Court considers the apex doctrine and the wait-and-see approach articulated in *Bank of the Ozarks v. Capital Mortg. Corp.* No. 4:12-mc-00021 KGB, 2012 U.S. Dist. LEXIS 99506, at *5–6 (E.D. Ark. July 18, 2012). After reviewing the case law, the Court notes that the apex doctrine has not been adopted in Arkansas or in the Eighth Circuit. *Mojica v. Securus Techs., Inc.*, No. 5:14-CV-5258, 2017 U.S. Dist. LEXIS 38616, at *3 (W.D. Ark. Mar. 17, 2017). Therefore, the Court will not apply a doctrine that has not been adopted by the courts above it, and the Court has no intention of undertaking that analysis.

The Court's decision to allow Plaintiffs to move forward with Mr. Baumann's deposition is based on its analysis under the wait-and-see approach. While this case is unique to Plaintiffs in the sense that they are the ones who have been allegedly injured at the hands of the Defendant, many of the issues in this case are not unique. In fact, there are over 100,000 similar cases that have been or are pending in other jurisdictions and at least five similar cases pending in Arkansas. Indeed, the discovery taken in other cases has been a source of contention between the parties. Plaintiffs filed a motion to compel the production of depositions of Monsanto's employees, agents, and witnesses conducted in other lawsuits. That conflict was apparently resolved, and it is clear that there has been substantial discovery undertaken by similarly situated plaintiffs that is significantly relevant to this case. Even if the lawyers in this case did not take those depositions, the depositions were of the same witnesses, those witnesses were represented by counsel, and the same interests were at stake. Therefore, there is no reason to believe that these depositions would not be admissible in this action and that taking a new deposition of the same witness would not be duplicative.

Plaintiffs have indicated that Defendants may have produced over thirty depositions from other cases, which is easy to believe. While there is no limit to depositions in Arkansas, there is a limit to depositions under the Federal Rules of Civil Procedure. And because Arkansas Rule 30 is substantially similar to Federal Rule 30, the Court looks to the federal rule for guidance on the progression of discovery in this case. Under the Federal Rules, some courts would likely determine that the amount of discovery previously conducted on the central issues has almost reached that limit, thus requiring leave of court to take further depositions.

In view of that, at this juncture, it makes sense that Mr. Baumann's deposition is the first one to be noticed in this case. Similarly, it makes sense that at some point his deposition would become relevant. Based on the facts before the Court, Mr. Baumann is the one who has made his deposition relevant—more so than a CEO whose only relation to the litigation is that he or she is the head of the company being sued. Clearly, Mr. Baumann has made himself the lead dog in the Court's mind. As the head of the company, there is no one who better knows what both the left and right hands of the company are doing than Mr. Baumann. It would shock the Court if Mr. Baumann did not have unique or specialized knowledge. Indeed, if there is one person that would be charged with knowing most all things, it would be him.

Further, the Plaintiffs have already agreed to go to Germany. Thus, there is very little burden for Mr. Baumann to take one day to be deposed on what may be the biggest issue his organization is facing.

IT IS THEREFORE ORDERED that Monsanto's Motion for Protective Order is hereby DENIED. Werner Baumann is to give his deposition within ninety days of this Order's date.

ORDERED this ___ day of August 2022.

ROBERT B. GIBSON, III
CIRCUIT JUDGE



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Type: ORDER OTHER

So Ordered

A handwritten signature in blue ink, appearing to read "RB Gibson III", written over a horizontal line.

Robert B. Gibson III, 10th Circuit Division 3
Judge