

IN THE IOWA DISTRICT COURT FOR WAPELLO COUNTY

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**DOUG PAULS, et al.,**  
**Plaintiffs,**

**No. LALA 105144**  
**(Division C)**

v.

**RICHARD WARREN,**  
**WARREN FAMILY PORK, LLC,**  
**TRIPLE A FAMILY FARMS, GP, and**  
**JBS LIVE PORK, LLC** (*f/k/a CARGILL PORK, LLC*),  
**Defendants.**

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**RULING ON PRETRIAL MOTIONS**

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On November 24, and again on December 19, 2015 the court held hearing on the pending, pretrial motions in preparation for the Division C jury trial starting February 1, 2016 on bellwether plaintiffs' claims. During the course of the hearing held over the two days, the following appearances were made:

--Division C bellwether plaintiffs<sup>1</sup> were represented by David E. Sykes, Charles D. Miller, Charles F. Speer, Richard H. Middleton, and Peter B. Bieri;

--Defendants Warren and Warren Family Pork, LLC were represented by Gayla R. Harrison and Nicholas T. Maxwell;

--Triple A Family Farms, GP was represented by William H. Roemerman; and

--JBS Live Pork, LLC was represented by Jacob D. Bylund, Scott L. Halbur, Shannon L. Sole, and Cristopher H. Dolan.

After hearing counsel's legal arguments, the court took the pretrial issues under study. Now, in consideration of the pleading record—including the parties' superb and thorough legal briefing which is incorporated by this reference, the court issues summary rulings.<sup>2</sup>

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<sup>1</sup> This ruling addresses pretrial motions in Division C as pertaining to interests involving bellwether-plaintiff claims. Remaining plaintiff claims under Division C are in abeyance while pretrial and trial process proceeds on the bellwether claims.

<sup>2</sup> Iowa Rule of Civil Procedure 1.981 requires the court to address all points raised in motions for summary judgment. In an exercise of judicial economy to yield timely rulings vis-à-vis the looming trial schedule and counsel's need to proceed with final trial preparation, the court elects to issue summary rulings. Accordingly, the parties' respective briefing is incorporated by this reference, and legal authorities for the court's rulings are not recounted here.

**THE COURT DIRECTS THE FOLLOWING.**

**I. JBS Live Pork, LLC Motion for Summary Judgment**

**A. Damages Recoverable in Nuisance.**

- 1) As a matter of law, damages for interference with, and for loss of, the comfortable use and full enjoyment of real property are recoverable as damage to property rights under Iowa nuisance law. JBS's Motion seeking summary dismissal of the plaintiffs' claims which are made for temporary nuisance on these theories of recovery, is denied.
- 2) As a matter of law, damages for personal inconvenience, annoyance, discomfort, and loss of full enjoyment of property are recoverable as damage to the person under Iowa nuisance law. JBS's Motion seeking summary dismissal of the plaintiffs' claims which are made on these theories of recovery, is denied.
- 3) The plaintiffs do not seek recovery for any permanent nuisance and specifically, they do not claim damage for diminution of the value of real estate. In consideration of the plaintiffs' pleading for relief on the theory of a permanent nuisance, JBS's Motion seeking summary dismissal of all permanent-nuisance claims, is granted.

**B. Unconstitutionality of Immunity Statute, as Applied.**

**1) Inalienable Rights**

As a matter of law, the immunity for confined animal feeding operations (CAFOs) set forth in Iowa Code Section 657.11 (2) is unconstitutional as applied to the bellwether plaintiffs. The statute's grant of immunity violates individual plaintiffs' fundamental rights under the Inalienable Rights Clause of Article I, Section 1 of the Iowa Constitution, in that the Iowa legislature's exercise of police power in this manner unduly burdens the plaintiffs by denying them access to a lawful remedy for their alleged injuries to the person and/or to property occasioned in use of their real-estate interests. JBS's Motion seeking summary dismissal of the plaintiffs' claims on the basis of the immunity paragraph of Section 657.11 (2), is denied.

**2) Benefits of Pork Industry**

There are no material facts in good-faith dispute that demonstrate that the plaintiffs suffer a disqualification from remedy under a premise that they, as individuals, benefit from the immunity statute greater than those in the general public who benefit from the immunity protection of Iowa Code Section 657.11 (2). JBS's Motion seeking summary dismissal of all claims for a disqualification from remedy, drawn from analysis of the economic impact of the Iowa pork industry, is denied.

**C. Applicability of Statutory Exceptions to Immunity.**

As a matter of law, Iowa Code Section 657.11 (2) affords the plaintiffs a cause of action resembling a theory of negligence, asserted against CAFO owners and operators under exceptions to the immunity paragraph of the statute.

**1) Compliance With Statutes and Regulations**

Material facts are undisputed that the defendants are in compliance with federal and state statutes and regulations pertaining to CAFO ownership and operation, and thus, the cause of action afforded through Iowa Code Section 657.11 (2) (a) is, as a matter of law, unavailable to the plaintiffs. JBS's Motion seeking summary dismissal of all claims brought under that section of the statute is granted.

**2) Exception Under Section 657.11 (2)(b)**

Material facts are in good-faith dispute regarding the plaintiffs' claims asserted under Iowa Code Section 657.11 (2)(b). Further, adjudication of facts under this exception necessarily implicates reasonable inferences that may be drawn from both direct and circumstantial evidence and that may involve both disputed facts as well undisputed facts. JBS's Motion seeking summary dismissal of all claims brought under that section of the statute, is denied.

**D. Element of Causation**

Material facts are in good-faith dispute regarding causation of the plaintiffs' claimed injuries for damage to their persons and/or damage to their property rights. Fair adjudication of these facts necessarily implicates reasonable inferences that may be drawn from both direct and circumstantial evidence—and that may involve both disputed facts as well those facts which are undisputed. JBS's Motion seeking summary dismissal of all claims for a failure of proof of causation, is denied.

**E. Punitive-Damage Claims**

As a matter of law, the nature and measure of evidence necessary to submit the plaintiffs' punitive-damage claims are absent from this pleading record. Moreover, no claimed or established facts, nor any combination of them, could sustain a reasonable inference of the legal elements required to support an award of punitive damages. JBS's Motion seeking summary dismissal of all claims for punitive damages, is granted.

**F. Joinder in Warren Motion for Summary Judgment**

JBS's joinder in the Warren defendants' Motion for Summary Judgment entitles it

to the relief itemized in Section V., below. It is ordered, accordingly.

## **II. Plaintiffs' Motion to Exclude Dr. Hayes**

### **A. Trial Evidence**

The expert opinions of Dr. Dermot Hayes, as proposed for evidentiary use by JBS Live Pork, LLC to establish the economic impact and consequent reasonableness of the Iowa pork industry as underpinnings of Iowa Code Section 657.11 (2), is not legally relevant to issues to be decided by the jury fact-finder. Even if trial relevance were to be demonstrated, the probative value of the evidence is substantially outweighed by the risk of jury confusion of the issues, a threat of unfair prejudicial impact on the plaintiffs' nuisance claims, and an implicit invitation for jurors to inject their own economic interests into their adjudicative function. The plaintiffs' Motion to Exclude [Dr. Hayes] from trial presentation, is granted.

### **B. Pretrial Legal Analysis**

However, the court's use of Dr. Hayes' opinions as part of the overall analysis of the question of constitutionality of the immunity paragraph of Iowa Code Section 657.11 (2), is unaffected by the foregoing ruling.

## **III. JBS Live Pork, LLC's Motions to Exclude**

### **A. Dr. Nicholas Cheremisinoff**

The plaintiffs seek to present expert testimony from Dr. Nicholas Cheremisinoff regarding the prospect of using anaerobic digesters in CAFO operations for odor control. Controversy over Dr. Cheremisinoff's expert qualifications and opinions goes to the weight to be accorded to his testimony, rather than to its relevance and admissibility to assist the jury in sorting out claims under Iowa Code Section 657.11 (2)(b)(2). JBS's Motion to Exclude [Dr. Cheremisinoff] is denied.

### **B. Dr. Paul Rosenfeld**

The plaintiffs' November 20<sup>th</sup> Notice of Withdrawal of Plaintiffs' Expert Dr. Paul Rosenfeld resolves all issues posed by JBS's Motion to Exclude [Dr. Rosenfeld].

### **C. Kathy Martin**

The plaintiffs propose expert testimony from Kathy Martin regarding methodologies of management and odor control in CAFOs. Controversy over Ms. Martin's expert qualifications and opinions goes to the weight to be accorded to her testimony, rather than to its relevance and admissibility to assist the jury in analyzing claims under Iowa Code Section 657.11 (2)(b)(2). JBS's Motion to

Exclude [Kathy Martin] is denied as to her opinions 1, 2, and 3; with regard to her opinion 4 dealing with issues in the case Winburn, *et al.* v. Hoksbergen, *et al.*, Poweshiek County LALA 002187, the Motion to Exclude is granted on the basis of relevancy to the Division C trial.

**IV. Plaintiffs' Motion for Partial Summary Judgment (re: Affirmative Defenses)**

**A. Iowa Code Section 352.11**

Under authority decreed by the Iowa Supreme Court, Iowa Code Section 352.11 is unconstitutional and does not shield defendants from liability in this cause of action. Any affirmative defense grounded in that section, is not viable and is dismissed.

**B. Priority of Location**

While certain priority-of-location facts are not in dispute, as a matter of law the priority of location is not singularly dispositive of the plaintiffs' claims. A fair resolution of claims still requires analysis of other evidence, both direct and circumstantial, along with the reasonable inferences which may be drawn from the body of trial evidence. Any request for summary determination of rights based on priority of location, alone, is denied.

**C. Iowa Code Section 657.11 Immunity Paragraph**

Defenses grounded in the immunity protections articulated in Iowa Code Section 657.11 (2) are subject to the declaratory rulings in Section I., above. The plaintiffs' Motion for summarial relief via court recognition of the unconstitutionality of the statute, is granted.

**D. Iowa Code Section 172D.2**

Defenses based upon Iowa Code Section 172D.2 are inapplicable to this CAFO litigation, and should not be recognized. The plaintiffs' Motion for summary dismissal of such an affirmative defense, is granted.

**E. Laches, Estoppel, Waiver**

Defenses of laches, estoppel, and waiver are premised upon material facts in good-faith dispute, and will also involve reasonable inferences to be drawn from all the evidence, direct and/or circumstantial. The plaintiffs' Motion for summary dismissal of defendants' equitable affirmative defenses of laches, estoppel, and waiver, is denied.

**F. Intervening Cause and Comparative Fault**

JBS Live Pork, LLC does not assert a defense of intervening cause or comparative fault, and thus, the plaintiffs' request for summary preclusion of those theories of defense is moot. However, the absence of these affirmative defenses does not temper the plaintiffs' responsibility to prove causation of the injuries they allege.

**V. Warren Motion for Summary Judgment**

**A. Joinder in JBS's Motion for Summary Judgment**

The Warren defendants' joinder in JBS's Motion for Summary Judgment entitles them to the relief itemized in Section I., above. It is ordered, accordingly.

**B. Specific Warren Claims for Relief**

**1) Ardith Teeter Claims**

The circumstances of plaintiff Ardith Teeter involve a limited property interest in the form of a former occupancy/tenancy of real estate for a specific duration during the five-year statute of limitations period applicable to property-derived disputes. However limited, Teeter's interests are still actionable under the analysis set forth in Section I., above. The tailoring of her limited right of action should be reserved for jury-submission documents (legal instructions and Teeter's verdict form). Thus, the Warren Motion for summary dismissal of Teeter's claims, is denied.

**2) Proof Under Iowa Code Section 657.11 (2)(b)**

Material facts are in good-faith dispute regarding the elements necessary to prove exception to the immunity paragraph of Iowa Code Section 657.11 (2)(b). In part, evidence proffered for proof involves expert and non-expert testimony. No basis is shown by the Warren defendants to merit pretrial dismissal of Section 657.11 (2)(b) issues on a standard-of-care analysis, and their Motion for that relief is denied.

**3) Joint and Several Liability**

Tenets of conduct required to sustain joint and several liability involve findings of knowledge and intent which are seldom capable of direct proof, and necessarily involve a fact-finder's reasonable inferences from both direct and circumstantial evidence. The Warren defendants have failed to show entitlement to a pretrial preclusion of such fact-finding, and their Motion seeking summary dismissal of the request for joint and several liability, is denied.

**VI. Triple A Family Farms, GP's Motion for Summary Judgment**

**A. Joinder in JBS's Motion for Summary Judgment**

Triple A's joinder in JBS's Motion for Summary Judgment entitles it to the relief itemized in Section I., above. It is ordered, accordingly.

**B. Joinder in Warren Defendants' Motion for Summary Judgment**

Triple A's joinder in the Warren defendants' Motion for Summary Judgment entitles it to the relief itemized in Section V., above. It is ordered, accordingly.

**C. Specific Claims for Summary Relief**

**1) Limited Profile of Involvement**

No material facts are in good-faith dispute about the limited profile of Triple A Family Farms, GP in the Warren defendants' CAFO manure-management protocol. As a matter of law, the plaintiffs' claims against Triple A are unsustainable on the proof disclosed in the pleading record. Triple A's Motion for summary dismissal of the plaintiffs' claims against it, is granted.

**2) Dismissal of All Claims**

In consideration of the unique circumstances of the foregoing dismissal of claims against Triple A and the context of ongoing litigation involving non-bellwether plaintiffs in Division C, the court enlarges the ruling to embrace all Division C plaintiffs' claims. Any objection to the enlarged scope of this dismissal shall be filed by January 29, 2016 or stand barred.

**VII. Reservation of Issues for Trial**

All claims and defenses which have not been resolved through summary judgment of dismissal, are reserved for trial resolution.

**JUDGMENT IS ENTERED ACCORDINGLY JANUARY 9, 2016.**

**Directions for Service**

Service shall be completed upon all LALA 105144 parties by email.

Copies: David E. Sykes, attorney for plaintiffs  
Andrew R. Klonowski, attorney for plaintiffs  
Charles D. Miller, attorney for plaintiffs  
Charles F. Speer, attorney for plaintiffs  
Peter Britton Bieri, attorney *pro hac vice* for plaintiffs  
Richard H. Middleton, attorney *pro hac vice* for plaintiffs  
William H. Roemerma, attorney for Valley View, and Triple A Family Farms  
Gerald T. Sullivan, attorney for Valley View, and Triple A Family Farms  
Gayla R. Harrison, attorney for Warren and Warren Family Pork  
Nicholas T. Maxwell, attorney for Warren and Warren Family Pork  
Jacob D. Bylund, attorney for JBS Live Pork, LLC  
Scott L. Halbur, attorney for JBS Live Pork, LLC  
Shannon L. Sole, attorney for JBS Live Pork, LLC  
Christopher H. Dolan, attorney *pro hac vice* for JBS Live Pork, LLC  
Evelyn Thomann, case coordinator



State of Iowa Courts

**Type:** OTHER ORDER

**Case Number**      **Case Title**  
LALA105144      DOVICO JERRY VS VALLEY VIEW SWINE LLC ETAL

So Ordered

A handwritten signature in blue ink, appearing to read "Annette J. Scieszinski". The signature is fluid and cursive, written over a horizontal line.

Annette J. Scieszinski, District Court Judge,  
Eighth Judicial District of Iowa