

IN THE IOWA DISTRICT COURT FOR WAPELLO COUNTY

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**JERRY DOVICO, et al.,**

**Plaintiffs,**

**v.**

**VALLEY VIEW SWINE, LLC,**

**NICK ADAM, (dismissed 12-1-15)**

**JEFFREY ADAM, (dismissed 12-1-15)**

**SHAWN ADAM, (dismissed 12-1-15)**

**JBS LIVE PORK, LLC (f/k/a CARGILL PORK, LLC),**

**Defendants.**

**No. LALA 105144**

**(Division A)**

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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 A jury trial starting August 15, 2016 on bellwether plaintiffs' claims. During the course of the hearing held over the two days, the following appearances were made:

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

--Valley View Swine, LLC was represented by William H. Roerman<sup>2</sup>; and

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

After hearing counsel's legal arguments, the court took the pretrial issues under study, which has been enlarged with case record evolved through trial and post-trial proceedings on Division C bellwether claims, and additional Division A filings since the courtroom record closed December 19th. It is now timely to enter ruling on pending pretrial issues involving the Division A bellwether plaintiffs. The parties' excellent, conscientious legal briefing is incorporated by this reference.<sup>3</sup> The court now issues summary rulings.

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

<sup>2</sup> On November 23, 2015, the eve of hearing, the plaintiffs moved to dismiss defendants Nick, Jeffrey, and Shawn Adam. The dismissal was confirmed in a December 1<sup>st</sup> court order.

<sup>3</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 coming 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, 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 in the first sentence 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), starting in its second sentence, affords the plaintiffs a cause of action resembling a theory of negligence, asserted against CAFO owners and operators under exceptions to the immunity sentence 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 as undisputed facts. JBS's Motion seeking summary dismissal of all claims brought under that portion 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 under Iowa nuisance law. 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.

## **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 portion 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**

#### **1) JBS Motion to Exclude**

The plaintiffs seek to present expert testimony from Dr. Nicholas Cheremisinoff regarding the prospect of using anaerobic digesters in CAFO operations for odor control. Some 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 granted insofar as to incorporate all limine rulings on testimonial content and presentation ordered with respect to the trial of Division C bellwether claims. The record of those proceedings is incorporated in this ruling for the purpose of documenting the parameters of the limine relief granted.

#### **2) JBS Supplemental Motion to Exclude**

In a post-hearing, April 4, 2016 Supplemental Motion to Exclude, JBS seeks exclusion of Dr. Cheremisinoff's expert testimony due to recurrent violation of the court's limine rulings in the trial of Division C bellwether claims. The prospect of a similar pattern of violation is present in the Division A bellwether trial. Thus, partial relief on JBS's renewed request for exclusion is warranted to preserve the integrity of the trial process, and is reasonable under the circumstances confronting the court. In the event of a future violation of

court limine rulings by Dr. Cheremisinoff, the court shall immediately recess his examination to conduct a hearing outside the presence of the jury for the purpose of reconsidering the extent of relief allowed on JBS's Supplemental Motion to Exclude, and to consider striking all testimony of the witness.

**3) Plaintiffs' Motion to Supplement**

The plaintiffs seek through a post-hearing, April 6, 2016 Motion to Supplement Expert [Report of Dr. Cheremisinoff], the opportunity to enlarge upon expert opinion testimony, the disclosure of which was otherwise due June 1, 2015 under the law of this case. The timing of that deadline was a premise for the August 15, 2016 jury-trial assignment. No good cause has been demonstrated to warrant the extension of the deadline; moreover, to allow expansion of expert-opinion evidence at this juncture is prejudicial to the defendants and would unjustly imperil the long-standing trial date. The Plaintiffs' Motion to Supplement 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**

**1) JBS Motion to Exclude**

The plaintiffs propose expert testimony from Kathy Martin regarding methodologies of management and odor control in CAFOs. Some 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 granted insofar as to incorporate all limine rulings on testimonial content and presentation ordered with respect to the trial of Division C bellwether claims. The pretrial and trial record of the Division C bellwether claims, is incorporated in this ruling for the purpose of documenting the parameters of the limine relief granted.

**2) JBS Supplemental Motion to Exclude**

In a post-hearing, March 11, 2016 Supplemental Motion to Exclude, JBS seeks exclusion of Kathy Martin's expert testimony due to numerous incidents of the expert witness' intentional violation of pretrial and trial limine rulings. It is predictable, given the prolific record of violation, that similar unlawful efforts will be undertaken in the trial of Division A bellwether claims. The least-restrictive method of maintaining the Rule of Law, protecting the integrity of the trial process, and averting unfair prejudice to the defendants, is to require a perpetuated video deposition of testimony to be offered at trial.

- a. Thus, Ms. Martin may testify as an expert under all prevailing limine restrictions on the extent and content of her admissible testimony, but such testimony may not be presented live, and shall be presented through a perpetuated video deposition.
- b. The presentation of Ms. Martin's testimony through video deposition appropriately precludes juror questions for this witness.
- c. While Ms. Martin may be present in the trial gallery as a public spectator, counsel and the parties are prohibited from pointing her out at any time as a witness, or taking any other direct or indirect action to communicate to jurors—or allow her to communicate to jurors—that she is a witness and is personally present in the courtroom.
- d. Counsel and the parties are precluded from directly or indirectly commenting on the court's protective measure of enforcing Ms. Martin's compliance with the law and the court's orders through pretrial recording of her testimony.

JBS's Supplemental Motion to Exclude [Ms. Martin] is granted in part, to effect all of the above relief.

**3) Plaintiffs' Motion to Supplement**

The plaintiffs seek through a post-hearing, April 6, 2016 Motion to Supplement Expert [Report of Kathy Martin], the opportunity to enlarge upon expert opinion testimony, the disclosure of which was otherwise due June 1, 2015 under the law of this case. The timing of that deadline was a premise for the August 15, 2016 jury-trial assignment. No good cause has been demonstrated to warrant the extension of the deadline; moreover, to allow expansion of expert-opinion evidence at this juncture is prejudicial to the defendants and would imperil the long-standing trial date. The Plaintiffs' Motion to Supplement is denied.

**D. Valley View Joinder**

Valley View joins in JBS positions in seeking limine orders. Consequently, Valley View's conjoined prayers for relief are granted to the extent that JBS earned relief in this Section III., above.

**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**

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 summary relief via court recognition of the unconstitutionality of the first sentence of the statute, as applied to Division A bellwether plaintiffs, 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. Valley View Motions for Summary Judgment**

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

Valley View's joinder in JBS's Motion for Summary Judgment entitles it to the

relief itemized in Section I., above. It is ordered, accordingly.

**B. Dismissal of Individual Defendants**

Valley View's request for summary dismissal of individual defendants Nick, Jeffrey, and Shawn Adam became moot with the plaintiffs' November 23, 2015 Motion for Voluntary Dismissal which the court confirmed in a December 1<sup>st</sup> Order [Dismissing] Defendants Adam.

**VI. Reservation of Issues for Trial**

All claims and defenses which have not been resolved through summary judgment of dismissal, are reserved for trial resolution. Similarly, all requested limine relief that is not specifically granted, is denied.

**JUDGMENT IS ENTERED ACCORDINGLY JUNE 8, 2016.**

**Directions for Service**

Service shall be completed upon all parties by email.

Copies: David E. Sykes, plaintiffs' attorney  
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. Roerman, attorney for Valley View  
Gerald T. Sullivan, attorney for Valley View  
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  
Ryan P. Howell, attorney for JBS Live Pork, LLC  
Christopher H. Dolan, attorney *pro hac vice* for JBS Live Pork, LLC  
Andrew Grove, Area Media Coordinator  
Steffanie Swartz, 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