IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

FLORISTS' MUTUAL INSURANCE, COMPANY A/S/O BATTLEFIELD FARMS, INC.,	)	CIVIL ACTION NO. 3:01CV00095
Plaintiff,	)	
	)	MEMORANDUM OPINION
v.	)	
LUDVIG SVENSSON, INC.,	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

This matter comes before the court on defendant Ludvig Svensson, Inc.'s ("Svensson") October 18, 2002 Motion for Summary Judgment and also for the dispostion of other motions and issues raised during oral argument before the presiding United States Magistrate Judge on November 26, 2002.

The above-captioned civil action was referred to the presiding United States Magistrate Judge for proposed findings of fact, conclusions of law, and a recommended disposition. *See* U.S.C. § 636(b)(1)(B) (West 1993). In his February 13, 2003 Report and Recommendation, Magistrate Judge B. Waugh Crigler rendered to this court a report setting forth findings, conclusions, and recommendations for the disposition of the outstanding issues. The defendant filed timely objections to portions of the Magistrate's Report and Recommendation on March 3, 2003. The plaintiff then filed a timely response to the aforementioned objections on March 18, 2003.

The court has performed a *de novo* review of those portions of the Report and

Recommendation to which objections were made. *See* U.S.C. § 636(b)(1)(C) (West 1993 and Supp. 2000); FED.R.CIV.P. 72(b). Having thoroughly considered the entire case, all relevant law, and for the reasons stated herein, the court shall (1) voluntarily DISMISS COUNT II (breach of warranty) as withdrawn; (2) DENY the balance of the defendant's motion for summary judgment in its entirety; (3) STRIKE/DISMISS the defendant's affirmative defense of assumption of risk and its equitable defense of unclean hands; (4) to the extent the defendant's opposition to the expert evidence may be construed as an objection thereto, OVERRULE the defendant's verbal objection to the evidence of the plaintiff's report; and (5) ACCEPT the Report and Recommendation of the Magistrate Judge in its entirety.

I.

The court will rely on the Magistrate Judge's recitation of the facts involved in this matter. In brief, this is a subrogation action arising out of property loss that resulted from a fire at Battlefield Farms, a commercial greenhouse, in Orange County, Virginia, in November, 1999. The plaintiff, Florists' Mutual Insurance Company ("Florists"), insured Battlefield Farms. Under its insurance contract, Florists has paid Battlefield Farms for the loss incurred in the amount of $5,922,728.43.[1] Having made the payments, Florists became subrogated to the rights and interests of Battlefield Farms and, accordingly, instituted this diversity action as a subrogee.

Van Wingerden, Inc. ("Van Wingerden") is an authorized distributor for defendant Ludvig Svennson, Inc. Additionally, Van Wingerden provides greenhouse maintenance services

[1] Battlefield Farms had approximately two million dollars in uninsured losses, but has declined to pursue a claim for excess damages against the defendant.

for Battlefield Farms. In particular, Van Wingerden purchases, supervises the installation of, and maintains the shade cloth for Battlefield Farms' greenhouses. At the time of the fire, approximately 14 acres of ULS shade cloth had been installed throughout the greenhouses at Battlefield Farms, comprising the vast majority of the shade cloth utilized there.

The ULS shade cloth product is manufactured by AB Ludvig Svennson, a Swedish corporation that is the parent company of the defendant.[2] John C. Walters served as President of the defendant corporation from 1993 until 2001. Goran Henningsson has been the company's President since April, 2001, when Mr. Walters stepped down. The defendant is a wholly owned subsidiary of AB Ludvig Svensson. Mr. Henningsson and Anne Ludvigsson were officers of both the defendant and its parent company, and, while President, Mr. Walters reported primarily to Mr. Henningsson.

The fire occurred on or about November 11, 1999. Florists agrees that the fire began as a small, incipient blaze occasioned by an electric spark. Florists asserts, however, that because ULS shade cloth burns rapidly, the damage caused by the fire was widespread and devastating. It further asserts that, because of the tendency of the shade cloth to "burn and drop," vast damage was done to plants and to other items contained in the greenhouses that otherwise would have escaped harm. Florists contends that the defendant knew of the dual hazards of rapid flame-spreading and "burn and drop" of ULS shade cloth as early as 1993-1994, yet never warned Battlefield Farms of those hazards.

Additionally, the record evidence shows that AB Ludvig Svensson had developed and

[2] The defendant similarly is named Ludvig Svensson, Inc.

manufactured a flame-retardant shade cloth product called Revolux. Florists points to AB Ludvig Svensson's patent application for the Revolux product and contends that AB Svensson revealed its knowledge of the rapid spreading and burn and drop tendencies of ULS shade cloth. Further, the defendant sells the Revolux product in the United States, but Florists alleges that Battlefield Farms never was warned about the rapid spreading or burn and drop tendencies of ULS shade cloth, nor was it offered the new flame-retardant product. John C. Walters testified that he was aware of these dual hazards as early as 1994.

II.

COUNT I of the plaintiff's Complaint alleges negligence in several particulars, including negligent design, manufacture, failure to use fire resistant materials, failure to inspect, and failure to warn Battlefield Farms of the risks associated with the use of the product. It is worthy of note that Florists' claim of unreasonable risk and danger is not that the shade cloth was flammable, but rather that Svensson's negligence led to production of a product that facilitated rapid fire spread and that exhibited burn and drop tendencies, thus exacerbating damages resulting from an already devastating blaze.

In COUNT II of the Complaint, plaintiff Florists asserted various breach of warranty claims, but has since conceded that its breach of warranty claims are "unsupportable" as a matter of law. Florists, therefore, has withdrawn all claims asserted in COUNT II of the Complaint. (Pl's Mem. Opp. D's Mot. Summ. J. at 24.) Accordingly, the court shall voluntarily DISMISS COUNT II.

III.

On October 18, 2002, the defendant filed a motion for summary judgment. A party is entitled to summary judgment when the pleadings and discovery show that there are no genuine issues as to any material fact, and that the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[S]ummary judgment ... is mandated where the facts and the law will reasonably support only one conclusion." *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 279 (4th Cir. 2000) (quoting *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)). If the evidence is such that a reasonable jury could return a verdict in favor of the non-moving party, then there are genuine issues of material fact. *See Anderson*, 477 U.S. at 248. All facts and inferences shall be drawn in the light most favorable to the non-moving party. *See Food Lion, Inc. v. S.L. Nusbaum Ins. Agency, Inc.*, 202 F.3d 223, 227 (4th Cir. 2000). Guided by these principles, the Magistrate Judge recommended, *inter alia*, that this court deny the defendant's motion for summary judgment in every respect.

IV.

The defendant has articulated seventeen objections to the Magistrate Judge's Report and Recommendation. The objections fall into five general categories. The court will examine each category in turn.

A. *The Parbst Affidavit:*

In support of its argument that it warned Battlefield Farms of the danger of the shade cloth, the defendant, in its motion for summary judgment, contended that each roll of shade cloth contained a "roll insert," which warned against installing the shade cloth near sources of fire, and

which also mentioned the Revolux product as a fire retardant alternative. The Magistrate Judge noted that "the only evidence in the record revealing that the 'roll insert' was or likely was included in the shipments to Battlefield Farms" was the affidavit of Jeffrey Scott Abernathy. Report and Recommendation, page 5, note 3.

Florists, however, moved to strike the Abernathy affidavit. Because the defendant never identified Abernathy as a witness, either in Rule 26(a)(1) disclosures, in responses to interrogatories, or in the witness lists exchanged by the parties under the pretrial scheduling order, the Magistrate Judge sustained the plaintiff's motion to strike. The Magistrate based his conclusion, in part, on the idea that if the Abernathy affidavit is not considered, then "[t]here is no evidence that Defendant provided any warnings to Battlefield Farms." Report and Recommendation, page 14. Consequently, the Magistrate Judge concluded that there was insufficient evidence of adequate warnings given to Battlefield Farms about the dangerousness of the shade cloth.

Svensson did not object to the Magistrate's decision to sustain the plaintiff's motion to strike the Abernathy affidavit. Instead, according to the defendant, the Magistrate Judge overlooked the Kurt Parbst[3] affidavit, which constituted a "fundamental error with respect to the evidence" and "tainted much of the Magistrate Judge's analysis." Defendant's Objections, page 2. The question then becomes whether the Parbst affidavit constitutes sufficient evidence that the roll insert was or likely was included in the shipments to Battlefield Farms.

After a careful review of the affidavit of Kurt Parbst, it is clear that his affidavit testimony

[3] Kurt Parbst is employed by Ludvig Svensson, Inc. as a Sales and Technical Manager.

is insufficient evidence that the defendant warned Battlefield Farms of the dangerous nature of the shade cloth. First, Parbst's own sworn testimony establishes that he has been employed by the defendant only since October, 2000, eleven months after the fire at Battlefield Farms. (Parbst Aff. at ¶ 1.) Parbst, consequently, has no knowledge about whether the product information sheet was shipped with the shade cloth sent to Battlefield Farms. As a sales and technical manager, Parbst can only testify about the defendant's general shipping procedure. Parbst is unable to testify about any fact regarding the roll insert and Battlefield Farms. Parbst was only able to state generally that Svensson "inserted a product information sheet in every roll of shade cloth shipped." (Parbst Aff. ¶ 1.) The only witness able to testify about such a fact is Jeffery Abernathy and, for the reasons mentioned earlier, his affidavit was struck from the record.

Despite its contentions to the contrary, therefore, the defendant does not have any evidence that the roll insert was, in fact, included with the shade cloth sent to Battlefield Farms. To that end, the Magistrate Judge's analysis was not plagued by a fundamental error with respect to the evidence. Accordingly, the defendant's first, third, fourth, sixth, seventh, eighth, ninth and twelfth objections, which are a subset of the defendant's first general category of objections, shall be OVERRULED.

B. ***The Virginia Model Jury Instructions :***

In order to avoid liability, Svensson contends that it is solely a seller, and not a manufacturer, of shade cloth. The plaintiff, however, argues that the defendant can be held responsible as a seller (as opposed to manufacturer) of any product "it knew or should have known to be dangerous or defective." (Pl.'s Mem. Opp. D.'s Mot. Summ. J. at 14.) The plaintiff

cites Virginia Model Jury Instruction (VMJI) No. 34.170[4] in support of its position that Svensson, to the extent that it operated as a "seller" of shade cloth, had a duty to test and inspect the material to discover whether it was defective. Alternatively, Florists contends that record evidence establishes that Svensson made no effort to distinguish itself from its parent company in the marketplace and even referred to itself in the sales contract as "vendor" and to its product as "screens manufactured by vendor." This is important because VMJI No. 34.160 and the cases cited in its annotation, set forth a manufacturer's duty, and the duty of those who hold themselves out to be manufacturers, to inspect or test a product for its dangerousness. It is Florists' position, then, that regardless of whether Svensson designed or manufactured the shade cloth product, a jury could find that the defendant held itself out to be identified with manufacturing the product and then conclude that the defendant is liable either as a seller or as a manufacturer.

Even though the Magistrate Judge noted the aforementioned differences between VMJI No. 34.170 and VMJI No. 34.160, the defendant, in its objections, contends that the Magistrate "blurred [the] distinction so severely as to create a new rule not supported by law." Defendant's Objections, page 3. This is simply not the case. The Magistrate explained that, because of the distinction between the two rules, "the discovery evidence is sufficient to set forth the allegations that Defendant was negligent either as a seller or as a seller holding itself out as a manufacturer."

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[4] VNJI No. 34.170 provides: "If the seller knows, or by using ordinary care has a reason to know, that a product is likely to be dangerous if defective, he has a duty to make inspections or tests that are reasonably necessary to see that the product is safe for its intended purposes, and for any other reasonably foreseeable use." The comment to this instruction reveals an exception for "...those sellers who hold themselves out to be manufacturer... ." The duty of a manufacturer is set forth in VMJI No. 34.160.

Report and Recommendation, page 12. Moreover, and contrary to the defendant's argument, nothing within the terms of VMJI No. 34.170 limits its application to defective units as opposed to defective product lines. At the very least, then, there are genuine issues of material fact that militate against granting the defendant's motion for summary judgment on this issue. The defendant's fifth, sixth and twelfth objections to the Report and Recommendation, therefore, shall be OVERRULED.

C. *Dr. Beyler's Expert Report:*

At oral argument, the defendant contended, for the first time, that the testimony given by the plaintiff's expert witness, Dr. Beyler, was legally insufficient to demonstrate that the shade cloth was unreasonably dangerous.[5] The Magistrate Judge, conversely, found that plaintiff Florists "adduced sufficient expert evidence to support" its negligence claim. Report and Recommendation, page 19.

In objecting to the Magistrate's finding, the defendant contends that Dr. Beyler's expert testimony is legally insufficient to create a genuine issue of material fact for the plaintiff. Specifically, according to the defendant, Dr. Beyler "has no underlying factual basis to support his statements regarding the plaintiff's negligence claim."[6] Defendant's Objections, page 13.

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[5] In addition to questioning Dr. Beyler's expert report for the first time at oral argument, the defendant chose not to depose Dr. Beyler, which would seem to be a prerequisite for attacking the substance of his testimony. For these reasons, the court could refuse to consider the defendant's challenge altogether, but, in the interest of completeness, the court will entertain the argument.

[6] In his Rule 26(a)(2) expert disclosure, Dr. Beyler concluded that the rapid spread and "burn and drop" tendencies are defects that create an unreasonable danger. The defendant characterized this finding as one without "sufficient scientific basis." Defendant's

Moreover, Svensson contends that the "Court should follow the Fourth Circuit's reasoning in *Alevromagiros v. Hechinger Co.*, 993 F.2d 417, 421 (4th Cir. 1993), and find that Beyler's opinions are nothing more than 'subjective opinion' which the court found insufficient as a matter of law to sustain plaintiff's claim." *Id*. According to the defendant, *Alevromagiros* stands for the proposition that without identifiable industry standards relating to the hazards of shade cloth, no expert can demonstrate the unreasonable dangerousness of the ULS shade cloth. *See Alevromagiros*, 993 F.2d at 422 ("[A] plaintiff may not prevail in a products liability case by relying on the opinion of an expert unsupported by any evidence such as test data or relevant literature in the field ... He or she must establish the violation of industry or government standards, or prove that consumer expectations have risen above such standards.").

While the court agrees that it should follow the reasoning of the Fourth Circuit, after a careful reading of *Alevromagiros* and its progeny, the court believes that the defendant has misinterpreted that reasoning. The *Alevromagiros* court was concerned about the quality of the opinion of an expert who did not conduct or reference tests performed against any published industry or government standards, offered no evidence of customs in the trade, referred to no literature in the field, and identified no customer expectations. *Id.* at 421. As the defendant pointed out, the Fourth Circuit, faced with that situation, held that the expert offered nothing more than "subjective opinion," which the court found insufficient as a matter of law to sustain plaintiff's claim. Defendant's Objections, page 13 (citing *Alevromagiros*, 993 F.2d at 421). Put differently, the Fourth Circuit was concerned with admitting expert testimony from a witness

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Objections, page 14.

who, in lay terms, did not know what he or she was talking about. The case at bar presents an entirely different type of expert evidence, so, despite the defendant's contentions to the contrary, *Alevromagiros* does not dictate that the court deem Dr. Beyler's report legally insufficient.

The Fourth Circuit has instructed that "[i]t is generally held that relevant testimony from a qualified expert may be received if and only if he is in possession of such facts as would enable him to express a reasonably accurate conclusion as distinguished from mere conjecture." *Horton v. W. T. Grant Co.*, 537 F.2d 1215, 1218 (4th Cir. 1976). As the Magistrate Judge explained, Dr. Beyler, in reaching his conclusion "relied on the results of a flame spread test conducted by Walters Consulting Corporation." Report and Recommendation, page 23. Additionally, Beyler "indicated that his analysis and opinions were based upon onsite investigations of the fire site, a review of all relevant documents related to the fire, and interviews with relevant personnel at Battlefield Farms." *Id.* Even more, the defendant has not challenged Dr. Beyler's interpretation of the laboratory test results, which were derived from the Beyler's training and expertise, as inaccurate, unscientific, or inappropriate.

Given the foregoing, the court finds, as the Magistrate Judge recommended, that Dr. Beyler's expert report sets forth bases upon which liability can be found, the sufficiency or veracity of which now can be tested, if at all, on cross examination by defense counsel at trial.[7] Defendant Svensson's second, fifteenth and sixteenth objections, which relate to the legal sufficiency of the Dr. Beyler's expert report, therefore, shall be OVERRULED. Accordingly, the

[7] The court reached a similar conclusion in *Green v. Ford Motor Co., et al.*, Civil Action No. 3:00CV00049 (W.D. Va. Nov. 5, 2001) (UP).

defendant's motion for summary judgment on the grounds that Florists' expert evidence is inadequate as a matter of law to create a genuine issue of material fact on the question of unreasonable danger shall be DENIED.

D. *"Open and Obvious" Danger:*

Defendant Svensson "objects to the Magistrate Judge's opinion that Ludvig Svennson's 'position as to the adequacy of the warnings and as to whether its dangerousness was open and obvious is not supported by the instant record.'" Defendant's Objections, page 8 (quoting Report and Recommendation, page 12). Svensson argues that the risk associated with the shade cloth was so open and obvious as to obviate its duty to warn. The defendant contends, moreover, that "the alleged danger was exactly what the ordinary person would expect," namely "that burning cloth suspended overhead would likely fall as the fire progressed is an obvious conclusion based on the law of gravity." Defendant's Objections, page 9. In support of its position, Svensson argues that "Battlefield Farms' president, general manager and maintenance supervisor all testified that they were aware that ULS shade cloth would burn." *Id.* at 8 (citing Van Hoven, LeMay and Helwig depositons).

The defendant's reliance on the deposition testimony is misleading. While Van Hoven recognized that the shade cloth would burn, he also testified that he did not expect the fire "to spread as rapidly as it did." (Van Hoven Dep. at 26). To that end, the defendant's contention that "the alleged danger was exactly what the ordinary person would expect" is specious. So, as the Magistrate Judge explained, "while the flammability of the subject shade cloth was apparent, the spreading and 'burn and drop' tendencies of the shade cloth were not, at least as a matter of

law."[8] Report and Recommendation, page 13. To that end, whether the hazard alleged by Florists was "open and obvious" is more than fairly debatable on the record and, therefore, is a question of fact for the jury. Accordingly, the defendant's seventh objection shall be OVERRULED.

E. ***Dismissal of Defenses:***

1. ***Assumption of Risk:***

In its motion for summary judgment, the defendant relied in part upon the affirmative defense of assumption of risk. Specifically, the defendant argued that because Battlefield Farms conceded the flammability of the ULS shade cloth, it assumed the risk by using large quantities of the material. The Magistrate Judge concluded, however, "that there is no evidence in the instant record to support" a defense of assumption of risk. Report and Recommendation, page 16. Svensson objected to this finding.

Assumption of risk involves a subjective test, namely determining whether the plaintiff knew and understood the extent of a danger to which it was exposed, yet voluntarily submitted itself to that known danger. *Artrip v. E.E. Berry Equip. Co.*, 240 Va. 354, 358 (1990). In the instant case there is absolutely no evidence that the plaintiff has actual, subjective knowledge of the "spread and 'burn and drop' hazards of shade cloth." Report and Recommendation, page 16.

[8] The Magistrate's reliance on *Richard v. Wal-Mart Stores, Inc.*, 1997 U.S. Dist. LEXIS 13994, at *12 (W.D. Va. 1997), is justified. The court found that the "open and obvious" inquiry presented a question of fact because, while the plaintiff acknowledged that the average consumer would be aware of the obvious risk of filling a hot kettle with cold water, a question of fact had been presented as to whether the hazard of a rapid blast of steam was open and obvious when the kettle was cool to the touch when filled with water.

Moroever, it is well-settled that summary judgment on the assumption of risk defense is appropriate only if reasonable minds could not differ. If reasonable minds could differ, then whether the plaintiff assumed the risk should be left for the jury to decide. *Id.*; *see also Waters v. Safeway Stores, Inc.*, 246 Va. 269 (1993). It is clear on the record before the court that reasonable minds could differ over whether Battlefield Farms assumed the risk of a widespread fire with "burn and drop" effects. To that end, the summary judgment on this ground shall be denied. Moreover, a careful review of the record suggests that the court should, as the Magistrate Judge recommended, reject the defense of assumption of risk as a matter of law.

Although Svensson argues that Magistrate Judge Crigler "overlooked the evidence in the record," the defendant is unable to cite a single fire code that Battlefield Farms violated. Defendant's Objections, page 4. Additionally, as noted earlier, defendant Svennson has not set forth sufficient evidence that Battlefield Farms had actual knowledge of the spread and "burn and drop" dangers associated with shade cloth, a necessary element for the assumption of risk defense. In that regard, the defendant's thirteenth objection shall be OVERRULED and the defense of assumption of risk shall be rejected as a matter of law.

2. *Unclean Hands:*

The defendant argues that Florists, "as the real party in interest, may not prevail on a claim in equity when it failed to act on knowledge it possessed based upon annual inspections of Battlefield Farms and knowledge that ULS shade cloth had been involved in prior greenhouse fires." Defendant's Objections, page 12. Put differently, Svensson contends that the plaintiff's "unclean hands" preclude it from prevailing in this civil action.

The doctrine of unclean hands lies in equity. *See, e.g., Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814 (1945). The doctrine "closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. *Id.*

Because this is a subrogation action, which finds its roots in equity, the defendant argues that the conduct of the plaintiff subrogee, Florists, is relevant. Specifically, Svensson asserts that the business choices made by Florists, when it informed the defendant it would recommend to insurance customers that they use the Revolux product, render inequitable any recovery by it under the contractual provision of its policy with Battlefield Farms. Even assuming, *arguendo*, that the defendant's contention is true, there is no authority to support the legal conclusion that it asks the court to reach.

While it is true that the root of all subrogation lies in equity, the doctrine's modern day off-spring, which is the basis for the instant action, is statutory and contractual in nature. In fact, as the Magistrate Judge explained, the Virginia legislature expressly has provided for subrogation in the insurance context. The Virginia Code provides that:

> [W]hen any insurer pays an insured under a contract of insurance which provides that the insurer becomes subrogated to the rights of the insured against any other party the insurer may enforce the legal liability of the other party. This action may be brought in its own name or in the name of the insured or the insured's personal representative.

Va. Code § 38.2-207. Under Virginia law, therefore, the plaintiff's claims are entirely derivative of the claims of its subrogor, Battlefield Farms, and the subrogee stands in the shoes of the subrogor, no better, no worse. To that end, the general business conduct of the plaintiff subrogee

is irrelevant to a determination of whether the subrogee can recover for the insured loss suffered by the subrogor. Accordingly, not only shall the defendant's motion for summary judgment on its defense of unclean hands be DENIED, but this entire defense shall be rejected as a matter of law. Svensson's fourteenth objection shall be OVERRULED.

V.

Because neither the plaintiff nor the defendant filed timely objections to the remaining portions of the Magistrate Judge's Report and Recommendation, there is no reason for the court to address the issues. In the interest of completeness, however, the court notes that having thoroughly reviewed the entire case and all relevant law, the court is in complete agreement with the Magistrate Judge's analysis of all of the issues in this civil action.

VI.

For the reasons articulated herein, the court shall (1) voluntarily DISMISS COUNT II (breach of warranty) as withdrawn; (2) DENY the balance of the defendant's motion for summary judgment in its entirety; (3) STRIKE/DISMISS the defendant's affirmative defense of assumption of risk and its equitable defense of unclean hands; and (4) to the extent the defendant's opposition to the expert evidence may be construed as an objection thereto, OVERRULE the defendant's verbal objection to the evidence of the plaintiff's expert.

Additionally, the court shall OVERRULE the defendant's objections to the Magistrate Judge's Report and Recommendation. The court shall ADOPT the Magistrate Judge's Report and Recommendation in its entirety. The court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court, and argument

would not aid in the decisional process.[9] An appropriate Order shall this day enter.

The Clerk of the Court hereby is directed to send a certified copy of this Memorandum Opinion and the accompanying Order to Magistrate Judge Crigler and to all counsel of record.

ENTERED:

_____
Senior United States District Judge

_____
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

FLORISTS' MUTUAL INSURANCE, COMPANY A/S/O BATTLEFIELD FARMS, INC.,	)	CIVIL ACTION NO. 3:01CV00095
Plaintiff,	)	
	)	ORDER

[9] Pursuant to *U.S. v. Raddatz*, 447 U.S. 667, 674 (1980), the district court is not required to rehear testimony on which the magistrate judge based his findings and recommendations in order to make an independent evaluation of credibility. Specifically, the Supreme Court found that "[w]e find nothing in the legislative history of the statute to support the contention that the judge is required to rehear the [arguments] in order to carry out the statutory command to make the required 'determination.'"

v.	)	
	)	
LUDVIG SVENSSON, INC.,	)	
	)	
Defendant.	)	JUDGE JAMES H. MICHAEL, JR.

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED, ORDERED and DECREED

as follows:

(1) The "Defendant's Objections to Magistrate Judge's Report and Recommendation," filed March 3, 2003, shall be, and they hereby are, OVERRULED;

(2) The Magistrate Judge's Report and Recommendation, filed February 13, 2003, shall be, and it hereby is, ACCEPTED and ADOPTED in its entirety;

(3) COUNT II of the plaintiff's Complaint shall be, and it hereby, is DISMISSED as withdrawn;

(4) The defendant's Motion for Summary Judgment, filed October 18, 2002, shall be, and it hereby is, DENIED in all respects;

(5) The defendant's affirmative defense of assumption of risk and its equitable defense of unclean hands shall be, and they hereby are, REJECTED and DISMISSED as a matter of law; and

(6) to the extent the defendant's opposition to the expert evidence may be construed as an objection thereto, the defendant's verbal objection to the evidence of the plaintiff's expert shall be, and it hereby is, OVERRULED.

The Clerk of the Court hereby is directed to send a certified copy of this Order and the accompanying Memorandum Opinion to Magistrate Judge Crigler and to all counsel of record.

ENTERED:

_____
Senior United States District Judge

_____
Date