



**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

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ORDER

DEWAYNE JOHNSON VS. MONSANTO COMPANY ET AL

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON, ET AL.

Plaintiffs,

vs.

MONSANTO COMPANY, ET AL.

Defendants.

Case No. CGC – 16-550128

**ORDER ON DEPOSITION
DESIGNATIONS AND CERTAIN
PROPOSED JURY INSTRUCTIONS**

On May 16, 2018 I heard argument on certain of the parties' proposed jury instructions and the admissibility of their deposition designations. I had earlier provided a written tentative on all these issues. As I stated then, the rulings below are in effect *in limine*, and so subject to review by the trial judge as the trial progresses. *Chen v. L.A. Truck Centers, LLC*, 7 Cal. App. 5th 757, 768 (2017), *pet.rev.gntd.* March 29, 2017 ("In limine rulings are not binding; they are subject to reconsideration upon full information at trial. [Citation] ... by their very nature, motions in limine are subject to reconsideration at any time prior to the submission of the cause").

I first discuss the jury instructions and then (on page 17) discuss the deposition designations.

1 I. Jury Instructions

2 I adhere to two basic principles: (A) parties should use CACI when possible; (B) “a trial
3 court has no duty to modify or edit an instruction offered by either side in a civil case and if there
4 is error in the charge proposed, the court may reject the entire instruction,” *Green v. Cty. of*
5 *Riverside*, 238 Cal. App. 4th 1363, 1370 (2015); *Eng v. Brown*, 21 Cal. App. 5th 675, 704
6 (2018).
7

8 A. Johnson’s Proposed Instructions

9 1. Consumer Expectations Test

10 Johnson asks for CACI 1203 on design defect under the consumer expectations test.
11 Johnson’s Proposed Instructions, 1. Monsanto objects, incorporating its briefing in connection
12 with Johnson’s MIL No. 1. Monsanto’s Proposed Instructions, 15. In that briefing, the parties
13 disputed this action should be evaluated under the consumer expectations test or the risk-benefit
14 test. *See id.*; *see also* Order of April 3, 2018, 3 (declining to resolve whether Johnson must
15 proceed on either a consumer expectations test or a risk-benefit test to resolve the motion).
16 Consistent with its previous position, Monsanto argues that the Court should give CACI 1204 on
17 design defect under the risk-benefit test. Monsanto’s Proposed Instruction, 15. In the
18 alternative, Monsanto argues that the CACI 1204 instruction should be given as an alternative
19 instruction if the CACI 1203 instruction is given. *Id.*, citing CACI 1203; *Demara v. The*
20 *Raymond Corp.*, 13 Cal.App.5th 545, 554 (2017).
21
22

23 *Demara* explained the methods by which a plaintiff may establish a design defect for the
24 purposes of a strict liability claim. *Demara*, 13 Cal.App.5th at 553-54.

25 A plaintiff may prove a design defect under either of two alternative tests—
26 the consumer expectations test or the risk-benefit test. [Citations] Under the
27 consumer expectations test, the plaintiff may prove the existence of a defect
by showing that “the product failed to perform as safely as an ordinary
consumer would expect when used in an intended or reasonably foreseeable

1 manner.” [Citations] Under the risk-benefit test, the plaintiff need establish
2 only a prima facie case of causation, i.e., evidence that a design feature of the
3 product was a substantial factor in causing the plaintiff’s injuries. Once the
4 plaintiff makes this showing, the burden shifts to the defendant to establish
that, given certain factors, “on balance, the benefits of the challenged design
outweigh the risk of danger inherent in such design.” [Citations]

5 The two theories are not mutually exclusive, and depending on the facts and
6 circumstances of the case, *both* may be presented to the trier of fact in the
7 same case. [Citations] Indeed, the two theories are true alternative tests, since
8 (1) the consumer expectation test applies only in cases where the trier of fact
9 can evaluate a product’s safety design based on “the everyday experience of
the product’s users” [Citations], and (2) a finding that the product’s design is
not defective under the risk-benefit test does not negate liability under the
consumer expectation test [Citations] [risk-benefit test *not* a “counterweight”
or “‘defense’ ” to consumer expectation test]).

10 *Id.* (emphasis in original; footnote omitted).

11 In *Saller v. Crown Cork & Seal Co., Inc.*, 187 Cal.App.4th 1220 (2010), the trial court
12 refused to give a proposed instruction that was based on CACI 1203 because it was “not
13 applicable in this type of situation,” but elected to give an instruction based on CACI 1204
14 instead. *Saller*, 187 Cal.App.4th at 1229-30. The Court of Appeal reversed. *See id.* at 1236-37,
15 1241. *Saller* explained the applicability of the consumer expectations test:

16 The rationale of the consumer expectations test is that “[t]he purposes,
17 behaviors, and dangers of certain products are commonly understood by those
18 who ordinarily use them.” (*Soule, supra*, 8 Cal.4th at p. 566, 34 Cal.Rptr.2d
19 607, 882 P.2d 298.) Therefore, in some cases, ordinary knowledge of the
20 product’s characteristics may permit an inference that the product did not
21 perform as safely as it should. “If the facts permit such a conclusion, and if the
22 failure resulted from the product’s design, a finding of defect is warranted
23 without any further proof,” and the manufacturer may not defend by
24 presenting expert evidence of a risk/benefit analysis. (*Ibid.*) The consumer
25 expectations test is reserved for cases in which the everyday experience of the
26 products’ users permits a conclusion that the product’s design violated
27 minimum safety assumptions, and is “defective regardless of expert opinion
about the merits of the design.” (*Id.* at p. 567, 34 Cal.Rptr.2d 607, 882 P.2d
298.) Therefore, if the minimum safety of a product is within the common
knowledge of lay jurors, expert witnesses may not be used to demonstrate
what an ordinary consumer should expect. Nonetheless, the inherent
complexity of the product itself is not controlling on the issue of whether the
consumer expectations test applies; a complex product “may perform so
unsafely that the defect is apparent to the common reason, experience, and
understanding of its ordinary consumers.” (*Id.* at p. 569, 34 Cal.Rptr.2d 607,
882 P.2d 298.)

Id. at 1232.

1 With respect to jury instructions in particular, the *Saller* Court stated:

2 Whether the jury should be instructed on either the consumer expectations test
3 or the risk/benefit test depends upon the particular facts of the case. (*McCabe*,
4 *supra*, 100 Cal.App.4th at p. 1122, 123 Cal.Rptr.2d 303.) In a jury case, the
5 trial court must initially determine as a question of foundation, within the
6 context of the facts and circumstances of the particular case, whether the
7 product is one about which the ordinary consumer can form reasonable
8 minimum safety expectations. (*Id.* at p. 1126, fn. 7, 123 Cal.Rptr.2d 303.) “If
9 the court concludes it is not, no consumer expectation instruction should be
10 given.... If, on the other hand, the trial court finds there is sufficient evidence
11 to support a finding that the ordinary consumer can form reasonable minimum
12 safety expectations, the court should instruct the jury, consistent with
13 Evidence Code section 403, subdivision (c), to determine whether the
14 consumer expectation test applies to the product at issue in the circumstances
15 of the case [or] to disregard the evidence about consumer expectations unless
16 the jury finds that the test is applicable. If it finds the test applicable, the jury
17 then must decide whether the product failed to perform as safely as an
18 ordinary consumer would expect when the product is used in an intended or
19 reasonably foreseeable manner.” (*Ibid.*, citation omitted.)

20 *Id.* at 1233-34.

21 Monsanto’s chief argument against the use of the consumer expectations test in this case
22 is that Johnson is “a licensed pesticide applicator who claims injury based on the use of products
23 marketed for use by professionals.” Monsanto Proposed Instruction, 15. But the fact that the
24 “ordinary consumer” may be a “professional” does not foreclose the application of the consumer
25 expectations test. *Saller*, 187 Cal.App.4th at 1237 (“*Saller*’s work experience and exposure to
26 the regular and systematic use of asbestos insulation could permit the jury to draw conclusions
27 about whether the insulation performed as safely as an ordinary consumer (in this case a refinery
worker) would expect”). To the extent Monsanto intends to raise a sophisticated user defense,¹
such a defense is not properly adjudicated now. Johnson is entitled to an instruction on the
consumer expectations test, provided he makes the foundational evidentiary showing discussed

¹ See Monsanto’s Proposed Instructions, 15. In short, the sophisticated user defense, if applicable, exempts manufacturers from their typical obligation to provide product users with warnings about the products’ potential safety hazards. *Johnson v. American Standard, Inc.*, 43 Cal.4th 56, 65 (2008). “Under the sophisticated user defense, sophisticated users need not be warned about dangers of which they are already aware or should be aware.” *Id.* It seems unlikely Monsanto would argue that Johnson was aware of the cancer risks Monsanto says did not exist.

1 in *Saller* during trial and the evidence and argument at trial does not foreclose such an
2 instruction.²

3 Monsanto's request for an alternative instruction in the form set forth in CACI 1204 is
4 denied without prejudice. The consumer expectations test and the risk-benefit tests are
5 alternative tests. See *Demara v. Raymond Corp.*, 13 Cal.App.5th at 553-54. Johnson may elect
6 whichever theory of liability he prefers. Monsanto may not defend a claim under the consumer
7 expectations test by relying on the risk-benefit test. *Sparks v. Owens-Illinois, Inc.*, 32
8 Cal.App.4th 461, 473 (1995); see also *Soule*, 8 Cal.4th at 572 ("A party is entitled upon request
9 to correct, nonargumentative instructions on every theory of the case *advanced by him* which is
10 supported by substantial evidence") (emphasis added). While Johnson has taken action
11 inconsistent with an intent to rely on the risk-benefit test in filing his MIL No. 1, there is no
12 record of any stipulation or judicial determination foreclosing Johnson from proceeding under
13 the risk-benefit test. If Johnson later attempts to, and is permitted to, pursue such a theory, an
14 instruction based on CACI 1204 may be proper.

17 2. FIFRA

18 Johnson asks the Court to give an instruction that identifies FIFRA, discusses
19 misbranding under FIFRA, and discusses other obligations FIFRA imposes on Monsanto.

21 ² In its opposition to Johnson's MIL No. 1, Monsanto argued that the consumer expectations test was also
22 inapplicable because of the complexity of its product. See Monsanto Opposition to Johnson MIL No. 1, 5.
23 Complexity does not necessarily defeat reliance on the consumer expectations test. *Saller*, 187 Cal.App.4th at 1232.
24 Indeed, the consumer expectations test has been applied to a design defect claim arising out of residential use of a
25 pesticide. See *Arnold v. Dow Chemical Co.*, 91 Cal.App.4th 698, 725, 727 (2001) (distinguishing *Soule v. General*
26 *Motors Corp.*, 8 Cal.4th 548 (1994), an automobile case, and stating that the "consumer expectations test is not
27 foreclosed simply because expert testimony may be necessary to explain the nature of the alleged defect or the
mechanism of the product's failure"). To be sure, Monsanto has argued that *Trejo v. Johnson & Johnson*, 13
Cal.App.5th 110 (2017) points to a different result. See Monsanto Opposition to Johnson MIL No. 1, 5. Whether
Johnson's theory of liability is simply not amenable to the application of the consumer expectations test, such that
his claim fails, cannot be determined now. *Trejo*, 13 Cal.App.5th at 159-60 (in over the counter drug case, consumer
who suffered idiosyncratic reaction could not satisfy the test simply because she used the product and did not expect
to be injured – an analysis of the feasibility, practicality, risk, and benefit of an alternative design that eliminated the
risk was necessary).

1 Johnson Proposed Instructions, 2. Monsanto objects on the ground that Johnson is not pursuing
2 a claim on the basis that Monsanto violated FIFRA. Monsanto Proposed Instructions, 15.³

3 The FIFRA instruction is refused because Johnson is not pursuing a claim for violation of
4 FIFRA and there is no other apparent need for this instruction.
5

6 Perhaps Johnson seeks the instruction because of Monsanto's preemption affirmative
7 defense. Johnson's Proposed Instruction, 2:20-22. But by separate order on Johnson's summary
8 adjudication motion, the issue has been removed from this case. Or perhaps Johnson thinks it
9 necessary to clarify Monsanto's proposed EPA registration instruction. Johnson's Proposed
10 Instructions, 4. But I will refuse that instruction too.

11 3. EPA Registration

12 Johnson asks the Court to advise the jury that "[t]he EPA's registration of a pesticide
13 does not provide a defense to a violation of FIFRA. Governmental action (or inaction) is not
14 controlling on the question of product safety." Johnson's Proposed Instructions, 3. Monsanto
15 objects because (1) Johnson is not pursuing a claim under FIFRA and (2) Monsanto disagrees
16 with the substance of the proposed instruction. Monsanto's Proposed Instructions, 15-16.
17 Monsanto provisionally proposes an alternate instruction on preemption that would instruct the
18 jury to find that Johnson's claims are barred if it is highly probable that the EPA would not have
19 approved a cancer warning on the relevant product labels. *Id.* at 17.
20

21 Under FIFRA, registration of an article is not "a defense for the commission of any
22 offense" under FIFRA, but, as long as no cancellation proceedings are in effect, "registration of a
23 pesticide is prima facie evidence that the pesticide, its labeling and packaging comply with the
24 registration provisions of" FIFRA. 7 U.S.C. § 136a(f). As Johnson is not pursuing a FIFRA
25 claim, the only obvious other relevance of Johnson's instruction is to preemption. Monsanto's
26
27

³ Monsanto does not take issue with the substantive content of the proposed instruction.

1 alternative instruction explicitly addresses preemption. But the preemption affirmative defense
2 is no longer in the case and so neither of these instructions is needed.

3 Johnson's proposed instruction may be necessary to clarify Monsanto's proposed EPA
4 registration instruction. Johnson's Proposed Instructions, 4. For now, Monsanto's proposed
5 instruction is refused.
6

7 **B. Monsanto's Proposed Instructions**

8 **1. EPA Registration**

9 Monsanto proposes an instruction that discusses the EPA's role in regulating pesticide
10 labeling and advises jurors that they "may consider compliance with EPA requirements as
11 relevant evidence about the issue of whether Monsanto has provided adequate warnings."
12 Monsanto's Proposed Instructions, 1. Johnson objects, arguing that the instruction is incomplete,
13 argumentative, and improper. Johnson's Proposed Instructions, 4.
14

15 Under FIFRA, registration of an article is not "a defense for the commission of any
16 offense" under FIFRA, but, as long as no cancellation proceedings are in effect, "registration of a
17 pesticide is prima facie evidence that the pesticide, its labeling and packaging comply with the
18 registration provisions of" FIFRA. 7 U.S.C. § 136a(f). State law rules are preempted by FIFRA
19 if two conditions are met: (1) the state law must be a requirement "for labeling or packaging,"
20 rules governing the design of a product are not preempted; and (2) the state law must impose a
21 labeling or packaging requirement that is "in addition to or different from those required under
22 this subchapter." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 444 (2005). Putting the two
23 together, evidence that a product is registered with the EPA is prima facie evidence that the
24 labeling complies with California law. But evidence that a product is registered with the EPA
25 does not mean that the product complies with California law.
26
27

1 Monsanto's proposed instruction is not accurate— it is vague in its reference to "EPA
2 requirements" and does not state that registration is "prima facie evidence that the pesticide, its
3 labeling and packaging comply with" federal registration requirements.

4
5 Second, I am concerned that the instruction has the judge highlight evidence favorable to
6 Monsanto and so is prejudicial to Johnson.

7 The instruction is refused.

8 **2. Causation – Medical Probability**

9 Monsanto submits an instruction that would require the jury to find that its products
10 "medically caused" his mycosis fungoides to "a reasonable degree of medical probability."
11 Monsanto's Proposed Instructions, 3. Johnson responds that a "substantial factor" instruction
12 based on CACI 430 should be used instead.⁴

13
14 The parties cite cases that together stand for the proposition that a plaintiff must have
15 evidence that the alleged cause was more likely than not a substantial factor in causing the
16 plaintiff's injury to make out a prima facie case. *Uriell v. Regents of University of California*,
17 234 Cal.App.4th 735, 746 (2015); *Simmons v. West Covina Medical Clinic*, 212 Cal.App.3d 696,
18 702-03 (1989); *Jones v. Ortho Pharmaceutical Corp.*, 163 Cal.App.3d 396, 402-03 (1985);
19 *Cooper v. Takeda Pharmaceuticals America, Inc.*, 239 Cal.App.4th 555, 593-94 (2015) (expert
20 could conclude it was more likely than not that product exposure caused the plaintiff's bladder
21 cancer). But the burden that a plaintiff must meet to establish a prima facie case does not mean
22 there is a heightened standard of causation, nor do they warrant divergence from CACI 430.
23 *Uriell*, 234 Cal.App.4th at 746; *Cooper*, 239 Cal.App.4th at 595-96. An instruction based on
24 CACI 430 is better than Monsanto's proposed instruction.

25
26
27

⁴ CACI 430 provides only a definition of "substantial factor."

1 There may be disagreement as to whether the bracketed final sentence of the CACI 430
2 instruction should be given ["Conduct is not a substantial factor in causing harm if the same
3 harm would have occurred without that conduct." CACI 430.] Johnson might argue that "but
4 for" causation does not apply here because this is a case in which there may have been
5 concurrent independent causes that would have been sufficient by themselves to bring about the
6 harm. See CACI 430 Directions for Use; Johnson's Proposed Instructions, 5. First, the
7 substantial factor standard generally subsumes the "but for" test while reaching beyond it to
8 address other situations, such as independent or concurrent causes in fact. *Rutherford v. Owens-*
9 *Illinois, Inc.*, 16 Cal.4th 953, 969 (1997). Second, for example, a defendant is entitled to an
10 instruction that a product defect is not a substantial factor if the injury would have occurred
11 regardless if it puts on substantial evidence to support that theory. *Soule*, 8 Cal.4th at 573. At
12 this point, the parties' positions are unclear, and the issue is for trial.

15 3. Causation – Failure to Warn

16 Monsanto submits an instruction that, in the first sentence, sets forth a "substantial
17 factor" standard and, in the second sentence, states that Johnson is required to prove that he
18 would not have developed mycosis fungoides if Monsanto gave a different warning. Monsanto's
19 Proposed Instructions, 4. The instruction does not state a level of proof. Johnson again urges a
20 "substantial factor" instruction based on CACI 430. Johnson's Proposed Instructions, 6.

22 Monsanto provides no reason to diverge from CACI 430. CACI 430 sets forth the
23 standard clearly. Monsanto's instruction is refused. CACI 430 should be used.

24 It again appears that there may be a dispute as to whether the bracketed sentence of CACI
25 430 should be included. See discussion immediately above on that issue.

1 **4. Causation – Relative Risk Ratios**

2 Monsanto seeks an instruction to the effect that its products were only a substantial factor
3 in causing Johnson's injury if "the weight of the epidemiology studies support a relative risk
4 level greater than 2.0." Monsanto's Proposed Instructions, 5. Johnson objects. Johnson's
5 Proposed Instructions, 7.
6

7 The instruction is refused. First, the instruction would erroneously require Johnson to
8 prove causation by epidemiological studies. *See, e.g., Monroe v. Zimmer U.S. Inc.*, 766
9 F.Supp.2d 1012, 1029-30 (E.D. Cal. 2011) (epidemiological or in vivo research would be
10 unethical, so failure to produce an epidemiological or in vivo study was not fatal to the plaintiff's
11 claim).⁵ Second, the instruction conflates expert admissibility with the substantial factor
12 analysis. *See Cooper*, 239 Cal.App.4th at 593-96.
13

14 **5. Punitive Damages – Compliance with Legal, Regulatory, or Industry**
15 **Standards**

16 Monsanto seeks an instruction that (1) advises the jury that it "should" consider any good
17 faith effort to comply with federal regulations, industry customs, or standards; and (2) prohibits
18 the jury from punishing Monsanto for any conduct that complied with federal or state law, or
19
20

21 ⁵ In *Cooper v. Takeda Pharmaceuticals America, Inc.*, 239 Cal.App.4th 555 (2015), the California Court of Appeal
22 adopted the reasoning of a Ninth Circuit opinion applying California law, stating that epidemiological studies
23 become admissible to prove that a product was more likely than not the cause of a person's disease if, and only if,
24 the relative risk is greater than 2.0. *Cooper*, 239 Cal.App.4th at 593. The *Cooper* Court explained that a relative
25 risk factor of 2.0 implies a 50% chance that a specific person's disease was caused by the product. *Id.* This means
26 that a relative risk factor of 50% or above permits a conclusion that the product was more likely than not the cause
27 of the disease. *Id.* at 593-94. As a result, the *Cooper* Court held that an expert opinion that the defendant's product
was more probably than not the cause of the plaintiff's injury was admissible where it was based on epidemiological
studies showing a relative risk factor of greater than 2.0 and ruled out other possible causes. *Id.* In the present case,
Johnson's experts may, if this case proceeds to trial, rely on relative risk ratios of lower than 2.0 and other
considerations in support of their conclusion that Johnson's mycosis fungoides was caused by occupational exposure
to Monsanto's products. Nothing in *Cooper* forecloses such an approach (*i.e.*, *Cooper* did not find an expert opinion
insufficient because the risk ratio was lower than 2.0 even though there were other consideration that supported a
specific causation opinion).

1 was otherwise lawful where it occurred. Monsanto's Proposed Instructions, 6. Johnson objects
2 that this proposal is without legal support. Johnson's Proposed Instructions, 8.

3 Monsanto cites five cases.

4
5 (1) *State Farm Mutual Auto Insurance Co. v. Campbell*, 538 U.S. 408 (2003): The
6 Campbells secured a punitive damages award against State Farm that was based on in-state and
7 out-of-state conduct. *See State Farm*, 538 U.S. at 422. The Campbells did not dispute that much
8 of the out-of-state conduct was lawful where it occurred. *Id.* The Supreme Court stated that
9 lawful out-of-state conduct may be probative when it demonstrates deliberateness and culpability
10 of the defendant's action in the state where it is tortious, but that conduct must have a nexus to
11 the specific harm suffered by the plaintiff. *Id.* Moreover, the Court stated that the "jury must be
12 instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a
13 defendant for action that was lawful in the jurisdiction where it occurred." *Id.* The Court held
14 that the Utah courts erred by awarding punitive damages for conduct that bore no relation to the
15 Campbells' harm. *Id.*

17 (2) *Lusardi Construction Co. v. Aubry*, 1 Cal.4th 976, 996 (1992): Equitable
18 consideration precluded imposition of statutory civil penalties against a public work contractor
19 for failing to pay the prevailing wage where the contractor relied on a public entities'
20 representations that the project was not subject to the prevailing wage law. This case does not
21 involve the imposition of punitive damages.

23 (3) *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 891 (2000) (Stevens, J., dissenting):
24 In passing, Justice Stevens cited an opinion from the Western District of Oklahoma wherein the
25 District Judge held that substantial compliance with a regulatory scheme did not bar an award of
26 punitive damages but that a good faith belief in, and efforts to comply with, all government
27

1 regulations would be evidence inconsistent with the mental state requisite for punitive damages
2 under state law.

3 (4) *Stone Man, Inc. v. Green*, 435 S.E.2d 205, 206 (Ga. 1993): Under Georgia law,
4 compliance with the law will not preclude a finding that business activities constitute a nuisance
5 but it does tend to show that there is no clear and convincing evidence of “willful [sic]
6 misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise
7 the presumption of a conscious indifference to consequences[,]” especially in “a commercial
8 enterprise the operation of which is accompanied by a certain amount of unpleasant but
9 unavoidable effects or byproducts.”

10
11 (5) *Reed v. Tiffin Motor Homes, Inc.*, 697 F.2d 1192, 1198 (4th Cir. 1982): Evidence that
12 Tiffin followed industry standards and complied with the state of the art while designing a motor
13 home was admissible because it was probative on the issue of wantonness, willfulness, and
14 maliciousness of Tiffin’s acts.

15
16 As drafted, the first sentence of the proposed instruction is unduly prejudicial to Johnson.
17 While evidence of efforts to comply with the law may be relevant to Monsanto’s mental state for
18 the purposes of punitive damages, the Court should not give an instruction that highlights one
19 piece of evidence that Monsanto intends to produce and advise the jury to consider that piece of
20 evidence. Better and more even-handed is a generic instruction that advises the jury to consider
21 all of the evidence is appropriate. *See* CACI 200.

22
23 As drafted, the second sentence of the proposed instruction is broader than can be
24 supported by Monsanto’s authority. Monsanto’s authority supports an instruction that the jury
25 “may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in
26 the jurisdiction where it occurred[,]” although lawful out-of-state conduct may be probative
27

1 when it demonstrates deliberateness and culpability of the defendant's action in the state where it
2 is tortious. *See State Farm*, 538 U.S. at 422.

3 The present instruction is refused.

4
5 **6. Punitive Damages – Authorization by Management**

6 Monsanto proposes a jury instruction that details the circumstances on which a
7 corporation may be held liable for punitive damages. Monsanto's Proposed Instructions, 8.
8 CACI 3945 provides an appropriate and neutral discussion of the law. Monsanto's proposed
9 special instruction appears to be biased in Monsanto's favor in that it underscore themes
10 Monsanto intends to develop at trial.

11
12 **7. Punitive Damages – Relevant Conduct**

13 Monsanto proposes a jury instruction that would limit the jury to considering "conduct by
14 Monsanto that you believe caused [Johnson's] injuries[.]" to the exclusion of evidence
15 "regarding conduct that was not a cause of [Johnson's] injuries" as a basis for a finding that
16 punitive damages may be imposed. Monsanto's Proposed Instructions, 9. Johnson objects and
17 proposes an alternative instruction that (1) discusses the purposes of punitive damages; (2) states
18 that punitive damages may not be used to punish Monsanto for the impact of its misconduct on
19 persons other than Johnson; and (3) advises the jury that it may consider Monsanto's wrongful
20 conduct towards others in fixing the amount of the punitive damages award. Johnson's Proposed
21 Instructions, 10.

23 Instead of these proposals, CACI 3945 should be given, including its final sentence.

24 First, conduct that did not harm Johnson may be considered in deciding whether
25 Monsanto is liable for punitive damages to the extent that it bears on Monsanto's mental state.
26 *See State Farm*, 538 U.S. at 422 ("Lawful out-of-state conduct may be probative when it
27

1 demonstrates the deliberateness and culpability of the defendant's action in the State where it is
2 tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff"). The
3 fact that conduct did not cause Johnson's injuries does not mean that it is "independent from the
4 acts upon which liability is premised." *Compare id.* ("A defendant's dissimilar acts, independent
5 from the acts upon which liability was premised, may not serve as the basis for punitive
6 damages"). Monsanto's instruction should be refused.

8 Second, the first sentence of Johnson's proposed instruction duplicates language in CACI
9 3945, it should not be given if CACI 3945 is given.

10 Third, the balance of Johnson's proposal is likely to confuse a jury. In California,
11 "imposing punishment for harm caused to others, which is prohibited, is separate and distinct
12 from determining the degree of reprehensibility by considering evidence of harm caused to
13 others, which is permitted." *Bullock v. Philip Morris USA, Inc.*, 159 Cal.App.4th 655, 693
14 (2008).⁶ The law is adequately reflected in CACI 3945, including the final bracketed sentence.

16 8. Punitive Damages – Not Compensation

17 Monsanto proposes an instruction that explains that punitive damages are not
18 compensatory damages. *See* Monsanto Proposed Instructions, 10. Johnson objects, arguing that
19 CACI 3945 adequately explains the purpose of punitive damages and that it can be contrasted
20 with CACI 3900, which describes compensatory damages in tort cases. Johnson Proposed
21 Instructions, 11. As a fall back, Johnson proposes that a sentence be added to CACI 3945 that
22 explains that punitive damages are not awarded to compensate for the injuries a plaintiff
23 suffered.
24

26 ⁶ Johnson argues that *Bullock* held that any instruction that identifies the purposes of punitive damages, as does
27 CACI 3945, must include a qualification "that evidence of harm caused to others could be considered to determine
the reprehensibility of [the defendant's] conduct." Johnson's Proposed Instructions, 10. *Bullock* holds the opposite.
Bullock, 159 Cal.App.4th at 693-94.

1 First, Monsanto's separate instruction is unnecessary in light of CACI 3945. Second, to
2 address Monsanto's concern, adoption of the alternative proposed by Johnson as a fallback
3 position is appropriate.

4
5 **9. Punitive Damages – Remote Misconduct**

6 Monsanto proposes an instruction that explains that the jury may conclude that
7 misconduct that occurred in the distant past need no longer be punished or that it should be
8 punished less severely than recent misconduct. Monsanto's Proposed Instructions, 11.

9 Monsanto's instruction is refused. Monsanto relies solely on the purposes of punitive
10 damages to support this instruction. Those purposes are provided in CACI 3945. Further,
11 Monsanto has no authority for the proposition that misconduct that occurred "in the distant past"
12 is exempt from punishment because punishing such conduct "may [have] no deterrent or
13 punitive" effect. On the contrary, repeated conduct may be more reprehensible. *See Bullock*,
14 159 Cal.App.4th at 691 (repeated actions are worse than, and can be punished more severely
15 than, conduct limited to an isolated incident).

16
17 **10. Punitive Damages – Mitigating Evidence**

18 Monsanto proposes an instruction that directs the jury to consider mitigating evidence in
19 assessing whether to impose punitive damages and the appropriate amount of any such damages.
20 Monsanto's Proposed Instructions, 12. Johnson objects, arguing that CACI 3945 together with
21 CACI 200, which directs the parties to consider all of the evidence presented by the parties, is
22 appropriate and that Monsanto's instruction is not entirely correct. Johnson's Proposed
23 Instructions, 13. Monsanto's special instruction is refused. CACI 3945 is adequate.

24
25 Monsanto's authority reveals some instances where courts determined that there was
26 evidence that mitigated the reprehensibility of the defendant's conduct. *See Rosener v. Sears*,
27

1 *Roebuck & Co.*, 110 Cal.App.3d 740, 753-54 (1980); *E.E.O.C. v. Farmer Bros. Co.*, 31 F.3d 891,
2 904 (9th Cir. 1994); *see also State Farm*, 538 U.S. at 419 (discussing factors that should be
3 considered in evaluating reprehensibility with no discussion of mitigating factors).

4 CACI 3945 does not separately address mitigating evidence. Rather, it lists several
5 factors that should be considered. Of course, any evidence that weighs against one of the factors
6 could be considered mitigating evidence. Accordingly, Monsanto's proposed instruction is
7 unnecessary. As with Monsanto's other proposed instructions, it appears designed to prime the
8 jury for Monsanto's evidence rather than provide neutral guidance.
9

10 **11. Punitive Damages – No Greater Award than Necessary**

11 Monsanto proposes an instruction that informs the jury that any award of punitive
12 damages "should be no greater than the amount that you find necessary to punish Monsanto."
13 Monsanto's Proposed Instructions, 13. Johnson objects, arguing that this factor is already
14 encompassed within CACI 3945, which should be given instead. Johnson's Proposed
15 Instructions, 14.
16

17 Monsanto's proposed instruction is refused. Monsanto cites no California law in support
18 of its instruction. Monsanto's instruction is inconsistent with its own authority, which
19 recognizes the purposes of punishment and deterrence. Moreover, CACI 3945 addresses the
20 factors for awarding punitive damages, including Monsanto's financial condition, the
21 reprehensibility of Monsanto's conduct, and the reasonable relationship between the harm and
22 the amount of punitive damages. A CACI 3945 instruction should be given rather than
23 Monsanto's proposed instruction.
24
25
26
27

1 **12. Punitive Damages – Reasonable Relationship**

2 Monsanto proposes an instruction that informs the jury that there must be a reasonable
3 relationship between any punitive damages award and any compensatory damages awarded.

4 Monsanto's Proposed Instructions, 14. Johnson objects, arguing that this instruction misstates
5 the standard and that the proper standard is contained in CACI 3945. Johnson's Proposed
6 Instructions, 15.

7
8 Monsanto's instruction is refused. The relationship between the punitive damages and
9 the compensatory damages is a factor that courts may consider post-verdict to evaluate whether
10 there is a disparity between the actual or potential harm suffered by the plaintiff and the punitive
11 damages award. *Nickerson v. Stonebridge Life Ins. Co.*, 63 Cal.4th 363, 37172, 374-75 (2016).
12 This law for the jury is better reflected by CACI 3945 than by Monsanto's instruction.
13

14 **13. Preemption**

15 These are refused.

16
17 **II. Deposition Designations**

18 *Preliminary comments*

19 Many of the objections to the deposition designations are futile; they were apparently
20 made simply because they could be, not because a ruling would make much of a difference. As
21 indicated below, the parties have frequently invoked objections to questions which are useful
22 before the answer is known, but which are not useful in the present context when the answer is
23 known.
24

- 25 • All colloquy between counsel, including objections and arguments (much of which puts
26 counsel in a poor light) should be deleted from designations read to or viewed by the jury.
27

1 For just a few of many example, see Farmer 49:5 ff.; 254:8 ff.; 258:17-259:2; 265:2 ff.;
2 Heydens 118; Goldstein 14-15.

- 3 • It is not clear that all the designations were made in the good faith expectation of reading
4 them to the jury at trial, because it does not appear there will be time to do so.
- 5 • Objections to multiple pages- i.e. to a wide variety of statements- are overruled unless all the
6 statements are subject to the objection, which is almost never the case. E.g., Acquavella 92-
7 95, 104-113 (9 pages), 278-286 (8 pages); Farmer 178-187. See e.g. M Ross 272-277: the
8 objection is not valid as to every statement in all those pages, and hence it is overruled.
9 Same: Saltmiras 213-219.
- 10 • Objections such as at Daubert 800-804 are too numerous and apply to too many pages to
11 allow the judge to figure the evidentiary issue with respect to any given statement, and
12 according these objections cannot be sustained.
- 13 • It is a waste of time to object on the basis of for example "calls for a legal conclusion" when
14 the witness responds that he does not know. E.g., D. Jenkins 70. (It is also of course
15 pointless to designate the passage.)
- 16 • "Asked and answered" (e.g. Neugut 180) is not useful because it requires the judge to review
17 an undetermined number of prior pages of the deposition (or perhaps other materials) to
18 determine the validity of the objections.
- 19 • "Misstates record" is not useful, and generally cannot be ruled on, for the same reason.
- 20 • "Mischaracterizes" (e.g. Neugut 222) is a vague objection (what is being mischaracterized,
21 and in what way, is not stated) and generally cannot be ruled on, for the same reason.

- 1 • “Compound,” while occasionally useful at deposition and at trial, is not useful in this present
2 context where the answer is evident, unless the *answer* is itself ambiguous (which is not the
3 case in these transcripts). E.g., Neugut 290.
- 4 • “Calls for speculation,” while an objection that can be useful at trial, almost never makes
5 sense in the present context because the answer will actually reveal whether the witness does
6 in fact know the answer, in which case the objection is no good, or that she does not know, in
7 which case the proponent is wasting his time to use it at trial (unless the fact of ignorance is
8 material).
- 9 • “Vague and ambiguous” is generally useless in the present context for the same reasons:
10 while suitable at trial, it is not after the answer has already been given unless there is
11 something about the *answer* which is ambiguous. E.g. Neugut 330.
- 12 • E.C. § 352 issues are generally reserved for the trial judge; because usually they require a
13 weighing of relevance and prejudicial value, which in turn depends on the materiality of the
14 topic and whether it has been or will be addressed at trial in some other way; thus the issues
15 are (with a few exceptions) difficult or impossible to handle at this pretrial stage.
- 16 • A “relevance” objection is rarely sustained because it is usually difficult for the judge to
17 know whether there is the slightest modicum of relevance to a question, and if there is not, it
18 is usually just a waste of time for the proponent to use it—but harmless (the § 352 issues,
19 such as a waste of time, are reserved for the trial judge).
- 20 • The objection “incomplete,” without more, cannot be sustained, because it’s not clear in
21 what respect the answer or the question is ‘incomplete’. E.g. Neugut 71

- The objection “facts not in evidence” (Neugut 125) is virtually never useful in this context because it is impossible pretrial to know if the “facts” at issue (themselves usually not clear from the objection) will be in evidence by the time the designation is presented to the jury.
- There are no rulings on whether testimony is within the scope of expertise or expert designations (among other things, the parties have not provided the necessary information on which such rulings could be made). E.g., Acquavella 352 ff., 357; Goldstein 317.
- “Not calculated to lead to admissible evidence” is a particularly pointless objection in this context. E.g., Jameson 124, 131, 133
- “Document not authenticated” (e.g. Farmer 286, 426) is not ruled on because the issue in this context is not the admissibility of a document. See also e.g., J. Rowland 106.
- “Improper designation” is an objection which I do not understand. Wiesenberger 181.

Rulings

Objections noted below are sustained, otherwise they are overruled.

Acquavella

102, 120, 157-9, 213, 234, 236, 241, 247, 309:6-9, 311

Azevedo

6, 52, 59-60, 61-62

Blair

254

Daubert

No ruling on general objections.

1 **Farmer**

2 48:7-22; 58:4-18; 63:18-64:4; 119, 130, 140:1-3, 174-177:2, 191, 290:14-20, 394, 397:6-17,
3 398:14-25 (same for quotations at 400, 401-404. Other objections are overruled as when the
4 deponent adopts the statement, e.g. 414-15, 416); 504:18-22; 511, 514:22-516
5

6 **Goldstein**

7 14:2-6, 28:12-16, 44:3-19, 46:8-9, 46:23- 47:2, 58:4-7, 61:22-25, 97,⁷ 125, 129, 134, 137:3-
8 138:8, 160:16-21, 161:11-162:25, 163: 16-164:11, (no ruling in 165:17-166:23); 167-169, 171:
9 overruled if plaintiff's questions on Proposition 65 are admitted and otherwise sustained; 186,
10 198: 17-20, 202:24-203:1; 209:25-212:2
11

12 **S Gould**

13 62:13-25

14 **D. Heering**

15 107, 162-167

16 **Heydens**

17 36, 40, 97, 100, 170, 331 (hearsay), 420:10-11, 426:11-18, 434

18 **C Jameson**

19 None

20 **D Jenkins**

21 None

22 **A. Neugut**

23 11- no ruling

24 **Ofodile**

25 240:17-243:11; 245:18-248:13
26
27

⁷ The material testimony here likely commences at p.99 line 1.

1 **M Ross**

2 None

3 **J. Rowland**

4 90:14-94:10 [*except that the following portions are not excluded: 91:10 (to extract the name Jess*
5 *Rowland, to allow the next section to be understood); 91:13-23; 93:14-17]; 97-98:10*

7 **D Saltmiras**

8 251

9 **Weisenburger**

10 None

13 Dated: May 16, 2018



Curtis E.A. Karnow
Judge Of The Superior Court

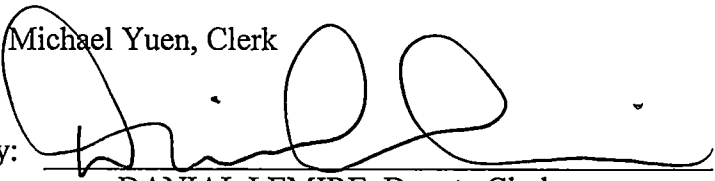
CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On **MAY 17 2018**, I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: **MAY 17 2018**

T. Michael Yuen, Clerk

By: 

DANIAL LEMIRE, Deputy Clerk