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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON,
Plaintiff,
v.
MONSANTO COMPANY
Defendants.

Case No. CGC-16-550128

**NOTICE OF MOTION AND PLAINTIFF'S
MOTION *IN LIMINE* NO. 8 TO EXCLUDE
EVIDENCE OF EXPERT/WITNESS
EXPERIENCE WITH ROUNDUP**

Trial Judge: TBD

Hearing Date: TBD

Time: TBD

Department: TBD

Trial Date: June 18, 2018

[Filed Concurrently with Declaration of Curtis
Hoke and [*Proposed*] Order]

ELECTRONICALLY
FILED
*Superior Court of California,
County of San Francisco*
05/24/2018
Clerk of the Court
BY: SANDRA SCHIRO
Deputy Clerk

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that, at a date and time set by the trial judge assigned to this matter
3 of the above-entitled Court located at 400 McAllister St. San Francisco, CA 94102-4515, Plaintiff
4 Dewayne Johnson will and hereby does move *in limine* to exclude evidence of expert/witness experience
5 with Roundup.

6 Plaintiff hereby seeks an *in limine* order instructing Defendants and their counsel not to refer to,
7 interrogate any witness concerning, comment on, or attempt to suggest to the jury any argument relating
8 to his expert's personal experience with Roundup, and to inform their witnesses of these instructions and
9 direct them not to make any reference to the topic. This Motion will be made upon the ground that Mr.
10 Johnson's expert's personal experiences with Roundup are irrelevant, and any attempt to convey this
11 information to the jury would be against public policy, highly improper and prejudicial to Plaintiff, even
12 if the Court were to sustain an objection and instruct the jury not to consider such facts or arguments.

13 This Motion *in Limine* is based on this Notice of Motion, the Motion and accompanying
14 Memorandum of Points and Authorities, the concurrently-filed Declaration of Curtis Hoke, the
15 concurrently-filed Proposed Order, all pleadings and papers on file in this matter, and such further oral
16 and documentary evidence and papers as the Court may consider at the time of the hearing.

17 Respectfully Submitted,

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19 Dated: May 24, 2018

THE MILLER FIRM, LLC

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21 By: /s/ Curtis G. Hoke

Michael J. Miller (appearance *pro hac vice*)
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28 **NOTICE OF MOTION AND PLAINTIFF'S MOTION IN LIMINE NO. 8**

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 In August of 2014, Dewayne Johnson was diagnosed with non-Hodgkin lymphoma (“NHL”) at
3 age 43 after spraying glyphosate-based herbicides (“GBHs”) for over two years. Mr. Johnson's
4 frequency of exposure to GBHs was intense, involving approximately 20-40 days per year at about 2-5
5 hours per day and starting in June of 2012. Mr. Johnson also suffered acute exposures due to spills
6 which left him soaked to the skin in GBHs. Mr. Johnson’s NHL subtype is t-cell lymphoma mycosis
7 fungoides, an aggressive variant, which involves lymphocytes located in the skin.

8 Plaintiff retained the services of Dr. William Sawyer for the purposes of analyzing causation and
9 exposure. At deposition, Monsanto questioned Dr. Sawyer regarding his personal experience using
10 Roundup at his home. Dr. Sawyer’s personal experience using glyphosate-based herbicides is irrelevant
11 and completely unrelated to his opinions of Roundup and surfactants in this case. *See*, Decl. of Curtis
12 Hoke, **Exhibit A** (Feb. 26, 2018 Deposition of William Sawyer) at 49:10 - 50:20.

13 **I. ARGUMENT**

14 Evidence of the parties experts’ personal experience with Roundup is not relevant to any issue in
15 this case and, even if found to be relevant, its probative value is substantially outweighed by the danger
16 of unfair prejudice, confusion of the issues, misleading the jury, undue delay and a waste of judicial
17 time. *See* Cal. Evid. Code. § 352.¹

18 **A. Plaintiff Expert’s Personal Experience With Roundup At His Home Is Irrelevant To**
19 **The Matters At Issue In This Case.**

20 California’s evidence code illustrates which type of evidence should be admissible. “No
21 evidence is admissible except relevant evidence”. *See*, Evid. Code § 350. Furthermore, “relevant
22

23 ¹ Defendant’s exposure expert Michael Sullivan, Ph.D. testified that he has sprayed Roundup and
24 glyphosate-containing products as a homeowner. Decl. of Curtis Hoke, **Exhibit B** (Deposition of
25 Michael Sullivan, Ph.D.) at 93-94. He testified that he did not take any particular safety precautions
26 while spraying and that he was not previously aware of the association between glyphosate and non-
27 Hodgkin’s lymphoma. *Id.* Plaintiff submits that this Motion *in Limine* would preclude any questioning
28 of Dr. Sullivan regarding his personal use as well. However, if Defendant is permitted to question Dr.
Sawyer, and other expert witnesses, regarding their personal experience, Plaintiff would need to waste
additional time questioning Dr. Sullivan on these unnecessary issues.

1 evidence means evidence ... having any tendency in reason to prove or disprove any disputed fact that is
2 of consequence to the determination of the action.” See Cal. Evid. Code § 210. “The test of relevance is
3 whether the evidence tends logically, naturally, and by reasonable inference to establish material
4 facts....”. *People v. Scheid* (1997) 16 Cal.4th 1, 13, [65 Cal.Rptr.2d 348, 939 P.2d 748].

5 A trial court “is vested with wide discretion in determining the relevance of evidence,” but it has
6 “no discretion to admit irrelevant evidence.” *People v. Babbitt* (1998) 45 Cal.3d 660, 681, [248 Cal.Rptr.
7 69, 755 P.2d 253]. An expert’s testimony must be based on matter ‘that is of a type that reasonably may
8 be relied upon by an expert’ See Cal. Evid. Code § 801, subd. (b); *People v. Leahy, supra*, 8 Cal.4th at
9 pp. 597–598 [34 Cal.Rptr.2d 663, 882 P.2d 321]; *People v. Mitchell, supra*, 110 Cal.App.4th 772, 783–
10 784.

11 Furthermore, Section 801 of the California Evidence Code, limits permissible opinion evidence
12 in pertinent part as follows: “If a witness is testifying as an expert, his testimony in the form of an
13 opinion is limited to such an opinion as is: (a) Related to a subject that is sufficiently beyond common
14 experience that the opinion of an expert would assist the trier of fact; and (b) Based on matter ... that is
15 of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to
16 which his testimony relates”

17 In the context of this case, evidence unrelated to Dr. Sawyer’s personal experience using
18 glyphosate-containing herbicides and non-Hodgkin’s lymphoma, is irrelevant to this matter, as it is
19 wholly unrelated to any fact at issue in the case. In fact Dr. Sawyer, in the same deposition explained in
20 detail that his use of Roundup pales in comparison to that of the plaintiff Dewayne Johnson. *See*, Decl.
21 of Curtis Hoke, **Exhibit C** (Feb. 27, 2018 Deposition of William Sawyer) at 526:2-527-9. He also
22 expounded upon the substantial precautions he takes prior to spraying the pesticides. *Id.*

23 The personal home experiences of Dr. Sawyer with Roundup cannot be compared to that of the
24 Plaintiff and are completely irrelevant to the litigation of this case. This personal home use was not used
25 in developing his expert testimony in any way and therefore should be excluded.

1 **B. Any Probative Value of Evidence of Plaintiffs’ Experts’ Personal Use of Roundup is Far**
2 **Outweighed by the Danger of Unfair Prejudice**

3 Even when evidence is relevant, a trial court may exclude it pursuant to evidence Cal. Evid
4 Code. 352. Under that section, a trial court is vested with discretion to exclude relevant evidence when
5 “its probative value is substantially outweighed by the probability that its admission will (a) necessitate
6 undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues,
7 or of misleading the jury.” See Cal. Evid. Code § 352.

8 Thus, even if the Court were to find that evidence or commentary has probative value, it could
9 still be excluded under Cal. Evid. Code. 352 based on the weight of the danger of unfair prejudice. The
10 prejudice referred to in Evidence Code section 352 applies to “evidence which uniquely tends to evoke
11 an emotional bias against the defendant as an individual and which has very little effect on the issues.”
12 *People v. Karis* (1988) 46 Cal.3d 612, 638 [250 Cal.Rptr. 659, 758 P.2d 1189]; *Vorse v. Sarasy* (1997)
13 53 Cal.App.4th [998,] 1009 [62 Cal.Rptr.2d 164].

14 Additionally, even if relevant, evidence that confuses the issues is inadmissible if the evidence
15 would lead to litigation of collateral issues that will distract the jury. See *People v. Vanegas*, 115 Cal.
16 App. 4th 592, 597–98, 9 Cal. Rptr. 3d 398 (2d Dist. 2004) (the trial court did not abuse its discretion by
17 excluding the opinion of the defendant's first accident reconstruction expert, who had died by the time of
18 the trial, as confusing, misleading and unduly prejudicial.)

19 Here in this case the mere fact that Dr. Sawyer used Roundup for his personal use is extremely
20 prejudicial and may result in the jury unfairly comparing Dr. Sawyer’s personal use to his professional
21 analysis. Furthermore, the jury may easily conflate Dr. Sawyer’s use of Roundup at his home with his
22 separate analysis of Roundup and surfactants. Substantial time will be expended in order to educate the
23 jurors on the separate nature of his personal use of Roundup, including the reasons why he takes such
24 substantial precautions prior to spraying the pesticides. Such testimony would be a waste of judicial
25 resources and expend unnecessary time on irrelevant issues. As a result, pursuant to Section 352 of
26 California’s Evidence Code, this information should be barred.

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II. CONCLUSION

Based upon the foregoing, Plaintiffs respectfully request that Defendant be ordered to refrain from any comment, allusion, question, suggestion, or reference to any of the subject matters or areas as specified above, and for such other and further relief to which Plaintiffs may be entitled.

Respectfully submitted,

Dated: May 24, 2018

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