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18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
19 **COUNTY OF SAN FRANCISCO**

20
21 DEWAYNE JOHNSON,
22 Plaintiff,
23 vs.
24 MONSANTO COMPANY,
25 Defendant.

Case No. CGC-16-550128
**DEFENDANT MONSANTO COMPANY'S
OPPOSITION TO PLAINTIFF'S
MOTION *IN LIMINE* NO. 4 TO
EXCLUDE EVIDENCE AND
ARGUMENT THAT PLAINTIFF FAILED
HIS QUALIFIED APPLICATOR TEST
THREE TIMES**

Trial Date: June 18, 2018
Time: 9:30 a.m.
Department: TBD

1 **I. INTRODUCTION**

2 Plaintiff Dewayne Johnson (“Plaintiff”) alleges that Roundup PRO® and Ranger Pro® are
3 defective and that his exposure to the products caused his mycosis fungoides (“MF”), a subtype of
4 non-Hodgkin lymphoma. In his motion *in limine*, Plaintiff argues that because California does not
5 technically require pesticide applicators to pass the Qualified Applicators exam to be able to spray
6 Roundup PRO® or Ranger Pro®, then evidence that Plaintiff failed that exam three times must be
7 irrelevant. But Plaintiff’s taking of the exam four times is relevant for reasons other than whether
8 California technically requires the certification. Namely, Plaintiff’s failures led to his intensively
9 studying for about a year and half about the safe handling, use and applications of pesticides as he
10 attempted to pass the exam. He studied materials discussing, among various subjects, how to
11 safely apply the products and minimize personal exposure, which is directly relevant here to the
12 issue of specific causation. Similarly, this evidence does not prejudicially imply that Johnson was
13 somehow an “incompetent” or “failed” applicator, as Plaintiff argues, but is relevant to a material
14 issue in this trial. Plaintiff’s Motion should be denied.

15 **II. BACKGROUND**

16 Plaintiff alleges that he was diagnosed with MF after spraying Ranger Pro® on weeds
17 between June 2012 and early 2016 as the Integrated Pest Manager for Benicia Unified School
18 District (“BUSD”). *See* Declaration of Sandra A. Edwards (“Edwards Decl.”) at ¶ 2, Ex. 1 (Depo.
19 of Dewayne Johnson (“Johnson Dep.”) at 15:20-22 (Dec. 7, 2017)) (stating that he began applying
20 Ranger Pro® around June 2012). As part of his duties as Integrated Pest Manager, his employer
21 BUSD required Plaintiff to obtain his qualified applicator certification (“QAC”). *See id.* at 40:12-
22 41:7. The QAC is a certification granted by the California Department of Pesticide Regulation to
23 pesticide applicators upon passing a written exam.

24 Plaintiff failed the QAC exam three times, but each time he failed, he was motivated to and
25 did continue to study and learn about how to safely apply Ranger Pro®. *See id.* at 37:21-38:6 (“So
26 how I learned is by failing the test. I failed the test three times. Then the fourth time, I passed, but
27 I just kept learning, I kept learning, I kept learning, I kept learning.”). Plaintiff followed an
28 intensive self-study routine and attended an all-day QAC test preparation class. *See id.* at 38:7-10;

1 619:15-620:1 (Dec. 7, 2017 and Jan. 20, 2018). By the time Plaintiff eventually passed his exam
2 and became a certified pesticide applicator, he had been studying extensively for approximately 16
3 to 18 months. *See id.* at 39:14-40:11 (Dec. 7, 2017).

4 **III. ARGUMENT**

5 Plaintiff devotes the bulk of his Motion to the largely immaterial issue of whether
6 California law required Plaintiff to have a QAC to spray Roundup PRO® or Ranger Pro®. Pl.’s
7 Mot. at 3-4. But Plaintiff’s reasoning is unduly narrow: these technical legal requirements are not
8 determinative of whether his taking the QAC exam multiple times is relevant, and Plaintiff fails to
9 explain why its relevance should hinge upon this issue. This Court must determine only whether
10 Plaintiff’s failing the QAC exam has “*any* tendency in reason to prove or disprove *any* disputed
11 fact that is of consequence to the determination of the action.” Cal. Evid. Code § 210 (emphasis
12 added). Indeed, Plaintiff’s studying for 16 to 18 months about how to safely apply Ranger Pro®
13 partly demonstrates his proficiency as a pesticide applicator, which bears directly on Plaintiff’s
14 actual level of exposure – a central issue in this case.

15 Plaintiff studied several subjects related to pesticide safety that, as evidenced by his
16 eventually passing the exam, demonstrate his sophistication in applying Ranger Pro®. Plaintiff
17 testified that he learned about, among other things, the applicable laws and regulations of pesticide
18 use, safe spraying techniques (including when and where to spray), and how to properly read a
19 pesticide label. *See* Edwards Decl. at ¶ 2, Ex. 1 (Johnson Dep. at 618:16-619:5 (Jan. 20, 2018)).
20 Further, his QAC study materials discuss, among other things, how to control airborne droplets of
21 pesticide while spraying (“drift”), how and when to wear certain personal protective equipment
22 (“PPE”), how to safely store and transport pesticides, and what first aid should be applied in the
23 event of an accidental exposure. *See* Edwards Decl. at ¶ 3, Ex. 2 (QAC Study Materials at
24 DJohnson-PSR-004483-525). The Ranger Pro® label, in turn, provides product-specific
25 instruction on proper PPE, first aid, storage and disposal, drift control, the proper ratio for diluting
26 Ranger Pro® with water, and applying using a backpack sprayer or other “high-volume
27 equipment,” as used by Plaintiff. *See* Edwards Decl. at ¶ 4, Ex. 3 (Ranger Pro® Label).
28 Plaintiff’s familiarity with these concepts – reinforced over several months due only to his failing

1 the QAC exam three times – is probative of his sophistication as an applicator. Plaintiff’s
2 knowledge of practices to help reduce his exposure to drift – which he alleges to be a significant
3 means by which he was exposed to the product – is relevant to causation. His knowledge of the
4 function and purpose of wearing PPE is relevant to causation. As is his knowledge of appropriate
5 dilution and spraying practices. A certified applicator like Plaintiff is more likely to be
6 knowledgeable about and follow important pesticide safety rules. Monsanto should be able to
7 introduce evidence about why Plaintiff committed himself to learning these rules for a year and a
8 half, which will necessarily involve referencing his failed exam attempts.

9 Further, this Court will decide at trial whether to adopt either the consumer expectations
10 test or risk-benefit test, or both, for determining Plaintiff’s strict product liability claim.^{1 2} See
11 *Romine v. Johnson Controls, Inc.*, 224 Cal. App. 4th 990, 1000-01 (2014) (noting that courts
12 evaluate design defect claims through the two tests); *Demara v. Raymond Corp.*, 13 Cal. App. 5th
13 545, 554 (2017) (“The two theories are not mutually exclusive, and depending on the facts and
14 circumstances of the case, *both* may be presented to the trier of fact in the same case.”). The
15 consumer expectations test concerns the expectations of only the ordinary consumer. *Romine*, 224
16 Cal. App. 4th at 1000-01. Ranger Pro® is not intended for ordinary consumer use; it is a
17 “professional herbicide for industrial, turf and ornamental weed control.” See Edwards Decl. at ¶
18 4, Ex. 3 (Ranger Pro® Label). Evidence about Plaintiff’s education and training over a 16 to 18-
19 month period regarding the safe handling and use of herbicides will be directly relevant to the
20 Court’s determination of the appropriate instruction for the jury at the conclusion of trial.

21 Plaintiff also argues that Monsanto will use Plaintiff’s failed exam attempts to “paint[] him
22 as an incompetent or ‘failed’ Roundup/RangerPRO applicator,” and that the evidence is unduly
23 prejudicial as a result. Pl.’s Mot. at 4. For the reasons discussed above, Plaintiff’s

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25 ¹ In his May 17, 2018 Order on Deposition Designations and Certain Proposed Jury Instructions
26 (“5/17/18 Order”), Judge Curtis E. Karnow declined to exclusively adopt the jury instruction for
either test, noting that the issue is properly adjudicated at trial. *Id.* at 2-5.

27 ² Judge Karnow denied without prejudice Monsanto’s request that the risk-benefit instructions be
28 provided as an alternative if the consumer expectations test instruction is given. 5/17/18 Order at
5. Monsanto respectfully disagrees with this ruling and intends to raise the issue again with the
trial court.

1 characterization of Monsanto's position is misguided, and the probative value of that evidence
2 substantially outweighs its limited prejudicial effect.

3 **IV. CONCLUSION**

4 The Court should deny Plaintiff's motion *in limine* and permit the introduction of evidence
5 that Plaintiff failed his QAC exam three times because it is relevant and probative to issues in
6 dispute in this case.

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Dated: June 7, 2018

Respectfully submitted,

FARELLA BRAUN + MARTEL LLP

By: 

Sandra A. Edwards

Attorneys for Defendant
MONSANTO COMPANY