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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON,

Plaintiff,

vs.

MONSANTO COMPANY,

Defendant.

Case No. CGC-16-550128

DEFENDANT MONSANTO COMPANY'S OPPOSITION TO PLAINTIFF'S MOTION *IN LIMINE* NO. 13 TO EXCLUDE EVIDENCE OF SMOKING AND DRUG USAGE

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

I. INTRODUCTION

Plaintiff Dewayne Johnson ("Plaintiff") seeks to exclude evidence of his history of smoking cigars and marijuana, arguing that because these activities have not been scientifically proven to cause mycosis fungoides, they must be irrelevant. Plaintiff's argument misses the mark: Monsanto has no burden at trial or the *in limine* stage to prove that smoking causes mycosis fungoides; even Plaintiff's experts agree that no one knows the actual cause(s) of the overwhelming majority of NHL cases diagnosed each year, including mycosis fungoides. But Monsanto is certainly entitled to show that smoking is a known risk factor for cancer generally, including NHL specifically, as even Plaintiff's experts and their reliance materials recognize. *See infra* p. 2-3. Just as importantly, smoking and drug use bear directly on Plaintiff's failure to warn claim. Plaintiff maintains that he would not have used Defendant Monsanto Company's ("Monsanto") glyphosate-based herbicides ("GBH") if the label had said that the product could cause cancer. But Plaintiff assuredly knew that smoking cigars and marijuana was harmful to his health, and he did so anyway. Plaintiff's claim about how he *would have* acted had he been presented with a warning rings false, and Plaintiff's conduct in light of well-known health risks in a trial in which he alleges he would have behaved differently if presented with different warnings by Monsanto is directly relevant.

II. ARGUMENT

It is Plaintiff's burden at trial to establish that Monsanto's GBH products are defectively designed, and that Monsanto's alleged failure to warn of risks associated with GBH products was the cause of his cancer. *See Huitt v. S. California Gas Co.,* 188 Cal. App. 4th 1586, 1604 (2010) ("To be liable in California, even under a strict liability theory, the plaintiff must prove that the defendant's failure to warn was a substantial factor in causing his or her injury."). Monsanto disputes that the GBH product warnings were inadequate based on the overwhelming consensus among the scientific and regulatory community that glyphosate is not carcinogenic, and it thus had no duty to warn Plaintiff about a non-existent cancer risk. *See T.H. v. Novartis Pharm. Corp.*, 245 Cal. App. 4th 589 (2016) ("A manufacturer is not required to warn about speculative harm."), *vacated on other grounds, H. (T.) v. Novartis Pharm. Co.*, 371 P.3d 241 (2016). But Plaintiff also

bears the additional burden of proving that a different warning or instruction on Monsanto's GBHs would have resulted in Plaintiff not developing mycosis fungoides. *See Huitt*, 188 Cal. App. 4th at 1604 ("[A] defendant is not liable to a plaintiff if the injury would have occurred even if the defendant had issued adequate warnings.").

Evidence of Plaintiff's smoking and drug use is relevant to what he would (or would not) have done in response to a different warning. Plaintiff here insists that he would not have sprayed GBH products if a label notified him of a cancer risk. *See* Declaration of Sandra A. Edwards ("Edwards Decl.") at ¶ 2. Ex. 1 (Dep. of Dewayne Johnson ("Johnson Dep.") at 715:25-716:8 (Jan. 20, 2018)) (Q: … If at any point during your employment as an integrated pest manager, the label was changed, or you were somehow notified that there was new information that this causes cancer, would you have continued using the product? … A: No. Even with the label – no."). But in the case of Plaintiff's choice to smoke his preferred brand of cigars, he was confronted with a plainly visible cancer warning every day for two years, and his behavior did not change. *See id.* at 75:15-16; 76:18-25 (Dec. 7, 2017) ("A: Yeah, I smoked Black & Milds back in the day …. It was two years straight every day smoking one of those . . . Q: But you smoked every single day? A: Yeah."). While not presented with the same written cancer warning when smoking marijuana, Monsanto is entitled to question Plaintiff regarding whether he knew smoking generally is associated with cancer, whether he knew it was unhealthy (which he likely did), and whether a hypothetical warning would have changed his decision. Accordingly, this evidence weighs directly on his failure to warn claim. *See Motus v. Pfizer Inc.,* 196 F. Supp. 2d 984, 999 (C.D. Cal. 2001), *aff'd,* 358 F.3d 659 (9th Cir. 2004) (granting summary judgment because the Plaintiff failed to identify any "evidence establishing that Dr. Trostler would have acted differently had Pfizer provided an adequate warning about the alleged risk .... [and] is therefore unable to create a genuine issue as to whether [the defendant's] [ ] alleged failure to provide an adequate warning caused her injuries.").

Plaintiff also argues that Monsanto must prove "to a reasonable medical certainty" at the *in limine* stage that Plaintiff's smoking and drug use caused his mycosis fungoides, and that Monsanto's failure to so prove requires such evidence to be excluded. *See* Pl.'s Mot. at 3:26-28.

However, Monsanto has no affirmative burden at trial or the *in limine* stage to prove the cause of Plaintiff's disease. Nor is proof to a reasonable degree of scientific certainty the threshold when determining whether evidence is relevant. *See* Cal. Evid. Code § 210 ("'Relevant evidence' means evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."). Contrary to Plaintiff's assertions, Monsanto is able to proffer evidence that smoking is a risk factor for cancer and non-Hodgkin lymphoma ("NHL") specifically. For example, Plaintiff's own expert describes smoking as a relevant factor for cancer epidemiology generally, and he reviewed studies that identified smoking as a relevant confounder for glyphosate and NHL. *See* Edwards Decl. at ¶ 7, Ex. 6 (Expert Report of Dr. Alfred Neuget at 3) ("From an epidemiologic perspective, an etiologic agent or risk factor is anything that increases the probability that an individual will develop the disease. These risk factors can include . . . smoking."); *id.* at 13 ("identifying "cigarette smoking status" as a factor that a certain study adjusts for when measuring the risk between glyphosate and NHL). Plaintiff also testified in his deposition that his smoking was plainly detrimental to his health. *See* Edwards Decl. at ¶ 2, Ex. 1 (Johnson Dep. at 77:1-7 (Dec. 7, 2017)) ("Q: All right. And tell me again why you stopped [smoking]? A: Just wasn't healthy, you know. You felt sick and you spitting out this green little – little – I don't know what it was, but it was some green fluid. You just – you knew it's from the cigars."). Given that Plaintiff's smoking is a potential risk factor for NHL, the evidence is relevant and should be admitted.

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III. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's motion *in limine* and permit the introduction of evidence of Plaintiff's history of smoking.

Dated: June 7, 2018

Respectfully submitted,

FARELLA BRAUN + MARTEL LLP

By: 

Sandra A. Edwards

Attorneys for Defendant
MONSANTO COMPANY