

1 Michael J. Miller (appearance *pro hac vice*)
2 Timothy Litzenburg (appearance *pro hac vice*)
3 Curtis G. Hoke (State Bar No. 282465)
4 **The Miller Firm, LLC**
5 108 Railroad Ave.
6 Orange, VA 22960
7 (540) 672-4224 phone; (540) 672-3055 fax
8 mmiller@millerfirmllc.com
9 tlitzenburg@millerfirmllc.com
10 choke@millerfirmllc.com

11 Attorneys for Plaintiff
12 DEWAYNE JOHNSON

ELECTRONICALLY
FILED
Superior Court of California,
County of San Francisco
06/12/2018
Clerk of the Court
BY: VANESSA WU
Deputy Clerk

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

DEWAYNE JOHNSON,

Plaintiff,

v.

MONSANTO COMPANY, STEVEN D.
GOULD, WILBUR-ELLIS COMPANY
LLC, and WILBUR-ELLIS FEED, LLC,

Defendants.

Case No. CGC-16-550128

**PLAINTIFF'S REPLY IN SUPPORT OF HIS
MOTION IN LIMINE NO. 5 TO EXCLUDE
EVIDENCE, TESTIMONY AND
ARGUMENT REGARDING ATTORNEY
RETENTION AND ADVERTISING**

Trial Judge: TBD

Trial Date: June 18, 2018

Time: 9:30 a.m.

Department: TBD

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. ARGUMENT

In its tortured response to Mr. Johnson's Motion, Monsanto's first argument is that any reference to other litigation should open the door to circumstances about litigation advertisements. See Def. Resp. at 1. Second, Monsanto argues that if Mr. Johnson testifies to his motivations for filing his lawsuit then he opens the door to attorney advertisements. See Def. Resp. at 1. Both arguments lack merit.

First, Monsanto is struggling to take a third bite of the apple after it has already lost this argument – attempting to exclude all evidence of other litigations. Judge Karnow ruled that “these complaints could be treated as notice to Monsanto of the alleged connection between glyphosate and the injury at issue in this case.” See 04/03/2018 Order on Motions *in limine* at 6. Monsanto calls such logic “illogical” in its response to this motion. See Def. Resp. at 1:12. Not so. Judge Karnow got it right. It is well settled in California that other similar incidents are admissible to prove “a defective condition, knowledge, or the cause of the accident, provided that the circumstances of the other accidents are similar and not too remote.” *Ault v. International Harvester Co.*, (1974) 13 Cal.3d 113. 121-22; *Genrich v. State of California* (1988) 202 Cal.App.3d 221, 228. Likewise, the introduction of evidence that Monsanto was on notice from other litigations does not open the door to Monsanto to introduce evidence of attorney retention and advertising. Such evidence is rarely permitted because it is irrelevant and subject to attorney-client privilege. *In re Norplant Contraceptive Products Liab. Litig.*, MDL 1038, 1997 WL 81087, at *1 (E.D. Tex. Feb. 21, 1997); See also *In re Dupont's Est.*, 140 P.2d 866, 872 (Cal. App. 1st Dist. 1943).

Second, Monsanto is either willfully misrepresenting Mr. Johnson's deposition testimony or Monsanto failed to read the testimony when it implied that Mr. Johnson decided to file his lawsuit after seeing an advertisement for Roundup lawsuits. The deposition testimony is clear, Mr. Johnson already had an attorney before seeing an advertisement for Roundup lawsuits. Mr. Johnson's testified as follows:

A. So I'm saying to myself, like oh, this is serious now. They're actually really starting to get this going, you know, so it was pretty tough.

Q. Did you call?

A. No.

Q. Did you already have a lawyer?

1 A. Yes, Sir. Two lawyers.

2 See Hoke Decl. at **Exhibit A**. (Deposition of Dewayne Johnson at 175:2-9 (Dec. 7, 2017)).

3 Even with substantiated claims, courts are very hesitant to allow even limited evidence of attorney
4 advertisements, seeking to protect attorney-client privilege and to provide a fair trial for plaintiffs. *In re*
5 *Norplant Contraceptive Products Liab. Litig.*, MDL 1038, 1997 WL 81087, at *1 (E.D. Tex. Feb. 21,
6 1997)(court granted plaintiffs' motion *in limine* to exclude defendants' experts' opinions regarding
7 negative media stories and attorney advertisements); *In re Prempro Products Liab. Litig.*, 4:04CV01169,
8 2007 WL 3125106, at *1 (E.D. Ark. Oct. 24, 2007). Here, Mr. Johnson already had an attorney that was
9 in the process of filing his lawsuit before Mr. Johnson saw an advertisement for Roundup lawsuits.
10 Monsanto's motivations argument is lacking any foundation, and as such, Mr. Johnson motion *in limine*
11 No. 5 should be granted in full.

12 **II. CONCLUSION**

13 Based on the foregoing, Plaintiff Dewayne Johnson respectfully requests that the Court enter an
14 Order granting this motion *in limine* and excluding evidence or testimony suggesting that this case was
15 generated by attorneys, or any other evidence or argument of attorney involvement. Such remarks are
16 inflammatory and are an improper attempt to prejudice the jury by suggesting that Plaintiff is pursuing his
17 claims only because an attorney advised it. This evidence is irrelevant and unduly prejudicial.

18 Respectfully submitted,

19 **THE MILLER FIRM, LLC**

20 DATED: June 12, 2018

21 By: 

22 Curtis G. Hoke (SBN 282465)
23 Timothy Litzenburg (appearance *pro hac vice*)
24 Michael J. Miller (appearance *pro hac vice*)
25 THE MILLER FIRM, LLC
26 108 Railroad Ave.
27 Orange, VA 22960
28 (540) 672-4224 phone
(540) 672-3055 fax
tlitzenburg@millerfirmllc.com
choke@millerfirmllc.com

Attorneys for Plaintiff,
DEWAYNE JOHNSON