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13 *DEWAYNE JOHNSON*

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **FOR THE COUNTY OF SAN FRANCISCO**

16 DEWAYNE JOHNSON,

17 Plaintiff,

18 v.

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

22 Defendants.

Case No. CGC-16-550128

**PLAINTIFF'S REPLY IN SUPPORT OF HIS
MOTION IN LIMINE NO. 4 TO EXCLUDE
EVIDENCE AND ARGUMENT THAT
PLAINTIFF FAILED HIS QUALIFIED
APPLICATOR TEST ON THREE
OCCASIONS**

Trial Judge: TBD

Trial Date: June 18, 2018

Time: 9:30 a.m.

Department: TBD

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

1 **I. ARGUMENT**

2 **A. The Number Of Times Mr. Johnson Failed His QAC Test Has Nothing To Do With**
3 **How Much Roundup/RangerPRO Mr. Johnson Was Exposed To; Nor Does It Have**
4 **Any Relevance To The Actual Amount Of Roundup/RangerPRO Mr. Johnson Was**
5 **Exposed To.**

6 The number of times Mr. Johnson failed his Qualified Applicator Certificate (“QAC”) test has
7 nothing to do with the issues in this lawsuit – whether Roundup/RangerPRO caused Mr. Johnson to
8 develop non-Hodgkin’s lymphoma (“NHL”) and whether Monsanto adequately warned of the known or
9 knowable link between Roundup/RangerPRO and NHL. Monsanto’s Opposition strains to argue that
10 the number of times Mr. Johnson failed his QAC test tends to show that “Plaintiff’s failures led to his
11 intensively studying for about a year and half about the safe handling, use and applications of pesticides
12 as he attempted to pass the exam. He studied materials discussing, among various subjects, how to
13 safely apply the products and minimize personal exposure, which is directly relevant here to the issue of
14 specific causation.” *See*, Def. Opp. At 1. Not so. The number of times Mr. Johnson failed his QAC test
15 has nothing to do with the actual amount of Roundup/RangerPRO has was exposed to while working for
16 Benicia Unified School District.

17 **B. Monsanto’s Opposition Does Not Argue That Any Of Its Experts Have Relied Upon**
18 **The Fact That Mr. Johnson Failed His QAC Test Three Times In Rendering Any**
19 **Opinions As To Mr. Johnson’s Level Of Roundup/RangerPRO Exposure.**

20 Tellingly, Monsanto’s Opposition does not argue that any of its experts have relied upon the fact
21 that Mr. Johnson failed his QAC test three times in rendering any opinions as to Mr. Johnson’s
22 Roundup/RangerPRO exposure levels. *See, generally*, Def. Opp. The reality is simple: the number of
23 times Mr. Johnson failed his QAC test really has nothing to do with the *actual* amount of
24 Roundup/RangerPRO he was exposed to. Indeed, if the fact that Mr. Johnson failed his QAC test three
25 times legitimately had any relevance to his level of exposure to Roundup/RangerPRO, Monsanto could
26 have easily directed this Court’s attention to an expert who has relied upon the fact that Mr. Johnso failed
27 his QAC test three times in rendering an opinion as to Mr. Johnson’s Roundup/RangerPRO exposure
28

1 levels. Monsanto has failed to make such an argument, presumably because it likely cannot point to a
2 single expert who has rendered an opinion as to Mr. Johnson's exposure to Roundup/RangerPRO which
3 is based on the fact that Mr. Johnson failed his QAC test three times.

4 **C. The Number Of Times Mr. Johnson Failed His QAC Test Is Irrelevant To The Jury's**
5 **Deliberation Of Plaintiff's Strict Liability Design Defect Claim.**

6 Here, Monsanto argues that "[T]his Court will decide at trial whether to adopt either the consumer
7 expectations test or risk-benefit test, or both, for determining Plaintiff's strict product liability claim."
8 See, Def. Opp. at 3. Monsanto's Opposition goes on to suggest that Monsanto may argue before the
9 honorable trial judge assigned to this matter that Mr. Johnson is a 'sophisticated user' and that the
10 appropriate test to apply should depend, at least in part, on the fact that Mr. Johnson failed his QAC test
11 three times. *Id.* Indeed, Monsanto claims that Mr. Johnson's training and experience "will be directly
12 relevant to the Court's determination of the appropriate instruction for the jury at the conclusion of trial."
13 *Id.* But this is a red herring; Plaintiff's Motion *in Limine* does NOT seek to preclude this honorable Court
14 from hearing any particular argument or evidence that might assist this honorable Court in deciding what
15 test to instruct the jury to apply herein. To the contrary, Plaintiff simply seeks to exclude irrelevant
16 evidence or argument that Plaintiff filed his QAC test three times from being considered by the jury.
17

18 **D. Monsanto Has Failed To Show Any Relevant Basis For Introducing Evidence Or**
19 **Argument That Mr. Johnson Failed His QAC Test Three Times; And Such Evidence**
20 **Will Create A substantial Danger Of Undue Prejudice, Confuse The Issues, And/Or**
21 **Mislead The Jury.**

22 Monsanto has failed to show any credible relevant basis for introducing evidence or argument that
23 Mr. Johnson failed his QAC test three times; and such evidence will create a substantial danger of undue
24 prejudice, confuse the issues, and/or mislead the jury. California Evidence Code Section 352 states that
25 "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the
26 probability that its admission will (a) necessitate undue consumption of time or (b) create substantial
27 danger of undue prejudice, of confusing the issues, or of misleading the jury." See, Cal. Evid. Code §
28 352. Evidence is not inadmissible under Section 352 unless the probative value is "substantially

1 outweighed by the probability of a ‘substantial danger’ of undue prejudice.” *See, People v. Fruits*, 247
2 Cal. App. 4th 188, 205 (2016), review denied (Aug. 10, 2016); *People v. Quang Minh Tran*, 51 Cal. 4th
3 1040, 1046 (2011).

4 Here, as discussed further above, there is no probative value in the fact that Mr. Johnson failed his
5 QAC test three times to the issues the jury will decide in this case. Indeed, the fact that Mr. Johnson failed
6 his QAC test three times 1) has no logical relationship to whether Roundup/RangerPRO caused Mr.
7 Johnson to develop NHL; 2) has no logical relationship to whether Monsanto failed to adequately warn
8 of the known or knowable link between Roundup/RangerPRO and NHL; and 3) has no logical relationship
9 to the actual amount of Roundup/RangerPRO Mr. Johnson was exposed to - and, indeed, Monsanto has
10 failed to show that any of its experts even rely on the fact that Mr. Johnson failed his QAC test three times
11 in rendering any opinion as to Mr. Johnson’s exposure to Roundup/RangerPRO. Tellingly, Monsanto
12 does not deny that it will attempt to paint Mr. Johnson as a “failed” or “incompetent” applicator in its
13 Opposition. *See, generally*, Def. Opp. Plaintiff anticipates that, given its lack of any probative value,
14 Monsanto will attempt to unduly prejudice Plaintiff by using the fact that he failed his QAC test three
15 times to prejudicially and misleadingly paint him as a “failed” or “incompetent” applicator. Such
16 argument or evidence should therefore be precluded pursuant to California Evidence Code Section 352.
17
18

19 **II. CONCLUSION**

20 Based on the foregoing, Plaintiff Dewayne Johnson respectfully requests that the Court enter an
21 Order granting his Motion *in Limine* No. 4.

22 Respectfully submitted,

23
24 Dated: June 12, 2018

THE MILLER FIRM, LLC

25
26 By: /s/ Curtis G. Hoke
27 Michael J. Miller (appearance *pro hac vice*)
28 Timothy Litzenburg (appearance *pro hac vice*)
Curtis G. Hoke (State Bar No. 282465)
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Attorneys for Plaintiff
DEWAYNE JOHNSON

1 PROOF OF SERVICE

2 I, Curtis G. Hoke, declare as follows:

3 I am a citizen of the United States and am employed in Orange County, Virginia. I am over the
4 age of eighteen years and not a party to the within action. My business address is 108 Railroad
5 Avenue, Orange, Virginia 22960. On June 12, 2018 _____, I served the following
6 documents by the method indicated below:

7 PLAINTIFF'S REPLY IN SUPPORT OF HIS MOTION IN LIMINE NO. 4 TO EXCLUDE
8 EVIDENCE AND ARGUMENT THAT PLAINTIFF FAILED HIS QUALIFIED
9 APPLICATOR TEST ON THREE OCCASIONS
10
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14

15 By Electronically Serving the document(s) described above via LexisNexis File & Serve
16 by 7:00 p.m. Pacific Standard Time on all parties appearing on the LexisNexis File & Serve
17 service list.

18 **SEE ATTACHED SERVICE LIST**

19 I declare under penalty of perjury under the laws of the State of California that the above
20 is true and correct.

21 Executed on this June 12, 2018 at Orange, Virginia.

22 

23
24 Curtis G. Hoke,
25 Declarant
26
27
28

1 *Johnson v. Monsanto Company, et al.*
2 **San Francisco Superior Court Case No.: CGC-16-550128**

3 **SERVICE LIST**

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28 **PROOF OF SERVICE**