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ELECTRONICALLY
FILED
*Superior Court of California,
County of San Francisco*
06/12/2018
Clerk of the Court
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON,

Plaintiff,

v.

MONSANTO COMPANY ET AL.,

Defendants.

Case No. CGC-16-550128

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

Trial Judge: TBD

Trial Date: June 18, 2018

Time: 9:30 a.m.

Department: TBD

1 **I. BACKGROUND**

2 Plaintiff's expert Dr. William Sawyer was utilized for the sole purpose of testifying about
3 Plaintiff's exposure to Roundup, not his own. The Defendant is attempting to admit extraneous
4 testimony that has nothing to do with Dr. Sawyer's expert testimony. Dr. Sawyer's opinion and detailed
5 analysis was specifically based on Mr. Johnson's occupational exposure to Roundup and not Dr.
6 Sawyer's limited personal use.

7 Specifically, his expert opinion is focused exclusively on the circumstances relating to Mr.
8 Johnson's exposure to specific Roundup products over an extensive period and in separate
9 circumstances and environments from what Dr. Sawyer's personal use has entailed. His expert opinion
10 was produced only to the extent that the product in this case was mislabeled.

11
12 **II. ARGUMENT**

13 **A. Dr. Sawyer's Personal Use of a Roundup Product was not Used to Develop his Expert**
14 **Testimony and Is Irrelevant to the Matters at Hand.**

15
16 The trial court has discretion to limit expert testimony and exclude that which is irrelevant,
17 unreliable or beyond the area of expertise. See Cal. Evid. Code, § 720; *Korsak v. Atlas Hotels, Inc.*
18 (1992) 2 Cal.App.4th 1516, 1523 ("the courts have the obligation to contain expert testimony within the
19 area of the professed expertise, and to require adequate foundation for the opinion").

20 An expert witness may not be cross-examined regarding matters that are not relevant to the
21 expert's opinion or qualifications. See Cal. Evid. Code, § 721, subd. (a); *People v. Smithey* (1999) 20
22 Cal.4th 936, 979 (Smithey).

23 The Defendant states that Dr. Sawyer's use of the Roundup product in question is
24 indistinguishable from that of the Plaintiff's but for the apparel he wears. What the Defendant
25 conveniently leaves out of this analysis is several major factors that make such a comparison difficult to
26 reconcile. This includes the sheer amount of Roundup products that was utilized by the Plaintiff in
27 comparison to the miniscule amount Dr. Sawyer uses per year. Timing is another key factor in that Dr.

1 Sawyer only uses Roundup on an extremely limited basis per year. *See*, Decl. of Curtis Hoke, **Exhibit C**
2 (February 27, 2018 Deposition of William Sawyer) at 526:2 -527:9. Finally, the area that Dr. Sawyer
3 applies his herbicide is in no shape or form similar to that of the Plaintiff. *Id.* Dr. Sawyer last applied
4 Roundup to a small back yard area whereas the Plaintiff has utilized Roundup in several large areas
5 because of his occupational duties. *Id.* Furthermore because of Dr. Sawyer’s knowledge of the
6 carcinogenic risk of glyphosate he goes to great lengths to avoid glyphosate exposure through diet. *Id.*
7 at 526:2-10.

8 Defendant incorrectly states that Dr. Sawyer and the Plaintiff utilized the same wand when in
9 fact Dr. Sawyer had taken precautions to reduce his exposure to Roundup via his own specially
10 manufactured wand and nozzle. *See*, Decl. of Curtis Hoke, **Exhibit C** (February 27, 2018 Deposition of
11 William Sawyer) at 529:1-9.

12 The Defendant also zones in on a statement by Dr. Sawyer as to a “zero exposure manner” where
13 he utilizes Roundup. This is done in order to find a tenuous link between Dr. Sawyer’s personal use and
14 the detailed examination of Roundup exposure that the Plaintiff underwent. Dr. Sawyer’s personal
15 knowledge of Roundup’s carcinogenic effects guided his Roundup usage and manner of exposure. The
16 Plaintiff had no such knowledge. Due to the small quantity of Roundup that Dr. Sawyer used and the
17 specifically manufactured nozzle that he utilizes, a comparison between the two individuals is lacking.

18 As stated before the Plaintiff was engaged in utilizing Roundup in a completely different
19 environment, fashion and usage amount with far less knowledge of the effects of Roundup than what Dr.
20 Sawyer possessed. To draw attention to the type of apparel that Dr. Sawyer uses is also a failed exercise
21 by the Defendant. Even when wearing slightly more equipment, the factors listed above would inhibit
22 the Plaintiff from utilizing Roundup in the same way as Dr. Sawyer and therefore such comparisons
23 between the two are erroneous.

24 The personal home experiences of Dr. Sawyer with Roundup cannot be compared to the heavy
25 use and exposure that Plaintiff has had and are irrelevant to the issues in this case. This personal home
26 use is inappropriate material for cross-examination and was not used in developing Dr. Sawyer’s expert
27 testimony in any way and therefore should be excluded.

1 Furthermore, there is no allegation in this case that the sale of glyphosate must be banned. This
2 case is about informing the public that unsafe exposure to glyphosate can cause cancer, so that the public
3 can make informed decisions about how to minimize their exposure to glyphosate. Plaintiff do not
4 allege, nor would they, that the *de minimus* use of glyphosate by Dr. Sawyer would be sufficient for him
5 to develop NHL. Because of his avoidance of GMO food, his exposure to glyphosate is actually much
6 less than the average adult. Because Dr. Sawyer’s exposure is not sufficient for him to develop NHL,
7 his use of glyphosate is irrelevant to the issues in this case.

8
9 **B. Any Probative Value of Evidence of Plaintiffs’ Experts’ Personal Use of Roundup is Far**
10 **Outweighed by the Danger of Undue Prejudice.**

11
12 As discussed before the evidence in question is irrelevant and has no bearing on the issues at
13 hand. Even if the Court deems such evidence is relevant it should be excluded under California
14 Evidence Code Section 352 due to its undue prejudice. The evidence in question if admitted, will
15 unfairly encourage the jury to focus on and conflate Dr. Sawyer’s use of his herbicide to Mr. Johnson’s
16 occupational use and equate the two as being similar when they are not.

17 The parallel between the two individuals is simplistic and a ploy by Defendant to distract the jury
18 with extraneous testimony. Such undue prejudice should be excluded. *Vorse v. Sarasy* (1997) 53
19 Cal.App.4th [998,] 1009 [62 Cal.Rptr.2d 164] (“In other words, evidence should be excluded as unduly
20 prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the
21 information, not to logically evaluate the point upon which it is relevant, but to reward or punish one
22 side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudiced
23 because of the substantial likelihood the jury will use it for an illegitimate purpose.”).

1 **C. Plaintiff's Motion is Not Overbroad and Only Seeks to Exclude Improper Expert**
2 **Testimony.**

3
4 The Plaintiff only seeks to exclude improper expert testimony. Under California law, the trial
5 court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on
6 which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the
7 expert relies, or (3) speculative. West's Ann.Cal.Evid.Code §§ 801(b), 802.

8 The California Law Revision Commission comments to Evidence Code section 801 explained
9 that "under existing law, irrelevant or speculative matters are not a proper basis for an expert's opinion.
10 See *Roscoe Moss Co. v. Jenkins* [(1942) 55 Cal.App.2d 369 [130 P.2d 477]] (expert may not base
11 opinion upon a comparison if the matters compared are not reasonably comparable).

12 The Defendant's experts should not be allowed to introduce extraneous testimony that is
13 irrelevant to the matters at hand. Defendant's expert personal experiences should be excluded if they
14 were not used to form an expert opinion.

15
16 **II. CONCLUSION**

17 Based on the foregoing, Plaintiff Dewayne Johnson respectfully requests that the Court enter an
18 Order granting Plaintiff's Motion *in Limine* No. 8.

19
20 Dated: June 12, 2018

Respectfully submitted,

21 **THE MILLER FIRM, LLC**

22
23 By: /s/ Curtis G. Hoke

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PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S MOTION *IN LIMINE* NO. 8

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

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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

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

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28 **PROOF OF SERVICE**