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

DEWAYNE JOHNSON,
Plaintiff,

v.

MONSANTO COMPANY
Defendants.

Case No. CGC-16-550128

**PLAINTIFF'S MOTION TO
PREINSTRUCT THE JURY**

Trial Judge: Hon. Judge Suzanne R. Bolanos

Trial Date: June 18, 2018
Time: 9:30 AM
Department: 504

ELECTRONICALLY
FILED
*Superior Court of California,
County of San Francisco*
06/22/2018
Clerk of the Court
BY: VANESSA WU
Deputy Clerk

1 **PLAINTIFF’S MOTION TO PREINSTRUCT THE JURY**

2 Plaintiff herein respectfully requests that the Court read the following jury instructions prior to
3 opening statements of counsel pursuant to California Rule of Court 2.1035 which provides that:

4 Immediately after the jury is sworn, the trial judge may, in his or her discretion, preinstruct the
5 jury concerning the **elements of the charges or claims**, its duties, its conduct, the order of
6 proceedings, the procedure for submitting written questions for witnesses as set forth in rule
7 2.1033 if questions are allowed, and the legal principles that will govern the proceeding.
(emphasis added)

8 Plaintiff therefore requests that the Court preinstruct the jury on the following 100 series CACI
9 instructions; CACI 200 on the burden of persuasion; and on the elements of Plaintiff’s claims for strict
10 liability failure to warn (CACI 1203), design defect (CACI 1205), and negligence (CACI 1221) as listed
11 below.

12 **100. Preliminary Admonitions**

13 You have now been sworn as jurors in this case. I want to impress on you the seriousness and
14 importance of serving on a jury. Trial by jury is a fundamental right in California. The parties have a
15 right to a jury that is selected fairly, that comes to the case without bias, and that will attempt to reach a
16 verdict based on the evidence presented. Before we begin, I need to explain how you must conduct
17 yourselves during the trial.

18 Do not allow anything that happens outside this courtroom to affect your decision. During the
19 trial do not talk about this case or the people involved in it with anyone, including family and persons
20 living in your household, friends and co-workers, spiritual leaders, advisors, or therapists. You may say
21 you are on a jury and how long the trial may take, but that is all. You must not even talk about the case
22 with the other jurors until after I tell you that it is time for you to decide the case.

23 This prohibition is not limited to face-to-face conversations. It also extends to all forms of
24 electronic communications. Do not use any electronic device or media, such as a cell phone or smart
25 phone, PDA, computer, the Internet, any Internet service, any text or instant-messaging service, any
26 Internet chat room, blog, or website, including social networking websites or online diaries, to send or
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1 receive any information to or from anyone about this case or your experience as a juror until after you
2 have been discharged from your jury duty.

3 During the trial you must not listen to anyone else talk about the case or the people involved in
4 the case. You must avoid any contact with the parties, the lawyers, the witnesses, and anyone else who
5 may have a connection to the case. If anyone tries to talk to you about this case, tell that person that you
6 cannot discuss it because you are a juror. If he or she keeps talking to you, simply walk away and report
7 the incident to the court [attendant/bailiff] as soon as you can.

8 After the trial is over and I have released you from jury duty, you may discuss the case with
9 anyone, but you are not required to do so.

10 During the trial, do not read, listen to, or watch any news reports about this case. This prohibition
11 extends to the use of the Internet in any way, including reading any blog about the case or about anyone
12 involved with it. If you receive any information about this case from any source outside of the courtroom,
13 promptly report it to the court [attendant/bailiff]. It is important that all jurors see and hear the same
14 evidence at the same time.

15 Do not do any research on your own or as a group. Do not use dictionaries, the Internet, or other
16 reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to
17 assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event
18 involved in this case or use any Internet maps or mapping programs or any other program or device to
19 search for or to view any place discussed in the testimony. If you happen to pass by the scene, do not
20 stop or investigate. If you do need to view the scene during the trial, you will be taken there as a group
21 under proper supervision.

22 If you violate any of these prohibitions on communications and research, including prohibitions
23 on electronic communications and research, you may be held in contempt of court or face other sanctions.
24 That means that you may have to serve time in jail, pay a fine, or face other punishment for that violation.

25 It is important that you keep an open mind throughout this trial. Evidence can only be presented
26 a piece at a time. Do not form or express an opinion about this case while the trial is going on. You must
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1 not decide on a verdict until after you have heard all the evidence and have discussed it thoroughly with
2 your fellow jurors in your deliberations.

3 Do not concern yourselves with the reasons for the rulings I will make during the course of the
4 trial. Do not guess what I may think your verdict should be from anything I might say or do.

5 When you begin your deliberations, you may discuss the case only in the jury room and only
6 when all the jurors are present.

7 You must decide what the facts are in this case. Do not let bias, sympathy, prejudice, or public
8 opinion influence your verdict.

9 At the end of the trial, I will explain the law that you must follow to reach your verdict. You must
10 follow the law as I explain it to you, even if you do not agree with the law.

11 **101 Overview of Trial**

12 To assist in your tasks as jurors, I will now explain how the trial will proceed. I will begin by
13 identifying the parties to the case. Dewayne Lee Johnson filed this lawsuit. He is called a plaintiff and
14 he goes by his middle name Lee Johnson. He seeks damages from Monsanto Company, Inc., who is
15 called a defendant.

16 First, each side may make an opening statement, but neither side is required to do so. An opening
17 statement is not evidence. It is simply an outline to help you understand what that party expects the
18 evidence will show. Also, because it is often difficult to give you the evidence in the order we would
19 prefer, the opening statement allows you to keep an overview of the case in mind during the presentation
20 of the evidence.

21 Next, the jury will hear the evidence. Plaintiff Lee Johnson will present evidence first. When
22 Plaintiff Lee Johnson is finished, Defendant Monsanto will have an opportunity to present evidence.

23 Each witness will first be questioned by the side that asked the witness to testify. This is called
24 direct examination. Then the other side is permitted to question the witness. This is called cross-
25 examination.

1 Documents or objects referred to during the trial are called exhibits. Exhibits have numbers and
2 letters so that they may be clearly identified. Exhibits are not evidence until I admit them into evidence.
3 During your deliberations, you will be able to look at all exhibits admitted into evidence.

4 There are many rules that govern whether something will be admitted into evidence. As one side
5 presents evidence, the other side has the right to object and to ask me to decide if the evidence is permitted
6 by the rules. Usually, I will decide immediately, but sometimes I may have to hear arguments outside of
7 your presence.

8 After the evidence has been presented, I will instruct you on the law that applies to the case and
9 the attorneys will make closing arguments. What the parties say in closing argument is not evidence. The
10 arguments are offered to help you understand the evidence and how the law applies to it.

11 **102. Taking Notes During the Trial**

12 You have been given notebooks and may take notes during the trial. Do not take the notebooks
13 out of the courtroom or jury room at any time during the trial. You may take your notes into the jury
14 room during deliberations.

15 You should use your notes only to remind yourself of what happened during the trial. Do not let
16 your note-taking interfere with your ability to listen carefully to all the testimony and to watch the
17 witnesses as they testify. Nor should you allow your impression of a witness or other evidence to be
18 influenced by whether or not other jurors are taking notes. Your independent recollection of the evidence
19 should govern your verdict, and you should not allow yourself to be influenced by the notes of other
20 jurors if those notes differ from what you remember.

21 The court reporter is making a record of everything that is said. If during deliberations you have
22 a question about what the witness said, you should ask that the court reporter's records be read to you.
23 You must accept the court reporter's record as accurate.

24 At the end of the trial, your notes will be collected and retained by the court but not as a part of
25 the case record.

1 **105. Insurance**

2 You must not consider whether any of the parties in this case has insurance. The presence or
3 absence of insurance is totally irrelevant. You must decide this case based only on the law and the
4 evidence.

5 **106. Evidence**

6 You must decide what the facts are in this case only from the evidence you see or hear during the
7 trial. Sworn testimony, documents, or anything else may be admitted into evidence. You may not consider
8 as evidence anything that you see or hear when court is not in session, even something done or said by
9 one of the parties, attorneys, or witnesses.

10 What the attorneys say during the trial is not evidence. In their opening statements and closing
11 arguments, the attorneys will talk to you about the law and the evidence. What the lawyers say may help
12 you understand the law and the evidence, but their statements and arguments are not evidence.

13 The attorneys' questions are not evidence. Only the witnesses' answers are evidence. You should
14 not think that something is true just because an attorney's question suggests that it is true. However, the
15 attorneys for both sides can agree that certain facts are true. This agreement is called a "stipulation." No
16 other proof is needed and you must accept those facts as true in this trial.

17 Each side has the right to object to evidence offered by the other side. If I do not agree with the
18 objection, I will say it is overruled. If I overrule an objection, the witness will answer and you may
19 consider the evidence. If I agree with the objection, I will say it is sustained. If I sustain an objection, you
20 must ignore the question. If the witness did not answer, you must not guess what he or she might have
21 said or why I sustained the objection. If the witness has already answered, you must ignore the answer.

22 An attorney may make a motion to strike testimony that you have heard. If I grant the motion,
23 you must totally disregard that testimony. You must treat it as though it did not exist.

24 **107. Witnesses**

25 A witness is a person who has knowledge related to this case. You will have to decide whether
26 you believe each witness and how important each witness's testimony is to the case. You may believe
27 all, part, or none of a witness's testimony.

1 In deciding whether to believe a witness's testimony, you may consider, among other factors, the
2 following:

3 (a) How well did the witness see, hear, or otherwise sense what he or she described in court?

4 (b) How well did the witness remember and describe what happened?

5 (c) How did the witness look, act, and speak while testifying?

6 (d) Did the witness have any reason to say something that was not true? For example, did the
7 witness show any bias or prejudice or have a personal relationship with any of the parties involved in the
8 case or have a personal stake in how this case is decided?

9 (e) What was the witness's attitude toward this case or about giving testimony?

10 Sometimes a witness may say something that is not consistent with something else he or she said.
11 Sometimes different witnesses will give different versions of what happened. People often forget things
12 or make mistakes in what they remember. Also, two people may see the same event but remember it
13 differently. You may consider these differences, but do not decide that testimony is untrue just because
14 it differs from other testimony.

15 However, if you decide that a witness did not tell the truth about something important, you may
16 choose not to believe anything that witness said. On the other hand, if you think the witness did not tell
17 the truth about some things but told the truth about others, you may accept the part you think is true and
18 ignore the rest.

19 Do not make any decision simply because there were more witnesses on one side than on the
20 other. If you believe it is true, the testimony of a single witness is enough to prove a fact.

21 **111. Instruction to Alternate Jurors**

22 As an alternate juror, you are bound by the same rules that govern the conduct of the jurors who
23 are sitting on the panel. You will observe the same trial and should pay attention to all of my instructions
24 just as if you were sitting on the panel. Sometimes a juror needs to be excused during a trial for illness or
25 some other reason. If that happens, an alternate will be selected to take that juror's place.

1 **112. Questions From Jurors**

2 If, during the trial, you have a question that you believe should be asked of a witness, you may
3 write out the question and send it to me through my courtroom staff. I will share your question with the
4 attorneys and decide whether it may be asked.

5 Do not feel disappointed if your question is not asked. Your question may not be asked for a
6 variety of reasons. For example, the question may call for an answer that is not allowed for legal reasons.
7 Also, you should not try to guess the reason why a question is not asked or speculate about what the
8 answer might have been. Because the decision whether to allow the question is mine alone, do not hold
9 it against any of the attorneys or their clients if your question is not asked.

10 Remember that you are not an advocate for one side or the other. Each of you is an impartial
11 judge of the facts. Your questions should be posed in as neutral a fashion as possible. Do not discuss any
12 question asked by any juror with any other juror until after deliberations begin.

13 **113. Bias**

14 Each one of us has biases about or certain perceptions or stereotypes of other people. We may be
15 aware of some of our biases, though we may not share them with others. We may not be fully aware of
16 some of our other biases.

17 Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect
18 our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we
19 make important decisions.

20 As jurors you are being asked to make very important decisions in this case. You must not let
21 bias, prejudice, or public opinion influence your decision. You must not be biased in favor of or against
22 any party or witness because of his or her disability, gender, race, religion, ethnicity, sexual orientation,
23 age, national origin, or socioeconomic status.

24 Your verdict must be based solely on the evidence presented. You must carefully evaluate the
25 evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or
26 witness.

1 **114. Bench Conferences and Conferences in Chambers**

2 From time to time during the trial, it may become necessary for me to talk with the attorneys out
3 of the hearing of the jury, either by having a conference at the bench when the jury is present in the
4 courtroom, or by calling a recess to discuss matters outside of your presence. The purpose of these
5 conferences is not to keep relevant information from you, but to decide how certain evidence is to be
6 treated under the rules of evidence. Do not be concerned about our discussions or try to guess what is
7 being said. I may not always grant an attorney’s request for a conference. Do not consider my granting
8 or denying a request for a conference as any indication of my opinion of the case or of my view of the
9 evidence.

10 **200. Obligation to Prove—More Likely True Than Not True:**

11 A party must persuade you, by the evidence presented in court, that what he or she is required to
12 prove is more likely to be true than not true. This is referred to as “the burden of proof.” After weighing
13 all of the evidence, if you cannot decide that something is more likely to be true than not true, you must
14 conclude that the party did not prove it. You should consider all the evidence, no matter which party
15 produced the evidence. In criminal trials, the prosecution must prove that the defendant is guilty beyond
16 a reasonable doubt. But in civil trials, such as this one, the party who is required to prove something need
17 prove only that it is more likely to be true than not true.

18 **1203. Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual**
19 **Elements:**

20 Mr. Johnson claims that Roundup’s design was defective because Roundup did not perform as
21 safely as an ordinary consumer would have expected it to perform. To establish that claim, Mr. Johnson
22 must prove the following:

- 23 1. That Monsanto manufactured, distributed or sold Roundup;
- 24 2. That the Roundup used by Lee Johnson did not perform as safely as an ordinary consumer
25 would have expected it to perform when used or misused in an intended or reasonably
26 foreseeably way;
- 27 3. That Mr. Johnson was harmed; and
- 28

1 4. That Roundup’s failure to perform safely was a substantial factor in causing Mr. Johnson’s
2 harm

3 **1205. Strict Liability – Failure to Warn – Essential Factual Elements**

4 Mr. Johnson claims that Roundup lacked sufficient warnings of potential risks or side effects. To
5 establish this claim, Mr. Johnson must prove all of the following:

- 6 1. That Monsanto manufactured, distributed or sold Roundup;
- 7 2. That Roundup had potential risks or side effects that were known or knowable in light of the
8 knowledge that was generally accepted in the scientific community at the time of the
9 manufacture, distribution, and sale of Roundup;
- 10 3. That the potential risks or side effects presented a substantial danger when Roundup is used
11 in an intended or reasonably foreseeable way;
- 12 4. That ordinary consumers would not have recognized the potential risks or side effects;
- 13 5. That Monsanto failed to adequately warn of the potential risks or side effects;
- 14 6. That Mr. Johnson was harmed; and
- 15 7. That the lack of sufficient warnings was a substantial factor in causing Mr. Johnson’s harm.

16

17 **1221 Negligence – Basic Standard of Care (Modified)**

18 A designer, manufacturer, supplier is negligent if it fails to use the amount of care in designing,
19 manufacturing or testing the product that a reasonably careful designer, manufacturer, supplier would use
20 in similar circumstances to avoid exposing others to a foreseeable risk of harm.

21 If failure to conduct reasonable testing would have led to the product causing substantial harm,
22 the manufacturer is chargeable with negligence if the defective condition could have been disclosed by
23 reasonable testing.

24 In determining whether Monsanto used reasonable care, you should balance what Monsanto knew
25 or should have known about the likelihood and severity of potential harm from the product against the
26 burden of taking safety measures to reduce or avoid the harm.

1 Dated: June 22, 2018

Respectfully submitted,

2 **THE MILLER FIRM, LLC**

3
4 By: /s/ Curtis G. Hoke

Curtis G. Hoke (SBN 282465)

Timothy Litzenburg (*Appearance pro hac vice*)

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11 *Attorneys for Plaintiff,*

12 *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 22, 2018 _____, I served the following
6 documents by the method indicated below:

7 **PLAINTIFF'S MOTION TO PREINSTRUCT THE JURY**

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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 22, 2018 at Orange, Virginia.

22
23 

24 Curtis G. Hoke,
25 Declarant

26
27
28 **PROOF OF SERVICE**

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