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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

**Trial Brief in Support of Plaintiff's Requested
Jury Instructions CACI 431, CACI 3928**

Hon. Judge Curtis E.A. Karnow

Trial Brief in Support of Plaintiff's Requested Jury Instructions CACI 431, CACI 3928

A. Introduction

The same set of facts support the inclusion of CACI 431 and CACI 3928 in the jury instructions in this case. There is evidence that RangerPro acts as both a tumor initiator and tumor promoter. There is also evidence that African-Americans are at an increased risk of mycosis fungoides and are therefore more susceptible to carcinogens. Dr. Nabhan, testified that either a genetic

1 predisposition or a surrogate factor associated with Mycosis Fungoides could work concurrently with
2 RangerPro to cause Mr. Johnson’s NHL. Dr. Kuzel agrees that there is a higher risk of mycosis
3 fungoides among the African-American community.

4 Plaintiff has never asserted nor was he required to assert that RangerPro was the sole cause of
5 his NHL. Plaintiff was consistent in stating that RangerPro was a substantial factor in causing his
6 NHL, not the sole factor. As Plaintiff’s counsel stated in opening arguments, “And when we talked
7 about did it cause Mr. Johnson's cancer, we're not talking about definitively or is it the only cause.
8 We're asking, did it substantially contribute to his physical condition?” Tr. at 1430:24-1431:10
9 (7/9/2018).

10 With respect to cancer Dr. Portier testified that “[s]ome people are very susceptible, and it
11 happens fast. Other people are very resistant, and it takes a very long time.” Tr. at 2371:20-24
12 (7/16/2018). Dr. Portier also testified that glyphosate “has the potential to be a promoter of
13 carcinogenesis.” Tr. at 1861:6-13, 1863:17-20. (7/12/2018). Dr. Nabhan testified that Mr. Johnson
14 was predisposed and thus more susceptible to developing Mycosis Fungoides:

15 Q. And it is certainly possible that something in Mr. Johnson's genetic makeup, for instance,
16 predisposed him to the disease; is that right?

17 A. I think, you know, being of the African American race, it's a well-known risk factor, and we
18 actually – I believe that this is not necessarily a race thing. I think it's a surrogate for something
19 else. Maybe it's a genetic makeup in the African American race, but just the fact you have a
20 genetic makeup or a particular reason to develop the disease, it doesn't mean that there are other
21 factors that may lead to substantially increased risk of developing the disease. I mean, again, it's
22 -- you know, again, I don't want -- there are many things **that you could have more than one
23 risk factor, but one could actually make that risk substantially higher.**

24 Tr. at 2999:1-16 (7/20/2018)

25 Dr. Kuzel agreed and explained at deposition that African Americans are at an increased risk of
26 Mycosis Fungoides and that the link “most likely is either related to some sort of environmental thing
27 that African-Americans preferentially are exposed to compared to Caucasians and Asians **or there's a
28 genetic predisposition that we don't understand yet and there is some evidence for that.**” Kuzel
Dep. 93:1-6.

1 Because there is testimony that Mr. Johnson’s race and his RangerPro use could combine to
2 make his risk of Mycosis Fungoides substantially higher the jury should be instructed on concurrent
3 causation. Because there is evidence that Mr. Johnson is genetically or otherwise predisposed to
4 developing Mycosis Fungoides the instruction for the “Unusually Susceptible Plaintiff” should be
5 given.

6 **B. Argument**

7 **1. Plaintiff requests that the jury be instructed on CACI 431.**

8
9 CACI 431 provides:

10 A person's negligence may combine with another factor to cause harm. If you find that
11 Monsanto's negligence was a substantial factor in causing Johnson's harm, then Monsanto is
12 responsible for the harm. Monsanto cannot avoid responsibility just because some other person,
13 condition, or event was also a substantial factor in causing Johnson's harm.

14 There is no requirement that the other cause be the negligence of another actor. The other cause
15 can simply be a condition with contributes to the cancer. Having a genetic predisposition due to race
16 would be a condition that potentially contributed to Mr. Johnson’s NHL.

17 It is well-established that the other concurrent cause need not arise from tortious conduct of
18 another actor. In fact, the Plaintiff’s own physical condition can be the contributing cause. As
19 explained recently in *Uriell v. Regents of Univ. of California*:

20
21 “CACI No. 431 is necessary to explain to the jury a “plaintiff need not prove that the
22 defendant's negligence was the sole cause of plaintiff's injury in order to recover. Rather it is
23 sufficient that defendant's negligence is a legal cause of injury, even though it operated in
24 combination with other causes, whether tortious or nontortious.” (*Logacz v. Limansky* (1999)
25 71 Cal.App.4th 1149, 1158, 84 Cal.Rptr.2d 257.) Failure to give an instruction on concurrent
26 and multiple causes, where appropriate, is reversible error. (*Id.* at p. 1166, 84 Cal.Rptr.2d 257.)

27 Uriells established through Dr. Brouillard's testimony the Regents' negligence was a substantial
28 factor in causing Kastan to die 10 years earlier than she would have if she had been timely
diagnosed and treated. The fact she had cancer, which acted concurrently, as another substantial
factor in causing her death, did not relieve the Regents of liability. CACI No. 431 properly
explained this issue of concurrent substantial causes to the jury.”

234 Cal. App. 4th 735, 747, 184 Cal. Rptr. 3d 79, 87 (2015)

1 This principle has long roots in California law. In *Hughey v. Candoli*, a victims own biological
2 susceptibility was found to be a concurrent:

3 “If it were conceded that defendant had established as matter of law that congenital heart
4 disease was a cause of death of this baby, that did not preclude a recovery by plaintiffs, for
5 defendant's proof showed two concurring causes, atelectasis and heart disease. Assuming that
6 the heart defect was prenatal and in no wise affected by the accident, it nevertheless appears
7 that that was not true of the atelectasis. We have then concurring proximate causes, one of
8 which flowed directly from the negligence of defendant. In this situation the concurrence of the
9 nontortious cause does not absolve defendant from liability for the tortious one.”

10 159 Cal. App. 2d 231, 240, 323 P.2d 779 (1958); See also *Kerby v. Elk Grove Union High Sch. Dist.*, 1
11 Cal. App. 2d 246, 252, 36 P.2d 431 (1934) (“But if the rupture of the artery was in fact caused by the
12 blow of the basketball, and that act of throwing the ball could be charged to the negligence of the agent
13 of the school district, liability might follow, even though the blow merely aggravated or accelerated the
14 physical defect which had previously existed.”)

15 In *Logacz v. Limansky*, a medical malpractice case, Plaintiffs alleged the decedent suffered
16 from a blood clot because of the Defendants' negligence. *Logacz v. Limansky* (1999) 71 Cal.App.4th
17 1149, 1158-1159. The Defendants, however, asserted “that nothing [defendant] did caused [decedent]'s
18 death. That unfortunate outcome ... was due to the fact of her morbid obesity, her sedentary nature...”
19 Id. Over Plaintiffs' objection the trial court failed to instruct the jury on concurrent causes. Id. The
20 appeals court overturned the decision, holding that the failure to instruct the jury on concurrent causes
21 was in error and prejudicial to Plaintiff, holding that Defendant’s argument regarding alternate causes:

22 “...highlight the serious consequences which can flow from a failure to give a concurring
23 causation instruction ... the jury was never told how to evaluate, weigh, or compare those
24 causes. Rather, it was led to believe, based on defense counsel's argument, that a number of
25 causes mandated a defense verdict.”

26 Id. at 1163.

27 Therefore, Mr. Johnson’s own biological condition putting him at increased risk of Mycosis
28 Fungoides can be considered a concurrent cause for purposes of CACI 431.

1 **2. Plaintiff requests that the jury be instructed on CACI 3928**

2 CACI 3928 provides that:

3 You must decide the full amount of money that will reasonably and fairly compensate Mr. Johnson
4 for all damages caused by the wrongful conduct of Monsanto, even if Mr. Johnson was more
5 susceptible to injury than a normally healthy person would have been, and even if a normally healthy
6 person would not have suffered similar injury.

7 California’s Supreme Court specifically has provided instruction as to preexisting conditions
8 and/or the contention that a plaintiff is particularly susceptible to injury. For example, in *Soule*, the
9 Court stated that even if a plaintiff without a preexisting condition would “probably have suffered less
10 injury or no injury does not exonerate a defendant from liability.” *Soule v. General Motors* (1994) 8
11 Cal.4th 548, 570-571 (emphasis added). This is because of the well-settled rule that a “tortfeasor takes
12 the person he injures as he finds him.” *Rideau v. Los. Angeles Transit Lines* (1954) 124 Cal.App.2d
13 466, 471. To be clear, “[i]f, by reason of some preexisting condition, his victim **is more susceptible to**
14 **injury**, the tortfeasor is not thereby exonerated from liability.” *Id* (emphasis added).

15 There is sufficient evidence to demonstrate that Mr. Johnson was more susceptible to developing
16 Mycosis Fungoides than the normally healthy person. This is not to suggest that he wasn’t healthy in
17 most respects, but everyone carries certain genes that make them more susceptible to certain diseases.
18 Absent exposure to an environment toxin, those diseases may never develop and the person would not
19 be considered unhealthy. See e.g. *Holley v. Scott*, No. 1:12-CV-01090-MJS, 2013 WL 3992129, at 4
20 (E.D. Cal. Aug. 1, 2013), *aff’d*, 576 F. App’x 670 (9th Cir. 2014) (“Plaintiff also alleges that as an
21 African American he is more susceptible to Valley Fever. The vulnerability of particular races,
22 including African American, has been held to be sufficiently serious to satisfy the first element of an
23 Eighth Amendment claim based on Valley Fever exposure.”)

24 Dr. Nahban and Dr. Kuzel both presented evidence explaining that Mr. Johnson’s race predisposed
25 him to a greater risk of Mycosis Fungoides. Because a jury could find that Mr. Johnson was
26 genetically or otherwise predisposed to Mycosis Fungoides the jury should be instructed on CACI
27 3928.
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