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ALAMEDA COUNTY

NOV 15 2018

CLERK OF THE SUPERIOR COURT

By Am Miller Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

COORDINATION PROCEEDING SPECIAL  
TITLE (RULE 3.550)

Case No. RG 17862702

**ROUNDUP PRODUCTS CASES**  
JCCP No. 4953

ORDER GRANTING PLAINTIFFS'  
MOTION FOR TRIAL PREFERENCE

*THIS ORDER RELATES TO:*

ALVA AND ALBERTA PILLIOD,

Plaintiffs,

v.

MONSANTO COMPANY; WILBUR-ELLIS  
COMPANY, LLC; and WILBUR-ELLIS  
FEED, LLC,

Defendants.

Plaintiffs Alva and Alberta Pilliod move the Court for mandatory trial preference under Code of Civil Procedure ["CCP"] Section 36(a). The Court heard argument on October 9, 2018, and continued the hearing to November 7, 2018 to allow the parties an opportunity to submit further evidence regarding the Pilliods' health and to make further argument.

1 Having considered the papers and arguments, the Pilliods' motion for trial preference is  
2 **GRANTED** for the reasons discussed below.

3 **I. THE OBJECTIONS TO DR. NABHAN'S TESTIMONY ARE OVERRULED**

4 Defendants' objections to the declaration of Dr. Chadi Nabhan are based primarily on the  
5 degree to which Dr. Nabhan's opinions are well founded upon the medical literature. In the  
6 absence of a showing of prejudice, the Court holds that these critiques go to the weight of Dr.  
7 Nabhan's opinions, not their admissibility. Therefore, Defendants' objections to the declaration  
8 of Dr. Nabhan are OVERRULED.

9 **II. THE REQUEST FOR ORAL TESTIMONY BY THE PILLIODS IS DENIED**

10 Evidence received at a law and motion hearing must be presented by declaration or  
11 request for judicial notice unless otherwise allowed by prior order. (R. Ct. 3.1306(a).) The  
12 Pilliods have not sought such an order, and the Court has not issued one. Therefore, if the  
13 Pilliods wished to provide live testimony their counsel had to seek leave to introduce oral  
14 evidence by serving and filing a written notice, which can be imaged and included in the Court's  
15 record, no later than three court days before the hearing. (R. Ct. 3.1306(b).)

16 The Pilliods' counsel made a same-day request to present oral testimony at the October 9  
17 hearing, which the Court denied at the hearing for lack of appropriate notice or prior leave. Late  
18 in the afternoon of November 5, the Court received a letter from the Pilliods' counsel asserting  
19 that counsel intended to have Alberta Pilliod testify at the November 7 hearing. Counsel's  
20 attempt at notice in the form of the November 5 letter is procedurally improper as the letter was  
21 not filed and was provided less than three days before the hearing. No other notice was provided  
22 to the Court of any intent to present oral testimony at the November 7 hearing.

23 Even when given proper notice, the Court has discretion to receive or exclude oral  
24 testimony at a law and motion hearing. The Court already continued this hearing by a month to  
25 allow the parties to gather, prepare, and submit written evidence. At the prior hearing on October  
26 9, defense counsel objected to the offer of oral testimony by the Pilliods for lack of notice.

1 Defense counsel also objected to the lack of a fair opportunity to prepare a cross-examination  
2 without the support of medical experts. The Pilliods had more than adequate notice that they  
3 should prepare and present their best case on written evidence, and they were given an  
4 opportunity to do so in their supplemental declarations.

5 For the want of proper procedure and in the exercise of its broad discretion, the Court  
6 declined to allow oral testimony at the continued hearing and will not schedule a further hearing  
7 to take the testimony.

### 8 **III. LEGAL STANDARDS FOR TRIAL PREFERENCE**

9 CCP Section 36(a) states that a Court must grant trial preference when a party is over 70  
10 years of age and the Court finds that “(1) The party has a substantial interest in the action as a  
11 whole [; and] (2) The health of the party is such that a preference is necessary to prevent  
12 prejudicing the party’s interest in the litigation.” Because this code section is mandatory and  
13 considers only the health of the moving party, the Court may not engage in a weighing of  
14 interests or comparison of potential prejudice to the opposing party once it finds that the moving  
15 party has made its showing. (*Fox v. Superior Court* (2018) 21 Cal.App.5th 529, 535.)

16 The parties do not dispute that the Pilliods are over 70 years of age and have a substantial  
17 interest in the action. Therefore, the below analysis focuses on the Pilliods’ health and whether  
18 the status of their health is such that it necessitates the grant of trial preference.

### 19 **IV. THE PILLIODS’ POOR HEALTH MANDATES TRIAL PREFERENCE**

20 The parties discuss the Pilliods’ health in terms of the risk of relapse of their cancers, so  
21 the Court begins its discussion there. If a relapse were to occur, that would almost certainly  
22 prejudice either Plaintiff’s interest in this case.

23 Dr. Nabhan opines that Mrs. Pilliod is at higher risk of relapse because she has already  
24 experienced one relapse and suggests that her age is a negative factor. (Nabhan Decl. ¶¶ 7-9.)  
25 Defendants’ expert, Dr. David Gordon, points out that Mrs. Pilliod has not relapsed for roughly  
26 two years while continuing to take maintenance chemotherapy and he convincingly distinguishes

1 the studies relied on by Dr. Nabhan. (2nd Gordon Decl. ¶¶ 14-20.) Plaintiffs argue that Mrs.  
2 Pilliod is approaching the “median survival” that was predicted when she was diagnosed with her  
3 condition. (Nabhan Decl ¶ 7.) The Court does not find this argument convincing and does not  
4 rely on it. The median survival at diagnosis is not a ticking time bomb, and it is not reliably  
5 indicative of an individual person’s current expected survival or prognosis.

6 Likewise, the Court does not find the argument regarding Mr. Pilliod’s risk of relapse  
7 persuasive as it is clear that he is in remission. (Gordon Decl. ¶ 7; Rebuttal Nabhan Decl. ¶ 26.)  
8 Although Dr. Nabhan notes that late relapses of large cell lymphomas have been reported in the  
9 literature and opines that a relapse would result in a short life expectancy (Nabhan Decl. ¶ 8;  
10 Rebuttal Nabhan Decl ¶¶ 26-28.), the literature he cites shows such late relapses are relatively  
11 rare. (See Rebuttal Nabhan Decl. ¶ 27.a–.c.)

12 The Court finds that the risk of relapse alone does not necessitate trial preference to avoid  
13 prejudice to the Pilliods’ interests. But relapse is not the end of the analysis. The Pilliods also  
14 describe other health conditions that risk prejudice to their interests in trial. For example, Mrs.  
15 Pilliod declares that her health has been “going downhill” since her 2016 relapse. (Alberta Pilliod  
16 Decl. ¶ 8.) One of the first symptoms of Mrs. Pilliod’s cancer was a sudden bout of vertigo that  
17 caused her to fall and hit her head, and she explains that her balance has been poor since her  
18 initial cancer diagnosis to date. (*Id.* ¶ 7.) Mrs. Pilliod regularly falls and is fearful of again hitting  
19 her head. (*Ibid.*) Her medical records reflect continuing “spells of trembling” and Mrs. Pilliod  
20 describes a seizure in September 2018 that caused her to suddenly lose balance and make  
21 involuntary rocking movements. (*Id.* ¶ 8; AP-08-000015; AP-08-000034.)

22 Mrs. Pilliod’s medical records indicate that she is “[o]verall doing well.” (AP-07-  
23 000043.) She has some complaints about appetite, but her weight is remaining roughly the same.  
24 (Rebuttal Nabhan Decl. ¶ 23; 2nd Gordon Decl. ¶ 21; *compare* AP-08-000033 [212 lbs. on  
25 10/5/2018], *with* AP-08-000014 [213 lbs. on 9/20/2018].) Dr. Gordon declares that the symptoms  
26 that Mrs. Pilliod describes as side-effects of her maintenance medication are not consistent with

1 the expected side-effect profile of her medication. (2nd Gordon Decl. ¶ 22.) Whatever the cause,  
2 however, Mrs. Pilliod experiences a number of significant health complaints, including dizziness,  
3 irregular gait, and double vision. Mrs. Pilliod drives her car with one eye shut. (AP-08-000034.).  
4 She often needs to keep her hands on the walls to walk around her home. (Alberta Pilliod Decl.  
5 ¶ 7.) She reports that, although her situation is not as bad as her husband's, she does sometimes  
6 experience "fogginess in [her] thought process." (*Ibid.*) Whatever her prognosis or chances of  
7 relapse, and whether or not she is doing well in the context of her serious disease and treatment,  
8 Mrs. Pilliod is not in good health.

9 Mr. Pilliod declares that he has mini-seizures approximately 10 days per month, which  
10 significantly impair his ability to concentrate and communicate. (See 2nd Gordon Decl. ¶ 26  
11 [medical records show that mini-seizures are consistent at around 10 days per month]; *see also*  
12 Decl. of Alberta Pilliod ¶ 12 ["[M]y husband, Alva Pilliod, currently suffers from mini seizures,  
13 which I have witnessed him experience approximately ten (10) days per month."].) Dr. Gordon  
14 explains that Mr. Pilliod's cognitive functioning and spatial reasoning remain consistent with an  
15 estimate of his pre-cancer abilities and do not show a significant decline. (See 2nd Gordon Decl.  
16 ¶ 26.) Yet Mr. Pilliod also reports significant episodes of foggiess of thought, an impaired  
17 ability to concentrate and communicate, and difficulty reading, speaking, and recognizing letters  
18 and numbers. (Decl. of Alva Pilliod ¶ 6; Rebuttal Nabhan Decl. ¶ 31; AP-02-000002.) Even apart  
19 from his mini-seizures, he struggles to articulate words. (*Ibid.*) He requires the use of a cane to  
20 get around his home. (Decl. of Alva Pilliod ¶ 6.) His medical records indicate he has mild  
21 aphasia and a recent MR scan shows "inter[n]al chronic lacunar infarct in the left posterior  
22 centrum semiovale," more commonly called a stroke. (AP-02-000003.) Mr. Pilliod also avers  
23 generally that his health has been going "downhill" since his initial cancer diagnosis and is  
24 continuing to get worse. (Decl. of Alva Pilliod ¶ 6.)

25 Defendants' expert, oncologist Dr. Gordon, opines that Mr. and Mrs. Pilliod are both in  
26 complete remission and that their prognosis is good. He opines that Mr. Pilliod "is well beyond

1 the period when relapse would be expected to occur” and “has the normal, substantial life  
2 expectancy of a 76-year-old male.” (Gordon Decl. ¶ 10, 11.) He opines that Mrs. Pilliod is in  
3 complete remission and receiving substantial benefits from her maintenance chemotherapy and a  
4 score of 90 to 100 out of 100 on the Karnofsky Performance Scale, a measurement of patients’  
5 overall performance. (Gorson Decl. ¶ 17, 19, 20.) Dr. Gordon does not, however, deny or rebut  
6 the existence of the Pilliods’ other health conditions and does not opine on their health other than  
7 in the context of their risk of relapse and life expectancy.

8       The *Fox v. Superior Court* case featured prominently at oral argument on the Court’s first  
9 hearing on this motion. ((2018) 21 Cal.App.5th 529.) In that case, an 81-year old plaintiff moved  
10 for trial preference under CCP Section 36(a). (*Id.* at pp.531-532.) Ms. Fox was suffering from  
11 Stage-IV lung cancer and was undergoing chemotherapy treatments every three weeks. (*Id.* at  
12 p.532.) Her cancer was “[r]esponding to current chemotherapy and . . . in partial remission . . . .”  
13 (*Ibid.*) Ms. Fox also suffered from the ongoing foggiess of thought and memory difficulties  
14 related to chemotherapy, often colloquially referred to as “chemo brain.” (*Ibid.*) The Court of  
15 Appeal noted that Ms. Fox was undergoing treatment for cancer that was only partly in  
16 remission, that Section 36(a) trial preference does not require a party’s imminent death or  
17 incapacity, and that “we see no genuine dispute that Ms. Fox is very sick.” (*Id.* at p.535) Health,  
18 as used in Section 36(a), encompasses more than life expectancy and the Court must consider  
19 factors such as a person’s state of physical discomfort, ability to perform basic life functions, and  
20 ability to recall facts, communicate, and dedicate time and attention to a litigation. (*See ibid.*)

21       The standard under Section 36(a) and the *Fox* case is not whether the moving party is  
22 getting worse. The test is whether the moving party’s current health is “such that a preference is  
23 necessary to prevent prejudicing the party’s interest in the litigation.” (CCP § 36(a).) Although  
24 Ms. Fox’s situation and prognosis were direr than the Pilliods’, the evidence before the Court is  
25 enough to find that the Pilliods are still “very sick.” Their current state of health makes it  
26 possible, but difficult, for them to travel to Court and participate in the trial. Mrs. Pilliod is on a



1 maintenance regimen of chemotherapy to prevent relapse. Both have significant cognitive or  
2 functional impairments that greatly impact their ability to carry on the functions of everyday  
3 living. Both have significant and reasonably founded fears that their health will decline. *Fox*  
4 establishes that plaintiffs health may be "such that a preference is necessary to avoid  
5 prejudice[e]" without evidence that they face an imminent decline and risk of death or greater  
6 disability.

7 The Court accordingly finds that the Pilliods' health is such that trial preference is  
8 necessary to avoid prejudice and grants trial preference under Section 36(a).

9 **V. ORDER**

10 The Pilliods' motion for trial preference is **GRANTED**.

11 At the November 7 hearing, Plaintiffs' counsel clearly stated that the Pilliods would not  
12 object to a trial date in March or April 2019, even if set more than 120 days after this hearing.

13 Trial is set for March 18, 2019. The pretrial conference date and a mandatory judicial  
14 settlement conference will be scheduled at a later time.

15  
16  
17 Dated: November 15, 2018



18 Ioana Petrou  
19 Judge of the Superior Court  
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# CLERK'S DECLARATION OF SERVICE

Coordination Proceeding Special Title (Rule 3.550)  
Roundup Products Cases  
Alameda County Superior Court  
Case No. JCCP 4953  
(RG17-862702)

I certify that I am not a party to this cause and that on the date stated below I caused a true copy of the foregoing **ORDER GRANTING PLAINTIFFS' MOTION FOR TRIAL PREFERENCE** to be served electronically, addressed as follows:

- (X) E-MAIL OR ELECTRONIC TRANSMISSION: In accordance with the Court's Order (CMO No. 2) governing Case No. JCCP 4953 authorizing all documents to be served electronically upon interested parties via Case Anywhere and its litigation system...

I declare under penalty of perjury that the same is true and correct.

Executed on November 15, 2018

Chad Finke  
Executive Officer/Clerk of the Superior Court

By:   
Pam Williams, Deputy Clerk  
Department 17