IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

KYLE CHAPLICK, *et al.*, Plaintiffs, v. MONSANTO COMPANY, Defendant.	Case No. 19SL-CC04115 Division 1

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR A MULTIPLE PLAINTIFF TRIAL SETTING

While venue circumstances have changed, the fact remains that, after more than a year of tireless preparation by both sides, this case, and each of its plaintiffs, is trial ready and should be set for trial soon. Plaintiffs have submitted a logical approach to efficiently and effectively handle in a single trial the common claims of thirteen Plaintiffs against one defendant, Monsanto, rather than separating the plaintiffs into 13 multi-week trials spanning well over an entire year.

As sometimes happens in litigation, rules and/or procedures change mid-stream, and parties must adapt to those changes. That is what the *Chaplick* Plaintiffs met with here: following the Supreme Court's decision in *State ex rel. Johnson & Johnson v. Burlinson,* No. SC96704 (Mo., February 13, 2019) ("*J & J*"), the Supreme Court ultimately issued a preliminary writ to consider whether its holding in *J & J* extends to cases such as *Winston v. Monsanto.* There was a valid reason that the Plaintiffs did not withdraw their opposition to severance and transfer in *Winston* earlier: the Supreme Court had previously denied the very same writ filed by Monsanto, albeit allowing Monsanto to raise the issue again in the circuit court and because *Winston* presented

different facts from J & J.[1] But when the Court issued the preliminary writ soliciting full briefing on the issue of *J & J* which went well beyond the October 2015 trial date, the Plaintiffs decided to withdraw their opposition to Monsanto's motion to sever and to transfer their case to this Court to avoid further delay of their trial. The Plaintiffs have not been "manipulating" or "gaming" the court system.

Failing their "gamesmanship" argument, Monsanto also argues that a jury cannot comprehend a multi-plaintiff trial and, as a result, Monsanto's due process rights would be violated if the Court were to order one here. *See generally* "Defendant Monsanto Company's Opposition to Plaintiffs' Motion for Multiple Plaintiff Trial Settings," dated Nov. 4, 2019 ("Mon. Opp."). That is non-sensical – juries around the country hear and decide multi-plaintiff trials. Monsanto's posturing collapses under any scrutiny and, accordingly, Plaintiffs respectfully request that the Court grant their instant motion and schedule their case for a single trial as soon as the Court's calendar allows in 2020.

BACKGROUND

Plaintiffs filed their original petition on March 12, 2018, in the Circuit Court of St. Louis City. Missouri's permissive joinder statute, in effect in 2018, was and remains applicable to their petition. Consistent with this joinder statute and related jurisprudence, the *Chaplick* Plaintiffs are properly joined. All of the Plaintiffs' claims arise from the "same transaction, occurrence, or series of transactions or occurrences" and there are questions of law and fact common to all of them that will arise in this action. Each of the *Chaplick* Plaintiffs used Roundup® products with the same

[1] The *Winston* Plaintiffs believed those facts were substantially distinguishable from *J & J*, thus warranting a different result: in *Winston*, in contrast to *J & J*, the 14 Plaintiffs filed their cases together and were always scheduled to be tried together.

active ingredient, glyphosate, that Plaintiffs' allege caused their NHL;[2] each Plaintiff alleges the same causes of action against Monsanto based on substantially the same facts; and each Plaintiff relies on the same general causation evidence. The liability evidence against Monsanto is the same for each of the *Chaplick* Plaintiffs.

Contrary to Monsanto's arguments, it makes little difference whether a particular plaintiff was exposed to a particular brand of Roundup -- as they are all exposed to Monsanto's Roundup – or when they first used Roundup, or the state in which they used Roundup, or the subtype of NHL they were diagnosed with as a result of their Roundup exposure. Indeed, Monsanto has already made the argument contained in their opposition brief before and courts have found the argument wanting. Monsanto made its first motion to sever the plaintiffs and transfer the case to the County of St. Louis on April 16, 2018, and later filed a renewed motion to sever and transfer. The Circuit Court of the City of St. Louis denied the motions. Monsanto then filed a motion for reconsideration, which was also denied. Monsanto filed a petition for writ of prohibition in the Court of Appeals, which the Court denied on January 3, 2019. Monsanto then sought a writ of prohibition from the Missouri Supreme Court, which the Court denied, without prejudice to raise the *J&J* issue in the Circuit Court, on April 2, 2019. Monsanto then repeated the same process: the Circuit Court denied its motion on May 28, 2019, and the Court of Appeals denied its writ application on July 8, 2019. The Supreme Court's grant of a preliminary writ on September 3, 2019 resulted in the Plaintiffs' decision to withdraw its opposition to Monsanto's motion and the transfer of this action to St. Louis County on September 4, 2019.

[2] Although the Plaintiffs have been diagnosed with various NHL subtypes, the *Chaplick* trial would implicate only a few NHL subtypes. In fact, 11 of the Plaintiffs have a form of B-cell NHL and 6 of those have the specific DLBCL subtype.

Prior to the issuance of the preliminary writ, the Circuit Court had established an October 15 trial date, and the parties had worked diligently to comply with the deadlines set in the Court's scheduling order. The parties had completed discovery, Monsanto had deposed the individual plaintiffs, the plaintiffs' treating physicians, the plaintiffs' treating oncologists and the Plaintiffs' expert witnesses. Indeed, in anticipation of trial, the parties had served their motions *in limine*, dispositive motions and witness lists. The parties were about to exchange their exhibit lists and deposition designations when the Supreme Court issued the temporary writ. As a practical matter, the parties were trial ready for the scheduled October 15 trial date. They remain ready today.[3]

ARGUMENT

I. Plaintiffs Were Properly Joined Within A Single Action

The Plaintiffs are properly joined in the instant action. Courts have consistently ruled that Missouri law allows for joinder of familially unrelated plaintiffs in the same lawsuit against a single defendant pursuant to Rule 52.05 and Missouri Ann. Stat. § 508.010.5. *See, e.g., Kelley v. National Lead Co.*, 210 S.W.2d 728, 729 (Mo. App. 1948); *Newton v. Ford Motor Co.*, 282 S.W.3d 825, 833 (Mo. 2009); *Barron v. Abbott Labs., Inc.*, 529 S.W.3d 795, 801 (Mo. 2017), *reh'g denied*, (Oct. 31, 2017) (Wilson, concurring) ("it bears emphasizing that Rule 52.05(a) expressly permits multiple plaintiffs to join their claims in a single petition "if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences ***and*** if any question of law or fact common to all of them will arise in the action") (emphasis in original). Plaintiffs whose claims are properly joined should have their claims tried together in a single trial. *See Anders v. Medtronic*, Cause No.

[3] Monsanto misrepresents to this Court that the parties agreed to "an indefinite continuance" of Walter Winston's trial. *See* Mon. Opp. at 3. As Monsanto well knows, Mr. Winston's case is subject to an agreement to resolve the case without trial; it is ***not*** continued.

1322-CC10219-02, slip op. at 13-14 (Mo. 22nd Cir. Ct. Jan. 13, 2015) (writ denied) (finding the claims of numerous plaintiffs in an action against the developers, manufacturers, and distributers of the Infuse bone graft were properly joined; "***The policy of the law is to try all issues arising from the same occurrence or series of occurrences together***.")

The overwhelming legal and factual similarities among the *Chaplick* Plaintiffs support a joint trial. The prevailing common questions of law and fact that lie at the heart of these matters overcome Monsanto's due process arguments. The formulation of the Roundup® product, Monsanto's knowledge about the health impact of its product, its deliberate decision not to test the risks associated with chronic exposure to its product, Monsanto's marketing of Roundup and the messages it instructed its sales directors to convey to the public will be facts relevant to every plaintiff. Similarly, the general causation testimony on the link between Roundup® and non-Hodgkin lymphoma (NHL) will also apply to all plaintiffs. Further, while plaintiffs' routes of exposure and medical histories will vary, the underlying medical foundation for the diagnosis and treatment of NHL will apply equally for every plaintiff.

Moreover, as Monsanto's defense in these cases is that general causation does not support an association between Roundup exposure and NHL, any plaintiff-dissimilarities are really of no moment.

The Court's management of its own docket falls squarely within the Court's discretion and it may and should move forward and advance the *Chaplick* plaintiffs to trial. The Missouri Rules of Civil Procedure support the efficient and effective management of plaintiffs in a single trial. The Court of Appeals has observed:

> We cannot agree with the defendants that the test for consolidation is whether the parties might have been originally joined in the same action. Rule 42.01 gives the trial court wide discretion in ordering consolidation. While the concepts of joinder and consolidation complement each other and

> overlap, they are nonetheless distinct. Consolidation is wider in scope. The fact that the dimensions of the separate actions may not be in all respects the same does not prevent consolidation if there exists between them "common questions of law or fact."

State ex rel. Allen v. Yeaman, 440 S.W.2d 138, 142-43 (Mo. Ct. of App. 1969). That court continued that Rule 42.01 is "flexible" and "that the procedure it contemplates is permissive and rests with the discretion of the trial court." *Id.* at 143. To the extent that the Court might wish to view the plaintiffs as 13 cases consolidated together, rather than properly joined, Rule 66 also supports the consolidation of the cases into a single trial. *See* Rule 66.01(b).

Other factors including the law of the case support a single trial. Considerations of judicial economy and efficiency and the significant financial burden on the individual Plaintiffs merit trying the *Chaplick* Plaintiffs together. When the petition was venued in the 22nd Circuit, the court properly exercised his discretion in issuing the trial Case Management Order, thereby addressing important administrative concerns and efficiently managing the large docket of Roundup cases pending in the St. Louis area. Missouri Rules of Civil Procedure (Rule 66) and Missouri case law provide that when actions involve a common question of law or fact arising out of the same transaction or, in this instance, series of transactions, the trial court may order the claims or actions consolidated. This is precisely what Judge Mullen considered when he scheduled the now *Chaplick* Plaintiffs for trial (in addition to the fact that they were properly joined). Monsanto filed a writ petition in response to Judge Mullen's decision to grant a joint trial and their arguments were both considered and rejected by the Missouri Court of Appeals. As such, these trial court and appellate decisions are the law of this case and this Court should not entertain Monsanto's attempts to re-litigate settled issues. *Walton v. City of Berkeley*, 223 S.W.3d 126, 128-29 (Mo. 2007) (authority omitted) ("The doctrine of law of the case provides that a previous holding in a case constitutes the law of the case and precludes relitigation of the issue on remand and

subsequent appeal. The doctrine governs successive adjudications involving the same issues and facts. Generally, the decision of a court is the law of the case for all points presented and decided, as well as for matters that arose prior to the first adjudication and might have been raised but were not"). As the Missouri Supreme Court noted, courts apply the doctrine "not only for judicial economy, but also to insure uniformity of decisions and protect the parties' expectations." *Id.* at 130. The court can "advance these goals [of judicial economy, uniformity and protection of party expectation] only if it applies nearly all the time, and discretion to disregard it is exercised only in rare and compelling situations not found here." *Id.* at 131.

II. Multiple Issues and Facts Will Not Confuse the Jury

Monsanto's concerns about the manageability of a multi-plaintiff trial and potential jury confusion are vastly overstated. As previously argued, the *Chaplick* Plaintiffs' claims implicate the laws of only three states: Florida, Georgia, and Missouri. Accordingly, the jury instructions would include the laws of only three states (with one of them being the law of the forum state). What is more, the Missouri jury instructions contemplate multiple plaintiffs instructed in separate packets. *See* MAI, 7th Ed., Sec. 2.00. There is simply no reason why a St. Louis County jury would not be able to discern the legal differences between a few states in such a tightly focused trial. In addition, Plaintiffs remain open to exploring the possibility of smaller Florida-only and Georgia/Missouri-only trials.[4]

[4] Such a division would make each trial a similar size.

Fairness considerations favor a multi-plaintiff trial over the inefficiency of multiple, serial single-plaintiff trials for years to come.[5] As previously argued, the liability and expert evidence in the *Chaplick* case is common to all plaintiffs. Given the many thousands of Roundup cases already pending in Missouri state courts and the hundreds (or thousands) more that the parties can reasonably expect will be filed in the next year and beyond, it is Monsanto's proposal of single-plaintiff trials that threatens a far greater strain on limited judicial time and resources and would deprive the Plaintiffs of their due process and the likelihood of a trial of their case in their lifetime would be unlikely.[6] Trying multiple plaintiffs in one trial is nothing new to this jurisdiction or any other state or federal court jurisdiction charged with handling complex litigation. It has proven to be an effective way for courts to meaningfully move multi-plaintiff litigation along, fairly and efficiently.

Monsanto's argument about potential jury confusion in awarding individual verdicts is unconvincing. For instance, Monsanto refers to the recent verdict in the 22-person trial regarding Johnson & Johnson brand talcum powder, in which the jury awarded equal compensatory damage awards to all plaintiffs. *See Ingham v. Johnson & Johnson*, No. 1522-CC10417 (Mo. Cir. Ct. St. Louis City). But counsel in *Chaplick* did not appear as trial counsel in the *Ingham* case, and even if the evidence in *Ingham* arguably supported different damages amounts, that case is nothing more

[5] Monsanto's reliance on *Rubio v. Monsanto Co.*, 181 F. Supp. 3d 746 (C.D. Cal. 2016), is inapposite. Moreover, Monsanto misstates the principal reason the *Rubio* court severed the two plaintiffs there. The *Rubio* Court found at the outset that the claims of a California and Texas plaintiff could not properly be joined under Rule 20(a). Moreover, in *Rubio*, the plaintiffs had different diseases: Plaintiff Mendoza had NHL while Plaintiff Rubio had been diagnosed with multiple myeloma. The IARC did not find a link between Roundup's active ingredient and multiple myeloma and the general causation issues regarding these two diseases would be different. Finally, the *Rubio* case was filed in federal court in the Central District of California, and the court found that plaintiff Rubio's claims arose predominately in Texas. Those issues are not relevant here; venue is proper in Missouri regardless of a plaintiff's residence or place of Roundup use because Monsanto resides in Missouri.

[6] With singular trials, there is also a higher likelihood that there will not be an overall resolution of Roundup cases. First, it is easier for Monsanto to resolve one case at a time on the eve of trial with singular trials. And, to date, single plaintiff trials are not showing signs of mass-level resolution.

than an outlier.[7] Juries hearing evidence regarding multiple-trial plaintiffs routinely differentiate among the plaintiffs, finding different damages amounts for each plaintiff and sometimes finding for some of the plaintiffs and for the defense as to other plaintiffs. Over the years, in dozens of multi-plaintiff trials, juries have shown that they can differentiate the law and facts that apply to each plaintiff and render verdicts in accordance with the evidence presented for each individual plaintiff. One trial cannot upend decades of successful and orderly multi-plaintiff trials.

There is no reason why a St. Louis County jury would not be capable of assessing individual damages for each plaintiff. Again, historically, juries have proven capable of discerning individual damage claims and awarding appropriate individualized damage awards—often in widely disparate amounts.[8] Further, juries are capable of discerning liability for some plaintiffs and defense verdicts for other plaintiffs in the same trial.[9]

CONCLUSION

For the foregoing reasons, Plaintiffs motion for a multi-plaintiff trial as soon as practicable for the Court's schedule should be granted.

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[7] But it is also noteworthy that this case confirms that the Supreme Court is not opposed to multi-plaintiff trials; it denied a writ petition against a 22-plaintiff trial before the trial began. *See* Mo.S.Ct. No. SC97184, *writ denied* (May 25, 2018).

[8] *See e.g. In re: Depuy Orthopaedics, Inc. Pinnacle Hip Implant Products Liability Litigation*. (Ex. A). For instance, in *Alicea et al.*, MDL No. 3:11-MD-2244-K (N.D. Tex.) (Ex. B) (jury returned a verdict in multi-plaintiff trial in favor of the plaintiffs with damages awards ranging from $35,705.57 to $264,201.45 for past medical expenses; $800,000 to $3,000,000 for past pain suffering; $1,000,000 to $3,000,000 for future medical expenses; and from $6,250,000 to $15,000,000 for future pain and suffering); *Andrews et al.*, MDL No. 3:11-MD-2244-K (N.D. Tex.) (Ex. C) (same); *Aoki et al.*, No. 3:11-MD-2244-K (N.D. Tex.) (Ex. D) (same); *Schafer v. Bayer*, No. 2006-413 (Lonoke Co. Cir. Ct.) (Ex. E) (same).

[9] In cases pending in a New Jersey consolidated action against defendant Merck & Co. relating to its drug Vioxx, the court ordered two cases to be tried together, *Cona v. Merck & Co.*, Inc., No. ATL-L3553-050MT and *McDarby v. Merck & Co., Inc.*, No. ATL-L-1296-05-MT (NJ. Super. Ct. Law Div. Feb. 23, 2006) (denying drug manufacturer's motion to sever cases consolidated for trial) (Ex. F). In the consolidated trial of the *Cona* and *McDarby* cases, the jury was able to weigh the evidence individually and rendered split verdicts, ruling in favor of the McDarbys but against the Conas on their respective injury claims. That outcome is not unique either. *See Mace v. Hoffman-LaRoche Inc.*, No. ATL-L-199-05 (N.J. Super. Ct. Law Div. Feb. 23, 2008) (Ex. G); *Andrews v. Hoffman LaRoche Inc.*, No. ATL-L-3319-04 (N.J. Super. Ct. Law Div. July 22, 2010) (Ex. H); *In re: Levaquin Litig.*, Case No. 286 (N.J. Super. Ct. L. Div. May 3, 2011) (Ex. I).

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was filed and served upon all counsel of record through the Missouri Electronic Filing system on this 7th day of November 2019.

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