

Filed 8/18/20

**CERTIFIED FOR PARTIAL PUBLICATION\***  
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION ONE

DEWAYNE JOHNSON,  
Plaintiff and Respondent,

v.

MONSANTO COMPANY,  
Defendant and Appellant.

A155940, A156706

(City and County of San  
Francisco Super. Ct.  
No. CGC-16-550128)

ORDER DENYING  
REHEARING AND  
MODIFYING OPINION

[NO CHANGE IN JUDGMENT]

BY THE COURT:

The petitions for rehearing are denied.

It is ordered that the opinion filed on July 20, 2020, be modified as follows:

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\* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II.A., II.B., and II.D. In particular, part II.A.4., regarding preemption, is not certified for publication because our rulings turn on the lack of a developed factual record and consequently provide little guidance to parties in future cases. (Cal. Rules of Court, rule 8.1105(c).)

The final paragraph on page 23 (starting with “Monsanto argues that the proper test”) should be deleted.

The first sentence of page 24 (starting with “Even setting aside”) should be deleted and replaced with the following: “We are unpersuaded by Monsanto’s argument that it could not be found liable under the consumer-expectations test because Johnson relied on the testimony of several experts.”

The first citation in the first full paragraph of page 26 “(174 Cal.App.3d at pp. 841–843)” should be deleted and replaced with the following: “(*West v. Johnson & Johnson Products, Inc.* (1985) 174 Cal.App.3d 831, 841–843.)”

The first three full sentences at the top of page 52 (starting with “Monsanto first raised this argument” and ending with “the issue again at oral argument.”) should be deleted.

The last paragraph on page 61 (starting with “Around two weeks after the hearing,” and ending at the top of page 62 with “thus remained the same.”) should be deleted.

The first sentence of the first full paragraph of page 62 (“The court did, however, address punitive damages.”) should be deleted and replaced with the following: “Around two weeks after the hearing, the trial court adopted an order that does not appear to have been submitted by either party. The court declined to reduce the award of future noneconomic damages. The court also concluded that punitive damages were appropriate.”

The first full paragraph on page 71 (starting with “In sum” and ending with “amount supported by evidence].”) should be deleted and replaced with the following: “In sum, the evidence supported an award of \$1 million per year for Johnson’s pain and suffering. There is no dispute that Johnson was entitled to \$4 million for his suffering up to the time of trial in the summer of 2018. Again, conflicting evidence was presented on how long Johnson would

live following trial. Although Johnson’s attorney said Johnson likely would live only two more years, his attorney represented at oral argument in June 2020 that Johnson was still living. The weight of the evidence was that Johnson would die far sooner than he otherwise would have, but obviously there was no way for the jury to determine precisely how long he would live. Instead of reducing the award to \$2 million for the two years of future suffering the jury was told during closing argument Johnson was expected to endure, we conclude that \$4 million is an appropriate award that best serves the interests of justice under the circumstances of this case. The jury’s total noneconomic damages award is thus reversed and remitted to \$8 million (\$4 million in past noneconomic loss, plus \$4 million in future noneconomic loss), plus the other compensatory damages awarded, resulting in a total reduced award of \$10,253,209.32 to compensate for economic loss. (*Bigler-Engler v. Breg, Inc.*, *supra*, 7 Cal.App.5th at p. 306 [reducing noneconomic compensatory damages to maximum supported by the evidence]; *Behr v. Redmond* (2011) 193 Cal.App.4th 517, 533 [where evidence is sufficient to sustain some but not all damages, court will reduce judgment to amount supported by evidence].)”

The second citation to *Shade Foods* (“(*Shade Foods*, at p. 891.)”) in the second paragraph on page 72 should be deleted and replaced with the following: “(*Shade Foods*, at p. 891; see also *Conservatorship of the Person of O.B.* (2020) 9 Cal.5th 989, 1004, fn. 5 [citing *Shade Foods* favorably].)”

There is no change in judgment.

Dated: 08/18/2020

## **Humes, P. J.**

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Humes, P. J. PRESIDING JUSTICE