A155940 & A156706

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

DEWAYNE JOHNSON,
Plaintiff and Appellant,

v.

MONSANTO COMPANY,
Defendant and Appellant.

APPEAL FROM SAN FRANCISCO COUNTY SUPERIOR COURT
SUZANNE R. BOLANOS, JUDGE • CASE NO. CGC-16-550128

PETITION FOR REHEARING

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PETITION FOR REHEARING

INTRODUCTION

Defendant Monsanto Company seeks rehearing because the court's opinion (1) fails to reduce the future noneconomic damages and punitive damages to an amount supported by the evidence presented at trial, (2) misstates or omits several material facts and issues, and (3) improperly faults Monsanto for failing to propose jury instructions and offer evidence on a cause of action that Plaintiff did not assert in this case.

LEGAL ARGUMENT

I. The court should grant rehearing to further reduce the future noneconomic damages and punitive damages to an amount supported by the evidence.

Rehearing is appropriate when the court reaches an erroneous decision because of a mistake of law. (*Alameda County Management Employees Assn. v. Superior Court* (2011) 195 Cal.App.4th 325, 338, fn. 10; Eisenberg, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2019) ¶ 12:19, p. 12-4.) Here, as we discuss below, the court reached an erroneous decision based on a mistake of law when it considered the length of possible future legal challenges in calculating a reduction to the award of future noneconomic damages, rather than basing that reduction solely on the evidence presented at trial. Because this section of the opinion is published, unless the court corrects this error, other courts are likely to make the same error in calculating future noneconomic damages in other cases.

The court properly concluded that the jury's award of future noneconomic damages was not supported by the evidence of Plaintiff's projected life expectancy at the time of trial. (See typed opn. 63-71.) Indeed, future noneconomic damages must be based on a plaintiff's probable life expectancy in his injured condition, and a plaintiff may not recover future noneconomic damages for years he is not likely to live. (See typed opn. 67, 70-71.) Because the jury awarded future noneconomic damages amounting to $1 million for every year of Plaintiff's 33-year *pre-injury* life expectancy ($33 million), the court correctly concluded that the future noneconomic damages were excessive. (Typed opn. 66-71.) The court reduced the future noneconomic damages to $4 million. (Typed opn. 71.) The court also reduced the punitive damages award to an amount equivalent to the modified compensatory award. (Typed opn. 71, 82-83.)

The court's decision to reduce the future noneconomic damages was correct, but the court erred in calculating the reduced amount. The court recognized that the evidence at trial established Plaintiff would live "no more than two years" after trial. (Typed opn. 61; see typed opn. 67 [Plaintiff's "counsel argued that he would not live another two years 'absent a miracle' "], 71 ["the evidence showed that [Plaintiff] had about two years of his life remaining after trial"].)[1] The court also concluded that "the

[1] More precisely, as Monsanto explained in its brief, the evidence established that Plaintiff was not likely to live more than 1.5 years. (AOB 88.) Specifically, Plaintiff's expert, Dr. Chadi Nabhan, testified that Plaintiff would not live past December 2019 (17B RT

evidence supported an award of $1 million per year for [Plaintiff's] pain and suffering." (Typed opn. 71.) Therefore, under the court's own analysis, the evidence supported an award of future noneconomic damages of no more than $2 million—i.e., $1 million per year for the roughly two years of Plaintiff's projected post-injury life expectancy. But the court reduced the future noneconomic damages to *double* that amount—$4 million—on the ground that "further legal challenges may follow before the award becomes final." (*Ibid.*) It was improper to reduce the damages to a sum that exceeds the maximum amount established by the evidence based on the length of the appellate process.

An award of future noneconomic damages must be based on the evidence presented at trial. (See, e.g., *Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [" 'recovery is limited . . . to compensation for the consequences which have occurred up to the time of the trial, or it is reasonably certain *under the evidence* will follow in the future' " (emphasis added)]; *ibid.* ["To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury"]; *Collins v. Union Pacific Railroad Co.* (2012) 207 Cal.App.4th 867, 884 ["A

2886:20-2887:12), or roughly 1.375 years after trial, which ended when the jury delivered its verdict on August 10, 2018 (see 5 AA 5503). Based on this testimony, Monsanto argued on appeal that the future noneconomic damages should be reduced to $1.5 million—i.e., $1 million per year for the roughly 1.5 years of Plaintiff's projected life expectancy after trial. (AOB 93-94.)

jury must impartially determine pain and suffering damages *based upon evidence specific to the plaintiff*" (emphasis added)].)

There is no basis in law to award additional future noneconomic damages based on the amount of time consumed by appellate proceedings. The law already accounts for such delays: if Plaintiff ultimately prevails, he will be compensated by statutory postjudgment interest accruing at 10 percent per year. (See Code Civ. Proc., § 685.010, subd. (a).) Indeed, the very purpose of postjudgment interest is to compensate a plaintiff for any time that elapses between entry and payment of the judgment. (See, e.g., *Hernandez v. Siegel* (2014) 230 Cal.App.4th 165, 175 ["The purpose of awarding postjudgment interest is to compensate the judgment creditor for the time value of the money until the judgment is paid"].) By awarding Plaintiff double the amount of future noneconomic damages otherwise supported by the evidence, the court is granting Plaintiff an extrajudicial windfall. In this case, that amount is far from trivial: an extra $2 million in future noneconomic damages, as well as another $2 million in matched-ratio punitive damages, plus an additional $400,000 per year in postjudgment interest. And because this part of the opinion is published, there is a grave danger that other courts and juries will make the same error in calculating future noneconomic damages in other cases.

For all these reasons, the court should modify its opinion to reduce the award of future noneconomic damages to $2 million, which is still higher than the highest amount supported by the evidence at trial. (See *ante*, pp. 7-8, fn. 1; *Bermudez v. Ciolek*

(2015) 237 Cal.App.4th 1311, 1338 [“ ‘When the evidence is sufficient to sustain some but not all alleged damages, we will reduce the judgment to the amount supported by the evidence’ ”].) The court should also reduce the punitive damages by $2 million in order to preserve the one-to-one ratio between punitive and compensatory damages that the court has otherwise deemed appropriate. (See typed opn. 71, 82-83.) As reduced, the compensatory damages would total $8,253,209.32 and the punitive damages would total the same amount, resulting in a total judgment of $16,506,418.60, plus an additional $519,772.18 in stipulated costs.[2] (See 6 AA 6182.)

II. The court should grant rehearing to correct several misstatements and omissions of material facts and issues in the opinion.

Rehearing is also appropriate in order to correct any misstatements or omissions of material facts and issues in an appellate opinion. (See *In re Marriage of Goddard* (2004) 33 Cal.4th 49, 53, fn. 2; see also Eisenberg, Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 12:16, pp. 12-3 to 12-4.) Here, as we discuss below, the opinion contains several misstatements and omissions of material facts and issues. The court should grant rehearing to correct its analysis of these material facts and issues and either reverse the judgment with directions to enter judgment for Monsanto or, at the very least, vacate the award of punitive

[2] If the court were to reduce the damages in this fashion, Plaintiff would still earn more than $1.6 million each year in postjudgment interest *alone* until the judgment is paid.

damages. Even if the court were to conclude that correcting these misstatements and omissions would not affect the disposition of the appeal, the court should still grant rehearing to correct these misstatements and omissions because Monsanto may seek Supreme Court review of the opinion. (See Cal. Rules of Court, rule 8.500(c)(2); *Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 283, fn. 3 [rejecting factual contention by parties that prevailed in the Court of Appeal because they "did not seek rehearing or modification on this or any other factual point"].)

Specifically, the court should correct the following misstatements and omissions in its opinion:

1. In the failure-to-warn discussion of the opinion (typed opn. 15-21), the court omits the fact that a unanimous worldwide regulatory consensus concludes that glyphosate is not carcinogenic (see, e.g., AOB 19-22, 24-26, 43, 45; ARB/X-RB 22-26). This omitted fact demonstrates that Plaintiff has failed to show a generally accepted, prevailing scientific view that glyphosate is carcinogenic, which is required in order to establish a strict-liability failure-to-warn claim. (See *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002.) Notably, the court recognized later in the opinion it was undisputed that no regulatory agency had ever determined that glyphosate posed a cancer risk to humans. (See typed opn. 79 ["no evidence was presented of a regulatory body concluding that glyphosate or Roundup products cause cancer"].)

2. The court ignores Monsanto's argument concerning the relevant time period applicable to the failure-to-warn claim.

Plaintiff first used Roundup in June 2012, he was diagnosed with non-Hodgkin's lymphoma (NHL) in August 2014, and he stopped using Roundup in March 2015. (AOB 31-32, 43.) The International Agency for Research on Cancer (IARC) monograph on glyphosate was not published until March 2015 (AOB 23), almost three years after Plaintiff first used Roundup and several months after he was diagnosed with NHL (AOB 31-32, 43). Thus, IARC's conclusions on glyphosate came too late to have any bearing on a duty to warn in this case. (AOB 43-44.) Moreover, when Plaintiff was diagnosed with NHL in August 2014, every regulatory agency that had examined the prevailing science had determined that there was insufficient evidence that glyphosate could cause cancer in humans. (AOB 19-21, 45; ARB/X-RB 22-27.)

3. The court cites Dr. James Parry's review of four genotoxicity papers published between 1997 and 1999 (typed opn. 2-3, 18, 75, 79) but (a) fails to acknowledge that genotoxicity alone is not evidence of causation and that genotoxicity does not mean carcinogenicity (5 AA 5678-5679, 5877; 14A RT 2258:4-2260:6), (b) ignores the fact that EPA and other regulators have reviewed the same genotoxicity papers (and dozens more) in reaching their conclusions that glyphosate is not a probable carcinogen (4 AA 4285-4501; 5 AA 5579, 5709-5710, 5866-5868), and (c) ignores the fact that not even IARC, or any expert in this case, based their causation conclusions on these four genotoxicity papers.

4. More generally, the court overemphasizes the importance of genotoxicity studies and underemphasizes the importance of epidemiology in evaluating Plaintiff's claims (see

typed opn. 75, 79) given that (a) genotoxicity does not mean carcinogenicity (see *ante*, p. 12, ¶ 3); (b) epidemiology (not genotoxicity) is considered the strongest evidence of a substance's likelihood to cause disease because epidemiology is the only evidence that measures real-world outcomes in humans based on actual exposures in the field (AOB 26; 24A RT 4206:23-4207:10); (c) Plaintiff's expert, Dr. Christopher Portier, conceded that the epidemiology established, at most, an association between glyphosate exposure and cancer, not a causal link (AOB 47; 13A RT 1964:13); (d) EPA considered nearly 90 genotoxicity studies, including all of the studies referenced at trial, and still concluded that glyphosate is not genotoxic and not likely to be carcinogenic (4 AA 4285-4501; 5 AA 5579, 5709-5710); and (e) foreign regulators also considered dozens of genotoxicity studies and reached the same conclusion as EPA (5 AA 5575, 5 AA 5708, 5866-5868).

5. The court largely ignores the animal studies involving glyphosate and EPA's conclusion that "[b]ased on the weight-of-evidence," the tumors observed in the rodent studies were not "related" to glyphosate. (AOB 29; 7 AA 7242.)

6. The court characterizes IARC as " 'the main arbiter of what a cancer causing agent is' " (typed opn. 8) but ignores the fact that IARC conducts only a hazard assessment, which evaluates only whether a substance is capable of causing cancer under hypothetical circumstances (see AOB 22-23). Thus, unlike government regulators, which perform risk assessments, IARC does not assess risks at real-world exposure levels, and IARC did not assess the dose of glyphosate that allegedly could cause cancer.

(*Ibid*.; 6 AA 6243; 12A RT 1717:7-12; 16B RT 2669:9-16, 2671:4-2673:8.) Moreover, because IARC's hazard assessment of glyphosate was published after Plaintiff was diagnosed with cancer (see *ante*, p. 12, ¶ 2), IARC's assessment had no impact on the failure-to-warn and punitive-damages claims, which had to be measured based on the evidence available at the time the products allegedly causing his injury were distributed.

7. The court ignores the fact that IARC did not consider either the Agricultural Health Study (AHS) or the North American Pooled Project (NAPP) because these studies had not yet been published when IARC conducted its review of glyphosate. (AOB 23.) When a meta-analysis is performed using the same methodology employed by IARC but includes the NAPP and AHS studies, that analysis shows no "positive association" whatsoever "between exposure to glyphosate and the risk of NHL." (24A RT 4305:4-4307:25; AOB 28.)

8. The court criticizes Monsanto's characterization of IARC's conclusion on glyphosate as a " 'minority' " view, stating that the evidence Monsanto cites "to support the argument is underwhelming." (Typed opn. 18.) To the extent the evidence in the record on this point is "underwhelming," that is so only because the trial court erroneously prevented Monsanto from introducing EPA and foreign regulatory materials, which directly contradicted IARC's conclusion and established that IARC's conclusion was a minority view. (AOB 68-73.) Indeed, this evidence would have demonstrated that IARC is the only agency in the world that has reached the conclusion that glyphosate is probably carcinogenic.

Numerous regulators in the United States and around the world have reached the opposite conclusion.[3] (AOB 19-22, 24-26.) Even plaintiff's own expert, Dr. Portier, acknowledged at trial that a consensus of regulatory agencies concludes there is no evidence establishing a causal link between glyphosate-containing herbicides and cancer, even though Dr. Portier personally disagrees with that conclusion. (13A RT 2010:4-25; 13B RT 2098:13-23, 2106:12-15, 2120:17-2122:17.)

9. The court states that "[a]t the time of trial, [EPA] had not come to a final conclusion on whether to classify glyphosate as carcinogenic" and that "EPA's position on glyphosate labeling appears to be evolving." (Typed opn. 8, 49.) These statements are incorrect and ignore the fact that EPA has consistently concluded, over decades, that a cancer warning is not necessary on glyphosate-containing herbicides. (See, e.g., AOB 19-20, 24-25.) These statements further misunderstand EPA's review process under FIFRA, through which EPA, before trial in 2016 and 2017, had published comprehensive scientific review papers that

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[3] Despite the trial court's evidentiary exclusion, the testimony of trial witnesses and the record compiled on summary judgment contain considerable evidence of EPA and foreign regulatory conclusions that glyphosate is not carcinogenic. (See, e.g., 1 AA 561, 577, 592, 880, 1099; 2 AA 1327-1328, 1330, 1332, 1333, 1814; 3 AA 2096-2107 [EPA documents in summary judgment record]; 5 AA 5572-5579, 5679, 5705-5710 [testimony concerning EPA]; 7 AA 7147-7373, 7596-7886 [EPA documents admitted by trial court for state of mind]; 1 AA 300, 301, 311, 314, 316, 323, 326, 329 [foreign regulatory conclusions in summary judgment record]; 13A RT 2014; 13B RT 2098, 2101-2133; 26B RT 4631; 5 AA 5575-5576, 5679, 5682-5683 [testimony concerning foreign regulatory conclusions].)

concluded, based on the weight of all scientific evidence, that glyphosate was not likely to cause cancer in humans. (4 AA 4285-4501.)

10. The court mentions several studies identified by Plaintiff's experts that showed a risk ratio in excess of 2.0 (typed opn. 33-34), but omits the fact that those studies did not adjust for other pesticides (AOB 27; 17A RT 2825:12-2830:5; 17B RT 2912:10-2934:24; 24A RT 4241:16-4243:3, 4244:21-4247:3, 4248:9-4249:10, 4253:13-4259:14). The court also ignores studies identified by Monsanto that show glyphosate is not carcinogenic. (AOB 21-22.)

11. The court states that the expert testimony at trial addressed causation and not a consumer's expectations about the use of Roundup. (Typed opn. 25-26, 28.) However, Plaintiff's consumer expectations claim is based on extensive, complex expert testimony purporting to explain the nature and existence of the alleged expectation that Plaintiff should have had about the product, but for Monsanto's failure to warn—i.e., that the chemical composition of Roundup could adversely affect Plaintiff's health. (AOB 51-54; 16B RT 2645:1-2646:23; 21A RT 3610:12-3612:25.)

12. The court states that the non-expert testimony on consumer expectations was sufficient to support the consumer expectations claim. (Typed opn. 28.) But the non-expert testimony established only that Plaintiff did not expect that he or others could be injured (i.e., get cancer) from being exposed to Roundup. (18B RT 3234:20-3235:5; 3283:6-11.) This evidence is insufficient as a matter of law to support a design defect claim premised on a

consumer expectations theory. (See *Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 158-159.)

13. The court faults Monsanto for not proposing jury instructions on a design-defect claim premised on a risk-benefit theory. (Typed opn. 23.) However, as we discuss below, Monsanto had no burden to propose jury instructions on liability theories that Plaintiff was not asserting in this case. (See pp. 26-30, *post*; *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 694 (*Bullock*) [a party " 'has no duty to propose instructions which relate only to the opposing theories of his adversary,' " quoting *Hensley v. Harris* (1957) 151 Cal.App.2d 821, 825 (*Hensley*)].)

14. The court states that it is "not in the best position" to evaluate evidence that was "largely presented for the first time on appeal" about whether EPA might have approved a cancer warning for Roundup's label. (Typed opn. 46.) But where, as here, the material facts are undisputed, appellate courts are in just as good a position to decide questions of law as trial courts. (See *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799, 800-801.) Given that the question of whether there is " 'clear evidence' " that EPA would not have approved a cancer warning is a question of law for the court to decide based on the entire record (see *Merck Sharp & Dohme Corp. v. Albrecht* (2019) 587 U.S. ___ [139 S.Ct. 1668, 1672, 1679-1680, 203 L.Ed.2d 822] (*Merck*)), this court should have considered all the evidence presented by the parties in making this determination.

15. The court states that Monsanto does not point to any federal regulation that a cancer warning would violate. (Typed

opn. 49.) A cancer warning, however, would violate the provisions of the product labels that were approved by EPA, which have no cancer warning and have the force of law. (See 7 U.S.C. § 136j(a); 40 C.F.R. § 152.44 (2019) [EPA's approval of a label in the course of registering a product compels the use of that approved label without deviation]; see also 7 U.S.C. § 136j(a)(2)(G) [use of a pesticide in a manner inconsistent with its labeling is a violation of federal law]; 40 C.F.R. § 156.10(i)(2)(ii) (2019) [same]; Appellant's Supplemental Brief 24-25, fn. 7.)

16. The court analyzes express preemption in terms of a comparison between "California's requirement that products contain adequate warnings" and "FIFRA's requirements that labels include necessary warnings and cautionary statements." (Typed opn. 44.) However, the requirement imposed by the judgment in this case that Roundup products include a cancer warning, is "'*different from*'" and "'*in addition to*'" the requirements of the product labels approved by EPA, which, as noted above, have no cancer warning and have the force of law. (See *Bates v. Dow Agrosciences LLC* (2005) 544 U.S. 431, 446-447 [125 S.Ct. 1788, 161 L.Ed.2d 687] [state law labeling requirement premised on state failure-to-warn claim qualifies as a labeling or packaging requirement governed by FIFRA], 452 ["The [preemption] provision [of FIFRA] also pre-empts any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA *and its implementing regulations*" (emphasis added)], 453 ["State-law requirements

must also be measured against any relevant EPA regulations that give content to FIFRA's misbranding standards"].)

17. The court concludes that Monsanto established only a "*possibility* of impossibility" preemption. (Typed opn. 51.) But in fact, it is undisputed that EPA, which has (and must) evaluate the carcinogenicity of glyphosate-based products for purposes of determining the required product labeling, (a) has never approved a product label for Roundup that requires a cancer warning, and (b) has directed all product manufacturers to remove Proposition 65 cancer warnings from the labels and labeling for glyphosate-based products. (See Brief for United States as Amicus Curiae in Support of Monsanto, *Monsanto Co. v. Hardeman* (9th Cir., Dec. 20, 2019, No. 19-16636), attached as exh. A to Declaration of David M. Axelrad in Support of Motion for Judicial Notice, pp. 13-15; EPA Registration Div. Director Michael L. Goodis, EPA Office of Pesticide Programs, Letter to EPA Registrants, Aug. 7, 2019, pp. 1-2 <https://tinyurl.com/y552m94m> [as of Aug. 3, 2020] (hereafter EPA Aug. 2019 Letter); see also 7 U.S.C. §§ 136a(c)(1)(F), (2)(A), 136c(a); 40 C.F.R. § 158.500 (2019) [EPA approves product registrations only after considering voluminous scientific data regarding human health risks, including specifically whether the pesticide poses a risk of cancer to humans]; Appellant's Supplemental Brief 10-12, 22-23.)

18. The opinion misstates that Monsanto has not pointed to anything having the force of law. (Typed opn. 51.) But as noted above, EPA has taken multiple actions having the force of law. Indeed, EPA found glyphosate not likely to be carcinogenic to

humans in 1991, 1993, 1997, 2002, 2004, 2008, and 2013, and reiterated those findings in 2015, 2016, 2017, 2019, and 2020—after IARC issued its monograph on glyphosate. (AOB 66; ARB/X-RB 54; Appellant's Supplemental Brief 22-24; 4 AA 4428-4429; 7 AA 7147, 7287, 7619-7620, 7634; EPA Aug. 2019 Letter, *supra*, at pp. 1-2.) EPA issued many of these findings while conducting a registration review of glyphosate pursuant to formal procedures set forth in FIFRA and implementing regulations that include, among other things, public notice and comment. (See 7 U.S.C. § 136a-1; 40 C.F.R. § 155.50(b), (c) (2019).)

19. The court concludes that Monsanto made no showing that it fully informed EPA of " 'the justifications for the warning' " sought by Plaintiffs. (Typed opn. 51, quoting *Merck*, *supra,* 139 S.Ct. at p. 1678.) There is, however, no dispute that EPA had available to it the full range of scientific evidence, that Monsanto possessed no information that EPA did not have, and that EPA made a determination based on the weight of all the available scientific evidence. (Appellant's Supplemental Brief 21-26.)

20. The court concludes that Plaintiff's design-defect claim is not preempted because it was based on more than the absence of a warning on Roundup's label. (Typed opn. 51-52.) However, the consumer-expectations claim presented to the jury was based solely on an alleged failure to warn that deprived Plaintiff of the information he needed to understand or expect the health consequences of exposure to Roundup. (9 RT 1429:11-22; 21A RT 3601:14-21; see 29A RT 5119:17-23, 5120:1-11; AOB 48-49; Appellant's Supplemental Brief 26.)

21. The court also discounts Monsanto's argument that the design-defect claim is preempted by stating that "Monsanto first raised this argument in its supplemental briefing in response to the court's question whether we could affirm the jury's verdict based solely on the design defect cause of action even if we concluded that [Plaintiff's] failure-to-warn causes of action were preempted." (Typed opn. 52.) This statement is not correct. Monsanto argued in its opening brief that the design-defect claim was inextricably intertwined with the failure-to-warn claim and therefore was also preempted. (AOB 48-49, 64-65.)

22. In evaluating the sufficiency of the evidence to support the jury's finding of malice and oppression (see typed opn. 72-80), the court fails to apply the governing "clear and convincing evidence" standard of review on appeal, as required by *Conservatorship of O.B.* (July 27, 2020, S254938) ___ Cal.5th ___ [2020 WL 4280960, at p. *8] and other authorities (see ARB/X-ARB 82-84).

23. The court ignores Monsanto's argument that a party cannot act "maliciously" if its actions are consistent with the best scientific evidence and a worldwide regulatory consensus that its product is not carcinogenic. (See AOB 75-78.)

24. The court concludes that *Johnson & Johnson Talcum Powder Cases* (2019) 37 Cal.App.5th 292 (*Echeverria*) is inapplicable here because the regulatory findings and conclusions concerning glyphosate were distinguishable from the regulatory findings and conclusions discussed in *Echeverria.* (Typed opn. 77-79.) But this court's discussion of *Echeverria* does not take into

account the worldwide regulatory consensus that is consistent with Monsanto's view of the scientific evidence and its position that glyphosate is not carcinogenic. (See AOB 19-22, 24-26, 45; ARB/X-RB 22-26.)

25. The court refers to Monsanto's interaction with EPA concerning a 1983 mouse study as evidence that Monsanto failed to conduct adequate studies of its glyphosate-based products. (Typed opn. 74-75.) However, the court does not mention that EPA ultimately concluded that these rodent studies were of no value in evaluating the carcinogenic potential of glyphosate. (See 12B RT 1817:21-1820:10; 26A RT 4528:3-4532:17; 7 AA 7242; see also ARB/X-RB 77-78.) This interaction is not clear and convincing evidence of malice. (See *In re Angelia P.* (1981) 28 Cal.3d 908, 919 (*Angelia P.*) [proof by the clear and convincing evidence standard "requir[es] that the evidence be ' "so clear as to leave no substantial doubt"; "sufficiently strong to command the unhesitating assent of every reasonable mind" ' "], superseded by statute on another ground as stated in *In re Cody W.* (1994) 31 Cal.App.4th 221, 229; *Tomaselli v. Transamerica Ins. Co.* (1994) 25 Cal.App.4th 1269, 1288, fn. 14 (*Tomaselli*) [" '[P]unitive damages should not be allowable upon evidence that is merely consistent with the hypothesis of malice, fraud, gross negligence or oppressiveness' "], called into doubt on another ground by *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 724, fn. 7.)

26. The court refers to Monsanto's interactions with Dr. Parry concerning his genotoxicity reports as evidence that Monsanto failed to conduct adequate studies of its glyphosate-

based products. (Typed opn. 75.) As discussed above, the court gives undue weight to the issue of genotoxicity and the studies considered by Dr. Parry. (See *ante*, pp. 12-13, ¶¶ 3-4.) In addition, the court does not mention the fact that Monsanto published the results of further studies it conducted in response to Dr. Parry's recommendations (5 AA 5843-5844, 5862-5863; see ARB/X RB 76-77), or that there is uncontroverted evidence that Dr. Parry ultimately concluded glyphosate is not genotoxic (5 AA 5865). These interactions are not clear and convincing evidence of malice. (See *Angelia P.*, *supra*, 28 Cal.3d at p. 919; *Tomaselli*, *supra*, 25 Cal.App.4th at p. 1288, fn. 14.)

27. The court refers to a " 'boat load' " of studies that became available by 2005 showing glyphosate's potential genotoxicity as evidence that Monsanto was discounting questions about the safety of glyphosate. (Typed opn. 75-76.) However, as discussed above, the court gives undue weight to the issue of genotoxicity, which is not the same as carcinogenicity. (See *ante*, p. 12-13, ¶¶ 3-4.) Moreover, the court omits any discussion of the undisputed evidence that, even after IARC made its glyphosate determination a decade later, regulatory agencies worldwide, having reviewed all the science, including the alleged " 'boat load' " of studies referenced above, unanimously concluded that glyphosate was not genotoxic or carcinogenic. (See AOB 19-22, 24-26, 45; ARB/X-RB 22-26.) The alleged "boat load" of studies is not clear and convincing evidence of malice. (See *Angelia P.*, *supra*, 28 Cal.3d at p. 919; *Tomaselli*, *supra*, 25 Cal.App.4th at p. 1288, fn. 14.)

28. The court refers to the evidence of Monsanto's so-called "ghostwriting" as evidence that Monsanto acted with a conscious disregard for public safety and concludes that Monsanto's failure to fully disclose its involvement in the preparation of various articles supports an inference that Monsanto was concerned about defending its product and not protecting public health. (Typed opn. 76.) The court ignores the fact that Monsanto employees were listed as contributors in the articles cited by Plaintiff as examples of improper ghostwriting. (AOB 85.) Moreover, inasmuch as the court appears to agree that there were no misstatements in any of these articles (typed opn. 76; see 6 AA 6141-6142; AOB 85-86; ARB/X-RB 80), the court fails to explain how participating in the publication of complete and accurate scientific information can be clear and convincing evidence of a conscious disregard of health and safety. (See *Angelia P.*, *supra*, 28 Cal.3d at p. 919; *Tomaselli*, *supra*, 25 Cal.App.4th at p. 1288, fn. 14.)

29. The court refers to Monsanto's meetings with government officials and opposition to the IARC report as evidence of Monsanto's indifference to public safety. (Typed opn. 74, 76-77.) But the court fails to mention there is no evidence that any of these meetings involved misrepresentations of scientific evidence or any improper conduct by Monsanto. There is also no evidence that Monsanto's efforts to persuade government agencies affected the ultimate decisions made by these agencies. (See *Echeverria*, *supra*, 37 Cal.App.5th at pp. 333-334 [even where the defendant "mount[ed] a defense" of its product by developing a "strategy" to

persuade regulatory agencies that preexisting studies were flawed and inconclusive, punitive damages were barred as a matter of law]; *ibid*. [punitive damages were unavailable as a matter of law where the defendant defended its product to a committee evaluating cancer risks and there was no evidence the defendant's efforts changed the committee's "ultimate conclusion"].)

30. In addition, the court does not address the fact that under the *Noerr-Pennington* doctrine, civil liability—including liability for punitive damages—cannot rest on advocacy or lobbying efforts conducted before government bodies. (See AOB 85.) The court also ignores the argument that any claim that Monsanto misled or defrauded EPA cannot support punitive damages as a matter of law under *Buckman Co. v. Plaintiffs' Legal Committee* (2001) 531 U.S. 341, 347-348 [121 S.Ct. 1012, 148 L.Ed.2d 854] [because "[p]olicing fraud against federal agencies" is not a matter within traditional state regulation and rather "the relationship between a federal agency and the entity it regulates is inherently federal," "fraud-on-the-FDA claims" are preempted by federal law]. (See ARB/X-RB 72-73.)

31. The court mentions Plaintiff's allegation that Monsanto failed to adequately test its products (typed opn. 76, 79) but omits the fact that (a) glyphosate is one of the most tested pesticides in the world (see AOB 20), (b) Monsanto has complied with EPA testing requirements for decades (AOB 80; 5 AA 5551-5552, 5583-5586, 5704, 5710-5711, 5843, 5863, 5866; 22B RT 3962:21-23), and (c) glyphosate has been approved by EPA for use without a cancer warning for decades (AOB 19-20, 24-25).

32. The court concludes that a finding of malice could be supported by Monsanto's failure to return Plaintiff's phone calls. (Typed opn. 77.) But the court does not mention that (a) there is no evidence that any failure to return the phone calls was deliberate; or (b) Dr. Dan Goldstein testified that if he had returned Plaintiff's phone calls, he would not have told Plaintiff to stop using Roundup because Monsanto believes it is safe. (5 AA 5624; see 6 AA 6142; AOB 86; ARB/X-RB 81-82.) Under these circumstances, any failure by Monsanto to return Plaintiff's phone calls is not clear and convincing evidence of malice. (See *Angelia P.*, *supra*, 28 Cal.3d at p. 919; *Tomaselli*, *supra*, 25 Cal.App.4th at p. 1288, fn. 14.)

33. The court fails to address Monsanto's argument that there is no causal nexus between Plaintiff's injury and the alleged conduct that, according to the court, supports the jury's finding of malice and oppression. (See AOB 84; ARB/X-RB 73-82.) Indeed, much of the conduct Plaintiff alleges in support of his punitive damages claim either occurred after Plaintiff was diagnosed with cancer or lacked a causal nexus to Plaintiff's injury. (See *ibid.*)

III. The court should grant rehearing to eliminate any reference in the opinion to Monsanto's failure to propose jury instructions and present evidence on a risk-benefit claim.

The court made another mistake of law when it faulted Monsanto for failing to propose jury instructions and present evidence relevant to a strict-liability design-defect claim premised on a risk-benefit theory. (See typed opn. 23-24.) As we discuss below, Monsanto had no obligation to propose jury instructions on

any of Plaintiff's claims, let alone a claim that Plaintiff voluntarily chose not to pursue in this case. Accordingly, the court should modify the opinion to omit the discussion faulting Monsanto for failing to propose jury instructions and present evidence on a risk-benefit design-defect claim. This modification would not change the outcome of the appeal; it would simply eliminate language that erroneously imposes on Monsanto a burden that Monsanto does not have under the law.

The opinion states: "Monsanto argues that the proper test to have been used in this case was the risk-benefit test, but it fails to point to anywhere in the record where it requested instructions on this test." (Typed opn. 23.) The opinion also faults Monsanto for not "cit[ing] to evidence in the record supporting the elements required to establish a defense under the [risk-benefit] test, i.e., that (1) a safer alternative design of Roundup products was infeasible, (2) the cost of a different design would have been prohibitive, or (3) any different design of Roundup products would have been more dangerous to the consumer." (*Ibid.*) For several reasons, the court should omit these statements from the opinion.

First, Monsanto did not argue in this appeal that the trial court should have submitted a risk-benefit claim to the jury. (See AOB 48-56; ARB/X-RB 27-34.) Rather, Monsanto argued that the trial court erred by submitting the consumer expectations theory to the jury. (See *ibid.*) Monsanto did state that a risk-benefit claim would have been a more appropriate claim to pursue on the facts of this case (AOB 50, 51, 55), but Plaintiff made a voluntary choice not to assert a risk-benefit claim (4 RT 441:9-17), which was his

prerogative. Plaintiff was entitled to choose whether to pursue a consumer expectations claim (if applicable), a risk-benefit claim, both claims, or neither. (See *McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1126 ["A claim of design defect may be proved under the consumer expectation theory (if applicable) or the risk benefit theory. The tests are not mutually exclusive, and a plaintiff may proceed under either or both."].) Because Plaintiff chose not to assert a risk-benefit claim, Monsanto had no burden to propose jury instructions or introduce evidence relevant to that theory of liability.

Second, even if Plaintiff had decided to assert a risk-benefit claim in this case, it would not have been *Monsanto's* burden to propose jury instructions on that theory—it would have been *Plaintiff's* burden to do so. (See *Bullock*, *supra*, 159 Cal.App.4th at p. 694 [a party " 'has no duty to propose instructions which relate only to the opposing theories of his adversary,' " quoting *Hensley*, *supra*, 151 Cal.App.2d at p. 825]; see also *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1130-1131 (*Metcalf*) [" ' " 'In a civil case, each of the parties must propose complete and comprehensive instructions in accordance with his theory of the litigation' " ' "].) Because it was Plaintiff's burden to propose jury instructions applicable to his own claims, the court should not fault Monsanto for failing to propose jury instructions on any of Plaintiff's claims.

Finally, the court cites *West v. Johnson & Johnson Products, Inc.* (1985) 174 Cal.App.3d 831, 864, called into doubt on another ground in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 565-

567, to support its suggestion that Monsanto should have requested jury instructions and proffered evidence relevant to a risk-benefit claim. (Typed opn. 23, 26.) But *West* is inapposite. There, the defendant argued that the trial court erred by giving a consumer expectations instruction and "should have instructed the jury to apply the 'risk-benefit' test instead." (*West*, at p. 864.) Here, as noted above, Monsanto did not argue that the trial court should have instructed the jury on the risk-benefit test because Plaintiff chose not to assert that theory. (See *ante*, pp. 27-28.) Rather, Monsanto argued that the consumer expectations test does not apply and because Plaintiff did not also assert a risk-benefit claim, Plaintiff failed to establish a valid design-defect claim in this case. (See ARB/X-RB 29-30, fn. 4 ["because Plaintiff made the decision to advance an invalid [consumer expectations] theory of design defect, and did not ask the court to instruct the jury on the alternative risk/benefit theory, Plaintiff did, in fact, waive his design defect claim"].) Moreover, to the extent *West* suggests that a defendant has a burden to propose jury instructions on a cause of action asserted by the plaintiff, *West* is wrong. (See *Metcalf*, *supra*, 42 Cal.4th at pp. 1130-1131; *Bullock*, *supra*, 159 Cal.App.4th at p. 694.)

In sum, because Monsanto had no burden to propose jury instructions or proffer evidence on a risk-benefit theory that Plaintiff did not pursue in this case, the court should modify the opinion by deleting the entire last paragraph on page 23, which begins with the following sentence: "Monsanto argues that the proper test to have been used in this case was the risk-benefit test,

but it fails to point to anywhere in the record where it requested instructions on this test." (Typed opn. 23.) The court should also delete the phrase "Even setting aside these briefing deficiencies," from the first sentence of the next paragraph, which begins on page 24 of the opinion. As noted above, these modifications will not impact the outcome of the appeal, but they will clarify that Monsanto has no burden to request jury instructions and present evidence on claims that Plaintiff voluntarily elected not to pursue.

CONCLUSION

For the reasons stated above, the court should grant rehearing as necessary to (1) reduce the future noneconomic damages and punitive damages to an amount supported by the evidence presented at trial, (2) correct the misstatements and omissions of material facts and issues identified herein, and (3) modify the opinion to eliminate language that improperly faults Monsanto for failing to propose jury instructions and offer evidence on a cause of action that Plaintiff did not assert.

August 4, 2020

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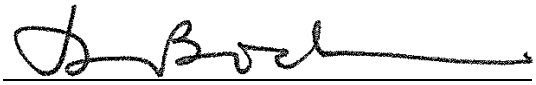
CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.204(c)(5).)

The text of this brief consists of 6,404 words as counted by the Microsoft Word version 2016 word processing program used to generate the brief.

Dated: August 4, 2020



Dean A. Bochner

PROOF OF SERVICE

Johnson v. Monsanto Company
Case No. A155940 & A156706

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On August 4, 2020, I served true copies of the following document(s) described as **PETITION FOR REHEARING** on the interested parties in this action as follows:

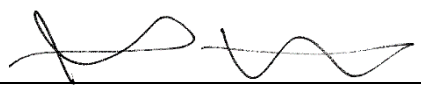
SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 4, 2020, at Burbank, California.



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