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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ALAMEDA

BEFORE THE HONORABLE WINIFRED Y. SMITH, JUDGE PRESIDING

DEPARTMENT NUMBER 21

---oOo---

COORDINATION PROCEEDING)	
SPECIAL TITLE (RULE 3.550))	
)	
ROUNDUP PRODUCTS CASE)	JCCP No. 4953
)	
_____)	
THIS TRANSCRIPT RELATES TO:)	
)	
Pilliod, et al.)	Case No. RG17862702
vs.)	
Monsanto Company, et al.)	Pages 4217 - 4317
_____)	Volume 26

Reporter's Transcript of Proceedings

Thursday, April 25, 2019

Reported by: Kelly L. Shainline, CSR No. 13476, RPR, CRR
Stenographic Court Reporter



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23
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25

1 Thursday, April 25, 2019

11:00 a.m.

2 P R O C E E D I N G S

3 ---oOo---

4 (Proceedings were heard in open court out of
5 the presence of the jury:)

6 **THE COURT:** Good morning, everybody.

7 **ALL:** Good morning, Your Honor.

8 **THE COURT:** So before we do anything, let's
9 talk a little bit about the day and what we're going to
10 accomplish today and not accomplish today.

11 I received the nonsuit motion last night and
12 filed endorsed copy today. I don't know whether or not
13 plaintiffs intend to argue orally or you want to have a
14 little extra time to get a written response on file.
15 You tell me.

16 **MR. BRADY:** I think we're prepared to address
17 most of the issues, if not all the issues, that they've
18 raised in the brief we got last night.

19 **THE COURT:** That's fine.

20 **MR. BRADY:** So if we need additional briefing
21 or the Court wants it, we're happy to do anything.

22 **THE COURT:** No, I just wanted to find out what
23 your preference is. And also, even if after you argue,
24 had you planned to file a brief, just for the record,
25 just asking.

1 **MR. BRADY:** We will, Your Honor.

2 **THE COURT:** And as for -- so we can talk about
3 that at any time.

4 So we have till about 2:00, 2:30 today. So we
5 have to get prepared for tomorrow. So we don't have the
6 entire rest of today to talk about this. And I'm not
7 sure I'm really prepared to discuss all of the jury
8 instructions in depth. There are several briefs, briefs
9 in opposition on particular jury instructions. I have
10 had a chance to sort of look at them for the most part
11 but not all the detailed briefing.

12 And I'm not making any final decisions today
13 in any event because we're not there yet, but I thought
14 we could certainly start talking about them.

15 So I'll tell you what, why don't we go ahead
16 and start then with the nonsuit motion. I got that last
17 night. I got the moving papers last night.

18 Or do you want to wait a minute?

19 **MR. WISNER:** Yeah, I haven't printed it out
20 for me. I assumed we would be covering it at the end of
21 today so --

22 (Simultaneous colloquy.)

23 **MR. WISNER:** So I'll be ready to go in
24 15 minutes. Sorry.

25 **THE COURT:** So moving forward.

1 On the jury instructions, I want to make sure
2 that the agreed-upon instructions and then the
3 plaintiffs' additional proposed instructions and then
4 Monsanto's instructions are the most recent filings on
5 this. Because you've each filed maybe 60 pages of
6 instructions at the beginning of the case. And then
7 somewhere a week or two ago I got -- a week ago I think
8 I got agreed-upon and then two sets that looked like
9 additional instructions. I just want to make sure that
10 that's what I'm dealing with at this point.

11 Yes?

12 **MR. EVANS:** I think so, yes.

13 **MR. WISNER:** I'm ready whenever you are.

14 **MR. BRADY:** We can go down the list. We've
15 got an agreed-on list of CACIs that I don't think
16 there's any issue on, Your Honor.

17 **THE COURT:** So I assume the agreed-upon list
18 is the agreed-upon list. So we don't really need to
19 talk about those. Those just are what they are. And I
20 don't disagree with any of them. So I think that's
21 fine.

22 We can certainly for the record read that in.
23 If you want to read that in, you can go ahead and do
24 that --

25 **MR. BRADY:** Thank you, Your Honor.

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THE COURT: -- the agreed-upon.

MR. BRADY: Thank you. Steve Brady for the Pilliod plaintiffs.

And for the record, the parties have agreed that the following instructions shall be given by the Court.

I have the names of the instructions. I don't have the CACI book in front of me. Do you have a CACI list?

THE COURT: Probably better to read it in by CACI just because whoever looks at this later down the pike is going to want to --

MR. BRADY: So starting at the top, Your Honor. CACI 5000.

I'll try to read slowly.

So both parties obviously agreed that CACI 5000, the duties of the judge and jury.

CACI 5001 on insurance.

CACI 5002 on evidence.

CACI 5003 on witnesses.

CACI 5006 on the definition of a nonperson party.

CACI 200 on the obligation to prove more likely to -- more likely true than not true.

Parties all agree on CACI 201, the highly

1 probable or clear and convincing proof standard with
2 respect to the evidence that that applies.

3 The parties agree on --

4 **THE COURT:** Just speak up just a little bit,
5 Mr. Brady.

6 **MR. BRADY:** Certainly.

7 The parties agree, Your Honor, on CACI 202,
8 the direct and indirect evidence instruction.

9 CACI 208, the use of deposition as substantive
10 evidence.

11 CACI 210 on the use of request for admissions.

12 CACI 219 on expert testimony.

13 CACI 220 on experts' questions containing
14 assumed facts, hypotheticals.

15 CACI 221, conflicting expert testimony.

16 CACI 3900, which is the introduction to tort
17 damages and case where liability is contested.

18 CACI 3902, the definitions of economic and
19 noneconomic damages.

20 CACI 3925, the statement that arguments of
21 counsel are not evidence of damages.

22 CACI 3964, the statement that jurors are not
23 to consider attorney fees and court costs in coming to
24 their verdict.

25 And then the predeliberation instruction, CACI

1 5009.

2 The note-taking instruction, CACI 5010.

3 The read-back instruction, CACI 5011.

4 The introduction to special verdict
5 instruction which is CACI 5012.

6 And then the instructions to alternate jurors,
7 instruction CACI 5015 or 5015.

8 Finally, the parties agree on the polling
9 instruction, CACI 5017.

10 And the instruction on questions from the
11 jurors, CACI 5019.

12 The demonstrative evidence definitions set
13 forth in CACI 5020.

14 And the final instruction on the discharge of
15 the jury, CACI 5090.

16 Those are the agreed CACI instructions,
17 Your Honor.

18 **THE COURT:** Okay. Thank you.

19 So there appear to be a few others that you
20 agree upon but don't appear in the agreed-upon list.
21 For example, what -- and then a couple that I think
22 should be there.

23 Monsanto, in their proposed jury instructions,
24 suggest 5005, multiple parties.

25 **MR. BRADY:** There would be no objection to

1 that from the plaintiffs, Your Honor.

2 **THE COURT:** Okay. But I also noticed that you
3 recommended 103 which is a similar instruction. So just
4 noting -- because what I really want to get down to at
5 the end of the day is what you really disagree about and
6 what I'm really going to be focusing on in terms of your
7 briefing. So that's why I want to go through and figure
8 out which ones need to be in that we're not going to
9 fight about or actually agree upon.

10 So multiple parties.

11 **MR. BRADY:** Whatever the Court's preference is
12 on 5003 or 5005 is fine. One's definitional.

13 (Court and Clerk confer off the record.)

14 **THE COURT:** So 5005.

15 I don't know, you didn't say 207, but evidence
16 applicable to one party, that should be in there.

17 **MR. BRADY:** I don't have an objection to that,
18 Your Honor.

19 **THE COURT:** 430, causation substantial factor.
20 I don't know if that was on your list. It is on
21 Monsanto's list.

22 **MR. BRADY:** The issue there, Your Honor, is
23 what we need to discuss and which the parties have
24 briefed about using the but-for test, the bracketed
25 language at the bottom of the instruction and we're

1 going to have to have a dialogue about that.

2 We're both in agreement that the first
3 paragraph -- well, the top of the instruction, the
4 substantial factor test is clearly the law and clearly
5 applies here, and I think Monsanto would agree, but they
6 want to also add the but-for qualification at the bottom
7 of the instruction and we've both briefed that for the
8 Court.

9 **THE COURT:** And that might be about as far as
10 it goes. Let's see.

11 (Pause in the proceedings.)

12 **THE COURT:** So item of economic damage was an
13 additional instruction proposed by Monsanto?

14 **MR. BRADY:** It's part of the introduction to
15 the plaintiffs' actual subsection damage part. So I
16 don't know why they haven't agreed on that, but the A,
17 B, C, D of 5903.

18 **THE COURT:** 5803?

19 **MR. BRADY:** 5903 sets forth the specific
20 damages.

21 **THE COURT:** So they're citing 3903, 390 --

22 **MR. BRADY:** I'm sorry, 3903, yes.

23 **THE COURT:** 3903. Okay. So I have not tried
24 to harmonize these two sets so you're going to have to
25 help me out as we go through this.

1 3903 and 3903A, is there some difference
2 between what Monsanto is proposing and what plaintiffs
3 are proposing?

4 **MR. ISMAIL:** Yes, Your Honor. And not in
5 terms of the, I think, principle but as applied to this
6 case. For example, plaintiffs' proposed 3903
7 includes -- there has been no evidence submitted by the
8 plaintiffs about Mr. Pilliod's future medical expenses
9 as an element of those economic damages. That's not
10 delineated in the plaintiffs' proposal. It is in ours.

11 And then they've added this paragraph 2 which
12 is a concept of lost consortium which is a claim which
13 has been dropped. The value of household services is
14 not a direct claim for either plaintiff. It would only
15 be a consortium value claim which neither plaintiff has
16 a consortium claim.

17 So that would be the reason why the form of
18 the instruction has not been agreed to although we each
19 have submitted this CACI instruction to be given. It
20 just -- we think it needs to be conformed to the claims
21 pled and the evidence submitted. That's all.

22 **MR. BRADY:** Your Honor, we concur that the
23 claim for consortium has been dropped. We will need two
24 separate instructions. It's clear to the defense, I
25 guess, for 3903 on medical expenses because, as

1 Mr. Ismail as probably -- properly noted, there is no
2 claim for future medical expenses for Al Pilliod. There
3 is obviously for Alberta. So we could --

4 **THE COURT:** Why don't you just meet and confer
5 on some different language.

6 **MR. BRADY:** We can add a paragraph in here
7 that makes it applicable for both. Or we can give it in
8 two separate 3903As, but it would be very simple for us
9 to modify.

10 **THE COURT:** I hope somebody is taking really
11 good notes because I'm just kind of going through that
12 so that you can revise this and then send me a set of
13 something with --

14 **MR. MILLER:** Yeah, we'll work it out.

15 **MR. EVANS:** I think that our proposed number 7
16 is -- captures what the evidence is. We can meet and
17 confer on it.

18 **THE COURT:** Well, that's what I'm looking at.
19 And I'm trying to find the same -- the similar
20 instruction here, and I'm not seeing it right now. But
21 as I said --

22 **MR. BRADY:** I'm sorry. Which number?

23 **THE COURT:** Okay. You put it under 3905.
24 It's 3903.

25 **MR. BRADY:** It's 3903, yeah.

1 **THE COURT:** And you're just going to meet and
2 confer on this?

3 **MR. BRADY:** We will. We can come to an
4 agreement on that. We agree with everything that they
5 say in terms of the damages. I don't think it should be
6 handled through a special instruction. I think we can
7 modify the CACI.

8 **THE COURT:** And I will tell you I have a bias
9 towards trying to stick with or vaguely modify CACI. I
10 am not a fan of special instructions, and many judges
11 are not. You've got to go down a rabbit hole with
12 special instructions.

13 So to be honest with you, to the extent that
14 either side has proposed and drafted special
15 instructions, I'm going to really need you to explain
16 why CACI won't work in this situation before I begin
17 modifying CACI or abandoning CACI and going to
18 something -- a truly drafted and special instruction.

19 You probably have run into this with other
20 judges who are a little reluctant, at least in
21 California, to depart from CACI.

22 **MR. BRADY:** That is our practice here,
23 Your Honor.

24 **THE COURT:** So let's see. So let me just go
25 through. I'll go through plaintiffs' first. The

1 multiple parties I think we've already taken care of.

2 There's a number 2 special instruction
3 regarding just the definition.

4 **MR. BRADY:** Hold on one moment, Your Honor.
5 Let me get to the special instructions.

6 **THE COURT:** And then I'll go through the
7 defendant's without arguing the merits of them, just
8 sort of figure out what the status is, and then maybe we
9 can...

10 **MR. BRADY:** So you're talking about the
11 definitional instruction first, Your Honor?

12 **THE COURT:** I'm talking about plaintiffs'
13 additional instructions, and I'm on 2.

14 **MR. BRADY:** That can probably be handled by
15 5003 or 5005. We just wanted to make sure that...

16 **THE COURT:** Well, let me ask the defendants if
17 they have an objection to that or some version of that?

18 **MR. BRADY:** It's a neutral statement.

19 **MR. ISMAIL:** I believe our multiple party
20 instruction, as the Court noted, was geared towards
21 this. Let me just pull it up.

22 **THE COURT:** Well, the multiple party
23 instruction was -- it's straight up 5005 which is
24 related to plaintiffs in this trial, you should decide
25 of each plaintiff separately as if it were a separate

1 lawsuit, which should be in there and I agree.

2 **MR. BRADY:** But this is a little different.

3 **THE COURT:** But I think this is a little bit
4 different in that it is --

5 **MR. EVANS:** Well, the verdict form,
6 Your Honor, I guess the second paragraph of their
7 special instruction number 2, for purposes of these
8 instructions, the verdict form from plaintiffs shall
9 refer to both Alberta and Alva Pilliod.

10 I guess we haven't gotten to the verdict form
11 yet, but I'm interested in how that will connect because
12 I think each case needs to be separately, obviously,
13 determined. So I'm not sure that I'm agreeable to
14 lumping them together.

15 **THE COURT:** So I looked at the verdict forms,
16 and just by the way, I'm hoping you're planning to
17 explain in detail what you want the jury to do with it,
18 each of your forms, because I don't want -- I'm hoping
19 that once you do that, they'll know how they want to
20 look at the form, understand the form, not so much that
21 they're going to know what to do, but they need to
22 understand the form is. When attorneys are vague about
23 the form itself and vague about what they are arguing
24 the jury should do, I get all kinds of crazy questions
25 they don't understand the form.

1 And then some judges don't really encourage
2 that. I do encourage it. I encourage the parties to
3 tell the jury what they want and what the verdict form
4 means so that when they go in there, they're not the
5 least unclear about what it is that, A, is being asked
6 for and what the form means.

7 **MR. BRADY:** Mr. Wisner is going to walk them
8 through it question by question, Your Honor.

9 **THE COURT:** And I'm sure defense will do it as
10 well. I'm just encouraging that detail, a bit of detail
11 in your closing, that's all.

12 **MR. EVANS:** As for -- I'm sorry, go ahead.

13 **THE COURT:** No. So as for this special
14 instruction, I looked at the verdict form, and I was
15 wondering whether or not -- and I haven't seen a verdict
16 form from the defendants, and maybe that's just an
17 oversight and it's here and I just haven't seen it. But
18 I didn't know whether or not a verdict form for -- you
19 were submitting a separate verdict form for Mr. Pilliod
20 and Mrs. Pilliod.

21 **MR. EVANS:** Yes.

22 **THE COURT:** And when I saw the plaintiffs'
23 verdict form, I wondered whether or not -- how you all
24 were approaching that and was there some difference of
25 opinion about how the verdict form should be structured.

1 **MR. BRADY:** That's why we wanted a general
2 verdict form, Your Honor, so there wouldn't be too many
3 questions. We didn't want to overwhelm the jury. That
4 was the thought behind our approach, was to simplify
5 this for the jury so you weren't bombarded with
6 questions, even if we walk them through it.

7 **THE COURT:** Let's revisit this instruction
8 because I want to look at the verdict form. My initial
9 thought is this is really two separate cases, and I
10 think if they have to be decided separately and I really
11 am not crazy about the idea of the jury feeling like
12 some parts are together and some parts are separate.
13 You know, there's common proof as to some parts of it,
14 but I think considering this is two separate -- two
15 separate cases tried together, separate verdict forms
16 for each of the plaintiffs would be appropriate.

17 I mean, if they're the same questions, then
18 fine. You know, once the jury's decided a question,
19 then they will understand they may have decided it for
20 both Mr. and Mrs. Pilliod. But I think it's important
21 for them to understand this is two separate cases and
22 they need to consider them separately.

23 **MR. BRADY:** I generally agree with you,
24 Your Honor. The only thing we wanted to avoid was
25 getting an inconsistent result by having them answer the

1 same question essentially on two verdict forms.

2 **THE COURT:** I understand that there's that
3 potential, but I'm more concerned about the potential
4 that they wouldn't consider the cases separately as they
5 should more than I'm worried about a confused verdict
6 form. Let's just say that.

7 **MR. BRADY:** Fair enough.

8 **MR. EVANS:** The last paragraph on their
9 special instruction number 2, I mean, I don't really
10 have a whole lot of heartburn about that, but we
11 probably just need to wait and see until the end of the
12 evidence comes in with respect to that.

13 **THE COURT:** Okay.

14 **MR. BRADY:** Your Honor, having a definition of
15 the Roundup products I think would be helpful to the
16 process. And for the argument of the --

17 **THE COURT:** Well, I think counsel just said
18 he's not really particularly worried about that at this
19 moment, but let's revisit it at the end of the case.

20 We're going to come back to all of these at
21 the end of the case just to make sure that these are the
22 decisions that need to be made. I'm not going to issue
23 a final order about these until after defendant has had
24 an opportunity to present their case.

25 **MR. BRADY:** I understand. This is just

1 supposed to be shorthand to help both sides.

2 **THE COURT:** Yes, well, I think it probably
3 will be some version of reminding them that we're
4 talking about Roundup and not the single chemical. But
5 we'll come back to this.

6 **MR. BRADY:** All right. So if we keep going
7 through the specials, there's a number of CACIs here
8 that we proposed to the defendants and they would not
9 agree to. So that's what you're going to be looking at
10 first.

11 Beginning with the party having the power to
12 introduce stronger evidence, CACI 203, this was proposed
13 to Monsanto and they wouldn't agree to this instruction.
14 So that's what you're going to see, a series of CACIs
15 here that were --

16 **THE COURT:** If you just denote that they're
17 contested, then I can develop that list. Some will be
18 easier than others --

19 **MR. BRADY:** Correct.

20 **THE COURT:** -- for me to make a call on.

21 **MR. BRADY:** So we're calling it instruction
22 number 3 here only because it was contested. That's all
23 those designations -- this isn't a special instruction.
24 I just want to clarify that for the jury. This is a
25 verbatim statement of CACI 203. It's only because we

1 couldn't get a stipulation that we laid them out in --
2 as instructions for the Court to consider. So I don't
3 want the title, that's all, to be misleading in the
4 record or for the Court.

5 **THE COURT:** Okay. And because you have
6 carefully said that the source is 203, I assume, now
7 there's somewhere the source is CACI but words that
8 there's been some modification of the instruction. So
9 thank you for telling me that it's not modified.

10 **MR. BRADY:** This one is not.

11 **THE COURT:** But this is not modified?

12 **MR. BRADY:** Correct.

13 **THE COURT:** I looked at the use instructions
14 for this instruction last night, and sometimes, you
15 know, I've included it. I'm not sure it applies in this
16 case. But based on the use instruction, I think that
17 it's required that there has to be some piece of
18 evidence that's not been rebutted, a clear indication
19 that there's something that's left unopposed.

20 And so I'm not sure -- I mean, I would be
21 interested to hearing what that is so that I would have
22 some context for considering this.

23 **MR. BRADY:** We're going to have to see what
24 they do in their case in chief, Your Honor. They've
25 sort of rebutted everything in cross-examination that

1 our experts have proposed. But if the Court feels that
2 way, then we should probably defer on this instruction
3 until after Monsanto finishes.

4 **THE COURT:** Okay. 205, same thing. I'm not
5 sure what they failed to -- or you failed -- you're
6 proposing it. So we'll have to see if there's something
7 that you believe that they have failed to explain or
8 deny. So we'll have to wait on that as well.

9 **MR. BRADY:** We feel that the evidence, at
10 least in light of Mr. Pease's testimony, the designated
11 person most knowledgeable, falls squarely within this
12 where he failed to explain or deny evidence, and even
13 when confronted with e-mails and other documents that
14 seem to show the opposite. So --

15 **MR. EVANS:** Mr. Pease was not called --

16 **MR. BRADY:** I'm sorry, Dr. Reeves. I'm sorry.

17 **THE COURT:** Okay. So just make a note that
18 when we talk about this in more depth, identify places
19 in the transcript that I can go back to. Because I
20 remember Dr. Reeves very generally, but a week ago, you
21 know, it would only be a very general sense of some of
22 the things that were said or not said. And honestly I'm
23 not going back in the transcript looking for things.
24 I'm going to have to ask you to do that --

25 (Simultaneous colloquy.)

1 **MR. BRADY:** We'll do that. And it was over
2 several days, too, Your Honor, because we used him sort
3 of to fill in the blanks between testimony of live
4 witnesses.

5 **THE COURT:** And just the snippets of the
6 transcript is fine. I don't need the whole transcript.
7 There are a lot of dead trees in honor of this case. So
8 I think that we can cut down on that.

9 So use of interrogatories, I haven't seen any
10 interrogatories.

11 **MR. BRADY:** I think we can withdraw that,
12 Your Honor. It was just in anticipation and it didn't
13 happen.

14 **THE COURT:** Number 6, 212, I'm not sure if
15 that applies. Oral or written statement by an opposing
16 party outside the courtroom. And I don't know if these
17 are statements that were made in deposition or what
18 you're referring to here.

19 **MR. BRADY:** There were numerous e-mails,
20 Your Honor, and PowerPoint decks and other statements
21 made by Monsanto personnel, some very high up in the
22 company, and doctors that this squarely applies to.
23 Some of them were deposed, some weren't, but much of
24 that evidence was already admitted by this Court.

25 **THE COURT:** Okay. I just want to know what

1 you're referring to so I have a frame of reference for
2 whatever arguments are coming in.

3 **MR. BRADY:** The e-mails would constitute
4 written statements, Your Honor.

5 **THE COURT:** And they probably would.

6 Negligence. So you have negligence and basic
7 standard of care, but then you also have the special --
8 the instructions that relate directly to failure to warn
9 and --

10 **MR. BRADY:** We can modify CACI 400 to take
11 care of this. I don't know that we need this as a
12 special instruction. I think it was in abundance of
13 caution because of the two plaintiffs. But if we go
14 back --

15 **THE COURT:** I think in your first set, it was
16 just the CACI 400 language. And then I'm noticing here
17 you broke it down to Mrs. Pilliod and Mr. Pilliod.
18 And --

19 **MR. BRADY:** I think that was just an abundance
20 of caution that it applied to both. We could probably
21 take CACI 400 at face value and just explain to the jury
22 that that's the legal standard that would apply to both
23 plaintiffs.

24 **THE COURT:** So, Mr. Ismail and Mr. Evans and
25 Mr. Brown, I don't know who's -- if everybody's chiming

1 in today, but who am I talking to today?

2 **MR. BROWN:** All of us.

3 **THE COURT:** Okay. So with respect to the
4 general negligence instruction, is there an objection to
5 that? Is it the modification, you don't believe it's
6 appropriate?

7 **MR. ISMAIL:** Well, I think it's the -- this
8 concept of sort of negligence in the air is sort of the
9 objection to the just -- if they have a negligent
10 failure to warn claim, then that's the negligence claim
11 in the case.

12 And so that has been proposed, and obviously
13 we'll -- if there's any differences, we'll work those
14 out. But this separate concept of just sort of --

15 **THE COURT:** General negligence. I actually
16 thought about that when I read it. If you have a
17 negligent failure to warn, there's a pretty complete
18 instruction on that. Why do we need general negligence?

19 **MR. BRADY:** Your Honor, I don't think --

20 **THE COURT:** I mean, when I read it, I thought,
21 well, there's a more specific --

22 **MR. BRADY:** But this comes with 401 which is
23 the definition of negligence, which I think is helpful
24 for the jury to understand. That's how the two CACIs
25 work, the basic standard of care in 401.

1 The defense objected to both 400 and 401. So
2 we proposed special instruction -- it's not really a
3 special instruction, but this restatement instruction as
4 a response. And we tried to just clean it up a little
5 bit. But we have no objection to the Court modifying
6 400 and 401.

7 I think they need to understand the standard
8 because I think that the negligent failure to warn does
9 not include the basic standard of care definition, which
10 is important.

11 **THE COURT:** So negligent failure to warn.

12 **MR. BRADY:** If you look at number 6,
13 Your Honor, which is in the instructions that were
14 proposed -- they modified it heavily. I'm sorry, that
15 won't help. Let me get that instruction for you.

16 **THE COURT:** You mean Monsanto's number 6?

17 **MR. BRADY:** Yeah, but that's a heavily
18 modified version of the CACI. Hold on. Let me get you
19 the CACI number on it.

20 **THE COURT:** It's 1222, I think.

21 **MR. BRADY:** Yes, I think you're right.

22 Thank you, 1222, Your Honor, you're absolutely
23 right. And that's the actual CACI on this.

24 But if you look at it, it doesn't really
25 contain the definitional statement of negligence that

1 the basic duty of care sets out in CACI 401.

2 **THE COURT:** It does not. But it may be that a
3 modification is in order without -- a modification of
4 either of that or a modification of 400 and 401 just to
5 state the general standard of care.

6 **MR. BRADY:** I think you still have to show the
7 general -- what the plaintiffs' burden of proof to prove
8 is on 400. I don't know why that would be
9 objectionable. That's all this instruction number 7
10 that we did.

11 And we split it up between the two plaintiffs.
12 That's all this is. Instruction number 7 is a
13 restatement of CACI 400, but with each plaintiff listed
14 separately to avoid any confusion because as the Court
15 wanted to be careful that they have separate claims.
16 We're happy to have you read 400 and 401 any way you
17 like.

18 **THE COURT:** Well, I'll take a look at it and
19 see. You know, I did just briefly look at the *Johnson's*
20 instructions yesterday, and I can't recall now which
21 ones were in and which ones were out. I just want to
22 get a general sense of -- I don't think that the general
23 negligence instruction was included in that actually.

24 **MR. BRADY:** It's a little different because he
25 was a commercial -- he was working at the time.

1 **MR. ISMAIL:** So we don't believe there should
2 be two separate negligence instructions. So if the
3 question is: Is the plaintiffs' burden and the
4 appropriate standard articulated in 1222, then perhaps
5 that's the better approach, to modify the specific
6 negligence claim here, failure to warn, rather than
7 giving the jury two separate constructs for negligence
8 and leaving it to them to figure out.

9 So I think that's what we were coming from.

10 **THE COURT:** Oh, I think at the end of the day
11 we might be in the exact same place which is that if you
12 modify 1222, that it still starts out with a statement
13 of the general standard of care for negligence and then
14 goes on to something more specific with respect to the
15 negligent failure to warn which is what I was thinking
16 that Mr. Wisner --

17 **MR. WISNER:** Makes sense.

18 **MR. BRADY:** That's exactly right. Because
19 1222 doesn't contain that definitional statement.

20 **THE COURT:** So with that in mind, can you guys
21 come up with something? That's what I'd like you to do.

22 **MR. MILLER:** Yes.

23 **MR. BRADY:** I'm sure we can.

24 **THE COURT:** Substantial factor. We talked
25 about 430, and you said that the 430 proposed by

1 defendants just in terms of modification. So discuss
2 that.

3 **MR. BRADY:** Your Honor, there's been a couple
4 of briefs filed on this, but let me kind of give you the
5 crux of the apostrophe, as the great philosopher Frank
6 Zappa would say.

7 **THE COURT:** And by the way, let me just stop
8 for a second and tell you what I have.

9 **MR. BRADY:** Sure.

10 **THE COURT:** Because when you said that there
11 was a brief on it, I have --

12 **MR. BRADY:** It's called Plaintiffs' Trial
13 Brief on Causation Jury Instructions. And then Monsanto
14 actually did an opposition --

15 **THE COURT:** Filed an opposition.

16 **MR. BRADY:** -- to plaintiffs' trial brief.

17 **THE COURT:** They did, and I briefly looked at
18 it, but I really did not study it in any depth because
19 I -- *Rutherford* was cited, and I took a look at it and I
20 was looking at the asbestos --

21 **MR. BRADY:** The seminal case is the *Major* case
22 and the defendants do cite that. And the *Major* case,
23 Your Honor, at -- let me give you the page. Let me give
24 you the citation, is the *Tajie Major* case, and the
25 citation on that one -- I've just got the slip opinion

1 number, but I'll get the citation for the Court.

2 But in the *Major* case, the court really gave
3 the entire history of BAJI 3.75 which is the old but-for
4 test proximate cause, talks about how the BAJI committee
5 later added 3.76 because of all the confusion that 3.75
6 was causing and the problems it was causing for the
7 court, a number of cases addressing it.

8 And then how, you know, in 1991 the *Garcia*
9 case, the *Mitchell v. Garcia* case, essentially tossed
10 that 375 but-for instruction.

11 And, Your Honor, I had a unique perspective on
12 it. I was a young lawyer at the time, and on behalf of
13 the Consumer Attorneys of California -- then it was
14 called the California Trial Lawyers Association -- I got
15 to participate in the meetings with defense counsel and
16 the bench and the CACI committee as we rewrote the
17 CACIs.

18 And, you know, the only reason why that last
19 portion of 430 was kept in, it was a political decision
20 at the end almost, because we couldn't get agreement
21 between everybody to fully, I guess, let the but-for
22 causation die.

23 But it was the clear intention, if you see the
24 Supreme Court, and in the *Major* case, which, you know,
25 the defendants acknowledge and they cite right at the

1 beginning of their brief. And for the record I'll just
2 put that on there because I think that's really the most
3 helpful. It's *Major v. R.J. Reynolds Tobacco Company*.

4 **THE COURT:** And it was cited -- yeah, it's
5 cited on the first page of Monsanto's brief.

6 **MR. BRADY:** It is, Your Honor, but not exactly
7 for what I believe that if the Court takes a careful
8 look at the case, it actually holds.

9 And at page 17 of that decision, *Major* goes
10 through -- the California Supreme Court goes through,
11 like I was saying, the whole history of pretty much the
12 abolition of 375.

13 And even though *Rutherford* created a small
14 exception, you know, in an attorney malpractice case
15 that really has no bearing here, you know, this general
16 rule applies. And I guess the whole discussion here
17 that we need to have, if we're going to have one, is
18 whether or not there were contributing factors here.

19 And the defendants, all through their brief,
20 claim that the plaintiffs' experts all testified that
21 the Roundup was the sole cause of the plaintiffs'
22 non-Hodgkin's lymphoma. And we submitted numerous
23 citations to the actual record in this case.

24 But if you go through, and I'd be happy to
25 make a record of that further if the Court would like,

1 but if we go through Dr. Weisenburger's testimony,
2 Dr. Sawyer's testimony, Dr. Nabhan's testimony, the
3 questions that were asked were all: Is -- was the
4 Roundup a substantial factor or substantial contributing
5 cause? No one ever asked whether it was the sole cause.
6 That word was never used.

7 The defendants say that over and over again in
8 their brief without any citation to the record, and that
9 is because neither that question nor that answer was
10 ever elicited by any of the witnesses.

11 Dr. Weisenburger specifically considered
12 obesity. And I could go through --

13 **THE COURT:** I don't really want you to do that
14 because what I was going to say to you is that I have
15 the cite, I will read the case. I did take a look at
16 this briefly last night.

17 I will just say off the top of my head, having
18 reviewed CACI 435, I don't think it's particularly
19 relevant, but I'll hear argument and I'll review this
20 more carefully.

21 But what I really need to do is probably on
22 these issues that have been briefed, probably need to
23 review them and give you a tentative so that we have
24 some context in which to actually argue this. Because
25 just off the top of your heads today is not going to be

1 helpful to either you or to me. And I did do a little
2 preliminary research and then got your brief on nonsuit.
3 So I stopped looking at it and started looking at that
4 instead. So I've gone through it a little bit. But
5 when I looked at CACI 435, I thought that was kind of
6 interesting. I'm not sure why I would read that, but
7 I'll take a look and give you a response.

8 **MR. BRADY:** We put that in mostly for
9 instructional purposes for how this issues has been
10 dealt with in a similar cancer type of -- group of
11 cases. Okay. I think 430 without the but-for at the
12 bottom and 431 in tandem cover the business and would,
13 if the Court were inclined to give those instructions as
14 we've requested, it would obviate the need for us to
15 have a conversation about 435, we would voluntarily
16 withdraw that.

17 **MR. ISMAIL:** Your Honor, just to briefly
18 respond. I know Your Honor wants to do much more review
19 of the case law.

20 But-for causation is alive and well in
21 California. It's not been held over as an artifact of
22 some political compromise in the creation of the CACI
23 instructions. That's completely false and belied by the
24 case law.

25 But-for causation the state has adopted the

1 restatement definition of substantial factor which
2 includes but-for causation as a necessary component to
3 that.

4 We have proposed CACI 430 in its entirety, as
5 was charged in the *Johnson* case, exactly coming from the
6 CACI 430.

7 The issue -- there is a very limited exception
8 to 430 as even articulated in the *Major* case. They call
9 it a limited exception. Not the default rule. And that
10 is when there are two or more independent and sufficient
11 causes bringing about the injury and such that the
12 plaintiff wouldn't be able to show that either is the
13 but-for cause.

14 So the classic example, as even in the
15 illustration in the restatement, is the two-fire
16 situation. Defendants' negligence railroad, I think, is
17 the exact example in the restatement. Starts a fire and
18 someone carelessly discards a cigarette, and the fires
19 converge to destroy property. That's your classic
20 independent sufficient causes example.

21 Here the plaintiffs' experts were pointedly
22 and quite forceful in pushing back that there's any
23 other cause to the plaintiffs' injuries. You'll recall
24 on Tuesday with Dr. Nabhan had his board up on -- I had
25 it up on the screen and I tried like heck to get him to

1 move Xs over to the right to say that he would agree
2 that they at least contributed to the plaintiffs'
3 injury. And he fought and refused to even acknowledge
4 obesity, age, race, autoimmune diseases had any
5 contribution to the plaintiffs' injury, let alone a
6 sufficient cause on its own that was concurrent with
7 Roundup.

8 So they are very far afield from the limited
9 exception articulated in California law, whether it be
10 the *Major* case, the other case law that we have
11 submitted to the Court.

12 And indeed the plaintiffs' position would be
13 akin to saying whenever there are alternative causes
14 posited for a personal injury claim or a product
15 liability claim, that but-for causation goes out the
16 window. And that can't be the law. It isn't the law.
17 There are many examples where but-for causation is
18 charged, just as it was in *Johnson*.

19 So those are the contours of what we're
20 having. We believe 430 in its entirety is the proper
21 charge. We can address separately whether this
22 asbestos -- this asbestos concept clearly doesn't apply
23 here by its own terms. But I would -- obviously we're
24 going to have to have further discussion on this, but
25 that's sort of what we think are the contours of this

1 discussion.

2 **MR. BRADY:** May I reply briefly, Your Honor?
3 Very briefly.

4 In *Johnson* there were no other causes that
5 were proffered by the plaintiff. It's a different case
6 than there was here.

7 If we could, I'd be happy to pull up the
8 boards that Dr. Nabhan marked up. Because he did
9 consider obesity and he did consider compromised immune
10 system and the Hashimoto's, and there are a number of
11 things which were not only brought up by the plaintiff
12 but brought up by the defense.

13 You've been sitting as a trial judge here in
14 this courthouse for many, many years, and you know in
15 the hundreds of trials I'm sure that you've tried that
16 the but-for is the exception to the rule. I think
17 Monsanto is looking at this backwards. I think that's
18 only given in very specific cases, like in *Rutherford*
19 where there was an attorney malpractice issue that had
20 to be decided first. It is not the general rule in
21 California. We have gone to legal cause. We have gone
22 to substantial factor. It is not live and well but-for
23 causation in California. It is a very rare and unique
24 animal to come into play in a case like this.

25 And especially where, if you look at the use

1 notes, when there are concurrent causes before the jury,
2 which not only had the plaintiff elicited from their own
3 experts, but the defense has gone beyond that in
4 eliciting a number of other concurrent causes, the skin
5 cancer, the family history, the other solid tumors, the
6 ulcerative colitis. You know, the defense has begged
7 this issue way beyond. This is the whole defense, that
8 it's concurrent causes.

9 Of course, they deny that Roundup played a
10 substantial factor. But, again, that's the issue,
11 substantial factor, for the jury. This is not a case
12 where following the use notes the Court would ever
13 employ the but-for test.

14 **MR. ISMAIL:** So, Your Honor, that's just
15 completely upside down. Even the *Major* case makes this
16 clear. The rule is but-for. The exception is when
17 there are two independent sufficient causes. And the
18 plaintiff expert considering other causes is miles away
19 from independent and sufficient. They have to each be
20 on their own a sufficient cause of the plaintiffs'
21 injury. Plaintiffs' experts, to a question, refused to
22 consider -- or sorry -- refused to state that there are
23 other sufficient causes that could bring about these two
24 cancers.

25 **THE COURT:** I'm looking at the use notes as

1 you're speaking. I'm listening to you, but I'm also
2 looking at the instructions and the use notes. And I
3 understand the argument.

4 **MR. ISMAIL:** Yes.

5 **THE COURT:** Just give me a chance to read the
6 brief.

7 **MR. ISMAIL:** Thank you, Your Honor.

8 **THE COURT:** And I can have a more informed
9 conversation with you. And I will try to get to this
10 over the weekend so that we can actually start pinning
11 these down next week.

12 **MR. WISNER:** We had a substantial fight about
13 this in front of Judge Chhabria, and I personally argued
14 it.

15 And there's actually a very good case on
16 point. I don't have the citation on hand, but I believe
17 it's actually in the usage notes. But it's a case where
18 even if the plaintiffs' experts themselves do not say
19 there are multiple concurrent independent causes, if the
20 defendants raise the possibility of independent
21 concurrent causes, then we have to get the instruction
22 the way -- without the but-for causation element.

23 And the reason for that is because they can't
24 have their cake and eat it too. They can't get rid
25 of -- they can't have the but-for causation instruction

1 and then argue to the jury, hey, something else caused
2 it. So they have to pick their poison. If they want to
3 argue Hashimoto's or basal cell carcinomas or the
4 translocation of the gene, which if they want to argue
5 all that, that's fine, then there is no but-for
6 instruction. If they agree not to argue that, then I
7 think that we're just agreeing it isn't Roundup that was
8 a factor, then it's a different conversation. So that's
9 sort of the issue.

10 **MR. BRADY:** The use note goes on to also
11 suggest that in a multiple concurrent cause case like
12 the defense has created here that the 431 instruction
13 should be given to clarify. This is of grave concern to
14 the California Supreme Court.

15 **MR. ISMAIL:** So the plaintiffs' articulation
16 would eradicate but-for causation unless the defendants
17 stipulated to causation which is clearly not the law.

18 It's positing an alternative cause. Just as
19 in *Johnson*, there was -- the defendants didn't stipulate
20 that Roundup was the cause of Mr. Johnson's cancer.
21 There was an argument that it was an unrelated cause,
22 that it was an idiopathic cancer which, by its terms,
23 presupposes there is a different cause for the cancer.

24 To say that the defense is suggesting an
25 alternative cause does not allow this jury on their own

1 to say that there are two independent sufficient causes
2 acting in concert to cause the injury. Because if the
3 plaintiffs' experts took the stand and said Roundup on
4 its own could cause this cancer and I believe did so and
5 in addition to that their autoimmune condition and body
6 weight and age also could have and did in this case
7 cause their cancer, we'd be in a totally different
8 world.

9 They wouldn't agree that any of those
10 additional factors had any contribution. If you recall,
11 we very vividly remember, Dr. Nabhan and I got into it
12 pretty heavily right before lunch where he wouldn't
13 allow me -- I was trying to get the Xs on the board for
14 even have him consider that those risk factors were
15 present in those individuals, and he refused to do so.

16 He and Dr. Weisenburger ended up with one X on
17 the far right of their columns, and you cannot have a
18 multiple independent sufficient cause instruction when
19 the plaintiffs say there's only one cause.

20 The defendants say that wasn't the cause,
21 something else caused it. But the jury can't on their
22 own speculate and say those two theories of causation
23 here combined to form a cancer. There's been no
24 competent testimony for that.

25 And I know I've overstayed my welcome on this

1 issue, Your Honor. I'll stop.

2 **THE COURT:** That's okay. I have it in mind.

3 **MR. BRADY:** We can look at the board. It's
4 just --

5 **THE COURT:** No, I remember the board. I
6 remember the argument. I remember the testimony. In
7 fact, I can recall sort of the line of questions with
8 most of the experts. So let me just think about that in
9 context of your argument here. I haven't read the *Major*
10 case.

11 **MR. BRADY:** Can I ask the Court to consider
12 one other case. This is the one that helped Judge
13 Chhabria. It's called *Logacz v. Limasky*, L-O-G-A-C-Z
14 versus L-I-M-A-S-K-Y, and the citation is
15 71 Cal. App. 4th 1147. Judge Chhabria felt that was
16 most instructive.

17 But, again, to say the but-for test is the
18 standard here and is alive and well and is given in
19 every case and the exception is legal cause is the
20 standard substantial factor, I think that belies what we
21 do in this building every day.

22 **THE COURT:** Okay. Well, honestly, the
23 building doesn't do anything, the judges do a lot.

24 **MR. BRADY:** The judges do a lot.

25 **THE COURT:** And I know you keep giving

1 Mr. Ismail a hard time about being pro hoc vice, but he
2 has a point. I mean, I see Mr. Evans more than I see
3 most people in this building. So he's a frequent flier.
4 In any event, nobody gets hometown in here. Let me just
5 say that.

6 **MR. BRADY:** Your Honor, I did not mean that.

7 **THE COURT:** Well, you said it nine times, come
8 on now. Fess up, Mr. Brady. Don't start backing down
9 now.

10 Anyway, thank you.

11 **MR. BRADY:** Can I say for the ninth time how
12 much we appreciate all the hard work that this Court has
13 done during this trial?

14 **THE COURT:** That's not getting you anywhere
15 either.

16 (Laughter.)

17 **MR. BRADY:** If there's something I want to say
18 nine times, that's it.

19 **THE COURT:** I'm just saying, that's not
20 getting you anywhere either.

21 Okay. I have the issue in mind. Thank you
22 very much. I appreciate that.

23 Strict liability.

24 **MR. BRADY:** Which one are you looking at now,
25 Your Honor?

1 **THE COURT:** I'll start with the plaintiffs and
2 then try to find the corresponding, if there is one.
3 And then defendants, I'm going to go over the
4 defendant's that I don't see their special or there's
5 no --

6 **MR. BRADY:** Which of the plaintiffs' are you
7 looking at? I'm sorry.

8 **THE COURT:** 1200, strict liability, essential
9 factual elements.

10 **MR. BRADY:** Okay. So we've got a couple
11 others in between there that we haven't addressed. If
12 you want to go back to, 413 would be the next one.

13 **THE COURT:** No, 430, 431, 435, that's where I
14 am. 413 -- oh, custom or practice. I skipped that
15 actually. Because we were talking about 400 and 401.
16 And custom and practice, I'm not sure that -- when I
17 looked at it, I was trying to figure out why I would
18 include 413. So why would I include 413 in terms of
19 custom and practice?

20 **MR. BRADY:** Your Honor, that's what Monsanto
21 has essentially tried to offer or argue through here.
22 But I think what we're looking at is why -- this goes to
23 the issue of using other surfactants, using other
24 dangerous drugs, who did what kind of testing, what
25 corporate -- what the duties of responsible corporations

1 are to test and provide warnings to their products.
2 It's generally a helpful definitional instruction.

3 **THE COURT:** Who's going to speak on that
4 issue?

5 You can give me previews of more argument to
6 come because I'm not resolving it today, but is there an
7 objection to that or something like that? And if so,
8 why don't you just give me the highlights.

9 **MR. EVANS:** Your Honor, I actually don't know
10 what they're referring to with respect to custom and
11 practice. There's been evidence regarding -- if we're
12 talking about surfactants, there's been evidence
13 regarding the surfactant issue. But that's not a custom
14 and practice in the concept of this instruction.

15 So I just don't know how it's applicable to
16 what factual scenario. We can certainly talk more about
17 it if they explain that.

18 **MR. BRADY:** Your Honor, their witnesses
19 testified on the portions that we played that they
20 followed all of the customs and practices, requirements
21 of the EPA. It's important --

22 **THE COURT:** Well, wait minute. Saying that
23 they're complying with the EPA and a custom and practice
24 in the community are two different things.

25 So I think that -- because when I saw 413, I

1 was thinking to myself I'm not sure that there has been
2 testimony even about custom and practice of other
3 pesticide producers or sellers.

4 And so to the extent that I think there's
5 probably more argument to come regarding compliance
6 with, or not, with the EPA, I don't think this speaks to
7 custom and practice in the --

8 **MR. BRADY:** We'll have to wait to see what
9 they do.

10 **THE COURT:** -- community. So we'll have to
11 come back to it, but as of this moment I don't see it.
12 So you'll have to convince me later down the pike that
13 there's a reason I would read this.

14 So let's skip over then to 1200.

15 So defendants didn't -- they started at 1204.

16 **MR. EVANS:** Right. Because, Your Honor, we
17 don't think that the design defect independent from
18 failure to warn is a valid claim. So that's why we
19 didn't do those instructions.

20 We did propose instructions, if you're going
21 to move forward with that claim, the design defect again
22 independent from failure to warn, then we propose the
23 risk benefit test as opposed to consumer expectation
24 test, which is a couple of instructions farther along.
25 But that's just the framework. We don't think the

1 design defect claim in itself is appropriate independent
2 from the failure to warn claim.

3 **THE COURT:** I saw that in your briefs.

4 **MR. EVANS:** Right.

5 **THE COURT:** I did see that. And I did sort of
6 look at those briefs and I started looking at that
7 issue. So that was one of the things I was going to ask
8 you about, but it also seems that maybe that's something
9 that we're going to have to address at the end. But I
10 would be interested in sort of getting an outline of --

11 **MR. WISNER:** I'll respond to that because this
12 is part of the nonsuit.

13 **MR. BRADY:** It is part of the nonsuit as well,
14 Your Honor. But, again, this is the -- we can come back
15 to this after we talk about whether the risk-benefit
16 analysis that they've proposed is the correct one or the
17 consumer expectation test, which has been given by both
18 Judge Chhabria and Judge Bolanos and is clearly, we
19 believe, the correct instruction to give in this case.

20 **THE COURT:** Mr. Wisner, you had something to
21 say?

22 **MR. WISNER:** Sure. So on the design defect
23 claim, they make assertions in their briefing
24 specifically that there's no evidence presented to the
25 jury that an alternative design --

1 **MR. EVANS:** Your Honor, this is the nonsuit.
2 If we're going to argue, can we argue that when we argue
3 the nonsuit?

4 **THE COURT:** So we'll skip this altogether for
5 right now.

6 **MR. EVANS:** Well, we're just framing -- I was
7 just trying to frame the issue with the instruction,
8 which is we're denying that there's a design defect. I
9 know it's argument, but I don't think we need to argue
10 that at this point.

11 **THE COURT:** Right. No, I understand how
12 you're framing the issue which is at the end of the day
13 you don't think the design defect survives, and your
14 nonsuit motion so that we shouldn't even be
15 considering -- we shouldn't be considering the
16 instruction regarding it, but if we do, then there is
17 benefit test that you're asking the Court to read
18 instead.

19 So there's a lot to unbundle that. There's a
20 lot there. And I think it probably starts with the
21 nonsuit motion, and we'll go from there.

22 And you know what, before we even start
23 talking about it, because I do understand the logic of
24 your argument, I have to read those briefs. I started
25 looking at them last night, and I downloaded a couple of

1 cases and I realized I was not clear on the concept. I
2 really wasn't clear on it.

3 **MR. EVANS:** Understood.

4 **THE COURT:** And I went back to the complaint
5 actually on that cause of action to see how it was pled
6 so I can understand the distinction. And I understand
7 that there are some phrases in the allegations regarding
8 design defect as -- and failure to warn. But, you know,
9 I do understand the two distinct claims being made and
10 we'll just have to go from there.

11 I'm going to have to take a look at the briefs
12 to figure out if they're one in the same, if they're
13 not, and I guess in large part whether or not we proceed
14 with that. So let's just keep going and get beyond
15 that.

16 So I think there also seems to be some
17 language differences. It's not that 1205 shouldn't be
18 read. I think defendant's includes the word "actual
19 risk" and plaintiffs' does not include the word "actual
20 risk." And I saw there was a brief on that and whether
21 or not it should include that word.

22 **MR. EVANS:** Right.

23 **THE COURT:** So I have in mind that there's
24 that difference of opinion about how it should be
25 worded. But 1205 in some form should be --

1 **MR. BRADY:** That's a clarity issue,
2 Your Honor. And I think we've responded to that too.

3 So do you want to step back then to 1203?

4 **THE COURT:** Well, 1203 is the consumer -- I
5 mean, I think that's sort of bound up in what we were
6 just talking about, which is if we get to -- depending
7 on how, I guess, the outcome of the nonsuit motion, but
8 also whether or not I think it should be read at the end
9 of the day, that's the other thing, at the end of the
10 case, whether both should be read and which -- whether
11 or not it should be consumer expectation versus risk
12 benefit test. And so I want to read the briefs first
13 before I even dive into that.

14 So 1203 is sort of part of that discussion.
15 So let's just move beyond that which is why I was going
16 on to 1205, which I will take a look at the distinction
17 between the word "actual" and not.

18 **MR. BRADY:** This is in the context of the
19 products case.

20 **THE COURT:** Right. And I want -- that seems
21 to be the only difference between the two.

22 **MR. BRADY:** It is. And maybe we can agree on,
23 depending on what the Court decides on 1222, you know,
24 in 400 and 401 you've already ordered us to meet and
25 confer on the 401, 401, 1222 issue. That may help make

1 the Court's decision on this.

2 But I think the use notes indicate that this
3 instruction should be given regardless of whether
4 there's prior definitional or prior -- if there's a
5 different negligence claim because the essential
6 elements of negligence with regard to the product
7 liability case are different. They use different
8 language concerning the design manufacturer's supply.
9 These are tailored in the negligence context to the
10 design defect and products liability.

11 **THE COURT:** So --

12 **MR. BRADY:** I don't think there's anything
13 offensive about this instruction. I think it's just an
14 accurate non -- neutral statement of the law.

15 **THE COURT:** Is there opposition to that 1205
16 specifically? Or do you want to work with plaintiffs on
17 that?

18 **MR. BROWN:** There are objections, Your Honor.
19 We filed a brief in that.

20 **THE COURT:** Okay. This is the -- hold on.
21 Which group is that? Failure to warn, 1205, 22, yes,
22 you did. I haven't looked at that brief yet. So give
23 me a chance to look at the brief.

24 **MR. BRADY:** Sure.

25 **THE COURT:** There is one brief I didn't see an

1 opposition to and that is Monsanto's bench brief in
2 support of additional proposed instructions 3 -- 5 and 3
3 or 5 and special instruction 3. And I couldn't find a
4 plaintiffs' opposition to that. You may have filed one.
5 But it was just filed like two days ago, I think.

6 **MR. BRADY:** I don't know if we've had a
7 chance.

8 **MR. MILLER:** I don't think we have.

9 **MR. BRADY:** I think we need to for the record,
10 Your Honor.

11 **THE COURT:** I just wanted to bring it to your
12 attention only because I didn't know if it was out there
13 and I haven't seen it.

14 **MR. BRADY:** What's that brief titled? I'm
15 sorry.

16 **THE COURT:** This is "Monsanto Company's Bench
17 Brief in Support of Additional Proposed Instruction
18 Number 5 and Special Instruction Number 3 Concerning
19 Failure to Warn and Punitive Damages."

20 **MR. BRADY:** Can we get you an opposition to
21 that by Monday, Your Honor?

22 **THE COURT:** Sure.

23 Okay. Let's skip forward. 1222, but I'm
24 assuming that there's --

25 **MR. BRADY:** We addressed that earlier. We had

1 that in here twice.

2 **THE COURT:** Okay.

3 I don't see any differences between the two,
4 but it says that this is modified. Where are the
5 modifications so that I don't have to go line by line?

6 **MR. BRADY:** Just the numbers. I think it's
7 just -- it's only modified because we have two
8 plaintiffs here. It was modified to address both
9 Mr. and Mrs. Pilliod in one instruction so we didn't
10 have to have you read it twice.

11 **THE COURT:** But there's no disagreement
12 between plaintiffs' and defendant's?

13 **MR. EVANS:** Which one are we talking about?
14 I'm sorry.

15 **THE COURT:** 1222.

16 **MR. BRADY:** This may take care and obviate the
17 need to discuss further instruction 400.

18 **THE COURT:** Okay.

19 **MR. BRADY:** I don't think we have to give
20 multiple instructions on the plaintiffs' burden.

21 **THE COURT:** So yes or no? They don't seem to
22 be --

23 **MR. EVANS:** Yeah, let me just look at it,
24 Your Honor.

25 **THE COURT:** That's fine.

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(Pause in the proceedings.)

MR. EVANS: Yeah, Your Honor, we -- that's in one of our briefs. The difference is that FIFRA issue that we briefed which is contained in the third element, I believe. Second and third elements look like they're different.

THE COURT: Oh, okay. And I think I did --

MR. BROWN: Your Honor, you indicated you haven't read the brief on 1205 and 1222.

THE COURT: No, I haven't, not really.

MR. EVANS: And they were going to brief it. So let's -- it's -- there are some differences there, Your Honor.

THE COURT: Okay. I see that.

MR. BRADY: These have to be modified slightly to make sense in the context of the case.

THE COURT: No, I haven't really read. But my -- oh, you know, I did take a look at it, and I think plaintiffs were arguing that this brings back preemption into -- is this the one they're arguing preemption is being reraised and I've already resolved it.

MR. BRADY: The defendants are trying to raise it again, but I think that issue has already been decided by this Court and all the other courts have looked at this issue. So I don't think that's going to

1 come into play here.

2 **MR. EVANS:** Well, I actually think that was a
3 little different issue, Your Honor, which was with
4 respect to the EPA to -- but the way Your Honor decided
5 it was, that it was a factual issue that would need to
6 be decided by the jury. So that is part of our briefing
7 that there should be a separate instruction that
8 addresses that preemption-related issue that Your Honor
9 ruled.

10 **MR. BRADY:** I don't understand what counsel is
11 talking about. The preemption issue is a question of
12 law that needed to be decided by the Court, Your Honor,
13 and it already has been.

14 **MR. EVANS:** We've quoted extensively from,
15 Your Honor, *Sargon* and summary judgment rulings as to
16 Your Honor's determination that there was a factual
17 issue regarding whether the EPA would have rejected a
18 proposed different warning. So that was the issue that
19 Your Honor has previously ruled upon.

20 **THE COURT:** I did rule on an MIL that that
21 evidence can't come in. That's one of the MILs was
22 related to whether or not evidence that the EPA
23 wouldn't -- or argument that the EPA would not have
24 approved a label -- a proposed label with -- I'd have to
25 go back to the MILs. Hold on one second.

1 **MR. BRADY:** You took that out, Your Honor.
2 That's exactly what you ruled.

3 **THE COURT:** Okay. So I'll look at the briefs.
4 But I did actually, now that you're mentioning it, I did
5 peruse the briefs last night. Because I did take a look
6 at the *Sargon* order and I did look at the MIL, and I
7 tentatively would say I agree, but let me just take a
8 look at the briefs again.

9 **MR. BRADY:** Thank you.

10 We're almost finished. Just a couple more for
11 the plaintiffs, Your Honor.

12 **THE COURT:** So items of economic damage, we
13 talked about that already, that that would be modified.

14 And then --

15 **MR. BRADY:** Monsanto has repeatedly made an
16 issue of Pilliods' other medical conditions, their
17 preexisting conditions, Your Honor, and that alone
18 can --

19 **THE COURT:** I can't hear you, Mr. Brady.
20 Would you bring the mic a little closer.

21 **MR. BRADY:** I'm sorry.

22 Monsanto has continuously alluded to and
23 cross-examined all of the witnesses regarding the
24 Pilliods' preexisting medical conditions. And I think
25 that alone would give rise to the Court giving the 3928

1 unusually susceptible instruction and allowing the
2 parties to argue that. That seems to be part and parcel
3 with Monsanto's attack on the plaintiffs' case here.
4 And I think that this instruction should fairly be given
5 under those circumstances.

6 **THE COURT:** I saw that, but I can't say I
7 agree. But we'll have to argue that probably at the
8 end, but at this moment I don't agree.

9 Just looking at the use notes for that
10 particular instruction doesn't seem to be relevant or
11 relate to --

12 **MR. BRADY:** I don't think that 3929 is any
13 longer an issue, Your Honor. I don't think there's been
14 any -- unless the defense does something in their case
15 on Monday or Tuesday to suggest that some physician or
16 other health care provider has provided some substandard
17 care to either of the Pilliods, I think that's
18 withdrawn.

19 **THE COURT:** Okay.

20 **MR. BRADY:** And the life expectancy
21 instruction is right out of the CACI mortality table,
22 Your Honor, that's attached to the CACI book.

23 **THE COURT:** Okay. Do you have any objection
24 to the 3932 which is the life expectancy instruction on
25 damages?

1 **MR. EVANS:** Your Honor, I'm not sure where we
2 ended up on that. Can we just circle back on that?

3 **THE COURT:** Why don't you just talk to them
4 about that? Okay. That's fine. That seems
5 appropriate.

6 And then punitive damages.

7 **MR. BRADY:** I haven't seen this last brief
8 that the defense -- that you have that I don't think we
9 do where we're going to be filing an opposition by
10 Monday.

11 Is this what's addressed there, counsel?

12 **THE COURT:** Pardon me?

13 **MR. EVANS:** I'm sorry.

14 **MR. BROWN:** Yes, for special proposed
15 instruction number 5 and 3.

16 **MR. BRADY:** Maybe we should circle back to
17 this after we file our opposition, Your Honor.

18 **THE COURT:** Okay.

19 **MR. BRADY:** I think the Court is going to end
20 up having to give some version of this, and I think this
21 is close, but we're happy to review and consider
22 Monsanto's brief on this and we'll reply appropriately.

23 **THE COURT:** Yeah, I think so. I did just look
24 at it briefly, but I do want to see an opposition. This
25 is the one I don't have an opposition to, and I do want

1 to see an opposition to that.

2 **MR. BRADY:** Your Honor, our next
3 instruction 25 on the registration requirements, I think
4 we should hold off until the Court has decided how it's
5 going to handle the defendant's special instructions.
6 They've submitted a slew of special instructions which
7 we think are an invitation to review, but I think the
8 Court will be disinclined to give based on the prior
9 statements that the Court made this morning.

10 So maybe we hold off on this until we look at
11 the defendant's special instructions.

12 **THE COURT:** So going -- well, I think we're
13 there actually. Why don't we take a break, it's 12:15,
14 for a few minutes to give our court reporter a few
15 minutes' break. And then we'll come back and talk about
16 the rest of these and then do your argument, and then I
17 think we're going to wind it up for today.

18 **MR. BRADY:** What time would you like us to
19 reconvene, Your Honor?

20 **THE COURT:** 15 minutes.

21 (Recess taken at 12:15 p.m.)

22 (Proceedings resumed at 12:32 p.m.)

23 **THE COURT:** So as we were saying, let's go on
24 to finish our discussion of the special instructions
25 proposed by the defendants and then we'll go on to the

1 motion.

2 I also want to ask that once we finish this
3 conversation, and this is just so that I can get an idea
4 where we are, if you would give me a set of instructions
5 that include the ones that we've agreed on, the ones
6 that we tentatively agreed on, even if you disagree, the
7 plaintiffs' versions and the defendant's versions of the
8 instructions. So I have something that I can sort of
9 see what a complete set, including those that are
10 disputed. Then I can sort of look at them as I go
11 through and sort of see how I would want to order them
12 and how, you know, it flows, what's in and what's out.
13 Can somebody do that for me?

14 **MR. BRADY:** Do you want one chronologically
15 just through the CACIs with notes on them which ones are
16 proposed by the plaintiff and which ones are objected to
17 by the plaintiff or defendant?

18 **THE COURT:** Yes. And including the special
19 instructions because I'm not ruling on anything.

20 **MR. BRADY:** Do you want those at the end after
21 the CACIs?

22 **THE COURT:** Yeah, I think at the end after the
23 CACIs. And then I'll figure out, if I want to integrate
24 them, where I would put them.

25 **MR. BRADY:** Fair enough.

1 **THE COURT:** So with Monsanto's proposed jury
2 instructions number 8, the modification of 3905 and
3 3905A.

4 **MR. EVANS:** We talked about that briefly,
5 Your Honor.

6 **THE COURT:** Pardon me? You talked about it?

7 **MR. EVANS:** We talked about it earlier.

8 **THE COURT:** Okay. So 3934 -- hold on a
9 second. I need to get volume 2. 3934, when I read it I
10 thought it probably should be included because it does
11 address the fact that there are multiple legal theories
12 that are --

13 **MR. BRADY:** Which one -- they didn't put the
14 CACI numbers on their instructions, Your Honor.

15 **THE COURT:** Yes, they did. This one is
16 page 12 of their proposed.

17 **MR. BRADY:** Oh, I see. I'm sorry.

18 **THE COURT:** Basically you only award damages
19 once no matter the number of legal theories that are
20 offered by either side.

21 **MR. BRADY:** I don't think we have any
22 disagreement.

23 **THE COURT:** Okay. Tentatively --

24 **MR. BRADY:** This needs to be read though in
25 the context of what we decide on the punitive damage

1 instruction in the 3903 series. There was some
2 objection by the defendants to our 3900 and 3903
3 instructions. I think generally this is correct.

4 **THE COURT:** Hold on.

5 **MR. BRADY:** I just don't want them to get
6 confused over the different types of damages. We agree
7 that damages are being sought under different legal
8 theories, some for -- compensatories are the
9 compensatories and the punitives are the punitives, but
10 this may be confusing.

11 **THE COURT:** I actually don't think it's
12 confusing. We're not talking about types of damage,
13 we're talking legal theories that are offered by
14 plaintiff and that they can only award damages once. So
15 they may find liability in one or maybe not the other
16 but just not -- to know that they can only award damages
17 only one legal theory.

18 **MR. BRADY:** There's a bunch more to this
19 instruction, though. They just took a paragraph, it's
20 the definitional paragraph at the top. It then goes on
21 to say you'll be, you know, asked to decide, you know,
22 about all these different legal theories. This is a
23 generally correct proposition of law, but it's only part
24 of the instruction.

25 **THE COURT:** Well, maybe you can talk about

1 some of those.

2 **MR. BRADY:** We can meet and confer.

3 (Simultaneous colloquy.)

4 **THE COURT:** Why don't you meet and confer on
5 them and come up with proposed something.

6 **MR. BRADY:** We agree it's correct expression
7 of law.

8 **THE COURT:** So I know you disagree about
9 punitive damages and there's a brief. So why don't we
10 just skip that altogether.

11 So defendant, in that, proposes special
12 instruction 1 through 9.

13 **MR. BRADY:** This is but-for causation again.
14 They've changed up the language here. I mean, this is
15 exact -- this is what we were talking about earlier
16 under 430, 431, and 435. They've tried to use a
17 favorable compilation here which I think belies the
18 current state of the law.

19 **THE COURT:** I guess my question is you have to
20 explain to me why you need these extra -- not extra --
21 special instructions that are not included in CACI or
22 why you think I need to -- ought to read them.

23 **MR. ISMAIL:** Sure. So, I mean, it does relate
24 to the prior discussion how but-for causation is the law
25 in California currently. This is a correct articulation

1 of the plaintiffs' burden. And the issue of clarity
2 here is the -- the definitional one of the particular
3 subtypes of NHL that each plaintiff is alleged to have
4 developed from exposure to the product.

5 So the but-for causation is the requirement,
6 and they would have to prove that specific to their
7 subtype of NHL. And that's all that's being suggested
8 here.

9 And so, I mean, that's the spirit with which
10 it's offered.

11 **THE COURT:** Okay.

12 **MR. ISMAIL:** And part of it is the confusion
13 of having two plaintiffs in the case and the fact that
14 the jury has heard about their two different related but
15 different forms of NHL. So --

16 **THE COURT:** All right. So it's a restatement
17 of but-for, and so I think I would have to know why --
18 let's assuming I would even say, okay, but-for is the
19 standard. Why would I have another instruction that
20 rearticulates the same thing?

21 **MR. ISMAIL:** Understood, Your Honor. Maybe
22 this does get resolved through the 430 discussion. But
23 we do have just a generalized concern about -- and
24 you've heard this from the beginning about the prejudice
25 and confusion from having two claims here and our desire

1 to make sure the jury understands that conflating the
2 two is not appropriate from an evidentiary or burden
3 perspective, and that's really what we're trying to
4 drive at here.

5 But I recognize the Court's comments that it
6 may be solvable through just giving the full 430 charge
7 rather than this additional charge. And happy to table
8 that discussion for the Court to consider further that
9 issue.

10 **THE COURT:** All right. I'm not indicating
11 that I agree with but-for.

12 **MR. ISMAIL:** Oh, I know.

13 **THE COURT:** I'm just simply saying I think we
14 can figure that out and articulate it through the use of
15 the CACI instruction.

16 **MR. ISMAIL:** Sure. Understood.

17 **THE COURT:** Why don't we just keep going and
18 if there's an additional concern once we've talked about
19 that, then we can come back to this.

20 **MR. ISMAIL:** Thank you, Your Honor.

21 **MR. BRADY:** We have some other concerns too
22 that we'll be happy to address, if and when it becomes
23 necessary, with the Court. They've added some new
24 terminology in there too talking about medical causation
25 and they've added --

1 **THE COURT:** I understand. And what I'm saying
2 is I don't see a need for it. If it needs tweaking,
3 what's been drafted for CACI, and I have to tell you I
4 have to really be persuaded that something that's
5 drafted is necessary, but that's okay. I'm going to
6 table that until we've had a chance to reconsider the
7 language --

8 (Simultaneous colloquy.)

9 **MR. EVANS:** Similar logic applies with respect
10 to number 2, Your Honor, of our special instructions.
11 Again, because of the combination of Mr. and
12 Mrs. Pilliod into one trial, we just think it's
13 appropriate to focus the jury back, not only in a
14 causation perspective, but a warning perspective that
15 each of their individual cases are separate. And the
16 issue is, you know, whether some sort of a different
17 warning would have made a difference to either one of
18 their decisions with respect to usage.

19 **THE COURT:** Okay.

20 **MR. BRADY:** This is covered by the CACI
21 failure to warn instruction. This is slanted in a way
22 that I think is inappropriate.

23 **THE COURT:** To the extent that your concern is
24 that the jury might not consider their claim separately,
25 I think looking at the wording of the CACI instructions

1 and how we articulated them to maybe clarify that
2 they're different cases and they have to consider them
3 differently, why don't we start there and then see if
4 there's anything else necessary beyond that.

5 **MR. EVANS:** Thank you, Your Honor.

6 So the next set of them all relate to punitive
7 damages with respect to 3, 4, 5, and 6. And I know
8 you're sort of taking damage issues --

9 **THE COURT:** Yeah, I'm going to have to just
10 take a look at those briefs and sort through what the
11 instructions should look like.

12 **MR. BRADY:** We'll address them in our
13 opposition that we'll file with the Court, Your Honor.

14 **THE COURT:** That's fine.

15 And then there's the EPA instruction.

16 **MR. EVANS:** Number 7, before we get there, is
17 the speculative conjectural risk, again we think it's
18 within the context of the failure to warn. There needs
19 to be some specificity.

20 Because the product usage was over such a long
21 period of time, the science has obviously evolved from
22 1982 until now. And the concept that back in 1982 that
23 Monsanto should have been warning about NHL risk is
24 completely speculative. I mean, none of the studies
25 that anyone's relied upon go back into that time period

1 with respect to showing any kind of an increased risk.

2 I mean, even if you look at the earliest very
3 small case-control studies, they are, you know, not
4 until the late '90s. And so that's the point of that is
5 that there's this 30-year time period of usage that we
6 think creates a problem from a speculation perspective.

7 **MR. BRADY:** That's a completely different
8 issue than what this instruction says and addresses.
9 And the *T.H. v. Novartis Pharmaceutical Corporation* case
10 doesn't address that at all, what the manufacturer
11 should have known at the time.

12 This simply says that the manufacturer has no
13 duty to warn of risks that are merely speculative or
14 conjectural. It's a different issue, and it doesn't --
15 it would be an inappropriate and I think erroneous
16 instruction to give in this case.

17 **THE COURT:** If you're concerned about that,
18 which I did read this instruction and glean anything
19 that you just said about, you might want to take another
20 stab at it because I would agree that that doesn't
21 articulate a concern about the length of time they were
22 using and what the warnings may or may not have been
23 reasonable at a particular time in that span of use.

24 **MR. BRADY:** They never changed, Your Honor.
25 The warnings are the same today as they --

1 **THE COURT:** I'm just suggesting to Mr. Evans
2 that if he wants to just rearticulate his thoughts about
3 what he wants to communicate in this jury instruction,
4 take another stab at it because I'm not getting that
5 from this. Talk about whether or not they ever changed
6 or whether it's relevant, I'm just suggesting that he do
7 that and then I can actually look at something that
8 reflects that thought.

9 **MR. EVANS:** Understood. Thank you.

10 **THE COURT:** All right.

11 So 8 and 9 are the subject of a brief, I
12 believe, and an opposition regarding --

13 **MR. EVANS:** Correct, Your Honor. And that was
14 the EPA brief. We think they're two separate issues.
15 One is the state of scientific knowledge at the time. I
16 think the EPA approvals of labels and EPA statements
17 concerning the lack of a carcinogenic effect certainly
18 goes to the state of the science over the course of time
19 and should be considered as such.

20 The number 9 is the issue regarding -- again,
21 in our brief, Your Honor, I think we quoted from the
22 summary judgment motion. I understand there was a
23 motion in limine on the same issue. But this goes back
24 to this whole impossibility defense and all those
25 interrelated issues. And so we understand Your Honor's

1 ruling, but we thought there was an issue with respect
2 to any possibility defense that at least at one point
3 Your Honor was suggesting or ruled was a factual issue
4 for the jury to determine.

5 **THE COURT:** All right.

6 **MR. MILLER:** Your Honor, again, it will be
7 part of our brief, but this was as a matter of law. In
8 the *Bates* case, the Supreme Court case, tells us the
9 only thing that we can say about the EPA, and we put it
10 in our EPA instruction, and it's right from the Supreme
11 Court -- unanimous Supreme Court decision: You can
12 consider evidence that the EPA approved it, but
13 ultimately it's a manufacturer responsibility -- it's in
14 our instruction, our proposed EPA instruction. It's
15 literally taken from the *Bates* case.

16 **THE COURT:** All right. So that takes us
17 all -- at least a run through all of the instructions so
18 I can get an idea where we are. And I think you have
19 already briefed the touch points, at least the points at
20 which you disagree most seriously, and I'll take a look
21 at those this weekend.

22 **MR. MILLER:** Sure.

23 **THE COURT:** So next week when we sort of
24 revisit these issues, I'll be able to give you more
25 guidance on them, and then right before we do it, I'll

1 actually issue rulings so that I will have considered
2 everything --

3 **MR. MILLER:** Sure.

4 **THE COURT:** -- that the defendants have
5 presented and then given them an opportunity to present
6 their case so they can more fully argue those things
7 that they can't yet argue because they haven't presented
8 their case.

9 **MR. BRADY:** Perfect.

10 **THE COURT:** So let's move on at this point to
11 the nonsuit.

12 **MR. BROWN:** Yes, Your Honor. I'm going to
13 begin and, of course Mr. Ismail or Mr. Evans may
14 contribute as we go through.

15 First off, I want to point out, Your Honor,
16 that I believe as to the fourth and sixth causes of
17 action as they're alleged in the complaint are really
18 nonissues. So the breach of warranty and the loss of
19 consortium are not in play.

20 **MR. WISNER:** That's correct.

21 **MR. BROWN:** Okay. And then I would like to,
22 Your Honor, begin with the fifth cause of action which
23 is the punitive damages.

24 **THE COURT:** Okay.

25 **MR. BROWN:** And in looking at the evidence

1 that's been provided here in conjunction with the --
2 with that cause of action and what Civil Code
3 Section 3295 requires, I think that there's been
4 complete insufficient evidence offered to establish
5 plaintiffs' entitlement to punitive damages or to
6 demonstrate Monsanto's conduct has at all been -- or is
7 subject to punitive damages.

8 And that is because if evidence of oppression,
9 fraud, malice, despicable conduct, vile conduct on
10 behalf of Monsanto has not been demonstrated, we know
11 that before the IARC monograph in 2015 that there was no
12 substantial evidence to demonstrate that glyphosate
13 and/or Roundup posed a risk of non-Hodgkin's leukemia.
14 And plaintiffs' claim that the failure to warn is
15 somehow sufficient to establish the type of conduct that
16 warrants a finding of punitive damages, but that is not
17 correct.

18 Again, to reiterate, you need vile conduct.
19 You need conduct that is despicable. And in terms of
20 what has been offered here, especially by Mr. and
21 Mrs. Pilliod, there is absolutely no evidence that the
22 conduct of Monsanto rises to that level.

23 Certainly one can argue that perhaps they
24 should have done more or perhaps they could have done
25 more. But, again, that doesn't rise to the level that

1 warrants a finding of punitive damages or that issue
2 even going to the jury.

3 And we're looking to the Court to exercise its
4 decision based on the evidence as it's come in thus far
5 to not allow that issue to go to the jury.

6 **THE COURT:** In the light most favorable to the
7 plaintiff, giving them every possible inference -- I
8 mean, I've read the cases where essentially the Court is
9 required to look at the evidence in a way that
10 dispelling pretty much all the conflicts, everything
11 should be looked at in favor of -- not me
12 dispassionately looking at it, but looking at it
13 essentially from the plaintiffs' point of view, in
14 making this decision.

15 **MR. BROWN:** Yes, Your Honor. As a matter of
16 fact, there is no evidence of despicable, vile,
17 intentional conduct aimed at creating a situation where
18 Mr. and Mrs. Pilliod would be injured. There's
19 absolutely no evidence to that effect.

20 We certainly don't have any evidence that
21 Mr. and Mrs. Pilliod ever spoke to or relied on any
22 representations by Monsanto or any other person
23 affiliated with or associated with Monsanto. Now I'm
24 not talking about somebody at the Ace Hardware or
25 somebody at Home Depot, but I'm talking about Monsanto.

1 And then on top of that, we heard testimony
2 from some employees of Monsanto who were involved in
3 marketing, some folks who were scientists, some folks
4 who were involved in communications.

5 But we have heard no evidence that any of the
6 folks who we've heard from by way of deposition and
7 video are either officers, directors, or managing
8 agents, or that those officers, directors or managing
9 agents authorize or --

10 **THE COURT:** Did the CEO -- wasn't there a
11 deposition video --

12 **MR. WISNER:** We did not play that one,
13 Your Honor.

14 **THE COURT:** Okay.

15 **MR. BROWN:** Yeah.

16 **THE COURT:** I'm trying to remember. There was
17 one I can't recall his name.

18 **MR. WISNER:** Grant was the CEO, that's right.

19 **THE COURT:** Did you play that?

20 **MR. WISNER:** We did not play that deposition.

21 **THE COURT:** Maybe I just recall reading it.
22 Go ahead.

23 **MR. BROWN:** So on those two bases, Your Honor,
24 we believe that the issues of punitive damages has --
25 should not go to the jury. The evidence is not

1 sufficient to support the jury's consideration of
2 punitive damages. And it would be a violation of
3 Monsanto's constitutional rights to allow that issue to
4 go to the jury.

5 So that's the issue on punitive damages.

6 Now, as to the first cause of action,
7 Your Honor, which I think we have denoted in the brief
8 as with letter C, I believe.

9 At the time --

10 **THE COURT:** Go ahead. You're talking about
11 Exhibit C?

12 **MR. BROWN:** No, no, no. I'm talking about
13 petty C, paragraph C in the brief.

14 **THE COURT:** Oh, I'm sorry. Go ahead. Yes.

15 **MR. BROWN:** Yeah, they alleged the defect in
16 the design of the Roundup product and that the product
17 failed to perform safely as an ordinary consumer would
18 expect when used in the intended manner.

19 At the time the Pilliods were using in 1982
20 the Roundup product, that's when they started using it,
21 the science had not established, much as it sits here
22 today, that Roundup is a cause of non-Hodgkin's
23 lymphoma. We know that IARC made that connection or
24 association in 2015.

25 But even as we stand here today, there are

1 innumerable entities, countries, governments who do not
2 draw the conclusion that exposure to Roundup results in
3 the development of non-Hodgkin's lymphoma.

4 So what can the expectation of the consumer be
5 in 1982 if Monsanto, at that point in time, is not
6 presented with conclusive evidence that exposure to its
7 Roundup product increases the risk and causes
8 non-Hodgkin's lymphoma? The consumer cannot have an
9 expectation, period.

10 And we have cited the Court to the authorities
11 which hold that the simple development of a condition or
12 the plaintiff saying, "Well, I didn't expect that I
13 would develop non-Hodgkin's lymphoma as a result of
14 using this product" is not sufficient to satisfy the
15 burden.

16 And, again, the authorities which we have
17 cited indicate, and I'll quote, that where you have to
18 analyze or examine the facts and determine what the
19 technical, scientific, and medical detail of the product
20 is that one is required to -- where one is required to
21 investigate those aspects, that is, the technical,
22 medical, and scientific, that you have to employ what
23 the Court has referred to earlier today as the risk
24 benefit test to determine whether or not the risk
25 associated with the product outweigh the benefits -- and

1 we -- as opposed to utilizing the consumer expectation
2 theory of liability.

3 Again, and just to reiterate, Your Honor, I
4 don't think, again, the plaintiffs can say that we had
5 any sort, any type of reasonable expectation concerning
6 how that product would perform because no one else did
7 in the 1980s, 1990s, and even as we stand here today
8 because the debate, the scientific debate, continues.

9 And I think as we've heard here, we've got
10 IARC who is saying that it's a probable human
11 carcinogen, but the rest of the world has not drawn that
12 conclusion.

13 And, again, to say that somehow Monsanto
14 should have employed a different basis than the
15 manufacture, distribution, and sale of the product is
16 not supported by the weight of the evidence.

17 **THE COURT:** You talked about that. You talked
18 about the 1980s, there being a lack of science, but they
19 used this product until, what, 2011 and 2015. And if
20 you were to look at the evidence in the light most
21 favorable to plaintiff, they're -- and I'm sure
22 Mr. Wisner will point to more specific things, but there
23 seems to have been a gradual and then a more intense
24 effort to not only investigate but bring public
25 awareness to the fact that glyphosate may have -- may

1 cause cancer in humans, including the increased number
2 of studies.

3 And when you say that "the rest of the world
4 doesn't," that doesn't seem to be entirely true because
5 while some countries have made that decision, others
6 apparently, according to one of the scientists, and I
7 can't tell you which one, is the -- or at least one of
8 the documents indicates that the formulation is required
9 to be different in some places than others to cut down
10 on the toxicity.

11 **MR. BROWN:** Yes. And those countries are
12 making that determination in 2018 and 2019. Mr. Pilliod
13 was diagnosed with his non-Hodgkin's lymphoma in 2011.
14 Ms. Pilliod was diagnosed in 2015.

15 So at the time that they were actually using
16 the product, right --

17 **THE COURT:** There's a lot of science out
18 there.

19 **MR. BROWN:** There may have been a lot of
20 science, but there was nothing conclusively establishing
21 that exposure to glyphosate or to Roundup and the
22 Roundup product created a risk of developing
23 non-Hodgkin's lymphoma.

24 Certainly by the time that Mr. Pilliod was
25 diagnosed, and I guess he claims that he continued to

1 use it a bit up until 2016 perhaps -- I may be wrong
2 about that -- and Mrs. Pilliod claims to have used it a
3 little bit up through 2012. But the science did not
4 evolve to the point where there was conclusive evidence
5 to support the conclusion that exposure to Roundup
6 increased the risk for development of non-Hodgkin's
7 lymphoma.

8 **THE COURT:** Okay.

9 **MR. BROWN:** And, again, as we say, Your Honor,
10 and again, yes, people continue to investigate, to look
11 at, to study, to evaluate. But there is evidence
12 supporting both sides of this particular issue. And it
13 is not clearly or conclusively established. And as a
14 matter of fact, the most that IARC can say it is a
15 probable carcinogen. It doesn't say that it is
16 definitely a carcinogen. And, again, the rest of the
17 world, people are the -- it's still being examined.

18 And so we think that in terms of the
19 establishment of a reasonable expectation of a consumer,
20 from the time they started using this product until the
21 diagnosis of their diseases, the Pilliods could have no
22 expectation in that regard. Certainly no one else did.

23 As to the third cause of action, Your Honor,
24 there's been no evidence offered as to the standard of
25 care in the manufacture, distribution, sale, development

1 of herbicides. We have heard nothing concerning that
2 particular issue.

3 So as we stand here now, we don't know what a
4 reasonable manufacturer or distributor of herbicides
5 would do under the same or similar circumstances, and
6 that is in fact a standard.

7 But there's been no evidence, this record is
8 completely devoid of any evidence, to support that, the
9 third cause of action.

10 And so with that, Your Honor, I would submit
11 it unless my colleagues have points.

12 **MR. EVANS:** Your Honor, obviously we made
13 additional arguments in the brief that Mr. Brown has not
14 addressed regarding causation and also with respect to
15 the impropriety and insufficiency of the evidence
16 regarding future damages for Mrs. Pilliod with respect
17 to the medical issue that we talked about. But we rest
18 on the papers.

19 **MR. WISNER:** Your Honor, obviously we're going
20 to submit a written brief probably on Monday responding
21 to this with much more detail, but I do want to address
22 some of the issues orally just so we can make a clear
23 record.

24 Let's start off in the exact order which
25 Mr. Brown went through starting with punitive damages.

1 In Monsanto's -- and Your Honor is correct,
2 there is a clear legal standard at this point in the
3 litigation where every reasonable inference and factual
4 inference has to go in our favor, and that's because the
5 question before is could a jury hearing the evidence
6 that they've heard conclude that, according to the
7 standard required under punitive damages, that Monsanto
8 acted with sufficient malice or oppression. And one of
9 the definitions for malice is a reckless disregard for
10 human safety and that's built into the definition and
11 the case law is very clear on that.

12 In their brief, they bullet point four items
13 of potential punitive misconduct. And they actually did
14 this in the *Johnson* case as well as in the *Hardeman*
15 case. They tried to cabin the scope of evidence that is
16 relevant to punitive damages and then try to explain
17 away those four pieces of evidence.

18 I should be clear that with a much less
19 developed record in both *Johnson* as well as in *Hardeman*,
20 this exact argument was not sustained. It was
21 overruled. And here we have considerably more evidence
22 that has been put into the record, largely because it
23 was developed either after the *Johnson* case was tried
24 or, for example, in *Hardeman* there was a cutoff of 2012
25 so there couldn't be any conduct post 2012. Here we

1 don't have as much of a limitation. Our time period
2 goes to the end of 2016.

3 But in addition to the four points they
4 articulated in their brief, they mentioned their failure
5 to conduct the genotoxicity studies that Dr. Parry
6 specifically recommended in 2000 where he actually
7 specifically told Monsanto that their product,
8 specifically the Roundup formulation, was genotoxic.

9 They did not only not do those studies, but
10 they also did not submit them to any regulatory
11 authorities. And we heard competent testimony from
12 Dr. Benbrook that they had an obligation under the law
13 to do so.

14 They also talk about ghostwriting. This one
15 is particularly on point because we have testimony from
16 Monsanto's own head of the product safety center,
17 Dr. Michael Koch, who said that the very ghostwriting
18 discussed by Dr. Heydens in his e-mails was unethical.
19 He straight up said it. And he agreed that if that in
20 fact occurred, which we have evidence which a reasonable
21 jury could infer that it did, specifically a statement
22 by Bill Heydens saying that he did it, that a jury could
23 conclude that in fact that was unethical and done with
24 malice with the intent to mislead the scientific
25 community about the safety of Roundup. And that was

1 back in 2000.

2 We have other examples of ghostwriting as well
3 with the Intertek panel. I don't want to go into that.

4 The response to Monsanto -- to IARC, I think
5 clearly -- or not clearly -- I think a jury can
6 reasonably conclude shows that Monsanto acted with
7 malicious intent.

8 The fact that Monsanto had an orchestrated
9 outcry plan which involved hiring third parties and
10 putting words in their mouth, attacking the scientists
11 of IARC, to discomfort the opposition, this all came in
12 actually just the other day, the fact that they had that
13 before they even knew what IARC would conclude is the
14 definition of malice. That is the definition of: We do
15 not care about the science, we care about making us look
16 good.

17 And I think the jury can see that and come to
18 a conclusion about Monsanto's intent. And that actually
19 predates the stopping of usage by Mr. Pilliod.

20 With regard to -- they talk about the Jess
21 Rowland stuff and how there was these interactions with
22 senior EPA officials. I think that goes more to the
23 reliability of the EPA assessment, not so much the
24 punitive, but again is something a jury could conclude.

25 But here's the stuff they didn't discuss, and

1 I'm going to do this quickly and this will be in our
2 brief.

3 The IBT scandal situation, that between 1976
4 and 1985 Monsanto knew it had no valid carcinogenicity
5 data related to Roundup, and notwithstanding that, they
6 took no action to warn consumers or anybody that they
7 didn't have valid safety data on it. They could have
8 withdrawn the product. They could have told people:
9 Hey, listen, we're redoing the studies, buyer beware.
10 But they didn't do that. And that shows, back in the
11 1980s, a reckless disregard for human health.

12 That's particularly compounded when you look
13 at some of the advertisements that we showed the jury,
14 specifically seen by the Pilliods, where these people
15 are walking around in shorts and a T-shirt spraying this
16 stuff that might cause cancer. That is completely
17 reckless disregard for human safety.

18 We know following the IBT scandal and the
19 first mouse study that they did that was valid in 1983,
20 the data showed in 1983 that it caused tumors in
21 animals. That's what the original data showed starting
22 in 1983. Monsanto took no action to warn consumers that
23 glyphosate was oncogenic, which is another term for
24 carcinogenic.

25 So we actually have competent scientific

1 evidence from their own scientists saying that it's
2 carcinogenic in 1983, and they took no action to warn.

3 Instead, they hired Dr. Kushner. And the
4 jury could see the evidence as it's been presented that
5 they hired Dr. Kushner who then fabricated evidence of
6 a tumor in the control group.

7 Now, they argue that it was there and we argue
8 that it wasn't, and that's a factual dispute that the
9 jury will have to resolve. But in light of the evidence
10 in our favor, they could conclude that Monsanto
11 literally manufactured false data to dissuade the EPA
12 which had initially classified Roundup as a class C
13 carcinogen.

14 We have documents showing that Monsanto
15 referred to its own response to scientific evidence as
16 playing, quote, whack-a-mole. And we have repeated
17 examples of e-mails all in evidence, Your Honor, where
18 Monsanto is saying stuff like, "Geez, this shows that we
19 have a cancer risk," and that starts back in 1999.

20 And for the course of the next 10 years
21 there's repeated statements by John Acquavella in these
22 emails saying: We have a real problem here, it's
23 showing an association between glyphosate and Roundup
24 and specifically hemolymphopoietic cancers, the most
25 damning of which is a 2002 memo, also in evidence, where

1 they straight up said it's associated with lymphoma.

2 So that's clear evidence that they knew. And
3 instead of actually warning in 2002, they continued to
4 suppress any warning, and I think the evidence is clear.

5 We've seen PowerPoints where they literally
6 discuss how they deal with people. There's a document
7 that specifically says let nothing go -- how to win the
8 argument, let nothing go, discomfort the opposition.
9 Discomforting the opposition is the definition of
10 malice.

11 There is the issue around POEAs. We have a
12 2010 e-mail. 2010. This is while both are still
13 spraying. Where their own scientists are saying: Why
14 are we selling a hazardous version of this when we have
15 a nonhazardous version available? And they talk about
16 the impending demise of the POEA surfactant.

17 And compounding that is they then respond why
18 they haven't done it, and that's because they want to
19 support their freedom to operate. It's all in this
20 e-mail dated 2010.

21 We also have evidence that various Monsanto
22 employees were celebrating the suppression of science,
23 for example, in the McDuffie article when Dr. Acquavella
24 interfaced with Dr. McDuffie to convince her that
25 Roundup or glyphosate shouldn't be discussed in the

1 study and then ultimately left the abstract. And we
2 have Dr. Farmer and everyone celebrating, saying: Yes,
3 this is good news.

4 We saw a document just yesterday that it's
5 good that consumers aren't concerned. All of these
6 pieces of evidence, when brought together, clearly can
7 be shown to a jury that Monsanto in fact acted with
8 reckless disregard to human health.

9 Regarding the managing agent question,
10 Your Honor, this also was raised in the *Johnson* case and
11 it was unsuccessful. Dr. Donna Farmer who -- oh, we
12 actually didn't play her depo. Bill Heydens was lead of
13 the product -- not product safety, he was lead of global
14 tox safety. We have the exact titles, that will be in
15 our brief. But the titles for the individuals who did
16 testify all clearly show managing agent responsibility.

17 Michael Koch, for example. He was the one who
18 talked about and advised about ghostwriting and actually
19 instructed that Monsanto engage in ghostwriting at one
20 point. He was the head of the product safety center.

21 We also had testimony from Bill Reeves who was
22 Monsanto's spokesperson who actually went and spoke for
23 the company and told us what Monsanto's view of these
24 various things were and went through document by
25 document. And his position, Your Honor, was that

1 there's no evidence across the board.

2 I mean, that's pretty out there and that's a
3 pretty preposterous statement, and I think the jury can
4 hear that statement and go: That shows a reckless
5 disregard for human health. Because they've seen dozens
6 and dozens of studies that in fact are positive.

7 We also have testimony from Dr. Goldstein. He
8 was the chief medical officer, I think, for Monsanto.
9 He was the pediatrician. He was personally responsible
10 for responding to inquiries about the risks and safety
11 of Roundup. He also testified he was the one who
12 mentioned them playing whack-a-mole.

13 There is more than sufficient evidence from
14 which a jury could conclude that these malicious conduct
15 and these malicious statements were done by people who
16 had managing and agent authority within the company. I
17 would point out that the managing issue is a factual
18 issue that a jury has to decide. It is not a legal
19 question. It is a factual question. And the case law
20 is very clear on that.

21 So that addresses punitive damages. I'm sure
22 there's more evidence.

23 And we also heard testimony from Samuel
24 Murphey. He was the global lead for media. We also
25 heard from Jim Guard who was the global lead for lawn

1 and garden products. And those were the last two
2 depositions we heard just before we closed our case.

3 So I want to turn to the second question which
4 was the design defect issue.

5 In Monsanto's brief, they specifically argue
6 that we presented no evidence that the POEA surfactant
7 in any way contributed to Mr. and Mrs. Pilliod's cancer.
8 The problem with that argument is it's factually untrue.
9 We have testimony from Dr. Sawyer who said, quote, this
10 is on line 31 -- page 3171, lines 20. And it states:

11 "So using these two numbers, how much
12 more genotoxic is Roundup relative to
13 glyphosate?

14 "About 50 times.

15 "So earlier we talked about how POEA
16 was 40 times, by itself, more toxic.

17 "Right.

18 "But when you have them together,
19 it's 50 times more toxic?

20 "Yeah, this is more important
21 actually. Earlier that was on mammalian
22 or aquatic toxicity, general toxicity
23 effects, where this is specifically DNA
24 damage on a percentage of DNA. This is a
25 very serious adverse effect."

1 And then later on, I didn't mess around. I
2 asked him the straight question. I said:

3 "Are there alternatives to POEA?

4 "Yes.

5 "And are those alternatives less
6 toxic?

7 "Yes. I mean, there's numerous
8 nonionic surfactants. One that we're all
9 familiar with that I use every morning and
10 every evening is my contact lens solution.
11 That has a nonionic surfactant, but it's
12 harmless.

13 "Another good example is the European
14 Union. They now use polyoxylated
15 etheramine instead of the tallowamine,
16 which is about -- I think -- I believe
17 from what I've read about 40 percent less
18 toxic than the POEA used in the U.S. by
19 Monsanto.

20 "So certainly there's alternatives,
21 and it's been around a long time too. But
22 not in the U.S. They're not used here."

23 And then I asked:

24 "Had the Roundup that Mr. and
25 Mrs. Pilliod been using contained a less

1 toxic surfactant than POEA, would that
2 have reduced the risk of contracting
3 non-Hodgkin's lymphoma?"

4 He said:

5 "It would have significantly reduced
6 the actual potency of the dose they
7 received by a good margin."

8 So we have directly linked a design defect,
9 the surfactant that they were using in the U.S., showing
10 that there was alternative design, showing that there's
11 safer versions of it.

12 We even have why they didn't present it. We
13 have an e-mail saying that. And we have testimony from
14 the expert saying it would have drastically reduced the
15 toxic effect on Mr. and Mrs. Pilliod as it relates to
16 non-Hodgkin's lymphoma.

17 There is enough evidence there, when looking
18 in the light most favorable to us, for us to properly
19 assert a design defect claim.

20 The issue, I think, is whether or not we apply
21 the consumer expectation test or the design -- the risk
22 benefit test. And we have a brief on this, Your Honor.
23 I think for purposes of this motion, it doesn't matter.
24 Right.

25 So if we talk about the consumer expectation

1 test, we see these commercials that Mr. and Mrs. Pilliod
2 actually saw and actually relied upon, and they were
3 spraying in their T-shirts and it looked safe and
4 they're quirky. There is no warning on the label that
5 they specifically read about any potential toxicity to
6 genotoxicity or carcinogenicity. And so from that, a
7 jury could conclude that it would be a reasonable
8 expectation that it does not cause cancer since they
9 have an obligation to warn about it.

10 However, even if we went down the risk benefit
11 test, we heard testimony from Dr. Sawyer who says you
12 can get the benefits without the risk. So regardless of
13 which test, he says there's an alternative that's just
14 as good and it's harmless.

15 So regardless of which test we use, and that's
16 a jury instruction discussion later, they lose on both
17 because we have evidence to get to the jury on both.

18 All right. Moving on to, Mr. Brown, in the
19 context of the design defect claim, made some arguments,
20 but I think they're not specific to the design defect.

21 He talked about how there's -- for what it's
22 worth, Your Honor, there's also evidence from Dr. Sawyer
23 talking about the types of sprayers that can reduce
24 exposure from the way that it was designed. And he
25 actually went into detail talking about how you can have

1 different types of sprayers that reduce exposures, that
2 Monsanto uses the hydraulic instead of the CDA rotary
3 mechanism. And that is a specific design defect as
4 well. And that's not looking at the modern one, right,
5 putting the issue aside because you struck that, but
6 looking at the one that they actually used. That was
7 hydraulic, and the jury saw evidence of that.

8 All right. There was this question, he kept
9 saying that, you know, because there was a debate within
10 the scientific community about Roundup causing cancer in
11 the 1980s, that that somehow makes any cause of action
12 impossible.

13 I actually know of no case law that supports
14 such a sweeping statement. Indeed if that were true,
15 then there would no -- there would never be any
16 lawsuits. Right? We saw this in tobacco or asbestos or
17 whatever, that the beginning of the risk being known
18 comes out through litigation, and it's done through
19 trials and lawsuits that bring this issue to the
20 forefront. And I think if we're being honest with
21 ourselves, we're seeing that happen, we're living that
22 history right now.

23 With that said, he also said it's simply not
24 supported by the weight of evidence, and I think that
25 statement that he repeated on multiple occasions

1 illustrates the problem with their motion. He's arguing
2 the weight of evidence. That's exactly what we're not
3 supposed to do here. We can argue the weight of
4 evidence to the jury and they can decide whether or not
5 we've met our burden consistent with the evidence or
6 not.

7 But as a matter of law, and in looking at the
8 evidence in our light most favorable, they simply cannot
9 somehow get away from these long and tried and true
10 causes of action because they can say someone else
11 disagreed. I mean, that's just not a proper defense.

12 Now they can sure argue that to the jury, and
13 I suspect they will. I expect the EPA will be mentioned
14 more than a few times in their closing argument. But
15 that's our opportunity to respond to it and say this is
16 why the EPA is wrong and here's why you should look at
17 the IARC experts, et cetera. That's for the jury to
18 decide.

19 The last one, Your Honor, is the notion that
20 we presented no evidence of a standard of care. And I
21 find this argument particularly troublesome on a couple
22 of levels. The first one being, well, we did offer an
23 expert to talk about standard of care, and they argued
24 that that was -- didn't require any expert testimony.
25 And so you actually excluded that very issue based on

1 their motion.

2 And so now they're saying they offered no
3 expert testimony about standard of care when they
4 previously have argued that it's not required.

5 So I don't know if they're judicially estopped
6 from even making that argument. It's kind of a weird
7 argument. But with all that said, the jury has heard
8 plenty of evidence about what a reasonable manufacturer
9 would have done. It doesn't take rocket science to look
10 at the jury instruction on what standard of care is
11 under 400 or 401, or even under the 1222 instruction
12 that we were discussing this afternoon, and make a
13 determination about whether or not a reasonable
14 manufacturer would have told people: Hey, be careful,
15 this stuff causes cancer.

16 And that doesn't require any sort of expert
17 testimony to prove that point. That's just common
18 sense. This isn't a med mal case where there's a
19 standard of care for medical practice or professions.
20 And I think there's a fundamental unfairness that they
21 can argue that we didn't present evidence from an expert
22 about that, when they themselves said you don't need
23 that to begin with. So it's sort of talking out of both
24 sides of their mouth.

25 On the remaining issues I think they didn't

1 want to argue it, I won't argue it now.

2 So on that, Your Honor, we'll submit our brief
3 on Monday, and obviously we oppose any sort of directed
4 verdict on these causes of action.

5 **THE COURT:** So what I will do is I will wait
6 until I get your final briefing on Monday to issue a
7 ruling.

8 I will say that tentatively it is likely to be
9 denied, but I will read all the papers. I'll read your
10 paper over again, consider all the oral arguments, and
11 then issue a final ruling Monday.

12 **MR. MILLER:** Unrelated, Your Honor, I'd like
13 to cite the case of goose versus gander and I would like
14 to ask the defendants to tell us who their witnesses are
15 next week and stop trying to hide it from us. Who are
16 they calling?

17 (Laughter.)

18 **MR. BROWN:** Your Honor, can I just make one
19 comment in terms of whatever the Court decides must be
20 based on the evidence that has been offered in the case,
21 not on someone's ability to speculate or guess or figure
22 out just based on common sense.

23 As the Court has already instructed the jury,
24 you base your decision, just like we all do, on what's
25 presented from the witnesses who testified here. And

1 that evidence must be in the record.

2 **MR. MILLER:** I would like to find out who the
3 witnesses are next week. We shared that with them long
4 before this time.

5 **MR. EVANS:** We have an agreement that we'll
6 disclose 48 hours before. So for Monday, we'll disclose
7 on Saturday. And that was the agreement the parties
8 had.

9 **MR. WISNER:** That's fine, Your Honor.

10 For what it's worth, if they want to play
11 these sort of tit-for-tat games, I'd ask the Court order
12 them to tell us who they're calling next week. We've
13 been more than accommodating. We didn't even make a big
14 fuss about the fact that they didn't have any witness
15 ready to be called yesterday even though we told them at
16 the beginning of the trial that we'd be done on the day
17 we finished.

18 We told them weeks in advance so they could
19 plan. We'd like the same courtesy here. And we ask the
20 Court to instruct them --

21 **THE COURT:** I thought we actually did that
22 last week when we were talking about what was going on
23 next week.

24 **MR. WISNER:** They previously told me they were
25 calling Dr. Bello on Monday. Apparently that's now

1 changed.

2 **MR. EVANS:** I did not say it's changed.

3 **THE COURT:** Can I just suggest to you that I
4 don't really want to get into the middle of a food fight
5 or disagreement. At the first opportunity that you can
6 disclose to plaintiffs who your witnesses, please do.
7 Because I want things to go smoothly. They need to be
8 prepared. Everybody needs to be prepared. I don't know
9 what else is going on. I don't want to know what else
10 is going on. All I know is we're here Monday ready to
11 start at 9:00 o'clock.

12 **MR. WISNER:** Well, Your Honor, they know right
13 now who they're calling next week and they're not
14 telling us. And so we'd ask you to tell them to tell us
15 so we can prepare. They have 17 potential live
16 witnesses. And it would be just completely outrageous
17 and a lack of civility to not tell us who they're
18 calling. We told them at least two weeks in advance for
19 every single witness. If they want to play this game,
20 that's fine, but it's really needlessly petty.

21 **MR. EVANS:** I'm glad that Mr. Wisner knows
22 that we know who we're calling next week. You know, the
23 clairvoyance is astounding.

24 I've already told them that Dr. Bello is on
25 Monday. I've told them that Dr. Mucci is either Tuesday

1 or Wednesday. And I've told them that Dr. Levine is the
2 following Monday.

3 What I have also told them is we have not made
4 a decision, if there's a fourth witness, who that will
5 be, and on Tuesday or Wednesday. That's exactly where
6 I'm at, Your Honor. There's nothing being hidden other
7 than we haven't made a decision. So as soon as I make a
8 decision, I'll let counsel know.

9 **MR. WISNER:** All right.

10 **THE COURT:** So it sounds like we're starting
11 with Dr. Bello on Monday.

12 **MR. MILLER:** Unrelated to that issue, two
13 seconds, Your Honor.

14 Yesterday Monsanto released the personal
15 information of jurors from the *Johnson* case. And I'm
16 hoping, without filing some sort of pleading in this
17 case, we can get an agreement from Monsanto to not
18 release personal information about the jurors in this
19 case.

20 **MR. EVANS:** I literally have no idea what
21 they're talking about.

22 **MR. WISNER:** So what happened in the *Johnson*
23 appeal, they filed their appeal yesterday. And they
24 attached the juror letters that were sent to the Court
25 and asked the Court to take judicial notice of them.

1 And it has their personal e-mail addresses and addresses
2 of the jurors.

3 **THE COURT:** Nobody is going to get that
4 information here.

5 **MR. MILLER:** We certainly hope not.

6 **MR. WISNER:** Well, they have that information.
7 And we just want agreement that under no circumstances,
8 whether it's here or on appeal, they will disclose the
9 personal information of any jurors publicly. It's
10 highly inappropriate. They just did it in *Johnson* which
11 is why we're concerned.

12 **MR. EVANS:** Again, Your Honor, we have no
13 interest in disclosing personal information in this
14 case. I literally know nothing about what they're
15 referencing. So that's all I can say.

16 **MR. WISNER:** If they agree not to, we're in
17 good shape. We just want to make sure that that's not
18 going to happen.

19 **MR. EVANS:** We certainly agree not to do that
20 going forward in this case. If there's an appellate
21 issue where that becomes somehow relevant, that will be
22 dealt with at that point, but we're certainly not going
23 to be releasing it during the course of this case.

24 **THE COURT:** All right. Thank you. Everybody
25 have a good weekend.

(Proceedings adjourned at 1:28 p.m.)

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I, Kelly L. Shainline, Court Reporter at the Superior Court of California, County of Alameda, do hereby certify:

That I was present at the time of the above proceedings;

That I took down in machine shorthand notes all proceedings had and testimony given;

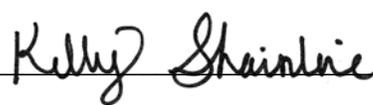
That I thereafter transcribed said shorthand notes with the aid of a computer;

That the above and foregoing is a full, true, and correct transcription of said shorthand notes, and a full, true and correct transcript of all proceedings had and testimony taken;

That I am not a party to the action or related to a party or counsel;

That I have no financial or other interest in the outcome of the action.

Dated: April 25, 2019



Kelly L. Shainline, CSR No. 13476