

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 02/26/2024

TIME: 03:01:00 PM

DEPT: 2103

JUDICIAL OFFICER PRESIDING: Kevin A. Enright

CLERK: Marc David

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT: S. James

CASE NO: **37-2021-00047326-CU-PO-NC** CASE INIT.DATE: 11/05/2021

CASE TITLE: **Dennis vs Monsanto Company [IMAGED]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: PI/PD/WD - Other

APPEARANCES

No Appearance by all parties

The Court, having taken the above-entitled matter under submission on 02/23/2024 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The Court MODIFIES the tentative ruling as follows:

FINAL ORDER

Defendant Monsanto Company's ("Monsanto") motion for a new trial is **DENIED**. The Court is not persuaded that Monsanto has presented a valid basis for a new trial. The Court is not persuaded that there was an irregularity in the proceedings of the court (CCP § 657(1)), excessive damages (CCP § 657(5)), insufficiency of evidence to justify the verdict (CCP § 657(6)), or that there was an error in law (CCP § 657(7)), sufficient to warrant a new trial.

Monsanto's motion for a verdict notwithstanding the judgment ("JNOV") is **DENIED** in part and **GRANTED** in part. Plaintiff's award of punitive damages is reduced to \$21 million to comply with due process requirements. Monsanto's JNOV motion is otherwise **DENIED**.

Defendant's request for judicial notice is **GRANTED**. While the Court may take judicial notice of the existence of the documents, it does not take judicial notice of their interpretation. (*C.R. v. Tenet Healthcare Corp.* (2009) 169 Cal.App.4th 1094, 1104.) Additionally, although the Court may take judicial notice of the existence of court filings, it cannot accept the truth of their contents except for documents such as orders. (*Garcia v. Sterling* (1985) 176 Cal.App.3d 17, 22.)

NEW TRIAL

Code of Civil Procedure section 657 contains the following limitation on the court's authority to grant a new trial: "A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences

therefrom, that the court or jury clearly should have reached a different verdict or decision." "A trial court has broad discretion in ruling on a new trial motion. (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 119.)

Monsanto's motion argued that a new trial was warranted due to: (1) Plaintiff's attorney's repeated misconduct; (2) the Court's evidentiary rulings; (3) Plaintiff's expert's testimony should have been excluded; (4) the verdict is not supported by the weight of the evidence; and (5) Plaintiff's award of punitive damages was unsupported by the evidence, excessive, and in violation of due process.

The California Constitution states that the court may not grant a new trial on account of "any error as to any matter of procedure, unless, after an examination of the entire cause, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., Art. VI, § 13.) Assuming an error occurred, the Court is not persuaded that any error resulted in a miscarriage of justice. A miscarriage of justice results only if it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Briley v. City of West Covina* (2021) 66 Cal.App.5th 119, 132 [internal quotations omitted].)

After weighing the evidence, the court is not persuaded that the jury clearly should have reached a different verdict.

Attorney Misconduct

"Attorney misconduct can justify a new trial only if it is reasonably probable that the party moving for a new trial would have obtained a more favorable result absent the misconduct." (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1411.) In making its determination regarding whether the alleged misconduct caused the other party prejudice, the court "must examine the entire case, including the evidence adduced, the instructions delivered to the jury, and the entirety of counsel's argument." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 296.)

In considering the attorney misconduct alleged by Monsanto, including viewing the statements in the context of the entire argument, the instructions provided to the jury, and the overall proceedings, the Court does not find that the alleged misconduct constituted prejudice as to warrant a new trial.

Evidentiary Rulings

- 2020 IRD and NRDC

Monsanto argued that a new trial was warranted because the Court erroneously allowed Plaintiff to offer evidence regarding the 2020 IRD and the NRDC opinions effect on it. Considering the limited nature of the evidence admitted, the Court's restrictions on what could be presented, Monsanto's ability to present evidence clarifying the lack of any change to the EPA's opinion, and the entirety of the proceedings, the Court does not find that this introduction of evidence prejudiced Monsanto that would support a new trial.

- Methamphetamine Use

Monsanto argued that a new trial was warranted because of the Court's exclusion of evidence of Plaintiff's prior use of methamphetamine and that Plaintiff "opened the door" to his substance use.

A "court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)

In this case, the Court thoroughly considered the highly prejudicial nature of the evidence of Plaintiff's

methamphetamine use in comparison to its probative value and determined that the probative value was substantially outweighed by the danger of undue prejudice. Further, the alleged evidence offered by Plaintiff was not sufficient to "open the door" regarding his prior methamphetamine use. Accordingly, the Court's exclusion of this evidence does not support a new trial.

The Court also considered Monsanto's arguments that: Plaintiff's expert's testimony should have been excluded; the verdict was not supported by the weight of the evidence; and Plaintiff's award of punitive damages were unsupported by the evidence, excessive, and in violation of due process. The Court is not persuaded that the jury clearly should have reached a different verdict or decision and therefore a new trial is not warranted on these grounds. Aspects of these issues are addressed further in the Court's ruling on Monsanto's judgment notwithstanding the verdict, including its determination that, while not constituting a "miscarriage of justice," Plaintiff's award of \$325 million in punitive damages violated due process.

Therefore, Monsanto's motion for a new trial is **DENIED**.

JNOV

A motion for judgment notwithstanding the verdict ("JNOV") is essentially "... a challenge to the sufficiency of the evidence to support the jury's verdict..." (*Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 703.) The standards for ruling on a motion for JNOV are well established. "'The trial court's discretion in granting a motion for judgment notwithstanding the verdict is severely limited.' [Citation.] 'The trial judge's power to grant a judgment notwithstanding the verdict is identical to his power to grant a directed verdict [citations]. The trial judge cannot reweigh the evidence [citation], or judge the credibility of witnesses. [Citation.] If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied. [Citation.] 'A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied.' " " (*Hansen v. Sunnyside Products, Inc.* (1997) 55 Cal.App.4th 1497, 1510.)

Monsanto moves for judgment notwithstanding the verdict based on (1) Plaintiff not being entitled to punitive damages; (2) the award of punitive damages violating due process by being excessive and punishing Monsanto multiple times for the same conduct; (3) Plaintiff's failure to prove causation; (4) Federal Insecticide, Fungicide, Rodenticide Act ("FIFRA") preempting Plaintiff's failure to warn claim; and (5) Plaintiff's claims being barred by California's statutory and regulatory regime governing pesticides. For the reasons set forth below, the Court finds Plaintiff's award of \$325 million in punitive damages violates due process by lacking a "reasonable relationship" to the \$7 million in compensatory damages awarded to the Plaintiff and therefore exceeds the constitutional threshold. The Court is otherwise not persuaded that Monsanto has satisfied the standards for granting judgment notwithstanding the verdict.

PUNITIVE DAMAGES

- Malice

Monsanto argued that Plaintiff failed to present sufficient evidence of malice to support an award of punitive damages and argues that it reasonably relied upon EPA, scientific studies and a consensus of the scientific community regarding Roundup not posing a cancer risk.

Punitive damages may only be awarded "where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." (Civ. Code, § 3294, subd. (a).) Malice includes "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." (Civ. Code, § 3294 subd. (c)(1); *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725.) "Malice" does not require evidence of an actual intent to harm and can be shown either by direct evidence or by implication through indirect evidence. (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299.) However, "a plaintiff must show more than negligence to recover punitive damages and instead must show that a defendant willfully and consciously ignored the dangers inherent in a product's design." (*Johnson v. Monsanto Company* (2020) 52 Cal.App.5th 434, 456.)

At trial, Plaintiff presented evidence that starting in the 1980's, Monsanto actively attempted to interfere with efforts by the EPA to classify glyphosate, the active component of Roundup, as a carcinogen; to shape scientific opinion to conform to Monsanto's perception of the safety of glyphosate and Roundup; and knowingly defended the safety of certain components of Roundup, despite having knowledge of their hazardous characteristics.

Plaintiff presented further evidence that Monsanto attempted to deceive the public, including by shopping for experts that may be counted on to adopt their preferred conclusion that Roundup was safe, rejecting opinions and recommendations that contradicted this conclusion, and failing to sufficiently test Roundup. This included evidence that Monsanto rejected its own retained expert, Dr. James Parry's, initial opinion on the genotoxicity of glyphosate and his recommendation that additional testing should be conducted to determine whether the components of the Roundup formulation increase the genotoxicity of glyphosate. Plaintiff also presented evidence, including internal emails, that Monsanto sought to influence and possibly manipulate outside scientific literature and opinions to support its desired conclusion, including by drafting articles, contacting authors, and having influential experts work "behind-the-scenes." This evidence strongly suggested Monsanto disregarded safety concerns and hindered transparent investigation of the risks, all while continuing to manufacture and market Roundup.

Monsanto presented evidence at trial that multiple scientific studies and reports by worldwide scientific bodies, including the EPA, support its position that Roundup does not pose a cancer risk and disputed the applicability of the International Agency for Research on Cancer's ("IARC") 2015 classification of glyphosate as "probably carcinogenic to humans." Monsanto also presented evidence regarding the adequacy of its studies into the genotoxicity of glyphosate, Dr. Parry's later conclusion that glyphosate is not genotoxic, the transparency of its contributions to scientific articles, and evidence of its justifications for deciding whether to pursue follow up studies on its genotoxicity.

From such conflicting evidence, a jury could reasonably infer that Monsanto willfully and consciously ignored the dangers inherent in Roundup and continued to sell and market the product and therefore acted with malice sufficient to warrant imposing punitive damages.

- Due Process

Monsanto argued that the punitive damages award violates due process and is excessive because it imposes punitive damages for the same conduct for which punitive damages have already been awarded and the ratio of compensatory to punitive damages is unconstitutional. Plaintiff argued that Monsanto waived any argument regarding the cumulative punitive damage awards by not presenting the jury with evidence of the prior verdicts and that the ratio of punitive damages was warranted based on Monsanto's conduct.

Cumulative Awards

California courts have recognized that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661.) In conducting a due process review of an award of punitive damages, however, a court may consider evidence of other punitive damages awards, even if the evidence was not presented to the jury. (*Pilliod v. Monsanto Company* (2021) 67 Cal.App.5th 591, 649.) This is because a court is required to "make an independent determination whether the amount of the award exceeds the state's power to punish." (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 375.)

In reaching its independent determination of whether Plaintiff's award of punitive damages violates due process, the Court considered Monsanto's evidence that it has paid over \$100 million in similar prior punitive damages awards, it had ceased production of glyphosate-based lawn products in the United States, and that its remaining inventory of such products will be sold off by the end of the second quarter of 2024.

Excessive Punitive Damages

Unlike compensatory damages, which seek to redress the concrete loss that a plaintiff has suffered, punitive damages are "intended to punish the defendant and deter future wrongdoing." (*Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 43 [Cooper].) "The amount of punitive damages offends due process under the Fourteenth Amendment as arbitrary only if the award is 'grossly excessive' in relation to the state's legitimate interests in punishment and deterrence." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 558.) To determine whether an award is grossly excessive a court must consider: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 418 [State Farm].) In considering these factors, the question for the court is not whether the jury's verdict is unreasonable based on the facts, but rather whether the award exceeds the state's power to punish. (*Nickerson, supra*, 63 Cal.4th 363, 375.)

The most important of these factors is the "degree of reprehensibility of the defendant's conduct." (*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 575 [Gore].) In determining the reprehensibility of a defendant's conduct a court must consider: (1) whether the harm was physical rather than economic; (2) the defendant's indifference to or a reckless disregard of the health or safety of others; (3) whether the plaintiff was financially vulnerable; (4) if the conduct involved repeated actions or was an isolated incident; and (5) whether the harm was the result of intentional malice, trickery, or deceit, or mere accident. (*State Farm, supra*, 538 U.S. at 419.) In California, "intentionally marketing a defective product knowing that it might cause injury and death is 'highly reprehensible.'" (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1690.) Repeated misconduct is also considered more reprehensible, and evidence of great profit may also be relevant to show a greater degree of reprehensibility. (*State Farm, supra*, 538 U.S. at 423.)

Here, Plaintiff presented ample evidence of Monsanto engaging in highly reprehensible conduct, including evidence of Plaintiff's physical harm and suffering. Plaintiff further presented evidence contrasting his role as an ordinary consumer to that of Monsanto, a multibillion-dollar company which intentionally used its vast resources over several decades to protect its profits over the safety of ordinary

consumers. showing a reckless disregard for the health and safety of the public.

While Monsanto presented evidence that it acted reasonably based on the available scientific evidence, there was sufficient evidence that would allow the jury to infer that Monsanto engaged in a course of highly reprehensible conduct at Plaintiff's, and the public's, expense.

Excessive Compensatory Damages

Monsanto argued that Plaintiff's \$7 million in compensatory damages do not bear a rational relationship to the evidence at trial and therefore include a punitive component that renders the jury's award of punitive damages grossly excessive. While Monsanto's Notice of Intention to File JNOV Motion did not assert excessive compensatory damages as a basis to enter judgment notwithstanding the verdict, the Court considered the compensatory damages in its due process analysis.

A lower ratio of punitive to compensatory damages may be necessary to satisfy due process requirements when a plaintiff is awarded significant compensatory damages that may include a punitive aspect and therefore be duplicative. (*State Farm, supra*, 538 U.S. 408, 426.)

In this case, Plaintiff presented substantial evidence that he suffered serious physical and emotional injuries. As described above, Plaintiff presented evidence of the serious effect his symptoms, diagnosis, treatment, and prognosis had on his physical and emotional well-being, including severe pain, embarrassment, fear of dying, depression, and his ability to maintain employment. While Monsanto argued that the Plaintiff's cancer is in remission and minimize the extent of his treatment, Plaintiff presented evidence that he underwent treatment for nearly two years before finally being diagnosed with cancer and that even though his cancer is in remission, his doctors expect that it will return. The likely seriousness of his future cancer risk is supported by evidence that his doctors recommended reserving chemotherapy treatment for the time when his cancer does return.

Accordingly, Plaintiff's presented substantial evidence to support his award of \$7 million in compensatory damages.

Ratio of Punitive Damages

Monsanto argued that the punitive damages award of \$325 million in relation to the \$7 million in compensatory damages is excessive and violates due process.

The Supreme Court has rejected the imposition of any rigid benchmark or mathematical formula for establishing a ratio between actual and punitive damages. (*State Farm, supra*, 538 U.S. at p. 425.) Any award of punitive damages "must bear a 'reasonable relationship' to compensatory damages or to the actual or potential harm to the plaintiff." (*Bullock, supra*, 198 Cal.App.4th at p. 563.) Accordingly, California courts "have adopted a broad range of permissible ratios [between punitive and compensatory damages]-from as low as one to one to as high as 16 to 1-depending on the specific facts of each case." (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 88.) In determining the proper ratio, courts consider the reprehensibility of the defendant's conduct, the nature of plaintiff's injury, and other relevant facts. (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1313.) Since an award of punitive damages must always be based upon the particular facts and circumstances of the case, an award of substantial compensatory damages alone, does not preclude an award of punitive damages that exceed them. (*Pilliod, supra*, 67 Cal.App.5th at p. 648.) Ultimately, "what ratio is reasonable necessarily depends on the reprehensibility of the conduct, the most important indicium of the reasonableness of the award"

(*Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1207 [internal quotations and citations omitted].)

While the prior awards were not a major factor in its decision, the Court is still convinced that Plaintiff's award of \$325 million in punitive damages violates due process by lacking a "reasonable relationship" to the \$7 million in compensatory damages awarded to the Plaintiff and exceeds the constitutional threshold. (See *Bullock, supra*, 198 Cal.App.4th at p. 563.) In this case, the lack of economic damages and the substantial compensatory damages for plaintiff's non-economic damages, when considered in conjunction with the highly reprehensible conduct of Monsanto, the need to punish Monsanto, and to deter Monsanto from such conduct, justifies an award of \$21 million in punitive damages. Such a ratio of 3 to 1 strikes a balance, including by taking into account the prior punitive damage awards and Monsanto's subsequent actions, and therefore does not exceed the state's power to punish.

Thus, Plaintiff's award of punitive damages is reduced to \$ 21 million.

CAUSATION

Monsanto argued that judgment should be entered in its favor because there is no reliable foundation for the specific causation opinions presented by Plaintiff's two experts. In particular, Monsanto argued that (1) Dr. Durrani did not adequately consider Plaintiff's dose or exposure and therefore his opinion on causation is not reliable; and (2) the experts relied on epidemiology studies that did not properly account for confounders.

A "trial court acts as gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771-772.) The court, however, doesn't weigh the opinion's persuasiveness, but rather "must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture. The court does not resolve scientific controversies." (*Id.* at 772.) Accordingly, since each study may have strengths and weaknesses, a court should not engage in piecemeal rejection of individual studies and instead must consider the body of the studies relied upon by an expert as a whole. (*Cooper*, 239 Cal.App.4th at 589.)

"To show that a defendant's product is a substantial factor in causing a plaintiff's disease, the plaintiff need not establish the product 'as the proximate cause of injury with absolute certainty so as to exclude every other possible cause of a plaintiff's illness, even if the expert's opinion was reached by performance of a differential diagnosis.' [Citation.] Instead, 'the plaintiff must offer an expert opinion that contains a reasoned explanation illuminating why the facts have convinced the expert, and therefore should convince the jury, that it is more probable than not' that the product was a cause-in-fact of the disease. [Citation.] Then the burden shifts to the defendant to prove 'the existence of an alternative explanation, supported by substantial evidence and not mere speculation,' to defeat the plaintiffs' explanation as a matter of law. (*Pilliod, supra*, 67 Cal.App.5th at p. 623 [quoting *Cooper v. Takeda Pharmaceuticals America, Inc.* (2015) 239 Cal.App.4th 555, 578].) "The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 978.)

Exposure Days and Absorption

Dr. Durrani testified that his methodology was the same as used in prior studies, was also based on his

experience as a practicing physician, and estimated a person's exposure history by analyzing units of exposure to determine the applicable dose over an extended period of time. Dr. Durrani further testified he utilized this method in evaluating the Plaintiff's exposure and that based upon the scientific literature, Plaintiff was eight times more likely to develop non-Hodgkin's lymphoma. Dr. Durrani also presented evidence of the scientific studies and literature that support these findings. Additionally, the use of exposure days in order to assess whether a specific dose caused a plaintiff's disease has been utilized in similar cases. (See *Phillips v. Honeywell Int'l Inc.* (2017) 9 Cal.App.5th 1061, 1086-1087.)

While Monsanto argues that Dr. Durrani should have adopted a different methodology that incorporated additional assessments based on actual absorption and exposure rates, Dr. Durrani presented sufficient explanation of the basis for his methodology, his justification for utilizing them, and the foundation of his opinion on causation for his opinion to be presented to a jury. The Court is not responsible for resolving scientific disputes.

Epidemiology Studies

Monsanto also argued that Plaintiff's experts improperly relied on epidemiological studies of health outcomes that were unadjusted for exposure to other pesticides in formulating their opinions on the specific cause of Plaintiff's non-Hodgkin's lymphoma.

Dr. Durrani testified that he relied upon multiple studies, including epidemiology, animal studies, and mechanistic data in order to evaluate causation. Further, both of Plaintiff's experts testified that in formulating their opinions they considered both adjusted and unadjusted data, and the risk of confounders on the results. Both experts concluded that based on the entirety of the information they reviewed, confounders, such as exposure to other pesticides, were not the cause of association between glyphosate and non-Hodgkin's lymphoma. While Monsanto's expert Dr. William Reeves testified that certain case control studies contradicted Plaintiff's experts' opinions regarding the association between glyphosate use and non-Hodgkin's lymphoma, resolution of this dispute and the credibility of the competing opinions was properly left to the jury.

Lack of Studies Addressing Mycosis Fungoides

Monsanto further argued that Plaintiff's expert's opinions on causation are also undermined because the studies did not address Plaintiff's specific set of non-Hodgkin's lymphoma, Mycosis Fungoides. Plaintiff argues that such studies were not required to support his expert's opinions.

Plaintiff's experts both testified that epidemiological literature rarely addresses non-Hodgkin's lymphoma subsets such as Mycosis Fungoides. Both experts also testified however that due to the rarity of Mycosis Fungoides, it was proper to look at the broader category of non-Hodgkin's lymphoma in order to reach their conclusion. (See *Wendell v. GlaxoSmithKline LLC* (9th Cir. 2017) 858 F.3d 1227, 1236 [exclusion of expert testimony due to the absence of certain test concerning a specific rare subset of cancer was improper since it is not always possible to conduct studies of rare conditions].)

Importantly, Monsanto did not present any evidence that this omission of certain studies was intentional or a scientific basis for undermining their findings. Accordingly, resolution of the credibility of Plaintiff's experts' opinions on causation despite the absence of specific studies on Mycosis Fungoides was properly left to the jury and Monsanto's JNOV motion is denied on this basis.

FAILURE TO WARN

Monsanto argued that Plaintiff's failure to warn claims fail because the risk of non-Hodgkin's lymphoma due to Roundup was never generally recognized as prevailing in the scientific community and that recent scholarship and regulatory agency opinions undermine the ruling in *Pilliod*. Plaintiff argued that the ruling in *Pilliod* is controlling and that he presented sufficient evidence that the jury could infer that the potential cancer risk associated with glyphosate and Roundup was known or knowable at the time.

"A duty to warn arises when a 'potential risk,' here the risk of cancer, is 'known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution.' [Citation.] 'A "potential risk" is one "existing in possibility" or "capable of development into actuality."' (Pilliod, supra, 67 Cal.App.5th 591, 622 [quoting *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002].)

In this case, just as in *Pilliod*, Plaintiff presented "substantial, if disputed, evidence that there is a risk of cancer from exposure to glyphosate and Roundup, and the risk was knowable, even if not known, in light of the best scientific and medical knowledge that was available." (See *Pilliod*, supra, 67 Cal.App.5th at p. 623.) As discussed in detail above, Plaintiff presented ample evidence of Monsanto's responses to scientific studies on the potential risk of cancer associated with glyphosate and Roundup, and potential reclassification by regulatory agencies. Plaintiff's evidence demonstrated not only the failure of Monsanto to adequately investigate the risk, but active efforts to limit research and shape scientific discourse regarding the risk.

From this evidence, the jury could infer that the potential cancer risk associated with glyphosate and Roundup was known or knowable in light of the best scientific and medical knowledge at the time it was manufactured, distributed, and sold to the Plaintiff and that any limitation in the available knowledge of the risk was the result of Monsanto's efforts to suppress it, or at minimum to limit discourse and further investigation.

Monsanto did present evidence that following IARC's 2015 classification of glyphosate as a probable human carcinogen that governmental regulatory agencies, including the EPA, rejected it and reaffirmed their prior conclusions. Plaintiff, however, presented evidence that these agencies did not rely on the best scientific data. In particular, Plaintiff presented evidence that the EPA relied primarily on industry sponsored studies, rather than the peer reviewed published literature that the IARC relied upon, and that the EPA's conclusion was vacated and then withdrawn.

Accordingly, Plaintiff presented substantial evidence to support his failure to warn claim and Monsanto's JNOV motion is DENIED on this basis.

FIFRA PREEMPTION

Monsanto argues that all of Plaintiff's claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 et seq. Plaintiff argues that this contention lacks merit and has been previously rejected in *Pilliod*, which is binding precedent on this Court.

It undisputed that *Pilliod*, supra, 67 Cal.App.5th at p. 591, is binding authority on the Court. (See *Auto Equity Sales, Inc. v. Superior Ct. of Santa Clara Cnty.* (1962) 57 Cal.2d 450, 455.) *Pilliod* is directly on point, and Monsanto raises similar arguments that were previously rejected in *Pilliod*, as well as in Monsanto's prior motion for summary judgment/summary adjudication. (ROA 473.)

Defendant has not met its burden to show express or implied preemption bars Plaintiff's claims. Defendant has not provided evidence that Plaintiff's common law claims impose any labeling requirements that are different from or additional to the misbranding requirements of FIFRA, or that it is impossible for Defendant to comply with federal and state law. (*Hardeman v. Monsanto Company* (9th Cir. 2021) 997 F.3d 941, 954-958.) Nor do the facts or arguments offered by Defendant (relying on non-FIFRA statutory schemes) demonstrate that *Pilliod* is distinguishable or the ruling in *Pilliod* is inconsistent with the provisions under FIFRA.

Accordingly, Monsanto's JNOV motion is DENIED on this basis.

CALIFORNIA STATUTORY AND REGULATORY REGIME

Monsanto contends all of Plaintiff's claims are barred by the California Food and Agriculture Code ("FAC") § 11501.1(a) and regulations by the California Department of Pesticide Regulation pursuant to that statutory scheme.

"As a general rule, unless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules. A statute will be construed in light of common law decisions, unless its language clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter." (*Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1193, citations omitted.) Accordingly, "[t]here is a presumption that a statute does not, by implication, repeal the common law. Repeal by implication is recognized only where there is no rational basis for harmonizing two potentially conflicting laws." (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297, citations omitted.)

The general rule is that statutes do not supplant the common law unless it appears that the Legislature intended to cover the entire subject or, in other words, to "occupy the field." (*I. E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285.) "[T]he phrase 'occupy the field' may convey displacement either of all other law, without limitation or, alternatively, of only local law by a higher law." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 76, citations omitted.)

FAC § 1150.1(a) provides: "This division and Division 7 (commencing with Section 12501) are of statewide concern and occupy the whole field of regulation regarding the registration, sale, transportation, or use of pesticides **to the exclusion of all local regulation**. Except as otherwise specifically provided in this code, **no ordinance or regulation of local government**, including, but not limited to, an action by a local governmental agency or department, a county board of supervisors or a city council, or a local regulation adopted by the use of an initiative measure, may prohibit or in any way **attempt to regulate any matter** relating to the registration, sale, transportation, or use of pesticides, and any of these ordinances, laws, or regulations are void and of no force or effect. (Emphasis added.) "If the director determines **that an ordinance or regulation**, on its face or in its application, is preempted by subdivision (a), the director shall notify the promulgating entity that it is preempted by state law." (*Id.*, § 1150.1(b), emphasis added.)

Here, the terms of the FAC specifically indicates an intent to occupy the regulatory field "to the exclusion of all local regulation" and voids "ordinance or regulation of local government" concerning certain regulations on pesticides. In contrast, nothing in the FAC indicates an intent to preempt common law claims, including Plaintiff's claims.

Nor does Monsanto's reliance on *Jacobs Farm/Del Cabo, Inc. v. Western Farm Service, Inc.* (2010) 190 Cal.App.4th 1502 compel a different finding. Although Monsanto cites language from *Jacobs Farms* indicating the use of pesticides in California is heavily regulated and California law overlaps with the comprehensive federal scheme, the *Jacobs Farm* court held California's statutory scheme concerning pesticides did not preempt or displace common law tort claims related to the use of pesticides where the pesticides that the defendant applied to fields near plaintiff's farm migrated to plaintiff's land, contaminated plaintiff's crop, and rendered the crop unmarketable. The *Jacobs Farm* court noted: "[a]lthough the scope of the statutory and regulatory scheme is broad, it provides no means of compensation for crop losses resulting from pesticide use." (*Jacobs Farm, supra*, 190 Cal.App.4th at p. 1522.) "Since the law makes no provision for a damages remedy, section 14003 implies that injured persons retain the right to sue for damages under the common law." (*Ibid.*) The *Jacobs Farm* court also cited the savings clause under § 12999.2, which expressly confirms that the "remedies or penalties" provided by Division 7 are "in addition to the remedies or penalties available under any other law." "Given these savings clauses, it is reasonable to conclude that the Legislature intended, as a general matter, to allow for common law claims seeking damages. Defendant does not contend otherwise." (*Jacobs Farm, supra*, 190 Cal.App.4th at p. 1522.)

Here, Monsanto does not address the explicit language of the FAC indicating a limited displacement as to local ordinances and regulations. Additionally, Monsanto does not cite any statutory provision under the FAC that compensates an individual injured by exposure to pesticides. (See *Jacobs Farm, supra*, 190 Cal.App.4th at p. 1522.) Nor does Monsanto provide sufficient argument it would be liable for misbranding by California Department of Pesticide Regulation regulations. (See *John Norton Farms, Inc. v. Todagco* (1981) 124 Cal.App.3d 149, 173 ["the registrant of an economic poison still has a duty to give specific warnings of harm attendant to its use of which it is aware or should be aware"]; see also 3 CCR §§ 6242, 6243.)

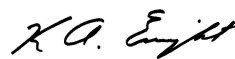
Monsanto has not shown Plaintiff's claims are either preempted or displaced by the FAC. Accordingly, Monsanto's JNOV motion is DENIED on this basis.

CONCLUSION

For all the reasons outlined above, Monsanto's motion for a new trial is **DENIED**. The Court **GRANTS** Monsanto's motion for JNOV in part and reduces Plaintiff's award of punitive damages to \$21 million dollars in order to comply with due process requirements. Monsanto's motion for JNOV is otherwise **DENIED**.

The minutes are the order of the Court. No formal order is required.

IT IS SO ORDERED.



Judge Kevin A. Enright