IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

DEWAYNE JOHNSON, Plaintiff and Appellant, v. MONSANTO COMPANY, Defendant and Appellant.	A155940 & A156706 (San Francisco County Super. Ct. No. CGC16550128)

BY THE COURT:

The court rules on the several outstanding motions in these consolidated appeals as follows.

Respondent Dewayne Lee Johnson filed a request for judicial notice on July 31, 2019, asking the court to judicially notice a trial-court order in a different lawsuit against appellant Monsanto Company. The request is granted.

On August 19, 2019, Monsanto filed a notice of new authority (Cal. Rules of Court, rule 8.254) to support its preemption argument. Johnson's August 29 motion to strike Monsanto's notice is denied.

Monsanto's January 15, 2020 request for judicial notice of an amicus curiae brief filed by the Environmental Protection Agency (EPA) in the Ninth Circuit Court of Appeals (*Monsanto Company v. Edwin Hardeman*, No. 19-16636) is granted.

The foregoing rulings are made without a determination of relevance, and without a determination whether this court ultimately will give effect to such evidence. (*Doers v. Golden Gate Bridge Etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1.)

The court also requests further briefing on Monsanto's preemption arguments, as follows.

As the parties are aware, Monsanto argued in its motion for summary judgment that Johnson's causes of action were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA, 7 U.S.C. § 136 et seq.). Monsanto contended that Johnson's failure-to-warn causes of action failed because the EPA repeatedly had approved the labels for its products containing glyphosate. Citing *Wyeth v. Levine* (2009) 555 U.S. 555 (*Wyeth*), the company contended that it thus would have been impossible to comply with both federal and state labeling requirements. The trial court concluded that Johnson's causes of action were not preempted.

On appeal, Monsanto devotes about four pages of its 95-page opening brief to renewing its argument that FIFRA preempts all of Johnson's causes of action. And only about two of those pages are devoted to the argument that FIFRA preempts Johnson's failure-to-warn claims because it would have been impossible to comply with both federal and state labeling requirements.

Since the filing of Monsanto's opening brief, the EPA has taken further action relevant to the labeling of products containing glyphosate, and Monsanto has taken steps to make evidence of those actions part of the appellate record (the subject of the court's rulings, above). As the court understands Monsanto's position, there always has been clear evidence that the EPA would not have approved a label change to its glyphosate-based products, which means it would have been impossible under *Wyeth*, *supra*, 555 U.S. at page 571, to comply with both federal and state requirements. And this argument is further supported by EPA actions taken after the jury's verdict in this case, according to Monsanto.

Also since the jury's verdict in this case, the U.S. Supreme Court has held that the question whether the FDA would not have approved a label change (thus preempting a state-law failure-to-warn claim under *Wyeth*) is a question for a judge, not a jury. (*Merck*

Sharp & Dohme Corp. v. Albrecht (2019) ___ U.S. ___ [139 S.Ct. 1668, 1672].) As the trial court observed in denying Monsanto's motion for summary judgment, however, it does not appear that any court has extended *Wyeth* to FIFRA.

Please answer the following questions:

(1) Should *Wyeth* be extended to FIFRA, such that a court should determine whether there is clear evidence the EPA would not have approved a change to the labels of Monsanto's glyphosate-based products?

(2) Assuming that *Wyeth* applies, is this a determination that should be made by this court in the first instance or on remand in the trial court? And whichever court makes the determination, how should it be made? (E.g., *Merck Sharp & Dohme Corp. v. Albrecht*, *supra*, ___ U.S. ___ [139 S.Ct. at p. 1672] [" 'clear evidence' is evidence that shows the court that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug's label to include that warning"].)

(3) If a court were to determine that FIFRA preempts Johnson's failure-to-warn causes of action under *Wyeth*, but not Johnson's design-defect cause of action, what effect, if any, would that have on the jury's verdict? The court is familiar with the parties' arguments on whether FIFRA preempts Johnson's design-defect cause of action and is interested for purposes of this question in how a court should rule assuming that only the failure-to-warn causes of action are preempted.

The parties shall file simultaneous supplemental briefs within 21 days of the date of this order. The briefs shall be no longer than 25 pages. Given that this case has calendar preference, the court is not inclined to grant requests for an extension of time absent the parties' agreement to an extension or a showing of extraordinary good cause.

Date: 01/21/2020 **Humes, P. J.** P.J.

PRESIDING JUSTICE