

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

EDWIN HARDEMAN,
*Plaintiff-Appellee/
Cross-Appellant,*

v.

MONSANTO COMPANY,
*Defendant-Appellant/
Cross-Appellee.*

Nos. 19-16636
19-16708

D.C. Nos.
3:16-cv-00525-VC
3:16-md-02741-VC

OPINION

Appeal from the United States District Court
for the Northern District of California
Vince G. Chhabria, District Judge, Presiding

Argued and Submitted October 23, 2020
San Francisco, California

Filed May 14, 2021

Before: Michael D. Hawkins, N. Randy Smith, and
Ryan D. Nelson, Circuit Judges.

Opinion by Judge R. Nelson;
Dissent by Judge N.R. Smith

SUMMARY*

Pesticides / Punitive Damages

The panel affirmed the district court’s judgment in favor of Edwin Hardeman in his action alleging that Monsanto’s pesticide, Roundup, caused his non-Hodgkin’s lymphoma.

Roundup is pesticide with the active ingredient glyphosate. Since 2015, thousands of cancer victims sued Monsanto in state and federal court. This appeal arose out of the first bellwether trial for the federal cases consolidated in a multidistrict litigation. The jury awarded Hardeman \$5,267,634.10 in compensatory damages, and \$75 million in punitive damages. The district court reduced the punitive damages award to \$20 million.

The panel held that Hardeman’s state failure-to-warn claims based on Roundup’s labeling were consistent with the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) and thus were neither expressly nor impliedly preempted. Specifically, the panel affirmed the district court’s conclusion that Hardeman’s state failure-to-warn claims were “equivalent to” and “fully consistent with” FIFRA and therefore not expressly preempted. *Bates v. Dow Agrosciences LLC*, 554 U.S. 431, 449 (2005). In addition, because Monsanto could comply with both FIFRA and California law, FIFRA did not impliedly preempt Hardeman’s state failure-to-warn claims.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel held that the district court ultimately applied the correct standard from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and did not abuse its discretion in admitting Hardeman's expert testimony. Despite its incorrect assumption that this court was more permissive than others in admitting *Daubert* testimony, the district court still employed the correct legal standard for reliability when it admitted Hardeman's expert testimony. The panel held further that the district court did not abuse its discretion in concluding that Hardeman's experts reliably based their general causation opinions on epidemiological evidence showing a connection between glyphosate and cancer. The panel also held that the district court did not abuse its discretion in admitting Hardeman's expert testimony on specific causation to show that Hardeman's cancer was caused by glyphosate, rather than some other factor. Here, Hardeman's experts reliably used differential diagnosis because they ruled in glyphosate based on the epidemiological evidence supporting the general causation opinions and ruled out alternate causes, such as idiopathy and Hepatitis C (HCV).

The panel held that the district court did not abuse its discretion in admitting the International Agency for Research on Cancer's classification of glyphosate as probably carcinogenic and three regulatory rejections of that classification by excluding evidence from other regulatory bodies. The panel held further that even if these evidentiary decisions were erroneous, any error was harmless because it was more probable than not that the admission of the evidence did not affect the jury's verdict.

The panel held that the district court's jury instruction on causation was erroneous because it was inconsistent with the

Judicial Council of California Civil Jury Instructions and California case law, but it was harmless error.

The panel held that the district court properly denied Monsanto judgment as a matter of law because evidence showed the carcinogenic risk of glyphosate was knowable at the time of Hardeman's exposure.

The panel held that evidence supported a punitive damages award, punitive damages were properly reduced, and the reduced award – while close to the outer limit – was constitutional. Specifically, the panel held that punitive damages were permissible under California law because substantial evidence was presented that Monsanto acted with malice by, among other things, ignoring Roundup's carcinogenic risks. The panel held that the jury's \$75 million punitive damages award was "grossly excessive" given the mitigating factors found by the district court. However, considering the evidence of Monsanto's reprehensibility, the district court's reduced \$20 million punitive damages award (a 3.8 to 1 damages ratio), while at the outer limits of constitutional propriety, ultimately comported with due process.

The panel cautioned that although this appeal involved a bellwether trial, many of its holdings were fact-specific, and different Roundup cases may present different considerations, leading to different results.

Judge N.R. Smith dissented to section VII.B, concerning punitive damages. He would hold that Monsanto's low degree of reprehensibility cannot constitutionally justify the district court's substantial punitive damages award. The facts found by the district court did not support a 3.8:1 ratio to compensatory damages.

COUNSEL

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