

IN THE THIRD DISTRICT COURT  
OF APPEAL, STATE OF FLORIDA

Case No. 3D2024-0569

MONSANTO CO.,  
Appellant,

v.

LAWRENCE J. BEHAR,  
Appellee.

NOTICE OF SUPPLEMENTAL  
AUTHORITY

Appellant, Monsanto Company, submits as supplemental authority the decision in *Erickson v. Monsanto Co.*, No. 4D2024-0835 (Fla. 4th DCA Nov. 7, 2024), a copy of which is attached to this notice, along with the trial court order the *Erickson* decision affirmed. The trial court in *Erickson* denied the plaintiff's motion for leave to amend to assert a claim for punitive damages. The supplemental authority is directly applicable to this matter because it involves the same product (the herbicide Roundup), the same products liability claims, the same defendant (Monsanto), the same plaintiff's counsel in both cases, the same evidence submitted in support of punitive damages, and the same issues regarding punitive damages. Monsanto's opening brief in this matter discussed the *Erickson* trial court

decision at several points (Br. at 26-27, 36-37, 49-50). A decision to affirm the trial court's order in this matter would create a split in the Florida district courts of appeal.

Dated: November 7, 2024

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing  
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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FOURTH DISTRICT

**DALE E. ERICKSON,**  
Appellant,

v.

**MONSANTO COMPANY, BAYER CORPORATION, BAYER AG,** et al.,  
Appellees.

No. 4D2024-0835

[November 7, 2024]

Appeal of a nonfinal order from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Carolyn Bell, Judge; L.T. Case No. 502020CA010208XXXXMB.

Stephen F. Rosenthal and Christina H. Martinez of Podhurst Orseck, P.A., Miami, for appellant.

Mihai M. Vrasmasu, Antar K. Vaughan, Lori-Ann C. Ridley and Jarvis C. James of Shook, Hardy & Bacon, L.L.P., Miami, and K. Lee Marshall and Christian M. Poland of Bryan Cave Leighton Paisner LLP, San Francisco, California, for appellee Monsanto Company.

PER CURIAM.

*Affirmed.*

DAMOORGIAN, CONNER and ARTAU, JJ., concur.

\* \* \*

***Not final until disposition of timely filed motion for rehearing.***

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY, FLORIDA

DIVISION: AF  
CASE NO.: 50-2020-CA-010208-XXXX-MB

DALE E ERICKSON,

Plaintiff

vs.

MONSANTO COMPANY,  
BAYER CORPORATION,  
BAYER AG,  
et al.,

Defendants.

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**ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO AMEND TO ASSERT  
CLAIMS FOR PUNITIVE DAMAGES**

**THIS CAUSE** came before the Court on November 27, 2023, for a hearing on Plaintiff Dale Erickson's ("Plaintiff" or "Mr. Erickson") Motion for Leave to Amend to Assert Claims for Punitive Damages ("Motion") (DE #146), filed on October 5, 2023. Defendant Monsanto Company ("Defendant" or "Monsanto") filed a Response in Opposition to Plaintiff's Motion ("Response") (DE #158) and its corrected exhibits (DE #159) on November 17 and 27, 2023, respectively. The parties filed supplemental briefs (DE #164, #166) and presented the Court with competing proposed orders on December 20, 2023. The Court has considered Plaintiff's Motion, Defendant's Response, all affidavits and other evidence presented, the parties' supplemental briefs and competing orders, the court record, the applicable law, and the arguments presented at the aforesaid hearing. Upon careful consideration, the Court hereby finds and rules as follows:

## **Background**

In this personal injury action, Plaintiff argues that Defendant's Roundup®-branded herbicides ("Roundup") contributed to his development of cancer, with which he was diagnosed in 2019. Specifically, Plaintiff alleges that he used Monsanto-manufactured Roundup between approximately 1974 and 2010. Roundup contains as its active ingredient glyphosate. Plaintiff alleges that his use of Roundup, and in particular the glyphosate in Roundup, contributed to his development of a type of non-Hodgkin's lymphoma ("NHL"). Plaintiff now moves for leave to amend his complaint to assert a claim for punitive damages pursuant to Section 768.72, Florida Statutes (2023), and Fla. R. Civ. P. 1.190. He alleges he is entitled to punitive damages because "Monsanto's actions during the period of Plaintiff's exposure to Roundup evince a conscious and willful disregard for the life and safety of Roundup users like Plaintiff." (Mot. at 16)

## **Legal Standard**

In *Fed. Ins. Co. v. Perlmutter*, 376 So. 3d 24 (Fla. 4th DCA 2023) (*en banc*), the Fourth District Court of Appeal recently clarified the substantive and procedural requirements for a trial court to consider in allowing a punitive damages claim. The *Perlmutter* court reiterated long-standing case law that trial courts bear a "gate-keeping" responsibility to determine entitlement to punitive damages, noting that Section 768.72 "create[s] a substantive legal right not to be subject to a punitive damages claim ... until the trial court makes a determination that there is a reasonable evidentiary basis for recovery of punitive damages." *Id.* at 31 (quoting *Globe Newspaper Co. v. King*, 658 So. 2d 518, 519 (Fla. 1995) (citation omitted)) (emphasis added).

Trial courts are to consider both the pleading component and the evidentiary component of a claim for punitive damages. *Id.* at 32. "[O]nce the trial court determines the proposed amended complaint states sufficient allegations to plead a proper punitive damages claim, the trial court

must next determine whether the movant has established a reasonable factual basis for its punitive damages claim consistent with the allegations in the amended complaint.” *Id.* The primary evidentiary foundational requirement for punitive damages under Section 768.72 is “a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages.” *Id.* at 30, citing to Section 768.72(1), Fla. Stat. (2013); Fla. R. Civ. P. 1.190(f). Courts are allowed to consider a proffer by the moving party, as well as record evidence from any party. *Id.* at 33. At this stage, trial courts may not, however, weigh evidence or witness credibility. *Id.* at 34. The movant is to be given the benefit of all reasonable inferences. *Id.*

Under Section 768.72(2),

(2) A defendant may be held liable for punitive damages only if the trier of fact, based on ***clear and convincing evidence***, finds that the defendant was personally guilty of ***intentional misconduct or gross negligence***. As used in this section, the term:

(a) ‘Intentional misconduct’ means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.

(b) ‘Gross negligence’ means that the defendant’s conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

Fla. Stat. § 768.72(2) (emphasis added).

In addition to the language of Section 768.72, case law “imposes additional restrictions on punitive damages claims, which ‘are reserved for ***truly culpable behavior*** and are intended to ***express society’s collective outrage***.” *Pinnacle Prop. Mgmt. Services, LLC v. Forde*, 372 So. 3d 292, 296 (Fla. 4th DCA 2023) (quoting *KIS Grp., LLC v. Moquin*, 263 So. 3d 63, 65–66 (Fla. 4th DCA 2019)) (internal quotations omitted) (emphasis added).

In *Perlmutter*, the Court further articulated the standard:

“[L]ong-established precedent dictates that actions which deserve punitive sanctions involve **outrageous conduct, malicious motive, or wrongful intention.**” *William Dorsky Assocs., Inc. v. Highlands Cnty. Title & Guar. Land Co.*, 528 So. 2d 411, 412 (Fla. 2d DCA 1988). “[P]unitive damages are reserved for truly ‘culpable conduct,’ ” where the conduct is “so outrageous in character, and so extreme in degree ... [that] **the facts [of the case] to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’**” *Oriolo*, 357 So. 3d at 706; *see also W.R. Grace & Co.—Conn v. Waters*, 638 So.2d 502, 503 (Fla. 1994) (“Punitive damages are appropriate when a defendant engages in conduct which is **fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights of others.**”); *Lee Cnty. Bank v. Winson*, 444 So. 2d 459, 463 (Fla. 2d DCA 1983) (“Punitive damages may be properly awarded only where a tort involves **malice, moral turpitude, or wanton and outrageous disregard of a plaintiff’s rights.**” (citing *Winn & Lovett Grocery Co. v. Archer*, 126 Fla. 308, 171 So. 214 (1936))).

*Perlmutter* at 36 (emphasis added).

The Florida Supreme Court has stated that “punitive damages are reserved for truly ‘culpable conduct,’ and the requisite level of negligence for those damages is ‘equivalent to the conduct involved in criminal manslaughter.’” *Cleveland Clinic Florida Health Sys. Nonprofit Corp. v. Oriolo*, 357 So. 3d 703, 706 (Fla. 4th DCA 2023) (quoting *Valladares v. Bank of Am. Corp.*, 197 So. 3d 1, 11 (Fla. 2016); *accord Naso v. Hall*, 338 So. 3d 283, 289 (Fla. 4th DCA 2022)).

As stated by the *Perlmutter* court, “a reasonable basis” for punitive damages “means the movant must demonstrate the movant will be able to produce competent, substantial evidence at trial upon which a rational trier of fact could find that the defendant specifically intended to engage in intentional or grossly negligent misconduct *that was outrageous and reprehensible enough to merit punishment.*” *Perlmutter* at 33-34 (emphasis added).

Under this standard, the trial court is to make a preliminary determination of “whether a reasonable jury, viewing the totality of proffered evidence in the light most favorable to the movant, could find by clear and convincing evidence that punitive damages are warranted.” *Id.* at 34. Clear and convincing evidence is, as defined by the Florida Supreme Court, more than “a preponderance of the evidence,” but less than “beyond and to the exclusion of a reasonable doubt.”

*In re Hawkins*, 151 So. 3d 1200, 1212 (Fla. 2014). This intermediate level of proof involves both a qualitative and quantitative standard. *Id.* “The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.” *Id.* (citation omitted). In the context of the trial court’s determination of punitive damages, “although the clear and convincing evidence standard can be met when evidence is *inconsistent or conflicting*, the standard cannot be met when the evidence is *ambiguous*.” *Perlmutter* at 34 n.7 (emphasis in original).

### **Plaintiff’s Allegations And Evidence**

In his Motion, Mr. Erickson alleges that Defendant Monsanto knew for decades that Roundup was a potential human carcinogen and that “[r]ather than warn of the danger, Monsanto engaged in a systematic effort to discredit the unfavorable science, create new science through ‘ghost-writing,’ and manipulate federal agencies with disinformation.” (Mot. at 2-3). Plaintiff further contends that Defendant “acted with a conscious disregard for human life in its marketing of a defective product it knew to be dangerous and the dangers of which it concealed from the public.” (Mot. at 17).

As part of his evidentiary proffer in support of punitive damages, Plaintiff has submitted documentary evidence including the following:

- Evidence from internal communications that, in the 1980s, Monsanto learned of a study indicating that glyphosate could cause tumors in mice, and hired a pathologist to try to discredit the study. Pl. Exs. C, D, E, F, G, H, I.
- Evidence that, in the 1980s, Monsanto conducted a rat study that found pancreatic tumors in rats exposed to glyphosate. Pl. Ex. M.
- Evidence from internal emails that, in the 1990s, after peer-reviewed studies found links

between Roundup and DNA damage, Monsanto attempted to develop “an external network of genotox experts” to support the safety of glyphosate. Pl. Exs. O, P. Monsanto considered employing a toxicologist named Dr. James Parry.

- Evidence that, after reviewing the studies, Dr. Parry reported to Monsanto his findings that Roundup may be genotoxic and proposed additional studies to further inquire into the issue. Pl. Exs. Q, R.
- Evidence that, in response to Dr. Parry’s findings, a Monsanto employee named Dr. Donna Farmer suggested Monsanto “drop Parry”. Other Monsanto employees stated they were “simply” not “going to do the studies Parry suggests” and would instead “find/develop someone [else] who is comfortable with the genotox profile of glyphosate/Roundup[.]” Pl. Ex. S.
- Evidence that, in the late 1990s, Monsanto learned of studies finding associations between glyphosate and lymphoma in humans. Pl. Ex. U.
- Evidence that, in the late 1990s, Monsanto employees understood that the carcinogenicity of glyphosate-based formulations was “another issue” distinct from the toxicity of glyphosate in isolation, but nevertheless did “not support doing any studies on glyphosate, formulations or other surfactant ingredients at this time . . .” Pl. Ex. U.
- Evidence that, in the late 1990s, Monsanto employees understood that the Roundup brand was “currently very vulnerable” in the area of genotoxicity. Pl. Ex. T.
- Evidence from internal emails that, in the 1990s and 2000s, Monsanto “ghostwrote” scientific articles by having its internal experts draft manuscripts for publication in peer-reviewed journals and lay publications that downplayed the risks of glyphosate as well as Monsanto’s role in the drafting process. Pl. Exs. W, X.

- Evidence from internal emails that, in the 2000s, Monsanto employee Dr. Donna Farmer expressed concern that “we have not done the necessary testing on the formulation to make th[e] statement” that Roundup is not a carcinogen. Pl. Ex. AA.
- Evidence from internal emails that, in the late 2000s, Dr. Farmer once again internally expressed that “you cannot say that Roundup does not cause cancer. We have not done carcinogenicity studies with ‘Roundup.’” Pl. Ex. AB.
- Evidence that in response to an epidemiological study in 2008 showing an association between glyphosate and Non-Hodgkin’s Lymphoma (NHL), the type of cancer with which Mr. Erickson was diagnosed, Monsanto’s internal response included the message “how do we combat this?” Pl. Ex. AC.
- According to Plaintiff, based on this evidence “a reasonable jury could conclude that Monsanto acted with a conscious disregard for human life in its marketing of a defective product it knew to be dangerous and the dangers of which it concealed from the public.” Mot. at 17.

### **Findings As To Intentional Misconduct or Gross Negligence**

Solely viewing the Plaintiff’s proffer and evidence, without regard to any record evidence offered by Defendant, and giving the Plaintiff the benefit of all reasonable inferences, the Court finds Plaintiff has not met his burden in making a reasonable showing of Monsanto’s intentional misconduct or gross negligence. While Plaintiff’s version of Monsanto’s actions may not qualify as the epitome of good corporate citizenship, this Court does not find, without hesitancy, that Monsanto’s actions, even as alleged by the Plaintiff, rise to the level of conduct that was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct. Without weighing the evidence, and finding all

inferences in favor of the Plaintiff, this Court finds that while there may be evidence that Monsanto was aware there were issues with glyphosate, the evidence that Monsanto *knew* it was carcinogenic and dangerous to humans as used in Roundup is ambiguous at best. This Court finds that Monsanto's failure to follow through on certain studies recommended by one scientist, or having "ghostwrote" scientific articles in peer reviewed journals (which were, ostensibly, peer reviewed by non-Monsanto scientists), or internally expressing concern about the lack of certain studies having been done, does not constitute ***outrageous conduct, malicious motive, or wrongful intention***. Indeed, viewing the entirety of the Plaintiff's claims and evidence as true, this Court does not find that Monsanto's actions were ***fraudulent, malicious, deliberately violent or oppressive, or committed with such gross negligence as to indicate a wanton disregard for the rights of others***. In short, this Court does not find that the Plaintiff has demonstrated he "will be able to produce competent, substantial evidence at trial upon which a rational trier of fact could find that the defendant specifically intended to engage in intentional or grossly negligent misconduct *that was outrageous and reprehensible enough to merit punishment.*" *Perlmutter* at 33-34 (emphasis added).

Upon additional consideration of the record evidence put forth by Monsanto, the Court finds even more ambiguity and less of a basis for punitive damages. In particular, the Court finds that Monsanto's evidence of statements by the United States Environmental Protection Agency (EPA) "that glyphosate is not likely to be a human carcinogen and poses no human-health risks of concern" and that "[t]he record underlying these conclusions is robust, reflecting more than a decade of analysis and thorough review of the scientific literature," (Def.'s Resp. at 15-18) raises enormous issues of ambiguity as to whether Roundup was carcinogenic. The Court also notes the November 7, 2023, decision by the United States Court of Appeals for the Ninth Circuit that

California's Proposition 65 cancer warning as applied to glyphosate was unconstitutional, recognizing that the "message that glyphosate is unsafe . . . is, at best, disputed." (Def.'s Resp. at 18).

The Court is mindful that any number of courts have allowed punitive damages claims relating to Roundup to be brought before juries and that, in fact, juries have returned verdicts for punitive damages that have been upheld on appeal. These include the significant awards referenced below in the discussion of prior awards of punitive damages. Nonetheless, this Court does not find these rulings persuasive on the facts presented here and under the standard articulated in *Perlmutter*.

For all of these reasons, the Court makes a preliminary determination that no reasonable jury, viewing the totality of proffered evidence in this case in the light most favorable to the movant, could find by clear and convincing evidence that punitive damages are warranted.

#### **Prior Awards of Punitive Damages**

Alternatively, the Court holds that Plaintiff's request for punitive damages is barred by section 768.73, Florida Statutes (2023), which provides in part:

(2)(a) Except as provided in paragraph (b), punitive damages may not be awarded against a defendant in a civil action if that defendant establishes, before trial, that punitive damages have previously been awarded against that defendant in any state or federal court in any action alleging harm from the same act or single course of conduct for which the claimant seeks compensatory damages. For purposes of a civil action, the term "the same act or single course of conduct" includes acts resulting in the same manufacturing defects, acts resulting in the same defects in design, or failure to warn of the same hazards, with respect to similar units of a product.

(b) In subsequent civil actions involving the same act or single course of conduct for which punitive damages have already been awarded, if the court determines by clear and convincing evidence that the amount of prior punitive damages awarded was insufficient to punish that defendant's behavior, the court may permit a jury to

consider an award of subsequent punitive damages. ...

§ 768.73(2), Fla. Stat.

The Court was presented with evidence that juries have awarded punitive damages against Monsanto in three separate Roundup NHL lawsuits. In each of those cases, the plaintiff(s) alleged harm from Defendant's same course of conduct from which Plaintiff here alleges harm. *See Johnson v. Monsanto Co.*, 52 Cal. App. 5th 434, 440 (2020), *as modified on denial of reh'g* (Aug. 18, 2020) ("Johnson sought recovery based on the theories that Roundup products had a design defect and that Monsanto provided inadequate warnings (seeking recovery both in strict liability and for negligently failing to warn). The main issues litigated at trial were whether Roundup products caused Johnson's illness and, if so, the degree to which Monsanto was aware of its products' carcinogenicity."); *Hardeman v. Monsanto Co.*, 997 F.3d 941, 952 (9th Cir. 2021) ("Hardeman sued Monsanto alleging that his use of Roundup—which started in the 1980s and ended in 2012—led to his diagnosis of non-Hodgkin's lymphoma ("NHL") in early 2015" and "alleged Monsanto's failure to warn him of the carcinogenic risks of Roundup caused his NHL."); *Pilliod v. Monsanto Co.*, 67 Cal. App. 5th 591, 607 (2021) ("[T]he Pilliods sued Monsanto for compensatory and punitive damages, alleging that they each developed non-Hodgkin's lymphoma as a result of using the same Roundup products. They asserted causes of action for design defect under the consumer expectations test and failure to warn. The Pilliods' claims were based on Monsanto's labeling, marketing, and promotion of Roundup.").

In each of those cases, the trial judge reduced the punitive damages award, which supports the conclusion that Defendant has been sufficiently punished. *See Johnson*, 52 Cal. App. 5th at 444, 449 (punitive damages of \$250 million reduced to approximately \$40 million); *Hardeman*, 997 F.3d at 976 (punitive damages of \$75 million reduced to \$20 million); *Pilliod*, 67 Cal. App.

5th at 640-41 (punitive damages of \$2 billion reduced to approximately \$70 million). Defendant proffers evidence that it paid these punitive damages awards and claims that they “have had their intended deterrent effect—Monsanto ceased production of glyphosate-based herbicides for sale in the residential marketplace, not because of any concern about potential carcinogenicity, but instead to ‘manage litigation risk’ spurred by the large punitive awards.” (Def.’s Resp. at 24-25).

Defendant has established that punitive damages have previously been awarded against it in actions alleging harm from the same single course of conduct for which Plaintiff now seeks damages, and Plaintiff has not provided evidence that the amount of punitive damages awarded was insufficient to punish Defendant’s behavior. *See* § 768.73(2). Therefore, it appears that the Court cannot permit a jury to consider an award of punitive damages. *Id.*; *see also Mixson v. C.R. Bard Inc.*, 628 F. Supp. 3d 1159, 1165-66 (N.D. Fla. 2022) (holding that punitive damages were barred where plaintiffs did not prove by clear and convincing evidence that prior punitive damages award was insufficient). Additionally, based on the prior punitive damages awards and the evidence that Defendant ceased production of glyphosate-based herbicides for residential users, the Court finds that Defendant has been sufficiently punished and deterred and therefore that punitive damages are inappropriate. *See Oriolo*, 357 So. 3d at 707 (“[P]unitive damages are awarded to punish wrongdoers and to deter them from committing similar bad acts in the future.”).

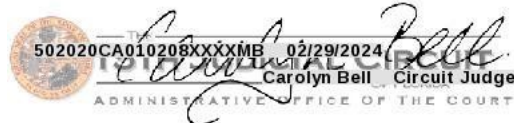
Based on the foregoing, Plaintiff has failed to provide a reasonable evidentiary showing that would provide a reasonable basis for recovery of punitive damages under section 768.72(1) and (2). In addition, Plaintiff’s claim for punitive damages is barred by section 768.73(2) because juries have awarded punitive damages against Defendant in actions alleging harm from the single

course of conduct from which Plaintiff alleges harm.

Accordingly, it is hereby

**ORDERED AND ADJUDGED** that Plaintiff's Motion for Leave to Amend to Assert Claims for Punitive Damages (DE #146) is **DENIED**.

**DONE AND ORDERED** in Chambers at West Palm Beach, Palm Beach County, Florida.



502020CA010208XXXXMB 02/29/2024

Carolyn Bell  
Circuit Judge

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