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IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

EARL NEAL, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 1722-CC10773
	)	
MONSANTO COMPANY,	)	
	)	
Defendant.	)	

MONSANTO COMPANY'S REPLY IN SUPPORT OF ITS MOTION *IN LIMINE* NO. 20
TO EXCLUDE PREJUDICIAL AND INFLAMMATORY ARGUMENTS

I. INTRODUCTION

Monsanto seeks to exclude nine specific prejudicial and inflammatory arguments that are logically and legally irrelevant. Rather than attempting to meet their burden of establishing admissibility, Plaintiffs waste the Court's time by engaging in a fantastical rant about other "creative"—and inflammatory—advocacy they could instead employ at trial. This bizarre diatribe involves "the cloaked angel of death," a scythe "laying low all … users of defendant's product," and narration by James Earl Jones. Plaintiffs have confirmed Monsanto's concerns. Plaintiffs' counsel's irreverence demonstrates that the Court should act now to exclude what otherwise will be a free-for-all in front of the jury. Moreover, the existence of a punitive damages claim does not, as Plaintiffs suggest, give them a free pass at trial to say and do whatever they wish.

II. ARGUMENT

A. Plaintiffs have not met their burden to show that the specific subject matter sought to be excluded is logically and legally relevant.

Plaintiffs wrongly argue that Monsanto has not met its burden to prove that the nine

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instances of improper subject matter should be excluded.[1] This ignores that Plaintiffs have the burden to prove admissibility. "Fundamental to the Missouri law of evidence is the rule that evidence must be both logically and legally relevant in order to be admissible." *Pittman v. Ripley Cnty. Mem'l Hosp.*, 318 S.W.3d 289, 293 (Mo. App. S.D. 2010). To be legally relevant, the probative value must outweigh "the dangers of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time or needless presentation of cumulative evidence." *Moon v. Hy-Vee, Inc.*, 351 S.W.3d 279, 285 (Mo. App. W.D. 2011) (quoting *Rader Family Ltd. P'ship v. City of Columbia*, 307 S.W.3d 243, 250 (Mo. App. W.D. 2010)). "The party seeking to admit evidence bears the burden of establishing both its logical and its legal relevance." *Nolte v. Ford Motor Co.*, 458 S.W.3d 368, 382 (Mo. App. W.D. 2014) (citing *Secrist v. Treadstone, LLC*, 356 S.W.3d 276, 283 (Mo. App. W.D. 2011)).

Monsanto objects to the admission of the following subject matter as irrelevant, prejudicial, inflammatory, and confusing. Despite their burden to do so, Plaintiffs did nothing to establish their admissibility:

1. Suggestions that jurors "send a message" to Monsanto, Bayer, other corporations, or the like;
2. Suggestions that jurors' verdict will affect themselves, their families, or their community;
3. Suggestions that jurors place themselves in the position of the Plaintiffs;
4. Statements that Roundup needs to be "kept far away from the jury" or "the community" or pretend that the jury is in danger when handling the product – or other related appeals to the emotions of jurors suggesting they are in danger;

[1] Plaintiffs' legal support is inapposite. The case they cite, *Wright v. Barr*, stands for the proposition that the burden to persuade an appellate court to overturn a trial court's ruling on an abuse of discretion standard lies with the appellant. 62 S.W.3d 509, 534 (Mo. App. W.D. 2001).

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5. References to Roundup or glyphosate as a "poison" or comparison to arsenic, tobacco, Sarin gas, or other known highly toxic substances;
6. A challenge to a defense witness to spray Roundup on their skin;
7. References to the trial as "Ground Zero" or other references to the 9/11 disaster or related hyperbolic statements to describe the substance of this lawsuit;
8. Presentation of images of injured or sick patients other than Plaintiffs;
9. Spraying with a Roundup bottle in the courtroom – no matter what it contains.

"A so-called 'golden rule' argument which asks the jurors to place themselves in the position of a party is ***universally condemned*** because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." *Norman v. Textron Inc*., No. 15-4108-CV-C-WJE, 2018 WL 3199496, at *7 (W.D. Mo. May 17, 2018) (quoting *United States v. Palma*, 473 F.3d 899, 902 (8th Cir. 2007)) (internal quotations omitted) (emphasis added). "It is generally held to be improper argument to ask a juror to place himself in the shose [sic] of a party and to render such a verdict or such damages as he would want rendered if he was so situated." *Merritt v. Wilkerson,* 360 S.W.2d 283, 285, 287–88 (Mo. Ct. App. 1962) (reversible error to overrule objection based on use of "golden rule" argument at closing).

Similarly, suggestions that the jurors' verdict will affect themselves, their families, or their community are generally considered to be irrelevant and excluded. In *Gannon v. Menard, Inc*., the court decided that counsel should not be allowed to argue that "Defendant's conduct negatively affected the safety of the community." No. 1:18-cv-00251-JMS-MJD, 2019 WL 7584294 at *6 (S.D. Ind. Aug. 26, 2019). "[T]he issue is whether Defendant's conduct was negligent and, if so, whether that negligence caused Plaintiff's injury. ***Any possibility that others could have been injured is irrelevant*** to the issues in this case." *Id.* (emphasis added).

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B. The existence of a punitive damages claim does not give Plaintiffs a free pass at trial.

Plaintiffs go too far by suggesting that the theme of "sending a message" to Monsanto may pervade this case just because they have pleaded a claim for punitive damages. They rely on cases where an attorney merely mentions "sending a message" during closing where punitive damages were not in play. None of these cases stand for the proposition that plaintiffs with a punitive damages claim can indiscriminately deploy such a theme throughout their case.

First, in *Derossett v. Alton & Southern Railway Co.*, the court determined that merely mentioning "sending a message" was not sufficient to prejudice the defendant, 850 S.W.2d 109, 113 (Mo. App. E.D. 1993). But the *Derossett* court also indicated that allowing a "send a message" theme to pervade attorney argument may indeed be prejudicial and reversible error. *Id.* at 112–13. Plaintiffs' reliance on *Pierce v. Platte-Clay Elec. Coop.*, 769 S.W.2d 769, 779 (Mo. banc 1989), is similarly misplaced. As in *Derossett,* no allegations were made that a "sending a message" theme pervaded the litigation. An attorney mentioned this argument at the end of his closing and, while the court did not agree to a mistrial, it sustained the objection. *Id.* So too, Plaintiffs miss the mark with their reliance on *Cornette v. City of North Kansas City*, 659 S.W.2d 245, 248 (Mo. App. W.D. 1983). Here, the "conscience of the community" argument was used during closing. *Id.* The trial court's discretion in denying a new trial was upheld, noting that the "conscience of the community" point was not connected to the adequacy of the verdict. *Id.* Nothing in *Derossett*, *Pierce*, or *Cornette* gives Plaintiffs a blank check to make "send a message" and "conscience of the community" themes pervasive throughout this trial.

Moreover, plaintiffs seeking punitive damages are constrained by constitutional limitations that prevent them from seeking to punish defendants for conduct wholly divorced from the liability at issue in the case. *See, e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996) (an award

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of punitive damages based on the alleged reprehensibility of defendants' conduct must be tied to the alleged wrongdoing at issue: "As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect the enormity of *his offense*." (internal quotation omitted and citation) (emphasis added). Conflating Roundup with arsenic or this trial to "Ground Zero" exemplifies this type of constitutional violation and the prejudice that arises from such comparisons.

C. The Court should exclude this subject matter now, and not delay until Monsanto is prejudiced at trial.

The Court should act now. Plaintiffs offer no reason to delay excluding this irrelevant, prejudicial, and inflammatory subject matter. To the contrary, they indulge in hyperbole and signal that they intend to engage in as much chicanery as they possibly can at trial. They suggest that prohibiting, for example, references to 9/11, Ground Zero, spraying jurors with purported Roundup, and comparing Roundup to arsenic, tobacco, and sarin gas will make for a "drab and colorless trial." Opp. at 5. But this argument merely shifts focus from Monsanto's legitimate concern that waiting to exclude plainly irrelevant and prejudicial subject matter until jurors have been exposed to it would invite reversible error.

Plaintiffs wrongly rely on *Roth v. Roth*, 176 S.W.3d 735 (Mo. App. E.D. 2005), to allege that a motion *in limine* is not the proper vehicle here as such a motion may not be used to "choke off" a party's case. Opp. at 3. In *Roth,* the appellate court reversed the trial court's exclusion of evidence offered to prove the defendant's key affirmative defense. *Id*. at 738–39. Nothing that Monsanto seeks to exclude in MIL 20 prevents a full and fair presentation of Plaintiffs' claims.

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2022 the foregoing was electronically filed with the Clerk of the Court for the City of St. Louis, Missouri using Missouri Case.Net which sent notification of such filing to all persons listed in the Court's electronic notification system.

/s/ *Erik L. Hansell*