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

CARL ALESI, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	Cause No. 19SL-CC03617
v.	)	
	)	Division No. 1
MONSANTO COMPANY,	)	
	)	July 22, 2022
Defendant.	)	

ORDER CONCERNING DEFENDANT MONSANTO COMPANY'S MOTION FOR SUMMARY JUDGMENT

Presently before the Court is Defendant Monsanto Company's ("Monsanto") Motion for Summary Judgment ("Motion"). On July 20, 2022, the Court conducted a hearing on Monsanto's Motion for Summary Judgment and other dispositive motions. The Court heard arguments of counsel and reviewed the pleadings and exhibits submitted and took the Motion for Summary Judgment and other dispositive motions under submission. After careful consideration of the legal briefs, exhibits, and oral arguments, the Court grants and sustains the Motion for Summary Judgment in part and denies and overrules it in part.

I. LEGAL STANDARD

A motion for summary judgment should be granted if the pleadings show that there are no issues of material fact and that the moving party is entitled to judgment as a matter of law. Rule 74.04(c); *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 380 (Mo. banc 1993). A "genuine dispute" is a dispute which is real, not merely argumentative, imaginary, or frivolous. *ITT*, 854 S.W.2d at 382.

II. DISCUSSION

Plaintiffs' six counts – design defect, failure to warn, negligence, fraud, statutory consumer fraud, and loss of consortium – are all premised on Plaintiffs' claims that glyphosate in Roundup caused their non-Hodgkin's lymphoma ("NHL") and Monsanto should have included cancer warnings on Roundup products. Monsanto argues it is entitled to summary judgment on the following grounds: (A) Plaintiffs have failed to produce admissible evidence of general and specific causation in support of their claims; (B) the undisputed facts establish Plaintiff Cheryl Davis would not have seen, or acted on, the warning she alleges Monsanto should have provided; and (C) Plaintiffs' claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq*.

A. Plaintiffs' expert testimony on general and specific causation

Monsanto's first argument for summary judgment is predicated on its six separate Motions to Exclude directed at Plaintiffs' expert witnesses. According to Monsanto, Plaintiffs have offered no admissible evidence of general or specific causation in this case.

Generally, the plaintiff in a products liability case "must establish the causal relationship by expert testimony." *Hagen v. Celotex Corp.*, 816 S.W.2d 667, 670 (Mo. banc 1991). Missouri courts have noted that "expert testimony is not necessarily required to establish product defect or unreasonable danger." *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 14 (Mo. banc 1994). However, expert testimony is necessary where "the lay jury [does] not possess the experience or knowledge of the subject matter sufficient to enable them to reach an intelligent opinion without help." *Siebern v. Missouri-Illinois Tractor & Equip. Co.*, 711 S.W.2d 935, 939 (Mo. App. E.D. 1986). *See also Pro Serv. Auto., L.L.C. v. Lenan Corp.*, 469 F.3d 1210, 1214 (8th Cir. 2006) (applying Missouri law).

> Missouri law holds that unless the injury involves a "sudden onset, visible injury, or an injury that as a matter of common knowledge follows the act ... some expert medical testimony combined with other evidence tending to show with a reasonable certainty that the accident caused the injury is necessary [to prove causation]."

Eppler v. Ciba-Geigy Corp., 860 F. Supp. 1391, 1395 n.3 (W.D. Mo. 1994) (omission and alteration in original) (quoting *Harris v. Washington,* 654 S.W.2d 303, 306 (Mo. App. E.D. 1983)).

Expert testimony is also required in negligence claims depending on the nature of the underlying injury.

> The testimony of a lay witness is sufficient to establish the nature, cause and extent of an injury "when the facts fall within the realm of lay understanding." *Griggs v. A.B. Chance Company,* 503 S.W.2d 697, 704 (Mo.App.1973). *See also Pedigo v. Roseberry,* 340 Mo. 724, 102 S.W.2d 600, 606–07 (1937); *State ex rel. Burcham v. Drainage District No. 25,* 272 S.W.2d 712, 716–17 (Mo.App.1954). However, when the injury is a "sophisticated injury, which requires surgical intervention or other highly scientific technique for diagnosis, and particularly where there is a serious question of pre-existing disability and its extent, the proof of causation is not within the realm of lay understanding...." *Griggs,* 503 S.W.2d at 704.

Williams v. Jacobs, 972 S.W.2d 334, 340 (Mo. App. W.D. 1998) ("It is not essential to have medical testimony, however, as a causal connection between an accident and injury can be inferred in cases where there is a visible injury, or a sudden onset of an injury, or an injury that as a matter of common knowledge follows the act.") (internal quotation marks omitted). These court opinions are consistent with the current version of section 490.065.2(1)(a), RSMo, which provides an expert witness may testify if "[t]he expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."

The injuries at issue in this case, the trial Plaintiffs' NHL, is plainly outside the realm of lay understanding. As Missouri courts recognize:

> proof of causation in cases involving exposure to a toxic substance typically requires a certain degree of scientific expertise. *See Lewis*, 5 S.W.3d at 585. This is because "[t]he diagnosis of disease induced by environmental factors is essentially 'a scientific undertaking' requiring proof which 'the scientific community deems sufficient for that causal link.' " *Id.* (citation omitted). As Defendants note, the requirement for expert testimony in cases like the instant matter, coincides with the requisite proof of causation in medical injury cases, where the cause of sophisticated injuries is not within a layperson's common understanding and, therefore, the plaintiff must establish the causal relationship through expert medical testimony. *See Brickey v. Concerned Care of the Midwest, Inc.*, 988 S.W.2d 592, 596–97 (Mo.App.E.D.1999).

Brown for Est. of Kruse v. Seven Trails Invs., LLC, 456 S.W.3d 864, 869–70 (Mo. App. E.D. 2014).

For the reasons explained in the Court's separate Order Concerning Monsanto's Motions to Exclude Experts, Plaintiffs' experts generally satisfy the requirements of section 490.065.2(1), RSMo, to offer their proffered testimony to the jury as limited by Court's orders stated therein. Consequently, summary judgment is not warranted on this ground.

Monsanto argues it is entitled to summary judgment as to Plaintiff Roberta Fox's claims because Plaintiffs' proffered experts have testified there is insufficient evidence to establish a causal connection between her NHL and Roundup exposure. The Court agrees. NHL is clearly a sophisticated injury such that expert testimony is required to show a causal connection for each plaintiff. *See Brown for Est. of Kruse*, 456 S.W.3d at 869–70. Without such expert testimony, Plaintiffs' counsel conceded during oral argument that Monsanto is entitled to summary judgment on Plaintiff Fox's claim.

B. Plaintiff Davis's failure to warn claim

Monsanto's second argument for summary judgment relates solely towards claims asserted by Plaintiff Cheryl Davis. Because Davis testified in her deposition that she did not read the label on the Roundup products she used, Monsanto argues she cannot succeed on her failure to warn claim. According to Monsanto, Missouri law requires plaintiffs prove that they would have noticed and acted upon the warning they allege should have been provided.

Monsanto relies on a single Supreme Court of Missouri opinion for the proposition that a plaintiff must "show that a warning would have altered [their] behavior" such that their alleged injuries would not have occurred. *Arnold v. Ingersoll-Rand Co.*, 834 S.W.2d 192, 194 (Mo. banc 1992).

That case, however, is easily distinguishable from this case. In *Arnold*, a mechanic brought claims related to an explosion caused by a spark created by the defendant manufacturer's air compressor. *Id.* at 192. In reversing the trial court's decision to submit the failure to warn claim to the jury, the Supreme Court did state: "Causation in a failure to warn case involves two separate requirements. First, the plaintiffs' injuries must be caused by the product from which the warning is missing. . . . Second, plaintiffs must show that a warning would have altered the behavior of the individuals involved in the accident." *Id.* at 194. Monsanto, however, ignores what the Supreme Court said next: "Missouri, like several other states, aids plaintiffs in proving this second part of causation *by presuming that a warning will be heeded*." *Id.* (emphasis added) (citing *See Duke v. Gulf & Western Mfg. Co.*, 660 S.W.2d 404, 419 (Mo. App. 1983)).

The Supreme Court in *Arnold* continued:

> The presumption that plaintiffs will heed a warning assumes that a reasonable person will act appropriately if given adequate information. Thus, a preliminary inquiry before applying the presumption is whether adequate information is available *absent* a warning. In *Duke*, the court of appeals proceeded to recognize a presumption that a warning would be heeded only after finding that there was a legitimate jury question whether the plaintiff did not already know the danger. *Duke*, 660 S.W.2d at 418–19. As causation is a required element of the plaintiffs' case, the burden is on plaintiffs to show that lack of knowledge.
>
> In this case, *plaintiffs' evidence does not indicate that a warning would have imparted additional information. Instead, the testimony of each of the mechanics present, the shop owner, and the parts supplier (who stopped by the shop on the morning of the explosion) indicated that they all knew that there was a danger of an explosion if gas fumes accumulated in the shop.* Thus, plaintiffs failed to present any evidence suggesting that a warning would have imparted additional information. Absent such a showing, the presumption that a warning would be heeded is not applicable. Thus, plaintiffs did not meet their burden of proof on the element of causation and the instruction on failure to warn should not have been submitted to the jury.

Id. (emphasis added).

Unlike the mechanic in *Arnold* who knew the risk of a gas explosion, there is no suggestion that Davis (or any of the other Plaintiffs) independently knew of the alleged causal connection between Roundup/glyphosate and development of cancer in humans such that any warning would not have provided additional information.

The presumption that a warning will be heeded is a rebuttable one. For example, in *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 754 (Mo. banc 2011), the plaintiffs brought claims for negligence and strict liability action against a vehicle manufacturer after a seat collapsed in a collision. The trial court granted the manufacturer's motion for directed verdict on the failure to warn claim, but the Supreme Court reversed. *Id.*

The Supreme Court acknowledge the rebuttable presumption that a plaintiff would heed a warning and explained:

> Here, Ford chose to try to rebut it by obtaining concessions from Ms. Moore on cross-examination that she really did not look for warnings and that she would have driven the vehicle once purchased. She agreed that she did not look specifically at this manual or at prior vehicle manuals with the purpose of seeing whether there was a seat weight limit.

Id. at 763.

However, the Supreme Court noted "earlier portions of her testimony . . . supported the Moores' position that she would have heeded a warning about the risks the seats posed for persons of greater than normal weight." *Id.* at 763. Accordingly, "[i]t would be up to a jury to weigh all of this testimony." *Id.* ("A jury may find persuasive the implication from Ford's questions that the Moores' testimony was self-serving and should not be accorded much weight. But a jury instead might find it entirely credible. Such a credibility determination is for the jury.").

Here, the pertinent portion of Davis' deposition testimony is as follows:

> Q. You never read any of the labels on any of the Roundup containers that you bought?
> . . .
> A. Not exactly, no.
> . . .
> Q. And you never read any of the labeling on any of the premixed Roundup containers that you used; correct?
> . . .
> A. No.

This testimony alone does not rebut the presumption that Davis would have heeded a warning. Her equivocal answer to whether she "read any of the labels on any of the Roundup containers that you bought" and other testimony (not quoted in Monsanto's summary judgment pleadings but included, in part, in Ex. 19 attached to its Statement of Facts) suggests that Davis did a cursory review of the Roundup container. The jury should decide whether Davis' testimony means she would not have heeded any possible warning.

Furthermore, the facts in *Moore* also seem distinguishable from the facts in this case: testimony suggesting the plaintiff in *Moore* did not look for warnings in a presumably lengthy vehicle manual is factually distinct from a potential warning directly on the container of a Roundup product or in a relatively shorter writing that could have been included in the packaging. Accordingly, Monsanto has not rebutted the presumption afforded Plaintiffs, including Davis, to warrant summary judgment on this ground.

C. Preemption

Monsanto's third and final argument for summary judgment is that Plaintiffs' claims are both expressly and impliedly preempted by federal law, namely FIFRA, 7 U.S.C. § 136 *et seq*.

"FIFRA creates a comprehensive scheme for the regulation of pesticide labeling and packaging." *Nat'l Bank of Com. of El Dorado, Arkansas v. Dow Chem. Co.*, 165 F.3d 602, 607 (8th Cir. 1999) (quoting *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69, 71 (8th Cir. 1995)). Specifically, FIFRA provides the following in relevant part:

> **(a) In general**
>
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> **(b) Uniformity**
>
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

7 U.S.C. § 136v.

The crux of Monsanto's argument that Plaintiffs' state law claims are "in addition to or different from" requirements imposed by the U.S. Environmental Protection Agency ("EPA") under FIFRA is because they are premised on an alleged duty include a cancer warning on Roundup products despite the EPA repeatedly determining glyphosate was not carcinogenic. This precise issue – whether a state law claim for failure to warn brought by plaintiffs who asserted glyphosate in Roundup caused their NHL – was recently addressed by the United States Court of Appeals for the Ninth Circuit in *Hardeman v. Monsanto Co.*, 997 F.3d 941 (9th Cir. 2021), *cert. denied*, 142 S. Ct. 2834 (2022).

In short, the Ninth Circuit thoroughly analyzed the issue and held that reliance on EPA registration is insufficient to conclude FIFRA preempts state common law claims. *Id.* at 956–57; *see also Carias v. Monsanto Co.*, No. 15CV3677JMAGRB, 2016 WL 6803780, at *6 (E.D.N.Y. Sept. 30, 2016) ("EPA's approval of the Roundup label does not preempt plaintiffs' claims."). Here, Monsanto has not provided any further explanation of how Missouri common law duties Plaintiffs seek to enforce are inconsistent with FIFRA. *See generally Holyfield v. Chevron U.S.A., Inc.*, 533 F. Supp. 3d 726, 735 (E.D. Mo. 2021) ("Defendants have provided no evidence whatsoever that the Missouri common law duties Plaintiffs seek to enforce are inconsistent with FIFRA."). Consequently, Monsanto's argument that Plaintiffs' claims are expressly preempted by FIFRA is unpersuasive.

The Ninth Circuit in *Hardeman* also addressed and rejected Monsanto's nearly identical argument that claims similar to Plaintiffs' claims here are impliedly preempted by FIFRA. In sum, the Ninth Circuit concluded, "[c]onsidering the responsibility FIFRA places on manufacturers to update pesticide labels and that EPA has allowed pesticide manufacturers to add cancer warnings to labels through the notification process without prior approval, it is not *impossible* for Monsanto to add a cancer warning to Roundup's label." 997 F.3d at 960.

During oral arguments, Plaintiffs alerted the Court to a more recent federal appellate opinion from the Eleventh Circuit reaching the same decision on the issue of preemption under FIFRA. *Carson v. Monsanto Co.*, No. 21-10994, 2022 WL 2678779, at *3 (11th Cir. July 12, 2022) (citing *Hardeman*, 997 F.3d at 956) (noting "The problem for Monsanto is that the EPA's registration process is not sufficiently formal to carry with it the force of law" and "it at most creates a rebuttable presumption of compliance with FIFRA's registration process and nothing more").

The Court further notes that Monsanto in the *Hardeman* case petitioned for a writ of *certiorari* before the Supreme Court of the United States. The Supreme Court invited the Solicitor General to file a brief expressing the views of the United States. The Solicitor General did so on May 10, 2022, and argued the Supreme Court should deny review, in part, because the Ninth Circuit correctly held FIFRA does not expressly or impliedly preempt the state law claim for failure to warn. *Brief for the United States as Amicus Curiae*, *Monsanto Co. v. Hardeman*, 2022 WL 1489462 (U.S. No. 21-241).

The Court acknowledges the "the well-settled view that denial of certiorari imparts no implication or inference concerning the [Supreme] Court's view of the merits." *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973). Nevertheless, the Court agrees with the Ninth Circuit's analysis, adopts it here, and denies Monsanto's Motion for Summary Judgment on this ground.

III. CONCLUSION

WHEREFORE, Defendant Monsanto Company's Motion for Summary Judgment is **GRANTED AND SUSTAINED IN PART** as to the claims asserted by Plaintiff Roberta Fox. In all other aspects, Defendant Monsanto Company's Motion for Summary Judgment is **DENIED AND OVERRULED IN PART**.

SO ORDERED:

Brian H. May #1 July 22, 2022

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Hon Brian H. May
Circuit Judge, Division 1