No. 21-10994

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOHN CARSON
Plaintiff-Appellant,

v.

MONSANTO COMPANY,
Defendant-Appellee

On Appeal from the United States District Court
for the Southern District of Georgia,
No. 4:17-cv-00237-RSB-CLR (Baker)

DECLARATION OF DAVID J. WOOL

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Counsel for Edwin Hardeman

I, David J. Wool, being duly sworn, hereby declare as follows:

1. I am a partner at Andrus Wagstaff, P.C. in Denver, Colorado. I am admitted to practice before this Court and am counsel of record in *Hardeman v. Monsanto Company,* Nos. 19-16636, 19-16708, currently on appeal before the United States Court of Appeals for the Ninth Circuit. The appeal was argued and submitted on October 23, 2020.

2. The purpose of this Declaration is to set forth information that has come to my attention that I believe constitutes fraud on this Court by both parties to the *Carson v. Monsanto*, No. 21-10994 (11th Cir. filed Mar. 26, 2021).

3. In late December 2020, I became aware of an order from the Southern District of Georgia, granting a motion for judgment on the pleadings in *Carson v. Monsanto*, No. 4:17-cv-00237-RSB-CLR (Dec. 21, 2020), wherein the District Court found plaintiff's failure to warn claims preempted under Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

4. Shortly thereafter, my partner Aimee Wagstaff informed me that she would reach out to Carson's attorney, Ashleigh Madison. On January 15, 2021, following discussions with Madison, Wagstaff informed me that Monsanto was attempting to force Madison to appeal the District Court's December 21, 2020 order. She informed me that, according to Madison, Monsanto's counsel, Martin Calhoun of Hollingsworth LLP, told Madison that Monsanto would never pay her client anything unless he appealed the District Court's preemption decision – a decision that Monsanto won – and that Monsanto was offering to pay Carson money to appeal the decision.

5. On January 22, 2021, Wagstaff forwarded me an email she had received from Madison that same day. *See* Exhibit A. The email stated that Madison had received a written settlement agreement from Monsanto which *required* that Carson appeal the decision.

6. On March 9, 2021, I learned that Madison had filed a consent motion pursuant to Fed. R. Civ. P. 15 to amend the *Carson* complaint, eliminating counts I (design defect) and III (negligence). This dismissal was suspicious because every trial involving claims that Roundup caused non-Hodgkin's lymphoma (NHL) had resulted in a verdict for the plaintiffs on design defect and negligence, i.e., the very claims Carson was dismissing. The consent motion indicated that each side would bear its own costs and did not mention a settlement.

7. I reached out to Madison to inquire as to the status of the *Carson* case and to broach the idea of a third party settlement agreement.

8. Prior to my call with Madison I reviewed the *Carson* complaint. I noted that the complaint appeared to have copied largely from complaints written and filed in federal cases involving Roundup and NHL. While the *Carson* complaint alleged that Roundup had caused the plaintiff to develop malignant fibrous histiocytoma (MFH), the complaint did not mention MFH other than to note the plaintiff had developed this type of cancer. Substantial portions of the complaint were devoted to the findings of the International Agency for Research on Cancer ("IARC") of "an increased risk between exposure to glyphosate [Roundup's active ingredient] and [NHL] and several subtypes of NHL." This was noteworthy because IARC's findings on the relationship between glyphosate and NHL have no bearing on whether Roundup caused Carson's disease, MFH.

9. I also read the briefing underlying the motion for judgment on the pleadings at the District Court related to FIFRA preemption. Carson's briefing failed to cite any of the various federal orders on FIFRA preemption and Roundup, all of which resolved the question in plaintiffs' favor. Likewise, Monsanto failed to cite any of the other courts which had ruled against Monsanto.

10. On March 15, 2021 I called attorney Ashleigh Madison. During the conversation, Madison confirmed her client's settlement agreement with Monsanto in the *Carson* case, and stated that the "first payment" was triggered by filing a notice of appeal.

11. I expressed my concern that Monsanto had concocted this settlement agreement in an attempt to create favorable appellate law for itself. Madison confirmed that this was her understanding as well, stating that she believed Monsanto had "ulterior motives."

12. I asked Madison what her analysis was as to the prospects of success on the appeal. Madison stated that she "didn't know" because she was "not familiar in the least bit about what briefing has been going on in the 9th Circuit."

13. Madison then stated to me that "[her] *duty* to file the notice [of appeal]" was not triggered until there was a stipulation of dismissal or some equivalent order by the judge, a statement which confirmed again that the

settlement required Carson to appeal in exchange for money. Madison also indicated that she had filed a consent motion to "eliminate some of the counts."

14. While Madison indicated she and her client might be interested in a third party settlement arrangement, she was concerned that Monsanto would seek action against her and would not agree to the parties "walking away," which, at the time, I understood to mean that Madison was concerned Monsanto would seek costs and/or fees.

15. Madison then stated that she was "pulling up the agreement right now" and then stated that what she had initially pulled up was "not the final version." After a brief pause, she stated "this is it" and began to read from what I understood to be the final version of the settlement agreement in *Carson v. Monsanto*.

16. Madison then appeared to read: "within seven days after the district court enters final judgment in the action pursuant to the stipulation of dismissal with prejudice described in section 2.0, Plaintiff shall file a notice of appeal of district court's December 21st, 2020 Order solely as it relates to the district court's dismissal of Count II of the complaint on grounds of Federal preemption." Madison went on to note "[t]he parties will be required to pursue and fully prosecute the appeal through a decision on the merits of the appeal." Madison described the consideration as "payment of one sum within fourteen days after the notice of appeal."

17. Madison continued: "[a]ny failure by Plaintiff to pursue and fully prosecute the appeal through a decision on the merits would constitute a breach of the agreement and require Plaintiff to reimburse defendant the sum of…" Madison then explained that the agreement included a liquidated damages provision.

18. Shocked, I inquired as to the amount of the liquidated damages provision. Madison stated "$99,900." Due to my shock at what Madison had just conveyed to me, I asked Madison to confirm my understanding that her client would be subject to an approximately $100,000 penalty in the event he decided not to appeal. Madison confirmed that my understanding was correct.

19. I expressed concern that the liquidated damages provision was ethically suspect. Madison did not dispute this observation but instead noted that the settlement agreement was "in her client's interest" because if she was successful then she and her client would get even more money from the second

payment. Madison also stated that Monsanto had an interest in the appeal going forward because "they think [the appeal] will result in a favorable decision for them."

20. I asked Madison whether she understood the agreement to be binding at this point. Madison stated that no duty had yet been triggered because no stipulation of dismissal had been filed. Madison expressed her concern that if she attempted to invalidate the contract that Monsanto "would not agree to a straight walkaway deal."

21. Madison then indicated that because her client had heard the high number, he was unlikely to be receptive to dismissal or another arrangement.

22. Madison then stated that her client was unlikely to be dissuaded from appeal because he had "seen all these other numbers." I took this to mean that her client had seen the jury verdicts in the three Roundup-NHL cases to go to trial, the *Johnson*, *Hardeman*, and *Pilliod* verdicts, and wanted to be compensated similarly to these plaintiffs who proved to a jury that Roundup caused their NHL.

23. Because the trials, which I presumed to be the "other numbers" Madison had just mentioned, involved claims that Roundup caused NHL, as opposed to MFH, I asked Madison if she had advised her client that there was no scientific basis for his claims. Madison confirmed repeatedly that she had advised her client that there was no reliable scientific basis for his claims.

24. To make absolutely certain that Madison understood my point, I asked, and Madison confirmed, that she understood her client's claim to have no chance of succeeding on the merits at trial. Specifically, Madison confirmed her understanding that, in the absence of the aforementioned settlement agreement, if the Carson case was successfully appealed to this Court and remanded to the district court, there was no chance of overcoming a *Daubert* challenge or proving her case to the jury, due to the absence of any scientific evidence to support Roundup having caused her client MFH.

25. Madison then stated that she thought there was a "very slim chance" Carson would be successful on appeal, and reiterated her concern that Monsanto would vigorously oppose a unilateral dismissal of the *Carson* case.

26. I then inquired as to the resources Madison had at her disposal to litigate an appeal of this magnitude, one possibly affecting thousands of

consumers. Madison indicated that while she would engage appellate counsel if she needed to, she "did not have an $80 million dollar case" where she was trying to defend a verdict and accordingly, would "not spend the kind of time" as if she were defending such a verdict. Madison stated that the time she would dedicate to the appeal would be commensurate with the benefit a successful appeal would yield for her and her client. Madison then stated that Monsanto had given her permission to engage other lawyers to aid with the appeal.

27. Madison then reiterated her concern that Carson was unlikely to be dissuaded from appeal because of the chances of obtaining the "high" value from the settlement agreement.

28. I emphasized to Madison my view of the case: that there was no reliable scientific evidence to support the underlying claim, that the case had no chance of succeeding in overcoming a *Daubert* challenge, much less succeeding at trial, and that a loss on appeal could potentially affect the rights of other potential plaintiffs who have been injured by Roundup or other pesticides. Madison indicated that she agreed with this view.

29. I again expressed my concern that Madison lacked the resources to devote to an appeal of this magnitude. Shortly thereafter, the call ended.

30. On March 18, 2021, I had a follow up call with Madison. I began the conversation by inquiring about the liquidated damages provision of the settlement agreement Madison had previously described, specifically whether the provision was applicable to Madison or Carson. Madison stated the provision applied to Carson, and that Carson had signed the agreement.

31. During the conversation, like the previous one, I specifically and repeatedly broached whether Madison and Carson would be receptive to an offer to indemnify them against the liquidated damages provision and/or the possibility of costs and/or fees.

32. I expressed my concern that Carson's underlying claim lacked a reliable scientific basis. I stated to Madison that while Carson has or had cancer, he was not injured by Monsanto's Roundup products and that there is no scientific evidence to support such a claim. Accordingly, I explained that Carson was risking the rights of people who are actually injured by pesticides to have their day in court in exchange for Monsanto paying Madison and her client. Madison stated that she agreed with this assessment.

33. Madison inquired as to whether I would be willing to discuss these concerns with Carson. I responded that I would be willing to do so.

34. I asked Madison whether she had been able to find any scientific support for Carson's claims. Madison confirmed that she was not able to find any experts to support her client's claims, in spite of the case having been filed in 2017. Madison stated she had discussed unavailability of experts to support the claims with her client. Madison stated that she had been approximately a month away from having to designate experts and had contemplated dismissing the case outright.

35. Prior to my call with Madison, I had conducted multiple PubMed searches on glyphosate and/or Roundup and MFH. PubMed is a reliable and reputable platform to search for scientific and/or medical articles. My searches on PubMed yielded no results for any article linking glyphosate and/or Roundup exposure to MFH. In other words, no published peer reviewed scientific articles associated Carson's cancer with exposure to Roundup. During our March 18, 2021 call, Madison stated that she too had not been able to find any articles supporting her clients claim either.

36. Because I suspected Monsanto may have tried to coerce Madison into settling the *Carson* case by offering to settle any other cases in which she was counsel of record, I inquired as to whether Madison had cases pending before Judge Chhabria in the *In Re Roundup Products Liability Litigation* MDL. Madison confirmed she had a single case in the MDL, but that her client had acute myeloid leukemia (AML), not NHL.[1]

37. Madison stated that the MDL court-appointed mediator, Kenneth Feinberg, had reached out to Madison to settle her single case in the MDL. The MDL is comprised of thousands of cases, nearly all involving NHL, not AML. To the best of my knowledge, with the exception of *Carson* and the AML case Madison has pending in the MDL, Monsanto has categorically refused to settle any Roundup-injury claim not involving NHL.

38. I ended the call by reiterating that Carson's case lacked merit in that he could not overcome a *Daubert* challenge or prevail at trial due to the dearth of

[1] The case appears to have been transferred to the MDL because Madison alleged in the complaint that AML is a subtype of NHL.

scientific evidence to support his claim. Madison indicated that this was her understanding as well.

39. On March 23, 2021, Madison emailed me to state: "I just heard back from Dr. Carson. He has given it a lot of thought and has decided that there is too much risk if we do not proceed with the agreement with Monsanto. In light of this decision, he does not think we need to talk."

Dated: April 22, 2021

Respectfully Submitted,

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