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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JUDI BARI, BY DARLENE COMINGORE, EXECUTOR OF THE ESTATE OF JUDY BARI, AND DARRYL CHERNEY,

Plaintiffs,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants.

Case No. C-91-1057-CW (JL)

OAKLAND DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL: EVIDENTIARY AND MISCONDUCT ISSUES

Date: November 1, 2002
Time: 10:00 a.m.
Courtroom 2
The Honorable Claudia Wilken

INTRODUCTION

The Oakland Defendants submit the following Memorandum of Points and Authorities, limited to evidentiary issues and misconduct, in support of their motion Federal Rule of Civil Procedure 59(a) for a new trial.

LEGAL ARGUMENT

I. THE OAKLAND DEFENDANTS ARE ENTITLED TO A NEW TRIAL BECAUSE EVIDENCE AND TESTIMONY ERRONEOUSLY ADMITTED AT TRIAL CAUSED THE VERDICT REACHED.

A jury verdict must be reversed upon a showing that evidence and testimony was erroneously admitted and that "the allegedly erroneous evidentiary ruling more probably than not was the cause of the result reached." Jauregui v. City of Glendale, 852 F.2d 1128, 1133 (9th Cir. 1988). Where the reviewing court is unsure as to whether the probabilities favor the same result, or whether the error was harmless, a new trial is required. U.S. v. Mitchell, 172 F.3d 1104, 1111 (9th Cir. 1993). When reviewing challenged evidence, it is important that it be viewed in light of the record as a whole. United States v. Nguyen, 284 F.3d 1086, 1090 (9th Cir. 2002).

Applying these principles to this case, as set forth below, evidence and testimony was admitted in error that without question caused the unfair result reached. The Oakland defendants are entitled to a new trial accordingly.

A. Introduction Of Evidence, In Violation Of This Court's Order, Of Purported Conduct By Non-Defendant Officers Was Error With Consequences For The Result.

Defendants filed a motion in limine prohibiting any testimony concerning the events surrounding the search of the Seeds of Peace residence and the police officers' interaction with its residents. The court ruled that the plaintiffs could only introduce evidence or testimony regarding the search of the Seeds of Peace house it if could be connected in some direct manner to the actions of a defendant in this action. (Order Regarding Motions in Limine and Other Pretrial Issues) Despite the court's ruling, the plaintiffs repeatedly

extracted testimony concerning the conduct of non-defendant police officers without establishing any connection to any defendant. For example, plaintiffs' counsel repeatedly brought out that officers had searched the house for hours, had rifled through the residents papers and videotaped the contents of the residence. Witnesses also testified that some of the residents were detained and taken to the Police Administration Building. Plaintiffs' intent in interjecting this prohibited evidence into the record was obvious: to tar the defendant officers by association, and to call into question the need for a warrant with respect to a reasonable belief that bomb making materials might be found at a location that they had already "ransacked". By violating the court's order and without providing a connection to the defendants, the plaintiffs were able to make it appear the defendants were misrepresenting the facts in order to obtain a search warrant for the Seeds of Peace residence.

Further, the court allowed the plaintiffs to call George Shook as a rebuttal witness despite the fact that the court's order prohibited him from testifying. Again, plaintiffs' counsel elicited testimony concerning the conduct of non-defendant police officers with respect to his alleged detention. These issues were previously ruled inadmissible and were prejudicial to the defendants.

B. The Redacted Media Reports Should Not Have Been Admitted.

The court permitted the jury to view news footage of the search of the Seeds of Peace residence as well as voluminous print media excerpts. The search of the Seeds of Peace residence was not conducted by any of the defendants and accordingly was not relevant to any issue in the case. Indeed, the court had previously ordered that events surrounding the search were not admissible, yet allowed footage of the search to be shown to the jury. Moreover, the redacted newspaper articles contained erroneous information and attributed statements to the defendants that would have otherwise been inadmissible either as hearsay, because they were more prejudicial than probative, or

because they did not have sufficient circumstantial guarantees of trustworthiness. Larez v. City of Los Angeles, 946 F.2d 630, 642-644 (9th Cir. 1991). These articles should not have been admitted, and, insofar as they involved non-probative highly prejudicial and inaccurate accounts of the events, they "more probably than not" influenced the result.

C. Admission Of Evidence Concerning The Forest Forever Initiative Was Prejudicial Error.

The jury heard substantial testimony concerning the "Forests Forever" initiative. Although both plaintiffs and witness Cecilia Lanman conceded that the plaintiffs had no role in the campaign to pass Proposition 130, the Forest Forever Initiative, Ms. Lanman was permitted to testify over the defendants' objections. Ms. Lanman testified that the initiative lost due to the timber industry labeling Proposition 130 the "Earth First! Initiative". There was however no evidence that the opponents of the initiative connected the plaintiffs' names to the initiative in any way. Indeed, there was no evidence connecting the incidents at issue in this trial with the failure of the initiative at all. Despite the non-probative and supremely prejudicial nature of Ms. Lanman's testimony, which left the jury with the impression that the defendants were a malign force for environmental degradation, she was allowed to testify and plaintiffs were permitted to argue for damages based on the initiative's failure to pass. This was clearly erroneous, and without question contributed to the result.

II. PLAINTIFFS' EXPERTS WERE ALLOWED TO TESTIFY IN ERROR.

A District Court serves a "gatekeeping" function with respect to expert testimony. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147-48 (1999), U.S. v. Hankey, 203 F.3d 1160, 1167 (9th Cir. 2000). That function includes a "special obligation" to determine the relevance and reliability of an expert's testimony in order to ensure accurate and unbiased decision making by the trier of fact. Kumho, at 147, Mukhtar v. California State University

Hayward, --F3d--, 2002 WL 1799785. Here, two of plaintiff's experts were allowed to testify without sufficient indicia of reliability, accuracy or lack of bias. Admission of that testimony was thus error that without question negatively influenced the result and thus requires a new trial.

A. Sid Woodcock Was Not Qualified To Testify As A Bomb Expert

Plaintiffs proffered Mr. Woodcock as a bomb expert at trial. Voir dire of Mr. Woodcock showed that he possessed no formal training in physics, engineering or forensic analysis of crime scenes. Despite his lack of qualifications, he was permitted to testify over the defendants' objections. This was plain error, because there was no indication of reliability whatsoever, and certainly no showing that he "employ[ed] in the courtroom the same level of intellectual rigor that characterizes the practice of intellectual rigor in the relevant field." Kumho at 152. Moreover, there is no question that the testimony contributed adversely to the result, insofar as Woodcock's testimony was held up in opposition to defendants' showing that the bomb could very likely have been behind rather than under the seat as plaintiffs claimed. This was a critical piece of evidence going to the question of probable cause, and to the credibility of the plaintiffs themselves.

B. Police Procedures Expert Anthony Bouza Was Improperly Allowed to Testify As To The Ultimate Issue Of Defendants' Liability.

In its order following the motions in limine, the Court allowed the plaintiffs to call Mr. Bouza to testify as an expert in police investigative practices. The court ruled that Mr. Bouza could testify regarding the propriety of the actions taken by the FBI and OPD. Mr. Bouza was ostensibly prohibited, however, from testifying to legal conclusions (such as whether probable cause existed or whether the officers' actions were reasonable). The court heard argument before Mr. Bouza testified as to whether there were any subjects as to which Mr. Bouza could testify, based on the court's order. Despite the court's ruling, Mr. Bouza was permitted to testify, over vigorous and repeated objections, to actions that he

believed the officers should have taken. He was also permitted., also over objections, to testify that there was no basis for the officers to arrest the plaintiffs so quickly and that he would decline to prosecute the case.

This was prejudicial error. Mr. Bouza's testimony was impermissible direct opinion about the defendants' liability. U.S. v. Lockett, 919 F.2d 585, 590 (9th Cir. 1990) ("a witness is not permitted to give a direct opinion about the defendants' guilt or innocence"). Bouza asserted in essence that there was not probable cause to arrest the plaintiffs, and that there was never a case to be made against them. The question of probable cause, and the basis for the defendants' prosecution of the case were of course the ultimate questions for the jury in this case. Bouza's testimony thus usurped the fact-finding role of the jury. Because this was the single most important issue in the trial, there can be no more obvious instance of error having an effect on the result.

III. DEFENDANTS ARE ENTITLED TO A NEW TRIAL DUE TO ATTORNEY MISCONDUCT.

District courts have inherent power to control their dockets. Hamilton Copper & Steel Corporation v. Primary Steel, Inc., 898 F.2d 1248, 1429 (9th Cir. 1990). In the exercise of that power, they may impose sanctions for attorney misconduct, up to and including dismissal of the action. Id.

Here, there were multiple instances of misconduct that were sufficiently egregious to require a new trial.

A. Mr. Serra's Conduct Requires The Award Of A New Trial.

As previously shown in Defendants' Motion for an Order Dismissing The Action And For Sanctions, brought by both the Oakland and Federal Defendants, plaintiffs' counsel J. Tony Serra, in a display of meticulous timing, exhorted the crowd at a rally in front of the federal courthouse, to "say a prayer for the jury" at the precise moment that the jurors were exiting the building. Mr. Serra and the plaintiffs' legal team were well aware that the

jury would be leaving at the time they took the stage, having previously been advised of that fact by the Court. The record shows that jurors slowed and listened to Mr. Serra's presentation.

It is hard to imagine a clearer example of an overt attempt to influence the jury during their deliberations. Although the jurors subsequently indicated that they were not swayed by Mr. Serra's call to prayer, their responses to the Court's questions show that to be untrue. This is so because they took offense at the suggestion that they could be influenced by such tactics, thus placing defendants in a bad light for raising the issue of Mr. Serra's brazen misconduct. The prejudice to defendants is obvious.

In addition, during his closing argument on May 16, 2002, Mr. Serra argued that the ancient redwoods are gone because of the defendants' actions in this case. There was obviously no evidence that the plaintiffs' arrests and the searches of their homes had an effect on the logging of ancient redwood forests. To the contrary, there was evidence that the plaintiffs enjoyed increased support for their movement due to the bombing incident and attendant publicity.

Mr. Serra also argued that Ms. Bari's terminal cancer might have been caused by the incident. That was an outrageous assertion, completely without support in the record, and an assertion that the plaintiffs agreed, disingenuously, as it turns out, not to proffer during the trial.

Plaintiffs' counsel's utter disregard for the orders of this court, and his contempt for the sanctity of the jurors deliberations require that defendants be granted a new trial.

B. Mr. Cunningham's Closing Argument Was Improper.

Mr. Cunningham argued May 16, 2002, that the jury was permitted to award damages for injury to reputation, the failure of the Forest Forever Initiative to pass and some perceived damage to Redwood Summer. Neither the evidence nor the law supported those arguments. Moreover, Mr. Cunningham urged the jury to award

damages under the universally condemned "Golden rule" theory, asking that the jury place itself in the plaintiffs' shoes with respect to damages. Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1246 (7th Cir. 1982).

In summary, plaintiffs' legal team repeatedly defied the orders of this court, and conducted themselves in a manner intended to play on the passions and prejudices of the jury. Under these circumstances, the court should exercise its "inherent powers" and order a new trial for defendants.

IV. The Jurors' Questions To The Court Should Have Been Answered Fully

The court received a note from the jury requesting a copy of Penal Code Section 12355(b), the "booby trap" provision. Mr. Cherney was charged with violating the booby trap section; the section was crossed off of Ms. Bari's arrest card. The plaintiffs had argued repeatedly and vigorously that the explosive device was a booby trap device. They further argued that the defendants knew it was a booby trap device and that was the reason the plaintiffs were charged with violating the booby trap provision. However, there was evidence that a road spiking or tree spiking kit was found in Mr. Cherney's van. The jury was prevented from reading the section and ascertaining its significance to Mr. Cherney's arrest and his possession of the spikes. Indeed, the note asked for the section so that the jury could determine if there was probable cause for the charge.

Failure to instruct the jury on the penal code section at issue was extraordinarily prejudicial in that it prevented the jury from conducting any meaningful analysis of probable cause. This is so because, without knowing the elements of the offense, they could not possibly ascertain whether there was a reasonable suspicion that the statute had been violated. This too was error, and had an indisputable effect on the result.

The jury submitted another note to the court dated May 22, 2002, asking when the determinative time is for considering whether there is probable cause for an arrest. The

question queried whether there would be a constitutional violation if there was probable cause initially, but later dissipated. The court referred the jury to the jury instructions instead of instructing them that the proper inquiry as to the existence of probable cause is the moment of the arrest and that any subsequent lack of probable cause is not a constitutional violation. This too was error, because it allowed the jury to proceed with its deliberations under an evident misapprehension of the applicable law. Under those facts, it can scarcely be doubted that the error would affect the result to defendants' prejudice.

CONCLUSION

As demonstrated above, multiple errors with respect to the admission of testimony and evidence had a detrimental effect on the result in this case. Moreover, attorney misconduct poisoned the deliberations, compelling a new trial. For all the foregoing reasons, individually and in the aggregate, the Oakland defendants respectfully urge this Court to grant their motion, and issue an order pursuant to FRCP 59(a) for a new trial.

Dated: September 6, 2002

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Attorneys for Oakland Defendants

PROOF OF SERVICE
BARI, ET AL. VS. USA, ET AL.
Court of Appeals Case No. 97-17375
United States District Court Case No. CV-91-1057-CW (JL)

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is City Hall, One Frank H. Ogawa Plaza, 6th Floor, Oakland, California 94612. On September 6, 2002, I served the within documents:

OAKLAND DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL: EVIDENTIARY AND MISCONDUCT ISSUES

☒ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below, or as stated on the attached service list, on this date before 5:00 p.m.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California addressed as set forth.

☐ by causing personal delivery by messenger of the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ by causing such envelope to be sent by Federal Express/ Express Mail.

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I am readily familiar with the City of Oakland's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on September 6, 2002, at Oakland, California.

Kristin Ericsson