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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEWAYNE JOHNSON,

Plaintiff,

vs.

MONSANTO COMPANY,

Defendant.

Case No. CGC-16-550128

DEFENDANT MONSANTO COMPANY'S TRIAL BRIEF IN SUPPORT OF MOTION FOR MISTRIAL

Hon. Judge Suzanne R. Bolanos

Trial Date: June 18, 2018
Department: 504

I. INTRODUCTION

Plaintiff's counsel made a series of calculated, intentional, and improper statements during closing argument, several over the Court's sustained objections, designed solely to inflame the prejudice and passion of the jury against Monsanto. Plaintiff's counsel fantasized to the jury that Monsanto's executives were sitting in a boardroom waiting to celebrate with iced champagne, told the jury they could be "part of history" and "change[] the world" by returning a verdict against Monsanto, and asked the jury to draw adverse inferences about why an EPA report was not admitted at trial. Plaintiff's counsel's calculus was transparent: in a trial of this length and complexity, he figures he can punch below the belt because no one wants to retry this case. The statements made during closing argument, however, require a mistrial, or at the very least, a curative instruction to the jury that admonishes Plaintiff's counsel's misconduct and instructs the jury to disregard his intentionally improper statements.

Counsel's arguments were particularly egregious given that the Court admonished him about some of these very issues just before closing arguments started. Specifically, the Court instructed Plaintiff's counsel:

> THE COURT: So just be careful that you don't cross the line and begin making prejudicial arguments [referring to comparisons with the tobacco industry], because then you'll reopen that door, and I'll have to decide whether or not it's more prejudicial than probative.

Declaration of Sandra A. Edwards ("Edwards Decl.") at ¶ 2, Ex. 1 (8/7/18 Tr. at 5031:11-14)

> THE COURT: . . . . So Mr. Wisner, when you argue, make sure that you base your argument on the evidence that is before the jury.
>
> MR. WISNER: Absolutely.
>
> THE COURT: So these statements are in evidence, and you're being permitted to put them on a slide and bold them in bright red. But remember also that your argument has to be based only on the evidence that's been presented and not on matters that are outside of their purview. Do you understand?
>
> MR. WISNER: Absolutely, your Honor.

Id. at 5033:9-19.

II. MISCONDUCT AND MISTRIAL STANDARDS

"The law, like boxing, prohibits hitting below the belt. The basic rule forbids an attorney to pander to the prejudice, passion or sympathy of the jury." *Regalado v. Callaghan*, 3 Cal. App. 5th 582, 598 (2016). Attorney misconduct is a proper ground for mistrial where the misconduct irrepealably damages a party's right to a fair trial. *Cassim v. Allstate Ins. Co.*, 33 Cal. 4th 780, 796 (2004); *Rufo v. Simpson*, 86 Cal. App. 4th 573, 613 (2001).

III. MISCONDUCT BY PLAINTIFF'S COUNSEL DURING CLOSING

A. Arguing Monsanto Executives Had Champagne on Ice Was Misconduct.

While commenting on Monsanto's net worth and cash reserves at the end of closing argument, Plaintiff's counsel told a fantastically absurd tale designed solely to paint Monsanto executives as corporate fat cats, telling the jury that:

> Right now Ms. Buck [Monsanto's trial representative] -- she's sitting over there in that corner. On her cell phone is a speed dial to a conference room in St. Louis, Missouri. And in that conference room, in that board room, there's a bunch of executives waiting for the phone to ring. Behind them is a bunch of champagne on ice.

Edwards Decl. at ¶ 2, Ex. 1 (8/7/2018 Tr. at 5117:2-7). Even after the Court sustained Monsanto's objection to that line of argument, *id.* at 5117:8-11, Plaintiff's counsel immediately returned to that very same theme:

> The number you have to come out with is the number that tells those people -- they hear it, and they have to put the phone down, look at each other, and say, "We have to change what we're doing." Because if the number comes out and it's not significant enough, champagne corks will pop. "Attaboys," are everywhere.

Id. at 5117:12-19. This line of argument was flagrantly improper.

First, it goes without saying that there is no evidence to support counsel's statements. It is elementary that argument made in closing that is unsupported by evidence is improper. *Karlsson v. Ford Motor Co.*, 140 Cal. App. 4th 1202, 1227 (2006) ("We agree that any references to Ford having destroyed or torn up documents was not supported by the evidence and constituted improper argument."). "While a counsel in summing up may indulge in all fair arguments in favor of his client's case, he may not assume facts not in evidence or invite the jury to speculate as to unsupported inferences." *Malkasian v. Irwin*, 61 Cal. 2d 738, 746 (1964) (affirming grant a new

trial where counsel hypothesized about a motor vehicle accident in a manner that was "contrary to physical facts" and where "[t]here was no testimony that even remotely suggested" his hypothetical occurred).

Second, the sole purpose of this statement was to inflame the jury against Monsanto based upon its corporate status and valuation. It is well established that "[a]ppeals to the sympathy of the jury based on the size or corporate status of a defendant are improper." *Brokopp v. Ford Motor Co.*, 71 Cal. App. 3d 841, 860 (1977) (holding the following closing argument impermissible: "'Save a buck, and that is the only reason I can think of why they would handle things the way they do. These large corporations, in effect, crippled [plaintiff]; they took his manhood away from him; they took his privacy from him; they took his body away from him; and they left him in pain. . . .'"); *accord Weaver v. Shell Oil Co.*, 129 Cal. App. 232, 234 (1933) (affirming grant of new trial based upon statement by plaintiff's counsel during closing argument that "[s]omeone must take care of this widow and those four children, and the Shell Company is a great big, rich corporation, has millions, and it can afford to take care of them.").

Third, the statements were intentional and reckless. Even after Monsanto's objection was sustained, counsel said the exact same thing in the next breath. *See Simmons v. S. Pac. Transp. Co.*, 62 Cal. App. 3d 341 (1976) (holding counsel was guilty of prejudicial misconduct where he "from the very beginning of the trial embarked on a campaign of hate, vilification and subterfuge for the sole purpose of prejudicing the jury against defendant . . . and its employees"); *see also id.* ("[A]n attempt to rectify repeated and resounding misconduct by admonition is . . . like trying to unring a bell." (citation omitted)).

B. Counsel's References to the Tobacco Industry Were Improper.

Plaintiff's counsel also made improper arguments comparing this case to cases against the tobacco industry. Indeed, Monsanto made a motion in limine to exclude any comparison between Monsanto and big tobacco, which the Court did not rule on because Plaintiff's counsel stated that he would stay away from the comparison during opening statements. Before closings, the Court admonished Plaintiff's counsel "not to cross the line and begin making prejudicial arguments" regarding the tobacco industry. Edwards Decl. at ¶ 2, Ex. 1 (8/7/18 Tr. at 5031:11-14). Yet,

during closing argument, Plaintiff's counsel crossed the line:

> MR. WISNER: . . . I said, "Doctor, you said that one of the great accomplishments of epidemiology was that it helped expose that tobacco was associated with lung cancer; right? "Yes." "And isn't it true that when that fight was happening in the epidemiology world, the tobacco companies kept saying it's confounders? "Maybe. I'm sure they did, yes." It's a classic way of hiding a risk.
>
> MR. LOMBARDI: Objection, your Honor. Beyond the scope of the evidence. There's no evidence about anything other than Monsanto in this case.
>
> THE COURT: Sustained.

Id. at 5073:12-24. Despite the trial court sustaining this objection, Plaintiff's counsel continued:

> So I asked Dr. Benbrook to tell us about ACSH, and here's what he said. "The ACSH, what position did it take with regards to tobacco? "They were one of the scientific organizations that held out to the end and argued that the science really clear about tobacco causing cancer. "QUESTION: Talked about how too many confounders; right? "ANSWER: That's certainly one of the arguments that's brought up." *That Monsanto is now raising confounders on this data, that they seek the allegiance of ACSH should tell you a lot.*

Id. at 5074:16-5075:2 (emphasis added).

The comparison between Monsanto and the tobacco industry was irrelevant, designed to appeal to the passion of the jury, and highly prejudicial for all the reasons stated in Monsanto's motion in limine. It is yet another instance of misconduct by Plaintiff's counsel during closing argument and ground for a mistrial. *See Stone v. Foster*, 106 Cal. App. 3d 334, 355 (1980) (holding that attempts "to appeal to the prejudice, passions or sympathy of the jury are misconduct"); *see also* Cal. Evid. Code § 352.

C. Asking the Jury to "Change[] the World" Was Improper.

The beginning of Plaintiff's counsel's closing argument was no less improper than the end. Within the first five minutes of closing argument, Plaintiff's counsel suggested to the jury that a verdict in his client's favor could "actually change[] the world:"

> And if you return a verdict today that does that, that actually changes the world. I mean, it's crazy to say that; right? I told you all at the beginning of this trial that you were part of history, and you really are, and so let me just say thank you.

Edwards Decl. at ¶ 2, Ex. 1 (8/7/18 Tr. at 5058:1-5).

The argument improperly appealed to the jurors' self-interest and asked them to become partisan advocates by suggesting that a verdict for Plaintiff would create history and change the world but a verdict for Monsanto would unremarkably do neither. It is well established that "[a]n attorney's appeal in closing argument to the jurors' self-interest is improper and thus is misconduct because such arguments tend to undermine the jury's impartiality." *Cassim*, 33 Cal. 4th at 796. Moreover, arguments that ask "each juror to become a personal partisan advocate" are improper because they "tend[] to denigrate the jurors' oath to well and truly try the issue and render a true verdict according to the evidence." *Loth v. Truck-A-Way Corp.*, 60 Cal. App. 4th 757, 765 (1998).

D. Counsel's Speculative Arguments About Why Matters Were Not In Evidence Were Improper.

Several times throughout closing argument, Plaintiff's counsel improperly speculated about matters not in evidence and asked the jury to make improper inferences regarding matters not in evidence. For example, in discussing an EPA document, counsel argued:

> Why is it that this document is given limited significance . . . ? Well, I have a couple theories. The first one is the EPA approved this product in 1970's. It's been on the market for 40 years, and the scientists that approved it would have to go and tell everybody in the world, we got it wrong. They have a dog in the fight, because they have to tell the world we made a mistake . . .
>
> They'd have to own up to that. And even after the scientific advisory panel said, hey, you ain't following your guidelines, you ain't doing it right, they just doubled down on it. They didn't explain anything. *And that's why the 2017 report is not in evidence* . . . .

Edwards Decl. at ¶ 2, Ex. 1 (8/7/18 Tr. at 5065:25-5066:14 (emphasis added)).

It is wholly improper to argue the importance of a court-excluded document and ask the jury to draw negative inferences because it wasn't admitted into evidence. *Hansen v. Warco Steel Corp.*, 237 Cal. App. 2d 870, 877 (1965) ("Counsel was guilty of *serious misconduct* in arguing the importance of the excluded document and in asking the jury to draw an inference because plaintiff's attorney had made an objection which the court had sustained." (emphasis added)).

Counsel's comments about why the EPA document was not in evidence were not only speculative, they were blatantly inaccurate. *See* Cal. Prof. Rules of Conduct 5-200(B) (attorney should not mislead the jury by false statement of fact or law).

Similarly, counsel also argued:

> Why didn't Monsanto call somebody who could testify to all three topics? They didn't present anybody about mechanism by the way at all. Why didn't they call somebody? Because they couldn't find anybody.
>
> . . .
>
> But why didn't they [call] a witness to say the opposite? Because they couldn't find one . . . If you showed her the animal data she'd go, you've got a problem, Dr. Foster, if you showed him the epi and you showed him the mechanism he'd probably say they've got a problem.

Edwards Decl. at ¶ 2, Ex. 1 (8/7/18 Tr. at 5063:20-5064:9)

Again, this was entirely speculation on the part of Plaintiff's counsel and not supported by any evidence. It is improper to argue facts not justified by the record or to suggest that the jury should speculate about unsupported inferences. *Cassim*, 33 Cal. 4th at 796; *see also Malkasian*, 61 Cal. 2d at747 ("There can be no doubt that to argue facts not justified by the record, and to suggest that the jury could speculate, was misconduct."). It is likewise improper to state what the answer to a question would have been if it had been asked. *See, e.g.*, *People v. Johnson*, 121 Cal. App. 3d 94, 102 (1981).

E. Counsel's Argument Regarding Monsanto's Witness, Dr. Kuzel, Was Improper.

When commenting on one of Monsanto's witnesses, Dr. Kuzel, Plaintiff's counsel argued:

> I mean there's offensive, and then there's completely bonkers. . . . . That Monsanto would call someone up here and speculate about bone marrow transplants that no one has ever offered to him, that he might live until he's 30, when his most recent scan showed the exact opposite, is outrageous. It is disgusting. It is reprehensible. *That man has no dignity.* I'm thankfully I wasn't here for that direct. I was writing a brief in the back room for most of it. When I was reading the transcripts, I turned red. I go to sleep every night thinking about this man and his family, because I know the consequences of what's happening to him. It haunts me, and he cavalierly says complete remission.

Edwards Decl. at ¶ 2, Ex. 1 (8/7/18 Tr. at 5107:20-5108:14). This is just one more example of Plaintiff's counsel's persistent improper attacks on Monsanto, its counsel, and its witnesses throughout closing argument.[1]

"Personal attacks on the character or motives of the adverse party, his counsel, or *his witnesses* are misconduct." *Stone*, 106 Cal. App. 3d at 355 (emphasis added) (comment that "I wouldn't believe one word he said . . ." was improper). "The rule [forbidding an attorney to pander to the prejudice, passion or sympathy of the jury] also manifests itself by prohibiting irrelevant ad hominem attacks." *Martinez v. Dep't of Transp.*, 238 Cal. App. 4th 559, 566 (2015); *accord Las Palmas Assoc. v. Las Palmas Center Assoc.*, 235 Cal. App. 3d 1220, 1246 (1991) ("Personal attacks on opposing parties and their attorneys, whether outright or by insinuation, constitute misconduct. Such behavior only serves to inflame the passion and prejudice of the jury, distracting them from fulfilling their solemn oath to render a verdict based solely on the evidence admitted at trial.").

In characterizing the witness's testimony as "offensive," "completely bonkers," "outrageous," "disgusting," and "reprehensible," and in claiming that Dr. Kuzel "has no dignity," Plaintiff's counsel's argument went far beyond the bounds of proper argument and into the realm of a personal attack on Dr. Kuzel's character. It was unnecessary and inappropriate; it was clearly misconduct. *See id*; *see also Stone*, 106 Cal. App. 3d at 355; *Johnson*, 121 Cal. App. 3d at 103 (counsel's comment that he believed the witness to be telling an "outright lie" was improper).

IV. MONSANTO'S OBJECTIONS TO THE MISCONDUCT ARE PRESERVED

Three times during closing argument Monsanto objected to improper statements by Plaintiff's counsel, including twice to comments by Plaintiff's counsel about popping champagne. *See* Edwards Decl. at ¶ 2, Ex. 1 (8/7/18 Tr. at 5073:21-24; 5117:8-21). Additionally, Monsanto timely made an oral motion for a new trial and alternatively a request for a curative instruction directly after Plaintiff's closing argument and before Monsanto's closing argument, raising the

[1] Counsel also personally attacked Plaintiff's counsel: "that Mr. Lombardi would tell you otherwise is a disservice to the quality of man I like to think he is, I think he's a nice guy. But. . . ." Edwards Decl. at ¶ 2, Ex. 1 (8/7/18 Tr. at 5244:16-19).

instances of misconduct cited here. The objections and requests for new trial and admonishment were promptly made so as "to give the court the opportunity to admonish the jury, instruct counsel and forestall the accumulation of prejudice by repeated improprieties" as required to avoid waiver. *Horn v. Atchison, Topeka & Santa Fe Ry. Co.*, 61 Cal. 2d 602, 610 (1964).

V. PROPOSED CURATIVE INSTRUCTION

Monsanto believes that the misconduct addressed in this brief can be remedied only by a mistrial. However, if the Court is inclined to deny Monsanto's motion for mistrial, Monsanto requests that the Court provide the following curative instruction:

> *Mr. Wisner argued yesterday about (1) facts that were not in evidence, like champagne in a board room; (2) why the EPA report was not in evidence; (3) his personal opinion of the credibility and character of Monsanto's witnesses; and (4) the historical significance and impact of this case on the community. Those arguments were improper. Mr. Wisner had no basis to make those statements and they should be disregarded.*

VI. CONCLUSION

For the reasons stated herein, Monsanto's new trial motion should be granted or alternatively a curative instruction admonishing Plaintiff's counsel misconduct should be given to the jury.

Dated: August 8, 2018

Respectfully submitted,

FARELLA BRAUN + MARTEL LLP

By: 

Sandra A. Edwards

Attorneys for Defendant
MONSANTO COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of August, 2018, I electronically filed the foregoing

- **DEFENDANT MONSANTO COMPANY'S TRIAL BRIEF IN SUPPORT OF MOTION FOR MISTRIAL**
- **DECLARATION OF SANDRA A. EDWARDS IN SUPPORT OF DEFENDANT MONSANTO COMPANY'S TRIAL BRIEF IN SUPPORT OF MOTION FOR MISTRIAL**

with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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