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DONNETTA STEPHENS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

BY FAX

DONNETTA STEPHENS,

Plaintiff

vs.

MONSANTO COMPANY, ET AL.,

Defendants.

Case No. CIVSB2104801

Assigned for All Purposes to the Hon. Gilbert G. Ochoa, Dept. S24

PLAINTIFF'S OPPOSITION TO DEFENDANTS MONSANTO COMPANY AND CROWN ACE HARDWARE'S MOTION TO BIND PLAINTIFF TO HER THIRD AMENDED INTERROGATORY RESPONSES

Department: S24
Judge: Hon. Gilbert G. Ochoa
Hearing Date: July 8, 2021
Time: 9:00 AM

Complaint Filed: August 14, 2020
Trial Date: July 19, 2021

INTRODUCTION

Plaintiff Donnetta Stephens ("Plaintiff" or "Mrs. Stephens") is currently 71 years of age and suffers from Stage IV non-Hodgkin's lymphoma ("NHL"). After undergoing a relapse in 2019, Mrs. Stephens received six cycles of chemotherapy that caused her to suffer memory loss, colloquially known as "chemo brain." Because of Mrs. Stephens' frail health, counsel for Mrs. Stephens moved for a preferential trial setting pursuant to CCP § 36(a). This motion hinged, in part, on Mrs. Stephen's chemotherapy-induced memory loss.[1] While Mrs. Stephens has actively and diligently worked through the discovery propounded by Defendants Monsanto Company and Crown Ace Hardware ("Defendants"), because of her memory loss, she was unable to recall certain Roundup exposures.

The evidence Defendants seek to exclude in this case arose organically in the course of conducting discovery and within the fact discovery window. Defendants' experts performed a property inspection at Mrs. Stephens' current residence on May 19, 2021, two weeks before the end of the fact discovery period. David Stephens sat with his mother throughout the inspection. Upon learning that Defendants were inspecting her property because of her use of Roundup there, he asked "[A]re they going over to Jane Street also?"[2] Until that moment, Mrs. Stephens had not remembered any Roundup exposure prior to moving in to Space 90 on Bryant Street where she currently resides. After further discussions with her family, Mrs. Stephens recalled additional exposures and immediately disclosed this information to Defendants.

This additional exposure information was then provided to Defendants on May 20, 2021 in Plaintiff's Fourth Amended Interrogatory Responses and Mr. and Mrs. Stephens, their son, David

[1] Exhibit 1, Plaintiff's Motion for Trial Preference, at pp. 7-8.
[2] Exhibit 2, Dep. Tr. of David Stephens, at 25:25-26:1.

Stephens, and their granddaughter, Winter Stephens, were made generally available for deposition on the date of Defendants' choosing. Defendants also requested the depositions of Mrs. Stephens' elder son, Scott Stephens, as well as family friends, Pat and Pam Sheeler, and the property manager at their current residence, Paul Gallardo. Counsel for Mrs. Stephens cooperated fully with Defendants, and all the depositions were conducted and completed prior to the close of the discovery window.

Despite having now deposed every witness they requested, Defendants accuse counsel and Mrs. Stephens, a 71-year-old cancer victim with medically documented memory loss, of engaging in gamesmanship. As described above, Plaintiff's Fourth Amended Interrogatory responses did *not* arise out of a motivation to lengthen Mrs. Stephen's exposure history, which was entirely sufficient prior to the amendment. Rather, the purpose of the amendment was to provide Defendants with information responsive to their discovery requests and to ensure that Mrs. Stephens' exposure history was accurately captured so that her full story could be told to this Court and to the jury.

Because Plaintiff acted in good faith in accordance with the rules of discovery and no possible prejudice can be shown, Defendants' Motion to Bind Plaintiff to her Third Amended Interrogatory Responses ("Motion to Bind") must fail. Pursuant to Cal. Civ. Proc. Code § 2030.310, not only can Plaintiff demonstrate substantial justification for her original interrogatory responses, but Defendants cannot show that they have been substantially prejudiced. Finally, even if Defendants suffered prejudice—which they did not—they are free to cure such prejudice through impeachment. As such, Defendants' Motion to Bind should be denied.

LEGAL STANDARD

Under Cal. Civ. Proc. Code § 2030.310, a party may serve an amended answer to any interrogatory without leave of court if the interrogatory contains information "subsequently

discovered, inadvertently omitted, or mistakenly stated in the initial interrogatory. . . ." This statutory section also provides that if a party seeks to bind the other party to prior interrogatory responses, the movant must satisfy three conditions:

> (1) The initial failure of the responding party to answer the interrogatory correctly has substantially prejudiced the party who propounded the interrogatory;
> (2) The responding party has failed to show substantial justification for the initial answer to that interrogatory; and
> (3) The prejudice to the propounding party cannot be cured either by a continuance to permit further discovery or by the use of the initial answer under Section 2030.410.

Cal. Civ. Proc. Code § 2030.310; *See also, People ex rel. Gov't Emps. Ins. Co. v. Cruz*, 244 Cal. App. 4th 1184, 1194, 198 Cal. Rptr. 3d 566, 575 (2016).

ARGUMENT

I. Plaintiff's Amended Interrogatories Are Not a Product of "Gamesmanship."

Defendants are moving the Court to cut fact discovery off weeks early so that they can limit the amount of evidence the jury can consider regarding Mrs. Stephens' exposure to their carcinogenic product. Furthermore, the exposures Defendants seek to exclude were to the concentrated Roundup product, which is indisputably more toxic and powerful than the pre-mixed, ready-to-use product Mrs. Stephens used at Space 90 in Yucaipa. And they accuse Plaintiff of gamesmanship.

Mrs. Stephens' cumulative dermal exposure to Roundup is a central issue in this case. As all the experts will agree, dose makes the poison. The dose here is dermal exposure to Roundup. While Mrs. Stephens was exposed to enough Roundup to cause her NHL at her current residence alone, it is now clear that this only accounts for about half of her actual lifetime exposure and only one of the multiple Roundup products she used. It is conceivable that a juror could think that 14 years of exposure was insufficient, or that a 14-year latency period is too short, while 28 years of exposure and 32 years of latency are convincing. As such, Plaintiff would be irreparably prejudiced if the jury is precluded from considering half of her lifetime exposure to the carcinogen at issue in this case.

It is also demonstrably untrue that Plaintiff's pre-amendment exposures were insufficient, as Defendants allege, however. Before the amendment, Plaintiff's experts had reached conclusions, to a reasonable degree of medical certainty, that her 14-year exposure history was a substantial factor in causing her NHL. For example, Dr. Dennis Weisenburger's May 17, 2021 deposition testimony is as follows:

> Q: . . .What are you going to tell the jury about this case?
> . . .
> A: [Mrs. Stephens] used [Roundup] over 200 times during that 14-year period. She used four- -- at least 14 gallons of -- of Roundup. You know, it meets the criteria for at least moderate exposure, which would increase her risk by -- of non-Hodgkin lymphoma by at least twofold. So based on that, you know, it's my opinion that Roundup was a substantial factor contributing to her development of non-Hodgkin's lymphoma.[3]

When asked about what caused Mrs. Stephens NHL during his May 15, 2021 deposition, Dr. Barry Boyd similarly states, "the probability is that her long-term exposure, both -- long duration as well as the amount of exposure she had to Roundup, played a significant role in her risk."[4] Dr. Boyd also notes that the latency period to develop NHL can be "from five to twenty years or more."[5]

Dr. William Sawyer also concluded that Mrs. Stephens' 14-year exposure exceeded the threshold required in the scientific literature. In an earlier copy of his report, dated April 29, 2021, Dr. Sawyer writes:

> Ms. Stephens regularly came into direct physical contact with liquid Roundup. During applications she wore shorts, sneakers with ankle socks and tank top shirts under highdrift (confined) conditions while sitting on the ground (rocks). She applied Roundup for 15 years with a midpoint of 34.5 8-hour, time-weighted exposure days, in clear excess of the threshold levels within the human applicator studies associated with NHL. On the basis of multiple applicable peer-reviewed and generally-accepted studies (as cited herein) and on the basis of Ms. Stephens' episodic exposures, doses and durations to Monsanto's Roundup product, it is my opinion, to reasonable toxicological certainty,

[3] Exhibit 3, Dep. Tr. of Dr. Dennis Weisenburger, at 49:18-19; 50:12-19.
[4] Exhibit 4, Dep. Tr. of Dr. Barry Boyd, at 129:12-17.
[5] *Id.* at 43:19-22.

that these exposures were above the threshold levels within the studies significantly and substantially increasing her risk of development of marginal zone lymphoma.[6]

Based on the testimony and report of Mrs. Stephens' three specific causation experts, her exposure history, even before adding the newly discovered exposure information, was sufficient. The latency period noted by Dr. Barry Boyd is also fitting for Mrs. Stephens' exposure history pre-amendment. Defendants naturally disagree with Dr. Boyd's assessment regarding latency, which is another reason they seek to preclude evidence of earlier exposures.

Furthermore, the additional exposure evidence was not withheld in any way from Defendants. As Mrs. Stephens' son, David, succinctly and clearly explained during his June 2, 2021 deposition, he did not become involved in the details of the litigation until recently when he felt his mom needed extra support.[7] Accordingly, David was present during the property inspection on May 19, 2021.[8] On the day of the inspection, while the inspection was going on outside, David sat with Mrs. Stephens in Mrs. Stephens' home.[9] David states, "[W]e were talking about exposure. My mom brought up the word 'exposure,' [t]hey want to talk about my exposure to Roundup here. And then I said, [a]re they going over to Jane Street also? And she said, not that I know of. Why? I said, well, because we used it over there too."[10] David goes on to discuss how looking at family photographs and discussing Mrs. Stephens' exposure history helped jog her memory of exposure she had previously forgotten about.[11]

Mrs. Stephens' was also reminded of her additional exposure history by her granddaughter, Winter Stephens. During her deposition, Winter recounted how, on May 17, 2021, she and her

[6] Exhibit 5, Dr. William Sawyer Rpt., at 190-91.
[7] Exhibit 2, Dep. Tr. of David Stephens, at 68:2-21.
[8] *Id.* at 70:2-12.
[9] *Id.* at 72:12-24.
[10] *Id.*
[11] *Id.* at 26:11-19; 73:18-25; 74:1-4.

grandmother were talking on the phone and reminiscing about the period when Winter lived with Mrs. Stephens and the yardwork they used to do together.[12] During the course of this conversation, Winter noted that Mrs. Stephens' memory was refreshed as to her exposure history at her neighbors' houses. Mrs. Stephens was then able to recall "hop[ping] over the wall" to get to space 89 and pulling weeds at space 149. She was also able to recall spraying Roundup at both properties.[13]

As demonstrated above, Plaintiff's amendment of her interrogatory responses was within the fact discovery period and was entirely consistent with California rules. Further, Plaintiff would be irreparably prejudiced at trial by the exclusion of half of her lifetime exposure to Roundup.

II. Defendants Have Not Been Substantially Prejudiced By Plaintiff's Amended Interrogatories.

In order to prevail on their Motion to Bind, Defendants must demonstrate that they have suffered "substantial prejudice" as a result of Plaintiff's Amended Interrogatories. Cal. Civ. Proc. Code § 2030.310. Defendants are unable to do so. Defendants claim that Mrs. Stephens has "greatly expanded the number of witnesses she claims saw her use Roundup or know about her usage."[14] Defendants then rely on *Thoren v. Johnston & Washer*, 29 Cal. App. 3d 270, 273 (1972) to support their claim that Mrs. Stephens' failure to disclose key witnesses should result in Mrs. Stephens being bound by her prior interrogatory responses. Defendants are incorrect. First, their reliance on *Thoren* is misplaced. In that case, appellant *willfully* withheld information responsive to interrogatories which barred respondent from obtaining the testimony of a vital witness. *Thoren*, 29 Cal. App. 3d at 273. That is not what happened here. It is beyond dispute that Mrs. Stephens did not willfully withhold any information; she simply did not remember and is entirely blameless in not being able

[12] Exhibit 6, Dep. Tr. of Winter Stephens, at 48:15-25; 49:1-19.
[13] *Id.*
[14] Defendants' Motion at p. 11.

to do so.[15] Furthermore, Defendants have not been "barred" from obtaining testimony of vital witnesses. Rather, Defendants were able to depose all Mrs. Stephens' fact witnesses, including David, Winter, and Scott Stephens, Pat and Pam Sheeler, and Mrs. Stephens' current property manager, Paul Gallardo. Defendants were also able to depose Mr. and Mrs. Stephens for a third time, and they were given the opportunity to re-depose Drs. Boyd and Weisenburger (which Defendants declined). As such, as the court in *Singer v. Superior Ct. of Contra Costa Cty.*, 54 Cal. 2d 318, 325, 353 (1960) stated, "it should not be the law that interrogatories can be used as a trap so as to limit the person answering to the facts then known and to prevent him from producing subsequently discovered facts."

Defendants' claim that the expansion of Mrs. Stephens' witness list has caused Defendants to suffer prejudice,[16] but it is difficult to see how that can be so. Upon discovering the identities of these new fact witnesses, counsel immediately offered the individuals for deposition with two weeks left in the discovery period.[17] Defendants were able to take and complete the depositions of the new fact witnesses as well as a third deposition of both Mr. and Mrs. Stephens.[18] All of this was accomplished within the discovery period.[19] If Defendants have outstanding questions that need to be addressed about the additional exposure history or about the fact witnesses, they have not informed Mrs. Stephens' counsel of this.[20]

Defendants also claim that the new exposure information seriously impedes Defendants' ability to prepare for trial, because Defendants' experts are unable to make their exposure and causation

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[15] Exhibit 7, May 24, 2021 Dep. Tr. of Donnetta Stephens at 31:3-7.
[16] It is important to note that Defendants' claim that Mrs. Stephens' "greatly expanded" the number of witnesses listed in her interrogatory responses is an exaggeration. Only six individuals were added, two of whom are deceased and two of whom are married and have the same information.
[17] Decl. of Fletcher V. Trammell at ¶2.
[18] *Id.*
[19] *Id.*
[20] *Id.*

assessments. Again, it is hard to imagine why this is so. Prior to submitting Plaintiff's amended discovery responses, only two of Plaintiff's experts had been deposed, Dr. Barry Boyd and Dr. Dennis Weisenburger.[21] Defendants were not only given an extension on expert discovery by this Court, but they were also provided the opportunity to depose Dr. Barry Boyd and Dr. Dennis Weisenburger again, which Defendants declined to do.[22] Plaintiff's experts did not have an issue adjusting to the new information, including Dr. William Sawyer, who was still able to prepare his report in time for his deposition.[23] It remains to be explained why it should be any different for Defendants' experts, particularly because Defendants have not voiced any specific concerns to counsel for Mrs. Stephens.[24] For these reasons, Defendants cannot demonstrate "substantial prejudice." In fact, the converse is true; if Mrs. Stephens' additional exposure history is excluded, only part of her story will be told, and she will be the one to suffer substantial prejudice that cannot be cured. As such, Defendants' motion must be denied.

III. Plaintiff Can Show a Substantial Justification for Her Initial Answers to Interrogatories.

Defendants' motion should also be denied on the basis that Mrs. Stephens can show substantial justification for her initial answers to Defendants' interrogatories. As stated by *Padron v. Watchtower Bible & Tract Soc'y of New York, Inc.*, "[s]ubstantial justification means a clearly reasonable justification that is well grounded in both law and fact." 16 Cal. App. 5th 1246, 1269 (2017). Indeed, even a party who intentionally withholds information—which is not the case here—can be found to have a substantial justification in doing so if the party acted reasonably. *Foothill*

[21] *Id.* ¶3.
[22] *Id.*
[23] *Id.* ¶4.
[24] *Id.*

Properties v. Lyon/Copley Corona Assocs., 46 Cal. App. 4th 1542, 1558 (1996). Mrs. Stephens is certainly able to meet this standard.

As noted above, Mrs. Stephens suffers from memory loss as a result of undergoing chemotherapy. Her memory loss was one of the bases for filing a preference motion pursuant to CCP § 36(a)[25] and is well-documented throughout her medical records.[26] Defendants claim that, because of her memory loss, Mrs. Stephens should have consulted family to help her with her Interrogatory Responses and that, in fact, Mrs. Stephens was required to do so. This is not the case. In making this claim, Defendants first cite to Cal. Civ. Proc. Code § 2030.220(c). Unfortunately, Defendants fail to cite the entire statute, leaving out pertinent information. The full statutory section reads:

> (a) Each answer in a response to interrogatories shall be as complete and straightforward as the information reasonably available to the responding party permits.
> (b) If an interrogatory cannot be answered completely, it shall be answered to the extent possible.
> (c) If the responding party does not have personal knowledge sufficient to respond fully to an interrogatory, that party shall so state, but shall make a reasonable and good faith effort to obtain the information by inquiry to other natural persons or organizations, except where the information is equally available to the propounding party.

Cal. Civ. Proc. Code § 2030.220.

Defendants misleadingly state that all responding parties are under an obligation to consult other people when answering discovery. The statute does not read as such. Rather, the statute is very

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[25] Exhibit 1, Plaintiff's Motion for Trial Preference, at pp. 7-8.

[26] Exhibit 8, Beaver Medical Group Records at Bates No. 001116 ("MRI [of] brain showed white matter disease. . ." "Her memory has been worsening. She forgets appointment times sometimes, has difficulty finding the right words."); Bates No. 001157 ("She is having trouble with her words (trouble naming a snail, etc.), remembering details. Duration of 2 months and worsening. She has a fog in her head."); Bates No. 001159 ("Memory issues with chronic findings on MRI of the brain and abnormal mini mental 21/30 - refer to neurology for further evaluation."); Bates No. 001130 ("The patient reports that she recently had a TIA. She also has issues in regard to her memory, and word finding difficulties.").

clear that this obligation is only triggered *if a responding party does not have personal knowledge* sufficient to respond fully to an interrogatory.

What a lack of personal knowledge means is demonstrated in *Jones v. Super. Ct.*, 119 Cal. App. 3d 534, 552-53 (1981), a case Defendants also cite in support of their argument that Mrs. Stephens was required to consult others to help her with her discovery responses. However, the facts of that case are inapposite here. In *Jones*, Plaintiff Benny claimed injuries as a result of a drug her mother ingested while plaintiff was in utero. *Jones*, 119 Cal. App. 3d at 541. Since the ingestion occurred prior to plaintiff's birth, she did not have personal knowledge of the pertinent circumstances. The court went on to hold that a "party without personal knowledge would be required to make a reasonable investigation to ascertain the facts when it affirmatively appeared that he had available to him sources of information as to the facts or matters involved in the [discovery]." *Id.* at 552. Here, that meant obtaining information from plaintiff's mother. *Id.*

The plaintiff in *Jones* did not have personal knowledge of events taking place prior to her birth. As such, requiring her to consult her mother, who did have personal knowledge, was fitting. However, the facts of Mrs. Stephens' case are easily distinguishable. No one can dispute that Mrs. Stephens has, and has always testified to, personal knowledge of spraying Roundup, and up until May 19, 2021, she believed she had answered all of Defendants' discovery requests completely. Prior to that day, she had no reason to believe that anyone else had information relevant to this case. Once David and Winter Stephens reminded her of the additional exposures, her personal knowledge expanded, and she immediately provided the responsive information to Defendants.

In responding to Defendants' discovery, Mrs. Stephens was always an active participant, and Mrs. Stephens always gave her counsel permission to affix her signature to the verification after

reviewing and approving any new discovery responses.[27] At the time of Mrs. Stephens' responses, she believed that her answers were true and correct[28] and, as such, did not realize she had memory gaps she needed help to fill.[29]

To summarize, Mrs. Stephens acted reasonably in light of the memory that was available to her. Her former responses are substantially justified by virtue of Mrs. Stephens simply not remembering her prior exposure history due to her documented memory difficulties—you simply cannot know what you do not remember. Finally, as noted above, just as soon as Mrs. Stephens' memory was triggered, she immediately worked with her son, granddaughter, and counsel to amend her discovery responses. For these reasons, Mrs. Stephens can show substantial justification for her initial answers to Defendants' interrogatories, and Defendants' motion must be denied.

IV. Even if Defendants Were Prejudiced By Plaintiff's Amended Interrogatory Responses, Defendants Could Cure Such Prejudice through Impeachment.

As demonstrated above, Defendants have not been prejudiced by Mrs. Stephens' amended interrogatories. However, even assuming *arguendo* that they had been, Defendants would be able to cure such prejudice through impeachment. Pursuant to Cal. Civ. Proc. Code § 2030.410, "At the trial or any other hearing in the action, so far as admissible under the rules of evidence, the propounding party or any party other than the responding party may use any answer or part of an answer to an interrogatory only against the responding party." This provision allows for Defendants to use Mrs. Stephens' prior interrogatory responses for purposes of impeachment and does not circumscribe Defendants' ability to do so.

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[27] Decl. of Fletcher V. Trammell at ¶5.
[28] Exhibit 9, Verification to Plaintiff's Third Amended Interrogatory Responses, at p. 27.
[29] Mr. Stephens did not recall the prior exposure history, but he was also not involved in household chores and never did the yard work. *See*, Exhibit 10, January 29, 2021 Dep. Tr. of Larry Stephens, at 18:7-24.

Defendants allege that where amended interrogatory responses expose the need for further discovery, the ability to use the responding party's discrepancies for impeachment is not sufficient to cure the prejudice. First, Defendants fail to cite any case law to support this claim. Instead, Defendants, again, improperly rely on *Thoren* in claiming that Mrs. Stephens should be bound to her prior discovery responses. Again, in that case, appellant *willfully* withheld information responsive to interrogatories which barred respondent from obtaining the testimony of a vital witness. As already explained, that is not the case here.

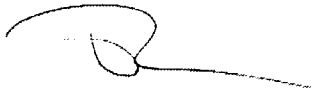
Second, Defendants' claim to need to conduct additional discovery is baseless. Not only were Defendants able to depose all fact witnesses they identified, but they were also able to depose Mrs. and Mr. Stephens again and were given the opportunity to re-depose Drs. Boyd and Weisenburger. What discovery Defendants wish to complete is a complete mystery, because Defendants have mentioned absolutely nothing to counsel for Mrs. Stephens that requires further examination. For these reasons, Defendants' motion should be denied.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Bind Plaintiff to her Third Amended Interrogatory Responses must be denied in its entirety.

Dated: June 24, 2021

Respectfully submitted,



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