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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**FOR THE COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

|  |  |  |
| --- | --- | --- |
| T.J. SIMERS, Plaintiff,vs.LOS ANGELES TIMES COMMUNICATIONS, LLC, et al., Defendants. |  | Case No.: BC 524 471**The Honorable** **Armen Tamzarian****PLAINTIFF** **T.J. SIMERS’ REQUEST FOR CURATIVE INSTRUCTIONS AND/OR TO CONDUCT FURTHER QUESTIONING OF DR. ZACKLER AND FURTHER CLOSING ARGUMENT TO CURE IMPROPER MISLEADING STATEMENTS OF LAW MADE DURING CLOSING ARGUMENT; EXHIBIT**Trial: January 5, 2022Time: 10:00 a.m.Dept.: 52Action Filed: October 15, 2013  |

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiff requests curative instructions and/or to allow further witness examination and closing argument to cure the clearly improper statements of law made during closing argument by Defense counsel.

Dated: January 18, 2022 By:

Nicholas C. Rowley, Esq.

Attorney for Plaintiff,

T.J. SIMERS

MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION AND ARGUMENT

Nicholas Rowley here. I am having a diagnostic medical procedure done at 6:30 a.m. and if capable will be in Court by 9 am. If not, I respectfully request to be permitted to appear via web/court connect.

By this motion I am requesting two curative instructions and/or to be allowed to recall Dr. Zackler who will testify that he is “reasonably certain” that Mr. Simers will suffer future harm. Reasonable certainty is not the standard for expert witness testimony or opinions in California nor is it the burden of proof. That didn’t stop the defense from usurping the Court and California law by telling the jurors that a different burden of proof exists in this State.

The curative instructions are necessary to prevent a potential miscarriage of justice. This is the third trial in this case. Hopefully, nobody wants a fourth trial.

Further questioning of Dr. Zackler is necessary if the Court is going to allow Plaintiff to be held to a higher burden of proof.

Further closing argument of 5 minutes each should suffice. I won’t need a rebuttal.

During closing argument, defense counsel (a very experienced trial lawyer, one of the best and most respected defense lawyers in California, president of ABOTA) crossed the line.

Mr. Schonbuch specifically told the jury that there is a different burden of proof in this case with respect to future damages.

It would be a fundamental error to the misapplication of due process to allow the jury to apply the wrong burden of proof in any case.

Allowing the statements made to the jury to stand without curing the error will not be harmless error if the jury awards zero for future damages, which is exactly what Mr. Schonbuch told the jury to do when telling them that a different burden of proof applies to future damages.

In criminal cases the standard is beyond a reasonable doubt. In dependency cases the standard is clear and convincing evidence. There is no “middle ground burden of proof” or “heightened burden of proof” in this case on any issue. There is only one burden of proof, and it was a misstatement of the law that was pre-planned in advance by Mr. Schonbuch.

In fact, Mr. Schonbuch told the undersigned that he had a surprise for me and that I was going to learn something new about the law from his closing argument that I didn’t know and that I would try my cases in California differently after I heard his closing. I was in fact looking forward to learning something because I have great respect for Mr. Schonbuch.

What I saw in the closing argument with respect to the burden of proof is what I believe Mr. Schonbuch was talking to me about before closing. What he did is improper and crossed the line.

As a lawyer who has tried 160 cases, most of them in California, I know what is proper and what is improper. I certainly know what the burden of proof is.

A trial lawyer telling the jury that a different burden of proof applies in closing argument is improper.

There is no burden of proof other than CACI 200 that applies to any issue of fact in this case. To lead the jury to believe that the burden of proof is higher or different with respect to answering question number 2 is wrong.

 Mr. Schonbuch’s words to the jury were exactly this : “***And this one is very important – to recover for future mental suffering, loss of enjoyment and all that is actually a different burden in this state. You’ve got to prove, Mr. Simers – see right here? Burden of Proof. T.J. Simers must prove that he is reasonably certain to suffer that harm.”***

 Mr. Schonbuch had a slide up that said burden of proof, and different language from a damages instruction in the slide. He did not have CACI 200 up in front of the jury.

A timely objection was made. A very specific objection in fact, which was that it was a misuse of the burden of proof to say there is a different burden in this state.

Mr. Schonbuch specifically chose to tell the jurors that a “different burden of proof” applies to future damages. That is an error in the law and if it wasn’t a mistaken belief, it is then misconduct.

Maybe what has happened is that the future damages instruction has language in it that has confused or misled the defense. We need the Court to clear up any confusion.

There is no law anywhere in California that requires Plaintiffs to meet a heightened burden of proof to recover for future damages as compared to past damages. If the future damages jury instruction is being used this way, it is being used improperly.

This isn’t the first time I have seen the future damages instruction argued but it is the first time it has been argued this way by telling the jury a different burden of proof applies.

Because of the way Mr. Schonbuch worded his argument, and the risk of the jurors being confused to believe that there is a different burden of proof for future damages as compared to past damages, we need the Court to read a curative instruction. We propose the following:

“**DURING CLOSING ARGUMENT YOU WERE TOLD THAT THERE IS A DIFFERENT BURDEN OF PROOF FOR FUTURE DAMAGES AS COMPARED TO PAST DAMAGES. TO CLEAR UP ANY POSSIBLE CONFUSION, THERE IS ONLY ONE BURDEN OF PROOF IN THIS CASE AND THAT BURDEN OF PROOF APPLIES TO HOW YOU SHOULD WEIGH ALL THE EVIDENCE AND ANSWER BOTH QUESTIONS ON THE VERDICT FORM. THE SAME BURDEN OF PROOF APPLIES TO BOTH QUESTIONS. I AM GOING TO RE-READ YOU THAT BURDEN OF PROOF.”**

It is requested that the court then re-read the more likely true than not true burden of proof.

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The next special jury instruction that is requested is that the Court instruct the jury as follows:

**EXPERT OPINIONS IN A CIVIL CASE SUCH AS THIS MUST BE ESTABLSHED TO A DEGREE OF REASONABLE MEDICAL PROBABILITY, NOT MEDICAL CERTAINTY.**

There is a minority of jurisdictions where experts must be able to express their opinions to a degree of reasonable medical certainty. California is not part of the minority.

Nonetheless, Mr. Schonbuch told the jurors that there is a requirement that Dr. Zackler and other witnesses expressed opinions to a standard of reasonably certainty. We need this curative instruction because Mr. Schonbuch told the jury that Dr. Zackler was required to testify to a degree of reasonable certainty.

Lastly, we request a curative instruction to instruct the jurors to disregard Mr. Schonbuch’s statement to the jury that we (Mr. Simers’ lawyers) knew about this law and chose not to ask certain questions. Those statements about us and our motives were improper, misconduct actually.

It would be improper for the undersigned to have told the jury “Mr. Schonbuch knows the law is x, y, or z, and that is why he didn’t do x, y, or z”. Doing so is arguing outside of the evidence and it is an improper personal attack on officers of the Court.

1. **LEGAL AUTHORITY**

**Burden of Proof**

CACI 200 is the burden of proof in this case. There is no other. More likely true than not true is what that burden of proof is.

To tell jurors otherwise is wrong and is usurping the role of the Judge by incorrectly and inaccurately telling jurors what the law is. It was misleading and deceptive.

The general rule in California is that “‘[i]ssues of fact in civil cases are determined by a preponderance of testimony.’” (Weiner v. Fleischman (1991) 54 Cal.3d 476, 483 [286 Cal.Rptr. 40, 816 P.2d 892]. The preponderance-of-the-evidence standard “simply requires the trier of fact ‘to believe that the existence of a fact is more probable than its nonexistence.’” (In re Angelia P. (1981) 28 Cal.3d 908, 918 [171 Cal.Rptr. 637, 623 P.2d 198].

“Preponderance of the evidence” “‘means what it says, viz., that the evidence

on one side outweighs, preponderates over, is more than, the evidence on the other side, not necessarily in number of witnesses or quantity, but in its effect on those to whom it is addressed.’” (Glage v. Hawes Firearms Co. (1990) 226 40 Cal.App.3d 314, 325 [276 Cal.Rptr. 430] (quoting People v. Miller (1916) 171 Cal. 649, 652 [154 P. 468] and holding that it was prejudicial misconduct for jurors to refer to the dictionary for definition of the word “preponderance”).

The Court has authority to issue curative instructions following misconduct by Counsel in closing arguments. *Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 321.

An effective curative instruction will usually make the need for a mistrial unnecessary following attorney misconduct in closing argument. *Id.* at 320.

“Misconduct by an attorney during trial has been defined as a dishonest act or attempt to persuade the judge or jury using deceptive or reprehensible methods.” Cal. Judges Benchbook: Civil Proceedings—Trial, 2021 §5.79 (defining and contextualizing attorney misconduct; citing *People v. Chojnacky* (1973) 8 Cal.3d 759, 766). Attempting to persuade the jury into believing that a different burden of proof applies to future damages as compared to past damages or to believe that reasonable medical certainty is the standard for expert testimony is wrong.

Defendant’s counsel improperly telling the jury that a different burden of proof applies to future damages needs to be cured. Defense counsel stated that there was a “requirement” that witnesses use the words “reasonably certain”. That is not the law.

The law for causation of damages as it applies to medical witnesses, experts, has been established in two cases Bromme vs. Pavitt 5 (1992) Cal.App 4th 1506 and Dumas vs. Cooney (1991) 235 Cal.App.3d 1593 and their progeny.

Mr. Schonbuch stated “***If you find future damages -- which you can’t under the law because, again, like I said there is not a single person who came in here and satisfied that requirement of reasonably certain. Not one witness***.”).

Over and over again Defendant’s counsel misstated and mischaracterized the requisite burden of proof, which is “more likely true than not true.” This was misleading and confused the jury. The Court’s intervention did not cure the problem.

The undersigned specifically objected to the argument, stating, “**Your honor, I’m going to object. That is misuse of the burden of proof to say there is a different burden in this state**.” (*Id.* at 179:15-26.)

Absent further curative instruction, there is risk of undue prejudice in that the jury misunderstands the burden of proof because of Defendant’s counsel’s ongoing misstatements of law leading the jury to believe the burden of proof is something more than preponderance of evidence.

Defendant’s counsel’s argument regarding the financial status of the newspaper industry and referencing specific numbers and measurements not in evidence was also improper. This shows that the defense is willing to win at any cost, even violating it’s own motion in limine and using the LA Times’ financial condition as a shield and sword.

**Financial Condition of the LA Times and Arguing Outside the Evidence**

Mr. Schonbuch made improper arguments concerning the LA Times having a lot more money than TJ. He used the word “hell”. He introduced evidence during closing that was not part of the trial and put it up on slides showing the average wages and net-worth of “one-percenters”. (*Closing Argument*, RT 1/14/22, 194:8-26 (stating, “No. 1, $53,490. That’s the average American salary.”); *see also id.* at 195:5-9 (stating, “The top 1 percent -- ever hear about the 1 percenters in the world? That means that you have $11 million of net worth.”).)

Here, California Civil Jury Instructions (“CACI”) Number 117—which was given—specifically provides, “In reaching a verdict, you may not consider the wealth or poverty of any party. The parties’ wealth or poverty is not relevant to any of the issues that you must decide.”

Mr. Schonbuch telling the jury that he represents Ozzy Osbourne was blatantly improper. He thereafter referred to himself as a nobody and improperly attacked Mr. Simers’ character, telling the jury Mr. Simers thinks he is better than everybody else. We don’t think there is any curative instruction for that wild portion of the argument and we do not want a mistrial.

Reference to the financial condition of Defendant, the LA Times having “**a hell of a lot more money**” than Mr. Simers, the financial condition of the newspaper industry, “average wages,” and the net-worth of one-percenters were all things not in evidence and lack any context (such as geographic scope, changes in business strategies, nature of employment, education, etc.). We believe that the Court’s instruction was sufficiently curative on this topic.

Mr. Schonbuch also falsely told the jury that the defense took 8,000 depositions in this case. That is absolutely untrue. The jurors should not be allowed to believe something so untrue. Mr. Schonbuch made this statement in conjunction with asking the jury if they thought we (Mr. Simers’ counsel) think that defense counsel is stupid. Mr. Schonbuch thereafter told the jury to believe him, which is improper vouching. (*See Closing Arguments*, RT 1/14/22, 178:4-9 (stating, “How stupid dop they think we are? We’ve taken 8,000 depositions in this case, penalty of perjury. You think we would get up there and be that crazy that we would day something that we didn’t know was true? Believe me, I read from his deposition, and he admitted it and we got the e-mails.”).) A lawyer should never tell a jury to believe a lawyer who is not a sworn witness who was subjected to cross examination.

**Improper Questioning During Trial Demonstrates A Pattern**

We ask that the Court take into consideration improper questions during the cross examination of Mr. Simers and Dr. Zackler in deciding what curative instruction to give to fix the improper statements during closing argument. Specifically, Defendant’s counsel improperly questioned witnesses with insinuating questions (*do you know, did you know* questions). Multiple objections were made to this line of questioning that defense counsel kept repeating. *See Love v. Wolf* (1964) 226 Cal.2d 378, 390 (it is improper to ask “did you know” or “Do you recall” questions to establish matters not in evidence). The Court had to instruct the jury multiple times during these lines of questioning.

**Impugning the Integrity and Motives of Counsel Was Improper**

It was improper for Mr. Schonbuch to point at Plaintiff’s counsel and tell the jury what we know about the law and to tell the jury that there was a reason we didn’t ask questions about “reasonable certainty”. What we as the lawyers know is not evidence. Impugning our integrity and motives was wrong. This portion of the argument was also outside the evidence. (*See* RT 1/14/22, 181:24-25 (stating, “And they know this. There is a reason they didn’t ask it.”).) (*See id.* at 181:28-182:2 (Objection stating, “. . . it’s misconduct, to talk about what I know and why we didn’t do something. That’s misconduct.”).

As introduced above and further discussed below, respectfully, the Court should issue curative instructions on these issues.

1. FURTHER AUTHORITY

Depending on the gravity of the misconduct and danger of undue prejudice, the Court has authority to issue curative instructions following misconduct by Counsel in closing arguments. *Sabella v. Southern Pac. Co.* (1969) 70 Cal.2d 311, 321. An effective curative instruction will usually make the need for a mistrial unnecessary following attorney misconduct in closing argument. *Id.* at 320.

“Misconduct by an attorney during trial has been defined as a dishonest act or attempt to persuade the judge or jury using deceptive or reprehensible methods.” Judges Benchbook, *supra,* § 5.79, p. 285 (defining and contextualizing attorney misconduct; citing *People v. Chojnacky* (1973) 8 Cal.3d 759, 766).

Issues of misconduct must be raised by a timely, *i.e*., immediate, objection. *Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 303. However, “[f]ailure to make a timely objection does not result in a waiver if the effect of the misconduct is so prejudicial that an admonition and corrective instruction cannot cure it[.]” Judges Benchbook, *supra*, § 5.97, p. 291 (citing *Sabella*, *supra*, 70 Cal.2d at 318).

We did our best to object. Closings were finished at 4:30 p.m. We were exhausted and actually went past 4:30 p.m.

1. **REQUEST FOR FURTHER ARGUMENT AND TO RE OPEN THE CASE**

I will be done with my procedure at 7:45 a.m. and have a suit and will try to make it to Court. I can get Dr. Zackler on Zoom and we can ask him if he is “reasonably certain” that TJ will suffer future mental anguish, suffering, emotional distress, and loss.

Dated: January 18, 2022 By:

 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Nicholas C. Rowley, Esq.

 Attorneys for Plaintiff

 T.J. Simers

**SIMERS v. LOS ANGELES TIMES COMMUNICATIONS, et al.** **LASC Case No. BC 524 471**

**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am an employee in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 145 S Spring Street, Suite 400, Los Angeles, California 90012.

On January 17, 2022, I served the foregoing document, described as **“PLAINTIFF T.J. SIMERS’S OPPOSITION TO DEFENDANT’S MOTION *IN LIMINE* NO. 4 TO PRECLUDE EVIDENCE AND TESTIMONY FROM VARIOUS WITNESSES.”** on all interested parties in this action by placing a true copy thereof in a sealed envelope, addressed as follows:

**Linda Miller Savitt, Esq.**

**Elsa Banuelos, Esq.**

**John J. Manier, Esq.**

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**Michael Schonbuch**

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**[x]  (BY MAIL)** As follows:

[x]  I placed such envelope, with postage thereon prepaid, in the United States mail at Los Angeles, California.

[x]  I am “readily familiar” with the firm’s practice of collecting 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, at Los Angeles, California, in the ordinary course of business. I am aware that, on motion of the party served, service is presumed invalid if the postal cancellation or postage meter date is more than one day after the date of deposit for mailing in this affidavit.

**[x]  (STATE)** I declare, under penalty of perjury under the laws of the State of California, that the above is true and correct.

**[x]  (BY ELECTRONIC MAIL)** I sent such document via facsimile mail to the number(s) noted above.

Executed on January 17, 2022, at Los Angeles, California.

XXX