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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

MICHAEL VILLAVERDE, as Wrongful Death Heir, and as Successor-in-Interest to SALVADOR VILLAVERDE, Deceased; and ELAINE VILLAVERDE, as Legal Heirs of SALVADOR VILLAVERDE, Deceased,

Plaintiffs,

vs.

ASBESTOS CORPORATION LIMITED; Defendants as Reflected on Exhibit 1 attached to the Summary Complaint herein; and DOES 1-8500.

ASBESTOS
No. CGC-10-275729

PLAINTIFFS' MOTION IN LIMINE TO PRECLUDE THE DEFENDANTS FROM IMPROPER QUESTIONING OF PROSPECTIVE JURORS DURING *VOIR DIRE*

Trial Date: February 19, 2013
Dept: 611

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I.

INTRODUCTION

Plaintiffs move this Court to preclude defendants from posing any improper questions to prospective jurors during *voir dire* examination. Under California Code of Civil Procedure section 222.5 (West 2012), the Court should not permit counsel to engage in "improper questioning." Questions not relevant to the purposes of *voir dire* are improper when the questions are "not likely to provide information useful in exercising a peremptory challenge or establishing a challenge for cause." See, People v. Williams (1981) 29 Cal.3d 392, 407. This Court should not permit any of the following types of improper questions for the purposes of

voir dire and should instruct defense counsel to refrain from asking such questions. Improper and inappropriate questions include, but are not limited to: (1) interjecting the defense counsel's opinions; (2) summarizing the evidence or stating facts which will be introduced into evidence; (3) instructing potential jurors on how to view or weigh the evidence; (4) questions not relevant to the prospective juror's ability to be fair or impartial in the case; (5) injecting the defense's arguments; (6) asking argumentative or leading questions; (7) asking general questions on the law; (8) misrepresenting the applicable standards, law, and facts; and (9) any other improper questions whose purpose is other than to ascertain bias from the prospective jurors for use in a peremptory or cause challenge and are not structured in such a way as to ascertain that knowledge. Though the trial court has wide discretion in permitting counsel's questions during *voir dire*, this Court may not permit questions that do not inure to the selection of a fair and impartial jury. (Cal. Rules of Court, Standards of Judicial Administration, standard 3; Cal. Rules of Court, rule 3.1540(c)); see, CAL. CIV. PROC. CODE § 222.5; see also, Williams, 29 Cal.3d at 407.

II.

ARGUMENT

California Code of Civil Procedure Section 222.5 (West 2012) states that "[t]o select a fair and impartial jury in civil jury trials, . . . counsel for each party shall have the right to examine, by oral or direct questioning, any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause." Morever, "[t]he scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge's sound discretion." Id. Most importantly, section 222.5 states that an improper question asked during *voir dire* includes "any question that, as its dominant purpose, attempts to precondition the prospective jurors to a particular result, indoctrinate the jury, or question the prospective jurors concerning the pleadings and the applicable law." Id. The case of Rousseau further elaborates on the scope of improper questions by holding:

Neither is it a function of the examination of prospective jurors to [1] educate the jury panel to the particular facts of the case, [2] to compel the jurors to commit themselves to vote a

particular way, [3] to prejudice the jury for or against a particular party, [4] to argue the case, [5] to indoctrinate the jury, or [6] to instruct the jury into matters of law. Rousseau v. West Coast House Movers (1967) 256 Cal.App.2d 878, 882. In addition, standard 3.25 of the Standards of Judicial Administration, regarding the examination of prospective jurors in civil cases, states that "the trial judge [should not] allow counsel to question the jurors concerning . . . the meaning of particular words or phrases, or the comfort of the jurors, except in unusual circumstances, where, in the trial judge's sound discretion, such questions become necessary to insure the selection of a fair and impartial jury."[1] "The purpose of the *voir dire* is but to insure choice of 12 jurors who are fair and who have no preconceived notions of the facts or the parties." Rousseau, 265 Cal.App.2d at 885.

California civil litigants are guaranteed the same procedural safeguards as used in criminal cases for securing an impartial jury drawn from a "representative cross-section of the community." E.g., Holley v. J.&S. Sweeping Co. (1983) 143 Cal.App.3d 588, 592–93 (finding that the *voir dire* procedure in a California criminal case is uniformly applicable to state civil cases) (citing the United States Supreme Court rationale in Thiel v. South Pacific Co. (1946) 328 U.S. 217 where the Court wrote, "[t]he American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community."). In ensuring their client the right to an impartial jury, counsel has the right to question any of the prospective jurors in order to exercise both peremptory and cause challenges. E.g., Williams, 29 Cal.3d at 409 (partially superceded in regard to criminal law by passage of Proposition 115 in 1990—Crime Victims Justice Reform Act); see also, Rousseau, 256 Cal.App.2d at 886 (acknowledging that *voir dire* practices in

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[1] Cal. Stds. Jud. Admin.,§ 3.25 (as noted in California Rules of Court, rule 3.1540). In addition, some judges further advise attorneys to refrain from "repeating questions asked by the judge or other attorney; expounding on any theory of the case, evidence to be presented, or the law; referencing inadmissible or prejudicial matters; asking questions regarding a juror's knowledge about the law of the case; asking a juror to define legal terms; asking questions about the jurors conduct in the jury room if evidentiary or voting problems arise; asking questions as to how a juror would weigh a particular fact or circumstance; requesting a juror to "tell me about yourself;" asking a juror to promise anything; phrasing statements in the form of a question; and addressing a juror by his or her first name." See, Cal. Judges Benchbook: Civ. Proceedings–Trial (CJER 2d ed. 2010), § 4.52.

criminal cases are valid precedent in civil cases and relying heavily upon criminal cases). While the cause challenge is traditionally allowed in limited circumstances, the California Supreme Court has recognized that "the peremptory challenge is a critical safeguard of the right to a fair trial" because it helps ensure the surviving jurors' impartiality. See, Williams, 29 Cal.3d at 405 (citing In re Murchison (1955) 349 U.S. 133, 136).

The Supreme Court articulated the purpose of the peremptory challenge in Swain, stating that "[t]he function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that 'to perform its high function in the best way "justice must satisfy the appearance of justice."' Swain v. Alabama (1965) 380 U.S. 202, 219 (overruled by Batson v. Kentucky (1986) 476 U.S. 79, but the purpose of *voir dire* remains the same) (citing In re Murchison, 349 U.S. at 136). In following the present jurisprudence governing *voir dire* under section 222.5, this Court must adhere to these rationales underlying peremptory challenges when considering the impropriety of anticipated defense counsel questions during *voir dire*. This Court should preclude defense counsel from asking any of the following types of "improper questions" during *voir dire*.

A. DEFENDANTS SHOULD BE PRECLUDED FROM IMPROPER QUESTIONING DURING *VOIR DIRE*, WHICH ATTEMPTS TO PRECONDITION OR INDOCTRINATE THE JURY, OR QUESTION THE PROSPECTIVE JURORS CONCERNING THE APPLICABLE LAW

Under the first prong of Rousseau, whereby the jurors should not be educated as to particular facts of the case, "[*v*]*oir dire* of the jury is not the time for premature presentation of evidence, nor for the even more frequent attempts at preinstruction. Neither instruction nor the giving of evidence is the function of counsel." See, Rousseau, 256 Cal.App.2d at 885; see also, Sweet v. Stutch (1966) 240 Cal.App.2d 891, 894. Moreover, "it is misconduct on the part of counsel . . . so to frame his question so that it goes beyond what is reasonably necessary to serve the legitimate purpose of eliciting the facts he is entitled to adduce in order to secure a jury free from bias or prejudice, if it is also apparent that the question may fairly be said to have the

effect of serving the illegitimate purpose of prejudicing the jury by fixing in their minds [an] idea." See, Arnold v. California Portland Cement Co. (1919) 41 Cal.App.420 (while holding that it was misconduct on the part of plaintiff's counsel to frame his question in a manner which suggested that defendant was protected by insurance against liability for negligence, the proposition is still pertinent to this case, as the overall purpose of *voir dire* is to ensure a jury free from bias and prejudice). Plaintiffs anticipate that questions and/or statements seeking to educate the jury as to particular facts, to present evidence, or to inject opinion will be presented by defense counsel during *voir dire* and, therefore, seeks to preclude them.

Such questions and/or statements might include, but are not necessarily limited to:

- *Has anybody had experience with a small business?*
(This is an attempt to suggest or otherwise infer that a defendant is a small business).

- *The material at issue is this case is _____, which is _____. . . . That's the product that's in issue.*
(This is an attempt to summarize facts or insert evidence. Therefore, any statement like this should be precluded, especially one which misstates or mischaracterizes the facts of this case, such as when there are several products at issue).

- *There is going to be "sketchy" information presented about my client.*
(Any statement similar to this posed by defense counsel equates to insertion of fact and opinion, as well as a mischaracterization of the evidence).

- *There will be evidence about the knowledge of the Navy and what the Navy knew. The defendant did not know about the dangers of asbestos.*

- *Has anybody ever received a bill that was not theirs?*

- *Do any of the jurors believe, as I do, that _____ ?*

See attached Exhibit A, pp. 35–36, 50, 104, 115–16. All such questions and/or assertions are purposefully crafted and wordsmithed attempts to precondition and indoctrinate the prospective jurors, often without any basis in case evidence, which is clearly improper under California Code of Civil Procedure Section 222.5, does not serve the purpose of determining any prejudice or bias of prospective jurors, and is inappropriate during *voir dire*. It should not be permitted.

Defense counsel should also not seek to prejudice the jury for or against another party, as this would be improper under the third prong of Rousseau. 256 Cal.App.2d at 882. Plaintiff

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anticipates that questions and/or statements of this type will be presented by defense counsel during *voir dire* and, therefore, seeks to preclude them.

Such questions and/or statements might include, but are not necessarily limited to:

- *Just because we used asbestos in our product, does that mean we are or were wrong?*
- *Just because we have been sued, does that mean we are wrong?*
- *Does anyone believe where there is smoke, there is fire?*
- *Just because we are here defending this case, does that mean we are wrong?*
- *Just because this case has made it this far, does that mean the case must have some merit?*

All questions and/or statements of this type seek to suggest that the defendant is not wrong and, thereby, might prejudice the prospective jurors against the plaintiff, which is highly inappropriate during *voir dire*. Overall, such questions and/or statements do not serve the purposes of *voir dire* in that they do not elicit information necessary for exercising a peremptory challenge or a challenge for cause. They are merely attempts to precondition and indoctrinate the jury and are in violation of California Code of Civil Procedure Section 222.5.

Questions asking the veniremen about their "understanding of 'general principles of law'" presume "that jurors will be adequately informed as to the applicable law," and were specifically disproved by the California Supreme Court, therefore, making them impermissible during *voir dire*. People v. Love (1960) 53 Cal.2d 843, 851–52 (superceded on another point of criminal law as to testimonial evidence). Furthermore, questions misstating the law are inappropriate and impermissible during *voir dire*. See, Kelly v. Trans Globe Bureau, Inc. (1976) 60 Cal.App.3d 195, 203–04. In Kelly, a personal injury case, the court of appeal held that "on *voir dire*, the prospective jurors were exposed to an erroneous statement of the legal principles;" the court found prejudicial error and reversed the trial court. Id. at 203–04. Therefore, under Love and Kelly, it is impermissible to allow the defense to ask the veniremen questions either requiring knowledge of the law or misrepresenting the applicable law to the venire.

Such improper questions indoctrinate and precondition the jury, and include, but are not limited to:

- *Can you go back in time to the past to judge the standards as they were then?*
- *Do you expect that the defendants have to disprove the case?*

(The foregoing two questions presume the jurors will be adequately informed on the applicable law).

- *It is not your job to "fill in the blanks . . ." can you stop yourself from filling in the blanks?*

(This statement implies that the jury should not draw inferences from circumstantial evidence, which is permissible, and the statement presupposes a case presents blanks).

- *"It is not about connecting two things; it is actually adding information." Can you do that?*

(This inappropriately endeavors to guide the jury on the law of how to evaluate the evidence).

- *Sympathy, and empathy, has "absolutely no place in this courtroom;" can you set yours aside?*

(Sympathy and Empathy may be an appropriate metric in assessing damages. The foregoing truncated statement does not comprehensively state the law accurately).

See attached Exhibit A, pp. 43, 49–52.

Furthermore, any questions that use the word "award" rather than the phrase "assess damages" misstates the function and applicable law of tort litigation, and this Court should preclude that terminology during *voir dire*. Defendant would be hard pressed to tell the jury that plaintiff gets an award for developing a terminal illness. "Award," in fact has no place in these proceedings or in law. Recompense for loss is nowhere accurately described as an "award." Therefore, defense counsel should be precluded from asking questions as to the general principles of law, as well as questions misstating the law. In today's day and age, the Court must be sensitive to such subtle realities.

Furthermore, the California Supreme Court has held that "argument should not be presented on *voir dire* examination" and is "[m]anifestly" improper. People v. Mitchell (1964) 61 Cal.2d 353, 366–67. The court upheld that "the challenged questions were properly disallowed, in that they were in the form of argument and there was not improper limitation as to defense counsel's inquiry." Id. Under Mitchell, defense counsel should not be allowed to pose questions to the veniremen that argue their case as to the evidence. In general, the defense

should not be permitted to pose statements to the jury about how there will be evidence about the knowledge of another party, or nonparty, and statements to the jury about what the defendant did not know. Specifically, the defense should not be permitted to present statements that *there will be evidence on what the Navy knew* and statements that *there will not be evidence on what the defendant knew* about the dangers of asbestos. These questions pertain to the defense's argument and are manifestly improper during *voir dire* examination. They do not serve to unearth the bias of particular veniremen, but they serve to indoctrinate and precondition the jury. Because such questions are impermissible, this Court should preclude the defendants from any argumentative questions during *voir dire*.

B. CALIFORNIA PUBLIC POLICY FAVORS EFFICIENT AND RELEVANT *VOIR DIRE* QUESTIONING IN ORDER TO CONSERVE JUDICIAL RESOURCES AND AVOID WASTING THE COURT'S TIME

The California Supreme Court has opined that trial courts need not permit "inordinately extensive and unfocused questioning" during *voir dire*, such as the types plaintiff seeks to preclude. See, Williams, 20 Cal.3d at 408. Historically, the California Courts of Appeal have noted "the waste of valuable court time involved in such excursions" and admonished that *voir dire* is "not the time for premature presentation of evidence, nor for the even more frequent attempts at preinstruction. Sweet, 240 Cal.App.2d at 894. In Sweet, the Court noted the time wasted in having to admonish counsel for interjecting evidence into the *voir dire* "question." Id. It stated that the "immediate advantage of such diversions is questionable," and the "larger interest of the trial bar as a whole, and of equally earnest litigants who await a forum for their trials, is frustrated by such dissipation of court time." Id. Furthermore, the courts have lamented that "[w]e cannot expect the Legislature to provide, or the people to pay for, additional courts to provide the leisure for overlong *voir dire* exercises" and that "with the growing frequency of multiple-party litigation, unrestricted *voir dire* by counsel often trespass on eternity." Rousseau, 256 Cal.App.2d at 886 (citing Sweet, 240 Cal.App.2d at 894). Inappropriate statements irrelevant to the purpose of peremptory and cause challenges and serving only to indoctrinate or precondition the jury waste the court's time.

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Under this policy, this Court should not permit defense counsel to pose irrelevant, purposeless questions which indoctrinate and ingratiate the venire, such as:

- *"Do you believe, as I do . . ."*
(inappropriately interjecting defense counsel's own opinion)

- *"Have you paid an attorney on a contingency fee basis, and do you think the amount your attorney took was fair?"*
(irrelevant to both peremptory and cause challenges, and preconditioning the jury)

- *If you were in my shoes, would you want you as a juror?*

- *Should I be worried about you?*

- *Does anyone think it is wrong for a defendant to choose to go to trial instead of settling the case?*

- *Should you, Mr./Ms. _____, be a juror in this case?*

(The foregoing four questions are irrelevant to both peremptory and cause challenges, because they are not aimed at uncovering bias or prejudice).

See attached Exhibit A, p. 105. Such impermissible questions do not serve a valid purpose under the policy of *voir dire*, as articulated by the United States Supreme Court and the California Supreme Court; they only serve to precondition the potential jurors, waste the court's time, and subvert the conservation policy set forth by the California courts. Therefore, this Court should promote effective and efficient *voir dire* and preclude defendants from asking the prospective jurors impermissible questions as specifically described in the foregoing motion.

III.

CONCLUSION

This Court should grant this motion to preclude defendants from asking improper questions during *voir dire*. Questioning which clearly preconditions prospective jurors as to a particular result, indoctrinate the jury, interject argument or spin, or question the prospective jurors concerning the applicable law should be precluded.

Dated: 3/4/13

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By: /s/ James P. Nevin
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