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DANYELLE WOLF

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – **CENTRAL DIVISION**

DANYELLE WOLF, an individual;

Plaintiff,

vs.

NICOLE MAYO, an individual; and DOES 1 THROUGH 250 INCLUSIVE;

Defendant(s).

Case No. 37-2014-00035743-CU-PA-CTL

PLAINTIFF'S MOTION IN LIMINE NO. 5 OF 5 TO EXCLUDED

Hearing
Date: December 4, 2015
Time: 9:00 a.m.
Judge: Hon. Gregory W. Pollock
Dept.: C-71

Trial Date: December 7, 2015

TO: THIS HONORABLE COURT AND COUNSEL OF RECORD FOR ALL PARTIES:

PLEASE TAKE NOTICE that Plaintiff Danyelle Wolf provide(s) the following pocket brief regarding voir dire / jury selection.

THE LAW OFFICES OF JOHN O. CLUNE

Dated: November 25, 2015 By: _____

John O. Clune
Attorney for Plaintiff
DANYELLE WOLF

MEMORANDUM OF POINTS & AUTHORITIES

LAW AND ARGUMENT

A. Voir Dire Allows for Selection of Fair and Impartial Jury, as Well as Assisting in Exercise of Peremptory and Cause Challenges.

A litigant is entitled to have an impartial jury decide his/her case, and "the right to trial by a jury drawn from a representative cross-section of the community is guaranteed equally and independently by the Sixth Amendment to the federal Constitution [citation omitted] and by article I, section 16 of the *California Constitution.*" (*Williams v. Superior Court* (1989) 49 Cal.3d 736, 740; see also *California Code of Civil Procedure* § 204(a).) The primary purpose of voir dire is to allow for the selection of a fair and impartial jury. (*California Code of Civil Procedure* § 222.5, *California Rules of Court* No. 3.1540(b); *Kelly v. Trans Globe Travel Bureau, Inc.* (1976) 60 Cal.App.3d 195, 203.) Section 222.5 provides:

> "Upon completion of the judge's initial examination, counsel for each party shall have the right to examine, by oral and direct questioning, any of the prospective jurors in order to enable counsel to intelligently exercise both peremptory challenges and challenges for cause. During any examination conducted by counsel for the parties, the trial judge should permit liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case. The fact that a topic has been included in the judge's examination should not preclude additional nonrepetitive or nonduplicative questioning in the same area by counsel.
>
> The scope of the examination conducted by counsel shall be within reasonable limits prescribed by the trial judge in the judge's sound discretion. In exercising his or her sound discretion as to the form and subject matter of voir dire questions, the trial judge should consider, among other criteria, any unique or complex elements, legal or factual, in the case and the individual responses or conduct of jurors which may evince attitudes inconsistent with suitability to serve

as a fair and impartial juror in the particular case. Specific unreasonable or arbitrary time limits shall not be imposed.

The trial judge should permit counsel to conduct voir dire examination without requiring prior submission of the questions unless a particular counsel engages in improper questioning."

Another purpose of jury selection is to assist counsel in the intelligent exercise of both peremptory challenges and challenges for cause. Pursuant to *California Code of Civil Procedure* § 222.5 the trial court may place "reasonable limits" on the scope of counsel voir dire examination "that allow counsel liberal and probing examination to discover bias and prejudice within the circumstances of each case." (*Bly-Magee v. Budget Rent-A-Car Corp.* (1994) 24 Cal.App.4th 318, 324; see also, *California Rules of Court* No. 3.1540(c) "... the trial judge must permit counsel to supplement the judge's examination by oral and direct questioning of any of the prospective jurors. The scope of the additional questions or supplemental examination must be within reasonable limits prescribed by the trial judge in the judge's sound discretion.") Accordingly, that right to an impartial jury can only be provided through a fair, impartial and adequate jury selection procedure, which allows a litigant to make a reasonable and informed decision regarding the jurors.

B. Properly Exercising Challenges, Peremptory and for Cause, Allows for the Empanelment of a Fair Jury.

California Code of Civil Procedure § 225(b) provides that a challenge for cause may be made if the juror is disqualified from serving; has in implied bias; has an actual bias "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." Section 229 explains when a challenge for implied bias may be taken, including (a) affinity to an officer of a corporation which is a party or witness; (b) Member of family of party or to an officer of a corporation which is a party, a partner in business with a party, holder of bonds or shares of capital stock of a corporation which is a party; or having been in attorney and client relationship with party's attorney within a year; . . . (e) ***Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them***; and (f) ***The existence of a state of mind in the juror evincing enmity against, or bias towards, either party. Those highlighted are the most pervasive and are the focus of most voir dire in civil actions.***

"A litigant suffers prejudice when, over his protest, the court impanels a juror whose state of mind requires the challenging party to introduce evidence in excess of a preponderance to such extent as will overcome antecedent prejudices of the juror." (*Leibman v. Curtis* (1955) 138 Cal.App.2d 222, 226.) In *Leibman*, the plaintiff's attorney had no remaining peremptory challenges, and when the juror admitted his hostility to the claim sued upon and would require more evidence than a mere preponderance to render a verdict in favor of the claim[1], his challenge for cause based on bias was denied. The judgment was reversed.

Similarly, in *Fitts v. Southern Pacific Co.*, (1906) 149 Cal. 310, was a personal injury action in which a prospective juror was disqualified for bias when he stated he felt many damage suits against the railroad were the injured party's own fault, and that he would go into the box prejudiced in favor of the railroad and would need "strong and positive testimony" before he could vote for a plaintiff's verdict. Likewise, in *People v. Williams*, (2001) 25 Cal.4th 441, 461, and *People v. Cleveland*, (2001) 25 Cal.4th 466, 474-475, the California Supreme Court held that a juror may be removed from a jury if it appears in the record as a demonstrable reality that the juror is refusing to deliberate or follow the law in an effort to exercise the naked power commonly known as jury nullification; the theory is that such a juror is "unable to perform his duty."

Likewise, in *Merced v. McGrath*, (2001) 94 Cal.App.4th 1024, 1027-1028, the Court of Appeal confirmed that trial court's removal of a prospective juror when he informed the court that it was reasonable to assume that he would not follow the jury instructions if the law went against his conscience. A belief in juror nullification supports the challenge for cause of the juror.

While a prospective juror is not incompetent to serve because of his or her race, origin or nationality, prospective jurors may be asked questions likely to reveal ethnic prejudice, consciously or unconsciously held, where relevant to the case. The California Supreme Court explained:

"Our courts have become increasingly aware that bias often deceives its host by distorting his

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[1] The prospective juror said he worked for Shell Oil Company, administering workmen's compensation insurance; had studied law for two years; had acquired a certain amount of knowledge of X-ray diagnosis and of general medical terminology; was familiar with back injuries; and would use all of such experience in judging the case. He stated he couldn't help but have some preconceived ideas so far as disability is concerned. Among other responses, he agreed if he was a party to the action who wanted a fair jury in this particular kind of a case only, he did not believe he would be the kind of a person he would want to select. The Court noted he hadn't told them what his preconceived ideas were, which means nothing to the Court, and wouldn't question him outside the presence of all the other jurors. (*Id.* at pp. 223-224.)

> view not only of the world around him, but also of himself. Hence, although we must presume that a potential juror is responding in good faith when he asserts broadly that he can judge the case impartially [citation omitted], further interrogation may reveal bias of which he is unaware or which, because of his impaired objectivity, he unreasonably believes he can overcome."

(*People v. Williams* (1981) 29 Cal.3d 392, 407.)

"[P]rospective jurors who bring to the courtroom a bias concerning the particular case on trial or the parties or witnesses thereto" must "be excused from the jury insofar as possible." (*People v. Wheeler* (1978) 22 Cal.3d 258, 274.) Accordingly, the critical inquiry "in such cases is whether the questions a defendant's trial counsel was precluded from asking during voir dire of the prospective jurors are relevant and substantially likely to uncover such racial, religious or ethnic bias," and "[i]f this inquiry is answered affirmatively as to any of such questions, appellant will have been deprived of his right to secure an impartial jury, and reversal will be mandated."[2] (*People v. Wells* (1983) 149 Cal.App.3d 721, 726.) "Because ***racial, religious or ethnic prejudice or bias is a thief which steals reason and makes unavailing intelligence***--and sometimes even good faith efforts to be objective--***trial judges must not foreclose counsel's right to ask prospective jurors relevant questions*** which are substantially likely to reveal such juror bias or prejudice, whether consciously or unconsciously held." [Emphasis added.] (*Id.* at p. 727.) Both adequate time and latitude in questioning are necessary to insure Plaintiffs have had the opportunity to select an impartial jury.

C. Arbitrary Time Limits Are Impermissible on Voir Dire.

The length of questioning permitted for attorney voir dire is subject to reasonable limitation by the trial judge. (*People v. Wright* (1990) 52 Cal.3d 367, 419; *People v. Williams* (1981) 29 Cal.3d 392, 408.) However, any limitations are subject to the requirements of Section 222.5 listed above.

In *People v. Hernandez* (1979) 94 Cal.App.3d 715, the court notes that "[a]lthough the trial judge has a duty to restrict the examination of the prospective jurors within reasonable bounds so as to expedite the trial (*People v. Dorsey* (1974) 43 Cal.App.3d 953, 966), the fixing of an arbitrary time limit for voir dire in advance of trial is dangerous and could lead to a reversal on appeal." (*Hernandez,*

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[2] Reversal of the judgment in *Wells* was compelled, because the trial judge precluded counsel from asking questions 5, 6 and 7. "These questions read respectively as follows: "5. Why are there so few blacks in professional golf and tennis?"; "6. Why are there so few blacks president [sic] of large corporations?" and "7. Why has there never been a black governor in California?" Each of these questions was relevant and substantially likely to uncover racial bias or prejudice, especially if followed up by reasonable questions testing the reasons for such answers as the prospective jurors would have given for them." (*Id.* at p. 727.)

supra, 94 Cal.App.3d at p. 719.)

The Court of Appeal considered these principles in *People v. Odle* (1988) 45 Cal.3d 386, 409, where the trial judge's limitation on voir dire was not found erroneous. In *Odle*, the trial court initially announced that each attorney would be limited to 25 minutes per prospective juror, but that time limit was not enforced. When the trial court noted that examinations were exceeding 25 minutes and asked if this would continue, defense counsel answer affirmatively to which the trial court did not object, and longer time per juror was allowed. The defendant asserted the time limitation, even though not enforced, adversely affected him because he was forced to hurry his examination. The California Supreme Court found no prejudice in this conduct.

Consequently, while a trial court's need to manage trial is acknowledged, the court may not place such limitations on voir dire that it prevents counsel conducting a liberal and probing examination of each juror, calculated to discover bias or prejudice with regard to the circumstances of the particular case, is prohibited by *California Code of Civil Procedure* § 222.5.

D. Peremptory Challenges May Not Be Used for Discriminatory Purposes.

Each party shall be entitled to six peremptory challenges to be exercised first by defendant, but a party may not use a "peremptory challenge to remove a prospective juror on the basis of an assumption that the prospective juror is biased merely because of his or her race, color, religion, sex, national origin, sexual orientation, or similar grounds." (*California Code of Civil Procedure* §§ 231(c), 231.5, 226(d).) While "[o]ne of the purposes for peremptory challenges is to permit an attorney to remove from the jury panel those who have individual characteristics which the attorney believes might make them sympathetic to the opposing party" *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1044), "the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16, of the California Constitution." (*People v. Wheeler* (1978) 22 Cal.3d 258, 276-277, disapproved on other grounds in *Johnson v. California* (2005) 545 U.S. 162, 168.) "[A] party is constitutionally entitled to a petit jury that is as near an approximation of the ideal cross-section of the community as the process of random draw permits." (*Ibid.*)

Procedurally, the California Supreme Court explains the appropriate three step process of

challenging the use of peremptory challenges which violate these principles:

> "If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, as in the case at bar, he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias."

(*Id.* at p. 279; see *Batson v. Kentucky* (1986) 476 U.S. 79, 97-98.)

This showing may be made based upon such factors as: disproportionate number of peremptories against a specific group subject to heightened scrutiny; the jurors in question share only this one characteristic their membership in the group; such circumstances as the failure of his opponent to engage these same jurors in voir dire questioning; and the challenging party need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule, but if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention. (*Wheeler, supra*, at 280-281.)

With regard to the first step of the process, the U.S. Supreme Court held "that California's 'more likely than not' standard is an inappropriate yardstick by which to measure the sufficiency of a prima case." (*Johnson v. California*, (2005) 545 U.S. 162, 168.) The Court reasoned, "it 'did not intend the first step to be so onerous that a defendant would have to persuade the judge—on the basis of all the facts, some of which are impossible for the defendant to know with certainty—that the challenge was more likely than not the product of purposeful discrimination. Instead, a defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred'" (*People v. Jordan*, (2006) 146 Cal.App.4th 232, 248, quoting *Johnson*), "so long as the sum of the proffered facts gives "rise to an inference of discriminatory purpose." (*Johnson, supra*, 545 U.S. at p. 169.) The court may not deny a challenge solely on the basis that some members of the "cognizable group" still remain on the jury. (*Turner v. Marshall* (9th Cir. 1997) 121 F.3d 1248, 1254.)

If the court finds that a prima facie case has been made, the burden shifts to the other party to

show if he can that the peremptory challenges in question were not predicated on group bias alone. The allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses. (*Wheeler, supra*, 22 Cal.3d at pp. 281-283.) Counsel should offer such explanations out of the presence of the remaining prospective jurors to avoid generating any resentment. (*People v. Adanandus* (2007) 157 Cal.App.4th 496, 501.) If the offending party fails to meet its burden and the trial court decides a peremptory challenge was exercised for a discriminatory purpose, then the jury thus far selected must be dismissed and a new panel must ordered to begin jury selection anew (unless the aggrieved party consents to an alternative remedy). (*Wheeler, supra*, 22 Cal.3d at 282.) If a trial court fails to follow this procedure, it is prejudicial per se. (*Wheeler, supra*, 22 Cal.3d at p. 281; *People v. Williams* (2000) 78 Cal.App.4th 1118, 1125.) Courts may issue prophylactic orders prior to any misbehavior, to forestall a *Wheeler* problem. (*People v. Boulden* (2005) 126 Cal.App.4th 1305, 1314; *People v. Muhammad* (2003) 108 Cal.App.4th 313, 325.) "In the event improperly challenged jurors have been discharged, . . . the court might [also] allow the innocent party additional peremptory challenges. [Citations.] [¶] Additionally, to ensure against undue prejudice to the party unsuccessfully making the peremptory challenge, the courts may employ the . . . procedure of using sidebar conferences followed by appropriate disclosure in open court as to successful challenges." (People v. Willis (2002) 27 Cal.4th 811, 821.) If such an order is issues, the trial court has authority to issue monetary sanctions (as well as other remedies) against an attorney who violates the *Wheeler/Batson* rule.

E. Jury Questionnaires Are Useful and Permissible.

Jury questionnaires are an accepted and often expedient method of obtaining information regarding prospective jurors commonly used in cases. *California Code of Civil Procedure* § 205 provides, "(c) The court may require a prospective juror to complete such additional questionnaires as may be deemed relevant and necessary for assisting in the voir dire process or to ascertain whether a fair cross section of the population is represented as required by law, if such procedures are established by local court rule. (d) The trial judge may direct a prospective juror to complete additional questionnaires as proposed by counsel in a particular case to assist the voir dire process." Section 222.5 also provides: "A court should not arbitrarily or unreasonably refuse to submit reasonable written

questionnaires, the contents of which are determined by the court in its sound discretion, when requested by counsel." Plaintiffs request this right to utilize jury questionnaires in order to properly determine jury bias or impartiality in this matter, which will also better expedite the voir dire process.

F. Jury Questions, As to All Issues to be Tried, Including Damages, May be Thorough and Probing

Pursuant to C.C.P. § 222.5, with respect to voir dire, both parties are entitled to engage in a "*liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case*...[and]...*form and subject matter of voir dire questions*" can be based on any "unique" element of the case or "responses or conduct of jurors which may evince attitudes inconsistent with suitability to serve as a fair and impartial juror in the particular case." This Court surely has encountered potential jurors during the voir dire process stating that it is "wrong to sue for non-economic damages" and/or who have simply never been in a situation where they have to think about how to value that loss. Furthermore, we are all in very hard economic times and the defendant(s), who plaintiff contends is/are responsible for serious injuries may be a sympathetic figure. But, jurors are not allowed to "let bias, sympathy, prejudice, or public opinion influence" their decision, pursuant to CACI 100. Prospective jurors may naturally out of sympathy want to award less in damages given the facts of the case or current economic conditions. Defendant must concede that it would improper if jurors deliberated and awarded plaintiff a reduced sum of $X because they felt sorry for the individual defendant or were worried about the Defendant's finances. A "liberal and probing" voir dire in this type of case requires Plaintiff's attorney to ask potential jurors - "If the evidence in this case justifies it, will you be return a verdict for $X million." It is expected that many jurors will say "no" and that such a demand triggers bias against plaintiff and plaintiff's attorneys - bias that plaintiff is entitled to know about up front. This type of questioning allows Plaintiff to probe and triggers frank and robust communications with jurors. Plaintiff should not learn of the jurors "responses" or "attitudes" to award such a sum by a defense verdict or a compromise verdict. Rather, Plaintiff is entitled to hear the prospective jurors "responses" and "attitudes" to these issues before they are selected, not following a verdict.

The *Rutter Group Treatise on Trials* recognizes that questions about specific dollar amounts can

be appropriate: "(4) [5:311] Other matters indicating possible bias, prejudice, etc.: Jurors may be questioned on any matter that might expose bias, prejudice or other ground for a challenge for cause or upon which prudent counsel would base a peremptory challenge. [See *People v. Williams* (1981) 29 Cal.3d 392, 402, 174 Cal.Rptr. 317, 321] (a) [5:312] Ability to award damages: Plaintiff's attorneys are usually permitted to question prospective jurors as to their ability to return a large verdict if supported by the evidence. (Some individuals may be incapable of rendering a $1 million dollar verdict under any circumstances.] For example, in a case involving a $1 million damage claim, plaintiffs' counsel may ask: "Assuming liability is established in this case, would you be able to return a verdict for $1 million?" Wegner, Fairbank, Epstein & Chernow, *CAL. PRAC. GUIDE: CIVIL TRIALS & EVIDENCE (The Rutter Group 2008),* p. 662."

The issue at voir dire is not whether the case justifies a verdict of $X million. That would be impossible because no evidence has been presented. But, palpable prejudice would occur if the evidence did justify it and 8 out of 12 jurors were in favor of awarding such a sum and a ninth juror says during deliberations that he/she does not care about non-economic damages and he/she would "never award more than $100,000" for Plaintiff's pain and suffering. Plaintiff is entitled to know if jurors have a maximum amount they were order or consider, irrespective of what evidence they hear. Any defendants' concerns that asking jurors about specific dollar amounts would precondition or indoctrinate jurors is unreasonable. Today's jurors do not simply award $X million because some Plaintiff's attorney talks about that sum during a few minutes of the voir dire process. Balancing the right of Plaintiff to conduct a "liberal and probing examination calculated to discover bias or prejudice with regard to the circumstances of the particular case" against any defendants' unreasonable concern of pre-conditioning, and permit fair jury selection that vigorously probes key issues including damages, and bias against awarding significant compensation if the evidence warrants it.

THE LAW OFFICES OF JOHN O. CLUNE

Dated: November 25, 2015

By: _____

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Attorney for Plaintiff
DANYELLE WOLF