THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE CHRISTENSEN FIRM, a Washington sole proprietorship, Plaintiff, v. CHAMELEON DATA CORPORATION, a Washington corporation; and DEREK S. DOHN, an individual, Defendants.	No. CV06-337 TSZ PLAINTIFF'S RULE 59 MOTION Noting Date: July 11, 2008

I. INTRODUCTION

Plaintiff The Christensen Firm hereby moves this Court for a new trial pursuant to Rule 59(a). A new trial is required because of: 1) Defendants' mid-trial disclosure of surprise-witness Daniel Gandara, who was Defendants' former counsel; 2) Defendants' trial misconduct; and 3) the erroneous admission of two hearsay exhibits that were drafted and offered into evidence by Defendants and were plainly prejudicial to Plaintiff.

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II. FACTS

A. Testimony of Former Defense Counsel Daniel Gandara

Daniel Gandara, Defendants' former counsel, was never disclosed as a witness prior to the close of discovery, *see, e.g.,* Dkt. #15, Ex. B. The Court had ruled prior to trial that Mr. Gandara and other witnesses that were not disclosed would not be permitted to testify. On Monday, May 26, 2008, in the middle of trial, Defendants notified Plaintiff's counsel that Mr. Gandara would be a defense trial witness for the defense the following day. Ex. I. On Tuesday, May 27, 2008, when Defendants informed the Court of their intent to call Mr. Gandara as a witness, Plaintiff objected. Mr. Gandara had not been disclosed, had never been deposed, and the Court had ruled that any witness not listed on the parties' initial disclosures could not testify at trial.

To justify their last-minute disclosure of Mr. Gandara, defense counsel represented to the Court on May 27, 2008 that the issues Mr. Gandara would address in testimony that day were new issues and thus Mr. Gandara could not have been identified as a trial witness before the close of discovery. The Court then permitted Mr. Gandara to testify. On May 27, 2008, Mr. Gandara proceeded to testify that: 1) early in this lawsuit, Mr. Gandara had offered to Plaintiff's counsel the return of Plaintiff's attorney-client electronic documents but Plaintiff's counsel had rejected such offers; 2) during Mr. Gandara's tenure as defense counsel Ms. Christensen had attempted to use the Protective Order improperly to redact personally embarrassing information from documents so that defense counsel would not be able to view such information; and 3) Defendants had promptly complied with all requirements of the Protective Order, including the obligation to obtain undertakings from Chameleon DATA employees and agents. *But see* Dkt. #19 at ¶ 9, Dkt. #17 at 3; Ex. G. Mr. Gandara's surprise testimony was then woven into the central theme in defense counsel's closing argument that

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Plaintiff had repeatedly been offered the return of the electronic documents but had refused the offer.

Mr. Gandara's testimony resulted in unfair surprise to Plaintiff. Defense counsel's representations to this Court - that these were all new issues justifying Mr. Gandara's eleventh-hour testimony - were false. Each subject in Mr. Gandara's testimony **had** been raised **prior** to the close of discovery on October 10, 2006. *See* Appendix A-1 (showing dates when parties raised issues that were subject of Mr. Gandara's testimony, including Defendants' failure to obtain undertakings pursuant to the Protective Order, the return of electronic documents, and the nature of the redactions in documents submitted to defense counsel).

In addition, Mr. Gandara's testimony itself was full of errors.[1] The Protective Order afforded special protection to Privileged Documents in Defendants possession, all of which Plaintiff had paid Chameleon DATA to collect, handle electronically, and store. Importantly, Mr. Gandara **never** volunteered to return nor offered to return these electronic documents to Plaintiff prior to October 2006. *See* Declaration of William F. Cronin ("Cronin Decl.") at ¶¶ 2-3.[2]

Mr. Gandara's surprise testimony concerning the alleged offer to Mr. Cronin to return documents substantially interfered with Plaintiff's presentation of the case and could not be rebutted with testimony. Because Mr. Gandara testified that his communications concerning this issue had been solely with Mr. Cronin, Mr. Cronin was the only individual who could refute Mr. Gandara's assertions, but Mr. Cronin's role as trial counsel effectively prevented

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[1] Plaintiff draws no conclusion and makes no contention whether Mr. Gandara knew his testimony was false at the time he testified.

[2] It was not until after this Court's October 30, 2006 Order (Dkt. #40) that Defendants provided Plaintiff with two storage devices purporting to contain all of Plaintiff's client documents.

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him from providing testimony. RPC 3.7. Ms. Christensen had no personal knowledge of the alleged "early 2006" communications to which Mr. Gandara referred; Ms. Christensen had in fact submitted a declaration on September 19, 2006, emphasizing the importance to her of the return of the electronic documents and the need to verify their removal from Defendants' computer systems. Dkt. #22 at ¶ 9. *See also* Appendix A-1.

III. ARGUMENT

Rule 59(a) provides that a court may grant a new trial "after a jury trial, for any reason a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). Assuming the Rule 59 motion is brought within the ten-day time limit, the Ninth Circuit permits a party to use the grounds enumerated in Rule 60(b) for granting a new trial under Rule 59(a). *See, e.g., Wharf v. Burlington Northern Railroad Co.*, 60 F.3d 631, 637 (9th Cir. 1995)("the standards for granting new trials are essentially the same under both rules, although a Rule 59 motion, because it must be made within 10 days, may require a slightly lower showing than a motion under Rule 60"); *Jones v. Aero/Chemo Corp.*, 921 F.2d 875, 878 (9th Cir. 1990)(where discovery misconduct is alleged, court can rely upon Rule 60(b)(3) for guidance, including fraud, misrepresentation, or misconduct of an adverse party). In addition, the Ninth Circuit has determined that a trial court may grant a new trial for a number of other reasons, including if the trial was not fair to the moving party, the verdict was based upon false or perjurious evidence, or to prevent a miscarriage of justice. *See, e.g., Molski v. M.J. Cable, Inc.*, 481 F.2d 724, 729 (9th Cir. 2007).

A. Mr. Gandara was a Surprise Witness Whose Testimony Substantially Interfered with the Presentation of Plaintiff's Case, Thereby Warranting a New Trial.

Mr. Gandara should not have been permitted to testify at trial. Under similar circumstances, the First Circuit Court of Appeals found that the trial court abused its discretion

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in refusing to grant a new trial under Rule 59 when the defendants "argued they were unfairly surprised at trial because the court allowed the plaintiff to offer the testimony of a previously undisclosed medical expert." *Perez-Perez v. Popular Leasing Rental, Inc.*, 993 F.2d 281, 285 (1st Cir. 1993). The *Perez-Perez* court concluded that a new trial was necessary because the testimony "introduced a novel theory of liability into this case. Defense counsel was denied an opportunity to design an intelligent litigation strategy to address the charge of visual impairment and to effectively cross examine Dr. Kleis in a highly specialized field of medicine [and] defense counsel was precluded from effectively addressing the charge." *Id.* at 287. *See also Sanford v. Crittenden Memorial Hospital*, 141 F.3d 882, 886 (8th Cir. 1998) ("Surprise during trial, by major variance in theory of recovery or defense, undisclosed until after the trial is underway, is a long-established ground for granting a new trial motion"); *Knowles v. Mut. Life Ins. Co. of New York*, 788 F.2d 1038, 1040 (4th Cir. 1986)(upholding trial court's grant of new trial on basis plaintiff had been unfairly surprised at the jury trial, where plaintiff was first informed of insurer's defense on key issue after the opening at trial and where plaintiff had no reasonable opportunity to meet the defense).

Similarly here, Defendants introduced a novel argument into the lawsuit in the middle of trial – they asserted for the first time, through the surprise testimony of Mr. Gandara, that shortly after the lawsuit was instituted in March 2006, Plaintiff had been offered and had rejected the return of the electronic client documents in Defendants' possession. Not only was Mr. Gandara's testimony a surprise, but Mr. Cronin would have directly rebutted it if he could have testified as a witness on this subject. *See* Cronin Decl. at ¶¶ 2-3. Nevertheless, because Mr. Gandara testified that the alleged communications were between himself and Mr. Cronin, Mr. Gandara's testimony was evidence that could not be rebutted without causing Mr. Cronin to violate the witness-advocate rule contained in RPC 3.7.

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B. Defendants Engaged in Misconduct Throughout Trial, Mandating a New Trial.

Plaintiff is entitled to a new trial if it can be shown by clear and convincing evidence that the verdict was obtained through fraud, misrepresentation, or misconduct. *See* Fed. R. Civ. P. 60(b)(3). For the purposes of this rule,

> "Misconduct" does not demand proof of nefarious intent or purpose as a prerequisite to redress. . . . The term can cover even accidental omissions - elsewise it would be pleonastic, because 'fraud' and 'misrepresentation' would likely subsume it. . . . Accidents -- at least avoidable ones -- should not be immune from the reach of the rule."

Jones v. Aero/Chemical Corp., 921 F.2d 875, 879 (9th Cir. 1990)(quoting *Anderson v. Cyrovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988)). Once misconduct is shown, Plaintiff must "'establish that the conduct complained of prevented the losing party from fully and fairly presenting his case or defense. Although when the case involves the withholding of information called for by discovery, the party need not establish that the result in the case would be altered.'" *Id.* (quoting *Bunch v. United States,* 680 F.2d 1271, 1283 (9th Cir. 1982) (citation omitted)).

There were numerous instances where Defendants' misconduct pervaded the jury trial. First, Mr. Gandara's appearance as a trial witness when he had not been listed in Defendants' initial disclosures was misconduct. Pursuant to Fed. R. Civ. P. 26, Defendants had a duty to supplement their witness list. Defendants only supplemented their list once and Mr. Gandara was never identified as a witness. *See* Dkt. # 15; Ex. B. *See also* Appendix A-1 (providing chronology regarding why Defendants were obligated to disclose Mr. Gandara as a witness prior to the close of discovery). In the leading case concerning the grant of a new trial for misconduct concerning discovery disclosures, the First Circuit stated: "Failure to disclose or produce materials requested in discovery can constitute 'misconduct' within the purview of [Rule 60(b)(3)]." *Anderson v. Cyrovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988)(citations

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omitted). If Mr. Gandara had been included in Defendants' Initial Disclosures, Plaintiff would have taken the same steps that were taken with every other Chameleon DATA witness before the close of discovery on October 10, 2006, i.e., served a subpoena duces tecum and deposed the witness. Plaintiff was deprived of that opportunity and, as a result, Mr. Gandara was allowed to testify at trial without ever being deposed or producing relevant documents.

Second and more troubling, defense counsel did not advise the Court that defense counsel intended to offer Mr. Gandara's testimony regarding communications with Mr. Cronin. At a minimum, this advance disclosure was needed so the Court could properly address the obvious problems with such testimony. The failure to make such a disclosure constituted trial by ambush of the worst kind. It allowed Defendants to offer testimony from Mr. Gandara that was not disclosed in discovery, that was not disclosed to the Court when Defendants explained during trial why Mr. Gandara's testimony was revealed late and was necessary, and that put Plaintiff in a position where the only rebuttal witness to Mr. Gandara's alleged conversation with Mr. Cronin was a witness – Mr. Cronin – who effectively could not testify pursuant to RPC 3.7. In a similar case, the First Circuit ruled:

> As already noted, there was, intentional or otherwise, an egregious breach of the discovery orders and the discovery rules which resulted in "substantial interference with the full and fair preparation" of plaintiff's case. We cannot know with certainty what impact the letter excerpts had on the jury, but to dismiss what happened as harmless error would render the discovery rules and orders issued thereunder useless. Moreover, where, as in this case, undisclosed evidence is introduced at a key point in the trial, it would be unrealistic to say that it had no effect on the jury's determination as to liability. If the jury decided that Dr. Klonoski was a tyrant as a husband and a liar, his chances of obtaining a favorable and fair verdict were destroyed. We find that the district court erred as a matter of law in allowing the letter excerpts into evidence and, as in *Anderson*, abused its discretion in not granting plaintiff's motion for a new trial.

Klonoski v. Mahlab, 156 F.3d 255, 275 (1st Cir. 1998).

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Third, Defendants' misconduct regarding the disclosure of Mr. Gandara as a witness prevented Plaintiff's claim from being fully and fairly presented to the jury and is grounds for a new trial. *Id.* Mr. Gandara's testimony, i.e., that Defendants had offered to return the electronic documents after the March 3, 2006 TRO hearing, was prejudicial error, and could have persuaded the jury that the case was unnecessary and thus bolstered Defendants' false assertions that it was Plaintiff, not Defendants, who prolonged this lawsuit. Defense counsel compounded the misconduct by arguing to the jury that an offer had supposedly been made by Mr. Gandara to Mr. Cronin to return the documents. *See Wharf v. Burlington Northern Railroad Co.*, 60 F.3d 631, 637-638 (9th Cir. 1995)(defense counsel's duty of candor to the court required counsel to correct a false fact and "[b]ecause that fact should not have been in evidence, it was improper for counsel to argue it to the jury"). Mr. Gandara's surprise "fact" became the centerpiece of defense counsel's closing argument in which counsel argued that the case had been prolonged because Plaintiff had refused to accept the alleged proffer to return the privileged documents. Plaintiff also does not have to demonstrate that the evidence altered the outcome. Under Ninth Circuit law, "where the case involves withholding of information called for by discovery, the party need not establish that the result in the case would be altered." *Jones v. Aero/Chemical Corp.*, 921 F.2d 875, 879 (9th Cir. 1990).

Fourth, Defendants sought and obtained motions in limine, summary judgment rulings, and limiting instructions that precluded Plaintiff from introducing evidence, yet at trial Defendants exploited the restrictions on Plaintiff by presenting evidence and making arguments directly aimed at the subjects of Defendants' own motions. Defendants moved to exclude evidence of Defendants' violations of the Protective Order. Dkt. #147.[3] Knowing that

[3] Plaintiff was only permitted to submit evidence to the jury concerning Defendants' failure to obtain undertakings from Chameleon DATA agents and employees, but was precluded from showing

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Plaintiff was precluded from offering any evidence of violations of the Protective Order, Defendants proceeded to argue to the jury that Plaintiff had presented no evidence that confidential information had been disseminated in violation of the Protective Order. Absent Defendants' successful motion *in limine*, Plaintiff would have shown continuous violations of the Protective Order, other than Defendants' failure to secure undertakings. *See* Christensen Decl. at ¶ 10. Defendants, who had moved for summary judgment on Plaintiff's right to injunctive relief, then argued that the jury ought to rule against Plaintiff because this was really a case about injunctive relief and that such relief had been granted or could be granted without the jury's involvement. Defense counsel referred repeatedly to the conversion claim during closing, knowing that it had been dismissed. Defendants' misuse of this Court's rulings is misconduct that warrants a new trial. *See, e.g., Anheuser-Busch, Inc. v. Natural Beverage Distr.*, 69 F.3d 337, 347(9th Cir. 1995)(where counsel makes arguments in violation of motion *in limine*, conduct is prejudicial and warrants new trial because party is prevented from rebutting it); *Clanahan v. McFarland Unif. School Dist.*, 2007 U.S. Dist. LEXIS 58710, *23 (E.D. Cal. August 3, 2007)(new trial necessary to avoid a miscarriage of justice because the "flavor of counsel misconduct influenced the jury by passion, prejudice and consideration of precluded evidence and counsel-created suggestions").

C. This Court Erroneously Admitted Prejudicial Hearsay Documents.

Over Plaintiff's objections, Defendants offered into evidence two inadmissible hearsay documents, Exhibits A-22 and A-35. They were two email messages that were particularly untrustworthy because Mr. Dohn drafted them **after** the dispute arose. *See United Telecommunications, Inc. v. American Television and Comm. Corp.*, 536 F.2d 1310, 1318 (10th

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instances where information subject to the protective order had been disclosed. *See* Christensen Decl. at ¶ 10.

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Cir. 1976)(noting that to avoid permitting a party to manufacture evidence supportive of its position, "letters written after a breach and after a party has become aware that litigation is imminent are seldom received. They are characterized as self-serving and inadmissible"). Mr. Dohn's anger is apparent in the emails – he clearly drafted the email messages to try to harm Ms. Christensen, both personally and professionally. Defendants sought the admission of the exhibits at trial to prejudice Plaintiff before the jury. Mr. Dohn's email messages contained outright lies, distortions, and other statements that were wholly irrelevant to the dispute. Defense counsel argued in closing that it was these two "personally embarrassing" documents that concerned Ms. Christensen, and not the thousands of attorney-client privileged documents in Chameleon DATA's possession.

Defendants did not offer Mr. Dohn's email messages into evidence against a party-opponent. *See* Rule 801(d)(2)(A). Mr. Dohn's self-serving statements were offered, over Plaintiff's objections, by Defendants and were thus hearsay.

> The statement of a party may be introduced as an admission only when offered against that party. *See U.S. v. Sanders*, 639 F.2d 268 (5th Cir. 1981); *Auto-Owners Insurance Company v. Jensen*, 667 F.2d 714, 722 (8th Cir. 1981). This principle is reflected by the standard but often unanalyzed objection that such testimony by a party constitutes a "self-serving declaration." 6 J. Wigmore, Evidence § 1732 (1976). Some confusion arises by reason of the fact that, to be admissible, a party's out-of-court statement need not have been against his interest when made. **But it may not be offered in his favor, but only against him**. *Auto-Owners Insurance co. v. Jensen, supra.*

United States v. Phelps, 572 F. Supp. 262, 265 (E.D. Ky. 1983)(emphasis added). Defendants never even argued that Mr. Dohn's self-serving statements fell within any hearsay exception. The Court's admission of these documents was reversible error. The Ninth Circuit reversed a verdict and remanded for a new trial where the trial court erroneously admitted into evidence a party's 216-page diary, which the Ninth Circuit found to be hearsay and chronicled the

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appellees' encounters with police and described the appellees' and others' feelings about these encounters and discussions. *Clark v. Los Angeles*, 650 F.2d 1033, 1037 (9th Cir. 1981).

> Admission of [the exhibit] was reversible error because its contents were highly prejudicial to the appellants. The diary is a heavily emotive document that does not simply relate factual occurrences, but is written in a style designed to arouse sympathy and create enmity for the appellants. Further, the document constitutes a written account of practically all of appellees' case against the appellants.

Id. at 1038.

Moreover, Defendants submitted these same documents to the Court *in camera* on September 7, 2006 to address the propriety of Plaintiff's redactions pursuant to the Protective Order. *See* Dkt. #17. In denying the motion, the Court specifically referred to Ex. A-35 as a document that Plaintiff was then entitled to redact using the Court's additional protective standard, "i.e., irrelevant, prejudicial, or damaging personal information may be sparingly redacted. Dkt. #40 at Para. 2." When Defendants unsuccessfully moved for sanctions regarding Plaintiff's privilege log, Dkt. #88, the Court denied the motion and upheld the privilege log. After submitting the issues to the Court and failing timely to move for reconsideration of these earlier decisions, defense counsel nevertheless submitted unredacted versions of these documents to the Court on the first day of trial.[4] Redactions that this Court had previously reviewed and approved based on full briefing by both parties were suddenly used at trial to suggest that Ms. Christensen had done something improper in redacting the documents and that the subject matter of the redactions was the reason for the lawsuit.

[4] Defendants never briefed the issue of overturning the law of the case, a discretionary right that "should be exercised sparingly so as not to undermine the salutary policy of finality that underlies the rule." *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 834 (9th Cir. 1982)(citations omitted).

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IV. CONCLUSION

For the foregoing reasons, this motion for a new trial should be granted.

DATED this 13th day of June, 2008.

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CERTIFICATE OF SERVICE

The undersigned declares as follows:

I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys of record for plaintiff The Christensen Firm herein.

I hereby certify that on June 13th, 2008, I electronically filed the foregoing document under seal with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following person:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 13th day of June, 2008, at Seattle, Washington.

Joyce Abraham

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