Case No. 05-17193

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANS, Inc.
Plaintiff and Appellant

v.

SACRAMENTO CITY UNIFIED SCHOOL DISTRICT,
TWIN RIDGES ELEMENTARY SCHOOL DISTRICT

Defendant and Appellee.

District Court Case No. CIV. S-98-0266 FCD PAN

APPEAL FROM UNITED STATES DISTRICT COURT
EASTERN DISTRICT COURT OF CALIFORNIA
HONORABLE FRANK C. DAMRELL, PRESIDING

APPLEANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellant, Plans, Inc. (People for Legal and Non-Sectarian Schools), is a non-profit California Corporation organized for the purpose, among other things, of educating the public regarding "Waldorf Education."

Dated: March 13, 2006

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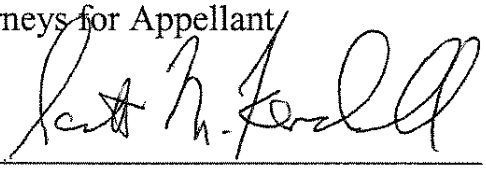
By 
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I. STATEMENT OF JURISDICTION

A. *The Basis for the District Court's Jurisdiction.*

The trial court previously found that jurisdiction was predicated upon 28 U.S.C. § 1331 AND 28 U.S.C. § 1343. (ER Tab 11, pp. 61-62.)

B. *The Basis for the Court Of Appeals Jurisdiction.*

This Court has jurisdiction of this appeal under the final judgment doctrine. A final Judgment was entered on October 4, 2005.(ER Tab 13, p. 103.)

C. *Filing Date of Appeal.*

Final Judgment was entered on October 4, 2005. Notice of Appeal was filed on November 3, 2005. (ER. Tab 13, p. 100)

II. STATEMENT OF ISSUES.

Did the Trial Court make prejudicial and reversible error by excluding percipient testimony from plaintiff's key witnesses because defendant's has previously identified the same witness as their expert, and then later dropped the witness.

III. STATEMENT OF THE CASE.

Plaintiff, PLANS, Inc., brought suit against the Twin Ridges Elementary School District (TRESD), and the Sacramento City Unified

School District (SCUSD), alleging that each of the districts were operating publicly funded Waldorf Schools in violation of the Establishment Clause of the First Amendment of the United States Constitution, the Fourteenth Amendment and the California State Constitution. (ER Tab 1, p. 2, ¶ 9.) PLANS further alleged that the primary purpose and primary effect of Waldorf schools was to advance religion, including the religious doctrine of Anthroposophy. (ER Tab 1, p. 2, ¶ 8.)

On the eve of a sixteen-day trial to the bench scheduled for January 14, 2002, the trial court reversed itself, granting summary adjudication on the issue of standing. Plaintiff PLANS appealed, and the matter was reversed and remanded. *PLANS, Inc. v. Sacramento City Unified School District, et al.*, 319 F.3d 504, (9th Cir., 2003).

On April 1, 2005, the trial court excluded a series of plaintiff's witnesses and exhibits under FRCP 37(c) on the grounds that plaintiff had failed to "disclose" the witnesses and exhibits. In addition, the court excluded witnesses critical to plaintiff's case that had appeared on PLANS's witness lists in Pretrial Conference Orders since 2001. The exclusion was presumed on the fact that early in the litigation defendant's had identified the witness or "their" experts even though two of the three were no longer on defendant's list at all.

The case was bifurcated with the matter of whether or not Anthroposophy was a religion to be tried first. All of the witnesses PLANS intended to use for this part of the trial had been excluded by the court, and PLANS could not proceed. This appeal ensued.

IV. STATEMENT OF FACTS.

After the matter was remanded, the trial court picked-up where it had previously left off. All of its pre-trial conference orders remained in effect, including its previous rulings on motions in limine.

In its Pretrial Conference Order, dated January 16, 2001, and in its Amended Pretrial Conference Order, dated April 13, 2001, the court explicitly identified Dr. Chrystal Olsen, Robert L. Anderson, and Betty Staley on PLANS witness list (ER Tab 2, p. 21; Tab 3, p. 45.)

Dr. Chrystal Olsen had previously been identified as an expert witness for defendants (ER Tab 2, p.21.) Plaintiff PLANS took her deposition over a two-day period, March 31, 1999 and April 9, 1999. While this witness continued to appear on PLANS witness list, she was dropped from defendants' list (ER Tab 11, p.81.)

Similarly, Robert L. Anderson had previously been designated as an expert witness for defendants, (ER Tab 11, p.81.) Defendants acknowledged, and the Pretrial Conference Order affirmed that Mr.

Anderson had percipient knowledge regarding this matter (ER Tab 11, p.81.) PLANS took Mr. Anderson's deposition on March 17, 1999 and April 5, 1999. Throughout the entire litigation, Mr. Anderson appeared on each and every witness list submitted by PLANS (ER Tab 2, p.21; Tab 3, pg. 45; Tab 11, pg. 76.)

Betty Staley initially appeared as an expert witness for defendants (ER Tab 3, p. 49.) She continued to be identified as such before the first appeal, (ER Tab 11, pg. 80-81.) but no longer appeared on defendants' witness list after the appeal. PLANS took her deposition on April 20, 1999, and April 23, 1999. Defendants acknowledged, and the Pretrial Conference order affirmed that Ms. Staley also had percipient knowledge about this case (ER Tab 3, pg. 49.)

In her deposition, Ms. Staley revealed:

- She is the Dean of Faculty at Rudolf Steiner College. ((ER Tab 5, pg. 63.)
- She is the director of the Waldorf programs in the public school at Ruldolf Steiner College. (ER Tab 5, pg. 63.)
- She is the director of foundation studies at Rudolf Steiner College. This is the basic introduction to Anthroposophy for teachers. (ER Tab 5, pg. 63-64.)

- She was specifically involved in adapting the Waldorf program for the subject public Waldorf School (John Morse). (ER Tab 5, pg. 65-66.)

At the time of the first trial, Betty Staley, Robert Anderson, and Dr. Olsen were confirmed trial witnesses for PLANS. At that time, there were no objections to any of these witnesses testifying on behalf of PLANS (ER Tab 3, pg. 39-40, 45.)

After the matter was reversed and remanded after the first appeal, the court re-opened limited discovery. As a result of defendants' responses to the additional discovery, as well as its own investigation related to those responses, PLANS identified additional witness and exhibits, which were included in its Pretrial Conference Statement (ER Tab 11, pg. 78-79, 85-89.)

Defendants subsequently filed Motions in Limine, Eleven, Twelve, and Thirteen. Motion Eleven requested "undisclosed" witnesses be excluded (ER Tab 7, pg. 32-35.)

Motion Twelve requested "undisclosed" exhibits to be excluded (ER Tab 18, pg. 36-39.) Motion Thirteen requested expert witnesses to be

excluded. PLANS, however, was not offering any expert witness testimony.[1]

In both Motions Eleven and Twelve, along with the supporting declaration, defendants never contend that plaintiff failed to comply with the disclosure requirements of FRCP Rule 26 (ER Tab 7, pg 33-35; Tab 8 pg. 36-39; Tab 9 pg. 40-42.) No party ever disclosed under Rule 26, as this case originated in 1997, when the Eastern District had opted out of Rule 26. All of the discovery in this case, by all parties, had been conducted through propounded discovery—depositions, interrogatories, admissions, request for production of documents.

The motions, instead, contended that the identified witnesses and exhibits never showed up in response to their propounded discovery—not automatic disclosures under Rule 26 (ER Tab 9, pg. 40-42.) Defendants, however, never identified a particular request that would have required the disclosure of a particular witness or document sought to be excluded (ER

[1] In the initial phase of the litigation, before the first appeal, PLANS offered its own expert witnesses. Some of those witnesses were excluded. After reviewing *Brown v. Woodland Joint Unified School District,* 27 F.3d1373 (9th Cir., 1994), PLANS concluded that it would not be helpful to engage in a "battle of the experts" as such testimony is not helpful in resolving Establishment Clause cases. (See *Id.* at p. 1382.) Instead, PLANS determined that its best presentation would be for Waldorf and Anthroposophy associated witnesses. For phase one, PLANS intended to use Betty Staley to describe what her school actually teaches Waldorf teachers about Anthroposophy. Her deposition had revealed that she would be candid and truthful, and PLANS contends she would have established through her percipient testimony that Anthroposophy is a religion, despite her "opinion" that it is not. For phase two, excessive entanglement, PLANS had deposed a series of teachers about their percipient practices in the classroom, as well as the training they received to implement such practices.

Tab 9, pg. 40-42.) In addition, Motion Eleven did not request the exclusion of Betty Staley, Robert Anderson, and Dr. Olsen (ER Tab 7, pg. 32-35.)

The hearing on the new Motions in Limine were on April 1, 2005. A review of the transcripts reveals the court's concern that witnesses and documents had not been disclosed under Rule 37(c) (ER Tab 10, pg. 51-60.) When the court was advised that the case never proceeded under that Rule, defendant's counsel had every opportunity to clarify, but instead stated: "We met all our discovery responsibilities. We disclosed witnesses and exhibits" (ER Tab 10, pg. 57-58.)

The court also took the position that because the defendants had identified Betty Staley, Robert Anderson, and Dr. Olsen as experts that some rule existed that plaintiff could not use them in his case in chief as percipient witnesses. This was apparently true even if the witnesses (Betty Staley and Dr. Olsen) were no longer defense witnesses (ER Tab 10, pg. 57.)

In the court's Third Amended Pretrial Conference Order it granted Motions 11 and 12, excluding all of the requested witnesses and exhibits identified by defendants'. The cited reason for the exclusions was FRCP 37(c) (ER Tab 11, pg. 65-66.)

Apparently not in response to Motions 11 and 12, the court also excluded plaintiff from calling Robert L. Anderson, Dr. Chrystal Olsen and

Betty Staley. The court inferred the reason was because they were currently or previously identified as experts by defendants (ER Tab 11, pg. 71.)

Plaintiff could not proceed with phase one of the trial without the testimony of Betty Staley, and the matter was dismissed. This appeal then ensued.

V. SUMMARY OF ARGUMENT.

The exclusion of Betty Staley, without cause, and without any identifiable prejudice to defendants, completely undermined PLANS ability to succeed in phase one of the bifurcated trial. Betty Staley was the architect of the public Waldorf movement, and she also was the key player in teaching to future teachers the relationship between Anthroposophy and Walfdorf (the Foundation).

Through her testimony, including the exhibits that would have been authenticated through her, PLANS contends that it would have been able to establish, through percipient facts, that Anthroposophy is a religion for the purpose of the Establishment Clause.

As Betty Staley had been disclosed since at least 1999 as a witness for plaintiff, it is puzzling that the court would exclude her on the grounds that she had not been disclosed. More troubling, the court appears to believe that percipient testimony of a material witness can be shielded merely by the

other party designating that person as an expert—even when they have dropped that person from their witness list.

While PLANS agrees that she may be excluded from giving opinion testimony, there is no legal basis, whatsoever, articulated by the court for excluding her percipient testimony. Moreover, no prejudice to defendants can be identified by permitting her to testify. For much of the time of the litigation, this witness was under defendants' control. On the other hand, this witness is a hostile to PLANS position.

Similarly, the exclusion of percipient testimony of Dr. Olsen and Robert Anderson is without foundation. Contrary to the position of the trial court, PLANS remains aware of no rule or authority that permits a party to shield the percipient testimony of a witness by designating them as their expert.

VI. STANDARD OF REVIEW.

A district court decision to impose or deny discovery sanctions generally is reviewed for abuse of discretion. *Avery Dennison Corp. v. Allendale Mut. Ins. Co.*, 310 F3d 1114, 1117-1118 (9th Cir. 2002); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F3d 1101, 1105 (9th Cir. 2001).

VII. ARGUMENT.

A. *No Authority Permits Exclusion of Relevant, Material, Percipient Testimony by Designating as Expert.*

It appears that the court's rationale for excluding percipient testimony from Staley, Anderson, and Dr. Olsen is simply because defendants identified them as experts. Remarkably, the court felt this appropriate even when defendants no longer intended to use Staley and Olsen as experts or percipient witnesses.

PLANS remains aware of no authority that supports such an exclusion. The percipient testimony of Staley is relevant and material. It would be an odd rule that would permit shielding the problematic percipient testimony of a witness by simply designating them as an expert. If that were the rule, it would invite all sorts of gamesmanship.

B. *Testimony From Staley, Anderson, and Dr. Olsen Does Not Unfairly Prejudice Defendants In Any Way.*

No serious argument can be made that these witnesses were not "disclosed." They were confirmed witnesses in the Pretrial Conference Order in 2001—without objection by defendants.

At best, the court's conduct appears to be intended to punish plaintiff for the perceived failure to disclose the witnesses and documents identified in Motions in Limine Eleven and Twelve.[2]

VIII. CONCLUSION.

The trial court abused its discretion by excluding the percipient testimony of Staley, Anderson, and Dr. Olsen. Contrary to the express statement of the court, no rule allows a party to shield itself from damaging percipient testimony by designating such a witness as its own expert.

The court's exclusion of these witnesses, and Betty Staley in particular, completely prejudiced PLANS ability to put on its case in phase one of the trial. If the court would have permitted the percipient testimony of theses witnesses, no prejudice would have been attributable to defendants.

This court should reverse the trial court, and remand this matter for trial on the merits.

Dated: March 13, 2006

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[2] While PLANS continues to believe that the exclusion of the requested witnesses and exhibits in Motions Eleven and Twelve were improper, as defendants did not even present a prima facie case for such a discover sanction, PLANS does not seek reversal of those orders except to the extent they apply to Staley, Anderson, and Dr. Olsen. Their discussion, however, was necessary to set the scene for the court's confusion regarding Rule 37(c), and the court's frustration.

CERTIFICATE OF COMPLIANCE PURSUANT TO

FED. R. APP. 32(a)(7)(C) AND CIRCUIT RULE 32-1

FOR CASE NUMBER 01-16437

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionally spaced, has a typeface of 14 points and contains 2,231 words.

Dated: March 13, 2006

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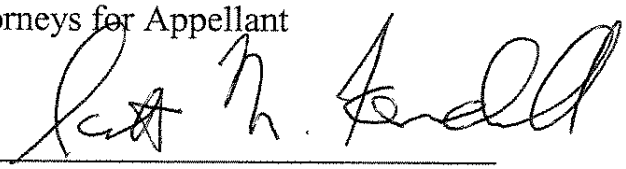
By 
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STATEMENT OF RELATED CASES

Appellant is aware of no related cases pending before the court.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 13, 2006, 2 copies of the foregoing, and one copy of the Appellant's Excerpt of Record were mailed via U.S. Postal Service, first class mail, to the following:

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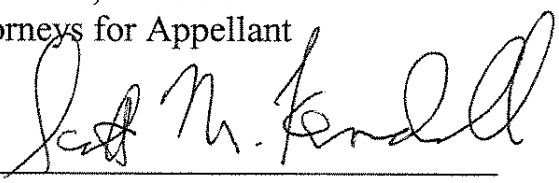
By 
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