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8 SUPERIOR COURT - STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA - UNLIMITED JURISDICTION

11 RONALD C. WILGENBUSCH and JUDITH
12 A. WILGENBUSCH,

13 Plaintiffs,

14 vs.

15 AMERICAN BILTRITE, INC., et al.,

16 Defendants.

Case No. RG19029791

DEFENDANT FRYER-KNOWLES, INC., A
WASHINGTON CORPORATION'S
MOTION FOR MISTRIAL

Judge: Hon Brad Seligman
Dept.: 23

Action Filed: August 2, 2019
Trial Date: June 29, 2020

1 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

2 Defendant FRYER-KNOWLES, INC., A WASHINGTON CORPORATION
3 (“FKWA”) seeks a mistrial because its chances of receiving a fair trial have been
4 irreparably damaged. On July 15, 2020, without any prior notice and contrary to the
5 Court’s final Order of July 7th, lead trial counsel for FKWA, Edward R. Hugo, was barred
6 from entering the courtroom to conduct the first day of *voir dire* in person. Mr. Hugo was
7 unceremoniously turned away because the Court was “not set up for counsel” given that
8 the judge was in a room by himself so he could speak unmasked. Accordingly, even
9 though Mr. Hugo was wearing a mask and although it appeared there were few enough
10 people in the courthouse to allow for appropriate social distancing, Mr. Hugo was
11 refused entry—not due to any overriding interest that would trump the constitutional
12 right of all members of the public (let alone lead trial counsel) to attend court
13 proceedings, but simply because the Court did not “anticipate” counsel’s arrival.

14 After the Court prevented Mr. Hugo from attending *voir dire* in person, there was
15 no means available for him to meaningfully participate in the virtual *voir dire*. The Court
16 never offered or provided a continuance or an alternative place in the Hayward
17 courthouse for Mr. Hugo to participate. As a result, **lead trial counsel for FKWA was**
18 **precluded from participating in any portion or phase of *voir dire* on July 15, 2020.**

19 FKWA also seeks a mistrial because the conduct of the virtual *voir dire* on July 15,
20 2020 was riddled with various problems that have prejudiced FKWA’s Due process rights
21 and the protections guaranteed by the California Constitution. Specifically, for at least
22 half an hour, the attorneys were put on mute by the moderator and were unable to
23 unmute themselves to object. Thus, FKWA’s objections were neither noted on the record,
24 nor ruled upon, thereby irrevocably tainting the fairness of the jury selection process.

25 Furthermore, given the virtual nature of *voir dire*, the Court was unable to fulfill its
26 role of controlling the proceedings before it, including juror conduct, resulting in jurors
27 who appeared to be asleep or were exercising, who left the proceedings without
28 permission, or who were otherwise distracted or absent. Such behavior is unacceptable

1 and is the antithesis of a fair and impartial jury that will be able to appropriately weigh
2 the evidence in this scientifically complex and lengthy trial.

3 Based on the foregoing, FKWA's chances of receiving a fair trial have been
4 irreparably damaged, and, therefore, this Court should declare a mistrial before the
5 Court, the parties, and the public expend additional resources on a virtual *voir dire*
6 process that has already proven—after only one day—to not only be unworkable, but to
7 also be highly prejudicial to FKWA.

8 **II. STATEMENT OF FACTS**

9 **A. Contrary to the Court's Orders Regarding the June 29th Pretrial** 10 **Conference and Jury Hardships, the July 7th Order Does Not State** 11 **that Counsel Must Attend *Voir Dire* Remotely, but Rather Provides** 12 **for Remote and In-Person *Voir Dire***

12 On June 1, 2020, the Court set the instant matter for trial on June 29, 2020 and
13 stated that the Pretrial Conference would be held “via video-conference (BlueJeans.com)
14 with all counsel appearing remotely.” (**Exhibit A** to the Declaration of Edward R. Hugo
15 (“Hugo Decl.”), at p. 1.) Thereafter, at Pretrial Conferences on June 29, 2020 and July 1,
16 2020, the Court orally proposed certain jury selection and *voir dire* procedures. (Hugo
17 Decl., ¶ 3.) Specifically, on June 29, 2020, the Court stated it intended to proceed with *voir*
18 *dire* using the videoconferencing platform Zoom, but on July 1, 2020, the Court noted that
19 if Department 511 of the Hayward Hall of Justice were available, then *voir dire* would
20 proceed with the jurors physically present in the courtroom, albeit wearing face masks.
21 (Hugo Decl., ¶ 3.)

22 FKWA promptly filed a trial brief the next day, July 2nd, and a supplemental brief
23 on July 6th, objecting to the Court's proposed jury selection and *voir dire* procedures.
24 (Hugo Decl., ¶ 4.) On July 7th, after a hearing specifically devoted to “jury selection and
25 trial procedures,” the Court issued a final Order with regard to “hard shipping” that
26 states: at the “**initial meeting**” of jurors, the Court would attend “via a remote BlueJeans
27 application (with counsel also attending remotely).” (Hugo Decl., ¶ 5; **Exhibit B** to (Hugo
28 Decl., at p. 2 (emphasis added).) With regard to actual *voir dire*, the Court's July 7th final

1 Order states: “[v]oir dire will be conducted via Zoom **and in person.**” (Hugo Decl., ¶ 6;
2 **Exhibit B** to (Hugo Decl., at p. 2 (emphasis added).)

3 **B. FKWA’s Lead Trial Counsel Was Improperly Turned Away from**
4 **Court on July 15th, Causing Him to Miss *Voir Dire***

5 In reliance on the Court’s July 7th Order, Edward R. Hugo, lead trial counsel for
6 FKWA, e-mailed the Court and all parties, stating in relevant part that he looked forward
7 to appearing in person on July 15th for the first time in this case. (**Exhibit C** to Hugo Decl.,
8 ¶ 7). Since the case was assigned to Judge Seligman, over FKWA’s objection, all hearings
9 were conducted remotely. (Hugo Decl., ¶ 7.) In other words, attorneys were not
10 permitted to personally attend any (not one) of the hearings that Judge Seligman held in
11 this matter. (*Ibid.*)

12 The next morning, July 15, 2020, Mr. Hugo appeared at the Hayward Hall of
13 Justice, wearing a mask (**Exhibit D** to Hugo Decl., ¶ 8) and following all health-related
14 Covid-19 guidelines, in order to participate, as lead trial counsel, in *voir dire*. (Hugo Decl.,
15 ¶ 8.) However, the Court refused to allow him to enter the courtroom. (*Ibid.*) He was
16 advised that “[t]he court **anticipated** that all counsel would attend voir dire remotely.
17 The courtroom **is not set up** for counsel. The Judge will be in another room, alone, **so he**
18 **can speak unmasked.**” (**Exhibit C** to Hugo Decl., ¶ 8 (emphasis added).)

19 The Court did **not** state that there was any rule barring Mr. Hugo from appearing
20 in person, but rather that the Court had not “anticipated” his attendance. The Court also
21 did not explain why it could not accommodate a single additional person wearing a
22 mask, even though several jurors were able to attend in person. Furthermore, other than
23 Mr. Hugo, the only individuals on the second floor of the courthouse were five “live”
24 prospective jurors and two apparent court attendants. (Hugo Decl., ¶ 10.) The courthouse
25 in total appeared to be a “ghost town,” and the instant matter appeared to be the only
26 trial or other court proceeding taking place in the entire Hayward Hall of Justice. (*Ibid.*)
27 Thus, it seems that the only reason Mr. Hugo was barred from entry, despite wearing a
28 mask, was to allow the judge to remain unmasked.

1 After waiting in the courthouse hall for over an hour and lodging objections to his
2 exclusion from the in-person *voir dire* proceedings of July 15th by e-mail (the only means
3 of communication with the Court available to Mr. Hugo), Mr. Hugo left the courthouse
4 after he believed that “virtual *voir dire*” had begun. (Hugo Decl., ¶ 9.) Once *voir dire*
5 began without Mr. Hugo, there was no means available to him to meaningfully
6 participate. (*Ibid.*) The Court never offered or provided a continuance or an alternative
7 place in the Hayward courthouse for Mr. Hugo to participate in *voir dire*. (*Ibid.*) As a
8 result, **lead trial counsel for FKWA was precluded from participating in any portion or**
9 **phase of *voir dire* on July 15, 2020.** (*Ibid.*)

10 **C. The Remote *Voir Dire* Process Is Plagued with Problems that**
11 **Violate FKWA’s Right to a Fair Trial, Including the Inability of**
12 **Counsel to Lodge their Objections and Juror Inattention**

13 Underscoring the importance of in-person attendance during *voir dire*, on July 15th,
14 there were times that the attorneys, including co-counsel for FKWA, Christina Glezakos,
15 were put on mute by the moderator and could not unmute themselves to object.
16 (Declaration of Tina M. Glezakos (“Glezakos Decl.”), ¶ 7; **Exhibit E** to Hugo Decl., ¶ 9.)
17 The attorneys had to e-mail the court clerk multiple times requesting to be taken off
18 mute. (*Ibid.*) At 10:02 a.m. on July 15th, counsel advised the Court via e-mail that they had
19 been muted and could not raise objections. (*Ibid.*) The Clerk responded that the attorneys
20 should be able to unmute themselves. (*Ibid.*) The attorneys responded that they could not
21 do so and were missing opportunities to object. (*Ibid.*) This same exchange repeated
22 several times between counsel and the Clerk until at least 10:31 a.m., during which time
23 various attorneys were unable to object. (*Ibid.*)

24 Further depriving FKWA of its constitutional and statutory right to a fair trial,
25 based on what FKWA could observe¹, numerous jurors who appeared remotely were
26 either not present for portions of *voir dire* or visibly distracted. For instance, during

27 ¹ The Zoom platform was configured such that, even in gallery view, it was not possible to see all 18
28 prospective jurors that were questioned as part of the first panel of jurors. (Declaration of Tina M. Glezakos
 (“Glezakos Decl.”), ¶ 3.) As such, it was not possible to see in one screen shot the reactions and facial
 expressions of the potential jurors simultaneously when the attorney conducting *voir dire* was asking
 questions. (Glezakos Decl., ¶ 3.)

1 portions of *voir dire*, Juror 104501419 was laying in what appeared to be a bed, curled up,
2 and possibly asleep. (Glezakos Decl., ¶ 5.a.) Juror 103818273 was working out on an
3 elliptical machine. (*Id.* ¶ 5.b.) Yet another juror, Juror 101366277 had a child that was in
4 and out of the room, and the juror appeared to leave the room at times with the child. (*Id.*
5 ¶ 5.c.) Furthermore, multiple jurors appeared to be using computers while having the
6 Zoom meeting playing on another device. (*Id.* ¶ 6.)

7 As demonstrated by the above, *voir dire* using remote technology has proven to be
8 unfeasible due to the inability to make objections for the record, inability to adequately
9 observe all jurors during *voir dire*, and absent or inattentive jurors. Moreover, in light of
10 Governor Newsom’s statewide closure announcement on Monday, July 13th, the ability to
11 proceed with trials has also been severely hampered due to litigation support vendors’
12 office closures, further violating FKWA’s Due Process and Constitutional rights to a fair
13 and impartial trial. (**Exhibit F** to Hugo Decl., ¶ 10.)

14 **III. ARGUMENT**

15 A motion for a mistrial should be granted when a party’s chances of receiving a
16 fair trial have been irreparably damaged. (*People v. Silva* (2001) 25 Cal. 4th 345; *Velasquez*
17 *v. Centrome, Inc.* (2015) 233 Cal. App. 4th 1191.) Here, FKWA’s chances of receiving a fair
18 trial have been irreparably damaged due to the following: (1) FKWA’s lead trial was
19 improperly turned away from the courtroom during the first day of *voir dire*, in violation
20 of FKWA’s constitutional and statutory rights; (2) as a result of being turned away,
21 FKWA’s lead trial counsel was not able to participate in *voir dire*; (3) FKWA was unable
22 to lodge objections during certain portions of *voir dire* because the Zoom moderator had
23 muted the participants; and (4) a number of the jurors appearing remotely were either
24 not paying attention or absent for portions of jury selection.

25 **A. Lead Trial Counsel’s Exclusion from In-Person *Voir Dire* (and, 26 *Ultimately, Portions of Voir Dire Altogether*), Violated FKWA’s 27 Constitutional and Statutory Right to Attend Civil Court Proceedings**

28 Pursuant to the First Amendment, the public has a right to attend civil

1 proceedings. (Cal. Judges Benchbook Civ. Proc. Trial § 5.53 (citing *Press-Enterprise Co. v.*
2 *Superior Court* (1986) 478 U.S. 1, 9; *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999)
3 20 Cal. 4th 1178, 1181-1182).) Code of Civil Procedure section 124 also guarantees that
4 “the sittings of every court shall be public.” This “presumption of openness in the
5 courtroom” may only be overcome “by an overriding interest based on findings that
6 closure is essential to preserve higher values and is narrowly tailored to serve that
7 interest.” (Cal. Judges Benchbook Civ. Proc. Trial § 5.53 (citing *Press-Enterprise Co., supra*,
8 478 U.S. at pp. 9-10; *People v. Perez* (2018) 4 Cal. 5th 421, 462-463; *People v. Scott* (2017) 10
9 Cal. App. 5th 524, 530).) Accordingly, “[i]nstances in which courtroom closure is
10 appropriate are uncommon.” (Cal. Judges Benchbook Civ. Proc. Trial § 5.53 (citing *Scott*,
11 10 Cal. App. 5th at p. 530).)

12 Here, in violation of the First Amendment and Code of Civil Procedure section
13 124, not only a member of the public, but **lead trial counsel** for FKWA, was turned away
14 from the courtroom during the first day of *voir dire*. The Court did not articulate any
15 cogent reason, let alone an “overriding interest,” justifying the closure of the courtroom
16 to Mr. Hugo. Furthermore, the closure of the courtroom is at odds with the “COVID-19”
17 section of the Alameda Superior Court’s website, which anticipates “visitors to court
18 facilities”² and provides guidelines for their admittance. Instead, the Court’s decision to
19 close its doors to counsel appears to have been based on convenience, *i.e.*, to allow the
20 judge to remain unmasked. However, convenience cannot override a party’s
21 fundamental right to Due Process and a fair trial.

22 Even more troubling, as a resultant of the Court’s decision to not admit Mr. Hugo,
23 Mr. Hugo was unable to participate in *voir dire* in any meaningful way. Assuming
24 *arguendo* that the Court had an “overriding interest” in preventing counsel’s entry, such
25 courtroom closure should have been “narrowly tailored” to allow lead counsel to
26 participate in jury selection. For instance, the Court could have offered Mr. Hugo an
27 alternate location in the courthouse to participate in *voir dire*, or a brief continuance to
28

² <http://www.alameda.courts.ca.gov/Pages.aspx/COVID-19>

1 allow Mr. Hugo to participate in *voir dire* virtually. However, neither option was
2 available to Mr. Hugo.

3 **B. FKWA's Chances of Receiving a Fair Trial Have Also Been**
4 **Irreparably Damaged Due to Counsel's Inability to Conduct**
5 **Meaningful *Voir Dire*, to Lodge Objections, and Due to Juror**
6 **Absence or Inattentiveness**

7 The California Constitution provides that "[t]rial by jury is an inviolate right and
8 shall be secured to all." (Cal. Const., art. I, § 16.) Thus,

9 *a jury's failure to pay attention to the evidence presented at trial is a form*
10 *of misconduct* which will justify the granting of a new trial if shown to be
11 prejudicial to the losing party. (See Code Civ. Proc., § 657, subd. 2.) *The*
12 *duty to listen carefully during the presentation of evidence at trial is*
13 *among the most elementary of a juror's obligations.* Each juror should
14 attempt to follow the trial proceedings and to evaluate the strengths and
15 weaknesses of the evidence and arguments adduced by each side so that the
16 jury's ultimate determinations of the factual issues presented to it may be
17 based on the strongest foundation possible. *Were the rule otherwise,*
18 *litigants could be deprived of the complete, thoughtful consideration of the*
19 *merits of their cases to which they are constitutionally entitled.* (U.S.
20 Const., 6th & 7th Amends.; Cal. Const., art. I, § 16.)

21 (*Hasson v. Ford Motor Co.* (1982) 32 Cal. 3d 388, 411 (emphasis added).)

22 To ensure the selection of a jury that will abide by its "duty to listen carefully
23 during the presentation of evidence," Code of Civil Procedure section 222.5(b)(1)
24 provides in pertinent part as follows:

25 ...counsel for each party shall have the right to examine, by oral and direct
26 questioning, any of the prospective jurors in order to enable the counsel to
27 *intelligently* exercise both peremptory challenges and challenges for
28 cause...During any examination conducted by counsel for the parties, the
trial judge *shall permit liberal and probing examination* calculated to
discover bias or prejudice with regard to the circumstances of the particular
case before the court. (emphasis added).

In *People v. King* (1987) 195 Cal. App. 3d 923, the Court of Appeal stated as follows
regarding an attorney's ability to conduct an effective and adequate *voir dire*:

...in practical terms, observing potential jurors may reveal as much about
them as counsel may learn from listening to them. As if to underscore the
importance of the visual aspect of jury selection, the legal term used to
describe this process – *voir dire* – is itself a combination of two French verbs
meaning "to see" and "to say." The importance of observation during *voir*
dire extends to court and counsel alike.

1 (Id. at p. 932.)

2 Inadequate *voir dire* that is “fundamentally unfair” is a basis for reversal later as
3 the right to *voir dire* is “a means to achieve the end of an impartial jury.” (*People v. Fuiava*
4 (2012) 53 Cal. 4th 622, relying upon *People v. Carter* (2005) 36 Cal. 4th 1215, 1250.) Without
5 adequate *voir dire* the trial judge’s responsibility to remove prospective jurors who will
6 not be able to impartially follow the court’s instructions and evaluate evidence cannot be
7 fulfilled. (*People v. Roldan* (2005) 35 Cal. 4th 646 (disapproved on other grounds by *People*
8 *v. Doolin* (2009) 45 Cal. 4th 390); see also Cal. Code Civ. Proc. § 128(a)(3) (court has the
9 power “[t]o provide for the orderly conduct of proceedings before it”); *California Crane*
10 *School, Inc. v. National Com. for Certification of Crane Operators* (2014) 226 Cal. App. 4th 12,
11 19 (judges “are responsible for ensuring . . . that juries are properly cared for and that all
12 court cases assigned to them are fairly and efficiently heard and decided”).)

13 Here, FKWA’s lead trial counsel, Mr. Hugo, did not have the opportunity to
14 participate in *any* portion or phase of *voir dire* on July 15, 2020 (Hugo Decl., ¶ 9), let alone
15 an opportunity to *meaningfully* participate in *voir dire*. Furthermore, although his co-
16 counsel, Ms. Glezakos, was able to participate remotely in *voir dire*, she was not afforded
17 the ability to conduct *meaningful voir dire*, as envisioned by the Constitution and
18 California Supreme Court caselaw, because the virtual proceedings were fraught with
19 prejudicial irregularities. First, counsel was not able to see all 18 prospective jurors that
20 were questioned in one screen when the attorney conducting *voir dire* was asking
21 questions (Glezakos Decl., ¶ 3), thereby defeating one of the principal purposes of *voir*
22 *dire*, which is to *observe* the jurors’ reactions. In addition, there were various periods of
23 time when counsel was muted, and, therefore, unable to object (*id.* ¶ 7), further calling
24 into question the fairness of the proceedings and the impartiality of the jurors selected.
25 Finally, various jurors’ failure to pay attention on the very first day of trial proceedings,
26 (including, most glaringly, one juror who was possibly asleep (Glezakos Decl., ¶ 5.a)),
27 raises serious concerns about the ability of any “virtual” jury to pay attention during the
28 remainder of *voir dire*, let alone trial itself. Furthermore, given the remote nature of the

1 proceedings, the Court is unable to ensure the jurors' attentiveness to the evidence like
2 the Court would be able to do during in-person proceedings. Taken together, these
3 circumstances demonstrate that FKWA already has been deprived of the right to a fair
4 trial, and that it will "be deprived of the complete, thoughtful consideration of the merits
5 of [its] case[] [by the jury] to which [FKWA] [is] constitutionally entitled." (*See Hasson,*
6 *supra*, 32 Cal. 3d at p. 411.)

7 **IV. CONCLUSION**

8 For the foregoing reasons, FKWA respectfully requests that this Court grant the
9 requested mistrial as FKWA's chances of receiving a fair trial have been irreparably
10 harmed.

11
12 Dated: July 16, 2020

HUGO PARKER, LLP

13
14 By: /s/ Edward R. Hugo

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FRYER-KNOWLES, INC., A

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