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A Toxic Pairing: Discovery Misconduct and Juror Neuropsychology in a Plant Patent Trial

"Earth & Table" Law Reporter

The most important plant patent trial of the early 21st century just took place in northern California. *California Berry Cultivars v. The Regents of the University of California* sorts out "stakeholder" rights associated with the University system's vaunted strawberry breeding program.

Two esteemed UC Davis professors left their academic positions and formed California Berry Cultivars (CBC) in order to commercialize their longstanding research accomplishments. They had spent their careers at the University's land grant college propagating and discovering new and improved varieties of strawberries. In a real sense, these professors *were* the University's strawberry breeding program.

The jury verdict is in. Cribbing from an old Rolling Stones song, it left the professors' reputations in tatters; and their private business interests, shattered.

In the fog of trial, one thing proved certain: a *discovery misconduct* jury instruction must have had a devastating impact on juror psyches from a neuropsychological standpoint. In simple terms, this post explains why.

Juror Neuropsychology in a Nutshell

From a jury's perspective, their cognitive task is binary: Whom do we like or dislike? Whom do we believe or disbelieve? Once they solve those riddles, the jury verdict form is easy to fill out.

Two recent books brilliantly explain the virtually unconscious thought patterns of human beings as they evaluate new and unfamiliar situations. They are Daniel Kahneman's *Thinking, Fast and Slow* (2011) and Jonathan Haidt's *The Righteous Mind: Why Good People Are Divided By Politics and Religion* (2012).

Heavily distilled, Daniel Kahneman's book describes how we unconsciously mold facts to fit our preconceived notions of human behavior. This is the world of "implicit bias" discussed at length in diversity training seminars. We often reach conclusions about variable fact situations instantly, rather than deliberately.

Jonathan Haidt's book approaches an analysis of human behavior from a different angle—that of moral foundations psychology, a still budding research field. His research demonstrates that each of us is born with a hard-wire moral coding that develops through nurture. These moral foundations relate to how we conduct ourselves in our most basic societal interactions.

In shorthand, these foundations include a moral concept and its antonym:

- Care/Harm: this moral foundation node concerns how we care for the most vulnerable members of our society, such as children.
- Fairness/Cheating: this encompasses how we interact with others, *e.g.*, in business dealings.
- Loyalty/Betrayal: this relates to one's relative standing in a family or other grouping.
- Authority/Subversion: this covers adherence to or subversion of established institutions.
- Sanctity/Degradation: this embraces religious modes of thinking, and food purity issues, among other things.

Haidt's research shows that individual moral foundations are also closely linked to political leanings. Progressive liberals, for example, tend to focus on only two moral foundations—care/harm and fairness/cheating—to the exclusion of others; whereas right wing conservatives tend to apply all five moral foundations to fact situations in a statistically equal distribution pattern.

Anyone watching the Democratic and Republican National Conventions last year will discern how the Democratic convention concentrated on issues of child-rearing and breaking the glass ceiling for women in their careers; and was roiled by Bernie Sanders supporters who felt the "fix was in." Care/harm and fairness/cheating moral foundations were in abundant display.

In contrast, the Republican convention and its attendees played up their loyalties to family and country. Uncle Sam-like costumes, military uniforms and patriotic banners were omnipresent.

Applied to a jury pool in a patent case, this mindset is called upon to judge a complex fact pattern with which jurors will most likely have had no prior experience. Instructed to determine the credibility of witnesses and a case's outcome, they will rely on unstated, implicit biases and unconsciously applied moral foundations when filling out the verdict form.

How Pretrial Discovery Tactics Can Backfire Badly at Trial

Whatever the outcome of post-trial motions and any appeal, the *California Berry Cultivars* case offers an object lesson in how to effectively lose a case at trial through pretrial discovery sanctions.

As lawyers know, almost all cases settle before trial. Skirmishes over what should or should not have been produced by litigant parties are often then forgotten. However, when a case goes to trial, perceived efforts to impede pretrial discovery can lead to disastrous consequences.

Here, CBC formed a business relationship with a Spanish company, International Semillas (IS), in order to research and test new strawberry varieties. Early on, CBC's counsel took a fervently-held position that strawberry research and propagation activities *performed in Spain* were not relevant to a case involving an application of U.S. patent law. Further, under the revised federal rules of procedure, CBC argued that the University's discovery demands relating to Spanish strawberry breeding activities were not proportional to the actual issues at trial, as only U.S. based conduct was at issue.

To make pretrial discovery matters worse, CBC's counsel incorrectly informed the University that the professors had not used any University-owned strawberry plant patents in their Spanish research efforts. Later, the University's expert witness would turn that misleading representation on its head through his DNA analysis—shredding the credibility of CBC and its counsel.

CBC tried valiantly to convince the presiding judge that it should not be blamed for IS's discovery failures. CBC employed the following decision-tree logic:

- CBC is not IS, even though they are in a contractual relationship, and cannot control IS's responses to the University's discovery demands.
- Even if IS documents and testimony are irrelevant, CBC wants these IS documents and deposition testimony, too.

- CBC encouraged IS repeatedly to comply with the University's discovery subpoenas, to no avail.
- The University could have obtained IS documents it wanted through other means and should have done so.
- CBC too has been harmed and prejudiced by IS's non-production of records.

Suffice to say, the presiding federal judge rejected CBC's discovery positions seriatim. Once the court determined that CBC had more business control over its Spanish business partner than CBC would acknowledge, the court had no problem in holding CBC directly accountable for IS's discovery shenanigans.

The resulting "Discovery Misconduct" jury instruction issued by the court is largely self-explanatory:

Discovery Misconduct

The University has diligently sought, but was prevented from obtaining, evidence of CBC activities in Spain from International Semillas, Javier Cano, and David Garcia Sinova. International Semillas violated Court orders by failing to produce Javier Cano or David Garcia Sinova for deposition in the U.S. and by failing to produce documents that the University requested. While Cano was later produced for deposition by videoconference, Cano obstructed the University's ability to discover his activities by improperly refusing to answer the University's questions.

You can consider this conduct when deciding the issues in this case, to the extent you find it relevant. For example, you may infer from this conduct that it was designed to conceal the full extent of CBC's activity in Spain, although you are not required to draw that inference. Dkt 317

A Predictable Jury Verdict

As its verdict, the *CBC* jury found that the departing professors: (1) converted the University's property interests in its strawberry breeding program; (2) breached fiduciary and loyalty duties owed to the University; (3) intentionally interfered with University patent agreements; and (4) willfully and directly infringed University strawberry plant patent rights by importing and using seeds derived from patented plants.[1]

From a neuropsychological standpoint, the verdict was most likely foreordained by the "discovery misconduct" jury instruction:

- Narratives of document destruction and deposition evasiveness are much easier for a lay juror to understand than complex issues of strawberry patentability.

- Faced with a clear statement that one side apparently acted improperly, the jury will quickly infer that their other conduct must also have been untoward, relying on the bromide that "you are known by the company you keep."

- For progressive liberal jurors, obstruction of pretrial discovery would demonstrate that CBC is a "cheater" and hence push their very strong "fairness/cheating" moral foundation buttons.

- For conservative jurors, the departing professors' surreptitious conduct must have provoked the moral foundation motifs of authority/subversion and loyalty/betrayal to their detriment.

- Ironically, the fact that the jurors *were not required* to draw any negative inferences from IS's discovery misconduct probably reinforced the fact that they could and should make such inferences. In this regard, making the inference voluntary—rather than mandatory—subtly encourages jurors to act on their instincts. Most people do not like to be told what to do and would resent a jury instruction that forces their hand by making the inference mandatory.

The Key Takeaway

The key takeaway of this post is simple: not even the most highly skilled trial lawyer can undo the intense neuropsychological impact of a *discovery misconduct* jury instruction. The *CBC* trial was over before it started.

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[1] The jury verdict did not entirely go in the University's favor. The jurors found that CBC and the departing professors did not (1) intentionally interfere with certain existing or prospective contractual relations; or (2) willfully infringe UC plant patents through "benchmarking" activities.

With respect to CBC's one (remaining) claim against the University (all others had been dismissed though pretrial motion activity), the jury found that the University did not breach a covenant of good faith and fair dealing with respect to strawberry patentability determinations or related requests for patent assignments.