

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

ROBERT E. HUNTER, D.V.M.; and )  
HOWARD ELEY, ) 2:06-cv-00457-GEB-EFB  
Plaintiffs, )  
v. ) ORDER\*  
COUNTY OF SACRAMENTO, )  
Defendant. )

On November 24, 2008, Plaintiffs filed a motion for a new trial arguing error was committed when part of Exhibit A, which was admitted into evidence, was not provided to the jury during its deliberations; and, when the Court failed to instruct the jury exactly as Plaintiffs requested. Defendant opposes the motion.

The argument concerning Exhibit A is unpersuasive. Counsel were expected to ensure that all admitted exhibits were given to the jury by inspecting the exhibits before the courtroom deputy clerk gave them to the jury. However, Plaintiffs' motion reveals counsel failed

\* This matter was determined to be suitable for decision without oral argument. L.R. 78-230(h).

1 to ensure all portions of Exhibit A were given to the jury. The  
2 record reveals that during jury deliberations the jury sent a note  
3 concerning Exhibit A, the content of which was disclosed to counsel  
4 for each party so they could suggest an appropriate response. The  
5 portion of the transcript involving the note follows.

6 THE COURT: I just received a note from the jury.  
7 The record shall reflect I'm conducting a  
8 telephonic conference call. It's 10:35 a.m., and  
today's date is November 13th. The time on the  
note that I just received from the jury is  
10:25, and it's as follows:

9 "Is the handwritten document that was presented  
10 (on the overhead projector) by the plaintiffs'  
attorney available as evidence? We can't locate it  
in the binder." And then it's signed by the  
11 foreperson.

Who is speaking?

12 MR. GORSKI: Gorski, Your Honor. That's part of  
Exhibit A, the defendant's exhibit binder.

13 MR. CREGGER: Judge, the only thing I can think of  
14 is that it's the claim -- the initial complaint  
made to internal affairs, which was handwritten.  
If that's the case, it is in Exhibit A. I'm just  
15 curious, I -- you know, when they say  
the handwritten document, I don't recall any  
16 others, but there may have been.

MR. GORSKI: That was the only one.

17 THE COURT: Mr. Gorski, you need to say your last  
name first so the record is clear.

18 MR. GORSKI: Gorski. Sorry, Your Honor.  
The handwritten document they're talking about  
19 that was on the overhead projector was the  
internal affairs complaint. It was filled out by  
me and sent in to internal affairs. It must be the  
one they're talking about. And it's part of  
20 Exhibit A. There is actually two copies of it in  
there, one with a sticky note and one without.

21 MR. CREGGER: Cregger. I agree it's in Exhibit A,  
if that's the document they're asking about.

22 THE COURT: Do you have a proposed response?

23 MR. CREGGER: I think the proposed response should  
24 be this, so we clarify what it is they're asking  
about, "If you're referring to the complaint made  
25 to internal affairs on behalf of plaintiff Hunter,  
it is in Exhibit A."

26 MR. GORSKI: And if it's not we can just bring them  
a copy.

27 THE COURT: Well, I'm not inclined to tell the jury  
28 that something is in Exhibit A if it's not in  
Exhibit A.

1 MR. GORSKI: It should have been, Your Honor,  
2 that's the whole point. It was part of Exhibit A.  
3 And the copy I was using on the overhead projector  
4 was mine that was printed off from the CD Exhibit  
5 A, and that's all that is. And so it should be in  
6 there as part of Exhibit A.

7 THE COURT: Should I respond by saying, "The  
8 parties think the document you reference is part  
9 of Exhibit A"?

10 MR. CREGGER: I think that's an appropriate  
11 response, Your Honor. If for some reason it didn't  
12 make it into the exhibit, it should have. I mean,  
13 as far as I recall, it was there. For the record,  
14 this is Cregger.

15 MR. GORSKI: I agree, Your Honor. This is Gorski.

16 THE COURT: But when you say "I agree," do you  
17 agree that I should write on the note, "Response:  
18 The parties think the document you referenced is  
19 part of Exhibit A"?

20 MR. GORSKI: Correct.

21 MR. CREGGER: Yes, Your Honor.

22 THE COURT: Thank you. Good-by.

23 Plaintiffs' counsel declares: "The Court ruled that the  
24 hand written note, if not in the exhibit binder, though part of  
25 Exhibit 'A', would not be permitted in the jury room." However, the  
26 transcript concerning the jury's note does not support this averment.  
27 The transcript reveals the Court's response to the jury's note did not  
28 foreclose the document being given to the jury upon further inquiry.  
Moreover, since Plaintiffs' counsel agreed with the response given to  
the jury, and did not object to it at the time, Plaintiffs have waived  
basing their new trial motion on this response. Accordingly, this  
portion of Plaintiffs' motion is denied.

23 Plaintiffs' challenge to the jury instructions given at  
24 trial is based on a one sentence conclusory argument which assumes  
25 Plaintiffs' proposed instructions were not considered before the jury  
26 instructions were finalized. This argument is also unpersuasive.  
27 "Jury instructions must be formulated so that they fairly and  
28 adequately cover the issues presented, correctly state the law, and

1 are not misleading." Duran v. City of Maywood, 221 F.3d 1127, 1130  
2 (9th Cir. 2000). "The instructions must allow the jury to determine  
3 the issues presented intelligently." Fikes v. Cleghorn, 47 F.3d 1011,  
4 1013 (9th Cir. 1995). Since Plaintiffs have not shown that the  
5 instructions given failed to "fairly and adequately cover the issues"  
6 tried, this portion of the motion is also denied.

7 Therefore, Plaintiffs' motion for a new trial is denied.

8 Dated: January 8, 2009

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10 GARLAND E. BURRELL, JR.  
11 United States District Judge

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