

# The Sound of One Juror Clapping? Verdict Affirmed!

By HERB FOX

What is the sound of one juror clapping during a plaintiff's rebuttal argument? Unless there is actual prejudice, that sound is the Court of Appeal affirming judgment for the plaintiff.

During closing arguments after a three-day jury trial in a contract dispute heard in San Luis Obispo Superior Court, plaintiff's counsel referred to BAJI 2.22, telling the jury that "if you decide that that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said." In response, Juror No. 2 applauded.

After a lunch break, the trial court and counsel interviewed each juror separately, in an effort to determine the impact of Juror No. 2's applause. Juror No. 2 explained, "I was pleased with the statement that was read whereas if it was proved that somebody lied on the stand that all of their testimony could be dismissed."

All of the other jurors noted the applause, but all denied that it would impact their impartiality. The jurors found the applause odd, embarrassing or an expression of stress. None

recalled the statement that prompted or immediately preceded the clapping.

The trial court declined to remove Juror No. 2. It noted that the conduct was unusual but "no grounds for substitution" because the incident did not cause any of the jurors to be "influenced or prejudiced." It further found "that the incident in and of itself is not of such a magnitude that it would require automatic removal."

Upon deliberations, the jury awarded plaintiff over \$300,000. Defendant filed a motion for new trial, arguing that the applause and other statements made by Juror No. 2 during deliberations constituted misconduct. The trial court denied the motion, and the defendant appealed.

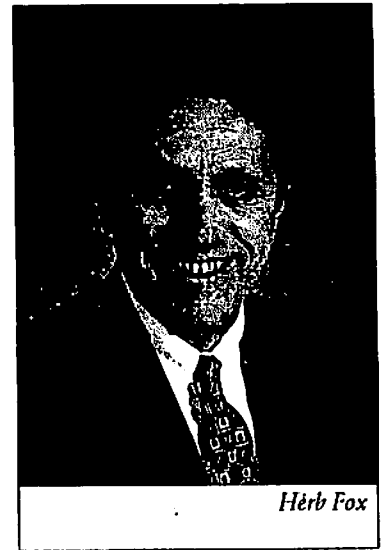
In a published opinion written by Justice Kenneth Yegan, the Court of Appeal affirmed. The Court found that the clapping was "tantamount to the formation of an opinion as to the credibility of a witness" and was "technical misconduct." And on appeal, serious juror misconduct gives the appellant a leg up because there is a presumption of prejudice.

But that presumption is not applied in the event of every insignificant infraction of the rules by a juror. "Where the misconduct is of such a trifling nature that it could not in the nature of things have prevented either party from having a fair trial, the verdict should not be set aside."

Here, the Court of Appeal found the misconduct to be insignificant. "The applause, by itself, does not indicate that Juror No. 2 had unfairly pre-judged the witnesses' credibility or that she was unwilling to consider other jurors' points of view. Moreover, there is no evidence the applause impacted the jury's deliberations in any way."

The Court also rejected the arguments of misconduct during deliberations, relying largely on the rule that a jury verdict cannot be impeached by evidence of the jurors' mental processes or reasoning.

The published opinion is *Bandana Trading Co., Inc. v. Quality Infusion Care, Inc.*, Court of Appeal Case No. B196119, filed on July 21 2008. Mark Yanis of Huntington Beach represented Appellant; Roy E. Ogden and Sue N. Carrasco, of Ogden & Fricks in San Luis Obispo, represented Respondent. ■



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