No. 11-17250

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KARIN KLEIN,

Plaintiff-Appellant,

vs.

TAP PHARMACEUTICAL PRODUCTS, INC.,
ABBOTT LABORATORIES, and
TAKEDA CHEMICAL INDUSTRIES, LTD.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Nevada
No. 2:08-CV-00681-RLH-RJJ
The Honorable Roger L. Hunt, United States District Judge

MOTION FOR LEAVE TO FILE AND AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA (SUPPORTING APPELLANT AND REVERSAL)

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I. MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Consumer Attorneys of California ("CAOC") respectfully moves the Court for leave to file an amicus curiae brief supporting appellant Karin Klein. *See* Fed. R. App. P. 29(b). Klein does not oppose leave to file. This motion is necessary because appellees have advised through counsel that they do not consent to CAOC's participation as amicus curiae. *See* 9th Cir. R. 29-3 & advisory committee note.

Founded in 1961, CAOC is a voluntary non-profit membership organization of over 3,000 consumer attorneys practicing in California and other states. Its members predominantly represent individuals subjected to consumer fraud, unlawful employment practices, personal injuries and insurance bad faith. CAOC has taken a leading role in advancing and protecting the rights of consumers, employees and injured victims in both the judicial and legislative branches. *See generally* www.caoc.org. CAOC has regularly been granted leave to participate as amicus curiae in the Ninth Circuit. *See, e.g.*, *Makaeff v. Trump Univ.*, No. 11-55016; *Mazza v. Am. Honda Motor Co.*, No. 09-55376.

Here, CAOC addresses the standards of review that apply to the claims of error raised in Klein's opening brief. The proper standard of review is always a threshold consideration on appeal. CAOC examines, in particular, the abuse of discretion standard of review. To give another perspective on the matter, CAOC respectfully asks the Court to grant leave to file the attached amicus curiae brief.

II. AMICUS CURIAE BRIEF[1]

A. The Discretion Vested in District Courts Is Not License to Wholly Prevent One Party from Presenting Legally Relevant Evidence to a Jury

Appellant Klein is candid about the standard of review governing most of the issues she raises – abuse of discretion. Because the issues here are fact-intensive and evidentiary in nature, the Court at first blush might view this appeal as a straightforward candidate for affirmance. Citing the applicable standards of review, the appellee pharmaceutical company will almost certainly argue as much.

But not so fast. "Little turns" on the "label" affixed to a standard of review. *Koon v. United States*, 518 U.S. 81, 100 (1996). Indeed, abuse of discretion is an umbrella term. This mode of review applies to many different situations and, as a result, its exact meaning depends on context.

One theme is consistent and crucial about abuse of discretion. Just because, in contrast to de novo review, abuse of discretion generally allows a range of choice, district courts may not simply "do as they please." *Daniels v. Allen*, 344 U.S. 443, 497 (1953). As Justice Frankfurter forcefully stated: "Discretion without a criterion for its exercise is authorization of arbitrariness." *Id.* at 496. To borrow from a scholar

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[1] CAOC certifies that no party's counsel authored this brief in whole or in part; no party or its counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than CAOC, its members and its counsel here prepared the brief or made any monetary contribution toward preparing it. *See* Fed. R. App. P. 29(c)(5).

making the same point: "It runs strongly against the grain of our traditions to grant uncontrollable and unreviewable power to a single judge." *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 184 (1978) (Maurice Rosenberg, Professor of Law, Columbia University).

The Supreme Court has therefore emphasized that "[w]hether discretion has been abused depends" on "the bounds of that discretion and the principles that guide its exercise." *United States v. Taylor*, 487 U.S. 326, 336 (1988). To take one example pertinent to this appeal, where a district court "premised" its ruling on "improper legal criteria" – even on an issue usually regarded as a discretionary call – the court below has "abused its discretion." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980-81 (9th Cir. 2011). Here, as appellant Klein has explained, the district judge's evidentiary rulings are at loggerheads with substantive law ***deeming*** admissible the very evidence (other Lupron warnings) she sought to present – yet never seen by the jury. *See* Appellant's Opening Brief (Corrected) (Dkt. No. 24-2) ("AOB") at 19-21.

The notion of trial court leeway is also easily punctured for the adverse event reports the jury was not allowed to hear about. The district court either misapprehended, or failed to follow, Nevada Supreme Court precedent recognizing this evidence as relevant and admissible in this type of suit (asserting causes of action under Nevada law). AOB at 23. So too for federal regulatory law that points to the same conclusion. AOB at 25. Even where a standard of review is normally viewed as

"deferential," as with evidentiary rulings, this Court "accord[s] the decisions of district courts no deference when reviewing their determinations of questions of law." *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010). Trial courts commit reversible error by grounding their rulings on "a materially incorrect view of the relevant law." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990). A district court going down this path "by definition abuses its discretion." *Koon*, 518 U.S. at 100.

Importantly, district courts receive no deference, in particular, on questions of state law. "The obligation of responsible appellate review and the principles of a cooperative judicial federalism . . . require that courts of appeals review the state-law determinations of district courts *de novo*." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 239 (1991). This ensures "doctrinal coherence" and "decisional accuracy" in federal litigation that turns, as this appeal does to a large degree, on Nevada law being correctly applied. *Id.* at 231-32.

On the record in this case involving state law causes of action, the abuse of discretion standard is not highly deferential. A "ruling should be viewed as lying in the area of the lower court's discretion only in the rare situations where the underlying reasons for bestowing it there warrant appellate court deference." *Appellate Review of Trial Court Discretion*, 79 F.R.D. at 184. Here, the discovery and evidentiary rulings challenged by Klein present "legal concepts in the mix of fact and law," which, due to

"concerns of judicial administration," push the matter closer to independent review. *United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc) (internal quotation marks omitted), *cert. denied sub nom. Hinkson v. United States*, __ U.S. __, 131 S. Ct. 2096 (2011).

B. The Claims of Error and Their Prejudicial Impact Are Viewed Collectively, Not Piece by Piece or in Isolation

There is no polite way to characterize the proceedings below. With all respect to the district court, the trial and discovery skirmishes preceding it were a miscarriage of justice. This is the rare case where, for the reasons Klein has identified, this Court should reverse for a do-over.

The civil trial is becoming a rarity due to the increasing difficulty of defeating motions to dismiss under decisions such as *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), as well as passing summary judgment. There is also the daunting cost of trying a complex case against a well-funded corporate defendant. But Klein got to a jury, only to be entirely shackled in the evidence she was allowed to present. It is particularly galling to have qualified (and expensive) expert witnesses on hand to testify, only for them to be shut down before the jury and precluded from offering competing expert opinions. The pattern shown by the record is deeply disturbing. Virtually every discovery and evidentiary ruling, and other orders of significance, went for one party. Klein was not entitled to a perfect trial, but at least an evenhanded one. Such a one-sided proceeding was not the fair trial our system demands.

Appellees may parse each of the rulings Klein has challenged, and seek to justify them individually as within the district court's discretion. The prejudicial effect, however, is evaluated in the aggregate. Of course, "individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." *Bourjaily v. United States*, 483 U.S. 171, 179-80 (1987). The sum of Klein's evidentiary presentation was entirely, and erroneously, kept from the jury. This should more than suffice to reverse for a new trial.

III. CONCLUSION

For the reasons stated, CAOC respectfully urges this Court to reverse and grant Klein the relief she seeks.

DATED: June 15, 2012

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STATEMENT OF RELATED CASES

Amicus curiae Consumer Attorneys of California is unaware of any pending appeals in this Court related to this matter. 9th Cir. R. 28-2.6.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,384 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using a proportionally spaced typeface using Microsoft Office Word 2003 SP3 with 14-point Times New Roman font.

DATED: June 15, 2012

s/ KEVIN K. GREEN
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CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2012, I authorized the electronic filing of the foregoing **MOTION FOR LEAVE TO FILE AND AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA (SUPPORTING APPELLANT AND REVERSAL)** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the "active" email addresses denoted on the attached Service List for Case 11-17250. I further certify that I caused to be mailed the same document via the United States Postal Service to the "not registered" participants indicated on the Service List for Case 11-17250, as indicated below:

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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 15, 2012.

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