

09-17533

United States Court of Appeals
for the Ninth Circuit



SHELDON G. ADELSON,
Plaintiff-Appellant,

v.

MOSHE HANANEL,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. The Trial Court Improperly Excluded Evidence That Hananel Made the Defamatory Statement.

A. Hananel Mischaracterizes the Record About the Macau Articles.

A new trial is warranted because the trial court improperly excluded evidence of Hananel’s media campaign against Adelson, including a press release and articles quoting interviews with Hananel, including two articles that included the same defamatory statement that was published in the *Las Vegas Sun* and was at issue in this case. Because the jury found for Hananel on the basis that he had not actually made the statement, this exclusion was prejudicial.

Hananel argues first that two articles from newspapers in Macau, which contained the same statement that the *Sun* published, were inadmissible because Adelson had no way of “prov[ing] that Hananel had made the statement to the Macau newspapers.” Br. 13. The Magistrate Judge did not accept that objection, and Judge Reed did not even mention it. And for good reason—it would prove far too much. Hananel disputed making the statement to the *Sun* as well, yet he did not, and cannot seriously, contest that the *Sun* article was admissible. Hananel’s proposed rule would make it virtually impossible to prove defamation, particularly in light of the trial court’s prior ruling barring Adelson from deposing the *Las Vegas Sun* reporter, even concerning his general practices. If the reporter’s shield statute prevents speaking to the reporter, and the statement itself is inadmissible

unless the defendant admits to it, then a defamation claim could proceed only on the defendant's consent.

This objection also depends on a misstatement of the record. Hananel quotes the response of Adelson's counsel to make it sound as if he "was answering the wrong question" and had no response to the court's actual question about how to introduce the Macau articles. Br. 13-14. In fact, the colloquy continued, immediately following the portion that Hananel quotes:

THE COURT: So he [Hananel] does acknowledge speaking to reporters in Macau about his disputes with Mr. Adelson?

MR. KENT: Yes.

THE COURT: He does not admit that he made the statement that you allege is defamatory?

MR. KENT: Correct.

THE COURT: And so your position is, the fact that another newspaper that he acknowledged speaking to picked up the same quote, makes it more likely than not that he made the statement that was attributed to him in the Las Vegas Sun?

MR. KENT: Absolutely.

A-21.

Hananel also asserts that the Macau newspapers "copied the *Sun* article word for word." Br. 14. A comparison of the original Portuguese articles shows that that is simply not the case. Among other differences that are obvious even to non-Portuguese speakers, the *Hoje Macau* article is significantly longer than the *Ponto*

Final article, belying the allegation that they both simply copy the *Sun* article, and the *Hoje Macau* includes a reference to the “Las Vegas Sun” in the third paragraph, while the *Ponto Final* refers to the “PONTO FINAL” in the first paragraph, neither of which are mentioned in the *Sun*. In addition, even if the Macau articles were merely based on the article in the *Sun*, they would still have been relevant. In light of the evidence (much of which was excluded) that Hananel had hired a publicist and that the publicist distributed a press release to reporters worldwide, a jury easily could have inferred that it was not just coincidence that these stories appeared in Macau newspapers and that it was Hananel who was responsible for bringing the *Sun* article to their attention. That inference, in turn, would have been relevant both to the veracity of Hananel’s claim that he had been misquoted and to his state of mind.

Moreover, those issues could have been resolved by the trial court, but Hananel never made that argument below. He noted that “this article is *possibly* picked up from the earlier article here,” but his argument for exclusion was only that Hananel disputed making the statement to the Macau reporters. A-21-22 (emphasis added). Adelson’s counsel also acknowledged the possibility that the Macau articles were merely republications but explained that they still would be relevant to damages. A-19-20.

Hananel further contends that the Macau articles were evidence of “prior bad act[s],” subject to a heightened standard under Rule 404. Br. 15. Hananel’s statements to other newspapers, however, were not “bad acts”—he argued that the statements were all true. A-111-15, 115-16. And in any event, the court made no finding that there was insufficient foundation for the Macau articles under Rule 404. Instead, it relied on the plainly mistaken view that because the *Sun* article was the sole basis for the defamation claim, any evidence of similar statements was ipso facto inadmissible, even to prove that Hananel made the statement to the *Sun*. A-3-4.

B. The Other Articles Were Also Relevant.

The district court also erred by excluding a series of other articles and a press release from Hananel’s publicist, showing his efforts to reach media around the world. With the benefit of this context, the jury could have doubted Hananel’s story that he spoke to, and was quoted accurately by, numerous reporters, but that the sole instance where he was misquoted happened to be the very article at issue in this case. The other articles therefore were relevant to prove that Hananel had also made the statement to the *Sun* and to show that the statement was not accidental.

Hananel responds only by pointing out that those articles did not contain the identical statement and that reporters had called both Adelson and Hananel about

the lawsuit in Israel. Br. 18. That is true, but irrelevant. As the court reasoned in *Fiber Systems*, other statements, “while perhaps not defamatory on their face, were relevant to the question of whether FSI defamed the defendants.” 470 F.3d 1150, 1170 (5th Cir. 2006). Hananel notes that the evidence in *Fiber Systems* was used to show malice, rather than that the statement had actually been made (Br. 21), but the same logic applies—Hananel’s denial of making the statement to the *Sun* would have been less persuasive in light of evidence that he did speak to many other reporters.

Hananel quotes Adelson’s post-trial argument on punitive damages to suggest that Adelson never said that the other articles were relevant to show malice. Br. 20. Of course, Adelson could hardly rely on those articles after a trial at which they had been excluded. But before trial, he consistently argued that they were relevant precisely to prove state of mind. *See* A-22 (“First, they do show Mr. Hananel’s state of mind.”); A-23 (“goes to his state of mind”); A-345 (article relevant “to the damages as well as to show an intent, knowledge that this was false”). The trial court’s denial of punitive damages on the basis that “the testimony we have is that the reporter called him and not that he called the reporter” (Br. 20-21 (quoting A-128)), when viewed in light of its exclusion of evidence that would have showed a systematic media campaign by Hananel, only amplifies the prejudice from that exclusion.

Hananel also quotes a blanket order ruling on multiple exhibits proffered by both parties to suggest that the trial court found these articles to be irrelevant and prejudicial. Br. 23 (quoting A-9). It is not even clear that this order refers to the articles: the court specifically referred to evidence “to support [each side’s] claims and defenses on the underlying merits of the prior and pending litigation” in other jurisdictions (A-8), a characterization that does not fit. As explained in Adelson’s opening brief (at 10-11), the reason that the court excluded the articles and the press release was that it believed that no statement by Hananel other than the *Sun* article was relevant for any purpose. A-16-17; A-22-31. That ruling was plainly overbroad.

Finally, Hananel argues that the articles should have been excluded as prejudicial under Federal Rule of Evidence 403. Br. 22-23. Hananel’s argument for prejudice essentially admits their relevance: he says that the jury “easily could have . . . impermissibly concluded that because Hananel had been quoted in other articles, he more likely than not made the statement to the *Sun*.” Br. 23. That is exactly why the articles *were* relevant. The fact that Hananel was quoted correctly in newspapers around the world tends to cast doubt on his explanation that the *Sun* either mistakenly or deliberately fabricated the statement. Despite his initial protestations that the articles “did not shed light on whether Hananel made the

alleged defamatory statement to the *Sun*” (Br. 17), it is clear that he sought to exclude the articles for precisely the opposite reason.

II. The Trial Court Failed To Cure the Prejudice From Hananel’s Improper Argument and Testimony.

A. As a Result of Hananel’s Misconduct, the Jury Heard a Prejudicial, One-Sided Account of the Prior Cases.

There is no question that Hananel’s counsel repeatedly violated the trial court’s rulings on the scope of argument about prior litigation. As shown in Adelson’s Opening Brief (at 13-17), the trial court sustained more than a dozen objections to Hananel’s comments and questions on this issue. Whatever Hananel may say now about what the pre-trial rulings meant, it is clear that the court did not share those views. *E.g.*, A-91 (“I think the argument has been improper.”). The only issue now is whether the trial court did enough to cure the prejudice that arose from Hananel’s plan to give the jury a one-sided view of the Massachusetts case. Unfortunately, it did not.

Before trial, Hananel sought a ruling in limine concerning the Massachusetts case concerning his demand for options in the Macau development. A-193-97. Both the district court and the First Circuit rejected his claims of vexation and harassment (*Adelson v. Hananel*, 510 F.3d 43, 52, 53 (1st Cir. 2007)), and the district court then ruled for Adelson on the merits. *Adelson v. Hananel*, 641 F. Supp. 2d 65 (D. Mass. 2009). Naturally, Hananel’s motion was directed at

the aspect of those proceedings that would have prejudiced him—the outcome. His argument in support of the motion, however, was that the entire proceeding was irrelevant: “precluding any reference to Judge Saris’ written order and judgment in no way handicaps or prejudices Adelson since *the two actions are factually unrelated and have no bearing on one another.*” A-196 (emphasis added). Hananel argued that

[t]his case is very narrow in scope; Adelson’s counsel has conceded and this Court has acknowledged its limited scope. Given that the parties are engaged in several ongoing lawsuits with one another, many of which relate to claims stemming from Hananel’s employ with Adelson, it is of particular importance that this case be a surgical one.

A-195. In fact, he even argued that “[w]hether Hananel has a right to an option in the Macau casino project is *wholly irrelevant* to the single defamatory statement at issue here.” A-196 (emphasis added). The court granted Hananel’s motion.

At trial, however, Hananel took a completely different tack, repeatedly raising the Massachusetts and Israeli cases that he previously had said were “factually unrelated and have no bearing on” this one. A-196. He offered his view of the procedural history: “Adelson then goes on the counteroffensive and files one case after another” (A-116); Adelson “files paper after paper in case after case” (*id.*); a lawsuit by IPI “was ultimately withdrawn [from Israeli court] only after paper after paper to be refiled in Massachusetts with paper after paper only to be dismissed there” (A-142). And he argued the merits: Hananel was merely trying to “enforce

his rights” through litigation in Israel (A-116); Adelson’s “litigations . . . were vexatious, oppressive and harassing” (*id.*); Adelson “start[ed] an Israeli case which he files in late 2002 blaming Mr. Hananel for embezzlement when there was nothing to it” (A-140).

These efforts were extremely prejudicial, especially in light of the court’s rulings that Adelson could not respond. For instance, Hananel told the jury that Adelson had filed appeals in Massachusetts (A-117), suggesting that Adelson had lost at trial. In fact, Adelson had appealed only the *forum non conveniens* dismissal of the Massachusetts suit; he won that appeal, and then he won on the merits at trial. It is Hananel who is now appealing in the First Circuit, a fact that the jury never learned. Likewise, Hananel was able to go on and on about how he

was asserting rights to the fact that he did not get sufficient notice from Mr. Adelson, that he was entitled to certain benefits, that he was entitled to certain options and the case had been amended as of 2003, this was in effect as of 2004, the cases had been consolidated, to add his option rights for Macau. That was one of his rights.

A-80. But Adelson was precluded from telling the jury that the “rights” that they heard so much about were found to be non-existent.¹ Finally, Hananel told the jury

¹ Hananel accuses Adelson of misrepresenting the Massachusetts decision. Br. 26. The Massachusetts court found that: “As to the extent and meaning of the term at the center of the dispute, the option in projects initiated by Hananel, it is clear that there was simply no meeting of the minds.” *Adelson*, 641 F. Supp. 2d at 83. The court concluded, therefore, that “too many essential details were left undecided to find that the term was anything but too vague and indefinite to be unenforceable [*sic*, “enforceable”].” *Id.*

that “there was nothing to” another lawsuit, by IPI, accusing him of misconduct during his employment. A-142. Though that lawsuit has never been decided on the merits, the jury heard only Hananel’s repeated assertions that it was brought in bad faith, and not Adelson’s response.

Just this type of one-sided exposition, resulting from counsel’s disregard for court rulings, has been found to warrant a new trial. In *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, this Court observed that

[t]he testimony elicited in violation of the court's ruling left the jury with the unrebutted impression that Anheuser had for years wrongfully interfered with offers from numerous purchasers to buy Beardslee's business. Because references to prospective purchasers and to the details of potential sales were excluded by the court’s ruling, Anheuser did not present evidence to rebut the inference Beardslee had created. Anheuser was thus in the untenable situation that the district court had sought to avoid in its *in limine* ruling.

69 F.3d 337, 347 (9th Cir. 1995) (affirming grant of new trial). The same result is called for here.

The court further found that “[w]ere the Court to attempt to supply a reasonable interpretation of the option term under the circumstances, despite the fact that the parties failed to agree to the necessary specifics, Hananel still would not prevail.” *Adelson*, 641 F. Supp. 2d at 83 (citation omitted). Finally, the court found that “even were the Court to accept Hananel’s version of the option as covering any venture ‘initiated’ by Hananel, he still would not be entitled to an interest in the Macau casino.” *Id.* at 84. “Thus, even if the parties minds had met, and they had met in the way Hananel claims, his actions still would not have entitled him to options in the Macau casino.” *Id.*

Based on those findings, it was entirely fair to characterize Hananel’s claim to options in the Macau casino as “imaginary.” *Adelson* Br. 17.

B. Hananel Disregards the Trial Court’s Clear Rulings That His Argument Was Impermissible.

Hananel now asserts that he was allowed to discuss all of those matters because his narrowly-drawn request for an order in limine mentioned only the Massachusetts order and not the proceedings themselves. Br. 25-27. He concludes from that wording that he was entitled to say anything he wanted about the other cases as long as he did not mention that he lost. The trial court obviously did not agree. Whether it thought it was enforcing the in limine order or simply Rule 403, the court sustained nearly every objection that Adelson made to this line of argument. *See* Adelson Br. at 13-17. For instance, when Hananel made exactly the argument he makes now as to why the prior proceedings were relevant (Br. 29-31)—“these cases are important, lady and gentlemen of the jury, because it relates to the truth of the statement” (A-138; *see also* A-142)—the court’s *sua sponte* response was unequivocal: “The [previous] objection’s sustained. All right. Stop. The objection’s sustained. That’s not proper argument here.” A-140-41.²

While the court sustained Adelson’s objections, that did not “unring the bell” of Hananel’s improper testimony argument. The court could have at least given a curative instruction, or permitted Adelson to give the jury the other side of the story, including the finding that Hananel had no rights to anything in Macau and

² *See also* A-139 (also *sua sponte*; “The objection’s sustained. The objection’s sustained. That’s not proper. That’s not relevant here.”); A-142 (same).

the Massachusetts court's express rejection of the charge that the option case had been brought in Massachusetts to vex and harass Hananel, but it declined even that limited relief. A-125.

Hananel also points out that the court agreed at the opening of the case that "the jury should know that Adelson and Hananel have been involved in protracted and contentious litigation in Israel and federal court, and the District of Massachusetts and here, disputing whether Hananel is entitled to options as a result of a casino venture in which Adelson invested in Macau." A-16-17. As he instructed the jury, however, those lawsuits were relevant only "as context" and "as background." A-138.

The court did not rule that Hananel could make those proceedings the focal point of his opening and closing arguments. We know that because Judge Reed repeatedly sustained objections when Hananel did so.³ And we also know that because Magistrate Judge Leen excluded trial exhibits on the ground that "counsel for both sides repeatedly sought to admit exhibits to support their claims and defenses on the underlying merits of the prior and pending litigation in Macau⁴ and

³ A-139 ("THE COURT: The objection's sustained. The objection's sustained. That's not proper. That's not relevant here. Please wrap up that part. Get to this case here. MR. GREEN: Getting to this case, Your Honor. THE COURT: It's not this case, I've made that ruling. It's only context or background. This jury is going to decide a different issue, not the case in Israel.").

⁴ The court presumably meant "Israel." There is no litigation pending in Macau.

the District of Massachusetts.” A-7. She excluded those exhibits both because they were irrelevant and because “to the extent that portions of some of the parties’ proposed exhibits contained a grain of relevant evidence, their probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, and would tend to mislead the jury.” A-8. Hananel’s assertion that he did not violate pre-trial rulings because he avoided mentioning the Massachusetts court’s *order* (Br. 25) is indefensible in light of the rulings of both judges below. And there certainly is nothing in the record to imply that Hananel’s tendentious account of the earlier cases, rejected by the Massachusetts courts in important respects, was proper “background,” while Adelson’s was not. Yet that was the practical effect of the court’s tepidly sustaining Adelson’s objections, but refusing to allow any response.

Nor does Hananel’s own testimony, bringing up the other proceedings in response to questions by Adelson’s counsel, somehow cure the prejudice. Br. 28. In fact, in many of the same instances that Hananel now cites, the court interrupted Hananel’s rambling answers about how Adelson had harassed him. *E.g.*, A-276 (“In my appeals, in my motions, in the United State Court I said that he’s depriving me for my right. I go to prove it from the First Circuit Court that this is right, that

he's vexatious and oppressive to me, and I did, I said it so many times -- THE COURT: Another question, please.").⁵

In short, the trial court's repeated rulings demonstrate that there was no "safe harbor" for Hananel to bring the Massachusetts history into this case and that Judge Reed did not condone the conduct of Hananel's counsel. The issue presented for this Court is whether the prejudice from that misconduct should be allowed to stand.

⁵ See also A-123 (Hananel: "He loaded me with papers over papers over papers. He sue me for 9 dollar, for 20 dollar, for 15 dollar. THE COURT: Stop. Stop. Another question, please. THE WITNESS: And this is harassment. THE COURT: Another question. Try to answer the questions."); A-280 ("Mr. Adelson sue me for 9 dollar, among other things, for 9 dollar, telephone call that I phone to him, and I was blind when I got this lawsuit and it had to be read to me and I had to ask for extension because I couldn't cope with it. THE COURT: Stop. Another question please.").

CONCLUSION

For all of the foregoing reasons, plaintiff-appellant Sheldon G. Adelson respectfully requests that this Court vacate the judgment below and remand for a new trial.

Dated: New York, New York
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because: this brief contains 3,542 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in 14-point Times New Roman.

s/Andrew H. Schapiro
Andrew H. Schapiro

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on April 26, 2010.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Andrew H. Schapiro
Andrew H. Schapiro