Highmark, Inc. v. Allcare Health Management System, Inc.
134 S.Ct. 1744 (2014)

- Patent Act: "The court in exceptional cases may award reasonable attorney fees to the prevailing party."
    - Exceptional case – "material inappropriate conduct" or "brought in subjective bad faith" and "objectively baseless"
    - "Stands out from others with respect to the substantive strength of a party's litigating position or the unreasonable manner in which the case was litigated."
- Allcare licenses intellectual property assets, including 105 Patent, which is a "fully integrated and comprehensive health care system that includes the integrated interaction of the patient, health care provider, bank, insurance company, utilization reviewer, and employer." Purchased from inventor for $75K.
- Tried to voluntarily license. Failed. Commissioned a telephone "survey" of healthcare companies using similar software. Claim to be "consultant attempting to identify organizations that are leaders in the electronic processing of authorizations and referral requests." Then ask about what their computer system could do. Then sent demand letter that software infringed 105 Patent.
- Publically available information confirmed that Highmark's software did not fall within patent definition. Allcare continued to demand and threatened lawsuit involving millions of dollars of damages.
    - Another company Allcare had sued had raised same defense. It was rejected by the court and Allcare prevailed.
    - In this case, Special Master had rejected most of Highmark's defense in a 51-page report. At summary judgment, Special Master issued second report, changing his position.
- Highmark sought declaratory judgment. Allcare counterclaimed for infringement.
- Four years of discovery. Highmark moved for summary judgment. Allcare did not oppose most claims. Highmark prevailed on last claim, based on publically available information. Allcare's own expert confirmed Highmark's software was not within patent definition.
- Federal Circuit affirmed without opinion. Judge said Allcare's position "makes no sense to me at all" at oral argument.
- Highmark moved for attorney's fees.
- Court granted on grounds that Allcare did not adequately investigate, passed up opportunity to have its expert inspect, pursued meritless allegations after the lack of merit became apparent, appeared to acknowledge that it pursued meritless allegations as leverage, engaged in vexatious and deceitful conduct, including using the survey, changed position several times, made misrepresentations to get case transferred, engaged in "the sort of conduct that gives the term 'patent troll' its negative connotation."
- $4.7M in attorney's fees and $375K in sanctions.
- Remanded to apply AOD standard. Court of Appeals vacated and remanded to district court.
- District court reaffirmed prior finding that this was an exceptional case.

Gall v. United States
552 U.S. 38 (2007)

- Sentence which deviates from Sentencing Guidelines range must be supported by "extraordinary circumstances"
- Gall was student at University of Iowa. At age 21, struggling with drugs and alcohol, he began purchasing Ecstasy for his own use and for resale. In about eight months, distributed several thousand tablets and made a profit of about $40K.
- Then decided to change his life and focus on studies. Stopped using drugs. Stopped selling drugs. Graduated, moved to Arizona, started working in the construction industry.
- Three years later, approached by feds. Asked if he was involved in conspiracy to distribute Ecstasy. Admitted he had sold drugs. No action taken.
- Another year later, four years after he last sold drugs, he was charged with conspiracy to distribute. Gall voluntarily surrendered and returned to Iowa. Admitted all involvement. Released on own recognizance. Resettled in Iowa, opened business, was very successful.
- Eventually pleaded guilty to distributing 10K tablets (total number for him and co-conspirators; his involvement was less). Plea left sentence within discretion of district court.
- Criminal history = failure to zip a gun bag on a hunting trip, underage drinking, possession of marijuana. All at under age 21.
- Criminal history level of 1, offense level of 19. Statutory range: Max of 20 years, no mandatory minimum. Recommended range of 30-37 months.
- Moved for downward departure based on age, cooperation, remorse, and post-offense rehabilitation. Conduct was aberrant, voluntarily withdrew from conspiracy.
    - Age based on brain science argument that human brain not fully developed until 25.
- Remained sober since release, described by employer as "reliable, honest, friendly, polite, with superior work ethic and a valuable resource." Court received "small flood" of letters from others attesting to his character.
- Court believes he learned from experience and has admirably moved to secure better future.
- But sentence must reflect the seriousness of joining a conspiracy to distribute drugs.
- Probation for three years with strict limitations. Not "leniency, but a substantial restriction of freedom."
- Any term of imprisonment "would be counter effective by depriving society of the contributions of the Defendant who understands the consequences of his criminal conduct and is doing everything in his power to forge a new life . . . Post-arrest conduct was not motivated to please the court, but by his own desire to lead a better life. Indeed a sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing."
- Eighth Circuit reversed. Not supported by extraordinary circumstances. District court gave too much weight to withdrawal, age, rehabilitation and not enough to seriousness of the offense and need to avoid unwarranted sentencing disparities. Ignored serious health risks of Ecstasy.
    - Wrong standard, only AOD.

- Not AOD: district court "quite reasonably attached great weight to Gall's self-motivated rehabilitation, which was undertaken at his own initiative. This lends strong support to the conclusion that imprisonment was not necessary to deter Gall from engaging in future criminal conduct or to protect the public from his future criminal acts."

Biscan v. Brown
Tenn. Sup. Ct.

- Biscan, age 16, was injured in car crash leaving Defendant Worley's home. A second defendant, Brown, was driving the car. Brown's blood-alcohol content was .17%. Biscan's was .032%.
- Biscan was in a coma for three weeks, sustained permanent brain damage.
- Parties were at eighteenth birthday party for Worley's daughter.
- Negligence action against both. Worley for permitting, condoning, and failing to exercise control over minors drinking alcohol.
- Affirmative defense of Biscan's comparative fault.
- Worley did not serve alcohol, but expected minor guests to bring and consume alcohol. Rule was that anyone who consumed alcohol would have to spend the night.
- Jury found Brown at 70% fault, Worley at 15% fault, Biscan at 15% comparative negligence. Damages at $4M.
- Trial court admitted evidence of Biscan's knowledge of effects of alcohol, but excluded testimony of her prior experiences with alcohol and alcohol-related juvenile court citations. Defendants argued relevant to show comparative negligence in accepting a ride with Brown.
- Tennessee AOD standard: applies an incorrect legal standard or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining. Relevance standard: any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Excludable if probative value is substantially outweighed by the danger of unfair prejudice, confusion, or misleading the jury.
- Knowledge evidence: testimony from friends she had consumed alcohol and become intoxicated in the past; Biscan had ridden with Brown 3-5 times in the past when he was intoxicated.
    - Trial court excluded this evidence, but admitted Biscan's BAL and testimony that she had been told by her father and in school that drinking and driving was harmful and testimony she had gone out with groups of classmates who consumed alcohol.
    - TNSCT found relevant. Factor in determining fault of a minor is minor's experience. Because consumption is illegal, knowledge is put at issue by fact minor is underage. Probative of her ability to evaluate risk. "It is one thing to have been told that alcohol can impair one's ability to drive; it is quite another to have experienced that impairment firsthand."
    - But not AOD: There was a danger that jury would confuse that conduct and earlier negligence with the issue of negligence on the night of this accident. Some evidence establishing Biscan's knowledge was admitted, as was her BAC. The jury found her negligent and allocated fault to her, which shows jury believed

Biscan knew or should have known that Brown was intoxicated when she got in the car with him.

- Expert testimony: Defendants proposed expert, Dr. Mitchell, to testify as to effects of intoxication related to BAC. Professor of pathology, board-certified, 25 years of teaching experience. Never performed research on correlation of effects of alcohol toxicity and BAC. Would have opined that Brown would have exhibited signs of intoxication and that "relatively inexperienced teenage drivers would be expected to demonstrate the full effects of intoxication with little ability to mask the adverse effects on motor function and speech."
    - Biscan moved to exclude on grounds not qualified by knowledge, skill, experience, training, or education.
    - Opinion based on "experience as a dormitory headmaster in the early 1960s and reading of literature on the subject, which he had destroyed." One was 1943 Scandinavian journal article re tolerance of alcohol by inexperienced, moderate, and chronic drinkers. Purpose of study was to identify field tests that could reliably indicate intoxication, like field sobriety tests now use. Basis for conclusion that 90% of teenagers would exhibit effects of alcohol was "just observation."
    - Trial court excluded on grounds Mitchell is "not qualified as an expert to testify as to the issues on which Defendants have tendered him, not scientific, technical, or otherwise specialized knowledge on the issues, facts and data underlying Mitchell's opinion indicate a lack of trustworthiness."
    - Tenn. R. Evid 702: If scientific knowledge "will substantially assist the trier of fact to understand the evidence or to determine a fact in issue." Must also determine whether qualifications authorize expert to give an informed opinion on the subject at issue. Reliable or valid.
    - Not AOD: Whether a person exhibited signs of intoxication has been the subject of lay witness testimony, and testimony from law enforcement and emergency personnel with more expertise or experience, in hundreds, if not thousands, of cases in this state. Consequently, it is questionable that expert testimony based on past personal observation and generalized principles within the knowledge of the general population would have added anything to the proof or would have substantially assisted the trier of fact. The fact that the law assigns to a passenger, presumably a lay person, the responsibility of assessing the risk of riding with a driver who may be intoxicated leads to the obvious conclusion that the question of whether someone showed the effects of intoxication does not require expert proof.

Napolitano v. Compania Sud Americana de Vapores
421 F.2d 382 (2d Cir. 1970)

- Two personal injury actions. Plaintiff slipped on spilled oil or grease on deck while loading cargo and fell off Jacob's ladder because of grease on rungs.
- In first case, testimony started at 10:30 a.m. and concluded at 12:20 p.m. Defense counsel informed court that medical witness would not be available to testify until 2:00 p.m. Trial judge refused to accommodate witness and ordered defense counsel to sum up. Case went to jury.

    - COA found not unreasonable to request delay at time when courts usually break for lunch. Would have allowed request if they had been asked. But "cannot find the action of the district judge was so unreasonable or so arbitrary as to amount to a prejudicial abuse of discretion.
        - "We have permitted a great deal of latitude to be given to individual district judges who conscientiously labor to reduce calendar congestion." Also, counsel could have deposed.
- In second case, witnesses present in court but not identified in defendant's pre-trial memorandum were not allowed to testify. Amended pre-trial memorandum was served on Plaintiff on Friday before Tuesday trial. Filed with court on Monday. Said availability of these witnesses was not previously known. Case had been pending for four years. But pretrial conferences had spanned over a year. Witnesses not allowed and defense had to conclude without proof. Had previously identified only doctor and "other officers and employees of the defendant who will be identified prior to the trial."
    - Not AOD. Purpose of pretrial memoranda is to provide notice, but also to be flexible and not become a vice holding the parties. Power reserved to trial judge to amend or permit departure.
- Also, judge "exhibited impatience and displeasure with defense counsel's handling of the defense." Reading of record "does tend to evoke sympathy for counsel . . . Would tend to discourage even a tough skinned attorney's enthusiasm for trial work . . . Remarks indicate a harsh overreaction to counsel's performance, but most vitriolic displays occurred out of the jury's presence."
    - Affirmance "should not be construed as approving the trial judge's unnecessary sarcastic comments or his tongue lashing of defense counsel."

People v. OJ Simpson

Experts Question Some of Judge's Rulings on Evidence

They say that Fujisaki's decisions against Simpson could give an appeals court grounds to reverse a verdict.

December 18, 1996|STEPHANIE SIMON | TIMES STAFF WRITER

The hotline counselor is in. The Mark Fuhrman tapes are out.

The frame-up theory is in. The Colombian drug dealers are out.

The lie detector test is in. Then out. Then, maybe, in again.

It's up to Superior Court Judge Hiroshi Fujisaki to make these calls in the O.J. Simpson civil trial--to decide what's in and what's out, to separate admissible evidence from wild conjecture and irrelevant sideshow. With each decision, Fujisaki shapes the case now unfolding in his Santa Monica courtroom. He also opens himself to a lot of second-guessing.

Lately, evidence experts have begun to question some of Fujisaki's rulings. They worry that the judge's decisions may be prejudicing jurors against Simpson. Enough wrong moves, the pundits say, and Fujisaki could end up tainting the trial with "reversible error"--giving an appeals court grounds to overturn any verdict against Simpson.

"Individually, none of these rulings is enough [to be considered] reversible error, but you begin to wonder if in aggregate they create a real problem," said civil litigator Steven G. Madison, who follows the trial closely.

Loyola law professor Stan Goldman, a frequent visitor to Fujisaki's courtroom, was more blunt: "My take on this," he said, "is that the good judge could use a refresher course in evidence."

Lead defense attorney Robert C. Baker has grown so frustrated at the many rulings against him that he has abandoned any pretense of deference to the judge. Just last week, Baker twice shouted at Fujisaki for making snap judgments against the defense. In one case, Fujisaki ruled that Baker could not show jurors a letter Simpson had written to the police. "You haven't even seen the letter!" Baker protested. The next day, Fujisaki ruled that the plaintiffs could play a video despite defense objections. "You don't even know what this video is," Baker complained.

Legally, Fujisaki has a near-absolute right to call such issues as he sees them. A far more important problem, in the view of some critics, is a troika of questionable evidentiary rulings. In these three decisions, analysts say the judge may have abused his discretion.

He allowed testimony about an anonymous call to a shelter hotline from a woman who identified herself as "Nicole" and who spoke fearfully of her ex-husband stalking her and threatening to kill her. The call came June 7, 1994--five days before the murders of Nicole Brown Simpson and Ronald Lyle Goldman.

Analysts deemed the testimony highly inflammatory, and said it was far too flimsy to be admitted in court since no one could be sure the caller was actually Nicole Simpson. It was excluded from Simpson's criminal trial as improper hearsay because the caller could not be positively identified, much less cross-examined.

In another controversial hearsay ruling, Fujisaki permitted Al Cowlings to tell jurors about a conversation he had with Nicole Simpson in 1989. According to Cowlings, Nicole confided that O.J. Simpson hit her and pulled her hair during a nasty fight.

The hearsay rule generally prohibits a witness from reporting what someone else has told him. But Fujisaki admitted this particular bit of hearsay because Cowlings testified that O.J. Simpson was nearby during the conversation in question. The judge apparently concluded that because Simpson did not contradict Nicole when she told Cowlings she had been abused, jurors should be allowed to hear her contention in court.

Though such reasoning is legally valid, some analysts said the judge was too quick to apply it in this instance. Cowlings was fuzzy on Simpson's exact whereabouts, so there was no proof Simpson was in a position to hear and contradict his ex-wife's accusations. "I don't think Cowlings' testimony should have been allowed," said Goldman, who teaches a class in evidence law.

Fujisaki also drew considerable heat for flip-flopping on the issue of lie detectors.

Testimony about polygraph results is banned from criminal trials and is almost never admitted in civil cases because the tests are considered unreliable. Yet Fujisaki did not intervene when an attorney fired off questions accusing O.J. Simpson of flunking a lie detector test with a miserable score of minus 22.

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Simpson denied even taking a polygraph test. And the judge instructed jurors to disregard the whole subject. But a few weeks later, Fujisaki allowed the defense to bring up the issue again, by contending that Simpson had volunteered to take a polygraph exam for police. Legal analysts pronounced themselves baffled by the whole episode.

"These rulings are giving Mr. Simpson a safety net under the high wire, a second chance [in the Court of Appeals]," attorney Brian Lysaght said. The polygraph and hotline rulings in particular, Lysaght said, "are jeopardizing any verdict that comes in down the road."

The rulings are particularly striking because Fujisaki has taken a markedly restrictive approach to so many other issues. He has blocked the defense from arguing that the real killer was a Colombian drug dealer, since Simpson's lawyers have no evidence to back up the theory. Similarly, he has barred the plaintiffs from raising allegations that Simpson took drugs, since that is not relevant to the trial. He will let the defense contend that some evidence was planted, since it was handled in a manner that a reasonable person might consider suspicious. But he will not permit blanket allegations of a massive frame-up.

Given this obvious determination to limit the scope of the Simpson case, many analysts were stunned when Fujisaki suddenly adopted a more expansive view and admitted the testimony of hotline counselor Nancy Ney, a volunteer at the Sojourn House battered women's shelter.

"If he wasn't over the line on that one, he definitely had chalk on his feet," Madison said.

"He's on extremely thin ice, and I'm being kind," Lysaght agreed.

Fujisaki declared Ney's testimony admissible on the grounds that it could help jurors analyze Nicole Simpson's state of mind about her relationship with O.J. Simpson.

That ruling was unusual because in most trials, the victim's state of mind is not at issue. From a legal point of view, it simply does not matter whether Nicole feared O.J. Simpson. All that matters is whether he killed her. Any evidence of fear is considered irrelevant; after all, even if Nicole Simpson was terrified of her ex-husband, that does not mean he slashed her throat.

In this case, however, Fujisaki ruled that her state of mind was a legitimate topic for the testimony because the defense had "opened the door" to exploring her emotions.

Simpson raised the issue when he testified that his ex-wife was not afraid of him during a major fight eight months before the murders. He further testified that he did not intend to scare her when he sent her a letter in early June revoking her right to use his address as a tax shelter. With those assertions on the record, Fujisaki declared, Nicole Simpson's state of mind was fair game for both sides.

But jurors are not trained in the nuances of evidence law. And several analysts said they doubted the jury would be able to understand--much less follow--Fujisaki's instruction to use Ney's testimony for the sole purpose of evaluating Nicole Simpson's state of mind. "It's a mental gymnastic that no one can do," Lysaght said.

The inevitable temptation will be for jurors to consider the testimony as proof that O.J. Simpson did in fact stalk and threaten Nicole. "The jury's going to use it for the wrong reason," law professor Goldman predicted.

Similarly, analysts said jurors would be hard-pressed to obey the judge's admonition to disregard the sensational questions about Simpson flunking a polygraph test with a score indicating "extreme deception."

Even as they debate whether Fujisaki's decisions have tainted the jury, the pundits wonder whether a higher court would dare to declare the trial unfair if Simpson loses. The relevant question may not be whether Fujisaki has committed reversible error, but whether an appeals court panel would intervene in a case that has become so emotional and so politicized.

Or, as Madison put it: "Would a court of appeal have the courage to overturn a verdict in favor of the families and against O.J. Simpson?"