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In the Supreme Court of California

Wilson Dante Perry,

Plaintiff and Appellant

v.

Bakewell Hawthorne, LLC,

Defendant and Respondent

After a Decision by the Court of Appeal
Second Appellate District, Division Two
Case No. B264027

Los Angeles Superior Court Case No. BC 500198
The Honorable Gregory Keosian

Petition for Review

Howard Posner (SBN 94712)
2734 Oakhurst Avenue
Los Angeles, CA 90034
310 497 0449 310 839 2355 (fax)
howardposner@ca.rr.com

S. Sean Bral (SBN 190489)
Bral & Associates
1875 Century Park E Ste 1770
Los Angeles, CA 90067
(310) 789-2007

Attorneys for Petitioner Wilson Dante Perry

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Issues Presented

1. Code of Civil Procedure sections 2034.210 *et. seq.* establish a procedure for designation of "expert trial witnesses" and exchange of information about them. Does section 2034.300, which provides for excluding the "expert opinion of any witness offered by a party who has unreasonably failed" to comply with that procedure, apply to a motion for summary judgment?

2. Does any party have standing to object to expert declarations in a summary judgment proceeding if no party has served a timely demand for exchange of expert witness information?

3. Has a party who responded to an untimely demand for exchange of expert witness information by objecting to it, and not designating an expert witness, "unreasonably failed" to designate an expert witness?

Reasons for Granting Review

The published Court of Appeal Opinion in this case creates conflicts with both longstanding and recent decisions interpreting the law of expert witness disclosure, making review by this Court necessary "to secure uniformity of decision." (CRC 8.500(b)(1).)

In this personal injury action alleging a dangerous condition on business premises, plaintiff Wilson Dante Perry served an objection to defendant Chase Bank's untimely demand for exchange of expert witness information, and did not designate an expert witness in response to the demand.

When another defendant, respondent Bakewell Hawthorne LLC, the

owner of the premises, made a motion for summary judgment based on its asserting that there was no evidence of a dangerous condition, Perry opposed the motion with an engineer's declaration detailing how the steps on which Perry fell violated the building code in their dimensions and had deteriorated over time, so that Bakewell Hawthorne should have known there was a longstanding unsafe condition. The trial court excluded the declarations under section 2034.300, ruled that Bakewell's contention was undisputed without them, and granted summary judgment. The Court of Appeal affirmed.

Code of Civil Procedure § 2034.300 allows the trial court to exclude only expert opinions offered by a party who has "unreasonably" failed to make disclosure:

> [O]n objection of any party who has made a complete and timely compliance with Section 2034.260, the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the following:
>
> (a) List that witness as an expert under Section 2034.260.

Under *Kennedy v. Modesto City Hospital* (1990) 221 Cal. App. 3d 575, section 2034.300 does not allow a court to exclude an undesignated expert's declaration in a summary judgment proceeding, because the statutory scheme (CCP § 2034.210 -2034.310) deals explicitly with trial and "expert trial witnesses," and not pretrial proceedings. The Court of Appeal in the instant case acknowledged the holding in *Kennedy,* but held precisely the opposite: "The plain language of the statute encompasses exclusion of an expert opinion from evidence in a summary judgment proceeding." (Opinion, p. 11.)

And under *Staub v. Kiley* (2014) 226 Cal.App.4th 1437, an untimely

demand for expert witness information confers no standing to object — even at trial — to the expert witnesses of the party who did not respond to the demand. The Court of Appeal in the instant case did not mention *Staub,* but came to the opposite holding: not only did the untimely demand confer standing on Bakewell Hawthorne to object Perry's expert witnesses, but Perry's objection to the untimely demand was a nullity because a motion for a protective order was his only remedy. (Opinion, pp. 9-10.)

Both *Kennedy* and *Staub* are contrary to the Court of Appeal's holding in the present case that the trial court "implicitly found that plaintiff had unreasonably failed to disclose his expert witnesses" (the trial court's order, AA 221-222, does not mention "unreasonable") and that the law and record support such a finding and establish a ground for excluding Perry's expert witness declarations. The holding in *Staub* would preclude a finding that failure to comply with an untimely expert witness designation demand is "unreasonable" for purposes of section 2034.300, even at trial. And under Kennedy, even an unreasonable failure to disclose is not a ground to exclude expert witness declarations in a summary judgment proceeding.

Thus the Court of Appeal's decision in the present case creates conflicts in the law affecting expert witnesses both in summary judgment and at trial. It would effectively vitiate the statutory deadlines for serving demands for exchange of expert witness information, since it holds, contrary to *Staub,* that an untimely demand has the same effect as a timely one. By making a statute intended to bar expert witnesses at trial applicable to summary judgment, it would erode the policy that recognizes summary judgment as a drastic measure that should not be used as a substitute for trial, and resolving all doubts about the propriety of the motion in favor of the party opposing it.

The Court of Appeal's decision creates significant conflicts with existing authority. Supreme Court review is necessary to resolve the decisional conflicts that the Court of Appeal's decision creates.

Background

The Injury and Lawsuit

Respondent Bakewell Hawthorne, LLC owns property in Los Angeles, leased to a Chase Bank. The bank's automated teller machine can be reached from the sidewalk by climbing eight steps up from the sidewalk. (AA 108)

Petitioner Wilson Dante Perry was injured when slipped and fell while descending the steps after using the ATM on January 10, 2013. (AA 86 ¶¶ 1-2.) He sued Bakewell and Chase, alleging negligence in maintaining the premises. (AA 25.)

Bakewell moved for summary judgment (AA 1) asserting that it had no notice of a dangerous condition, and therefore breached no duty to Perry. (AA 2-3.)

The Untimely Demand for Exchange of List of Expert Witnesses

On May 5, 2014, Chase served a Demand for Exchange of List of Expert Witnesses, demanding an exchange on May 26, 2014. (AA 174-175.) Code of Civil Procedure section 2034.230(b) provides, "The specified date of exchange shall be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date, unless the court, on motion and a showing of good cause, orders an earlier or later date of exchange." May 26 was only 49 days before the July 14, 2014 trial date and 21 days after service of the Demand (May 25 was a Sunday). But because

the Demand was served by mail, Code of Civil Procedure section 1013(a) required an additional five days to serve the expert witness information — i.e., a total of 25 days, until May 30, 2014. Chase failed to comply with the statute.

On May 14, 2014, Respondent served an objection to Chase's Demand as untimely. (Opinion, p. 2.) On May 26, Chase and Bakewell Hawthorne exchanged lists of expert witnesses. (*Id.*)

The Summary Judgment Motion: Bakewell Denies there Was a Dangerous Condition

Bakewell moved for summary judgment (AA 1), arguing that there was no dangerous condition on the property, Bakewell had no notice of a dangerous condition, and Bakewell had breached no duty to Perry. (AA 2-3.)[1]

Opposition to the Summary Judgment Motion: Perry's Expert Testimony Establishes a Longstanding Dangerous Condition

In opposing the summary judgment motion, Perry introduced a declaration from engineer Brad Avrit (AA 101) establishing that the condition of the stairs was unsafe and violated both state and local building codes. The heights of the risers on the stairway (i.e. the change in elevation of each step) varied from $4^{3/4}$ inches to $5^{1/2}$ inches, and the width of the treads (the horizontal parts that get stepped on) varied from 11 inches to $11^{15/16}$ inches. (AA 144.) Section 91.3305(b) of the Los Angeles City Building Code of 1954-55, in effect when the building was constructed,

[1] Chase moved for summary judgment on similar grounds at the same time. The court denied the Chase motion, but Perry later dismissed Chase.

required that "the difference in the height of any two risers or in the width of any two treads of any one flight shall not exceed one-fourth inch." (AA 102, ¶¶ 7-8, AA 142, top of page at (b)) Thus the variation in riser height was three times what the ordinance allows, and the variation in the tread width nearly four times what the ordinance allows.

The stairs also violated industry standards. Avrit noted that under "Standard Practice for Safe Walking Surfaces" (ASTM International F-1637-02, AA 148, ¶ 7), "Step nosings [i.e., the edge of each tread] shall be readily discernible, slip resistant, and adequately demarcated," but the Bakewell steps "are concrete, with the step nosings of a similar color and texture as the treads, and thus the surfaces blend together. Moreover, steps themselves were in substantial disrepair. The concrete on the steps was uneven and chipped, and the paint on the nosing of the steps was faded." (AA 102, ¶ 9)

Avrit explained that the Building Code requirements for consistency in riser and tread dimensions are safety regulations, because "from a biomechanical standpoint, when a person descends the stairway, they get into a rhythm (due to muscle memory), and expect certain stair dimensions, which is the purpose of limiting variation in rise and tread width. Upon reaching a dimensional inconsistency and variations between risers [or] treads, a stairway user could easily misstep, lose balance and fall." The stairway therefore presented "a substantial fall hazard for stairway users exercising reasonable care." (AA 102, ¶ 10)

The violations of the 1954-55 Los Angeles City Building Code and failure to meet industry standards constituted a violation of Los Angeles Municipal Code section 91.3402 and California Building Code section 3401.2, both of which provide, "Buildings and structures, and parts thereof, shall be maintained in a safe and sanitary condition[.]" (AA 103, ¶ 12; AA

151 at § 94.3401.2, AA 153)

Avrit found long-term deterioration of the stairs, and repairs that had been made with plaster instead of "adequate material" such as epoxy or concrete, and concluded that the dangerous condition existed long enough that reasonable periodic inspections would have discovered it. (AA 103-104, ¶ 13.)

Perry also introduced a declaration (AA 155) from Eris Barillas, a forensic analyst in Avrit's firm, stating that she had made the measurements on which Avrit's opinion was based, and taken the photographs that were exhibits to his declaration.

Bakewell Hawthorne Objects to the Expert Declarations

In its reply papers Bakewell objected to the declarations of Avrit and Barillas on the ground that Perry had not designated experts in response to Chase's demand for exchange of expert witness information that had served. (AA 197-198.)

Bakewell also made a number of arguments about the condition of the stairs and its duty to inspect, none of which were discussed by the Court of Appeal.

The Trial Court Excludes Perry's Expert Witness Declarations and Bases its Grant of Summary Judgment on that Exclusion

The trial court granted summary judgment "because Plaintiff's opposition relies fundamentally on the opinions of two experts, which is [sic] precluded from evidence because plaintiff did not timely designate experts." (AA 221, fifth ¶.) Therefore, "The facts supporting defendant's contentions that it did not breach a duty of care because it conducted regular inspections remain undisputed." (AA 222, third ¶.)

The Court of Appeal's Decision

The Court of Appeal affirmed the judgment. It expressly disagreed with the *Kennedy v. Modesto City Hospital* holding that section 2034.300 did not apply to summary judgment, holding that despite the repeated references to "trial" in the sections surrounding it surrounding it, section 2034.300 applied to non-trial proceedings such as summary judgment. (Opinion, pp. 10-11.)

The Court of Appeal did not mention *Staub v. Kiley,* but rejected Perry's argument based on its principal holding that an untimely demand for exchange of expert witness information cannot give the demanding party standing to object to another party's expert witnesses at trial. The Court of Appeal found that the only remedy available to a party served with an untimely demand was to move for a protective order. (Opinion, pp. 9-10.)

No petition for rehearing was filed in the Court of Appeal.

Legal Discussion

I. The Holding in *Kennedy v. Modesto City Hospital* — that CCP § 2034.300 Does Not Allow Exclusion of Expert Declarations on Summary Judgment — Comports with the Wording of the Statute. The Court of Appeal's Holding in the Present Case Does Not.

Until the Court of Appeal's decision in the present case was published, it has been settled that declarations of expert witnesses who were not designated in response to a demand for expert witness information cannot be excluded from a summary judgment proceeding on that ground.

Kennedy v. Modesto City Hospital (1990) 221 Cal. App. 3d 575,

considering this precise question, held that expert witness declarations are admissible in a summary judgment proceeding even if the experts' testimony would be excludable at trial because the party offering them failed to designate the experts in response to a demand for expert witness information. Treatises cite *Kennedy* for this proposition,[2] although the only cases considering the proposition and following Kennedy have been unpublished.

The medical malpractice plaintiff in *Kennedy* had opposed a summary judgment motion with declarations of two physician experts, one of them designated untimely and improperly and the other not designated at all. (*Id.* at 579.) There was no contention that the experts' testimony would have been admitted at trial.

The Court of Appeal first observed, "It is clear that the court granted defendant's motion for summary judgment because it excluded consideration of [the plaintiff's expert witness] declarations. It is equally clear that had it considered these declarations, the court would have properly denied the motion. The court excluded consideration of the declarations, not because of any evidentiary objection under the Evidence Code, but due to the procedural bar posed by section 2034." (*Id.* at 580.)

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[2] "[E]xpert testimony offered by a noncomplying party will not be excluded from pretrial proceedings." (3 DeMeo, Cal. Deposition and Discovery Practice. (2015) § 64.50[2], pp. 64-46 – 64-47.)

"It appears that an expert used in support of or in opposition to a motion for summary judgment or summary adjudication does not have to be disclosed." (Kennedy & Martin, Cal. Expert Witness Guide (2015) § 16.5, p. 16-14.)

"The exclusion mandated by Code of Civil Procedure section 2034.300 is applicable only to trial proceedings, not to pretrial proceedings. Thus, in a summary judgment proceeding, declarations of experts who were not properly designated as experts may not be excluded from consideration by the trial court." 8 Cal. Points & Authorities, (2015), § 88.33, p. 88-61.)

The *Kennedy* court quoted extensively from the expert witness statute, Code of Civil Procedure section 2034 (sections 2034.210 through 2034.310 since the statute was renumbered in 2004) and its repeated mention of "trial," in explaining why the procedural bar did not apply to summary judgment. Here is that explanation, with the current section numbers added in brackets:

> Throughout section 2034, terms such as "trial date," "trial witnesses," "evidence at the trial," "trial of the action," and "testify at trial" are used; this choice of words indicates the drafters had in mind the applicability of its provisions to the actual trial. Some examples will make this clear: "After the setting of the initial trial date," any party may demand information covering "each other's expert trial witnesses." (§ 2034, subd. (a).) [now § 2034.210]
>
> "Any party may demand a mutual and simultaneous exchange ... of a list containing the name and address of any natural person ... whose oral or deposition testimony in the form of an expert opinion any party expects to offer in evidence at the trial." (§ 2034, subd. (a)(1).) [now § 2034.210(a)]
>
> "If any expert designated by a party ... has been retained ... for the purpose of forming and expressing an opinion ... in preparation for the trial of the action...." (§ 2034, subd. (a)(2).) [now § 2034.210(b)]
>
> "Any party may make a demand for an exchange of information concerning expert trial witnesses" no later than a specified time "before that trial date...." (§ 2034, subd. (b).) [now § 2034.220]
>
> "A list ... of any person whose expert opinion that party expects to offer in evidence at the trial." (§ 2034, subd. (f)(1)(A).) [now § 2034.260(b)(1)]
>
> "A representation that the expert has agreed to testify at the trial." (§ 2034, subd. (f)(2)(C).) [now § 2034.260(c)(3)]
>
> "[I]ncluding any opinion and its basis, that the expert is expected to give at trial." (§ 2034, subd. (f)(2)(D).) [now §

2034.260(c)(4)]

> Very telling is the express language of the exclusionary provision contained in section 2034, subdivision (j) [now § 2034.300]. It states in relevant part: "... on objection of any party [that has timely complied with the disclosure provisions] the trial court shall exclude from evidence the expert opinion...."
>
> We infer from these provisions the Legislature had in mind the exclusion of expert testimony offered by noncomplying parties at trial, not at a pretrial proceeding.
>
> Admissibility at trial is not necessarily the same as admissibility at a summary judgment proceeding. For example, a declaration is not admissible at trial, but is expressly made admissible by section 437c in a summary judgment proceeding. So too, evidence made inadmissible at trial by reason of the express procedural bar contained in section 2034, subdivision (j) [2034.300], does not necessarily make the evidence inadmissible in a summary judgment proceeding.

(*Id.* at 581-582, ellipses in original)

The Court of Appeal in the present case drew precisely the opposite conclusion, holding that section 2034.300 provides for excluding expert witness declarations in a summary judgment proceeding:

> The language of section 2034.300 does not limit its application to a trial. Rather, the statute broadly authorizes a trial court to "exclude from *evidence* the expert opinion of any witness that is offered by any party who has unreasonably failed to . . . [m]ake that expert available for a deposition." (§ 2034.300, subd. (d), italics added.) The plain language of the statute encompasses exclusion of an expert opinion from evidence in a summary judgment proceeding.
>
> That the terms "trial date," "trial witnesses," "evidence at the trial," "trial of the action," and "testify at trial" are used elsewhere in the statutory scheme governing expert witness discovery (see, e.g., §§ 2034.210-2034.290) does not persuade us that a trial court's authority under section 2034.300 is limited

> to excluding an expert opinion from evidence at trial and does not extend to a pretrial proceeding such as summary judgment.
>
> Rather, the absence of a specific reference to "evidence at the trial" in section 2034.300 indicates that a trial court's authority to "exclude from evidence" encompasses both pretrial and trial proceedings.

(Opinion, pp. 10-11; italics in original.)

In other words, the Court of Appeal has just held that sections 2034.210 through 2034.290 deal specifically with the designation of expert witnesses *for trial* and the exclusion of expert witnesses *at trial,* but section 2034.300 abruptly changes the subject to exclusion of expert witnesses *in any proceeding,* and section 2034.310 immediately changes the subject back to trials (it begins, "A party may call at trial an expert not previously designated by that party if..."). If the Legislature intended such a counterintuitive scheme, it could have said explicitly that a court can "exclude from evidence *in any proceeding"* the expert opinion of any witness that is offered by any party who has unreasonably failed to comply. The Court of Appeal's reading strips away the statutory scheme and interprets section 2034.300 out of context.

The Court of Appeal's holding in the present case is diametrically opposed to the rationale of *Kennedy,* which noted, "Admissibility at trial is not necessarily the same as admissibility at a summary judgment proceeding. For example, a declaration is not admissible at trial, but is expressly made admissible by section 437c in a summary judgment proceeding." (221 Cal.App.3d at 582.) A reason for this difference is that the "purpose of the summary judgment statute is to eliminate the necessity of trying sham and meritless cases, not to stop facially meritorious cases at the summary judgment stage by reason of a procedural bar which at trial may be overcome." (Id. at 582-583.)

The Court of Appeal in the present case did not make explicit its rationale for differing with *Kennedy,* but it placed a greater value on enforcing the expert witness designation rules — other than rules requiring demands for exchange of information to be timely — than on the strong policy of not granting summary judgment if it will deny a trial on the merits to a party with a meritorious case. Here, the evidence that the condition of the stairs violated statutes and ordinances created a presumption of negligence under Evidence Code section 669(a), so the case is obviously meritorious. "Summary judgment is a drastic measure that deprives the losing party of a trial on the merits. It should therefore be used with caution, so that it does not become a substitute for trial ...Any doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion." (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107, citations omitted; *Mendoza v. Brodeur* (2006) 142 Cal.App.4th 72, 79).

The Court of Appeal in the present case said, "The factual circumstances here differ substantially" from those in *Kennedy,* because the plaintiff in *Kennedy* had made a tardy designation of one expert, and the Kennedy court noted that a "technical failure to properly designate" could be remedied by a motion to augment or submit a tardy designation after remand. "Unlike the plaintiff in *Kennedy*, plaintiff in the instant case could not remedy his failure to comply with the statutory requirements. His belated effort to do so after entry of judgment was rejected by the trial court." (Opinion, p.12.) In fact, Perry's post-summary judgment motion to make a late designation of experts was concerned solely with Chase, not with Bakewell Hawthorne, which had been awarded a judgment at that point. In both the present case and *Kennedy,* a statute allowed a party "who

has failed to submit expert witness information on the date specified in a demand for that exchange leave to submit that information at a later date." (CCP § 2034.710.) The lower courts entered summary judgment. The only reason the *Kennedy* plaintiff could remedy a failure to designate her expert was that the Court of Appeal reversed the judgment. The only reason Perry has no such remedy is that the Court of Appeal affirmed the judgment.

Regardless of the differences in factual details between *Kennedy* and the present case, the Court of Appeal below explicitly rejected the holding and reasoning in *Kennedy.* Neither the statute nor the policy considerations have changed since *Kennedy* was decided. It is still important that summary judgment not become a tool to dispose of meritorious cases without trial. That policy should not be undermined by the notion that even an untimely expert witness demand should be a fatal trap for a litigant.

II. Under *Staub,* An Untimely Demand for Exchange of Expert Witness Information Does Not Confer Standing to Object to Expert Testimony

Chase served a Demand for Exchange of List of Expert Witnesses (AA 174-175) that demanded an exchange 21 days after the service of the demand. Because it was served by mail, it had to allow 25 days under Code of Civil Procedure sections 2034.230(b) and 1013(a).

Under the same circumstances, *Staub v. Kiley* (2014) 226 Cal.App.4th 1437 held that a defendant lacked standing to move to exclude expert testimony at trial. The defendant in *Staub* mailed a demand for exchange of expert witness information on December 6, demanding exchange on December 27, 21 days later, as in the present case. The Court of Appeal

pointed out that the "Civil Discovery Act expressly provides that the five-day extension allowed by section 1013 applies to all discovery methods contemplated by the act (§ 2016.050); section 1013, subdivision (a) provides that the time for performing any act is extended by five days when the demand or notice is served by mail[.]" (*Id.* at 1445-46.) The trial court granted a motion in limine excluding the plaintiff's expert witnesses from testifying at trial based on a failure to exchange expert information timely, and then granted nonsuit. (*Id.* at 1440.) On appeal, the court held that the failure to allow the extra five days meant the defendant lacked standing to object to the experts' trial testimony:

> [T]he exchange date should have been January 2, 2012. Defendants' demand to exchange on December 27, 2011, was "premature" and did not comply with the timing required by section 2034.260.
>
> Under these circumstances, plaintiffs are correct that defendants lacked standing to bring a motion under section 2034.300 to seek to preclude plaintiffs' expert witnesses from testifying at trial. Only a party that has itself "made a complete and timely compliance with Section 2034.260" may seek to exclude his opponent's experts for the opponent's unreasonable failure to comply with expert discovery.

(*Id.* at 1446, citations omitted)

Staub establishes that *no* party had standing to object to Perry's expert witness declarations.

(The plaintiff in *Staub* objected to the demand, and eventually made a designation after the demand date. The parties then went through a period of bickering about depositions of the sort that drives judges to distraction and drives attorneys to become appellant specialists. The *Staub* court noted these circumstances, and noted that even if the defendant did have standing to object to the plaintiff's expert witnesses at trial, there was no

unreasonable failure to comply with the statute. The analysis of reasonableness did not affect the principal holding that the untimely demand could not give the defendant standing to object to the plaintiff's expert witness testimony.)

Staub noted that its holding was "bolstered by the fact that the order excluding plaintiffs' experts from testifying at trial was in effect a terminating sanction, as it eviscerated plaintiffs' case. The "general rule [is] that a terminating sanction may be imposed only after a party fails to obey an order compelling discovery .... Here, there was no history of discovery abuse by plaintiffs which would warrant the imposition of a terminating sanction. This case is not remotely on a par with the type of case in which a sanction of this type is warranted." (*Id.* at 1448.)

The Court of Appeal in the present case does not discuss *Staub,* but its holding is directly contrary to *Staub's*, in that it assumes Bakewell Hawthorne had standing to object despite the untimeliness of the demand, and contrary to *Staub,* had no recourse other than seeking a protective order:

> Although plaintiff's counsel claimed to have served a written objection to the timeliness of the demand, "'[t]he Legislature did not provide for objections to demands for exchanges of experts.' [Citation.]" (*Cottini v. Enloe Medical Center* (2014) 226 Cal.App.4th 401, 419 (*Cottini*), quoting *Zellerino v Brown* (1991) 235 Cal.App.3d 1097, 1112.) He should instead have filed a motion for a protective order. (*Cottini*, at p. 419.)

(Opinion, p. 9; footnote omitted.)

Under *Staub,* no protective order is needed when the demand is untimely. Neither *Cottini* nor *Zellerino* involved an untimely

demand. It makes no sense to tell parties that they must make a motion for a protective order when served with an invalid demand that confers no rights on the demanding party. It is also a recipe for harassment if parties can force their opponents to waste time moving for protective orders in the days shortly before trial when expert exchanges typically occur.

III. A "Failure" to Disclose Expert Witness Information in Response to an Invalid Demand Is Not "Unreasonable."

Code of Civil Procedure section 2034.300 allows a court to exclude expert trial testimony only if the party has "unreasonably" failed to disclose experts or make them available. Under *Staub,* objecting rather than responding to an untimely and invalid demand that confers no standing on the propounder is not an unreasonable failure to do anything.

If a court is going to exclude expert witness testimony — as Staub notes, often effectively a terminating sanction — based on a party's lack of response to an demand for exchange of expert witness information, it should be very sure that the propounding party is in strict compliance with the statute. To do otherwise would be to place an unnecessary and unfair trap in the way of litigants.

The Court of Appeal's decision creates significant conflicts in the law of expert witness designation, creating needless difficulties in a body of law that has made sense and worked well up until now.

This Court's review is now necessary to resolve those conflicts.

Dated: March 14, 2016

Howard Posner
Attorney for Petitioner

Certification of Length

This text of this brief contains 4,906 words, according the word processing program's count function.

Dated: March 14, 2016

Hal Posner

Howard Posner

Proof Of Service

I am over 18 and not a party to this action. My business address is
On March 14, 2016, I served the Petition for Review by depositing copies in the United States Mail, postage prepaid, to:

Kim Schumann
Schumann Rosenberg
3100 Bristol Street, Suite 100
Costa Mesa CA 92626

Los Angeles County Superior
Court Clerk
111 North Hill Street
Los Angeles, CA 90012

Clerk of the Court of Appeal
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

One electronic copy was also filed with the California Supreme Court in accordance with Rule of Court 8.212(c)), and with the Second District Court of Appeal in accordance with local rules.

I declare under penalty of perjury that the above is correct. Executed in Los Angeles, California on March 14, 2016.

Hal Posner

Filed 2/3/16

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

WILSON DANTE PERRY,

Plaintiff and Appellant,

v.

BAKEWELL HAWTHORNE, LLC,

Defendant and Respondent.

B264027

(Los Angeles County
Super. Ct. No. BC500198)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gregory Keosian, Judge. Affirmed.

Howard Posner; Bral & Associates and S. Sean Bral for Plaintiff and Appellant.

Schumann / Rosenberg, Kim Schumann and Jeffrey P. Cunningham for Defendant and Respondent.

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* Part III of this opinion is not certified for publication. (See Cal. Rules of Court, rule 8.1110.)

Plaintiff and appellant Wilson Dante Perry (plaintiff) appeals from the summary judgment entered in favor of defendant and respondent Bakewell Hawthorne, LLC (defendant) in this personal injury action based on negligence and premises liability. Plaintiff's principal argument on appeal is that the trial court erred by excluding expert witness declarations he submitted in opposition to the summary judgment motion. Plaintiff further argues that defendant had notice of a dangerous condition on the premises.

We conclude that the trial court's exclusion of plaintiff's expert declarations was not an abuse of discretion and that plaintiff failed to raise any triable issue as to notice. We therefore affirm the judgment.

BACKGROUND

Plaintiff commenced the instant action in January 2013 for injuries he sustained when he fell on an exterior stairway on property owned by defendant and occupied by former defendant JP Morgan Chase Bank, NA (Chase). In the operative first amended complaint, plaintiff alleged that defendant and Chase were negligent in designing, developing, operating, and maintaining the stairway, causing plaintiff to fall and sustain injuries. Trial was initially set to commence on July 14, 2014.

On May 5, 2014, Chase served a demand for exchange of expert witness information pursuant to Code of Civil Procedure section 2034.210.[1] On May 14, 2014, plaintiff served an objection to the demand on the ground that it was untimely. Defendant and Chase exchanged expert witness information on May 26, 2014. Plaintiff did not participate in the exchange and did not designate any expert witnesses.

Defendant thereafter moved for summary judgment on the ground that plaintiff could not satisfy his burden of proving the existence of a dangerous condition at the property or that defendant had knowledge of such a dangerous condition. In support of its motion, defendant submitted a separate statement of undisputed material facts stating

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

that defendant's personnel performed daily inspections of the property that included identifying potentially dangerous conditions, that Chase conducted periodic inspections, and that defendant's insurance carrier conducted regular annual inspections, and that at no time on or prior to January 10, 2013, was any dangerous condition reported to defendant. Defendant's separate statement was in turn supported by declarations and deposition testimony by employees of defendant and of Chase responsible for inspection, maintenance, and repair of the property stating that neither defendant nor Chase had notice, on or before January 10, 2013, of any dangerous condition with regard to the stairway on which plaintiff fell.

In opposition to the summary judgment motion, plaintiff submitted a memorandum of points and authorities in which he argued that the stairway violated applicable provisions of the Los Angeles Building Code. Plaintiff also submitted the declarations of two experts, Brad Avrit and Eris J. Barillas, who opined that the stairway was in a state of disrepair and in violation of the Los Angeles Building Code and applicable industry standards.

Defendant filed evidentiary objections to plaintiff's expert declarations, arguing principally that plaintiff's failure to participate in the exchange of expert witness information and failure to designate any expert witnesses precluded him from using the declarations to oppose summary judgment.

The trial court sustained defendant's evidentiary objections and granted the motion for summary judgment on the ground that plaintiff offered no admissible evidence to dispute the facts that defendant breached no duty of care and had no actual or constructive notice of any dangerous condition.

On February 17, 2015, plaintiff filed an ex parte application for reconsideration of the order granting the motion for summary judgment, or in the alternative, for an order shortening the time for a hearing on the motion for reconsideration. Plaintiff argued that Chase's demand for exchange of expert witness information was untimely, that plaintiff had served a written objection that the demand was untimely, and that defendant lacked standing to object to plaintiff's expert declarations because it had failed to timely comply

with section 2034.260. On February 19, 2015, plaintiff obtained an order setting a hearing date of April 23, 2015, for the motion for reconsideration.

On March 11, 2015, defendant filed an ex parte application for entry of judgment on the grounds that plaintiff's counsel at the time, Daniel Wagner, was ineligible to practice law in California as of January 26, 2015, and that the February 19, 2015 order setting a hearing date on plaintiff's motion for reconsideration was illegally obtained and should be stricken. In support of the ex parte application, defendant presented a suspension notice concerning Mr. Wagner from the State Bar of California's website, and email correspondence from Mr. Wagner dated March 9, 2015, acknowledging his suspension and revoking the motion for reconsideration.

In response to defendant's ex parte motion, judgment was entered in defendant's favor on March 11, 2015.

On March 26, 2015, plaintiff filed an ex parte motion for an order granting leave to provide tardy expert witness disclosures pursuant to section 2034.710.[2] The trial court denied the ex parte motion. This appeal followed.

DISCUSSION

I. Applicable legal principles and standard of review

Summary judgment is granted when a moving party establishes the right to entry of judgment as a matter of law. (§ 437c, subd. (c).) A defendant moving for summary judgment bears the initial burden of proving that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (§ 437c, subd. (p)(2); *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1037.) Once the defendant has made such a showing, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action.

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[2] Section 2034.710 authorizes a trial court to allow a party who has failed to submit expert witness information on the date specified in a demand for that exchange leave to submit that information at a later date.

(*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 849 (*Aguilar*).) If the plaintiff does not make such a showing, summary judgment in favor of the defendant is appropriate. In order to obtain a summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action . . . . [T]he defendant need not himself conclusively negate any such element . . . ." (*Id.* at p. 853.)

We review the trial court's grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348; § 437c, subd. (c).)

Plaintiff's challenge to the summary judgment is premised on the trial court's purportedly erroneous exclusion of expert declarations submitted in opposition to the motion for summary judgment. He contends defendant lacked standing to object to the declarations and that the trial court lacked authority under section 2034.300 to exclude the expert declarations in a summary judgment proceeding. "'[W]hen the exclusion of expert testimony rests on a matter of statutory interpretation, we apply de novo review.' [Citation.]" (*Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 950 (*Penny Lane*).)

"When construing a statutory scheme, our primary guiding principle is to ascertain the intent of the Legislature to effectuate the purpose of the law. [Citation.]" (*Schweitzer v. Westminster Investments, Inc.* (2007) 157 Cal.App.4th 1195, 1204.) "We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.

[Citations.]" (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.)

II. Exclusion of expert declarations

A. Statutory framework

Section 2034.210 provides in relevant part: "After the setting of the initial trial date for the action, any party may obtain discovery by demanding that all parties simultaneously exchange information concerning each other's expert trial witnesses . . . ." (§ 2034.210.) A demand for exchange of expert witness information must be in writing, identify the party making the demand, and specify the date of the exchange of expert trial witnesses, expert witness declarations, and any demanded production of writings. (§ 2034.230.)

Section 2034.260, subdivision (a) requires "[a]ll parties who have appeared in the action" to "exchange information concerning expert witnesses in writing on or before the date of exchange" indicated in a demand for exchange of such information. Subdivision (b) of section 2034.260 states that "[t]he exchange of expert witness information shall include" either "[a] list setting forth the name and address of any person whose expert opinion that party expects to offer in evidence at trial" or "[a] statement that the party does not presently intend to offer the testimony of any expert witness."

Section 2034.300 provides that "on objection of any party who has made a complete and timely compliance with Section 2034.260, the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to . . . [l]ist that witness as an expert under Section 2034.260." (§ 2034.300, subd. (a).)

B. Defendant's standing to object to the expert declarations

Plaintiff contends the trial court erred by sustaining defendant's objections to the expert declarations because defendant did not make the demand for exchange of expert witness information and therefore lacked standing to object. He cites *West Hills Hospital v. Superior Court* (1979) 98 Cal.App.3d 656 (*West Hills*) as support for this argument.

West Hills concerned a medical malpractice action against a hospital and two doctors. The defendant doctors served on the plaintiff a demand to exchange expert witness information that was also directed to the plaintiff. Although the demand was not directed to the defendant hospital, an informational copy was served on counsel for the hospital. (*West Hills, supra*, 98 Cal.App.3d at p. 657.) The hospital did not serve a list of experts on any party, and the plaintiff subsequently moved to preclude the hospital from presenting any expert witnesses at trial. (*Id.* at p. 658.)

The court in *West Hills* addressed two issues under the statutory scheme then in effect: (1) who is required to exchange expert witness information, and (2) who has standing to object to a party's expert witness testimony. With regard to first issue, the court held that "only the party who makes the demand and the party on whom it is made are required to comply with [former] section 2037.2 and not other parties on whom copies of the demand may be served." (*West Hills, supra*, 98 Cal.App.3d at p. 660.) This holding does not preclude defendant's challenge to plaintiff's expert declarations, as Chase's demand was directed to and served upon both plaintiff and defendant. Both were required to participate in the exchange of expert witness information.

With regard to standing to object to expert testimony, the court in *West Hills* held that the objecting party must have complied with its obligation to exchange expert witness information: "Petitioner's second contention regarding [the plaintiff's] standing is also well taken. [Former] [s]ection 2037.5 requires first that the party seeking sanctions be in compliance with [former] section 2037.2." (*West Hills, supra*, 98 Cal.App.3d at p. 660.) Because the plaintiff had filed his list of experts after the date of the exchange, the court concluded that he was not "strictly speaking," in compliance with [former] section 2037.2 and lacked standing to object to the expert testimony. (*Ibid.*) This second holding does not preclude defendant from objecting to plaintiff's expert declarations, as defendant complied with its obligation, under section 2034.300 to have "made a complete and timely compliance with Section 2034.260." (§ 2034.300.)

The court in *West Hills* then went on, however, to state: "Furthermore, even if petitioner had been required to serve a list of its experts, pursuant to [former] section

2037.2, subdivision (a)(3) the only party on whom it would have been required to serve its list, was the party who served the Demand on it -- in other words, [the defendant doctors], and pursuant to [former] section 2037.5, only [the defendant doctors] would have had standing to object to petitioner's calling its expert witnesses." (*West Hills, supra*, 98 Cal.App.3d at p. 660.) Assuming the foregoing statements constitute an alternate holding rather than dictum, we decline to apply it here. Under the statutes in effect at the time of the *West Hills* decision, a party served with a demand for exchange of expert witness information was required to serve a list of its expert witnesses only upon the party who served the demand, and not on any other party. (*Id.* at p. 659.)[3] The court in *West Hills* applied this limitation in a reciprocal manner, limiting standing to object to another party's expert witnesses to the party serving the demand. (*Ibid.*)[4] The current statutory scheme is much broader. Section 2034.210 provides that "[a]fter the setting of the initial trial date for the action, any party may obtain discovery by demanding that *all parties* simultaneously exchange information concerning each other's expert trial witnesses." (Italics added.) Section 2034.300 allows "*any party* who has made a complete and timely compliance with Section 2034.260" to seek to "exclude from evidence the expert opinion of any witness that is offered by *any party* who has unreasonably failed" to participate in an exchange of expert witness information.

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3 Former section 2037.2 provided, in pertinent part: "(a) Not later than the date of exchange: [¶] (1) Each party who served a demand and each party upon whom a demand was served shall deposit with the clerk of the court their list of expert witnesses. [¶] (2) A party who served a demand shall serve his list upon each party on whom he served his demand. [¶] (3) Each party on whom a demand was served shall serve his list upon the party who served the demand." (*West Hills, supra*, 98 Cal.App.3d at p. 659, quoting former section 2037.2.)

4 Former section 2037.5, which imposed sanctions for failure to comply with a demand for exchange of expert witness information, provided that "upon objection of a party who has served his list of witnesses in compliance with Section 2037.2, no party required to serve a list of expert witnesses on the objecting party may call an expert witness to testify." (*West Hills, supra*, 98 Cal.App.3d at p. 659, quoting former section 2037.5.)

(§ 2034.300, subd. (a), italics added.) Defendant participated in the exchange of expert witness information and plaintiff did not. Under the current statutory scheme, defendant did not lack standing to object to plaintiff's expert declarations.[5]

C. The trial court's authority under section 2034.300

1. Unreasonable failure to exchange expert witness information

Section 2034.300 empowers the trial court to exclude the expert opinion of any witness offered by a party who has unreasonably failed to disclose expert witness information. (§ 2034.300, subd. (a).) A trial court's determination under section 2034.300 that a party has unreasonably failed to comply with the statutory requirements for expert witness discovery is reviewed for abuse of discretion. (*Penny Lane, supra*, 170 Cal.App.4th at p. 950.)

By excluding from evidence plaintiff's expert declarations, the trial court in this case implicitly found that plaintiff had unreasonably failed to disclose his expert witnesses. The record supports that finding. It is undisputed that Chase served a demand for exchange of expert witness information, that defendant and Chase participated in the exchange, and that plaintiff did not. Although plaintiff's counsel claimed to have served a written objection to the timeliness of the demand,[6] "'[t]he Legislature did not provide for objections to demands for exchanges of experts.' [Citation.]" (*Cottini v. Enloe Medical Center* (2014) 226 Cal.App.4th 401, 419 (*Cottini*), quoting *Zellerino v Brown* (1991) 235 Cal.App.3d 1097, 1112.) He should instead have filed a motion for a protective order. (*Cottini*, at p. 419.) Having neither sought nor obtained such order, plaintiff was required to "exchange information concerning expert witnesses in writing

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[5] We do not address plaintiff's argument that Chase, who is not a party to this appeal, lacked standing to object to the expert declarations because Chase's demand for exchange of expert witness information was untimely.

[6] Plaintiff did not raise the timeliness issue in the trial court below until after the motion for summary judgment had been granted. He did so in an ex parte motion for reconsideration of the order granting summary judgment, and that motion was subsequently withdrawn by his counsel.

on or before the date of exchange specified in the demand." (§ 2034.260; *Cottini*, at p. 419.) The trial court's determination that plaintiff unreasonably failed to exchange expert witness information was not an abuse of discretion. The court was authorized to exclude plaintiff's expert declarations pursuant to section 2034.300.

2. *Kennedy v. Modesto City Hospital* did not preclude the ruling

Plaintiff contends section 2034.300 applies only to the exclusion of expert testimony at trial and cannot be used to exclude a declaration submitted in a summary judgment proceeding. He cites the Fifth Appellate District's decision in *Kennedy v. Modesto City Hospital* (1990) 221 Cal.App.3d 575 (*Modesto*) as support for that argument. As we discuss, *Modesto* is factually distinguishable, and the court's holding in that case did not preclude the trial court from excluding the expert declarations as evidence in the summary judgment proceeding in the instant case.

In *Modesto*, the appellate court reviewed a trial court's exclusion of two expert declarations submitted by the plaintiff in opposition to a motion for summary judgment in a medical malpractice action. One declaration was from a doctor the plaintiff never designated as an expert witness, and the other declaration was from a doctor listed in a supplemental, but untimely designation. (*Modesto, supra*, 221 Cal.App.3d at pp. 579-580.)

The court in *Modesto* compared the applicable deadlines for demanding and exchanging expert witness information under former section 2034 with those for filing and determining a motion for summary judgment under section 437c, noting that there appeared to be no coordination between the two statutes. (*Modesto, supra*, 221 Cal.App.3d at p. 581.) The court observed: "Normally a summary judgment will be heard and determined before the exchange of expert witness information is completed." (*Ibid.*)[7] In light of the different statutory deadlines, the court in *Modesto* found "no

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[7] The summary judgment at issue in *Modesto* had been noticed and heard within the time frame for the parties' expert witness exchange only because the initial trial date had been continued, as it was in the instant case. (*Modesto, supra*, 221 Cal.App.3d at p. 581.)

ascertainable intent to make the exclusion of expert testimony applicable to a summary judgment proceeding." (*Ibid.*)

The *Modesto* court next considered the statutory language itself, noting that "Throughout [former] section 2034, terms such as 'trial date,' 'trial witnesses,' 'evidence at the trial,' 'trial of the action,' and 'testify at trial' are used; this choice of words indicates the drafters had in mind the applicability of its provisions to the actual trial." "We infer from these provisions the Legislature had in mind the exclusion of expert testimony offered by noncomplying parties at trial, not at a pretrial proceeding." (*Modesto, supra*, 221 Cal.App.3d at pp. 581-582.)

The *Modesto* court's analysis notwithstanding, we do not find the lack of coordination between the statutes governing summary judgment and those governing exchange of expert witness information, or the absence of an express legislative intent to apply the exclusionary sanction of section 2034.300 to a summary judgment proceeding, to preclude the trial court's evidentiary ruling in this case. As the court in *Modesto* observed, the issue does not frequently arise because a motion for summary judgment is normally determined before the exchange of expert witness information. (*Modesto, supra*, 221 Cal.App.3d at p. 581.) Given the rarity of circumstances under which the two statutory schemes might intersect, the lack of coordination between them is unsurprising, as is the absence of any express legislative intent to impose such coordination.

The language of section 2034.300 does not limit its application to a trial. Rather, the statute broadly authorizes a trial court to "exclude from *evidence* the expert opinion of any witness that is offered by any party who has unreasonably failed to . . . [m]ake that expert available for a deposition." (§ 2034.300, subd. (d), italics added.) The plain language of the statute encompasses exclusion of an expert opinion from evidence in a summary judgment proceeding.

That the terms "trial date," "trial witnesses," "evidence at the trial," "trial of the action," and "testify at trial" are used elsewhere in the statutory scheme governing expert witness discovery (see, e.g., §§ 2034.210-2034.290) does not persuade us that a trial court's authority under section 2034.300 is limited to excluding an expert opinion from

evidence at trial and does not extend to a pretrial proceeding such as summary judgment. Rather, the absence of a specific reference to "evidence at the trial" in section 2034.300 indicates that a trial court's authority to "exclude from evidence" encompasses both pretrial and trial proceedings.

Finally, we decline to apply the *Modesto* court's analysis to the instant case because the factual circumstances here differ substantially from those presented in *Modesto*. The plaintiff in *Modesto* filed an untimely supplemental designation that the court found to be a "technical failure" to comply with former section 2034. That technical failure to comply, the *Modesto* court concluded, could be remedied by a motion to amend or augment the expert designation or by a motion seeking leave to submit a tardy designation.[8] (*Modesto, supra*, 221 Cal.App.3d at p. 583.) The court reasoned that "While there is a time limit before trial to make these motions, the trial court has the discretion to permit the motion to be made at a later date, even during trial. [Citation.]" (*Ibid.*) Here, unlike *Modesto*, plaintiff's conduct was more than a mere "technical failure" to comply with the statutory requirements for exchange of expert witness information. Plaintiff failed to provide any expert witness information or to designate any expert witness. Unlike the plaintiff in *Modesto*, plaintiff in the instant case could not remedy his failure to comply with the statutory requirements. His belated effort to do so after entry of judgment was rejected by the trial court.

We conclude the court's holding in *Modesto* did not preclude the trial court from sustaining defendant's evidentiary objection to plaintiff's expert declarations in the summary judgment proceeding.

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[8] Section 2034.610 accords a trial court discretion to grant a party who has engaged in a timely exchange of expert witness information leave to augment or amend that party's expert witness list. As discussed, section 2034.710 authorizes a trial court to allow a party who has failed to submit expert witness information on the date specified in a demand for that exchange leave to submit that information at a later date.

III. Negligence and premises liability

The elements of a negligence cause of action are the existence of a legal duty of care, breach of that duty, and proximate cause resulting in injury. (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917-918.) The elements of a cause of action for premises liability are the same as those for negligence: duty, breach, causation, and damages. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205 (*Ortega*); see Civ. Code, § 1714, subd. (a).) In addition, a plaintiff suing for premises liability has the burden of proving that the owner had actual or constructive knowledge of a dangerous condition in time to correct it, or that the owner was "'able by the exercise of ordinary care to discover the condition.'" (*Ortega, supra*, at p. 1206, quoting *Girvetz v. Boys' Market, Inc.* (1949) 91 Cal.App.2d 827, 829.)

The undisputed evidence in the instant case shows that defendant breached no duty of care and had no knowledge of any claimed dangerous condition of the stairway on which plaintiff fell, despite regular inspections by it, by its insurance carrier, and by Chase. Plaintiff failed to raise any triable issue of material fact regarding these elements of his negligence and premises liability claims. Summary judgment was therefore properly granted in defendant's favor. (*Aguilar, supra*, 25 Cal.4th at p. 849; § 437c, subd. (p)(2).)

DISPOSITION

The judgment is affirmed. Defendant is awarded its costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT