

S233096

SUPREME COURT
FILED

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA APR - 6 2016

WILSON DANTE PERRY,

Plaintiff and Appellant

v.

BAKEWELL HAWTHORNE, LLC,

Defendant and Respondent

Frank A. McGuire Clerk

Deputy **CRC**
8.25(b)

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

Los Angeles County Superior Court
Case No. BC 500 198
Hon. Gregory Keosian, Judge

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

I. ARGUMENT 1

 A. APPELLANT’S PETITION FOR REVIEW IS UNTIMELY AND THUS
 CANNOT BE CONSIDERED 1

 B. APPELLANT FAILS TO MEET HIS BURDEN TO SHOW A GROUND
 FOR REVIEW “TO SECURE UNIFORMITY OF DECISION”
 REGARDING *KENNEDY V. MODESTO CITY HOSPITAL* (1990) 221
 CAL.APP.3D 575 3

 C. APPELLANT FAILS TO MEET HIS BURDEN TO SHOW A GROUND
 FOR REVIEW “TO SECURE UNIFORMITY OF DECISION”
 REGARDING *STAUB V. KILEY* (2014) 226 CAL.APP.4TH 1437 5

II. CONCLUSION 7

CERTIFICATE OF WORD COUNT 8

PROOF OF SERVICE 8-9

TABLE OF AUTHORITIES

Statutes and Regulations

Code of Civil Procedure Section 2034.710 5

California Rules of Court Rule 8.25(b) 1

California Rules of Court Rule 8.264(b)(1) 1

California Rules of Court Rule 8.268 4, 5

California Rules of Court Rule 8.500(b)(1) 5

California Rules of Court Rule 8.500(e)(1) 1, 3, 4

Cases

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

Perry v. Bakewell Hawthorne, LLC (2016) 244 Cal.App.4th 712 3

Staub v. Kiley (2014) 226 Cal.App.4th 1437 5, 6

I. ARGUMENT

**A. APPELLANT'S PETITION FOR REVIEW IS UNTIMELY AND
THUS CANNOT BE CONSIDERED**

California Rules of Court ("CRC"), Rule 8.500(e)(1) provides: "A petition for review must be served and filed within 10 days after the Court of Appeal decision is final in that court. For purposes of this rule, the date of finality is not extended if it falls on a day on which the clerk's office is closed."

The Court of Appeal's decision herein was filed on February 3, 2016. Thus, pursuant to CRC Rule 8.264(b)(1), the decision became final on March 4, 2016.

Where the decision became final on March 4, pursuant to CRC Rule 8.500(e)(1), Appellant had to have filed and served his Petition by March 14, 2016.

This Court's docket reflects that the Petition was not filed until March 16, 2016.

Appellant may contend that the Petition was filed and served pursuant to CRC Rule 8.25(b), and therefore is timely on that basis. However, the Proof of Service for the Petition does not reflect that it was filed and served pursuant to Rule 8.25(b).

CRC Rule 8.25(b) provides in relevant part:

(3) A brief, an application to file an amicus curiae brief, an answer to an amicus curiae brief, a petition for rehearing, an answer to a petition for rehearing, a petition for transfer of an appellate division case to the Court of Appeal, an answer to such a petition for transfer, a petition for review, an answer to a petition for review, or a reply to an answer to a petition for review is timely if the time to file it has not expired on the date of:

(A) Its mailing by *priority or express mail* as shown on the postmark or the postal receipt; or

(B) Its delivery to a common carrier *promising overnight delivery* as shown on the carrier's receipt. (Emphasis added.)

The Proof of Service of the Petition does not provide that it was served by priority or express mail, nor by common carrier “promising overnight delivery.”

For these reasons, Appellant’s Petition is untimely and cannot be considered.

B. APPELLANT FAILS TO MEET HIS BURDEN TO SHOW A GROUND FOR REVIEW “TO SECURE UNIFORMITY OF DECISION” REGARDING *KENNEDY V. MODESTO CITY HOSPITAL* (1990) 221 CAL.APP.3D 575

Appellant in his Petition for Review (pg. 1) argues that the “published Court of Appeal Opinion in this case [*Perry v. Bakewell Hawthorne, LLC* (2016) 244 Cal.App.4th 712] 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).”

Thus, the sole ground for review proffered by Appellant is “to secure uniformity of decision.” As is plain from the Court of Appeal’s Opinion, this ground does not exist with regard to *Kennedy v. Modesto City Hospital* (1990) 221 Cal.App.3d 575.

Perry does not create “conflicts with both longstanding and recent decisions interpreting the law of expert witness disclosure....” It does not purport to abrogate *Kennedy*. Instead, as stated in the *Perry* Opinion, the Court of Appeal found that *Kennedy* was factually distinguishable and made its decision on that basis:

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, 270 Cal.Rptr. 544 (*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, 270 Cal.Rptr. 544.)

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, 270 Cal.Rptr. 544.) The court observed: “Normally a summary judgment will be heard and determined before the exchange of expert witness information is completed.” (*Ibid.*) In light of the different statutory deadlines, the court in *Modesto* found “no ascertainable intent to make the exclusion of expert testimony applicable to a summary judgment proceeding.” (*Ibid.*)

* * *

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, 270 Cal.Rptr. 544.) 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. (*Perry, supra*, 244 Cal.App.4th at 721-722; emphasis added.)

Therefore, contrary to Appellant's argument, *Perry* does not create any conflict with *Kennedy*. *Perry* creates an exception to the application of *Kennedy* where a party commits "more than a mere "technical failure" to comply with the statutory requirements for exchange of expert witness information" and the party's failure to comply with expert witness exchange requirements can be remedied. *Id.* at 722.

For these reasons, in future cases should a party commit a "technical failure" to comply with the statutory requirements for exchange of expert witness information," and the party's failure to comply with expert witness exchange requirements can be remedied (for example, via a motion under Code of Civil Procedure section 2034.710 for leave to submit a tardy expert witness disclosure), then such facts would come within *Kennedy* and not within *Perry*.

Thus, Appellant fails to meet his burden to show a ground for review "to secure uniformity of decision" under CRC Rule 8.500(b)(1).

C. APPELLANT FAILS TO MEET HIS BURDEN TO SHOW A GROUND FOR REVIEW "TO SECURE UNIFORMITY OF DECISION" REGARDING *STAUB V. KILEY* (2014) 226 CAL.APP.4TH 1437

Appellant in his Petition for Review (pgs. 2-3) argues that review is necessary “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 to Perry’s expert witnesses, but Perry’s objection to the untimely demand was a nullity because a motion for protective order was his only remedy. (Opinion, pp. 9-10.)”

Appellant is making at least three arguments in this portion of his Petition, seeking review pursuant to CRC Rule 8.500(b)(1), but none of those arguments even remotely present a basis for review to secure uniformity of decision:

1. There is no basis for review with regard to *Staub* including for the simple reason acknowledged by Appellant - “The Court of Appeal in the instant case did not mention *Staub*.” Where the *Perry* decision does not mention *Staub*, this obviously means that no conflict is presented between *Perry* and *Staub*, and thus no ground “to secure uniformity of decision” under CRC Rule 8.500(b)(1) exists.

2. That (according to Appellant’s unsupported argument) the demand for exchange of expert witness information served by former Defendant, JP MORGAN CHASE BANK, NA, is claimed to be untimely does not present any ground for review under CRC Rule 8.500(b)(1). This is a factual issue properly resolved by the Trial Court, which found

that the demand was not untimely. Moreover, this issue cannot be considered on a Petition for Review. At most, it could only have been considered (if at all) on a Petition for Rehearing pursuant to CRC Rule 8.268. However, Appellant did not file a Petition for Rehearing, and thus has waived his argument.

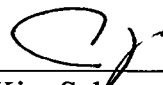
3. There is no basis for review with regard to whether “Perry’s objection to the untimely demand was a nullity because a motion for protective order was his only remedy.” The *Perry* decision does not change California law on this subject. It does not present any conflict in law. Moreover, this issue cannot be considered on a Petition for Review. At most, it could only have been considered (if at all) on a Petition for Rehearing pursuant to CRC Rule 8.268. However, Appellant did not file a Petition for Rehearing, and thus has waived his argument.

II. CONCLUSION

For all the reasons stated herein, Respondent respectfully submits that Appellant’s Petition for Review should be denied.

Dated: April 5, 2016

SCHUMANN | ROSENBERG

By: 

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Jeffrey P. Cunningham, Esq
Attorneys for Defendant and
Respondent, BAKEWELL
HAWTHORNE, LLC

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.204, I certify that the text of the above brief contains 1677 words, according to the word count of the computer program used to prepare the brief.

Dated: April 5, 2016



Jeffrey P. Cunningham, Esq.

PROOF OF SERVICE

I am over the age of eighteen years and not a party to this action. My business address is 3100 Bristol Street, Ste. 100, Costa Mesa, CA 92626. On April 5, 2016, I served the attached **Respondent's Answer to Petition for Review** by depositing copies of it with Federal Express, postage prepaid, for overnight delivery to:

Howard Posner, Esq.
2734 Oakhurst Avenue
Los Angeles, CA 90034

Los Angeles County Superior Court
Court Clerk
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Los Angeles, CA 90012

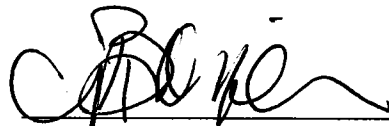
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1875 Century Park E. Ste. 1770
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Clerk of the Court of Appeal
300 S. Spring Street
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Los Angeles, CA 90013

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

Court of Appeal in accordance with its Local Rules.

I declare under penalty of perjury that the above is correct. Executed in Costa
Mesa, CA on April 5, 2016.



Phillina Batiller-Orfila