S233096

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

Reply to Answer to Petition for Review

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Bakewell's Argument about *Kennedy v. Modesto City Hospital* Shows Why Review is Necessary

Bakewell argues in its Reply (at p. 5) that the present case "does not create any conflict with *Kennedy* [*v. Modesto City Hospital* (1990) 221 Cal. App. 3d 575]." The conflict is obvious and fundamental, and Bakewell's attempt to explain it away shows why review is needed to resolve it.

Kennedy analyzed the expert witness provisions in Code of Civil Procedure sections 203.210 – 2034.300 and decided that "the Legislature had in mind the exclusion of expert testimony offered by noncomplying parties at trial, not at a pretrial proceeding." (*Id.* at 582.)

The Court of Appeal in the present case held, "The language of section 2034.300 does not limit its application to a trial ... 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, p. 11-12)

Kennedy held that a court cannot exclude expert testimony except at trial. The present case holds that a court can exclude expert testimony at any stage. It is hard to imagine a more direct conflict. Both decisions are based on the wording of the statute, which they interpret in diametrically opposed ways. So the notion that the two cases came to opposing holdings because the facts are somehow distinguishable makes sense only to someone who avoids reading either decision.

But Bakewell's argument that in future cases *Kennedy* will apply in cases of "mere technical failure" to comply with expert witness information statutes, while the present case will apply when the failure is not merely technical, shows the likelihood of confusion the present decision would create. Under *Kennedy,* the limits on a court's power to exclude expert

testimony are clear. If Bakewell's reading of the present decision is applied, nothing will be clear. The result in each case will depend on whether a failure to comply with an expert witness information demand is "technical" or not. The standard for determining which is which will be confused indeed, because it will begin with the present case, in which not responding to an untimely demand was deemed far more than a mere "technical" failure.

The Court of Appeal has made settled law unsettled. Review is needed to settle it again.

The Present Decision Conflicts with *Staub v. Kiley*, whether it Mentions *Staub* or Not

Staub v. Kiley (2014) 226 Cal.App.4th 1437 held that a party's service of an untimely expert witness demand did not confer standing on that party standing to move to exclude expert testimony at trial. The present case holds that it does confer standing, and the sole remedy for a party served with a late demand (apparently, no matter how late or how close to the trial date) is to move for a protective order. Again, the conflict between the two decisions is obvious and direct.

Bakewell's principal argument — that there is no conflict between *Staub* and the present decision because the present decision does not actually cite *Staub* — owes more to Monty Python than to serious jurisprudence.

Its second argument — that timeliness is a factual issue, and the trial court found the demand was timely — is just wrong. The record contains no trial court finding that expert information demand was timely, and the Court of Appeal, understanding that that it was untimely, specifically addressed the issue and held that the only remedy for untimeliness was a motion for protective order.

The Petition for Review Was Timely

Bakewell argues that the Petition for Review was untimely because the proof of service did not contain the right magic words, but Rule 8.25(b)(3)(A), which Bakewell quotes, says a petition for review is filed timely if the time to file it has not expired on the date it is mailed "by priority or express mail *as shown on the postmark or the postal receipt.*" (Italics added.) There is no requirement that the proof of service say anything in particular. The rule reflects the common-sense expectation that court personnel will be able to read an envelope and a postmark. (The expectation was met here; the Supreme Court online docket says the Petition for Review was "Filed pursuant to CRC 8.25(b).") The timeliness argument is frivolous.

Dated: April 13, 2016

Howard Posner
Attorney for Petitioner

Certification of Length

This text of this brief contains 705 words, according to the word processing program's count function.

Dated: April 14, 2016

Howard Posner

Proof Of Service

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

Kim Schumann
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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
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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 April 14, 2016.