S233096

In the Supreme Court of California

Wilson Dante Perry,

Plaintiff, Appellant and Petitioner

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

Opening Brief on the Merits

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The Issue

The Supreme Court's Order granting review stated:

The issue to be briefed and argued is limited to the following: Does Code of Civil Procedure section 2034.300, which requires a trial court to exclude the expert opinion of any witness offered by a party who has unreasonably failed to comply with the rules for exchange of expert witness information, apply to a motion for summary judgment?

It does not. The statutory scheme for expert witness discovery is addressed to preparation for trial, and is irrelevant to summary judgment. The purpose of that scheme is to allow parties to prepare to cross-examine expert witnesses, rebut their opinions, and impeach their testimony.

Cross-examination, rebuttal and impeachment are integral to the trial process, in which the trier of fact must weigh the evidence and the witnesses' credibility in resolving issues of fact. But cross-examination, rebuttal testimony and impeachment have no place in the summary judgment process, in which the inquiry ends with determining whether a triable issue of fact exists.

Thus Code of Civil Procedure sections 2034.210 through 2034.310 are replete with references to trial and trial testimony, but do not mention expert testimony in a motion for summary judgment, or any other motion. The requirement that "the trial court shall exclude from evidence" the testimony of undisclosed experts" can be read to include a summary judgment only by ignoring a statutory framework that obviously, and repeatedly, confines itself to the subject of disclosing trial testimony.

And excluding expert witness declarations in opposition to a summary judgment motion is contrary to the policy of resolving doubts against granting summary judgment so as to allow cases to be tried on the merits.

Background

The Injury and Lawsuit

Respondent Bakewell Hawthorne, LLC leases property in Los Angeles to a Chase Bank. The bank's automated teller machine can be reached from the sidewalk by an eight-step stairway. (AA 108)

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

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.) On May 14, 2014, Respondent served an objection to Chase's Demand as untimely. (Court of Appeal Opinion, p. 2.)[1] 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), asserting that it had no notice of a dangerous condition, and therefore breached no duty to Perry. (AA 2-3.)

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[1] 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[.]" 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). Because the demand was served by mail, Code of Civil Procedure section 1013(a) required an additional five days, until May 30, to serve expert witness information.

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 stairs' condition was unsafe and violated state and local building codes. Section 91.3305(b) of the Los Angeles City Building Code of 1954-55, in effect when the building was constructed, required that "the difference in the height of any two risers [the vertical parts of the steps] or in the width of any two treads [the horizontal step surfaces] of any one flight shall not exceed one-fourth inch" (AA 102, ¶¶ 7-8, AA 142), but the height of the risers varied by as much as three fourths of an inch, and the width of the treads varied by nearly an inch. (AA 144.) Thus the variation in riser height was three times what the ordinance allowed, and the variation in tread width was nearly four times what the ordinance allowed. Because persons descending stairs develop a rhythm from muscle memory and expect certain stair dimensions, variations in the dimensions could cause a person to misstep, lose balance and fall. (AA 102, ¶ 10)

The stairs also violated industry standards requiring the edges of each tread (called "nosings") to be "readily discernible, slip resistant, and adequately demarcated;" instead, the edges were "of a similar color and texture as the treads, and thus the surfaces blend together." The steps 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.) There was long-term deterioration of the stairs, and repairs that had been made with plaster instead of "adequate material" such as epoxy or concrete, showing that the dangerous condition existed long enough that periodic inspections would have discovered it. (AA 103-104, ¶ 13.)

The violations of industry standards and the Los Angeles City Building

Code constituted violations of Los Angeles Municipal Code section 91.3402 and California Building Code section 3401.2, both of which provide that premises "be maintained in a safe and sanitary condition[.]" (AA 103, ¶ 12; AA 151 at § 94.3401.2, AA 153)

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

Bakewell objected to Avrit's declaration because Perry had not designated experts in response to Chase's demand for exchange of expert witness information. (AA 197-198.)

The trial court granted summary judgment "because Plaintiff's opposition relies fundamentally" on its expert opinions, which were "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 *Kennedy v. Modesto City Hospital* (1990) 221 Cal. App. 3d 575, which held that former section 2034(j), now section 2034.300, did not apply to a summary judgment motion. The Court of Appeal held instead that 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.)

This Court granted review on April 27, 2016.

Argument

I. The Plain Wording of the Expert Disclosure Statute, Including CCP § 2034.300, Deal with Expert Witnesses at Trial, Not in Some Other Proceeding.

Code of Civil Procedure § 2034.300 provides:

> [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.
>
> (b) Submit an expert witness declaration.

The question of whether section 2034.300 applies to a proceeding other than trial has not been addressed by the Supreme Court.[2]

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[2] The issue was raised but not decided under former Code of Civil Procedure section 2037 in *Mann v. Cracchiolo* (1985) 38 Cal.3d 18. Medical malpractice defendants moving for summary judgment urged that because the plaintiffs' physician expert "had not been listed as one of their experts for trial, he could not be called as a witness at trial, and because the purpose of a summary judgment is to determine whether there are any triable issues of fact," the court had to disregard his declaration in deciding a summary judgment motion. The Supreme Court did not directly address the question of whether expert witness inadmissibility at trial necessarily meant inadmissibility on summary judgment. Instead, it pointed out that under former section 2037.6, the court could allow an expert not designated timely to testify at trial if there was a "good faith effort to list" the expert witness and the opposing party had notice of the witness, or if the failure to designate the expert was excused for a variety of reasons, including "mistake, inadvertence, surprise, or excusable neglect." (*Mann* at 39-40 and fn 10.) The expert witness statute at issue was repealed and replaced in 1986 (Stats. 1986, ch. 1334 § 2, at p. 4700.) No published (or, to Perry's knowledge, unpublished) decision has cited *Mann* on the question of undesignated expert testimony admissibility in a summary judgment.

"Our fundamental task in interpreting a statute is to determine the Legislature's intent so as to effectuate the law's purpose. 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." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.)

The expert witness disclosure statute (CCP § 2034.210 – 2034.310) deals with disclosing expert witness information *for trial.* It uses the word "trial" 23 times, and "expert trial witness" or "expert trial witnesses" nine times. The only other proceedings it mentions are those that would occur in the expert witness disclosure process itself: motions for earlier or later dates for exchange of information (§ 2034.230(b)), motions for protective order (§ 2034.250(a), (c) and (d)), and motions for preservation of the original demand and responses for longer than six months after trial. (§ 2034.290(b).)

Kennedy v. Modesto City Hospital (1990) 221 Cal. App. 3d 575, held that declarations of expert witnesses 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 exchange of expert witness information. Treatises cite

Kennedy for this proposition.[3] Until the present case, no published decision had taken issue with *Kennedy*.

The medical malpractice plaintiff in *Kennedy* 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.) The Court of Appeal 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.)

Kennedy carefully examined the wording of former Code of Civil Procedure section 2034 in explaining why that procedural bar did not apply to summary judgment. In 2004 the relevant subdivisions of section 2034 were renumbered 2034.210 through 2034.310 by Assembly Bill 3081 (Stats. 2004, ch. 182), section 61 of which states, "Nothing in this act is intended to substantively change the law of civil discovery." *Kennedy's* analysis (with

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[3] "[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.)

current section numbers added in brackets) quoted extensively from the statute in pointing out that it was concerned exclusively with expert testimony at trial, rather than summary judgment:

> 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).) [§ 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).) [§ 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).) [§ 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).) [§ 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).) [§ 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).) [§ 2034.260(c)(4)]
>
> Very telling is the express language of the exclusionary provision contained in section 2034, subdivision (j) [§ 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...."

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

Kennedy inferred from the wording of the statutes that "the Legislature had in mind the exclusion of expert testimony offered by noncomplying parties at trial, not at a pretrial proceeding." The court added, "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 582.)

Kennedy's analysis is common sense: in a statutory scheme dealing with disclosing expert trial witnesses who will testify at the trial, and disclosing what expert opinions they intend to offer at trial, the logical conclusion is that the section about excluding undisclosed experts means that they are excluded at trial.

The *illogical* conclusion would be that a detailed statutory scheme dealing with experts who will testify at trial is meant to exclude undisclosed experts from proceedings other than trial. The Court of Appeal below (Opinion, at p. 5-6) quoted *Coalition of Concerned Communities* and its requirement that it "not examine that language in isolation, but in the context of the statutory framework as a whole." (34 Cal.4th at 733.) But the Court of Appeal not only considered section 2034.300 in isolation, resolutely refusing to give an weight to the constant references to trial and testimony in the surrounding sections, but said outright that it was doing so:

> 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.

(Court of Appeal Opinion, pp. 10-11.)

The Court of Appeal did not explain why it found the statute's insistent references to trial testimony unpersuasive, but its conclusion defied logic. To decide that section 2034.300 applies to proceedings other than trial, it is necessary to decide 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 Legislature said nothing of the sort.

II. The Purpose and Public Policy Behind Both Summary Judgment and Expert Witness Disclosure Indicate that § 2034.300 Does Not Apply to Summary Judgment

A. Expert Witness Disclosure is a Discovery Tool For Assisting Trial Preparation by Facilitating Cross-Examination and Rebuttal

If the plain wording of the expert witness disclosure statute were not clear enough, the purpose of both the expert witness disclosure statute and the summary judgment statute, and the policies underlying those statutes, show that the exclusion of section 2034.300 does not apply to summary judgment motions, because applying it would be contrary to the purpose and policy underlying summary judgment.

The "purpose of the expert witness discovery statute is to give fair notice of what an expert will say at trial. This allows the parties to assess whether to take the expert's deposition, to fully explore the relevant subject area at any such deposition, and to select an expert who can respond with a competing opinion on that subject area." (*Bonds v. Roy* (1999), 20 Cal.4th 140, 146-147; *Cottini v. Enloe Medical Center* (2014) 226 Cal.App.4th 401, 415.) "[P]arties must prepare to cope with witnesses possessed of specialized knowledge in some scientific or technical field. They must gear up to cross-examine them effectively, and they must marshal the evidence to rebut their opinions." (*Bonds,* 20 Cal.4th at 147.)

B. Cross-Examination and Rebuttal Are Irrelevant in a Summary Judgment Motion

While competing opinions, rebuttal and effective cross-examination are key elements of a trial, they are irrelevant in a summary judgment motion. A trial is about resolving conflicting evidence. A summary

judgment motion is only about determining whether the evidence conflicts. "Summary judgment law turns on issue finding rather than on issue determination." (*Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal.App.4th 392, 396.) "The actual weighing of conflicting evidence by the factfinder is a process which can never take place in the context of a summary judgment motion." (*Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 396; *Hernandez v. Department of Transportation* (2003) 114 Cal.App.4th 376, 388.)

"Accordingly, the function of the trial court in ruling on a motion for summary judgment is merely to determine whether such issues of fact exist, and not to decide the merits of the issues themselves." (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107.)

"[I]f the court concludes that the plaintiff's evidence or inferences raise a triable issue of material fact, it must conclude its consideration and deny the defendants' motion." *Aguilar v. Atlantic Richfield* (2001) 25 Cal.4th 826, 856.

So if, for example, in the present case Perry were allowed to have engineer Brad Avrit testify at trial without disclosing Avrit as an expert witness, Perry would have seized an unfair advantage because Bakewell Hawthorne would have lost the opportunity to prepare effective cross-examination of Avrit, find its own expert witness to contradict his testimony, or find evidence impeaching Avrit, so that the trier of fact would have the best presentation of evidence from both sides to weigh and determine the facts.

But on a motion for summary judgment, contradiction, rebuttal and impeachment play no role because there is no trier of fact and no fact-finding. The court hearing the motion cannot weigh the evidence. (*Ibid.*) It does not matter if the moving party is surprised (as parties on both sides of

summary judgment motions often are), by the opposing party's evidence, because as a practical matter forewarned would not be forearmed. Under Code of Civil Procedure section 437c(c), "summary judgment may not be granted by the court based on inferences reasonably deducible from the evidence if contradicted by other inferences or evidence that raise a triable issue as to any material fact." "[T]he facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences therefrom must be accepted as true." (*Sada* v. *Robert F. Kennedy Medical Center* (1997) 56 Cal. App.4th 138, 148; *Hersant v. Department of Social Services* (1997) 57 Cal. App. 4th 997, 1001.)

The absence of evidence-weighing cuts both ways. Under section 437c(e), "If a party is otherwise entitled to a summary judgment pursuant to this section, summary judgment may not be denied on grounds of credibility or for want of cross-examination of witnesses furnishing affidavits or declarations in support of the summary judgment[.]"

Significantly, the only absolute exception to the procedural bar against undisclosed witness testimony at trial is in section 2034.310, which allows undisclosed expert witness testimony to impeach the other side's expert witness. At trial it might matter to the finder of fact how much an expert witness is getting paid, or whether in an earlier case the expert has given an opinion contradicting the expert's opinion in the current case, or whether the plaintiff is the expert's sister. But because impeachment goes to the weight of the evidence, it is peculiarly an issue for a finder of fact at trial (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998), and has no application to a motion for summary judgment.

C. Applying Section 2034.300 to Motions for Summary Judgment Is Contrary to the Policy of Resolving all Doubts in Favor of Denying Summary Judgment Sparingly so as to Protect the Right to Trial on the Merits

Exclusion of expert testimony in opposition to a motion for summary judgment is often a death knell for a plaintiff's case, as it would be in the present case. Engineer Brad Avrit's declaration, establishing that the condition of the stairs violated statutes and ordinances, creates a presumption of negligence under Evidence Code section 669(a), so the case is obviously meritorious, and summary judgment was granted only because the trial court excluded that declaration.

"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).

Thus there are two policies in play. First is the strong policy in favor of allowing trial on the merits rather than disposing of cases on summary judgment. Second is the policy of facilitating discovery of expert witnesses so that parties can prepare for expert testimony at trial, which, whatever its importance in the abstract, is vastly less important — to the point of irrelevance — in the context of a summary judgment motion, because trial is not impacted by allowing expert testimony in a summary judgment proceeding.

The trial court and Court of Appeal in the present case shunted aside the very real — and immediately impacted — policy of ensuring a trial on the merits when a case has merit, in favor of a policy that was not impacted

at all. Such an approach is completely backward.

On every level, section 2034.300 is a statute dealing with preparation for trial. It is part of a statutory scheme that deals repeatedly and invariably with expert witness trial testimony; making it applicable to a motion will serve no pressing purpose, but will allow trial courts to prevent meritorious cases from getting to trial.

And as *Kennedy v. Modesto City Hospital* pointed out, Code of Civil Procedure section 437c is a statutory scheme in which the rules of admissibility differ from the rules at trial, with the entire process based on declarations that would be inadmissible at trial. (221 Cal. App. 3d at 582.) The different rules make sense in light of the different purposes of trial and summary judgment. Trials resolve factual issues. Summary judgment motions are limited to determining whether factual issues exist. There is no reason why evidence should be subject to the same rules in both proceedings.

A new rule applying section 2034.300 to summary judgment motions will do little to further the purpose of the expert witness disclosure rules, which is to assist in trial preparation. It will greatly erode the policy that summary judgment should not be used to prevent meritorious cases from getting to trial.

Dated: May 27, 2016

Hal Posner

Howard Posner
Attorney for Petitioner

Certification of Length

This text of this brief contains 4,304 words, according the word processing program's count function.

Dated: May 27, 2016

Howard Posner

Proof Of Service

I am over 18 and not a party to this action. My business address is
On May 27, 2016, I served the **Opening Brief on the Merits** by depositing copies in the United States Mail, postage prepaid, to:

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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 May 27, 2016.