SUPREME COURT
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S233096

IN THE
SUPREME COURT OF THE STATE 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 County Superior Court Case No. BC 500 198
The Honorable Gregory Keosian

ANSWER BRIEF ON THE MERITS

Kim Schumann, Esq. (SBN 170942)
Jeffrey P. Cunningham, Esq. (SBN 151067)
Schumann | Rosenberg
3100 Bristol Street, Suite 100
Costa Mesa, CA 92626
(T) (714) 850-0210 (F) (714) 850-0551
Cunningham@SchumannRosenberg.com

Attorneys for Defendant and Respondent,
BAKEWELL HAWTHORNE, LLC

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Cunningham@SchumannRosenberg.com

Attorneys for Defendant and Respondent,
BAKEWELL HAWTHORNE, LLC

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I. INTRODUCTION

This Court granted review on the issue: "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?"

As shown herein, and as correctly decided by the Court of Appeal in *Perry v Bakewell Hawthorne, LLC* (2016) 244 Cal.App.4th 712 (review granted and opinion superseded by *Perry v. Bakewell Hawthorne*, 368 P.3d 923), Code of Civil Procedure section 2034.300 clearly applies to summary judgment motions. The unambiguous language of the statute provides that a trial court "shall 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.

A declaration from an expert witness is "evidence" containing "the expert opinion" of that witness. An expert witness also comes within the language "any witness." The statute's plain language thus empowers a trial court to exclude such "evidence" in the form of "expert opinion" from a "witness" on a motion for summary judgment. If the Legislature intended to restrict this authority to exclude an undisclosed expert witness' testimony at trial, it had the opportunity to have so stated and would have so stated in Code of Civil Procedure section 2034.300. But, it did so not limit a trial court's authority.

Plaintiff, WILSON DANTE PERRY ("Plaintiff"), myopically fixates on the word "trial" and combinations of it and "witness," "date" and "evidence" in sections of the Code of Civil Procedure *other* than section 2034.300. But, as correctly found by the Court of Appeal, the language on which Plaintiff relies does not appear in section 2034.300, leading to the inescapable conclusion required by cannons of statutory construction that "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." (*Perry, supra*, 244 Cal.App.4th at 723.)

Application of Code of Civil Procedure section 2034.300 to summary judgment motions would advance the main purpose of the expert witness discovery statutes - to avoid surprise and prejudice. The purpose of the expert witness discovery statutes is to give fair notice of what an expert will testify, thus allowing 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, 147-148.) One of the purposes of the Civil Discovery Act (including the statutes governing expert witness discovery) is "to safeguard against surprise." (*Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 950.)

Plaintiff did not designate any expert witness. Defendants, BAKEWELL HAWTHORNE, LLC ("Bakewell") and JP MORGAN CHASE BANK, NA ("Chase"), brought motions for summary judgment. In reliance on Plaintiff's failure to designate any expert witness, neither Bakewell nor Chase presented declarations from expert witnesses with their motions. Plaintiff also unreasonably failed to take any of the actions listed in Code of Civil Procedure section 2034.300 (a)-(d) inclusive of making "that expert available for a deposition under Article 3 (commencing with Section 2034.410)." The Trial Court (Hon. Gregory Keosian, Judge) thus properly excluded Plaintiff's undesignated experts' declarations to avoid surprise and prejudice to Bakewell and Chase.

Further, as correctly determined by the Court of Appeal, this case and *Kennedy v. Modesto City Hospital* (1990) 221 Cal.App.3d 575 are factually distinguishable and thus do not create a conflict in the law. Therefore, the ground on which review has been granted, "to secure uniformity of decision" (California Rules of Court Rule 8.500(b)(1)), does not exist and review should be dismissed as improvidently granted and the Court of Appeal's opinion ordered republished.

II. LEGAL ARGUMENT AND AUTHORITY

A. The Plain Meaning of Code of Civil Procedure section 2034.300 is That it Applies to Summary Judgment Motions Where a Trial Court "Shall Exclude

From Evidence the Expert Opinion of Any Witness That is Offered by Any Party Who Has Unreasonably Failed" to Participate in Exchange of Expert Witness Information

Plaintiff's arguments ignore the plain meaning of Code of Civil Procedure section 2034.300, and improperly attempt to add language to it that the Legislature did not include in the statute.

The usual starting point in interpreting any statute is the plain language of the statute itself. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1000.)

"Our role in construing a statute is to ascertain the Legislature's intent so as to effectuate the purpose of the law. (*People v. Snook* (1997) 16 Cal.4th 1210, 1215 [69 Cal.Rptr.2d 615, 947 P.2d 808].) In determining intent, we look first to the words of the statute, giving the language its usual, ordinary meaning. If there is no ambiguity in the language, we presume the Legislature meant what it said, and the plain meaning of the statute governs. (*Ibid.*)." (*Hunt, supra,* 21 Cal.4th at1000.)

Where legislative intent is expressed in unambiguous terms, the statutory language must be treated as conclusive; "no resort to extrinsic aids is necessary or proper." (*Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, 1119-1120, citing *People v. Otto* (1992) 2 Cal.4th 1088, 1108.)

Code of Civil Procedure section 2034.300 provides in relevant part that "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...."

The words of this statute are clear. The Legislature expressed in unambiguous terms the scope and effect of it. First, the meaning of "evidence" is unambiguous. Evidence Code section 140 defines "evidence" to mean "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact."

Opinion of an expert is "evidence" as defined in Evidence Code section 140. (*Andersen v. Howland* (1970) 3 Cal.App.3d 380, 384.) Therefore, "evidence" as used in

Code of Civil Procedure section 2034.300 includes a declaration submitted by an expert witness to support or oppose a motion for summary judgment.

The Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them. (*People v. Overstreet* (1986) 42 Cal.3d 891, 897; *People v. Cruz* (1996) 13 Cal.4th 764, 775.)

Evidence Code section 140 was enacted in 1965. Code of Civil Procedure section 2034.300 was enacted in 2004. Thus, the Legislature is deemed to have been aware of the broad definition of "evidence" in Evidence Code section 140 when Code of Civil Procedure section 2034.300 was enacted thirty-nine years later. (*Overstreet, supra,* 42 Cal.3d at 897; *Cruz, supra,* 13 Cal.4th at 775.) This includes that "evidence" was not limited to "evidence" presented at "trial," and thus covers "evidence" presented in connection with motions for summary judgment.

Second, the meaning of "expert opinion" in Code of Civil Procedure section 2034.300 is unambiguous. Testimony by expert witnesses is addressed in various sections of the Evidence Code. For example, its section 720 provides:

> (a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.
>
> (b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.

Evidence Code section 801 provides:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

> (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
>
> (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

None of the Evidence Code sections regarding "expert opinion" provide that it can only be provided at "trial." In fact, Evidence Code section 801 specifically refers to "expert opinion" given at a "hearing"; this clearly encompasses "expert opinion" given via declaration in connection with a hearing on a motion for summary judgment. Therefore, "expert opinion" as used in Code of Civil Procedure section 2034.300 includes such testimony via declaration submitted by an expert witness to support or oppose a motion for summary judgment.

Evidence Code sections 702, 801 and similar sections were enacted in 1965. Thus, when the Legislature enacted Code of Civil Procedure section 2034.300 in 2004, it is deemed to have been aware of the broad meaning of "expert opinion" as used in the prior thirty-nine years. (*Overstreet, supra,* 42 Cal.3d at 897; *Cruz, supra,* 13 Cal.4th at 775.) This includes that "expert opinion" was not limited to it being presented at "trial," and thus covers "expert opinion" presented in connection with motions for summary judgment.

Third, the meaning of "any witness" in Code of Civil Procedure section 2034.300 is unambiguous. Numerous sections of the Evidence Code concern "witnesses." For example, Evidence Code section 800 pertains to "lay witnesses." Evidence Code section 801 concerns "expert witnesses." No Evidence Code section (or decisional law) provides that a person is a "witness" only if he or she is testifying at "trial."

The rules of evidence prescribed in the Evidence Code (inclusive of its sections 800

and 801, both of which were enacted in 1965) apply to declarations including those submitted in connection with motions for summary judgment. Evidence Code section 300 provides: "Except as otherwise provided by statute, this code applies in every action before the Supreme Court or a court of appeal or superior court, including proceedings in such actions conducted by a referee, court commissioner, or similar officer, but does not apply in grand jury proceedings."

Evidence Code section 300 does not state that the Evidence Code (including those sections concerning witnesses) only applies to "trial," but instead broadly applies to "every action" without any exception for motions for summary judgment. Moreover, the use of "any" in Code of Civil Procedure section 2034.300 with reference to "witness" delimits its scope, including that it obviously is not limited to an expert witness testifying at trial.

Evidence Code sections 300, 800, 801 and similar sections concerning witnesses were enacted in 1965. Thus, when the Legislature enacted Code of Civil Procedure section 2034.300 in 2004, it is deemed to have been aware of the broad meaning of "witness" as used in the prior thirty-nine years. (*Overstreet, supra,* 42 Cal.3d at 897; *Cruz, supra,* 13 Cal.4th at 775.) This includes that "witness" is not limited to an expert witness testifying at "trial," and thus covers "expert opinion" from "any witness" presented in connection with motions for summary judgment.

Fourth, the meaning of "offered by any party" in Code of Civil Procedure section 2034.300 is unambiguous. This simply means the act of proffering evidence. Under section 2034.300, this involves offering "expert opinion" of "any witness" at a trial or hearing, inclusive of a motion for summary judgment.

For these reasons, Plaintiff's attempt to inject ambiguity into Code of Civil Procedure section 2034.300 (where none exists) should be rejected. The statute is unambiguous and empowered the Trial Court to strike the declarations of Plaintiff's undesignated experts.

The Court of Appeal correctly found that the plain meaning of Code of Civil Procedure section 2034.300 authorized exclusion of Plaintiff's undesignated experts'

declarations: "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." (*Perry, supra,* 244 Cal.App.4th at 722.) The Court of Appeal's reasoning is correct and should be followed.

B. That Code of Civil Procedure Section 2034.300 Does Not Include Terms Referencing "Evidence at the Trial" Reflects the Legislature's Decision to Not Limit the Section to Exclusion of an Expert's Opinion at Trial

Plaintiff's position is based on language used in sections of the Code of Civil Procedure *other* than its section 2034.300. For example, he cites to terms such as "trial date," "trial witnesses," "evidence at the trial," "trial of the action" and "testify at trial" used in sections 2034.210–2034.290. (Opening Brief, pgs. 5-10.)

Plaintiff ignores the fact that Code of Civil Procedure section 2034.300 does not contain any of the language on which he relies. His argument is also contrary to basic rules of statutory construction.

This Court in *Briggs v. Eden Council for Hope and Opportunity* addressed this exact issue. In it, plaintiffs opposing an anti-SLAPP motion to strike argued that the language "in connection with a public issue or an issue of public interest" of Code of Civil Procedure section 425.16(e)(3) and (4) should be read into clauses (1) and (2) of section 425.16(e). (*Briggs, supra,* 19 Cal.4th at 1117-1119.)

However, this Court disagreed where the language "in connection with a public issue or an issue of public interest" is not stated in Code of Civil Procedure section 425.16(e)(1) or (2). It held in relevant part:

> Second, the Court of Appeal's analysis contravenes fundamental principles of statutory construction. Where different words or

> phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning. (*Playboy Enterprises, Inc. v. Superior Court* (1984) 154 Cal.App.3d 14, 21 [201 Cal.Rptr. 207].) Clauses (3) and (4) of section 425.16, subdivision (e), concerning statements made in public fora and "other conduct" implicating speech or petition rights, include an express "issue of public interest" limitation; clauses (1) and (2), concerning statements made before or in connection with issues under review by official proceedings, contain no such limitation. In light of this variation in phraseology, it must be presumed the Legislature intended different "issue" requirements to apply to anti-SLAPP motions brought under clauses (3) and (4) of subdivision (e) than to motions brought under clauses (1) and (2). (*Playboy Enterprises, Inc., supra*, at p. 21.) That the Legislature, when amending section 425.16 in 1997 to add the substance of clause (4), was at pains simultaneously to separate, by parenthetical numbering, subdivision (e)'s resulting four clauses buttresses the point by emphasizing the grammatical and analytical independence of the clauses.
>
> If, as plaintiffs contend, the operative language in section 425.16, subdivision (b), referring to a person's exercise of First Amendment rights "in connection with a public issue," were meant to function as a separate proof requirement applicable to motions brought under all four clauses of subdivision (e), no purpose would be served by the Legislature's specification in clauses (3) and (4) that covered issues must be "of public interest." (3) " 'Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.' " (*Reno v. Baird* (1998) 18 Cal.4th 640, 658 [76 Cal.Rptr.2d 499, 957 P.2d 1333], quoting *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22 [56 Cal.Rptr.2d 706, 923 P.2d 1].) Accordingly, we reject plaintiffs' contention and adopt, instead, a construction that gives meaning and assigns import to the phrase "of public interest" in subdivision (e)(3) and (4) of section 425.16. (*Briggs, supra,* 19 Cal.4th at 1117-1118; emphasis added.)

Plaintiff is making the same argument rejected in *Briggs*. He contends that Code of Civil Procedure section 2034.300 should be read to include "trial date," "trial witnesses," "evidence at the trial," "trial of the action" and "testify at trial," despite the fact that none of

those terms appear in section 2034.300. (Opening Brief, pgs. 5-10.)

Plaintiff's position thus "contravenes fundamental principles of statutory construction." (*Briggs, supra,* 19 Cal.4th at 1117; *Playboy Enterprises, Inc., supra,* 154 Cal.App.3d at 21.) Where the Legislature chose not to include any of the terms on which Plaintiff relies in Code of Civil Procedure section 2034.300, "it is presumed the Legislature intended a different meaning" (*Ibid.*) - that a trial court may exclude from evidence the expert opinion of any witness offered by a party in connection with a motion for summary judgment who has unreasonably failed to do any of things prescribed by its subparts (a)-(d).

Plaintiff's argument is also contrary to the rule of statutory construction that "we presume the Legislature meant what it said, and the plain meaning of the statute governs." (*Hunt, supra,* 21 Cal.4th at1000.) As a matter of law, it must be presumed that where the Legislature did not include any of the terms on which Plaintiff relies in Code of Civil Procedure section 2034.300, that it intended to not limit a trial court's ability to exclude evidence under that section to same provided at trial.

The Court of Appeal correctly found that Plaintiff's reliance on language used in sections of the Code of Civil Procedure other than section 2034.300 was unavailing: "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." (*Perry, supra,* 244 Cal.App.4th at 723.)

C. Application of Code of Civil Procedure Section 2034.300 to Declarations of Undesignated Experts on Summary Judgment Advances the Goal of the Expert Witness Discovery Statutes to Avoid Surprise and Prejudice

Application of Code of Civil Procedure section 2034.300 to summary judgment motions advances the main purpose of the expert witness discovery statutes - to avoid surprise and prejudice. The purpose of the expert witness discovery statutes is to give fair notice of what an expert will testify, thus allowing 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, supra,* 20 Cal.4th at 147-148.) One of the purposes of the Civil Discovery Act (including the statutes governing expert witness discovery) is "to safeguard against surprise." (*Boston, supra,* 170 Cal.App.4th at 950.)

The need for pretrial discovery is greater with regard to expert witnesses than ordinary fact witnesses. (*Bonds, supra*, 20 Cal.4th at 147; *Boston, supra*, 170 Cal.App.4th 936, 951).

As noted by the Court of Appeal, "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." (*Perry, supra,* 244 Cal.App.4th at 715.) Plaintiff also failed to seek a protective order. "Having neither sought nor obtained such order, plaintiff was required to "exchange information concerning expert witnesses in writing on or before the date of exchange specified in the demand." (§ 2034.260; *Cottini*, at p. 419, 172 Cal.Rptr.3d 4.) 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." (*Id.* at 721.)

Approximately five months after they designated experts, Bakewell and Chase filed their motions for summary judgment, to be heard in January 2015. [Appellant's Appendix ("AA"), 1-75.] Defendants relied on Plaintiff's failure to designate experts and seek a protective order where neither provided declarations from expert witnesses in support of their motions.

On December 23, 2014, Plaintiff filed his untimely opposition documents which, for the first time, included declarations from undesignated experts. (AA, 83-165.) This occurred

approximately seven months after Defendants served expert witness designations. Plaintiff also unreasonably failed to take any of the actions listed in Code of Civil Procedure section 2034.300(a)-(d), including to make his experts available for deposition.

Plaintiff argues that Defendants were not prejudiced by his submission of declarations from undesignated experts in opposition to motions for summary judgment. Plaintiff surmises that because Defendants would not have been able to cross-examine or rebut such experts in connection with the motions for summary judgment, this somehow means that they were not prejudiced by his failure to designate experts and otherwise comply with the requirements of Code of Civil Procedure section 2034.210 et seq. (Opening Brief, pgs. 11-13.)

Plaintiff is incorrect and misses the point. Had Plaintiff complied with his obligations under the expert witness discovery statutes, Bakewell and Chase would have received the information and documents required under Code of Civil Procedure section 2034.260 in May 2014 (at least seven months before the summary judgment hearing). Defendants also would have deposed Plaintiff's experts well before the summary judgment motions were heard.

Moreover, had Plaintiff complied with his obligations under the expert witness discovery statutes, Bakewell and Chase would have known that he had retained experts and the substance and foundation for their opinions, and thus would have prepared summary judgment motions supported by their own experts' declarations. But, where Plaintiff did not so comply and did not make his experts available for deposition, Defendants were deprived of their rights to conduct this discovery and to have prepared their motions accordingly.

This is a textbook example of the kind of surprise and prejudice that the expert witness discovery statutes are designed to avoid. (*Bonds, supra,* 20 Cal.4th at 147-148; *Boston, supra,* 170 Cal.App.4th at 950.)

Under these circumstances, the Trial Court was correct in striking Plaintiff's undesignated experts' declarations where, had it not done so, Bakewell and Chase would have suffered surprise and prejudice as a result of Plaintiff's numerous failures to comply with his obligations under the expert witness discovery statutes. This is particularly so

where, as noted by the Court of Appeal, Plaintiff failed to make such experts available for deposition. (*Perry, supra,* 244 Cal.App.4th at 722.)

Thus, application of Code of Civil Procedure section 2034.300 to summary judgment motions advances the main purpose of the expert witness demand and designation statutes to avoid surprise and prejudice. (*Bonds, supra,* 20 Cal.4th at 147-148; *Boston, supra,* 170 Cal.App.4th at 950.)

D. The Court of Appeal's Decision and *Kennedy v. Modesto City Hospital* Do Not Create a Conflict in Decisional Law Under Code of Civil Procedure Section 2034.300

Review has been granted "to secure uniformity of decision" under California Rules of Court, Rule 8.500(b)(1) based on Plaintiff's argument that the Court of Appeal's decision conflicts with *Kennedy v. Modesto City Hospital* (1990) 221 Cal.App.3d 575.

However, as correctly decided by the Court of Appeal, *Modesto* is factually distinguishable from this case and therefore does not create a conflict necessary for review under California Rules of Court Rule 8.500(b)(1):

> 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. (*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 expertwitness. 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 Plaintiff's argument, *Perry* does not create any conflict with

Modesto. *Perry* creates an exception to the application of *Modesto* 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 *Modesto* and not within *Perry*.

Therefore, the ground on which review has been granted, "to secure uniformity of decision," does not exist and Bakewell respectfully submits that review should therefore be dismissed as improvidently granted and the Court of Appeal's opinion ordered republished.

Dated: June 29, 2016

SCHUMANN | ROSENBERG

BY: /s/ Jeffrey P. Cunningham
Kim Schumann, Esq.
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 4,652 words, according to the word count of the computer program used to prepare the brief.

Dated: June 29, 2016

/s/ Jeffrey P. Cunningham

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 June 29, 2016, I served the attached **ANSWER BRIEF ON THE MERITS** by depositing copies of it in the United States Mail, postage prepaid, to:

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

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

S. Sean Bral, Esq.
Bral & Associates
1875 Century Park E. Ste. 1770
Los Angeles, CA 90067

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 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 June 29, 2016.

/s/ Phillina Batiller-Orfila
Phillina Batiller-Orfila, *Paralegal*