SUPREME COURT
FILED

JUL 22 2016

Frank A. McGuire ~~Clerk~~

Deputy CRC 8.25(b)

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

Reply Brief on the Merits

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

Table of Contents

I. The Plain Meaning of CCP § 2034.300 Limits Its Application to Trial 1

II. The Legislature is Presumed to have Known of, and Approved, *Kennedy v. Modesto Hospital's* Holding when it Re-enacted Former CCP § 2034(j) as the Current § 2034.300 4

III. Bakewell's Arguments Demonstrate that *Kennedy* Should Not Be Overturned 7

A. The Answer Brief Shows How the Reasons for Excluding Undesignated Expert Testimony at Trial Do Not Apply to Summary Judgment 7

B. Applying Section 2034.300 to Summary Judgment Subverts the. Policy of Resolving Cases on the Merits 8

IV. Bakewell's "Mere Technical Failure" Argument is Inaccurate, Illogical and Unworkable 9

Table of Authorities

Statutes

Assembly Bill 3081 (Stats. 2004, ch. 182) § 61 5

Code of Civil Procedure § 425.16(b)(1) 3

Code of Civil Procedure § 425.16(e) 3-4

Code of Civil Procedure § 473(a)(2) 8

Code of Civil Procedure § 2034.210 1

Code of Civil Procedure § 2034.260 ....1, 2, 4

Code of Civil Procedure § 2034.270 ....1, 2, 4

Code of Civil Procedure § 2034.300 ....1, 2, 4-6, 8-9

Code of Civil Procedure § 2034.410 1

Code of Civil Procedure § 2034.610 1

I. The Plain Meaning of CCP § 2034.300 Limits Its Application to Trial

Bakewell argues that because Code of Civil Procedure section 2034.300 does not contain the word "trial," its "plain meaning" does not limit it to exclusion of witnesses at trial. Here is what section 2034.300 actually says:

> Except as provided in Section 2034.310 and in Articles 4 (commencing with Section 2034.610) and 5 (commencing with Section 2034.710), 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 do any of the following:
>
> (a) List that witness as an expert under Section 2034.260.
>
> (b) Submit an expert witness declaration.
>
> (c) Produce reports and writings of expert witnesses under Section 2034.270.
>
> (d) Make that expert available for a deposition under Article 3 (commencing with Section 2034.410).

Because compliance with section 2034.260 is what gives a party the right to object to an expert's testimony, and unreasonable failure to "List that witness as an expert under Section 2034.260" and produce "reports and writings of expert witnesses under Section 2034.270" and "make that expert" — presumably the one listed as required under section 2034.260, — "available for for deposition," is what makes the expert opinion objectionable, section 2034.300 must be construed in conjunction with sections 2034.260 and 2034. 270.

Section 2034.260 provides in relevant part:

> (a) All parties who have appeared in the action shall exchange information concerning expert witnesses in writing on or

> before the date of exchange specified in the demand. The exchange of information may occur at a meeting of the attorneys for the parties involved or by a mailing on or before the date of exchange.
>
> (b) The exchange of expert witness information shall include either of the following:
>
> (1) A list setting forth the name and address of any person whose expert opinion that party ***expects to offer in evidence at the trial.***
>
> (2) A statement that the party does not presently intend to offer the testimony of any expert witness.

(Emphasis added.) Section 2034.260 applies *only* to witnesses the party expects to testify at trial. A party cannot unreasonably fail to disclose any witness but a trial witness under section 2034.260. Leaving aside the possibility of cross-examining parties' counsel at summary judgment oral arguments about their subjective intent to call or not call expert witnesses at trial, section 2034.300 cannot apply in a summary judgment proceeding because the predicate failure to designate under section 2034.260 cannot be established.

Similarly, section 2034.270 applies to trial witnesses, and a failure to produce reports and writings cannot be established for purposes of section 2034.300:

> If a demand for an exchange of information concerning ***expert trial witnesses*** includes a demand for production of reports and writings as described in subdivision (c) of Section 2034.210, all parties shall produce and exchange, at the place and on the date specified in the demand, all discoverable reports and writings, if any, made by any designated expert described in subdivision (b) of Section 2034.210.

(Emphasis added.)

Bakewell's repeated arguments that section 2034.300 does not mention "trial" is thus simply wrong, the result of reading it in isolation, stripped of

the statutes to which it refers, ignoring the rule that courts "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." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.)

The rule is illustrated in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, on which Bakewell purports to rely. *Briggs* resolved a split in the courts of appeal over Code of Civil Procedure section 425.16(e), which establishes the scope of the anti-SLAPP statute. Section 425.16(b)(1) provided that "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike[.]" Section 425.16(e) defined "act in furtherance of of the person's right of petition or free speech:"

> As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Some of the Courts of Appeal read the section to mean that the legislative, executive or judicial proceeding in (1) and (2) had to be in connection with a public issue or issue of public interest for there to be "act in furtherance of a

person's right of petition or free speech under the United States or California Constitution in connection with a public issue," while others read the preamble language in section 425.16(e) to define any act in (1) and (2) as acts in furtherance of the right of free speech in connection with a public interest. *Briggs* held that the latter reading was correct, noting that the explicit "public issue" wording of (3) and (4) would be surplusage if the statute were read to require that proceedings be "in connection with a public issue." The statute could not be read as if those clauses did not exist.

Here, Bakewell asks the Court to hold that section 2034.300 should be read as if sections 2034.260 and 2034.270 do not exist, even though it refers to them specifically and is premised on them.

II. The Legislature is Presumed to have Known of, and Approved, *Kennedy v. Modesto Hospital's* Holding when it Re-enacted Former CCP § 2034(j) as the Current § 2034.300

In the course of a lengthy discourse aimed at establishing that the phrase "expert opinion" in the Evidence Code does not exclude a declaration in a summary judgment proceeding — a point that the defendant scarcely needs to make in a case where the plaintiff appealed so that he can offer expert opinion in a summary judgment proceeding — Bakewell raises a point that actually bears on the question before this Court when it argues:

> "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."
>
> "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."

(Answer Brief 4.) Bakewell's statement is only half true. Code of Civil Procedure section 2034.300 was not "enacted" in 2004. It was *re*-enacted. Former section 2034(j) became section 2034.300 with no changes in its wording other than its references to other sections of former section 2034 that had also been renumbered. Section 61 of the enactment, Assembly Bill 3081 (Stats. 2004, ch. 182), provides, "Nothing in this act is intended to substantively change the law of civil discovery."

This means the Legislature re-enacted section 2034.300 14 years after *Kennedy v. Modesto City Hospital* (1990) 221 Cal.App.3d 575 held that it does not exclude expert witness testimony from motions for summary judgment.

When courts have construed a statute, and the legislature then reenacts that statute without changing its language, the legislature is presumed to know of the judicial construction, and there is a strong presumption that when the legislature reenacts the statute that has been judicially construed, it adopts that construction. This Court has so held many times.

"We have observed that when as here 'a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it.' [Citations.] 'There is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts.'" (*People v. Meloney* (2003) 30 Cal.4th 1145, 1161, citing *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 353.)

"It is a cardinal principle of statutory construction that where legislation is framed in the language of an earlier enactment on the same or an analogous subject, which has been judicially construed, there is a very

strong presumption of intent to adopt the construction as well as the language of the prior enactment." (*Union Oil Associates v. Johnson* (1935) 2 Cal.2d 727, 734-735.)

"The Legislature, of course, is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof." (*People v. Yartz* (2005) 37 Cal.4th 529, 538, citing *People v. Harrison* (1989) 48 Cal.3d 321, 329.)

The United States Supreme Court refers to this adoption of judicial construction as "ratification." "The doctrine of ratification states that "Congress is presumed to be aware of [a] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." (*Department of Transportation v. Public Citizen* (2004), 541 U.S. 752, 770 fn 4, ellipses original, citation omitted.)

"A statute will be construed in light of common law decisions, unless its language 'clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common-law rule concerning the particular subject matter[.]'" (*People v. Ceja* (2010) 49 Cal.App.4th 1, 10.)

When the Legislature re-enacted section 2034(j) as section 2034.300, it is presumed to have known about *Kennedy,* the only case to construe the statute in the context of summary judgment. So if, as Bakewell argues, *Kennedy* "myopically fixates on the word 'trial'" in the surrounding sections of the statute (Answer Brief 1), the Legislature is presumed to have approved of that myopic fixation.

III. Bakewell's Arguments Demonstrate that *Kennedy* Should Not Be Overturned

A. The Answer Brief Shows How the Reasons for Excluding Undesignated Expert Testimony at Trial Do Not Apply in Summary Judgment

The Opening Brief on the Merits pointed out that different treatment of expert witness discovery is inherent in the difference between trial, where there is a trier of fact that must weigh the evidence, and summary judgment, where the court must find not facts but issues, and cannot weigh the evidence.

In its Answer Brief, Bakewell responds by confusing summary judgment with trial in its discussion of "surprise" and "prejudice." It claims that if Perry had disclosed his expert in response to Chase's untimely demand, Bakewell "would have deposed Plaintiff s experts well before the summary judgment motions were heard [and] 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."

In short, says Bakewell, expert witness information disclosure would have allowed it to present the court with conflicting expert opinions and allowed it to impeach Perry's expert opinions. But Bakewell is at a loss to explain how conflicting opinions or impeaching evidence would make any difference in a summary judgment motion. A court cannot grant the defendant summary judgment because of evidence contradicting or casting doubt on the moving plaintiff's evidence: once the court sees 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. In attempting to show that there is no reason expert testimony rules for summary judgment should be different from those at trial, Bakewell illustrates the reason.

Indeed, it is the party in Perry's position that is more likely to suffer surprise and prejudice if undisclosed expert witness testimony is barred in summary judgment. As the Court of Appeal noted (p. 10, fn 7), because expert witness information disclosure normally happens shortly before trial, the issue of undisclosed experts on summary judgment will come up when the trial has been continued. But trials get continued for all sorts of reasons, including, for example, amendment of pleadings (CCP § 473(a)(2)) and allowing a party to conduct additional discovery and make a motion for summary judgment. (*Polibred Coatings, Inc. v. Superior Court* (2003) 112 Cal. App. 4th 920, 922-23.) In such situations, a summary judgment motion might raise an issue that the responding party has not foreseen. The responding party would not only need to find an expert, but also contend with an inevitable objection that the expert's declaration should be excluded under section 2034.300 because failure to designate the expert earlier was unreasonable.

B. Applying Section 2034.300 to Summary Judgment Subverts the Policy of Resolving Cases on the Merits

Kennedy has been a precedent for a quarter of a century, during which time 1) the Legislature has re-enacted the statute it construes without change, raising the presumption that *Kennedy's* holding is now embodied in the statute, and 2) *Kennedy's* holding has caused no ill effects that Bakewell can point to. The Opening Brief pointed out, at the risk of belaboring the obvious, that allowing undesignated expert declarations in a summary judgment proceedings strikes a balance between the policy of encouraging

compliance with discovery statutes and the policy of hearing cases on the merits rather than resolving them in a way that excludes hearing the merits — a policy that requires regarding summary judgment as a drastic remedy and resolving all doubts in favor of denial.[1]

The point is apparently unanswerable; at least, Bakewell does not answer it. Its Answer Brief (pp. 9-12) does not mention the policy of resolving cases on the merits, and discusses the purpose of expert witness disclosure as if there were no countervailing policy at all. To apply section 2034.300 to summary judgment motions is to discount that policy.

IV. Bakewell's "Mere Technical Failure" Argument is Inaccurate, Illogical and Unworkable

Still trying to argue that the Court of Appeal's Opinion in this case is not diametrically opposed to the holding in *Kennedy,* Bakewell claims that the Opinion below creates "an exception" to *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." (Answer Brief 14.) The argument is nonsense.

To begin with, a court can *always* allow a party to remedy a failure to comply with expert witness exchange requirements, whether the failure was merely technical or not. Code of Civil Procedure section 2034.710(a) provides, "On motion of any party who has failed to submit expert witness information on the date specified in a demand for that exchange, the court may grant leave to submit that information on a later date." The statute does

[1] Yes, the headnote on page 14 of the Opening Brief says "Denying Summary Judgment Sparingly." Doubtless the readers are more alert than the writer was.

not distinguish between technical and non-technical failures (section 2034.720 requires a finding of "mistake, inadvertence, surprise, or excusable neglect") and on its face allows a party that did not respond at all to an expert witness information demand to designate experts.

The technical/non-technical exception is both a mischaracterization of the Court of Appeal decision in this case, which categorically rejected *Kennedy's* holding based on its own reading of the statute (Opinion, 10-11), and a really bad idea, because it would defeat this Court's mandate of securing uniformity of decision. A holding that courts must exclude expert witness declarations in cases of "more than technical failure" and allow them in cases of "mere technical failure" would be the opposite of securing uniformity of decision. It would just turn every case of involving an undesignated expert declaration in a summary jdugment into a dispute about whether the failure to designate was "merely technical" or not.

A comparison of this case with *Kennedy* illustrates the pitfalls of such disputes. In both *Kennedy* and the present case, the plaintiff sought to introduce a declaration from an expert who had not been designated at all. The trial court here excluded the testimony of a witness who had not been designated in response to an untimely demand for exchange of expert witness information; the trial court in *Kennedy* excluded the declaration of witness who was not designated in response to a timely one. In both cases the statute allowed the plaintiff to move for leave to make a tardy designation (see *Kennedy,* 221 Cal. App. 3d at 580). Kennedy did not make such a motion before appealing. Perry made the motion and the court denied it. Bakewell argues that (as the Court of Appeal in this case stated) the trial court's denial of Perry's later motion means "he could not remedy his failure to comply with the statutory requirements" (Court of Appeal Decision 12, Answer Brief 13), as if the trial court's later decision under section 2034.710 controls the question of whether it should exclude an

expert witness declaration in the first place. The trial court's later decision under section 2034.710 certainly has no bearing on whether the failure to designate experts was "technical" or not. Technicality is not a criteria for granting or denying relief under section 2034.710.

The technical/non-technical chases its premises in a fruitless search for substance like a kitten chasing the end of a laser pointer beam on the floor. It makes no sense.

For a quarter century, a statute that on its face refers to excluding expert testimony only at trial has been interpreted to exclude expert testimony only at trial. Changing that interpretation would throw the law into confusion, weaken the policy in favor of deciding cases on the merits, and do little to advance the policy of encouraging expert witness discovery.

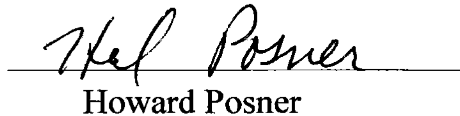
Dated: June 20, 2016

Howard Posner
Attorney for Petitioner

Certification of Length

This text of this brief contains 3,095 words, according the word processing program's count function.

Dated: June 20, 2016



Howard Posner

Proof Of Service

I am over 18 and not a party to this action. My business address is
On June 20, 2016, I served the **Reply Brief on the Merits** 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

An electronic copy was also filed.

I declare under penalty of perjury that the above is correct. Executed in Los Angeles, California on June 20, 2016.