

CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Perry v Bakewell Hawthorne, LLC 2/3/16

Expert Witness Disclosure (CCP section 2034); Objection to Timeliness of Disclosure; Standing to Object; Exclusion from Trial or MSJ Hearing

Plaintiff commenced the instant action in January 2013 for injuries he sustained when he fell on an exterior stairway on property owned by defendant and occupied by former defendant JP Morgan Chase Bank, NA (Chase). In the operative first amended complaint, plaintiff alleged that defendant and former defendant Chase were negligent in designing, developing, operating, and maintaining the stairway, causing plaintiff to fall and sustain injuries. Trial was initially set to commence on July 14, 2014.

On May 5, 2014, Chase served a **demand for exchange of expert witness information** pursuant to Code of Civil Procedure section 2034.210. On May 14, 2014, **plaintiff served an objection** to the demand on the ground that it was untimely. **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.

Defendant thereafter moved for summary judgment on the ground that plaintiff could not satisfy his burden of proving the existence of a dangerous condition at the property or that defendant had knowledge of such a dangerous condition. In support of its motion, defendant submitted a separate statement of undisputed material facts stating that defendant's personnel performed daily inspections of the property that included identifying potentially dangerous conditions, that Chase conducted periodic inspections, and that defendant's insurance carrier conducted regular annual inspections, and that at no time on or prior to January 10, 2013, was any dangerous condition reported to defendant. Defendant's separate statement was in turn supported by declarations and deposition testimony by employees of defendant and of Chase responsible for inspection, maintenance, and repair of the property stating that neither defendant nor Chase had notice, on or before January 10, 2013, of any dangerous condition with regard to the stairway on which plaintiff fell.

In opposition to the summary judgment motion, plaintiff submitted a memorandum of points and authorities in which he argued that the stairway violated applicable provisions of the Los Angeles Building Code. **Plaintiff also submitted the declarations of two experts, Brad Avrit and Eris J. Barillas**, who opined that the stairway was in a state of disrepair and in violation of the Los Angeles Building Code and applicable industry standards.

Defendant filed **evidentiary objections to plaintiff's expert declarations**, arguing principally that plaintiff's failure to participate in the exchange of expert

witness information and failure to designate any expert witnesses precluded him from using the declarations to oppose summary judgment.

The **trial court sustained defendant's evidentiary objections** and granted the motion for summary judgment on the ground that plaintiff offered no admissible evidence to dispute the facts that defendant breached no duty of care and had no actual or constructive notice of any dangerous condition.

Efforts by plaintiff to have the ruling reconsidered were ultimately withdrawn. Defendant moved for entry of judgment ex parte. In response to defendant's ex parte motion, judgment was entered in defendant's favor on March 11, 2015.

On March 26, 2015, plaintiff filed an ex parte motion for an order granting leave to provide tardy expert witness disclosures pursuant to section 2034.710. The trial court denied the ex parte motion. This appeal followed.

Plaintiff challenged the summary judgment premised on the trial court's purportedly erroneous exclusion of expert declarations submitted in opposition to the motion for summary judgment. He contended defendant lacked standing to object to the declarations and that the trial court lacked authority under section 2034.300 to exclude the expert declarations in a summary judgment proceeding.

The Second District Court of Appeal began its opinion by framing its opinion with section 2034.210, which provides in relevant part: “After the setting of the initial trial date for the action, any party may obtain discovery by demanding that all parties simultaneously exchange information concerning each other’s expert trial witnesses” (§ 2034.210.) Section 2034.260, subdivision (a) requires “all parties who have appeared in the action” to “exchange information concerning expert witnesses in writing on or before the date of exchange” indicated in a demand for exchange of such information. Subdivision (b) of section 2034.260 states that “the exchange of expert witness information shall include” either “a list setting forth the name and address of any person whose expert opinion that party expects to offer in evidence at trial” or “a statement that the party does not presently intend to offer the testimony of any expert witness.”

Section 2034.300 provides that “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 . . . list that witness as an expert under Section 2034.260.” (§ 2034.300, subd. (a).)

Plaintiff contended the trial court erred by sustaining defendant’s objections to the expert declarations because defendant did not make the demand for exchange of expert witness information and therefore lacked

standing to object. He cited *West Hills Hospital v. Superior Court* (1979) 98 Cal.App.3d 656 (*West Hills*) as support for his argument.

West Hills concerned a medical malpractice action against a hospital and two doctors. The defendant doctors served on the plaintiff a demand to exchange expert witness information that was also directed to the plaintiff. Although the demand was not directed to the defendant hospital, an informational copy was served on counsel for the hospital. (*West Hills*, at p. 657.) The hospital did not serve a list of experts on any party, and the plaintiff subsequently moved to preclude the hospital from presenting any expert witnesses at trial.

The court in *West Hills* addressed two issues under the statutory scheme then in effect: (1) who is required to exchange expert witness information, and (2) who has standing to object to a party's expert witness testimony. With regard to the first issue, the court held that "only the party who makes the demand and the party on whom it is made are required to comply with former section 2037.2 and not other parties on whom copies of the demand may be served." (*West Hills*, at p. 660.) In the present case, this holding does not preclude defendant's challenge to plaintiff's expert declarations, as Chase's demand was directed to and served upon **both** plaintiff and defendant. Both were required to participate in the exchange of expert witness information.

With regard to standing to object to expert testimony, the court in *West Hills* held that the objecting party must have complied with its obligation to exchange expert witness information: “Petitioner’s second contention regarding the plaintiff’s standing is also well taken. Former section 2037.5 requires first that the party seeking sanctions be in compliance with former section 2037.2.” (*West Hills*, at p. 660.) Because the plaintiff had filed his list of experts after the date of the exchange, the court concluded that he was not “strictly speaking,” in compliance with former section 2037.2 and lacked standing to object to the expert testimony. The Justices then explained that in the present matter, this second holding does not preclude defendant from objecting to plaintiff’s expert declarations, as defendant complied with its obligation, under section 2034.300 to have “made a complete and timely compliance with Section 2034.260.”

The court in *West Hills* then went on, however, to state: “Furthermore, even if petitioner had been required to serve a list of its experts, pursuant to former section 2037.2, subdivision (a)(3) the only party on whom it would have been required to serve its list, was the party who served the Demand on it -- in other words, the defendant doctors, and pursuant to former section 2037.5, only the defendant doctors would have had standing to object to petitioner’s calling its expert witnesses.” (*West Hills*, at p. 660.) Assuming the foregoing statements constitute an alternate holding rather than dictum, the Second DCA declines to apply it here. Under the statutes in effect at the time of the *West Hills* decision, a party served with a demand for exchange of expert witness information was required to serve a list of its expert witnesses only upon the party who served the

demand, and not on any other party. The court in *West Hills* applied this limitation in a reciprocal manner, limiting standing to object to another party's expert witnesses to the party serving the demand. **The current statutory scheme is much broader.** Section 2034.210 provides that "after the setting of the initial trial date for the action, any party may obtain discovery by demanding that *all parties* simultaneously exchange information concerning each other's expert trial witnesses." Section 2034.300 allows "*any party* who has made a complete and timely compliance with Section 2034.260" to seek to "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. (§ 2034.300, subd. (a)) **Defendant participated in the exchange of expert witness information and plaintiff did not.** Under the current statutory scheme, defendant did not lack standing to object to plaintiff's expert declarations. Section 2034.300 empowers the trial court to exclude the expert opinion of any witness offered by a party who has unreasonably failed to disclose expert witness information. (§ 2034.300, subd. (a).)

By excluding from evidence plaintiff's expert declarations, the trial court in this case implicitly found that plaintiff had unreasonably failed to disclose his expert witnesses. The record supports that finding. It is undisputed that Chase served a demand for exchange of expert witness information, that defendant and Chase participated in the exchange, and that plaintiff did not. Although plaintiff's counsel claimed to have served a written objection to the timeliness of the demand, "**the Legislature did not provide for objections to demands for**

exchanges of experts.’” (*Cottini v. Enloe Medical Center* (2014) 226 Cal.App.4th 401, 419 (*Cottini*), quoting *Zellerino v Brown* (1991) 235 Cal.App.3d 1097, 1112.) **Plaintiff should instead have filed a motion for a protective order.** (*Cottini*, at p. 419.) 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.) 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.

Plaintiff also 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 (*Modesto*) as support for that argument.

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*, at pp. 579-580.)

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*, at p. 581.) The court observed: “Normally a summary judgment will be heard and determined before the exchange of expert witness information is completed.” 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.”

The *Modesto* court next considered the statutory language itself, noting that “Throughout former 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.” “We infer from these provisions the Legislature had in mind the exclusion of expert testimony offered by noncomplying parties at trial, not at a pretrial proceeding.” (*Modesto*, at pp. 581-582.)

The *Modesto* court’s analysis notwithstanding, the Second DCA did not find the lack of coordination between the statutes governing summary judgment and those governing exchange of expert witness information, or the absence of an express legislative intent to apply the exclusionary sanction of section 2034.300 to a summary judgment proceeding, to preclude the trial court’s evidentiary ruling in this case. As the court in *Modesto* observed, the issue does not frequently arise

because a motion for summary judgment is normally determined before the exchange of expert witness information. (*Modesto*, at p. 581.) Given the rarity of circumstances under which the two statutory schemes might intersect, the lack of coordination between them is unsurprising, as is the absence of any express legislative intent to impose such coordination.

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 . . . make 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 was not considered persuasive 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 Second DCA found 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.

In the present case, 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.

The Justices concluded 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.

The judgment is affirmed. Defendant is awarded its costs on appeal.

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