CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Du-All Safety, LLC v Superior Court 4/18/19
Supplemental Expert Witness Disclosure; as a right

On March 2, 2017, plaintiffs Mark Krein and his wife Lori Krein (when referred to collectively, plaintiffs) filed their first amended complaint, based on an accident in November 2015, when Mark Krein, an employee of Tuolomne Water District, fell from a bridge at his place of employment and "sustained paraplegic injuries."

The complaint alleged seven causes of action, only two of which included Du-All as a defendant: the first, for general negligence, and the seventh, for loss of consortium. The other five causes of action were product liability claims, all alleged against the other eleven defendants. It appears that by May 2018 at least eight of the defendants had been removed from the case, no fewer than six by dismissal and two by good

faith settlements. Whether any defendant beyond Du-All remained in the case is not apparent.

Meanwhile, on March 7, 2018, Du-All filed a motion to continue the trial, and on March 16, counsel for plaintiffs and Du-All filed a stipulation, with an order signed by the court, continuing the trial to June 25. The record reflects that from all indications all parties, including Du-All, fully complied without compulsion in any discovery in which it was involved, demonstrating that at all times Du-All and its counsel apparently acted cooperatively and appropriately. And without gamesmanship.

On May 7, Du-All served its expert witness disclosure, identifying the two experts it "expected" to call at trial: (1) a health and safety management consultant, and (2) a structural engineer.

On May 7, plaintiffs served their expert witness disclosure, also identifying a safety consultant and a structural engineer. In addition, plaintiffs disclosed five other experts to testify on various topics, as follows: (1) Tracy Albee, a registered nurse and life care planner, to testify regarding past and future injury-related needs and costs; (2) Digby Macdonald, a chemist, to testify to the effects of rust and corrosion; (3) Robert Johnson, a forensic economist, to testify to past and future economic losses; (4) Dr. Ted Scott, a physiatrist, to testify to damages and

injuries and their cause and effects; and (5) Scott Simon, a vocational rehabilitation consultant, to testify to functional limitations and need for assistance. That same day, plaintiffs produced their life care plan.

Following receipt of plaintiffs' expert disclosure and the life care plan, Du-All **determined that supplemental experts would be necessary**, and it retained several supplemental experts to rebut the anticipated testimony of the experts disclosed by plaintiffs. And on May 25, **pursuant to CCP section 2034.280**, Du-All served its supplemental expert disclosure, listing the following five experts: (1) Darko Babic, a rust expert engineer, to respond to plaintiffs' expert MacDonald; (2) Carol Hyland, a life care planner, to rebut the reasonableness of the life care plan created by plaintiffs' expert Albee; (3) Mark Newton, an economist, to rebut plaintiffs' expert Johnson as to past and future economic losses; (4) Jill A. Moeller, a vocational rehabilitation consultant, to rebut plaintiffs' expert Simon on issues of functional limitations and need for assistance; and (5) Dr. Maureen D. Miner, a physiatrist, to rebut plaintiffs' expert Scott on the nature and extent of Mark Krein's damages and injuries, including the cause and effect of those injuries.

On June 4, pursuant to an order shortening time, plaintiffs filed a **motion to strike Du-All's supplemental disclosure**, setting the hearing for June 7. Plaintiffs argued that Du-All should have disclosed the experts

identified in the supplemental disclosure in its original disclosure because these types of experts are commonly used in personal injury cases. And, plaintiffs argued, Du-All engaged in "gamesmanship" and, moreover, plaintiffs were prejudiced by the supplemental expert disclosure, but citing in claimed support only Du-All's "concern that it would be difficult to schedule the initially-designated expert depositions before trial. . . ."

On June 4, the same day on which plaintiffs filed their motion to strike, Du-All filed a motion to continue the trial date because discovery, both non-expert and expert, had not been completed—indeed, that expert discovery had not even begun.

On June 6, Du-All filed its opposition to the motion to strike and a supporting declaration, stating that the supplemental experts were just that, experts retained after receipt of plaintiffs' expert disclosure. And, counsel for Du-All declared, there was no "gamesmanship" involved in its supplemental expert disclosure.

On June 7, three days after Du-All filed its motion to continue the trial—and the day Du-All's motion was set for hearing—the parties stipulated to continue the trial date to October 29. The stipulation was entered into before the hearing on plaintiffs' motion to strike, and was based on the parties' desire to accommodate a mutually convenient date

for the deposition of plaintiff, the orderly depositions of expert witnesses, and the completion of certain expert testing. The stipulation further agreed that expert discovery was to remain open until 30 days before the newly-agreed-to trial date.

The same day, June 7, the court granted the motion to continue the trial, resetting it to October 29. The final item on calendar was the issue of "the experts," the entirety of which is reflected in fewer than three pages of the reporter's transcript. In part, it was as follows:

"THE COURT: All right. It's abundantly clear to me that the defendant failed to comply with the simultaneous rule in disclosing experts . . . for life care or life planning, for vocational rehab, and for someone that's going to be talking about the nature and extent of the Plaintiff's injuries. Those three experts Carol Highland [*sic*], Jill Moeller, and Dr. Minor may not be expert witnesses in this case because they are not disclosed. . . . Darko Babic may testify as it's not necessary—even though the case really does have the component where rust and corrosion is an important aspect and everybody has known it for a long time, the fact that the—those kind of issues—one might have presumed reasonably on the defense side that the structural engineer expert on both sides would go into that and it might have—it's certainly possible that it might have been news that a chemist was going to be testifying for the other side on the issue of

rust and corrosion, and so I think that it is reasonable, although I see it as a close issue frankly. It's reasonable to have that expert testify and be named in the supplemental declaration for experts. That would be my view after having read the paperwork.

"MR. SHANAGHER [counsel for Du-All]: Couple of comments, your Honor?

"THE COURT: I already made my decision, I don't know what you're going to comment for. You don't get to try to talk me out of it at this point.

"MR. SHANAGHER: Okay. All right. Fair enough. The only thing that was not clear, was there was one other expert. I think that you mentioned Miller, Minor, and Highland [*sic*].

"THE COURT: Yes.

"MR. SHANAGHER: But not Mark Newton the economist?

"THE COURT: Oh, no, the economist has to go too. You knew—you had to have known that—that, one, the other side was going to have an economist and that you should have an economist, too. The statement opening the *Fairfax* case applies in this case.

"MR. SHANAGHER: We respectfully disagree with, your Honor.

"THE COURT: All right."

On July 5, Du-All filed a motion for reconsideration based on a new fact, the four-month trial continuance. The motion argued that the trial did

not take into consideration its order granting the continuance, which eliminated any possible prejudice plaintiffs may claim, and, further, that the parties still had not commenced expert discovery.

On July 25, plaintiffs filed their opposition, relying on *Fairfax v. Lords* (2006) 138 Cal.App.4th 1019, to argue Du-All should have identified the supplemental expert witnesses in its original disclosure. Plaintiffs did not identify any actual prejudice they sustained, instead arguing that the supplemental designation was "inherently prejudicial." Du-All filed a reply, and on August 7, the trial court denied Du-All's motion for reconsideration in a one-line order, providing no reason for its denial.

On August 23, 2018, Du-All filed a petition for peremptory writ. The First District Court of Appeal asked for opposition, which was filed on September 4. On September 26, the DCA issued an alternative writ of mandate. Oral argument then followed.

The 1st DCA began its opinion by pointing out that under CCP section 2034.210, subdivision (a), a party may demand a mutual and simultaneous exchange of each expert witness that any party "expects to offer in evidence at . . . trial." And section 2034.260, subdivision (b)(1), requires an expert witness disclosure to list every expert "that the party expects to offer" in evidence at trial. Du-All did that, identifying the two

experts it intended to call, a health and safety management consultant safety and a structural engineer.

The statutory scheme provides that following review of the experts the other side has disclosed, **a party may file a <u>supplemental expert witness disclosure</u>. This is under section 2034.280, which provides that "within 20 days after the exchange described in Section 2034.260, any party who engaged in the exchange may submit a supplemental expert witness list containing the name and address of any experts who will express an opinion on a subject to be covered by an expert designated by an adverse party to the exchange, if the party supplementing an expert witness list has not previously retained an expert to testify on that subject."**

There is no dispute that Du-All timely and simultaneously designated its initial experts. And also no dispute it timely designated its rebuttal experts in the same fields as plaintiffs' initially designated experts.

The California Judges Discovery Benchbook provides:

"A party that has participated in the exchange of expert witness lists may supplement its list without a court order, provided that (CCP § 2034.280)

“• It submits its supplemental list to the other parties within 20 days after the exchange.

“• Any newly designated expert will express an opinion only on a subject to be covered by an expert designated by an adverse party.

“• It has not previously listed any expert witness on that subject.

“• The supplemental list is accompanied by an expert witness declaration . . . .

“• It makes each newly designated expert immediately available for a deposition.” (California Judges Benchbook: Civil Proceedings—Discovery (CJER 2d ed. 2012) § 23.23, pp. 473–474.)

A leading California treatise on discovery describes “Supplementing Expert Witness Information” this way: “**Second Thoughts**: As the trial date draws near, the litigants sometimes will change their minds about the need for expert testimony. One party may initially decide that a particular aspect of the case does not require expert testimony. Then, the initial exchange of expert witness information reveals that another party has designated one or more experts to testify in this area. This may cause the party who has not listed an expert to decide that the safer course is to retain one. **Section 2034.280** offers a way to effectuate this change of mind. **It provides a window of opportunity after the initial exchange during which a party may have a *right* to make a supplemental expert witness designation. In this respect *supplementation* of an expert witness under**

Section 2034.280 is different both from *augmenting* an expert witness list and from making a *tardy* submission of one. These latter steps are not a matter of right; they require leave of court." (1 Hogan & Weber, Cal. Civil Discovery (2d ed. 2005) Expert Witness Disclosure, § 10:11, pp. 10-32 to 10-33, footnotes omitted.)

The leading practice treatise puts it similarly: "**Supplemental expert witness lists:** Sometimes, the exchange reveals that one party plans to call experts on subjects the opposing party assumed would *not* require expert testimony. In such cases, the opposing party **has the *right* to *supplement*** its expert witness exchange by adding experts *to cover subjects on which the other party indicates it plans to offer expert testimony*, and on which the opposing party had not previously retained an expert to testify." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶ 8:1686, p. 8J-18.)

The trial court's ruling here reads into the statute obligations that do not exist: that a party must not only initially disclose every expert witness it expects to call at trial, but also every expert witness it anticipates using to rebut the experts the other side might designate as an expert. This interpretation is not supported by the plain language of section 2034.210, which requires only that a party designate the experts it expects to call at trial. Indeed, if plaintiffs' interpretation were correct, there would be no

need for section 2034.280. In short, the Legislature contemplated that when a party designates an expert, it is possible the other side might want to designate a rebuttal expert on the same topic.

Staub v. Kiley (2014) 226 Cal.App.4th 1437 is persuasive. There, in a medical malpractice case, the trial court granted defendants' in limine motion precluding plaintiffs' expert witnesses from testifying, on the ground plaintiffs unreasonably failed to timely disclose their designated experts, and then entered judgment for defendants following their successful motion for nonsuit. The Court of Appeal reversed, with the following observations:

"… plaintiffs cannot be said to have unreasonably failed to comply with defendants' expert witness demand, so as to justify excluding plaintiffs' experts' testimony. Although section 2034.300 does not provide explicit guidance as to how a court should decide if the party's failure was reasonable or unreasonable, the record does not support the trial court's implicit conclusion that plaintiffs behaved so unreasonably as to warrant exclusion of their experts' opinion testimony."

"Failure to comply with expert designation rules may be found to be 'unreasonable' when a party's conduct gives the appearance of gamesmanship, such as undue rigidity in responding to expert scheduling

issues. (*Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1504.) The operative inquiry is whether the conduct being evaluated will compromise these evident purposes of the discovery statutes: ' "to assist the parties and the trier of fact in ascertaining the truth; to encourage settlement by educating the parties as to the strengths of their claims and defenses; to expedite and facilitate preparation and trial; to prevent delay; and to safeguard against surprise." ' " (*Staub,* at 1446–1447.)

The *Staub* court added this: "Our conclusion is bolstered by the fact that the order excluding plaintiffs' experts from testifying at trial was in effect a terminating sanction, as it eviscerated plaintiffs' case. The 'general rule is that a terminating sanction may be imposed only after a party fails to obey an order compelling discovery . . . .' (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1426.) Here, there was no history of discovery abuse by plaintiffs which would warrant the imposition of a terminating sanction. This case is not remotely on a par with the type of case in which a sanction of this type is warranted. (Cf. *Zellerino v. Brown* (1991) 235 Cal.App.3d 1097, 1117)" (*Staub,* at p. 1448.)

While the effect here might not be a nonsuit, to force Du-All to defend against the testimony of plaintiffs' four experts without experts of its own could be said to "eviscerate" its defense, at least to the extent of the issues on which the experts would testify.

Fairfax, 138 Cal.App.4th 1019, the case primarily relied on by plaintiffs—and the one case cited by the trial court in its brief holding—is easily distinguishable. *Fairfax* was a medical malpractice case against a podiatrist. Defendant served a demand for the exchange of expert witness information, and plaintiff timely designated a retained expert, also stating he reserved his right to call any treating physicians as witnesses. On the same date, defendant served a document that purported to be a designation of expert witnesses, but contained no such information, stating instead that defendant " 'hereby gives notice that he is not designating any retained experts for the first exchange of expert witness information,' " going on to state that he " 'expressly reserves the right to designate experts in rebuttal to plaintiff's designations.' " Several weeks later, defendant issued a second designation of expert witnesses, naming two witnesses designed to counter plaintiff's expert, also purporting to reserve the right " 'to provide a supplemental designation of experts regarding all issues for which plaintiff designates an expert.' " Over plaintiff's objection, the court allowed defendant's experts to testify, and the jury returned a defense verdict.

The Court of Appeal reversed, beginning its opinion with the observation that the statute governing the exchange of expert information "required a 'simultaneous' exchange of information, in which each side

must either identify any expert witnesses it expects to call at trial, or state that it does not intend to rely upon expert testimony. When it comes to issues that both sides anticipate will be disputed at trial, a party cannot merely 'reserve its right' to designate experts in the initial exchange, wait to see what experts are designated by the opposition, and then name its experts only as purported 'rebuttal' witnesses." (*Fairfax,* at p. 1021.) "The effect of defendant's expert designation was to delay his own list of 'expected' witnesses until after he had seen the list put forth by plaintiff." "Plaintiff designated only one retained expert, to address the only real disputed issue in this case . . . . **Because defendant had every reason to anticipate such a designation, he had a corresponding obligation to designate whatever expert he expected to have testify on the issue *at the same tim*e**." Defendant "had no right to simply delay his designation of retained experts until after he had the opportunity to view the designation timely served by plaintiff," and the trial court erred by refusing to strike his designation. The Court in that case concluded the "wait to see" approach would not be allowed.

First, unlike the defendant in *Fairfax*, Du-All complied with the statute in its initial disclosure, naming the two experts it "expected" to call.

Second, there was prejudice in *Fairfax*, the improper expert testimony the court allowed that resulted in the defense verdict. Here, there was no

prejudice found, indeed, even meaningfully attempted to be shown by plaintiffs, whose fundamental contention on the issue below is that there was "inherent prejudice." Importantly, the court had continued trial to October 29, with expert discovery to remain open until 30 days before trial.

Third, and again unlike the defendant in *Fairfax*, whose wait to see approach was "his express intent" (*Fairfax,* at p. 1026), indicating what could be considered gamesmanship, there is no gamesmanship here. Neither Du-All "nor its counsel engaged in actions that can be characterized as gamesmanship, nor did they engage in a 'comprehensive attempt to thwart the opposition from legitimate and necessary discovery,' justifying exclusion of evidence." (*Staub*, at p. 1447, quoting *Zellerino*, at p. 1117.)

Attempting to make a case to the contrary, plaintiffs assert that Du-All "Engaged in a Pattern of Unreasonable Conduct," a statement purportedly supported by the various items set forth in bullet-point fashion for three pages in the return. Passing over whether the items in fact demonstrate any "unreasonable conduct," the fact is that every single item on those pages deals with scheduling issues, all in or around May and June 2018. This is hardly a "pattern of misconduct." Not only that, most of these items were brought to the trial court's attention in the context of the motion to continue trial, to which plaintiffs stipulated.

Finally, and perhaps most importantly, *Fairfax,* at p. 1019 was essentially a one-issue case—whether defendant committed malpractice; this was "the only real disputed issue in the case." This necessarily meant that defendant had to know what the issue was, and thus what expert he "expected" to call. This is not so here, and plaintiffs have not demonstrated that Du-All always expected to retain experts in the various fields of expertise set forth in the plaintiffs' initial disclosure, and therefore "had to have known" that plaintiffs were going to call certain experts. The Justices note that the expert disclosure statute merely requires a party to designate an expert whose opinion the party "expects to offer in evidence at . . . trial." (§ 2034.210, subd. (a).) So, the mere fact that Du-All may have known, expected, or even anticipated that plaintiffs would designate damages experts does not, under the requirements set forth in the Code of Civil Procedure, place any responsibility on Du-All to anticipate what experts plaintiffs might designate and in anticipation of that designation designate rebuttal experts in its initial disclosure.

Here, Du-All disclosed the experts it expected to call at trial. Then, when plaintiffs disclosed five other experts, and, it must be emphasized, also produced a life care plan, Du-All retained and designated experts to rebut plaintiffs' position, including its own expert on a life care plan. This is the precise reason why the Legislature codified the right to designate

rebuttal experts. The trial court's denial of this enumerated right by placing limitations not found in the Code of Civil Procedure was an abuse of discretion.

In short, Du-All had a *right* to do what it did. And the trial court's order was error, especially as Du-All complied with its disclosure obligations, there is no indication it acted unreasonably or engaged in gamesmanship, and there was no prejudice to plaintiffs.

A peremptory writ of mandate shall issue directing respondent superior court to vacate its order granting in part plaintiffs' motion to strike Du-All's supplemental disclosure of expert witnesses and to enter a new and different order denying the motion in its entirety. Du-All shall recover the costs incurred in this writ proceeding.

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