S233096

IN THE SUPREME COURT OF CALIFORNIA

WILSON DANTE PERRY,
Plaintiff and Appellant,

v.

BAKEWELL HAWTHORNE, LLC,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION TWO
CASE NO. B264027

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA IN SUPPORT OF DEFENDANT AND RESPONDENT BAKEWELL HAWTHORNE, LLC

HORVITZ & LEVY LLP
STEVEN S. FLEISCHMAN (BAR NO. 169990)
*JOSHUA C. MCDANIEL (BAR NO. 286348)
BUSINESS ARTS PLAZA
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800 • FAX: (844) 497-6592
sfleischman@horvitzlevy.com
jmcdaniel@horvitzlevy.com

ATTORNEYS FOR AMICUS CURIAE
ASSOCIATION OF SOUTHERN
CALIFORNIA DEFENSE COUNSEL

GORDON & REES LLP
DON WILLENBURG (BAR NO. 116377)
1111 BROADWAY, SUITE 1700
OAKLAND, CALIFORNIA 94607
(510) 463-8600 • FAX: (510) 984-1721
dwillenburg@gordonrees.com

ATTORNEYS FOR AMICUS CURIAE
ASSOCIATION OF DEFENSE
COUNSEL OF NORTHERN
CALIFORNIA AND NEVADA

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Miscellaneous

IN THE
SUPREME COURT OF CALIFORNIA

WILSON DANTE PERRY,
Plaintiff and Appellant,

v.

BAKEWELL HAWTHORNE, LLC,
Defendant and Respondent.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT BAKEWELL HAWTHORNE, LLC

Under California Rules of Court, rule 8.200(c), the Association of Southern California Defense Counsel (ASCDC) and the Association of Defense Counsel of Northern California and Nevada (ADCNCN) request permission to file the attached amicus curiae brief in support of defendant and respondent Bakewell Hawthorne, LLC.[1]

[1] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than amici, its members, or their counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.200(c)(3).)

ASCDC is a preeminent regional organization of lawyers who specialize in defending civil actions. It has approximately 1,100 attorney members, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. ASCDC is dedicated to promoting the administration of justice, educating the public about the legal system, and enhancing the standards of civil litigation practice. ASCDC is also actively engaged in assisting courts by appearing as amicus curiae.

ADCNCN is an association of approximately 900 attorneys primarily engaged in the defense of civil actions. ADCNCN members have a strong interest in the development of substantive and procedural law in California, and extensive experience with civil matters generally, including summary judgment and trial practice. The Association's Nevada members are also interested in the development of California law because Nevada courts often follow the law and rules adopted in California. ADCNCN has filed briefs as amicus curiae in numerous cases before the California Supreme Court and Courts of Appeal across the state.

The two Associations are separate organizations, with separate memberships and governing boards. They coordinate from time to time on some matters of shared interest, such as this application and brief.

As civil trial and appellate practitioners, the Associations' members are well versed in the standards applicable to the statutory schemes governing exchanges of expert witness information and motions for summary judgment. In addition, the Associations' members are vitally interested in the issue before this Court regarding the proper interpretation of Code of Civil Procedure

sections 437c and 2034.300. If appellant's interpretation is adopted, and the Court of Appeal's decision below reversed, parties will be allowed to force a trial even though there is no triable controversy based on the evidence that is admissible at trial.

This case presents the Court with an opportunity to resolve a split of authority and clarify that evidence inadmissible at trial is inadmissible in summary judgment proceedings, thus assuring that the summary judgment statute's core purpose of avoiding needless trials through summary disposition is not undermined.

Accordingly, amici request that this Court accept and file the attached amicus curiae brief.

August 22, 2016

HORVITZ & LEVY LLP
STEVEN S. FLEISCHMAN
JOSHUA C. MCDANIEL

By: 
Steven S. Fleischman

Attorneys for Amicus Curiae
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

August 22, 2016

GORDON & REES LLP
DON WILLENBURG

By: 
Don Willenburg

Attorneys for Amicus Curiae
ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA

AMICUS CURIAE BRIEF

INTRODUCTION

Code of Civil Procedure section 2034.300[2] *requires* a trial court to "exclude from evidence" the opinion of any expert that a party unreasonably fails to designate in response to a demand for exchange of expert witness information. The issue before the Court is whether section 2034.300's exclusionary rule applies in connection with motions for summary judgment or adjudication.[3]

The Court should hold that it does. The reason is simple and straightforward: If the moving party meets its initial burden demonstrating that it is entitled to summary judgment, the opposing party must come forward with *admissible* evidence to show that a triable issue of fact exists. (See § 437c, subd. (c); *Christina C. v. County of Orange* (2013) 220 Cal.App.4th 1371, 1379 (*Christina C.*) [the party opposing summary judgment " ' "must produce admissible evidence raising a triable issue of fact" ' "].) "Claims and theories not supported by admissible evidence do *not* raise a triable issue" sufficient to defeat summary judgment. (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2016) ¶ 10:253.1, p. 10-111.) Evidence rendered inadmissible by the expert witness statutes should not be treated

---

[2] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

[3] The issue in this case applies equally to motions for summary judgment and motions for summary adjudication. We use the term summary judgment for the sake of simplicity.

any differently than other evidence that is inadmissible at trial, such as hearsay. Were the law otherwise, the parties and the trial court would be forced to continue to prepare for and litigate an unnecessary trial, thus defeating the whole purpose of summary judgment, which is to " 'expedite litigation by the elimination of needless trials.' " (*Wiler v. Firestone Tire & Rubber Co.* (1979) 95 Cal.App.3d 621, 625 (*Wiler*).)

Here, it is undisputed that appellant Wilson Dante Perry's experts will be excluded from trial. The trial court determined that Perry unreasonably failed to designate any experts in response to a demand for exchange of expert witness information, and the Court of Appeal held that the trial court's determination in that regard was not an abuse of discretion. The trial court also concluded that, without any expert opinion, there is no triable controversy in this case, and the Court of Appeal affirmed that decision as well. Summary judgment is thus not only appropriate but necessary to avoid the expense of preparing for a trial that will inevitably result in a nonsuit given the plaintiff's inability to introduce expert testimony in support of his case.

In sum, the Court should hold that where, as here, a party is barred from offering an expert opinion at trial, the party cannot use that expert opinion to defeat a motion for summary judgment. Applying section 2034.300's exclusionary rule in summary judgment proceedings is consistent with both the expert disclosure statute's text and the core purpose of summary judgment in California.

LEGAL ARGUMENT

I. NOTHING IN SECTION 2034.300 PRECLUDES APPLYING ITS EXCLUSIONARY RULE IN SUMMARY JUDGMENT PROCEEDINGS.

A. The statute requires the trial court to "exclude from evidence" the opinion of any expert that a party unreasonably fails to designate.

The statutory scheme governing the disclosure of expert witnesses is set forth in section 2034.010 et seq.

The process begins with a demand. "[A]ny party" may "demand[ ] that all parties simultaneously exchange information concerning each other's expert trial witnesses," including, among other things, a list of the names and addresses of the experts whose opinions each party expects to introduce at trial. (§ 2034.210.) The exchange must occur at least "50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date." (§ 2034.230, subd. (b).)

The effect of a demand is to "obligate[ ] *all* parties *mutually* and *simultaneously* to exchange information concerning their expert trial witnesses." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 8:1640, p. 8J-4; see also *Fairfax v. Lords* (2006) 138 Cal.App.4th 1019, 1021 (*Fairfax*) ["Section 2034 requires a 'simultaneous' exchange of information, in which each side must either identify any expert witness it expects to call at

trial, or state that it does not intend to rely upon expert testimony"].)[4]

If the initial exchange "reveals that one party plans to call experts on subjects the opposing party assumed would *not* require expert testimony" (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 8:1686, p. 8J-17), the opposing party "may submit a supplemental expert witness list" to add experts on that subject—but only if that party engaged in the initial exchange and has not previously retained an expert to testify on that subject (§ 2034.280, subd. (a); see *Fairfax*, *supra*, 138 Cal.App.4th at p. 1025).

After the deadline for exchanging expert witness lists (and supplemental lists) has passed, a party may only designate additional expert witnesses under limited circumstances, and only with the court's leave. (See §§ 2034.610-2034.620 [motion to augment or amend a prior timely expert witness list or declaration], 2034.710-2034.720 [motion for leave to file a tardy expert witness list].) Such motions must be made "a sufficient time in advance of the time limit for the completion of [expert] discovery," though the court may permit the motion to be made at a later time under "exceptional circumstances." (§§ 2034.610, subd. (b), 2034.710, subd. (b).)

---

[4] If a party believes the demand specifies an incorrect date for the exchange, the remedy is to "promptly move for a protective order" directing "[t]hat the date of exchange be earlier or later than that specified in the demand." (§ 2034.250, subds. (a) & (b)(2).) Perry never moved for a protective order, so, like Bakewell, he was required to comply with JP Morgan Chase Bank's (Chase) demand. (Typed opn. 9-10.)

Subdivision (a) of 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," inter alia, to "[l]ist that witness as an expert under Section 2034.260."

B. The fact that section 2034.300 is silent as to whether it is limited to trial proceedings suggests that it applies in both summary judgment and trial proceedings.

Both sides on appeal (as well as the Court of Appeal below) contend that the statute's "plain" language resolves this case. (E.g., OBOM 5 [case should be resolved based on the "plain wording of the expert disclosure statute" (original formatting omitted)]; ABOM 3 [case should be resolved based on the "plain meaning" of section 2034.300]; typed opn. 11 ["The plain language of [section 2034.300] encompasses exclusion of an expert opinion from evidence in a summary judgment proceeding"].)

Arguably, the answer to this question does not lie in the plain language of either section 2034.300 or the summary judgment statute (§ 437c) because both statutes are silent on this precise issue. Moreover, because the timeline for expert witness designations is based on the "initial trial date" (§§ 2034.220, 2034.230, subd. (b)) and the timeline for filing and hearing motions for summary judgment is based on the actual "date of trial" (§ 437c, subd. (a)(2), (3)), the two timelines are uncoordinated. In some

cases the exchange of expert witness information will occur before summary judgment motions are filed, and in other cases it will not.[5]

Nevertheless, the fact that section 2034.300 does not explicitly state whether it applies to pretrial proceedings is not particularly significant. Other evidentiary rules are similarly silent as to whether they apply in summary judgment proceedings, but it is well understood that they do. For example, the hearsay statute simply provides that "[e]xcept as provided by law, hearsay evidence is inadmissible" (Evid. Code, § 1200, subd. (b)), but hearsay statements are excluded in summary judgment proceedings as well as at trial (e.g., *DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 679-682 [affirming summary judgment where trial court properly sustained hearsay objections]).

Nor is it significant that the provisions surrounding section 2034.300 frequently refer to trial. It is only natural that those

---

[5] As a practical matter, summary judgment motions are typically heard close to the trial date for a variety of reasons, including court congestion, the need to conduct discovery, and the fact that a premature motion will be met with a request by the opposing party to conduct additional discovery. (§ 437c, subd. (h); Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶¶ 10:66-10:66a, pp. 10-30 to 10-31.) Indeed, courts often hear summary judgment motions less than 30 days before trial. (§ 437c, subd. (a)(3) [court has discretion to hear summary judgment motions less than 30 days before trial]; e.g., *Beroiz v. Wahl* (2000) 84 Cal.App.4th 485, 493, fn. 4.) And, as Perry points out, "trials get continued for all sorts of reasons" (RBOM 8), which further extends the deadline for hearing summary judgment motions (see *Green v. Bristol Myers Co.* (1988) 206 Cal.App.3d 604, 609), but *not* the deadline for exchanging expert witness information (see § 2034.230). For these reasons, summary judgment motions are frequently heard after the expert witness deadline has passed, as in this case.

provisions would refer to trial because the purpose of the exchange is to inform the parties of the expert opinions each party intends to offer *at trial*. But the fact that the surrounding provisions look forward to trial does not mean section 2034.300's exclusionary rule is limited to trial proceedings.

As the Court of Appeal below correctly concluded, the key point is that "[t]he language of section 2034.300 does not limit its application to a trial." (Typed opn. 11.) Indeed, if anything, "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." (Typed opn. 12.)

II. APPLYING SECTION 2034.300 IN SUMMARY JUDGMENT PROCEEDINGS FULFILLS THE SUMMARY JUDGMENT STATUTE'S PURPOSE OF AVOIDING NEEDLESS TRIALS.

A. Summary judgment is no longer a disfavored remedy.

No longer a disfavored remedy, the summary judgment procedure provides a "particularly suitable means to test the sufficiency of the plaintiff's prima facie case." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 203.) It is not regarded as "a disfavored procedural shortcut, but rather as an integral part of our rules of civil procedure." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 10:278, pp. 10-129 to 10-130.)

Previously, "summary judgment was regarded as a 'drastic' remedy 'to be used with caution so that it does not become a substitute for trial.' " (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 10:278, p. 10-129.) Following amendments to the summary judgment statute in 1992 and 1993, however, "that attitude has changed." (*Ibid.*; see *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 848 [the 1992 and 1993 amendments " ' "dramatically" ' " liberalized summary judgment law in California].)

Relying on pre-1992 authority, Perry harks back to the old attitude by asserting that summary judgment is a " 'drastic measure' " that should be " 'used with caution.' " (OBOM 14, quoting *Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107; see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 10:278, p. 10-129 [listing *Molko* as an example of the old, pre-amendment view of summary judgment].) Likewise, Perry asserts that there is a "strong policy" against granting summary judgment (OBOM 14), which is really just another way of saying that summary judgment is a disfavored remedy. These characterizations of California's policy regarding summary judgment are inconsistent with the modern view of summary judgment in California and should be rejected.

B. To defeat summary judgment, the opposing party must come forward with evidence that would be admissible at trial.

Once the moving party has met its initial burden in moving for summary judgment, the burden shifts to the opposing party to show that a triable issue of one or more material facts exists. (*Locke v. Warner Bros., Inc.* (1997) 57 Cal.App.4th 354, 362.) The opposing party must come forward with *admissible* evidence. (See § 437c, subd. (c) ["In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, *except that to which objections have been made and sustained by the court*" (emphasis added)]; see also *Christina C.*, *supra*, 220 Cal.App.4th at p. 1379 [to avoid summary judgment, a party " ' "must produce *admissible* evidence raising a triable issue of fact" ' " (emphasis added)]; *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1119 ["A motion for summary judgment must be decided on *admissible* evidence" (emphasis added)]; cf. *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 717 [reviewing court does not consider summary judgment evidence as to which objections sustained]; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334 [same].)

Perry suggests that the standards for the admissibility of evidence can be more lenient in summary judgment proceedings than at trial. (OBOM 15 ["section 437c is a statutory scheme in which the rules of admissibility differ from the rules at trial"]; see also *ibid.* ["There is no reason why evidence should be subject to the

same rules in both proceedings"].) The Court of Appeal in *Kennedy v. Modesto City Hospital* (1990) 221 Cal.App.3d 575 (*Kennedy*) made the same point, noting that "[a]dmissibility at trial is not necessarily the same as admissibility at a summary judgment proceeding." (*Id.* at p. 582.) As an example, the *Kennedy* court pointed out that "a declaration is not admissible at trial, but is expressly made admissible by section 437c in a summary judgment proceeding." (*Ibid.*)

The general statement in *Kennedy*, however, is incorrect and should be disapproved of by this Court. The proper rule: "The same rules of evidence that apply at trial also apply to the [evidence] submitted in support of and in opposition to motions for summary judgment." (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 761; see also *Towns v. Davidson* (2007) 147 Cal.App.4th 461, 472 ["a party opposing a motion for summary judgment may use declarations by an expert to raise a triable issue of fact on an element of the case *provided the requirements for admissibility are established as if the expert was testifying at trial*" (emphasis added)].) Nothing in section 437c suggests that trial courts should apply different standards to determine the admissibility of evidence in summary judgment proceedings. There is only one Evidence Code and it should apply equally to all evidentiary matters, whether a summary judgment motion or a trial.

As *Kennedy* pointed out, declarations are a notable exception, necessary to account for the fact that summary judgment motions are decided on the basis of papers, not live testimony. (See *Jauregi v. Superior Court* (1999) 72 Cal.App.4th 931, 941, fn. 14 ["section 437c provides an exception to the Evidence Code to the extent the

statute allows the parties to rely upon evidence presented by way of declaration or other means that might not be permitted at trial before the trier of fact"].) But aside from that one exception, which is necessary to prevent summary judgment motions from turning into full-blown evidentiary hearings, "section 437c does not suspend any other rule of admissibility." (*Ibid.*) The exception noted by *Kennedy* is a one-off, not an example of any broader principle.

In sum, there is no support for Perry's suggestion that trial courts should apply different standards of admissibility in trial and summary judgment proceedings. Absent a contrary expression of intent by the Legislature, courts should apply the same standards in both proceedings. On Perry's rationale, a court could ignore the fact that evidence submitted in opposition to a motion for summary judgment was inadmissible because it was hearsay, or was protected by the settlement, mediation, or attorney-client privileges, or for any of the myriad other reasons why evidence is properly excluded. If the evidence will not be admissible at trial, it should not be allowed to force a trial in the face of an otherwise-sufficient summary judgment motion.

C. Requiring a trial where there is no triable controversy based on the admissible evidence would defeat the whole purpose of summary judgment.

Allowing an opposing party to defeat summary judgment with evidence that will be inadmissible at trial would defeat the core purpose of summary judgment, which is to " 'expedite litigation by

the elimination of needless trials.' " (*Wiler*, *supra*, 95 Cal.App.3d at p. 625.)

This case illustrates the problem. Perry's case hinges on his ability to get the opinions of his experts into evidence. However, Perry did not exchange an expert witness list on the date specified in Chase's demand, and his request to make a tardy designation was denied. (See 2 AA 275 [3/30/15 docket entry]; RBOM 10.) Moreover, the trial court implicitly determined that Perry's failure to designate any experts was unreasonable, and the Court of Appeal concluded that the trial court's determination in that regard was not an abuse of discretion, a ruling not at issue on review. (Typed opn. 9-10.) Accordingly, Perry's experts are barred under section 2034.300 from offering opinions at trial.

If the case is allowed to go to trial, the trial would be a needless waste of scarce judicial resources because the only evidence that could possibly create a triable issue—the opinions of Perry's undesignated experts—has now been ruled inadmissible. There is no alternative source for the excluded testimony. Indeed, if this case goes to the jury without the opinions of Perry's experts, the trial court will presumably be compelled to grant a motion for nonsuit.

Thus, far from "greatly erod[ing]" the policy underlying the summary judgment statute (OBOM 15), applying section 2034.300's exclusionary rule in the summary judgment context advances the statute's purpose by sparing the parties and the court from having to go through the motions of a needless trial.

D. In appropriate cases, the trial court has discretion to continue summary judgment proceedings to allow a party to make a tardy designation of experts.

Kennedy expressed the concern that summary judgment should not be prematurely granted where the failure to designate an expert can later be cured. The court explained:

> [Al]though at the time of the summary judgment motion Dr. Smith's testimony may not have been admissible at trial because there was a technical failure to properly designate under section 2034, subdivisions (a), (f) and (h) [now sections 2034.210, 2034.260, and 2034.280], there remains the opportunity to make a motion to augment or amend (§ 2034, subd. (k)) [now section 2034.610], or a motion to submit tardy information under section 2034, subdivision (l) [now section 2034.710]. 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.

(*Kennedy*, *supra*, 221 Cal.App.3d at p. 583.) The court also noted that "the plaintiff, through her properly designated experts or through examination of defendants' experts, may be able to present sufficient evidence to go to the trier of fact." (*Ibid.*)

Kennedy was decided in 1990—i.e., before summary judgment law in California was dramatically liberalized. That may explain why the court there was reluctant to affirm a grant of summary judgment where it was still unclear whether the plaintiff would be

able to obtain evidence sufficient to go to the trier of fact.[6] Today, however, "[t]he party opposing summary judgment *must* produce admissible evidence raising a triable issue of fact," and "[c]laims and theories not supported by admissible evidence do *not* raise a triable issue." (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 10:253.1, p. 10-111, first emphasis added, second emphasis in original; see also *Christina C.*, *supra*, 220 Cal.App.4th at p. 1379 [" 'a party "cannot avoid summary judgment by asserting facts based on mere speculation and conjecture, but instead must produce admissible evidence raising a triable issue of fact" ' "].)

Moreover, *Kennedy* failed to recognize the various options available to a party opposing summary judgment. If, after the date for exchanging expert information has passed, the opposing party realizes that expert testimony is needed to show a triable issue of fact, that party can seek relief from the trial court under sections 2034.610 or 2034.710, which permit augmentation or tardy designation of experts.[7] If such a motion would require a continuance of the summary judgment proceedings (or the trial itself), the summary judgment statute gives the trial court

---

[6] This, together with the case's unusual set of facts, may also explain why the Legislature saw no need to amend the expert disclosure statute in response to *Kennedy*.

[7] Depending on the facts, the opposing party may have other options, such as supplementing a previous timely expert designation (§ 2034.280) or seeking a continuance to depose another party's timely designated expert (§§ 437c, subd. (h), 2025.210, subd. (b) [following a 20-day hold on depositions by plaintiff at the beginning of the lawsuit, depositions may be taken at any time]).

discretion to grant such a request. (See § 437c, subd. (h) [trial court has authority to "order a continuance to permit affidavits to be obtained or discovery to be had"].)

Here, Perry could not file a motion to augment or amend because that option is available only to a party who has previously engaged in a timely exchange of expert witness information. (§ 2034.610, subd. (a).) His only option, then, was to seek leave to make a tardy designation under section 2034.710. He did so, but the trial court properly exercised its discretion and denied his request. (2 AA 275 [3/30/15 docket entry reflecting the trial court's order "denying plaintiff's ex parte [application] to allow designation of expert witnesses ten (10) months after the expiration of the statutory deadline"].)

Accordingly, even if the concerns expressed in *Kennedy* were still valid following the amendments to California's summary judgment statute (they are not), those concerns are inapplicable where, as here, the party opposing summary judgment has exhausted his options and will be precluded from offering any expert opinion at trial. Because in this case there is no triable controversy without Perry's inadmissible expert opinions, summary judgment is the appropriate remedy.

CONCLUSION

For the foregoing reasons, ASCDC and ADCNCN respectfully urge this Court to affirm the Court of Appeal's decision.

August 22, 2016

HORVITZ & LEVY LLP
STEVEN S. FLEISCHMAN
JOSHUA C. McDANIEL

By: 
Steven S. Fleischman

Attorneys for Amicus Curiae
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

August 22, 2016

GORDON & REES LLP
DON WILLENBURG

By: 
Don Willenburg

Attorneys for Amicus Curiae
ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rules 8.204(c)(1), 8.520(b)(1).)

The text of this brief consists of 3,754 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: August 22, 2016

Steven S. Fleischman

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is Business Arts Plaza, 3601 W. Olive Ave., 8th Fl., Burbank, California 91505-4681.

On August 22, 2016, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AND ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA IN SUPPORT OF DEFENDANT AND RESPONDENT BAKEWELL HAWTHORNE, LLC** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 22, 2016, at Burbank, California.

Kathy Turner

Kathy Turner

SERVICE LIST
Wilson Dante Perry v. Bakewell Hawthorne, LLC
CASCT Case No. S233096
COA 2/2 Case No. B264027 • LASC Case No. BC500198

Individual / Counsel Served	Party Represented
Kim Schumann, Esq. Jeffrey P. Cunningham, Esq.* SCHUMANN | ROSENBERG 3100 Bristol Street, Suite 100 Costa Mesa, California 92626 (714) 850-0210 • FAX: (714) 850-0551 Cunningham@SchumannRosenberg.com	Defendant and Respondent BAKEWELL HAWTHORNE, LLC
Kevin T. Dunbar, Esq. DUNBAR & ASSOCIATES, APLC 100 Oceangate, Suite 640 Long Beach, California 90802 (562) 491-7600 • FAX: (562) 491-7607 KDunbar@KDunbarLaw.com	Defendant and Respondent JP MORGAN CHASE BANK, N.A.
S. Sean Bral, Esq. BRAL & ASSOCIATES 1875 Century Park East, Suite 1170 Los Angeles, California 90067 (310) 789-2007 • FAX: (310) 789-2006 seanbral@gmail.com	Plaintiff and Appellant WILSON DANTE PERRY
Howard C. Posner, Esq. 2734 Oakhurst Avenue Los Angeles, California 90034 (310) 497-0449 • FAX: (310) 839-2355 howardposner@ca.rr.com	Plaintiff and Appellant WILSON DANTE PERRY
Office of the Clerk California Court of Appeal Second Appellate District, Division 2 300 South Spring Street Second Floor, North Tower Los Angeles, California 90013 (213) 830-7102	Electronic Filing • Service Copy Only http://www.courts.ca.gov/2dca-efile.htm B264027_CACB_ASCDC

Individual / Counsel Served	Party Represented
Hon. Gregory Keosian Los Angeles County Superior Court Central District 111 N. Hill Street, Dept. 61 Los Angeles, California 90012 (213) 633-1061	Trial Court Judge • BC500198
Clerk of the Court Supreme Court of California 350 McAllister Street San Francisco, California 94102-3600 (415) 865-7000	Electronic Submission Copy http://www.courts.ca.gov/24590.htm Followed by original plus eight paper copies submitted by Federal Express S233096_ACB_ASCDC