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May 24, 2013

Clerk, California Supreme Court
350 McAllister Street
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Re: *Garrett v. Howmedica Osteonics Corp., et al.*, No. S2100018

To the Chief Justice and Associate Justices of the California Supreme Court:

The International Association of Defense Counsel (IADC) and the Atlantic Legal Foundation (ALF) urge the Court to grant the petition for review in *Garrett v. Howmedica Osteonics Corp., et al.,* No. S2100018.

The Court of Appeal opinion holds that the normal admissibility limits on expert opinion do not apply to expert declarations opposing summary judgment. Under the Court of Appeal's rule, an expert opinion may defeat summary judgment even though it will not be admissible at trial. Court of Appeal decisions conflict on this issue. Further, the question affects most every summary-judgment or summary-adjudication motion in a case involving experts. And in practice, the Court of Appeal opinion hamstrings the trial court from exercising its gatekeeper function on summary judgment – forcing the court to admit vague declarations without determining whether they have a reliable basis, then deny summary judgment. That invites abuse. The decision warrants review both to secure uniformity of decision and to settle a question of law important to civil litigation. *See* Cal. R. Ct. 8.500(a)(1). Promptly resolving the conflict will benefit litigants on both sides of the issue and relieve overburdened trial courts from holding needless trials.

The IADC's Interest. The IADC is an association of corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and the continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine

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injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

ALF's Interest. ALF Foundation is a nonprofit, nonpartisan public interest law firm. It provides legal representation, without fee, to scientists, parents, educators, other individuals, small businesses and trade associations. The Foundation's mission is, inter alia, to advance the rule of law in courts and before administrative agencies by advocating for the application of sound science in judicial and regulatory proceedings. The Foundation's leadership includes distinguished legal scholars and practitioners from across the legal community. In pursuit of its mandate, the Foundation has served as counsel for numerous distinguished scientists as amici -- including almost two dozen Nobel Prize winners in Chemistry, Medicine or Physiology and Physics -- whose goal is to educate and inform judges about the correct scientific principles and methods to be applied to issues of causation in litigation. As such, we have appeared in several cases in the California courts, including some of the cases cited herein.

The Court of Appeal Opinion. This is a product liability case concerning a leg prosthesis. After the defense moved for summary judgment, plaintiff's expert gave a bare-bones opinion that the prosthesis' material failed testing specifications. The expert did not provide the facts, data or reasoning on which his opinion was based – such as which specifications the product allegedly failed, an opinion that those specifications applied to the product, how he tested the product, or what his results were. (Typed Opinion ["Op."]. 4, 14, 17). He did not opine that the ostensible defect had caused plaintiff's injury, asserting only that unidentified "strong arguments" supported causation. (Op. 4, 14) The trial court excluded the bulk of the declaration under Evidence Code sections 801 and 802, on the ground that it "lacks adequate factual foundation" and "is entirely devoid of any reasoned analysis to support his opinion." (Op. 13, 20)

The Court of Appeal reversed. It held that the standards of admissibility at trial do not apply to declarations opposing summary judgment, that the declaration should have been admitted, and that once in evidence it created a triable issue. The Court of Appeal recognized that this Court's opinion in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 interprets Evidence Code sections 801 and 802 to require a foundational showing that the matter relied on "provide[s] a reasonable

basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible," and to "allow[] the trial court to inquire into the reasons for an expert's opinion and to exclude expert opinion testimony if it is 'based on reasons unsupported by the material on which the expert relies.'" (Op. 14-15) (quoting *Sargon,* 55 Cal.4th at 771) It also recognized that *Sargon* holds that before admitting expert opinion, the trial court "must … determine whether the matter relied on can provide a reasonable basis for the opinion…." (Op. 16) (quoting *Sargon,* 55 Cal.4th at 772). The Court of Appeal also apparently agreed that the expert's failure in this case to explain his methods and results prevented the trial court from concluding that his opinion was based on reliable matter. (Op. 20) ("Absent more specific information on the testing methods used and the results obtained, the trial court here could not scrutinize the reasons for [plaintiff's expert's] opinion to the same extent as did the trial court in *Sargon.*").

Nevertheless, the Court of Appeal held that *Sargon* did not control because *Sargon* "involved the exclusion of expert testimony at trial" while "this case involves the exclusion of expert testimony presented in opposition to a summary judgment motion." (Op. 18, 19-20) It ruled that an expert declaration submitted in opposition to summary judgment, as to which there was no evidentiary hearing or Evidence Code section 802 examination, need not meet the same admissibility standards as expert opinion at trial or declarations supporting summary judgment:

> *The rule that a trial court must liberally construe the evidence submitted in opposition to a summary judgment motion applies in ruling on both the admissibility of expert testimony* and its sufficiency to create a triable issue of fact. [Citations] In light of the rule of liberal construction, a reasoned explanation required in an expert declaration filed in opposition to a summary judgment motion *need not be as detailed or extensive as that required of expert testimony in support of a summary judgment motion or at trial.*

(Op. 20) (emphasis added). It therefore held that "the sustaining of the objections to the [expert's] declaration based on Evidence Code sections 801, subdivision (b) and 802 was an abuse of discretion." (Op. 20) The

court then held that the expert's previously-excluded opinion created a triable issue of fact and reversed the summary judgment. (Op. 21-24)

Under the Court of Appeal's opinion, plaintiffs can forestall summary judgment by submitting conclusory expert opinions. The court cannot ensure that the opinion is based on reliable matter or that the expert used proper methodology, because the basis of the opinion can be stated so vaguely that it cannot be evaluated. Under the Court of Appeal's decision, such expert evidence must be admitted and will defeat summary judgment – even if it will be inadmissible at trial and even if all of the evidence that *will* be admissible at trial can yield only one result.

The Conflict Among Court of Appeal Decisions. The Court of Appeal opinion continues a conflict in the case law.

Like the court here, some Court of Appeal opinions hold that expert declarations opposing summary judgment do not require the same level of facts and analysis otherwise required for admissibility, and reverse summary judgment. *Jennifer C. v. Los Angeles Unified School District* (2008) 168 Cal.App.4th 1320, 1332-33 (reversing exclusion of expert declaration opposing summary judgment based on expert's failure to explain facts and reasoning; "The requisite of a detailed, reasoned explanation for expert opinions applies to 'expert declarations in *support* of summary judgment,' not to expert declarations in *opposition* to summary judgment."); *Powell v. Kleinman* (2007) 151 Cal.App.4th 112, 125-26, 128-30 (reversing exclusion of expert declaration opposing summary judgment based on expert's failure to explain facts and reasoning; explicitly distinguishing admissibility requirements for expert evidence *supporting* summary judgment from those for expert evidence *opposing* summary judgment).

Some other Courts of Appeal hold that expert declarations opposing summary judgment are governed by the same admissibility requirements that govern expert opinions at trial or in support of summary judgment, and affirm the exclusion of expert declarations submitted in opposition to summary judgment that fail to disclose the facts and reasoning on which the opinion is based. For example, directly contrary to the Court of Appeal opinion here, *Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755 holds that "The same rules of evidence that apply at trial also apply to

declarations submitted in support of and in opposition to motions for summary judgment." *Id.* at 761. *Bozzi* holds that the rule of liberally construing declarations submitted in opposition to summary judgment does not apply to the threshold issue of the declaration's admissibility. Though declarations supporting a summary-judgment motion are "strictly construed" and those opposing summary judgment are "liberally construed," "[t]his does not mean that courts may relax the rules of evidence in determining the admissibility of an opposing declaration. Only *admissible evidence* is liberally construed in deciding whether there is a triable issue." *Id.* at 761 (emphasis in original). *Bozzi* affirms exclusion of the expert's declaration, and summary judgment, because the expert ""did not state any facts to support his opinion" and the opinion was "speculative and without foundation." *Bozzi,* 186 Cal.App.4th at 763.

Similarly, *Golden Eagle Refinery Co. v. Associated Internat. Ins. Co.* (2001) 85 Cal.App.4th 1300 *disapproved on other grounds in State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1036, ruled that the trial court properly excluded an expert declaration opposing summary judgment because the expert reached his conclusion "without explanation or revealing his reasons" and "an opinion unsupported by reasons or explanations does not establish the absence of a material fact issue for trial, as required for summary judgment." 85 Cal.App.4th at 1315 (citation omitted). Far from lowering the admissibility standards for expert declarations opposing summary judgment as the Court of Appeal did here, *Golden Eagle* applied to a declaration opposing summary judgment the same admissibility requirements that govern an expert declaration supporting summary judgment. The case *Golden Eagle* relied on, *Kelley v. Trunk* (1998) 66 Cal.App.4th 519, affirmed exclusion of an expert declaration *supporting* summary judgment. *See also Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510 (non-moving party's experts in medical malpractice case did not create material dispute by stating it was "`more probabl[e] than not'" that plaintiff's injury resulted from trauma during surgery without explanation or facts other than assumed facts for which no evidence was presented.)

The Court of Appeal Opinion is Incorrect, and Needlessly Increases Litigation Costs and Trial Courts' Workload. There is no statutory basis to lower the admissibility requirements for declarations opposing summary judgment – but not for those submitted in support of summary judgment or

at trial – as the Court of Appeal opinion here does. Doing so unjustifiably makes it easy to avoid summary judgment for reasons unrelated to the prospect of prevailing at trial, increases litigation costs and makes more work for trial courts.

First, the governing statutes provide no basis to single out expert declarations in opposition to summary judgment for a lower set of admissibility requirements, or to interpret Evidence Code sections 801 and 802 differently from the way they apply at other stages of litigation.

The summary judgment statute requires that *both* supporting and opposing declarations "shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated in the affidavits or declarations." Code Civ. Proc. § 437c(d). The Evidence Code provides that its requirements apply to "every action," Evid. Code § 300, and "all proceedings conducted by California courts" unless otherwise provided by statute. California Law Revision Commission, Recommendation Proposing an Evidence Code, 7 Cal. L. Rev. Comm'n Reports 1, 50 (1965) (comment on section 300). The Evidence Code provides only a single set of admissibility requirements, without regard to which side submits the evidence. By direct operation of sections 437c(d) and 300, those Evidence Code admissibility requirements apply to expert evidence whether it is submitted in support of summary judgment, in opposition to summary judgment, at trial, or in some other proceeding. There is no statutory basis to single out expert declarations opposing summary judgment for special, lower admissibility standards.

Admissibility of expert opinions is governed by Evidence Code sections 801 and 802. Section 801 explicitly limits admission of expert opinion: "If a witness is testifying as an expert, his testimony in the form of an opinion *is limited to such an opinion as* is ….(b) Based on matter … whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates …." Evid. Code § 801 (emphasis added). Under section 801(b), "a court *must* determine whether the matter that the expert relies on is of a type that an expert reasonably can rely on" and "the matter relied on *must* provide a reasonable basis for the particular opinion offered." *Sargon,* 55 Cal.4th at 770 (quoting and agreeing with *In re Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564) (emphasis added).

When an expert fails to disclose the bases of his or her opinion, as here, the trial court cannot conclude that the matter relied on provides a reasonable basis for the opinion, as required to admit the evidence. The court also has no discretion to refuse to enforce section 801. That section expressly "limit[s]" expert evidence, and the Evidence Code expressly *requires* the court to exclude evidence that does not comply. Evid. Code 803 ("The court may, and upon objection *shall, exclude* testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion.") (emphasis added).

Section 802 explicitly authorizes trial courts to require the witness to state the facts and reasoning on which the opinion is based: "The court in its discretion may require that a witness before testifying in the form of an opinion be first examined concerning the matter upon which his opinion is based." Evid. Code § 802. Under section 802, "a court may inquire into, not only the type of material on which an expert relies, but also whether that material actually supports the expert's reasoning." *Sargon,* 55 Cal.4th at 771. Section 802 appears to authorize exactly the inquiry the trial court here undertook, which the Court of Appeal held to be an abuse of discretion. (Op. 20)

Second, the purpose of summary judgment is frustrated if summary judgment is denied based on evidence that will not be admissible at trial. Summary judgment should be granted when a trial would be useless because only one side can win:

> [S]ummary judgment law in this state … may be reduced to, and justified by, a single proposition: If a party moving for summary judgment in any action … would prevail at trial without submission of any issue of material fact to a trier of fact for determination, then he should prevail on summary judgment. In such a case … the 'court should grant' the motion 'and avoid a ... trial' rendered 'useless' by nonsuit or directed verdict or similar device.

Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 855 (quoting *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 374 (conc. opn. of Chin, J.)); *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768-69 (where evidence "would forecast the inevitability of a nonsuit in defendants'

favor," court is "well justified in awarding summary judgment to avoid a useless trial.").

As this Court has recognized, the standards applied on summary judgment should mirror those that will apply at trial. "[H]ow the parties moving for, and opposing, summary judgment may each carry their burden of persuasion and/or production depends on *which* would bear *what* burden of proof at trial." *Aguilar,* 25 Cal.4th at 862. Similarly, "the placement and quantum of the burden of proof at trial [are] crucial for purposes of summary judgment." *Id.* (citing *Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 252).

Critically here, the proof needed to withstand summary judgment is measured by that needed to prevail *at trial*. Where the defense moves for summary judgment, "a plaintiff, who would bear the burden of proof by a preponderance of evidence at trial, must present *evidence* that would allow a *reasonable trier of fact to find in his favor* on [that] issue by a preponderance of the evidence...." *Aguilar,* 25 Cal.4th at 852 (emphasis added). An expert opinion – or any other evidence – cannot meet this test unless it will be admissible at trial. If not admitted, it will not allow a reasonable trier of fact to find in the plaintiff's favor. That is surely one reason why the summary judgment statute requires evidence supporting or opposing summary judgment to be "admissible." Code Civ. Proc. § 437c(d). Since the standards applied on summary judgment should mirror those that will apply at trial, the evidence needed to withstand summary judgment is that needed to persuade a trier of fact at trial, and the summary judgment statute requires the evidence to be admissible (presumably at trial), expert evidence should not be admissible on summary judgment unless it would be admissible at trial.

Third, lowering the admissibility requirements for this one category of expert opinion – those submitted in opposition to summary judgment motions – serves no sound policy.

The apparent, though unspoken, policy reason for lowering the admissibility requirements is to protect plaintiffs from summary judgment when the expert cannot *currently* satisfy the normal admissibility requirements but may *eventually* be able to do so. But the summary judgment statute already provides a solution to this issue.

avoid summary judgment and force a trial based on evidence that would not even be admissible at trial, the Court of Appeal opinion raises litigation costs without promoting just resolution of cases.

Creating an easy way to stave off summary judgment also strains California's overburdened trial courts. Under the Court of Appeal's rule, cases that would be terminated by summary judgment, if the normal rules of admissibility were applied, must instead be tried. Those trials will consume days or weeks of judges' and staff's attention – delaying resolution of other deserving cases. Courts can best serve everyone if they hold trials when appropriate but also grant summary judgment when appropriate.

Fifth, the federal courts' experience with *Daubert* demonstrates that the normal standards for admissibility of expert evidence may safely be applied to expert evidence submitted in opposition to summary judgment. The *Daubert* requirements were first announced in the setting of an expert opinion opposing summary judgment, and fully apply to such opinions. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) (announcing *Daubert* requirements on review of exclusion of expert declaration opposing summary judgment); *General Electric Co. v. Joiner* (1997) 522 U.S. 136 (holding that trial court properly excluded expert evidence opposing summary judgment pursuant to *Daubert*); *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999) (similar). Federal courts do not specially scrutinize the exclusion of expert declarations opposing summary judgment – *i.e.* "outcome determinative" exclusions of expert evidence. *Joiner,* 522 U.S. at 142-43. And federal law agrees with *Bozzi, supra*, that admissibility of expert testimony is *not* subject to the rule that disputed issues are resolved against the moving party. "On a motion for summary judgment, disputed issues of fact are resolved against the moving party.... But the *question of admissibility of expert testimony is not such an issue of fact,* and is reviewable under the abuse-of-discretion standard." *Joiner,* 522 U.S. at 143.

Daubert, Joiner and *Kumho Tire* are particularly instructive because *Sargon*'s interpretation of Evidence Code sections 801 and 802 is heavily informed by these very decisions. *See Sargon,* 55 Cal.4th at 771-72. For 20 years since *Daubert*, federal courts have applied the *Daubert* standard to summary-judgment motions, without a special exception for expert

Code of Civil Procedure section 437c(h) provides that when plaintiff's affidavits show that "facts essential to justify opposition may exist but cannot, for reasons stated, then be presented," the court shall deny motion, order a continuance, or make any other just order. A continuance is "virtually mandated" upon a good-faith showing that it is needed to obtain facts essential to justify opposition to the summary judgment motion. *Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395; *Dee v. Vintage Petroleum, Inc.* (2003) 106 Cal.App.4th 30, 34. The plaintiff need not show that such evidence *does* exist, only that it *may* exist. *Dee,* 106 Cal.App.4th at 34; *Frazee v. Seely* (2002) 95 Cal.App.4th 627, 634. If the plaintiff's expert cannot yet satisfy sections 801 and 802 as construed in *Sargon*, and the plaintiff can make a good-faith showing that the expert may reasonably be able to, she can obtain a continuance. In contrast, if a plaintiff cannot establish a reasonable basis for thinking that the expert will *ever* be able to satisfy sections 801 and 802, the expert's opinion will not be admissible at trial and there is no reason to lower the bar on summary judgment. Neither scenario justifies lowering the admissibility requirements for expert opinion opposing summary judgment, let alone in the face of section 437c(d)'s mandate that the evidence opposing summary judgment must be admissible and the Evidence Code's express requirements for expert opinion.

Fourth, lowering the admissibility requirements for expert evidence opposing summary judgment invites abuse, harming both defendants and the court system. The Court of Appeal's opinion here makes Evidence Code sections 801 and 802 largely toothless for declarations opposing summary judgment. The opinion holds that the trial court abused its discretion in excluding an opinion that unspecified tests with unknown results failed unidentified standards, and that causation was suggested by unidentified "strong arguments." But paid experts in many cases can generate the same sort of vague declaration. Once in evidence, such declarations would often cause summary judgment to be denied where it would otherwise have been granted, as the cases demonstrate. The Court of Appeal here and the cases it followed – *Jennifer C.* and *Powell* – all reversed summary judgments after concluding that the expert declarations opposing summary judgment were admissible under the lowered standard.

As the Court knows, trials are expensive, and that expense adds to settlement pressure, even in cases without merit. By making it easy to

opinions opposing summary judgment, and without noticeable ill effects. The federal courts' experience strongly suggests that the normal admissibility requirements for expert evidence, including *Sargon,* may safely be applied to expert opinion opposing summary judgment, and that lowering the bar is not necessary to assure fair results.

In sum, the Court of Appeal opinion here adds to a conflict on a recurrent issue that greatly affects a large number of cases. It will make it harder to obtain summary judgment, and so increase costs for defendants and increase demands on courts' limited resources, without promoting just resolution of cases. This Court should grant review.

Sincerely yours,

Robert A. Brundage

Robert A. Brundage

PROOF OF SERVICE

I am over 18 years of age, not a party to this action and employed in the County of San Francisco, California at Three Embarcadero Center, San Francisco, California 94111-4067. I am readily familiar with the practice of this office for collection and processing of correspondence for mailing with the United States Postal Service and correspondence is deposited with the United States Postal Service that same day in the ordinary course of business.

Today I served the attached:

AMICUS CURIAE LETTER

by causing a true and correct copy of the above to be placed in the United States Mail at San Francisco, California, in a sealed envelope(s) with postage prepaid, addressed as follows:

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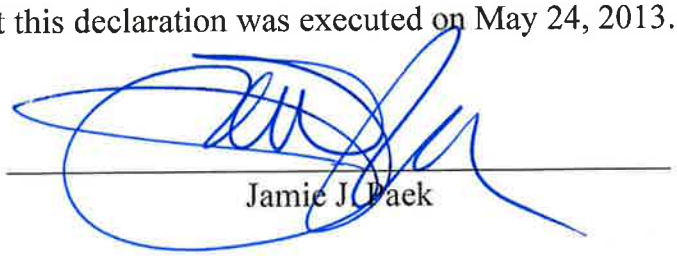
I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that this declaration was executed on May 24, 2013.



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