Fancourt v. Zargaryan

2025 DJDAR 11652

Court of Appeal, Second District, California.

> The goal of California's statutory scheme governing presentation of evidence in the case-in-chief "is to avoid surprise at trial. (*Staub v. Kiley* (2014) 226 Cal.App.4th 1437, 1444, 1447, 173 Cal.Rptr.3d 104 (*Staub*); see also *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 781, 149 Cal.Rptr. 499 (*Deyo*) ["discovery laws were designed to prevent trial by ambush"].)
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> Surprise at trial is *unfair*. It also is *inefficient*." (emphasis in original.)

FACTS/PROCEDURAL HISTORY

This matter stems from an accident in 2017. "At about 'walking speed' defendant driver Areg Zargaryan ran into McDonald on his motorcycle. McDonald did not fall to the ground. He walked to the sidewalk without assistance and left the scene without receiving medical attention. The next day, McDonald went to a clinic and reported pain in his right hip, leg, and foot—but not in his neck or groin. McDonald later claimed the accident created debilitating and long lasting pain by injuring his neck and groin. The defense contested this account of excruciating pain, pointing out McDonald after the accident continued snowboarding, rollerblading, and motorcycling." (*McDonald v. Zargaryan* (2025) 340 Cal.Rptr.3d 285, 286.)

In September 2021 the parties exchanged expert disclosures. McDonald's list did not include one Dr. Toorag Gravori. A month later, McDonald supplemented his expert list—but not with Dr. Gravori. In fact, Dr. Gravori was not added to the list until a week before trial and 16 months after the exchange of expert information. McDonald did not meet the good doctor until January 18, 2023 and the same day Dr. Gravori drafted a detailed report indicating McDonald needed spinal surgery. Spinal surgery had never before been an issue. "McDonald himself did not claim his condition, six years after the accident, had worsened just before trial. Rather, he went rollerblading the day before he went to Gravori. McDonald also went rollerblading the day afterwards." (*Id.*, at 287.)

On January 24, 2023, Plaintiff counsel emailed Defendant a document titled "Plaintiff's Further Supplemental Disclosure of Expert Witness of New Treating Doctors." It was not filed with the court. Plaintiff did not move for leave to augment his witness list. On January 25, 2023, Defendant filed a MIL protesting the 11th hour addition of an expert, asking the court to exclude Dr. Gravori. On the first day of trial, Plaintiff opposed the MIL. On January 31, 2023 the court heard the MIL and ruled that Gravori could testify if he was made immediately available for deposition at Plaintiff's expense. On the night of February 1, 2023 Gravori was deposed. Defendant renewed motion to exclude Gravori and the court denied the motion and allowed Gravori to testify. The jury returned a substantial verdict for McDonald and Zargaryan appealed.

The Court of Appeal held that the trial court abused its discretion by allowing a tardily disclosed expert witness to testify at trial.

DISCUSSION

The court focused on the goal of the statutory scheme governing presentation of evidence at trial. The primary goal is to avoid surprise and prevent inefficiency. The court conceded that, while surprise is effective in warfare, it is disfavored in court. By hiding the ball, the parties are unable to come to a common understanding of the value of the case. Thus, preventing settlement. "Cards up the sleeve make settlement less likely." Courts appreciate settlements because it is efficient. Disclosure of experts are particularly important to this end because experts can be such powerful witnesses and because it takes significant time and resources to combat an experts opinions. "Courts must view ambushes with tardy new experts with stern disapproval, for witnesses who are genuine experts can be extremely dangerous for the other side. Jamming the opposition for preparation time can be successful, if the judge allows this unfair tactic." (340 Cal.Rptr.3d at 288–289.) "As a result, deliberately rushing the other side's preparation is odious. Trial judges do right by spotting and squelching this foul tactic." (340 Cal.Rptr.3d at 289.)

Plaintiff's counsel had no reasonable justification for the delay. Nor did McDonald or the good doctor. There was no emergency or serious unexpected development. There was no sudden unavailability of a long-designated expert. While the world's supply of unexpected and unfortunate events is varied and unlimited—none were present here. Therefore, the trial court abused its discretion and harmed Defendant's case at trial. The court vacated the judgment, remanded for a new trial, and awarded costs to the appellants.