

Bonds v. Roy

Supreme Court of California

March 29, 1999, Decided

No. S070590.

Reporter

20 Cal. 4th 140 *; 973 P.2d 66 **; 83 Cal. Rptr. 2d 289 ***; 1999 Cal. LEXIS 1539 ****; 99 Cal. Daily Op. Service 2251; 99 Daily Journal DAR 2947

CHARLES R. BONDS, Plaintiff and Appellant, v.
MOHAN ROY, Defendant and Appellant.

Defendant physician challenged a decision from the Court of Appeal (California), which affirmed a trial court's judgment that limited defendant's expert testimony in plaintiff patient's medical malpractice action.

Subsequent History: [****1] Rehearing Denied
May 19, 1999, Reported at: 1999 Cal. LEXIS 3205.

Prior History: Superior Court of Orange County.
Super. Ct.No. 664259. H. Warren Siegel, Judge.

Disposition: The judgment of the Court of Appeal is affirmed.

Core Terms

subdivision, expert witness declaration, declaration, general substance, expert witness, trial court, deposition, designated, amend, expected testimony, expert testimony, discovery, parties, narrative

Case Summary

Overview

Plaintiff patient sued defendant physician, contending that defendant negligently severed a major nerve in plaintiff's right arm during surgery. The parties exchanged designations of experts, including expert declarations. The declarations described defendant's expected expert testimony as going to liability, causation, and damages. At trial, defendant's counsel sought to expand the scope of one expert's testimony to include two new areas. The trial court declined the request, stating that any expansion would be unfair, prejudicial, and would constitute surprise to plaintiff. A jury returned a verdict in favor of plaintiff and an intermediate court affirmed. On appeal, the court found that defendant did not amend the expert witness declaration to include new information as required by Cal. Civ. Proc. Code § 2034(k). The court stated that even if defendant did meet statutory requirements, the trial court acted within its discretion when denying defendant's request. The request afforded no practical opportunity for the expert to be disposed or for rebuttal. The court affirmed the judgment and held that the trial court properly limited expert's testimony.

Procedural Posture

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signed only by the attorney for the party designating the expert, or by that party if that party has no attorney.

Outcome

The appellate court affirmed an intermediate court's judgment that affirmed a trial court's decision to limit defendant physician's expert testimony. The court held that defendant did not meet a statutory requirement to amend an expert witness declaration in a timely manner.

Civil Procedure > ... > Methods of
Discovery > Depositions > Oral Depositions

Evidence > ... > Testimony > Expert
Witnesses > General Overview

Civil Procedure > ... > Discovery > Methods of
Discovery > General Overview

Evidence > Types of
Evidence > Testimony > General Overview

LexisNexis® Headnotes

Evidence > ... > Testimony > Expert
Witnesses > General Overview

Evidence > Types of
Evidence > Testimony > General Overview

HN1 Testimony, Expert Witnesses

Under Cal. Civ. Proc. Code § 2034, any party may demand the exchange of expert witness information. In this exchange, a party may provide either a list setting forth the name and address of any person whose expert opinion that party expects to offer in evidence at the trial or a statement that the party does not presently intend to offer the testimony of any expert witness.

Evidence > ... > Testimony > Expert
Witnesses > General Overview

HN3 Depositions, Oral Depositions

Pursuant to Cal. Civ. Proc. Code § 2034(f)(2)(A)-(E), an expert witness declaration must be under penalty of perjury and must contain the following: a brief narrative statement of the qualifications of each expert; a brief narrative statement of the general substance of the testimony that the expert is expected to give; a representation that the expert has agreed to testify at the trial; a representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial; and a statement of the expert's hourly and daily fee for providing deposition testimony and for consulting with the retaining attorney.

Evidence > ... > Testimony > Expert
Witnesses > General Overview

HN4 Testimony, Expert Witnesses

HN2 [\[↕\]](#) **Testimony, Expert Witnesses**

For certain expert witnesses, the exchange of expert witness information shall also include or be accompanied by an expert witness declaration

See Cal. Civ. Proc. Code § 2034(j).

Evidence > ... > Testimony > Expert

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Witnesses > General Overview

HN5 [\[↕\]](#) **Testimony, Expert Witnesses**

See Cal. Civ. Proc. Code § 2034(k).

declaration and all discoverable reports and writings along with the supplemental list, and must make the additional experts available immediately for deposition, even if the time for discovery has expired.

Evidence > ... > Testimony > Expert
Witnesses > General Overview

Evidence > ... > Testimony > Expert
Witnesses > General Overview

Evidence > Types of
Evidence > Testimony > General Overview

Evidence > Types of
Evidence > Testimony > General Overview

HN6 [\[↕\]](#) **Testimony, Expert Witnesses**

If a party wishes to expand the scope of an expert's testimony beyond what is stated in the declaration, it must successfully move under Cal. Civ. Proc. Code § 2034(k) for leave to amend that party's expert witness declaration with respect to the general substance of the testimony that an expert previously designated is expected to give.

HN8 [\[↕\]](#) **Testimony, Expert Witnesses**

The exclusion sanction of Cal. Civ. Proc. Code § 2034(j) applies when a party unreasonably fails to submit an expert witness declaration that fully complies with the content requirements of Cal. Civ. Proc. Code § 2034(f)(2).

Civil Procedure > ... > Discovery > Methods of
Discovery > Expert Witness Discovery

Headnotes/Summary

Evidence > ... > Testimony > Expert
Witnesses > General Overview

Summary
CALIFORNIA OFFICIAL REPORTS
SUMMARY

Evidence > Types of
Evidence > Testimony > General Overview

During the trial of an individual's medical malpractice action against a physician, the trial court precluded a defense expert witness from testifying as to a subject that had not been previously described in defendant's declaration of expert witnesses. Before trial, the parties had

HN7 [\[↕\]](#) **Methods of Discovery, Expert Witness Discovery**

Under Cal. Civ. Proc. Code § 2034(h), any party who engages in the expert witness exchange may

who engaged in the expert witness 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. The party must do so within 20 days after the initial expert witness exchange, must submit an expert witness

exchanged designations of experts, including expert witness declarations (Code Civ. Proc., § 2034), and defendant designated the expert as one whose testimony was to be related to damages. At his deposition, the expert testified as to his evaluation of plaintiff's disability, but he did not testify as to issues concerning the standard of care. At trial, defendant sought to elicit testimony from this witness concerning the standard of care, but the

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trial court precluded the testimony, finding that there was no time for plaintiff to depose the expert. After trial, the trial court entered judgment on the jury's verdict for plaintiff. (Superior Court of Orange County, No. 664259, H. Warren Siegel, Judge.) The Court of Appeal, Fourth Dist., Div. Three, No. G016807, affirmed, while reversing an order striking plaintiff's memorandum of costs and remanding for a hearing on that issue.

The Supreme Court affirmed the judgment of the Court of Appeal. The court held that a trial court has the power under Code Civ. Proc., § 2034, to preclude an expert witness from testifying as to a subject that had not been previously described in the party's declaration of expert witnesses. Code Civ. Proc., § 2034, subd. (j)(2) (court shall exclude testimony of expert witness where party has unreasonably failed to submit expert witness declaration), does not require a trial court to admit expanded expert testimony whenever a party has submitted a declaration. Code Civ. Proc., § 2043, subd. (f)(2), sets forth five content requirements for a declaration, and therefore a declaration submitted under Code Civ. Proc., § 2034, subd. (j)(2), must meet those five requirements. Thus, the sanction of excluding testimony applies when a party unreasonably fails to submit an expert witness declaration that fully complies with Code Civ. Proc., § 2034, subd. (f)(2). Further, the statute envisions timely disclosure so that parties may prepare for trial, and allowing new and unexpected

Witnesses § 10—Expert Witnesses—Disclosure of Witness Information—Trial Court's Power to Preclude Testimony Beyond Subject Described in Party's Discovery Declaration.

--In an individual's medical malpractice action against a physician, the trial court did not err in precluding a defense expert witness from testifying as to a subject that had not been previously described in defendant's declaration of expert witnesses, submitted during discovery under Code Civ. Proc., § 2034. Code Civ. Proc., § 2034, subd. (j)(2) (court shall exclude testimony of expert witness where party has unreasonably failed to submit expert witness declaration), does not require a court to admit expanded expert testimony whenever a party has submitted a declaration. Code Civ. Proc., § 2043, subd. (f)(2), sets forth five content requirements for a declaration, and therefore a declaration submitted under Code Civ. Proc., § 2034, subd. (j)(2), must meet those five requirements. Otherwise the elaborate procedures for amending a declaration in Code Civ. Proc., § 2034, subd. (k), would be meaningless. Further, the statute envisions timely disclosure so that parties may prepare for trial, and allowing new and unexpected testimony at trial would frustrate this purpose. In this case, defendant's declaration stated that the expert was to testify as to damages, but at trial defendant sought to elicit testimony concerning the standard of care. At that point, plaintiff had no time to depose the expert or rebut

testimony at trial would frustrate this purpose. In the circumstances of this case, the trial court properly limited the expert's testimony to that described in the declaration. (Opinion by Brown, J., expressing the unanimous view of the court.)

Headnotes

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CA(1a)[[↕](#)] (1a) CA(1b)[[↕](#)] (1b)

the expert's testimony. In this circumstance, the trial court properly limited the expert's testimony to that described in the declaration. (Disapproving to the extent they are inconsistent: *Castaneda v. Bornstein* (1995) 36 Cal.App.4th 1818 [43 Cal.Rptr.2d 10]; *Martinez v. City of Poway* (1993) 12 Cal.App.4th 425 [15 Cal.Rptr.2d 644].)

[See 2 Witkin, Cal. Evidence (3d ed. 1986) § 1534 et seq.]

CA(2)[[↕](#)] (2)

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Witnesses § 10—Expert Witnesses—Disclosure of Witness Information—Statutory Purpose.

--The purpose of the expert witness discovery statute (Code Civ. Proc., § 2034) is to give fair notice of what an expert will say at trial. This allows the parties to assess whether to take the expert's deposition, to fully explore the relevant subject area at any such deposition, and to select an expert who can respond with a competing opinion on that subject area. Late disclosure of experts frustrates the very purposes of the discovery statutes and should be permitted, with appropriate safeguards and limits, only when absolutely necessary to avoid a miscarriage of justice.

Counsel: Gordon, Edelstein, Krepack, Grant, Felton & Goldstein, Howard D. Krepack and Steven J. Kleifield for Plaintiff and Appellant.

Philip L. Merkel for Defendant and Appellant.

Thelen, Reid & Priest, Curtis A. Cole and Matthew S. Levinson for California Medical Association, California Dental Association and California

The issue in this case is whether under Code of Civil Procedure section 2034 (section 2034), which provides for discovery of expert witness information, a trial court may preclude an expert witness from testifying at trial on a subject whose general substance was not previously described in an expert witness declaration. The Courts of Appeal are in conflict on this issue. We conclude the testimony may be precluded and, therefore, affirm [****2] the judgment of the Court of Appeal, which reached the same conclusion.

I. FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts are undisputed. Plaintiff Charles R. Bonds sued defendant Dr. Mohan Roy for medical malpractice during surgery. Bonds contended Roy had negligently severed a major nerve in his right arm, leaving Bonds with little use of that arm and hand.

The parties exchanged designations of experts, including expert witness declarations. In these declarations, Roy's trial counsel designated Dr. Robert Shuman, a cardiovascular thoracic surgeon, Dr. Jan Duncan, an orthopedic surgeon, and Roy as defense experts. The declarations described Shuman's [*143] expected testimony as going to

California Dental Association and California Healthcare Association as Amici Curiae.

Judges: Opinion by Brown, J., expressing the unanimous view of the court.

Opinion by: BROWN

Opinion

[*142] [**67] [***290] **BROWN, J.**

liability, causation, and damages and Duncan's expected testimony as going to damages.

At his deposition, Duncan testified he had been retained for "basically, two things. One, is to evaluate the disability of Mr. Bonds at the time I saw him. And the other was to evaluate how much disability he was [having] prior to the surgery, based on the records." Duncan specifically confirmed he did not expect "to be giving any testimony or any opinion concerning the standard of care issues [***3] that might be involved in this case."

At trial, during the afternoon recess of the last day of testimony, Roy's trial counsel sought to expand the scope of Duncan's testimony to include two new areas, which his appellate counsel

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characterizes as relating to "the standard of care." These were whether Bonds's injury was consistent with a cut nerve or merely a stretched nerve, and the standard of care as to immediate reoperation and consultation with a neurologist. The trial court declined the request, stating Duncan had been expected to testify only as to damages and noting that because he was the last defense witness, there was not enough time to adjourn and take his deposition. The trial court stated any expansion of the scope of Duncan's testimony at that point would be unfair, prejudicial, and a surprise to Bonds. Duncan, who was also a qualified medical evaluator, testified solely on the issue of Bonds's state of disability at the time Duncan examined him, and what vocational opportunities were available to Bonds. The jury returned a verdict in Bonds's favor.

The Court of Appeal affirmed, while reversing an order striking Bonds's memorandum of costs and remanding for a hearing [****4] on that issue. In particular, the court held that the trial court had properly limited Duncan's testimony to the area

party expects to offer in evidence at the trial" or "[a] statement that the party does not presently intend to offer the testimony of any expert witness." (Subd. (f)(1)(A), (B).) **HN2**[↑] For certain expert witnesses, including the expert at issue in this case, "the exchange shall also [****5] include or be accompanied by an expert witness declaration signed only by the attorney for the party designating the expert, or by that party if that party has no attorney." (Subd. (f)(2).) ² This **HN3**[↑] declaration must be under penalty of perjury and must contain the following: "(A) A brief narrative statement of the qualifications of each expert. [P] (B) A *brief narrative statement of the general substance of the testimony that the expert is expected to give.* [P] (C) A representation that the expert has agreed to testify at the trial. [P] (D) A representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning the specific testimony, including any opinion and its basis, that the expert is expected to give at trial. [P] (E) A statement of the expert's hourly and daily fee for providing deposition testimony and for consulting

described in the expert witness declaration. The court expressly disagreed with *Castaneda v. Bornstein* (1995) 36 Cal. App. 4th 1818, 1828-1830 [43 Cal. Rptr. 2d 10] (*Castaneda*) and *Martinez v. City of Poway* (1993) 12 Cal. App. 4th 425, 429-430, 432 [15 Cal. Rptr. 2d 644] (*Martinez*), which held that a trial court lacks the power to do so. Roy's petition for rehearing was denied.

We granted Roy's petition for review, limited to the issue set forth above.

[**68] [***291] II. STATUTORY FRAMEWORK

Under *HNI*[↑] section 2034, subdivision (a),¹ any party may demand the exchange of expert witness information. In this exchange, a party may provide either [*144] "[a] list setting forth the name and address of any person whose expert opinion that

¹All references to subdivisions are to subdivisions of section 2034 unless otherwise indicated.

providing deposition testimony and for consulting with the retaining attorney." (Subd. (f)(2)(A)-(E), italics added.)

[****6] *HN4*[↑]

Subdivision (j), the subdivision at issue in this case, provides, "Except as provided in subdivision[] (k), . . . on objection of any party who has made a complete and timely compliance with subdivision (f), the trial court *shall exclude from evidence* the expert opinion of any witness that is offered by any party who has *unreasonably* failed to do any of the following: [P] (1) List that witness as an expert under subdivision (f). [P] (2) *Submit an expert witness declaration*. [P] (3) Produce reports and writings of expert witnesses under subdivision (g). [P] (4) Make that expert available for a deposition

²As can be seen, the term "expert witness declaration" is something of a misnomer since it is prepared and signed not by the expert, but by either a party or the party's attorney. (2 Cal. Civil Discovery Practice (Cont.Ed.Bar 1998) § 11.20, pp. 952-953.)

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under subdivision (i)." (Subd. (j)(1)-(4), italics added.) Subdivision (k), in turn, provides, "On motion of any party who has engaged in a timely exchange of expert witness information, the court may grant leave to (1) augment that party's expert witness list and declaration by adding the name and address of any expert witness whom that party has subsequently retained, or (2) *amend that party's expert witness declaration with respect to the general substance of the testimony that an expert previously designated is expected to give.*" (Italics added.) Subdivision [****7] (k) goes on to enumerate an exhaustive series of requirements both for making and granting such a motion.³

³"[The] motion shall be made at a sufficient time in advance of the time limit for the completion of discovery under [Code of Civil Procedure] Section 2024 to permit the deposition of any expert to whom the motion relates to be taken within that time limit. However,

[****8] [*145] [**69] [***292] III. DISCUSSION

CA(1a)[↑] (1a)

Roy contends that because he "[s]ubmit[ted] an expert witness declaration" (subd. (j)(2)), the trial court was powerless to limit the scope of Duncan's expert testimony no matter how inaccurately the declaration described the general substance of that testimony. We disagree. In our view, the language "[s]ubmit an expert witness declaration" in subdivision (j)(2) refers to submission of a declaration that fully complies with the content requirements of subdivision (f)(2), including the requirement that the declaration contain "[a] brief narrative statement of the general substance of the testimony that the expert is expected to give." (Subd. (f)(2)(B).) *HN6*[↑] If a party wishes to expand the scope of an expert's testimony beyond

under exceptional circumstances, the court may permit the motion to be made at a later time. This motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each issue presented by the motion. . . . The court shall grant leave to augment or amend an expert witness list or declaration only after taking into account the extent to which the opposing party has relied on the list of expert witnesses, and after determining that any party opposing the motion will not be prejudiced in maintaining that party's action or defense on the merits, and that the moving party either (1) would not in the exercise of reasonable diligence have determined to call that expert witness or have decided to offer the different or additional testimony of that expert witness, or (2) failed to determine to call that expert witness, or to offer the different or additional testimony of that expert witness as a result of mistake, inadvertence, surprise, or excusable neglect, provided that the moving party (1) has sought leave to augment or amend promptly after deciding to call the expert witness or to offer the different or additional testimony, and (2) has promptly thereafter served a copy of the proposed expert witness information concerning the expert or the testimony described in subdivision (f) on all other parties who have appeared in the action. Leave shall be conditioned on the moving party making the expert available immediately for a deposition under subdivision (i), and on such other terms as may be just, including, but not limited to, leave to any party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated, a continuance of the trial for a reasonable period of time, and the awarding of costs and litigation expenses to any party opposing the motion. [P] The court shall impose a monetary sanction under [Code of Civil Procedure] Section 2023 against any party, person, or attorney who unsuccessfully makes or opposes a motion to augment or amend expert witness information, unless it finds that the one subject to the sanction acted with substantial justification or that other

what is stated in the declaration, it must successfully move under subdivision (k) for "leave to . . . amend that party's expert witness declaration with respect to the general substance of the testimony that an expert previously designated is expected to give."

We begin with the language of the statute. The phrase "expert witness declaration" does not exist in a vacuum. Rather, under subdivision (f)(2), [***9] it is a term of art, referring to a declaration that meets each of five separate content requirements. (See *ante*, at p. 144.) It follows that a party "[s]ubmit[s] an expert witness declaration" within the meaning of subdivision [*146] (j)(2) when it submits a declaration that complies with all of these requirements. (See Kennedy & Martin, Cal. Expert Witness Guide (Cont.Ed.Bar 1998) § 10.25, p. 276 [Subdivision (j)(2) exclusion sanction generally invoked when a party has unreasonably failed to "[s]ubmit an expert witness declaration *that meets the requirements of CCP § 2034(f)(2)*." (Italics added.)].)

circumstances made the imposition of the sanction unjust." HNS5[↑] (Subd. (k).)

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A conclusion that the exclusion sanction of subdivision (j) could be invoked only when a party failed to submit an expert witness declaration altogether would render meaningless the elaborate amendment provisions of subdivision (k) (see *ante*, fn. 3), which are expressly cross-referenced in subdivision (j). (See subd. (j) ["Except as provided in subdivision[] (k)"].) Subdivision (k) presupposes that a designated expert may testify only on the subjects set forth in an expert witness declaration, requiring a party to seek [***10] leave to amend the declaration if there are deviations in "the general substance of the testimony that an expert previously designated is expected to give." If a motion to amend an expert

the Legislature intended to allow sufficient time before trial for experts to be identified so that the subject matter of their expected testimony can be fully explored at a deposition.

CA(2)[↑] (2)

Indeed, the very purpose of the expert witness discovery statute is to give fair notice of what an expert will say at trial. This allows the parties to [*147] assess whether to take the expert's deposition, to fully explore the relevant subject area at any such deposition, and to select an expert who can respond with a competing opinion on that subject area. "The opportunity to depose an expert during trial, particularly if the testimony relates to a

witness declaration to add a new area of testimony is denied under subdivision (k), it follows that the testimony is to be excluded under subdivision (j). Otherwise, the denial of the motion to amend would have no practical effect. It seems unlikely the Legislature would provide such a detailed, yet ultimately meaningless, mechanism for determining whether a party should be allowed to amend its expert witness declaration.

The remaining provisions of section 2034 confirm that the Legislature did not intend to do so. *HN7* [↑] Under subdivision (h), for example, "any party who engaged in the [expert witness] 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." The conditions under which a party is permitted to submit such a supplemental [****11] list are quite strict, however--the party must do so within 20 days after the initial expert witness exchange, must submit an expert witness declaration and all discoverable reports and writings along with the supplemental list, and must make the additional experts available [**70] [***293] immediately for deposition, even if the time for discovery has expired. (Subd. (h).) These strict procedures again demonstrate that

central issue, often provides a wholly inadequate opportunity to understand the expert's opinion and to prepare to meet [****12] it. [Citations.]" (Kennedy & Martin, Cal. Expert Witness Guide, *supra*, § 10.18, at p. 267.) "[T]he need for pretrial discovery is greater with respect to expert witnesses than it is for ordinary fact witnesses [because] . . . [P] . . . the other parties must prepare to cope with witnesses possessed of specialized knowledge in some scientific or technical field. They must gear up to cross-examine them effectively, and they must marshal the evidence to rebut their opinions." (1 Hogan & Weber, Cal. Civil Discovery (1997) Expert Witness Disclosure, § 10.1, p. 525.) "Late disclosure of experts . . . frustrates the very purposes of the discovery statutes, and should be permitted, with appropriate safeguards and limits, only when absolutely necessary to avoid a miscarriage of justice." (Kennedy & Martin, Cal. Expert Witness Guide, *supra*, § 10.18, at p. 268.)

CA(1b) [↑] (1b)

In this regard, it is difficult to distinguish cases in which a party inaccurately describes the general substance of an expert's expected testimony from cases in which a party wholly fails to disclose an expert. (See *Province v. Center for Women's Health & Family Birth* (1993) 20 Cal. App. 4th 1673, 1681-1684 [25 Cal. Rptr. 2d 667] [****13]

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[percipient witness not listed as an expert improperly permitted to testify as to expert medical opinion], disapproved on other grounds in *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal. 4th 30, 41 [32 Cal. Rptr. 2d 200, 876 P.2d 999]; *Richaud v. Jennings* (1993) 16 Cal. App. 4th 81, 90-91 [19 Cal. Rptr. 2d 790] [party desiring to call an expert not designated when expert witness information was exchanged must move to augment its expert witness list under subdivision (k)]; *Zellerino v. Brown* (1991) 235 Cal. App. 3d 1097, 1117-1118

is no indication that the Legislature intended to narrow the exclusion sanction of subdivision (j) by sanctioning only those parties who unreasonably [****15] fail to "[s]ubmit an expert witness declaration" altogether. [**71] [***294] Rather, the amendment, considered in the context of the statute as a whole, is best viewed as an *extension* of the exclusion sanction to cover any unreasonable failure to comply with the expert witness declaration requirements of subdivision (f)(2). (See *ante*, at p. 144.)

[1 Cal. Rptr. 2d 222] [plaintiff's conduct "prejudiced the defense, which did not have the ability to counter the testimony of the belatedly disclosed experts".) When an expert is permitted to testify at trial on a wholly undisclosed subject area, opposing parties similarly lack a fair opportunity to prepare for cross-examination or rebuttal. It makes little practical difference whether the party proffering the expert testimony failed to submit an expert witness declaration or submitted an inaccurate one.

In reaching a contrary conclusion, the Courts of Appeal in *Castaneda*, *supra*, 36 Cal. App. 4th at page 1829, [****14] and *Martinez*, *supra*, 12 Cal. App. 4th at pages 429-430, relied on a 1987 amendment to the text of subdivision (j). As originally enacted in 1986, subdivision (j) stated, "Except as provided in subdivision[] (k), . . . on objection of any party who has made a complete [*148] and timely compliance with subdivision (f), the trial court shall exclude from evidence the expert opinion of any expert that is offered by any party who has failed to . . . [P] . . . [P] (2) State in an expert witness declaration the general substance of the testimony of that expert." (Stats. 1986, ch. 1336, § 2, p. 4756.) The following year, the Legislature passed certain "cleanup" amendments, including amending the foregoing language to sanction a party who unreasonably fails to "[s]ubmit an expert witness declaration." (Stats. 1987, ch. 86, § 17, p. 351.) There is no indication in the legislative history of the amendments as to why this language was changed. In particular, contrary to the suggestion in *Castaneda* and *Martinez*, there

Nor are we persuaded by *Castaneda's* observation that "[t]here are, of course, remedies short of evidence exclusion available to the opposing party when the proponent of the expert testimony fails to comply with the requirement to disclose the general substance of that testimony. . . . The proponent could be required to submit a detailed declaration as to the expert's expected testimony, including a description of the information concerning the subject matter of the action the expert relied on in formulating his or her opinions, the subjects on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each such opinion. [Citation.] The proponent could be required to make the expert available for deposition at the [****16] time and place most convenient to the opposing party and to pay all costs and litigation expenses incurred in the deposition. [Citation.] The trial court could allow the opposing party to designate additional experts or elicit additional opinions from those previously designated in order to rebut the testimony of the proponent's expert. [Citation.]" (*Castaneda*, *supra*, 36 Cal. App. 4th at p. 1830.) What the *Castaneda* court failed to appreciate is that nearly all of these "remedies" are already required by subdivisions (f)(2) and (k). (See *ante*, at p. 144 & fn. 3.)

In short, the statutory scheme as a whole envisions timely disclosure of the general substance of an expert's expected testimony so that the parties may properly prepare for trial. Allowing new and unexpected testimony for the first time at trial so

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long as a party has submitted any expert witness declaration whatsoever is inconsistent with this purpose. We therefore conclude that *HN8* [↑] the exclusion sanction of subdivision (j) applies when a party [*149] unreasonably fails to submit an expert witness declaration that fully complies with the content requirements of subdivision (f)(2).

IV. DISPOSITION

The judgment of the Court of Appeal is affirmed.

[**72] [***295] George, C. J., Mosk, J., Kennard, J., Baxter, J., Werdegar, J., and Chin, J., concurred.

including the requirement [****17] that the declaration contain "[a] brief narrative statement of the general substance of the testimony that the expert is expected to give." (Subd. (f)(2)(B).) This encompasses situations, like the present one, in which a party has submitted an expert witness declaration, but the narrative statement fails to disclose the general substance of the testimony the party later wishes to elicit from the expert at trial. To expand the scope of an expert's testimony beyond what is stated in the declaration, a party must successfully move for leave to amend the declaration under subdivision (k).⁴

Turning to the facts of the present case, Roy concedes that he never moved under subdivision (k) to amend Duncan's expert witness declaration to include the subject matter of standard of care. Even if we were to consider his trial counsel's request [****18] to expand the scope of Duncan's testimony an implicit motion under subdivision (k), the trial court acted well within its discretion in denying it. Duncan was the last defense witness, testifying in the afternoon of the last day of testimony. Roy did not even attempt to expand the scope of Duncan's expert testimony until just prior to his taking the stand, and Roy's trial counsel offered no excuse for his failure to do so earlier. This late request afforded no practical opportunity for Duncan to be deposed or for Bonds's own experts to rebut Duncan's testimony. On these facts, the trial court properly limited the scope of Duncan's testimony to the general substance of what was previously described in the expert witness declaration.

⁴ *Castaneda, supra*, 36 Cal. App. 4th 1818, and *Martinez, supra*, 12 Cal. App. 4th 425, are disapproved to the extent they are inconsistent with this opinion.

The petition of appellant Mohan Roy for a rehearing was denied May 19, 1999.

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