

Appellate Reports

Ayon v. Esquire Deposition Solutions — Provides guidance on when credibility issues can create triable issues of fact

By Jeffrey I. Ehrlich

Ayon v. Esquire Deposition Solutions, LLC

(2018) __ Cal.App.5th __ (Fourth Dist., Div. 3.)

Who needs to know about this case? Lawyers attempting to oppose summary judgment by raising questions about the witnesses' credibility.

Why it's important: Provides guidance on when credibility issues can create triable issues of fact; explores the distinction between disbelief of a witness's testimony about the existence of a fact and affirmative proof that negates the fact.

Synopsis: While crossing a street at 10:10 p.m., plaintiff Ayon was struck and injured by a car driven by Brittini Zuppardo. At the time of the accident Zuppardo was on her cell phone, speaking with Michelle Halkett. Zuppardo was the scheduling manager for Esquire Deposition Services (Esquire), and Halkett was a court reporter for Esquire. Ayon sued Esquire and Zuppardo for her injuries, claiming that Esquire was vicariously liable for Zuppardo's negligence because she was discussing scheduling a deposition at the moment of the accident.

Zuppardo and Halkett both denied that they were discussing anything related to work in their conversation. This testimony was supported by the undisputed evidence that Zuppardo only made after-hours work calls on rare occasions, and that it was not within her usual job duties. It was also supported by evidence that the two were friends.

Esquire moved for summary judgment. Ayon opposed based on circumstantial evidence that she claimed would have allowed a jury to conclude that Zuppardo and Halkett were scheduling a deposition. This evidence was principally that, in her deposition, Zuppardo testified that she and Halkett were "very close" friends, who spoke on their cell phones "quite a bit." When asked how frequently they spoke, Halkett was non-committal, saying that they "sometimes maybe" spoke several times a week. After the deposition Ayon obtained Zuppardo's cell-phone records, which showed that the only time in the last six months that she and Halkett had spoken by cell phone was on the night of the accident, and that during that period they had only exchanged a single text message.

The trial court granted the motion and the Court of Appeal affirmed.

The appellate court agreed that Ayon's evidence concerning the lack of frequency with which Zuppardo and Halkett spoke on the phone was "strong evidence bearing adversely on Zuppardo's testimony about the closeness of their friendship." But the court concluded that "[t]his evidence is not enough, however, to conclude the two had no friendship at all. Halkett corroborated Zuppardo's testimony that the two were friends. Halkett did not make any claims about the frequency with which the two spoke on a cell phone in particular, but she did testify that they spoke daily and saw each other a couple of times per week in the office. She also testified to specific activities they had enjoyed together outside of work."

The plaintiff's response to this evidence was to suggest that Halkett had a reason to lie in order to protect her relationship with Esquire, which supplied her with 99 percent of her court-reporting work.

The court found that none of the plaintiff's facts created a true factual dispute about the substance of Halkett's testimony; at most, they "marginally undermine Halkett's credibility." But, as the court noted, "merely offering reasons a witnesss might have an incentive to lie, without offering any evidence to suggest Halkett actually was lying, is not enough to create a disputed issue of material fact. In most respondeat superior cases, an employee's testimony will be crucial to the defense. Summary judgment would become virtually impossible if merely pointing out that an employee's interests are aligned with the employer were enough to not only undermine the employee's testimony, but also prove the opposite is true. That is not the law."

Ayon relied heavily on *Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, which held that a plaintiff had created a triable issue of fact sufficient to overcome summary judgment in a case against a landlord who denied knowledge of the dangerous propensities of his tenant's dogs. Early in the case the landlord denied even knowing about the dogs, but that was later exposed as a lie. The court reversed a summary judgment for the plaintiff, explaining, "There is more than one way to prove the existence of a fact, and thus more than one way to create a triable issue about the existence of that fact. . . . [One of those ways] is to introduce evidence

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tending to show an opponent's denial of the existence of the fact is to be disbelieved, that is, evidence challenging the credibility of his denial. For, as a matter of common sense as well as formal logic, to disbelieve the denial of the existence of a fact is to believe in the existence of that fact." (*Id*., 34 Cal.App.4th at p. 1835.)

The appellate court both distinguished *Donchin* and critiqued its analysis. The court first noted that *Donchin* involved an issue of the landlord's state of mind, and section 437c, subdivision (e) specifically permits a court, in its discretion, to deny summary judgment where the only issue is the credibility of a witness making a statement about state of mind. The court held that this exception "simply does not apply here, where two witnesses testified to an objective fact: the topic of their conversation."

The court then offered four reasons why it was "uncomfortable" with *Donchin*'s reasoning. (1) *Donchin* did not cite section 437c, subdivision (e), which seems to directly contradict some of the broad pronouncements in *Donchin's* rationale; (2) As a matter of formal logic, *Donchin's* rule holds, if at all, in the context of a witness's mental state, but not in many other contexts. Thus, to disbelieve the landlord's statement about the dogs' dangerous propensities, one could only conclude the landlord believed they are dangerous, not that they actually were dangerous. Since the issue was the landlord's belief, that reasoning held. But imagine a different case where a witness testified the light was red, but then evidence emerged that the witness was nowhere near the light at the time. We would not conclude the light was green. Nor would we conclude the light was yellow. We would simply conclude the witness was lying in affirming the belief the light was red. Formal logic could take us no further; (3) Facts rarely come in binary pairings such that a disbelief of one fact necessitates belief in its opposite. Here, for example, the testimony concerned a topic of conversation. Formal logic cannot get us from disbelief that the witnesses were talking about Halkett's son, to an affirmation that they were scheduling a deposition. "The rejection of a witness's testimony by the trier of fact has only the effect of removing that testimony from the evidentiary mix. Without more, the disregard or disbelief of the testimony of a witness is not affirmative evidence of a contrary conclusion."; (4) *Donchin* gave inadequate attention to the need for a plaintiff to present substantial evidence. The point of the summary judgment procedure is to test whether the plaintiff has enough evidence to support a jury verdict. Substantial evidence, however, is not synonymous with any evidence. Rather, substantial evidence must be sufficient to support the essential elements underlying a verdict. Here, the inference that Zuppardo lied about the extent of her friendship with Halkett may be relevant to the ultimate issue of whether they were discussing a scheduling matter in the sense that it tends to show a consciousness of guilt and thus can give credence to other evidence of guilt. But a lie about the extent of their cell phone contacts is not substantial evidence about the actual topic of conversation that night.

Short(er) takes:

Insurance; per-person versus per-occurrence limits; loss-of-consortium claims: *Jones v. IDS Property Casualty Insurance Company* (2018) __ Cal.App.5th __ (Third Dist.)

Jones was seriously injured in a traffic accident with Buhler. Jones obtained a stipulated judgment against Buhler awarding him $1.35 million and awarding his wife $150,000 for loss of consortium. The Buhlers' policy with IDS had limits of $250,000 for bodily injury to each person, and $500,000 for each occurrence. Specifically, the policy stated, "The bodily injury liability limits for each person is the maximum we will pay as damages for bodily injury, including damages for care and loss of services, to one person per occurrence."

IDS paid the Joneses a total of $250,000. The Buhlers sued, arguing that IDS should have paid the Joneses $250,000 each under the policy's per-occurrence limit. The trial court granted summary judgment to IDS. Affirmed.

The Buhlers read the policy so that the phrase "to one person in one occurrence" modifies "the maximum we will pay" rather than the closer term "bodily injury." This reading results in the $250,000 limit's application to damage amounts *to be paid* to one person, rather than applying the limit to damages derived *from bodily injury* to one person. The Buhlers argued that because Mark and Melanie Jones are two people, and thus the payment for damages will be from IDS to more than one person, the higher per occurrence limit applies. They assert "a reasonable insured would expect that the 'per person' limitation in a policy would limit a single claimant's recovery, not multiple claimants."

The court rejected this argument, explaining, "This interpretation is contrary to the express language of the policy that the per person limit applies to damages for bodily injury to one person, "regardless of the number of ... claims, claimants ...." Thus, the Buhlers' interpretation is not reasonable. . . . Further, any time loss of consortium is at issue, there are two persons damaged, the person suffering bodily injury and the spouse. If a claim for loss of consortium always triggered the per occurrence limit, there would be no need to define damages for bodily injury to include loss of consortium."

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Appeals and Appellate Procedure; appellant's burden to provide adequate record: *Mack v. All Counties Trustee Services, Inc.* (2018) 26 Cal.App.5th 935 (Second Dist., Div. 1)

Mack acquired ownership of a parcel of real property by quitclaim deed in April 2005. The grantor was VII Series, Inc. On the same day the property was deeded to Mack, VII Series, Inc. obtained a loan and secured it with a trust deed on the property, in favor of Creative Investment. In June 2005, Mack filed a quiet title action against Creative Investment, VII Series, and others. Mack prevailed in 2007. While the litigation was proceeding, Creative Investment allegedly initiated a fraudulent foreclosure on the property. The property was sold at a trustee's sale based on the secured loan to VII Series.

In March 2012, the third parties who purchased the property at the trustee's sale obtained a quiet title judgment against Mack. The record does not show whether Mack appealed.

Mack initiated the current lawsuit in November 2014 against the entity that conducted the trustee's sale and others. The trial court dismissed the action on demurrer, without leave to amend, and entered a judgment of dismissal in June 2016. Mack then filed a motion for reconsideration or motion to set aside the order under Code of Civil Procedure section 473. When those were denied, Mack appealed.

Mack claimed on appeal that the June 22, 2016 judgment was void because the March 2012 quiet title judgment (based on the "fraudulent" trustee's sale) is void. She argued that the March 2012 quiet title judgment was void because it conflicts with the trial court's November 2007 judgment. The trial court's December 2016 order denying Mack's motion to vacate the June 2016 judgment says that Mack "failed to establish that the judgment is void or that it should be set aside for any other reason."

"The record contains nothing that would establish that either the June 22, 2016 judgment or the March 2012 judgment is void on its face. Other than in very broad terms without any context, Mack's brief does not explain why she believes any particular judgment is void. Neither the briefing nor the record establish that any judgment is void. "It is the duty of an appellant to provide an adequate record to the court establishing error. Failure to provide an adequate record on an issue requires that the issue be resolved against appellant. [Citation omitted.] Because we have no record upon which we might review the trial court's December 2016 order denying Mack's motion to vacate the June 2016 judgment, we affirm."


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