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A call to arms

Challenging exorbitant expert fees and using *Aguilar* to restructure summary judgments are things that we all can do

By Walter "Skip" Walker and Jeffrey Walker

Premium gas prices hit $6.39 a gallon in the Bay Area in early March. Blame it on the Russians, except gas prices have been inexorably rising for several years. Three dollars, 3.50, four dollars, five. Not much we can do about it, except, maybe, buy a Tesla.

There's also not much we can do about *Howell* or the always but ever increasingly ridiculous MICRA limitations (although we continue to try). What we absolutely can do, however, is act singularly and collectively to stymie a couple of other scourges we face as litigators: escalating expert fees and the onslaught of summary judgment motions.

Expert fees

Recently, our firm received notice that defendant's expert toxicologist would only appear for his deposition if we paid him $1,700 per hour, with a four-hour minimum. We protested. Defense counsel said there was nothing he could do about it.

Once any party deems that the fee to take an expert deposition is unreasonable, Code of Civil Procedure (CCP) section 2034.470 authorizes a motion asking the court to set the fee. Notice of the motion must be served on both the party and the expert. It should be no surprise that such a motion must be accompanied by a meet and confer declaration. But what does the court realistically expect to come of a meet-and-confer? Ours went along the following lines: "Forty-eight-cents per second?! We're not paying that;" to which opposing counsel responded, "Hey, that's what the expert charges."

Really? Well, let's see what the code says (CCP 2034.470, subd. (b)):

> [During the meet and confer process] either the party or the expert shall provide the other with all of the following:
>
> (1) Proof of the ordinary and customary fee actually charged and received by that expert for similar services provided outside the subject litigation.
>
> (2) The total number of times the presently demanded fee has ever been charged and received by that expert.
>
> (3) The frequency and regularity with which the presently demanded fee has been charged and received by that expert within the two-year period preceding the hearing on the motion.

If the court determines the fee demanded by the expert to be unreasonable, it is required to set a reasonable fee. The determination of reasonableness will be based on the proof that was to be provided during the meet and confer process as well as the ordinary and customary fees charged by similar experts for similar services within the relevant community, and any other factors the court deems necessary or appropriate to make its determination. In our firm's motion, data from an expert-finding service and the fee of our rebuttal expert were presented to the court.

The court reacted by cutting the $1,700 per hour fee in half with no minimum, not even one hour. We did not get sanctions, but they are available under CCP section 2034.470(g) against any party, person, or attorney who unsuccessfully opposes a motion. Nonetheless, we did take a measure of satisfaction in knowing that either the defense expert is not getting his outrageous fee or defense counsel is going to have to pay the difference between what the expert wants and what the court is allowing.

Summary judgment motions

Nobody seriously doubts the need for a summary judgment law. Wacky suits get filed, so do suits that are derived primarily from spite or intended to extort or simply have no basis whatsoever. But what was clearly intended by the legislature as a means to sift out lawsuits that should never have been filed in the first place is now being used as a weapon by defense counsel who feel they have nothing to lose by filing such a motion. After all, they might win. And if they lose, well, at the very least they will have gotten plaintiffs to lay out their entire case well before trial.

In California, the law governing summary judgments is set forth at CCP section 437c. While there are multiple subsections to CCP section 437c, of particular importance is subdivision (p)(2), which provides:

> A defendant... has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action.

Fair enough, one would think, especially when CCP section 437c (p)(2) goes on to say that even if the moving party has met its burden, that does not mean it is entitled to summary judgment. Rather, it means that "the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto."

But suppose you are a busy trial court (are there any other kind?), suppose you have too many cases, not enough judges, courtrooms, jurors. It is possible you don't even have enough staff. Might there be some incentive to want to get rid of some of the matters that are piling up before you?

Checks and balances: *Aguilar*

And here is where *Aguilar* comes into play, or at least where it is supposed to come into play. In 2001, the California Supreme Court presented a comprehensive analysis of the summary judgment

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statute in *Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826. It explained that summary judgment was not just a means by which a judge sitting in law-and-motion could decide that a case has no merit and should be thrown out. Rather, it is a drastic measure that may not be invoked unless it is clear that there are no triable issues of material fact.

Still leaving too much to the discretion of a trial court judge? Well, the Supreme Court went on to say that a triable issue of material fact exists if "the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (45 Cal.4th at 845.)

Still too much discretion? Not if the trial court follows the Supreme Court's directive that the evidence presented and all inferences reasonably drawn therefrom are to be viewed in the light most favorable to the party opposing the motion (25 Cal.4th at 843); not if the trial court follows the *Aguilar* directive that a triable issue of fact exists if the evidence would "allow" a reasonable trier of fact to find in favor of the party opposing the motion (*Id.* at 845); not if the court adheres to the *Aguilar* holding that if a defendant moves for summary judgment it must present evidence that would "require" a reasonable trier of fact *not* to find any underlying material fact to be in dispute *(id.* at 851).

And if the trial court is hell-bent on dismissing your case and does not follow *Aguilar*? Then you appeal, of course, knowing that the appellate court is required to perform a de novo review of the trial court's ruling.

The appeal

All should be well on the appeal of an erroneous, unfair or improper grant of summary judgment because your three appellate panelists will be in the exalted positions they are in as a result of them being elite judges themselves once upon a time – and, of course, they have the benefit of highly qualified research attorneys to assist them. But there are some other things that come into play that may have an effect on the appellant's confidence.

The court of appeal does not have to be good, noble, or correct. Its greatest tool in this regard is the fact that it does not have to publish its opinions. An unpublished opinion has no force beyond the case it addresses, no effect on anyone but the parties before it. Without publication, there is close to no chance the Supreme Court is going to accept review.

Oh, a party that has lost before the Court of Appeal can petition for a rehearing, but good luck with that. The losing party can point out factual errors in an adverse decision, but all that is likely to achieve is the correction of the errors and not a change in the decision. And a losing party can certainly ask for the decision to be published, but the risk of publication is turning a bad decision into bad law.

So, what is the poor practitioner to do? Perhaps, if we start at the beginning, we can find a way to avoid the bad ruling – and perhaps the best path in that regard is to turn back to *Aguilar.*

A call to the coroner

Is *Aguilar* dead? If not, it may be on life support. Yet it has never been overruled and most appellate decisions still pay it lip service. The suggestion put forth here is to mine *Aguilar*, to force the trial court at least to pay heed to its strictures even before it gets to the specific facts of your case.

Start with this: In a motion for summary judgment, the initial burden is on the moving party to show the nonexistence of any issue of material fact. (25 Cal.4th at 845.)

Where the evidence presented by the moving party does not meet its burden, the motion must be denied without looking at the opposing evidence. As an appellate court recently declared in *Dix v. Live Nation Entertainment, Inc.* (2020) 56 Cal.App.5th 590, 605, starting with a cite to *Aguilar:*

> Where the evidence presented by defendant does not meet its burden, "the motion must be denied without looking at the opposing evidence, if any, submitted by plaintiff." Accordingly, a plaintiff has no evidentiary burden on summary judgment unless and until the moving defendant first meets its initial burden.

As *Aguilar* said, the moving party's showing requires an affirmative production of evidence, and it does not suffice simply to claim that plaintiff's evidence is insufficient. (25 Cal.4th at 854.)

And as *Dix* shows us, pointing this out as the holding of the California Supreme Court sometimes works.

Conclusion

Challenging exorbitant expert fees and attempting to restructure summary judgments are things that we all can do. If enough of us mount those challenges, each of us will benefit. Too bad the same can't be said about gas prices.

This article is derived from excerpts of talks given by Skip and Jeff Walker at the annual meeting of the Western Trial Lawyers Association in Anchorage, Alaska, February 2022.


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