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PERSPECTIVE

On the Contrary, Consistency Counts

By Paul Kujawsky

When Ralph Waldo Emerson remarked dismissively that "a foolish consistency is the hobgoblin of little minds," he wasn't thinking of motions for summary judgment or adjudication. On the contrary — inconsistency in your evidence can doom your attempt to create a triable issue of fact.

That was the holding in *Alvis v. County of Ventura*, (Oct. 20, 2009, B212337). In that case, an expert's declaration, submitted in opposition to a motion for summary adjudication, contradicted his earlier statement to a third party. The result was that the declaration failed to defeat the motion.

The case arose out of the deadly 2005 La Conchita landslide. La Conchita is a community at the bottom of an unstable 600-foot cliff in unincorporated Ventura County. A decade earlier, after a similar landslide, the county had considered how to remove debris from Vista Del Rincon Drive, at the base of the cliff, without further destabilization.

In 2000-2001 the county erected a wall, comprising steel beams set into the ground, with horizontal wooden boards attached between the beams. Water was to drain through the spaces between the boards.

The county notified the residents of La Conchita that "[t]he retaining wall will allow the debris removal to occur without adversely affecting the stability of the overall landslide as it currently exists. It is NOT intended to increase the overall stability of the La Conchita landslide mass."

On Jan. 10, 2005, the second, larger la Conchita landslide destroyed 16 houses, and killed 10 people. In the subsequent consolidated legal actions, plaintiffs sued the county for maintaining a dangerous condition of public property. They asserted that the wall actually diverted the landslide towards the affected property, causing the deaths, injuries and property damage.

The county moved for summary adjudication of all causes of action save inverse condemnation. The motion relied on the design immunity of Government Code Section 830.6.

William Britt, the county civil engineer who managed the stabilization project, submitted a declaration in support of the motion. His opinion was that the wall had no effect on the slide. First, there were existing channels that collected and directed the debris flow. Second, only an extremely large debris flow could reach the wall. Such a flow "would engulf everything in its path, including the wall. It is my professional opinion...that the wall would have no more than a trivial impact on such a large debris flow."

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In their opposition, plaintiffs countered with the declaration of geotechnical and civil engineer Awtar Singh. Singh reckoned that there was inadequate drainage behind the wall. Water pressure built up behind the wall, contributing to the wall's collapse and the subsequent carnage.

But the county objected to Singh's evidence. It pointed out that the declaration contradicted Singh's previously-expressed opinion: In a report to an insurance company, Singh had concluded that "[f]ailure started as a landslide in the upper reaches and then flowed at a rapid rate down to the developed area below," which would exonerate the county wall.

The trial court granted the county's motion, noting that "The Court finds the declaration of Dr. Singh on those issues unconvincing because it...is contradicted in some respects by his prior report written in February of 2005." Plaintiffs dismissed the inverse condemnation count in order to appeal.

On appeal, the court affirmed in an opinion by Justice Arthur Gilbert, joined by Justices Kenneth R. Yegan and Paul H. Coffee. The court held that conflicting expert declarations typically generate a triable issue of fact. But a declaration does not create a triable issue of fact when it contradicts the expert's own prior statements on a material issue, if the contradiction is unexplained. In that instance, the declaration is no bar to summary judgment or adjudication.

As stated in *Leasman v. Beech Aircraft Corp.*, (1975) 48 Cal.App.3d 376, 382: "[W]hen a defendant can establish his defense with the plaintiff's admissions...the credibility of the admissions are valued so highly that the controverting affidavits may be disregarded as irrelevant, inadmissible or evasive." Thus, a declaration which is just trying to undo the harm caused by earlier testimony simply is not "substantial evidence."

This is the long-standing rule in California. But *Alvis* innovates in two ways:

First, the court, almost casually, extends this rule to all prior statements — even those, unlike depositions and discovery responses, which are not verified or made under oath. "Singh's prior statement was not in the form of testimony under oath. But the same reasoning applies. We cannot accept as substantial evidence of a triable issue of fact a declaration that directly contradicts the declarant's prior statement, where the contradiction is unexplained. We may not ignore this significant contradiction."

One wonders how far this will extend. If instead of an insurance company report, Singh had been overheard in a bar making the same assessment, would it still trump his later declaration? Prior admissions made under oath in the course of discovery are, presumably, thoughtful and considered. The further one wanders from that context, the less the prior statements have the character of "admissions." We'll need to see how future cases handle this issue.

The second *Alvis* innovation is to suggest the cure for contradictory evidence: explain why the witness has changed his tune. The court doesn't insist that the witness cling like a barnacle to his original story. But counsel can't ignore a material discrepancy. The alteration in the witness's evidence must be justified.

This can be done. New facts coming to light may demand fresh opinions. New discovery responses can justify a new perspective. Assuming that the declarant's new version isn't simply the result of a "Bloody Hell! If that's her story, the case is dead!" realization, tell the court why the current version of reality is accurate, and why the earlier version was mistaken.

Alvis is a gentle reminder (or a kick in the pants) that when opposing a motion for summary judgment or adjudication, check the declarations against the rest of the file. Make sure all the opinions and facts line up. If they don't, figure out a good reason.

If you're defending a summary judgment motion, review the file to trip up the opposing declarant with a clashing prior statement. And since the standard of review on appeal of summary judgments is de novo, you'll get another chance to ferret out contradictions if your opponent is a sore loser.

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