

**Association of Defense
Counsel of Northern
California and Nevada**



August 19, 2021

Acting Presiding Justice Mark B. Simons
Justice Gordon B. Burns
Judge Victor A. Rodriguez
Court of Appeal
First Appellate District, Division Five
350 McAllister Street
San Francisco, CA 94102-7421

Re: Support for petition for rehearing in No. A153106,
Harris v. Thomas Dee Engineering Company

Honorable Justices and Judge,

The Association of Defense Counsel of Northern California and Nevada (“ADCNCN”) and the Association of Southern California Defense Counsel (“ASCDC”) (together, the “Associations”) write jointly to urge the Court to grant the petition for rehearing in this case. To the extent necessary, we ask this court to consider this letter an application to file an amicus curiae brief in support of the rehearing petition.

Interest of the Requesting Organizations

ADC-NCN currently numbers more than 700 attorneys throughout Northern California and Nevada who are primarily engaged in the defense of civil actions. Members represent civil defendants of all stripes, including businesses, individuals, HOAs, schools and municipalities and other public entities. Members have a strong interest in the development of substantive and procedural law in California, and extensive experience with civil matters generally, defense of public entities, and anti-SLAPP matters.

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ASCDC is the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. It has over 1,100 attorneys in Central and Southern California, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. The ASCDC is actively involved in assisting courts on issues of interest to its members. In addition to representation in appellate matters, the ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas.

Although the Associations are separate organizations, they have some members in common and coordinate from time to time on matters of shared interest, such as this letter. Together and separately, they have appeared as amicus curiae in many cases before both the California Supreme Court and Courts of Appeal across the state to express the interests of their members and their members' clients, a broad cross-section of California businesses and organizations.

They have a shared interest in ensuring that summary judgment standards are clear and applied consistently.

No party has paid for or drafted this letter.

Why the Court should grant rehearing

Rehearing should be granted because this Court's decision conflicts with California Supreme Court precedent and creates confusion regarding the evidentiary standard that applies at summary judgment versus trial. In *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 538 (Perry), the California Supreme Court held that "when the court determines an expert opinion is inadmissible because disclosure requirements were not met, the opinion must be excluded from consideration at summary judgment if an objection is raised." (Italics added.) In reaching its decision, the Court relied on the express language of Civil Procedure Code section 437c, subdivision (d), that requires that affidavits and declarations submitted in

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summary judgment proceedings “set forth admissible evidence.” (Id. at p. 538.)

In addition, the Court found that remedies that are available to cure inadequate and/or untimely expert disclosures “are available to a party before summary judgment, and should be invoked as soon as the party discovers the need to submit a declaration by a previously undisclosed expert.” (Perry, *supra*, 2 Cal.5th at p. 541, italics added; see also *id.* at fn. 6 [“If the time limit on submitting opposition to a summary judgment motion (§ 437c, subd. (b)(2)) prevents a party from obtain a ruling on a motion for relief under sections 2034.610 or 2034.710, the party may seek a continuance for that purpose under section 437c, subdivision (h)”].) Unless the court grants relief, the declaration contains inadmissible evidence, excludable upon objection if the failure to disclose was unreasonable. (Id. at pp. 541-542.)

Here, in contrast, this Court held that plaintiffs could successfully oppose summary judgment with an expert declaration that included undisclosed opinions that the trial court had discretion to exclude upon objection. As explained in the petition for rehearing, a long line of cases, starting with *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 919 (*Kennemur*), have held that trial courts have discretion to exclude new expert opinions not offered at the expert’s deposition. (Petition for Rehearing, p. 6.) In this case, plaintiffs failed to seek relief for their inadequate expert disclosure as they were required to do prior to opposing summary judgment. (Perry, *supra*, 2 Cal.5th at pp. 541-542 & fn. 6.) Accordingly, the trial court properly excluded the declaration that contained inadmissible evidence upon defendant’s objection. (Id. at pp. 538 & 541-542.) This Court should grant rehearing because under Perry “admissibility of the expert’s opinion can and must be determined before the summary judgment motion is resolved.” (Id. at p. 543, italics added.) Unless the court grants relief, the declaration contains inadmissible evidence that must be excluded from consideration at summary judgment if an objection is raised as occurred here. (Id. at p. 538.)


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In the alternative, the Court should change the publication status of the opinion to unpublished to avoid confusion in future cases regarding the proper application of Perry and Kennemur on summary judgment.

Respectfully submitted,



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PROOF OF SERVICE

Harris, et al. v. Thomas Dee Engineering Company
Case No. A153106

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Ropers Majeski PC, 545 Middlefield Road, Suite 175, Menlo Park, California, 94025 email: donna.bautista@ropers.com. On the date below, I served the within document(s):

LETTER SUPPORTING REHEARING

Harris, et al. v. Thomas Dee Engineering Company, Case No. A153106

- VIA E-SERVICE (TrueFiling) on the recipients designated on the electronic service list generated by TrueFiling system.

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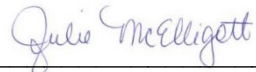
- VIA U.S. MAIL: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in United States mail in the State of California at Menlo Park, addressed as set forth below.

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First Appellate District,
Division Five
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7421

Clerk for delivery to
Hon. Brad Seligman
Alameda County Superior
Court
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on August 19, 2021 at Menlo Park, California.

A handwritten signature in blue ink that reads "Julie McElligott". The signature is written in a cursive style with a horizontal line underneath it.

Julie McElligott